Joint Committee on Justice

Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill

June 2022
Table of Contents

CATHAOIRLEACH’S FOREWORD .................................................................................................................................................. 4
COMMITTEE MEMBERSHIP .................................................................................................................................................. 5
COMMITTEE RECOMMENDATIONS .......................................................................................................................................... 8

CHAPTER 1 - Introduction .................................................................................................................................................. 10

Purpose of the Bill ................................................................................................................................................................. 10
Procedural basis for scrutiny .................................................................................................................................................. 10
Engagement with Stakeholders ........................................................................................................................................ 11

CHAPTER 2 - Summary of Evidence .................................................................................................................................. 13

1. Accountability structures and oversight bodies ........................................................................................................ 13
2. Prosecutorial powers of members of an Garda Síochána (Head 9) ........................................................................ 18
4. Notification of being under investigation by the Garda Ombudsman ............................................................................ 27
5. Appointment of members of Garda staff (Head 45) ............................................................................................................ 29
6. Other suggested measures to strengthen the Policing, Security and Community Safety Bill .................................. 32

CHAPTER 3 - Summary of Submissions .......................................................................................................................... 35

MEETING 1 ............................................................................................................................................................................ 35
1. Establishment and membership of Board (Head 10) and Role of Board (Head 11) and Ineligibility for appointment, disqualification for office, cessation of membership (Head 13) ......................... 36
2. Procedures for appointments, suspensions and dismissals of members of An Garda Síochána (Heads 19, 20, 23, 38, 39, 41, 45) ........................................................................................................................................ 39
3. Annual service plan (Head 53) ........................................................................................................................................ 42
4. Objective and functions of Authority (Head 104) .............................................................................................................. 43
5. Interpretation (Head 157) .............................................................................................................................................. 44
6. Part 5: Office of the Garda Síochána Ombudsman (Heads 139-156) / Part 6: Complaints, incidents of concern, investigations and other matters (Heads 157-190) ........................................ 46
7. Additional Points ......................................................................................................................................................... 49

MEETING 2 ......................................................................................................................................................................... 51
1. Objective and functions of Authority (Head 104) .............................................................................................................. 52
2. Objectives, functions and powers of Garda Ombudsman (Head 143) ............................................................................. 54
3. Interpretation (Head 157) .............................................................................................................................................. 56
4. Supplementary provisions in relation to complaints (Head 158) ....................................................................................... 58
5. Search of Garda Premises (Head 170) .............................................................................................................................. 60
6. Additional powers for purpose of undertaking formal investigation (Head 171) ......................................................... 62
7. Additional Points.......................................................................................................................... 64

APPENDICES...................................................................................................................................... 68

APPENDIX 1 - ORDERS OF REFERENCE OF THE COMMITTEE.................................................. 68
APPENDIX 2 - LIST OF STAKEHOLDERS, SUBMISSIONS AND CORRESPONDENCE...........75
CATHAOIRLEACH’S FOREWORD

In April 2021, the Minister for Justice, Ms Helen McEntee TD, forwarded the General Scheme of the Policing, Security and Community Safety Bill to the Joint Committee on Justice in accordance with Standing Orders for the purpose of pre-legislative scrutiny. The Committee welcomes the General Scheme’s intention to introduce wide-scale reform to policing in Ireland and the Scheme’s intention to align with recommendations made within the ‘Commission on the Future of Policing in Ireland (CoFPI)’.

In undertaking pre-legislative scrutiny, the Committee has sought to scrutinise the proposed legislation and provide recommendations on areas where it believes change or amendments are warranted. Among the areas identified for further examination within the General Scheme include: the prevalence and organisation of the accountability structures and oversight bodies pertaining to an Garda Síochána (AGS); the proposed expansion of the remit of the Office of the Garda Ombudsman [Part 6]; the prosecutorial powers afforded to members of AGS (Head 9); and the change of status of Garda civilian staff (Head 45).

The Committee has made these recommendations in the hope that they will assist Minister McEntee 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
In April 2021, the Minister for Justice, Ms Helen McEntee TD, forwarded the General Scheme of the Policing, Security and Community Safety Bill to the Joint Committee on Justice in accordance with Standing Orders for the purpose of pre-legislative scrutiny.

The Committee welcomes the General Scheme’s intention to introduce wide-scale reform to policing in Ireland and the Scheme’s intention to align with recommendations made within the ‘Commission on the Future of Policing in Ireland (CoFPI)’.

In undertaking pre-legislative scrutiny, the Committee has sought to scrutinise the proposed legislation and provide recommendations on areas where it believes change or amendments are warranted. Among the areas identified for further examination within the General Scheme include:

- the prevalence and organisation of the accountability structures and oversight bodies pertaining to an Garda Síochána (AGS);
- the proposed expansion of the remit of the Office of the Garda Ombudsman [Part 6];
- the prosecutorial powers afforded to members of AGS (Head 9); and the change of status of Garda civilian staff (Head 45).

The Committee has made these recommendations in the hope that they will assist Minister McEntee 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
Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta an Bhille um Póilíneacht, Slándáil agus Sábháilteacht an Phobail

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 accountability structures proposed in the General Scheme be evaluated, particularly in terms of the various bodies to whom the Commissioner must be accountable and the time it will take the Commissioner to account to these different bodies.

2. The Committee recommends that the roles of the Board of an Garda Síochána (‘Garda Board’) and the Policing and Community Safety Authority (PCSA) be clarified under Head 11 and Head 104 respectively to avoid any duplication of roles.

3. The Committee recommends that the Garda Board should have a role in the development of the annual service plan.

4. The Committee acknowledges the need, in Head 9, for the inclusion of powers of prosecution currently available to Gardaí pursuant to the *Garda Síochána Act 2005* but recommends that progress be prioritised to bring about the re-assigning of these powers to a national prosecution service.

5. The Committee recommends that Part 6 of the General Scheme be re-examined, to ensure that the investigative powers of the Office of the Garda Síochána Ombudsman (‘Garda Ombudsman’), are fully compliant with the human rights and constitutional rights of Garda members.

6. The Committee recommends that the General Scheme provide clarity regarding the accountability of the Garda Síochána Ombudsman Commission (GSOC), as a body under the aegis of the Department of Justice, in terms of its performance and other functions.

7. The Committee recommends that a comprehensive review of GSOC be undertaken, to establish the precise factors that are causing some investigations
to take an extended period of time to resolve. The results of this review should help to inform the legislation and to avoid such delays from occurring in the operation of the Garda Ombudsman.

8. The Committee recommends that, in accordance with natural justice, further guidance should be set out and agreed as to what point it would be required to put a Garda member on notice that they are under investigation by the Garda Ombudsman.

9. The Committee recommends that ‘incidents of concern’ be defined more clearly under Head 165.

10. The Committee recommends that consideration be given to re-organising the process of the Garda Ombudsman’s investigations so that serving Garda members would no longer be seconded to assist with the investigation.

11. The Committee acknowledges the statutory obligation within the General Scheme which requires consultation with relevant staff representative bodies and trade unions before any change to the status of Garda staff occurs. The Committee also encourages that ongoing dialogue take place between the Department and these bodies in relation to the impact of any proposed changes on their members.

12. The Committee recommends that the proposals in Head 114, to carry out unannounced visits, be formalised and underpinned by legislation rather than by way of a Memorandum of Understanding (MOU). The Head should also be clearer about what precise information should be provided to the Garda Ombudsman’s Office when requested.
CHAPTER 1 - Introduction

This is the report on Pre-Legislative scrutiny of the General Scheme of the Policing, Security and Community Safety Bill, which will introduce significant reforms to policing in Ireland and once enacted, will repeal and replace the Garda Síochána Act 2005 (as amended).

Purpose of the Bill

The General Scheme of the Bill was developed based on recommendations within the ‘Commission on the Future of Policing in Ireland (CoFPI)’.

Among the General Scheme’s objectives include consolidating independent, external oversight of An Garda Síochána (AGS) through a new Policing and Community Safety Authority (PCSA); providing the new Office of the Garda Ombudsman (‘Garda Ombudsman’), which will replace the Garda Síochána Ombudsman Commission (GSOC), with greater independence and an expanded remit; and reorganising the internal governance within AGS, which will result in the Garda Commissioner becoming a “true CEO” and being answerable to a new Board of an Garda Síochána (‘Garda Board’).¹

The General Scheme also aims to ensure that community safety should be a ‘whole of government’ responsibility, requiring State services to work with local communities and AGS to keep communities safe.

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 - Minister McEntee publishes General Scheme of landmark Policing, Security and Community Safety Bill (www.gov.ie)
**Engagement with Stakeholders**

The Joint Committee on Justice invited submissions from stakeholders on the General Scheme of the Policing, Security and Community Safety Bill.

On 20\textsuperscript{th} October 2021 and 15\textsuperscript{th} February 2022, the Committee held public engagements with several of these stakeholders, as laid out in the table below:

**Table 1: List of public engagements with Stakeholders**

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Witnesses</th>
<th>Date of appearance</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Policing Authority</td>
<td>Mr. Bob Collins, Chairperson&lt;br&gt;Ms. Helen Hall, Chief Executive</td>
<td>20\textsuperscript{th} October 2021</td>
</tr>
<tr>
<td>Garda Síochána Inspectorate</td>
<td>Mr. Mark Toland, Chief Inspector&lt;br&gt;Ms. Pauline Shields, Deputy Chief Inspector</td>
<td>20\textsuperscript{th} October 2021</td>
</tr>
<tr>
<td>Irish Council for Civil Liberties (ICCL)</td>
<td>Ms. Doireann Ansbro, Head of Law and Policy&lt;br&gt;Ms. Gemma McLoughlin-Burke, Procedural Rights Fellow</td>
<td>20\textsuperscript{th} October 2021</td>
</tr>
<tr>
<td>An Garda Síochána</td>
<td>Mr. Drew Harris, Garda Commissioner&lt;br&gt;Ms. Anne Marie McMahon, Deputy Commissioner&lt;br&gt;Ms. Shawna Coxon, Deputy Commissioner</td>
<td>20\textsuperscript{th} October 2021</td>
</tr>
<tr>
<td>Department of Justice</td>
<td>Mr. Doncha O’Sullivan, Assistant Secretary, Head of Criminal Justice Governance&lt;br&gt;Ms. Anne Barry, Principal Officer, Policing Legislative Framework Unit</td>
<td>20\textsuperscript{th} October 2021</td>
</tr>
<tr>
<td>Association of Garda Sergeants &amp; Inspectors (AGSI)</td>
<td>Ms. Antoinette Cunningham, General Secretary&lt;br&gt;Mr. Ronan Clogher, Deputy General Secretary</td>
<td>15\textsuperscript{th} February 2022</td>
</tr>
</tbody>
</table>
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 engagements can be found here and 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. Accountability structures and oversight bodies

Members and witnesses discussed accountability structures and oversight bodies relating to an Garda Síochána (AGS).

Members questioned the number of policing oversight bodies that exist and whether it would be possible to amalgamate any of these.

Questions were raised around the accountability structures in the General Scheme in respect of the Garda Commissioner. For example, Heads 11, 23 and 28 state that the Commissioner is not accountable to the Board of an Garda Síochána (‘Garda Board’), however, this appears to contradict the provisions contained in Head 25.

Witnesses raised the following relevant points in relation to accountability structures and oversight bodies:

- The Policing Authority highlighted that, the essential element of oversight, where the Commissioner and their colleagues retain accountability for their actions through the PCSA, is a welcome inclusion in the General Scheme.
- The Authority highlighted that the most important elements of accountability are that it is external, independent, strong, statutorily supported and visible to the public. They argued that the General Scheme addresses some elements of accountability well but could improve how it addresses the other elements. For example, as the Garda Board has fiduciary responsibilities to the organisation it was argued that it may attempt to protect its area of statutory responsibility, which may result in a less open and forthright relationship between them and AGS.
- Witnesses highlighted the uncertainty surrounding the Garda Commissioner’s accountability. The proposed legislation will require the Commissioner to be accountable to several different bodies for different functions within the
General Scheme, including the Garda Board, the Authority, the Minister and the National Community Safety Steering Group.

- In relation to this, the Garda Commissioner highlighted his concern that this will result in the Commissioner spending a disproportionate amount of time reporting to these bodies rather than undertaking other vital policing management duties.

- Witnesses stated that some of the oversight bodies within the General Scheme contain overlapping remits, for example the Garda Board (Head 11) and the PCSA (Head 104) which may cause confusion as to which body is responsible for which area of oversight.

- They argued that the General Scheme proposes to outsource key areas including budget, discipline and policing operations to the oversight bodies, which would contradict the recommendation from the CoFPI that these oversight bodies should not impinge on the operational independence of the Commissioner or result in micromanagement of the Commissioner.

**Board of an Garda Síochána (‘Garda Board’) [Heads 10-18]**

Questions were also raised around the creation of the Garda Board within the General Scheme, and whether it will meet the criteria required of it to be public, external, strong and statutorily supported.

In terms of the creation of the Garda Board, Members questioned whether the Board will be less independent than it would have been in the past and whether the Board will be public, external and strong in its functions.

Questions were also raised as to how much influence the new Board will have in the creation of the strategic and service plans and the role that oversight bodies in general will have regarding these plans.
Witnesses raised the following relevant points in relation to the Garda Board:

- The Garda Commissioner welcomed the potential for the Garda Board to support internal management governance and organisational effectiveness. However, similar to other witnesses, he pointed out that there is a risk that the oversight role of the Garda Board may duplicate that of the PCSA, which could result in a dilution of the general oversight function within the General Scheme.

- The Policing Authority welcomed the introduction of the General Scheme and the value that the Board would bring. The Authority does not favour the structure of the Board as currently proposed, however, by amending certain Heads within the General Scheme this would solve this problem with relative ease.

- It was recommended that the Board’s powers be stronger and more effective, for example, providing them a role in the development of the annual service plan (Head 53). Currently the Commissioner and the Policing Authority work in tandem to design the annual plans and strategic plan but witnesses stated that, as proposed in the General Scheme, the Board does not have a role in the formation of the strategic plan and only has a role in approving the plan. Witnesses highlighted that the Board could introduce a valuable perspective to the plan of the lived experience of policing, through including experience of public accountability and of its engagement with the Community.

- They also pointed out that under Head 53 (5) (j) it is stipulated that the Service Plan must align with the policies of Government or of the Minister, which they believe could compromise the independence of the Garda Commissioner when setting this plan.

- In addition, the General Scheme as drafted states that the Commissioner invites the PCSA to provide its views on the service plan. However, the Policing Authority stressed that this should be rephrased in the General Scheme to emphasise that the PCSA provides its opinions on the Plan out of its own statutory capacity, rather than requiring an invitation from the Commissioner to do this. They pointed out that this would be important to highlight the fact that the PCSA is not an agent of the Commissioner and to maintain the distance between the Commissioner and the PCSA as an oversight organisation.
ICCL argued that any confusion surrounding the proliferation of oversight bodies can be clarified, for example, that the roles of the PSCA and the Garda Board be made clear. They also recommended that the Board’s role should be limited to supporting internal Garda management.

In response to the points raised by witnesses, the Department of Justice provided clarification to some of the questions raised, as follows:

- The Department pointed out that for most policing and security services there are generally multiple oversight and accountability arrangements.
- It was clarified that the Garda Board is not an external oversight body, but rather a non-executive corporate board, similar to those that other public service bodies have. Its function is to strengthen the internal governance of AGS. The Department argued that using a corporate board is recognised as best practice for the governance of large organisations and that the General Scheme reflects the view that AGS does not require a different governance structure to that of other large bodies.
- It was stated that the Board will provide a more appropriate framework of governance between the Minister’s Department and AGS than there is currently, as it will allow the Minister’s Department to pull back from day-to-day management of AGS while reassuring the Minister in relation to governance standards within AGS.
- It was clarified that the General Scheme provides for two external oversight bodies, as recommended by CoFPI, which include the PCSA and the Garda Ombudsman. As the PCSA will combine the current Garda Inspectorate and the Policing Authority, this will result in one less policing oversight body than there is currently.
- It was highlighted under the CoFPI report that existing governance and oversight structures for policing were not clear as there was a lack of distinction between the roles of oversight bodies and that this was detrimental to effective accountability for policing.
• Thus, a key objective of the Scheme was to ensure that each branch of the new governance and oversight framework would have a clear policy objective and clearly defined functions. This would include separation of the management of AGS from independent external oversight.

• The CoFPI report also found there was a lack of clarity over the responsibility of AGS for its own governance. Thus, while the PCSA’s role is to oversee and assess in an independent and transparent manner the performance by AGS of its functions, the PCSA will not have statutory responsibility for executive functions. These will transfer to AGS to help enable AGS to take charge of the management of itself, supported by the Board and subject to independent external scrutiny.

• In relation to planning instruments and strategies, the Department stated that the role of the Board reflects the standard responsibilities of corporate boards across the public and private sector and the Code of Practice for the Governance of State Bodies.

• The Department stated that the proposed accountability and independent oversight framework and the relationship between the Commissioner and the oversight bodies is consistent with the Constitutional requirement that the Government has control in relation to matters of fundamental importance to the exercise of its executive powers, while allowing police matters to be delegated appropriately.
2. Prosecutorial powers of members of an Garda Síochána (Head 9)

Members questioned the role of members of AGS in prosecuting offences, as provided for under Head 9.

Members pointed out that the CoFPI recommended that Gardaí should not have a role in prosecution and questioned witnesses as to their perspectives on this. Questions were asked in relation to whether the recommendation to remove prosecutorial powers from members of AGS included the decision whether or not to prosecute, the act of prosecution itself and whether this would apply to cases all the way to District Court level.

Members also asked representatives of Garda staff organisations on the appropriateness of front-line Garda managers having these powers, taking into account the time these managers must spend in courtrooms prosecuting cases.

Representatives from ICCL stated that they support the removal of prosecutorial powers from members of AGS. They argued that one of the elements of a right to a fair trial is to be represented by a legal expert. They believe that the decision to prosecute and the act of prosecution itself should, in cases at all court levels, be carried out by the Office of the Director of Public Prosecutions (DPP).

They underlined that the introduction of this legislation would provide an opportunity to incorporate this recommendation contained within the CoFPI and pointed out that the DPP will need to be allocated increased resources, in order to carry out this role.

Representatives from the AGSI stated that they also do not agree that their members should prosecute court cases as they believe this task should be the responsibility of solicitors and barristers. They support this practice being reformed and encouraged discussions about areas in which Garda resources could be better used aside from prosecuting cases.

Commissioner Drew Harris stated that he believes the prosecution of offences by members of AGS in the District Court has advantages and disadvantages. He pointed out that it can be beneficial for Garda members to prosecute cases as it maintains
their investigative skills and the quality of their investigative work, skills which can be lost if this task is removed from a police force.

In addition, he pointed out that the act of prosecuting cases in court demonstrates to Gardaí the link between the investigative work they have undertaken for a case and the impact of their appearance in court. This provides a good basis for those who may wish to move onto serious crime investigations, alongside familiarising them with court processes.

In follow-up written correspondence to the Committee (see Appendix 2), the Department of Justice clarified that Head 9 restates the existing provisions regarding the role of AGS in prosecution decisions and presenting prosecutions at court, as provided under section 8 of the *Garda Síochána Act 2005*. However, a *High-Level Review Group on the Role of An Garda Síochána in the Public Prosecution System* was established in September 2020 and was tasked with reporting back to Government on the preferred method with which to implement the CoFPI’s recommendations in this area.

It was stated that, subject to detailed analysis and evaluation of the cost to the Exchequer, the Government accepted the CoFPI’s recommendation that prosecution decisions should be under the remit of an expanded state solicitor or national prosecution service.

This group is incorporating international research and is comprised of a cross-section of stakeholders including representatives from Departments of State, the Judiciary, AGS, the Office of the Director of Public Prosecutions, the State Solicitors’ Association, the NGO sector, academia, and legal practitioners.

Witnesses and members discussed the proposed expanded powers of the Office of the Garda Síochána Ombudsman (‘Garda Ombudsman’), the policing ombudsman intended to replace the current Garda Síochána Ombudsman Commission (GSOC).

Committee members asked witnesses their opinions on these expanded powers and on statements made previously by the Garda Commissioner that these powers would be disproportionate, unconstitutional and would breach the human rights of Garda members.

Witnesses raised the following points in relation to the potential implications of the extended powers proposed for the Garda Ombudsman under the General Scheme:

- The Garda Commissioner pointed out that, as proposed under the General Scheme, the Ombudsman’s investigations could continue for a prolonged period without needing to inform the Garda in question or even the Commissioner about the nature of the crime for which they are being investigated and whether this is a criminal matter or one of misconduct. The Commissioner argued that these powers would breach a Garda member’s human rights.

- AGSI raised the following concerns in relation to the proposed expanded powers for GSOC
  - General Scheme gives the new Ombudsman unfettered powers while it also contains a lack of oversight, as it has not specified who the Ombudsman should be accountable to.
  - General Scheme proposes there would be no time limits to the Ombudsman’s investigations, despite the concern about the length of time it currently takes GSOC to resolve some cases.
  - Under the legislation as proposed, a Garda could be investigated under a wide range of areas such as performance, disciplinary regulations breaches of the Garda code, matters of public interest, incidents of concern but without the member being notified that they are under investigation.
3. Impact of the expanded powers of the Office of the Garda Síochána Ombudsman

Part 6

Witnesses and members discussed the proposed expanded powers of the Office of the Garda Síochána Ombudsman ('Garda Ombudsman'), the policing ombudsman intended to replace the current Garda Síochána Ombudsman Commission (GSOC). Committee members asked witnesses their opinions on the expanded powers and on statements made previously by the Garda Commissioner that these powers would be disproportionate, unconstitutional and would breach the human rights of Garda members.

Witnesses raised the following points in relation to the potential implications of the extended powers proposed for the Garda Ombudsman under the General Scheme:

- The Garda Commissioner pointed out that, as proposed under the General Scheme, the Ombudsman’s investigations could continue for a prolonged period without needing to inform the Garda in question or even the Commissioner about the nature of the crime for which they are being investigated and whether this is a criminal matter or one of misconduct. The Commissioner argued that these powers would breach a Garda member’s human rights.

- AGSI raised the following concerns in relation to the proposed expanded powers for GSOC General Scheme gives the new Ombudsman unfettered powers while it also contains a lack of oversight, as it has not specified who the Ombudsman should be accountable to.

- General Scheme proposes there would be no time limits to the Ombudsman’s investigations, despite the concern about the length of time it currently takes GSOC to resolve some cases.

- Under the legislation as proposed, a Garda could be investigated under a wide range of areas such as performance, disciplinary regulations, breaches of the Garda code, matters of public interest, incidents of concern but without the member being notified that they are under investigation.

- AGSI stated there is no clear definition of what constitutes an incident of concern and that clear reasons, grounds and definitions should be set out if a Garda is going to be investigated for an incident. They stated it appears that the Ombudsman is being granted the same powers to investigate a minor disciplinary issues as it is to investigate an incident of a serious and criminal nature.

- There is a clear absence of natural justice and fair procedure in the Ombudsman’s new powers, as a Garda against whom a complaint has been made is entitled to know what the subject of the complaint is about, as, the nature of the alleged offence may impact on their rights and entitlements.

- Ombudsman’s powers encroach on basic rights of Garda members, rights which every other citizen enjoys.

- New powers do not contain any constitutional safeguards for Garda members.

- The expansion of these powers has not been justified and the General Scheme does not elaborate on what powers GSOC currently requires to carry out its function or why these additional powers are required.

- General Scheme does not specify what actions Ombudsman should take if frivolous or vexatious complaints are made.

- The Association of Garda Superintendents stated that Head 170 (1) provides for a search of a Garda Síochána premises when undertaking a formal investigation. Under the Damache ruling, entering into a premises based on warrants issued by the organisation of AGS is prohibited, however this subhead provides authority to the Garda Ombudsman and its officers to issues such search warrants. The Association pointed out how this conflicts with existing legislation and contravenes the Constitution and human rights of any Garda premises.

- Furthermore, as ‘Garda premises’ is not defined, they questioned whether this would render the house of any Garda member who works from home as a Garda premises, as this would also breach the inviolability of the home as protected in the Constitution. They argued as such that Garda members must
be entitled to the same rights under this legislation that would be afforded to members of the public.

- The ICCL viewed the expanded powers of GSOC positively and emphasised the need for the new ombudsman to receive greater powers and resources, as was highlighted in the CoFPI and in the UN Committee against Torture’s latest report. They claimed that the legislation contains several protections against the extended powers for the Ombudsman, including
  - The Ombudsman is not an unaccountable body, as it will be accountable to the Oireachtas and potentially the High Court.
  - The legislation requires the Ombudsman’s office to ensure that it will execute its functions with fairness regarding the complainants and those being investigated.

- Stakeholders gave different suggestions as to what types of cases should be referred to GSOC for investigation:
  - **Policing Authority**: Pointed out that if all incidents of concern are escalated to the Ombudsman for investigation, this may take away from the growing acceptance of performance management occurring within the organisation, which the Authority believes would be the preference of the Commissioner and senior staff. In addition, if all concerns were escalated to an external body the Authority believes this may give the impression that it is not possible to undertake such concerns efficiently within the organisation itself.
  - **ICCL**: Minor infractions like consistently being late would not require GSOC. But any cases involving a lower threshold of human rights violation, or an allegation of mistreatment should certainly be escalated to a GSOC investigation. For example, a case where excessive use of force is used, as even if it does not cause serious harm, it is still a disproportionate use of force.
  - **Garda Síochána Inspectorate**: Recommended that sexual offences and abuse of power for sexual gain offences should be referred to GSOC for investigation.
An Garda Síochána: The Commissioner emphasised that any case involving a breach of infringement of human rights would always be classified as serious and would be referred to the Garda Ombudsman. While cases of poor performance would be dealt with by the management officers within AGS, certain cases of public complaints require consultation with GSOC to ascertain how they would refer those types of complaints involving performance issues back to AGS to handle. Overall, it is important that matters which can be discussed and dealt with at local management level are handled as such, in order to ensure that the Ombudsman’s resources are devoted specifically to serious cases and crimes.

Problems with the current operation of GSOC

Members also questioned the existing manner in which GSOC investigations are carried out, pointing out the significant amount of time it can take for GSOC to conclude investigations into members of AGS.

Members questioned to whom GSOC is accountable, in particular in situations where they are taking an extensive period of time to conclude their investigation into an individual.

The GRA and AGSI were questioned as to their Member’s experiences with GSOC and any changes their members would suggest to improve GSOC’s current systems.

Witnesses raised the following relevant points in relation to the problems with the current operation of GSOC:

- Concerns were raised over the lengthy period of time it takes GSOC to resolve certain investigations. In some cases, Gardai have been left under investigation for extended periods of time and the AGSI asserted that in some of these situations, GSOC has not responded to communication from the Garda’s solicitors surrounding their case, leaving the Garda member in a state of limbo.
• The AGSI asserted that there is also no accountability surrounding the reasons that GSOC can take so long to resolve investigations.

• Several suggestions were made as to why it takes GSOC so long to resolve cases. Some suggested that GSOC is under-resourced or that the process of finding and arranging for a serving Garda to be seconded to the investigation can slow down the process. The AGSI pointed out that GSOC had a budget over €11 million in 2020 and had 127 employees and questioned whether GSOC had confidence issues preventing them from progressing cases faster.

• The GRA recommended that there should be effective oversight over the operation of the Garda Ombudsman in the General Scheme to ensure that cases of investigations being delayed would be subject to further scrutiny.

• The GRA asserted that the scrutiny of their members does not take a light-handed approach. They asserted that their members are subject to extensive and multiple layers of oversight and that there are few professions which would be subject to this level of oversight. There are more frequent instances of Gardaí being scrutinised online as they are filmed by the public and the videos, which can give a biased or unbalanced view of a situation, are uploaded to the internet. They highlighted the internal disciplinary regulations, processes and procedures that are initiated when a complaint is made, alongside complaints being processed through civil avenues.

• In response to questions raised on the need for independent investigation of Gardaí, the Association of Garda Superintendents confirmed that GSOC’s current investigative process involves serving Garda members being asked to partake in investigations. However, they emphasised that AGS had no choice in their involvement and would prefer if GSOC were to take over these investigations completely so that AGS no longer had any involvement.
In response to the points raised by witnesses, the Department of Justice provided clarification to some of the questions raised, as follows:

- The Department of Justice clarified that the Garda Ombudsman will be a continuation of the current GSOC, but with a new structure, greater independence and expanded remit.
- The Garda Ombudsman will be subject to oversight by the Department of Justice and this structure is in place in accordance with good practice in respect of the governance of State bodies.
- The Department pointed out that the CoFPI had acknowledged that GSOC investigations are cumbersome and inefficient and that the General Scheme aims to improve this by providing for a more streamlined investigative process (Heads 168-171).
- It intends to move away from the dual investigative process in the Garda Síochána Act 2005 to a single investigative process, similar to other regulatory bodies.
- In addition, it also intends to move away from the sequential approach in the 2005 Act, where GSOC must finish the criminal investigation before following on in sequence with any non-criminal investigation that involves disciplinary matters.
- The Department emphasised that the significant changes they are making to the investigative process is intended to make it a more timely, effective and transparent process for both members of the public and serving Gardaí.
- In terms of GSOC’s accountability, if an individual is dissatisfied after engaging with them, there is an administrative processes in place to take complaints regarding how GSOC has engaged with this individual. There may also be opportunities for a judge-led inquiry into the conduct of GSOC officers, as recommended within the CoFPI.
- In response to claims that the expanded powers will compromise the fair procedures and natural justice of Garda members under investigation, the Department of Justice clarified that this will not be the case, as the Garda Ombudsman will be statutorily required under Head 143 to ensure that its
functions are “performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations”.

- In terms of how different complaints are handled, the Department clarified that under Head 159, all complaints from the public are to be referred to GSOC, as per CoFPI recommendations. The Ombudsman will decide whether or not the complaint is suitable for themselves or for the Garda Commissioner to resolve as per arrangements that will be put in place by the Commissioner and the Ombudsman, under Heads 160 and 162. The Ombudsman and Commissioner will devise a list of categories of complaint that can be resolved by AGS and this list will be approved by the Minister, subject to the complaint not falling under certain categories, e.g., where the act that may constitute a criminal offence.

- In accordance with CoFPI’s recommendations, complaints in relation to customer service failures or behavioural issues demonstrated by a Garda are best dealt with internally as part of AGS’ management functions.

- The General Scheme also provides for the Commissioner to notify ‘incidents of concern’ to the Ombudsman. These are allegations of criminality or notifiable misconduct that have been brought to the attention of AGS outside of a complaint made by the public and do not include matters that are best dealt with by the Garda performance management system.

- The Ombudsman may decide to investigate the matter and following conclusion of this investigation and any results, the Garda Commissioner will decide the final course of action, unless there is sufficient evidence that GSOC feels this matter is an offence and should be referred to the Director of Public Prosecutions (DPP).

- The Department stated that the Scheme’s approach is intended to ensure independent oversight and investigation of complaints, while ensuring that AGS retains responsibility for the standards and behaviour of Garda personnel and in managing their performance.
4. Notification of being under investigation by the Garda Ombudsman

A discussion also ensued around Head 158 and whether Garda members should be on notice of being under investigation by the Garda Ombudsman or not.

Some Members argued that not alerting a Garda member that they are under investigation by the Ombudsman would not breach their right to natural justice, as they could still avail of the same methods of examining whether these rights had been breached as other citizens could, i.e., through a judicial review. They questioned why the same principles should not apply to both Garda members and citizens in terms of not being on notice that they are under investigation, until such point at which it is necessary, for example, to interview the individual in relation to the investigation. Members clarified that they were not referring to situations in which a garda has been suspended and does not know the reasons behind their suspension and emphasised their disagreement with such situations. Other Members highlighted that because the investigation is being conducted by the Ombudsman rather than internally by AGS they do not see why a Garda should not be put on notification of this.

In response, witnesses stated that while it was possible for Gardaí to pursue judicial reviews if they believe their natural rights were breached, this option was expensive. Furthermore, they argued that this procedure does not observe principles of natural justice and due process as some Garda members are not been informed why they have been suspended, despite requesting this information and it was also argued that GSOC currently does not resolve some of the cases assigned to it in a reasonable amount of time.

Witnesses pointed out that in these circumstances, members of the public are afforded more natural justice and fair procedures than members of AGS are. The AGSI provided an example where a citizen being interviewed for a criminal matter will be given a legal caution before they are asked any questions. However, under the General Scheme, the Ombudsman can classify something as a formal investigation without specifying whether it is for a criminal or disciplinary matter. A separate section specifies that a Garda must account to a member in the course of their duties. As a result of these provisions, when accounting under that formal investigation, any information gathered on that Garda could subsequently be used against them in a
criminal investigation, even if the Garda had not been administered a caution and was not aware a criminal investigation was launched against them.

They recommended that instead of a formal investigation, the Ombudsman should specify whether an incident is criminal or disciplinary and then appropriate powers should be used based on this.

The Association of Garda Superintendents stated that the approach to notification must be proportionate and that rather than adopting a blanket approach, it should depend from situation to situation whether an individual would be notified or not.
### 5. Appointment of members of Garda staff (Head 45)

Members and witnesses raised questions surrounding Head 45 of the General Scheme, which would alter the status of Garda civilian staff, from civil servants to public servants. As a result, witness pointed out that these staff would be subject to the same investigative process by the Garda Ombudsman as sworn members of AGS would.

Members discussed the potential reasons behind the suggested change in status of Garda Staff under this General Scheme. Some Members argued that due to the sensitive nature of the material that Garda staff handle, it is fair that they would be subject to a higher standard than their counterparts and that the same investigative process as a sworn Garda member would apply to them.

Members asked witnesses if they had any solutions as to how Garda staff could still be held to a higher scrutiny process, without changing their status to public servants or without being subject to the same investigative process by the Garda Ombudsman as a Garda member.

Representatives from Fórsa expressed their disagreement with the proposed changes in this General Scheme for their civilian staff, as they believe it overextends the Ombudsman’s powers in relation to their civilian staff.

They pointed out that civil servants in all areas are covered by their own particular codes, including standards of public office and code of ethics. Procedures are available to deal with breaches of these codes, which would also cover breaches in relation to the Official Secrets Act. They argued that these existing codes and procedures have been sufficient to deal with disciplinary breaches up until now, however, they believe that the General Scheme as proposed overlooks these procedures.

In response, the Department of Justice stated that the General Scheme when enacted will not automatically result in a change to the status of existing Garda staff. They highlighted that in order to change the status of Garda staff from that of civil servants, an order from the Minister is required and that the Scheme includes a statutory
obligation at such a point to undertake consultation with the relevant staff representative bodies and trade unions before this change occurs.

Questions were also raised surrounding the level of consultation that had been undertaken with representative and stakeholder bodies in advance of the General Scheme being published. Members questioned which bodies had been consulted during the drafting of the General Scheme and asked what the normal process for consulting witnesses during the drafting of a General Scheme was, and whether the process followed for this General Scheme.

The AGSI stated that there had been no consultation with them in relation to the General Scheme or the proposals contained within it and that they found this regrettable, as they had only become aware of the General Scheme when discovering it online.

Representatives from Fórsa also stated that they had not been consulted with in relation to the General Scheme. They underlined that during their 30 years working within the Union, this was only the second occasion in which such consultation hadn’t happened in relation to a General Scheme, with the introduction of financial emergency measures in the public interest, (FEMPI), during the economic crisis being the only other occasion.

They argued that under the terms of national agreements, Fórsa is required to comply with all cooperation and consultation agreements set down but that in this instance, they felt that their employer had been not demonstrated the same concern in terms of their commitments under national agreements.

The Department clarified that extensive consultation with stakeholder bodies had taken place over the last two years in advance of the General Scheme being published and that this consultation would continue as the legislation is further developed. Among the bodies consulted in relation to the General Scheme include the Garda Commissioner and Garda oversight bodies such as GSOC, the Policing Authority, and the Garda Inspectorate.
In addition, it was pointed out that the General Scheme is also based on recommendations made in the CoFPI, which in itself had engaged in consultation with Garda members, Garda associations and unions, and conducted extensive public consultations when compiling its final Report.
6. Other suggested measures to strengthen the Policing, Security and Community Safety Bill

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:

- **Head 114 Powers of Inspector of Policing Services**

Members commented on the inspection function within the proposed PCSA [Head 114] and asked how this provision could be strengthened within the General Scheme.

Witnesses welcomed this provision allowing the PCSA to undertake unannounced visits, as they felt such visits form an important part of the inspection function and can promote public confidence in how Garda stations are being run. Witnesses recommended that this provision should be formalised and legislated for, rather than provided for through a Memorandum of Understanding (MOU), as proposed in the General Scheme.

They recommended the Head should follow the example of Head 177, which is clearer about what information should be provided to the new Garda Ombudsman’s Office by AGS.

In follow-up written correspondence to the Committee, the Department clarified that Head 114 sets out the intended powers of the inspectors of policing services who will be staff of the Policing and Community Safety Authority.

They clarified that the operation of these powers is being worked out as the General Scheme is drafted, but most importantly it will be ensured that the inspections conducted are efficient and do not adversely impact the performance of AGS or jeopardise criminal investigations.

The Department pointed out that the provision to undertake unannounced visits to Garda premises is located within the context of a planned inspection.
Commissioner would be informed of a planned inspection, which may involve unannounced visits to Garda premises, but the Commissioner would not be told the location or timing of this visit.

It was also pointed out that these inspections are separate to the those conducted by the Garda Ombudsman and that the PCSA will not be the national preventive mechanism (NPM) for the Optional Protocol to the UN Convention against Torture (OPCAT) for garda custody facilities. This function will be carried out by a new Inspector of Places of Detention, which will be provided for in the upcoming *Inspection of Places of Detention Bill*.

- **Head 30 Directives from Minister**

Questions were raised surrounding Head 30 and how written directives from the Minister could impact a Garda Commissioner’s operational control or independence.

The Commissioner raised concern with the amount of influence that can be applied to his direction and control of the organisation and pointed out that in general in the General Scheme, there appears to be several different elements which can bear influence on this, such as policing priorities, the approval of the strategic plan, the annual plan.

In supplementary written information to the Committee, the Department clarified that Head 27 of the General Scheme is intended to guarantee the operational independence of the Commissioner from the Garda Board, the Minister and to make clear the connection between Head 27 and the accountability framework for the Garda Commissioner. They stated that the wording of this Head will be reviewed during the drafting process to ensure its clarity in this regard.

In terms of Head 30, the Department stated that this Head will provide the Minister the power to issue directives to the Garda Commissioner, with the approval of the Government and that the Minister may do this of their own initiative or based on recommendations from the PCSA. They pointed out that this Head is largely intended to replicate section 25 of the *Garda Síochána Act 2005*, and its purpose
was to help formalise and bring transparency to the relationship between the police and Government. This section was designed to allow the Minister to respond promptly to important events, for example during times of national crisis and it was pointed out that only three directives has been issues under this power since 2005.

- Inclusion of human rights standards as part of code of ethics

In response to questions, ICCL confirmed their belief that the human rights standards expected of Garda members should be included in the code of ethics and breach of these standards should be made a disciplinary offence, in order to ensure accountability and repercussions for such breaches.
CHAPTER 3 - Summary of Submissions

MEETING 1

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

➢ The Policing Authority
➢ Irish Council for Civil Liberties (ICCL)
➢ The Garda Inspectorate
➢ Office of the Garda Commissioner, An Garda Síochána

These submissions highlighted in particular, the concern over the absence of clarity and significant overlap between the respective roles of the Garda Board and the new Policing and Community Safety Authority (Head 11), changes to the appointments, suspensions and dismissals of members of An Garda Síochána (AGS), and the expanded remit of the Office of the Garda Síochána Ombudsman (currently named Garda Síochána Ombudsman Commission or GSOC) [Part 5].
1. Establishment and membership of Board (Head 10) and Role of Board (Head 11) and Ineligibility for appointment, disqualification for office, cessation of membership (Head 13)

The Inspectorate, an Garda Síochána and the Policing Authority argued that Head 11 as proposed in the Scheme may cause confusion regarding distinctions between the responsibilities of the Garda Commissioner, and between the roles and functions of the Garda Board and the proposed Policing and Community Safety Authority (PSCA). This could lead to tasks being duplicated and reduce public accountability and effectiveness of oversight arrangements if oversight of key organisational issues are not transparent. They highlighted that clear lines of accountability and oversight should be provided in the General Scheme to avoid confusion about the respective objectives and functions of these bodies. The Policing Authority also believes the Board should remain accountable to the PSCA so that it is subject to external oversight and is publicly accountable.

The Garda Inspectorate commented that Head 11(c) and Head 104 appear very similar in their purpose and that this overlap in their roles could cause confusion. The Garda Síochána stated that the functions of the Board and Authority (Head 104) in the General Scheme should be re-examined and clarified to ensure there is no confusion between the remit of both bodies or a duplication of reporting requirements on the Garda Commissioner on these matters.

ICCL noted that two members of the Commission on the Future of Policing in Ireland (CoFPI) opposed the creation of this Board and questioned the merits behind creating this Board and how the external oversight and accountability currently provided by the Policing Authority will be maintained.

Membership of the Board

In terms of membership of the Board, the Policing Authority argued that they would prefer if Head 10(2) stated explicitly that competition for appointment to the Board would be conducted by an independent body, to ensure that there is an opportunity
for individuals to express their interest in this role and to avoid negative perceptions forming regarding the independent of appointments.

ICCL recommended that when appointing members to the Board (Head 10) the Minister should ensure that an individual has expertise in human rights law and the public sector duty.

An Garda Síochána recommended that the following be excluded from being a member of the Board: any current and former member of An Garda Síochána; any current and former member of the Policing Authority and Policing and Community Safety Authority; any current and former employee, including Ombudsman Commissioner, of the Garda Síochána Ombudsman Commission (Head 13).

They also highlighted that in many other public sector organisations Chief Officer’s are included as *Ex Officio* members of similar Boards and requested that the Garda Commissioner be reconsidered as an *Ex Officio* member of the Board.

**Concerns regarding oversight and accountability frameworks**

An Garda Síochána highlighted several of their general concerns with the proposed oversight and accountability frameworks in the Scheme, which were as follows:

- They believe these oversight measures encroach unnecessarily on the Garda Commissioner and his ability to direct and control an Garda Síochána (AGS) as stipulated in Head 25 and on his responsibilities as a Public Sector Employer. They believe this inhibits the capacity of the Garda Commissioner to control the organisation as a true CEO, which is a central aim of the General Scheme.

- They argued that the oversight measures in the Scheme verge more on control than oversight and that the accountability frameworks proposed are overly complex and unmanageable.

- Furthermore, they believe these frameworks create layered controls in multiple bodies which is not conducive to the effective and efficient management of the
Policing Service by the Garda Commissioner and will distract the Garda Executive from undertaking their policing functions.

- The argued the expanded powers, remit and duties of those external bodies will weaken and remove the independence of AGS from an investigative, administrative, employment and stakeholder engagement perspective.

- They believe the roles and responsibilities of the multiple regulatory and oversight bodies are unclear and create a corporate oversight structure that is unnecessarily complex and unwieldy. This may negatively impact essential working relationships and without a dispute resolution mechanism, any such disputes may be sent forward to and further over-burden the Court System.
2. Procedures for appointments, suspensions and dismissals of members of An Garda Síochána (Heads 19, 20, 23, 38, 39, 41, 45)

Appointment of Garda members

The Policing Authority argued against the weakening of its authority in several areas under the proposed General Scheme, including the weakening of its input into the requirements for the position of Garda Commissioner (Head 19), Deputy Garda Commissioner (Head 20), Assistant Garda Commissioner and Chief Superintendent (Head 38) and in ranks below Chief Superintendent (Head 41).

It was argued that the Policing Authority’s role in such appointments is valuable as it offers insights into the oversight responsibilities and the other statutory functions of the Gardaí. If these changes are to be made they argued that its successor body the Policing and Community Safety Authority (PSCA) should be represented on the selection board for the positions of Commissioner and Deputy Commissioner rather than the current proposal to include them as a consultee before a selection competition is undertaken. The Authority argued that the PSCA should also be consulted regarding appointments at principal Officer level or higher under Head 45.

In terms of appointments for Assistant Garda Commissioner and Chief Superintendent, while the Policing Authority was satisfied that the involvement of the Public Appointments Service (PAS) in these appointments ensures external operation of the competitions for these posts, it was argued that that the PCSA should have a consultative role in determining the competences for these positions and should be represented on the selection boards (Head 38). An Garda Síochána believe that Head 38 as is currently formatted dilutes the Commissioner’s ability to appoint personnel and thus the phrase ‘approval of the Board’ should be changed to ‘in consultation with the Board’.

The Authority protested against the proposals in the General Scheme that appointments to Superintendent and all other ranks below that of Chief Superintendent would now be undertaken by the Garda Commissioner. They argued that external involvement in the appointment of Superintendents is critical to safeguarding the future of the organisation (Head 41).
The Garda Inspectorate welcomed the intention under Heads 38 and 41 to open entry routes for these positions in AGS to police officers from other jurisdictions. The Inspectorate previously recommended to the Minister that a Direct Entry Inspector programme and potentially a Direct Entry superintendent programme be developed to attract candidates with appropriate leadership and management experience from organisations external to AGS. They further recommended that reciprocal arrangements that exist for senior appointments processes in the PSNI and AGS under the Intergovernmental Agreement on Police Co-operation be expanded to allow access to sergeant and inspector promotional process in both jurisdictions.

The Inspectorate also welcomed the provisions under Head 45 which emphasises the role of Garda staff to assist in carrying out the functions of AGS and will facilitate the Commissioner to recruit staff with necessary specialist and technical skills, thus releasing Garda members for front-line policing duties.

Suspensions, dismissals, or removal of Garda members

Regarding the suspension of a Garda Commissioner or deputy Garda Commissioner, the Policing Authority argued that their role in the suspensions or removals of individuals in the above-mentioned positions should also be extended beyond the consultation provision (Head 23). They also recommended that the PSCA should be consulted and not just informed regarding suspensions or removals of individuals appointed as Assistant Garda Commissioner or Chief Superintendent (Head 39). They argued that the proposed procedures for dismissals under Head 41 of the General Scheme do not provide sufficient safeguards as they remove the current external oversight in these processes. They stated that this will result in a lack of transparency and the assurance of fair process for dismissals at all ranks (Head 41).

In relation to Heads 23 and 39 An Garda Síochána requested clarification as to whether the proposals in the Scheme for the suspension and removal of members under these Heads mirrors the same process that is applied to other senior office holders of Government Departments or State organisations who are removed from
their positions. They argued the same processes should be applied all individuals holding such senior positions.

Under Head 39 they requested that the requirement for a statement of reasons for the removal of a Garda staff member to be laid before each House of the Oireachtas should be removed and argued that the approval of the Garda Board in this Head undermines the role of the Commissioner to ensure order within AGS and opens sensitive investigations to the Garda Board.
3. **Annual service plan (Head 53)**

The Policing Authority believe that the reduced role of the Authority in the Annual Service Plan will result in a further reduction in public accountability. They argued that under Head 53(6) the provision of the PCSA’s views should arise from their own statutory capacity rather than being invited by the Commissioner to provide their views on the plan.

In addition, they believe that Head 53(5) increases the political involvement of the Minister in forming the plan by compelling the Garda Commissioner, when developing the plan, to be consistent with policies of any Minister of the Government where those policies may affect or relate to the functions of An Garda Síochána. As a result, they believe that this would significantly erode the operational independence of the Commissioner.

An Garda Síochána noted that Head 53(3) stipulates that the service plan must be prepared within 42 days of the publication of the Estimates for Public Services and Head 53(5) stipulates that it must be a ‘costed plan’, which would contain estimates of the financial resources required and the number of Garda members and staff required to meet these objectives and services. They argued that it may not be possible to complete such a costed plan in the timeframe stipulated and without additional supports.

In addition, the Garda Commissioner highlighted that further clarity is required to address a situation where a Board is not constituted or where the Board does not adopt the plan, and to provide other arrangements for such a situation. The Policing Authority highlighted the Scheme states that if the Board does not approve a plan, the Minister may request the Commissioner to submit a Plan without Board approval. They argued that this could further diminish all oversight of the process.
4. Objective and functions of Authority (Head 104)

Both ICCL and the Policing Authority welcomed this Head. ICCL welcomed its clear functions and references to human rights standards and the Policing Authority welcomed that it maintained many of the existing functions of the Policing Authority in the PCSA, which, combined with the inspection elements of the Garda Inspectorate will allow for a more holistic approach to oversight of policing performance.

The Garda Inspectorate stated that it is difficult to ascertain whether the oversight of policing may be strong or weak under the Garda Board as its operations and how transparent its processes will be are unclear under the General Scheme. They noted that it will be important to ensure that there are no gaps in oversight between the Independent Examiner and the Authority in the area of AGS’s performance and standards relating to National Security, State Security and Security Services, as the Authority will not be empowered to examine or inspect these areas under the Scheme and it is not stated whether they can carry out such inspections in cooperation with the Examiner.

The Inspectorate highlighted several other discrepancies with this Head including:

- It is unclear who the Authority is intended to advise and is therefore responsible for considering or accepting its advice.
- The Authority appears obliged to make recommendations only to the Minister of Justice and the Commissioner, despite the potential for its recommendations to be cross sectoral in nature.
- Clarity is required regarding who is responsible for setting professional policing standards and whether these are the Ethical Standards and Commitments set out in the Garda Code of Ethics. Policing standards also require clearer definition.
- This Head should stipulate that the Authority possess a monitoring role regarding the external oversight of garda use of force trends.
5. Interpretation (Head 157)

The following points were raised regarding several of the terms under Head 157:

**Definition of conduct**

- An Garda Síochána argued that it is difficult to determine the purpose of conduct which is not similar to other provisions in the Scheme relating to complaints. A new definition of police conduct would have to correspond with a clearer definition of what the duty of an individual member of AGS is.

- Regarding notifiable misconduct, they stated that the General Scheme should include the mechanism and criteria that the Minister may utilise to define matters as notifiable misconduct and should set out the threshold for such misconduct and consider raising this threshold.

**Incidents of concern**

- The Garda Inspectorate argued that category ‘incident of concern’ is open to interpretation and that the precise threshold for notification is subject to further consideration.

- An Garda Síochána requested that the inclusion of Garda staff under this Head be reconsidered, as treating Garda staff who undertake administrative duties differently than their counterparts in other Departments or Public Bodies may impact negatively on AGS as an employer.

**Serious Harm**

- The Inspectorate welcomed the inclusion of abuse of power for sexual gain as a form of serious harm. They pointed out that under in order to satisfy the State’s obligations under international law and carry out independent investigations, referrals under Head 165 from the Garda Commissioner should be extended to cases where a Garda employee is suspected of sexual violence or abuse of power for sexual gain against a member of the public or another garda employee.
• An Garda Síochána highlighted that it may not be possible to immediately identify abuse of power for sexual gain occurring, as this may only be identified after investigation. This contradicts with the phrasing of Head 164 which implies an immediate response should by the Ombudsman should be given in relation to such an incident.

The additional points were raised:

• The Inspectorate believe that the Gardaí should develop formal arrangements whereby intelligence could be shared between GSOC, Law Enforcement Agencies and the Garda Anti-Corruption Unit.

• Finally, they point out that trainee Gardaí should be included in the provisions and treated in the same manner as Garda staff as recent trainees were deployed to operation prior to commencing their training during the COVID-19 pandemic.
6. Part 5: Office of the Garda Síochána Ombudsman (Heads 139-156) / Part 6: Complaints, incidents of concern, investigations and other matters (Heads 157-190)

Submissions highlighted some general concerns and comments in relation to the proposals for Part 5 and Part 6 surrounding the expanded remit of the Office of the Garda Síochána Ombudsman (OGO) (which is the proposed new title given to GSOC under this Scheme), the new processes for the handling of complaints, incidents of concern and the conduct of investigations.

An Garda Síochána made several comments in relation their strong concerns regarding Parts 5 and 6 of the General Scheme, which are as follows:

- They argued that these provisions grant unregulated, unsupervised and unquestionable powers to GSOC which fail any tests of reasonableness, suspicion or proportionality.
- They believe these Parts propose disproportionate powers for designated officers of the Ombudsman when conducting a formal investigation of Garda personnel or Garda staff and that the Ombudsman's powers are far in excess of those that a member of An Garda Síochána possesses to conduct investigations.
- These believe that these powers transgress the principles of constitutional fairness and are constitutionally or legally unsound.
- They stated that the proposals remove the distinction between alleged criminal behaviour of Garda personnel and conduct or service level issues which could result in claims of abuse of power by GSOC and in legal action and multiple court challenges being taken.
- They argued that expanding the conduct that can be investigated by GSOC in this manner will disincentivise effective policing and fails to acknowledge the complexities of the policing environment.
• They believe the expanded powers of GSOC do not provide adequate safeguards to ensure due process or fair procedures for those concerned (Head 143). They argued that these investigations do not specify a timeline for completion, which affects the due process and fair procedures of an individual being investigated or in respect of public interest in this investigation and no reference is made to mediation or any other informal means of resolving complaints (Head 143 (6)).

• This will impact on the welfare of Garda staff who may not know whether they are being investigated, who will not be provided with the anticipated timescale of any such investigation and who will not know whether they are being investigated for crime or misconduct, as all matters are dealt with as crime at the outset.

• The proposals unduly impact on the human rights of Garda members and Garda personnel. This may further impact on the responsibilities of An Garda Síochána as a public body employer under section 42 of the Irish Human Rights and Equality Commission Act 2014 as the above sections do not meet the standards of legality, proportionality, necessity and constitutionality in several areas.

• They argued the proposals in the Scheme will not achieve their aim of improving creating a positive culture within AGS but will hinder this by removing the responsibility of managers to intervene in the case of unacceptable conduct and will instead designate a remote entity with this responsibility.

• They also argued that there is an absence of appropriate independent judicial oversight or indeed any operational scrutiny of the Garda Ombudsman, when seeking to search a premises and stressed that the CoFPI recommended there be such an oversight mechanism for the Ombudsman.

The Policing Authority highlighted the following points, among others:
• The volume of work which will be given to the OGO will need to be accompanied by a significant expansion in staffing, in particular staff with investigate experience.

• The Scheme should not undermine the Commissioner in his role and responsibility as Chief Executive to manage poor performance and behaviour.

• The OGO must keep the PSCA informed and that the requirements to share information with the PSCA under Head 174 and Head 229 may not be sufficient to ensure this occurs.

• The requirement for referrals from the Commissioner to the OGO could challenge in the Garda Commissioner in effectively implementing a performance management culture within AGS. It was proposed that a triaging system could be applied to prevent this and that a review period should be prescribed in the legislation to allow this approach to be scrutinised regarding its success or otherwise.

• There should be a similar standard of accountability for the entire garda workforce.

• There should be an ‘active duty’ placed on Garda members to report wrongdoing and provide information regarding investigations and a stipulation that not doing so would constitute an offence. Such a provision should change the current phrasing of Head 171 and encourage members to submit such information of their own volition rather than after being instructed to do so.

The ICCL endorsed the recommendation by the CoFPI that GSOC be renamed to the Independent Office of the Police Ombudsman, to highlight its independence from AGS (Head 139).
7. Additional Points

In addition to the above key issues, some stakeholders indicated specific interest in certain areas, as follows:

**Interpretation (Head 2)**

An Garda Síochána argued for clearer or more appropriate definitions to be provided in the Scheme for the following terms: ‘capital plan’; ‘person’; ‘corruption’; ‘business interest / secondary occupations’ for Garda personnel. They also requested that the Public Spending Code definition of ‘capital expenditure’ be used in the Scheme and that a legislative definition for ‘police corruption’ be provided to anchor anti-corruption policies within a legislative framework.

**Oversight of Policing and Security Services (Part 1, Part 3, Part 7, Head 3, Head 49, Head 195)**

The Garda Inspectorate stressed in relation to several parts and Heads that security services and policing services are separate in the General Scheme, as are oversight arrangements, with the Independent Examiner being responsible for oversight of security services and the Authority being responsible for oversight of policing services. However, it is not always straightforward to discern between criminals and organised crime networks in serious crime and other crimes committed. Policing tactics and policing powers used in these different areas also overlap.

Therefore, they express that it is essential that this separation does not result in any gaps in oversight in these critical areas.

**ICCL: General recommendations**

ICCL made the following recommendations in relation to the General Scheme, among other points:
• The power of prosecution should be removed from members of AGS, as was recommended by the CoFPI.
• The Garda Code of Ethics should include references to human rights standards that is expected of Garda members and staff. This Code of Ethics should be further re-enforced by making it into a disciplinary code (Head 66).
• The Optional Protocol to the UN Convention against Torture (OPCAT) must be ratified and implemented and an independent National Preventive Mechanism to inspect all places of detention including prisons, Garda stations, direct provision centres and psychiatric hospitals. They highlight that independent and unannounced visits to police stations can be an important safeguard against abuse occurring, compared with the ‘planned inspections’ proposed under the Scheme.
• Disaggregated data on the use of police powers should be collected on all areas of policing (Head 65).
MEETING 2

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

➢ Fórsa
➢ AGSI
➢ The Association of Garda Superintendents
➢ GRA

These submissions highlighted in particular, the impact of the expanded investigatory powers of the Office of the Garda Síochána Ombudsman on the legal, constitutional and privacy rights of Gardaí (Head 143); the excessive time it has taken GSOC to complete investigations of complaints against Gardaí and the need to deal effectively with false and vexatious complaints made against Gardaí; and the impact of the proposals under the General Scheme on civilian staff within An Garda Síochána (AGS) (Head 45).
1. Objective and functions of Authority (Head 104)

The main points discussed by stakeholders in relation to Head 104 were as follows:

- The functions and objectives of the Board of An Garda Síochána (‘the Board’) (established under Head 10) and the Policing and Community Safety Authority (‘the Authority’) must be clear to ensure there is not a duplication of roles between the two.
- Target structures and objectives of the Authority must be clear to ensure they are realistic and achievable.

Among the points raised by the Association of Garda Superintendents in relation to Head 104 were:

- The Association cautioned that the Authority should not begin their assessment against Garda members with the presumption of guilt when carrying out their role of independent and transparent assessment of the performance of an Garda Síochána (AGS) members.
- Under subhead (2)(ii) the Association questioned why other organisations listed in Head 85 do not appear to be subject to formal oversight similar to AGS and whether this indicates a partisan approach towards AGS.
- They questioned whether the Authority would be responsible for addressing deliberately false and vexatious complaints that are made against Gardaí.
- Under subhead (4) the Association questioned what Code of Ethics, Confidentiality and Impartiality requirements would guide the Authority to ensure that ethical, legal and human rights of AGS members are protected.

Stakeholders also commented when setting targets structures these must be clearly established to ensure these objectives are reasonable and realistic.

Stakeholders pointed out that clarity is required on the functions and objectives of the Board and of the Authority as otherwise there may be a duplication of responsibilities between the two, for example the review of performance of An Garda Síochána under Head 104(2)(b).
The Association also pointed out that under Head 102, they were concerned with the composition of the Authority and that its capacity to self-govern is not a good model to drive reliable oversight. They argued that the lack of details surrounding the Authority could enable poor practice and questionable governance.
2. Objectives, functions and powers of Garda Ombudsman (Head 143)

Stakeholders raised the following key points in relation to Head 143:

- Part 5 of the Bill deals with the expanded remit of the formerly named ‘Garda Síochána Ombudsman Commission’ (GSOC), whose name will change to ‘Office of the Garda Síochána Ombudsman’ (referred to from here as Garda Ombudsman).
- Proposed investigative powers of the Garda Ombudsman will encroach on the legal, constitutional and privacy rights of Gardaí.
- Concerns expressed over how GSOC has previously handled false or vexatious complaints.

Many of the stakeholders emphasised their concerns at the proposed expansion of the Garda Ombudsman’s powers and urged that there must be oversight of the operation and exercise of these powers. It was pointed out that the expanded investigative powers will encroach on the legal, constitutional and privacy rights of Garda members, who deserve to have these rights protected as citizens do.

Submissions highlighted this Head refers to ‘public confidence’ in the Garda Ombudsman’s investigation but does not refer to the confidence of Garda members in these investigations. Stakeholders expressed their dissatisfaction at how GSOC previously handled vexatious complaints made against members and their failure to make prosecutions for such complaints. They also criticised the excessive period of time it has taken to resolve these complaints and highlighted that the General Scheme as proposed does not specify any requirements for the Ombudsman to finish these investigations any faster. They recommended that timelines for investigating complaints must be clearly laid out, as should systems and procedures for the handling of complaints. It was also recommended that the Ombudsman’s investigations should be undertaken on the presumption of innocence rather than guilt.
Among the points raised by the Association of Garda Superintendents in relation to Head 143 include:

- They questioned the inclusion of Garda staff under the remit of the Garda Ombudsman and whether this was within the terms of employment of current Garda staff members, as such staff are not bound by the same disciplinary measures or have the same role as Garda members.
- Under subhead 4, they pointed out that the allocation of ‘all powers that are necessary’ is far beyond constitutional or legislative boundaries particularly considering that debates around other statues have opposed granting such powers.
- They questioned what processes will be in place to allow for complaints regarding Garda Ombudsman activities and whether there will be a Code of Ethics to guide the Ombudsman’s activities.
3. Interpretation (Head 157)

The following points were raised regarding several of the terms under Head 157.

The Association of Garda Superintendents argued that the following terms needed to be defined more clearly:

- Admissible complaint
- Complaint
- Gross Misconduct

They also highlighted that ‘Conduct Regulations’ should be clearly set out and agreed with representative associations in advance of the Bill being implemented and questioned whether ‘Performance Regulations’ are the same as ‘Conduct Regulations’ or whether they are intended to replace the Conduct or Disciplinary Regulations.

The AGSI also stated that the proposed definition of conduct is vague and would result in a member being uncertain of the circumstances in which their actions would constitute a breach of conduct. Similarly, they argued that a threshold for complaints of 'notifiable misconduct' must be made clear so that members and the public are both aware of acceptable standards when interacting.

Incidents of concern

- The Association of Garda Superintendents highlighted that this term should specify ‘the alleged conduct complained of’, as it should adopt an approach of the presumption of innocence rather than guilt.
- The AGSI argued that the criteria for determining an incident of concern should be made clear.
- Both the AGSI and the Association of Garda Superintendents highlighted the frivolous and vexatious complaints that are made against Garda members and argued that this subhead should provide safeguards against such complaints.
Interpretation (Head 157)

The following points were raised regarding several of the terms under Head 157.

The Association of Garda Superintendents argued that the following terms needed to be defined more clearly:

- Admissible complaint
- Complaint
- Gross Misconduct

They also highlighted that 'Conduct Regulations' should be clearly set out and agreed with representative associations in advance of the Bill being implemented and questioned whether 'Performance Regulations' are the same as 'Conduct Regulations' or whether they are intended to replace the Conduct or Disciplinary Regulations.

The AGSI also stated that the proposed definition of conduct is vague and would result in a member being uncertain of the circumstances in which their actions would constitute a breach of conduct. Similarly, they argued that a threshold for complaints of 'notifiable misconduct' must be made clear so that members and the public are both aware of acceptable standards when interacting.

Serious Harm

- While acknowledging the seriousness of ‘abuse of power for sexual gain’, the AGSI highlighted that some form of investigation would need to take place before establishing concretely whether such an accusation appears to be true.
- They also highlighted that the new Garda Anti-Corruption Policies intend to deal with this topic.
4. Supplementary provisions in relation to complaints (Head 158)

Stakeholders raised the following key points in relation to Head 158:

- Head fails to recognise the effectiveness of the Local Intervention process for resolving complaints at a local level.
- Concern was expressed over the lengthy period of time it takes GSOC to resolve some complaints.
- Complaints should be filed within 6 months and clear guidelines should apply in situations where this period is extended.

The AGSI raised several concerns with this Head. Firstly, they argued that it does not recognise the efficacy of the Local Intervention Process, which was co-developed with GSOC. This process is intended to resolve certain types of service-level complaints against members of AGS at a local level, (e.g. complaints of poor quality of service, incivility, or rudeness) rather than escalating these to a formal complaints process. Its aim is to address and discuss the issue to help the individual learn from the incident rather than focusing on blame. The AGSI believe that this process should be maintained as it deals with such complaints at an appropriate level and allows them to be dealt with in a prompt and efficient manner.

In addition, the AGSI recommend that subhead 2 be reviewed to ensure the right of their members to a private life when off duty is protected, as the subhead as phrased and the use of the word ‘discredit’ regarding the conduct of a member while not on duty is vague and threatens this right.

They also argued that subhead 3 does not clarify when a member of AGS will be notified in situations where a complaint has been made against them. They argued that this must be specified under this subhead so that the principles of natural justice and fair procedure apply to Gardaí similar to other citizens.

Stakeholders also highlighted their concerns surrounding the timeframe in which complaints are made and in which GSOC handles these complaints. The AGSI strenuously criticised the excessively lengthy period of time it has taken for GSOC to
resolve complaints against their members, with some of these investigations lasting up to 5 years. They stated that GSOC has not been held accountable for or explained these delays and outlined the stress and anxiety of their members during this period, the impact of lengthy investigations on their professional lives and on their personal lives and families.

The AGSI questioned the training and qualification that GSOC members had received to investigate these complaints and argued that this Head does not address the need for safeguards for their members to ensure that such investigations would be resolved in a timely manner.

The Association of Garda Superintendents stated that complaints filed should be done within 6 months rather than 12 months. In addition, in situations where it is decided to extend the time in which a complaint may be made, the Association stated that there must be clear and unambiguous guidelines surrounding the situations in which this is allowed, in the interest of the legal and constitutional rights of those members subject to such a complaint.

The Association of Garda Superintendents recommended that equity should apply in this Head to how Garda members and Garda personnel are treated under this process. They recommended that anonymous complaints should be omitted from this categorisation in the interests of fairness.
5. Search of Garda Premises (Head 170)

Stakeholders raised the following key points in relation to Head 170:

- Concern about the extensive and disproportionate nature of the search powers granted to the Garda Ombudsman.
- Powers proposed would allow the Ombudsman the power to search any person in the Garda station when commencing their search, even though the individual may not be connected to the matter under investigation.
- Powers proposed are a breach of the Constitution, and the human rights and legal entitlement of those impacted.

Submissions highlighted their concern with the search powers granted to the Garda Ombudsman under this Head. The Association of Garda Superintendents pointed out that this Head overrides the principles of the Damache ruling, which resulted in specific legislation to address issues of independence, investigative integrity and judicial oversight in any situation where the States intends to breach constitutional and inalienable protections. It was argued that the power to search any person found in a premises is rigidly protected by legal provisions and only granted under a search warrant and should not be granted as a general power without legal and justified reasoning.

Other issues posed by this Head include:

- Subhead 3, which forces the Commission to consent to such search taking place and leaving them vulnerable to legal action taken by any Member for breach of their entitlements.
- Subhead 4, which implies that the only possible leakage of information could be from the Commissioner, thus compromising their integrity.
- This Head raises data protection concerns and it was argued that attempts by the Ombudsman to access AGS’ information systems and data should not be encouraged and authorised in legislation. This would also impact on AGS members and their responsibility to protect their community, if the Head would
allow the Ombudsman access to all database systems of AGS which contains sensitive, confidential information.

The AGSI questioned the extensive nature of these powers and proposed that this Head should include further protection for their members. They highlighted that as proposed, this Head would grant the Garda Ombudsman the power to search any person in the Garda station when commencing their search, even though the individual may not be connected to the matter under investigation. They stated that these powers are permitted under the Head even when the matter investigated is not criminal in nature and questioned the legal basis and proportionality of these powers.

In addition, they questioned the lack of independence when the Garda Ombudsman can issue authorisations for these searches to each other, rather than needing to swear for a warrant to search in front of a judge as Gardaí must do.
6. Additional powers for purpose of undertaking formal investigation (Head 171)

Stakeholders raised the following key points in relation to Head 171:

- Powers proposed are disproportionate and should be reserved for serious criminal investigations only.
- Deviating from normal investigation procedures must be fully justifiable, necessary, proportionate and legitimate.

The AGSI highlighted that, similar to Head 170, this Head proposes to limit the rights of Garda members when investigations are being conducted. They stated that the classification of a ‘formal investigation’ must be defined with clear criteria attached to it. The Head at present grants disproportionate powers by allowing the Garda Ombudsman to use powers attached to a serious criminal investigation for a matter that might be minor or non-criminal. The AGSI stated that such increased powers should only apply to serious matters of a criminal nature.

They also argued that the legal entitlements proposed for the Ombudsman should be reviewed to ensure they comply with the legal entitlements of Garda members, who have a basic right to know the matter that they are being investigated for.

The Association of Garda Sergeants argued that the powers proposed under this Head do not acknowledge the legal, constitutional or human rights entitlements of members and that it should be clearly demonstrated why the proposed changes to investigative powers are necessary and proportionate. They made the following points in relation to subheads:

- It appears unclear whether Head 71(1)(b) signals an arrest or detention and what entitlements a person in this situation should have, such as whether legal representation or another person may be entitled to accompany that person.
• Head 71(3) does not address the need to have demands issued in a written
document or the possibility that a person requested may not be in a position
to comply with a request for such documents and that they may have a
reasonable justification for this.

• Head 71(6) regarding the disclosure of sensitive information by the Minister
should be reviewed, as the Minister cannot be truly impartial when deciding to
release such information, being the employer of both the Garda Ombudsman
and Garda members.
7. Additional Points

In addition to the above key issues, some stakeholders indicated specific interest in certain areas, as follows:

**Fórsa**

- Fórsa expressed concern that the Scheme as proposed would remove the civil service employee status of its civilian members in An Garda Síochána (AGS), and these staff would become direct employees of AGS. They argued that the definition of ‘Garda Personnel’ in Head 2 as encompassing both sworn members and Garda Staff be removed and that the current and separate titles of “Garda member” and “Garda Staff” should remain.
- They argued that Head 45, which would change the status of this staff from civil servants to public servants, is neither appropriate nor warranted.
- Fórsa were concerned that these staff members would be subject to investigation by the Garda Ombudsman, which would result in these staff being subject to same complaints process as a sworn Garda member despite not having same powers. They argued that the proposed investigative powers of the Ombudsman are excessive, disproportionate and breach the internal civil service processes and guidelines.
- Fórsa opposed the inclusion of Garda staff under Parts 5 and 6 of the General Scheme.
- Fórsa expressed their dissatisfaction at what they argued was a complete lack of consultation with their union, despite the impact this proposed legislation would have on their staff and despite assertions that extensive stakeholder consultation had taken place when the General Scheme was being drafted.

**The Association of Garda Superintendents**

- The Association expressed concerned with the establishment of the Board of an Garda Síochána (‘the Board’) (Head 10) and at the potential for the Board
members to be made up of political contacts, which could result in
politicisation, a lack of transparency in separation of powers and could hinder
police independence.

- The Association highlighted the additional types of behaviour, ethical and
conduct policies attributed to AGS members under the proposed Bill, which
appear overly complicated. They stressed that the Bill must ensure that
Gardai be entitled to the same legislative, constitutional, human rights
protections, including when subject to investigations.

- The Association criticised how the Bill is vague and appears flawed in some of
its attempts to fix perceived issues, for example, affording additional powers
to bodies to create oversight that appears bureaucratic and complicated in
nature.

- The Association highlighted the increased powers given to the Garda
Ombudsman under this Bill and argued that these powers are lacking detail
and are not in line with the previous sharing of investigative powers. They
expressed concern that these investigative powers fail take note of existing
case law and precedent.

- The Association criticised the Bill’s limitation on the activities of the
Commissioner in key areas and the negative impact this may have on the
independence of AGS, the unrestricted operation of policing powers and the
conduct of policing functions.

**AGSI**

- The AGSI highlighted that the Bill proposes to create a multi-layered system
of boards and agencies and questioned how AGS can function with so many
bodies who have similar functions but may have different visions for the
agency which would cause confusion.

- The AGSI highlighted that the newly established Garda Anti-Corruption Unit
was not referenced in the Bill and it is unclear where the Unit will function
within the organisation or regarding Garda Ombudsman investigations. They
pointed out that this must be clarified or AGS members could be subject to multiple investigations on an issue by different bodies.

- The AGSI expressed concern that the changes proposed in the Bill could create a ‘punitive’ culture within AGS where the potential for breaching regulations could be the overriding thought for members when interacting with the public and that a culture of mentoring and training for members to learn from their mistakes will be replaced with over-regulation.

- The AGSI questioned the rationale and need for many of the proposed changes in the General Scheme. They questioned its proportionality, as it does not appear to take into account the existing and significant oversight, accountability, disciplinary, ethical, legal and other regulatory systems that AGS members are subjected to.

- The AGSI highlighted that the Bill must clarify which elements of legislation, governance and regulations apply to individual groups of workers within the organisation, as the General Scheme fails to clarify this when referring to Garda members, Garda staff, Garda personnel and Garda reserves.

**GRA**

- The GRA argued that sub-paragraph Head 8(1)(f) should be removed from the General Scheme.

- The GRA stated that under Head 11 the Board should include the GRA as a stakeholder in decision-making.

- Head 41
  - The GRA stated that the appointment of persons to ranks below rank of Chief Superintendent should be addressed in a discrete Head given its importance.
  - They also believe promotions to ranks below Chief Superintendent should be restricted to current members of AGS.
  - The GRA highlighted that the power of summary dismissal is a significant power and this Head does not specify how the Commission
• The GRA objects to any requirement that would result in a Garda member being required to account to a member of Garda Staff of any grade (Head 43).
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,
Functions of Departmental Select Committees.

(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, SUBMISSIONS AND CORRESPONDENCE

- Dr. James Renwick
- Department of Justice
- The Policing Authority
- TUSLA
- Irish Council for Civil Liberties (ICCL)
- Garda Síochána Inspectorate
- An Garda Síochána
- Dr. Vicky Conway
- Fórsa
- Association of Garda Superintendents
- Association of Garda Sergeants and Inspectors (AGSI)
- Garda Representative Association (GRA)
- Association of Garda Chief Superintendents
- Garda Síochána Ombudsman Commission (GSOC)
- The Association of Higher Civil and Public Servants (AHCPS)
- Law Society of Ireland

[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/].
General Scheme of the Policing, Security and Community Safety Bill

Pre-legislative scrutiny clarifications

Dear Alan

I refer to the discussion by the Joint Committee on Justice on 20 October 2021 of the General Scheme of the Policing, Security and Community Safety Bill. As indicated, and with a view to assisting the Committee with its work, I wish to address a number of the matters raised during the discussion and to provide clarification on the approach in the Scheme. These clarifications are supplementary to the explanatory memorandum provided to the Committee.

Prosecution of offences by members of An Garda Síochána (head 9)

Head 9 restates the existing law as set out in section 8 of the Garda Síochána Act 2005. This is necessary pending the report of the High Level Review Group on the Role of An Garda Síochána in the Public Prosecution System. The High Level Review Group (HLRG) was established in September 2020 to examine the recommendation from the Commission on the Future of Policing in Ireland (‘CoFPI’) in respect of An Garda Síochána’s role in prosecution decisions and presenting prosecutions at court and to recommend a preferred option to achieve the recommendation for consideration by Government.

The CoFPI report includes the recommendation that all prosecution decisions should be taken away from the police and the practice of police prosecuting cases in court should cease. The CoFPI Report advocated for prosecution decisions to be under the remit of an expanded state solicitor or national prosecution service. The Government
accepted this recommendation in principle, subject to further detailed analysis, including the cost to the Exchequer.

The HLRG is chaired by former Secretary General to the Government Mr Dermot McCarthy and is comprised of representatives from relevant stakeholders including Departments of State, the Judiciary, An Garda Síochána, the Office of the Director of Public Prosecutions, the State Solicitors’ Association, the NGO sector, academia, and legal practitioners. The HLRG is to report through the Department of the Taoiseach to take account of the independence of the Office of the DPP.

**Independence of Garda Commissioner (head 27)/ Directives from Minister (head 30)**

As recognised by CoPFI, the Garda Commissioner in his or her capacity as police chief, as opposed to chief executive of the police organisation, should be clearly operationally independent to align with an important principle of policing viz. that police chiefs should be fully accountable for their conduct of all policing activities and the outcome of those activities but should not be directed in operational matters by politicians or anyone else. As also recognised by CoFPI it is not the job of the Board of An Garda Síochána to second guess the Garda Commissioner in relation to operational matters. Head 27 is intended to give statutory expression to this. The approach and wording of head 27 is subject to review in the course of the drafting of the Bill to ensure that it adequately captures the intended scope of the Commissioner’s operational independence from the Board of An Garda Síochána, the Minister and any Minister of the Government, and that its relationship with the accountability framework for the Garda Commissioner is clear.

It is important to note that the question of ensuring operational independence from the Policing and Community Safety Authority does not arise in view of the nature of the relationship between the Garda Commissioner and the new Authority. That relationship (as is also the case with the existing Policing Authority) is one of the Garda Commissioner assisting and cooperating with the Authority and reporting to it to facilitate the Authority in the performance of its oversight role in relation to the performance by An Garda Síochána of its functions relating to policing services.

The power on the part of the Minister under head 30 to issue directives is in large part a restatement of section 25 of the Garda Síochána Act 2005. It provides for the Minister with the approval of the Government to issue directives to the Garda Commissioner. The Minister may do so at his or her own initiative or on the recommendation of the Policing and Community Safety Authority (in so far as policing services are concerned). The power in section 25 has been used sparingly with three
directives issued since 2005, all aimed at facilitating cooperation between An Garda Síochána and civil inquests and an inquiry in Northern Ireland. Section 25, as enacted, was intended to assist in formalising the relationship between the police and the Government and to bring transparency to that relationship. It is intended to enable the Minister to respond to important events quickly and decisively, for example, at times of national crisis. When issued, a directive must be laid before the Houses of the Oireachtas unless to do so would prejudice the security of the State or might impede the prevention, investigation or prosecution of an offence. In such a case a written statement indicating that a directive has been issued must be laid.

**Accountability and independent oversight framework for Garda Commissioner**

In view of the unique role performed by police and security services, governance and oversight arrangements put in place by most countries tend to involve multiple reporting and accountability lines, whether to the Minister and Government, parliamentary committees and independent oversight bodies. Under the Scheme the Garda Commissioner is subject to a number of lines of accountability as follows:

- The Garda Commissioner, as recommended by CoFPI, is accountable to the Board of An Garda Síochána for the performance of his/her functions (head 25). The Board, in line with good corporate governance, is required to establish and implement arrangements for the management of the performance of the Commissioner and implement the necessary development and appraisal processes (head 11). This represents a change to the existing framework under which the Commissioner is accountable to the Minister for the performance of his/her functions. As recognised by the Effectiveness and Renewal Group in relation to the Minister’s Department, the Board has the advantage of providing a more appropriate framework of governance between the Minister’s Department and An Garda Síochána than currently exists (Second Report, 30 September 2018). It will facilitate the Minister’s Department in pulling back from involvement in day-to-day management of An Garda Síochána while also having the capacity to provide objective reassurance to the Minister in relation to governance standards within An Garda Síochána. The Board is accountable to the Minister for its performance (head 11). These arrangements reflect the accountability arrangements that apply to other public sector bodies with corporate boards e.g. the Health Service Executive, the Health Information and Quality Authority, and the Child and Family Agency.

- The Garda Commissioner, as recommended by CoFPI, continues to be accountable to the Minister and the Government for higher level matters concerning the policing and security of the State (head 28). This aligns with the Minister and the
Government’s overall responsibility for public safety and the security of the State and their accountability to the Houses of the Oireachtas.

- The Garda Commissioner as accounting officer for the Garda Vote is, as now, accountable to the Committee on Public Accounts (head 58). The Garda Commissioner is, as now, required to attend before other Oireachtas Committees (head 59).

As regards the Policing and Community Safety Authority (and the existing Policing Authority) the Garda Commissioner is statutorily bound to assist and cooperate with that body (head 25), and to report and to attend meetings, including in public, to facilitate that body in discharging its independent oversight mandate (head 119).

Equally the relationship between the Garda Commissioner and the Office of the Garda Síochána Ombudsman is one of assisting and cooperating and providing information requested by that body to facilitate it in performing its important independent oversight role in relation to complaints and other allegations of wrong doing on the part of garda personnel (heads 25 and 177).

This accountability and independent oversight framework and the nature of the relationship between the Garda Commissioner and the independent oversight bodies is consistent with the constitutional requirement that the Government retains ultimate control in relation to matters of fundamental importance to the exercise of its executive powers in this area while allowing for the delegation of appropriate policing matters.

For completeness, it should be noted that An Garda Síochána’s participation in the national structures aimed at enhancing community safety – the National Community Safety Steering Group – is on a par with other participants who will include senior officers of relevant Departments of State and relevant public service bodies amongst others who have responsibility for the implementation of elements of the national community safety strategy to be devised under the Scheme (heads 85 and 86). The Steering Group is intended to provide high level support to drive implementation of the strategy.

**Number and role of external oversight bodies**

Leaving aside the Independent Examiner of Security Legislation whose remit extends beyond An Garda Síochána, the Scheme provides for two external oversight bodies as recommended by CoFPI - the Policing and Community Safety Authority and the Office of the Garda Síochána Ombudsman. The Policing and Community Safety Authority
combines the oversight function of the existing Policing Authority in relation to policing services and the functions of the Garda Síochána Inspectorate. This will result in a reduction of one in the number of external oversight bodies in the policing area (head 128).

A key objective in the development of the Scheme was to ensure that each element of the new governance and oversight framework would have a clear policy objective and clearly defined functions. Central to achieving this is the clear separation of the management of An Garda Síochána from independent external oversight as recommended by CoFPI. By way of background to this recommendation, a key finding of the CoFPI report was that the existing governance and oversight structures for policing, which developed in a piecemeal reactive manner, are “set up to fail” because they are confused with no clarity as to where responsibility lies. With responsibility being so diffuse CoFPI found that it acts to the detriment of clear and effective accountability for policing. CoFPI also found that there is a lack of distinction between the roles of some of the oversight bodies and the responsibility of An Garda Síochána itself for its own governance. It found that this conflation of governance / management and independent oversight is problematic and counterproductive as it prevents An Garda Síochána from taking ownership of its future direction and driving reform and also undermines the independence of external oversight.

Under the Scheme the objective of the Policing and Community Safety Authority (head 104) is to oversee and assess in an independent and transparent manner the performance by An Garda Síochána of its functions relating to policing services in order to support the effective provision and continuous improvement of such services to the benefit of the safety of the public. Its functions are necessarily set out in broad-ranging terms in order to enable it to review or inspect any matter that could be said to influence the performance of An Garda Síochána in relation to policing services. It will have enhanced inspection powers compared to the Policing Authority (head 114). Unlike the Policing Authority it will not have statutory responsibility for executive functions. These functions will transfer to An Garda Síochána under the guidance of the Board or to the Minister as appropriate with the new Authority having a consultative role. This key change is intended to support the coherence of the framework, enable An Garda Síochána to take charge of the management of itself (supported by the addition of the Board) and subject to robust independent external scrutiny.
The Office of the Garda Síochána Ombudsman (a continuation of GSOC but with a new structure, greater independence and expanded remit) has a clearly defined objective and functions (head 143). It is concerned with the handling of complaints and the investigation of allegations of wrong doing on the part of garda personnel. It will no longer have the power to undertake systemic reviews of certain practices, policies and procedures of An Garda Síochána as recommended by CoFPI; such reviews are appropriate to the Policing and Community Safety Authority. This will also assist in ensuring greater clarity of roles and the overall coherence of the framework.

The Garda Ombudsman will, in response to CoFPI’s recommendation that its “cumbersome and inefficient” processes be overhauled, operate with a new streamlined investigation model that will support timely, more transparent and effective resolution of complaints and investigations in the interests of complainants and members of An Garda Síochána (heads 168-171). These very necessary reforms will not involve any trade off with fair procedures and natural justice. The Office of the Garda Ombudsman will be statutorily required to ensure that the functions of the Office are “performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations.” (head 143). Any person who come within the scope of an investigation will be accorded full due process as is their right.

It is important to note that the Board of An Garda Síochána is not an external oversight body – it is a non-executive corporate board similar in many respects to the boards of other public service bodies – and is concerned with strengthening the internal governance of An Garda Síochána. An Garda Síochána, as a large public service body with an annual budget of circa €2Billion and a workforce of in excess of 18,000 personnel, requires a strong and efficient governance structure to support the Garda Commissioner and senior leadership team in running the organisation. As noted by CoFPI the Garda Commissioner is performing two roles – that of chief of police and CEO – and (irrespective of the office holder at any given time) would benefit from the support and challenge that a suitably skilled corporate board can provide to the person charged with running a large organisation. A corporate board is recognised as the best practice standard for the governance of large organisations.

While policing is unique in view of the extraordinary powers accorded to police officers, the Scheme reflects the view that that uniqueness does not require different governance structures to other large bodies, rather it is addressed in the explicit statement of the operational independence of the Garda Commissioner and the robust independent oversight structures provided for in the Scheme in the shape of the Policing and Community Safety Authority and the Office of the Garda Ombudsman.
Planning and governance instruments - Priorities, three year strategic plan and annual service plan

The Scheme provides for a number of planning and governance instruments in respect of An Garda Síochána. Under the Scheme:

- the Minister determines the security priorities (as now) (head 50),
- the Minister approves the policing priorities as determined by the new Authority (as does the Policing Authority currently) (head 49),
- the Minister approves, with or without amendment, the three year strategic plan as adopted by the Board. The new Authority has a consultative role. Regard is to be had to the priorities in the preparation of the strategic plan (head 51),
- the Minister approves, with or without amendment, the annual costed service plan adopted by the Board following the announcement of the Estimates. The new Authority has a consultative role. The plan is not to be inconsistent with the priorities and the strategic plan (head 53),
- the Minister approves the multi-annual capital plan adopted by the Board. This is a new planning and governance instrument (head 56).

The role of the Board in relation to the strategy for the garda organisation reflect the standard responsibilities of corporate boards across the public and private sector and the Code of Practice for the Governance of State Bodies. Equally the proposed role of the Minister aligns with his or her accountability to the Oireachtas and his/her responsibilities in relation to policing and security policy and structural oversight of An Garda Síochána. They, in many respects, replicate what one sees in other public service sectors.

Inspections / powers/unannounced visits

Head 114 of the Scheme sets out the intended powers of the inspectors of policing services who will be staff of the Policing and Community Safety Authority. It is intended that the inspectors will have powers to visit at any time a garda premises where members of garda personnel are assigned, to require the furnishing of information, records or documents for the purposes of inspection; to make copies of records or other documents and/or to take possession of records or other documents and remove them from the location. This is subject to special provision where a member raises a security concern with the possibility of the matter being referred to the Independent Examiner for review. Provision is made for a memorandum of understanding to be agreed between the Garda Commissioner and the new Authority in order to ensure that the inspections are conducted in an efficient and effective manner.
manner and do not adversely affect the performance of An Garda Síochána of its functions and in a particular do not jeopardise criminal investigations or prosecutions or affect the management of persons in the custody of An Garda Síochána. The precise manner in which the powers are set out is subject to review in the course of drafting to ensure that the policy intent is fully achieved.

The power to conduct unannounced visits to garda premises is situated in the context of a planned inspection. Inspections, either of a thematic nature or of the operation of a particular division or unit require advance preparation, including collating information from An Garda Síochána. In this context the Garda Commissioner would be informed of a planned inspection and that it may involve unannounced visits to garda premises but would not be informed of the location or timing of such visits.

Inspections are to be distinguished from the investigations conducted by the Office of the Garda Ombudsman into allegation of wrong doing which may, where the necessary threshold is met, include the exercise of search powers.

It is important to say that it is not intended that the new Authority will be the national preventive mechanism (NPM) for the Optional Protocol to the UN Convention against Torture (OPCAT) for garda custody facilities. The policy position in relation to OPCAT is that there should be a single NPM for the justice sector. A new Inspector of Places of Detention is to be designated as NPM in places where persons are detained in the Garda, Prison and Court estates, including places of transport and transit between Garda stations, prisons. The Inspector of Places of Detention will be empowered to fulfil the required role under OPCAT by the introduction of new legislation and will have all the necessary powers to do so. The aim is to bring the General Scheme of the Inspection of Places of Detention Bill to Government for approval in Q1 2022.

Management of performance and conduct
As recommended by CoFPI the Scheme will enable the replacement of the existing discipline system (set out in regulations under the 2005 Act) with a new system which will allow garda managers and supervisors to distinguish matters of misconduct which may require penalisation and matters of performance which may require guidance, advice and training rather than punishment (see heads 220 -222). This twin track approach will align with standard practice in the Civil Service and more widely. Of course, in cases of serious underperformance sanction up to dismissal may continue to be appropriate. The remit of the Office of the Garda Ombudsman takes account of this distinction.
Remit of the Office of the Garda Ombudsman – performance/conduct

The Scheme provides a system for the independent investigation of complaints (other than customer service type complaints or “performance management” complaints as they were labelled by CoFPI) from members of the public. As recommended by CoFPI all complaints from members of the public are to be referred to the Garda Ombudsman (head 159). The Garda Ombudsman will decide whether a complaint requires investigation by the Ombudsman or whether it is suitable for resolution by An Garda Síochána in accordance with arrangements to be put in place by the Garda Commissioner in consultation with the Ombudsman (heads 160 and 162). A complaint is suitable for resolution by An Garda Síochána if it comes within a list of categories of complaint drafted by the Garda Ombudsman, and the Garda Commissioner and approved by the Minister and the Ombudsman determines that there are no other special circumstances that require the complaint be investigated independently. The list of categories of complaints to be approved by the Minister cannot include any complaints:

- where the act or omission complained of would (if proved) constitute a criminal offence,
- where the act or omission complained of would (if proved) constitute a breach of the professional standards of behavior that would justify conduct proceedings, or
- which concern the death of, or serious harm to, a person as a result of garda operations or while in the custody or care of An Garda Síochána (head 161).

This approach is intended to give effect to CoFPI’s view that “Not all complaints need to be investigated by an independent body. Many fall into the category we shall call ‘performance management complaints’. These are matters involving for example customer service failures, where police members are alleged to have been impolite, incorrect or negligent in their dealings with individuals or organisations. Complaints of this kind can and should be dealt with by supervisors within the police organisation as part of normal management functions” (Ch 14, para. 3 of the CoFPI report).

The Scheme also places an obligation on the Garda Commissioner to notify what are called “incidents of concern” to the Garda Ombudsman (head 165). These are allegations of criminality or notifiable misconduct that have come to the attention of An Garda Síochána other than by way of a complaint from a member of the public. They do not include matters that are appropriate to the garda performance management system. The process of notification is intended to ensure independent oversight. The Garda Ombudsman will have a number of options following notification,
including in the case of criminal allegations, the option to investigate the matter itself. This process will be subject to protocols to be agreed between An Garda Síochána and the Garda Ombudsman.

The action to be taken at the conclusion of an investigation by the Garda Ombudsman and the issuing of his/her report and recommendations (if any) will be a matter for the Garda Commissioner as the office holder responsible for the running of An Garda Síochána and the employer. Of course, in the event that the Garda Ombudsman is of the opinion that the report of an investigation discloses conduct that may constitute an offence the matter will be referred to the Office of the Director of Public Prosecutions.

In summary the approach is intended to ensure independent oversight and investigation of allegations of wrongdoing where that is merited and also to ensure that An Garda Síochána retains responsibility for the standards of behavior of garda personnel and managing their performance.

The Department is available to provide any further assistance to the Joint Committee that may be required as it undertakes its work.

I look forward to the Joint Committee’s deliberations and its report in due course.

Yours sincerely

Doncha O’Sullivan
Assistant Secretary
Criminal Justice Governance & European Affairs
I am writing to the Committee in response to the drafting of the Policing, Security and Community Safety Bill, specifically the proposed establishment of an Independent Examiner of Security Legislation in Part 7 of the Bill. The role is evidently based upon a mixture of the features of the Australian position of Independent National Security Legislation Monitor (INSLM) and the UK’s Independent Reviewer of Terrorism Legislation (IRTL) upon which the Australian role was largely based.

I am a practicing barrister and a part-time academic in Australia who previously held the INSLM role from 2017 to 2020: see www.inslm.gov.au. I recall being consulted at an early stage in the Republic of Ireland’s planning for the establishment of this role and I commend the drafters for the terms of the proposed establishment of the Independent Examiner of Security Legislation in the Bill.

May I respectfully make the following suggestion concerning the Bill: you might consider adding the powers of compulsion contained in Part 3 of the Independent National Security Legislation Monitor Act. As I read it, the Bill takes the UK approach of relying upon co-operative production of material, including highly sensitive and classified material. In Australia there are statutory powers of compulsion, powers to hold hearings and compel the attendance of witnesses, together with mandatory protective mechanisms for such sensitive and classified material.

As I explain in the attached material, I utilised both private and public hearings, the latter being livestreamed: this allows full discussion of material which is sensitive for government agencies and commercial entities, before holding public hearings, so there is no inadvertent release of what must be kept confidential, while greatly adding to public confidence in the process.

Examining highly sensitive and classified material is a key rationale for this role. It is, to use the example mentioned by Lord David Anderson QC an answer to any Minister who says ‘just trust me, but if you could see what I could see you would be convinced’ - the IRTL/INSLM and now the Examiner do see what the Minister sees - an important reassurance in a democracy. The power of compulsion even if never used is an important reminder to agencies of the requirement to fully disclose, and to a sceptical public, of the fact that the Examiner is seeing everything. Further, it means powers of compulsion can be used against non-government or official entities.

I would be happy to appear (remotely of course) before the Committee if that would assist.

To: Mr Alan Guidon
Clerk to the Committee on Justice
justice@oireachtas.ie

9 May 2021
Today, I will say something about:

• the INSLM role and its origins;
• the counter-terrorism threat;
• my tentative views on my citizenship inquiry, namely that some laws pass muster and some don’t;
• my approach to my encryption inquiry;
• some key questions.

The INSLM role and its origins

In 2001, there were no federal anti-terrorism laws and thus no such prosecutions, ASIO had shrunk with the end of the Cold War, Al Qaeda was hardly a household name and ISIL didn't exist. The attacks of 9/11 changed many things, and they certainly began a process of legislative and government response to terrorism activities which has continued to this day and which has resulted in over 75 separate statutes being passed and a similar number of people—10% of whom were children—being convicted of such offences so far, with many receiving lengthy sentences. And that is not all: there are:

• new or updated laws concerning espionage and sabotage;
• a variety of laws to deal with the still sizeable cohort of foreign fighters, their supporters and dependants; and
• new encryption laws to counter organised criminals and terrorists using technology to ‘go dark’ as far as surveillance of them by police and intelligence authorities is concerned, although in the UK the preferred terms are not ‘going dark’ but ‘going spotty’ or even ‘going different’.

The new laws (like the new threats) were and are often unsettling in their novelty and reach and raise legitimate questions:

• Do they go too far?
• Do they work?
• Do they properly deal with legitimate human rights concerns?

In a sceptical world, it is no longer enough for any government minister anywhere to say ‘just trust us’ or ‘if you knew what I know you would be satisfied’. As Sir Adrian Fulford, the UK Investigatory Powers Commissioner, has said of transparency:

*in the post-Snowden world, the security and law enforcement agencies can no longer expect to work in the shadows, in the sense that material which can properly be made public should be widely available for scrutiny.*

In 2010 Australia adapted the role of the United Kingdom’s Independent Reviewer of Terrorism Legislation, by enacting the *Independent National Security Legislation Monitor Act* which provides for the appointment of a part-time INSLM. With my appointment to that role in early 2017, I followed two
eminent lawyers, namely the Honourable Roger Gyles AO QC and, before him, Bret Walker SC.

Fundamentally, to adopt the language of former Independent Reviewer Lord David Anderson QC, both Reviewer and INSLM share the following features:

• first, independence;
• second, an entitlement to see everything of relevance, even the most highly classified intelligence material: this is one answer to the person unconvinced by a Minister who says ‘if you could see what I see’ as both INSLM and Reviewer can and do see just that; and
• third, compulsory publication of the reports to government, in my case tabling of any declassified report must occur within 15 sitting days so that the Parliament and the public can read and consider for themselves.

As INSLM I don't investigate complaints or look at bills, rather, I independently:

• review the operation, effectiveness and implications of national security and counter-terrorism laws; and consider whether such laws
• contain appropriate protections for individual rights;
• remain proportionate to terrorism or national security threats; and
• remain necessary.

Many reviews can be conducted by me of my own motion, however, the Prime Minister and the Attorney-General can send me any topic related to counter-terrorism or national security - a much broader concept - and the increasingly important and highly respected Parliamentary Joint Committee on Intelligence
and Security (PJCIS) can also send me certain matters, and they in fact have recently sent me their first reference, namely, the encryption review, which I will come to.

**Threats**

Because I must consider whether particular laws remain proportionate to threats of terrorism or to national security or both, I receive regular briefings from police, policy and intelligence agencies on all matters of relevance to my reviews. As has been the case for the past four years, the current threat of a terrorist act occurring in Australia remains at the ‘probable’ level. My views are that:

- The credible threat of one or more terrorist attacks in Australia will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future;
- While more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely;
- There can be no guarantee that the authorities will detect and prevent all attacks although most have been;
- There is also the risk of opportunistic if unconnected ‘follow-up’ attacks in the immediate aftermath of a completed attack at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality;
- The threats come mainly from radical and violent Islamist action – which is not to be confused with the great world religion of Islam which advocates peace;
• There are also increasing concerns about radical, violent, right wing activity;
• The implications of the recent atrocities in Christchurch and Sri Lanka, as with the likely future roles of the remnant foreign fighters of the so-called caliphate, are yet to be fully worked out.

Turning to the dual citizenship issue: a key focus of the current operation of counter-terrorism laws concerns Foreign Fighters, which brings me to say something about ISIL members and supporters.

The rise of ISIL, which led to the so-called caliphate, took almost everyone by surprise. I expect its capacity to surprise will continue. ISIL has produced a large, now widely dispersed, radicalised, highly trained diaspora of actual or potential terrorists, many of whom remain with their supporters and dependants (including children), and most of whom remain outside of their countries of citizenship. Foreign Fighters abroad or at ‘home’ pose a durable threat, directly by pursuing violence, indirectly by inspiring others.\textsuperscript{iv} The formation of Al-Qaeda is said to be a good example of this, where Foreign Fighters involved in the 1970’s/1980’s Afghan–Soviet conflict later formed the core of Al-Qaeda.\textsuperscript{v}

And the ISIL threat is wider than the Foreign Fighter group, large though it is, because of the effectiveness of its message, particularly over the internet, to inspire other attacks. As the UK Home Secretary, Sajid Javid, said in a speech on 20 May this year:

\begin{quote}
In fact, of all the terrorist plots thwarted by the UK and our Western allies last year, 80\% were planned by people inspired by the ideology of [ISIL]/Daesh, but who had never actually been in contact with the so-called Caliphate.\textsuperscript{vi}
\end{quote}
We still have much in common with the United Kingdom, for example:

- legal history and institutions;
- membership of Five Eyes;
- close collaboration in intelligence and law reform, and, unfortunately;
- dual citizens who are either ISIL terrorists, their supporters or their child dependants.

There has been much reporting about the plight of such children or those who travelled as children. Let me say something about children in this context, although I will be careful to say nothing which could interfere with Australia’s current diplomatic and aid efforts.

The position of children and young people is not straightforward. Of course, as a matter of humanity, reflecting the terms of the Convention on the Rights of the Child, the plight of very young children is distressing and there is general hope for their safe return. Beyond the very young, the position becomes more complex.

As I said in my recent report to the Prime Minister concerning the *Prosecution And Sentencing Of Children For Terrorism Offences*,

> There are ... parallels between child soldiers and Australian children in territory controlled by ISIL: the fact that each are certainly victims does not mean they cannot also become perpetrators, and thus they remain a cohort of interest.\(^\text{vii}\)

That remains true even though ISIL no longer controls territory as it once did. As a matter of law, the cohort of children need to be divided, between:
• those under the age of criminal responsibility, which is 10;
• those under 14 where there the presumption against criminal intent applies;
• and those between 14 and 18 who are to be tried and punished as juveniles.

It is very possible that there were young Australians over 14 years of age who have committed one or more terrorist offences or breached the declared area provisions which made it a crime to be in Mosul or Raqqa without reasonable excuse. Finally, within these groups no doubt the level of criminal culpability will vary.

The current Citizenship review

While revoking citizenship due to terrorist conduct is a recent development the concept of stripping citizenship for criminal conduct is not new. There are two types of provisions of relevance in the *Australian Citizenship Act*. First, there are what I might call the conventional provisions in s 35A. The requirements that must be met to empower the Minister to revoke a person’s citizenship under s 35A are:

• the person has been convicted of a specified offence related to terrorism;
• the person has been sentenced to at least six years imprisonment for such offences;
• the person is a national or citizen of a country other than Australia;
• the Minister is satisfied that the person’s conduct demonstrates that they have repudiated their allegiance to Australia; and
• the Minister is satisfied that it is in the public interest for the person to no longer be an Australian citizen, having regard to certain factors.

My preliminary view is that such provisions pass muster under the *INSLM Act*, at least for the following reasons.

First, there is a conviction by a jury – so the terrorist conduct is established.

Second, there is a substantial sentence imposed by a judge, which shows the level of seriousness of the conduct.

Third, the person will not be rendered stateless, thus we continue to comply with the Convention on Statelessness.

Fourth, it seems to me too absolute to say that citizenship revocation for terrorists is either always or is never justified or is either always or is never an effective way to protect the Australian community. Rather, *sometimes* it is both justified and effective.

The argument in favour of such revocation might go like this:

• Citizenship still has at its core the notion of allegiance to a nation state;
• Just as it can be expressly disavowed by renunciation, it can be impliedly disavowed by inconsistent conduct: take the historical case of spying or fighting for the enemy during World War 2;
• Although there are no longer declared wars between nation states, is it not so very different where an Australian citizen fights for ISIL against the Australian Defence Force or its allies?
The High Court has said ‘Australian citizenship is a common bond, involving reciprocal rights and obligations’xi and that ‘a federal offence is, in effect, an offence against the whole Australian community’xii - and a serious terrorism offence is a clear case of an offence against the Australian community and one which may break the common bond;

If all of that is accepted, then there is a logical argument that it may, I emphasise, may, be in the public interest in an individual case to revoke citizenship.xiii In the language of the INSLM Act the law may be ‘necessary’. But because there may be many competing factors a decision must be made considering the facts and surrounding circumstances in each particular case.

In contrast there are two ‘operation of law provisions’ (ss 33AAxiv and 35xv) which in effect provide that if:

- a person is a dual citizen of Australia and another country;
- is 14 years of age or more;
- is outside Australia; and
- engages in fact in specified forms of acts related to terrorism - such as committing a terrorist act, or fighting for ISIL; then
- by operation of law, without any further event such as conviction by jury or decision by a minister, official, judge or Tribunal member, the person then and there loses their citizenship.

These provisions operate to cease a person’s Australian citizenship automatically on the occurrence of certain ‘conduct’ (s 33AA) or where the person fights for, or is in the service of a Declared Terrorist Organization (s 35). Upon the relevant Ministerxvi becoming aware of citizenship so ending under s 33AA, 35, or 35A, he must give (or make reasonable attempts to give) notice to
the person of that event as soon as practicable unless there is a decision made on
the grounds of security, international relations etc not to notify in which case the
former citizen will not be aware of their loss of citizenship.

In contrast to my preliminary views on s 35A, my preliminary view of ss 33AA
and 35 is that each are problematic under the INSLM Act for at least the
following reasons.

First, the law operates in an uncontrolled and uncertain manner. The Australian
government has publicly announced that the provisions of the law have operated
to deprive 12 persons of Australian citizenship although, mainly because of
Ministerial decisions not to notify the affected persons, the names of the persons
are not known publicly except for Neil Prakash, where there is a disagreement
between Australia and Fiji as to which country he remains a citizen of.

It is very likely that there are more, perhaps many more, persons who have in
this way lost their citizenship, but who are not known to the authorities. The
most obvious group of such persons are those who fought for or supported ISIL
without the knowledge of Australia, but the same could be said of as yet
unknown terrorist recruiters or financiers anywhere in the world. Any
government should be able to say at any particular time who is and is not a
citizen but this law prevents it from definitively doing so.

I note that the Minister may reverse the revocation, but is under no compulsion
even to consider such action. If, however, he does so, Parliament must be
advised of the fact and the reasons for doing so. The provisions make
citizenship comparatively easy to lose but hard to regain even if many years
pass before the government or the person become aware of the citizenship loss.
Second, the law lacks the traditional and desirable accountability which comes from a person taking responsibility for a decision whether that is a Minister, an official, a judge or a tribunal member.

Third, there will inevitably be cases where it is not in the public interest to cancel a particular person’s citizenship for terrorist conduct, support or affiliation: examples of relevant factors can readily be imagined: actually, they don't need to be imagined because they are already listed as reasons to be taken into account in a Ministerial exemption decision under s 33AA (17), namely:

- the severity of the conduct engaged in;
- the degree of threat posed by the person to the Australian community;
- the age of the person;
- if the person is aged under 18--the best interests of the child as a primary consideration – that reflects Australia’s obligations under the Convention on the rights of the child;
- whether the person is being or is likely to be prosecuted in relation to the conduct engaged in, and, I would add, the extent to which they might be prepared to be a Crown witness against co-accused or others;
- the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- Australia's international relations;
- any other matters of public interest.

None of those matters is considered when the law first operates: to that extent the operation of the law is likely to be disproportionate to the threat posed by some persons and, in any event their rights in relation to the loss of the valuable right of Australian citizenship seem insufficiently safeguarded.
**Fourth**, the problems are compounded by the capacity of the Minister not to give notice of the loss of citizenship: the revokee may well order their life on the basis that they remain a citizen when they do not. Take the possibility of an Australian woman who decided to have another child wrongly thinking the child will be Australian: there is then no technical breach of either the Convention on the Rights of the Child nor the Convention on Statelessness, but it is highly problematic for both mother and child.

**Fifth**, there are real problems with review and scrutiny. Although the courts can make a declaration that at the relevant time the person was not in fact a dual citizen and thus cannot have lost their (sole) Australian citizenship, the conclusion by an inter-departmental committee that the disqualifying conduct has occurred cannot easily be challenged, if it can at all.

However, my preliminary view is that there is a solution to these problems which might work, and that is to adopt the existing procedures for challenges to passport cancellations, where, as here, there is often much sensitive intelligence material which cannot be disclosed to the revokee, but where the Security Appeals Division of the Administrative Appeals Tribunal adopts a more inquisitorial model and tests the intelligence material in private in the absence of the revokee. This is essentially the model used in the UK in the Special Immigrations Appeals Commission. Noting that the Commonwealth is about to appoint special advocates to deal with Control Order cases, I would favour the UK model of using Special Advocates to represent the interests of the revokee in the closed session. The Tribunal could be required to apply all the factors the Minister may currently apply in deciding whether to reverse the revocation.

As you can appreciate, these are complex and difficult issues and the main reason for my appearance today at the Lowy Institute is to encourage wide participation in this and indeed all of my inquiries including the public hearings on citizenship due to be held 27 June 2019.
Encryption

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA) commenced in early December last year having been introduced as a bill some 6 weeks before. The PJCIS urgently considered its terms - however, having received advice from the government that there was an immediate need to provide agencies with additional powers and to pass the Bill in the last sitting week of 2018, it cut short its consideration and recommended enactment with some amendments, with the proviso that there be further review by both the Committee and my Office. This year it referred review of the Act to me.

The key features of the Act that have received attention are the new ability of federal intelligence and Australian police to get technical assistance from a designated communications provider either by agreement or ultimately by compulsion to require that provider to take certain steps to help the authorities perhaps by giving access to an app, or a service offered by an ISP, or an encrypted communication, but with a view to ‘better deal with the challenges posed by ubiquitous encryption’. xvii Today is not the day to go into any detail on how this complex Act works: the 2019 report xviii on the Act by the PJCIS is a good summary of the many controversies which attend the Act.

Today I advise all those interested in this important law to become engaged in my review. I would like to set up consultative groups so please let me know if you would like to take part. May I suggest a few principles, some derived from the report by David Anderson, called ‘A Question of Trust’. xix

- *First*, just as in the physical world we do not accept lawless ghettos where the law does not apply, so also it should be in the virtual world: in this context it means intrusive surveillance powers – conferred by law and with clear thresholds and safeguards – which already apply in the
physical world should in principle apply in the analogous virtual world unless there are good reasons otherwise, an example of such a good reason would be if, I emphasise if, the operation of the law would unduly undermine, say, the integrity of the financial and banking system.

• *Second*, what the law permits and forbids must be clear.

• *Third*, oversight and safeguards are vital and there are comparative models of interest: so, in the UK, industry is involved through a technical advisory panel and also in adjudicating on some requests through membership of a technical advisory board. It may also be appropriate to have a ‘double lock’ for decisions with the relevant Minister’s most intrusive powers subject to routine review by a panel of retired judges who have access to all the underlying material.

This is a very complex review and I welcome wide participation.

**Key Questions**

May I finish by noting some key questions.

• *First*, how can the role of Parliament and key committees such as the PJCIS in scrutinising counter terrorism and national security laws be enhanced?²²

• *Second*, how best to achieve the desirable aim *‘that material which can properly be made public should be widely available for scrutiny’*: one way to start, as I suggested in my latest report to the Prime Minister is following the UK practice of regularly making accessible figures on numbers of arrests and convictions.²²

• *Third*, how best to enhance the vital role of the guardians whether that is the judiciary; or the bodies like the Inspector-General of Intelligence and
Security to whom whistleblowers may legitimately turn with any concerns they may have about illegality or maladministration? xxii

- *Fourth*, how to ensure proper safeguards against misuse of internet technology? xxiii

I suggest that one way to start to answer all of those questions is to measure them against the critical issue of trust in a democratic society. As David Anderson has written:

> Public consent to intrusive laws depends on people trusting the authorities, both to keep them safe and not to spy needlessly on them...

> Trust in powerful institutions depends not only on those institutions behaving themselves (though that is an essential prerequisite), but on there being mechanisms to verify that they have done so. Such mechanisms are particularly challenging to achieve in the national security field, where potential conflicts between state power and civil liberties are acute, suspicion rife and yet information tightly rationed...

> Respected independent regulators continue to play a vital and distinguished role. But in an age where trust depends on verification rather than reputation, trust by proxy is not enough. Hence the importance of clear law, fair procedures, rights compliance and transparency. xxiv

I look forward as INSLM to continuing to play my part on the issue of trust.

It is a privilege to do so.

12 June 2019
The views in this are my own.


As Mr Justice Haddon-Cave, then Judge managing the Terrorism Cases List in England and Wales, said when sentencing the Parson’s Green Bomber, in terms I would adopt:

[48] … the Qur’an is a book of peace; Islam is a religion of peace. The Qur’an and Islam forbid anything extreme, including extremism in religion. Islam forbids breaking the ‘law of the land’ where one is living or is a guest. Islam forbids terrorism (hiraba). The Qur’an and the Sunna provide that the crime of perpetrating terror to ‘cause corruption in the land’ is one of the most severe crimes in Islam. So it is in the law of the United Kingdom.


This has been referred to as the ‘bleed-out’ effect. (see Barak Mendelson “Foreign Fighter- Recent Trends” (2011) 55(2) Orbis.


As put by Audrey Macklin, historians view citizenship revocation as recrudescent rather than as emergent: Deniz Kayis n-5.

35A Conviction for terrorism offences and certain other offences

Cessation of citizenship on determination by Minister

(1) The Minister may determine in writing that a person ceases to be an Australian citizen if:

(a) the person has been convicted of an offence against, or offences against, one or more of the following:

(i) a provision of Subdivision A of Division 72 of the Criminal Code;

(ii) a provision of Subdivision B of Division 80 of the Criminal Code (treason);

(iia) a provision of Division 82 of the Criminal Code (sabotage) other than section 82.9 (preparing for or planning sabotage offence);
(iib) a provision of Division 91 of the *Criminal Code* (espionage);

(iic) a provision of Division 92 of the *Criminal Code* (foreign interference);

(iii) a provision of Part 5.3 of the *Criminal Code* (except section 102.8 or Division 104 or 105);

(iv) a provision of Part 5.5 of the *Criminal Code*;

(vi) section 6 or 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*; and

(b) the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years; and

(c) the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination; and

(d) the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and

(e) having regard to the following factors, the Minister is satisfied that it is not in the public interest for the person to remain an Australian citizen:

(i) the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;

(ii) the degree of threat posed by the person to the Australian community;

(iii) the age of the person;

(iv) if the person is aged under 18—the best interests of the child as a primary consideration;

(v) the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;

(vi) Australia’s international relations; and

(vii) any other matters of public interest.

Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

(2) The person ceases to be an Australian citizen at the time when the determination is made.

(3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person’s birth).
(4) For the purpose of paragraph (1)(b):

(a) the reference to being sentenced to a period of imprisonment does not include a suspended sentence; and

(b) if a single sentence of imprisonment is imposed in respect of both an offence against a provision mentioned in paragraph (1)(a) and in respect of one or more other offences, then:

(i) if it is clear that only a particular part of the total period of imprisonment relates to the offence against the provision mentioned in paragraph (1)(a)—the person is taken to have been sentenced to imprisonment in respect of that offence for that part of the total period of imprisonment; and

(ii) if subparagraph (i) does not apply—the person is taken to have been sentenced to imprisonment in respect of the offence against the provision mentioned in paragraph (1)(a) for the whole of the total period of imprisonment.

Minister to give notice

(5) If the Minister makes a determination under subsection (1) because of which a person ceases to be an Australian citizen, the Minister:

(a) must give, or make reasonable attempts to give, written notice to that effect to the person:

(i) as soon as practicable; or

(ii) if the Minister makes a determination under subsection (7)—as soon as practicable after the Minister revokes the subsection (7) determination (if the Minister does so); and

(b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

(6) A notice under paragraph (5)(a) must set out:

(a) the matters required by section 35B; and

(b) the person’s rights of review.

(7) The Minister may determine in writing that a notice under paragraph (5)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke the determination:

(a) no later than 6 months after making it; and

(b) at least every 6 months thereafter until 5 years have passed since the determination was made.

Minister must revoke determination if conviction overturned
(8) The Minister must, in writing, revoke a determination made under subsection (1) in relation to a person if:

   (a) a conviction because of which the determination was made is later overturned on appeal, or quashed, by a court; and

   (b) that decision of that court has not been overturned on appeal; and

   (c) no appeal, or further appeal, can be made to a court in relation to that decision.

(9) If the Minister revokes the determination, the person’s citizenship is taken never to have ceased under this section because of that determination.

General provisions relating to Minister’s powers

(10) The powers of the Minister under this section may only be exercised by the Minister personally.

(11) Except for the powers of the Minister under subsection (1), the rules of natural justice do not apply in relation to the powers of the Minister under this section.

(12) Section 47 does not apply in relation to the exercise of the powers of the Minister under this section.

(13) An instrument exercising any of the Minister’s powers under this section is not a legislative instrument.

xi Roach v Electoral Commissioner (2007) 233 CLR 162, 177 [12].

xii In Pham v R (2015) 256 CLR 550 the plurality said at [24]: “As Kirby J observed in Putland v The Queen, a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth.”

xiii The First INSLM’s final Annual Report so stated.

xiv 33AA Renunciation by conduct

Renunciation and cessation of citizenship

(1) Subject to this section, a person aged 14 or older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2).

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (14).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

(2) Subject to subsections (3) to (5), subsection (1) applies to the following conduct:
(a) engaging in international terrorist activities using explosive or lethal devices;
(b) engaging in a terrorist act;
(c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
(d) directing the activities of a terrorist organisation;
(e) recruiting for a terrorist organisation;
(f) financing terrorism;
(g) financing a terrorist;
(h) engaging in foreign incursions and recruitment.

(3) Subsection (1) applies to conduct specified in any of paragraphs (2)(a) to (h) only if the conduct is engaged in:
(a) with the intention of advancing a political, religious or ideological cause; and
(b) with the intention of:
   (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
   (ii) intimidating the public or a section of the public.

(4) A person is taken to have engaged in conduct with an intention referred to in subsection (3) if, when the person engaged in the conduct, the person was:
(a) a member of a declared terrorist organisation (see section 35AA); or
(b) acting on instruction of, or in cooperation with, a declared terrorist organisation.

(5) To avoid doubt, subsection (4) does not prevent the proof or establishment, by other means, that a person engaged in conduct with an intention referred to in subsection (3).

(6) Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the Criminal Code, respectively. However (to avoid doubt) this does not include the fault elements that apply under the Criminal Code in relation to those provisions of the Criminal Code.

(7) This section does not apply in relation to conduct by a person unless:
(a) the person was not in Australia when the person engaged in the conduct; or
(b) the person left Australia after engaging in the conduct and, at the time that the person left Australia, the person had not been tried for any offence related to the conduct.
(8) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person’s birth).

(9) Where a person renounces their Australian citizenship under this section, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct referred to in subsection (2).

Minister to give notice

(10) If the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:

(a) must give, or make reasonable attempts to give, written notice to that effect to the person:

   (i) as soon as practicable; or

   (ii) if the Minister makes a determination under subsection (12)—as soon as practicable after the Minister revokes the determination (if the Minister does so); and

(b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

Note: A person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

(11) A notice under paragraph (10)(a) must set out:

(a) the matters required by section 35B; and

(b) the person’s rights of review.

(12) The Minister may determine in writing that a notice under paragraph (10)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:

(a) no later than 6 months after making it; and

(b) at least every 6 months thereafter until 5 years have passed since the determination was made.

Minister’s power to rescind notice and exempt person

(13) Subsections (14) to (19) apply only if a person has renounced his or her citizenship under this section.

(14) At any time after a person has renounced his or her citizenship under this section, the Minister may make a determination to:
(a) rescind any notice given under subsection (10) in respect of the person; and

(b) exempt the person from the effect of this section in relation to the matters that were
the basis for the notice, or in relation to matters that would have been the basis for giving a notice in
respect of the person under paragraph (10)(a), but for the operation of subsection (12).

(15) The Minister does not have a duty to consider whether to exercise the power under
subsection (14) in respect of any person, whether the Minister is requested to do so by the person who
has renounced his or her citizenship under this section, or by any other person, or in any other
circumstances.

(16) To avoid doubt, in deciding whether to consider exercising the power in subsection (14),
the Minister is not required to have regard to any of the matters referred to in subsection (17).

(17) If the Minister decides to consider whether to exercise the power in subsection (14), then,
in that consideration, the Minister must have regard to the following:

(a) the severity of the matters that were the basis for any notice given in respect of the
person under subsection (10), or of matters that would have been the basis for giving a notice in
respect of the person under paragraph (10)(a), but for the operation of subsection (12);

(b) the degree of threat posed by the person to the Australian community;

(c) the age of the person;

(d) if the person is aged under 18—the best interests of the child as a primary
consideration;

(e) whether the person is being or is likely to be prosecuted in relation to matters
referred to in paragraph (a);

(f) the person’s connection to the other country of which the person is a national or
citizen and the availability of the rights of citizenship of that country to the person;

(g) Australia’s international relations;

(h) any other matters of public interest.

(18) If the Minister makes a determination under subsection (14), the Minister must cause to
be laid before each House of the Parliament, within 15 sitting days of that House after the Minister
makes the determination, a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister’s
reasons in relation to the matters set out in subsection (17).

(19) If the Minister thinks that it would not be in the public interest to publish the name of the
person or of any other person connected in any way with the matter concerned, the statement under
subsection (18) must not include those names or any information that may identify those persons.

General provisions relating to Minister’s powers
(20) The powers of the Minister under this section may only be exercised by the Minister personally.

(21) Section 47 applies to a decision by the Minister to make, or not make, a determination under subsection (14), but does not apply to any other decision of the Minister under this section (including any decision whether to consider exercising the power in subsection (14) to make a determination).

(22) The rules of natural justice apply to a decision by the Minister to make, or not make, a determination under subsection (14), but do not apply to any other decision, or the exercise of any other power, by the Minister under this section (including any decision whether to consider exercising the power in subsection (14) to make a determination).

(23) An instrument exercising any of the Minister’s powers under this section is not a legislative instrument.

(24) To avoid doubt, a person’s citizenship is taken never to have ceased under this section because of particular conduct if:

(a) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not engage in the conduct or have the requisite intention under subsection (3) of this section; or

(b) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time of the conduct; or

(c) the Minister makes a determination under subsection (14) in relation to the conduct to exempt the person from the effect of this section; or

(d) a declaration under section 35AA is disallowed by either House of the Parliament, and the person’s citizenship would not have ceased under this section if that declaration had not been made.

35 Service outside Australia in armed forces of an enemy country or a declared terrorist organisation

Cessation of citizenship

(1) A person aged 14 or older ceases to be an Australian citizen if:

(a) the person is a national or citizen of a country other than Australia; and

(b) the person:

(i) serves in the armed forces of a country at war with Australia; or

(ii) fights for, or is in the service of, a declared terrorist organisation (see section 35AA); and
(c) the person’s service or fighting occurs outside Australia.

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (9).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

(2) The person ceases to be an Australian citizen at the time the person commences to so serve or fight.

(3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person’s birth).

(4) For the purposes of subparagraph (1)(b)(ii) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:

(a) the person’s actions are unintentional; or

(b) the person is acting under duress or force; or

(c) the person is providing neutral and independent humanitarian assistance.

Minister to give notice

(5) If the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:

(a) must give, or make reasonable attempts to give, written notice to that effect to the person:

(i) as soon as practicable; or

(ii) if the Minister makes a determination under subsection (7)—as soon as practicable after the Minister revokes the determination (if the Minister does so); and

(b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

Note: A person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the Judiciary Act 1903.

(6) A notice under paragraph (5)(a) must set out:

(a) the matters required by section 35B; and

(b) the person’s rights of review.
(7) The Minister may determine in writing that a notice under paragraph (5)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:

(a) no later than 6 months after making it; and

(b) at least every 6 months thereafter until 5 years have passed since the determination was made.

Minister’s power to rescind notice and exempt person

(8) Subsections (9) to (14) apply only if a person has ceased to be a citizen under this section.

(9) At any time after a person has ceased to be a citizen under this section, the Minister may make a determination to:

(a) rescind any notice given under subsection (5) in respect of the person; and

(b) exempt the person from the effect of this section in relation to the matters that were the basis for the notice, or in relation to matters that would have been the basis for giving a notice in respect of the person under paragraph (5)(a), but for the operation of subsection (7).

(10) The Minister does not have a duty to consider whether to exercise the power under subsection (9) in respect of any person, whether the Minister is requested to do so by the person who has ceased to be a citizen under this section, or by any other person, or in any other circumstances.

(11) To avoid doubt, in deciding whether to consider exercising the power in subsection (9), the Minister is not required to have regard to any of the matters referred to in subsection (12).

(12) If the Minister decides to consider whether to exercise the power in subsection (9), then, in that consideration, the Minister must have regard to the following:

(a) the severity of the matters that were the basis for any notice given in respect of the person under subsection (5), or of matters that would have been the basis for giving a notice in respect of the person under paragraph (5)(a), but for the operation of subsection (7);

(b) the degree of threat posed by the person to the Australian community;

(c) the age of the person;

(d) if the person is aged under 18—the best interests of the child as a primary consideration;

(e) whether the person is being or is likely to be prosecuted in relation to matters referred to in paragraph (a);

(f) the person’s connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;

(g) Australia’s international relations;
(h) any other matters of public interest.

(13) If the Minister makes a determination under subsection (9), the Minister must cause to be laid before each House of the Parliament, within 15 sitting days of that House after the Minister makes the determination, a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister’s reasons in relation to the matters set out in subsection (12).

(14) If the Minister thinks that it would not be in the public interest to publish the name of the person or of any other person connected in any way with the matter concerned, the statement under subsection (13) must not include those names or any information that may identify those persons.

General provisions relating to Minister’s powers

(15) The powers of the Minister under this section may only be exercised by the Minister personally.

(16) Section 47 applies to a decision by the Minister to make, or not make, a determination under subsection (9), but does not apply to any other decision of the Minister under this section (including any decision whether to consider exercising the power in subsection (9) to make a determination).

(17) The rules of natural justice apply to a decision by the Minister to make, or not make, a determination under subsection (9), but do not apply to any other decision, or the exercise of any other power, by the Minister under this section (including any decision whether to consider exercising the power in subsection (9) to make a determination).

(18) An instrument exercising any of the Minister’s powers under this section is not a legislative instrument.

(19) To avoid doubt, a person’s citizenship is taken never to have ceased under this section because of the person serving or fighting as set out in subsection (1) if:

(a) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person did not so serve or fight (whether because of subsection (4) of this section or for any other reason); or

(b) in proceedings under section 75 of the Constitution, or under this Act or another Commonwealth Act, a court finds that the person was not a national or citizen of a country other than Australia at the time the person served or fought; or

(c) the Minister makes a determination under subsection (9) in relation to the conduct to exempt the person from the effect of this section; or

(d) a declaration under section 35AA is disallowed by either House of the Parliament, and the person’s citizenship would not have ceased under this section if that declaration had not been made.

xvi Formerly the Attorney-General, now the Minister for Home Affairs.

Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, December 2018


There is the ever decreasing time available for scrutiny of bills and an increasing number of bills. I am also interested to see what the government says about the important recommendations of the 2017 Independent Intelligence Review concerning an expanded role for the PJCIS: see Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2017 Independent Intelligence Review https://www.pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf

Recommendation 23: The role of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) be expanded by amending relevant legislation to include:

a) a provision enabling the PJCIS to request the Inspector-General of Intelligence and Security (IGIS) conduct an inquiry into the legality and propriety of particular operational activities of the National Intelligence Community (NIC) agencies, and to provide a report to the PJCIS, Prime Minister and the responsible Minister;

b) a provision enabling the PJCIS to review proposed reforms to counter-terrorism and national security legislation, and to review all such expiring legislation;

c) provisions allowing the PJCIS to initiate its own inquiries into the administration and expenditure of the ten intelligence agencies of the NIC as well as proposed or existing provisions in counter-terrorism and national security law, and to review all such expiring legislation;

d) provisions enabling the PJCIS to request a briefing from the Independent National Security Legislation Monitor (the Monitor), to ask the Monitor to provide the PJCIS with a report on matters referred by the PJCIS, and for the Monitor to provide the PJCIS with the outcome of the Monitor’s inquiries into existing legislation at the same time as the Monitor provides such reports to the responsible Minister; and

e) a requirement for the PJCIS to be regularly briefed by the Director-General of the Office of National Intelligence, and separately by the IGIS.

I look forward to a comprehensive response by government to my latest report to the Prime Minister concerning the prosecution and sentencing of children for Commonwealth terrorism offences. Although perhaps the most important recommendation is to bring Australia’s sentencing laws for juvenile terrorists into line with the Convention on the Rights of the Child by allowing sentencing judges more discretion, and thus a greater chance of rehabilitating juvenile terrorism offenders, I also look forward to a response to my recommendations that: As is proposed with Corporations Act offences, the Federal Court have concurrent jurisdiction with the Supreme Courts of the States and Territories to try all terrorist offences; That the government provide annual funds – miniscule in amount in comparison to the counter-terrorism budget – to allow a small number of Australian and English judges - say two a year - to attend each other’s annual judicial training to
encourage appropriate improvements and innovations in the conduct of terrorism trials. Further detail on each is as follows:

Rights of the Child: In federal criminal law, where imprisonment is ordered, there is a head sentence imposed, and a judicial determination of a non-parole period. Because of a perception that an early terrorism offender had received a lenient non-parole period, s 19AG of the Crimes Act (Cth) was enacted. It requires every court imposing a term of imprisonment on an adult or child convicted of a terrorism offence to fix a non-parole period of at least three-quarters of the duration of the head sentence, hence the ‘75% rule’. At the time s 19AG was enacted, parole was almost automatic. That is no longer the case. This change diminishes dramatically the necessity of the provision. Section 19AG precludes any judicial discretion in setting a child’s non-parole period. I concluded that Section 19AG in its current form, as it applies to children, is in breach of Australia’s obligations under the CRC and recommended that it no longer apply to those under 18 at the time of offending.

Federal Court: I recommended that in all terrorism matters tried on indictment, the Federal Court of Australia should have jurisdiction concurrent with the courts of the States and Territories, including because of:

- the disparity in the approaches taken in the eight State and Territory jurisdictions;
- the complexity of federal legal and procedural issues which typically arise in terrorism cases;
- the truly national nature of terrorism offences;
- the fact that the Federal Court already has jurisdiction to make Control Orders under Div 104 of the Criminal Code and is shortly to be given concurrent jurisdiction in criminal prosecutions for breaches of the Corporations Act (Cth);\textsuperscript{xii}
- the recent appointment of specialist criminal law judges to the Federal Court.

Judicial Education: As Chief Justice Ferguson of the Supreme Court of Victoria said in her submission to the inquiry: ‘Terrorism trials generally involve a high level of legal and evidentiary complexity and require significant pre-trial management. Cross-jurisdictional learning is an important tool’. I concluded that enhancing judicial training in terrorism matters, including on the unique issues arising in the trial of children, is highly desirable. The Judges of England and Wales who regularly try terrorism matters told me that they welcome the participation of Australian judges in their annual training. The details of such training are matters for the independent judiciary. I therefore recommended that monies be made available to the appropriate Australian judicial education bodies to allow English and Australian judges expert in the conduct of terrorism trials to travel each year to the other jurisdiction to observe the conduct of terrorism trials and to provide or receive judicial continuing legal education with a view to encouraging appropriate improvements and innovations in the conduct of such trials.

Openness: A key function of the INSLM is in monitoring whether relevant laws remain ‘proportionate to any threat of terrorism or threat to national security, or both’. In a sceptical age, in both Australia and the United Kingdom it is not infrequently said that the terrorism and national security threats are overstated. It is important for public confidence that as much as possible is authoritatively revealed, provided the national interest is not thereby damaged. The public and its elected representatives have a strong interest in being told by government with regularity and accuracy how often counter-terrorism powers are used, and equally statistics as to consequential arrests, convictions and other limitations upon liberty, and I have so recommended.

\textsuperscript{xii} Apart from my inquiry, there is for example the important Digital Platforms Inquiry of the ACCC: https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry.

\textsuperscript{xiv} A Question of Trust 13.3-13.4.
WHAT ARE THE RIGHT ENCRYPTION LAWS FOR AUSTRALIA?

LOWY INSTITUTE, SYDNEY, 5 MARCH 2020¹

In 2019 the Parliamentary Joint Committee on Intelligence and Security referred to me as INSLM for review the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth). As I move to finalise the report of the review, due no later than 30 June 2020, I here discuss possible models whereby the interests of individuals, organisations, business, intelligence, police and integrity agencies might be reconciled. Separately, I publicly announce my intention to consider what statutory amendments might be necessary to avoid any repetition of the wholly secret criminal proceedings involving ‘Alan Johns’.

Introduction

1.1. It is an honour to be speaking at the Lowy Institute for the second time in a year, and my last time as INSLM, as I finish in that role on 30 June. In June last year I spoke² here about the INSLM role and its origins, and the counter-terrorism and counter-espionage threats: I refer you to that speech and also to my latest Annual Report which was tabled last week in Parliament and is on www.inslm.gov.au: suffice to say that:

- the espionage and foreign interference threat has increased,
- an onshore terrorism attack remains at the ‘probable’ level it has been since 2014,³ and
- I expect ISIL will continue to surprise.

1.2. I also note the important comments by the Director-General of Security at the inaugural Annual Threat Assessment held at ASIO’s headquarters last week, which I was privileged to attend.⁴

1.3. I also spoke here about my review concerning the loss of citizenship for terrorist activities.⁵ The resulting report was delivered in August to the Attorney-General, the Hon Christian Porter MP, and led to a government response within weeks in the form of amending legislation; the key points of difference between my recommendations and the government’s response are now being considered by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).⁶

¹ Check against delivery. The views in this are my own.
³ https://www.nationalsecurity.gov.au/securityandyourcommunity/pages/national-terrorism-threat-advisory-system.aspx which states that ‘Australia’s National Terrorism Threat Level remains Probable. Credible intelligence, assessed by our security agencies, indicates that individuals or groups continue to possess the intent and capability to conduct a terrorist attack in Australia.’
1.4. As I am being hosted by Dr Shanahan today may I acknowledge his important work in this area, including his recent analysis with Jennifer Percival in the report: the ‘Typology of Terror’.

1.5. The PJCIS is perhaps not as well-known as it should be given its importance.7 One of its principal functions is ensuring, by the conduct of statutory reviews, that national security and counter-terrorism law remains necessary, proportionate and effective. It complements and bolsters my role as INSLM.8 Indeed, it has been common for my reports to inform the work of the PJCIS as it considers whether such laws should be enacted, amended or repealed.9 Although we each can and do hold public and private hearings, a key difference is that my ‘Royal Commission’ like powers give me access as of right to all relevant material regardless of national security classification.

1.6. In 2019 the PJCIS for the first time used its powers to refer a review to me,10 namely of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth) (TOLA Act). I must report to it no later than 30 June, it must report to the Parliament no later than the end of September.11

1.7. When I spoke here last year I foreshadowed three principles which would – and still do – guide my inquiry. They are drawn in part from my former UK counterpart Lord David Anderson QC’s report A Question of Trust.

- First, just as in the physical world we do not accept lawless ghettos where the law does not apply, so also it should be in the virtual world: in this context it means intrusive surveillance powers – certainly, conferred by law and with clear thresholds and safeguards – which already apply in the physical world should in principle apply in the analogous virtual world, unless there are good reasons to the contrary.
- Second, what the law permits and forbids must be clear.
- Third, oversight and safeguards are vital.

1.8. A few weeks ago I held public hearings: the transcript is on my website.12 I have also consulted widely with industry both large and small, human rights groups,
civil society, police, intelligence and oversight bodies both here and in the UK and the USA.

1.9. Here in Australia, and internationally, there is great interest in, and strong views about, TOLA, which is seen as far reaching and novel in its scope. The short period allowed for consultation on the TOLA Bill clearly caused lingering disquiet, even anger. Some say that brevity of itself means that the TOLA Act should be repealed, with consultation to begin again, not least as a way of regaining trust. Realistically, I do not think that is likely nor do I think it is appropriate to recommend it.

1.10. Other submitters, perhaps the majority, have focused on three main areas for reform, which are also my focus:

- The definitions in the TOLA Act of systemic weakness and systemic vulnerability, and how disputes concerning the application of these statutory terms can be resolved.
- Where the current TOLA decision makers are the Attorney-General or agency heads, replacing them with current or retired judges, assisted by technical experts who understand the effect of the exercise of particular TOLA powers on privacy and on the effectiveness of encryption.
- Better record keeping requirements, and clear statements of review rights when compulsory powers are used, so that affected people and entities can exercise those rights, including by complaining to the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security.

Context of TOLA’s enactment

1.11. Because this is such a technical area it is impossible today to discuss the full context, legal and technological. But let me try and discuss the key concepts.

1.12. First, let me start with some definitions.

- When I speak about the World Wide Web, I acknowledge it is fragmenting, if it has not already separated, due to extensive firewalls in China, Russia and elsewhere. (I also note the increasing importance of the Internet of Things now that we have ‘smart’ cars, fridges and so on.)
- By data "content" I mean such things as texts, emails, phone calls, videos and pictures.
- By "metadata" I mean such things as when an email was sent, the sender and recipients, their locations, how it was sent, how it was stored, and what websites have been visited, what apps were used and so on.
- Sometimes data is ‘in motion’ for example a phone call as it is being made; sometimes it is ‘at rest’, such as when either content or data is stored on a device or in the ‘cloud’.  

---

13 A mandatory data retention regime is prescribed by Part 5-1A of the TI Act and it requires carriers, carriage service providers and internet service providers to retain a defined set of telecommunications data for two years, ensuring that such data remains available for law enforcement and national security investigations. The law is being reviewed by the PJCIS:
1.13. Let me to say something about the context of the TOLA Act, and that is not easy as it includes dynamic events, not yet fully understood.

1.14. For example, today’s Australian newspaper said:

*Home Affairs Minister Peter Dutton will meet security ministers from the Five Eyes intelligence alliance in Washington on Thursday, in a bid to finalise a global agreement that would force Facebook and Google to help shut down live streaming and sharing of child sex abuse.*

_The top-level forum to be hosted at the White House will coincide with the introduction of a bill today to the Australian parliament that would enact mirror laws with the US CLOUD Act._

_This would allow reciprocal rights for both US and Australian security agencies to issue warrants for data held offshore by cloud providers in hunting down terrorists and child sex networks._

1.15. Just this week the AFP Commissioner wrote that ‘The AFP has an urgent need for a legal framework that provides faster and more effective access to electronic data held or controlled overseas, where it is critical to Australian investigations and prosecutions.’ So it may be effective diplomacy as well as good law reform to adopt this model here.

1.16. And indeed, the first item of business in the House of Representatives today was the introduction of the *Telecommunications Legislation Amendment (International Production Orders) Bill 2020.*

1.17. Other events include the following.

1.18. There is the near universal use of the web in Australia and comparable countries for legitimate private, commercial and government communications.

1.19. As our digital footprints grow with our web searches and purchases online, and our communications by texts and emails, and on social media, those entities who provide our means of using the web – called designated communications providers (DCPs) in TOLA – analyse, and then profit from having, our personal and commercial information, for example by ‘data mining’ it using proprietary algorithms. The ubiquity of the web has led to the largest ‘tech titan’ DCPs having enormous (although opaque) power, which is in some ways greater than many nation states.

1.20. The full extent of their monetisation of personal and commercial information is unknown and perhaps unknowable, and so, although I accept that reputable companies do seek and obtain consumers’ consent, there may be no real capacity to give informed consent to it by any consumer. Such developments alone have led to demands for greater privacy rights, including what in the European Union has been called the ‘right to be forgotten’. They have also led, in Australia, to increased interest from regulators, including the national competition regulator, the Australian Competition and Consumer Commission (ACCC) which has, for example:

---

14 This draws on my opening remarks at my recent public hearings.
• Taken Google to the Federal Court alleging it made false or misleading representations to consumers about the personal location data Google collects, keeps and uses;
• Concluded its important Digital Platforms Inquiry which among other matters found that ‘the market power of Google and Facebook has distorted the ability of businesses to compete on their merits in advertising, media and a range of other markets’;¹⁶
• Proposed far-reaching reforms aimed, among other matters, at protecting quality Australian journalism and also ensuring a realistic way of consumers giving fully informed consent to private providers as to the use of private data.

1.21.

The fact that there is now a greater range of information about each of us in existence than there ever has been before, and that we do not fully know or understand what personal data is on our phones or computers, nor which commercial entities have access to it or use it, are facts that remain highly relevant to my review because, if we are ignorant about, say, what is on our mobile devices and how its content is used commercially, we equally cannot fully comprehend in advance how it might be used in a later investigation or prosecution by police, intelligence or integrity agencies who might obtain the data or content by legally authorised compulsion.

1.22.

To give an analogy with the physical world, if my paper diary or notebook is seized under warrant, or even if my house is searched, I know and can comprehend what is being searched and seized. But if my computer or mobile phone is seized and fully accessed for example by decryption of all passwords, I probably will not know even approximately what it contains nor how it might be used. Nor for that matter, might a judge issuing a warrant fully comprehend these matters, at least without access to some really good technical advice.

1.23.

So if this is an example of where the analogy between the virtual and physical worlds breaks down, one consequence is that it cannot be assumed that old and apparently robust safeguards, developed over many years for the use of police and intelligence powers in the physical world, remain adequate.

1.24.

So far I have just spoken about lawful use. The universal use of the web attracts criminals and other bad actors and thus the internet and the world wide web is increasingly where the age-old struggle between police and criminals, and spies and intelligence agencies, is carried on, and in new ways.

1.25.

For example:
• ISIL has made very effective use of the web to publicise, proselytise, and direct terrorism;
• The Christchurch shooter live-streamed his atrocities on social media;¹⁷
• There is large scale theft of private data and corporate intellectual property;
• There is local and transnational organised crime, money-laundering, trafficking of illicit drugs and arms and child sexual exploitation, including in

¹⁷ The attack by an Australian in Christchurch was by a perpetrator who conducted the attack alone. However, he drew inspiration from a global network of like-minded individuals who often disseminate and discuss their views online. The phenomenon is not new. Christchurch turned into a seminal event in the history of such terrorism for its lethality and use of technology to maximise impact, in particular the live streaming of the attacks on social media. In turn, that use of technology led to the swift enactment of the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 and also a number of international initiatives led by Australia to limit and prevent the internet from being a safe haven for terrorist and violent extremist content and activity.
the dark web which facilitates the commission of such crimes anonymously and thus with impunity.

- Nation States and their proxies continue to engage in espionage and foreign interference but they also work on their capacities to engage in cyber-attacks such as Computer Network Attacks which not only allows nation states and their proxies to disable access by another country’s military to its computers and web servers, but also to have kinetic effects for example by releasing dam water, turning off power to hospitals, or attacking a stock exchange’s records. It is no accident that such conduct is capable of amounting to a terrorist act under Australian law.iii

- The New York Times’ Privacy Project18 provides many examples of such behaviour, and also of the large scale theft of private data and corporate intellectual property – as do the unsealed indictments filed by the US Department of Justice against, for example, members of the Chinese People’s Liberation Army.19

1.26. The response by both legitimate and bad actors to these activities has been to almost universally encrypt content, and to encrypt some metadata. The evidence I have received is that the so-called ‘golden age’ when content could immediately be read and comprehended by police, integrity and intelligence agencies has gone. Instead, they now speak of a virtual world which has gone ‘dark’, gone ‘spotty’ or even gone ‘different’ and this change was a key impetus for the TOLA Act.

**There is no binary choice between encryption and policing or intelligence work**

1.27. Not only are the topics I have mentioned vast and complex, but they sometimes attract strident overstatement based on extreme or improbable examples.

1.28. So I am very grateful for the clear and informed thinkers in this field, a number of whom have made submissions. May I quote from two. First, the Encryption Working Group assembled by the Carnegie Endowment and Princeton University20 recently said:

18 https://www.nytimes.com/series/new-york-times-privacy-project
19 For one example in 2018 see ‘Chinese Intelligence Officers and Their Recruited Hackers and Insiders Conspired to Steal Sensitive Commercial Aviation and Technological Data for Years’: https://www.justice.gov/opa/pr/chinese-intelligence-officers-and-their-recruited-hackers-and-insiders-conspired-steal
20 https://carnegieendowment.org/programs/technology/cyber/encryption states:

‘The Carnegie Endowment for International Peace and Princeton University have convened a small group of experts to advance a more constructive dialogue on encryption policy. The working group consists of former government officials, business representatives, privacy and civil rights advocates, law enforcement experts, and computer scientists. Observers from U.S. federal government agencies attended a select number of working group sessions. Since 2018, the working group has met to discuss a number of important issues related to encryption policy, including how the relevant technologies and uses of encryption will evolve in the future.’

Its document ‘Key Takeaways from the Encryption Working Group’s Paper on “Moving the Encryption Policy Conversation Forward” states:

‘The working group rejects two straw men—absolutist positions not actually held by serious participants, but sometimes used as caricatures of opponents. These are:
(1) that we should stop seeking approaches to enable access to encrypted information
The working group rejects two straw men—absolutist positions not actually held by serious participants, but sometimes used as caricatures of opponents. These are:

(1) that we should stop seeking approaches to enable access to encrypted information; and

(2) that law enforcement will be unable to protect the public unless it can obtain access to all encrypted data through lawful process.

1.29. Similarly Sir David Omand, a former spymaster as head of GCHQ, in his recent book, Principled Spying, wrote:

As with all hard public policy issues, there is no easy way of reconciling conflicting ethical concerns. Place the security of personal data and one’s anonymity on the Internet above all else and law enforcement is shut out, the rule of law is undermined, and crime, terrorism, and cyber attacks flourish. Insist on a right of access to all encrypted data for law enforcement and intelligence agencies—for example, through controlling or weakening encryption standards—and confidence in the Internet as a secure medium will be lost, and fragmentation of the Internet will spread.

I agree with both statements: the choice is not binary.

Pre-TOLA

1.30. The context having been sketched out, what, then, does TOLA change, and how, if at all, should it now be amended? Let me continue to use the familiar example

---

(2) that law enforcement will be unable to protect the public unless it can obtain access to all encrypted data through lawful process.

We believe it is time to abandon these and other such straw men. More work is necessary, such as that initiated in this paper, to separate the debate into its component parts and examine risks and benefits in greater granularity. There will be no single approach for requests for lawful access that can be applied to every technology or means of communication. Mobile phone proposals should be evaluated against adherence to core principles. The working group has identified core principles against which to judge proposals for mobile phone encryption access. The group agrees that proposals should, at a minimum, adhere to these principles.

- **Law Enforcement Utility**: The proposal can meaningfully and predictably address a legitimate and demonstrated law enforcement problem.
- **Equity**: The proposal offers meaningful safeguards to ensure that it will not exacerbate existing disparities in law enforcement, including on the basis of race, ethnicity, class, religion, or gender.
- **Specificity**: The capability to access a given phone is only useful for accessing that phone (for example, there is no master secret key to use) and that there is no practical way to repurpose the capability for mass surveillance, even if some aspects of it are compromised.

Few public statements from national governments, for example, have distinguished between approaches for data at rest and data in motion. Similarly, when groups raise concerns about undermining encryption, they tend to emphasize the general risks versus those related to specific applications of encryption.

Key Takeaways from the Encryption Working Group’s Paper on “Moving the Encryption Policy Conversation Forward”

21 Oman and Phytin, Principled Spying, the Ethics of Secret Intelligence, Oxford University Press, 2018.
22 In the Chapter on Digital Intelligence and Cyberspace at P 144.
of the mobile phone (rather than be diverted into such matters as the detail of computer networks.\footnote{25})

1.31. In substance, for many years before 2018 there have been federal laws permitting law enforcement, intelligence and integrity bodies to obtain the mobile phone itself and to search and copy the content and data on the device, and to intercept and access content and data in motion (such as what was said in a phone call).

1.32. There is a patchwork of lengthy and frequently amended Acts which allows this, but in essence it is to be found in four main Acts: the \textit{Surveillance Devices Act 2004 (SD Act)}, the \textit{Australian Security Intelligence Organisation Act 1979 (ASIO Act)}, the \textit{Telecommunications (Interception and Access) Act 1979 (TI Act)}, and the \textit{Crimes Act 1914}. The legal scheme rapidly gets more complex. But in substance, prior to TOLA the AFP and ASIO, for example, might:

\begin{itemize}
\item[a.] Under the \textit{TI Act}: seek access to telecommunications data, stored communications that already exist, or the interception of communications in real time. (That access might be given by a telecommunications provider without the need to obtain the actual mobile phone.\footnote{25})
\item[b.] Under the \textit{SD Act} or the \textit{ASIO Act}: a Computer Access Warrant which could authorise covert access and copying what is in a phone (or computer);
\item[c.] Under the Crimes Act: \footnote{26} AFP constables executing warrants either in respect of premises \footnote{27} or in respect of a person \footnote{28} could search for and seize ‘evidential material’\footnote{29} - which includes things ‘in electronic form’\footnote{30} and to move a thing found at warrant premises ‘to another place for examination or processing’\footnote{31}.
\end{itemize}

1.33. What then are the safeguards at the federal level?

\begin{itemize}
\item[a.] \textit{Permission} for such access is granted by warrant issued by an independent eligible judge or Tribunal member for the AFP, and by the Attorney-General for ASIO. (Looking at police approvals, the application process is not centralised and there are insufficient details publicly available about who approves, how long they take to do so, how many applications are knocked back and for what reason. Very little is publicly known about the ASIO process although some secret statistics are made available to a limited audience, including me.)
\item[b.] \textit{Complaints} can be made to the Ombudsman for the AFP or the IGIS for ASIO.
\item[c.] There is a constitutionally entrenched\footnote{32} right to judicially review decisions of officers of the Commonwealth under the TOLA Act in Australia, our founders having had in mind the US Supreme Court case of \textit{Marbury v Madison}.\footnote{32}
\end{itemize}

\footnote{23} There are real technical complexities here which time prevents me from dealing with: to give one example considered by the Carnegie/Princeton group it is important to distinguish between data in the cloud, data in motion, and data on devices.\footnote{24} A data surveillance device, a listening device, an optical surveillance device or a tracking device;\footnote{25} A named person warrant might allow all of an individual’s landlines or mobile services to be intercepted or accessed. A ‘B Party warrant’ allows interception of communications with people communicating with a criminal suspect.\footnote{26} And Customs, now Australian Border Force Officers have significant powers as well.\footnote{27} \textit{Crimes Act 1914} (Cth) (Crimes Act) s3C(1).\footnote{28} Crimes Act s3C(2).\footnote{29} Crimes Act s3F(1)(c), in respect of a warrant in force in relation to premises.\footnote{30} Crimes Act s3C(1).\footnote{31} in certain circumstances : Crimes Act s3K(2).\footnote{32} 5 US 137; see, eg https://www.law.cornell.edu/supremecourt/text/5/137
d. Certain laws can be reviewed by me and the PJCIS.

**TOLA**

1.34. In Schedule 1 of TOLA, the response to going dark is really twofold. First, either by request in a technical assistance request (TAR) or by compulsion in a technical assistance notice (TAN) a DCP must make the unintelligible content or data intelligible, or do another act or thing, but only if they have an existing capability to do so, and when they do so they cannot be sued civilly for doing so and they do not commit a criminal offence.

1.35. Next, by a technical capability notice (TCN), an agency may request the Attorney General to grant a compulsory notice to create a new capability which the DCP does not then have, to allow the content or data otherwise obtained by warrant or authority to be made intelligible or decrypted, for example. The same civil and criminal protections apply.

1.36. But, and it is a large ‘but’, none of the Schedule 1 powers can validly authorise (nor civilly protect) the relevant DCP if the requested act or thing would create a systemic weakness or systemic vulnerability.

1.37. Unlike the underlying warrants or authorisations, TANs are not granted by an eligible judge or independent tribunal member but are simply granted by the agency head or their delegate, a significant departure from the normal course of an independent eligible judge or tribunal member as the issuer. The Attorney-General issues a TCN (and TANs for ASIO) although a retired judge with technical assistance can be requested to give a report to the Attorney which must be considered but is not binding.

1.38. (In Schedule 2 the position is similar with, for example, Computer Access Warrants.

1.39. There are related powers given to the police, the Australian Border Force and ASIO, in Schedules 3, 4 and 5 which are designed for example to require a person to provide their password to their mobile phone once there is already separate authority to look at that phone. The idea of unlocking a computer or phone is readily understandable but it is extremely important for public confidence that these intrusive powers are properly regulated and subject to proper oversight.

**What might be done?**

1.40. My current views are as follows.

1.41. First, as to necessity, I agree that ‘going dark’ has created a large problem for police, intelligence and integrity agencies, so justifying a proportionate but not absolute legislative response. (I have already announced that for so long as the police have access to TARs and TANS so should the State and Territory ICACs, who have said how important these powers are to their work in ensuring integrity in government administration, including for police.)

1.42. Second, there is at least some evidence that the law is either effective or capable of being made effective, especially in relation to the powers in Schedules 2-5, and for the TARs and TANs in Schedule 1. The publicly available material does not show that TANs have been used, because requests have been complied with
voluntarily, but the use of TARs shows TANs are capable of being effective. There is however no public evidence that the more intrusive TCN which is for the creation of a new capability has yet been used.

1.43. The real question for me is whether any of these powers are proportionate to the undoubted threats - especially of criminality - that exist. And the answer to that question must focus on the thresholds and safeguards for their use.

1.44. Where in Schedules 2-4, the powers are expanded, for example, to require a password to be provided to a mobile phone but that power is safeguarded because it is granted by the same independent person, say, a judge, that previously granted access to the underlying content, then the power is more likely to be proportionate to the threats.

1.45. In contrast, approval by agency heads or the Attorney-General is what makes the Schedule 1 powers look like outliers. I think it is wrong to minimise the significance of the new Schedule 1 powers as merely making existing laws ‘technology proof’ by giving access to content which the authorities already have. The key impetus for Schedule 1 was that content was no longer readable or comprehensible especially because of encryption.

1.46. So my clear starting point is that where the encrypted content can only be obtained by judicially approved warrant or authority, the same thresholds and levels of approval should apply for giving unencrypted access. Thus TANs and TCNs should be issued, or at least subject to a ‘double lock’ approval system, by a judge, serving or retired rather than an agency head or the Attorney.

1.47. Next, I think the same rules should apply to TARs even though they are voluntary because of their likely impact upon the rights of third parties who do not know and cannot consent to the TAR.

1.48. The next question is whether the technical complexity of what is being authorised requires senior lawyers with access to top level technical advice. I think it does and there is an excellent operating model to look to in the United Kingdom.

**IPCO**

1.49. In November, I had the privilege of meeting with the Investigatory Powers Commissioner's Office, or IPCO, in the UK. It arose from my counterpart’s report, "A Question of Trust." It is now headed-up by Sir Brian Leveson, a famous and senior ex-judge, and there are 15 senior retired judges, and some very distinguished technical advisers.

1.50. It works in this way: there is a double-lock system, so that if you can imagine a warrant or authorisation application is given first to the Minister, the same paperwork is then given to IPCO. IPCO doesn't look at all the matters the Minister looks at, for example, effects on international relations, but does ask, looking at the same material the Minister did, is the application lawful, proportionate, and reasonable? And if it's not, then the request is ineffective hence the ‘double lock’.

1.51. Having spent time with both IPCO and security and police agencies in the UK, I can say it's been very well-received, not least because it has raised the level of trust. My conversations on both sides of the Atlantic Ocean in the US and the UK, made it clear to me that IPCO was critical to the UK obtaining a CLOUD Act agreement from the United States. Australia seeks such an agreement as I noted earlier.
1.52. What if Australia wants to use something which already exists rather than create an IPCO? Well, there is something which already exists, and has done for a long time, and that is the Administrative Appeals Tribunal (AAT); it is independent of government, headed by a Federal Court judge, its Deputy Presidents can be other federal judges or senior lawyers, and it already grants some warrants, and already reviews some ASIO decisions.

1.53. So one possibility is that an application – for at least a TAN, TAR and TCN – could go for approval to the Security Division of the AAT, which is accustomed to dealing with highly sensitive or secret information. Now, a DCP which doesn’t object to a TAN or a TCN needn't appear; if it did object, for example, as to whether the request was reasonable or proportionate, or created a systemic weakness, you could resolve it at a contested hearing. You could also use one of the alternative dispute resolution processes currently available in the AAT.

1.54. Because there is a lot of technical material to be understood, the Presidential Member could, with advantage, sit with an eminent scientific or technical expert who would be appointed as a part-time member. To the extent they could publish at least some of their reasons, that would guide agencies and DCPs alike.

1.55. There would also be a central registry which would ensure the security of classified materials, and awareness of similarity with previous applications.

1.56. Appointment to the AAT of say, half a dozen distinguished technical experts whose expertise would cover the likely range of technical questions in issue is desirable, and they could also have a joint role working as consultants for the IGIS and the Ombudsman in their respective audit functions. This is effectively what happens with IPCO.

1.57. I consider that these difficult and important decisions should be made by judges of the higher courts; there may be something to be said for appointing them for a single, non-renewable term. The new bill produced today is also highly significant, as I understand it, for the first time some ASIO authorisations are to be issued by the AAT, rather than the Attorney-General. If this becomes the law it may be irresistible that the Attorney no longer issue other ASIO warrants on authority.

1.58. In the written paper I note some other matters.

1.59. [The role of the Ombudsman and the Inspector General of Intelligence and Security for police on the one hand and intelligence agencies on the other is absolutely vital. In order for them to do their job given the large number of times some of the powers in TOLA or related powers are being used I will make a series of recommendations about keeping proper statistics which are available to them so they can better perform their task. I will also recommend that there be a standard or prescribed form of notice under Schedule 1 of TOLA which will let the DCP, which will not always be a large or sophisticated corporation, understand their rights and duties and also the limitations for example on the protections available to them. I expect those categories of recommendations to be relatively uncontroversial.

1.60. The second and much more difficult category is the idea of systemic weakness or systemic vulnerability and in the case of all the powers under Schedule 1, TARS, TANs and TCNs, they can’t be used in such a way as to create a systemic weakness or vulnerability. If they do, they are invalid so the obtaining of the information by the agency would be unlawful but that invalidity also means that the protection from being sued by customers of the DCPs would also fall away so that definitions are critical.
1.61. You will see from many of the submissions to the inquiry that there is criticism of the definitions. The challenge I have set for all the DCPs and other submitters is to come up with better definitions than exist now. One way of doing so would be to give statutory examples of what is or is not for example a systemic weakness and put it in the statute rather than in a supplementary explanatory memorandum. Another option may be to very significantly alter the definitions. I invite people to come up with better definitions and justify them and I will consider them along with my technical advisers. I note there is a current bill in the Senate which does just that and which I will consider.

1.62. The other aspect of this issue is how to adjudicate a bona fide dispute between an intelligence, integrity or police agency on one hand and a DCP on the other about whether a Schedule 1 notice or request crosses the line. Such disagreements are bound to happen at some stage and it is undesirable that either the agency or the DCP have as their first call either a criminal prosecution in the case of the agency or a civil case seeking a declaration that the line has been crossed and the purported obligation need not be complied with.

1.63. In each case, in either a criminal or civil court, this would result in the disclosure or the risk of disclosure of what are likely to be current police, intelligence or integrity operations on the government side and highly sensitive intellectual and commercial property of the DCPs on the other. The courts are designed in principle to operate openly and are not designed to hear such matters in complete secrecy. I again note the potential significance of today’s Bill.

1.64. Where there is no agreement, I recommend that the Attorney General no longer have a role in relation to issuing the TCNs but rather the TANs and the TCNs can only be issued by again the Security Appeals Division of AAT constituted by in each case a presidential member and a senior member who is an eminent scientific or technical member.

1.65. A guiding principle of the exercise of any coercive power is that it must be exercised lawfully, responsibly and appropriately. These values are underpinned by the higher value of trust. Any scheme involving the use of coercive power must have the necessary checks and balances not only to ensure that agencies exercising those powers make correct and lawful decisions, but that such decisions are seen to be made. It is only through doing so that agencies will instil and inspire the community’s trust in their exercise of new powers in our sceptical age.

New Inquiry

1.66. In December last year it came to public attention that federal criminal proceedings in the ACT Supreme Court had been held in a closed court by an order made under section 22 of the National Security Information (Criminal and Civil Proceedings) Act (NSI Act). The court order prohibited the disclosure of the nature of the offending or the provisions under which the defendant had been charged or convicted.

1.67. The publicly known facts reveal that there has been an apparently unique set of circumstances whereby a person known as Alan Johns was charged, arraigned, pleaded guilty, sentenced, and served his sentence with minimal public knowledge of the details of the crime – we know only that it was for ‘mishandling classified
information’. The Attorney-General advises that ‘the matter is unique in my experience, and I am not aware of any other similar cases.’ I agree with him. Wholly closed criminal proceedings do indeed appear to be unprecedented in Australia, save possibly during the World Wars.

1.68. To be clear, this matter was quite different from cases where there are in criminal proceedings:

a. Temporary non-publication orders to protect the administration of justice, for example by keeping the fact of a conviction, or the nature of evidence given, in open court confidential, so as not to prejudice the fair trial of the accused or a co-accused;

b. Permanent non-publication and related closed court orders to protect the identities of a person whose identity is protected by common law or statute;

c. Orders made by a court setting aside a subpoena or refusing access to a document on the grounds of public interest immunity privilege in which case such material is not received into evidence at all.

1.69. Criminal proceedings, in this case involving the judicial power of the Commonwealth, differ from civil proceedings or a private arbitration not least because of the public interest in the administration of criminal justice. This means that the circumstance that the Attorney-General and the accused agreed on secrecy orders is the beginning of the argument, not the end of it. Very many accused have an interest in their criminal proceedings and sentence not being known as it adversely affects their reputation and may affect their treatment by other prisoners.

1.70. The public interest in open justice is particularly strong in criminal proceedings. I understand that the interests of justice even in criminal matters may require modification of the open justice principle: see, eg Hogan v Hench [2011] HCA 4; T v The Queen [2019] HCA 40.

1.71. I stand by my statement to the Senate this week as follows: ‘As far as we know there has never been another case, at least in peacetime in Australia, where all of it has been conducted in secret. That is something significant and different, and for my part, I would not like to see it repeated.’

1.72. In order to ensure that the law permits suppression orders which are proportionate and only made to the extent necessary, I ask whether the NSI Act should require that, or at least require the court to consider whether:

a. a contradictor, such as media interests, or a special advocate (such as is now provided for in control order matters) should be heard,

b. at least some details of the charges and orders should always be publicly known,

c. reasons should always be given by the presiding judge for the exceptional step of departing from the strong presumption of open criminal justice. I will consider whether amendments to the NSI Act or indeed any other federal statute or rule should be recommended to avoid a repetition of these apparently unique facts. I will report on this matter in my final Annual Report which I will deliver by the end of my term

1.73. I now invite submissions as to amendments to the law to avoid a repetition of these apparently unique facts.
1.74. In conclusion, I reiterate what I said in my last Lowy speech which is that I look forward to the remainder of my time as INSLM, a role in which I am privileged to serve.

Dr James Renwick CSC SC
5 March 2020

---

1 Simon Benson ‘Five Eyes closes on tech child sex deal’ https://www.theaustralian.com.au/nation/politics/five-eyes-closes-on-tech-child-sex-deal/news-story/0464b5e9e4681db8c57be0c011192830
2 The Australian 3/3/20: Police need faster access to overseas information to fight crime and keep Australians safe: Reece Kershaw.

iii By s 100.1(2) of the Criminal Code, an essential element of a terrorism offence is action that:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person’s death; or

(d) endangers a person’s life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

(I) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

iv In Graham v Minister for Immigration and Border Protection; The Puja v Minister for Immigration and Border Protection [2017] HCA 33 (6 September 2017) the plurality (Keitel CJ, Bell, Gaveller, Keane, Nettle And Gordon JJ) stated (citations omitted):

38. Resolution of the issue concerning s 75(v) of the Constitution requires a return to first principles.

39. As the plaintiff’s argument with respect to inconsistency correctly apprehended, all power of government is limited by law. Within the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies.
That constitutional precept has roots which go back to the foundation of the constitutional tradition of which the establishment of courts administering the common law formed part. By the time of the framing of the Australian Constitution, the precept had come to be associated in the context of a written constitution with the decision of the Supreme Court of the United States in *Marbury v Madison*. The precept has since come to be associated in the particular context of the Australian Constitution with the decision of this Court in *Australian Communist Party v The Commonwealth*. There Dixon J referred to the Australian Constitution as "an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed", adding that "]among these I think that it may fairly be said that the rule of law forms an assumption". There also Fullagar J observed that "in our system the principle of Marbury v Madison is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs".

Acceptance by the framers of the Australian Constitution of the principle in *Marbury v Madison* was combined with a desire on their part to avoid replication of the actual outcome in that case. The outcome had been that the Supreme Court had held that Congress lacked legislative power to authorise the Supreme Court to compel an officer of the United States to perform a statutory duty.

The upshot was the inclusion within Ch III of the Constitution of s 75(v), which confers original jurisdiction on the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, and of s 77(i) and (iii) in so far as those provisions empower the Commonwealth Parliament to confer or invest equivalent statutory jurisdiction on or in other courts. The power of a court exercising jurisdiction under, or derived from, s 75(v) to grant a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth is a power to enforce the law that limits and governs the power of that officer.

What follows from the inclusion of s 75(v) in the Constitution is that it is "impossible" for Parliament "to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition". The same is to be said of the impossibility of Parliament imposing a public duty with the intention that the duty must be performed and yet depriving this Court of authority by mandamus to compel performance of the duty imposed and of the impossibility of Parliament imposing a constraint on the manner or extent of exercise of a power with the intention that the constraint must be observed and yet depriving this Court of authority by injunction to restrain an exercise of that power rendered unlawful by reason of being in breach of that constraint.

The presence of s 75(v) thus "secures a basic element of the rule of law".

A term which is designed to cover the whole spectrum of entities and people which are involved in the communication of content and data, whether it is hardware manufacturers, software or app manufacturers, cloud providers, and telecommunications companies.

As I said in my written opening at the public hearings:

The main reforms made by Schedule 2 are as follows: a.empowering the Attorney-General to authorise ASIO, in a computer access warrant, to intercept communications for the purpose of doing anything specified in the warrant, thereby removing the need for ASIO to obtain a separate warrant under the TIA Act for the interception; b.empowering the Attorney-General to authorise ASIO, in a computer access warrant, to remove a computer or other thing from premises to do to the computer or thing anything specified in the warrant; c.empowering ASIO to remove a computer or thing from premises for the purpose of executing a computer access warrant; d.empowering ASIO to do anything...
reasonably necessary to conceal the fact that something has been done in relation to a computer under a computer access warrant or related authority; e.empowering the Attorney-General to authorise a law enforcement officer to apply for a computer access warrant at the request of a foreign government.

Schedule 3 amends the warrant powers in Part IAA the Crimes Act (Cth) for police constables in particular in respect of data held in or accessible from electronic devices. Schedule 3 does not amend any other parts of the Crimes Act, nor any other legislation. There are related powers given to the police, the Australian Border Force and ASIO, in Schedules 3, 4 and 5 which are designed for example to require a person to provide their password to their mobile phone once there is already separate authority to look at that phone. The idea of unlocking a computer or phone is readily understandable but it is extremely important for public confidence that these intrusive powers are properly regulated and subject to proper oversight.

The reforms effected by Schedule 4 concern Australian Border Force Officers. Prior to TOLA, the Customs Act empowered an ABF officer to apply to a magistrate for an ‘assistance order’ compelling a person with a particular connection to a computer to provide ‘any information or assistance it is reasonable and necessary’ to access, copy or convert into electronic form data held in a computer or data storage device. Following TOLA, that power continues to exist. Schedule 4, in essence, a.introduces a power for ABF officers to obtain a search warrant in respect of a person; b.expands the ABF’s powers in respect of electronic items and access to data in connection with the execution of a search warrant in respect of premises; c.increases the time during which a computer or data storage device moved from warrant premises by the ABF for examination or processing may be retained for that purpose; and d.amends offence provisions and maximum penalties that apply where a person fails to comply with an assistance order. 48.Schedule 5 deals the provision of assistance to ASIO, either voluntarily or under compulsion. The amendments that Schedule effects protect those who assist ASIO, by engaging in certain conduct, against civil liability for that conduct, either at the request of the Director-General or by voluntary disclosure. Further, it empowers the Director-General to request the assistance. Schedule 5 entered into force on 9 December 2018.

Law enforcement agencies, security agencies and the Department of Home Affairs contended that there are already a number of conditions applicable to the issuing of industry assistance notices that help ensure the responsible use of those notices. A primary argument raised in these submissions is that a distinction needs to be drawn between the compulsory industry notices and warrants or other like instruments. That distinction is said to be between a tool that provides ‘content’ and one that merely provides ‘access’ to content. For instance, the Department of Home Affairs submitted that industry assistance notices do not empower agencies to obtain content without an underlying warrant, but are instead merely a mechanism to ensure that whatever content is obtained under a pre-existing warrant accessible and comprehensible to the agency. For that reason, these agencies and the Department contend that it is unnecessary to require any independent or external authorisation of an industry assistance notice distinct from the independent and external authorisation of the warrant to which it relates.

These submissions also contended that there already exist relatively rigorous conditions on the issue of the compulsory industry notices, for instance through the statutory decision-making criteria, notification obligations and limitations on the scope of the power.

The security agencies and the Department of Home Affairs further contended that the executive arm of government routinely issues certain coercive warrants or instruments without any external approval (e.g., warrants issued by the Attorney-General at the request of security agencies). Some contend that this means Australia already has in place a double-lock approval mechanism, because it involves the request made by the Agency Head to be approved by an applicable Minister, potentially with the concurrence of other Ministers.

The security and law enforcement agencies also contended that their exercise of power to request the issue of various warrants and instruments is already subject to various reporting requirements, and to regular periodic review after the fact by the IGIS, the Commonwealth Ombudsman and similar agencies (depending on the agency). In the agencies’ submissions, that external review is sufficient to ensure the lawful exercise of those powers.
NEW REVIEW


An own motion review

The Independent National Security Legislation Monitor Act confers an own motion power upon the INSLM to review at any time any of the defined ‘counter-terrorism and national security legislation’, which includes the National Security Information (Criminal and Civil Proceedings) Act 2004 (NSI Act). As INSLM, I independently review the operation, effectiveness and implications of national security and counter-terrorism laws; and consider whether such laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary. My ‘Royal Commission’ like powers as INSLM give me access as of right to all relevant material regardless of national security classification. I do not consider complaints.

I recently wrote to the Attorney-General saying:

I note with interest your response to Senator Patrick’s Question on Notice 957 concerning ‘Alan Johns’. In view of the public interest in the matter, and now that the Richardson Review has been completed, I have now decided of my own motion to consider the operation in that matter of the National Security Information (Criminal and Civil Proceedings) Act 2004 and I will make any necessary recommendations arising from that review in my final annual report (parts of which may need to be classified).

The publicly known facts

Based upon a response by the Attorney-General to Question on notice no. 957 from Senator Rex Patrick, the following matters only have been officially stated or confirmed. They are the public or unclassified facts I assume for the purpose of my unclassified report on this review. There is a great deal of public speculation about the nature of the charges and the evidence supporting them. I am not authorised to disclose anything further than has been made public by the government, and no inferences should be drawn from this notice as to the true facts beyond those set out in it. Interested persons may however be assured that I will obtain, and then examine in private, the charges, evidence, submissions and transcripts of these closed proceedings. All that can be made public will be included in my final unclassified Annual Report to the Attorney-General.
1. ‘Alan Johns’ communicated confidential information contrary to a lawful obligation not to do so. The information was of a kind that could endanger the lives or safety of others. This risk remains.

2. Following an AFP investigation, the CDPP decided a prosecution was appropriate (given the Prosecution Policy of the Commonwealth, it may be assumed that the CDPP therefore considered it was in the public interest to prosecute and there were reasonable prospects of conviction).

3. The relevant offences provide that the Attorney-General’s consent is required before a prosecution can proceed. That consent was given.

4. The prosecution commenced in the ACT Magistrates Court and was ultimately heard in the ACT Supreme Court. The NSI Act was invoked to manage the protection of the national security information in the proceedings.

5. Once the NSI Act is invoked, the Attorney-General may be heard on issues relating to the disclosure and protection of national security information. The Attorney-General was represented by the Australian Government Solicitor in relation to the NSI Act.

6. The court made orders under section 22 of the NSI Act, with the consent of the relevant parties, that is, the Attorney-General and the accused, protecting the national security information. The orders provided for a mechanism for closure of the court in circumstances where highly sensitive national security information would have been disclosed, but did not prevent the defendant or his counsel from accessing the information.

7. Mr Johns was represented by counsel of his choice.

8. Mr Johns pleaded guilty to the offences. There was thus no jury trial which, given the CDPP presented an indictment, would have been by jury: Constitution s 80.

9. He was sentenced to a term of imprisonment for the offences. The term of imprisonment was two years and seven months, imposed across an aggregate of five charges. He was released from custody on recognisance to be of good behaviour for three years.

10. Consistent with the Supreme Court orders, Mr Johns may disclose the fact of his conviction and terms of his sentence and that the nature of his offending involved ‘mishandling classified information’. He may not otherwise disclose sensitive information including information that reveals the nature of his offending or the provisions against which he was charged or convicted. The Attorney-General states that ‘any further comment on this specific matter would be inappropriate in light of the court orders and the risks which led to those orders being made.’

11. The NSI Act balances the need to protect national security information with the principle of open justice and gives the court wide powers to make orders it considers appropriate about such matters. The nature of the national security information involved in this proceeding informed the Commonwealth’s position to seek protective orders. The Attorney-General advises that ‘the matter is unique in my experience, and I am not aware of any other similar cases.’

The scope of my inquiry and my request for submissions

The publicly known facts set out above reveal that there has been an apparently unique set of circumstances whereby a person was charged, arraigned, pleaded guilty, sentenced, and has served his sentence with minimal public knowledge of the details of the crime, as a result of consent orders which were not the subject of published judicial reasons. The limited facts
which are now known did not arise because the court orders so provided. Rather, the details of these closed proceedings were apparently revealed in passing in collateral civil proceedings, and as a result of questions in Parliament.

I have commenced this inquiry because of the importance of the principle of open justice including in matters which may relate to counter-terrorism or national security. Further:

1. I concur in the statement by the Attorney-General that ‘the matter is unique in my experience, and I am not aware of any other similar cases’. Wholly closed criminal proceedings do indeed appear to be unprecedented in Australia, save possibly during the World Wars.
2. To be clear, this matter was quite different from cases where there are in criminal proceedings:
   a. Temporary non-publication orders to protect the administration of justice, for example by keeping the fact of a conviction, or the nature of evidence given, in open court confidential, so as not to prejudice the fair trial of the accused or a co-accused;
   b. Permanent non-publication and related closed court orders to protect the identities of a person whose identity is protected by common law or statute;
   c. Orders made by a court setting aside a subpoena or refusing access to a document on the grounds of public interest immunity privilege in which case such material is not received into evidence at all.
3. Criminal proceedings, in this case involving the judicial power of the Commonwealth, differ from civil proceedings or a private arbitration not least because of the public interest in the administration of criminal justice. This means that the circumstance that the Attorney-General and the accused agreed on secrecy orders is the beginning of the argument, not the end of it. Very many accused have an interest in their criminal proceedings and sentence not being known as it adversely affects their reputation and may affect their treatment by other prisoners.
4. The public interest in open justice is particularly strong in criminal proceedings.
5. I understand that the interests of justice even in criminal matters may require modification of the open justice principle: see, eg Hogan v Hinch [2011] HCA 4; HT v The Queen [2019] HCA 40. An example of powers in addition to the NSI Act is s 8 of the Court Suppression And Non-Publication Orders Act 2010 (NSW) which provides:

**8 Grounds for making an order**

(1) A court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice,

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

(c) the order is necessary to protect the safety of any person,
(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the *Crimes Act 1900*),

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

6. In order to ensure that the NSI Act permits suppression orders which are proportionate and only made to the extent necessary, I ask whether the NSI Act should require that, or at least require the court to consider whether:

   a. a contradictor, such as media interests, or a special advocate (such as is now provided for in control order matters) should be heard,
   b. at least some details of the charges and orders should always be publicly known,
   c. reasons should always be given by the presiding judge for the exceptional step of departing from the strong presumption of open criminal justice.

I will consider whether amendments to the NSI Act or indeed any other federal statute or rule should be recommended to avoid a repetition of these apparently unique facts. I will report on this matter in my final Annual Report which I will deliver by the end of my term as INSLM on 30 June 2020.

Dr James Renwick CSC SC
3rd INSLM
March 2020
Mr Alan Guidon
Clerk to the Committee
Joint Committee on Justice

By Email to: justice@oireachtas.ie

23 July 2021

Your Ref: JCJ/4/5/L/06

General Scheme of the Policing, Security and Community Safety Bill

Dear Alan

Thank you for your letter of 12 July 2021 inviting submissions on the General Scheme of Policing, Security and Community Safety Bill.

As you will be aware the Government approved the General Scheme of the Bill last April for priority drafting following which Minister McEntee published the Scheme and referred it to the Joint Committee for pre-legislative scrutiny on 27 April 2021.


This landmark legislation will create a new infrastructure for policing, security and community safety in Ireland, and will replace the Garda Síochána Act 2005. Its main purposes are:

- to recognise the prevention of harm to individuals, particularly those who are vulnerable or at risk, as an explicit objective of An Garda Síochána;

to provide a new coherent governance and oversight framework for policing to -
  o strengthen the governance of An Garda Síochána through empowering the
  Garda Commissioner (as a “true CEO”) to lead the organisation and drive
  reform with the support of a non-executive board, and
  o ensure strong truly independent external public oversight through (i)
    merging the broad-ranging oversight functions of the Policing Authority and
    the inspection functions of the Garda Síochána Inspectorate in a new,
    stronger independent oversight body, and (ii) the reform of the system for
    the handling and investigation of allegations of wrongdoing by garda
    personnel together with the reorganisation of the Garda Síochána
    Ombudsman Commission;

• to make community safety a whole of government responsibility by –
  o providing a new framework at national and local level to enhance
    community safety including through the establishment of Local Community
    Safety Partnerships, and
  o placing an obligation on Departments of State and public service bodies to
    cooperate with An Garda Síochána and each other in relation to enhancing
    community safety;

• the establishment of an Independent Examiner to strengthen oversight of security.

The Scheme has been developed based on the recommendations of the CoFPI report and
having regard to other reports relevant to the justice sector. The proposed reforms
reflect the extensive consultations undertaken by Department officials with stakeholders
most directly affected including the Garda Commissioner and the policing oversight
bodies.

In view of the size and import of the Scheme - it comprises nine Parts with 252 heads
and seven schedules - an explanatory memorandum was prepared as a companion to it.
The memorandum outlines the background to the proposals, their objectives and the
main provisions of each Part, highlighting points of significant departure from the
existing statutory framework and the rationale for same. It will, I hope, be a useful aid
to the Joint Committee as it undertakes its scrutiny of these reform proposals.

For ease of reference, I enclose a copy of the memorandum provided at the time of
referral. I also enclose a copy of the Scheme which has been subject to a minor
typographical correction since publication.
Please be assured that the Department is available to provide any further assistance to the Joint Committee that may be required as it undertakes its work.

I look forward to the Joint Committee’s deliberations and its report in due course.

Yours sincerely

[Signature]
Oonagh McPhillips
Secretary General

Encl.
General Scheme of the Policing, Security and Community Safety Bill

Explanatory Memorandum
1. **Background**

In December 2018, the Government published the plan entitled *A Policing Service for our Future* to implement the Report of the Commission on the Future of Policing in Ireland (CoFPI) – *The Future of Policing in Ireland*. In that context the Government approved the preparation as a matter of priority of the General Scheme of the Policing and Community Safety Bill as recommended by CoFPI (Decision S180/20/10/1002C). The Programme for Government – *Our Shared Future* – commits to rapidly implementing the CoFPI Report and to introducing a new Policing and Community Safety Bill to redefine the functions of An Garda Síochána.

The December 2018 Government Decision also approved, in principle, the establishment of an Independent Examiner of terrorist and serious crime legislation, subject to an examination of the functions of such a role and the detail of the statutory powers that would be required for the role. That work has been completed and provision is made for the establishment of the Independent Examiner of Security Legislation in this Bill as it will complement the stronger independent external oversight regime proposed for policing. Accordingly, “security” is included in the title of the Bill to better indicate its content.

In addition to CoFPI, other reports have been considered in the development of the Scheme including the Report of the Effectiveness and Renewal Group in relation to the Department of Justice (the ERG), the reports of the Disclosures Tribunal, and reports of the Policing Authority and the Garda Síochána Inspectorate. The opportunity has also been taken to review provisions of the Garda Síochána Act 2005 not substantially affected by CoFPI and to address any issues in their operation and to modernise them where they are being restated.

In line with the Government Decision of December 2018 the Minister’s Department has consulted extensively with stakeholders most directly affected including the Garda Commissioner and the three policing oversight bodies in the course of the development of the Scheme. There will be further consultation and engagement with other Departments and key stakeholders during the drafting of the Bill.
2. Objectives of General Scheme

The Scheme provides for a new framework for policing, security and community safety aimed at improving the performance and accountability of the policing and security services to the benefit of the safety of communities. The Scheme provides that the Bill when enacted will repeal the Garda Síochána Act 2005 (as amended) in its entirety.

The main objectives of the Scheme are:

- to recognise the prevention of harm to individuals, particularly those who are vulnerable or at risk, as an explicit objective of An Garda Síochána;
- to provide a new coherent governance and oversight framework for policing that will strengthen both the management of An Garda Síochána and independent external oversight supporting clear and effective accountability and ultimately better policing;
- to make community safety a whole of government responsibility by -
  - providing a new framework at national and local level to enhance community safety including through the establishment of Local Community Safety Partnerships, and
  - placing an obligation on Departments of State and public service bodies to cooperate with An Garda Síochána and each other in relation to enhancing community safety; and
- the establishment of an Independent Examiner of Security Legislation to strengthen oversight of national security.

The governance of An Garda Síochána will be strengthened through empowering the Garda Commissioner, as the “true CEO”, to lead the organisation and drive reform. The Commissioner will be supported, and held to account for his or her performance, by a non-executive board, a corporate governance standard in the public and private sector. The additional functions of the Commissioner will, similar to the CEOs of other public sector bodies, include workforce planning, human resources and industrial relations, and finance. The Commissioner’s operational independence is made explicit. The Board of An Garda Síochána will be accountable to the Minister
for its performance. The Commissioner will continue to be required to keep the Minister and the Secretary General of the Department informed of significant matters and to account to the Minister and Government for policing and security matters as needs be.

Independent external oversight will be strengthened through the new Policing and Community Safety Authority and the reorganised Garda Síochána Ombudsman Commission.

The Policing and Community Safety Authority (the “new Authority”) will merge the broad-ranging oversight functions of the existing Policing Authority and the inspection functions of the Garda Síochána Inspectorate superseding both bodies. It will oversee and assess in an independent and transparent manner the performance of An Garda Síochána in relation to policing services but with the benefit of an in-house empowered inspection function. It will (as is the case with the Policing Authority) be required to hold meetings in public with the Garda Commissioner and the senior leadership team.

The three person Garda Síochána Ombudsman Commission will be replaced with an Ombudsman /Deputy Ombudsman model so that it will have a clear and publicly identifiable head. It will also become a vote holding body to reinforce its independence. It will have an expanded remit in terms of garda personnel and the allegations of wrongdoing by garda personnel which come within its jurisdiction to investigate. The system for the handling and investigation of allegations of wrongdoing will also be substantially reformed to support a streamlined, simplified approach with appropriate safeguards that will be to the benefit of complainants, An Garda Síochána and the wider public.

The totality of the changes contained in the Scheme - the new governance and oversight framework for An Garda Síochána, the complimentary strengthening of oversight of the wider national security area through the establishment of the Independent Examiner of Security Legislation, and the national and local structures proposed to drive interagency cooperation and community engagement to ensure that people are safe and feel safe in their communities - will see the policing and security landscape transformed in the coming years.
The framework contained in the Scheme is consistent with the constitutional requirement that the Government retains ultimate control in relation to matters of fundamental importance to the exercise of executive powers in these matters while allowing for the delegation of appropriate policing matters.

### 3. Main Provisions of the General Scheme

The Scheme consists of 9 Parts with 252 heads and 7 schedules. The substantive proposals are contained in Parts 2 to 7, the most significant of which are detailed below. Parts 1, 8 and 9 respectively concern preliminary and general matters, regulation making powers and miscellaneous matters, and consequential amendments to the statute book arising from the Scheme.

#### Part 2 An Garda Síochána (Ch. 1-11 heads 6 to 83)

The Scheme continues the Garda Síochána in being but provides that it shall be known as An Garda Síochána. This change to how the organisation is to be titled in the English language version of legislation is intended to reflect An Garda Síochána being the title used by the organisation itself and the accepted title in common usage. This Part addresses the functions of An Garda Síochána, the purpose and principles underpinning those functions, the arrangements for its governance, organisation and personnel, and the relationship with the Minister and Government.

**Functions of An Garda Síochána (Ch. 1 head 8)**

As recommended by CoFPI, the prevention of harm particularly to individuals who are vulnerable or at risk is included as a specific objective of An Garda Síochána. This recognises that much of the work of Gardaí on a daily basis, as is the case with other police services, is concerned with the non-crime related activity of providing services to people with mental health and addiction conditions, people who are homeless, children, the elderly and others at risk. The existing obligation on An Garda Síochána to cooperate with other Departments of State, agencies and other bodies is maintained with a reciprocal obligation provided for in Part 3 to support a whole of government approach to community safety. The obligation to cooperate does not confer any new rights in law on any person.
For the purposes of the Scheme, and as set out in the proposed long title, the concept of community safety can be understood to involve multi-sectoral approaches at national and local level to enhance the safety, and perception of safety, in communities through collaboration between relevant Departments of State and public service bodies and community engagement in the prevention of crime and harm.

Having regard to the emphasis on human rights as the foundation and purpose of policing, the objective of An Garda Síochána in this regard has been strengthened to include an explicit reference to protecting human rights. The language throughout the Scheme in relation to human rights has also been reinforced and the responsibilities of the Garda Commissioner and the Board in this regard made explicit.

*Board of An Garda Síochána (Ch. 2 heads 10-18)*

As recommended by CoFPI, the Scheme provides for the establishment of a non-executive Board of An Garda Síochána, a corporate governance standard across the public and private sector. The Commissioner will not be a member. As “true CEO” he or she will report to the Board and be held accountable by it for his or her performance. The benefit of the Board will be to provide assurance to the Minister – and support to the Commissioner - in relation to the internal governance of the organisation and ensuring that risks are identified at an early stage and mitigated. It will bring external expertise in corporate areas of identified need and provide an independent external perspective, supporting the Commissioner’s capacity to plan, manage and drive reform and providing robust but constructive challenge to strengthen internal decision-making capacity.

The Board will comprise 9 members including a chairperson, appointed by the Minister. It is intended that the selection will be done in accordance with the generally applicable open process for the appointment of persons to State boards. A person will be required to have sufficient experience and expertise in matters connected with the functions of An Garda Síochána, matters of organisational governance, management, public administration or financial matters to enable him or her to make a substantial contribution to the performance of An Garda Síochána. In addition to standard ineligibility provisions in relation to persons holding political office, members of garda personnel and members of the policing oversight bodies will be ineligible. Provision is made for
standard good governance arrangements including gender balance, staggered terms of appointment and limits on reappointments and for procedural matters. The Board will meet at least 6 times annually. It will be required to establish an audit committee and may establish other committees. It will be supported by a secretariat appointed by the Board, in consultation with the Commissioner, from appropriately qualified garda staff.

The functions of the Board will be to oversee the development of major corporate strategies, annual costed service plans, governance standards and controls, to approve senior appointments/dismissals (other than of the Garda Commissioner and Deputy Commissioners), to establish and implement arrangements for the management of the Commissioner’s performance, and to undertake other specific functions as set out in the Scheme. As with other such boards, the Board will have no role in relation to operational matters.

The Commissioner will be required to provide the Board with all necessary information to enable it to perform its functions effectively. Having regard to the confidentiality and secrecy attaching to certain information held by the organisation (e.g. sensitive details relating to national security infrastructure projects) the Commissioner may exclude information the disclosure of which could be prejudicial to the security of the State. This will be circumscribed by rules and procedures to be agreed by the Board and the Commissioner by way of written protocols. Having regard to the nature of the functions of the Board and its non-involvement in operational matters it is not anticipated that this will arise with any frequency.

The Board will be accountable to the Minister for its performance and will be required to inform the Minister of any matters that it considers require the Minister’s attention.

_Garda Commissioner, Deputy Garda Commissioner (Ch. 3 heads 19-24)_

The appointment of the Garda Commissioner will continue to be made by the Government as required for consistency with the executive power of the Government. Deputy Commissioners will be similarly appointed as they may on occasion be required to act as Garda Commissioner. The selection process will be undertaken by the Public Appointments Service at the request of the Minister and
following consultation with the Board and the Policing and Community Safety Authority (the successor body to the Policing Authority and Inspectorate provided for under Part 4) in relation to the recruitment process and job specifications. This approach ensures that the selection process, in line with reforms of recent years, will be conducted in accordance with best practice recruitment practice and rigorous standards of fairness and impartiality, and is, and is perceived to be, non-political. The term of appointment for the Garda Commissioner will be a period not exceeding 5 years but with the option of reappointment by the Government for a further period not exceeding 2 years following consultation with the Board and the new Authority in accordance with regulations. Provision is made for the suspension of the Commissioner or a Deputy by the Minister where there is an investigation into allegations of criminal wrongdoing or serious misconduct. The removal of either office holder is a matter for Government. The suspension or removal may be at the initiative of the Minister/Government or on the recommendation of the Board. Such decisions are subject to compliance with fair procedures and natural justice and consultation with the Board and the new Authority (in so far as the matter concerns policing services).

*Functions, duties of Garda Commissioner (Ch 4 heads 25 to 34)*

The Garda Commissioner will continue to direct and control the organisation and be responsible for carrying on and managing and controlling generally the administration and business of An Garda Síochána. The functions as set out make it clear that the Commissioner is responsible for the allocation and deployment of the resources available to him or her. They have been updated to reflect the emphasis in CoFPI on the Commissioner’s responsibility to seek to ensure the continuous improvement of policing and security services, to implement arrangements for the continuous professional development of garda personnel and to fulfil the obligations on the organisation arising under section 42 of the Irish Human Rights and Equality Act 2014. In line with the objective of empowering the Commissioner to manage the organisation, the prohibition on the Commissioner entering into contracts in relation to land is removed; instead he or she will be able to do so with the appropriate ministerial consents.

As noted above the Commissioner will be accountable to the Board for the performance of his or her functions. The Commissioner will continue to be required to account fully to the Minister and Government for policing
and security through the Secretary General of the Department and to keep the
Minister and the Secretary General informed of significant developments and any
other matters that in his or her opinion should be brought to the Minister’s or
Secretary General’s attention.
As recommended by CoFPI the operational independence of the Garda
Commissioner vis a vis the Board, the Minister and any Minister of the Government
is made explicit in the Scheme.

In relation to the strengthened oversight bodies the Commissioner will be required
to assist and cooperate with them. Although rarely used, the Scheme continues to
provide that the Minister with the approval of the
Government may issue written directives concerning any matter to An Garda
Síochána. The new Authority will (as does the Policing Authority at present) have
the power to recommend to the Minister that a directive be issued in relation to a
policing matter.

_Garda personnel (Ch 5 heads 35-48)_
Significant change is proposed in relation to the personnel of An Garda Síochána to
reflect CoFPI’s recommendations that the Garda Commissioner must be
empowered with the normal levers of control available to a CEO to lead the
organisation and to drive reform, that An Garda Síochána be treated as an
organisation with a single workforce with a common loyalty and mission, and that
efforts are made to broaden the diversity of the workforce.

The Scheme introduces the concept of “garda personnel” which comprises garda
members (including reserve members) and garda staff (formerly referred to as
civilian staff). The position adopted throughout is that the provisions of the Scheme
should apply to all personnel unless there is a compelling reason to draw a
distinction. Connected with this approach, the Scheme enables garda staff to be
recruited directly to An Garda Síochána
rather than to the Civil Service with provision made for the transfer of existing staff
subject to the making of an order by the Minister following engagement with staff
representative bodies.

The Scheme dispenses with the long standing approach of determining the
maximum number of members in each rank by Government Order and with the
Policing Authority’s approving role in relation to the number and grades of garda staff. Instead it provides that the Commissioner will determine the number and composition of the workforce on foot of periodic strategic workforce planning exercises and subject to the approval of the Minister given with the consent of the Minister for Public Expenditure and Reform. The Commissioner will also have responsibility for determining terms and conditions of garda personnel, again with the relevant ministerial consents in line with public sector norms.

In relation to the recruitment and appointment of garda personnel the approach in the Scheme is designed to ensure that the processes are independent, impartial, reflect best practice and are conducted efficiently. The approach will also support greater diversity through enabling more opportunities for open recruitment to all ranks and bring greater alignment between garda members and garda staff. In summary:

- Assistant Commissioner and chief superintendent appointments will require the approval of the Board following competitions by the Public Appointments Service - regulations will provide for the new Authority to nominate a representative to sit on selection boards,
- superintendents, inspectors and sergeants will be appointed by the Commissioner in accordance with regulations and public sector recruitment standards and processes,
- appointments to senior garda staff positions will also require the approval of the Board with the selection of all garda staff done in accordance with public sector recruitment standards and processes.

The removal of senior personnel will also require the approval of the Board.

The Board will also have a specific function to ensure that appropriate arrangements for the recruitment and appointment of members of garda personnel that comply with best practice are in place.

These changes, whereby responsibility for the selection and/or appointment of senior garda personnel is situated with the garda organisation itself rather than the new Authority, are instrumental to ensuring that the new body is focused exclusively on providing robust, truly independent, oversight of An Garda Síochána’s policing performance. The new Authority will, as part of its broad-
ranging oversight role, keep under review the arrangements for recruitment and appointments.

In addition to supporting diversity through open recruitment, the Scheme removes the reference to “before God” from the solemn declaration made by members at the time of admission. Having regard to the objective of promoting a single workforce ethos provision is also made for garda staff to give an undertaking on appointment.

Accountability and funding of An Garda Síochána (Ch 6 heads 49-65)
The Scheme provides for the determination of policing and security priorities, a 3 year strategic plan, annual service plans and annual and multi-annual capital plans which will set the parameters for the services to be provided by An Garda Síochána and support accountability in relation to its funding. The approach is designed to support a more structured, transparent relationship between An Garda Síochána and the Minister and Department with a costed annual service plan at its core as recommended by CoFPI and the ERG.

The Minister will continue to determine the security priorities while the new Authority will inherit the Policing Authority’s responsibility for determining policing priorities subject to the approval of the Minister. The continuing role of the new Authority will ensure that the policing priorities are informed by the views and values of communities.

The Board will adopt a 3 year strategic plan for submission to the Minister for approval. The new Authority will have a consultative role consistent with its remit of independent oversight of policing.

The Board will adopt an annual costed service plan for submission to the Minister for approval following the announcement of the Estimates. The Authority will have a consultative role consistent with its remit.
The Commissioner will continue to be the Accounting Officer for the Garda Vote and to be accountable to the Public Accounts Committee and other Oireachtas Committees.

The Minister’s role is consistent with the constitutional requirement that the Government retains ultimate control in relation to matters of fundamental importance to the exercise of its executive powers in this area while allowing for delegation of appropriate policing matters.

**Codes of ethics, standards of integrity, unauthorised disclosure of information (Ch 7 heads 66-68)**

The Scheme situates responsibility for the preparation of a code of ethics for members of garda personnel with the new Authority. It is considered appropriate that this responsibility which currently sits with the Policing Authority should pass to its successor. The Code established by the Policing Authority in 2016 will remain unless the new Authority decides that revision is appropriate. Provision is also made for the standards of integrity to be adhered to by Board and committee members, advisors or consultants and their employees and for the Board to prepare codes of ethics for such persons.

**Chapters 8 to 11 (heads 69 to 83)**

These Chapters restate provisions in the 2005 Act subject to certain modifications to improve their operation and align with the overall Scheme. A number of points are of note.

Chapter 8 (head 69) restates section 42 of the 2005 Act which provides for the establishment of a special inquiry relating to any aspect of the administration, practice or procedure of An Garda Síochána. The threshold for the establishment of such an inquiry is clarified and its remit is extended to encompass all garda personnel. The provision is subject to further review having regard to the experience of stakeholders of its use to date and the extent to which the process achieves its original objective of providing a relatively speedy and informal form of inquiry.

Chapter 9 (heads 70-71) restates provisions of the 2005 Act in relation to liability on the part of garda members and the provision of legal aid but transfers
responsibility for making a contribution to the legal costs of members from the Minister to the Commissioner.

Chapter 10 (heads 72-80) restates provisions of the 2005 Act in relation to international service with some amendment to better reflect the nature and scope of garda overseas service. It continues to provide for reciprocal arrangements for the secondment and exchange of members of the Police Service of Northern Ireland and of An Garda Síochána. Further consideration is being given to how these provisions may be extended to facilitate the development of reciprocal arrangements with other police services, where appropriate, having regard to the CoFPI recommendation on the greater use of secondments and exchanges to support talent management and development.

Chapter 11(81-83) restates a number of offences in the 2005 Act of causing disaffection and impersonation of a member. A new offence of driving a vehicle with blue flashing lights in a manner likely to deceive is provided for. While rare such incidents occur from time to time.

**Discipline System**
As referred to in the Government Decision of December 2018 the Garda Commissioner has completed a detailed review of the discipline system having regard to the recommendations of the Second Interim Report of the Disclosures Tribunal and CoFPI. While that review is under consideration by the Minister’s Department with a view to the development of regulations, its overarching recommendation that the current system should be replaced by a system that differentiates between misconduct and performance management issues has been reflected in the development of this Part and other Parts of the Scheme.

**Part 3 Community Safety (Heads 84 -95)**
A key principle of CoFPI is that policing is not the responsibility of An Garda Síochána and the Department of Justice alone, rather it is a shared responsibility involving other Departments and agencies and the wider community working together. Having regard to the Working Group on Community Safety established as a subgroup of the Implementation Group on Policing Reform, and further policy development work undertaken by the Minister’s Department,
the Scheme provides for a framework at national and local level to underpin a whole of government approach to promoting safer communities through preventing crime and harm. It is built around:

- a national strategy on community safety to serve as an overarching policy framework and programme of actions to guide the other parts of the framework. The strategy will be prepared by the Minister in conjunction with a number of other relevant Ministers to support a “whole of government” approach,
- a designated Cabinet Committee to provide high level political oversight,
- a national community safety steering group to provide senior leadership and direction for the implementation of the national strategy and fostering interagency cooperation,
- a national office for community safety, sitting under the steering group, headed by a director which will be the operational executive with responsibility for delivering the national strategy objectives and supporting the Local Community Safety Partnerships,
- Local Community Safety Partnerships which will replace the Joint Policing Committees to develop and implement local community safety plans that respond to the specific needs of the community. Membership will include local representatives, service providers, and a range of community representatives who will work in partnership and be supported by dedicated staff. They will also provide a forum for consultation in relation to local policing priorities,
- statutory obligations on Departments of State and other public service bodies to cooperate in the delivery of community safety and to have regard to community safety in the conduct of their own functions. As referenced above these obligations will create no new rights on the part of individuals. The wording of these obligations will be reviewed further in the course of drafting to ensure they achieve the desired objective.

Having regard to community safety being a relatively novel concept in the State it is considered desirable that the structures are capable of being adapted quickly in light of experience and emerging needs. To achieve this the Scheme sets out the policies and principles to enable the making of regulations governing the detailed functions and operation of the above mentioned entities. Learnings from the piloting of the concept of Local Community Safety Partnerships in a number of areas will inform the drafting of the Scheme and the development
of the regulations in due course. Having regard to the increased emphasis on the role of the new Authority in overseeing An Garda Síochána’s performance in relation to community safety the Scheme provides a number of formal linkages between the above mentioned entities and the new Authority.

**Part 4 Establishment and functions of Policing and Community Safety Authority (heads 96-138)**

The Scheme provides for the establishment of the Policing and Community Safety Authority - the new Authority – as a strong, truly independent policing oversight body that will combine the broad-ranging oversight function of the Policing Authority and the complementary inspection function of the Garda Síochána Inspectorate, superseding both bodies.

As envisaged in the Scheme it will oversee and assess in an independent and transparent manner the performance of An Garda Síochána in relation to policing but with the benefit of an in-house inspection function which is not available to the Policing Authority at present. The oversight role will include overseeing and accessing how An Garda Síochána is working with other public service bodies to enhance community safety.

The in-house inspection function will be strengthened with new powers to conduct unannounced visits of Garda stations and other premises under the control of the Commissioner and consistent with the remit of the new Authority in relation to policing services. These powers will be subject to agreement of a memorandum of understanding to ensure that they are conducted in a manner that does not jeopardise criminal investigations or prosecutions or affect the management of persons in custody. In addition, having regard to the dual nature of the services provided by An Garda Síochána, provision is made for the new Authority to refer a matter to the Independent Examiner for review where the Garda Commissioner declines to comply with a request for information on the grounds of the security of the State or endangerment to the life or safety of a person who has provided information in confidence.

Provision is also made for the conduct of joint inspections with other inspection bodies where that would be mutually beneficial, and subject to such other bodies being prescribed following consultation with the responsible Minister.
The new Authority may conduct inspections at its own initiative or at the request of the Minister. The Commissioner will be obliged to provide a written response setting out his or her consideration of an inspection report and what actions he or she proposes to take in relation to the report within a specified time period.

To support the new Authority in the performance of its functions the Commissioner will (as is the case in relation to the Policing Authority) be required to assist and cooperate with the body including through the provision of information, documents and attendance at meetings including not less than 4 meetings in public annually.

The new Authority will be similar to the Policing Authority in structure. It will be a body corporate with its own vote and explicit statutory independence in the performance of its functions. It will comprise 9 members including a chair representing particular areas of experience and expertise and appointed by Government following a selection process undertaken by the Public Appointments Service and resolutions of both Houses of the Oireachtas. It will, as recommended by CoFPI, replace the existing Policing Authority and Garda Síochána Inspectorate. This fresh start will ensure that the members of the new Authority are appointed with the appropriate expertise to carry out the specific range of functions. Provision is made for the transfer of staff, property, etc. from the existing bodies to support a smooth transition ensuring that the expertise built up by the bodies is retained. The precise resource requirements of the new Authority will be subject to further detailed examination of its functions in the context of the planning for the implementation of the legislation.

Part 5 Office of the Garda Síochána Ombudsman (heads 139-156)

The Scheme provides for the substantial reorganisation of the three person Garda Síochána Ombudsman Commission (GSOC). This follows a review, as recommended by CoFPI, to ensure its suitability to take on the expanded remit envisaged for it under Part 6. The body will continue in being but under an Ombudsman/Deputy Ombudsman model to ensure that the body has a clearly identifiable head for the first time. The office of Deputy is required having regard to the expanded remit but also having regard to the nature of the powers exercised by the Ombudsman (which include the power to issue a search warrant of a garda station) and the
importance of having an appropriate person to exercise such powers in the Ombudsman’s absence. The office holders will be appointed by the President on the nomination of Government and following a selection process undertaken by the Public Appointments Service. Their term of office will be 6 years with the possibility of reappointment. In order to reinforce the independence of the body provision is made for it to have its own vote. The accounting officer role will be assigned to a new chief administrative officer with the appropriate skillset for such a role.

Part 6 Complaints, incidents of concern, investigations and other matters (heads 157-190)

The Scheme significantly expands the remit of the Office of the Garda Síochána Ombudsman, and overhauls the processes for the handling of complaints and the conduct of investigations to support timely and effective resolution while safeguarding due process for all concerned.

The expansion of its remit applies to both garda personnel and matters that may be subject to its independent oversight:

- all complaints will require to be investigated by the Garda Ombudsman other than minor service level complaints (e.g. discourtesy, failure to return a call) which will be referred, where appropriate, to An Garda Síochána for resolution in accordance with published arrangements established by the Garda Commissioner following consultation with the Ombudsman;
- allegations of criminal behaviour or serious misconduct that are not the subject of complaint from the public and which are normally investigated by An Garda Síochána itself will be subject to its oversight - the Garda Commissioner will be required to notify the Ombudsman of such “incidents of concern” in accordance with protocols to be agreed and it will be for the Ombudsman to decide what action to take including whether he or she should launch an investigation where the allegations are of a criminal nature;
- the definition of “serious harm” in relation to the obligation to refer complaints or incidents concerning the death of, or serious harm to a person as a result of garda operations or while in the custody or care of An Garda Síochána is
clarified to include allegations of sexual offences and is also expanded to include allegations of abuse of power for sexual gain;
• the Garda Commissioner is empowered to refer a matter to the Ombudsman where he or she believes it to be in the public interest such as allegations of past wrongdoing;
• garda staff will be brought within its remit - this is subject to their change in status from civil servants to public servants to avoid overlap with the existing disciplinary processes that apply to the Civil Service;
• former Garda Commissioners will also come within its remit.

Under the Scheme the Ombudsman will have the power to conduct preliminary inquiries to support decisions around whether a complaint is admissible and whether the complaint or other matter warrants “formal investigation.”

The Scheme streamlines and simplifies the investigation process by providing a new single formal investigation process by which the investigating officer will have equivalent powers to that of a garda member. This will replace the current dual process which requires GSOC, on the basis of limited information and analysis, to decide at the outset whether to launch a criminal or non-criminal investigation and also requires the investigation of non-criminal matters to await the conclusion of the criminal investigation. The lawful exercise of any individual garda power will, of course, be dependent on the threshold for same being met. The overriding principles of fair procedures and natural justice will apply to any person who is the subject of such an investigation.

At the end of the investigation a report will be submitted to the Ombudsman who will decide what action is appropriate including referral of the matter to the Director of Public Prosecutions and/or to the Garda Commissioner. The Ombudsman may include recommendations in a report to the Commissioner that action should be taken under the new conduct or performance arrangements in relation to a member of garda personnel or that changes to practices, policies or procedures are required. Overall the new approach will support better decision making and more expedition in the conduct of investigations and greater transparency in the interests of the Ombudsman, An Garda Síochána, complainants and the wider public.
The obligation on the Garda Commissioner to provide information at the request of the Garda Ombudsman is strengthened to support the Ombudsman in the performance of his or her functions subject to special provisions in relation to information relating to the security of the state. Where such provisions are invoked, the Independent Examiner will have an oversight role.

In addition, provision is made for the sharing of information (in accordance with the applicable law) between the Garda Ombudsman, the new Authority and An Garda Síochána to support the effective performance of their functions. For example, the Ombudsman will be enabled to conduct research and analysis on trends in the types of cases it is dealing with and share its findings with other stakeholders.

The Scheme also seeks to strengthen oversight and accountability on the part of the Garda Ombudsman by providing for a right of review on the part of complainants in relation to certain decisions and also making it clear that the Ombudsman may review its own decisions and take any appropriate corrective action. In addition, the potential scope of a judicial enquiry into the conduct of a designated officer of GSOC is expanded to include all officers of the Garda Ombudsman, the policies and procedures of the Office and also members of garda personnel, where appropriate.

**Part 7 Independent Examiner of Security Legislation**

The Scheme provides for the establishment of the Independent Examiner of Security Legislation. This office represents a significant development in enhancing independent oversight of the use of legal powers in the area of security and allows for oversight of State offices and agencies who utilise the relevant security legislation and/or have a national security remit.

The primary function of the Independent Examiner will be to keep under review the operation and effectiveness of security legislation to ensure security legislation remains necessary and fit for purpose, and contains appropriate safeguards for protecting human rights.
The Independent Examiner will also have a general examination function in relation to the delivery of security services; and those State offices and agencies who have a security remit will be obliged to cooperate with the Examiner in the performance of his or her duties.

The Scheme also provides that the Independent Examiner will review refusals of information to oversight bodies on grounds of the security of the State and where the oversight bodies wish to appeal that decision.

The Independent Examiner will also assume the existing oversight roles carried out by designated judges (currently serving High Court judges) relating to the operation of the statutory frameworks for data retention, interception of communications and surveillance.

The Independent Examiner will report annually to the Taoiseach, and the report shall be laid before the Oireachtas. The Independent Examiner will also produce other subject matter reports as necessary for publication. It is intended that the Independent Examiner, in carrying out his or her functions, will help promote public confidence in national security measures and enhance the national security response.

Recognising that State security is an area involving highly sensitive information which must be protected and handled with care, the provisions have been crafted to ensure that sensitive information is managed accordingly.

4. Regulatory Impact Analysis

A Regulatory Impact Analysis (RIA) will be finalised and published with the Bill.

Department of Justice
27 April 2021
Policing Authority Submission to the Joint Oireachtas Committee on Justice

Policing, Security and Community Safety Bill

6 August 2021
Introduction

1. The Authority welcomes the opportunity to make this submission to the Joint Oireachtas Committee on Justice, on the General Scheme of the Policing, Security and Community Safety Bill (the Bill). The Authority has made submissions throughout the development of changes anticipated by this Bill, from its genesis in the deliberations and recommendations of the Commission on the Future of Policing in Ireland to the various iterations of the scheme of the bill developed by the Department of Justice.

2. On 7 October 2020, the Authority provided a submission on the draft General Scheme of the Policing and Community Safety Bill for Parts 1 to 4 (Part 6 which specified the future role of GSOC was addressed by a separate, later submission). This included a high level paper which addressed some key themes and concerns of the Authority at that time, namely:
   - Concern about the oversight architecture, with the proposed role of the new garda board;
   - The removal of functions from the Authority in relation to the Policing Priorities, Policing Plan and Garda Strategy Statement;
   - The removal of Authority involvement in appointments;
   - Multiple accountabilities for the Garda Commissioner; and,
   - Whether the intent of the Commission of the Future of Policing in Ireland with regard to Community Safety was being realised through the general scheme.

   A detailed annex accompanied this submission, providing observations on each head where applicable. Copies of these submission have been submitted for the Committee Members’ reference. The Authority met with representatives of the Department of Justice on 29 October to discuss the observations and again on 5 November to specifically discuss the approach to Community Safety. A new draft of the general scheme was published on 27 April 2021 and it would appear that many of the Authority observations have been adopted and found expression in the published scheme on which we are not providing comment.

   In its assessment of the various iterations of this Bill, a guiding principle for the Authority is that nothing should be done to weaken or dilute the depth and strength of the oversight of policing introduced in the 2015 Amendment Act. Its democratic and public value have steadily becoming clearer and there is no evidence of any benefit that would flow from any diminution.

3. The enactment of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act in 2015 was a sharp and necessary break with a troubled policing past. It represented a major development in the governance and oversight of the Garda Síochána. It was a clear statement of government intent to create a greater structural distance between the Department of Justice and the Garda Síochána than had previously existed. The then Minister for Justice said in the Dáil that there was a commitment ‘to a root and branch reform of the administration of justice in this country’ and the then Taoiseach described the decision to set up an independent policing authority as:

   ‘a radical change from what has applied since the foundation of the state. It is a change we intend to follow through and it will be a litmus test in many ways for the independence and authority of the new body’.

The Heads of the Policing and Community Safety Bill represent a very significant shift in public policy from that which was only brought into being in 2015. By any measure, they represent, and
perhaps more importantly, will be widely perceived as, a resiling from important elements of the external, independent, robust oversight introduced on 1 January 2016.

4. The impression, apparently held and conveyed by the Commission on the Future of Policing, that the existence and functioning of the Authority under the provisions of the 2015 Act served to limit the capacity of the Commissioner to direct and manage the Garda Síochána was unfounded and not supported by any clear evidence from the first two and a half years of the Authority’s existence. Nor has any experience in the period since then offered any such evidence. Support for the Commissioner in the management if the organisation, such as was envisaged in the 2005 Act, continues to be a highly desirable objective. But the current Scheme goes well beyond that and there is a risk that the establishment of the Board as proposed could present a confused pattern of responsibility for the Commissioner, dilute the effectiveness and clarity of the oversight arrangements and, in some circumstances, lead to duplication of effort.

5. The Authority has expressed its clear views in respect of its appointments responsibilities under the current statute in its response to the Commission’s report and in its comments on the initial draft Heads. These are very relevant to the consideration of the comments on the Heads under review. Two important issues merit restatement here. The first is that the oversight responsibilities and the other statutory functions of the Authority give it a particularly relevant perspective on the needs of the organisation and offer insights not otherwise available. The second is that contrary to the views apparently held by the Commission, the Commissioner would enjoy no greater level of involvement in the appointments process were it undertaken by PAS than is available under the Authority’s arrangements. A critical separate factor is the value of the appointments being made by a body external to the Garda Síochána. None of the comments on Heads relating to appointments should be interpreted as a change of position on these issues.

6. These observations are not for making no change in the current statutory arrangements as the Authority has indicated consistently over the past three years. Some elements of the 2015 Amendment Act merit and require change. Equally, there are a number of proposals in the Scheme that are warmly to be welcomed - some because they make important advances in the original draft Heads and some because they are valuable in themselves and important initiatives which will serve the public interest. As the substance of this response will show, there is much to welcome in the proposed measure, including the integration of the Authority and the Inspectorate in one body, with more clearly defined inspection provisions and the development of an independent security structure. There is also a movement to some greater co-ordination in the area of community safety although with less ambition and transformative potential than might have been expected and with a possible risk of greater centralisation than the Commission on the Future of Policing in Ireland would have anticipated.

7. However, the Authority has a number of noteworthy concerns in relation to some of the proposed draft provisions, in the context of the adequacy of the oversight provisions, which in its view represent a step backwards in terms of accountability of the Garda Síochána. The reporting lines for the Commissioner are now confused and involve the Minister, the Board, the PCSA and the National Office in an uncoordinated, overlapping manner which in has the very real potential to reduce public accountability and internalises key issues which should be subject to public scrutiny. These changes have been proposed without any indication or evidence base alluding to what is wrong with the current system. These will be drawn out in the following head by head commentary.
### Observations on Individual Heads

<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part 1 – Preliminary and General matters</strong></td>
<td></td>
</tr>
<tr>
<td>Heads 1 to 2</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 3 Security Services</td>
<td>There are no specific observations in relation to the head itself. However, there would be benefit in prescribing elsewhere in the bill, an agreement between the Garda Síochána and oversight bodies as to what constitutes security services and what is subject to oversight from the outset, in terms of operational functions of the Garda Síochána. Elements of policing services are carried out by the units responsible for security services. This has posed potential difficulties in retrieving information in a timely manner to inform oversight activities.</td>
</tr>
<tr>
<td>Heads 4 to 5</td>
<td>No comments</td>
</tr>
<tr>
<td><strong>Part 2 – An Garda Síochána</strong></td>
<td></td>
</tr>
<tr>
<td>Chapter 1 General</td>
<td></td>
</tr>
<tr>
<td>Heads 6 to 9</td>
<td>No comments</td>
</tr>
<tr>
<td>Chapter 2 Board of the An Garda Síochána</td>
<td></td>
</tr>
<tr>
<td>Head 10 Establishment and membership of Board</td>
<td>While it may be the intent to appoint Board members through the Public Appointments Service, the current wording of the Bill under subhead (2) is for the appointment of Board members by the Minister without a public dimension and without opportunity for individuals to express interest. This may result in negative perceptions in relation to the independence of appointments. It is preferable that competition for these appointments is conducted by an independent body and this should be explicitly specified under this head.</td>
</tr>
</tbody>
</table>
| Head 11 Role of Board                           | - The Authority is in favour of the concept of a Management Board with the appropriate expertise and experience to support the Commissioner in the management of the organisation, as envisaged in the 2005 Act. It is the Authority’s view that such a Board could be invaluable to a Commissioner for the implementation of an agenda for change within the organisation. It would provide welcome external advice and support for the key areas of finance, human resources and IT, recognising that the pattern of the development of the Garda Síochána heretofore has not focussed on the requirement to have significant levels of professional expertise in these areas within the organisation.  
- However, the role of the board in the current Scheme goes well beyond that. It appears to be based on the notion that the existence and |
<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>functioning of the Authority under the provisions of the 2015 Act served to limit the capacity of the Commissioner to direct and manage the Garda Síochána. This assertion was unfounded and not supported by any clear evidence at the time of the Commission’s work or in subsequent years.</td>
</tr>
<tr>
<td></td>
<td>Furthermore, there is a risk that the role of the Board as proposed could present a confused pattern of responsibility for the Commissioner, dilute the effectiveness and clarity of the oversight arrangements and, in some circumstances, lead to duplication of effort. In its current proposed form, it may distort the roles and relationships which are vital and exist in the current oversight architecture, established by the Act. This confusion may diminish public accountability by internalising issues which would be better dealt with through more transparent oversight mechanisms. It is the Authority’s view that the correct balance between internal and external oversight is not achieved by the proposed model.</td>
</tr>
<tr>
<td></td>
<td>If the policy position remains committed to the establishment of a Garda Board, then it is the Authority’s view that it should structure such an internal board so that its focus is exclusively on:</td>
</tr>
<tr>
<td></td>
<td>• improving and supporting the quality of the strategic management of the organisation (i.e. the expected functions associated with a non-executive board) –</td>
</tr>
<tr>
<td></td>
<td>• its proper care of the substantial funding entrusted to it;</td>
</tr>
<tr>
<td></td>
<td>• the wellbeing and accountability of all who work in the Garda Síochána;</td>
</tr>
<tr>
<td></td>
<td>• ensuring that its technological capacity meets the needs of contemporary and foreseeable demands on policing;</td>
</tr>
<tr>
<td></td>
<td>• maintaining a constant focus on data quality in all its aspects; and</td>
</tr>
<tr>
<td></td>
<td>• taking all necessary measures to ensure that its estate and its means of being present in the community meet the needs of its staff and of the people they serve.</td>
</tr>
<tr>
<td></td>
<td>The Bill in its current form grants the board a much more expansive set of functions and has the capacity to remove oversight of key organisational issues from external, public oversight. It has been posited that the proposed structure contained in the Bill is based on boards of other state bodies. However, these other bodies are considerably different from the Garda Síochána in terms of powers afforded to the organisations they supervise, the potential impact on individuals and the public as a whole and organisation track record.</td>
</tr>
</tbody>
</table>
|       | The current Bill does not facilitate public accountability of the Board itself. While it is proposed that the Board is accountable to the Minister, it is the Authority’s view that this does not create the necessary structural distance between the Department of Justice and the Garda Síochána. Moreover, the absence of reporting obligations for the Board to the Authority means its work will not be subject to external oversight and this has a very significant
Policing Authority submission to the Joint Oireachtas Committee on Justice on the Policing, Security and Community Safety Bill

<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>potential to change the incentives that underpin the public accountability of the Garda Commissioner.</td>
</tr>
<tr>
<td></td>
<td>In this head or elsewhere in the act obligations for the Board to report to the Authority should be included in order for the Authority to take an holistic approach to oversight of the Garda Síochána and have sight of those organisational issues which impact on policing performance.</td>
</tr>
<tr>
<td>Heads 12 to 18</td>
<td>No comments</td>
</tr>
<tr>
<td>Chapter 3 Garda Commissioner, Deputy Commissioner</td>
<td></td>
</tr>
<tr>
<td>Head 19 Appointment of Garda Commissioner</td>
<td>- The Authority did not support the changes proposed by this head in previous drafts. The appointment of the Commissioner (or equivalent rank) by an empowered, independent policing oversight body is best practice. No evidence has been provided for the necessity to remove this function from the Authority.</td>
</tr>
<tr>
<td></td>
<td>- In respect of this head and others concerning appointments and as per comments in the introduction to this submission, it is the Authority’s view that the oversight responsibilities and the other statutory functions of the Authority give it a particularly relevant perspective on the needs of the organisation and offer insights not otherwise available.</td>
</tr>
<tr>
<td></td>
<td>- Furthermore, contrary to the views apparently held by the Commission on the Future of Policing in Ireland, the Commissioner would enjoy no greater level of involvement in the appointments process were it undertaken by PAS than is available under the Authority’s arrangements. A critical separate factor is the value of the appointments being made by a body external to the Garda Síochána. None of the comments on Heads relating to appointments should be interpreted as a change of position on these issues.</td>
</tr>
<tr>
<td></td>
<td>- The Authority has noted the inclusion of the PCSA as a consultee in this latest draft under subhead (3) prior to undertaking a selection competition and prior to any extension beyond the initial five-year contract. However, subheads (3) and (4) represent a significant weakening of the input of the Authority in the shaping of the requirements of the position which stands at odds with the functions of the Authority as outlined at Head 104 and its roles in respect of the priorities and the service plan. At a minimum, the head should provide for the Authority to be represented on the selection board for the position of Commissioner.</td>
</tr>
<tr>
<td></td>
<td>- Subheads (6) and (7) have the potential to introduce two separate periods of uncertainty within a Commissioner’s term of office. In particular, the potential extension of 2 years to the Commissioner’s term under subhead (7) may be insufficient for the Commissioner to exercise leadership and influence the direction of the organisation, and may reduce stability of the organisation. Consideration may be given to shortening the term under</td>
</tr>
</tbody>
</table>

6
<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>subhead (6) and lengthening to the extension under subhead (7) to equate to an approximately similar maximum term.</td>
</tr>
<tr>
<td>Head 20 Appointment of Deputy Garda Commissioner</td>
<td>The Authority did not support the changes proposed by this head in previous drafts as, similar to the changes in appointing the Commissioner, no evidence has been provided for the necessity to remove this function from the Authority. The Authority has noted that its proposed replacement body, the PCSA, has been added as a consultee prior to undertaking a selection competition, in the latest draft. However, similar to observations on Head 19, this head represents a significant weakening of the input of the Authority in the shaping of the requirements of the position. At a minimum, the head should provide for the Authority to be represented on the selection board for the position of Deputy Commissioner.</td>
</tr>
<tr>
<td>Head 21 to 22</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 23 Suspension and removal of Garda Commissioner and Deputy Garda Commissioner</td>
<td>The Authority did not support the changes proposed by this head in previous drafts. The inclusion of the PCSA under subheads (3) and (7) since the last draft is welcomed. However, there should be a role for the Authority in such suspensions or removals beyond the consultation provision. If in the course of the PCSA’s oversight there is a serious issue of performance in respect of a Commissioner, the Authority should have a statutory formal recourse, beyond some informal expression of views to the Minister.</td>
</tr>
<tr>
<td>Head 24 Inquiry into any matter giving rise to notification under head 23(7)</td>
<td>- In previous drafts the Authority were not included in this head. There was no rationale provided for why the proposed PCSA would not be notified as to the findings of inquiry in relation to the Commissioner or Deputies. Even if it is determined that the PCSA is not to be involved in the suspension or removal there is no logic to it not being informed at the same time as the Board of the findings. The changes to the current draft provide for the findings of such inquiries to be shared with the PCSA inasmuch as they relate to policing services. - The head still does not include any notification for the PCSA when such a review is initiated.</td>
</tr>
</tbody>
</table>

Chapter 4 Functions, duties of the Garda Commissioner

| Heads 25 and 26 | No comments |
| Head 27 | The Authority welcomes the inclusion of this provision. |
| Head 28 | No comments |
## Policing Authority submission to the Joint Oireachtas Committee on Justice on the Policing, Security and Community Safety Bill

<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>The Authority expressed concern at the PCSAs exclusion from this head in previous drafts. The inclusion of sub-head (2) in this latest draft appears to address these concerns.</td>
</tr>
<tr>
<td>Head 30</td>
<td>The capacities provided to the Authority under Section 25 of the current act to recommend a Directive to the Minister or to receive information from the Minister were not retained for the PCSA in previous drafts. These appear to have been addressed in subheads (2) and (6) of the latest draft.</td>
</tr>
<tr>
<td>Heads 31 to 32</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 33</td>
<td>It would be very desirable to require consultation with the Authority in respect of the Public Attitudes Research, as is presently the case in the Act, or any other comparable research, such as a Culture Audit, since its outcomes represent important measures in determining performance in respect of the Priorities or Policing Plan or otherwise in evaluating effectiveness.</td>
</tr>
<tr>
<td>Head 34</td>
<td>No comments</td>
</tr>
<tr>
<td>Chapter 5 Garda Personnel</td>
<td></td>
</tr>
<tr>
<td>Heads 35 to 37</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 38</td>
<td>As per comments in the introduction to this submission and under Head 19, it is the Authority’s view that the oversight responsibilities and the other statutory functions of the Authority give it a particularly relevant perspective on the needs of the organisation and offer insights not otherwise available. - Furthermore, contrary to the views apparently held by the Commission on the Future of Policing in Ireland, the Commissioner would enjoy no greater level of involvement in the appointments process were it undertaken by PAS than is available under the Authority’s arrangements. A critical separate factor is the value of the appointments being made by a body external to the Garda Síochána. None of the comments on Heads relating to appointments should be interpreted as a change of position on these issues. - In this and other heads, the Bill removes the Authority’s role in relation to Garda appointments. Over the past five years, the Authority has successfully run independent competitions for the ranks of Superintendent and above and has approved appointments of senior garda staff. This has brought fairness, specialist knowledge, and independent oversight to the processes involved, as attested by Garda members. - Following receipt of previous iterations of the Bill, the Authority did not support the changes proposed by this head. The appointment of the senior garda members by an empowered, independent policing oversight body is</td>
</tr>
<tr>
<td>Head</td>
<td>Authority comment</td>
</tr>
<tr>
<td>------</td>
<td>-------------------</td>
</tr>
<tr>
<td>best practice and is the norm in most developed countries. No evidence has been provided for the necessity to remove this function from the Authority.</td>
<td></td>
</tr>
<tr>
<td>- The latest iteration of the Bill does leverage some of the Authority’s expertise and ensures, through the involvement of the Public Appointments Service external operation of competition for posts for Chief Superintendents and above. This appears to have resolved some of the Authority’s concerns with regard to previous drafts of the Bill.</td>
<td></td>
</tr>
<tr>
<td>- However, the PCSA should have a consultative role, at least, in determining the competences for these positions and should be represented on the selection boards.</td>
<td></td>
</tr>
<tr>
<td>Head 39 Suspension, removal of persons appointed to rank of Assistant Garda Commissioner or Chief Superintendent</td>
<td>The Authority was concerned about the PCSAs exclusion from previous iterations of this Bill. The inclusion of subheads (6) and (7) in the current draft is an improvement. However, the PCSA should be also be consulted, not just informed, in respect of any suspensions or removals under this Head.</td>
</tr>
<tr>
<td>Head 40 Inquiry into any matter giving rise to notification under head 39(3)</td>
<td>Under previous drafts the PCSA would not be notified as to the findings of inquiry in relation to the Commissioner or Deputies. This would appear to be addressed by the inclusion of subhead (6)(c).</td>
</tr>
<tr>
<td>Head 41 Appointment of persons to ranks below rank of chief superintendent and dismissal of such members for reasons of public confidence</td>
<td>- While it may be the intent that appointments under this head would be carried out through the Public Appointments Service, the current wording of the Bill specifies that the Garda Síochána would assume responsibility for appointments to these ranks. It is the Authority’s view that explicit reference is made to the role of the Public Appointments Service in this head.</td>
</tr>
<tr>
<td>- In its current form, this head removes responsibility for running competitions for the appointment of Superintendents from the Authority. Rather, for appointments to Superintendent and all other ranks below that of Chief Superintendent, fall to the Commissioner. It would appear from the draft provisions in the Bill that the Commissioner has an unfettered role, save what may be in future regulations. This is particularly concerning with regard to appointments of Superintendents. The role of the Superintendent is one which carries significant power and authority in statute. It is also the rank from which the future senior leadership of the organisation will be drawn including, possibly, future Commissioners. External involvement in the appointment of Superintendents is in the Authority’s view critical to safeguarding the future of the organisation.</td>
<td></td>
</tr>
<tr>
<td>- The Garda Síochána’s capacity to fulfil these competitions is limited, not least of all by its culture of cronyism. As reflected in the most recent</td>
<td></td>
</tr>
<tr>
<td>Head</td>
<td>Authority comment</td>
</tr>
<tr>
<td>------</td>
<td>------------------</td>
</tr>
<tr>
<td></td>
<td>culture audit in 2018, there are perceptions among the garda workforce that internal promotions were not based on meritocracy and a perception existed that favouritism and nepotism were pervasive.</td>
</tr>
<tr>
<td></td>
<td>For all ranks, the new Bill does not provide sufficient safeguards in terms of dismissals. Under the Garda Síochána Act 2005, as amended, Section 14(2)(d) only allows for dismissal of ranks below that of superintendent provided there is consent by the Authority.</td>
</tr>
<tr>
<td></td>
<td>The removal of external oversight of dismissals of all ranks under this head further reduces transparency and the assurances of fair process.</td>
</tr>
<tr>
<td></td>
<td>Heads 42 to 44</td>
</tr>
<tr>
<td></td>
<td>Head 45 Appointment of members of garda staff</td>
</tr>
<tr>
<td></td>
<td>Heads 46 to 48</td>
</tr>
<tr>
<td>Chapter 6 Accountability and funding of An Garda Síochána</td>
<td>The Authority welcomes the return of this important function to the remit of the PCSA following its removal in previous drafts. The absence of target setting, as provided for the Minister under Head 50, may reduce the impact of priority setting for the Garda Síochána.</td>
</tr>
<tr>
<td></td>
<td>Head 50</td>
</tr>
<tr>
<td></td>
<td>Head 51 Strategic plan</td>
</tr>
<tr>
<td>Head</td>
<td>Authority comment</td>
</tr>
<tr>
<td>-------</td>
<td>------------------</td>
</tr>
<tr>
<td>Head 52 Publication and implementation of approved strategic plan</td>
<td>In order to adequately fulfil its oversight role, the PCSA should also be provided with progress reports on the implementation of the strategy.</td>
</tr>
</tbody>
</table>
| Head 53 Annual Service Plan | - The diminution of the role of the Authority in the Annual Service Plan (known as the “Policing Plan” under the current Act) represents a further reduction in public accountability. The current Act allows for the Authority to approve the Plan, while leaving ownership of the Plan to the Garda Síochána. This in turn facilitates robust engagement and co-creation of the plan between the Authority and the Garda Síochána to ensure the Plan is ambitious, addresses concerns of public interest and allows for agility as the operating environment changes.  
- The capacity for the Commissioner to invite the Authority to provide views on the Annual Service Plan provides little assurance that these views will find expression in the final plan and distorts the oversight relationship between the Authority and the Commissioner. It does not allow for sufficient agency on the part of the Authority to be proactive in the provision of its views and guidance on the content and focus of the Plan. Specifically, the Authority believes that the provision of the PCSA’s views, as provided for in Subhead (6) should derive from its own statutory capacity and not at the request of the Commissioner.  
- Furthermore, the Bill does not allow for ongoing engagement between the Commissioner and the Authority during the life of the Plan to address issues as they arise and does not facilitate an agile response by the organisation.  
- Approval of the Plan under the draft provisions in the Bill switches to the Board which internalises the process and reduces public accountability and external oversight.  
- Subheads 8 and 9 allow for a situation whereby, should the Board not approve a plan, the Minister may request the Commissioner to submit a Plan without Board approval. This creates the further potential to diminish all oversight of the process.  
- Subhead 5 introduces a significant degree of political involvement from the Minister on the formation of the plan. Subhead (5)(j) compels the Commissioner, in developing the plan, to be consistent with the policies of any Minister of the Government to the extent that those policies may affect or relate to the functions of An Garda Síochána. This represents a significant change from the comparable provision in the current statute and might represent, or be perceived to represent, a significant erosion of the operational independence of the Commissioner.  
- Under subhead (10)(b), the Minister should consult with the PCSA to allow the PCSA to convey a view that would be critical in informing the Minister’s opinion in respect of the provision at 11(c). That will, in its turn, require |
Policing Authority submission to the Joint Oireachtas Committee on Justice on the Policing, Security and Community Safety Bill

<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 54 Amendment of approved annual service plan</td>
<td>that a copy of the Plan be made available to the PCSA before its approval under subhead (10)(a).</td>
</tr>
<tr>
<td>Head 55 Implementation of approved annual service plan</td>
<td>This head needs to be amended to reflect observations provided above with regard to Head 53 to ensure any amendments to the Plan continue to ensure the delivery of policing services to meet the needs of communities.</td>
</tr>
<tr>
<td>Heads 56 to 65</td>
<td>The PCSA should be in receipt of the same information as the Board and the Minister in order to ensure effective oversight and transparency.</td>
</tr>
<tr>
<td>Heads 56 to 65</td>
<td>No comments</td>
</tr>
<tr>
<td>Chapter 7 Codes of ethics, standards of integrity, unauthorised disclosure of information</td>
<td>Heads 66 to 68</td>
</tr>
<tr>
<td>Chapter 8 Special inquires relating to administration, practice or procedure</td>
<td>Head 69</td>
</tr>
<tr>
<td>Chapter 9 Liability</td>
<td>Heads 70 to 71</td>
</tr>
<tr>
<td>Chapter 10 International service and cooperation with police services, law enforcement agencies or other relevant person outside State</td>
<td>Heads 72 to 74</td>
</tr>
<tr>
<td>Head 75 Secondment from Police Service of Northern Ireland to certain ranks in Garda Síochána</td>
<td>Heads 76 to 80</td>
</tr>
<tr>
<td>Chapter 11 Offences of causing disaffection, impersonation</td>
<td>Heads 81 to 83</td>
</tr>
</tbody>
</table>

Part 3 - Community Safety

<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 84</td>
<td>No comments</td>
</tr>
</tbody>
</table>
### Policing Authority submission to the Joint Oireachtas Committee on Justice on the Policing, Security and Community Safety Bill

<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
</table>
| Head 85 | The Authority welcomes the provision for contribution by the PCSA to the strategy under subhead (3)(a).  
- However, in addition, the PCSA should be included as a consultee under subhead (6) in the event that the Government wishes to amend the strategy. |
| Head 86 National Community Safety Steering Group | Following a lack of specific reference to the PCSA in this section in previous drafts, a representative of the PCSA is now provided for on the steering group. This remains a relatively minor involvement for a body with Community Safety in its title. |
| Head 87 National Office for Community Safety | While the responsibilities of the Director to report to the PCSA are noted in Part 4, the remit of the National Office and the PCSA create the capacity for diffused accountability and complication of the oversight structure in relation to the delivery of policing services. The heads in their current form do not facilitate effective coordination and may place unnecessary burden on the Garda Síochána in terms of its oversight obligations |
| Heads 88 to 93 | No comments |
| Head 94 Staffing of Local Community Safety Partnerships | A person assigned under subhead (1) should be someone at a minimum level of seniority, especially having regard to the responsibilities envisaged under subhead (1)(b).  
- The rationale for the provision under subhead (2) is unclear and it should be considered if it is necessary for inclusion. |
| Head 95 | No comments |

### Part 4 Establishment and Functions of Policing and Community Safety Authority

| Heads 96 to 103 | No comments |
| Head 104 Objective and functions of the Authority | The Authority warmly welcomes that many of its existing functions have been retained in the proposed replacement body - Policing and Community Safety Authority (PCSA).  
- It is also welcome that the PCSA will combine the existing functions of the Authority and have the inspection functions currently in the remit of the Garda Inspectorate. This will undoubtedly allow for a more holistic approach to oversight of policing performance and organisation reform of the Garda Síochána.  
- The Authority however has concerns that the removal of its existing functions in relation to the Garda Board, Appointments of Superintendents, and the Annual Policing Plan (renamed the Service Plan) pose more risks than enhancements to the oversight of the Garda Síochána. |
<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 105</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 106</td>
<td>A provision should be considered for inclusion under this head, similar to that under head 93, subhead (3) as follows; “A statement that, in the course of a discussion at a meeting of the Authority or of any of its committees, is made in any form and without malice by a member of the Authority or by a person attending the meeting at the request of the Authority or committee is privileged for purposes of the law of defamation and so is any subsequent publication of the statement made without malice.”</td>
</tr>
<tr>
<td>Heads 105 to 109</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 110 Annual Business Plan</td>
<td>It is noted that the measures set out here for scrutiny of the Authority’s Business Plan and changes to the same do not exist for other regulatory bodies such as the Legal Services Regulatory Authority, the Property Services Regulatory Authority or the Office of the Director of Corporate Enforcement/proposed Corporate Enforcement Authority. Such provision risks being overly intrusive and could be interpreted as fettering the independence and agility of the PCSA.</td>
</tr>
<tr>
<td>Heads 111 to 113</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 114 Powers of Inspector of Policing Services</td>
<td>Consideration should be given as to whether the requirement for a memorandum of understanding under subheads (2) and (3) risks fettering the independence and agility of the PCSA’s inspection processes.</td>
</tr>
<tr>
<td>Head 115</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 116</td>
<td>Consideration should be given to including a specific time limit for the laying of reports before the Houses of the Oireachtas.</td>
</tr>
<tr>
<td>Heads 117 to 119</td>
<td>No comments</td>
</tr>
<tr>
<td>Head 120</td>
<td>The wording of subhead (2)(c) should be amended for the Director to attend “at least 1 meeting” rather than only attend one meeting.</td>
</tr>
<tr>
<td>Heads 121 to 138</td>
<td>No comments</td>
</tr>
<tr>
<td>Part 5 – Office of the Garda Síochána Ombudsman &amp; Part 6 – Complaints, Incidents of concern, investigations and other matters</td>
<td></td>
</tr>
<tr>
<td>Heads 139 to 190</td>
<td>In its submission to the Department (attached for the Committee’s reference) the Authority welcomed many aspects of the General Scheme as it related to OGO and the complaints process but highlighted a number of general and specific items of concern.</td>
</tr>
</tbody>
</table>
An overriding concern is that the volume of work which will be created for the OGO by the provisions in the general scheme is a cause for concern given GSOC’s current resource capacity. If the policy direction is to be maintained, it would seem that it would need to be accompanied by significant increased investment in staffing and specifically a considerable expansion in the number of staff with investigative expertise.

At a high level, the issues previously raised by the Authority, and any additions to the revised draft of the general scheme that address these issues, can be summarised as follows:

- The Authority highlighted that the scheme should not undermine the Commissioner’s responsibility to manage poor performance and behaviour in his role as Chief Executive. The revised Part 6 reviewed by the Authority in 2020 had already removed references to OGO receiving complaints about performance. Additional changes have been made in the latest draft including, for example to Head 143 and Head 157 which may further strengthen the role of the Commissioner in this regard.

- The Authority stressed the requirement for OGO to keep the PCSA informed. The addition of Head 174 in the latest draft requires the Garda Ombudsman to provide copies of reports of formal investigations under Head 168 to the Garda Commissioner, to the Minister or the PCSA, as appropriate with such recommendations “as he or she sees fit”. Head 229 also provides for the creation of regulations with respect to sharing of information between the Commissioner, OGO and the Authority. This may address some of these concerns but given the PCSA role in relation to contributing to the reduction of complaints (as per Head 104), a question remains as to whether this addition is sufficient.

- The Authority is very firmly of the view that there should be a similar standard of accountability for the entire garda workforce. There have been limited changes in this regard in the latest draft.

- The Authority called for an active duty to be placed on all members of the Garda workforce to (a) report wrongdoing, and (b) provide information to investigations (whether undertaken by the Garda Síochána or OGO) including a provision that to not do so constitutes an offence. The introduction of Head 171 in the latest draft places obligations on persons to provide relevant information which they hold and introduces an offence for non-compliance. However, this is more reflective of compliance with instruction rather than encouragement of submitting information by the person holding such information of their own volition. Various other heads which were present in previous drafts, and referred to interference with an investigation, are still present.

- The Authority highlighted a risk that the requirement for referrals from the Commissioner to OGO could pose a significant challenge to the Commissioner in implementing a performance management culture within
<table>
<thead>
<tr>
<th>Head</th>
<th>Authority comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>the Garda Síochána. It further highlighted that the requirement for referrals from the Commissioner to OGO could pose a significant challenge to the Commissioner in implementing a performance management culture within the Garda Síochána and proposed that some sort of triaging system could be used. It also called for a risk based approach with a review period prescribed in the legislation to allow for an examination of the effectiveness of this approach. A review has been included in Head 159 which will be conducted by the Minister and the PCSA are one of the stakeholders specified to be consulted in this process. Head 161 has also been changed in terms of the agreement of which complaints may be addressed by the Garda Síochána. In this head, and throughout, the term “performance management” has been removed and it would appear that the definitions used allow for greater leeway in this decision.</td>
</tr>
<tr>
<td></td>
<td>- The Authority cited numerous examples in the previous draft of heads which used terms such as “without delay” and “as soon as practicable” stating that more precision and specified time limits should be included. There have been no changes with regard to these observations.</td>
</tr>
<tr>
<td></td>
<td>- In the previous draft, respondents were asked to consider whether “any related matter” could also be investigated as part of an investigation instigated on foot of a protected disclosure (Head 167 in the latest draft). This was removed from the earlier draft due to concerns regarding its vagueness. The Authority suggested some qualified term, such as “any matter necessarily arising from the disclosure” could be used, however this aspect has been excluded.</td>
</tr>
</tbody>
</table>

**Part 7 - Independent Examiner of Security Legislation**

| Heads 191 to 217 | No comments |

**Part 8 Regulations and Miscellaneous Provisions**

| Heads 220 to 228 | These heads provide for the making and review of Regulations and contain a number of provisions for consultation with the various stakeholder bodies. The proposed PCSA is not among these. Given the statutory remit of the proposed PCSA the Authority is of the view that explicit reference to the PCSA should be made in the legislation under these heads. |

**Part 9 – Consequential Amendments**

| Heads 230 to 252 | No comments |
Submission to the Department of Justice and Equality on the Draft General Scheme of the Policing and Community Safety Bill

7 October 2020
Contents

Chairperson’s Foreword ........................................................................................................................................... 1

1 Introduction .......................................................................................................................................................... 7

2 Welcome for the merger with the Garda Inspectorate ..................................................................................... 7

3 Oversight Architecture ....................................................................................................................................... 8

3.1 Lack of evidence and limited rationale for a radical change ....................................................................... 8

3.2 The appropriate role of the proposed Garda Síochána Board .................................................................. 9

3.3 Functions of the Policing and Community Safety Authority ........................................................................ 11

3.4 Practical implications and risks of changing the oversight architecture ...................................................... 12

4 Appointments .................................................................................................................................................... 16

4.1 Introduction .................................................................................................................................................... 16

4.2 Appointments of senior Garda members – from Chief Superintendent and above .................................... 17

4.3 Appointments of senior Garda Staff – from Principal Officer and above ..................................................... 18

4.4 Appointments of Garda Superintendents ..................................................................................................... 18

5 Multiple accountabilities of the Garda Commissioner .................................................................................... 19

6 Out of step with other jurisdictions ................................................................................................................ 20

7 Community Safety – does it reflect the ambition of COFPI? .......................................................................... 21

Appendix 1 – Extracts from the Code of Practice for the Governance of State Bodies about the Role of a State Board ............................................................................................................................................... 23

Appendix 2 – Proposed governance and accountability framework for Ireland .............................................. 24

Annex to the Submission - Head by Head commentary
Chairperson’s Foreword

The enactment of the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act in 2015 was a sharp break with a troubled policing past. It represented a major development in the governance and oversight of the Garda Síochána. It was a clear statement of government intent. It marked a turning in public policy on policing. It created a greater structural distance between the Department of Justice and the Garda Síochána than had ever before existed. The then Minister for Justice said in the Dáil that there was a commitment ‘to a root and branch reform of the administration of justice in this country’ and the then Taoiseach described the decision to set up an independent policing authority was ‘a radical change from what has applied since the foundation of the state. It is a change we intend to follow through and it will be a litmus test in many ways for the independence and authority of the new body’.

That Act became law less than five years ago.

When the Authority responded in writing to the report of the Commission on the Future of Policing in Ireland, it identified a range of priorities and related recommendations that it warmly welcomed – the focus on Human Rights bringing new life to what the statute already contained; the proposals on community policing and on community safety; the integration of the Authority and Inspectorate in one body; the emphasis on learning and development in the Garda Síochána. It also identified a number of issues that caused it concern, among others the weakening of oversight, the lack of coherence in the proposed architecture, the uncertain role of a Garda Board.

Considering this Scheme, the Authority cannot be altogether certain that the potential for good in the Commission’s report (all of which could be fully achieved without any weakening of current oversight arrangements) can be fully realised. And it seems clear, alas, that its initial apprehensions may be more than justified. The Heads of the Policing and Community Safety Bill represent a very significant shift in public policy from that which was brought into being in 2015. By any measure they represent, and perhaps more importantly, will be widely perceived as, a resiling from important elements of the external, independent, robust oversight introduced on 1 January 2016. Like most things in life, the current arrangement is not perfect but it was a dramatic step for Ireland in developing an approach to policing oversight that was in line with modern democratic principles.

The proposed measure provides for a considerable repatriation of responsibilities to the Department of Justice and considerable re-internalisation of responsibilities within the Garda Síochána. These changes in direction, taken together, will serve to limit the range and effectiveness of the oversight arrangements that are envisaged in these Heads.

The Authority fully understands that Governments and the Oireachtas can change policy, amend or repeal legislation, alter structures, execute sharp turns in direction – even from positions adopted with considerable fanfare less than five years ago. That is how our democracy can work. But it is difficult to discern the imperative that demands the direction in policing oversight that it has now been decided to follow in the proposed measures. And it is impossible to be persuaded that all that is proposed will be for the good.

The Garda Síochána is qualitatively different from any other state body or agency. Even the health service, essential and critical to so many though it be, is not an adequate comparator. There is no organisation in the state where such a substantial proportion of its staff have the coercive and
intrusive powers that can be exercised by the more than 14,000 Garda members, acting on their individual authority.

Therefore, the character and strength of the oversight, the quality of the leadership and the arrangements for the appointment (and removal) of those who daily guide the organisation, and who have direct influence on the professional lives of all who work in the Garda Síochána, must also be qualitatively different.

The decision by the Government and Oireachtas in 2015 to move these oversight and appointment responsibilities to an external, independent Authority, while retaining a role for Government at the most senior levels, was not an accident. Nor was it an intrusion into the strategic and day to day management of the organisation. It was a recognition of the particular character of policing and a clear statement of the significance and separateness of the oversight and appointment arrangements that were required to secure the confidence of the public and to serve the interest of the same public.

In the Authority’s view, nothing in the real world has changed to warrant a departure from that crucial and very welcome policy decision.

The Heads of the Bill, more correctly perhaps the notes thereupon, cleave very closely to the Commission’s report, except where they sharply differ – and they do differ. But they resemble the Report in one particular fashion. Nowhere is there an evidence-based, coherent explanation or rationale for the changes that are proposed. Neither is any substantial body of argument offered that merits such a rapid and significant shift in oversight and governance of the Garda Síochána. Nor is there much apparent evidence of any understanding of just how the current arrangements work in practice or of what has been achieved within them.

The body of this response will engage with a range of matters of substance in the draft Heads and an Annexe will respond to each individual Head. But a number of elements should be highlighted here.

‘Internal Management’

Much is made in the notes to the Heads, as in the Commission’s report, of the extent to which it is claimed or believed that the role of the current Authority infringes upon the capacity of the Commissioner to manage the Garda Síochána, to be in a real sense its Chief Executive.

It is said or implied that the Authority engages in ‘internal management’. But there is no evidence of that. Where are the management functions of the Authority within the organisation? Where is the capacity to act that does not involve the Commissioner? Where can the Authority interpose itself between the Commissioner and the organisation? And equally importantly where is it believed the Authority has attempted so to do? Where is there other than the provision of a point of reference and consent external to the organisation in respect of a number of decisions, for example the Section 14 provision for dismissal of a garda member by the Commissioner? For the avoidance of any doubt, the Authority does not wish, and has never wished, to have any active engagement in the internal management of the Garda Síochána.

Appointments

It is apparently felt that the Commissioner is less involved in senior appointments than would be the case if some other agency had the responsibility currently exercised by the Authority. But there would be no greater level of engagement open to the Commissioner were the appointments made
through the Public Appointments Service. The Commissioner is fully involved in decisions about vacancies that require to be filled, about the skills that are required and can be a member of or represented on each and every interview panel. The increasing personal involvement of the Commissioner in the appointments process in recent years is very much welcomed. Moreover, the Authority has certain statutory capacities that greatly assist the appointments process and these may not easily be replicated in other circumstances.

Where the appointments and promotions arrangements have been of such concern within the organisation and where the Cultural Audit in 2018 revealed such a lack of confidence in internal processes, it seems counterproductive, retrogressive and no more efficient or effective to alter current arrangements.

Within the realm of appointments, particular attention has been drawn in the notes, as in the Commission’s report, to the Authority’s role in the appointment of Commissioner and Deputy Commissioners. This is portrayed as cumbersome and the capacity of the Authority to recommend to government that no appointment be made is seen as a great risk. Past and current practice do not bear out these apprehensions and the basis for their vigorous expression is not understood.

The process for the appointment of the Commissioner in 2017/18 was undertaken with great care as it was the first made under the new legislation. But to characterise it as cumbersome or excessively lengthy or otherwise unsatisfactory is not to have been part of it in any meaningful way. It worked very well, was conducted professionally by the PAS with the close involvement of the Authority; and the recommendation to Government by the Authority and the subsequent Government decision were made with all despatch and to the satisfaction of all concerned.

The competition for Deputy Commissioner conducted last year and that currently underway benefitted greatly from the earlier experience. It is the case that the Authority recommended to the Government that no appointment be made last year but that was the recommendation of the selection board and was the shared view of all concerned in the selection process. It is hardly being suggested (although that seems to be the sense of the thinking reflected in the relevant note) that such an outcome should not be contemplated in any future competition at this level.

Northern Ireland

Throughout the notes and commentary, as was the case with the Commission’s report, there is no reference to the extent to which the proposed new oversight arrangements and architecture reflect a drift from recommended best practice. In particular the growing extent to which such arrangements in this state will be out of alignment with the position in Northern Ireland is unaddressed. The Good Friday Agreement envisaged a growing equalisation of rights and protections between the two jurisdictions. It is a source of concern that in an area as important as external oversight and governance of policing, there will be a growing divergence under the proposed Scheme.

Policing Priorities

The return to the Department of the setting of the Policing Priorities is one of those areas where the closeness of relationships between the Department and the Garda Síochána is re-established – against the policy thrust of the 2015 amendment Act. The Minister has to approve the priorities as they are currently set by the Authority. That Authority process involves close engagement with the
Commissioner. There has been no suggestion that any priorities identified over the past four years were inappropriate, excessive or unwelcome to the Commissioner.

There is much to be said for there being an external involvement in the setting of policing priorities for the organisation. There is also a great deal of merit in that being external to the Minister and the Department, while perfectly properly requiring the Minister’s approval. The proposed change will not unreasonably be seen as a return to greater political direction of the focus of the Garda priorities.

It is, moreover, a move that carries not inconsiderable risk. Political risk for the Minister where the desirable distance between government and policing decisions and priority setting will be seen to be shortened. Cultural risk in that it may be perceived as reflecting a step back to past practices and be at odds with the momentum of the change programme within the Garda Síochána. Governance risk as this step, taken with some others, will suggest that the circle is closed within the Garda Síochána and between the Garda Síochána and the Department. And there may be an effectiveness risk attached to this proposal as well.

**Policing Plan**

The location of the determination of the Policing Plan within the Garda Síochána will also inevitably distort the relationship between the oversight body and the Commissioner. In circumstances where the oversight body’s only involvement with the Plan is as a statutory consultee and where the Garda Board would be entitled to reject any suggestions from the PCSA, the capacity to engage effectively with oversight of the implementation of the plan would be considerably weakened.

The Authority has always emphasised that the Plan, although approved by the Authority, is and must be seen to be the Commissioner’s Plan and must have a central role in the organisation. The proposed arrangements will lose the iterative, real-time engagement that the Authority can have with the Commissioner and his colleagues on the Plan and the capacity to make mid-course corrections or adjustments in the light of the oversight process or, as in 2020, to alter the Plan substantially when circumstances arise. The proposed statutory framework will run the real risk of being retrospective, historical and, thereby, less effective.

**Functions of the PCSA**

The extent to which there is a shift away from the present level of independent oversight is reflected in the functions that the Scheme proposes to give to the PCSA. This presents a sharp narrowing of the areas to be identified in the statute as engaging the new Authority’s role. The notes to the relevant Head suggest that the areas omitted are ‘within the remit of the body’ but are not included because it is ‘more appropriate to emphasise the matters that are of direct relevance to the public’.

This is very difficult to understand. It is, indeed, right that the matters concerned should be within the remit because they are inextricably linked to the delivery of the most effective policing service for the people. But without their inclusion in the statute, the intention of the note may be difficult to realise. And is it seriously being suggested that the public are not interested in, or do not find relevant to their concerns, the quality and appropriateness of garda training, effective performance management or the effective deployment of the resources that public funds provide? Restoring the full range of current functions would go some way towards addressing some of the concerns that are expressed in the body of this document.
Garda Board

The Authority has always supported the need for external advice and support for the key areas of finance, human resources and IT, recognising that the pattern of the development of the Garda Síochána had not focussed on the requirement to have significant levels of professional expertise in these areas within the organisation. It had considered it a matter for great regret that the advisory mechanism contained in the 2005 Act had never been utilised, seeing that as a striking missed opportunity. These views had been communicated to the various Commissioners and they were reinforced in the only meeting that a number of members of the Authority had with some members of the Commission on the Future of Policing.

The Authority still holds firmly to the need for such professional expertise within and to the value of experience, advice and support from without. On that account, it is not in principle against the notion of a Garda Board. But it has serious concerns about the thinking behind the current proposal and the role envisaged for the Board. That concern flows from the view expressed above that the Garda Síochána is qualitatively different from any other public body in the state and from the Authority’s view of the necessity to retain the extent of independent oversight that was introduced in 2016. It is inescapable that the manner in which the Garda Board is conceived in the Scheme will have implications for the nature of oversight of policing and for public confidence in the efficacy of that oversight.

If the Government is committed to the establishment of a Garda Board, then it should structure it so that its focus is exclusively on improving and supporting the quality of the strategic management of the organisation – its proper care of the substantial funding entrusted to it; the wellbeing and accountability of all who work in the Garda Síochána; ensuring that its technological capacity meets the needs of contemporary and foreseeable demands on policing; maintaining a constant focus on data quality in all its aspects; and taking all necessary measures to ensure that its estate and its means of being present in the community meet the needs of its staff and of the people they serve.

Such a Board could be invaluable to a Commissioner. It would not be in the oversight domain. It would not be a barrier to effective, external oversight. It would not be seen to stand in the way of the Garda Síochána being held to account. And it would not play the part currently envisaged in the Scheme as determining the Policing Plan. Such an approach would also allay some of the concerns about the consequences of the Scheme as it stands.

Conclusion

As the substance of this response will show, there is much to welcome in the proposed measure – the integration of the Authority and the Inspectorate in one body, with more clearly defined Inspection provisions; the development of an independent security structure; the movement to some greater co-ordination in the area of community safety although with less ambition and transformative potential than might have been expected and with a possible risk of greater centralisation; the removal of some mechanistic elements from the current statutory provisions.

But the primary focus of the Authority’s response and its advice to the Minister must be in the realm of the adequacy of the oversight provisions. It is here that it has a real sense of a step backwards, a withdrawal from the external character of the current arrangements, a return to a role for the Department, the turning away from which was a central part of the foundation stone of the 2015
Act; and the return to or internalisation within the Garda Síochána of a range of issues whose removal was also foundational in 2015.

The Authority has no interests to serve beyond its view of the public interest. Its concern is not a seeking to hold on to that to which individuals have grown accustomed. It is the bringing of almost five years of experience of what is possible to its judgement of what may be lost.

The Authority is approaching the Scheme for the Bill anew. It is not limiting itself by what it said in response to the Commission. Not least because recommendations for change are entirely different from proposals for legislation. And also, because forty percent of the membership of the Authority were not members in 2018. These views are offered in discharge of its statutory responsibilities and because of its firm belief that any move away from the rigour of the oversight mechanisms that were so recently introduced will be seen to represent a lessening of the Government’s commitment to the principles of genuine and strong oversight. And because they have the potential to slow and inhibit, rather than support and encourage the process of change to which the Commissioner is so clearly committed.

In a lecture in Queen’s University Belfast in May 2019, shortly before he ended his term of office, the then Chief Constable of the PSNI Sir George Hamilton said ‘the mechanisms of the Policing Board of Northern Ireland and the Ombudsman have been essential in building trust’. The trust of the public in policing is critical to its legitimacy and its credibility and is the only sure foundation on which enduring public confidence can be built and maintained. The key test to apply to any element of the proposed legislative framework is whether it will serve to enhance or tend to erode that crucial trust.

Bob Collins
Chairperson
1 Introduction

The Policing Authority (‘Authority’) welcomes the opportunity in this initial response to set out, at a high level, its views on the Draft General Scheme in order the help with the Department’s ongoing drafting process. There is much to be welcomed in the draft, which offers both the potential and possibility of real change and reform. The Authority in offering its views reserves the right to revisit the views expressed in this submission subsequent to any further iterations of the Draft General Scheme. This is of particular relevance given the revisions to the provisions in Part 6 dealing with the proposed Office of the Garda Síochána Ombudsman, which have only recently been provided and have not yet been considered by the Authority.

A detailed head by head commentary on individual provisions is set out in an Annex to this submission. The rest of this submission is structured as follows:

- Section 2 welcomes the merger of the Policing Authority and the Garda Inspectorate and highlights four issues in that regard which could be considered further.
- Section 3 discusses the difficulties that the Authority believes to be inherent in the oversight architecture that is proposed in the Draft General Scheme.
- Section 4 outlines the rationale for the Policing and Community Safety Authority (PCSA) to retain the appointment functions relating to senior positions within the Garda Síochána.
- Section 5 highlights the difficulties that will arise from the Draft General Scheme by imposing multiple and conflicting accountabilities on the Commissioner;
- Section 6 addresses the oversight architecture envisaged by the Draft General Scheme and cautions that it is unique, untested and increasingly adrift from that which exists in Northern Ireland, having regard to the Good Friday Agreement.
- Section 7 argues that for a body charged with the oversight of Community Safety, the Draft General Scheme provides the Policing and Community Safety Authority (PSCA) with a very limited role.

2 Welcome for the merger with the Garda Inspectorate

The Authority welcomes the proposed merger with the Garda Inspectorate to create one single integrated entity and supports many of the proposals set out in the Draft General Scheme which is further articulated in the detailed Annex to this submission.

There are four issues that would merit further consideration.

Firstly, the Authority, by its nature and because of the issues it deals with, has to be agile in its response to issues as they arise. In each year, issues have arisen that had not been contemplated in the original business plan for the year. Consequently, any requirement for the submission of an annual business plan of the PCSA would need to be premised on a requirement for such agility and the ability for timely revisions of the annual plan. While positively, the PSCA can revise that plan, an overly complicated review process could preclude an instant or immediate inspection, in response to a development or to information received by the PCSA. It is also welcomed that unannounced
inspections can be undertaken outside the plan by having advised the Commissioner of the intention.

Secondly, at several points in both the Draft General Scheme itself and the accompanying notes to the draft, reference is made to the requirement for inspections and inquiries to be carried out and reported on by the PCSA in an objective, fair and impartial manner. The Authority completely supports the concept that both inspections and the subsequent findings based on these findings should be objective and fair. However the Authority submits that the notion that the findings of the PCSA based on inspections, and the evidence uncovered as a result, should be circumscribed by a restriction to be impartial is quite the opposite to what a truly independent oversight body should do. Impartiality is defined as “treating all rivals or disputants equally” and yet the very act of articulating a finding and recommendation will, by necessity, reflect the views of the PCSA with regard to how the issue/function under inspection should be properly carried out.

Thirdly, it is well appreciated by the Garda Síochána currently that policing services and security services are at times inextricably linked. It will be important that the legislation allows sufficient flexibility to ensure that the scope of inspections can at times encompass security services, where there is a commonality to policing services.

Fourthly, the increased transparency set out in Heads 115 and 116 in relation to publication of reports of inspections or inquiries are very welcome. There may be merit in further considering the use of the term “as soon as practicable” in Head 115 and specified time limits should be considered.

3 Oversight Architecture

3.1 Lack of evidence and limited rationale for a radical change

The Policing Authority undertakes independent oversight of the Garda Síochána using an evidence-led approach to identify issues and to determine recommendations. The Garda Síochána is an evidence-led organisation with regard to the investigation of criminal acts and increasingly, with the encouragement and recommendations of the Authority, is taking an evidence-led approach in the strategic management of the organisation. It is therefore disappointing that both the Draft General Scheme and the Commission on the Future of Policing in Ireland (Commission / COFPI) on which it is based were issued with no accompanying underlying evidential basis. This is all the more concerning and perplexing given that the impact of the Draft General Scheme, if implemented as currently drafted, will essentially represent a radical reversal of a Government policy which was only determined five years ago. It is difficult to understand the impetus for such a reversal in the absence of a stated rationale or evidence and without any apparent evidence of how the current arrangements are working in practice or of what has been achieved within them.

It would seem that the impact of the Draft General Scheme would be to diminish the constructive elements and accentuate the adverse proposals emanating from the COFPI Report. The Authority has consistently maintained the view that the nature and extent of the powers given to the Garda Síochána, like any police service, demand particularly robust and transparent accountability
mechanisms. Indeed this is implicitly recognised in the current oversight arrangements involving three external agencies and a government department. Police services should not be compared with other state agencies - and governance, accountability and oversight of the Garda Síochána must be empowered, external, independent and publicly exercised, both in the public interest and to strengthen public trust and confidence in our policing service.

In its comprehensive written response to the recommendations of the COFPI Report, the Authority identified a range of priorities and related recommendations that it warmly welcomed – the focus on Human Rights bringing new life to what the statute already contained; the proposals on community policing and on community safety; the integration of the Authority and Inspectorate into one statutory body; and the emphasis on learning and development in the Garda Síochána. It also identified a number of issues that were a cause for concern, including among other things, the weakening of oversight, the lack of coherence in the proposed oversight architecture, and the uncertain role of the Garda Síochána Board (the Board).

To be clear the Authority has always been supportive of the concept of a Management Board with the appropriate expertise and experience. It is the Authority’s view that such a Board could be invaluable to a Commissioner for the implementation of an agenda for change within the organisation. The Authority’s concern lies not with the Board itself but with the possibility for confusion that arises as a result of the institutional architecture that is being proposed. This is discussed in more detail in section 3.2 below.

3.2 The appropriate role of the proposed Garda Síochána Board

The Authority believes that Garda Síochána Board (Board) offers the potential for increased management of the activities of the Garda Síochána and the performance of the Commissioner and his Senior Management Team, but without interposing it in the oversight zone. Having an experienced and effective management board to whom the Commissioner reports would bring greater focus and clarity to issues such as prudent financial management, the well-being of Garda members and the management of the Garda estate.

The Authority has been consistent in its view that performance of the Garda Síochána as an organisation has been impacted negatively precisely because the importance of strategic enablers, such as HR, ICT, training and finance, to frontline policing has been insufficiently recognised within the organisation. These enablers are intrinsically linked to the quality of the policing experienced by the public and a Board with a remit for operational support and supervision is an important addition to the capability of the organisation.

That being said, the Authority is not persuaded by the model for the Board that is proposed in the Draft General Scheme. The perspective of the Authority on this issue is that internal supervision frames things differently from external oversight. Management is directed towards results and as such the internal supervision offered by an appropriately designed and resourced management board is a valuable addition to the Garda Síochána.
The correct balance between the need for the Garda Síochána to be more business-like and the need for open and public accountability vested in an independent, empowered and external body is not achieved by the Draft General Scheme. The Authority notes that a number of potential difficulties arise with the proposed model including:

a) The insertion of a Board into the oversight loop, as proposed, unnecessarily creates the potential for confusion and overlap and could lead to a situation where the Board is effectively interposed between the Commissioner and the PCSA. Given that reporting by the Commissioner to the Board and reporting by the Board to the Minister will not operate in public, there is a considerable risk that this will reduce transparency and undermine public accountability and trust.

b) In the context of the Code of Practice for the Governance of State Bodies (2016), the Board’s mandate is necessarily and correctly inward focussed since it must act in the best interests of the organisation. The extracts from the Code of Practice for the Governance of State Bodies about the Role of a State Board are set out for reference in Appendix 1.

c) The Draft General Scheme proposes that the Board will be supported by a secretariat resourced from within the Garda Síochána and approved by the Commissioner. The potential for perceived conflicts of interest in this arrangement is apparent and operationally it could provide further significant challenges. For example any member of the Garda workforce will still fall under the command and control of the Garda Commissioner. Equally, those individuals will likely continue their career within the organisation after completing a period as part of the secretariat. At a minimum, provision in the Draft Scheme needs to include measures to protect members and staff after fulfilling this role, given the tasks they will have in pursuing and interrogating information from other parts of the organisation. Such protection would also have the benefit of giving staff in the secretariat the freedom and security to express their views and offer independent advice to the Board.

If the Government is committed to implementing the Commission’s recommendation for such a Board, then it is the Authority’s view that it should structure it accordingly. It should make the focus of the Board exclusively on the quality of the strategic management of the organisation – its proper care of the substantial public funding entrusted to it; the wellbeing and accountability of all who work in the Garda Síochána; ensuring that its technological capacity meets the needs of contemporary and foreseeable demands on policing; and taking all necessary measures to ensure that its estate and its means of being present in the community meet the needs of its staff and of the people they serve.

Such a Board could be invaluable to a Commissioner. It would not be in the oversight loop (such as the notes specifically envisage). It would not be a barrier to external oversight. It would not be seen to stand in the way of the Garda Síochána being held to account. And it would not play the part currently envisaged as the determinant of the proposed annual policing and security service plan which is to replace the current policing plan.

The Notes to the Draft Head 52 rely on section 31 of the Health Act 2004 as a rationale for the preparation of the annual policing and security service plan. The Authority submits that such a rationale is not needed since the Policing Plan is already part of the oversight architecture.
Furthermore the comparison of the Garda Síochána with the HSE is not valid for a whole range of reasons.

Drawing from the experiences of other state bodies does not suffice. The Garda Síochána is unlike any other state body. The character of the powers of individual Garda members is qualitatively different from any other official or employee in the public service. It follows that the nature and character of the oversight should be, and currently is, different.

The argument is put forward in the Draft General Scheme that the Commissioner will continue to be required to report to the PCSA as is currently the case under the 2005 Act to the Authority. The absence of accountability has not, heretofore, prevented the Commissioner being held to account by the Authority. However, the requirement for the Commissioner to be accountable to the Board on a range of governance, accountability and strategic issues currently overseen by the Authority means that in effect the “reporting” obligation of the Commissioner to the PCSA will be significantly curtailed. With the presence of a Board to which the Commissioner is accountable, there is a significant possibility that relationship with the PCSA becomes passive, removing the potential for the positive outcomes that have emerged from the dialogic process of accountability over the past five years. The inevitable risk is that the insertion of the Board, as envisaged in the Draft General Scheme, will dilute the nature of the relationship that has emerged between the Authority and the Commissioner, perhaps not immediately, but in time.

In having to report to the Authority in the absence of a Board, the Garda Síochána has had to move beyond a reporting or management framing of events to explore and understand better how and why certain events occurred and what was required to be done to avoid them happening again. This took time. It took robust engagement that was at times difficult but more often collaborative and always constructive. In this context it is legitimate to ask whether those issues examined by the Authority since its establishment would be exposed to proper scrutiny. Set out in the next section is an exploration of the practical implications and risks of changing the oversight architecture and how key matters handled by the Policing Authority might not be capable of being adequately dealt with under the proposed new oversight architecture.

### 3.3 Functions of the Policing and Community Safety Authority

As set out above, the merger with the Inspectorate and the corresponding functions are very much welcomed. However, the loss or significant dilution of a number functions are noted as unfavourable, including for example, the Authority’s role in relation to appointments and its role in relation to the Strategy Statement, Policing Plan and setting of policing priorities. These are dealt with in further detail below.

Key elements of the Authority’s existing functions, although they are identified in the notes as being within the PCSA remit are not included in the PCSA functions as outlined in Head 103. What is pronounced strengthens itself; what is not pronounced tends to non-being”[1] – therefore the

---

[1] From the Czesław Miłosz poem “Reading the Japanese Poet Issa (1762–1826)”
Authority is strongly of the view that the functions for the Policing Authority under Section 62 H.(2) (a) to

“.... keep under review the adequacy of—

i. the corporate governance arrangements and structures within the Garda Síochána,

ii. the arrangements for the recruitment, training and development of the members and members of the civilian staff of the Garda Síochána,

iii. the mechanisms in place within the Garda Síochána for the measurement of performance and accountability of such members and staff, and

iv. the arrangements for managing and deploying the resources available to the Garda Síochána so as to ensure the most beneficial, effective and efficient use of those resources,...”

be retained for the PCSA.

Much is made in the notes to the Draft General Scheme, as in the Commission’s report, of the extent to which it is claimed or believed that the role of the current Authority infringes upon the capacity of the Commissioner to manage the Garda Síochána, to be in a real sense the Chief Executive. The implication is that the Authority engages in ‘internal management’ and operates to some extent as a non-executive management board. There is no evidence to support this view. The Authority has no management functions within the organisation and engages with management issues only from an oversight perspective and in as much as the Act permits.

True oversight is inherent in governance and accountability. Thus where key oversight functions are removed from the proposed PCSA and artificially segregated between the Department of Justice and the Garda Board, the risk arises that the vision of all-embracing transparent oversight in public will not result.

3.4 Practical implications and risks of changing the oversight architecture

The Authority has confirmed many times that its approach to the oversight of performance is not mechanistic. It is concerned with the quality, impact and experience of policing. Key to this has been the longevity of attention and focus it has given to particular areas of concern that arose, and which it believed warranted, and at times demanded, that focus, in the interests of public confidence. Examples of this include its oversight of the Policing Plan and related priorities (discussed in detail below as an example), issues in respect of fixed charge notices and mandatory alcohol testing (MIT/MAT), the approach to the investigation of homicides, governance matters relating the operation of the youth diversion programme and review of the irregularities in, and governance of, financial matters in the Garda College.

The Authority’s actions are guided by the public interest. Its primary activity is oversight and that singularity of purpose allows it to persist in order to understand failures in policing performance and their implications for victims, suspects and the public. It also allows for a focus on what action is required in order to reduce and eliminate the risk of the reoccurrence of these failures. In many instances the awareness of the issues only arose as a result of the oversight work. In some cases, the Garda Síochána was not aware or only partially understood the extent of the issue until such
time as oversight required that the organisation investigate and engage more comprehensively. The Authority held the Garda Commissioner and the organisation to account, many times in public, to set out what had happened, to challenge its understanding of why it had happened and to give reassurance that these issues were being dealt with transparently and comprehensively.

Oversight by necessity frames things differently from internal supervision. Oversight is directed towards the preservation of public confidence. Internal supervision is directed towards a fiduciary duty to the organisation. The motivation, imperative and desired outcomes of each are not necessarily aligned and nor should they be. They play very different but important roles. The primary role prescribed for the Board in the Draft General Scheme relates to the supervision of the management of the organisation, rather than the quality of the policing service provided to the public or the maintenance of public confidence.

The draft legislation retains the Authority’s function to oversee performance, but there are implications for oversight, and public confidence in the efficacy of that oversight, in the current manner in which the Board is conceived.

In terms of the Homicide review, the organisation’s initial framing of what had happened was one of it being an issue of data and categorisation. The management response was that the data issues would be rectified. The oversight response was to seek assurance on the public’s behalf that the ‘data issue’ had in no way compromised the standard of investigation into the 41 deaths that had occurred. It had implications for public confidence in the Garda Síochána. Despite assurances that there were no investigative issues, the final report presented by the Homicide Review team two years on from the first discussions with the Authority found issues in a number of investigations and identified 21 actions required to eliminate the risk of these issues reoccurring. That engagement continues to ensure that the necessary remedial actions are being followed throughout.

Similarly in relation to the MIT/MAT issue, the initial framing was that the irregularities that occurred stemmed from technical issues and the absence of training. Initial estimates of the discrepancies in the number of instances involved was succeeded by numbers that showed the matter to be pervasive across the country, requiring the conscious and deliberate inputting of erroneous information by Garda members.

The trajectory of the examination of issues arising in the area of youth diversion was similar. The issues as reported were presented as ones of technical or process errors. The requirement to account moved that framing, over time and through dialogue, into one that brought up issues of culture, ethics, and systemic failings in supervision. This required the Garda Síochána to develop a response and to be held to account for its implementation. Oversight of these issues has been characterised by the need for significant robust engagement and significant time and focus. These are the characteristics which should be implicit and explicit in any oversight arrangement and which thus should offer meaningful assurance to the public that it can be confident that external, independent oversight of policing exists.

The nature of the issues critical to each of these examples are organisational, but are inseparable from policing performance and must be integrated into oversight. The draft General Scheme runs
the risk of being perceived as treating organisational management as being the preserve solely of the Board thereby undervaluing their critical impact on the delivery of policing.

There is a second significant impact of the proposed changes. While the Board offers potential to provide meaningful support, assistance and expertise to the Commissioner in the management of the organisation, the proposals, wrongly in the opinion of the Authority, conflate that management role with a role more properly exercised by an external and independent body. Such externality and independence is essential in order to ensure that the organisation is appropriately challenged to reflect the needs of the public, which may not always align with the desires of the organisation.

<table>
<thead>
<tr>
<th>The Policing Priorities and Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Policing Priorities are the measure against which the Commissioner’s Statement of Strategy and Annual Policing Plans are assessed. The Priorities set out those matters of community safety and concern which are of greatest importance to the public and towards which the public requires its policing service to direct its resources, attention and focus. The current statutory arrangements give the Authority the role of developing the Policing Priorities and this it has done based on consultation and engagement with stakeholders (including Joint Policing Committees), attention to trends and experience in other jurisdiction and information and data on both crime and public attitudes.</td>
</tr>
<tr>
<td>The experience of the Authority has been that no assumption of continuity can be made between those matters considered most important by the Community and those considered most important by the police service. The Authority has occupied an important external position in examining the tension between both perspectives and facilitating a process of discussion that challenges the police service to take cognisance of the perspective of the Community and adds weight to that voice within that discussion.</td>
</tr>
<tr>
<td>It is proposed that the determination of the policing priorities in future will be a function of the Minister. This is a proposal that carries considerable political risk for the Minister where the desirable distance between government and policing decisions and priority setting will be seen to be shortened.</td>
</tr>
<tr>
<td>The Policing Plan is the Garda Síochána’s articulation of what it will seek to achieve as an organisation in any one year and to which it will direct is resources, effort and attention. The annual plan gives practical effect to the objectives and goals identified in the organisation’s Statement of Strategy. It is also its articulation of its commitments to the Community in that year and as such it is the central document against which the Authority assesses Garda Síochána performance on behalf of the Community.</td>
</tr>
<tr>
<td>Currently the Authority has a statutory function to approve the Policing Plan. This has, each year, involved an iterative process of engagement with the Garda Síochána senior management as to the content of the Plan and the measures by which its achievement will be assessed. The Policing Plan is the Commissioner’s Plan. However, the Authority has played a critical role in bringing</td>
</tr>
</tbody>
</table>
### The Policing Priorities and Plan

External, independent challenge to the development of the Plan and the value of that external questioning, support and challenge in the process should not be underestimated.

The approval function is important for two reasons. The Authority, as an external independent body, is well positioned through its engagement with a broad range of stakeholders, to reflect and articulate the commitments it believes will deliver improved policing for the Community. The current heads envisage the Authority’s role as consultative. The approval of the Policing Plan becomes a function internal to the organisation. External challenge is lost with a resulting diminution of the ability to bring the voice of the Community into that discussion. While the Garda Síochána engages and consults with stakeholder groups, ultimately the organisation will not be challenged to reflect those needs in the Plan. The Authority has supported the Garda Síochána in most of what it has proposed within its annual Policing Plans but it has also, each year, challenged the organisation to include commitments that answer performance issues it has uncovered through its oversight work. These can be organisational, or can reflect a particular area of policing that stakeholder engagement has shown is not meeting the needs of the Community. It is difficult to understand how the loss of this external challenge will benefit the development of the annual Plan.

Secondly, the Authority as the organisation charged with the assessment of Garda performance against the Policing Plan is well placed to assess the realism of the Plan put forward - this in circumstances where the Garda Síochána recognises its own tendency to promise more than it is confident it can deliver. It is also in a position to identify cross-cutting themes that are impacting on performance and which in themselves need to become commitments in the subsequent year’s plan. The link between external assessment and external approval is sensible. The Garda Síochána maintains its ownership of the Policing Plan with no loss of the ability of informed external challenge to ensure that the organisation is responding to Community need and is tasked with realistic but stretching targets.
4  Appointments

4.1  Introduction

The proposed legislation excludes the Authority from any role in relation to Garda appointments. The Authority does not support these proposed changes and believes that it weakens the independence of the process, both actual and perceived, and removes specialist knowledge and oversight expertise from the process.

Since its establishment the Authority has successfully:

- Sanctioned 1,105 Garda staff positions;
- Made 30 Senior Garda Staff appointments at Deputy Secretary (1), Executive Director (5) and Principal Officer (24) levels; and,
- Appointed 153 individuals to Senior Ranks at Assistant Commissioner (8), Chief Superintendent (34) and Superintendent (111) ranks; and
- Utilised the services of the Public Appointments Service (PAS) to run a recruitment process to select a Garda Commissioner and as a result of that process recommended the current Commissioner for appointment by Government.

The Authority agrees that the current legislative provisions in relation to appointments in the Garda Síochána are complex, unwieldy and at times inconsistent. The Authority also agrees that the Commissioner should have delegated responsibility for managing the number and grades of staff up to and including the equivalent of Assistant Principal Officer for Garda Staff and up to Inspector for Garda Members. This should of course be within an approved Employee Control Framework (ECF), similar to other state bodies and should not have to seek sanction from the Authority or the Department of Justice and Equality and the Department of Public Expenditure and Reform unless they are outside that ECF.

If conferred with this delegated sanction, the Garda Síochána, similar to other state bodies, must be required to comply with the requirements and standards for public service recruitment processes. The organisation must also be subject to direct oversight from the Commission for Public Service Appointments in that regard, if they recruit directly instead of using PAS.

Notwithstanding all of this, it remains essential is that the proposed PCSA retains certain key responsibilities for oversight of the arrangements that the Commissioner puts in place to fulfil these delegated responsibilities in line with the current 62H (2) (a) to:

“(a) keep under review the performance by the Garda Síochána of its functions and the arrangements and strategies in place to support and enhance the performance of those functions and, in particular, shall keep under review the adequacy of—

........... (ii) the arrangements for the recruitment, training and development of the members and members of the civilian staff of the Garda Síochána, (iii) the mechanisms in place within the Garda Síochána for the measurement of performance and accountability of such members and staff, and (iv) the arrangements for managing and deploying the resources available to the Garda
4.2 Appointments of senior Garda members – from Chief Superintendent and above

The appointment of the most senior police officers by an empowered, independent policing oversight body is best practice and is the norm in most developed countries. No evidential basis has been provided to justify the need for change in an Oireachtas decision that is less than four years in effect and is working efficiently, transparently and independently.

The changes contained within the Draft General Scheme propose that the Authority will have no role in the nomination of Commissioner and Deputy Commissioner on the basis that it was “somewhat cumbersome administratively when used for the first time in 2017/2018”. Instead, the Garda Board is to have a consultative role thus removing independent oversight of the appointment of the most senior officers completely from the process. Discarding the role of an independent, impartial external body in the appointment of senior officers in order, it is suggested, to make administrative efficiencies (where there is no evidence of their absence) appears to be short-sighted. The notes to the Draft General Scheme refer to the capacity of the Authority to recommend to government that no appointment be made as a great risk to the “the policing and security of the State.” Surely the imperative, implied in the notes, to ensure that an appointment is recommended irrespective of the capability of the field of candidates, represents an equal if not greater threat. In any event, past and current practice do not bear out these apprehensions and the basis for their vigorous expression is not understood.

The remit of conducting senior competitions was transferred to the Authority in order to remove political influence and the perception of political influence from policing, in particular with regard to promotions and appointments. There was also a strongly held belief amongst the Garda workforce that bias existed in the promotions system prior to the Authority taking on the responsibility for senior competitions. A lack of trust in the promotions system and a perception of nepotism and unfairness was documented in the audit carried out by the Commission for Public Services appointments in 2015\(^1\) and this was echoed from within the organisation by Garda members and staff in the 2018 Culture Audit.\(^2\) However, recent candidate feedback on the senior competitions has confirmed that while this perceived bias existed in the past, candidates to a large degree trust the transparency and fairness of the competition process as run by the Authority, and accept the many changes and improvements that have been made over the past four years.

There is merit in including an option for the PCSA to request that the PAS run the competitions on its behalf as this is not currently legislatively possible. However, this should not be conflated with PCSA having no role in the appointment of senior police officers.

---


Finally, and importantly, the proposals are completely out of step with other policing oversight bodies (e.g. the Northern Ireland Policing Board, Scottish Police Authority and English and Welsh Police and Crime Commissioners) where the responsibility for very senior appointments from Assistant Commissioner (or equivalent) and above, lies with the oversight bodies in order to ensure public confidence in the transparency of the process.

4.3 Appointments of senior Garda Staff – from Principal Officer and above

The Authority’s function to appoint Garda Staff at Principal Officer and higher is regarded as critical in the context of the importance of ensuring specialist expertise at very senior levels in the Garda Síochána in the Corporate Services functions. The Garda Commissioner retained the ability to determine, in line with public sector recruitment rules, whether recruitment is externally run by the PAS or TLAC or through internal competitions. The Authority’s involvement has been operating without difficulty and included the Authority being invited by the Garda Síochána to be involved at the point of determining the role specification, being kept apprised of the intended recruitment process and making the final appointment. The Garda Síochána has also invited the Authority to be involved in the majority of selection boards. No evidence has been presented to amend the involvement of the oversight body in such senior appointments.

4.4 Appointments of Garda Superintendents

The Authority agrees that Assistant Principals should be the responsibility of the Garda Commissioner within the proposed framework set out in Section 4.1 above. While Superintendents are at an equivalent level to the Assistant Principal grade, the Authority considers that they merit a different focus because of the key role that they occupy in many statutory provisions and the fact that this is the grade from which the majority of more senior officers including at the highest level are likely be made.

The Authority agrees that the selection competition could be run by the PAS on behalf of the Garda Commissioner. However, in addition to its oversight of arrangements as set out in Section 4.1 above, for Superintendents, the PCSA should also:

- Approve the Job specification which sets out the knowledge, ability, suitability, experience, qualifications, training or expertise required for the position, as developed by the Garda Commissioner;
- Approve the selection process proposed by the Garda Commissioner; and
- Have the ability to nominate a member to the selection board for the competition.
5 Multiple accountabilities of the Garda Commissioner

It would appear from the Draft General Scheme that the Commissioner is accountable to both the Board and the Minister, that the Board is separately accountable to the Minister and that the Commissioner reports to the proposed PCSA and the Office of the Garda Síochána Ombudsman. The complex relationships being proposed are set out in the diagram in Appendix 2. This complexity raises a very simple pragmatic issue for the Commissioner and a potentially huge risk for the political process – who does the Commissioner contact first when an operational crisis occurs?

When the functions of the Minister in terms of approval and oversight are added to this accountability structure, the potential for political involvement and certainly the strong perception of same becomes apparent:

- The Minister will approve the annual policing and security service plan, which is to be prepared by the Commissioner within 6 weeks of the publication of the estimates. The plan must be approved by the Board before submission to the Minister;
- The Minister will approve the strategic plan, as submitted by the Board, following consultation with interested parties; and
- The Minister will set the strategic priorities, following consultation with the Garda Commissioner, the Board and the PCSA in relation to policing aspects.

As discussed earlier, if the accountability is to the Board and onward to the Minister, then it changes the relationship with the PCSA and it is difficult to see any situation where the PCSA view could have primacy over that of the Board.

In addition, the Authority submits that this reporting arrangement exposes the Minister (separately from the Department) to the perception of, and potentially the risk of, overt involvement in policing matters. This could be perceived as a return to “unwholesome Ministerial influence on policing”3, when as the Report of the Independent Review Group on the Department of Justice and Equality noted there was a “shared culture of secrecy”4.

There is also the related “cultural” risk whereby this abrupt reversal of policy could act to consolidate the influence of those, both within Garda Síochána and elsewhere, who have consistently opposed the introduction of the external, independent and accountable oversight provided by the Authority.

It would appear from the Draft General Scheme that the views expressed in the COFPI Report that oversight by the Authority acts in some way as an intrusion on the ability of the Commissioner to independently and effectively manage the strategic and non-policing related operational functions of the Garda Síochána have been accepted.

---

In the absence of any evidence to support this position and indeed in the face of the evidence to the contrary the Authority continues to argue strongly against this proposition. As noted earlier, since its establishment the Authority has fully endorsed the role of the Commissioner as the Chief Executive of the Garda Síochána as an organisation and has not played any role in the day to day management of the Garda Síochána by the Commissioner and his senior team.

The Authority, through its oversight of the governance and accountability of the Garda Síochána, has consistently worked with the Commissioner to ensure that identified and required improvements to the key enablers for organisational effectiveness - human resources management, financial management and ICT management - are implemented. Although the Commissioner may be asked to account for her/his decisions (and the Authority would submit that true independent oversight and accountability requires this) the final decision in each of these strategic areas lies with the Commissioner.

6 Out of step with other jurisdictions

The enactment of the legislation in 2015 and the devolution of power from the centre created an identified and much needed separation between the Minister for Justice and the Commissioner. This put Ireland in line with other developed nations in the common law world and importantly led to improved consistency in the structure of policing oversight in both jurisdictions on the island of Ireland. Throughout the notes and commentary to the Draft General Scheme, as was the case with the COFPI Report, there is no reference to the extent to which the new oversight arrangements and architecture reflect a drift from recommended best practice. The Authority submits that reversing “the most important single change in the governance of the Garda Síochána in its history” requires a comprehensive and substantive body of evidence.

In an attempt to provide some evidence against which to consider this proposed radical shift in current policy the Authority undertook a review of policing oversight in a number of selected comparable jurisdictions (Northern Ireland, Scotland, the U.K (London), Canada (Toronto and Ottawa), Australia and New Zealand).

In those jurisdictions where an oversight body exists (such as in Northern Ireland, Scotland and London), it is an independent body, separated from the overseen police service and to which the commissioner/chief of police is accountable with respect to a wide range of functions.

There are jurisdictions in which the commissioner/chief of police is accountable to a Minister (e.g. Australia and New Zealand). However, unlike the structure proposed in the Draft General Scheme there is no additional layer of accountability to a Board, nor a duty to report to an additional external body/Authority (such as the proposed PCSA).

The Authority found that none of the jurisdictions reviewed has a reporting structure that replicates the structure proposed in the Draft General Scheme. It is the view of the Authority that the risk of

---

5 The then Minister for Justice and Equality Ms. Frances Fitzgerald in the Dáil Éireann debate - Thursday, 15 May 2014
poor outcomes where independent, accountable and transparent oversight of policing is lacking is too high to warrant such an experimental approach to the design of new oversight structures.

The Authority has also compared the oversight arrangements proposed in the Draft General Scheme to policing oversight in Northern Ireland since one of the imperatives to the reform of oversight in 2015 was the need to ensure greater consistency across both jurisdictions on the island. The comparison shows that the concentration of power will rest with the Minister in Ireland compared to Northern Ireland where the Northern Ireland Policing Board retains the tools to ensure that its vision of oversight is delivered by the policing service. The Good Friday Agreement envisaged a growing equalisation of rights and protections between the two jurisdictions. It is a source of concern that in an area as important as external oversight and governance of policing, there will be a growing divergence under the proposed Draft General Scheme. The extent to which the oversight arrangements and architecture in this state will be out of alignment with the position in Northern Ireland as a result of the proposals contained in the Draft General Scheme is not addressed in the commentary.

7 Community Safety – does it reflect the ambition of COFPI?

The Authority welcomes the movement towards better co-ordination in the area of community safety. It does seem however that the proposals in the scheme are much less ambitious and have much less transformative potential than the COFPI anticipated and recommended.

The Authority’s engagement on this issue with those working at community level has repeatedly found support for legislation that will mandate a requirement for multi-agency cooperation that is meaningful and inclusive. Coupled with that support however has been a caution that the resulting structures do not place limitations and requirements of a type that practically preclude and/or smother the very community work it attempts to engender. Any structures arising from the legislation cannot be inimical to the ethos and mode of working at community level and yet expect to benefit from the knowledge and expertise that exists within the groups and organisations working on the ground. The approach and structure proposed in the Draft General Scheme appears to be very ‘top-down’ and centralised and runs contrary to a meaningful and inclusive approach at community level. The inclusion of ‘Community Safety’ in the new body’s title suggests a far greater role and function in relation to community safety than is realised in the Draft General Scheme. Under the current proposals this seems quite mechanistic and the PCSA will have a very limited capacity to exercise any real influence or to have any meaningful involvement in the implementation of policy apart from the attendance by the National Director at PCSA meetings and the right to attend meetings of local bodies.

The Draft General Scheme provides that the role of the PCSA is to oversee the performance of the Garda Síochána in relation to its activities to enhance community safety. This doesn’t seem to add anything meaningful to what the existing Authority can do. For example, the Authority currently oversees Garda Síochána performance in relation to its contribution on interagency working for such national strategies as roads or drugs. Yet oversight of Community Safety by the PSCA was a
significant tenet of the Commission’s report and the recommendations which Government accepted – yet this enhancement doesn’t find expression in the Draft General scheme. The only additional function is the obligation of the Director of the National Office for Community Safety to attend meetings on request and to answer questions.

This runs the risk of building public expectations on something that cannot be delivered by the PCSA. The PCSAs functions are of an essentially tangential nature in terms of the structures, strategy and accountability for community safety as set out in the Draft General Scheme. The Draft General Scheme should be more ambitious to the recommendations of COFPI in this regard.

Regarding the proposed Local Community Safety Partnerships the Authority foresees a number of potential imbalances in the proposed structures, such as:

- While there will be a local community safety plan, it would appear that the Garda Síochána are the only specified body who will be held accountable to the partnership for its performance under the Policing Plan. No other community safety actor will be potentially called to account against their local plans; and
- Reference is made to the importance of ‘bottom up’ approaches, yet there is little mention of the local fora or any statutory indication of how that is to be safeguarded or achieved.
Appendix 1 – Extracts from the Code of Practice for the Governance of State Bodies about the Role of a State Board

The Board is collectively responsible for leading and directing the State body’s activities. While the Board may delegate particular functions to management the exercise of the power of delegation does not absolve the Board from the duty to supervise the discharge of the delegated functions. All board members have a fiduciary duty to the State body in the first instance (i.e. the duty to act in good faith and in the best interests of the state body).

The principal fiduciary duties are:

1. to act in good faith in what the Board member considers to be the interest of the company;
2. to act honestly and responsibly in relation to the conduct of the affairs of the company;
3. to act in accordance with the company’s constitution and exercise his or her powers only for the purposes allowed by law;
4. not to benefit from or use the company’s property, information or opportunities for his or her own or anyone else’s benefit unless the company’s constitution permits it or a resolution is passed in a general meeting;
5. not to agree to restrict the Board member’s power to exercise an independent judgment unless this is expressly permitted by the company’s constitution;
6. to avoid any conflict between the Board member’s duties to the company and the Board member’s other interests unless the Board member is released from his or her duty to the company in relation to the matter concerned;
7. to exercise the care, skill and diligence which would be reasonably expected of a person in the same position with similar knowledge and experience as a Board member. A Board member may be held liable for any loss resulting from their negligent behaviour; and
8. to have regard to interests of the company’s members.

The powers of governance and management of a company are delegated by the members of the company to the Board and the board owe their duties, first and foremost to the company.
Appendix 2 – Proposed governance and accountability framework for Ireland

Ireland – Proposed Governance/Accountability/Reporting Framework

The PCSA will have the power to question the Garda Commissioner and senior leadership team in public

* On policing performance issues
** Former GSOC with a new structure and a broader remit

Independent Examiner

Oversee GS performance relating to policing services

Reviewing objectives in the annual policing and security plan, as they relate to policing services associated with the national

Undertake inspections/inquiries on its own initiative or at the request of the Minister. Provision is also made for joint inspections with other relevant inspections bodies.

Specific Functions

- Assist and co-operate with the PCSA
- Appear at public and private meetings with the PCSA
- Provide reports to the PCSA as its requests

National Office for Community Safety

PCSA

OGSO**

Reporting to

Reporting to

Reporting to

Internal Garda Board

Accountable to

Accountable to

Accountable to

Accountable to

Minister for Justice

Garda Commissioner

The Garda Síochána

Government

JOC Justice & Equality

Oireachtas Committee
Annex to the Submission to the Department of Justice and Equality on the Draft General Scheme of the Policing and Community Safety Bill

7 October 2020
1. Introduction

This paper provides observations on each head of the Draft General Scheme of the Policing and Community Safety Bill for Parts 1 to 4. It is structured as follows:

- Section 2 sets out the views of the Authority in relation specifically to Head 103 - Objective and Functions of Authority.
- Section 3 offers some observations on Part 1 of the Draft General Scheme dealing with Preliminary and General Matters.
- Section 4 looks at Part 2 of the Draft General Scheme which deals with the role of the Garda Síochána.
- Section 5 provides some remarks on Part 3 – Community Safety.
- In section 6 a number of detailed comments are provided regarding Part 4 that deal with the Establishment and Functions of the Policing and Community Safety Authority.

Observations have been categorised as follows:

<table>
<thead>
<tr>
<th>Color</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Red</td>
<td>These are Heads or Subheads where significant change would be required to address concerns expressed.</td>
</tr>
<tr>
<td>Amber</td>
<td>These are heads where observations or queries would only present a minor change to the relevant Head or Subhead</td>
</tr>
<tr>
<td>Green</td>
<td>These are heads which are welcomed by the Authority, carried over from the extant Act and are not seen as requiring change or where there is no particular observations which would materially affect sufficient and appropriate oversight of policing in Ireland.</td>
</tr>
</tbody>
</table>
2. Head 103 - Objective and Functions of Authority

Comparing to Section 62H of the Act, the loss or significant dilution of a number functions are noted as unfavourable, namely:

- 62H 1(b) The Authority’s role in relation to appointments; and
- 62H 1(d) and 1(e) The Authority’s role in relation to the Strategy Statement and Policing Plan respectively, and related setting of policing priorities under Section 20.

Additionally, a number of other functions which are contained under 62H are also no longer present. For example with regard to the roles under 62H 2(a) and (b) it is understood that much of this responsibility will transfer to the board. This is discussed in more detail in other sections of this response.

The function regarding the Code of Ethics in 62H is not present under this head but is addressed under Head 65, similar to Section 17 of the Act and is welcomed.

The function under 62H 1(f) and in reference to Sections 35 and 36 of the Act regarding the Authority’s role in relation to JPCs is no longer present. This has transitioned into role for the National Office for Community Safety under Head 86 for the local community safety partnerships, and is addressed elsewhere in this document.

A number of other functions have changed and are reflected in the below table along with responses to the scope and nature of each performed function.

<table>
<thead>
<tr>
<th>Area</th>
<th>Function</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>General oversight</td>
<td>(a) to further its objective under subhead (1) as far as practicable...</td>
<td>This function is broadly similar to that contained in the Act and additions are accepted. The wording of “as far as practicable” when practicability is diminished by the overall structure presented in this bill is addressed elsewhere in this submission.</td>
</tr>
<tr>
<td></td>
<td>(1) The objective of the Authority is to oversee and assess in an</td>
<td></td>
</tr>
<tr>
<td></td>
<td>independent and transparent manner the performance by the Garda</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Síochána of its functions relating to policing services in</td>
<td></td>
</tr>
<tr>
<td></td>
<td>order to support the effective provision of such services to the</td>
<td></td>
</tr>
<tr>
<td></td>
<td>benefit of the safety and wellbeing of the public.</td>
<td></td>
</tr>
<tr>
<td>Review of Performance</td>
<td>(b) to keep under review the performance by the Garda Síochána of its</td>
<td>The wording of this subhead is unexceptional. However, its effect, in respect of b (i), i.e. the oversight of the policing plan will be considerably limited by the changes made elsewhere</td>
</tr>
<tr>
<td></td>
<td>functions relating to policing services and the arrangements and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>strategies in place to support</td>
<td></td>
</tr>
<tr>
<td>Area</td>
<td>Function</td>
<td>Response</td>
</tr>
<tr>
<td>------</td>
<td>----------</td>
<td>----------</td>
</tr>
<tr>
<td></td>
<td>and enhance the performance of those functions and, in particular to keep under review - (i) the delivery of the objectives of the annual policing and security service plan approved under head 52 insofar as it concerns policing services, and (ii) the delivery of the objectives of the national community safety strategy</td>
<td>to the arrangements for determining and approving the plan.</td>
</tr>
<tr>
<td>Inspections</td>
<td>(c) to carry out at its own initiative or at the request of the Minister inspections or inquiries in relation to any particular aspects of the operation and administration of the Garda Síochána (including in relation to its cooperation with other public service bodies to enhance community safety) and make recommendations for any action by the Garda Commissioner or the Minister that the Authority considers necessary</td>
<td>The combining of the functions of the Garda Inspectorate and the Policing Authority has been welcomed.</td>
</tr>
<tr>
<td>Joint Inspections</td>
<td>(d) to carry out joint inspections or inquiries as provided for under head 114</td>
<td>The capacity to conduct joint inspections is welcomed.</td>
</tr>
<tr>
<td>Recommendations from Inspections...</td>
<td>(e) to advise on, and monitor the implementation of any recommendations arising from such inspections or inquiries as it considers appropriate or at the request of the Minister</td>
<td>This element is welcomed.</td>
</tr>
<tr>
<td>Area</td>
<td>Function</td>
<td>Response</td>
</tr>
<tr>
<td>------</td>
<td>----------</td>
<td>----------</td>
</tr>
<tr>
<td><strong>Advise on Reviews from other bodies</strong></td>
<td>(f) to advise on, and monitor the implementation by the Garda Síochána of any recommendations arising from reviews or inquiries carried out by bodies other than the Authority as it considers appropriate or at the request of the Minister;</td>
<td>This is an appropriate function for the new body.</td>
</tr>
<tr>
<td><strong>Promote Policing Principles</strong></td>
<td>(g) to promote the policing principles;</td>
<td>No change has been made to this function and this is welcome.</td>
</tr>
<tr>
<td><strong>Promote Policing Standards</strong></td>
<td>(h) to promote professional policing standards (including human rights standards) and the continuous improvement of policing having regard to best international practice;</td>
<td>It is accepted that it is implicit in the promoting of standards that this would define a level below which the organisation and its members may not fall. However, given that the Bill relies heavily on using HIQA as a precedent, as established under the Health Act 2007, it is surprising that this function is limited to a ‘promoting’ type role, in contrast to the role of establishing a Code of Ethics under Head 65. HIQA have a clearly defined function to set standards under the Act rather than solely promote standards.</td>
</tr>
<tr>
<td><strong>Promote Public Awareness</strong></td>
<td>(i) to promote public awareness of matters relating to policing services</td>
<td>No change has been made to this function and this is welcome.</td>
</tr>
<tr>
<td><strong>Keep Minister informed</strong></td>
<td>(j) to keep the Minister informed of developments in respect of matters relating to policing services and make recommendations to assist the Minister in co-ordinating</td>
<td>No change has been made to this function and this is welcome.</td>
</tr>
<tr>
<td>Area</td>
<td>Function</td>
<td>Response</td>
</tr>
<tr>
<td>------</td>
<td>----------</td>
<td>----------</td>
</tr>
<tr>
<td>and developing policy in that regard;</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Crime Trends/Use of Force</strong></td>
<td>(k) to keep itself generally informed of - (i) trends and patterns in the use of force by members of the Garda Síochána, and (ii) trends and patterns in crimes committed;</td>
<td>The addition of monitoring of use of force is welcome. However, the removal of the function for the PCSA to keep itself informed of complaints made against members of the Garda Síochána and the application of the Disciplinary Regulations, as contained in the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015 would appear to limit the capacity to develop a holistic view of the provision of policing services to the community and measuring policing performance. It would also reduce the capacity to inform the enhanced research function contained in this Bill and specified under function (l)(iii) below. Additionally there does not appear to be any alternative function for the Office of the Garda Síochána Ombudsman (OGSO) to keep the PCSA informed and vice versa. This prevents any triangulation of information held by the PCSA, the GS and the OGSO. This will be dealt with again under Heads 67, 127 and 154 below.</td>
</tr>
<tr>
<td><strong>Research</strong></td>
<td>(l) to undertake, commission or assist in research projects (including by way of public consultation) and other activities in respect of matters relating to policing services, which in the opinion of the Authority, may - (i) promote improvements in standards for those matters and public awareness of them, (ii) promote</td>
<td>The expansion of this function is welcomed, with the exception of the lack of provision to allow the gathering of complaints data to support the research function in (iii).</td>
</tr>
<tr>
<td>Area</td>
<td>Function</td>
<td>Response</td>
</tr>
<tr>
<td>------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>improvements in interagency cooperation and community engagement in the delivery of community safety, or (iii) contribute to a reduction in the number of complaints against members of the Garda workforce or the Garda Síochána in relation to those matters, and make recommendations to the Garda Commissioner and the Minister arising from those projects or activities...</td>
<td></td>
</tr>
</tbody>
</table>

3. Part 1 - Preliminary and General Matters

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 1 Short title and commencement</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 2 Interpretation</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 3 Security Services</td>
<td>There are no specific observations in relation to the head itself. However, there would be benefit in prescribing elsewhere in the bill, an agreement between the Garda Síochána and oversight bodies as to what constitutes security services and what is subject to oversight from the outset, in terms of operational functions of the Garda Síochána. Elements of policing services are carried out by the units responsible for security services. This has posed potential difficulties in retrieving information in a timely manner to inform oversight activities.</td>
</tr>
<tr>
<td>Head 4 Repeals</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 5 Expenses</td>
<td>No observations</td>
</tr>
</tbody>
</table>
### 4. Part 2 – Garda Síochána

#### Chapter 1: General

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 6 Continuation of Garda Síochána</strong></td>
<td>No observations</td>
</tr>
</tbody>
</table>
| **Head 7 Principles of policing**         | - Consider the deletion of the words “a wide degree” from 7(c).  
- The Notes to this head refer to “divisions being self-sufficient administrative units and in effect being mini police services in their own right for most policing purposes but within a national framework led by Garda Headquarters” (emphasis added). The Authority notes that there is a single indivisible police force in the State and the language used in the notes should be careful to reflect this.  
- Under principle (e) the wording does not reflect the emphasis on Human Rights which was demonstrated in the COFPI report. It is recommended that this should be strengthened to “vindicating the human rights of individuals” or similar language in line with the functions in Head 8. |
| **Head 8 Functions of Garda Síochána**    | No observations |
| **Head 9 Prosecution of offences by members of Garda workforce** | No observations, other than to note that the default position of expanding prosecutions to Garda members and staff is welcomed as it allows the Commissioner the flexibility to utilise both garda members and garda staff for certain policing services. |

#### Chapter 2: Garda Síochána Board

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 10 Membership of Board</strong></td>
<td>No observations, other than how this head relates to observations made about the overall role and function of the Board.</td>
</tr>
<tr>
<td><strong>Head 11 Role of Board</strong></td>
<td>The Authority has always been supportive of the concept of a Management Board with the appropriate expertise</td>
</tr>
</tbody>
</table>
and experience. It is the Authority’s view that such a Board could be invaluable to a Commissioner for the implementation of an agenda for change within the organisation. The Authority’s concern lies not with the Board itself but with the possibility for confusion that arises as a result of the institutional architecture that is being proposed. It is the Authority’s view that the correct balance between internal and external oversight is not achieved by the proposed model.

| Head 12 Meetings of Board and procedures | No observations. |
| Head 13 Ineligibility for appointment, disqualification for office, cessation of membership | No observations. |
| Head 14 Removal of member of Board from office | No observations. |
| Head 15 Removal of all members of Board from office | No observations. |
| Head 16 Committees of Board | No observations. |
| Head 17 Remuneration of expenses of members of Board and committees | No observations. |
| Head 18 Provision of services to Board | Recognising that Members of staff assigned to the Board, will still fall under the command and control of the Garda Commissioner, there are issues related to the provision of the best possible service to the Board, which the Authority would wish to discuss further with the Department. |

Chapter 3 – Garda Commissioner, Deputy Garda Commissioner

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 19 Appointment of Garda Commissioner</td>
<td>The Authority does not support the changes proposed by this head. The appointment of the Commissioner (or equivalent rank) by an empowered, independent</td>
</tr>
</tbody>
</table>
### Head 20 Appointment of Deputy Garda Commissioner

As above, the Authority does not support the changes proposed by this head. There has been no evidence provided demonstrating the necessity of removing this function from the PCSA.

### Head 21 Power of Deputy to perform functions of Garda Commissioner

The removal of the obligation on the Minister to inform the PCSA of any authorisations given under this section, may result in ineffective communications. Consideration should be given to reinstating that element of Section 35 – and it is not onerous.

### Head 22 Resignation of Garda Commissioner, Deputy Garda Commissioner

The notification of resignation should be extended to include the PCSA.

### Head 23 Suspension and removal of Garda Commissioner and Deputy Garda Commissioner

The Authority does not support the lack of involvement of the PCSA in the suspension or removal of a Garda Commissioner or Deputy Garda Commissioner. Similarly to appointments, an empowered, independent policing oversight body is best practice being significantly involved in such matters is the norm in most other jurisdictions.

### Head 24 Inquiry into any matter giving rise to notification under head 23(7)

There is no rationale provided for why the PCSA would not be notified as to the findings of inquiry in relation to the Commissioner or Deputies. Even if it is determined that the PCSA is not to be involved in the suspension or removal there is no logic to them not being informed at the same time as the Board of the findings.

### Chapter 4 Functions, duties of Garda Commissioner

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 25 Functions of Garda Commissioner</strong></td>
<td>The key issue in this head relates to the accountability of the Commissioner in relation to the dynamic and depth of reporting by the Commissioner to the PCSA. The functions of the Commissioner in this regard need to be</td>
</tr>
<tr>
<td>Head</td>
<td>Response</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Head 26 Direction and control of Garda Síochána</strong></td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 27 Independence of Garda Commissioner</strong></td>
<td>The inclusion of this head is welcome.</td>
</tr>
<tr>
<td><strong>Head 28 Duty of Garda Commissioner to account to Government, Minister and Attorney General</strong></td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 29 Duty of Garda Commissioner to provide information to Minister</strong></td>
<td>The requirement under Section 41 of the current act that “If and insofar as a report under subsection (2) relates to matters concerning policing services, the Minister shall inform the Authority of those matters.” should be retained so that PCSA would similarly be informed by the Minister.</td>
</tr>
<tr>
<td><strong>Head 30 Directives from Minister</strong></td>
<td>The capacities provided to the Authority under Section 25 of the current act to recommend a Directive to the Minister or to receive information from the Minister not being retained for the PCSA is difficult to understand and weakens the effectiveness of the oversight role and should be reinstated.</td>
</tr>
<tr>
<td><strong>Head 31 Delegation of powers, functions, or duties of Garda Commissioner</strong></td>
<td>The extension to include all members of the garda workforce is welcomed.</td>
</tr>
<tr>
<td><strong>Head 32 Powers relating to contracts, bank accounts, etc.</strong></td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 33 Arrangements for obtaining views of public</strong></td>
<td>No observations.</td>
</tr>
<tr>
<td><strong>Head 34 Provision of police services for certain events, etc</strong></td>
<td>No observations.</td>
</tr>
</tbody>
</table>
## Chapter 5 Garda Workforce

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 35 Ranks, numbers in each rank, terms and conditions</td>
<td>Maintaining a ranks order is somewhat archaic and being prescriptive in relation to this seems at odds with the Commissioner being the “true CEO”; the public sector wide concept of having an Employment Control Framework (ECF); and the theme throughout the scheme of there being a single workforce, equating garda member ranks with garda staff grades. On the other hand, the Minister for Justice and the PCSA would wish to be part of the determination of what the ECF should be particularly at a senior level for all of the Garda workforce. Could this be reframed to link in to a requirement to have an ECF recommended by the Garda Board, after consultation with the PCSA and with the consent of the Minister for Justice? This allows the Commissioner to have flexibility as to what workforce is needed, yet within a national framework.</td>
</tr>
<tr>
<td>Head 36 Member’s solemn declaration</td>
<td>The removal of religious references and addition of the Code of Ethics is welcome. It is arguable that the reference to human rights could be enhanced, by stating the “vindication of human rights”</td>
</tr>
<tr>
<td>Head 37 Appointment of persons to ranks of Assistant Garda Commissioner and chief superintendent</td>
<td>The Authority does not support the changes proposed by this head. The appointment of the senior garda members by an empowered, independent policing oversight body is best practice and is the norm in all developed countries. No evidence has been provided for the necessity to remove this function from the Authority. This is covered in greater depth at the start of this submission.</td>
</tr>
<tr>
<td>Head 38 Suspension, removal of persons appointed to rank of Assistant Garda Commissioner or chief superintendent</td>
<td>The Authority does not support the lack of involvement of the oversight body in the suspension or removal of Assistant Commissioners or Chief Superintendents. Similarly to appointments, an empowered, independent policing oversight body is best practice being significantly involved in such matters is the norm in other developed countries.</td>
</tr>
<tr>
<td>Head</td>
<td>Response</td>
</tr>
<tr>
<td>------</td>
<td>----------</td>
</tr>
<tr>
<td>Head 39 Inquiry into any matter giving rise to notification under head 38(3)</td>
<td>There is no rationale provided for why the PCSA would not be notified as to the findings of inquiry in relation to the Commissioner or Deputies. Even if it is determined that the PCSA is not to be involved in the suspension or removal there is no logic to them not being informed at the same time as the Board of the findings.</td>
</tr>
</tbody>
</table>
| Head 40 Appointment of persons to ranks below rank of chief superintendent and dismissal of such members for reasons of public confidence | The Authority agrees that Assistant Principals should be the responsibility of the Garda Commissioner within the proposed framework set out in Section 4.1 of the main submission document. While Superintendents are at an equivalent level to the Assistant Principal grade, the Authority considers that they merit a different focus because of the key role that they occupy in many statutory provisions and the fact that this is the grade from which the majority of more senior officers including future Garda Commissioners will likely be made. The Authority agrees that the selection competition could be run by the PAS on behalf of the Garda Commissioner. However, in addition to its oversight of arrangements as set out in Section 4.1 above, for Superintendents, the PCSA should also:  
- Approve the Job specification which sets out the knowledge, ability, suitability, experience, qualifications, training or expertise required for the position, as developed by the Garda Commissioner;  
- Approve the selection process proposed by the Garda Commissioner; and  
- Have the ability to nominate a member to the selection board for the competition. |
<p>| Head 41 Appointment of reserve members | Given the community safety role of the PCSA, it may be beneficial for the proposed PCSA to retain a role in relation to providing guidance on the regulations governing the powers, recruitment and training for reserve members. |
| Head 42 Duty of members of Garda Síochána to account | No observations |</p>
<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 43 Admission of Garda trainees</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 44 Appointment of members of garda staff</td>
<td>It is the Authority’s view that the functions relating to the appointment of senior garda staff from Principal Officer level and above should transfer to PCSA.</td>
</tr>
<tr>
<td>Head 45 Garda staff solemn declaration</td>
<td>Observations in relation to Head 36 should be considered here.</td>
</tr>
<tr>
<td>Head 46 Power to appoint consultants and advisers</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 47 Representative associations</td>
<td>No observations</td>
</tr>
</tbody>
</table>

Chapter 6 Accountability and funding of Garda Síochána

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 48 Interpretation</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 49 Setting of strategic priorities by Minister</td>
<td>The Authority does not support the removal of this function from the independent oversight body. The input from communities which is guaranteed through the involvement of independent oversight, is critical for driving the delivery of policing services. There can be no assumption of alignment between the policing outcomes of most value to the public and those of most value to the GS organisation. In considering priorities within a context of finite resources, it is unrealistic to expect that an internal process for the development of the priorities can match the necessary challenge required to ensure that the policing outcomes of value to the public will be adequately represented. External independent development of the priorities provides informed challenge. This is discussed in greater depth at the outset of this submission.</td>
</tr>
<tr>
<td>Head 50 Strategic plan</td>
<td>The Authority does not support the diminution of the role of the independent oversight body in the approval of the strategy statement. The requirement for the Authority to approve the Strategy allows for external independent challenge that is informed, through oversight, of the performance challenges facing the</td>
</tr>
<tr>
<td>Head</td>
<td>Response</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Head 51 Publication and implementation of approved strategic plan</td>
<td>In order to adequately fulfil its oversight role, the PCSA should also be provided with progress reports on the implementation of the strategy.</td>
</tr>
<tr>
<td>Head 52 Annual policing and security service plan</td>
<td>The Authority does not support the diminution of the role of the independent oversight body in the approval of the Policing Plan. The wording in this head that the Commissioner shall “have regard to” the views of the PCSA is not sufficient to allow for effective oversight of the development of the plan. The Policing Plan is central to policing oversight as the GS statement of commitments to the public. External, independent approval of the Policing Plan is an essential element in ensuring that the Plan as produced is reflective of and addresses the performance challenges, the needs of communities and is informed by the outcomes of oversight. This is discussed in greater depth in the main submission paper. Additionally, the issues that should arise in an annual policing plan pertaining to the investment in and strategic management of capital planning and finance, human resources and IT should have direct input from the PCSA. Such matters are not just about administration or prudential management of public funds. Rather, they are inextricably linked to, and indispensable for, the provision of the highest quality policing service for the public.</td>
</tr>
<tr>
<td>Head 53 Amendment of approved annual service plan</td>
<td>This head needs to be amended to reflect observations provided for Head 52 to ensure any amendments to the plan continue to ensure the delivery of policing services to meet the needs of communities.</td>
</tr>
<tr>
<td>Head 54 Implementation of approved annual service plan</td>
<td>The proposed Authority should be in receipt of the same information as the board and the Minister in order to ensure effective oversight and transparency.</td>
</tr>
<tr>
<td>Head 55 Annual and multi annual capital plan</td>
<td>No observations</td>
</tr>
</tbody>
</table>
### Head 64 Statistical information

Given the significant findings regarding data quality issues over the past five years, it may be valuable to include an addition which commits the Commissioner to continuous improvements to data quality and enhancement of the Garda Síochána’s capacity and capability in this regard.

---

**Chapter 7 Codes of ethics, standards of integrity, unauthorised disclosure of information**

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 65 Code of ethics for members of garda workforce</td>
<td>The retention of the Code of Ethics under the PCSA’s remit is welcomed.</td>
</tr>
<tr>
<td>Head 66 Standards of integrity, codes of ethics for members of committees, advisors or consultants etc.</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 67 Confidentiality of certain information</td>
<td>No observations</td>
</tr>
</tbody>
</table>
### Chapter 8 Special inquiries relating to administration, practice or procedure

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
</table>
| **Head 68 Special inquiries relating to administration, practice or procedure** | - The content of this Head is welcome and the involvement of the PCSA both in consultation by the Minister and in having the ability to directly request an inquiry and have feedback from the Minister from same is appropriate and welcome. Its presence in this Head reinforces the need to restore to Head 103 those elements of the functions of the current Authority not replicated in the draft Head.  
- Although not provided in the current Section 42, it is however worthy of consideration as to how the results of such inquiries, if not published in whole or in part under sub-section (12) be communicated confidentially to the PCSA as appropriate.  
- It would seem appropriate to vest the ability in the Minister to refer matters arising for follow up specifically to the PCSA to ensure implementation of any recommendations arising out of inquiries and to also require the Commissioner to implement same.  
- It would seem important that either here or elsewhere that there be clarity in relation to an express ability for the Minister and the Department of Justice to share information with the PCSA, the Ombudsman and the Garda Síochána as relevant and vice versa which relate to our relevant functions and it would be important that this is explicit so that each body doesn’t encounter Data Protection limitations. |

### Chapter 9 Liability

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 69 Liability for certain acts of members of Garda Síochána</strong></td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 70 Legal aid for members of Garda Síochána</strong></td>
<td>No observations</td>
</tr>
</tbody>
</table>
### Chapter 10 International service and cooperation with police services, law enforcement agencies or other relevant person outside State

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 71 Interpretation</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 72 International service</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 73 Power to enter into agreements with other law enforcement agencies, relevant persons or bodies outside the State</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 74 Secondment from Police Service of Northern Ireland to certain ranks in Garda Síochána</td>
<td>Similar to appointments, the PCSA should be directly involved in secondments into the Garda Síochána at the ranks of Chief Superintendent and above.</td>
</tr>
<tr>
<td>Head 75 Secondment from Garda Síochána to Police Service of Northern Ireland</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 76 [Breach of discipline] by seconded member of Garda Síochána</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 77 [Breach of discipline] by seconded member of Police Service of Northern Ireland</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 78 Records relating to members serving outside the State</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 79 Duties of Ard-Chláraitheoir in relation to records transmitted under this Act</td>
<td>No observations</td>
</tr>
</tbody>
</table>

### Chapter 11 Offences of causing disaffection, impersonation

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 80 Causing disaffection</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 81 Offence of impersonating member of Garda Síochána</td>
<td>No observations</td>
</tr>
</tbody>
</table>
### 5. Part 3 – Community Safety

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 83 Interpretation</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 84 National Community Safety Strategy</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 85 National Community Safety Steering Group</td>
<td>The lack of explicit reference to the PCSA in this and the majority of subsequent heads in this part, calls into question the relevance of the inclusion of Community Safety in the titling of the new body. With regard to the steering group, the PCSA should have a more prominent and defined role in order to fulfil its community safety role.</td>
</tr>
<tr>
<td>Head 86 National Office for Community Safety</td>
<td>While the responsibilities of the Director to report to the PCSA are noted in Part 4, the remit of the National Office and the PCSA create the capacity for diffused accountability and complication of the oversight structure in relation to the delivery of policing services. The heads in their current form do not facilitate effective coordination and may place unnecessary burden on the Garda Síochána in terms of its oversight obligations.</td>
</tr>
<tr>
<td>Head 87 Director of National Office</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 88 Accountability to Oireachtas Committees</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 89 Staff of National Office</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 90 Provision of services to National Office</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 91 Regulations concerning Local Community Safety Partnerships</td>
<td>No observations</td>
</tr>
</tbody>
</table>
### Head 92 Functions of Local Community Safety Partnerships

In order to facilitate effective oversight of the delivery of policing services at local level, the Partnerships should be required to submit three year plans, short term plans, progress reports and annual reports to the PCSA.

### Head 93 Staffing of Local Community Safety Partnerships

No observations

### Head 94 Duties of Departments of State and other public service bodies

No observations

### 6. Part 4 - Establishment and Functions of Policing and Community Safety Authority

<table>
<thead>
<tr>
<th>Head 95 Interpretation</th>
<th>No observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 96 Establishment day of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 97 Establishment of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 98 Membership of Authority</td>
<td>The notes on page 218 state that members will be appointed by the President, yet the text of the head states that members will be appointed by the Government. Depending on the decision taken this should be made consistent.</td>
</tr>
<tr>
<td>Head 99 Recommendations for appointment of ordinary members of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 100 Terms and conditions of appointment of members of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 101 Ineligibility for appointment, disqualification for office of member of Authority, cessation of membership, etc.</td>
<td>It should also be considered if former members of the Garda Síochána should be eligible to become Members of the Authority and the Authority would wish to discuss further with the Department.</td>
</tr>
<tr>
<td>Head</td>
<td>Response</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Head 102 Removal of member of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 103 Objective and functions of Authority</td>
<td>- Section 103 is dealt with in detail in Section 2 above.</td>
</tr>
<tr>
<td></td>
<td>- Specifically in relation to the PCSA functions as outlined in Head 103, the note on page 240 confirms that the existing functions remain for the Policing Authority under Section 62 H.(2) (a) to</td>
</tr>
<tr>
<td></td>
<td>&quot;...keep under review the adequacy of—&quot;</td>
</tr>
<tr>
<td></td>
<td>i. the corporate governance arrangements and structures within the Garda Síochána,</td>
</tr>
<tr>
<td></td>
<td>ii. the arrangements for the recruitment, training and development of the members and members of the civilian staff of the Garda Síochána,</td>
</tr>
<tr>
<td></td>
<td>iii. the mechanisms in place within the Garda Síochána for the measurement of performance and accountability of such members and staff, and</td>
</tr>
<tr>
<td></td>
<td>iv. the arrangements for managing and deploying the resources available to the Garda Síochána so as to ensure the most beneficial, effective and efficient use of those resources,...&quot;</td>
</tr>
<tr>
<td></td>
<td>These functions are not however detailed in Head 103 and this should be rectified</td>
</tr>
<tr>
<td>Head 104 Authority to have regard to security services</td>
<td>The Authority would welcome some discussion on the import of this Head which restates the current statutory position</td>
</tr>
<tr>
<td>Head 105 Meetings and business of Authority</td>
<td>The retention of this function of the Authority is welcome.</td>
</tr>
<tr>
<td></td>
<td>The notes to this head states that “This reflect(s) CoFPI’s view that the successor body to the Policing Authority and the Garda Inspectorate “should use every opportunity to improve transparency of policing, including through public meetings with An Garda Síochána” (See Ch. 13, para. 13).”</td>
</tr>
</tbody>
</table>
It is already current practice that the Authority use every opportunity to improve transparency through conducting meetings in public. This is only one of many examples in the Draft General Scheme where reference is made to a COFPI recommendation for a function that is already undertaken by the Authority and it would seem appropriate that the notes be updated before publication.

<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 106 Committees of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 107 Power to appoint consultants and advisers etc. and to enter into contracts</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 108 Strategy statement of Authority</td>
<td>No observations</td>
</tr>
</tbody>
</table>
| Head 109 Annual Business Plan | - Subhead (3) a risks creating a scenario where the annual plan is overly prescriptive and will not allow for sufficient agility either in the conduct of inspections, the responses to issues as they arise and the overall independence of the PCSA in relation to its functions.  
  - As mentioned elsewhere in this submission, the use of the word “impartial” is contradictory to the functioning of an independent oversight body.  
  - Under subhead (6), the requirement to consult with the Minister in the formulation or revision of the plan may not be appropriate as it could be viewed as a compromising of the independence of the PCSA. It is not part of the current arrangements for the Authority to consult or submit its work plan to the Minister. Nor does it reflect the practice in Scotland to which reference is made earlier in the notes to this head. |
| Head 110 Appointment of Chief Executive of Authority | No observations                                                                                                                                                                                                                                                             |
| Head 111 Staff of Authority | No observations                                                                                                                                                                                                                                                             |
| Head 112 Appointment of Inspectors of Policing Services | Consistent with the comments in relation to Head 98, it should be considered if it is appropriate to allow for |
## Head 113 Powers of Inspector of Policing Services

As under Head 109, subhead (5) limits the agility of the Authority to respond quickly to issues as they arise. This may not be suitable for the facilitation of effective oversight and transparency. Furthermore, subhead (1)b does not adequately facilitate joint inspections as specified in Head 114.

## Head 114 Joint Inspections and inquiries

While it is accepted that the PCSA or any other body should not be able to compel another to participate, including a provision that agencies should not be allowed to unreasonably refuse to carry out a joint inspection would be beneficial.

## Head 115 Reports of inspections or inquiries requested by Minister

The use of the term “as soon as practicable” may not be sufficient in relation to supplying reports to the Commissioner or publication of reports. Specified time limits should be considered. When making recommendations it should be envisaged that the PCSA would be able to make recommendations concerning aspects of its own role arising from an inspection report.

## Head 116 Reports of inspections or inquiries undertaken at Authority’s own initiative

No observations

## Head 117 Monitoring and assessment of measures in relation to recommendations in inspection or inquiry reports

The wording in head 117(1) is suggests that the PCSA will be unable to “monitor and assess the measures taken by the Garda Síochána in relation to such of the recommendations contained in a report submitted to the Minister” where the Minister has not asked for this monitoring and assessment. The provision should be re-worded so that the PCSA is not so restricted.

## Head 118 Duty of Garda Commissioner to facilitate performance by Authority of its functions

No observations
<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 119</strong> Cooperation of Garda Síochána with inspections and inquiries</td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 120</strong> Duty of Director of National Office to assist and cooperate with Authority</td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 121</strong> Accountability for accounts of Authority</td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 122</strong> Accountability of Authority to other Oireachtas Committees</td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 123</strong> Code of Governance</td>
<td>Under sub-head 1(e), the use of the word “impartial” in relation to inspections is contradictory to the functioning of an independent oversight body. The words “objective” and “fair” are sufficient in this regard.</td>
</tr>
<tr>
<td><strong>Head 124</strong> Annual and other reports to Minister</td>
<td>While the head is welcome, we would suggest removing the text “because of their gravity or other such exceptional circumstances”. It would seem appropriate to allow the PCSA the ability to judge this and not be prescriptive. The requirements in the text alluded to sets a very high bar and might preclude the Minister receiving appropriate reports.</td>
</tr>
<tr>
<td><strong>Head 125</strong> Standards of integrity</td>
<td>No observations</td>
</tr>
<tr>
<td><strong>Head 126</strong> Codes of ethics for members, members of committees, advisors or consultants etc.</td>
<td>There is potentially a typo under subhead (3) where “prohibition” is stated. This is likely meant to be “provision”.</td>
</tr>
</tbody>
</table>
| **Head 127** Confidentiality of certain information | - This provision should be extended to include former members and staff of the Policing Authority.  
- It would seem important that either here or elsewhere that there be clarity in relation to an express ability for the Minister and the Department of Justice to share information with the PCSA, the Ombudsman and the Garda Síochána as relevant and vice versa which relate to our relevant functions and it would be important that this is |
<table>
<thead>
<tr>
<th>Head</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 128 Dissolution of Policing Authority and Garda Síochána Inspectorate</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 129 Transfer of staff of Policing Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 130 Transfer of property (other than land), rights and liabilities, and continuation of leases, licences and permissions granted by Policing Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 131 Preservation of contracts, agreements or arrangements made by the Policing Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 132 Records of Policing Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 133 Liability for loss on part of Policing Authority occurring before establishment day</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 134 Final accounts and final annual report of Policing Authority</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 135 Transfer of staff of Garda Síochána Inspectorate</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 136 Preservation of [contracts, agreements or] arrangements made by the Garda Síochána Inspectorate</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 137 Records of Garda Síochána Inspectorate</td>
<td>No observations</td>
</tr>
<tr>
<td>Head 138 Liability for loss on part of Garda Síochána Inspectorate occurring before establishment day</td>
<td>No observations</td>
</tr>
</tbody>
</table>

explicit so that each body doesn’t encounter Data Protection limitations.
17 November 2020

Ref: PA/2020/225

Mr Doncha O’Sullivan
Assistant Secretary,
Criminal Justice Governance & European Affairs
Department of Justice
51 St. Stephens Green
Dublin 2

Dear Doncha

I refer to your correspondence of 24 September 2020 enclosing Part 6 of the Draft General Scheme of the Policing and Community Safety Bill (Part 6) and to our earlier correspondence with Ms. Anne Barry on this matter dated 30 March 2020.

In our correspondence of 30 March we referred to a number of high level preliminary observations for consideration when drafting legislative provisions concerning the proposed Office of the Garda Síochána Ombudsman (Office of the Garda Ombudsman or OGO). The Authority is pleased to note that these observations have informed the overall direction of Part 6 as drafted and are also reflected in the detailed draft heads and accompanying notes provided.

The Authority welcomes this opportunity to provide some additional observations on the revised Part 6 in the hope that they will assist in the drafting.

The introduction to Part 6 states that this draft

“expands the remit of the renamed Office of the Garda Ombudsman to include garda staff and a broader oversight role in relation to allegations of wrong doing notwithstanding the absence of a complaint from a member of the public. It also reforms the processes for the handling of complaints and the conduct of investigations in order to streamline them and
ensure timely resolution of complaints and investigations while safeguarding due process for all concerned.”

The Authority fully appreciates the challenging reconciliations to be achieved between legitimate but differing positions and recognises the effort and work of officials in attempting to achieve a balance.

**An Independent OGO**

The Authority fully supports the concept that allegations from all sources of misconduct by members of the Garda workforce must be within the jurisdiction of OGO and they determine the appropriate action. It is the nature of the allegation or complaint rather than its source that is the critical factor in deciding the appropriate course of action. Notwithstanding this, these concepts should not be allowed to undermine the Garda Commissioner’s responsibility to manage poor performance and behaviour in his role as Chief Executive.

We note that the proposed Office of the Garda Ombudsman (OGO) will have its own Vote and we welcome the restructuring of the OGO to include an Ombudsman, Deputy Ombudsman and a Chief Executive Officer. The expansion of the remit of OGO with regard to: (i) the personnel (i.e. the defined Garda Workforce to include both Members and Garda Staff – both serving and former at all levels); (ii) the range of issues that will fall under its jurisdiction of complaints to be considered; and (iii) the expanded list of recognised sources of these complaints (from members of the public, through its own initiative, referrals from the Commissioner, the Minister and third parties, as a result of protected disclosures etc.) will add to the perceived independence of the Office.

Notwithstanding this independence the Authority suggests that there is a need for the OGO to keep the Policing and Community Safety Authority (PCSA) more fully informed than is currently envisaged in Part 6 as drafted (i.e. more than in cases where the PCSA has referred a matter). The PCSA must be in receipt of as much information as possible to perform its functions and this is especially the case to inform the PCSA’s core inspection and inquiry functions. Apart from any other consideration, it might prevent unnecessary duplication of focus. Whether the necessary provision is made in this Part or elsewhere is a matter for discussion.

Since reference is made above to the Garda Workforce which is deliberately defined to include both sworn and non-sworn members it is worth making the point that there remains a number of instances of marked differences in how both are treated under Part 6. While on the one hand it could be argued that the sworn / warranted Garda members should be held to higher account, in the context of the vision for the future with Garda staff being assigned to operational policing work, it would seem worthwhile to ensure that they are held to similar standards.
A Publicly Accountable OGO

Transparency and accountability are key prerequisites to developing trust and confidence in the independence and effectiveness of the OGO to investigate allegations of misconduct. Trust and confidence are especially important where there is significant potential for the power imbalance between the complainant and the subject of the complaint (i.e. the member of the garda workforce) to be perceived as impeding or frustrating investigations. The Authority therefore welcomes the retention of provisions to keep parties informed subject to safeguards and the obligation on the OGO to provide reports to appropriate parties on conclusion of different types of investigations.

The power to compel the provision of information, the duty to preserve evidence and the creation of an offence for obstructing an investigation and failing to obey the direction of a designated officer and/or the provision of false and misleading evidence are important elements to engender trust and confidence in investigations undertaken by OGO. However, to further strengthen the investigation process, an active duty should be placed on all members of the Garda workforce to (a) report wrongdoing, and (b) provide information to investigations (whether undertaken by the Garda Síochána or OGO) including a provision that to not do so constitutes an offence.

Under various heads in Part 6 there are provisions whereby the Commissioner and other garda staff can decide to refuse to provide information requested during the course of an investigation by OGO citing national security issues or the potential threat of harm to individuals who could be identified etc. In these cases the Independent Examiner of Security Legislation (Independent Examiner) provided for in Part 7 will act as a reviewer where OGO appeals that decision. In the interests of transparency and accountability the criteria developed and the assessment of these criteria by the Independent Examiner should be published when it is appropriate to do so. Additionally even in the course of such an investigation there should be provision to provide the complainant with information about the progress of the investigation even if the details are required to be confidential.

The introduction of a broader right of review of decisions, and the provision to allow OGO to implement administrative procedures to allow for the reconsideration of incorrect decisions is to be welcomed. Likewise the broadened scope of a permissible Judicial Inquiry of the decisions of the OGO provides an additional layer of accountability. Two alternative tests for setting up such an inquiry are proposed in the notes on pages 90/91: (i) in respect of a matter which [the Minister] considers to be of significant public concern; or (ii) if [the Minister] considers it desirable in the public interest to do so. The Authority suggests that the wording of Part 6 should not be constrained by the alternatives proposed and alternative wording such as “in respect of a matter of which is of significant public interest” should be considered.
The Commissioner’s Role as CEO

As noted in our submission on the Draft General Scheme of the Policing and Community Safety Bill Parts 1-7, the Authority fully supports the concept of the Commissioner as the CEO of the Garda Síochána and the relevant functions conferred on that role as set out in Draft Head 25. The Authority is pleased to note that nothing in the processes, procedures and roles identified in relation to complaints, incidents of concern, investigations and other procedures outlined in Part 6 appears to constrain the Commissioner in that role. On the contrary for example; (i) Head 161 (11) provides that:

“Where the Garda Commissioner is notified under subhead (9)(b) that a complaint has been determined to be inadmissible, nothing in this Part shall prevent the Garda Commissioner from taking any action he or she deems appropriate in relation to the inadmissible complaint”;

and, (ii) Head 161(9) has been included to remove any uncertainty of the ability the Commissioner to implement dismissal procedures (set out under Head 40) for reasons of public confidence. This deference to the role of the Commissioner is repeated at various points in Part 6. Nevertheless, similar to the point made earlier, the Authority would urge to the Department to give consideration to any perceived interference in that role identified by the Commissioner in his review of Part 6.

An Effective OGO

There is always a danger that with an expanded remit, OGO could easily be overwhelmed by the scale and complexity of the issues it is required to deal with and that this could have adverse consequences for its effectiveness and timeliness. In this regard the expanded remit of OGO will require significant additional resources if OGO is to successfully and effectively meet the ambitions of Part 6.

The delineation of roles between OGO and the Commissioner, in particular with regard to role of the Commissioner as the CEO of the Garda Síochána with responsibility for issues of performance management is an important principle. We welcome the inclusion of definitions for a performance management complaint (including the flexibility to amend what is included as a performance management complaint) and a performance management system, and note that the provisions in Part 6 will take account of the revamped performance and conduct regulations currently under consideration.

There is a risk that the requirement for referrals from the Commissioner to OGO could pose a significant challenge to the Commissioner in implementing a performance management culture within the Garda Síochána. The Authority has placed significant emphasis on the importance of
developing and consolidating a mature performance management system within the Garda Síochána and it would be concerned lest any aspect of the ‘incident of concern’ approach act as an impediment to the momentum of the Commissioner’s efforts in this regard.

Agreed thresholds and robust processes will help to avoid any such outcome. Perhaps a triaging of performance management complaints could be undertaken by the Commissioner in the first instance. The obligation to automatically send through every single complaint could also become unduly onerous for OGO. There may be other ways of getting comfort that the appropriate distinctions are being made between those complaints that can be dealt with through performance management and those that are beyond that process. For example a risk based approach might be taken with a review period prescribed in the legislation to allow for an examination of the effectiveness of this approach.

Head 166 (3) notes that OGO “shall inform the Garda Commissioner of his or her decision under subhead (2) without delay.” In the interests, both, of an efficiency of process and for the member of the garda workforce concerned the Authority proposes the introduction of a specified and short timeline for response such as two weeks from the date of receipt of the referral.

The provisions for the development of protocols regarding notifications and referrals between the Commissioner and OGO and for the development of arrangements for the handling of complaints suitable for resolution by the Garda Síochána reflects the Local Intervention model developed by GSOC and the Garda Síochána. This should facilitate a speedy resolution of both minor service level type complaints and more serious matters.

While it is commendable that these protocols are developed and can be amended without the need for legislative amendment, it is of course predicated on the assumption that protocols can be agreed. Head 162(1) provides that:

“The Garda Ombudsman, in conjunction with the Garda Commissioner shall, as soon as practicable after the commencement of this head, prepare for submission to the Minister a draft list of categories of complaint that constitute performance management complaints for the purposes of this Part.”

The language used in this Head “in conjunction with” and “as soon as practicable” may not be sufficient to lead to the desired outcome. The Authority suggests that greater precision in the respective roles of the Ombudsman and the Commissioner under this head are clearly laid out, and that “as soon as practicable” is replaced by a time limit “within six months”. In addition a useful tool could be the inclusion of a provision that allows the Minister to impose a protocol if it has not been prepared and submitted within the time period.
The system of referrals and cross referrals is complex and probably needs to be so to ensure that the OGO is comprehensive in its scope and to further ensure legal certainty for all participants in any putative complaint process. The Authority welcomes the attempts made in the draft provisions to ensure the timely conclusion of investigations and to allow parallel investigations to run simultaneously (i.e. the investigation of incidents which may constitute an offence alongside those incidents where no criminal matters arise). This should ensure that comprehensive reports can be provided to relevant parties to determine whether follow on actions are required and that both complainants and the subjects of complaints are not left waiting for a conclusion.

Nevertheless there may be opportunities to further streamline the complaint handling, investigation and resolution processes set out. To this end the Authority would urge the Department to consider any proposals put forward by GSOC born out of a range of difficult and challenging cases encountered in its current role.

Further to this point the Authority notes that in Part 6 the phrases “as soon as practicable” and “without delay” are used at various points when referring to actions that the OGO and the Commissioner might take. We would suggest, replacing indeterminate phrases such as these, where possible, with specific time limits – see the example cited above. Another example is Head 160(3) that provides that “A complaint made to the Garda Síochána shall be referred to the Garda Ombudsman without delay.” In this case the phrase ‘without delay’ could be replaced by ‘within [...] weeks of receipt of the complaint’.

Specific Issues
The notes to Part 6 raise a number of specific issues on which specific views are sought:

1. On Page 15 there is a question as whether the obligation to notify an incident of concern should be triggered by an “allegation” or a “credible allegation”. The Authority would suggest the use of the term “credible allegation”.

2. On page 47 with regard to the investigation of protected disclosures, respondents are asked to consider whether “any related matter” could also be investigated as part of an investigation instigated on foot of a protected disclosure. The Authority’s concern with the inclusion of this term is that it allows for any such investigation to expand beyond its own limits. The Authority’s preference is not to include it. However, if it is necessary to include, some qualified term, such as “any matter necessarily arising from the disclosure” could be used.
3. On page 82, respondents are asked to give further consideration to the treatment of incidents of concern that may fall to be notified under Head 166 and specifically asks whether there are operational circumstances in which a member of the Garda Síochána should be in a position to charge another member without awaiting a notification or determination by the Garda Ombudsman. The Authority’s view is that members’ ability to effect a charge should not be restricted by awaiting a notification or determination.

4. Head 187 sets out a series of provisions to provide for the treatment of complaints and other matters on hand in GSOC and the Garda Síochána at the time of implementation of the new legislation. The Authority notes that this is a complicated and sensitive issue that will require further consideration as discussed in the notes to the Part 6.

I hope the comments above are helpful and should you require anything further please contact me or my colleague, Mr. Cormac Keating.

Yours sincerely,

Helen Hall
Chief Executive
Mr. Alan Guidon
Joint Committee on Justice
Leinster House
Via email

Re. General Scheme of the Policing, Security and Community Safety Bill

Dear Mr. Guidon,

Thank you for your letter of July 9th and the request / invitation for the Child & Family Agency (Tusla) to respond to the General Scheme as set out.

I set out the following by way of the position of this Agency and for the attention of the Committee.

Part 3 Community Safety

Head 84. The inclusion of specific reference to the Minister for Children, Equality, Disability, Integration and Youth and the Child and Family Agency is welcome.

Head 85. It is recommended to avoid doubt that the strategy would ensure a reference to/regard for the existing strategies of individual public body/organisations many of which are also anchored in their own statute.

Head 86. The approach is welcome in respect of a National Community Safety Steering Group.

Head 93. There are many existing inert agency structures and processes, and it is recommended that consideration is given to utilising or replacing some of these in the context of what is proposed in this Head to maximise effectiveness and reduce duplication.

Head 95 (3) This is a welcome reference, but caution is advised as the sharing of information between state organisations has become a very complex issue since 2018. Adequate provisions as to interpretation by bodies and departments should be considered.

Overall, the general scheme is welcomed in its detail and approach.

Yours sincerely
ICCL Submission on the Policing, Security and Community Safety Bill, 2021

August 2021
Submission on the Policing, Security, and Community Safety Bill

Introduction

ICCL welcomes the opportunity to provide an analysis of the General Scheme of the Policing, Security, and Community Safety Bill. This Bill introduces some positive and welcome developments and reforms, in line with recommendations by the Commission on the Future of Policing in Ireland (CoFPI). ICCL is committed to advocating for a human rights based approach to policing in Ireland and made a comprehensive submission on this to the CoFPI.

Head by Head Analysis

This Bill introduces important organisational and structural reforms recommended by CoFPI. It establishes a new Policing and Community Safety Authority, an Independent Examiner of national security legislation, and a Garda Síochána Ombudsman.

ICCL does not comment on all Heads but have put comments on the Heads we wish to analyse in numerical sequence below.

Head 7

*Increased references to human rights*: The Bill includes increased references to human rights standards, as compared to the Garda Síochána (GS) Act 2005. It also sets out principles of policing, including “when providing policing services every member of garda personnel is required to act professionally, ethically, with integrity and in a manner that protects and vindicates human rights.” The increased focus on human rights is welcome.

Head 9

*Prosecution powers*: The Bill includes a provision on prosecution by AGS despite the CoFPI recommendation that AGS should not have a role in prosecution. It is a similar provision to the GS Act 2005 and provides that “any member of AGS may institute and conduct prosecutions in a court of summary jurisdiction, but only in the name of the Director of Public Prosecutions.” CoFPI recommended that “All prosecution decisions should be taken away

---

1 This submission was written by ICCL policy officer Elizabeth Carthy.
3 Ibid. Head 7.
from the police and given to an expanded state solicitor or national prosecution service. We also recommend that the practice of police prosecuting cases in court should cease.” ICCL reiterates this recommendation and calls for this provision and prosecutorial powers for AGS to be removed. We call on government to provide sufficient resources to the DPP as a matter of urgency to ensure that there are adequate numbers of prosecutors in the State.

**Head 10 and 11**

*Board of AGS:* As recommended by CoFPI, a Board of AGS will be set up with different functions, including to “ensure that AGS has appropriate systems, policies and procedures in place to ensure compliance with its obligations under section 42 of the Irish Human Rights and Equality Commission Act 2014.” However, the Bill does not include human rights experience as something that members should have experience or expertise in. It only includes reference to matters connected with the functions of AGS, organisational governance, management or public administration or financial matters. ICCL recommends that when appointing a person to be a member of the Board, the Minister shall satisfy themself that the person has sufficient expertise or experience in human rights law and the public sector duty. We also note Footnote 63 of the COFPI report in relation to the creation of this board, where two of the members of the Commission state their opposition to the creation of this board as follows:

> Dr Vicky Conway and Dr Eddie Molloy fully support the Commission’s report on the future of policing in Ireland. However, they state their disagreement with the recommendation relating to a board as follows: “Against a background of decades of antipathy in Ireland towards external oversight and accountability for policing, we believe the inclusion of this board as an additional element in the oversight and governance architecture, and the consequential dilution of the role of the external oversight body (until now the Policing Authority), does not offer the best prospects of achieving the goal of unambiguous, independent, empowered, transparent accountability. While exchanges between the Policing Authority and An Garda Síochána may have appeared fractious, it is still early days in the development of an effective system of governance. Our proposal would be simply to build on the progress made to date by the Policing Authority, which in our view has been both supportive and necessarily challenging in its engagement with An Garda Síochána. We believe that the solution should be to adequately empower the Policing Authority while encouraging maturation of the culture of An Garda Síochána concerning external accountability.”

ICCL considers that there is merit to this opinion and we urge government to clarify the advantages of an internal governance Board and how robust external oversight and accountability, currently offered by the Policing Authority, will be maintained.

---

8 Ibid. Head 10.
Head 65

Need to provide for disaggregated data collection for all areas of policing: The Bill restates the provision relating to statistical information that is in the GS Act 2005.9 This provision provides that the Garda Commissioner shall ensure that statistical information concerning offences, criminal proceedings and the state of crime in the State is compiled and stored. This provision is too narrow and does not meet the data gathering requirements of AGS under human rights law. As ICCL has previously highlighted, data collection is vital for transparency and ensures effective accountability. It also enables the public to understand and question particular trends in policing.10

ICCL recommended that AGS, liaising with the Policing Authority, should monitor all areas of policing. This means collecting disaggregated data on: reported incidents of crime; recording rates for hate crime; recording rates for domestic and sexual violence; use of powers to stop, search, question, and enter premises; use of security powers including surveillance and covert operations; use and deployment of cover human intelligence sources; detentions; use of force; arrest, charge and outcome rates; complaints; training delivered; and, the representativeness of the service.11

Disaggregated data includes data on the grounds under equality legislation, such as age, gender, disability, and race, and others, such as ethnicity.12 Throughout the Covid-19 pandemic, the Policing Authority have published reports with detailed information on the use of Covid-19 related enforcement powers.13 ICCL and others have called on AGS to collect and report disaggregated data relating to the use of these powers, specifically in relation to ethnicity.14

The AGS Legal Executive Director, appearing before the Oireachtas on the topic of civil liberties during the Covid-19 pandemic on 22 June 2021, questioned whether AGS should be the collector of disaggregated data on the use of police powers or “the referrer of that data to entities within the state who already hold that data, that would require an action and legislative permission to take a unique identifier which is then transferred” and highlighted that “AGS are not experts in this regard, in the collection of such sensitive data, but more importantly are not the appropriate body to collect it in the context of such adversarial circumstances that suspects in particular and vulnerable individuals might find themselves in

---

10 See further Alyson Kilpatrick, ICCL, A Human Rights Based Approach to Policing in Ireland, 2018, p. 25.
11 Ibid.
14 ICCL, Monitoring rights during the pandemic, 2021; ICCL, Human rights in a pandemic, 2021.
vis-à-vis AGS.” The AGS Legal Executive Director highlighted that the Garda Commissioner is supportive of the need to collect this data pursuant to its statutory duty to eliminate discrimination.\textsuperscript{15}

Given the vital role that disaggregated data plays in ensuring transparency, accountability, and evidence based responses, ICCL recommends that provision be made in this Bill for the collection of disaggregated data relating to the use of police powers and on all areas of policing based on equality grounds (gender, family status, marital status, age, disability, sexual orientation, race, religion, and member of the Traveller community), socio-economic status, geographic location, and ethnicity.

\textbf{Head 66}

\textit{Disciplinary code:} The Bill provides for a code of ethics for members of garda personnel to be established by the Policing and Community Safety Authority. It will include standards of conduct and practice and provisions to encourage and facilitate the reporting of wrongdoing in AGS.\textsuperscript{16} This provision is similar to the GS Act 2005, however it is no longer the Minister who shall establish the code or Garda Commissioner who shall draft the code.\textsuperscript{17} Further, in preparing the code of ethics, the Authority shall have regard to the policing principles in addition to the standards, practices and procedures in other EU countries, and relevant recommendations of the Council of Europe.

In 2002, the Ioann Report, a human rights audit of Garda policies and practices was published. It recommended that “The Garda Code should be reviewed to ensure that human rights are reflected throughout so that infringements of human rights, as with other infringements of the code, become a disciplinary offence.”\textsuperscript{18} Similarly, ICCL, in our 2018 CoFPI submission, recommended that the code of ethics should be revised to expressly include the human rights standards expected of Garda and civilian staff and their practical application.\textsuperscript{19} While the Bill provides that reference to the policing principles, which include mention of human rights, shall be taken into account in drafting the code of ethics, ICCL recommends that the Bill explicitly include the need to include human rights when preparing the code of ethics. Further, the Authority should have regard to the human rights standards expected of garda members and staff and their practical application when performing its functions.

\textsuperscript{15} Irish Human Rights and Equality Commission Act 2014, s 42.
\textsuperscript{16} Policing, Security, and Community Safety Bill, 2021, Head 66.
\textsuperscript{17} Garda Síochána Act 2005, section 17.
\textsuperscript{18} Alyson Kilpatrick, ICCL, \textit{A Human Rights Based Approach to Policing in Ireland}, 2018, p. 35.
\textsuperscript{19} Alyson Kilpatrick, ICCL, \textit{A Human Rights Based Approach to Policing in Ireland}, 2018, p. 46.
The code of ethics provided for in the Bill is not a disciplinary code. Instead the Bill provides for conduct regulations and performance regulations. As ICCL has previously recommended, breach of the code of ethics should constitute a disciplinary offence.

**Head 100**

*Policing and Community Safety Authority:* The Policing and Community Safety Authority will replace the existing Policing Authority and Garda Inspectorate. It is positive that in making recommendations of persons who are suitable for appointment as ordinary members of the Authority, consideration shall be given to the desirability of the members possessing knowledge of, and experience in, certain matters, including matters connected with human rights, equality, and diversity.

**Head 104**

Head 104 provides that the objective of this body is to “oversee and assess in an independent and transparent manner the performance of AGS of its functions relating to policing services in order to support the effective provision and continuous improvement of such services to the benefit of the safety of the public.” This body has clear and welcome functions, which include references to human rights standards. Given the importance of inspections to ensuring that standards are upheld, a particularly important function of this body will be to “carry out at its own initiative or at the request of the Minister inspections in relation to any particular aspects of the operation and administration of AGS relating to policing services (including in relation to adherence to human rights standards and cooperation with other public service bodies to enhance community safety.” Another important function from a human rights perspective will be its obligation to “promote professional policing standards (including human rights standards) and the continuous improvement of policing having regard to best international practice.”

**Head 113**

*Increased inspection powers:* The Bill provides for the appointment of Inspectors of Policing Services by the Policing and Community Safety Authority. It provides that “the Authority and Garda Commissioner shall agree a memorandum of understanding concerning the conduct of investigations” and sets out a number of issues which the memorandum must address. This includes visits, including unannounced visits in connection with a planned inspection.

---

25 Policing, Security, and Community Safety Bill, 2021 Head 104(2)(c)
26 Policing, Security, and Community Safety Bill, 2021 Head 104(2)(h)
the manner in which they may be carried out, and the furnishing of information and the making available of records or documents in relevant locations, including in Garda stations.

ICCL has long called for independent inspections of Garda stations and we welcome this provision. However, the current plans to appoint the Inspector of Prisons as the inspectorate for Garda stations as part of the National Preventive Mechanism, required under the Optional Protocol to the UN Convention against Torture may cause some confusion as to roles and responsibility. ICCL considers the policing oversight body is the appropriate inspector for Garda Stations and calls on government to reconsider the designation of the Inspector of Prisons for this role. We address the scope of the current inspection powers provided for in this Bill further below.

Head 114
*Increased inspections and the ratification of OPCAT:* ICCL has repeatedly called for the ratification and implementation of the Optional Protocol to the UN Convention against Torture (OPCAT).²⁷ While ICCL welcomes the increased inspection powers provided for in the Bill by Inspectors of Policing Services, these powers are to be carried out “in connection with a planned inspection.”²⁸ A “planned inspection” means “an inspection included in the annual business plan… or of which the Garda Commissioner has been informed prior to a visit to any relevant location.”²⁹ Given these limitations, it is unclear whether these inspections would be sufficient to meet OPCAT requirements. Independent, unannounced visits to Garda stations and other places where people deprived of their liberty can be an important safeguard against abuse. The European Committee for the Prevention of Torture highlighted allegations of physical ill-treatment and verbal disrespect from remand prisoners in police custody and recommended that custody registers in all Garda stations should be comprehensively maintained and an independent system to monitor stations should be put in place.³⁰ ICCL recommends that OPCAT be ratified and implemented and an effective and independent National Preventive Mechanism to inspect all places of detention, including police stations, be established.

Head 139
*Garda Síochána Ombudsman:* The Bill provides for the re-organisation of the current three person Garda Síochána Ombudsman Commission (GSOC) to a one person Garda Síochána Ombudsman with a Deputy Garda Ombudsman. The CoFPI recommended that this body be

---
²⁷ See for example, ICCL, *Ratify OPCAT and allow inspection of direct provision centres*, 2018.
³⁰ Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Government of Ireland on the visit from CPT from 23 September to 4 October 2019, 2020, p.4.
called the Independent Office of the Police Ombudsman to “make clear that it is not part of AGS.” ICCL agrees that the name of the Ombudsman should reflect its independence from AGS and recommends that the CoFPI recommendation be implemented.

Head 194

*Independent Examiner:* An Independent Examiner of national security legislation will be established, as recommended by CoFPI. This body will “promote public confidence in measures being taken to protect the security of the state, including by assessing whether security legislation is necessary, proportionate and effective while containing the appropriate safeguards for human rights and by preparing reports for publication.” This is a positive step. ICCL has highlighted the need for a review of security legislation, particularly in relation to its compliance with human rights. We have previously recommended that there should be a clear statutory framework to ensure that any rights interfered with for the purpose of security can only be done so lawfully.

**Recommendations**

1. Include a requirement for sufficient expertise or experience in human rights law and the public sector duty in order to be appointed as an AGS board member.

2. Rename the Garda Síochána Ombudsman to the Independent Office of the Police Ombudsman.

3. Remove the power of prosecution by members of AGS, as recommended by CoFPI.

4. Include reference to the human rights standards expected of garda members and staff and their practical application as part of the code of ethics.

5. Ensure the code of ethics can be enforced by making it a disciplinary code.

6. Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including prisons, Garda stations, direct provision centres, and psychiatric hospitals.

7. Assign the Police Oversight Body as the inspector for Garda station custody suites rather than the Inspector of Prisons.

8. Provide for the collection of disaggregated data on the use of police powers and on all areas of policing.

---


About ICCL

The Irish Council for Civil Liberties (ICCL) is Ireland’s oldest independent human rights body. It has been at the forefront of every major rights advance in Irish society for over 40 years. ICCL helped legalise homosexuality, divorce, and contraception. We drove police reform, defending suspects’ rights during dark times. In recent years, we led successful campaigns for marriage equality and reproductive rights.
ICCL Follow-up Submission on the Policing, Security and Community Safety Bill, 2021

October 15th, 2021

Introduction

1. The aim of this follow-up submission is to elaborate on our original submission in particular on the oversight structures envisioned in the Bill. This is in light of recent public controversy which has surfaced since the date of ICCL’s original submission in August 2021. While our original submission focused on the wording and drafting of the Bill, this submission wishes to re-emphasise ICCL’s position on external oversight as per our submission to the Commission on the Future of Policing in Ireland (CFP) in 2018.

2. At the outset, ICCL would like to stress the importance of external policing oversight; police cannot police themselves. As one of the key principles of natural justice states, *nemo iudex in sua causa*, “no one should be a judge in

---

1 This submission was written by ICCL policy officer Sarah O’Malley.
their own cause”.⁴ As noted by the CFP, the “delivery of effective policing is directly influenced by the structures for governance and oversight”;⁵ therefore ICCL is calling for the most robust possible procedures for such oversight. We are calling for An Garda Síochána (AGS) to operate a model of policing by consent which includes the public’s ability to hold them to account.⁶

3. AGS’s own internal mechanisms are not suitable alternatives to external oversight. By way of example, the establishment of the Garda Anti-Corruption Unit (GACU) in June 2021 is of no relevance to the external oversight mechanisms provided for in this Bill. Allegations into corruption must be independently investigated by an independent office. The Garda Síochána Ombudsman Commission (GSOC) raised the alarm that GACU was established without any consultation and have underscored the issue that any investigations would be undermined without any independent, external oversight.⁷

4. This submission has three substantive parts on the proposals for:
   A. A Policing and Community Safety Authority,
   B. An Office of the Garda Síochána Ombudsman and
   C. An External Examiner of terrorism legislation.

5. ICCL welcomes the establishment of these three important oversight mechanisms. While our original submission was structured in a Head by Head format, this submission highlights relevant Heads grouped thematically not numerically, for the ease of the reader.

---

⁴ See Damache v DPP [2012] IESC 11.
⁶ ICCL has long called for consent based policing, rather than policing by coercion. See for example ICCL’s Doireann Ansbro, Irish Examiner “We need a model of policing by consent” May 19th 2021.
6. There are core principles which have been accepted at a European and international level which are necessary to ensure effective external police oversight which include, inter alia:
   a. adequate powers
   b. independence from police and government
   c. adequate resourcing
   d. promptness
   e. transparent operation/public scrutiny and regular reporting
   f. public and government support and
   g. civil society/victim involvement.\(^8\)

This submission will highlight the importance of these principles with respect to the three new bodies.

A. The Policing and Community Safety Authority

7. ICCL welcomes the Authority as a mode of ensuring that the operation of AGS is subjected to external independent scrutiny. This is particularly important in terms of ensuring respect for human rights standards within AGS. For example, the Authority will be able to investigate “particular aspects of the operation and administration of An Garda Síochána relating to policing services (including in relation to adherence to human rights standards and cooperation with other public service bodies to enhance community safety)”.\(^9\)

In light of the core principle that oversight mechanisms need adequate powers to fulfil their roles effectively, this investigative function is

---

\(^8\) See 17\(^{th}\) session of the Human Rights Council “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston’ Addendum, Study on police oversight mechanisms”, 28 May 2010, para. 30, A/HRC/14/24/Add.8. Similar principles were also identified by the European Commission of Human Rights rapporteur on police which are based on a synthesis of the extensive authorities emanating from the European Court of Human Rights (ECtHR) and the UK House of Lords, see Victoria Law Foundation “An Effective System for Investigating Complaints Against Police: A study of human rights compliance in police complaint models in the US, Canada, UK, Northern Ireland and Australia” 2009, p. 22.

\(^9\) Head 104(2)(c).
proportionate as it is focused on “particular aspects” of operations. The outcome of these investigations will be in the form of “recommendations” to the Garda Commissioner or the Minister for actions. This is a welcome check on AGS’s operations and it is hoped that these recommendations will be fully taken into account.

8. A body such as the Garda Commissioner’s Office may be independent but still subject to oversight, as all public bodies should be. Independence and external scrutiny are not mutually exclusive. Hierarchical control of AGS without operational scrutiny would be inconsistent with democratic principles and the key principles of transparency and public scrutiny. ICCL welcomes the proposed quarterly meetings between the Commissioner and the Authority which will be open to the public. ICCL warns against any dilution of the Garda Commissioner’s duty to cooperate with the Authority. Any weakening of language would undermine the Authority’s ability to effectively complete their important supervisory mandate.

B. The Office of the Garda Síochána Ombudsman

9. In addition for our calls for the name of this body to include the word “independent”, ICCL also recommends that consideration be given to changing the word “Ombudsman” in the Bill to “Ombudsperson” to make the Bill gender neutral and bring it in line with the values it represents. ICCL

10 Head 106(3).
11 Head 119.
13 While ICCL recognises that “Ombudsman” is often understood to be a gender neutral term, the use of alternative words for “Ombudsman” such as “Ombudsperson” are commonplace in other jurisdictions as well as at international organisations. See for example the US Department of State Privacy Shield Ombudsperson, British Columbia, Canada’s Ombudsperson the International Organisation for Migration (IOM)’s Office of the Ombudsperson, the UN Security Council’s Ombudsperson to the ISIL (Da’esh) and Al-Qaida Sanctions Committee, the World Intellectual Property Organization (WIPO)’s Office of the Ombudsperson, and the Organization of American State’s Office of the Ombudsperson.
also cautions against giving the Ombudsperson powers under the Coroners Act,¹⁴ and instead calls for reform of the Coronial system.¹⁵

10. Independent investigations into serious allegations of misconduct are crucial. For matters where a death has occurred, Ireland has an obligation under the European Convention of Human Rights to carry out an effective official investigation under Article 2.¹⁶ ICCL wishes to underline the importance of effective impartial independent review of serious matters and welcomes the reforms of the Ombudsperson.

11. ICCL will now comment on:

   i. The mandate of the Ombudsperson,
   ii. The new investigative powers,
   iii. Fair procedures in the new system,
   iv. Public interest and public scrutiny and
   v. Oversight of the Ombudsperson.

   **i. Mandate of the Ombudsperson**

12. ICCL is supportive of the new proposed structure and believes it will provide for the effective, fair, and impartial handling of serious complaints on Garda behaviour. Certain categories, the details of which will be agreed upon between the Commissioner and the Ombudsperson, will remain with AGS.¹⁷ The only issues which fall within the Ombudsperson’s non-negotiable remit are those of a serious nature such as acts or omissions which constitute a

---

¹⁴ Head 189.
¹⁶ See for example Independent Police Complaints Commission (IPCC), Corruption in the Police Service in England and Wales, First Report, Presented to Parliament pursuant to Section 11 (S) of the Police Reform Act 2002, September 2011, para. 4 referring to Ramsahai v the Netherlands (Application No 52391/99, 15 May 2007) which found that a police investigation into a death where police were involved in an operation leading to the death was a violation of the investigative obligation under Article 2 as it lacked the necessary independence. See also Mikiashvili v Georgia (Application No 18996/06, 9 October 2012) (finding of an Article 3 breach due to inadequacy of investigation).
¹⁷ Head 161.
criminal offence, a breach of the standards of professional behaviour or which result in death or serious injury,\textsuperscript{18} or where “special circumstances” exist.\textsuperscript{19} This is appropriate.

13. The Garda Commissioner will retain independence and a considerably broad mandate under the proposed new regime. Only where conduct reaches a high threshold of seriousness, for example where death, or serious harm have occurred, must they refer a case to the Ombudsperson.\textsuperscript{20} This is an acceptable and appropriate limitation on the jurisdiction of the Ombudsperson.

14. ICCL welcomes the Ombudsperson powers applying to investigations into civilian staff working for AGS.\textsuperscript{21} The inclusion of civilian staff was recommended by CFP to ensure that AGS was seen and dealt with as one organisation.\textsuperscript{22} ICCL believes that this provision will contribute to a greater culture of accountability inside the AGS and will remove any impunity or inconsistencies amongst staff of AGS, both police staff or otherwise. Further, civilian staff of police in other jurisdictions are subject to investigation, for example in Australia.\textsuperscript{23}

\textit{ii. The new investigative powers}

15. The Bill expands on some of GSOC’s powers, giving the new body broader investigative powers. In our submission to the CCP, we noted our concern “that GSOC does not have sufficient statutory powers to effectively investigate

\begin{itemize}
\item Head 161(2).
\item Head 160(4)(b).
\item Head 164.
\item See Head 157(4), “(4) A member of garda staff shall not be subject to a complaint or formal investigation under this Part until such time as the Minister has made an order for the purposes of head 45(5)” and Head 45(5) “Every member of the civilian staff of An Garda Síochána who is a civil servant of the Government before the commencement of this head and who is designated by order of the Minister for the purposes of this head shall, on being so designated, become a member of garda staff.”
\item Commission on the Future of Policing, The Future of Policing in Ireland, 2018, p. 49, para. 11.
\item In New South Wales part 51 of the Law Enforcement Conduct Commission Act 2016 No 61 allows for investigation of administrative police staff.
\end{itemize}
allegations of human rights violations by members of An Garda Síochána.”

We therefore welcome the new powers. ICCL also stresses that while the new office will have more powers, the Bill also provides for more procedural safeguards and oversight of the Ombudsperson.

16. The provisions as drafted respect the fundamental principles of fairness and proportionality. As the scandals involving the AGS in the past have shown, garda oversight is critical and the more powers an oversight body has, the more effective it will be. The Bill will allow the new office to achieve their aim effectively and efficiently while guaranteeing respect for human rights and promoting good administration within AGS. GSOC, as noted by the CFP, was hampered by a lack of resources and jurisdictional limitations. The new provisions will ensure that the new body can effectively fulfil its statutory duty.

17. ICCL supports the provisions in relation to searches of garda premises provided in Head 170 whereby a designated officer can search a garda premises with the authorisation issued by the Garda Ombudsperson, rather than a warrant issued “in accordance with law” under Head 169(1)(a). However, we believe one procedural safeguard in particular under this Head could be strengthened.

18. As noted by Chief Justice Denham in the Supreme Court in the Damache case there are two elements which must be present to ground a valid and constitutional search warrant. First, it must be issued by an independent person and secondly that person must be satisfied that there exists

25 See for example Heads 146, 152, 153, 154, 155, 156, 176 and 183.
26 This is a well-documented issue for GSOC, see ICCL, “RIGHTS-BASED POLICING: HOW DO WE GET THERE?: A SUBMISSION BY THE IRISH COUNCIL FOR CIVIL LIBERTIES TO THE COMMISSION ON THE FUTURE OF POLICING” January 2018, pp 40-42 “GSOC has insufficient powers to ensure effective oversight of investigations by An Garda Síochána where complaints to GSOC are referred back to An Garda Síochána. GSOC made several complaints in this regard to the Oireachtas Joint Committee on Justice and Equality in 2016. The Independent Review Mechanism also highlighted the problem” (footnotes omitted).
reasonable grounds.\textsuperscript{28} It should be noted that this two-part test was outlined in relation to searches of a person’s private dwelling house which is protected constitutionally. A search of a garda premises, a place of work, does not involve such important fundamental freedoms and rights to privacy, however the two key safeguards are nonetheless present in the Bill.

19. Under the proposed Bill, the designated officer must apply to the Ombudsperson who is not involved in the investigation themselves. ICCL suggests further strengthening this presumption of impartiality by adding wording to this effect to the Bill. The Ombudsperson must be satisfied that reasonable cause exists that a member of AGS has committed an offence. The Bill doesn’t stop there, it is also required that the Ombudsperson identifies reasonable grounds that evidence of this offence can be found at the garda premises. Given that the inviolability of the dwelling home is not at stake,\textsuperscript{29} and that warrantless searches are commonplace in other contexts such as regulatory regimes,\textsuperscript{30} ICCL is confident based on our legal analysis that there is no valid cause for concern about this provision.

20. Furthermore, another important safeguard is present in the legislation, the Garda Commissioner’s prior consent to a search must be sought.\textsuperscript{31} The Commissioner can object to a search on State security grounds. The Bill provides for an alternative way to perform the search if there are national security issues, a process which includes oversight from the Minister.\textsuperscript{32} The Bill does not provide for random, baseless searches of garda premises. The provisions appropriately balance rights of members of AGS with the designated officer’s duties to investigate effectively and in a timely fashion.\textsuperscript{33} Promptness is a key principle to respect to ensure public confidence in

\textsuperscript{28} Damache v DPP [2012] IESC 11, para. 36.
\textsuperscript{29} The dwelling home “enjoys the highest level of protection which might reasonably be afforded in a democratic society” Rozmyslowicz v Minister for Justice and Equality & ors [2018] IECA 289.
\textsuperscript{31} Head 170 (3).
\textsuperscript{32} Subsections 5-8 of Head 170.
\textsuperscript{33} Head 143(6).
external investigations. A designated officer may search a premises promptly however we call on further scrutiny into the impartiality of the Ombudsperson themselves to the investigation before they authorise a search.

iii. Fair procedures

21. The new Office will be bound by principles of fairness in carrying out its duties, as noted in Head 143(6) “The Garda Ombudsman shall establish and maintain efficient and effective systems and procedures for the handling of complaints and the conduct of investigations in a fair, timely and effective manner.” ICCL also suggests adding wording to this provision including that the Ombudsperson will handle complaints in a manner that respects human rights standards.

22. ICCL is committed to the full enjoyment of fair procedures for anyone suspected of committing an offence. ICCL recalls that an objective of the new Ombudsperson is “to ensure that the functions of the Office are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations under Part 6,…”.34 We also note that, after deciding if the matter is appropriate for the Ombudsperson, the Ombudsperson shall “c) subject to subhead (8), notify, where known, the member of garda personnel who is the subject of the complaint and specify the nature of the complaint and the name of the complainant.”35

23. Delays in the past which caused lengthy investigations were due to GSOC being inadequately resourced. ICCL has expressed grave concern about this resourcing problem.36 ICCL calls for adequate resources to be provided to the new body to ensure that investigations are completed in as timely a

34 Head 143, 2(a) (emphasis added).
35 Head 160(7)(c) (emphasis added).
fashion as practicable. An investigation can and will be stopped if it is no longer “reasonably practicable”.

24. Further, ICCL welcomes that any summary offence notified to the DPP is subjected to a statute of limitations for prosecution of 18 months, capping the length of investigation for summary matters. ICCL finds this extension of the statute of limitations appropriate for police who ought to be held to a higher standard when they commit criminal offences. In general, indictable offences are not bound by a statute of limitations unless legislation provides for one. ICCL finds this approach reflected in the Bill appropriate as members of AGS will have the same rights as other accused people to challenge any prosecutions which are unduly delayed if this impacts their right to a fair trial.

25. ICCL notes and welcomes that members under investigation enjoy the right to information. For example, if the investigation is discontinued, they are notified along with the reason why the investigation has ended. It is essential that such information is provided in a timely manner.

26. The rights of gardaí under investigation must be balanced with other rights i.e. the public interest in having serious situations investigated. ICCL welcomes Head 166 which allows the office to open investigations of its own initiative, if in the public interest. ICCL trusts this provision will only be used where the public interest outweighs a member of AGS’s rights. ICCL finds this weighing of rights appropriate and proportionate.

iv. Public scrutiny

27. ICCL welcomes the objectives of the office being the promotion of “public confidence in the processes for the resolution of complaints” made by the public, and to promote “public understanding”. These are key steps in

37 Head 160(7)(c).
38 Head 179.
39 Head 172(3)(b).
40 Head 143 (2)(b).
41 Head 143 (5)(a).
fostering informed public scrutiny. However, ICCL would recommend
clarification on how these objectives are to be achieved in practice.

v. Oversight of the Ombudsperson

28. As recommend by CFP, the Bill contains an expansion of the current scope
of the judicial inquiry process contained in the Garda Síochána Act 2005. Head 183 provides for judicial inquiries into the conduct of the “Office of the Garda Ombudsman” as well as its investigation procedures, policies and practices. The latter encompasses a wider mandate than the current model for an investigating judge and will ensure that the overall running of the office is subject to judicial scrutiny, not just specific incidents. This will ensure that any issues with the office’s investigatory powers could be examined by a judge before any harm is done in a particular investigation. ICCL welcomes the Bill’s strengthening of judicial oversight of the Ombudsperson. The addition of a provision of judicial inquiry into investigative policies will provide for independent oversight of the “effectiveness and timeliness” of the Ombudsperson’s investigations.

29. In addition to the Bill’s inclusion of a provision for oversight by Oireachtas committees, ICCL suggests that the provision also provides for reporting by the Ombudsperson to the Justice Committee.

C. Independent Examiner of Security Legislation

30. ICCL has long called for a clear statutory framework to ensure that any rights interfered with under the umbrella term of “national security” can only be done so lawfully. In our submission to the CFP we called for an external

---

44 Head 153.
examiner on state surveillance. ICCL welcomes the proposed creation of an Independent Examiner of Security Legislation, particularly the role’s functions under the Justice (Surveillance) Act 2009. It is vital that there is independent scrutiny of decisions made on the basis of national security given the risks to civil liberties these decisions so often have. This position is of particular importance given the reactive and often rushed nature of anti-terrorist legislation and the rights issues that flow from restrictions justified by governments on national security grounds.

31. ICCL recalls that the establishment of such an Independent Examiner was recommended by the CFP, in particular with reference to the position in the UK. In the UK, anti-terrorism laws have been subject to review since 2001 by the Independent Reviewer of Terrorism Legislation. This model has similarly been used in Australia since 2010, where there exists an Independent National Security Legislation Monitor. Further, in Northern Ireland, there has been an Independent Reviewer of the Justice and Security (Northern Ireland) since 2007.

32. The position in the UK has been successful, the Office gaining support from academia, civil society as well as endorsement of its recommendations by the United Nations Special Rapporteur on Counter-terrorism.

---

46 Head 204.
49 See for example Professor Clive Walker, “HUMAN RIGHTS AND COUNTERTERRORISM IN THE UK”, 2016, p. 7 “…extraordinary powers should be subjected to extraordinary scrutiny, so it is welcome that the government has adopted the practice of appointing an Independent Reviewer of Terrorism Legislation”; Dr. Jessie Blackbourn, Critical Debates on Counter-Terrorism Judicial Review Cambridge, Chapter 7 ”Independent reviewers as alternative: an empirical study from Australia and the United Kingdom” 2014.
50 See for example Amnesty International UK, “Counter-Terrorism and Sentencing Bill 2019-21, Submission to the Public Bill Committee”, June 2020, para. 4; Liberty UK “Liberty’s Committee Stage Evidence on the Counter-Terrorism and Border Security Bill” June 2018.
33. One empirical study on the Reviewers in the UK and Australia noted the benefits of these models:

Independent review offers forms of scrutiny not found in traditional constitutionalist review mechanisms. There is a lot to commend in the offices of Independent Reviewer and Independent Monitor. For example, they may be given access to closed material that is not available to Parliament or the public and they can make informed decisions based on a range of sources. They have the opportunity to examine antiterrorism laws in as broad a manner as possible, reporting not just on how the laws are used, but also on whether they are effective or even necessary. Reviewers can highlight cases of misuse of the laws, either on an individual or wider scale, and can expose longitudinal trends in counter-terrorism practice. Most importantly, they do all this in the public domain, enabling and enhancing parliamentary and public debate on anti-terrorism laws.52

34. However, as this expert in counter terrorism laws also noted:

However, this type of scrutiny is meaningless if it has no ability to shape the activities of the government’s counterterrorism agenda. It is essential, therefore, that offices of independent review of anti-terrorism laws are established and constructed so as to be able to inform public and parliamentary debate and to hold the government to account. It is critical that the mandate, structure, methodology and independence of the office enable the reviewer to carry out their function in a neutral and objective manner.53

“As regards targeted surveillance of identified individuals or organisations, the Special Rapporteur unequivocally endorses the assessment of David Anderson QC, the UK’s Independent Reviewer of terrorism legislation, that prior authorisation by an independent and impartial judiciary is an essential safeguard.” (emphasis added).

52 Dr. Jessie Blackbourn, Critical Debates on Counter-Terrorism Judicial Review Cambridge, Chapter 7 "Independent reviewers as alternative: an empirical study from Australia and the United Kingdom" 2014.

53 Ibid.
35. Therefore ICCL calls on government to ensure that the Independent Reviewer is engaged both in the public sphere and in the Houses of the Oireachtas and to provide in legislation that the Reviewer discharges their responsibilities in an entirely impartial manner.

36. Head 213 could be amended to provide for a more rigorous vetting procedure. Particularly in light of the above, ICCL calls on government to ensure that the Reviewer appointed is not at risk of actual or apparent bias.

37. It is essential and welcome that the legislation provides for sufficient safeguards in relation to national and personal security of the Examiner.

38. To safeguard personal security of people at risk and international intelligence sources, information holders must ensure that information is appropriately redacted.\textsuperscript{54} ICCL finds this to be a proportionate provision. Additionally, any sensitive information which may pose a national security risk must be kept strictly confidential.\textsuperscript{55} The Examiner will take all necessary and reasonable measures to protect the security of all information provided to him or her and have to receive the information holder’s consent that the measures are of an acceptable standard.\textsuperscript{56}

39. We note that the legislation provides that sensitive information shall not be published other than with the agreement of the relevant information holder and relevant Minister.\textsuperscript{57} ICCL understands these provisions may be necessary to address national security concerns; however it is essential that these provisions do not unduly restrict the public accountability of the Examiner. It would be useful for a periodic review of the operation of Head 210 to be

\textsuperscript{54} Head 198.  
\textsuperscript{55} Head 199 and 200.  
\textsuperscript{56} Head 201   
\textsuperscript{57} Head 210(2).
conducted to understand how frequently such agreements will be in place for.

Conclusion

40. To conclude, ICCL felt it was important to restate our positions on these key oversight mechanisms as they are central to creating a truly transparent, human rights compliant AGS. This Bill interacts with the other two garda bills on digital recordings and police powers in key ways. Transparency in compliance, reporting, disaggregated data collection, and decision making is crucial to allow for proper public scrutiny and accountability. ICCL welcomes these three oversight mechanisms and calls on government not to dilute their powers or fail to properly resource them.
Mr Alan Guidon  
Clerk to the Joint Committee on Justice  
Leinster House  
Dublin 2

Your Ref: JCJ/4/5/L/05xx

12 August 2021

General Scheme of the Policing, Security and Community Safety Bill
Submission from the Garda Síochána Inspectorate

Dear Mr Guidon,

The Garda Síochána Inspectorate welcomes the opportunity to provide the Committee on Justice with a submission on the General Scheme of the Policing, Security and Community Safety Bill, which it hopes will assist the Committee in its scrutiny of the Bill. As requested, our submission is set out in the attached document on a Head by Head basis.

The Inspectorate has played a lead role through its many inspection reports, in supporting Garda Reform and setting out a vision for the delivery of a visible modern policing service. For example, the Inspectorate’s report Changing Policing in Ireland (2015) set out a pathway to modernise and restructure the Garda Síochána to ensure that the greatest proportion of personnel is deployed on front-line policing services.

In the Policing with Local Communities report (2018), the Inspectorate highlighted that accessibility and reassurance are essential elements of policing and are critically important to local communities, particularly those who are most vulnerable.

The report of the Commission on the Future of Policing in Ireland (CoFPI) proposed a new approach to policing and community safety, which will ensure that police are more visible in communities, and can focus on preventing harm. The General Scheme sets out to meet the Government’s commitment to implement the CoFPI report recommendations, while ensuring that there remains a strong and independent public external accountability mechanism for the Garda Commissioner and the Garda Senior Leadership Team.

The Inspectorate welcomes that the General Scheme will make the prevention of harm and protection of people who are vulnerable or at risk an objective of the Garda Síochána and the safety of communities as a “whole of government” responsibility. It
is encouraging that it sets out to strengthen the objectives of the Garda Síochána in relation to protecting and vindicating the human rights of individuals.

Of particular relevance to the Inspectorate is the provision for a new body, the Policing and Community Safety Authority (the Authority) to supersede both the Policing Authority and the Inspectorate. A principal function of the Authority will be to carry out inspections in relation to any particular aspects of the operation and administration of the Garda Síochána relating to policing services. In order for the proposed new oversight arrangements to be effective, it is critical that the inspection function remains an important part of the oversight architecture and this submission includes observations and suggestions to support the performance of the inspection function within the Authority.

Pending the enactment of the General Scheme, the Inspectorate continues to fulfil its statutory function of ensuring that the resources available to the Garda Síochána are used efficiently and effectively through inspection as set out in our Work Plan for the period 2019-2021.

The Inspectorate’s latest report, Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations” (2021) was recently presented to the Minister for Justice and awaits publication. The Committee may wish to note that it recommends a number of legislative changes regarding arrest and detention which are relevant to the General Scheme of the Garda Síochána (Powers) Bill.

Thank you for the opportunity to provide a written submission to the Committee and I hope that our observations will be of assistance in its consideration of the General Scheme.

If I can be of any further assistance, please do not hesitate to contact me,

Yours sincerely,

Mark Toland
Chief Inspector
Garda Inspectorate
Submission by the
Garda Síochána Inspectorate

Submission to the Houses of the Oireachtas Joint Committee on Justice

General Scheme of the Policing, Security and Community Safety Bill

13 August 2021
1. Introduction
The Garda Síochána Inspectorate (the Inspectorate) is pleased to make a submission to the Houses of the Oireachtas Joint Committee on Justice (the Committee) on the General Scheme of the Policing, Security and Community Safety Bill 2021.

The Inspectorate welcomes the publishing of the General Scheme which seeks to implement the Report of the Commission on the Future of Policing in Ireland (CoFPI).

The Scheme proposes to:

➢ Recognise the role of the Garda Síochána in the prevention of harm, particularly to those who are at risk or vulnerable and to place a reciprocal obligation on relevant Departments of State and other public service bodies to cooperate with the Garda Síochána and each other in relation to the broader issue of community safety;

➢ Provide for a new coherent governance and oversight framework for policing to strengthen the governance of the Garda Síochána, to ensure clear and effective independent oversight and to ultimately deliver better policing;

➢ Create a strategic framework at national and local level to enhance the safety, and perception of safety in communities. This will be achieved through greater collaboration between relevant Departments of State and public service bodies as well as through engagement with local communities to prevent crime and harm; and

➢ Strengthen oversight of security legislation.

The Scheme includes 9 Parts and a number of Schedules. Observations and suggestions on relevant heads in Parts 1-8 which contain substantial proposals, are set out in this submission (section 3) to assist the Committee in its scrutiny of the Scheme.

2. Executive Summary

Part 1 - Preliminary and General Matters

1. Among other matters this part defines “security services” and identifies the functions of the Garda Síochána referred to in Head 8, that are concerned with protecting the security of the State for the purposes of defining the remit of the Policing and Community Safety Authority (the Authority) to be established under Part 4 which concerns oversight
of the performance of the Garda Síochána in relation to policing services. It also provides that where a question or dispute arises as to whether a particular matter relates to policing services or security services, the question or dispute shall be submitted to the Minister for determination.

2. The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services. This could lead to a large number of matters being referred to the Minister for determination as to whether they relate to security or policing services. It is important to ensure that there are no gaps in oversight in this most critical area.

Part 2 An Garda Síochána

1. The Inspectorate welcomes the inclusion in the principles of policing that policing services will be provided in a manner that protects and vindicates human rights. The Inspectorate believes that for the Garda Síochána to continue to maintain the confidence and trust of those they serve, it is an absolute requirement that policing services be provided in this manner. The recognition of the role of the Garda Síochána in the prevention of harm in our communities is also welcomed.

2. The relationship between the Garda Commissioner, the Garda Board and the Policing and Community Safety Authority (the Authority) should be transparent and easily understood. To avoid confusion in relation to their objectives and functions, clear lines of accountability and oversight should be provided for in the General Scheme.

3. Despite the concept of a single organisation, where the personnel of the Garda Síochána comprise members and members of garda staff, it is notable that the wording of the solemn declaration is different for garda members and for garda staff and the arrangements for taking it also differ. This is written in a way that is not inclusive.

4. The Inspectorate welcomes the intention to open up entry routes into the Garda Síochána. The Inspectorate submitted an advice paper to the Minister in May 2018 on this matter which advised that barriers to opening up entry routes to the Garda Síochána need to be addressed by the creation of new entry routes which allow for direct entry across all ranks.
Part 3 Community Safety

1. As highlighted in Part 1 above, provision is made for the setting of priorities for policing services by the Authority while the Minister is responsible for the setting of priorities for security services. The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services. It is important to ensure that there are no gaps in oversight in this most critical area.

2. This part of the Scheme provides for a national strategy on community safety to serve as an overarching policy framework and contains a programme of actions to underpin a whole of government approach to community safety nationally. It also provides for the establishment of local community safety partnerships to develop and implement local community safety plans that respond to the specific needs of the community. This supports a recommendation previously made by the Inspectorate.

3. In providing local policing services gardaí are routinely dealing with people or matters that require the assistance of, or the action of, another body or agency. The Inspectorate previously made recommendations that called for improved co-operation across government department’s agencies and bodies. For cross sectoral co-operation to succeed in making communities safer and reducing harm, there needs to be a recognition by key players of their role, a strategic commitment to meeting their responsibilities and where necessary, providing an appropriate level of resources.

4. Community safety partnerships in other jurisdictions are not solely focused on the activity of the police and partnerships have senior representation from many other agencies and bodies. In the Scheme, apart from local authorities and the police, it is unclear what other state agencies or bodies will become core members of local community safety partnerships.

5. While the Inspectorate welcomes the inclusion of an obligation on Departments of State and other public service bodies when performing their functions to take account of the importance of taking steps to support the delivery of community safety, it is unclear what state agencies or bodies will become core members of local community safety partnerships.

Part 4 - Establishment and Functions of Policing and Community Safety

1. Part 4 of the General Scheme provides for the establishment of the Policing and Community Safety Authority which will supersede the Inspectorate and the Policing Authority. A principal function of the new Authority will be to carry out inspections in
relation to any particular aspects of the operation and administration of the Garda Síochána relating to policing services. To support the expedient performance of this function, the Scheme makes welcome provision for the appointment of Inspectors of Policing Services, and the conducting of joint inspections.

2. It also provides for the agreement of a memorandum of understanding (MOU) concerning the conduct of inspections including unannounced visits to relevant locations. The Inspectorate is of the view that some of these matters, such as the furnishing of documentation and information would be strengthened if they were laid out in legislation. With regards to the completion of an MOU, the Inspectorate believes that a time limit should be set in the legislation for its completion.

3. As the Authority will be limited to the functions of the Garda Síochána as they relate to the delivery of policing services, it will reduce the scope of the inspection function that currently exists in the Inspectorate. As such, the Authority will not be empowered to scrutinise the Garda Síochána’s performance and professional standards as they relate to National Security, State Security and Security. It is important to ensure that there are no gaps in the oversight arrangements in this most critical area.

4. The Inspectorate is of the view that the provision for providing documentation should be extended to require the Garda Commissioner to also provide any information in the possession of the Garda Síochána, which is in the opinion of the Authority necessary for carrying out or in connection with its functions. This provision should be similar to Head 177 relating to the provision of information to the Garda Ombudsman by the Garda Síochána.

**Part 5 - Office of the Garda Síochána Ombudsman and Part 6 Complaints, incidents of concern, investigations and other procedures**

1. The Inspectorate welcomes the provision to provide for the reform of the structures of the Garda Síochána Ombudsman Commission.

2. The expansion of the remit of the new Office of the Garda Ombudsman to include garda staff and a broader oversight role in relation to allegations of wrong doing notwithstanding the absence of a complaint from a member of the public is also welcome.

**Part 7 - Independent Examiner of Security Legislation**

1. This part of the Scheme provides for the establishment of the Independent Examiner of Security Legislation. The functions of the Examiner are to keep under review the operation of effectiveness of security legislation, and consider whether security legislation remains necessary and fit for purpose, and contains appropriate safeguards for protecting the rights of individuals.
2. The Garda Síochána Act 2005 allows for the conducting of inspections by the Inspectorate in relation to both policing and security services. The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services.

It is important to ensure that there are no gaps in oversight between the role of the Independent Examiner and the Authority in this most critical area.

3. Although the Scheme provides for the Authority to carry out joint inspections with other statutory agencies, it is unclear if the Authority can carry out joint inspections with the Examiner.

Part 8 Miscellaneous and Regulations

1. The Inspectorate welcomes the provision under this Part of the capacity for the Garda Commissioner, the Policing and Community Safety Authority, and the Office of the Garda Síochána Ombudsman to share information. This will support each of the bodies in expediently performing their respective functions.
### 3. Head by Head Observations and Suggestions

<table>
<thead>
<tr>
<th>Part 1 Reference</th>
<th>Observations and Suggestions</th>
</tr>
</thead>
</table>
| **Head 3**       | **Definition of Security Services**  
This head defines "security services" and identifies the functions of the Garda Síochána referred to in Head 8. that are concerned with protecting the security of the State for the purposes of defining the remit of the Policing and Community Safety Authority to be established under Part 4 which concerns oversight of the performance of the Garda Síochána in relation to policing services Security Services (3) and (4)

3) *Where a question or dispute arises as to whether a particular matter relates to policing services or security services, the question or dispute shall be submitted to the Minister for determination.*

(4) *The determination by the Minister of the question or dispute referred to him or her under subhead (3) shall be final.*

The Garda Síochána Act 2005 allows for the conducting of inspections by the Inspectorate in relation to security services, and allows the Minister to exclude from the copies of reports which are to be laid before the Houses of the Oireachtas any matter which, would be prejudicial to the interests of national security.

The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services. This could lead to a large number of matters being referred to the Minister for determination as to whether they relate to security or policing services.

It is important to ensure that there are no gaps in oversight between the role of the Independent Examiner and the Authority in this most critical area.
<table>
<thead>
<tr>
<th>Part 2 Reference</th>
<th>Observations and Suggestions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 7</strong></td>
<td>Principles of Policing (a) and (c)</td>
</tr>
<tr>
<td></td>
<td><em>a) effective policing services improve the safety of persons, localities and communities in the State</em></td>
</tr>
<tr>
<td></td>
<td><em>(c) effective policing relies on securing public support and confidence</em></td>
</tr>
<tr>
<td></td>
<td>While these principles include the provision for “effective policing services” and “effective policing”, the Inspectorate is of the view that “efficient policing” should also be included as a principle. The efficient use of resources is equally important to the provision of policing services, the safety of communities and public confidence in policing.</td>
</tr>
<tr>
<td><strong>Principles of Policing (b) and (e)</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The Inspectorate welcomes the inclusion in the principles that policing services will be provided in a manner that protects and vindicates human rights. The Inspectorate believes that, for the Garda Síochána to continue to maintain the confidence and trust of those they serve, it is an absolute requirement that policing services be provided in this manner.</td>
</tr>
<tr>
<td><strong>Head 8</strong></td>
<td>Functions of the Garda Síochána (f) and (h)</td>
</tr>
<tr>
<td></td>
<td><em>(f) preventing harm to individuals in particular those who are vulnerable or at risk</em></td>
</tr>
<tr>
<td></td>
<td><em>(h) protecting and supporting victims of crime</em></td>
</tr>
<tr>
<td></td>
<td>While the Inspectorate welcomes these additions to the functions of the Garda Síochána, there does not appear to be a definition of vulnerable. As these functions are carried forward into Part 3 and joint working between departments, it is important to define what is meant by vulnerable in the General Scheme.</td>
</tr>
<tr>
<td><strong>Head 9</strong></td>
<td>Prosecution of Offences (2)</td>
</tr>
<tr>
<td></td>
<td><em>Subject to subhead (3), any member of An Garda Síochána may institute and conduct prosecutions in a court of summary jurisdiction, but only in the name of the Director of Public Prosecutions.</em></td>
</tr>
<tr>
<td></td>
<td>The responsibility for prosecution decisions and presenting cases at court in most other policing jurisdictions rests solely with an independent prosecution service. The Inspectorate has been a long-term advocate of removing the entire prosecutorial function from the Garda Síochána and assigning it to the Director of Public Prosecutions. This view was supported by the Commission on the Future of Policing in Ireland.</td>
</tr>
<tr>
<td></td>
<td>The Inspectorate’s latest report on Countering the Threat of Internal Corruption in the Garda Síochána (2021) raises a number of issues about the prosecution of certain lower level offences by the Garda Síochána, particularly in relation to inadequate supervision. Recommendation 19 sets out a number actions for the</td>
</tr>
</tbody>
</table>
| Head 11 | Role of the Garda Board (1) (c)  
Monitor implementation of organisational performance and oversee major capital expenditure and investment having regard to head 55.  
The role of the Board to monitor implementation of performance objectives and organisational performance appears to be very similar to the objective of the Authority (Head 104) to oversee and assess in an independent and transparent manner the performance by the Garda Síochána of its functions relating to policing services in order to support the effective provision of such services to the benefit of the safety and wellbeing of the public.  
Notwithstanding the new Authority’s more limited role in relation to policing services when compared to the current Policing Authority, it is difficult to see the difference in these two responsibilities. As such, the roles appear to overlap and could create the potential for confusion.  
Relationship between the Commissioner, the Garda Board and the Authority  
The relationship between the Garda Commissioner, the Garda Board and the Authority should be transparent and easily understood. To avoid confusion in relation to their objectives and functions clear lines of accountability and oversight should be provided for in the General Scheme. |
|---|---|
| Head 25 | Functions of the Garda Commissioner  
Similar to the comment in Head 11, the relationship between the Garda Commissioner, the Garda Board and the Authority is not outlined and needs to be clarified. This has the potential to lead to confusion in relation to the alignment of strategy with high-level goals and the prioritisation of the use of resources.  
The relationship between the Garda Commissioner, the Garda Board and the Authority should be transparent and easily understood. To avoid confusion in relation to their objectives and functions clear lines of accountability and oversight should be provided for in the General Scheme. |
### Head 34

**Provision of police services for certain events (3)**

*Police services relating to the protection, whether by means of police escorts or otherwise, of persons or property at risk of harm while in transit within the State may be provided under this head, but only in the circumstances and to the extent authorised by regulation under head 21.*

The Inspectorate in its Countering the Threat of Internal Corruption report (2021) found that local arrangements for providing policing services (non-public duty) for many different types of events had been developed. This results in ad hoc practices and inconsistencies in the provision of resources to police local events and the charging practices for providing such services. Recommendation 22 of the report proposes that the Garda Síochána should develop, publish and implement policy and guidance on charging for non-public duty.

### Head 37

**Member’s solemn declaration**

Despite the concept of a single organisation, where the personnel of the Garda Síochána comprise members and members of garda staff, it is notable that the wording of the solemn declaration is different for garda members and for garda staff and the arrangements for taking it also differ. This is written in a way that is not inclusive.

The New Zealand Police has taken a more inclusive approach. While the solemn undertaking and the oath are different because of the provision of police powers, all employees make an undertaking first and constable’s further take the oath. This is a process that could be suitable for adoption and inclusion in the General Scheme.

### Head 38

**Appointment of persons to Ranks of Assistant Garda Commissioner and Chief Superintendent**

The use of the word person instead of member as used in the Garda Síochána Act 2005 opens up entry to these ranks to police officers in other jurisdictions.

Following the submission of an Inspectorate advice paper on opening up entry routes into the Garda Síochána, the Inspectorate welcomes the intention to extend eligibility for appointment to assistant garda commissioner and chief superintendent to police officers in other jurisdictions.

### Head 41

**Appointment of persons to ranks below rank of chief superintendent**

As highlighted in Head 38, the Inspectorate welcomes the intention to open up entry routes into the Garda Síochána. The Inspectorate submitted an advice paper to the Minister in May 2018 which advised that barriers to opening up entry routes to the Garda Síochána needed to be addressed. This included further recommendations to provide entry routes which allow for direct entry across the ranks, including the sergeant and inspector ranks.
In relation to appointment of persons to ranks below rank of chief superintendent, the Inspectorate advice included:

- That similar reciprocal arrangements as exist for senior appointment processes in the PSNI and Garda Síochána under the Intergovernmental Agreement on Police Co-operation be developed to allow access to the sergeant and inspector promotional processes in both jurisdictions.
- That a Direct Entry Inspector programme to attract candidates with appropriate leadership and management experience in organisations outside the Garda Síochána be developed.
- That the case for developing a direct entry programme for superintendent be reviewed after the implementation of the proposed Direct Entry Inspector programme is fully evaluated.

**Head 42**

**Appointment of reserve members (1)**

*The Garda Commissioner may, subject to the regulations, appoint persons as reserve members of An Garda Síochána.*

The Inspectorate welcomes the removal of the term “to assist it in performing its function” as used in 15(1) of the Garda Síochána Act 2005 which limits the role of reserve members to one of assisting.

The Inspectorate’s report Policing with Local Communities (2018) found that the Garda Reserve is an important element of the garda workforce and, with the right leadership and support in place, it can deliver an additional and important uniformed presence in local communities. The report recommends that Reserves should be authorised to patrol independently and to use the powers for which training was provided.

**Head 45**

**Appointment of members of garda staff (1)**

*The Garda Commissioner may appoint persons (to be known as “garda staff”) to carrying out of the functions of the Garda Síochána and may determine their duties.*

The Inspectorate is pleased to note that this sub-head refers to Garda Staff “carrying out the functions of the Garda Síochána.” Which makes it clear that the role of garda staff is to assist in the carrying out of the functions of the Garda Síochána i.e. the provision of policing and security services.

The Inspectorate found in its reports Changing Policing in Ireland (2015) and Policing with Local Communities (2018) that the use of garda staff centred on clerical support and lacked imagination. There was also a general absence of acknowledgement of the benefits of high-level management, technical skills and qualifications that garda staff could bring.

The Inspectorate has recommended previously that garda members on duties that do not require police powers should be replaced by garda staff to facilitate the release of members back to front-line duties. This recommendation is echoed in report of the
CoFPI. This Head will facilitate the recruitment of staff by the Commissioner with the necessary specialist, technical and other skills to release garda members of all ranks for front-line duties.

<table>
<thead>
<tr>
<th>Head 46</th>
<th>Garda staff undertaking</th>
</tr>
</thead>
<tbody>
<tr>
<td>As per the comments in Head 37, despite the concept of a single organisation, where the personnel of the Garda Síochána comprise members and members of garda staff, it is notable that the wording of the solemn declaration is different for garda members and for garda staff and the arrangements for taking it also differ. This is written in a way that is not inclusive.</td>
<td></td>
</tr>
<tr>
<td>As also explained in Head 37, the New Zealand Police has taken a more inclusive approach. While the solemn undertaking and the oath are different because of the provision of police powers, all employees make an undertaking first and constable’s further take the oath. This is a process that could be suitable for adoption and inclusion in the General Scheme.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Heads 49</th>
<th>Setting of priorities by Authority for policing services</th>
</tr>
</thead>
<tbody>
<tr>
<td>As highlighted in Part 1 above, provision is made for the setting of priorities for policing services by the Authority while the Minister is responsible for the setting of priorities for security services.</td>
<td></td>
</tr>
<tr>
<td>The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services.</td>
<td></td>
</tr>
<tr>
<td>It is important to ensure that there are no gaps in the setting of priorities between the Minister and the Authority in this most critical area.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 50</th>
<th>Setting of priorities by Minister for security services</th>
</tr>
</thead>
<tbody>
<tr>
<td>While it is noted that before determining or revising priorities or establishing or revising performance targets under this head, the Minister must consult with (a) the Garda Commissioner, and (b) such other persons as the Minister considers appropriate.</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate is of the view that the National Security Analysis Centre, established as a result of a recommendation in the CoFPI report to bring the various relevant agencies of the State together, to pool expertise and information and produce a comprehensive picture of the threats to the State. As such, it, should be specified in the Act as a body that the Minister must consult with when setting of priorities under this head.</td>
<td></td>
</tr>
</tbody>
</table>
As highlighted in Part 1 above, provision is made for the setting of priorities for policing services by the Authority while the Minister is responsible for the setting of priorities for security services. The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services.

It is important to ensure that there are no gaps in the setting of priorities between the Minister and the Authority in this most critical area.

<table>
<thead>
<tr>
<th>Part 3 Reference</th>
<th>Observations and Suggestions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Head 92</strong></td>
<td><strong>Regulations concerning Local Community Safety Partnerships (1)</strong></td>
</tr>
</tbody>
</table>

*(b). providing a consultative forum for the preparation of the local policing plan and its implementation.*

Apart from local authorities and the police, it is unclear what other state agencies or bodies will become core members of Local Community Safety Partnerships. The regulations to be made under this head should specify who appoints persons or bodies to the partnerships and place an obligation on the person or body to fully participate in the work of the partnership.

**(2) (l) Attendance at Meetings**

*The attendance of representatives of the Policing and Community Safety Authority at meetings of the safety partnership and its committees for the purposes of performing its functions.*

Facilitating the attendance of representatives of the Policing and Community Safety Authority at meetings of the safety partnership and its committees will greatly assist the new oversight body to perform its functions as set out in Head 104.

**(n) Cooperation of the CSP with other committees/groups**

*The cooperation of the safety partnership with other safety partnerships and local community development committees.*

While outlining the principle (to be provided for in regulations) of the cooperation of the safety partnership with other safety partnerships and local community development committees and such other bodies or persons as required, the Inspectorate believes that it is important to clarify how they will interact with each other. For example, Sex Offender Risk Assessment and
Management (SORAM) committees which support enhanced levels of co-operation and co-ordination between key statutory organisations involved in managing the risks posed to the community by convicted sex offenders operate across Ireland. It is unclear if these committees will have any reporting line to, or relationship with, the Local Community Safety Partnerships. In some jurisdictions, Community Safety Partnerships provide the strategic lead for other committees with a community safety responsibility. This would include committees or groups who are responsible for child protection, youth offending and sexual and violent offender management.

**Head 93**

**Functions of Local Community Safety Partnerships**

1. Providing views to the relevant divisional officer on the preparation of the local policing plan and on progress on the implementation of the plan in relation to its functional area.

   It appears that the regulations may only make provision for Local Community Safety Partnerships to provide views on the preparation of the Garda Síochána local policing plans and that the regulations may not provide for the partnerships to provide views on the plans of other members of the partnership.

**Head 94**

**Staffing of Local Community Safety Partnerships**

The creation of community safety managers and providing sufficient staffing are considered by the Inspectorate to be essential elements that will be critical to the success of Local Community Safety Partnerships. It is also worth noting that in other jurisdictions this has led to the creation of multi-agency co-located units that include the assignment of police officers and other members of the police workforce.

**Head 95**

**Duties of Departments of State and other Public Service Bodies**

1. A Department of State or other public service body shall, in performing its functions, take account of the importance of taking steps to support the delivery of community safety including through the prevention of crime and the prevention of harm to individuals in particular those who are vulnerable or at risk.

   The Inspectorate welcomes the inclusion of an obligation on Departments of State and other public service bodies when performing their functions to take account of the importance of taking steps to support the delivery of community safety.

**Part 4 Reference**

**Observations and Suggestions**

**Head 98**

**Name of the New Oversight Body**

As the functions of the new oversight body as outlined in the heads in connection with community safety are more limited than the role envisaged by the CoFPI report. The inclusion of community safety in its name could lead to confusion as the to the core objective of the Authority which is to provide oversight of the Garda Síochána and the performance of its functions relating to the provision of
policing services, rather than community safety. It may also lead to confusion between the roles of the Authority, the National Community Safety Steering Group and the National Office for Community Safety.

<table>
<thead>
<tr>
<th>Head 104</th>
<th>Objectives and Functions of Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>A number of the current Policing Authority functions, are not included in the functions of the Authority. For example, the appointment to senior ranks will become a matter for the Commissioner.</td>
<td></td>
</tr>
<tr>
<td>The report of CoFPI envisages the purpose of the Garda Board as strengthening the governance and accountability of the organisation, holding the Commissioner and senior management to account for the effective performance of their responsibilities and providing a more appropriate framework of governance between the Department of Justice and the Garda Síochána than currently exists.</td>
<td></td>
</tr>
<tr>
<td>At this time, it is unclear to the Inspectorate what impact this may have on general oversight of the Garda Síochána. Without a clear understanding of how the Garda Board will operate in practice and without knowledge of how transparent their processes will be, it is difficult to comment on how the new governance structure will impact on oversight of the Garda Síochána. With an appropriate level of transparency by the Garda Board, oversight of policing might still be strong. However, if this oversight is not transparent, then oversight may be weakened or perceived to be weakened.</td>
<td></td>
</tr>
<tr>
<td>As the Authority will be limited to the functions of the Garda Síochána as they relate to the delivery of policing services, it will diminish the inspection function that currently exists in the Inspectorate. As such, the Authority will not be empowered to scrutinise the Garda Síochána’s performance and professional standards as they relate to National Security, State Security and Security Services and it appears that the inspection function will be unable to conduct inspections into these aspects of policing.</td>
<td></td>
</tr>
<tr>
<td>It is important to ensure that there are no gaps in oversight between the role of the Independent Examiner and the Authority in this most critical area.</td>
<td></td>
</tr>
<tr>
<td>As commented under Head 3, it is unclear if the Authority can carry out joint inspections with the Examiner.</td>
<td></td>
</tr>
</tbody>
</table>
| (2) (c) Inspect into any aspect of the operation or administration to carry out at its own initiative or at the request of the Minister Inspections in relation to any particular aspects of the operation and administration of An Garda Síochána relating to policing services including in relation to adherence to human rights standards and cooperation with other public service bodies to enhance community safety) and make recommendations to the
Garda Commissioner or the Minister as the case may be for any action that the Authority considers desirable.

While the Inspectorate has traditionally made recommendations to the Garda Commissioner or to the Department of Justice, it has also made cross sectoral recommendations in a number of its reports including the recently published report on Countering the Threat of Corruption in the Garda Síochána (2021). Additionally, with new community safety responsibilities and the ability to conduct joint inspections, recommendations are likely to be cross sectoral and far broader. This subhead appears to preclude the Authority from making recommendations to anyone other than the Minister for Justice and the Commissioner.

(2) (f) To advise on, and monitor the implementation by An Garda Síochána of any recommendations arising from investigations, inquiries or reviews carried out by bodies other than the Authority as it considers appropriate or at the request of the Minister.
It is not clear who the Authority is expected to advise and who is responsible for considering the advice, deciding to accept the advice and acting on the advice.

(2) (h) Promote professional policing standards (including human rights standards)
It is unclear who is responsible for setting the professional policing standards and if the professional policing standards referred to are the Ethical Standards and Commitments set out in the Garda Code of Ethics. In England and Wales, the Standards of Professional Behaviour that apply to all police officers have been set out by the Home Office by way of statutory guidance.

(2) (k)(i) to keep itself generally informed of trends and patterns in the use of force by members of An Garda Síochána.
The Inspectorate recommended in its report on Public Order Policing (2019) that the external oversight of garda use of force trends should be incorporated into the performance monitoring activities of the Policing Authority and any subsequent oversight body. As such, this head should be strengthened to reflect the monitoring role envisaged by the Inspectorate.

(2)(m)(i) promote improvements in standards for those matters and public awareness of them.
As highlighted in (2) (h) policing standards are not defined or explained.

Head 110

Annual Business Plan (3)&(5)
(3) The business plan shall for the year to which it relates indicate the Authority's activities, and shall in particular –
(a) set out priorities for inspections to be carried out (including any joint inspections), and information on how such inspections will be carried out in a way which is -
(i) proportionate, accountable and transparent, and
(ii) ensures the integrity and objectively of the findings of such inspections,

(5) The Authority shall keep the business plan under review, and may from time to time revise the plan.

While it is important to deliver inspections that are in the business plan, it is also important that the Authority has the ability to respond to an emerging and significant policing issue or to a request from the Minister that is outside of the business plan process. These subheads appear to provide such flexibility.

<table>
<thead>
<tr>
<th>Head 113</th>
<th>Appointment of Inspectors of Policing Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) and (6) Appointment and Experience</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate welcomes the appointment of inspectors of policing services and in doing so it acknowledges the importance of service as a senior officer or retired such officer in the police service of another state, or having otherwise obtained such relevant experience, qualifications, training or expertise. Because of the important nature of this role and the high-skill set that is required, the Inspectorate believes that the recruitment process should be open and transparent.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 114</th>
<th>Powers of Inspectors of Policing Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) As soon as practicable after the commencement of this head the Authority and the Garda Commissioner shall agree a memorandum of understanding concerning the conduct of inspections under head 104(2) (c) or (d).</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate believes that a time limit for the MOU to be agreed needs to be included. For example, within six or nine months of the commencement and to set out the procedure to be followed if it is not possible to agree an MOU within the set timeframe.</td>
<td></td>
</tr>
<tr>
<td>In order for Inspectors of Policing Services to have all such powers as are necessary or expedient for the carrying out or in connection with inspections, the Inspectorate believes that under Head 104(2) (c) or (d), a head similar to 177 needs to be included. Head 177 provides that the Garda Commissioner shall, as soon as practicable, provide the Garda Ombudsman with such information and documents as the Garda Ombudsman may request for the purpose of, or in connection with, the exercise of any of his or her functions.</td>
<td></td>
</tr>
<tr>
<td>The Inspectorate considers that the power to make unannounced visits at any time to any garda station or other premises or facility where members of garda personnel are assigned in connection with the provision of policing services should be explicitly set out in the General Scheme.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 115</th>
<th>Joint inspections</th>
</tr>
</thead>
<tbody>
<tr>
<td>While prescribing joint inspections is viewed by the Inspectorate as a positive step, it does not appear to be sufficiently strong enough</td>
<td></td>
</tr>
</tbody>
</table>
to ensure that joint inspections will actually take place. Further consideration will be required as to whether the approach in this head and in particular the proposal to prescribe other inspection bodies is sufficient to empower those other bodies to undertake joint inspections.

It is unclear if the Authority can carry out joint inspections with the Examiner and if prescribed bodies will have their own operating legislation changed to facilitate joint inspections.

### Head 116

**Reports of inspection or inquiry requested by the Minister**

(4) The Minister may exclude from the copies of a report which is to be laid before the Houses of the Oireachtas any matter which, in his or her opinion might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person.

The Inspectorate suggests that any matter that may jeopardise a discipline investigation should be considered as an additional reason for excluding that matter from a report.

### Head 117

**Reports of inspections or inquiries undertaken at Authority’s own initiative**

(2) As soon as practicable after giving a report to the Garda Commissioner and the Minister and subject to subhead (3) the Authority shall publish the report on the Internet, or in accordance with such other arrangement as it may consider appropriate.

The Inspectorate welcomes the provision to facilitate the publication of the Authority’s self-initiated inspections at this point.

(3) The Authority may exclude from the report to be published any matter which, in its opinion might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person.

The Inspectorate suggests that any matter that may jeopardise a discipline investigation should be considered as an additional reason for excluding that matter from a report.
<table>
<thead>
<tr>
<th>Head 119</th>
<th>Cooperation of the Garda Síochána with inspections and inquiries</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) (b) the duty to provide on request by the Authority, any document relating to policing services in the power or control of An Garda Síochána.</td>
</tr>
<tr>
<td></td>
<td>The Inspectorate is of the view that this provision should be extended to provide a duty to also provide any information in the possession of the Garda Síochána which is in the opinion of the Authority necessary for carrying out or in connection with an inspection or inquiry.</td>
</tr>
<tr>
<td></td>
<td>This provision should be similar to Head 177 that requires that the Garda Commissioner shall, as soon as practicable, provide the Garda Ombudsman with such information and documents as the Garda Ombudsman may request for the purpose of, or in connection with, the exercise of any of his or her functions.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 122</th>
<th>(1) Accountability of Authority to Oireachtas Committees</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The Garda Síochána Act 2005 provides that the Chief Inspector of the Garda Inspectorate shall, at the written request of a committee of either or both of the Houses of the Oireachtas (other than the Committee of Public Accounts) in connection with the subject matter of any report of which copies were laid before those Houses under section 117(4), attend before it in relation to any aspect of that matter.</td>
</tr>
<tr>
<td></td>
<td>This head, does not provide for similar parliamentary scrutiny of inspection reports from the Authority. The Inspectorate is of the view that such scrutiny should be provided for.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Part 5 Reference</th>
<th>Observations and Clarifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 143</td>
<td>Objectives, functions and powers of Garda Ombudsman</td>
</tr>
<tr>
<td></td>
<td>The Inspectorate welcomes the exclusion of a current GSOC function to conduct inspections or inquiries into practices, policies or procedures. This removes any overlaps with the functions of the Authority.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 149</th>
<th>Designation of officers Designation of officers and others for purpose of investigations under Part 6</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This is a welcome addition that permits the Garda Ombudsman to delegate some of the current functions of the Commissioners to senior designated officers.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Part 6 Reference</th>
<th>Observations and Suggestions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Head 157</td>
<td>Interpretation</td>
</tr>
<tr>
<td></td>
<td>The category of “incident of concern” is an area open to wide interpretation. It is noted that the precise threshold for notification is subject to further consideration.</td>
</tr>
<tr>
<td></td>
<td>In the Inspectorate’s report on Countering the Threat of Internal Corruption in the Garda Síochána (2021), two recommendations</td>
</tr>
</tbody>
</table>
are made in connection with the sharing of intelligence and the investigation of conduct. This includes a recommendation that the Garda Síochána should develop formal arrangements for the mutual sharing of intelligence between the Garda Síochána Ombudsman Commission, Law Enforcement Agencies and the Garda Anti-Corruption Unit.

A further recommendation is made to the Department of Justice to implement the necessary statutory framework (in line with the State’s obligations under the European Convention on Human Rights relating to effective independent investigation) to ensure that all instances of conduct linked to sexual violence or abuse of power for sexual gain arising from the actions of a member of the garda workforce acting in their professional capacity, which could result in a breach of an individual’s rights under Article 2 or Article 3 of the European Convention on Human Rights are referred for independent investigation.

This definition will have a significant impact on Head 165 in connection with the notification of incidents by the Garda Commissioner to the Garda Ombudsman.

**Definition of serious harm**
The inclusion of a sexual offence in the definition of serious harm provides clarity over what types of cases should be automatically referred by the Garda Commissioner to the Garda Ombudsman and removes the current confusion and inconsistency in this particular area. The Inspectorate believes that in order to satisfy the State’s obligations under international law to carry out independent investigations, at a minimum, referrals under Head 165 from the Garda Commissioner should extend to cases where a member of the garda workforce is suspected of sexual violence or abuse of power for sexual gain against a member of the public or another garda employee. The Inspectorate is pleased to see that abuse of power for sexual gain is included in the definition of serious harm.

**Trainee gardaí**
While trainee gardaí are not attested, they could be treated in the same way as garda staff and the Inspectorate is unclear as to why they are not included in the provisions. With the recent COVID-19 crisis, trainee gardaí have been deployed to operational posts prior to completing their training at the Garda College and prior to them commencing their probationary period.

<table>
<thead>
<tr>
<th>Head 159</th>
<th><strong>Making and recording of complaints</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) (b)Where a complaint is made to An Garda Síochána it may be made to—</td>
<td></td>
</tr>
<tr>
<td>(b) any member of garda personnel at a Garda Síochána station</td>
<td></td>
</tr>
</tbody>
</table>

Providing for a member of garda staff to receive a complaint provides more inclusivity and is a positive addition.
<table>
<thead>
<tr>
<th>Head 160</th>
<th>Determination of admissibility of complaint, suitability for resolution by Garda Síochána</th>
</tr>
</thead>
<tbody>
<tr>
<td>5) For the purposes of making a determination under subhead (1) or (3) the Garda Ombudsman may make such enquiries as he or she thinks fit.</td>
<td></td>
</tr>
<tr>
<td>This is a welcome inclusion and addresses a current legislative gap in the ability of GSOC (prior to determination) to make pre-admissibility inquiries into the circumstances of a complaint.</td>
<td></td>
</tr>
<tr>
<td>For many complainants, an early intervention, explanation or apology will often resolve their complaint. This head may prevent the Garda Síochána from resolving service level or performance management complaints at the time that a complaint is made directly to the Garda Síochána.</td>
<td></td>
</tr>
<tr>
<td>(9) Determining that a complaint is inadmissible</td>
<td></td>
</tr>
<tr>
<td>The removal of a provision to notify a member of the garda workforce who may be the subject of an inadmissible complaint removes an unnecessary requirement that is currently placed on GSOC.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 161</th>
<th>Categories of complaints suitable for resolution by An Garda Síochána</th>
</tr>
</thead>
<tbody>
<tr>
<td>As highlighted in Head 160 - For many complainants, an early intervention, explanation or apology at the time of making a complaint can often resolve their complaint this head may prevent the Garda Síochána from resolving service level complaints at the time that a complaint is made directly to a member of garda personnel.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 164</th>
<th>Matters concerning death of, or serious harm, to a person</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The Garda Commissioner shall, without delay, refer to the Garda Ombudsman any matter that appears to the Garda Commissioner to indicate that the conduct of a member of garda personnel may have resulted in the death of, or serious harm to, a person</td>
<td></td>
</tr>
<tr>
<td>The inclusion of a time frame for notification is a good addition, and the use of ‘without delay’ appears to be appropriate.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Head 165</th>
<th>Notification to Garda Ombudsman of incident of concern in relation to conduct of member of garda personnel</th>
</tr>
</thead>
<tbody>
<tr>
<td>(5)(ii) The Garda Commissioner shall be required to notify an incident of concern under subhead (i)</td>
<td></td>
</tr>
<tr>
<td>(ii) would not endanger the life or safety of any person who has given formation in confidence to a public body in relation to the enforcement or administration of the law</td>
<td></td>
</tr>
<tr>
<td>Inclusion of the criteria for not notifying on the grounds that it would endanger the life or safety of any person who has given information in confidence to a public body in relation to the enforcement or</td>
<td></td>
</tr>
</tbody>
</table>
administration of the law, may well remove incidents of concern raised by persons such as covert human intelligence sources in connection with their handling. The Inspectorate notes that subhead (6) provides that the Garda Commissioner is required to inform the Independent Examiner and Garda Ombudsman without delay when subhead 5 is invoked.

| Head 166 | **Investigation of matters in the public interest**

(5) The Policing and Community Safety Authority may refer any matter to the Garda Ombudsman that gives rise to a cause for concern that a member of garda personnel may have—

- (a) committed an offence, or
- (b) behaved in a manner that may have breached the standards of professional behaviour and which if proved would justify conduct Proceedings.

The provision to allow the Policing and Community Safety Authority to refer any matter that gives cause for concern to the Garda Ombudsman is an important addition. This addresses a gap in the Inspectorate’s current legislation.

| Head 168 | **Formal Investigation**

**Barred list**

In England and Wales provision is made in certain circumstances for a finding of gross misconduct in relation to a former member of a police service to be recorded on a “barred list”. The effect of appearing on the barred list is exclusion from working in the policing field.

The importance and use of a Barred List in England and Wales is explained in the Inspectorate’s Countering the Threat of Internal Corruption Report (2021). This list applies to workforce members who are dismissed from a police service.

In the UK, there is also a Police Advisory List for those who retire or resign from the police service during an investigation or before issues of conduct come to light.

The Barred and Police Advisory Lists are managed by the UK College of Policing. In the absence of a professional body in Ireland, a recording system for any such findings should be introduced to retain this type of information. It is worth noting that ex-garda members can currently apply for the majority of positions within GSOC and will be able to apply for positions in the new Policing and Community Safety Authority.

| Head 173e | **Garda Ombudsman referral to the Director of Public Prosecutions**

1(b) at the Director’s request, provide him or her with any other information relating to the investigation that appears to the Director to be necessary for performing his or her functions under the Prosecution of Offences Act 1974.
This subhead closes a gap in the current process whereby the investigation is effectively closed once a report is completed and sent to the DPP. As such, a request from the DPP for additional action, such as further statements creates a challenge as the case cannot effectively be re-opened.

**Head 177**  
**Provision of information to Garda Ombudsman by Garda Síochána**  
This is an important provision as it strengthens the obligation on the Garda Commissioner to provide the Garda Ombudsman with such information or documents as the Garda Ombudsman may require for the purposes of, or in connection with, the exercise of his or her functions. The inclusion of "as soon as practicable" is an important addition.

As highlighted in Head 119, the Inspectorate believes that a similar provision should be made for the Authority.

**Head 181**  
**Protocols**  
While the head states that written protocols should be arranged as soon as practicable, it would be beneficial to put a time period on this, such as six or nine months after the passing of the Act.

\[1(h) \text{ the sharing with each other of information (including evidence of offences) obtained by either the Garda Ombudsman or the Garda Commissioner.}\]

While this subhead addresses the issue of information, it does not explain what type of information this refers to. For example, it is not clear if it includes information and intelligence on corruption or suspected wrongdoing. This is an area that is also examined in the Inspectorate’s Countering the Threat of Internal Corruption report (2021).

**Head 188**  
**Power of Garda Ombudsman to enter into agreements with law enforcement agencies or other relevant persons or bodies outside the State**  
This is a welcome provision that addresses a previous legislative gap that prevents GSOC from entering into agreements with police oversight bodies and law enforcement agencies outside the State in order to exchange information.

**Part 7 Reference**  
**Observations and Suggestions**  

**Head 195**  
**Functions of Examiner**  
\[(1)(d) \text{ to examine whether the delivery of security services is to the highest levels of efficiency and effectiveness having regard to international standards.}\]

The General Scheme separates security services from policing services and the oversight arrangements will also be separated with the Independent Examiner having responsibility for oversight of security services and the Authority being responsible for oversight of policing services. There is not always such clear lines
between those criminals and organised criminal networks involved in serious crime and other crimes that impact on communities. There are also overlaps in the policing tactics and policing powers that are used. For example, those who pose a threat to national security may also be involved in serious criminality that is covered by policing services.

It is important to ensure that there are no gaps in oversight between.

While Head 115 allows for joint inspections with other statutory agencies, it unclear if the Authority can carry out joint inspections with the Examiner.

**Heads 203, 204 and 205**

**Other Oversight Roles - 202 (2), 203 (2) and 204 (2)**

The Inspectorate notes that the Independent Examiner will also have an oversight role in relation to the operation of the provisions of the Interception of Postal Packets and Telecommunications Messages (Regulations) Act 1993, the operation of the provisions of the Criminal Justice (Surveillance) Act 2009 and the operation of the Communications (Retention of Data) Act 2011. While these powers are used to investigate crimes against the state, they are used on a daily basis in connection with the investigation of other crime, including serious and organised crime.

The Inspectorate has previously examined the use of these types of powers and they will no doubt feature in future inspections conducted by the Authority. There is a need for clarity around the different oversight responsibilities in respect of these areas and policing activity associated with the various pieces of legislation.

**Part 8**

**Reference**

**Observations and Suggestions**

**Head 222**

**Regulations relating to standards of professional Behaviour**

1) *The Minister may, after consulting with the Garda Commissioner and the Garda Síochána Ombudsman, and with the approval of the Government, make regulations prescribing the standards of professional behaviour applicable to members of garda personnel.*

The Inspectorate is of the view that the Authority should also be included as one of the bodies the Minister should consult with while making regulations under this subhead.

**Head 229**

1) *Sharing of information for the performance of functions*

1) *For the performance of their respective functions under this Act and the regulations or any other enactment -*

(a) the Garda Commissioner,

(b) the Policing and Community Safety Authority, and

(c) the Office of the Garda Síochána Ombudsman may share information, including personal information, with each other in accordance with the law.*
The inspectorate welcomes the provision under this head to facilitate the Garda Commissioner, the Policing and Community Safety Authority, and the Office of the Garda Síochána Ombudsman to share information. This will support each of the bodies in expediently performing their respective functions.

<table>
<thead>
<tr>
<th>Head 239</th>
<th>Amendment of Freedom of Information Act 2014 (C) (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This head continues the exemption currently in place for the Inspectorate’s inspection function from the Freedom of Information Act 2014 insofar as it relates to records concerning an inspection or inquiry carried out by the Authority.</td>
</tr>
<tr>
<td></td>
<td>This is a necessary provision that if it was not in place would impede the expedient carrying out of inspections.</td>
</tr>
</tbody>
</table>

4. Conclusion

The Inspectorate welcomes the publication of the General Scheme. In order for the proposed new oversight arrangements to be effective it is critical that the inspection function remains an important part of the oversight architecture and this submission includes observations and suggestions to support the performance of the inspection function within the Authority. The Inspectorate appreciates the invitation to furnish a written submission to the Committee and hopes that it will be of assistance in its consideration of the Scheme.
The above entitled matter and your correspondence of 13 July 2021 refers.

An Garda Síochána welcomes the invitation to make a written submission to the Dáil Committee on Justice on the General Scheme of the Policing, Security and Community Safety Bill. As Commissioner, I acknowledge the very particular privilege of this opportunity during my tenure to positively influence the development of the legislative architecture underpinning the State’s policing service for future generations.

This Scheme aims to provide a new coherent governance and oversight framework for policing, designed to strengthen both the management of An Garda Síochána and independent external oversight of policing within the State.

Regrettably, however, for the reasons detailed below and in finer detail within the comprehensive submission attached hereto, I am firmly of the view that there are significant legal infirmities and a fundamental imbalance in the proposed framework. As it is currently drafted, the Scheme falls well short of our shared ambition for a transparent, accountable, trusted and effective policing service for the future.

An Garda Síochána: Ag Coinneáil Daoine Sábhálta – Keeping People Safe
By way of example, as to why I take this view, starts with my concerns with respect to the proposed governance and oversight structures. While I warmly welcome the establishment of a non-executive Board of An Garda Síochána to strengthen Garda management and governance, I have a number of concerns as detailed within the attached submission.

For example, whilst it is clearly intended that the Board would have no role in relation to operational policing matters, as currently drafted, the absence of clarity and significant overlap between the respective roles of the Board and the new Policing and Community Safety Authority taken together significantly risk encroaching on the operational independence of the Garda Commissioner. My concerns with respect to the absence of clarity and significant overlap between the respective roles extends also into the area of interagency co-operation, where I see proposed complex and divergent accountability structures.

A key principle of the Commission on the Future of Policing in Ireland (CoFPI) is that policing is not the responsibility of An Garda Síochána and the Department of Justice alone, rather it is a shared responsibility involving other Departments and agencies, and the wider community working together. The Scheme aims to make community safety a whole of government responsibility by placing an obligation on Departments of State and public service bodies to cooperate with An Garda Síochána, and each other, in relation to enhancing community safety. It is clear that there is an imbalance in the framework proposed in the Scheme and as a result, it may fall short of the shared ambition for safer communities.

An Garda Síochána is held to account for interagency co-operation to the Policing and Community Safety Authority, whereas the other agencies are held accountable to the National Community Safety Steering Group. It is the steering group’s function to provide senior leadership and direction for the implementation of the national community safety strategy and fostering interagency cooperation. The primary function of the Authority will be to oversee the performance of An Garda Síochána in relation to policing services. It is envisaged this role will include overseeing and assessing how An Garda Síochána is working with other public service bodies to enhance community safety. It is my view that this particular function should rest with the National Community Safety Steering Group, rather than the Policing and Community Safety Authority, as the Authority has no remit in respect of these other agencies.

I have serious concerns regarding the proposed provisions contained within Part 5 (Office of the Garda Síochána Ombudsman) and Part 6 (Complaints, incidents of concern, investigations and other matters) of the Scheme. The provisions as drafted fail to achieve the objectives of overhauling the processes for dealing with complaints against An Garda Síochána, fail to layout a framework to conduct investigations in a timely and effective manner, and most significantly of all, fail to offer a process which safeguards due process and fair procedures for all concerned.

An Garda Síochána: Ag Coinneáil Daoine Sábháilte – Keeping People Safe
In particular, the absence of independent oversight of the effectiveness and timeliness of the Garda Ombudsman's investigation of complaints, and the absence of reduced notification requirements upon the Garda Ombudsman to the Garda Commissioner and Garda personnel who are the subject of a complaint, will in my view mire the complaints process in costly and expensive legal challenge.

Furthermore, there is complete absence of appropriate independent judicial oversight or indeed any operational scrutiny of the Garda Ombudsman, for example, when seeking authority to search a Garda premises. When coupled with the disproportional powers proposed for designated officers of the Ombudsman when conducting a formal investigation in respect of all Garda personnel, applying now not only to Garda Members, but equally to Garda staff, who it must be remembered exercise none of the legal powers that might go some way to justify such a heightened regime of scrutiny, means I consider this aspect of the Scheme not only to be draconian in nature, but likely to be found to have transgressed the very foundational principles of constitutional fairness in the all but certain litigation which would follow any attempt to introduce such a regime.

As Garda Commissioner, it would be remiss of me not to acknowledge some uncomfortable truths about the recent and not so recent history of events in An Garda Síochána, which gave rise to the CoFPI recommendations and the impetus for this Scheme. An Garda Síochána accept without reservation that the loss of confidence in our management structures, processes and most especially our culture is an absolutely legitimate basis for an ambitious legislative reform agenda. However, it is not fair to disregard the progress made to date in respect of our identified deficiencies, recent examples of which include a reform agenda that saw the establishment of Anti-Corruption and Human Rights Units, and significant progress on a range of APSFF initiatives supported by the Department of the Taoiseach, with cross inter-departmental support.

In my view, this overly punitive approach as proposed is not only unfair, but it is also unlikely to be effective. It will not build a positive working culture or assist in the delivery of an improved policing service. What I firmly believe would be effective is; being responsive to the public needs in terms of our delivery of their policing service. This will be best achieved by providing the appropriate leadership at all levels, creating an ethical environment with improved training. For example, further embedding the Garda Decision Making Model with its focus on the Code of Ethics, constitutional and human rights, an appropriate, supportive developmental performance assessment regime, together with training, awareness building and capacity building as broadly recommended by the Garda inspectorate. This, in my view, is the route to a positive working environment.

Regrettably, the Heads as they currently relate to the Garda Ombudsman and An Garda Síochána will not deliver such an environment. In fact, the
proposed powers are disproportionate in respect of the actual threat of corruption and misconduct facing An Garda Síochána.

A positive culture, with ethical decision making and good behaviour exhibited towards the public and other work colleagues, cannot be delivered from a location or organisation outside An Garda Síochána. Rather, it must be built into the hurly burly of everyday management and leadership, with issues being dealt with quickly and proportionately. These processes, as outlined in the Scheme, will not assist in this regard, but will in my view actually prevent that from happening, by removing the everyday responsibility of managers to intervene in a timely manner in respect of unacceptable conduct, passing on all responsibility to a remote entity.

A further major concern relates to the impact on the welfare of individual members and staff under investigation, under the Scheme as proposed. As currently formulated, Garda employees may not know whether or not they are being investigated and they are not entitled to know the anticipated timescale of any such investigation. They will not know from inception whether they are being investigated for crime or misconduct, as initially, all matters are dealt with as crime. There are no requirements as to the timelines of investigation, investigations can literally run on for years, all of which creates huge stress and anxiety for the individual Garda Member or Garda staff, and is in of itself in flagrant disregard to established principles of fair procedure.

Finally, evidencing the size and scope of this endeavour, the Scheme provides for the establishment of the Independent Examiner of Security Legislation. This is a significant development in the oversight of security legislation, the delivery of security services and the adjudication on information requests on matters pertaining to State security. While the Scheme acknowledges the sensitive nature of State security and the need for the protection of same, An Garda Síochána is resolute in its position that it is imperative that no intelligence information should be shared/provided to any third party without the explicit permission of the said intelligence provider.

In conclusion, while I appreciate that An Garda Síochána is one of many stakeholders with whom the Department have engaged in the drafting of this Scheme, there remains a number of significant proposed legislative provisions within the Scheme that are of considerable concern to me as Commissioner of this organisation. These concerns and their potential consequences are set out in detail in the attached written submission to which I know you will give your dedicated attention, and I thank you in advance for this.

I continue to engage with the Minister and Department of Justice with a view to creating a sound legislative framework to build an effective policing service for the future.
Please find enclosed the written submission from An Garda Síochána to the Committee on the General Scheme of the Policing, Security and Community Safety Bill.

Yours sincerely,

J A HARRIS
COMMISSIONER
AN GARDÁ SÍOCHÁNA

August 2021
An Garda Síochána

DRAFT

Submission to the Dail Committee on Justice:

General Scheme of the Policing Security and Community Safety Bill

Version No: 0.03
Date: August 2021
# Table of Contents

1. EXECUTIVE SUMMARY ................................................................. 1
2. OBSERVATIONS ON THE GENERAL SCHEME .................................. 7
2.1. PART 1: PRELIMINARY AND GENERAL MATTERS .................................. 7
2.1.1. Head 1: Short Title and Commencement ........................................... 7
2.1.2. Head 2: Interpretation - Definition of Capital Expenditure .................. 7
2.1.3. Head 2: Interpretation - Definition of Capital Plan ............................. 7
2.1.4. Head 2: Interpretation - Definition of the term person ....................... 7
2.1.5. Head 2: Interpretation - Lack of definition of corruption to support Garda Anti-Corruption policies ................................. 7
2.1.6. Head 2: Interpretation - Lack of definition of “business interests” to support Garda Anti-Corruption policies ............................. 8
2.1.7. Head 3: Security Services ............................................................... 8
2.1.8. Head 4: Repeals ............................................................................ 9
2.1.9. Head 5: Expenses ......................................................................... 9
2.2. PART 2: AN GARDA SIÓCHÁNA ..................................................... 9
2.2.1. Head 6: Continuation of Garda Síochána .......................................... 9
2.2.2. Head 7: Principles of Policing ......................................................... 9
2.2.3. Head 8: Functions of Policing ....................................................... 10
2.2.4. Head 9: Prosecution of offences by members of An Garda Síochána .......... 11
2.2.5. Head 10: Establishment and Membership of Board ........................... 11
2.2.6. Head 11: Role of the Board .......................................................... 11
2.2.7. Head 12: Meetings of Board and Procedures ................................... 12
2.2.8. Head 13: Ineligibility for appointment, disqualification for office, cessation of membership .............................. 12
2.2.9. Head 14: Removal of member of Board from office .......................... 12
2.2.10. Head 15: Removal of all members of Board from office ..................... 13
2.2.11. Head 16: Committees of Board .................................................... 13
2.2.12. Head 17: Remuneration and expenses of members of Board and committees ... 13
2.2.13. Head 18: Provision of services to the Board .................................... 13
2.2.15. Head 20: Appointment of Deputy Garda Commissioner .................... 14
2.2.16. Head 21: Power of Deputy to perform functions of Garda Commissioner .......................................................... 14
2.2.17. Head 22: Resignation of Garda Commissioner, Deputy Garda Commissioner .................................................. 14
2.2.18. Head 23: Suspension of Garda Commissioner and Deputy Garda Commissioner .............................. 14
2.2.19. Head 24: Inquiry into any matter giving rise to notification under Head 23(7) ........................................ 15
2.2.20. Head 25: Functions of Garda Commissioner .................................... 15
2.2.21. Head 26: Direction and control of Garda Síochána .......................... 16
2.2.22. Head 27: Independence of Garda Commissioner ................................ 16
2.2.23. Head 28: Duty of Garda Commissioner to account to Government, Minister and Attorney General ........................................ 16
2.2.24. Head 29: Duty of Garda Commissioner to provide information ............ 16
2.2.25. Head 30: Directives from Minister ................................................. 17
2.2.26. Head 31: Delegation of powers, functions, or duties of Garda Commissioner .................................. 17
2.2.27. Head 32: Powers relating to contracts, bank accounts, etc..................... 17
2.2.28. Head 33: Arrangements for obtaining views of public ......................................................... 17
2.2.29. Head 34: Provision of police services for certain events, etc. ........................................... 17

CHAPTER 5: GARDA PERSONNEL ................................................................................................. 17
2.2.30. Head 35: Garda personnel ................................................................................................. 17
2.2.31. Head 36: Ranks, under in each rank, terms and conditions ............................................. 17
2.2.32. Head 37: Member’s Solemn Declaration ......................................................................... 18
2.2.33. Head 38: Appointment of persons to ranks of Assistant Garda Commissioner and Chief Superintendent ................................................................. 19

2.2.34. Head 39: Suspension, removal of persons appointed to rank of Assistant Garda Commissioner or Chief Superintendent ................................................................. 19
2.2.35. Head 40: Inquiry into any matter giving rise to notification under Head 39(3) ................. 19
2.2.36. Head 41(3): Summary Dismissal (public confidence) ...................................................... 19
2.2.37. Head 42: Appointment of reserve members .................................................................... 19
2.2.38. Head 43(1): Duty of members of Garda personnel to account ........................................ 19
2.2.39. Head 43(3): Duty of members of Garda personnel to account ........................................ 19
2.2.40. Head 43(4): Admissibility in criminal proceedings .......................................................... 20
2.2.41. Head 44: Admission of Garda trainees .......................................................................... 20
2.2.42. Head 45: Appointment of members of Garda staff ........................................................ 20
2.2.43. Head 46: Garda Staff Undertaking .................................................................................. 20
2.2.44. Head 47: Power to appoint consultants and advisers ..................................................... 20
2.2.45. Head 48: Representative Associations .................................................................... 20

CHAPTER 6: ACCOUNTABILITY AND FUNDING OF AN GARDA SÍOCHÁNA ........................................ 21
2.2.46. Head 49: Setting of priorities by Authority for policing services ..................................... 21
2.2.47. Head 50: Setting of strategic priorities by Minister for Security Services .................... 21
2.2.48. Head 51: Strategic Plan ..................................................................................................... 21
2.2.49. Head 52: Publication and implementation of approved strategic plan ............................. 22
2.2.50. Head 53: Annual service plan ......................................................................................... 22
2.2.51. Head 54: Amendment of approved annual service plan ............................................... 22
2.2.52. Head 55: Implementation of approved annual service plan ........................................... 22
2.2.53. Head 56: Annual and multi annual capital plan ............................................................... 23
2.2.54. Head 57: Implementation of approved capital plan ......................................................... 23
2.2.55. Head 58: Accountability of Garda Commissioner for accounts of Garda Síochána .......... 23
2.2.56. Head 59: Attendance of Garda Commissioner before other Oireachtas Committees ....... 23
2.2.57. Head 60: Audit committee ............................................................................................. 23
2.2.58. Head 61: Provisions supplementary to Head 60 ............................................................... 24
2.2.59. Head 62: Functions of audit committee ......................................................................... 24
2.2.60. Head 63: Governance Framework .................................................................................. 24
2.2.61. Head 64: Annual Report ................................................................................................. 24
2.2.62. Head 65: Statistical information ..................................................................................... 24

CHAPTER 7: CODE OF ETHICS, STANDARDS OF INTEGRITY, UNAUTHORISED DISCLOSURE OF INFORMATION ................................................................................................. 24
2.2.63. Head 66: Code of ethics for members of Garda personnel ........................................... 24
2.2.64. Head 67: Standards of integrity, codes of ethics for members of committees, advisors or consultants etc. ................................................................................. 25

2.2.65. Head 68: Confidentiality of certain Information (also relevant to heads 127/restatement of section 62M and head 154/restatement of section 81 of the 2005 Act) ................................. 25

CHAPTER 8: SPECIAL INQUIRIES RELATING TO ADMINISTRATION, PRACTICE OR PROCEDURE ................................................................. 26
2.2.66. Head 69: Special inquiries relating to administration, practice or procedure .......... 26

CHAPTER 9: LIABILITY .................................................................................................................. 26
2.2.67. Head 70: Liability for certain acts of members of An Garda Síochána ............................ 26
2.2.68. Head 71: Legal aid for members of An Garda Síochána .................................................. 27
CHAPTER 10: INTERNATIONAL SERVICE AND COOPERATION WITH POLICE SERVICE, LAW ENFORCEMENT AGENCIES OR OTHER RELEVANT PERSONNEL OUTSIDE STATE

2.2.69. Head 72: Interpretation......................................................................................... 27
2.2.70. Head 73: International service ................................................................................ 27
2.2.71. Head 74: Power to enter into agreements with other law enforcement agencies, relevant persons or bodies outside the State........................................................................ 27
2.2.72. Head 75: Secondment from Police Service of Northern Ireland to certain ranks in An Garda Síochána ........................................................................................................ 27
2.2.73. Head 76: Secondment from An Garda Síochána to Police Service of Northern Ireland ........ 27
2.2.74. Head 77: Breach of standards of professional behaviour by seconded member of Garda Síochána ........................................................................................................ 27
2.2.75. Head 78: Breach of professional standards of behaviour by seconded member of Police Service of Northern Ireland ................................................................. 27
2.2.76. Head 79: Records relating to members serving outside the State........................... 27
2.2.77. Head 80: Duties of Ard-Chláraitheoir in relation to records transmitted under this Act .... 27
CHAPTER 11: OFFENCE OF CAUSING DISAFFECTION AND IMPERSONATION

2.2.78. Head 81: Causing disaffection............................................................................ 28
2.2.79. Head 82: Offence of impersonating member of Garda Síochána ............................ 28
2.2.80. Head 83 Other offences relating to impersonation ................................................ 28
2.3. PART 3: COMMUNITY SAFETY

2.3.1. Head 84: Interpretation......................................................................................... 29
2.3.2. Head 85: National Community Safety Strategy....................................................... 29
2.3.3. Head 86: National Community Safety Steering Group........................................... 29
2.3.4. Head 87: National Office for Community Safety .................................................. 29
2.3.5. Head 88: Director of National Office ...................................................................... 29
2.3.6. Head 89: Accountability to Oireachtas Committees .............................................. 29
2.3.7. Head 90: Staff of National Office........................................................................... 29
2.3.8. Head 91: Provision of services to National Office .................................................... 29
2.3.9. Head 92: Regulations concerning Local Community Safety Partnerships ............... 29
2.3.10. Head 93: Functions of Local Community Safety Partnerships ............................... 30
2.3.11. Head 94: Staffing of Local Community Safety Partnerships .................................. 30
2.3.12. Head 95: Duties of Departments of State and other public service bodies ............. 30
2.4. PART 4: ESTABLISHMENT OF THE FUNCTIONS OF POLICING AND COMMUNITY SAFETY AUTHORITY .................................................................................... 31

2.4.1. Head 96: Interpretation......................................................................................... 31
2.4.2. Head 97: Establishment day of Authority ............................................................... 31
2.4.3. Head 98: Establishment of Authority .................................................................. 31
2.4.4. Head 99: Membership of Authority.................................................................... 31
2.4.5. Head 100: Recommendations for appointment of ordinary members of Authority .......... 31
2.4.6. Head 101: Terms and conditions of appointment of members of Authority .......... 31
2.4.7. Head 102: Ineligibility for appointment, disqualification for office of member of Authority, cessation of membership, etc. ................................................................. 31
2.4.8. Head 103: Removal of member of Authority ....................................................... 31
2.4.9. Head 104: Objective and functions of Authority ................................................ 31
2.4.10. Head 105: Authority to have regard to security services .................................... 32
2.4.11. Head 106: Meetings and business of Authority ................................................ 32
2.4.12. Head 107: Committees of Authority .................................................................. 32
2.4.13. Head 108: Power to appoint consultants and advisers etc. and to enter into contracts ........ 32
2.4.15. Head 110: Annual Business Plan ....................................................................... 32
2.4.16. Head 111: Appointment of Chief Executive of Authority .................................... 33
2.4.17. Head 112: Staff of Authority ................................................................. 33
2.4.18. Head 113: Appointment of Inspectors of Policing Services .................. 33
2.4.19. Head 114: Powers of Inspectors of Policing Services .............................. 33
2.4.20. Head 115: Joint Inspections ................................................................. 33
2.4.21. Head 116: Reports of inspections requested by Minister ......................... 34
2.4.22. Head 117: Reports of inspections undertaken at Authority’s own initiative 34
2.4.23. Head 118: Monitoring and assessment of measures in relation to recommendations in inspection reports ................................................................. 34
2.4.24. Head 119: Duty of Garda Commissioner to facilitate performance by Authority of its functions ................................................................. 34
2.4.25. Head 120: Duty of Director of National Office to assist Authority ............ 34
2.4.26. Head 121: Accountability for accounts of Authority ................................ 34
2.4.27. Head 122: Accountability of Authority to other Oirechtaí Committees ....... 35
2.4.28. Head 123: Governance framework ....................................................... 35
2.4.29. Head 125: Standards of integrity .......................................................... 35
2.4.30. Head 126: Codes of ethics for members, members of committees, advisors or consultants etc. ................................................................. 35
2.4.31. Head 127: Confidentiality of certain information ...................................... 35
2.4.32. Head 128: Dissolution of Policing Authority and Garda Síochána Inspectorate 35
2.4.33. Head 129: Transfer of staff of Policing Authority .................................... 35
2.4.34. Head 130: Transfer of property, rights and liabilities, and continuation of leases, licences and permissions granted by Policing Authority ......................................................... 35
2.4.35. Head 131: Preservation of contracts, agreements or arrangements made by the Policing Authority ................................................................. 35
2.4.36. Head 132: Records of Policing Authority ................................................ 35
2.4.37. Head 133: Liability for loss on part of Policing Authority occurring before establishment day ................................................................. 35
2.4.38. Head 134: Final accounts and final annual report of Policing Authority ...... 35
2.4.39. Head 135: Transfer of staff of Garda Síochána Inspectorate .................... 35
2.4.40. Head 136: Preservation of contracts, agreements or arrangements made by the Garda Síochána Inspectorate ................................................................. 36
2.4.41. Head 137: Records of Garda Síochána Inspectorate .................................. 36
2.4.42. Head 138: Liability for loss on part of Garda Síochána Inspectorate occurring before establishment day ................................................................. 36
2.5. PART 5: OFFICE OF THE GARDA SÍOCHÁNA OMBUDSMAN ......................... 37
2.5.1. Head 139: Continuation of Garda Síochána Ombudsman Commission under name of Office of the Garda Síochána Ombudsman ............................................. 37
2.5.2. Head 140: Appointment of Garda Ombudsman and Deputy Garda Ombudsman 37
2.5.3. Head 141: Terms of appointment of Garda Ombudsman and Deputy Garda Ombudsman ... 37
2.5.4. Head 142: Acting Garda Ombudsman .................................................... 37
2.5.5. Head 143: Objectives, functions and powers of Garda Ombudsman .......... 37
2.5.6. Head 144: Functions of Deputy Garda Ombudsman ............................... 37
2.5.8. Head 146: Annual and other reports by Office of the Garda Ombudsman ................................................................. 37
2.5.9. Head 147: Appointment of Chief Administrative Officer of Garda Ombudsman ... 37
2.5.10. Head 148: Officers of Garda Ombudsman ............................................. 37
2.5.11. Head 149: Designation of officers and others for purpose of investigations under Part 6 ... 37
2.5.12. Head 150: Special Assistance ............................................................... 38
2.5.13. Head 151: Power to appoint consultants and advisers and to enter into contracts .... 38
2.5.14. Head 152: Accountability for accounts of Office of Garda Ombudsman .... 38
2.5.15. Head 153: Accountability to other Oirechtaí committees ............................ 38
2.5.16. Head 154: Confidentiality of information obtained by Garda Ombudsman ......................... 38
2.5.17. Head 155: Final accounts and final annual report of Ombudsman Commission ................ 39
2.5.18. Head 156: Records of Ombudsman Commission .......................................................... 39
2.6. PART 6: COMPLAINTS, INCIDENTS OF CONCERN, INVESTIGATIONS AND OTHER MATTERS .. 40
2.6.1. Head 157: Interpretation - New Definition of Conduct .................................................. 40
2.6.2. Head 157: Interpretation – Garda Staff ............................................................................. 45
2.6.3. Head 157: Interpretation – Notifiable Misconduct ............................................................ 45
2.6.4. Head 157: Interpretation – Serious Harm .......................................................................... 45
2.6.5. Head 158: Supplementary provisions in relation to complaints ......................................... 46
2.6.6. Head 159: Making, recording of complaints etc. .............................................................. 46
2.6.7. Head 160: Determination of admissibility of complaint, suitability for resolution by An Garda Síochána etc. .............................................................................................................. 47
2.6.8. Head 161: Categories of complaints suitable for resolution by An Garda Síochána .......... 49
2.6.9. Head 162: Arrangements for handling complaints suitable for resolution by An Garda Síochána .......................................................... 49
2.6.10. Head 163: If complaint suitable for resolution by An Garda Síochána is referred under Head 160 .......................................................................................................................................................... 49
2.6.11. Head 164: Matter concerning death of, or serious harm to, a person ............................... 49
2.6.12. Head 165: Notification to Garda Ombudsman of incident of concern in relation to conduct of member of Garda personnel .................................................. 50
2.6.13. Head 166: Investigation of matters in the public interest .............................................. 51
2.6.14. Head 167: Protected disclosures relating to Garda Síochána .......................................... 52
2.6.15. Head 168: Formal Investigation ....................................................................................... 52
2.6.16. Head 169: Powers equivalent to member of An Garda Síochána when undertaking formal investigation .......................................................................................................................... 53
2.6.17. Head 170: Search of Garda Premises .............................................................................. 54
2.6.18. Head 171: Additional powers for purpose of undertaking formal investigation ................ 55
2.6.19. Head 172: Power to discontinue formal investigation ...................................................... 58
2.6.20. Head 173: Garda Ombudsman referral to the Director of Public Prosecutions ............... 58
2.6.21. Head 174: Other actions by Garda Ombudsman following formal investigation ............ 59
2.6.22. Head 175: Investigation of matters relating to Garda Commissioner by Garda Ombudsman 60
2.6.23. Head 176: Duty to keep certain persons informed ......................................................... 61
2.6.24. Head 177: Provision of information to Garda Ombudsman by Garda Síochána ............... 61
2.6.25. Head 178: Duty to preserve evidence ............................................................................. 62
2.6.26. Head 179: Extension of Time Limits for instituting summary proceedings for offences ...... 62
2.6.27. Head 180: Same conduct may form basis for complaint or charge ................................. 62
2.6.28. Head 181: Protocols ......................................................................................................... 62
2.6.29. Head 182: Review of decisions by Garda Ombudsman .................................................. 63
2.6.30. Head 183: Judicial inquiry into conduct of Office of the Garda Ombudsman and procedures, policies and practices of that Office ................................................................................................................. 63
2.6.31. Head 184: Offence of providing false or misleading information .................................... 63
2.6.32. Head 185: Jurisdiction to investigate offence under this Part ......................................... 64
2.6.33. Head 186: Transitional provisions relating to complaints under the Garda Síochána Act 2005 ................................................................................................................................. 64
2.6.34. Head 187: Qualified privilege for certain statements and publications ............................ 64
2.6.35. Head 188: Power of Garda Ombudsman to enter into agreements with law enforcement agencies or other relevant persons or bodies outside the State .................................................. 64
2.6.36. Head 189: Performance of functions by designated officers of Garda ............................. 64
2.6.37. Ombudsman under Coroners Act 1962 ............................................................................ 64
2.6.38. Head 190: Duty of members of Garda personnel to account to designated officer ............ 64
2.7. PART 7: INDEPENDENT EXAMINER OF SECURITY LEGISLATION ......................................................... 66
2.7.1. Head 191: Interpretation .......................................................... 66
2.7.2. Head 192: Establishment day .................................................. 66
2.7.3. Head 193: Establishment of office of Independent Examiner .......................... 66
2.7.4. Head 194: Objectives ............................................................... 67
2.7.5. Head 195: Functions ............................................................... 67
2.7.6. Head 196: Review of other laws ............................................. 67
2.7.7. Head 197: Responsibilities of other bodies ............................... 67
2.7.8. Head 198: Access to information and individuals .......................... 67
2.7.9. Head 199: Sensitive Information .............................................. 68
2.7.10. Head 200: Confidentiality of sensitive information .................. 68
2.7.11. Head 201: Protection of information ........................................ 68
2.7.12. Head 202: Amendment of Schedule 5 ....................................... 68
2.7.13. Head 203: Amendment of Section 8 of Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 .......................................................... 68
2.7.14. Head 204: Amendment of Section 12 of Criminal Justice (Surveillance) Act 2009 .......................................................... 69
2.7.15. Head 205: Amendment of Communications (Retention of Data) Act 2011 .......................................................... 69
2.7.16. Head 206: Adjudication of requests for information .................. 69
2.7.17. Head 207: Annual report ......................................................... 69
2.7.18. Head 208: Other reports .......................................................... 70
2.7.19. Head 209: Reviews ................................................................. 70
2.7.20. Head 210: Inclusion of sensitive information in reports of Examiner .......... 70
2.7.21. Head 211: Publication of reports ............................................. 70
2.7.22. Head 212: Response to reports of Examiner ............................. 70
2.7.23. Head 213: Appointment of Examiner ........................................ 70
2.7.24. Head 214: Terms and conditions of appointment .................... 70
2.7.25. Head 215: Disqualification, resignation and removal from office ....... 70
2.7.26. Head 216: Provision of services and staff to Examiner ............... 70
2.7.27. Head 217: Power to enter into contracts .................................... 70
2.8. PART 8: REGULATIONS AND MISCELLANEOUS PROVISIONS .......................................................... 71
2.8.1. Head 218: General power to make regulations .......................... 71
2.8.2. Head 219: Regulations relating to management of Garda Síochána .... 71
2.8.3. Head 220: Performance regulations .......................................... 71
2.8.4. Head 221: Conduct regulations ................................................ 71
2.8.5. Head 222: Regulations relating to standards of professional behaviour .... 71
2.8.6. Head 223: Regulations relating to fees for provision of vetting services .... 71
2.8.7. Head 224: Continuation of certain regulations and orders .............. 71
2.8.8. Head 225: Dissolution of the Garda Síochána Reward Fund .......... 71
2.8.9. Head 226: Certificate evidence ................................................ 71
2.8.10. Regulations and Miscellaneous Provisions – Other Matters .............. 71
2.9. PART 9: CONSEQUENTIAL AMMENDMENTS .......................................................... 73
2.9.1. Head 227: Proof of membership, rank or grade in Garda Síochána ...... 73
2.9.2. Head 228: Exercise of special powers by security officers ............... 73
2.9.3. Head 229: Sharing of information for the performance of functions ...... 73
2.9.4. Head 230: Amendment of Public Service Superannuation (Miscellaneous Provisions) Act 2004 .......................................................... 73
2.9.5. Head 231: Amendment of Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 .......................................................... 73
2.9.7. Head 233: Amendment of Welfare of Greyhounds Act 2011 ................ 73
2.9.8. Head 234: Amendment of Road Traffic Act 2010 .......................... 73
2.9.9. Head 235: Amendment of Industrial Relations Act 1990 ...................... 73
2.9.10. Head 236: Amendment of Criminal Justice (Offences relating to Information Systems) Act 2017
2.9.11. Head 237: Amendment of Criminal Justice (Victims of Crime) Act 2017
2.9.15. Head 241: Amendment of Europol Act 2012
2.9.16. Head 242: Amendment of Criminal Justice (Corruption Offences) Act 2018
2.9.17. Head 243: Amendment of Criminal Justice (Surveillance) Act 2009
2.9.18. Head 244: Amendment of Children Act 2001
2.9.20. Head 246: Amendment of Criminal Justice (International Cooperation) Act 2019
2.9.21. Head 247: Amendment of Coroners Act 1962
2.9.22. Head 248: Amendment of Criminal Justice (Forensic Evidence and DNA Database System) Act 2014
2.9.24. Head 250: Amendment to Taxes Consolidation Act 1997
2.9.25. Head 251: Amendment of Comptroller and Auditor General (Amendment) Act 1993
2.9.26. Head 252: Amendment of Fisheries (Consolidation) Act 1959
1. EXECUTIVE SUMMARY

The genesis of the Policing, Security and Community Safety Bill (the ‘Bill’) is the report of the Commission on the Future of Policing in Ireland (CoFPI). Published on 18th September, 2018, the CoFPI report unflinchingly identified the shortcomings in the culture, structures, accountability mechanisms and management processes of An Garda Síochána. This first published iteration of the Bill has been drafted with the intention of implementing the CoFPI recommendations, and as a consequence, as per the Bill’s long title, deliver:

“An Act to make further and better provision in relation to An Garda Síochána”

It is the unequivocal view of An Garda Síochána that not only does the Bill as drafted fail to appropriately transpose the spirit and intention of the CoFPI recommendations, but moreover significant sections as detailed below, trammel long established constitutional rights in respect to the dignity, privacy and human rights of Garda personnel. In our collective view the legislation as drafted will be vulnerable to immediate and sustained legal challenges and will ultimately be found to be legally infirm and constitutionally repugnant.

Taking the totality of the offending provisions together exposes the systematic disregard for proportionality and fairness in the very architecture of this Bill as currently drafted.

As a consequence, not simply do the provisions of this Bill as proposed risk unintentionally subverting the vision of the CoFPI recommendations, it risks protracted, expensive and time-consuming legal challenge, and fundamentally has the very real potential to adversely impact policing in the State.

The apparent total disregard of An Garda Síochána’s previous observations on the earlier iteration of this Bill gives rise to deep concerns. Accordingly, this submission seeks to both reiterate where relevant those earlier observations and unambiguously set out the totality of our observations in respect of the current iteration as a main stakeholder whose day job is keeping people safe.

Concerns (General)

In general terms it is offered that the Bill:

1) Significantly and unnecessarily encroaches upon the autonomy of the Garda Commissioner to direct and control An Garda Síochána as Ireland’s Policing Service which runs contrary to Head 25.

2) Significantly and unnecessarily encroaches on the autonomy of the Garda Commissioner to meet his lawful responsibilities as a Public Sector Employer.

3) Moves beyond oversight and creates layered controls in multiple bodies that is not conducive to the effective and efficient management of the Policing Service by the Garda Commissioner.

4) Regularly confuses the concept of oversight with control and provides powers that facilitate this unnecessary encroachment.

5) Creates overly complex and unmanageable accountability frameworks that will over-burden the Garda Executive, removing them from their core policing functions, Policing Operations, modernisation initiatives and efficiencies and actual leadership of An Garda Síochána.

6) Effectively fetters the capacity of the Garda Commissioner to control the organisation as a true CEO (a significant recommendation of CoFPI).
7) Expands significantly the powers, remit and duties of those external bodies in a manner that dilutes and removes the essential independence of a Policing Service from an investigative, administrative, employment and stakeholder engagement perspective.

8) Is drafted with ambiguity in respect of roles and responsibilities for the multiplicity of regulatory and oversight bodies, creating a corporate oversight structure that is unnecessarily complex and unwieldy. These overlaps and encroachments have the potential to negatively impact essential working relationships and absent a dispute resolution mechanism, may give rise to recourse in the already overstretched Court System.

9) Makes the Garda Commissioner fiscally responsible for the Organisation but provides no controls for how budgets are sought or spent within the new corporate structure

10) Erodes the legal and constitutional rights of members and Garda staff in a manner that lacks reasonableness, proportionality or necessity, effectively purporting to assert that Constitutional, Human and Employee Rights as currently provided for in the State, do not apply with equality to Garda Members or Garda Staff.

11) Provides unregulated, unsupervised and unquestionable powers to GSOC that are in several provisions absent any tests of reasonableness, suspicion or proportionality. This compared with the significant regulation of Garda Powers in the recently published Garda Powers Bill, creates an obvious and questionable disparity with regards to the rights of those under suspicion or investigation.

12) In an effort to strengthen the Investigative Authority of GSOC permits flagrant disregard for basic rights and Natural Justice that will significantly and adversely impact the employment environment within An Garda Síochána.

13) Removes the line between alleged Criminal behaviour of Garda personnel and conduct/service level issues in a manner that will be perceived and could actually result in repeated claims of abuse of power by GSOC and force multiple and repeated Court Challenges.

14) Significantly expands Conduct that can be investigated in a manner that is likely to disincentivise policing efficiency and fails to recognise the complexities of the policing environment

In light of the comprehensive CoFPI report, there can be no doubt but that the restructuring and reform of the prevailing model for the delivery of the police service is required and that appropriate legislation to that end is both necessary and to be welcomed.

However, as detailed in this submission, this current iteration of the Bill requires urgent reconsideration.

In our respectful view, the need to oversee the use of Garda Powers cannot be achieved by creating a body that can act with impunity, without oversight, who can act on opinions rather than on any of the established measures of reasonableness or proportionality.

As a consequence, An Garda Síochána, as an entity has been positioned in an inadequate control over the following:

- Recruitment of staff
- Promotion of Staff
- Employee Conduct
- Employment termination
Building Infrastructure
Strategic Direction
Community Engagement
Decision making
Protecting the Rights of Employees
Self determination
Self-regulation
Vision setting

As drafted, a myriad of overlapping entities are empowered in respect to the above, however only the Commissioner is accountable.

The proposed structures, far reaching oversight and unnecessarily intrusive levels of governance can only result in an organisation that will be significantly burdened, less agile, becoming psychologically an increasingly unsafe working environment that will struggle to meet the required and desired reforms and efficiencies. Instead of developing essential symbiotic relationships with stakeholders, the Bill promotes the potential for confusion and conflict.

**Direction & Control of An Garda Síochána**

Head 25 of the draft Bill articulates the functions of the Commissioner ‘to direct and control [the business of] An Garda Síochána’. However, the Bill also provides that the Garda Commissioner shall seek to ensure that his or her functions are carried out with due regard to:

- the policing principles and
- the objective of promoting effectiveness, efficiency and economy in An Garda Síochána.

The Bill also requires the Commissioner to seek to ensure that his or her functions are carried out in accordance with:

(a) the policing priorities **determined (under Head 49) by the Authority** which must then be submitted to the Minister for approval
(b) any security priorities **determined by the Minister (under Head 50)**
(c) the **approved** strategic plan (Under Head 51 the Garda Commissioner is obliged to prepare a strategic plan for An Garda Síochána for submission to the Minister and can only do so when it has been adopted by the Board).
(d) the **approved** annual service plan (Under Head 53 the Commissioner is obliged to submit an annual service plan to the Minister but may only do so when it has been adopted by the Board).
(e) the **approved** capital plan,
(f) the relevant **allocated** resources,
(g) any relevant *policies of the Minister or the Government*, and
(h) any **directive issued to him or her** (under Head 30); and
(i) the Garda Commissioner is **accountable to the Board for the performance of his or her functions** (the Board of An Garda Síochána is tasked with overseeing and monitoring the Commissioner’s performance (Under Head 11)
(j) and (pursuant to Head 28) the Commissioner is **obliged to account** fully to the Government and the Minister.

(k) Under Head 30 the Minister, with the consent of the Government can issue directives to the Commissioner.

**Garda Ombudsman and Investigation of Offences**

The CoFPI envisaged a new independent body that would be significantly different from GSOC with a more defined remit encompassing all cases other than performance management matters. In addition it was anticipated that there would be enhanced oversight of its work leading to an advanced police
complaints system, built on fundamental principles of “fairness and proportionality”, designed to make a vital contribution to police effectiveness and trust and confidence in the police. To that end it was recommended that GSOC should be superseded by a new independent complaints body with the possible new title of “Independent Office of Police Ombudsman” [IOPO] and that it would to carry out all investigations itself rather than by Gardaí, as is often the case, presently.

The CoFPI report stated that:

An underlying principle of the work of IOPO should be that it investigates incidents rather than individuals, so as to find fault where appropriate, identify what needs to be learned, and make recommendations for change as required. Whether or not an individual Garda can be considered to have breached the technicalities of the Disciplinary Regulations should not be the determining factor.

Instead the investigation should examine whether policing occurred in accordance with accepted standards. The process for IOPO investigations should be clear and simple, to enhance both swiftness and transparency. IOPO’s remit should be expanded to include complaints relating to incidents involving non-sworn personnel of An Garda Síochána as well as sworn police. It is a central tenet of this report that the police service should be seen and treated as a single organisation with a single workforce. It will investigate incidents as well as individual actions, so that any broader lessons for the organisation can be identified. It will assess all complaints received and make a timely determination whether the complaint is a performance management issue. If this is the case, it will refer the issue back to An Garda Síochána to be addressed under performance management processes, which also require reform.

Part 5 of the Bill concerns the Office of the Garda Síochána Ombudsman and Part 6 governs “Incidents of concern, investigations and other matters”. In our opinion when the two provisions are considered together, they fail to deliver on the CoFPI vision, they are otherwise problematical and they require serious reconsideration and amendment, not least because some aspects represent a significant and irregular encroachment on the individual rights and entitlements of Garda personnel.

Part 5 of the Bill in this respect needs due consideration as it lays out the functions of the Office of the Garda Ombudsman and in particular head 143, which details the objectives, functions and powers of the Garda Ombudsman.

The objectives state under subhead 2 (a) and (b) that:

(a) To ensure that the functions of the Office are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations under part 6, and

(b) To promote public confidence in the process for the resolution of complaints made by members of the public and in the investigations referred to in paragraph (a).

The overview to Part 6 of the Bill details that it: “reforms the process for the handling of complaints and the conduct of investigations in order to streamline them and ensure timely resolution of complaints and investigations while safeguarding due process for all concerned.”

The Code of Ethics drafted by the Policing Authority which now forms an integral part of the organisation states that:

It applies both to interactions between persons working for the Garda Síochána and the public, and to interactions between colleagues within the Garda Síochána. It must be remembered that those within the Garda Síochána are entitled to the same rights and protections as those they serve.
This view is also replicated in a Council of Europe recommendation, ‘The European Code of Police Ethics’.

Section 17 Garda Síochána Act 2005 as amended details that in drafting a code of ethics the Policing Authority will consider recommendations of the Council of Europe.

The European Code of Police Ethics states that:

*Police staff shall as a rule enjoy the same civil and political rights as other citizens. Restrictions to these rights may only be made when they are necessary for the exercise of the functions of the police in a democratic society, in accordance with the law, and in conformity with the European Convention on Human Rights. Police personnel shall be subject to the same legislation as ordinary citizens, and exceptions may only be justified for reasons of the proper performance of police work in a democratic society.*

While it is accepted that the Garda workforce may be subject to stricter rules in society than others, under Article 40.1 of the Constitution, any such restrictions must be for a good reason and be proportionate and necessary in a democratic society. A number of Heads of Bills in part 6 do not appear to strike this balance.

GSOC themselves have been found to have stretched the boundaries of their role when they utilised Section 98 Garda Síochána Act 2005 as amended to obtain retained telephone data of a Journalist. The explanatory memorandum accompanying the published draft scheme of the Bill details that:

*Under the Scheme the Ombudsman will have the power to conduct preliminary inquiries to support decisions around whether a complaint is admissible and whether the complaint or other matter warrants “formal investigation.” The Scheme streamlines and simplifies the investigation process by providing a new single formal investigation process by which the investigating officer will have equivalent powers to that of a garda member. This will replace the current dual process which requires GSOC, on the basis of limited information and analysis, to decide at the outset whether to launch a criminal or non-criminal investigation and also requires the investigation of noncriminal matters to await the conclusion of the criminal investigation. The lawful exercise of any individual garda power will, of course, be dependent on the threshold for same being met. The overriding principles of fair procedures and natural justice will apply to any person who is the subject of such an investigation.*

The last line of this reference is noteworthy as the overriding principles of fair procedure and natural justice are absent from this new scheme. The Ombudsman will have powers far in excess of a member of An Garda Síochána to conduct investigations. The purpose of these additional powers is not adequately discernible from part 6 of the Bill and go beyond what is necessary in a democratic society. They contain no safeguards and are open to abuse.

- CoFPI envisaged a new independent body (different from GSOC) which deals with all cases other than performance management matters. This new body would have an oversight of its work leading to an advanced police complaints system built on principles of “fairness and proportionality”.

- Head 143(2) of the Bill sets out the objectives of the Garda Ombudsman however there is no reference to mediation and any other informal means of resolving complaints.

- No timelines have been set out for the processing of complaints to the Ombudsman.

---

1. General Scheme of the Policing Security and Community Safety Bill Explanatory Memorandum (www.justice.ie)
CoFPI stressed that there should be an oversight mechanism for the Ombudsman, however this is absent from the Bill as currently drafted.

We make reference to the cases of McNeill [1997] and Gillen[2012]— in regard to due process and fair procedures, including in particular timeliness in respect of the public interest of such allegations being investigated ‘the air should be cleared one way or the other’.

Conclusion

In conclusion, the equal enjoyment of rights of police officers is documented in several human rights instruments including the Garda Code of Ethics. This Bill purports to sever that equality. Further, it purports to expand that unequal treatment to ‘Garda personnel’.

As highlighted in the most recent Public Attitudes Survey, An Garda Síochána enjoys significant public trust. This strong social standing and public trust is almost entirely absent from the discernible rationale underpinning this Bill.

The powers being afforded to the Ombudsman are far in excess of what is legal, necessary and proportionate in our small relatively peaceful democratic Republic.

With little regard to international human rights instruments or the constitutional principles of fair procedure, we believe there are fundamental flaws in the General Scheme of the Policing Security and Community Safety Bill as it is currently drafted.

In particular the investigative powers of external agencies as drafted are disproportionate and unfair and have the capacity to unduly impinge upon the human rights of all Garda personnel and are constitutionally or otherwise legally unsound, with insufficient safeguards checks and balances.

Further it is our view that the Bill as drafted offends against the responsibilities of An Garda Síochána as a public body employer under section 42 of the Irish Human Rights and Equality Commission Act 2014. As outlined in detail in the forgoing, the critical ingredients required within legal rules to satisfy the standards of legality, proportionality, necessity and constitutionality are in large part unmet in significant sections of this Bill as drafted.

An Garda Síochána is of the view that a Policing Service for the Future envisioned by the CoFPI recommendations will not be delivered by this Bill as currently constituted.

The submission will now offer further specific observations on a Head by Head basis for consideration by the Committee.
2. OBSERVATIONS ON THE GENERAL SCHEME

2.1. PART 1: PRELIMINARY AND GENERAL MATTERS

2.1.1. Head 1: Short Title and Commencement
2.1.1.1. No matters arising at this time based upon the published text of the General Scheme.

2.1.2. Head 2: Interpretation - Definition of Capital Expenditure
2.1.2.1. The definition of capital expenditure in the published General Scheme is “expenditure to acquire a fixed asset or to significantly extend the life of an existing asset”. The Public Spending Code (pg. 61) defines capital expenditure as; “Capital expenditure relates to the acquisition, construction or enhancement of significant fixed assets including land, buildings, and equipment that will be of use or benefit for more than one financial year”. An Garda Síochána recommend that the Public Spending Code definition is utilised in the General Scheme to ensure alignment of the Scheme and the Code.

2.1.3. Head 2: Interpretation - Definition of Capital Plan
2.1.3.1. The definition of a capital plan in the published General Scheme “means a plan the purpose of which is to acquire a fixed asset or to significantly extend the life of an existing asset”. An Garda Síochána recommend updating the definition to align with the recommended definition of capital expenditure e.g. sets out the investment priorities for the acquisition, construction or enhancement of significant fixed assets including land, buildings, and equipment that will be of use or benefit for more than one financial year.

2.1.4. Head 2: Interpretation - Definition of the term person
2.1.4.1. The term ‘person’ is used throughout the General Scheme and in some instances reaches further than an individual. The term ‘person’ is not defined within the Scheme. An Garda Síochána recommend the term ‘person’ should be defined as appropriate with the relevant parts of the Scheme.

2.1.5. Head 2: Interpretation - Lack of definition of corruption to support Garda Anti-Corruption policies.
2.1.5.1. An Garda Síochána submit that the inclusion in the General Scheme of a legislative definition of “Police Corruption” is required, in order to anchor anti-corruption policies within a legislative framework similar to that provided under Section 26 of the Criminal Justice and Courts Act 2015 (UK Legislation). The definition of Police Corruption as per UK legislation is outlined hereunder for ease of reference.

“A Police constable ... commits an offence if he or she – (a) exercises the powers and privileges of a constable improperly, and (b) knows or ought to know that the exercise is improper”.

2.1.5.2. Sub-Section 4 of that legislation states that “for the purposes of this section, a Police Constable exercises the powers and privileges of a constable improperly if:
- he or she exercises a power or privilege of a constable for the purposes of achieving benefit for himself or herself, or
- a benefit or a detriment for another person;
• a reasonable person would not expect a power or privilege to be exercised for the purposes of achieving that benefit or detriment”.

2.1.5.2 An Garda Síochána has adopted the following broad definition of “corruption” in Garda policy and seek to have same incorporated in legislation:

- **Corruption** - is the abuse of a position of trust in order to gain an undue advantage. Corruption includes the abuse of power by an individual, for private and/or organisational gain, favour, advancement or reward and/or that is inconsistent with the proper practice of an individual’s office, employment or responsibilities.

2.1.6. **Head 2: Interpretation - Lack of definition of “business interests” to support Garda Anti-Corruption policies.**

2.1.6.1 An Garda Síochána has developed the following definitions in its draft “Business Interest & Secondary Occupation Policy”:

- **Business Interest** - Garda Personnel have a Business Interest if they hold any office or employment for gain or reward, own any property for rent or lease, or carry on any business outside their employment.

- A Business Interest includes employment in any e-business, or commercial interest conducted via the internet in relation to the provision of goods and services.

- **Secondary Occupation** - includes any occupation whereby there is an element of gain or reward or an intended element of gain or reward.

2.1.6.2 In order to support the implementation of the proposed Business Interests and Secondary Occupations Policy, An Garda Síochána request that consideration be given to defining in the General Scheme what constitutes a business interest / secondary occupation for Garda personnel. Comparative legislation in the UK is detailed hereunder by way of assistance.

- Regulations 7 and Regulation 8 of the Police Regulations 2003 (UK Legislation) deals with Business Interests which are incompatible with membership of Police Forces in the United Kingdom and proceed to define what constitutes a Business Interest in this context. Attention is drawn to these specific Regulations as a point of reference.

- The Police Regulations 2003 and Police (Amendment) (No.2) Regulations 2006 require serving police officers to notify their Chief Officer, in writing, of business interests and/or additional occupations they have, or propose to have, unless that business interest has previously been disclosed. A failure to disclose any business interest may result in disciplinary action being taken. It is submitted that comparable Irish legalisation is required.

2.1.7. **Head 3: Security Services**

2.1.7.1 An Garda Síochána is cognisant that a definition is required for security services to enable the demarcation of roles of the oversight bodies. Therefore, An Garda Síochána recommends the inclusion of the following additional Sub-Heads to Head 3:

- Head 3(1)(d): An Garda Síochána shall endeavour to take the necessary legal measures to protect, secure, enhance and strengthen the security apparatus of the State from a
policing and security perspective in partnership and collaboration with relevant Statutory Bodies and International Organisations.

- Head 3(1)(e): An Garda Síochána shall work in mutual partnership and co-operation in conjunction with Foreign Intelligence and Security Services to secure and strengthen the security of the State.

- Head 3(1)(f): An Garda Síochána shall ensure that International Intelligence, Security and Police to Police obligations, by virtue of International Agreements / Treaties are fostered, developed and implemented in the best interest of the security of the State.

2.1.7.2 An Garda Síochána acknowledges the inclusion of a definition of “security services” under Part 7 for the purposes of that Part which refers to information holders who hold sensitive information related to protecting the security of the State having regard to the matters set out in Head 3(1).

2.1.8. Head 4: Repeals
2.1.8.1 No matters arising at this time based upon the published text of the General Scheme.

2.1.9. Head 5: Expenses
2.1.9.1 No matters arising at this time based upon the published text of the General Scheme.

2.2. PART 2: AN GARDA SÍOCHÁNA

CHAPTER 1: GENERAL

2.2.1. Head 6: Continuation of Garda Síochána
2.2.1.1 An Garda Síochána previously raised the matter that the use of the term ‘police’ within the Irish State should be solely reserved for use by An Garda Síochána as it has responsibility in legislation for the provision of the State’s policing service. Accordingly, An Garda Síochána are firmly of the view that all other state organisations should be prohibited from utilising the term ‘police’ in their title as it causes confusion with citizens and visitors to the Irish state when seeking the assistance of the State’s police service An Garda Síochána. This has raised issues in the past where crimes/incidents reported to these organisations in the belief that they were reported to the State police organisation resulting in no Garda record of same.

2.2.1.2 Therefore, An Garda Síochána seeks that all other state organisations are prohibited from utilising the term ‘police’ in their title, especially those in a frontline role where they interface with the public and do not perform a policing function as would be understood by the public, i.e. investigation of crime etc.

2.2.2. Head 7: Principles of Policing
2.2.2.1 The extension of the principles of policing from those in the current Garda Síochána Act 2005 (2005 Act) and particularly the requirement to act ‘professionally, ethically, with integrity’ at point (e) is noted. The inclusion of ethical behaviour as one of the principles underpinning the functions of An Garda Síochána is welcomed.
2.2.3. **Head 8: Functions of Policing**

2.2.3.1 An Garda Síochána recommends the inclusion of a number of Sub-Heads under Head 8 regarding the Defence Forces as aid to the civil authorities. The necessity for these inclusions emanates from legal advice and guidance received by An Garda Síochána from the Office of the Attorney General indicating that An Garda Síochána would be responsible and accountable for the actions of Defence Forces personnel, under the Garda Síochána Act 2005 as amended, and accordingly, could be subject to criminal investigation and potential prosecution by the Garda Síochána Ombudsman Commission (GSOC).

2.2.3.2 In light of these advices, An Garda Síochána seeks further engagement with the Department to discuss these matters and whether the provisions and protections of Head 70 would address the matters raised in the Attorney General advices.

2.2.3.3 Otherwise it is deemed prudent to have the following proposed legal provisions inserted into the General Scheme for the purpose of providing a legal and accountability shield to An Garda Síochána in view of same:

- **Head 8(2)(b):** For the purpose of achieving the objective referred to in Sub-Head 1(a), (b) and (c), An Garda Síochána can formally request the professional support, expertise, logistical and service assistance of the Permanent Defence Forces [or any part thereof deemed functionally appropriate from an operational perspective] under the auspices of 'Aid to the Civil Authorities' at the behest of the Garda Commissioner subject to formal sanction of the Department of Justice.

- **Head 8(2)(c):** An Garda Síochána shall develop a 'Memorandum of Understanding' with the Permanent Defence Forces in respect of establishing Protocols for the operational deployment regarding Members of the Permanent Defence Forces in accordance with aiding the civil authorities from an operational functionality and governance perspective in accordance with the provisions of Sub-Head 2(b).

- **Head 8(2)(d):** For the purpose of achieving the objective referred to in Sub-head 1, any Corporate or individual liability, act or omission arising from the provision of professional services to An Garda Síochána and / or relevancy to joint co-operation with An Garda Síochána concerning a Statutory Body, State Agency and / or Government Department, having by virtue of law, responsibility of the said Public Body rests with the said Public Authority; its Department or Oversight Authority.

2.2.3.4 The Garda Commissioner is designated as the Central Authority in the State for the purposes of the [Criminal Records (Exchange of Information) Act 2019](#). Under this legislation the Central Authority is required to take such steps as may be necessary to ensure that when information relating to a conviction in the State of a person is recorded on the Criminal Records Database, it shall be accompanied by information, where available, in respect of the nationality or nationalities of the convicted person. Therefore, An Garda Síochána seek under Head 8 that the functions of An Garda Síochána is extended to incorporate its remit as the holder and source of criminal records within the State. This would consolidate in a single piece of legislation the functions of An Garda Síochána.

2.2.3.5 Similarly, under Section 117, of the [Criminal Justice (Forensic Evidence and DNA Database System) Act 2014](#), the Head of the Technical Bureau of the Garda Síochána is the national contact point in relation to dactyloscopic data and shall perform in the State the functions of the national contact point provided for in a relevant European Union or international...
instrument insofar as they concern cooperation in relation to automated searching for or automated comparison of dactyloscopic data and the exchange of such data and the reference data relating to them. Therefore, An Garda Síochána request that under Head 8 the functions of An Garda Síochána is extended to incorporate its remit as the holder and source dactyloscopic data (fingerprints and palm prints) within the State.

2.2.3.6 An Garda Síochána remain of the view that consideration be given under Head 8(1)(i), to extend traffic enforcement powers for certain minor road traffic offences to Traffic Wardens under the employment of An Garda Síochána. The model for this proposal may be found in other jurisdictions such as the United Kingdom. These wardens undertake proactive patrols, enforcement and investigation activities addressing traffic offences, reducing traffic congestion and the improvement of traffic flow. An Garda Síochána propose that these ‘An Garda Síochána Traffic Wardens’ would have the powers to stop and regulate traffic and have a role in the enforcement of certain minor road traffic offences.

2.2.4. Head 9: Prosecution of offences by members of An Garda Síochána
2.2.4.1. No matters arising at this time based upon the published text of the General Scheme.

CHAPTER 2: BOARD OF AN GARDA SIOCHANA

2.2.5. Head 10: Establishment and Membership of Board
2.2.5.1 An Garda Síochána is of the view that critical to the success of the Garda Board will be those appointed by Government and the experience and expertise that they bring to their role. It is noted in the General Scheme that the experience of Garda Board members in respect of policing could be interpreted as restricted to “matters connected with the functions of the Garda Síochána”.

2.2.6. Head 11: Role of the Board
2.2.6.1 An Garda Síochána remains seriously concerned regarding the boundary of the role and functions of the Board and that of the Policing and Community Safety Authority. Especially in light of the addition of new functions for the Authority under Head 104. (See Head 104 for further details).

2.2.6.2 An Garda Síochána acknowledge the inclusion of Sub-Heads 3 and 4 where the Garda Commissioner will be enabled to exclude from information provided to the Board any matter the disclosure of which, in his or her opinion, could be prejudicial to the security of the State. It is also noted the Commissioner and the Board will be required within a specified period to agree by written protocols rules and procedures concerning the application of this exclusion.

2.2.6.3 An Garda Síochána acknowledge the inclusion of Sub-Head 9 a definition for “major plans of action” includes plans concerning the strategic direction of the organisation, the development of the capacity and capability of the organisation and of its personnel, and the optimum use of the resources but does not include operational policing or security plans (including plans for the management of major events). However, further allowance should be made for An Garda Síochána to respond quickly to an operational situation or emergency that would require significant expenditure. An Garda Síochána is an operational emergency service, working 24/7 and of necessity must respond quickly to emerging situations.
2.2.6.4 Sub-Head 11(5) sets out that the Garda Commissioner is not a member of the Board. An Garda Síochána submit that it is unusual in public sector organisations that the Chief Officer is not an Ex Officio member of the Board. Accordingly, An Garda Síochána request that this matter be reconsidered and recommend that the Garda Commissioner would be an Ex Officio member of the Board. The following are cited as examples of where the Chief Officer is a member of the Board:

- National Treasury Management Agency (Amendment) Act 2014: S.8(1) “3A. (1) The Agency shall comprise . . . (b) the Chief Executive, . . . as ex officio members”
- Enterprise Ireland: Industrial Development (Enterprise Ireland Act) 1998: S.13(4) The chief executive officer shall, for the duration of his or her appointment, become an ex officio member of the Board.
- Universities Act 1997: Section 16: (2) The members of the governing authority shall include—(a) the chief officer
- Institute of Technology Act 1992: Third Schedule: “3. The Director shall be ex officio a member of the governing body and shall be entitled to be a member of every committee appointed by the governing body.”

2.2.7. Head 12: Meetings of Board and Procedures

2.2.7.1 An Garda Síochána acknowledges that the Board will meet a minimum six times a year, this is a reduction from the original 11 set out in the initial draft of the General Scheme.

2.2.8. Head 13: Ineligibility for appointment, disqualification for office, cessation of membership

2.2.8.1 Under Head 13, An Garda Síochána previously made a number of recommendations regarding the ineligibility for appointment, disqualification for office, and cessation of membership of the Board. An Garda Síochána request that these matters be revisited in the General Scheme and propose the following;

2.2.8.2 In respect of Head 13(1)(e), An Garda Síochána remain of the strong view that any current and former member of An Garda Síochána is excluded from being a member of the Board.

2.2.8.3 In respect of Head 13(1)(f), An Garda Síochána recommend that any current and former member of the Policing Authority and Policing and Community Safety Authority is excluded from being a member of the Board.

2.2.8.4 In respect of Head 13(1)(g), An Garda Síochána recommend that any current and former employee, including Ombudsman Commissioner, of the Garda Síochána Ombudsman Commission is excluded from being a member of the Board due the required independence of the Garda Síochána Ombudsman Commission.

2.2.8.5 In respect of Head 13(3)(d), An Garda Síochána recommend that a person shall cease to be qualified to hold office on the Board if they are convicted of any offence rather than an indictable offence.

2.2.9. Head 14: Removal of member of Board from office

2.2.9.1. No matters arising at this time based upon the published text of the General Scheme.
2.2.10. Head 15: Removal of all members of Board from office

2.2.10.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.11. Head 16: Committees of Board

2.2.11.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.12. Head 17: Remuneration and expenses of members of Board and committees

2.2.12.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.13. Head 18: Provision of services to the Board

Under Head 18 the Garda Commissioner would be obliged to provide the Board with such resources including accommodation, facilities, services and staff as the Board reasonably determines are necessary for the due fulfilment of its functions and the Board shall, in consultation with the Garda Commissioner, appoint as secretary to the Board a senior Garda staff member who has the requisite skills for the position. The Board shall hold as many meetings as may be necessary for the due fulfilment of its functions, but in each year shall hold no fewer than one meeting in every two months of that year. The chairperson may call a meeting of the Board at any reasonable time.

2.2.13.1 The Department of Justice advise that the Garda Board will appoint a secretariat to be based in Garda Headquarters to support it in the carrying out of its functions and it is intended that the draw on Garda resources will be modest. Members of the secretariat will report to the Board Chairperson.

2.2.13.2 An Garda Síochána has previously raised concern with the Department of Justice that this Head requires the Garda Commissioner to provide the Board with significant resources including accommodation, facilities, services and staff as the Board reasonably determines are necessary for the due fulfilment of its functions. The Board may appoint in consultation with the Garda Commissioner such and so many other Garda staff members as it considers reasonably necessary to assist the secretary in the performance of his or her duties.

2.2.13.3 The scale of resources to be made available to the Garda Board to facilitate them to discharge their responsibilities needs to be qualified prior to the establishment of the Board.

2.2.13.4 The Board is only one of the entities and agencies with whom the Commissioner is obliged to meet and engage.

Further similar and significant obligations arise in respect of:

- The National Community Safety Steering Group;
- The National Office for Community Safety and Local Community Safety Partnerships;
- The Policing and Community Safety Authority (The Authority shall have not less than four meetings with the Garda Commissioner in each year, the present Policing Authority has eleven each year).
- The Garda Síochána Ombudsman and
- The Independent Examiner of Security Legislation.

The only specific exception where the Garda Commissioner is not accountable to and must act independently of members of the Board or any Minister of the Government is in relation to the
maintenance of order or the enforcement of the law in relation to any individual or group of individuals, the investigation and prosecution of offences (which is of course regulated under the delegated authority of the DPP).

CHAPTER 3: GARDA COMMISSIONER, DEPUTY GARDA COMMISSIONER

2.2.14. Head 19: Appointment of Garda Commissioner
2.2.14.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.15. Head 20: Appointment of Deputy Garda Commissioner
2.2.15.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.16. Head 21: Power of Deputy to perform functions of Garda Commissioner
2.2.16.1 An Garda Síochána remain of the view the provision in Head 21 should be strengthened by making specific reference to the transfer of the legal authority to the Deputy Commissioner during such periods when performing the functions of the Garda Commissioner.

2.2.16.2 An Garda Síochána have previously sought the legislative provision in the General Scheme for an Assistant Commissioner to perform the functions of a Deputy Commissioner in an ‘acting up’ capacity in certain circumstances. An Garda Síochána require that an express provision be included to allow for the Garda Commissioner to appoint an Assistant Commissioner in a temporary capacity in the absence, incapacity or suspension of a Deputy Commissioner to perform all the functions of a Deputy Commissioner.

2.2.17. Head 22: Resignation of Garda Commissioner, Deputy Garda Commissioner
2.2.17.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.18. Head 23: Suspension of Garda Commissioner and Deputy Garda Commissioner
2.2.18.1 The new provisions of this Head are noted, in particular Sub-Head 1 which provides that the Minister may suspend the Garda Commissioner or a Deputy Garda Commissioner from duty where the person is the subject of an investigation into allegations that he or she may have committed an offence, or behaved in a manner that would constitute serious misconduct subject to a specified threshold being met; “in the interests of An Garda Síochána”.

2.2.18.2 This test mirrors that of the case of a Deputy Commissioner where he or she may be suspended from duty by the Commissioner under the Garda Síochána (Discipline) Regulations 2007 (Regulation 7).

2.2.18.3 Head 23(10), provides for a statement of the reasons for removal from office being laid before both Houses of the Oireachtas. While accepting that the office of the Commissioner and Deputy Commissioner are senior positions, the removal from office should be treated in the same manner as any other senior State position/office holder. Therefore clarification is sought as to whether the General Scheme reflects the process when other senior office holders of Government Departments / organisations from the state are removed from office.
2.2.19. Head 24: Inquiry into any matter giving rise to notification under Head 23(7)

2.2.19.1. This Head contains no reference to the qualifications that the appointee is to have to qualify them to carry out an inquiry. Section 109 of the 2005 Act provides that the Minister may request the Chief Justice to invite a judge to inquire into the conduct of a designated Officer of GSOC. The Chief Justice may invite a judge of the Supreme Court, a Judge of the Court of Appeal or Judge of the High Court to conduct the inquiry. An Garda Síochána recommends that that an inquiry under Head 24 should be conducted by a person of similar standing.

2.2.19.2. An Garda Síochána also recommend that Head 24(2)(a) and (b) are merged. Sub-Head 2(a) causes an issue when a person is requested to provide information that is not within their remit or knowledge.

CHAPTER 4: FUNCTIONS, DUTIES OF GARDA COMMISSIONER

2.2.20. Head 25: Functions of Garda Commissioner

2.2.20.1

Head 25 of the draft Bill articulates the functions of the Commissioner ‘to direct and control [the business of] An Garda Síochána’. However, the Bill also provides that the Garda Commissioner shall seek to ensure that his or her functions are carried out with due regard to:

- the policing principles and
- the objective of promoting effectiveness, efficiency and economy in An Garda Síochána.

The Bill also requires the Commissioner to seek to ensure that his or her functions are carried out in accordance with:

(I) the policing priorities determined (under Head 49) by the Authority which must then be submitted to the Minister for approval
(m) any security priorities determined by the Minister (under Head 50)
(n) the approved strategic plan (Under Head 51 the Garda Commissioner is obliged to prepare a strategic plan for An Garda Síochána for submission to the Minister and can only do so when it has been adopted by the Board).
(o) the approved annual service plan (Under Head 53 the Commissioner is obliged to submit an annual service plan to the Minister but may only do so when it has been adopted by the Board).
(p) the approved capital plan,
(q) the relevant allocated resources,
(r) any relevant policies of the Minister or the Government, and
(s) any directive issued to him or her (under Head 30); and
(t) the Garda Commissioner is accountable to the Board for the performance of his or her functions (the Board of An Garda Síochána is tasked with overseeing and monitoring the Commissioner’s performance (Under Head 11)
(u) and (pursuant to Head 28) the Commissioner is obliged to account fully to the Government and the Minister.
(v) Under Head 30 the Minister, with the consent of the Government can issue directives to the Commissioner.
2.2.21. Head 26: Direction and control of Garda Síochána

2.2.21.1 The provision of this Head sets out the Garda Commissioner’s function to direct and control the Garda Síochána. An Garda Síochána requests the following insertion in Head 26(3) to address situations where the Commissioner has delegated his/her functions:

Head 26(3): Garda Staff should perform the functions, roles and responsibilities within the scope of the Garda Staff Members Office / Area of responsibility in a professional, prompt and punctual manner under the direction and control of the Garda Commissioner and / or any Office-holder on behalf of the Commissioner in the delegation of such duties.

2.2.22. Head 27: Independence of Garda Commissioner

2.2.22.1 The provisions of this Head makes explicit the operational independence of the Garda Commissioner from the Board, the Minister, and any Minister of the Government, as recommended by the Commission on the Future of Policing in Ireland (CoFPI) report. Notwithstanding Head 28 and Head 29, An Garda Síochána purport that the Secretary General of the Department of Justice should also be included in Head 27, otherwise potentially the Commissioner may act independently of the Board and Minister in certain cases but not the Secretary General of the Department of Justice.

2.2.23. Head 28: Duty of Garda Commissioner to account to Government, Minister and Attorney General

2.2.23.1 An Garda Síochána previously advised that issues have arisen in the past as regards to the legal authority of the Garda Commissioner to provide information and documents to the State Claims Agency who are defending the State in litigation proceedings where the Garda Commissioner is not a named party.

2.2.23.2 In order to avoid a situation as currently arises, where the State Claims Agency have to obtain on Order for Third Party Discovery from the Garda Commissioner, An Garda Síochána recommend that a provision is included under Head 28 along the following lines:

The Garda Commissioner shall provide the Attorney General either directly or through the Chief State Solicitors Office and the State Claims Agency with all of the material specified in Sub-Head 2 that is required by the Attorney General or the State Claims Agency in connection with the conduct of legal proceedings on behalf of the State.

2.2.24. Head 29: Duty of Garda Commissioner to provide information

2.2.24.1 An Garda Síochána acknowledge that the Garda Commissioner’s direct line to the Minister as in section 41(1) of the Garda Síochána Act 2005 will be maintained under the published General Scheme.

2.2.24.2 An Garda Síochána recommend that Head 29 be expanded in order to ensure it provides organisational protection to the Garda Commissioner in advising the Minister for Justice of issues of concern arising within An Garda Síochána, the policing environs and / or matters concerning security of the State. It is proposed that the said legal definition be expanded to include issues of public interest / concern and or matters in which it would be deemed prudent in the Garda Commissioner’s opinion that requires the briefing of the Minister for Justice and / or Government.
2.2.24.3 An Garda Síochána are of the view in the interest of National Security matters, this provision should be exempt from the Freedom of Information and / or current Data Protection Legislation in addition to Parliamentary scrutiny by Oireachtas Committees.

2.2.25. Head 30: Directives from Minister
2.2.25.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.26. Head 31: Delegation of powers, functions, or duties of Garda Commissioner
2.2.26.1. This Head and Section 31 of the 2005 Act provides for the delegation of the Garda Commissioner’s functions. An Garda Síochána recommends the inclusion in the General Scheme of a similar new legislative provision to facilitate the exercise of functions in the absence of a Deputy Garda Commissioner. Current legislation is silent on this requirement, consequently the functions of the Deputy Commissioner cannot be performed in an acting capacity by an Assistant Commissioner.

2.2.26.2 An Garda Síochána is also of the view that the General Scheme should address the matter of the individual that the delegation is to, must carry out the function under the general direction of whomever delegated the authority akin to the proposals under Head 26(3).

2.2.27. Head 32: Powers relating to contracts, bank accounts, etc.
2.2.27.1 An Garda Síochána recommend the inclusion of “or other property of any kind” in addition to land under Head 32(2).

2.2.27.2 This Head facilitates the acquiring of land/property, accordingly there is also a requirement to add reference in the text of the General Scheme to hold and dispose of property etc.

2.2.28. Head 33: Arrangements for obtaining views of public
2.2.28.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.29. Head 34: Provision of police services for certain events, etc.
2.2.29.1. No matters arising at this time based upon the published text of the General Scheme.

CHAPTER 5: GARDA PERSONNEL

2.2.30. Head 35: Garda personnel
2.2.30.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.31. Head 36: Ranks, under in each rank, terms and conditions
2.2.31.1 While it is noted Head 42 relates to the appointment of Garda Reserve members, Head 36 makes no mention of the rank of Reserve Garda. The Reserve Garda is a Rank within the organisation is included in Regulation 8 of S.I. 412/2006 Garda Síochána (Reserve Members) Regulations 2006.
2.2.32. Head 37: Member’s Solemn Declaration
2.2.32.1 An Garda Síochána welcomes the revised wording of the solemn declaration includes a specific commitment to act in accordance with the Code of Ethics.
2.2.33. **Head 38: Appointment of persons to ranks of Assistant Garda Commissioner and Chief Superintendent**

2.2.33.1. The requirement for the ‘approval’ of the Board, dilutes the Garda Commissioner’s ability to appoint personnel. An Garda Síochána seeks that the term ‘approval’ be changed to ‘in consultation with’. The suitability of the candidates will be a matter for the interview board in any appointment process.

2.2.34. **Head 39: Suspension, removal of persons appointed to rank of Assistant Garda Commissioner or Chief Superintendent**

2.2.34.1. An Garda Síochána is of the view that seeking the approval of the Garda Board undermines the role of the Commissioner in ensuring good order within An Garda Síochána and unnecessarily opens sensitive investigations to the Garda Board.

2.2.34.2. An Garda Síochána seeks the removal of the provision that a statement of reasons for the removal to be laid before each House of the Oireachtas. This is not reflective of similar for other office holders in the State. An Garda Síochána also advise there may also be issues in relation to privacy rights arising in this context.

2.2.35. **Head 40: Inquiry into any matter giving rise to notification under Head 39(3)**

2.2.35.1 Having regard to the independence of the Garda Commissioner, An Garda Síochána is of the view that instead of ‘obtaining approval’ of the Garda Board, the Garda Commissioner should ‘consult with’ the Board on the appointment of a person to hold an inquiry to any matter under Head 39(3).

2.2.36. **Head 41(3): Summary Dismissal (public confidence)**

2.2.36.1 An Garda Síochána seeks further clarification in the General Scheme regarding the summary dismissal provision under Head 41(3), which now applies to members of Superintendent rank, whereas the current Section 14 of the 2005 Act applies to members not below the rank of Inspector.

2.2.37. **Head 42: Appointment of reserve members**

2.2.37.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.38. **Head 43(1): Duty of members of Garda personnel to account**

2.2.38.1 Head 43(1) is intended to replace the current Section 39 of the 2005 Act. However, this provision is now extended to include Garda staff. Depending on interpretation, it may now provide for a scenario where a Garda member could be required to account to a Garda staff member of higher grade/rank. It is not clear if this is intended to be the case, as Garda ranks and Garda Staff grades are not agreed as equivalent. Accordingly, further clarity will be required here as to what is intended under this provision.

2.2.39. **Head 43(3): Duty of members of Garda personnel to account**

2.2.39.1 Sub-Head 43(3) states that the member of Garda personnel concerned shall be informed by the member of higher rank or grade that such failure may lead to dismissal from An Garda
Síochána. This will require establishment of formal equivalency between grades and ranks agreed with the Unions and Associations.

2.2.39.2 In addition use of the term "member of Garda staff" and "member of Garda personnel" causes confusion in the differentiation of Garda Members and Garda Staff. Clarity is required in this regard in the General Scheme to ensure all personnel can easily determine what parts of the legislation apply to them — Garda Members, Garda Staff or both.

2.2.40. Head 43(4): Admissibility in criminal proceedings

2.2.40.1 Head 43(4) requires further clarity in that it should state “is not admissible in any criminal proceedings against the member of Garda personnel concerned”. The current text states the “member concerned” which could be interpreted as excluding Garda staff. Similarly the next reference to member should also refer to member of Garda personnel.

2.2.41. Head 44: Admission of Garda trainees

2.2.41.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.42. Head 45: Appointment of members of Garda staff

2.2.42.1 The provisions of the Head are noted and it is welcomed that the Garda Commissioner will now be responsible for ‘Garda Staff’ within An Garda Síochána. However, An Garda Síochána has serious concerns on the implementation of these provisions and is of the view further engagement between the Department of Justice, Representative Unions and An Garda Síochána is required prior to the progression of this Head of the General Scheme.

2.2.43. Head 46: Garda Staff Undertaking

2.2.43.1 Previous drafts of the General Scheme included a "Garda staff solemn declaration". The published General Scheme requires Garda staff to give an undertaking, but the wording is not specified. In the context of becoming one organisation, it is the view of An Garda Síochána that the wording for Garda staff should closely mirror that of Garda members insofar as possible and be incorporated in the Scheme. The same wording for committing to the Code of Ethics from Head 37 should also apply to Garda staff.

2.2.44. Head 47: Power to appoint consultants and advisers

2.2.44.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.45. Head 48: Representative Associations

2.2.45.1 An Garda Síochána acknowledges that a review of the Garda Staff Association Regulations is currently being undertaken by the Department of Justice. However, An Garda Síochána recommends that consideration be given to the introduction of a Representative Association for the Assistant Commissioner and Deputy Commissioner ranks.

2.2.45.1 Head 48 refers to Associations representing “members of An Garda Síochána” while the definitions of the General Scheme includes the Garda Reserve in the definition for a member. The fact that in other Heads in the Scheme, the Garda Reserve is explicitly referenced, it could give rise to the interpretation that the Garda Reserve is not entitled to be represented by a Representative Association in the future. This would be seen as a negative and limiting
interpretation for future development of the Garda Reserve and as such clarity should be brought to wording within this Head.

CHAPTER 6: ACCOUNTABILITY AND FUNDING OF AN GARDA SÍOCHÁNA

2.2.46. Head 49: Setting of priorities by Authority for policing services
2.2.46.1 This is a new Head replacing the former Head in the draft of the General Scheme provided to An Garda Síochána.

2.2.46.2 An Garda Síochána had previously sought the separation of security matters from the wider policing priorities. Under Head 49, the Authority shall determine and from time to time revise priorities for An Garda Síochána in performing its functions relating to policing services only, for submission to the Minister for approval. Before determining or revising priorities under this Head the Authority must consult with:

- the Garda Commissioner,
- the National Community Safety Office, and
- such other persons as the Authority considers appropriate.

2.2.47. Head 50: Setting of strategic priorities by Minister for Security Services
2.2.47.1 This is a new Head replacing the former Head which related to the wider strategic priorities of An Garda Síochána.

2.2.47.2 An Garda Síochána had previously sought the separation of the security matters from the wider policing priorities. Under this Head, the Minister may determine and from time to time revise priorities for An Garda Síochána in performing its functions relating to security services, and establish and from time to time revise the performance targets to be achieved in relation to each priority. Before determining or revising priorities or establishing or revising performance targets under this head the Minister must consult with:

- the Garda Commissioner, and
- such other persons as the Minister considers appropriate.

2.2.47.3 An Garda Síochána notes the revision that the Garda Commissioner only informs the Minister of the measures taken to achieve the objectives of the priorities determined and the performance targets established under this Head and the outcome of those measures.

2.2.48. Head 51: Strategic Plan
2.2.48.1 An Garda Síochána acknowledges the revision in the published General Scheme where under Head 51, the Garda Commissioner at the request of the Board, prepares a strategic plan for An Garda Síochána for submission to the Minister for approval with or without amendment, for the ensuing 3 years. Previously it was the Garda Síochána Board in consultation with the Garda Commissioner prepared the strategic plan. This appears to be at variance with the functions set out for the Garda Board.

2.2.48.2 Under Sub-Head 7 there is no provision for the Garda Commissioner to instigate an amendment of an approved plan with the approval of the Minister. Similarly, there is no provision for consultation with the Garda Commissioner on the amendment of an approved strategic plan by the Minister or the Board. An Garda Síochána requests that the aforementioned amendments to the General Scheme are considered.
2.2.48.3 Under the Public Services Management Act there is a requirement for an updated plan “within 6 months after the appointment of a new Minister of the Government having charge of the Department or Scheduled Office”. Clarification is sought on the requirement for Head 51 to transcribe for a change of a Minister/Government during the three year period of a strategic plan.

2.2.49. Head 52: Publication and implementation of approved strategic plan
2.2.49.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.50. Head 53: Annual service plan
2.2.50.1 An Garda Síochána acknowledges the revision in the published General Scheme where under Head 53, the Garda Commissioner shall request the Authority to provide its views on what the plan should contain where as in previous drafts the Garda Commissioner was to consult with the Policing and Community Safety Authority in relation to the provision of policing services.

2.2.50.2 An Garda Síochána also acknowledges the removal of reference to local policing plans under Sub-Head 7.

2.2.50.3 Head 53 provides that an annual service plan shall not be submitted to the Minister unless it is adopted by the Board. There is no explicit provision allowing for other arrangements should a Board not be constituted nor the situation should the Board not adopt the plan, although Sub-Heads 8 and 9 do allow for the Minister to direct the plan to be submitted to him/her and for this to be deemed to have been adopted by the Board. Further clarity is required to address these circumstances.

2.2.50.4 Head 53 makes an explicit link between the estimates process and the development of an annual service plan. Head 53(3) provides that the plan must be prepared within 42 days of the publication of the Estimates for Public Services while Head 53(5) states that this plan must contain estimates of the financial resources allocated to meet each objective (costed plan). The annual service plan must also contain estimates of the number of members, Garda staff members and reserve members for the period and the services to which the plan relates (condensed workforce plan). These are onerous provisions, particularly in respect of the financial resources and may not be possible to deliver in the short to medium term. An Garda Síochána request that these provisions are revised considering the feasibility to achieve same, due to An Garda Síochána’s capability to prepare a “costed service plan” without intervention and additional supports in the timeframe outlined.

2.2.51. Head 54: Amendment of approved annual service plan
2.2.51.1 An Garda Síochána seek to clarify should Head 54 include reference to the Garda Board in the amendment of the annual service plan.

2.2.52. Head 55: Implementation of approved annual service plan
2.2.52.1. No matters arising at this time based upon the published text of the General Scheme.
2.2.53. **Head 56: Annual and multi annual capital plan**

2.2.53.1 The Head provides that the plan shall not be submitted to the Minister unless it is adopted by the Board. There is no explicit provision allowing for other arrangements should a Board not be constituted nor the situation should the Board not adopt the plan, although Sub-head 7 does allow for the Minister to direct the plan to be submitted to him/her. An Garda Síochána seek clarification in the General Scheme and that any direction of the Minister supersedes the Board etc.

2.2.54. **Head 57: Implementation of approved capital plan**

2.2.54.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.55. **Head 58: Accountability of Garda Commissioner for accounts of Garda Síochána**

2.2.55.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.56. **Head 59: Attendance of Garda Commissioner before other Oireachtas Committees**

2.2.56.1. An Garda Síochána has made a previous submission on Head 58 and requests further consultation with the Department of Justice regarding same.

2.2.56.2. An Garda Síochána recommends the inclusion of a reference in the General Scheme to matters that the Garda Commissioner shall not be required to give an account. In particular, matters pertaining to Section 42 enquiries and/or any non-statutory enquiries should not be given in evidence before an Oireachtas Committee or any matter under investigation by GSOC.

2.2.56.3. An Garda Síochána recommend that there should be consistency across the General Scheme as to the matters that should not be subject of discussion / briefing across all fora e.g. Oireachtas Committees, Policing and Community Safety Authority meetings etc. For example the following matters should not be discussed.

   - Matters in the interests of national security
   - Any matter into which an inquiry is to be made is a sensitive personnel matter, including Data Protection
   - The inquiry would, or would be likely to, prejudice proceedings which have been commenced in a court of law
   - Any matter touching upon a crim investigation

2.2.56.4 In respect of the current listing under Sub-Head 9, An Garda Síochána recommend data protection matters should be included.

2.2.56.5 Accordingly, An Garda Síochána recommend that a protocol be developed for policing discussion topics in a public fora under the General Scheme.

2.2.57. **Head 60: Audit committee**

Under Head 60 the Commissioner would be **required** to ensure that the audit committee that is established by the Board is provided with the necessary secretarial and other resources to enable it to perform its functions.
2.2.58. Head 61: Provisions supplementary to Head 60
2.2.58.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.59. Head 62: Functions of audit committee
2.2.59.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.60. Head 63: Governance Framework
2.2.60.1. An Garda Síochána note that there is no provision under Head 63 for the Board to consult with the Garda Commissioner when developing the Governance Framework. This is of a concern as the framework will include an outline of the managerial, organisation and governance structures of An Garda Síochána and the processes and guidelines to be followed to ensure compliance with the reporting requirements imposed on the Garda Commissioner by or under this Act or other Acts, and An Garda Síochána’s internal controls, including its procedures relating to internal audits, risk management, public procurement, financial reporting and protected disclosures. An Garda Síochána seek that a formal consultation mechanism amongst the Board and Garda Commissioner, as part of the development of the Governance Framework, be incorporated into the General Scheme.

2.2.61. Head 64: Annual Report
2.2.61.1 An Garda Síochána acknowledges the amendment from two months to three months to produce an Annual Report that has been approved by the Garda Board by the end of March. Currently, under the 2005 Act, An Garda Síochána have four months from the start of the year to produce an Annual Report and this period does not incorporate the additional step of adoption of the Report by the Garda Board. It was previously noted that the proposed legislation gives the new Authority three months to produce an Annual Report that would in effect be less complex and voluminous than the Garda Annual Report. Accordingly, An Garda Síochána is seeking the retention of the four month period to produce an Annual Report that has been approved by the Garda Board.

2.2.61.2 The provisions of this Head states the report shall not be submitted to the Minister unless it is adopted by the Board. There is no explicit provision allowing for other arrangements should a Board not be constituted nor adopt the annual report. Accordingly, An Garda Síochána seek to have this anomaly addressed in the General Scheme.

2.2.62. Head 65: Statistical information
2.2.62.1. No matters arising at this time based upon the published text of the General Scheme.

CHAPTER 7: CODE OF ETHICS, STANDARDS OF INTEGRITY, UNAUTHORISED DISCLOSURE OF INFORMATION

2.2.63. Head 66: Code of ethics for members of Garda personnel
2.2.63.1. Head 66 provides that the Authority shall establish a Code of Ethics that includes standards of conduct and practice for members of Garda personnel, and provisions to encourage and facilitate the reporting by members of Garda personnel of wrongdoing in An Garda Síochána. Should this not be a function of the Garda Board?
2.2.63.2. In relation to facilitating the reporting of wrongdoing, An Garda Síochána seeks clarification in the General Scheme as to how this will be achieved, i.e. by way of another reporting channel in addition to those already in place with the Garda Anti-Corruption Unit and under the Protected Disclosures legislation.

2.2.64. Head 67: Standards of integrity, codes of ethics for members of committees, advisors or consultants etc.

2.2.64.1 This provision provides for the development of a Code of Ethics which would apply to consultants or advisors employed by An Garda Síochána. The current Code of Ethics does not currently apply to consultants employed by the organisation and this extension of the Code is welcomed by An Garda Síochána.

2.2.65. Head 68: Confidentiality of certain Information (also relevant to heads 127/restatement of section 62M and head 154/restatement of section 81 of the 2005 Act)

2.2.65.1 Post the publication of the General Scheme, the Department of Justice advised that based upon An Garda Síochána’s submission that Section 62 of the 2005 Act can be difficult to operate, external counsel has made the following suggestions in relation to Head 68 and also a number of suggestions in relation to Head 127 which, if accepted, would apply to head 68.

2.2.65.2 The advices relating to Head 68 are as follows:

- Head 68 deals with confidentiality of certain information and provides that a person who is or was a member of Garda personnel, engaged under contract or other arrangement to work with or for An Garda Síochána, or a member of the Board or a committee of the Board, shall not disclose, in or outside the State, any information obtained in the course of carrying out duties of that person’s office, employment, contract or other arrangement if the person knows the disclosure of that information is likely to have a harmful effect. Subhead (4) lists a number of circumstances in respect of which disclosure is not prohibited. Consideration might be given to including a provision indicating that it is a defence to show that the disclosure falls within the list provided. It may also be appropriate to introduce a defence similar to that provided by Section 51 of the Freedom of Information Act 2014 which provides that in a prosecution for certain offences under the Official Secrets Act 1963, it shall be a defence to prove that a disclosure of information was reasonably believed by the person charged to be an authorised disclosure.

- The offence prevents disclosure by those “engaged under contract or other arrangement to work with or for An Garda Síochána”. Bodies engaged under contract or other arrangement may have employees, and it is conceivable that these employees could disclose confidential information. Consideration might therefore be given to extending the prohibition to employees of those engaged under contract or other arrangement by the Authority.

- The necessary provisions should be included so as to ensure that disclosure of information in relation to duties which occurred prior to the repeal of the 2005 Act remains an offence after the date of repeal.

2.2.65.3 In respect of Head 127 (which if accepted would apply to Head 68) the following observations are offered:
The offence prevents disclosure by those “engaged under contract or other arrangement by the Authority”. Those engaged under contract or arrangement may have employees. In its current form, Head 127 would not appear to criminalise disclosures by such employees. Consideration might be given to extending the offence to cover disclosures by employees of persons engaged under contract or arrangement by the Authority.

The Head criminalises disclosure of information if the person knows that “disclosure of that information is likely to have a harmful effect”. Consideration might be given to using the formulation of “knows or believes”. Even though a presumption is provided under this Head, it may be difficult for the prosecution to establish knowledge as opposed to belief in the likely harmful effects of a disclosure.

To provide clarity as to the proofs which must be adduced in court, Head 127(1) might be modified to criminalise the disclosure of information where “that disclosure is likely to have a harmful effect and the person knows or believes that to be the case”. An additional provision might be included to clarify that it is not necessary for the prosecution to prove that the disclosure actually had a harmful effect.

Head 127(4) sets out a list of circumstances in which disclosure of information is lawful. Consideration might be given to amending this subhead so as to provide that it is a defence to show that the disclosure falls within the list provided. Under Head 127 in its current form, the prosecution would be required to adduce evidence negating the possibility that the disclosure falls within each and every one of the categories provided, which might pose a considerable burden depending on the circumstances of the case.

The list of persons to whom disclosures may be lawfully made in Head 127(4)(a) does not include any member of the Authority itself. It does not include the Director of the National Office, despite the General Scheme envisaging close interactions between the Authority and Director. Although such interactions may be covered by Head 127(4)(d), it might be appropriate to amend Head 127(4)(a) to expressly provide for this.

In the interests of ensuring consistency in Irish law, it may be appropriate to introduce a defence similar to that provided by Section 51 of the Freedom of Information Act 2014. That provides that in a prosecution for certain offences under the Official Secrets Act 1963, it shall be a defence to prove that a disclosure of information was reasonably believed by the person charged to be an authorised disclosure.

CHAPTER 8: SPECIAL INQUIRIES RELATING TO ADMINISTRATION, PRACTICE OR PROCEDURE

2.2.66. Head 69: Special inquiries relating to administration, practice or procedure
2.2.66.1. No matters arising at this time based upon the published text of the General Scheme.

CHAPTER 9: LIABILITY

2.2.67. Head 70: Liability for certain acts of members of An Garda Síochána
2.2.67.1 An Garda Síochána has previously raised the issue that this Head explicitly excludes Garda Staff. If Garda staff are subject to appearances in tribunals and court cases, this Head should be expanded to include all Garda personnel.
2.2.68. **Head 71: Legal aid for members of An Garda Síochána**

2.2.68.1 Similar to Head 70, An Garda Síochána has previously raised the issue that Head 71 also explicitly excludes Garda Staff. If Garda staff are subject to appearances in tribunals and court cases, this Head should be expanded to include all Garda personnel.

**CHAPTER 10: INTERNATIONAL SERVICE AND COOPERATION WITH POLICE SERVICE, LAW ENFORCEMENT AGENCIES OR OTHER RELEVANT PERSONNEL OUTSIDE STATE**

2.2.69. **Head 72: Interpretation**

2.2.69.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.70. **Head 73: International service**

2.2.70.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.71. **Head 74: Power to enter into agreements with other law enforcement agencies, relevant persons or bodies outside the State**

2.2.71.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.72. **Head 75: Secondment from Police Service of Northern Ireland to certain ranks in An Garda Síochána.**

2.2.72.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.73. **Head 76: Secondment from An Garda Síochána to Police Service of Northern Ireland**

2.2.73.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.74. **Head 77: Breach of standards of professional behaviour by seconded member of Garda Síochána**

2.2.74.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.75. **Head 78: Breach of professional standards of behaviour by seconded member of Police Service of Northern Ireland**

2.2.75.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.76. **Head 79: Records relating to members serving outside the State**

2.2.76.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.77. **Head 80: Duties of Ard-Chláraitheoir in relation to records transmitted under this Act**

2.2.77.1. No matters arising at this time based upon the published text of the General Scheme.
CHAPTER 11: OFFENCE OF CAUSING DISAFFECTION AND IMPERSONATION

2.2.78. Head 81: Causing disaffection
2.2.78.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.79. Head 82: Offence of impersonating member of Garda Síochána
2.2.79.1. No matters arising at this time based upon the published text of the General Scheme.

2.2.80. Head 83 Other offences relating to impersonation
2.2.80.1. No matters arising at this time based upon the published text of the General Scheme.
2.3. **PART 3: COMMUNITY SAFETY**

2.3.1. **Head 84: Interpretation**

2.3.1.1 An Garda Síochána has previously raised the issue that the interpretation of ‘administrative area’ has been given the meaning as set out in Section 2 of the [Local Government Act 2001](https://example.com), which implies it is interpreted to mean Local Authority Areas. An Garda Síochána’s Divisional structure does not align to the Local Authority Areas. Accordingly, this will result Local Authority areas, incorporating segments of different Divisions with different policing plans.

2.3.2. **Head 85: National Community Safety Strategy**

2.3.2.1 Head 85 states one objective of the national strategy will be “to promote multi-disciplinary approaches and inter agency collaboration to enhance community safety”. This is a worthy objective, but it is the view of An Garda Síochána that this will not work effectively or efficiently without addressing the sharing of information between agencies. This has been a significant issue across other partnerships between An Garda Síochána and state bodies, e.g. J-ARC.

2.3.3. **Head 86: National Community Safety Steering Group**

2.3.3.1 No matters arising at this time based upon the published text of the General Scheme.

2.3.4. **Head 87: National Office for Community Safety**

2.3.4.1 Under the published General Scheme, the National Office shall have responsibility for promoting and monitoring the delivery of the objectives of an approved national strategy/framework (includes community engagement/crime prevention) under the direction of a Steering Group. An Garda Síochána seeks confirmation on the extent of the remit of the National Office for Community Safety to oversee training, policy development and funding for community engagement and crime prevention.

2.3.5. **Head 88: Director of National Office**

2.3.5.1 No matters arising at this time based upon the published text of the General Scheme.

2.3.6. **Head 89: Accountability to Oireachtas Committees**

2.3.6.1 No matters arising at this time based upon the published text of the General Scheme.

2.3.7. **Head 90: Staff of National Office**

2.3.7.1 No matters arising at this time based upon the published text of the General Scheme.

2.3.8. **Head 91: Provision of services to National Office**

2.3.8.1 No matters arising at this time based upon the published text of the General Scheme.

2.3.9. **Head 92: Regulations concerning Local Community Safety Partnerships**

2.3.9.1 An Garda Síochána acknowledges the amendments under Head 92(1)(b) and the removal of reference to the monitoring progress on the implementation of local policing plans.
2.3.10. **Head 93: Functions of Local Community Safety Partnerships**

2.3.10.1 An Garda Síochána has serious concerns arising from Head 93(3), and request that legal advice is sought from the Office of the Attorney General as to the provision of 'legal privilege' to members of the Local Community Safety Partnership which is akin to the constitutional protection afforded to Members of the Oireachtas. An Garda Síochána strongly opposes the inclusion of this legal provision given the significance of this provision.

2.3.10.2 Accordingly, in light of the potential risks associated with such committees, that certain members of same could utilise the said fora as a method of raising their local profile from a political perspective thus resulting in senior members of An Garda Síochána having to disassociate themselves from an organisational perspective from comments / debates held by the said partnership committees. This could have the net effect of eroding public confidence in An Garda Síochána and the partnerships.

2.3.11. **Head 94: Staffing of Local Community Safety Partnerships**

2.3.11.1 No matters arising at this time based upon the published text of the General Scheme.

2.3.12. **Head 95: Duties of Departments of State and other public service bodies**

2.3.12.1 No matters arising at this time based upon the published text of the General Scheme.
2.4. PART 4: ESTABLISHMENT OF THE FUNCTIONS OF POLICING AND COMMUNITY SAFETY AUTHORITY

2.4.1. Head 96: Interpretation
2.4.1.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.2. Head 97: Establishment day of Authority
2.4.2.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.3. Head 98: Establishment of Authority
2.4.3.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.4. Head 99: Membership of Authority
2.4.4.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.5. Head 100: Recommendations for appointment of ordinary members of Authority
2.4.5.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.6. Head 101: Terms and conditions of appointment of members of Authority
2.4.6.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.7. Head 102: Ineligibility for appointment, disqualification for office of member of Authority, cessation of membership, etc.
2.4.7.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.8. Head 103: Removal of member of Authority
2.4.8.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.9. Head 104: Objective and functions of Authority
2.4.9.1 An Garda Síochána notes the following four new Sub-Heads in the published General Scheme under Sub-Head 2(b): to keep under review the performance by An Garda Síochána of its functions relating to policing services and the arrangements and strategies in place to support and enhance the performance of those functions and, in particular to keep under review:

- the corporate governance arrangements and structures within An Garda Síochána,
- the arrangements for the recruitment, training and development of members of Garda personnel,
- the mechanisms in place within An Garda Síochána for the measurement of performance and accountability of members of Garda personnel, and
- the arrangements for managing and deploying the resources available to An Garda Síochána so as to ensure the most beneficial, effective and efficient use of those resources;

2.4.9.2 An Garda Síochána also notes the role of the Garda Board (Head 11), in particular:
promote high standards of governance with particular regard to the codes of ethics issued under Heads 66 and 67,

monitor implementation of organisational performance and oversee major capital expenditure and investment having regard to Head 55,

ensure that appropriate arrangements for the recruitment, appointment, training, development and performance management of members of Garda personnel that comply with best practice are in place,

ensure, having regard to the resources reasonably and prudently expected to be available to An Garda Síochána, the integrity of An Garda Síochána’s accounting and financial reporting systems, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards,

2.4.9.3 Accordingly, An Garda Síochána is of the view that in light of the role of the Board that the inclusion of the additional Sub-Heads under Head 2(b) causes further confusion as to the extent of the remit of the Board and the Authority. An Garda Síochána requests a revision of the functions of the Board and Authority in the General Scheme to avert confusion regarding the remit of both bodies and the duplication of reporting requirements on the Garda Commissioner on these subject matters.

2.4.9.4 An Garda Síochána acknowledges the removal of the term ‘inquiries’ under Sub-Head 2(c).

2.4.9.5 An Garda Síochána also notes that the role of the new Authority in relation to community safety and linkages with the national community safety structures have been strengthened in the published General Scheme, explicit provision is made for it to be consulted on the national strategy and a representative will be appointed to the National Community Safety Steering Group. It will also be able to convene meetings of the Local Community Safety Partnerships’ chairs/vice chairs.

2.4.10. Head 105: Authority to have regard to security services
2.4.10.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.11. Head 106: Meetings and business of Authority
2.4.11.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.12. Head 107: Committees of Authority
2.4.12.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.13. Head 108: Power to appoint consultants and advisers etc. and to enter into contracts
2.4.13.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.14.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.15. Head 110: Annual Business Plan
2.4.15.1. No matters arising at this time based upon the published text of the General Scheme.
2.4.16. Head 111: Appointment of Chief Executive of Authority
2.4.16.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.17. Head 112: Staff of Authority
1.4.17.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.18. Head 113: Appointment of Inspectors of Policing Services
2.4.18.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.19. Head 114: Powers of Inspectors of Policing Services
2.4.19.1 An Garda Síochána acknowledges the inclusion at Sub-Head 2, that as soon as practicable after the commencement of this Head, the Authority and the Garda Commissioner shall agree a Memorandum of Understanding concerning the conduct of inspections under Sub-Head 2(c) or 2(d), in order to ensure that they are carried out in an efficient and effective manner and do not adversely affect the performance by An Garda Síochána delivering its functions under the General Scheme, and in particular it does not jeopardise criminal investigations or prosecutions or affect the management of persons in the custody of An Garda Síochána.

2.4.19.2 An Garda Síochána acknowledges the expansion of Sub-Head 4 and the inclusion of Sub-Head 6 that a member of Garda personnel may decline to provide information or a document requested in the course of an inspection on the grounds that it relates to the security of the State or would endanger the life or safety of a person who has given information in confidence. Where this provision is invoked and confirmed by the Garda Commissioner a referral may be made to the Independent Examiner of Security Legislation to the Minister with whom the final decision will rest.

2.4.20. Head 115: Joint Inspections
2.4.20.1 An Garda Síochána has previously flagged serious concerns relating to the content of Head 115 as it provides the legal authority for Inspectors of Police to perform Joint Inspections with External Agencies whom most likely will be working in partnership with An Garda Síochána in terms of policing operations/investigations. There are additional concerns arising from the prospect that such Agencies may be subject to Garda scrutiny and/or criminal investigation and accordingly, this measure would be deemed inappropriate.

2.4.20.2 The functions of other related bodies such as HIQA as cited by the GSOC (in previous discussions regarding this Head) has no legal role/remit over An Garda Síochána. Therefore, An Garda Síochána strongly disagrees with the rationale put forward as to the requirement for joint inspections as set out in the General Scheme.

2.4.20.3 An Garda Síochána strongly recommends that Joint-Inspections is removed from the General Scheme as these statutory agencies have no legal remit or role in performing same, and could potentially jeopardise the current professional partnerships between them and An Garda Síochána who may have to conduct criminal investigations into such agencies in the future.
2.4.21. Head 116: Reports of inspections requested by Minister
2.4.21.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.22. Head 117: Reports of inspections undertaken at Authority’s own initiative
2.4.22.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.23. Head 118: Monitoring and assessment of measures in relation to recommendations in inspection reports
2.4.23.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.24. Head 119: Duty of Garda Commissioner to facilitate performance by Authority of its functions
2.4.24.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.25. Head 120: Duty of Director of National Office to assist Authority
2.4.25.1 An Garda Síochána notes that the CoFPI Report (Chapter 13 – Paragraph 4) does not suggest that the Policing and Community Safety Authority should have any role in monitoring the work of health, social services and other such agencies. But the Authority should monitor how those agencies work with An Garda Síochána to help people whose safety is at risk or who may pose a risk to the safety of others.

2.4.25.2 An Garda Síochána remains of the view that Head 120 creates an imbalance where An Garda Síochána can be held to account by the Authority under Head 104 regarding inter-agency cooperation and community engagement in the delivery of community safety whereas the Director of the National Office and other agencies via the Steering Group are accountable to the Minister.

2.4.25.3 An Garda Síochána objects to this approach within the General Scheme. All matters relating to inter-agency co-operation should be addressed at the same forum. It is not practical for the Authority to have a function to promote improvements in inter-agency cooperation and community engagement in the delivery of community safety when they have no authority for the other agencies.

2.4.25.4 In light of the provisions under Head 86(6), where the regulations made under this Head may make provision for the functions National Community Safety Steering Group which may include “promoting and monitoring compliance by Departments of State and public service bodies with their obligations under the Act and the regulations and fostering inter-agency collaboration in the delivery of community safety”, An Garda Síochána seek that the dual oversight mechanism for inter-agency cooperation contained within the General Scheme is revised where all matters regarding inter-agency cooperation in the delivery of community safety comes under the remit of the Steering Group and this element is removed from the functions of the Authority.

2.4.26. Head 121: Accountability for accounts of Authority
2.4.26.1. No matters arising at this time based upon the published text of the General Scheme.
2.4.27. Head 122: Accountability of Authority to other Oireachtas Committees
2.4.27.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.28. Head 123: Governance framework
2.4.28.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.29. Head 125: Standards of integrity
2.5.29.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.30. Head 126: Codes of ethics for members, members of committees, advisors or consultants etc.
2.4.30.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.31. Head 127: Confidentiality of certain information
2.4.31.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.32. Head 128: Dissolution of Policing Authority and Garda Síochána Inspectorate
2.4.32.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.33. Head 129: Transfer of staff of Policing Authority
2.4.33.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.34. Head 130: Transfer of property, rights and liabilities, and continuation of leases, licences and permissions granted by Policing Authority
2.4.34.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.35. Head 131: Preservation of contracts, agreements or arrangements made by the Policing Authority
2.4.35.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.36. Head 132: Records of Policing Authority
2.4.36.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.37. Head 133: Liability for loss on part of Policing Authority occurring before establishment day
2.4.37.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.38. Head 134: Final accounts and final annual report of Policing Authority
2.4.38.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.39. Head 135: Transfer of staff of Garda Síochána Inspectorate
2.4.39.1. No matters arising at this time based upon the published text of the General Scheme.
2.4.40. Head 136: Preservation of contracts, agreements or arrangements made by the Garda Síochána Inspectorate
2.4.40.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.41. Head 137: Records of Garda Síochána Inspectorate
2.4.41.1. No matters arising at this time based upon the published text of the General Scheme.

2.4.42. Head 138: Liability for loss on part of Garda Síochána Inspectorate occurring before establishment day
2.4.42.1. No matters arising at this time based upon the published text of the General Scheme.
2.5. **PART 5: OFFICE OF THE GARDA SÍOCHÁNA OMBUDSMAN**

2.5.1. **Head 139: Continuation of Garda Síochána Ombudsman Commission under name of Office of the Garda Síochána Ombudsman**

2.5.1.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.2. **Head 140: Appointment of Garda Ombudsman and Deputy Garda Ombudsman**

2.5.2.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.3. **Head 141: Terms of appointment of Garda Ombudsman and Deputy Garda Ombudsman**

2.5.3.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.4. **Head 142: Acting Garda Ombudsman**

2.5.4.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.5. **Head 143: Objectives, functions and powers of Garda Ombudsman**

2.5.5.1 An Garda Síochána remains of the view in respect of Head 143(6), that there will be an obligation on the Ombudsman to establish and maintain efficient and effective systems and procedures for the handling of complaints in a fair, timely and effective manner. An Garda Síochána recommends that there should be independent oversight of the effectiveness and timeliness of investigations and complaints handled by the Ombudsman. This is not addressed in the published General Scheme. There should be a specific requirement that the Garda Ombudsman promotes confidence in their organisation within An Garda Síochána.

2.5.6. **Head 144: Functions of Deputy Garda Ombudsman**

2.5.6.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.7. **Head 145: Strategy statement of Office of the Garda Ombudsman**

2.5.7.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.8. **Head 146: Annual and other reports by Office of the Garda Ombudsman**

2.5.8.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.9. **Head 147: Appointment of Chief Administrative Officer of Garda Ombudsman**

2.5.9.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.10. **Head 148: Officers of Garda Ombudsman**

2.5.10.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.11. **Head 149: Designation of officers and others for purpose of investigations under Part 6**

2.5.11.1. No matters arising at this time based upon the published text of the General Scheme.
2.5.12. **Head 150: Special Assistance**

2.5.12.1 Head 150(4)(c) explicitly excludes Garda Staff in respect of compensation for injuries incurred when carrying out duties with the Garda Ombudsman for which both Garda members and Garda staff can be engaged. An Garda Síochána had previously recommended that consideration should be given to expand this Head to include all Garda personnel. An Garda Síochána are of the firm view that there should not be any distinction amongst Garda personnel during any period of temporary service with the Office of the Garda Ombudsman.

2.5.12.2 In respect of Head 150(4), An Garda Síochána remain of the view that there is an issue with regards to members of An Garda Síochána on temporary service with the Ombudsman, whether they are subject to the Discipline Regulations of An Garda Síochána, particularly in circumstances where matters arise which pre-date their secondment to the Ombudsman. In addition, if a member, while on temporary service, becomes the subject of a discipline or complaint allegation, clarification is required in the General Scheme as to what mechanism is proposed to deal with such complaints and who will investigate them under these circumstance. This is not addressed in the published General Scheme.

2.5.13. **Head 151: Power to appoint consultants and advisers and to enter into contracts**

2.5.13.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.14. **Head 152: Accountability for accounts of Office of Garda Ombudsman**

2.5.14.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.15. **Head 153: Accountability to other Oireachtas committees**

2.5.15.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.16. **Head 154: Confidentiality of information obtained by Garda Ombudsman**

2.5.16.1 Head 154(1) of the General Scheme makes reference at (a) to a member of the Garda Síochána Ombudsman Commission and at (c) to an officer of the Garda Ombudsman. Clarification is required in the text that (c) is a reference to an officer of the current Garda Síochána Ombudsman or the proposed Garda Ombudsman, in light of (d) it would be assumed to be the former to avoid any ambiguity.

2.5.16.2 Head 154(2) of the General Scheme defines ‘Harmful effect’. There is a change to the meaning of harmful effect in published General Scheme to that previously provided by The Department to An Garda Síochána (31/07/2020). In the previous draft of the General Scheme, Sub-Head 2 stated “For the purpose of this head, the disclosure of information referred to in subhead (1) does not have a harmful effect unless it...” In the current version subhead 2 states; “For the purpose of this head, “likely to have a harmful effect” means likely to...” This appears to lower the bar as to what constitutes a potential offence. It is noted the original version is contained in the current legislation at Section 62 of the Garda Síochána Act 2005 as amended.

2.5.16.3 An Garda Síochána are of the view that there should also be incorporated in this Head a prohibition to include circumstances where information may be disclosed for pecuniary gain/personal advantage or to undermine others, in circumstances where there may not necessarily be a harmful effect, as Head 154(6) requires that there be a harmful effect. Such a provision should also apply to Garda personnel in the context of a reworded Section 62 of the 2005 Act.
2.5.16.4 Head 154(4) does not prohibit a person from disclosing information in certain circumstances. In respect of inadmissible complaints, Garda members are currently made aware of the fact that a complaint was deemed inadmissible. Members are not made aware of the details of the complaint or the complainant. In the interests of fairness and natural justice this Sub-Head should be extended to include the notification of inadmissible complaints. This would assist members in re-evaluating their interactions with complainants.

2.5.16.5 It is noted that Sub-Head 2(e) has been inserted in the current Draft General Scheme: “the disclosure of information referred to in Sub-Head 1 does not have a harmful effect unless it – impedes an investigation by the Garda Síochána or otherwise prejudices the effective performance of the Garda Síochána’s functions”. It is not clear if this was intended to address the above issue. However, it is noted that Head 160 Sub-Head 9, still proposed to remove the notification of inadmissible complaints to members as standard practice. It remains the view of An Garda Síochána that members should continue to be notified of inadmissible complaints made against them and that in the interest of fairness the precise reason for inadmissibility should be clearly stated.

2.5.17. Head 155: Final accounts and final annual report of Ombudsman Commission
2.5.17.1. No matters arising at this time based upon the published text of the General Scheme.

2.5.18. Head 156: Records of Ombudsman Commission
2.5.18.1. No matters arising at this time based upon the published text of the General Scheme.
2.6. PART 6: COMPLAINTS, INCIDENTS OF CONCERN, INVESTIGATIONS AND OTHER MATTERS

2.6.1. Head 157: Interpretation - New Definition of Conduct

**Definition of “Conduct” includes acts, omissions, statements, and decisions (whether actual, alleged or inferred)**

This definition represents a significant shift from the definition of “conduct” in the 2005 Act wherein “conduct” is defined to include any act or omission and a reference to the occurrence of any conduct includes the doing of an act or the making of an omission;

There is no regard to the duty of an individual Garda member or how a failure to fulfil that duty is currently determined by the courts within this definition. An expansion of what constitutes police conduct would have to coincide with a clearer definition of what is the duty of an individual member of An Garda Síochána.

Due to the inclusion of this expanded definition of conduct from the current definition within section 82(1) of the Garda Síochána 2005 there is a requirement to provide clarity in respect of the position of a member of An Garda Síochána. This may initially appear to be pedantic, but the expansion of the definition of ‘police conduct’ demonstrates an absence of understanding of policing in the State and as such clarity of definition is very relevant in this context. Moreover, the definition of conduct is a definition simpliciter for other definitions containing the term conduct.

The status of a member of An Garda Síochána has not been defined by any of the statutes enacted to establish or amend policing in the State. The initial Act establishing An Garda Síochána, the Garda Síochána (Temporary Provisions) Act 1923 details that any reference to the Royal Irish Constabulary shall with minor structural exceptions be taken as a reference to a member of An Garda Síochána. This provision was additionally included in section 19 Garda Síochána Act 1924 and again in section 22(2) Police Forces Amalgamation Act 1925. Section 19(1) Garda Síochána Act 1924 and section 22(2) Police Forces Amalgamation Act 1925 have not been repealed and have survived the enactment of the Garda Síochána Act 2005.¹

This indicates that members of An Garda Síochána hold the same legal status as their predecessors in the Royal Irish Constabulary and are essentially common law peace officers. Notwithstanding this view the two sections that recognised the common law position of police officers in the Royal Irish Constabulary and the Dublin Metropolitan Police were repealed by the initial legislation establishing policing in the Irish Free State.² Although the Garda Síochána Act 2005 does not define the status of a member of An Garda Síochána the Act does acknowledge the continuance of their duties, immunities and powers recognised at common law.

An Garda Síochána, as stated in the Garda Síochána Act 2005 (hereafter the Act of 2005) has a function with specific objectives, as such, it can be inferred that its members have a degree of responsibility in meeting these objectives. Furthermore, in order to be a member of An Garda Síochána you must swear an oath of office. The oath was changed by virtue of the Act of 2005 and is not set in such strong terms as the oath sworn from 1924 until 2005.³ The original oath states that:

---

¹ Garda Síochána (Temporary Provisions) Act 1923, s 21.
³ Constabulary(Ireland) Act 1836, s 11 was repealed by the 4th schedule Garda Síochána Act 1924; Dublin Police Act 1836, s 4 was repealed by the 2nd schedule Police Forces Amalgamation Act, 1925.
⁴ Garda Síochána Act 2005, s 16.
I, _______________________________ do solemnly and sincerely before God declare and affirm and my word and honour pledge that I will be faithful to the utmost of my ability in my employment by the Executive Council of Saorstát Eireann in the office of _______________ in the Gárda Síochána and that I will render good and true service and obedience to Saorstát Eireann and its constitution and government as by law established, without favour or affection, fear, malice, or ill-will, and that I will see and cause the peace to be kept and preserved, and that I will prevent to the best of my power all offences against the same, and that while I shall continue to hold the said office, I will to the best of my knowledge discharge all the duties thereof faithfully according to law, and that I do not belong and that I will not while I hold the said office, join, belong, or subscribe to any political society whatsoever, or to any secret society whatsoever.\(^6\)

The oath establishes two issues pertinent to the status of a member of An Garda Síochána. Firstly, it refers to Gardaí as office holders and, secondly, it details that Gardaí must swear that they ‘will see and cause the peace to be kept and preserved, and that prevent to the best of their power all offences against the same’.\(^7\) This is a very strong statement that clearly sets a member of An Garda Síochána apart from others in society. While the Act of 2005 altered the oath to be sworn there are members still serving that have sworn the older oath and the position of a member of An Garda Síochána in society has not substantially changed by virtue of the Act of 2005. A member of An Garda Síochána is required under the Act of 2005 to solemnly declare that they will carry out the duties of such member with due regard for human rights and in accordance with the law.\(^8\)

The solemn declaration in the Act of 2005 details the following, ‘I will faithfully discharge the duties of a member of the Garda Síochána’, and as such the declaration is not set in terms of an individual’s duty but that of a member of An Garda Síochána’s duty.\(^9\) This indicates that the duties recognised prior to the Act of 2005 are still very much a part of an individual Garda member’s purpose.

The duties, immunities and powers of Gardaí have been considered by the courts. In the *DPP v Bartley*, Carney J held that:

In light of what has happened in particular in relation to Raheny Garda Station some old law which still holds good requires to be restated. Where a credible complaint of felony is made to a policeman, he has no discretion under the Common Law not to investigate it and apprehend a named offender. A failure to carry out this duty vigorously constitutes an illegality on the policeman’s part and renders him liable to prosecution on indictment.\(^10\)

Carney J, in his judgment, cited with approval two cases that set out the duty of a police officer. The first an Irish case from 1888 and the second relates to a Court of Appeal case from England and Wales. In the Irish case *Creagh v Gamble* the court held that, ‘a person against whom a reasonable suspicion

---

\(^6\) Police Forces Amalgamation Act 1925, sch 4. S.I. No. 244/1938 - Police Forces Amalgamation Act, 1925, Adaptation Order, 1938 amended the original oath by changing Executive Council of Saorstát Eireann to Government of Ireland. The Oath in the Garda Síochána Act 1924 was contained in the fourth schedule and is same as the oath in the 1925 Amalgamation Act. The Police Forces Amalgamation Act 1925 was enacted to amalgamate two existing police forces the Garda Síochána and the Dublin Metropolitan Police. The Amalgamation Act 1925 repealed certain sections of the act which regulated the Garda Síochána. In particular the Police Forces Amalgamation Act 1925 repealed section 5 Garda Síochána Act 1924 which required that a member of the Garda Síochána swear an oath of office it did not however repeal the fourth schedule containing the oath. This is in contrast to the Garda Síochána Act 2005 which repealed certain sections of the Police Force Amalgamation Act 1925. In particular section 11 which required an oath to be sworn and the fourth schedule containing the oath. Schedule 4 Garda Síochána Act 1924 containing the oath has never been repealed and as such arguably remains on the statute books. This indicates that the duties laid down in the oath still apply.

\(^7\) Police Forces Amalgamation Act 1925, s 16.

\(^8\) Garda Síochána Act 2005, s 16.

\(^9\) Ibid.

\(^10\) *DPP v Bartley* [1997] IEHC 94.
of a felony exists shall be brought to justice. The Peace Officer is not only entitled, but bound, to arrest him.”11 The second case referenced by Carney J is R v Dytham.12 The court in R v Dytham established that, ‘a police constable is a public officer. The second was that there does exist at common law an offence of misconduct in a public office.’13 The court in R v Dytham in referencing Stephens Digest of Criminal Law held:

Every public officer commits a misdemeanour who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.14

The common law duties of Gardaí were also considered by the Supreme Court in DPP v Fagan.15 The Supreme Court in DPP v Fagan relied on a number of UK judgments in holding that Gardaí have a common law duty to prevent and detect crime.16 Blayney J in his Judgment in Fagan cited with approval a passage from the judgment of Viscount Cave LC in Glasbrook Bros. Ltd v Glamorgan County Council, ‘No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for property from criminal injury…’.17 Blayney J further cited with approval a passage from a second UK case, Rice v Connolly.

The passage in Rice v Connolly was from the Judgment of Lord Parker CJ, who held:

It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and bring an offender to justice.18

In Fagan, Irvine J drew an analogy with a driver of an emergency vehicle to demonstrate the boundaries for Gardaí in carrying out their duty:

Even drivers of emergency vehicles, who may be exempted from ordinary speed limits, are not exempted in terms of liability for negligence. They are not given carte blanche to drive without due care. However, in determining whether due care was taken, the court is entitled to give the object of the journey due weight.19

While it can be seen that there are limitiations on how Gardaí carry out their duties the courts will nonetheless balance this with the societal benefit of the duty Gardaí were performing at the time. In holding that there are boundaries on what is considered acceptable in society from a peace officer in the performance of their duties, Irvine J cited with approval a paragraph from a UK case, Hill v Chief Constable of West Yorkshire.20 The paragraph in question was from the Judgment of Lord Keith:

13 Ibid 3.
14 Ibid 5.
16 Ibid 274.
18 Rice v Connolly [1966] 2 All ER 649, 651.
19 John Fagan v Garda Commissioner and others [65].
There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecutions, and also for negligence.\textsuperscript{21}

There is a balance that An Garda Síochána and each of its members must weigh in fulfilling their duty as society expects them to operate within acceptable (and lawful) boundaries. The common law however is not the only source of law in which a policing duty can be seen to exist.

The development of a policing duty can also be seen within human rights law. It is evident that there is a positive duty on Gardaí to detect and prevent crime that is based in the common law and it is clear that the courts accept the existence of this duty in the context of act or omission. The proposed expansion of what boundaries exist for examining police conduct are ambiguous and any such expansion requires a statutory definition of a member of An Garda Síochána.

The Code of Ethics, the purpose of which is to set standards for members of An Garda Síochána in carrying out their duties, is constructed in terms of “acts”. Furthermore, the statutory development of a policing standards within Head 66 details that regard should be given to relevant recommendations of the Council of Europe.

Article 16 Recommendation Rec (2001)10 of the Committee of Ministers to Members States on the European states that Police personnel, at all levels, shall be personally responsible and accountable for their own actions or omissions or for orders to subordinates. The commentary to article 16 states that:

\textit{In a society governed by the rule of law, the law applies equally to all citizens. If this principle is to be meaningful, it follows that police personnel, just as any citizen, must also be personally accountable for their own actions. Moreover, they should also be fully accountable for orders to subordinates police personnel, given with hierarchical powers.}

The extended definition of conduct is not known to domestic law or policing standards under international human rights law and as such there is no basis for it. Further ambiguity is created with the subsequent definition of complaint. Complaint is defined as:

“\textit{complaint” means a statement (whether oral, written or electronic) expressing dissatisfaction with an act or omission by a person who, at the time of the act or omission concerned, was a member of garda personnel;}

The substance of the definition only extends to an act or omission and does not align with the previous definition of conduct. This is further replicated in Head 158 titled: Supplementary provisions in relation to complaints. Head 158(1) details that:

\textit{(1) A complaint under this Part may relate to—}

\textit{(a) any action taken, or failed to be taken, by a member of garda personnel concerned, or}

\textit{(b) the standard of any service the member of garda personnel concerned provided or failed to provide.}

The extended definition of conduct is additionally absent from the supplementary provisions. The definition of conduct stands apart from other provisions in the Bill relating to complaints and it is difficult determine its purpose.

\textbf{Definition relating to “incidents of concern”}

The definition states that:

\textsuperscript{21} Ibid [54].
“incident of concern in relation to the conduct of a member of garda personnel” means any matter which is not and has not been the subject of a complaint under head 159 or a referral under head 165 but in the case of which there is an allegation that a person,

(a) who is a serving member of garda personnel, or

(b) who, at the time of the conduct concerned was a member of garda personnel, may have –

(i) committed an offence, or

(ii) behaved in a manner that constitutes notifiable misconduct;

The threshold for an incident of concern is potentially low and will depend on the extent of notifiable misconduct as prescribed by the Minister. The threshold merely being an allegation is a matter of concern. There is no provision to test the veracity of the allegation. This creates the issue that even if it is known to be a vexatious allegation, An Garda Síochána must forward it as it constitutes an ‘incident of concern’ irrespective of whether it is a credible allegation.

The referral of an incident of concern is a serious matter and the threshold for referral should be reflective of this. The examination of incidents of concern cannot be done in isolation from other provisions that are intertwined with the application of the provision.

Incident of concern is anchored to the definition notifiable misconduct. Notifiable misconduct is defined as:

“notifiable misconduct” means misconduct that if proved would justify the bringing of conduct proceedings or dismissal proceedings and which has been prescribed by the Minister as notifiable to the Garda Ombudsman for the purposes of head 165 due to –

(a) the nature or gravity of the misconduct,

(b) the seniority in rank or grade of a member of garda personnel,

(c) the nature of the duties which a member of garda personnel is assigned to undertake, or

(d) the importance of maintaining public confidence in the arrangements for the investigation of allegations of misconduct by a member of garda personnel;

Both of these definitions must be read in light of Head 165. The inclusion of incidents of concern is in itself understandable, however, there remains a lot of ambiguity on the construction of the Head and how it correlates with other Heads in Part 6. There could essentially be a low bar for referrals, which the Minister could so prescribe.

Further, it is not clear how in the absence of a complaint or referral how the incident of concern mentioned in this provision might come into being.

Whereas under Head 158 (5) a complaint must be made within the period of 12 months beginning on the date of the act of omission giving rise to the complaint, that time limit may be extended if the Garda Ombudsman considers that there is good reason for doing so. There is no prescribed criteria for such extension of time nor any provision for a submission or input by or on behalf of Garda personnel who may be the subject of late complaints. In that regard, for fairness, a provision similar to Order 84 rule 21 of the Rules of the Superior Courts dealing with extensions of time for judicial review proceedings might be usefully considered:-

... the [Ombudsman] shall only extend such period if it is satisfied that:
(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application [...] within the period mentioned in sub-rule (1) either:

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by

the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of [this] sub-rule, the [Ombudsman] court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

2.6.2. Head 157: Interpretation – Garda Staff

2.6.3.1 Garda Staff do not have any greater powers than any other civil servants interfacing with the public. This would include civil servants dealing with very vulnerable members of the public who are regularly in contact with departments such as Department of Social Welfare and State agencies such as the Courts Service etc. Accordingly, An Garda Síochána remain of the view that the inclusion of Garda Staff under this Part of the General Scheme should be revisited. The treatment of Garda Staff performing administrative functions differently than their peers in other Departments/Public Bodies may have negative consequences for An Garda Síochána as an employer of choice. This Head is disproportionate in its impact.

2.6.3. Head 157: Interpretation – Notifiable Misconduct

2.6.5.1 Notifiable misconduct, is defined as misconduct that if proved, would justify the bringing of conduct proceedings or dismissal proceedings and which has been prescribed by the Minister as notifiable to the Ombudsman due to:

- the nature or gravity of the misconduct,
- the seniority in rank or grade of a member of Garda personnel,
- the nature of the duties which a member of Garda personnel is assigned to undertake, or
- the importance of maintaining public confidence in the arrangements for the investigation of allegations of misconduct by a member of Garda personnel.

2.6.5.2 An Garda Síochána are of the view that the General Scheme should incorporate the mechanism and criteria that the Minister may utilise to prescribe matters as notifiable misconduct and set out the threshold for such misconduct. Accordingly, An Garda Síochána recommends that further consideration is given to the definition of complaint, incident of concern and raising the threshold for notifiable misconduct.

2.6.4. Head 157: Interpretation – Serious Harm

2.6.6.1 The definition of Serious Harm in the context of referrals (currently known as Section 102 Referrals Garda Síochána Act 2005) is revised in the published General Scheme. While the previous draft included sexual offences which was welcomed by An Garda Síochána, the current draft now includes “abuse of power for sexual gain”. Abuse of power for sexual gain is not of itself a criminal offence.
2.6.6.2 Serious harm is defined in the Non-Fatal Offences Against the Person Act, 1997. Sexual Offences are also specific offences. Abuse of power for sexual gain which is a form of corrupt activity may not be immediately identifiable as envisaged by Head 164. Head 164 implies an immediate response by the Ombudsman to an urgent incident where death or serious harm has resulted from the conduct of a Garda member. Abuse of power for sexual gain may only be identified after investigation and is not a matter which necessarily enables immediate notification or response. This matter is further examined in the submission under Head 164.

2.6.5. Head 158: Supplementary provisions in relation to complaints

2.6.7.1 In regards to Sub-Head 1(a), it remains the view of An Garda Síochána that the expansion of a complaint to include action taken, or failed to be taken by or on behalf of “…the Garda Síochána…” will widen the remit of the Ombudsman and may impinge upon the objectives and functions of the Garda Inspectorate or future inspection functions of the new Authority.

2.6.7.2 This provision specifically designates service level issues as coming within the definition of complaints. Under the Garda Síochána Act 2005 (as amended) complaints could only be made in relation to “misbehaviour” which was defined as conduct that constituting an offence or a breach of discipline. Under an agreed Local Intervention process with GSOC, service level issues were dealt with without the need to deem such matters admissible and were often swiftly resolved. Now such complaints will be deemed admissible notwithstanding the fact that there would previously have been resolved or otherwise potentially deemed inadmissible.

2.6.7.3 In regards to Sub-Head 2, the term "Discredit" is not defined. While "Discreditable Conduct" is a breach of discipline under the current disciplinary regulations, it is not clear if it will be a term which will be used under the proposed standards of professional behaviour. It remains the recommendation of An Garda Síochána that the term "discredit" be defined to include "off duty and purporting to invoke Garda powers" and/or "serious misconduct".

2.6.7.4 Sub-Head 3 states that a complaint under this Part need not identify the member of Garda personnel who is the subject of the complaint in order to fall within Sub-Head 3. An investigation can be commenced notwithstanding a member has not been identified. However, the General Scheme does not provide any requirement to put a member on notice when they have been identified as being the subject of the complaint. An Garda submit this is contrary to the principles of natural justice and fair procedure and require that this inconsistency is addressed in the General Scheme.

2.6.6. Head 159: Making, recording of complaints etc.

2.6.8.1 Subject to Sub-Heads 6 and 7, a complaint made to An Garda Síochána concerning a member of Garda personnel shall be referred to the Garda Ombudsman without delay (Sub-Head 3). This is a referral and not a notification as set out in the 2005 Act. There is no provision in the General Scheme for the circumstance where a complainant does not wish for the Ombudsman to investigate and seek An Garda Síochána to investigate the matter. There is such a provision for incidents of concern under the General Scheme.

2.6.8.2 Sub-Heads 6 and 7 provide that the Minister not later than three years after the commencement of the Head can review this process and may order that certain categories be dealt with under a resolution process (currently local intervention) without referral to the Garda Ombudsman. An Garda Síochána are of the view that this process should form part of the General Scheme from the outset, and should not require a review by the Minister. Local
2.6.8.3 Sub-Head 7 is somewhat contradictory, as it permits the Minister to specify categories of complaint which will not be required to be referred to the Ombudsman. It states that instead they will be dealt in accordance with arrangements established under Head 162. However, Head 162(1) refers to the establishing and maintaining of efficient and effective arrangements for the handling of complaints determined by the Ombudsman under Head 160 as suitable for resolution by An Garda Síochána. The determination under Head 160 can only be made in respect of complaints referred to the Ombudsman. On the one hand it states not to refer certain complaints to the Ombudsman and on the other hand it requires a determination of admissibility (which will require complaints to be referred to the Garda Ombudsman). This will lead to a lacuna that must be addressed.

2.6.7. Head 160: Determination of admissibility of complaint, suitability for resolution by An Garda Síochána etc.

2.6.9.1 In regards to Sub-Head 2, it remains the strong view of An Garda Síochána that in the interest of fairness, the precise reason for inadmissibility should be clearly stated. The removal of frivolous or vexatious as a reason for deeming a complaint inadmissible exposes Garda personnel to unnecessary investigation which may have a harmful effect on their reputation and welfare. An Garda Síochána recommend that frivolous or vexatious as a reason for deeming a complaint inadmissible is reinstated in the General Scheme.

2.6.9.2 An Garda Síochána note in the second draft of the General Scheme (Version 23.09.2020) provided by the Department to An Garda Síochána, that the Department of Justice stated “…provision may be made by way of protocols under Head 182 to address the circumstances in which a member should be informed of an inadmissible complaint e.g. where there is a pattern of vexatious complaints against the member from a member of the public.”

2.6.9.3 In regards to Sub-Head 5, for the purposes of making a determination under Sub-Heads 1 or 3, the Ombudsman may make such enquiries as he or she thinks fit. An Garda Síochána recommend that this Head should be amended with the insertions of “reasonably necessary in all of the circumstances” for “as he or she thinks fit”. This is to reflect the standard to which Chief Justice Clarke criticised the decision making by GSOC during his Section 109 Inquiry. There remains ambiguity in the General Scheme as to how the enquiries process (prior to a determination on admissibility) will be conducted generally as highlighted by the inquiry conducted by Chief Justice Clarke.

2.6.9.4 An Garda Síochána purport that it would be more appropriate to apply this objective standard to the conduct of enquiries by a public body as the purely subjective standard as proposed, as it leaves room for ambiguity in how this process will be conducted generally.

2.6.9.5 An Garda Síochána note that the requirement for “timely enquiries” has been removed from the published General Scheme. This leaves no requirement for the Garda Ombudsman to carry out enquiries in an expeditious manner and may result in protracted enquiries taking place before an admissibility decision is made. This is not in the interests of natural justice and fair procedures in respect of the Garda personnel concerned.

2.6.9.6 It would appear timely was inserted into the second draft of the General Scheme on foot of An Garda Síochána submissions in respect of the first draft. It has now been removed from the published scheme. It is also noted that the Garda Commissioner will only be notified of a
complaint when it has been deemed admissible or inadmissible. It has been the case that some time can lapse between a complaint being received at Ombudsman and an admissibility determination being made. An Garda Síochána remain of the view that there must be a requirement for the Garda Ombudsman to carry out timely enquiries before determining admissibility of a complaint.

2.6.9.7 Under Sub-Head 7, the Garda Commissioner will no longer be required to notify a member concerned of an admissible complaint as this will be done by the Garda Ombudsman. It is not clear in the General Scheme how will members be notified. It is also not clear when the Garda Commissioner and local Garda management will be made aware of an admissible complaint against a member of Garda personnel. In this environment, there are welfare considerations for those subject of a complaint and suitable provision must be made in the General Scheme to clarify the current deficit.

2.6.9.8 In addition, where Garda personnel are identified during the course of an investigation the Garda Commissioner should be informed of this immediately. No consideration has been made for the normal management actions of repositioning or suspension.

2.6.9.9 There is no clarity in the General Scheme on when and how members are put on notice of an investigation when they are identified during the course of an investigation as being the subject of a complaint. Accordingly, it remains the firm view of An Garda Síochána that in all cases where a member is identified as being the subject of a complaint that the Garda Commissioner is notified to ensure that, where necessary appropriate supports are put in place for the member of concerned. Therefore, An Garda Síochána seek the suitable amendments to the General Scheme. No consideration has been given to the need to prevent repetition of conduct complained of, protection of the public or preservation of evidence.

2.6.9.10 In regards to Sub-Head 8(a), where the Ombudsman has good reason to do so, he or she may postpone a notification under Sub-Head (7)(c). As previously stated in reference to other Heads, the terminology of this Sub-Head should align with the standard that Chief Justice Clarke applied regarding the decision making of GSOC. An Garda Síochána have previously recommended that “good reason” should be deleted and replaced by “reasonable in all the circumstances”. – [See Chief Justice Clarke Review paragraph 3.24 by way of example of the standard applied].

2.6.9.11 In regards to Sub-Head 9, An Garda Síochána remain opposed to the proposal to remove the notification of inadmissible complaints as standard practice.

2.6.9.12 In respect of Sub-Head 10, clarification is required in the General Scheme as to what the implications may be for a former member of Garda personnel during the course of, or at the conclusion of an investigation which is not criminal in nature. The current text of the Scheme is silent on this matter.

2.6.9.13 An Garda Síochána remain of the view that there is a requirement to cater for circumstances where a complainant does not wish for the Ombudsman to investigate their complaint and specifically request the Garda authorities to investigate same. Sub-Head 11 provides that where a complaint is deemed inadmissible then nothing in Part 6 shall prevent the Garda Commissioner from taking any action he or she deems appropriate in relation to the inadmissible complaint. This does not go far enough to address the issue as the Commissioner cannot take any action in the matter until the Garda Ombudsman deem the complaint inadmissible. In addition, where there is a delay in determining that a complaint is
inadmissible there may be the potential of loss of evidence which may hamper subsequent actions by An Garda Síochána and its ability to mitigate against any risks arising.

2.6.8. **Head 161: Categories of complaints suitable for resolution by An Garda Síochána**

2.6.10.1 Head 161 no longer incorporates Performance Management complaints. As a result there is more scope for resolving complaints outside the more formal proposed performance arrangements. However, the process remains more cumbersome that the current Local Intervention process agreed between An Garda Síochána and GSOC. An Garda Síochána recommend that further consideration be given in the General Scheme to the resolution of performance related complaints.

2.6.9. **Head 162: Arrangements for handling complaints suitable for resolution by An Garda Síochána**

2.6.11.1 It remains the position of An Garda Síochána that the current Local Intervention model should be retained and provided for in statute. The purpose of Local Intervention is to provide swift resolution to service level complaints, which results in learning at individual and organisational level. Prior to attempting resolution, the complaints would be required to be put through the admissibility process which may slow the resolution process.

2.6.10. **Head 163 If complaint suitable for resolution by An Garda Síochána is referred under Head 160**

2.6.10.1 No matters arising at this time based upon the published text of the General Scheme.

2.6.11. **Head 164: Matter concerning death of, or serious harm to, a person**

2.6.13.1 An Garda Síochána notes that the term “promptly” has been replaced by the term “without delay” in the published General Scheme.

2.6.13.2 An Garda Síochána wish to reiterate that a referral can only made when criteria are satisfied, for example when it has been established that serious harm has been done. This may not be readily apparent at the scene of an incident and may cause a referral to be made some time afterwards.

2.6.13.3 In addition to the above, Head 164 includes the conduct of Garda personnel which must be considered in light of the new definition under Head 157. Furthermore, the scope of Head 164 (currently Section 102 Garda Síochána Act 2005) has been extended since the last draft of the General Scheme (Version 23.09.2020) provided to An Garda Síochána, as the definition of “conduct” has now been included in the interpretation. As stated previously conduct now includes acts, omissions, statements and decisions (whether actual, alleged or inferred). This may have the effect of altering the types of incidents to be referred to the Garda Ombudsman as an act or omission only has to be inferred. This will have implications for the decision making of Superintendents when making referrals in such circumstances.

2.6.13.4 Head 164 has been expanded in light of the addition of abuse of power for sexual gain in the definition of serious harm. Unlike sexual offences where the allegation is that of a clear criminal offence, the abuse of power for sexual gain may not be readily apparent. It may be difficult for a Superintendent, who is delegated the function to refer, to establish that an abuse of power for sexual gain has occurred without some investigative steps being taken. Whereas cases involving injury resulting in substantial risk of death, serious disfigurement,
substantial loss or impairment of mobility of the body or a sexual offence, can be easily discernible resulting in timely referral.

2.6.13.5 It is noted that in its report “Countering the Threat of Internal Corruption” the Garda Síochána Inspectorate recommended (no. 27) that the Department of Justice should implement the necessary statutory framework to ensure that all instances of conduct linked to sexual violence or abuse of power for sexual gain arising from the actions of a member of Garda personnel acting in their professional capacity are referred for independent investigation. A victim of abuse of power for sexual gain could be a member of the public or a member of Garda personnel. If the person is a member of the public any complaint will, in any event, fall for referral under Head 159. If the victim is a member of Garda personnel there may be a reluctance to report such instances in light of the fact that an external agency will be investigating. While it is agreed that the reporting of sexual offences should fall under this Head it is not clear that Head 164 is the best fit for the referral of instances of abuse of power for sexual gain. It is submitted that it may be more appropriate for cases of abuse of power for sexual gain to be designated by the minister as a notifiable “incident of concern”.

2.6.13.6 It is also noted that the Garda Síochána Inspectorate Report only required cases where members were acting in their professional capacity to be referred. Section 102 (which Head 164 is designed to replace) provides for the referral of matters regardless of whether the member was on duty or off duty. By including the referral of cases of the abuse of power for sexual gain under Head 164 may be moving beyond the intentions of the Garda Síochána Inspectorate.

2.6.12. Head 165: Notification to Garda Ombudsman of incident of concern in relation to conduct of member of Garda personnel

2.6.14.1 An Garda Síochána remain of the strong belief in the context of an investigation into a breach of the standards of professional behaviour, not relating to the commission of a criminal offence, Sub-Head 2(c) appears to usurp the authority of an investigator.

2.6.14.2 It was previously noted that some clarity was provided in the explanatory notes with the draft of the General Scheme (Version 23.09.2020) that “the options of a joint investigation or undertaking its own investigation are provided in relation to allegations of a criminal nature only as it is considered that responsibility for the investigation of non-criminal conduct matters absent a complaint from a member of the public is appropriate to the Garda Commissioner as the office holder responsible for the direction and control of members. Such matters will be investigated in accordance with the Conduct Regulations/Code by the Garda Síochána.” However, there is only one investigation process provided in the General Scheme that is the “Formal Investigation” process under Head 168.

2.6.14.3 An Garda Síochána have serious concerns that the provision for joint investigation teams will lead to confusion regarding roles and responsibilities of investigators and will lead to a diminution in the eyes of the public of the independence of the Ombudsman. Furthermore, it will lead to a lack of clarity regarding the lead agency in such investigations.

2.6.14.4 As referred previously all matters coming to the attention of the Garda Anti-Corruption Unit will as incidents of concern be notifiable to the Ombudsman for the purposes of Head 165.

2.6.14.5 On receipt of a notification of an incident of concern, the Ombudsman following consultation with the Garda Commissioner, and in accordance with protocols agreed under Head 181, may decide where the incident of concern relates to the commission of an offence:
(i) establish in conjunction with the Garda Commissioner, a joint investigation team to undertake the investigation of the incident of concern, or
(ii) determine that the matter warrants an investigation under Head 168 and direct the Garda Commissioner to forward, without delay, all material in relation to the incident of concern to the Garda Ombudsman.

2.6.14.6 The Ombudsman may decide to investigate jointly with a Garda Anti-Corruption Unit investigation or the Ombudsman could decide to investigate the matter itself.

2.6.14.7 There is no requirement on the Ombudsman to make a timely decision in relation to the above. In addition, where the Ombudsman directs the Garda Commissioner to forward, without delay, all material in relation to the incident of concern the Garda Anti-Corruption Unit may seek to object to forwarding information of a sensitive nature.

2.6.14.8 It is also noted that Sub-Head 4(a) provides that nothing in this Head shall prevent the Garda Commissioner or a member of Garda personnel from commencing or continuing a criminal investigation or conduct proceedings in relation to an incident of concern pending a notification to the Garda Ombudsman under Sub-Head 1 or the making of a determination by the Garda Ombudsman under Sub-Head 2.

2.6.14.9 Given that there is no requirement on the Ombudsman to make a timely decision in such matters there is the potential that an investigation could be largely completed before the Garda Ombudsman could decide to conduct a joint investigation or undertake the investigation itself. Accordingly, An Garda Síochána seek to have further clarity in the General Scheme to address these anomalies.

2.6.13. Head 166: Investigation of matters in the public interest

2.6.15.1 There remains no definition of what constitutes the “public interest” in the General Scheme. An Garda Síochána’s position is that a definition is required to remove ambiguity in respect of the reference to “public interest” in the various Heads within the General Scheme.

2.6.15.2 Sub-Head 1(b) sets an exceptionally low threshold to commence an investigation under this Head. The absence of a definition of public interest or the use of more prescriptive language gives the Ombudsman a very wide discretion to decide what is or is not in the public interest. An Garda Síochána recommend that the threshold for a public interest inquiry initiated by the Ombudsman should be aligned to the threshold for notification of an incident of concern. A public interest investigation could under this Head be invoked for minor matters where normal processes contained within the General Scheme are sufficient.

2.6.15.3 In order for a matter to be considered a public interest matter it should have an element of public disquiet. It should distinguish between what is a public interest matter and what is interesting to the public. A public interest matter should not concern the individual unless a pattern of behaviour is/has developed. In addition, a matter should not be deemed a public interest matter solely on the basis of media reports which may prove to be inaccurate.

2.6.15.4 A public interest investigation should only be undertaken where the interests of the public in general is the predominate issue at stake and other processes within the General Scheme are not appropriate. Additionally, An Garda Síochána recommend that the reference in the Sub-Head to “may if it appears to him or her desirable” should be deleted and replaced with “reasonable in light of all the circumstances maintaining confidence in An Garda Síochána in
the performance of its functions”. This test was the legal standard applied by Chief Justice Clarke Justice regarding an examination of the decision making of GSOC in his inquiry.

2.6.14. Head 167: Protected disclosures relating to Garda Síochána

2.6.16.1 An Garda Síochána remain of the view that the Garda Commissioner should be notified of a protected disclosure in order to ensure that there is no penalisation or perceived penalisation of the person making the disclosure.

2.6.16.2 In regards to Sub-Head 5, An Garda Síochána acknowledge that the reference to “enquiries and investigations” has been removed and replaced by “enquiries as he or she thinks fit”. An Garda Síochána note that the word “timely” in relation to enquiries in previous drafts has been removed. An Garda Síochána has previously recommended that the scope and duration envisaged for enquiries and investigations under this Sub-Head in advance of a decision as to whether a disclosure will be investigated under Sub-Head 168 (1) should be also addressed. Accordingly, An Garda Síochána seek that the term ‘timely’ is reinstated in the General Scheme.

2.6.16.3 In regards to Sub-Head 7, it remains the view of An Garda Síochána that the Garda Commissioner should be included in the notification process of a decision to investigate. An Garda Síochána also note that the disclosure of information that falls under the scope of Section 18 of the Protected Disclosures Act, 2014 is excluded from a protected disclosure (i.e. relating to the Security of the State).

2.6.15. Head 168: Formal Investigation

2.6.17.1 An Garda Síochána request that the term "Formal Investigation" in the Head title is amended, as it may be misleading, in that it suggests that there may also be an informal investigation process.

2.6.17.2 In the previous draft of the General Scheme (Version 23.09.2020), Head 171 proposed a declaration by the Ombudsman that the formal investigation includes the investigation of the commission of an offence. This has now been removed entirely from the General Scheme and there is now no longer any distinction between a criminal investigation and an investigation of a breach of the standards of professional behaviour.

2.6.17.3 In the explanatory notes to the second draft of the General Scheme (Version 23.09.2020) it was stated that “the Attorney General’s Office has advised that in principle criminal and non-criminal investigations should be able to run concurrently but care would be required to ensure that the criminal investigation/prosecution is not likely to be prejudiced by the conduct of the non-criminal investigation and vice versa.

2.6.17.4 The Supreme Court has held that there is no immutable rule that civil proceedings must remain at a standstill to await the outcome of a criminal investigation (O’Flynn v Mid-Western Health Board [1991] 2 I.R. 223 cited favourably by the High Court in Rodgers v An Post [2014] IEHC 412]). Given there is now one investigative process in the General Scheme, clarity is required in the General Scheme as to how the criminal investigation/prosecution is not likely to be prejudiced by the conduct of the non-criminal investigation and vice versa, particularly as the reference to representation for the member of Garda personnel has been removed.
2.6.17.5  The above has been further exacerbated in the published General Scheme by virtue of the fact that there is only one investigation process with no longer any distinction between a criminal investigation and an investigation into a breach of the standards of professional behaviour.

2.6.17.6 In regards to Sub-Head 2, An Garda Síochána remains of the view that matters previously raised on the suspension of an investigation have not been clarified. If it is envisaged that on the conclusion of an investigation by another body, the Ombudsman may still undertake an investigation notwithstanding the fact that it may be considered double jeopardy and contrary to fair procedures. An Garda Síochána recommend that further clarification of this matter is incorporated in the General Scheme.

2.6.17.7 In regards to Sub-Head 3(a), it remains a concern for An Garda Síochána that where the identity of the member of Garda personnel is unknown, an investigation can be continued in the context of the matter being complained of not being a criminal matter. These parameters are too broad.

2.6.17.8 In regards to Sub-Head 3(b), clarification is required in the General Scheme on the likely outcome/sanction for a former member of Garda personnel who is the subject of the investigation which does not involve a criminal offence. It is noted in the explanatory notes accompanying the previous draft of the General Scheme (Version 23.09.2020), it was stated that that “some consideration could be given, in the context of the review of discipline, to making provision for the recording of a finding against a former member on his or her employment record.”

2.6.17.9 In addition to the aforementioned, An Garda Síochána has previously sought clarification in the General Scheme on the obligation on former Garda personnel to cooperate with an investigation which does not involve a criminal offence and what protections they will be afforded. This has not been addressed in the published General Scheme.

2.6.16. Head 169: Powers equivalent to member of An Garda Síochána when undertaking formal investigation

2.6.18.1 An Garda Síochána note that the process for investigation has been simplified in the published General Scheme. However, An Garda Síochána contend to such an extent that necessary safeguards for members of Garda personnel have been removed. The clear distinction between a criminal investigation and an investigation into a breach of the standards of professional behaviour have been eliminated.

2.6.18.2 There is no longer a provision in the General Scheme for the issuing of a declaration by the Ombudsman that the formal investigation includes the investigation of the commission of an offence, nor a requirement for a designated officer to give Garda personnel an opportunity to be heard, in person or by a legal representative, and to present evidence and make submissions. [Head 170(1) in the previous draft of the General Scheme (Version 23.09.2020)]. An Garda Síochána seek that these current protections for Garda personnel are reinstated in the General Scheme.

2.6.18.3 Under Head 169(1) a designated officer of the Garda Ombudsman has, for the purposes of undertaking a formal investigation, all the powers immunities and privileges of a member of An Garda Síochána. Therefore, a formal investigation will effectively be undertaken to a criminal standard regardless of the issue being investigated. This represents a complete turnaround from the previous draft of the General Scheme (Version 23.09.2020) wherein the
An Garda Síochána would issue a declaration that subject matter of the investigation appears to involve the commission of an offence.

2.6.18.4 An Garda Síochána previously raised concerns that if the Ombudsman does not have to form this view (that a matter is criminal or disciplinary in nature) then how will a member of Garda personnel be in a position to know the case against them (i.e. criminal or discipline), what obligations are placed upon them and what protections are afforded to them. These matters must be addressed in the General Scheme.

2.6.17. Head 170: Search of Garda Premises

(1) Subject to this head, a designated officer undertaking a formal investigation under head 168 may carry out a search of a Garda Síochána premises in accordance with an authorisation issued by the Garda Ombudsman.

(2) Subject to subhead (3), the Garda Ombudsman may issue to a designated officer an authorisation to search a Garda Síochána premises, if the Garda Ombudsman is satisfied that the officer—

(a) with reasonable cause, suspects the member of garda personnel who is the subject of the investigation to be guilty of an offence, and

(b) has reasonable grounds for suspecting that evidence of, or relating to, the commission of the offence is to be found in the premises or in the possession of any person to be found there.

This is a restatement of a provision in the Garda Síochána Act 2005 as amended. It must be noted unlike other Heads in this part of the Bill, the actions of the Garda Ombudsman must meet an established legal threshold. This is an extensive power that is issued internally by the Garda Ombudsman with no external oversight. It does not take due consideration of recent jurisprudence on search warrants in the Damache decision. It is difficult to argue that this power in its existing form is proportionate considering that anybody in a Garda premises at the time of the search can be searched. The Supreme Court in Damache held that:

The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

(i) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(ii) Impair the right as little as possible;

(iii) Be such that their effects on rights are proportionate to the objective...

The Supreme Court in Damache further held that:

No issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency.

The Court points out that it is best practice to keep a record of the basis upon which a search warrant is granted.

This Court would grant a declaration that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976) and referred to as s. 29(1) of the Act of 1939, is repugnant to the Constitution as it permitted a search of the appellant’s home contrary to the Constitution, on foot of a warrant which was not issued by an independent person.

These points should be considered on the inclusion of this proposed Head in its current form and the potential unconstitutionality of same.
This may involve the authorisation of the search of a large premises in a circumstance where there is only a small area that is concerned in the context of the investigation or a small number of people that are concerned in the investigation. While it is understood that it is the search of a Garda premises, equally this is an extensive power that has the very real potential of encroaching disproportionately on individuals due to its extensive reach.

In reality an authorisation under this Head could be carried out when prisoners, witnesses and solicitors may be on the premises. If the view is to retain this authorisation then the broad scope must be narrowed to authorise the search of an area in a Garda premises reasonably believed to concern the investigation of the offence and the search of persons who it is reasonably believed are connected to the offence under investigation.

Alternatively, it is recommended that the search of a Garda Station should be carried out under a relevant search warrant to which the suspect offence applies. The search warrant should be duly authorised by an independent body and the review of Justice Murray detailed as much when investigating the accessing of GSOC to personal communications of journalist. Justice Murray stated that:

_Similarly, the obligation to obtain prior authorisation from a judge or independent body before making a disclosure request should also be applied to GSOC; although the current chairman of GSOC is a High Court judge, the concept of prior authorisation necessitates an assessment by a person or authority independent of the statutory body concerned. Moreover, the application for prior authorisation should include information disclosing reasonable grounds for believing that the offence on which the application is based is a serious offence for the purposes of the criteria of the 2011 Act. Finally, it goes without saying that all of the previously tabulated recommendations pertaining to the security, confidentiality and timely destruction of personal communications data should be applied with equal force to GSOC._

Having regard to the foregoing, absent any circumstances of urgency, there is appears to be no valid basis for vesting in the Ombudsman the power to issue an authorisation to search a Garda station or other Garda premises and search all persons found therein. In circumstances where the relevant criminal investigation is being conducted by or on behalf of the Ombudsman there does not seem to be any reason why a designated officer of the Garda Ombudsman who holds a reasonable suspicion cannot apply to a judge for a search warrant in the ordinary course under the specific statute that is related to his or her suspicion. Alternatively, and preferably there would be an open channel between the Ombudsman and the Garda Commissioner and any search of a Garda station might be done on consent if the considered appropriate

2.6.18. Head 171: Additional powers for purpose of undertaking formal investigation
This Head provides that –

(1) For the purpose of a formal investigation under head 168 the designated officer (in addition to the powers he or she has under head 169) –

(a) may require any person who, in his or her opinion, possesses information or has a document or thing in his or her power or control that is relevant to the investigation, to provide that information, document or thing to the designated officer, and

(b) where appropriate, may require that person to attend before the designated officer for that purpose, and the person shall, subject to subhead (4), comply with the requirement.

(2) A requirement under subhead (1) shall specify—

(a) a period within which the person is to comply with the requirement, and
(b) as appropriate—

(i) the place at which the person shall attend to give the information concerned or to which the person shall deliver the document or thing concerned, or

(ii) the place to which the person shall send the information, document or thing concerned.

(3) A person required to attend before the designated officer under subhead

(1)—

(a) shall answer fully and truthfully any question put to him or her by the designated officer, and

(b) if so requested by the designated officer, shall sign a declaration of the truth of his or her answer to the question.

This is extensive and it must be noted that it is in addition to all other powers when a formal investigation is in place. Once a formal investigation is instigated a Designated Officer has criminal investigatory powers irrespective of whether the alleged conduct is disciplinary in nature. This power has no safeguards and can be invoke at a very low bar based on mere opinion. This power can potentially be used during both criminal and conduct investigations to circumvent legislative provisions which ordinarily come with high thresholds of protections.

This power is currently within section 96 of the Garda Síochána Act 2005 but is restricted to non-criminal offences by virtue of section 95. The safeguards contained within section 95 of the Garda Síochána Act 2005 allowing for Gardaí to be legally represented does not appear to have been included in the Bill. This is indicative of another erosion of the rights of Gardaí. There is also equivalent legislation under the Companies Act 2014 as part of a court ordered investigation.

It is noted that subhead 10 precludes the use of the information in criminal proceedings, however, it does not preclude the use of the information to initiate a criminal investigation or for that matter arrest or obtain a search warrant.

See DPP v O’ Driscoll (Supreme Court, 1st July, 2010) that: “Material grounding a reasonable cause to suspect need not satisfy the same threshold as is required to lay a charge nor is it necessary that it constituted admissible evidence.” Moreover, the equivalent power in the Companies Act 2014 (sections 747- 757) must be based on an order of the Court and there must be reasonable grounds for the investigation as held in Dunnes Stores Ireland Company v Ryan [2002] 2 I.R 60. No such safeguard exists within this Head. The Ombudsman does not have to provide the a reason for invoking such a wide reaching power this is in sharp contrast with the construction of the Garda Powers Bill which places in statute obligations to inform individuals as to the purpose and extent of the statutory powers being utilised.

A significant concern with this Head is in circumstances where it potentially intersects with a criminal and civil investigation and while it is recognised that the Courts have recognised that civil and criminal procedures can run concurrently, the Head does not specifically detail an obligation to inform Gardaí at the investigative stage the nature of the investigation, be it a criminal or civil investigation. Notwithstanding this view, attention must be brought to the case of Re National Irish Bank [1999] 1 ILRM 321 where a similar power under the now repealed section 10 of the Companies Act 1990 the court held that, ’the powers given to the inspectors under s. 10 of the Companies Act 1990 are no greater than the public interest requires. Their meaning is clear and they pass the proportionality test.’

However, we would say a distinction must be drawn as the power under section 10 could only be used in light of an investigation initiated by the Courts and was essentially the investigative process. The process in the Companies Act is a civil process but as this distinction is no longer made in Head 171, as
distinct from section 96 of the Garda Síochána Act 2005, it is difficult to discern the extent of this potentially unfettered power. Furthermore, the absence of reference to legal representation as provided for in the Garda Síochána Act 2005 should be noted.

In our opinion, having been vested with the full panoply of Garda Powers under Head 169, the search power and interrogation powers afforded to the Ombudsman under Heads 170 and 171 of the Bill individually and collectively transgress proportionality and constitutional fairness and/or are otherwise contrary to law. As per Costello J. in Heaney -v- Ireland [1994] 3 I.R. 593 at p. 607.

The power that the Ombudsman will have are in addition to equivalent statutory Garda powers and can be potentially utilised as a process to support a criminal investigation. Moreover, GSOC were found to have operated outside the boundaries of their power by Justice Murray when they used section 98(2) of the Garda Síochána Act 2005 in manner that enabled them to obtain data under section 6 of the Communications (Retention of Data) Act 2011:

GSOC’s interpretation to the contrary notwithstanding, it is not self-evident that the terms of section 98(2)(c) necessarily comprehend the powers reserved to an officer of the Garda Síochána not below the rank of superintendent which is the designation in section 6 of the 2011 Act. Moreover, some of the powers conferred by the 2011 Act – such as “the safeguarding of the security of the state” or “the saving of human life” - have nothing to do with GSOC’s functions as set out in the 2005 Act.

The influence of judgments of the European Court of Human Rights can be seen more extensively in recent judgments in the superior courts in this jurisdiction. In Maestri v. Italy the European Court of Human Rights held that:

"The law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

Furthermore, the Court in Maestri v. Italy held that:

"For domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise."

It is evident that the highlighted provisions of Part 6 do not meet this standard failing to adequately determine its scope and the manner in which the provision can be exercised. There is no foreseeability as to when this provision can be invoked and its scope is wider than section 96 of the Garda Síochána Act 2005 as it is no longer explicitly restricted to non-criminal matters. The foreseeability of law has been determined by the European Court of Human Rights as a prerequisite of a lawful provisions. In the Grand Chamber case of Fernández Martínez v Spain the European Court of human Rights held that:

"Domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention."

In our view the State would be failing in its obligations under the Convention to enact this part of the Bill in its current form. This provision provides for a quasi-power of detention and questioning that can

---

22 Maestri v. Italy (Application no. 39748/98) para [30].
23 Ibid para [30].
24 Fernández Martínez v Spain (Application no. 56030/07) Para [117].
be used based on opinion and applied to any person. This is a far-reaching power devoid of any safeguards as to its scope. The view that this is a de facto power of detention can be seen in Dunne v Clinton [1930] I.R. 366 at 372 which was cited with approval by O'Higgins C.J. in People v Walsh [1980] I.R. 294 at 302. The idea that a person could be detained short of arrest for the purpose of facilitating an investigation was rebutted by Hanna J in the High Court:

The first question that arises is whether this detention is something different from arrest or imprisonment. In law there can be no half-way house between the liberty of the subject, unfettered by restraint, and an arrest. If a person under suspicion voluntarily agrees to go to a police station to be questioned, his liberty is not interfered with, as he can change his mind at any time. If, having been examined, he is asked and voluntarily agrees to remain in the barracks until some investigation is made, he is still a free subject, and can leave at any time. But the practice has grown up of ‘detention’ as distinct from arrest. It is, in effect, keeping a suspect in custody ... without making a definite charge against him ... there can be no such thing as notional liberty, this so-called detention amounts to arrest, and the suspect has in law been arrested and in custody during the period of his detention.

This case involved a voluntary attendance at a Garda Station and the High Court held it was a deprivation of liberty. Similarly, Head 171 is not a voluntary process and as such it cannot be construed as anything other than detention for questioning.

In this respect the threshold for use of such a power must meet the requirements of Article 5 of the European Convention on Human Rights. Moreover, as drafted, there is no time limit on how long a person can be kept for questioning or for that matter there is also no limit on the number of times a person can be requested to attend for questioning.

The European Court of Human Rights has held: ‘The fact that a person is not handcuffed, put in a cell or otherwise physically restrained does not constitute a decisive factor in establishing the existence of a deprivation of liberty (M.A. v. Cyprus, @ para 193).’

In our collective view the additional powers that Head 171 of the Bill purports to vest in designated officers of the Garda Ombudsman are repugnant to the Constitution. Unlike section 95 of the 2005 Act where the member of the Garda Síochána concerned is expressly afforded an opportunity—(a) to be heard, in person or by a legal representative, and (b) to present evidence and make submissions when the Ombudsman Commission decides to investigate a complaint about conduct that does not appear to constitute an offence, Head 171 of the Bill purports to require information in circumstances under pain of criminal sanction in circumstances where it has not yet decided or has not made clear whether the investigation concerns a criminal offence and it doesn’t expressly permit of legal representation.

It might be assumed that the right to legal representation is implicit and whereas it might be contended that the provision that excludes the use of the information in criminal proceedings cures the provision of the defect herein identified, we don’t believe that it does in circumstances where under pain of criminal sanction in the course of a formal investigation Garda personnel may be compelled to provide information to an external investigative body. We believe this offends against the principle that persons are not obliged to incriminate themselves. Because it infringes upon and renders criminal the exercise of a right to silence, accordingly we believe this provision may be constitutionally infirm.

2.6.19. Head 172: Power to discontinue formal investigation
2.6.19.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.20. Head 173: Garda Ombudsman referral to the Director of Public Prosecutions
2.6.20.1. No matters arising at this time based upon the published text of the General Scheme.
2.6.21. Head 174: Other actions by Garda Ombudsman following formal investigation

If the Garda Ombudsman is of the opinion that a report under head 168(4) discloses:

(a) a matter that should be dealt with under An Garda Síochána’s performance arrangements;
(b) a matter that should be dealt with under An Garda Síochána’s misconduct arrangements;
or (c) a concern in relation to the practices, policies or procedures of An Garda Síochána or any other issue of a general or systemic nature in relation to An Garda Síochána,

The threshold of 'opinion' in this instance is extremely low considering the view of Clarke C.J. of the standard applied to the decision making of GSOC and the issues this created. There is a similar provision currently in section 97 of the Garda Síochána Act 2005, but that in itself irrespective of the presumption of constitutionality, does not in and of itself make such a provision legal.

Subhead (3) states that: *In any performance, conduct or dismissal proceedings instituted on foot of a recommendation in a report provided under subhead (2), a document that purports to be that report—
(a) is evidence of the facts stated in the document unless the contrary is proved, and
(b) is deemed to be such document unless the contrary is proved.*

There are real concerns that this subhead goes far beyond what would be considered due process rights and fundamental principles of fairness identified by the Supreme Court. This subhead falls into the domain of documentary evidence and the rule against hearsay. The report referenced in question is merely a report based on the findings of an investigation by a Designated Officer.

It is an opinion based on the evidence gathered and cannot purport to be evidence of the facts stated in it. A number of Statutes in Irish Law contain provisions where a document may be admissible in evidence of the facts stated therein. These contain safeguards absent entirely from the proposed subhead and exclude reports created in civil and criminal proceedings and disciplinary proceedings. These provisions include, section 21 Criminal Justice Act 1984, section 5 Criminal Evidence Act 1992 as amended, section 52 Criminal Justice (Theft and Fraud Offences) Act 2001 and the recently enacted section 14 Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

In the examination of this subhead the Law Reform Commission Report on Consolidation and Reform of Aspects of the Law of Evidence (LRC 117-2016) was considered along with a Conference Paper presented by Ms. Sinéad McGrath B.L. on the 3rd of November 2018 to the National Annual Prosecutors Conference. The inclusion of this subhead in its current form additionally infringes the due process rights recognised by Article 6 European Convention on Human Rights. The Law Reform Commission in their Report stated:

*The human rights dimension: the Constitution imposes boundaries on the options for reform of the rule against hearsay rule. All proceedings, civil or criminal, must adhere to the Constitutional right to fair procedures so reform of the rule against hearsay must not offend against these fundamental requirements. Art. 6(1) of the European Convention on Human Rights also binds contracting states to certain minimum requirements of fair procedures, including the rule against hearsay, in both civil and criminal proceedings.*

It is evident that this provision is not aligned to the views of the Law Reform Commission. The rule against hearsay is detailed in a well-known passage from the judgment of Lord Wilberforce in *Ratten v R*:

*The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness...*
may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on ‘testimomially’, i.e. as establishing some fact narrated by the words.\(^{25}\)

In regard to documentary evidence Edwards J held that:

*Where a document is produced by a party who proposes to rely upon the statements it contains, not as evidence of their truth by way of an exception to the hearsay rule, but to show for some legitimate purpose that the statements (whether or not they be true) were in fact made, then the document is properly characterised as non-hearsay original evidence (otherwise original evidence).*\(^{26}\)

In terms of section 5 of the Criminal Evidence Act 1992 which is an exception to the hearsay rule the Court of Appeal in *People (DPP) v O’Mahoney* held that:

*It is an essential feature of the exception to the hearsay rule created by s. 5 (1) of the Act of 1992 that for the information contained in a document to be admitted in evidence it must have been compiled in the ordinary conduct of a business, and not for the purposes of investigating or prosecuting the accused.*\(^{27}\)

This head goes against this general exception to the hearsay rules as the report is compiled for the purpose of an investigation. In *Director of Corporate Enforcement v Bailey* cited with approval the judgment of *Savings and Investment Bank v Gasco Investments (Netherlands) BV* where it was held that:

*To my mind it is obvious that a report by inspectors, containing as it does a selection of evidence put before the inspectors and their comments and conclusions thereon, is not a record in any ordinary sense of the word. It falls short of simply compiling the information supplied to them in the sense that some information will not be included in the report, and it goes beyond such a compilation in that it expresses opinions thereon.*

It is submitted as a matter of law that a report under this Head cannot be evidence of the facts stated. A similar provision was contained in section 22 of the Companies Act 1990 but was repealed by the Companies Act 2014. It does not appear the provision was restated in the Companies Act 2014 inferring that such a provision pushed the boundaries of the hearsay rule beyond acceptable limitations.

Consideration should be given to section 21 of the United Kingdom’s Police (Conduct) Regulations 2020 on the extent of a report drafted at the conclusion of an investigation. Section 21 of the Police Conduct Regulations detail that the report is a summary of the facts and the opinion of the investigator does not amount to evidence of the facts stated therein unless the contrary is proven.

Consideration should also be given to the Home Office Guidance accompanying the regulations. The report proposed in this subhead is a summary of the investigation including the opinion of the Designated Officer and should aid in forming the basis of the type of conduct proceedings if any to follow. It is essentially the book of evidence that supports the functioning of Subhead 6.

### 2.6.22. Head 175: Investigation of matters relating to Garda Commissioner by Garda Ombudsman

2.6.24.1 This Head has potential for far reaching consequences. The threshold for the Ombudsman to bring about such an investigation with the consent of the Minister and with the approval of the Government should reflect the severity of what is being sought.

2.6.24.2 In that regard, in respect of Sub-Head 1, An Garda Síochána recommend that the threshold should be amended with the deletion of “if it appears to him or her desirable” and replaced with:


\(^{26}\) *The Leopardstown Club Ltd v Templeville Developments Ltd* [2010] IEHC 152 [5.13].

\(^{27}\) [2016] IECA 111 [53].
with a legally recognised threshold of “if it is considering all the circumstances reasonable”. Furthermore, as previously highlighted there is no definition of the “public interest”.

2.6.24.3 Clarification is required in the General Scheme on the provisions that prescribes the procedure to be followed on completion of an investigation into the Garda Commissioner under Head 175. Head 174(1) provides that a copy of the report on the results of the investigation and any proposed recommendations is provided to the Garda Commissioner, to the Minister or the Policing and Community Safety Authority, as appropriate.

2.6.23. Head 176: Duty to keep certain persons informed

2.6.25.1 It remains the position of An Garda Síochána that the General Scheme should provide for meaningful updates to be provided to the Garda Commissioner, particularly in circumstances where a member’s suspension is reviewed every three months. Accordingly, An Garda Síochána request that further consideration be given to include in the General Scheme reference to the quality and frequency of information to be provided.

2.6.25.2 An Garda Síochána is also of the view that matters pertaining to Head 176 (quality and frequency of information provided to the Garda Commissioner, particularly in circumstances where a member’s suspension is reviewed every three months) should be incorporated in the Protocols under Head 181.

2.6.24. Head 177: Provision of information to Garda Ombudsman by Garda Síochána

This Head provides that-

\[(1) \text{ Subject to this Act the Garda Commissioner shall, as soon as practicable, provide the Garda Ombudsman with such information and documents as the Garda Ombudsman may require for the purpose of, or in connection with, the exercise of any of his or her functions.}\]

The restriction to information confined solely relating to the Security of the State shows an incomplete understanding of the information held by An Garda Síochána and a lack of awareness of the potential consequences of disclosing other sensitive information that may not fall into this category.

Further, the security of the State is not fully defined. The UN Security Council Resolution 2482 (2019) adopted by the Security Council at its meeting, on 19 July 2019, highlights the very real intersectionality of organised crime and terrorism. The inclusion of organised crime offences within the State’s schedule of offences attached to the Offences Against the State Act 1939/1998 and the use of the Special Criminal Court to prosecute people attached to organised crime gangs is indicative of this phenomena, whereby organised crime is a significant threat in and of itself to the security of the State.

This Head anticipates the transfer of information from the Garda Commissioner to the Garda Ombudsman in an unfettered manner. The following should be inserted:

“As the Garda ombudsman may reasonably require”.

The terminology in this section is vague, and the construction of section 103A Garda Síochána Act 2005 as amended affords more clarity as to what information is required by the Garda Ombudsman. Section 103A Garda Síochána Act 2005 as amended details that:

*The Garda Commissioner shall ensure that information to be provided by the Garda Síochána to the Ombudsman Commission for the purposes of an investigation by the Commission of a complaint, or an investigation by the Commission of any matter under section 102 or 102B, is so provided as soon as practicable.*
Section 103A leaves no doubt as to the circumstances for which information/data will be transferred to GSOC. The vague and ambiguous terminology leaves the proposed Head in potential conflict with the requirements under Chapter 2 of the Data Protection Act 2018 “Processing of Special Categories of Personal data and processing of personal data relating to criminal conviction and offences”.

It is recommended that the transfer of information/data between the two agencies contain the safeguards within Chapter 2 of the Data Protection Act 2018 to allow for a robust provision capable of withstanding legal challenge and at the very least the proposed subhead should include that the information requested is necessary and proportionate to the aim/function to be achieved. The terms of this Head should be specific in regard to the functions for which the information will be required. For example, the request should be specific as to the reason for/ or what type of investigation grounds the request. The absence of Data protection safeguards in this provision should be addressed with the Data Protection Commissioner considering the sensitive information that may be requested.

2.6.25. Head 178: Duty to preserve evidence
2.6.27.1 There is no requirement under the General Scheme on the Ombudsman to notify the Garda Commissioner of the receipt of a complaint. The vast majority of complaints are received directly by the Ombudsman. Therefore, unless the Commissioner is notified of the receipt of a complaint, there an increased potential for the loss of evidence relating to a complaint. Therefore, it is essential that the Garda Commissioner is notified of the receipt of complaint by the Ombudsman and that this is done in timely manner in order to ensure evidence is preserved at the earliest opportunity.

2.6.26. Head 179: Extension of Time Limits for instituting summary proceedings for offences
2.6.28.1 Post the publication of the General Scheme, the Department of Justice advised An Garda Síochána that they have sought legal advices on Head 179. An Garda Síochána are of the view that the 18 month period should be retained.

2.6.27. Head 180: Same conduct may form basis for complaint or charge
2.6.29.1 No matters arising at this time based upon the published text of the General Scheme.

2.6.28. Head 181: Protocols
2.6.30.1 Sub-Head 1(d) refers to the establishment and management of joint investigation teams established under Head 166(2)(d)(i). An Garda Síochána remain of the view that this proposal will lead to confusion regarding roles and responsibilities of investigators and will lead to a diminution in the eyes of the public of the independence of the Ombudsman. Furthermore, it will lead to a lack of clarity regarding the lead agency in such investigations. Accordingly, An Garda Síochána strongly recommend the removal of reference to joint investigation teams in the General Scheme.

2.6.30.2 Sub-Head 1(h) refers to the sharing with each other of information (including evidence of offences) obtained by either the Garda Ombudsman or the Garda Commissioner. An Garda Síochána request that this protocol should be more specific due to the data protection issues previously highlighted. The information to be shared should be specific to the function of the Ombudsman and apply to notification of incidents involving serious harm, incidents of concern and relevant evidence reasonably necessary for investigation including an admissibility investigation.
2.6.30.3 Sub-Head 1(j) refers to the provision of training in relation to the conduct of investigations to officers of the Garda Ombudsman by the Garda Síochána. In previous discussions amongst the Department, An Garda Síochána and GSOC, An Garda Síochána did not agree to the provision of training to GSOC Officers as envisaged by GSOC and highlighted a number of concerns. Matters highlighted were the current overwhelming training demands for member of An Garda Síochána in the first instance and secondly concerns regarding the independence, impartiality and potential conflict of interest matters arising from such arrangements. Accordingly, An Garda Síochána seek the removal of this provision from the General Scheme.

2.6.29. Head 182: Review of decisions by Garda Ombudsman
In respect of Subhead (2) the period referred to in subhead (1) may be extended where the Garda Ombudsman is satisfied that circumstances exist that warrant extension

This subhead should be amended to include that “where the Garda Ombudsman is satisfied that it is reasonable in all the circumstances that an extension is warranted.” This will align with the standard applied to the decision making of GSCO by Clarke C.J.

In respect of Subhead (6) nothing in this Head shall prevent the Garda Ombudsman from reviewing a decision that he or she has made under this Part, and, subject to this Act, taking any appropriate action to redress or reconsider any decision found to be incorrect.

This subhead applies no time limit on issues that have become statue barred or a significant time has lapsed since the decision was made on a misconduct matter. Members of the Garda workforce cannot be left subject to discipline following unconscionable delay in investigation (unless of course they are the reason for the said inordinate delay. Any decision to review should, in the interest of fair procedures, be communicated to the member of Garda Personnel also.

There is substantial ambiguity on the scope of Part 6 of the Bill which will create serious difficulties in the drafting of protocols under Head 181. There needs to be clarity on the extent of the powers of GSOC in the performance of their function. That clarity must meet recognisable legal standards. It is the strong view of An Garda Síochána that Part 6 as currently drafted falls short in this respect.

2.6.30. Head 183: Judicial inquiry into conduct of Office of the Garda Ombudsman and procedures, policies and practices of that Office
2.6.32.1 It remains the view of An Garda Síochána that in addition to the provisions of this Head, there should be an additional independent arbitration process for matters which are not serious enough to warrant a judicial inquiry, when An Garda Síochána, or the subject of the complaint perceive that an investigation has been mishandled.

2.6.32.2 In respect of Sub-Head 5, An Garda Síochána seeks clarification in the General Scheme that the term “where a member of Garda personnel was involved in the investigation concerned” is confined solely to members of Garda personnel on temporary service with the Ombudsman. If this is the case then it would not extend to members of Garda staff.

2.6.31. Head 184: Offence of providing false or misleading information
2.6.33.1 An Garda Síochána remains of the view that it should not be inhibited from referring such matters to the DPP as currently set out in the text of Head 184(2).
2.6.32. **Head 185: Jurisdiction to investigate offence under this Part**

2.6.32.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.33. **Head 186: Transitional provisions relating to complaints under the Garda Síochána Act 2005**

2.6.33.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.34. **Head 187: Qualified privilege for certain statements and publications**

2.6.34.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.35. **Head 188: Power of Garda Ombudsman to enter into agreements with law enforcement agencies or other relevant persons or bodies outside the State**

2.6.35.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.36. **Head 189: Performance of functions by designated officers of Garda**

2.6.36.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.37. **Ombudsman under Coroners Act 1962**

2.6.37.1. No matters arising at this time based upon the published text of the General Scheme.

2.6.38. **Head 190: Duty of members of Garda personnel to account to designated officer**

This Head provides that –

1. A member of garda personnel shall, when directed to do so by a designated officer account for any act done or omission made by the member concerned while on duty.

2. A failure to comply with a direction under subhead (1) shall be the subject of action in accordance with the Conduct Regulations or conduct code.

3. The member of the garda workforce concerned shall be informed by the designated officer that such failure may lead to dismissal from the Garda Síochána.

4. Any information provided by a member of garda personnel in accordance with a direction under subhead (1) is not admissible in any criminal proceedings against the member concerned and this shall be explained to him or her in ordinary language by the designated officer concerned.
The extent of this provision in the context of the single investigatory stream is also concerning in light of the other Heads specifically highlighted. The evidence presented on the other Heads is applicable to this Head and as such does not require to be restated here. This Head is problematic as the provision of information in this context could conceivably support the decision to instigate an investigation of criminal matters.

It is evident that to invoke this provision the Ombudsman would have to have been in receipt of a complaint and as such it forms part of the investigatory process. This interferes with the right to silence the right to due process and fair procedures. The legality of a similar provision under section 39 of the Garda Síochána Act 2005 was examined in *Wilson v Farrell & others* [2014] IEHC 201 in regard to duty to account to a superior officer. The High Court in the context of an employment relationship held that, ‘in a hierarchical, discipline-based police force and I think that it must follow therefrom that a lawful demand that a member account for himself has to be addressed.’ This applies to a duty or action carried out by a member of An Garda Síochána and merely places in law a duty to report to superiors.

Investigating is a skill in which coercive methods to illicit information do not work and the UN has recently developed guidance in this respect called the Méndez Principles. It does not fit that simply because it is sometimes difficult to illicit information during an investigation that coercive powers should be bestowed on a state body to the detriment of a person’s fundamental rights. This goes beyond what is necessary in a democratic society even if the power is to investigate the police.

There are a number of other provisions considered pertinent for inclusion in respect of which we have concerns, albeit not as concerning as the aforementioned Heads.

**Head 167** pertains to protected disclosures in particular subhead 7, which states:

> Where the Garda Ombudsman decides that a disclosure made to him or her under subhead (1) or referred to him or her under subhead (2) is not a matter that he or she should investigate under head 166(1) he or she shall notify—

- (a) the worker making the disclosure, and
- (b) where the disclosure was made to the Garda Ombudsman under subhead (2), the Minister, of his or her decision and the reason for same

In keeping with the Data Protection Act 2018 the Ombudsman has no authority to retain this material. There should be a provision requiring the Ombudsman to destroy the information in the disclosure and certify this fact. Advice on appropriate data protection safeguards in this provision could be addressed with the Data Protection Commissioner in light of the sensitive information potentially contained in a protected disclosure and the absolute requirements of confidentiality prescribed in s.16 of the Protected Disclosures Act.

In **Head 175**, the investigation of matters relating to the Garda Commissioner, the threshold to request an investigation is extremely low. This is a significant provision with potentially far reaching consequences. The threshold for the Garda Ombudsman to bring about such an investigation with the
consent of the Minister and with the approval of the Government should reflect the significance of what is being sought. The threshold should align with the section 109 report of Clarke C.J. and be amended with a legally recognised threshold “if it is considered in all of the circumstances reasonable.....”.

2.7. **PART 7: INDEPENDENT EXAMINER OF SECURITY LEGISLATION**

2.7.1. **Head 191: Interpretation**

2.7.1.1 A separate definition of security services has been inserted for the purposes of Part 7 of the General Scheme. In that regard, An Garda Síochána recommend that it be defined in legislation as the sole Competent Law Enforcement Authority responsible for the domestic / internal security of the State and that it be designated as the lead Authority in respect of the protection, preservation and investigation of threats to the security of the State supported by other statutory Bodies.

2.7.1.2 In addition, An Garda Síochána propose that it be designated in the General Scheme as the sole Competent Authority for the performance of the role of enhanced security checks in accordance with Domestic and EU legislation regarding the function of conducting National Security Vetting in this jurisdiction.

2.7.2. **Head 192: Establishment day**

2.7.2.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.3. **Head 193: Establishment of office of Independent Examiner**

2.7.3.1 An Garda Síochána recommend the rewording of Head 193(2) as a safe guard measure to ensure that National Policy and / or associated operational decisions [at Strategic level] are not taken by the Independent Examiner without the approval by Government and statutory stakeholders:

“Subject to this Act, the Examiner shall be independent in the performance of his or her operational functions and accountable for the performance of such functions to the Taoiseach.”

2.7.3.2 This amendment would align with the provisions of Head 207.
2.7.4. **Head 194: Objectives**

2.7.4.1 An Garda Síochána recommends the following re-wording of Head 194(a); To promote public confidence in the measures being taken to protect the security of the State, including by assessing whether security legislation is necessary, proportionate and effective while containing the appropriate safeguards for protecting human rights and by preparing reports on his or her work to be submitted to Government periodically.

2.7.4.2 This measure will ensure the legislative framework supporting the protection of the State is reviewed by the Examiner with a view to evaluating its implementation effectiveness. Thereby resulting in reports being prepared for Government for consideration of the Cabinet rather than the risk of having such reports released into the public domain, thus highlighting a weakness in the legislative framework which may identify a shortcoming in State Security.

2.7.5. **Head 195: Functions**

2.7.5.1 An Garda Síochána recommend the following re-wording of Head 195:

(a) To keep under review the effectiveness and implementation of security legislation;

(b) As part of the review provided for in subhead (1) (a), to consider whether security legislation —

(ii) Is adequate for the purposes for which it was put in place;

(iii) Addresses gaps in the legislative framework regarding the security of the State,

2.7.6. **Head 196: Review of other laws**

2.7.6.1 In respect of Head 196(2), An Garda Síochána recommend that any legislative review conducted by the Independent Examiner under the Draft General Scheme should involve a process of formal consultation/input [submission] from the Information Holder responsible for implementing the said piece of legislation, in order to ensure the rationale for the existence and effectiveness of such legal provisions are provided for consideration of the Examiner.

2.7.6.2 An Garda Síochána are of the view that it is imperative there is a mechanism of appeal for statutory bodies such as An Garda Síochána in instances where legislation recommendations may impact adversely on the Security of the State.

2.7.7. **Head 197: Responsibilities of other bodies**

2.7.7.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.8. **Head 198: Access to information and individuals**

2.7.8.1 An Garda Síochána recommend that the following insertions is made to Head 198(6); 
Appropriate facilities and accommodation shall be made available to the Examiner within the premises of Information Holders to permit examination of documents and other related items and for the purpose of interviewing agreed designated person / persons nominated by the information-holder. The current wording of Sub-Head 6 goes beyond the envisaged remit of the Examiner. The current wording allows for the interviewing of any individual whereas the proposed wording refines the process to those relevant and aligns with Head 198(3).
2.7.9. **Head 199: Sensitive Information**

2.7.9.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.10. **Head 200: Confidentiality of sensitive information**

2.7.10.1. Due to the nature of this subject matter, it is critical that the security clearance of staff assigned to the Independent Examiner’s office is of the highest level in addition to the Examiner ensuring a high degree of security in relation to buildings, processes / procedures and systems. Accordingly, An Garda Síochána are of the view that the required level of security clearance of staff and their suitability to be assigned as staff to the Independent Examiner’s office is reflected in the General Scheme.

2.7.11. **Head 201: Protection of information**

2.7.11.1. An Garda Síochána notes this provision requires the Examiner to ensure measures for the protection of information must be agreed with Information Holders. An Garda Síochána is of the view that this Head allows for the possibility of different security regimes applying to information which may be sourced from multiple Information Holders based on the measures agreed with individual Information Holders.

2.7.11.2. The Department advises that an explicit provision has been included in the Draft General Scheme to support the lawful sharing of information between the new Authority, the Office of the Garda Síochána Ombudsman Commission and An Garda Síochána for the performance of their respective functions. The Department advises that they have had some engagement with the Data Protection Commission in relation to the Scheme and it is anticipated that there will be further engagement during the drafting stage to ensure that there are no unintended obstacles to information sharing between relevant bodies where such is necessary and appropriate for the performance of their respective functions subject to the **Data Protection Act 2018** and the **GDPR**.

2.7.11.3. An Garda Síochána are of the view that the Office of Independent Examiner and Department of Justice be included in this provision and that exemptions be applied to sensitive material supplied or appropriately classified by An Garda Síochána to each Body by excluding same from the provisions of the Freedom of Information and Data Protection Legislation.

2.7.12. **Head 202: Amendment of Schedule 5**

2.7.12.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.13. **Head 203: Amendment of Section 8 of Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993**

2.7.13.1. An Garda Síochána recommend the following amendment to Heads 203(3); The Independent Examiner may, if he or she forms a concern regarding the conduct of the information holder [omit: thinks it desirable to do so], may communicate with the Taoiseach or the Minister on any matter concerning interceptions.
2.7.14. Head 204: Amendment of Section 12 of Criminal Justice (Surveillance) Act 2009
2.7.14.1. A key legal issue of concern arising for An Garda Síochána in the General Scheme relates to the proposal that the Examiner will assume the legal responsibilities [currently performed by a Designated Judge] under the auspices of the Criminal Justice (Surveillance) Act, 2009 regarding the oversight functions conducted in relation to Interceptions and Surveillance. While this proposal may appear to develop good practice, it potentially raises a conflict of interest and concern regarding the level of information provided for the fulfilment of the two functions as proposed in the legislation [surveillance oversight v information appeals adjudication]. An Garda Síochána recommends that further consideration be given to the oversight remit of the Independent Examiner.

2.7.15. Head 205: Amendment of Communications (Retention of Data) Act 2011
2.7.15.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.16. Head 206: Adjudication of requests for information
2.7.16.1. An Garda Síochána welcomes the insertion of Sub-Heads 206(4-6) in the published General Scheme, where an application for a review is received from a statutory body by the Examiner under this Head or a notification under Head 173 – Search of a Garda Station, the Independent Examiner shall review the said case and submit a recommendation for a determination by the relevant Minister.

2.7.16.2. An Garda Síochána also acknowledge that having consulted with the relevant independent oversight body and information holder, the Examiner may put in place guidance to be followed by an independent oversight body and information holder for the processing of requests for information, with a view to reducing the number of requests refused and the number of requests appealed.

2.7.16.3. It is An Garda Síochána’s resolute position that it is imperative to safeguard the kernel rule of intelligence-harvesting and intelligence-sharing by the International Intelligence Community [Agencies], the 'third party rule', that no intelligence information should be shared / provided to any third party without the explicit permission of the said Provider.

2.7.16.4. If intelligence provided by a Foreign Service is disclosed [without the explicit permission of same] there is a very significant risk that such a breach of trust / confidence could adversely impact on the future sharing of intelligence thus increasing the risk of An Garda Síochána being excluded from sharing networks / fora. This would have grave implications for An Garda Síochána’s participation / membership in respect of intelligence-sharing fora thus reducing the Garda organisation’s capability / capacity in respect of protecting National Security.

2.7.16.5. To re-iterate the above, should the 'Independent Examiner’ decide at any future point that certain intelligence / information is to be shared with any Public Body outside the remit of the Intelligence Community, following an appeal, this could have serious and damaging consequences for Ireland as a sovereign nation and its international / national security interests. Therefore, An Garda Síochána strongly recommends that serious consideration should be afforded to sensitivities in which information emanating from Foreign Intelligence Services / External Partners be excluded from the 'Adjudication Process'.

2.7.17. Head 207: Annual report
2.7.17.1. No matters arising at this time based upon the published text of the General Scheme.
2.7.18. Head 208: Other reports
2.7.18.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.19. Head 209: Reviews
2.7.19.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.20. Head 210: Inclusion of sensitive information in reports of Examiner
2.7.20.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.21. Head 211: Publication of reports
2.7.21.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.22. Head 212: Response to reports of Examiner
2.7.22.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.23. Head 213: Appointment of Examiner
2.7.23.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.24. Head 214: Terms and conditions of appointment
2.7.24.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.25. Head 215: Disqualification, resignation and removal from office
2.7.25.1. No matters arising at this time based upon the published text of the General Scheme.

2.7.26. Head 216: Provision of services and staff to Examiner
2.7.26.1. Given the nature of the office of the Examiner, An Garda Síochána remain of the view that provision should be made in legislation for a higher level of vetting for those persons appointed to the staff of the office to assist the Examiner in the performance of his or her functions.

2.7.27. Head 217: Power to enter into contracts
2.7.27.1. No matters arising at this time based upon the published text of the General Scheme.
2.8. PART 8: REGULATIONS AND MISCELLANEOUS PROVISIONS

2.8.1. Head 218: General power to make regulations
2.8.1.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.2. Head 219: Regulations relating to management of Garda Síochána
2.8.2.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.3. Head 220: Performance regulations
2.8.3.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.4. Head 221: Conduct regulations
2.8.4.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.5. Head 222: Regulations relating to standards of professional behaviour
2.8.5.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.6. Head 223: Regulations relating to fees for provision of vetting services
2.8.6.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.7. Head 224: Continuation of certain regulations and orders
2.8.7.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.8. Head 225: Dissolution of the Garda Síochána Reward Fund
2.8.8.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.9. Head 226: Certificate evidence
2.8.9.1 No matters arising at this time based upon the published text of the General Scheme.

2.8.10. Regulations and Miscellaneous Provisions – Other Matters
2.8.10.1 An Garda Síochána has previously submitted for inclusion in the General Scheme a number of legislative requirements identified to support the work of the newly established Garda Anti-Corruption Unit to give full effect to a number of proposed policies and procedures, namely:

- **Integrity Testing**: The creation of stimulated corruption opportunities designed to provoke a response from a targeted police member to ascertain whether that member is involved in the commission of criminal or disciplinary offences. It is anticipated the Garda Anti-Corruption Unit will undertake this business activity in course and there is a requirement that same is underpinned by legislative provision. Integrity Testing may be random and / or intelligence led. An International point of reference in terms of legislation underpinning Police Integrity Testing is Section 207A of the Police Act 1990 (New South Wales – Australia).
- **In-Career Vetting:** In Quarter 2 2021, the Garda Anti-Corruption Unit commenced a scoping exercise focused on the establishment of a dedicated In-Career Vetting function within the unit. This exercise is guided by the Garda Síochána Inspectorate Report *Countering the Threat of Internal Corruption*, in particular Recommendation 14.

- The In-Career Vetting Section when established will focus on the vetting of serving Garda members and Garda Staff members. The introduction of a tiered system for In-Career Vetting is being explored. It is anticipated that applicants for vulnerable safety and security critical roles will attract a higher level of In-Career Vetting. The extent of In-Career Vetting at each tier will be equitable for Garda Members and Garda Staff and it is anticipated that members in vulnerable roles will be subjected to re-vetting.

- While the specifics of an In-Career Vetting Section and associated security clearance vetting procedure remain to be finalised, it is requested that consideration is afforded to including a legislative provision in the General Scheme for Garda personnel to furnish periodic financial and integrity statements to the Minister or Commissioner, as the case requires and on such other occasions as are prescribed by Regulations. An international point of reference in terms of placing such an obligation on Garda personnel is Section 97 of the Police Act 1990 (New South Wales – Australia).

- **Enshrining the Code of Ethics in Legislation:** An Garda Síochána previously recommended that consideration was afforded to providing a statutory basis to An Garda Síochána’s Code of Ethics. While Head 66 of the General Scheme provides for the Authority to establish a code of ethics, expressed elements of the Code of Ethics will not underpinned by statute. It is also noted that the solemn declaration as provided under Head 37 now contains the line “… I will conduct myself in accordance with the Code of Ethics established under Head 66…”
2.9. PART 9: CONSEQUENTIAL AMMENDMENTS

2.9.1. Head 227: Proof of membership, rank or grade in Garda Síochána
2.9.1.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.2. Head 228: Exercise of special powers by security officers
2.9.2.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.3. Head 229: Sharing of information for the performance of functions
2.9.3.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.4. Head 230: Amendment of Public Service Superannuation (Miscellaneous Provisions) Act 2004
2.9.4.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.5. Head 231: Amendment of Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013
2.9.5.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.6.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.7. Head 233: Amendment of Welfare of Greyhounds Act 2011
2.9.7.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.8. Head 234: Amendment of Road Traffic Act 2010
2.9.8.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.9. Head 235: Amendment of Industrial Relations Act 1990
2.9.9.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.10. Head 236: Amendment of Criminal Justice (Offences relating to Information Systems) Act 2017
2.9.10.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.11. Head 237: Amendment of Criminal Justice (Victims of Crime) Act 2017
2.9.11.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.12.1 No matters arising at this time based upon the published text of the General Scheme.
2.9.13.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.14.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.15. Head 241: Amendment of Europol Act 2012
2.9.15.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.16. Head 242: Amendment of Criminal Justice (Corruption Offences) Act 2018
2.9.16.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.17. Head 243: Amendment of Criminal Justice (Surveillance) Act 2009
2.9.17.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.18. Head 244: Amendment of Children Act 2001
2.9.18.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.19.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.20. Head 246: Amendment of Criminal Justice (International Cooperation) Act 2019
2.9.20.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.21. Head 247: Amendment of Coroners Act 1962
2.9.21.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.22. Head 248: Amendment of Criminal Justice (Forensic Evidence and DNA Database System) Act 2014
2.9.22.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.23.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.24. Head 250: Amendment to Taxes Consolidation Act 1997
2.9.24.1 No matters arising at this time based upon the published text of the General Scheme.
2.9.25. Head 251: Amendment of Comptroller and Auditor General (Amendment) Act 1993
2.9.25.1 No matters arising at this time based upon the published text of the General Scheme.

2.9.26. Head 252: Amendment of Fisheries (Consolidation) Act 1959
2.9.26.1 No matters arising at this time based upon the published text of the General Scheme.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Policing, Security and Community Safety 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 Policing, Security and Community Safety 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
Associate Professor of law, Dublin City University
Host of Policed in Ireland podcast
Former member of the Policing Authority and of the Commission on the Future of Policing

Email: Vicky.conway@dcu.ie

14 September 2021
Head 3

It should not be for the Minister to determine whether a matter is one of policing or security. This distinction should not be politicised. It is submitted that where a dispute arises the Independent Examiner of Security Legislation for determination. It is noted that in Head 114(6), and a number of subsequent heads, it is the independent examiner of security legislation who makes the determination when a conflict arises on the issue, between the Authority and the Commissioner.

Head 7

The current legislation provides a unique opportunity to embed a need for trauma informed service within policing. Research tells us very clearly that the vast majority of persons that the police interact with have experienced trauma, and score highly in terms of Adverse Childhood Experiences (including factors such as abuse, poverty, parental imprisonment and so on). All those who come to the police as victims have experienced something that has brought them there and research is clear that offenders have very high rates of ACEs. All of this trauma shapes how people behave – perhaps why they engage in criminality, but also how they interact with the police. A trauma informed approach to policing will lead to greater understanding of the needs of those interacting with the gardaí, more effective interventions and greater confidence in policing. It is submitted that a separate principle of policing should be operate from a trauma informed perspective. There is already an element of this present in how gardaí conduct interviews under the Garda Síochána Interview Model, where a key step in conducting the interview is to make it interviewee specific – to assess the needs and experiences of the interviewee, in part to assess potential hostility towards gardaí. This has proven highly effective in improving interactions with interview subjects. I also point members to an episode of my podcast, Policed in Ireland, with James Leonard where a garda’s sensitive and informed response to an overdose set James on a path to recovery (https://tortoiseshack.ie/21-addiction-with-james-leonard/)

Head 8

In line with the Commission on the Future of Policing Report the functions of the gardaí should include community safety.

Head 9

The Commission on the Future of Policing was very clear that the gardaí should no longer prosecute offences. The Commission found that vast resources are spent in attending court and prosecuting. It is a waste of what gardaí are trained to do. It is also something that they are not inherently trained to do and so are not qualified for. Many gardai have gone and undertaken the BL course at the Kings Inns but again this is a waste of valuable garda CPD time. If we are to enhance garda ability to perform its functions effectively, and make the best use of garda resources, then we need to restrict their activities to those which we need them to perform and for which they are professionally trained. It can be tempting to use the gardaí for additional functions, but these undermines recognition of policing as a profession and that members are highly skilled and trained for particular functions (crime prevention, investigation and detection of offences etc).
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Finally, and most importantly, it completely blurs roles and separation of powers to have those who investigate crimes, prosecute them. These functions should be very clearly separated in the interests of fairness, and the right to a fair trial. Prosecutions should be taken by those trained to do so.

Head 10

I, Dr Conway, and Dr Molloy disagreed with the majority of the Commission in respect of the recommendations relating to the establishment of a Board, and the consequences of that for other dimensions of accountability and governance. I submit that the creation of a Board is a retrograde step.

The Board will not enable clear, independent, empowered, transparent oversight and accountability, as is needed.

1. (clarity) this approach will create inherent duplication between the work of the Board, PCSOC and the relevant parliamentary committee(s). Thus there will not be clarity for the Commissioner, members of An Garda Síochána, members of other bodies or for the public, as to how oversight and accountability are achieved in practice. Rather than simplifying the system, an additional layer is being proposed.

2. (independent) The proposals confuse the place for accountability of the Commissioner, with the Commissioner accountable to the Board, the Minister and Government, and then overseen by the Authority. Thus the Commissioner is accountable to politicians and an internal board. As members of the Board of AGS, the duties of the members will be to AGS, rather than to society. It is very much an internal part of AGS. Accountability will not be independent in the way in which it needs to be. It will also be complicated and conflicting for the Commissioner.

3. (transparency) by moving certain engagements from the remit of the Policing Authority to a board setting, the achievements made by the Authority regarding transparency will be diluted. PCSOC will not have powers of enforcement or powers to achieve change: thus it will encounter many of the frustrations and limitations the Policing Authority has experienced. Meanwhile the Board will not conduct its activities publicly.

4. (culture)The installation of “supportive” governance via the Board, as envisaged by the Commission’s report, is highly unlikely to disrupt the deeply embedded culture of resistance to external oversight and accountability. This is an essential point. The Policing Authority has achieved a huge amount over the last 6 years, and through its persistent oversight many issues (including problems requiring a homicide review, and issues with the juvenile diversion programme) have come to light. These have been key to cultural changes: in response to the homicide review, and the perspectives of members of the Authority, over 100 members of AGS have been professionally trained to conduct reviews of investigations. Professionalism in that space will over take a blue wall of silence that has been seen in the past. The Authority has achieved that while having somewhat minimal powers of enforcement. The proposals erode that power even further, given the Minister and the Board far greater authority over the Commissioner. In effect, satisfying the Authority may become third on the pecking order. So the body which has the potential to increase transparency, oversight and in time effect cultural change will lose its capacity to do so.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

The Board represents a backward step in police governance and accountability. It took numerous scandals and events to justify the movement of certain key oversight and governance functions from the Minister to the Authority, having been shown that policing in Ireland needed to be depoliticised. It is now proposed to move these to a board that will be internal to AGS, with a number of powers also being returned to the Minister. This is even less independent than the arrangement which existed prior to the establishment of the Authority. At a minimum it reflects a repoliticisation of policing in Ireland.

[the proposed appointment process is not independent, indeed these are direct political appointments. Further, there is no overt requirement of knowledge of crime, victims or human rights. Also, will enough individuals of sufficient caliber and expertise will be attracted to these roles given there would now be a board and an Authority.]

It can be taken as my submission that all references to the Board should be removed, and, unless otherwise stated, should be read as a reference to the Authority instead. If anything the power of the Authority should be strengthened, through an increased hand in the budgetary process, and ideally, accountability over the Commissioner.

Head 11

It is highly problematic that the functions listed would all be performed by a Board that it is internal to AGS. These all require independent oversight and attention. The Policing Authority has proven the value of this since its creation in 2016. They are all integral to the operation of policing. And while it is important that internal governance structures are strong, that does not mitigate the need for external, independent input to and oversight of these key matters of governance. It is particularly concerning that the processes for assessing the performance of the Commissioner would fall to an internal board, especially where the independent element that had been inserted into the appointment and removal of the Commissioner is being removed.

That the Commissioner is envisaged as attending the meetings of the Board – in a role similar to a CEO reporting to the Board, also undermines the independence of the performance of these functions.

Head 12

Many of the earlier points are reinforced by the fact that none of the meetings are in public. In a democratic society, police governance and accountability should be transparent. Agendas, minutes and reports should also be published.

Head 18

That these functions will not be performed in an independent way is further evidenced by the fact that the Commissioner will provide services to the Board. The secretary will be a senior garda member. This Board is, as the terminology of an internal board suggests, very much part of the garda organization. The risk of regulatory capture is high. These functions are too important to be performed internally.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 19

It is highly disappointing that a backward step is being taken in relation to the appointment of the Garda Commissioner. While in the last number of years the Policing Authority has had a strong role in this process, running the competition and nominating the Commissioner to government, it is now envisaged to bring this back to a government appointment, with the Authority and the Board simply consulted. It is not clear why this is viewed as necessary as no clear difficulty emerged in the most recent appointment of the Commissioner. It is submitted that this decision is part of an overall process of disempowering the Authority, which has no evidentiary justification and would be a backward step. GRECO, the Council of Europe body for the prevention of corruption recommends independent appointment of the Chief of Law Enforcement Agencies. Political appointment of the chief can be a corruption risk. In the UK Chief Constables are appointed by the Police and Crime Commissioners, the equivalent of the Authority. And while the argument can certainly be made that there is a difference because the Commissioner is also head of the security service this did not prove problematic in the appointment of Commissioner Harris, the competition for which was run, and the nomination made by, the Policing Authority.

When this head is viewed in line with other heads, which include statements of accountability and who dismisses the Commissioner, the collective result is that the Commissioner is very much controlled by the Minister. This is of concern as it may create, even subconsciously, an inclination to please the Minister, and to perform functions in line with goals that are, to some extent, politicized.

Head 20

Again, for the same reasons it is problematic that the Deputy would be appointed by government. The Policing Authority has shown itself adept at making senior appointments and this should continue. It can be argued that senior staff should be appointed by the Commissioner but it is submitted that concerns about the fairness of internal promotion processes have abounded, and they have been quite slow processes. For the time being these appointments should continue to be made by the Authority.

It should also be made clear that the Deputy does not need to be an internal candidate.

Head 23

It is, for reasons outlined above, problematic that the Minister is the only person who can dismiss the Commissioner. We have seen this used historically for political reasons (DeValera was very clear on dismissing Eoin O’Duffy that he wanted a Commissioner he trusted). If the position is held at the control of government then the potential is created for the role to be politicized. This function should be assumed by the Authority, as the oversight body and the body with the greatest perspective on how the Commissioner is performing her functions, with the consent of the Minister.

Consideration should be given to include a grounds for suspension and dismissal that includes conduct which brings AGS into disrepute, given that the Commissioner is the leader of that organization and his actions have an enhanced symbolic significance.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 24

For the same reasons mentioned above, such inquiries into the performance of the Commissioner’s functions should not be entirely under the control of the government.

There should be clarity in terms of the qualifications of the person undertaking such an inquiry, perhaps a judge or a senior counsel, or provision could be made for a senior police officer from another jurisdiction to perform this inquiry.

Head 25

It is highly problematic, and contradictory with other provisions (including Head 23, Head 11, Head 28), that the Commissioner is accountable to the Board for the performance of her functions. This creates a deeply confusing situation for the Commissioner whereby he is stated, reading across the Bill, to be accountable to the Board, the Minister and Government, and overseen by the Authority, while possibly subject to an independent inquiry. One of the aims of this legislation (and a concern that drove the creation of the Commission on the Future of Policing) was to simplify accountability structures. This does not do this. It is also problematic because the Board is internal, and the members are political appointees, and this is not a satisfactory system when it comes to the accountability of the Commissioner.

Head 27

This is a confusing statement. It suggests, in contradiction with Head 25, that the Commissioner is not accountable to the Board for anything. The phrasing in relation to the matters for which the Commissioner is not accountable to government is peculiar. Surely the point is to give the Commissioner operational control, while also ensuring that she is accountable for the performance of her functions? We do not want government to have any say in or control over what the police do, but we do want the Commissioner to be accountable for the actions of AGS. For instance, we may well want to ask the Commissioner to account for why she did not dismiss an individual that had been convicted of a serious crime, or about how a particular protest was policed in comparison with another, or why a certain individual was not charged with an offence (particularly if there is any suggestions of favoritism, discrimination or corruption). But we do not want the Minister to have the ability to direct her to dismiss a police a protest in a particular way.

A more positive statement that the Commission has operational control and independence is to be preferred, with the Commissioner then fully accountable for the performance of her functions, and for AGS.

Head 28

Political accountability is problematic for the reasons outlined above. Further, as has been criticized by others including Prof Dermot Walsh, the ability of the Sec Gen to request any document, as created by the 2005 Act, gives government too much control.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 29

The need to not politicize policing must be balanced against the democratic needs of the state. At a minimum this should also apply to the Authority.

Head 30

The ability of the Minister to issue written directives is far too broad, creates potential for political interference, and for conflict with the Commissioner’s operational control and independence. It is difficult to understand the need for this.

Head 33

The Commissioner should also consult with the Authority on this point, particularly as the Authority will have much more engagement with the public than the Board, who will have none.

Head 40

Consideration should be given to permitting a member of another police service, from another jurisdiction, to perform such a function. This can increase professionalism.

Head 47

The Policing Authority should be given a function to review the engagement and use of consultants to ensure that public funds are being effectively used, and that AGS is building the internal professional capacity and expertise it requires, rather than just continually and expensively engaging consultants.

Head 48

Representative bodies have had extensive power, to the point of being able to stymie reform and development. Consideration should be given to placing more detail in the parent act, rather than just in regulations, in terms of their power, function and operation. There should also be greater clarity in terms of their oversight and accountability, given that issues have arisen in the past, as regards their finances in particular. The government financial support for the unions should be withdrawn. Clear duties to operate to the benefit of their members should be created.

Chapter 6 is entitled accountability and funding but a great many heads prior to this have addressed the issue of accountability. This is confusing.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 51

In line with my earlier statement, this function should be retained by the Authority who have performed well in terms of overseeing the strategy statements.

The inclusion of outcomes by which achievement is measured should be mandatory, not optional. This is essential for both driving policing but also for effective oversight. There are different forms which such KPIs can take and this can be discussed as appropriate.

The assessment of human rights issues should be mandatory, not at the belief of AGS. This is not a subjective matter. Indeed, they should be required to consult with IHREC on this.

There should be a public consultation on the strategic plan.

Head 52

The Authority should provide the oversight and progress reports on the implementation of the strategic plan. The current proposals effectively include duplication of this function.

Head 53

This brings the form and manner of the service plan back within the control of the Minister, while this has been done by the Authority since its creation. This is a further example of the repoliticisation of policing which is occurring via this legislation. This is a regressive development in policing which takes us back to a space of less independent standard and target setting in policing.

There should be clear deadlines, specified by date, for the completion of the service plan, always occurring before 01 January.

Is it very positive to see the financial elements being included in the service plan.

By stating (5(i)) that the plan must be consistent with Directives issued under head 30, scope is created for the Minister to direct and control policing which is in direct contravention with the concept of the Commissioner’s operational independence, a cornerstone of democratic policing.

Directions as regards amendments to the plan should come from the Authority, not the Minister. Again, looking collectively at the powers being reverted to the Minister, we can see extensive repoliticisation of policing.

Head 54

This is a very broad power of amendment being given to the Minister. Consideration should also be given to placing some parameters on the basis for amending the plan, given its centrality to delivering policing services. This should only be on the basis of some exceptional event (the pandemic is good example of this, however the visit of a head of state, or a sporting/musical event is not, in that contingency should always be made for such events).
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 55
The Authority should oversee the delivery of the service plan.

Head 56
The inclusion of a required capital plan is to be endorsed though again this should be approved by the Authority. This is a key way to ensure that the oversight function of the Authority is achievable in realistic ways. It is all well and good for the Authority to engage in conversations about how reform is progressing, but if this is not done in the context of a clear budget, it is not entirely realistic. It should be noted that in the North the Policing Board determines the budget for the PSNI.

Head 57
For a capital plan to be successful, consideration should be given as to whether 57(2) is overly permissive. Surely rather than just informing the Authority and the Minister there should have to be an application for exceeding the approved expenditure, with stated justification? It is appreciated that this is a huge shift from the current process of financing policing in the state, but if the capital plan is to be meaningful, and if the functions around achieving economy in policing are to be realized then the structures in place need to be tighter than simply submitting a capital plan which can be easily be worked around.

Head 59
It should perhaps be clarified that the Commissioner appears before committees (other than PAC) as a witness, and those committees (other than PAC) do not have the power to hold the Commissioner to account.

It is submitted (noting the submitted objection to the Board) that the Chairperson of the Board should not be able to a substitute for the Commissioner (but perhaps accompany).

Head 60
The Audit Committee should be appointed by the Policing Authority to ensure its independence and legitimacy.

Head 63
As an internal matter, the governance framework should be the responsibility of the Commissioner, to be approved by the Authority.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 64

The Policing Authority has done considerable work over the last number of years on the form, shape and content of the annual report. It should continue to reside with the Authority as it will be overseeing its implementation.

The inclusion of matters in relation to s.42 of the public sector duty should not be at the discretion of the board or AGS.

It should include key statistics on police powers and on key demographic information about their use: e.g. stop and search, arrest, detention, use of force, interrogation, along with details of age, gender, ethnicity, and location of use. These details are key to oversight of policing.

Head 65

In addition to what has been stated, the Commissioner should be required to compile and publish key statistics on police powers and on key demographic information about their use: e.g. stop and search, arrest, detention, use of force, interrogation, along with details of age, gender, ethnicity, and location of use. She should also be required to publish data on deaths in or following garda custody and contact (within 48 hours).

Head 69

It is submitted that such a function should properly be performed by the Garda Ombudsman Commission. It is the body created to investigate issues, and with its wider remit it should be capable of such investigations. Alternative mechanisms of inquiry are confusing for all concerned and blur the lines of accountability.

Head 70.

It is submitted that AGS, in addition to the State should be actionable, and that payments from such actions should come from the garda budget. The learnings and accountability from such actions is significantly limited where it has no repercussions for AGS. Millions are paid out every year in civil actions, with no consequences for AGS.

The term actionable wrong should also include a breach of human rights, not just constitutional.

Head 71

The contribution to legal costs by the Commissioner should also come from the garda budget.

Head 75/76

Serious consideration should be given to secondments from other police services. While this was established as part of the peace process, it has wide benefits and we could learn a great deal from other services.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Equally transfers from other services should be possible to equivalent ranks, subject to completion of appropriate training. Again there is great benefit in this.

Head 83

Under subsection 5, the term media is not defined. Does it then apply that if someone is wearing some uniform or dress in a video or picture, for instance, placed on social media that this would be covered? Should it, alternatively be ‘and’ subsection 5(b), rather than or?

Part 3 – Community Safety

Head 85

The lack of a definition of community safety is problematic. It is such a fundamental concept to so much of this bill that it needs definition or relevant bodies won’t be able to work to the concept of the Bill. Read in tandem with other sections it is hard to get an appreciation for what falls within the scope of this part of the Bill. Will different agencies, offices and groups have discretion in deciding what comes under the ambit of community safety? What is there is dispute about what is within their remit? What is members of the public feel their safety needs are not being met?

Is the Minister best placed to devise the Community Safety strategy or should it come from the National Office/Steering Group?

Head 87

Inter-agency cooperation is likely to be the greatest impediment to the achievement of these goals (once community safety is well defined). The current provisions do not provide sufficient clarity and requirements on how this is to be achieved.

Head 88

The Director should be appointed by the Public Appointment Service and not government. All such appointments should be independent.

Head 89

There is a conflict between head 88 and 89 in that it appears that the Director is accountable both to the Minister (88) and to Oireachtas Committees (89). It is submitted that the language of giving an account to the committee should be removed, in favour of appearing before the committee as a witness.

Head 92

In my study of Joint Policing Committees (Conway, 2019), one of the critiques which emerged was that the format of meetings often was overly formal and replicated council proceedings. This could
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

be exclusion to those who are not from that background i.e. lay or community members. Every effort should be made to ensure that the local community safety partnerships (LCSPs) are as inclusive as possible.

Head 93

The stated functions of the LCSPs are impressive but what powers will they have to achieve implementation? Will they be able to demand action from different agencies? Without this the plans may not be deliverable.

Head 95

In line with the comment re head 93, should this also require cooperation with the LCSPs, as well as AGS?

95(2) appears to provide a partial definition of community safety which is not used elsewhere. This could cause issues. Further, this definition is very individually focused, and not inclusive of communities.

Part 4 – Policing and Community Safety Authority

Head 99

Should consideration be given to broader diversity, beyond gender, in the membership of the Authority?

Head 101/102

Given that a member may hold office on the Authority for up to 8 years, why are members of the previous policing authority precluded from appointment if they have had more than 4 years’ service? An aggregate of 8 (following an application for appointment to the new body) across the two may enable a smoother transition from one body to the next. I do not believe there is any suggestion that the current Authority has performed so poorly in its service that its members should be precluded from membership, and indeed the current proposals do not preclude all members.

Head 104

As is clear from early in this submission, functions which have been moved from the Authority to the Board or the Minister (strategic plans, policing plans, senior appointments and so on) should be retained by the new Authority.

Oversight of delivery of objectives is hard to achieve, without clear KPIs, as previously mentioned.

Should the Authority be required to have regard to the community safety strategy in carrying out its functions (104(3))?
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

I have long argued, since before the creation of the Authority, that the Commissioner should be accountable to the Authority for policing functions of AGS. This connected to, at minimum, an ability to recommend dismissal of the Commissioner, and some role in the budget, would give the Authority the necessary teeth to achieve independent oversight of policing. At present it is reliant on ‘soft transparency’ powers of being able to have discussions in public and publish documents and reports. While powerful, this could and should be strengthened. Instead, by moving key powers to the Board and the Minister this current bill weakens the position of the Authority, thereby weakening independent oversight and accountability of policing in Ireland.

Head 118

This deals with implementation of inspections requested by the Minister, but not those undertaken at the Authority’s own request. The Authority should be required to monitor and assess measures taken by AGS in relation to all inspections done. Indeed, this is one of the benefits of the merger of the Authority with the Inspectorate, that it will be well placed to do so.

Head 122

This is inappropriately named Accountability of Authority to Oireachtas Committees. The Authority is accountable to the Minister, and to PAC for spending, and it should not be confused in this way. It would be better to describe their role as witnesses.

Part 5 Garda Síochána Ombudsman

Head 139

The Commission on the Future of Policing was very clear that the name of GSOC should be changed so as not to include ‘Garda Síochána’. The Commission spoke to many witnesses who indicated that they believed GSOC, because of its name, was not independent of AGS. Indeed, this is substantiated by GSOC’s own public attitude survey which shows that in 2019 34% of respondents believed it was part of AGS, a figure which has been consistently increasing since 2013 (27%). The Commission made clear recommendations in relation to this. The perception of impartiality is absolutely essential and given that a simple name change could enhance this, it should be done.

Head 143

The functions are stated to be in relation to complaints or concerns surrounding ‘conduct of a member’. The Commission on the Future of Policing was clear that the work of the Ombudsman’s body should be broadened to reviewed conduct, policies and procedure. So it should be possible for a complaint to concern ‘policing’ broadly.

It should also be required to conduct research into public satisfaction with the work of the office, as happens with the PNSI.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 150

For the purposes of independence, police officers from either AGS or other police services should not be engaged by the Ombudsman. Doing so undermines the independence of the office. Particularly in the light of police occupational subculture, even police from other jurisdictions cannot be considered fully independent as they bring the cultural values, norms and beliefs which pervade policing internationally. No investigations for the Ombudsman’s office should be conducted by police officers from any police service. This was clearly recommended by the Commission on the Future of Policing (p. 49).

Head 153

As has been stated on previous occasions, referring to the office’s ‘accountability’ to Oireachtas committees is inappropriate. The office is accountable to the Minister.

Head 157

The concept of admissible complaints should be done away with. Complaints should not have to pass an admissibility test. We would not accept this in other areas of public service – if someone has a complaint it should be investigated. If it is deemed to be vexatious, which only a tiny proportion of complaints to GSOC ever are, then that can be the outcome of the investigation. But to tell a someone who has taken the time and effort to make a complaint that the state does not consider their issue worthy of complaint is poor public service. It should be noted that OPONI in NI does not have an admissibility stage and it has not proved problematic. All complaints should be investigated.

It is good to see under the definition of ‘incident of concern’ that the member does not have to be a member at the time of investigation. This should be the case for all investigations. Retirement or resignation should not be a barrier to investigation. It may mean that no discipline can follow investigation, but there is much more that comes from investigations: there are learnings for the organisation, as well as substantiation or otherwise for the complainant.

Head 158

While it is encouraging to see that actions and omissions, and the standard of service provided are covered by complaints, it should not be so focused on an individual member. It may be that an individual has been failed by the service as a whole, but this phrasing would direct the investigation at a particular named member. For instance, if there has been a failure to investigate effectively a murder or a rape it is likely that numerous members are involved. The investigation should be open to review how an incident was handled, as per the recommendations of the Commission on the Future of Policing which was accepted by government which spoke of investigating ‘incidents’.

Head 160

As discussed previously, the requirement of admissibility should be scrapped. We would not accept this in any other public service.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

As mentioned it is good and proper that retirement, resignation or no longer being a member should not disqualify a complaint.

Head 161

In terms of determining what complaints may be resolved by AGS the legislation takes a very different approach to what was proposed by the Commission on the Future of Policing. The Commission had clearly recommended that only ‘performance management’ matters should be resolved by AGS, however the Bill only secures criminal offences, breach of standards justifying court proceedings, and death or serious harm from garda investigation. This is a very different and much higher standard being applied. Independent investigations are essential for confidence and legitimacy. It is also entirely unacceptable to suggest that what gets investigated by AGS can be determined between the Ombudsman and the Commissioner. This needs to be enshrined in law for public confidence. These are standards which should be legally determined and set, not in private spaces.

Further, investigation of complaints by members of AGS is not only inappropriate, but it also a waste of valuable garda resources. Far too many members (particularly at the senior level) reported spending significant portions of their time conducting investigations for GSOC. This is not how their professionalism and expertise should be used. The Commission was clear that non-core duties should be redirected from AGS and again this recommendation is being supplanted.

Head 162

How AGS investigates complaints should not be for the Commissioner to determine, but should be set down in Regulations supplementary to the Act. Again the public are entitled to transparency and confidence that their complaint will be handled properly, with the possibility of recourse to law for enforcement. Members of AGS are also entitled to certainty in the process. The Commission on the Future of Policing had been clear that because these would be just performance management issues, they should be handled under performance management processes. This recommendation strikes a strong balance between ensuring independent investigation and enabling the Commissioner to manage her staff. It is unclear why the deviation from the report of the Commission has occurred.

Head 164

This is to narrowly written. The Commissioner should be required to refer any incident in which serious harm or death has occurred in or following police contact and or custody. It should not be dependent on the Commissioner forming the opinion that the contact was the cause of the harm or death. That is for the ombudsman to determine. Further, for the benefit of confidence in the system and learning about engagements with people, there should be clarity that all deaths which occur within 72 hours are investigated. This is just not for the purpose of assessing whether AGS caused the death in any way, but also to ensure that its duty of care towards those it interacts with are fulfilled. To this end I refer Committee Members to the episode of Policed in Ireland where we heard from Johanna O’Hara whose son died within 5 hours of being released from garda custody and for
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

which there has been no independent investigation (https://tortoiseshack.ie/10-policed-in-ireland-a-voice-for-niall/)

Head 165

Too great scope and potential is provided for incidents of concern to be investigated by AGS, rather than the Ombudsman’s office. It should be remembered that the purpose of this provision is to ensure that all incidents of concern of investigated – not just those that happen to be witnesses by members of the public. If a supervisor or colleague witnesses wrongdoing this should just as much be subject to independent investigation as those seen by members of the public. As per the Commission on the Future of Policing the determinant of what should be investigated by AGS is whether or not it is a performance management issue or not. This recommendation strikes a strong balance between ensuring independent investigation and enabling the Commissioner to manage her staff. This chimes with rulings to the ECtHR whereby cases which may involved a breach of human rights by police should be independently investigated.

Head 166

Throughout this section the requirement that the breach of standards of professional behaviour would justify court proceedings is unjustified. Indeed, it is unclear how a breach of professional behaviour could result in court proceedings. Surely a breach of professional standards in itself merits investigation? Further, it is suggested that an additional criterion of bringing AGS into disrepute, or undermining confidence in AGS should be added. This essential to maintain confidence in, and the legitimacy of, AGS.

Head 167

In addition to the forms of protected disclosures listed, when a disclosure is made under section 6 of the 2014 Act to the employer or designated person, the Ombudsman’s Office should be advised of the disclosure and progress in relation to its investigation. The Ombudsman’s Office should have the capacity to intervene if it believes that the matter merits an independent investigation. Alerting the Office in this way, creates a balance whereby the person making the disclosure retains the option of disclosing internally but we can still be confident that the matter will be appropriately dealt with and that AGS are either satisfying an independent body that it has been addressed, or it is being independently investigated. For instance, if someone disclosed that a colleague had not interviewed a key witness had not been interviewed in a sexual offences case, AGS would alert the Ombudsman that in an unnamed case such a disclosure had been made. The Ombudsman would require updates on the case or could undertake an investigation under either head 166 or 168. In such a case there are concerns which go beyond those of the individual making the protected disclosure (the victim and any future victims) and which demand effective investigation of the concern. It is not just, in such a case, just about satisfying the person making the disclosure.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 168

Is the descriptor ‘formal’ necessary? Simply calling it an investigation, given that there is no power of informal investigation, might be more accurate and minimise the stress experienced by members of AGS.

Head 172

It is submitted that rather than discontinuing an investigation, what are listed to be ‘opinions’ in 1(a) should instead be potential proven outcomes of an investigation.

Head 174

The Ombudsman should also have the capacity to undertake informal resolution where it is clear that this might be effective. This has been trialled very effectively by GSOC and is a development that should not be lost. Often complainants want to be believed, and want an apology and so informal resolution can be very effective. We should be forcing all cases into an adversarial process where this can be avoided. Restorative justice can be used very effectively.

Consideration should also be given to permitting the Ombudsman’s office to make recommendations as to sanctions where appropriate. It is unclear whether this is covered in the current wording of ‘with such recommendations as she sees fit’.

The Ombudsman should also be required to published redacted versions of investigation reports to enhance public confidence in the investigation of complaints.

Head 175

The grounds for investigation here are limited. It is implicit that misconduct which does not meet the level of serious, by the Commissioner, will thus not be independently investigated. It is difficult to see the justification for this given the symbolic importance of the Commissioner’s behaviour. Further, in addition to excluding ‘serious’, it is submitted that an additional criterion of ‘behaviour which undermines public confidence in AGS’ should be included.

Head 182

Reviews of decisions are welcome, but should be extended to outcomes of investigations. This could be on the basis that not all appropriate factors or issues were taken into account, or proper procedure was not followed, in the making of the decision. It would be preferable that some kind of internal review would be possible rather than leaving complainants no alternative than to judicially review the office. Head 183 is welcome in this regard but it is not automatic and is at the behest of the Minister. An internal review possibility may stave off the need for head 183 inquiries.
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

Head 189

Officers of the Ombudsman’s office (and indeed gardaí) should not be performing functions for the coroner’s office. This was included in the Commission on the Future of Policing Report. It takes up time better spent on core policing/Ombudsman functions, and creates problems for the separation of powers. Similar conclusions were reached in a report published earlier this year by the ICCL - https://www.iccl.ie/iccl-death-investigations-coroners-inquests-the-rights-of-the-bereaved/

Part 7 – Independent Examiner of Security Legislation

Head 194

The objectives listed here centre on whether legislation is adequate to combat threats. This is different to what was recommended by the Commission on the Future of Policing which stated that the aim would be to “maintain a continuous review of how security legislation is being implemented by police and other agencies, and evaluate the case for changes needed to match the evolving threats while respecting fundamental rights”. The Examiner should primarily be about ensuring that these powers are being used appropriately. There has been a complete absence of oversight in the area of state security and this has been deeply problematic. Policing in this space has caused many issues in the past: from the Heavy Gang, to the Morris Tribunal and the Cory Inquiry. It is also the space in which the greatest powers are given to the gardaí, from lengthier detention periods, to minimised evidentiary requirements, to surveillance and seizure. It is also a space generally tried by the Special Criminal Court and the denial of the right to a trial by jury demands additional safeguards be put in place throughout the system. There is a proven need for oversight of how these powers are used, not just whether the law is adequate. It is very disappointing that the recommendations of the Commission would be dismissed in this way. To understand the potential of this role, if properly created, it is worth reviewing the reports of the Independent Reviewer of Terrorism in the UK (https://terrorismlegislationreviewer.independent.gov.uk/category/reports/) Even a quick glance generates a sense of confidence that the use of these powers are being properly overseen. And it is also clear that this is done in a way which does not compromise the security of the state at all.

Head 195

This head needs to more clearly state that a function is to ‘oversee the use of security legislation.’ It could potentially be inferred from the wording as it stands but it needs to be much more explicit. This is an important opportunity to introduce independent oversight that gives confidence in the use of security powers.

Heads 198 – 201

It is essential the Independent Examiner have the powers and responsibilities outlined herein. Without access to this information, even information of a highly sensitive nature, the Examiner will be unable to perform their functions.

If the Committee wishes to understand this better, it would be hugely beneficial for the Committee to hear from one of the Reviewers from the UK. The Commission met, for instance, with Lord David Anderson, who has continually taken an interest in developments in Ireland and it was highly
illuminating to hear how he did his work, what powers and resources he required to do so. This would give the Committee a key understanding of how such a role can work to achieve far greater confidence in policing in this space.

Head 207

It is submitted, as per the Reviewer in the UK, the annual report should contain more than just ‘general statements’. It should provide a detailed analysis on the use of powers, such as to establish public confidence both that the powers are being used appropriately, and that they are being overseen appropriately. It should of course be appropriately redacted for the purposes of data protection and state security but this is easily done, as the Reviewer role in the UK clearly establishes.

Head 208

The ability to submit other reports is very important.

Head 209

Again, the use of the word ‘general’ seems problematic in this space. She should be required to submit a detailed review of the performance of her functions.

Head 211

It maybe implicit, but a clear requirement to publish these reports publically, on the internet, should be included.

Head 213

The appointment should be following an independent process by the Public Appointment Service (as recent events have shown, simple nominations by government are highly problematic). It is also questionable whether the role needs to be restricted to a practicing lawyer or judge. It would be preferable to set out criteria which would be assessed through the appointments process. It may be, for instance, that there are some senior academics with specialist knowledge of terrorism legislation that would be very well placed to fill this role.

Part 8 – Regulations and miscellaneous

Head 221

While this is delegated to regulations it is important that this is approached carefully. The investigation of disciplinary matters has been a thoroughly overly legalised process to date, involving extensive delays in decision making and excessive appeals against process and outcomes. This is not good for the member concerned, nor is it good for the organisation (for instance the suspension of
Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill

the Director of HR in 2018 which has not, to date, been resolved as far as I know. This has prevented the organisation from hiring a new Director, leaving an absolutely pivotal role empty). Care must be taken to structure a system of discipline which has greater agility in the future, while maintaining rights to due process and fair proceedings.

Head 228

While there may be good reason to confer the powers outlined on the authorised bodies there needs to be oversight and accountability for the use of powers. These include powers of search, seizure, requiring identification and use of force. These are quite serious powers which have the capacity to be misused, in breach of human rights. Therefore, it is essential that there is oversight and accountability. The office of the Ombudsman would seem to be the appropriate body for such work: members of the public should be able to complain to them about their treatment by security officers of appropriate bodies.
Submission to the Oireachtas Committee on Justice

On the

General Scheme of the Policing Security & Community Safety Bill
## INDEX

i. Executive Summary          Pages 3 - 5
ii. Heads 1 – 5               Page 6
iii. Heads 6 – 15             Page 7
iv. Heads 16 – 24             Page 8
v.  Heads 25 – 34             Page 9
vi. Heads 35 – 44             Page 10
vii. Heads 45 – 52            Page 11
viii. Heads 53 – 65           Page 12
ix.  Heads 66 – 71            Page 13
x.   Heads 72 – 80            Page 14
xi.  Heads 81 – 92            Page 15
xii. Heads 93 – 104           Page 16
xiii. Heads 105 – 119         Page 17
xiv. Heads 120 – 134          Page 18
xv.  Heads 135 – 141          Page 19
xvi. Heads 142 – 153          Page 20
xvii. Heads 154 – 159         Page 21
xviii. Heads 160 – 166        Page 22
xix.  Heads 167 – 175         Page 23
xx.   Heads 176 – 185         Page 24
xxi. Heads 186 – 196          Page 25
xxii. Heads 197 – 211         Page 26
xxiii. Heads 212 – 224        Page 27
xxiv. Heads 225 – 237         Page 28
xxv. Heads 238 – 252          Page 29
EXECUTIVE SUMMARY

Dear Members
Dail Committee on Justice

Forsa represents some two thousand civil servants in An Garda Síochána including clerical, admin, technical and services grades and we welcome the opportunity to make this submission on behalf of our members employed in this area.

The Policing, Security and Community Safety Bill is a consequence of the report of the Commission on the Future of Policing in Ireland (COFPI). Published on 18th September, 2018, the COFPI report went some way in identifying the shortcomings in the Garda Síochána organisation and this draft heads of the Bill has been put together with the intention of moving towards implementing the COFPI recommendations, and to enable "An Act to make further and better provision in relation to An Garda Síochána"

Our first concern at the publication of the general scheme centres on the fact that absolutely no consultation whatsoever took place with our union as a representative of the staff most impacted by this proposed legislation.

In publishing the Bill, the Minister stated that “the scheme reflects enormous work by a dedicated team in my Department who engaged extensively with key stakeholders including all government departments, An Garda Síochána and the policing oversight bodies’. It is deeply concerning to Forsa that the thousands of staff who will be impacted by the proposed reforms were apparently not deemed by Government to be key stakeholders in this process. Also the published paper implementing the Report of the Commission on the Future of Policing in Ireland Scaling Phase Iteration October 2020 – March 2022 highlights the paramount role of proper stakeholder engagement stating that: ‘Stakeholder engagement is essential for the successful implementation of A Policing Service for our Future. Indeed, communications and engagement have been identified as a critical enabler of the programme of reform. Effective communication builds consensus, cooperation, and support with both internal and external stakeholders. Engagement increases understanding and ownership of the reform…..It is important to acknowledge that an important factor in ensuring that continued progress is made in implementing A Policing Service for our Future will be effective and timely stakeholder engagement across a number of fronts, including within the organisations central to the reform (e.g. An Garda Síochána, Department of Justice), across public sector organisations who have a stake in individual projects/actions, and with staff unions and representative associations’. This process was not afforded to Forsa and we were effectively bypassed in all discussions on the drafting of the bill.

Secondly the Heads of Bills of the “Policing, Security & Community Safety Bill” as published raise two significant issues of concern for Forsa and its members namely that if enacted this bill would effectively strip our civilian members in An Garda Síochána of their civil service employee status, resulting in civilian staff becoming direct employees of An Garda Síochána, and also our significant concerns that if enacted this Bill will allow civilian staff to come under the remit of a new policing complaints body that will replace GSOC. Effectively, what this means is that civilian staff would be subject to the same rigors of any complaints procedure as a uniformed Garda member with sworn powers.

The intention to have the Garda Commissioner take sole responsibility for Garda staff will effectively change the status of our members in An Garda Síochána from civil servants to
public servants is, in our view, neither appropriate nor warranted. To include such a far reaching measure in this Bill without prior engagement with the staff associations representing this cohort of staff is unacceptable and completely disregards the legitimate concerns of Garda staff and any IR process around this issue. It is therefore our view that this measure should not progress within the draft heads of Bill and that proper engagement between the Department of Justice, Representative Unions and An Garda Síochána is required prior to any legislation being enacted.

The investigative powers being afforded to the proposed new ombudsman are in our view excessive, disproportionate and trample on the recognised internal civil service processes and guidelines that are afforded to civil servants in the course of their duties and also raises the question of individual legal challenges as it is our view that the investigative powers being proposed do not afford individuals the right to natural justice and removes the lines between criminal conduct and internal employment issues. It is also our view that this measure should not progress within the draft heads of Bill and that proper engagement between the Department of Justice, Representative Unions and An Garda Síochána is required prior to any legislation being enacted.

Separately following a recent engagement with officials from the Department of Justice and Garda HR it was made clear to Fórsa that should the legislation as drafted become operational all new entrants would be captured under that legislation from day one.

While schedule 2 refers to head 45(7) as it applies to the terms and conditions of existing Garda staff, no such provision has been made in the draft legislation for the continuation of the terms and conditions enjoyed by existing staff to continue to apply to new entrants, only that these conditions under Head 45(1) & 45(3) including terms and conditions relating to remuneration and allowances can be determined by the Commissioner with the approval of the Minister with the approval of the Minister for Public expenditure. The absence of clarity on this matter is concerning to Fórsa and the legislation being contemplated as it applies to new staff is in its present form ambiguous in its interpretation. Again this issue needs proper engagement between the Department of Justice, Representative Unions and An Garda Síochána prior to being legislated for.

Fórsa has recently concluded a membership consultation process where our Garda Staff members were afforded the opportunity to have their respective views recorded. 94% of all respondents stated that they wish to remain a part of the overall Civil Service and benefit from the terms and conditions that being a civil servant brings such as having their terms and conditions decided at central level, access to interdepartmental competitions and access civil service mobility. What was absolutely clear was that the vast majority of respondents in this broad engagement process are angered at the continual lack consultation on a matter which will directly and negatively impact on their terms and conditions as civil servants.

In conclusion it is the view of Fórsa that the draft Policing Security & Community Safety Bill in its present iteration proposes to change the conditions of our members by progressing a one organisation agenda through legislation and in that same legislation enforce the full rigors of a new policing ombudsman on civilian staff with no sworn powers. This is all being pursued without any proper engagement and consultation between the Department of Justice, Representative Unions and An Garda Síochána. To enact this legislation as currently drafted will in our view only serve to undermine the IR process that is now urgently
required and will negatively impact on the terms and conditions of our members in An Garda Síochána.

This submission will below now offer further specific observations on matters of concern to Forsa on a Head by Head basis for consideration by the committee and we would welcome the opportunity to meet with your committee to further discuss our observations and concerns.

Regards

Thomas Cowman
Assistant General Secretary
Forsa Trade Union
20/10/2021
Part 1 - Preliminary and General Matters

Head 1 Short title and commencement

- No matters arising based on current text of the General Scheme

Head 2 Interpretation

- **Member of Garda personnel** means a member and a member of Garda staff;
- The change to including both sworn members and Garda Staff within an all-encompassing title under this Bill as “Garda Personnel” is in the view of Forsa neither warranted nor appropriate and Forsa has serious concerns at its use throughout this draft bill. It is our view that this measure is being proposed based on the desire of the Garda organisation to progress a one organisation agenda and it is our position that proper engagement has to take place between all representative unions, An Garda Síochána and the department of justice prior to any legislation being enacted that will if enacted only serve to frustrate the IR process. Under Head 45 the position of Forsa in relation to Garda staff is further elaborated.
- The clear position of Forsa in relation to Head 2 is that this definition of Garda Personnel is not appropriate and should be removed throughout this draft bill and the current title of “Garda member” and “Garda Staff” should remain and referenced where appropriate.
- **Throughout this submission where Garda Personnel is referenced head 2 will be referred to.

Head 3 Security Services

- No matters arising based on current text of the General Scheme

Head 4 Repeals

- No matters arising based on current text of the General Scheme

Head 5 Expenses

- No matters arising based on current text of the General Scheme
Part 2 – An Garda Síochána

Chapter 1 General

Head 6 Continuation of Garda Síochána
• No matters arising based on current text of the General Scheme

Head 7 Principles of policing
• Section (e) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 7.

Head 8 Functions of An Garda Síochána
• Section 3, 4 and 5b references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 8.

Head 9 Prosecution of offences by members of An Garda Síochána
• No matters arising based on current text of the General Scheme

Chapter 2 Board of An Garda Síochána

Head 10 Establishment and membership of Board
• No matters arising based on current text of the General Scheme

Head 11 Role of Board
• Section 1 (d) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 11.

Head 12 Meetings of Board and procedures
• No matters arising based on current text of the General Scheme

Head 13 Ineligibility for appointment, disqualification for office, cessation of membership
• Section 1 (e) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 13

Head 14 Removal of member of Board from office
• No matters arising based on current text of the General Scheme

Head 15 Removal of all members of Board from office
• No matters arising based on current text of the General Scheme

Head 16 Committees of Board
• No matters arising based on current text of the General Scheme
Head 17 Remuneration and expenses of members of Board and committees
• No matters arising based on current text of the General Scheme

Head 18 Provision of services to Board
• No matters arising based on current text of the General Scheme

Chapter 3 Garda Commissioner, Deputy Garda Commissioner

Head 19 Appointment of Garda Commissioner
• No matters arising based on current text of the General Scheme

Head 20 Appointment of Deputy Garda Commissioner
• No matters arising based on current text of the General Scheme

Head 21 Power of Deputy to perform functions of Garda Commissioner
• No matters arising based on current text of the General Scheme

Head 22 Resignation of Garda Commissioner, Deputy Garda Commissioner
• No matters arising based on current text of the General Scheme

Head 23 Suspension and removal of Garda Commissioner and Deputy Garda Commissioner
• No matters arising based on current text of the General Scheme

Head 24 Inquiry into any matter giving rise to notification under head 23(7)
• No matters arising based on current text of the General Scheme
Chapter 4  Functions, duties of Garda Commissioner

Head 25 Functions of Garda Commissioner
- Section 1 b (ii) & section 4 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated. in relation to Head 25.

Head 26 Direction and control of An Garda Síochána
- Section 26 (4) – It is our view that this section should be removed and is not warranted as the contents and effect of this head are captured within the Garda Code of Ethics under Chapter 7.

Head 27 Independence of Garda Commissioner
- Section b (iv) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 27.

Head 28 Duty of Garda Commissioner to account to Government, and provide information to Attorney General
- Section 2 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 28.

Head 29 Duty of Garda Commissioner to provide information
- No matters arising based on current text of the General Scheme

Head 30 Directives from Minister
- No matters arising based on current text of the General Scheme

Head 31 Delegation of powers, functions, or duties of Garda Commissioner
- Section 1 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated. in relation to Head 31
- Delegation of Functions – At present the delegation down of certain functions particularly HR functions to Garda Staff is subject to agreement at the civil service general council and any inclusion in regards to a delegation of functions on a legislative basis without a clear definition of same would not be acceptable to Forsa.

Head 32 Powers relating to contracts, bank accounts, etc.
- No matters arising based on current text of the General Scheme

Head 33 Arrangements for obtaining views of public
- No matters arising based on current text of the General Scheme

Head 34 Provision of police services for certain events, etc.
- No matters arising based on current text of the General Scheme
Chapter 5  Garda personnel

Head 35 Garda personnel
- Head 35 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 35.

Head 36 Ranks, numbers in each rank, terms and conditions
- No matters arising based on current text of the General Scheme

Head 37 Member’s solemn declaration
- No matters arising based on current text of the General Scheme

Head 38 Appointment of persons to ranks of Assistant Garda Commissioner and chief superintendent
- No matters arising based on current text of the General Scheme

Head 39 Suspension, removal of persons appointed to rank of Assistant Garda Commissioner or chief superintendent
- No matters arising based on current text of the General Scheme

Head 40 Inquiry into any matter giving rise to notification under head 39(3)
- No matters arising based on current text of the General Scheme

Head 41 Appointment of persons to ranks below rank of chief superintendent and dismissal of such members for reasons of public confidence
- No matters arising based on current text of the General Scheme

Head 42 Appointment of reserve members
- No matters arising based on current text of the General Scheme

Head 43 Duty of members of Garda personnel to account
- Section 1, 3 & 4 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 43
- The duty to account as written will replace section 39 of the 2005 act and this head if enacted would have the effect to bring Garda Staff into its remit. This would bring the issue of equivalence into consideration and as such this will need further clarity and discussion and would require engagement with Forsa as there is currently no formal agreement on equivalency between grades and ranks.

Head 44 Admission of Garda trainees
- No matters arising based on current text of the General Scheme
**Head 45 Appointment of members of Garda staff**
- Forsa has serious concerns regarding the totality of this Head, if enacted Head 45 will effectively change the status of our members in An Garda Síochana from civil servants to public servants and this in our view is neither appropriate nor warranted. To include such a far reaching measure in this Bill without prior engagement with the staff associations representing this cohort of staff is unacceptable and the view of Forsa is that further engagement between the Department of Justice, Representative Unions and An Garda Síochana is required prior to any movement to include such a provision into legislation.
- Schedule 2 refers to head 45(5) & 45(7) as it applies to the terms and conditions of existing Garda staff, no such provision has been made in the draft legislation for the continuation of the terms and conditions enjoyed by existing staff to continue to apply to new entrant Garda Staff.

**Head 46 Garda staff undertaking**
- Forsa has serious concerns regarding the totality of this Head. Civilian members of staff are not sworn members of An Garda Síochana and do not have sworn powers attached to their roles and therefore should not have to have the same rigors of a solemn declaration applied to their roles. A situation where this is given before the staff member’s supervisor and may be recorded is in the view of Forsa neither appropriate nor acceptable and it is the position of Forsa that Head 46 should be removed in its entirety.

**Head 47 Power to appoint consultants and advisers**
- No matters arising based on current text of the General Scheme

**Head 48 Representative associations**
- No matters arising based on current text of the General Scheme

**Chapter 6 Accountability and funding of An Garda Síochána**

**Head 49 Setting of priorities by Authority for policing services**
- No matters arising based on current text of the General Scheme

**Head 50 Setting of priorities by Minister for security services**
- No matters arising based on current text of the General Scheme

**Head 51 Strategic plan**
- No matters arising based on current text of the General Scheme

**Head 52 Publication and implementation of approved strategic plan**
- No matters arising based on current text of the General Scheme
**Head 53** Annual service plan
Section 5 (b) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 53

**Head 54** Amendment of approved annual service plan
- No matters arising based on current text of the General Scheme

**Head 55** Implementation of approved annual service plan
- No matters arising based on current text of the General Scheme

**Head 56** Annual and multi annual capital plan
- No matters arising based on current text of the General Scheme

**Head 57** Implementation of approved capital plan
- No matters arising based on current text of the General Scheme

**Head 58** Accountability of Garda Commissioner for accounts of Garda Síochána ... 94
- No matters arising based on current text of the General Scheme

**Head 59** Attendance of Garda Commissioner before other Oireachtas Committees 95
- Section 10 (b) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 59

**Head 60** Audit committee
- No matters arising based on current text of the General Scheme

**Head 61** Provisions supplementary to head 60
- No matters arising based on current text of the General Scheme

**Head 62** Functions of audit committee
- Section 4 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 62

**Head 63** Governance framework
- No matters arising based on current text of the General Scheme

**Head 64** Annual Report
- No matters arising based on current text of the General Scheme

**Head 65** Statistical information
- No matters arising based on current text of the General Scheme
Chapter 7  Codes of ethics, standards of integrity, unauthorised disclosure of information

Head 66 Code of ethics for members of Garda personnel
  • The title and section 1 (a) & (b) and section 7 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 66

Head 67 Standards of integrity, codes of ethics for members of committees, advisors or consultants etc.
  • No matters arising based on current text of the General Scheme

Head 68 Confidentiality of certain information
  • Section 1 (a) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 68

Chapter 8  Special inquiries relating to administration, practice or procedure

Head 69 Special inquiries relating to administration, practice or procedure
  • Section 1b (i), 6a, 7, 8, 8a, 9 & 10 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 69

Chapter 9  Liability

Head 70 Liability for certain acts of members of An Garda Síochána
  • This Head should be amended to include Garda Staff.

Head 71 Legal aid for members of An Garda Síochána
  • This Head should be amended to include Garda Staff.
Chapter 10 International service and cooperation with police services, law enforcement agencies or other relevant person outside State

**Head 72** Interpretation.
- No matters arising based on current text of the General Scheme

**Head 73** International service
- No matters arising based on current text of the General Scheme

**Head 74** Power to enter into agreements with other law enforcement agencies, relevant persons or bodies outside the State
- No matters arising based on current text of the General Scheme

**Head 75** Secondment from Police Service of Northern Ireland to certain ranks in An Garda Síochána.
- No matters arising based on current text of the General Scheme

**Head 76** Secondment from An Garda Síochána to Police Service of Northern Ireland
- No matters arising based on current text of the General Scheme

**Head 77** Breach of standards of professional behaviour by seconded member of Garda Síochána
- No matters arising based on current text of the General Scheme

**Head 78** Breach of professional standards of behaviour by seconded member of Police Service of Northern Ireland
- No matters arising based on current text of the General Scheme

**Head 79** Records relating to members serving outside the State
- No matters arising based on current text of the General Scheme

**Head 80** Duties of Ard-Chláraitheoir in relation to records transmitted under this Act
- No matters arising based on current text of the General Scheme
Chapter 11  Offences of causing disaffection, impersonation

Head 81 Causing disaffection
  • No matters arising based on current text of the General Scheme

Head 82 Offence of impersonating member of Garda Síochána
  • No matters arising based on current text of the General Scheme

Head 83 Other offences relating to impersonation
  • No matters arising based on current text of the General Scheme
Part 3 – Community Safety

Head 84 Interpretation
- No matters arising based on current text of the General Scheme

Head 85 National Community Safety Strategy
- No matters arising based on current text of the General Scheme

Head 86 National Community Safety Steering Group
- No matters arising based on current text of the General Scheme

Head 87 National Office for Community Safety
- No matters arising based on current text of the General Scheme

Head 88 Director of National Office
- No matters arising based on current text of the General Scheme

Head 89 Accountability to Oireachtas Committees
- No matters arising based on current text of the General Scheme

Head 90 Staff of National Office
- No matters arising based on current text of the General Scheme

Head 91 Provision of services to National Office
- No matters arising based on current text of the General Scheme

Head 92 Regulations concerning Local Community Safety Partnerships
- No matters arising based on current text of the General Scheme

Head 93 Functions of Local Community Safety Partnerships
- No matters arising based on current text of the General Scheme

Head 94 Staffing of Local Community Safety Partnerships
- No matters arising based on current text of the General Scheme

Head 95 Duties of Departments of State and other public service bodies
- No matters arising based on current text of the General Scheme
Part 4 - Establishment and Functions of Policing and Community Safety Authority 155

Head 96 Interpretation
- No matters arising based on current text of the General Scheme

Head 97 Establishment day of Authority
- No matters arising based on current text of the General Scheme

Head 98 Establishment of Authority
- No matters arising based on current text of the General Scheme

Head 99 Membership of Authority
- No matters arising based on current text of the General Scheme

Head 100 Recommendations for appointment of ordinary members of Authority
- No matters arising based on current text of the General Scheme

Head 101 Terms and conditions of appointment of members of Authority
- No matters arising based on current text of the General Scheme

Head 102 Ineligibility for appointment, disqualification for office of member of Authority, cessation of membership, etc.
- Section 1e references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 102

Head 103 Removal of member of Authority
- No matters arising based on current text of the General Scheme

Head 104 Objective and functions of Authority
- Section 2b (iv)&(v), 2k (iii) and 2m (iii) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 104

Head 105 Authority to have regard to security services
- No matters arising based on current text of the General Scheme

Head 106 Meetings and business of Authority
- No matters arising based on current text of the General Scheme

Head 107 Committees of Authority
- No matters arising based on current text of the General Scheme

Head 108 Power to appoint consultants and advisers etc. and to enter into contracts
- No matters arising based on current text of the General Scheme

Head 109 Strategy statement of Authority
- No matters arising based on current text of the General Scheme
Head 110 Annual Business Plan
- No matters arising based on current text of the General Scheme

Head 111 Appointment of Chief Executive of Authority
- No matters arising based on current text of the General Scheme

Head 112 Staff of Authority
- No matters arising based on current text of the General Scheme

Head 113 Appointment of Inspectors of Policing Services
- No matters arising based on current text of the General Scheme

Head 114 Powers of Inspector of Policing Services
- Section 4, 5 & 10 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 114

Head 115 Joint Inspections
- No matters arising based on current text of the General Scheme

Head 116 Reports of inspections requested by Minister
- No matters arising based on current text of the General Scheme

Head 117 Reports of inspections undertaken at Authority’s own initiative
- No matters arising based on current text of the General Scheme

Head 118 Monitoring and assessment of measures in relation to recommendations in inspection reports
- No matters arising based on current text of the General Scheme

Head 119 Duty of Garda Commissioner to facilitate performance by Authority of its functions
- No matters arising based on current text of the General Scheme

Head 120 Duty of Director of National Office to assist Authority
- No matters arising based on current text of the General Scheme

Head 121 Accountability for accounts of Authority
- No matters arising based on current text of the General Scheme

Head 122 Accountability of Authority to other Oireachtas Committees
- No matters arising based on current text of the General Scheme

Head 123 Governance framework
- No matters arising based on current text of the General Scheme

Head 124 Annual and other reports to Minister
- No matters arising based on current text of the General Scheme

Head 125 Standards of integrity
- No matters arising based on current text of the General Scheme
Head 126 Codes of ethics for members, members of committees, advisors or consultants etc.
- No matters arising based on current text of the General Scheme

Head 127 Confidentiality of certain information
- No matters arising based on current text of the General Scheme

Head 128 Dissolution of Policing Authority and Garda Síochána Inspectorate
- No matters arising based on current text of the General Scheme

Head 129 Transfer of staff of Policing Authority
- No matters arising based on current text of the General Scheme

Head 130 Transfer of property, rights and liabilities, and continuation of leases, licences and permissions granted by Policing Authority
- No matters arising based on current text of the General Scheme

Head 131 Preservation of contracts, agreements or arrangements made by the Policing Authority
- No matters arising based on current text of the General Scheme

Head 132 Records of Policing Authority
- No matters arising based on current text of the General Scheme

Head 133 Liability for loss on part of Policing Authority occurring before establishment day
- No matters arising based on current text of the General Scheme

Head 134 Final accounts and final annual report of Policing Authority
- No matters arising based on current text of the General Scheme

Head 135 Transfer of staff of Garda Síochána Inspectorate
- No matters arising based on current text of the General Scheme

Head 136 Preservation of contracts, agreements or arrangements made by the Garda Síochána Inspectorate
- No matters arising based on current text of the General Scheme

Head 137 Records of Garda Síochána Inspectorate
- No matters arising based on current text of the General Scheme

Head 138 Liability for loss on part of Garda Síochána Inspectorate occurring before establishment day
- No matters arising based on current text of the General Scheme
Part 5 - Office of the Garda Síochána Ombudsman

Forsa position in relation to the totality of heads 139 to 190
Similar to their counterparts in other civil service offices that engage with members of the public, Garda staff have the same agreed recognised internal civil service processes and guidelines that are afforded to all civil servants. Forsa are of the firm view that the investigative powers being afforded to the proposed new ombudsman in relation to Garda Staff are excessive and unwarranted and we are completely opposed to the inclusion of Garda Staff under Part 5 and 6 (heads 139 to 190.) It is therefore our strong position that this measure should not be progressed within the draft heads of Bill and that proper engagement between the Department of Justice, Representative Unions and An Garda Síochana is required prior to any movement to include such a provision into legislation.

Head 139 Continuation of Garda Síochána Ombudsman Commission under name of Office of the Garda Síochána Ombudsman
- No matters arising based on current text of the General Scheme

Head 140 Appointment of Garda Ombudsman and Deputy Garda Ombudsman
- Section 6 (e) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 140
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 140

Head 141 Terms of appointment of Garda Ombudsman and Deputy Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 142 Acting Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 143 Objectives, functions and powers of Garda Ombudsman
- Section 3 (a), (b) & (d) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 143
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 143

Head 144 Functions of Deputy Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 145 Strategy statement of Office of the Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 146 Annual and other reports by Office of the Garda Ombudsman
- No matters arising based on current text of the General Scheme
Head 147 Appointment of Chief Administrative Officer of Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 148 Officers of Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 149 Designation of officers and others for purpose of investigations under Part 6
- No matters arising based on current text of the General Scheme

Head 150 Special Assistance
- Section 1 (a), 4, 4(a) & (b) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 150
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 150
- Head 150 (4) excluded Garda Staff from compensation for any injuries incurred while serving with the Garda Ombudsman and it is the view of Forsa that this should be revisited.

Head 151 Power to appoint consultants and advisers and to enter into contracts
- No matters arising based on current text of the General Scheme

Head 152 Accountability for accounts of Office of Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 153 Accountability to other Oireachtas committees
- No matters arising based on current text of the General Scheme

Head 154 Confidentiality of information obtained by Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 155 Final accounts and final annual report of Ombudsman Commission
- No matters arising based on current text of the General Scheme

Head 156 Records of Ombudsman Commission
- No matters arising based on current text of the General Scheme
Part 6 – Complaints, incidents of concern, investigations and other matters

Head 157 Interpretation
- Under the following headings “complaint”, “incident of concern in relation to the conduct of a member of Garda personnel” (a) & (b), “member of Garda personnel”, “notifiable misconduct (b) (c) & (d), references the term Garda Personnel and the position referenced in Head 2 is reiterated in relation to Head 157
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 157

Head 158 Supplementary provisions in relation to complaints
- Section 1 (a) & (b) and 3 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 158
- Section 2(c) references Garda staff and the Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to this section
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 158

Head 159 Making, recording of complaints etc.
- Section 2 (b), 3, & 6(a) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 159
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 159

Head 160 Determination of admissibility of complaint, suitability for resolution by An Garda Síochána etc.
- Section 7(c) & 10 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 160
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 160

Head 161 Categories of complaints suitable for resolution by An Garda Síochána
- Section 2(b) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 161
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 161

Head 162 Arrangements for handling complaints suitable for resolution by An Garda Síochána
- Section 3(e) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 162
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 162

**Head 163** If complaint suitable for resolution by An Garda Síochána is referred under head 160

- Section 2(a) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 163
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 163

**Head 164** Matter concerning death of, or serious harm to, a person

- Section 2(b) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 164
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 164

**Head 165** Notification to Garda Ombudsman of incident of concern in relation to conduct of member of garda personnel

- The Head title plus section 1 & 4(a) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 165
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 165

**Head 166** Investigation of matters in the public interest

- Section 1, 2, 3, 5 & 7 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 166
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is in relation to Head 166

**Head 167** Protected disclosures relating to Garda Síochána

- Section 1 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 167
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 167

**Head 168** Formal Investigation

- Section 3 (a), (b) & (c) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 168
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 168

**Head 169** Powers equivalent to member of An Garda Síochána when undertaking formal investigation

- No matters arising based on current text of the General Scheme

**Head 170** Search of Garda Premises

- Section 2(a) & 11 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated is reiterated in relation to Head 170
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 170

**Head 171 Additional powers for purpose of undertaking formal investigation.**
• No matters arising based on current text of the General Scheme

**Head 172 Power to discontinue formal investigation**
• Section 3(b) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated is reiterated in relation to Head 172
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 172

**Head 173 Garda Ombudsman referral to the Director of Public Prosecutions**
• Section 1, 2(b) & 4 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated is reiterated in relation to Head 173
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 173

**Head 174 Other actions by Garda Ombudsman following formal investigation**
• Section 6 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated is reiterated in relation to Head 174
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 174

**Head 175 Investigation of matters relating to Garda Commissioner by Garda Ombudsman**
• No matters arising based on current text of the General Scheme

**Head 176 Duty to keep certain persons informed**
• Section 1(g) references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated is reiterated in relation to Head 176
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 176

**Head 177 Provision of information to Garda Ombudsman by Garda Síochána**
• No matters arising based on current text of the General Scheme

**Head 178 Duty to preserve evidence**
• Section 1 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated is reiterated in relation to Head 178
• The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 178

**Head 179 Extension of time limit for instituting summary proceedings for offences**
• No matters arising based on current text of the General Scheme
Head 180  Same conduct may form basis for complaint or charge
- Section 1 & 2 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 180
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 180

Head 181  Protocols
- No matters arising based on current text of the General Scheme

Head 182  Review of decisions by Garda Ombudsman
- No matters arising based on current text of the General Scheme

Head 183  Judicial inquiry into conduct of Office of the Garda Ombudsman and procedures, policies and practices of that Office
- Section 4 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 183
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 183

Head 184  Offence of providing false or misleading information
- No matters arising based on current text of the General Scheme

Head 185  Jurisdiction to investigate offence under this Part
- Section 7 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 185
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 185

Head 186  Transitional provisions relating to complaints under the Garda Síochána Act 2005
- No matters arising based on current text of the General Scheme

Head 187  Qualified privilege for certain statements and publications
- No matters arising based on current text of the General Scheme

Head 188  Power of Garda Ombudsman to enter into agreements with law enforcement agencies or other relevant persons or bodies outside the State
- No matters arising based on current text of the General Scheme

Head 189  Performance of functions by designated officers of Garda Ombudsman under Coroners Act 1962
- No matters arising based on current text of the General Scheme

Head 190  Duty of members of Garda personnel to account to designated officer
- The head title and section 1 & 4 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 190
- The Forsa position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 190
Part 7 - Independent Examiner of Security Legislation

Head 191 Interpretation
• No matters arising based on current text of the General Scheme

Head 192 Establishment day
• No matters arising based on current text of the General Scheme

Head 193 Establishment of office of Independent Examiner
• No matters arising based on current text of the General Scheme

Head 194 Objectives
• No matters arising based on current text of the General Scheme

Head 195 Functions
• No matters arising based on current text of the General Scheme

Head 196 Review of other laws
• No matters arising based on current text of the General Scheme

Head 197 Responsibilities of other bodies
• No matters arising based on current text of the General Scheme

Head 198 Access to information and individuals
• No matters arising based on current text of the General Scheme

Head 199 Sensitive information
• No matters arising based on current text of the General Scheme

Head 200 Confidentiality of sensitive information
• No matters arising based on current text of the General Scheme

Head 201 Protection of information
• No matters arising based on current text of the General Scheme

Head 202 Amendment of Schedule 5
• No matters arising based on current text of the General Scheme

Head 203 Amendment of Section 8 of Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993
• No matters arising based on current text of the General Scheme

Head 204 Amendment of Section 12 of Criminal Justice (Surveillance) Act 2009
• No matters arising based on current text of the General Scheme
Head 205 Amendment of Communications (Retention of Data) Act 2011
  • No matters arising based on current text of the General Scheme

Head 206 Adjudication of requests for information
  • No matters arising based on current text of the General Scheme

Head 207 Annual report
  • No matters arising based on current text of the General Scheme

Head 208 Other reports
  • No matters arising based on current text of the General Scheme

Head 209 Reviews
  • No matters arising based on current text of the General Scheme

Head 210 Inclusion of sensitive information in reports of Examiner
  • No matters arising based on current text of the General Scheme

Head 211 Publication of reports
  • No matters arising based on current text of the General Scheme

Head 212 Response to reports of Examiner
  • No matters arising based on current text of the General Scheme

Head 213 Appointment of Examiner
  • No matters arising based on current text of the General Scheme

Head 214 Terms and conditions of appointment
  • No matters arising based on current text of the General Scheme

Head 215 Disqualification, resignation and removal from office
  • No matters arising based on current text of the General Scheme

Head 216 Provision of services and staff to Examiner
  • No matters arising based on current text of the General Scheme

Head 217 Power to enter into contracts
  • No matters arising based on current text of the General Scheme
Part 8 - Regulations and Miscellaneous Provisions

**Head 218** General power to make regulations
  - No matters arising based on current text of the General Scheme

**Head 219** Regulations relating to management of Garda Síochána
  - No matters arising based on current text of the General Scheme

**Head 220** Performance regulations
  - No matters arising based on current text of the General Scheme

**Head 221** Conduct regulations
  - No matters arising based on current text of the General Scheme

**Head 222** Regulations relating to standards of professional behaviour
  - Section 1 references the term Garda Personnel and the Forsa position referenced in Head 2 is reiterated in relation to Head 222

**Head 223** Regulations relating to fees for provision of vetting services
  - No matters arising based on current text of the General Scheme

**Head 224** Continuation of certain regulations and orders
  - No matters arising based on current text of the General Scheme

**Head 225** Dissolution of the Garda Síochána Reward Fund
  - No matters arising based on current text of the General Scheme

**Head 226** Certificate evidence
  - No matters arising based on current text of the General Scheme

**Head 227** Proof of membership, rank or grade in Garda Síochána
  - No matters arising based on current text of the General Scheme

**Head 228** Exercise of special powers by security officers
  - No matters arising based on current text of the General Scheme

**Head 229** Sharing of information for the performance of functions
  - No matters arising based on current text of the General Scheme
Part 9 - Consequential Amendments

**Head 230** Amendment of Public Service Superannuation (Miscellaneous Provisions) Act 2004-349
- No matters arising based on current text of the General Scheme

**Head 231** Amendment of Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013
- No matters arising based on current text of the General Scheme

**Head 232** Amendment of Animal Health and Welfare Act 2013
- No matters arising based on current text of the General Scheme

**Head 233** Amendment of Welfare of Greyhounds Act 2011
- No matters arising based on current text of the General Scheme

**Head 234** Amendment of Road Traffic Act 2010
- No matters arising based on current text of the General Scheme

**Head 235** Amendment of Industrial Relations Act 1990
- No matters arising based on current text of the General Scheme

**Head 236** Amendment of Criminal Justice (Offences relating to Information Systems) Act 2017
- No matters arising based on current text of the General Scheme

**Head 237** Amendment of Criminal Justice (Victims of Crime) Act 2017
- No matters arising based on current text of the General Scheme

**Head 238** Amendment of Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016
- No matters arising based on current text of the General Scheme

**Head 239** Amendment of Freedom of Information Act 2014
- No matters arising based on current text of the General Scheme

**Head 240** Amendment of National Vetting Bureau (Children and Vulnerable Persons) Act 2012
- No matters arising based on current text of the General Scheme

**Head 241** Amendment of Europol Act 2012
- No matters arising based on current text of the General Scheme

**Head 242** Amendment of Criminal Justice (Corruption Offences) Act 2018
- No matters arising based on current text of the General Scheme

**Head 243** Amendment of Criminal Justice (Surveillance) Act 2009
- No matters arising based on current text of the General Scheme
Head 244 Amendment of Children Act 2001
  • No matters arising based on current text of the General Scheme

Head 245 Amendment of Ombudsman Act 1980
  • No matters arising based on current text of the General Scheme

Head 246 Amendment of Criminal Justice (International Cooperation) Act 2019
  • No matters arising based on current text of the General Scheme

Head 247 Amendment of Coroners Act 1962
  • No matters arising based on current text of the General Scheme

Head 248 Amendment of Criminal Justice (Forensic Evidence and DNA Database System) Act 2014
  • No matters arising based on current text of the General Scheme

Head 249 Amendment of Housing Miscellaneous (Provisions) Act 2009
  • No matters arising based on current text of the General Scheme

Head 250 Amendment to Taxes Consolidation Act 1997
  • No matters arising based on current text of the General Scheme

Head 251 Amendment of Comptroller and Auditor General (Amendment) Act 1993
  • No matters arising based on current text of the General Scheme

Head 252 Amendment of Fisheries (Consolidation) Act 1959
  • No matters arising based on current text of the General Scheme
Submission to the Dail Committee on Justice:

General Scheme of the Policing Security and Community Safety Bill
# Table of Contents

1. The Association of Garda Superintendents ......................................................... 8
1.1 The Role of Superintendents ............................................................................. 8
1.2 Submission Focus ............................................................................................... 9
1.3 Submission Layout ............................................................................................. 9
1.4 Bias ..................................................................................................................... 9
1.5 Executive Summary ........................................................................................... 10

2. Observations on the General Scheme of the Policing Security and Community Safety Bill 12
   2.1 Long Title ........................................................................................................ 12
   2.2 Part 1 – Preliminary and General Matters ......................................................... 12
   2.2.1 Head 2 ....................................................................................................... 12
   2.2.2 Head 3 ....................................................................................................... 12
   2.3 Part 2 – An Garda Siochana ........................................................................... 13
   2.3.1 Head 6 ....................................................................................................... 13
   2.3.2 Head 8 ....................................................................................................... 13
   2.3.3 Head 9 ....................................................................................................... 13
   2.3.4 Head 10 .................................................................................................... 13
   2.3.5 Head 11 ..................................................................................................... 14
   2.3.6 Head 12 ..................................................................................................... 14
   2.3.7 Head 13 ..................................................................................................... 14
   2.3.8 Head 17 .................................................................................................... 14
   2.3.9 Head 18 .................................................................................................... 15
   2.3.10 Head 20 .................................................................................................. 15
   2.3.11 Head 21 .................................................................................................. 15
   2.3.12 Head 23 .................................................................................................. 15
   2.3.13 Head 24 .................................................................................................. 16
   2.3.14 Head 25 .................................................................................................. 16
2.3.44  Head 66 ........................................................................................................ 24
2.3.45  Head 67 ........................................................................................................ 24
2.3.46  Head 68 ........................................................................................................ 24
2.3.47  Head 69 ........................................................................................................ 24
2.3.48  Head 70 ........................................................................................................ 25
2.3.49  Head 71 ........................................................................................................ 25
2.3.50  Head 79 ........................................................................................................ 25
2.3.51  Head 83 ........................................................................................................ 25
2.4  Part 3 – Community Safety ................................................................. 26
  2.4.1  Head 85 ........................................................................................................ 26
  2.4.2  Head 87 ........................................................................................................ 26
  2.4.3  Head 89 ........................................................................................................ 26
  2.4.4  Head 95 ........................................................................................................ 26
2.5  Part 4 – Establishment and functions of Policing and Community Safety Authority 27
  2.5.1  Head 100 ...................................................................................................... 27
  2.5.2  Head 102 ...................................................................................................... 27
  2.5.3  Head 104 ...................................................................................................... 27
  2.5.4  Head 106 ...................................................................................................... 28
  2.5.5  Head 107 ...................................................................................................... 29
  2.5.6  Head 108 ...................................................................................................... 29
  2.5.7  Head 109 ...................................................................................................... 29
  2.5.8  Head 110 ...................................................................................................... 29
  2.5.9  Head 111 ...................................................................................................... 29
  2.5.10 Head 114 .................................................................................................... 30
  2.5.11 Head 115 .................................................................................................... 30
  2.5.12 Head 116 .................................................................................................... 30
  2.5.13 Head 117 .................................................................................................... 31
  2.5.14 Head 118 .................................................................................................... 31
2.5.15  Head 119 ........................................................................................................... 31
2.5.16  Head 120 ........................................................................................................... 31
2.5.17  Head 122 ........................................................................................................... 31
2.5.18  Head 123 ........................................................................................................... 32
2.5.19  Head 126 ........................................................................................................... 32
2.5.20  Head 127 ........................................................................................................... 32
2.6  Part 5 – Office of the Garda Siochana Ombudsman  32
  2.6.1  Head 140 ........................................................................................................... 32
  2.6.2.  Head 141 .......................................................................................................... 33
  2.6.3  Head 142 ........................................................................................................... 33
  2.6.4  Head 143 ........................................................................................................... 33
  2.6.5  Head 144 ........................................................................................................... 35
  2.6.6  Head 153 ........................................................................................................... 35
  2.6.7  Head 154 ........................................................................................................... 35
2.7  Part 6 – Complaints incidents of concern investigations and other Matters  36
  2.7.1  Head 157 ........................................................................................................... 36
  2.7.2  Head 158 ........................................................................................................... 37
  2.7.3  Head 159 ........................................................................................................... 37
  2.7.4  Head 160 ........................................................................................................... 38
  2.7.5  Head 161 ........................................................................................................... 38
  2.7.6  Head 163 ........................................................................................................... 38
  2.7.7  Head 164 ........................................................................................................... 39
  2.7.8  Head 165 ........................................................................................................... 39
  2.7.9  Head 166 ........................................................................................................... 39
  2.7.10  Head 167 ......................................................................................................... 39
  2.7.11  Head 168 ......................................................................................................... 40
  2.7.12  Head 169 ......................................................................................................... 40
  2.7.13  Head 170 ......................................................................................................... 41
2.7.14 Head 171 ................................................................. 42
2.7.15 Head 172 ................................................................. 42
2.7.16 Head 173 ................................................................. 42
2.7.17 Head 174 ................................................................. 43
2.7.18 Head 175 ................................................................. 43
2.7.19 Head 177 ................................................................. 44
2.7.20 Head 179 ................................................................. 44
2.7.21 Head 181 ................................................................. 44
2.7.22 Head 182 ................................................................. 44
2.7.23 Head 184 ................................................................. 45
2.7.24 Head 185 ................................................................. 45
2.7.25 Head 186 ................................................................. 45
2.7.26 Head 187 ................................................................. 45
2.7.27 Head 189 ................................................................. 46
2.7.28 Head 190 ................................................................. 46

2.8 PART 7: Independent Examiner of Security Legislation 46
2.8.1 Head 194 ................................................................. 46
2.8.2 Head 195 ................................................................. 46
2.8.3 Head 197 ................................................................. 46
2.8.4 Head 198 ................................................................. 47
2.8.5 Head 199 ................................................................. 47
2.8.6 Head 208 ................................................................. 47
2.8.7 Head 209 ................................................................. 47
2.8.8 Head 210 ................................................................. 47
2.8.9 Head 212 ................................................................. 48
2.8.10 Head 215 ............................................................... 48

2.9 PART 8: Regulations and Miscellaneous Provisions 48
2.9.1 Head 218 ................................................................. 48
2.9.2 Head 219 ................................................................. 48
General Scheme of the Policing and Community Safety Bill

1 The Association of Garda Superintendents

The Association of Garda Superintendents represent members of An Garda Síochána at Superintendent rank in An Garda Síochána. There are 168 Superintendents in An Garda Síochána. The National Executive Committee of the Association of Garda Superintendents comprise of 10 experienced Superintendents who each on average has approximately 30 years’ service in An Garda Síochána through the various ranks up to and including Superintendent.

1.1 The Role of Superintendents

Superintendents are engaged in a leadership and management role in An Garda Síochána. They are responsible for managing and maintaining operational policing in all of its forms, particularly in the area of criminal legislation enforcement, investigation of offences and crimes and their prosecution.

Superintendents are also currently engaged in the investigation into allegations of misbehaviour of members of An Garda Síochána of lower ranks because of either internal disciplinary matters, criminal wrongdoings alleged or following receipt of complaints through the Garda Síochána Ombudsman Commission. We are charged with conducting investigations on behalf and in conjunction with the Garda Síochána Ombudsman Commission. The criminal investigations conducted into Garda members are the same as those of any criminal investigations. We utilise the powers available to us in a similar manner to those utilised in any investigation.

The Garda Síochána (Disciplinary) Regulations, 2007 prescribes the manner in which investigations into disciplinary matters are conducted in terms of notifications, timeframes, procedures and processes. In many instances criminal and disciplinary investigations are initiated simultaneously, but criminal investigations must be completed first so the disciplinary matters are left in abeyance until the criminal matters are finalised.
1.2 Submission Focus

This submission is based on our appreciation of the need for equity in terms of addressing all matters of proposed oversight. We have reviewed the legislative provisions under each Head, which includes the intrusive powers afforded to the Garda Ombudsman.

We are concerned that the Bill is delivering a clear message that An Garda Síochána is continually involved and engaged in systemic and widespread lawlessness. We absolutely accept that criminality has no place in An Garda Síochána and are continually active in addressing any such activity.

We fully appreciate and accept the need to have governance, safeguards and regulation as part of oversight but we are championing the necessity to provide individual and collective members of An Garda Síochána with the legal, constitutional and human rights protections afforded to each member of Irish society and those who visit this jurisdiction.

1.3 Submission Layout

We have addressed our concerns in a sequential and Head-by-Head basis. We have tried, wherever possible, to minimise reference backwards to previous heads without providing context whilst at the same time attempting to retain fluidity and minimise repetition.

We have attempted as much as possible to refrain from unnecessary commentary and have tried to confine it at all time to contextualising and explaining our interpretations of the proposed provisions and the issues we are highlighting.

1.4 Bias

We fully accept that we are in a position where bias is applicable based on our experience, professional activity and role. We have attempted to minimise or eliminate any bias and base our entire submissions on an absolute need to ensure that the Garda organisation remains functional, without over bureaucratising its functionality. We are concerned at the apparent over politicising of policing and feel that the public rhetoric has been toward the need for a
journey in the opposite direction whereas this proposed legislation appears to reverse that perception.

1.5 Executive Summary

The Association of Garda Superintendents have reviewed the entirety of the Policing and Community Safety Bill and make appropriate submissions where they see fit.

Significant concerns are held in relation to the establishment of the proposed Board, which appears to be significantly lacking in independence and any realistic degree of separation from the operational aspect of policing in this jurisdiction. There is a substantial unease at the potential, perhaps non-intentional, to populate the Board with political contacts and associates. This could have grave outcomes in terms of politicisation, resulting in minimal transparency in terms of separation of powers and stymying policing independence.

The same concerns are held in terms of the composition of the proposed new Authority. Being empowered to self-govern is perplexing and does not instil confidence in true oversight intentionality. The absence of detail, procedural clarity or its enunciation is tantamount to empowerment of poor practice, questionable governance and confusing standard setting.

The establishment of additional types of behavioural, ethical, discipline, conduct and performance policies in addition to the criminal law adherence aspects for An Garda Siochána seems to be overly complicated. The Bill is significantly deficient in detail and very ambiguous in these areas. Each Garda member is absolutely entitled to the same legislative, constitutional and human rights protections as any other person in this jurisdiction. There is full acceptance of essential adherence to standards set, to uphold the law in its various forms and the necessity to address any such failures by An Garda Siochána. This however, must be balanced with ensuring the same protections exist for the Gardaí should they be subject to investigation.

Procedurally the Bill appears flawed, vague and seems to be utilising wide brush strokes to address perceived issues. It attempts to afford additional powers to various bodies whilst creating an overtly beau acratic, complicated and seemingly populist notion of oversight. The attributing of additional powers to the Garda Ombudsman is imprecise, indistinct and not in
keeping with the normal course of apportionment of investigative powers. This particularly relates to search, demanding names and addresses and proposed prosecutions. Failure to take cognisance of existing case law and precedent is extremely concerning.

Overall, the Bill has the appearance of double standard setting with an overtly critical hold on the activities of the Commissioner in acute areas where political interference may be inferred. The independence of An Garda Síochána, the unrestricted execution of policing powers and the conducting of policing functions may well be a major casualty if the Bill as it currently stands progresses through the various stages to enactment.
2 Observations on the General Scheme of the Policing Security and Community Safety Bill

2.1 Long Title – page 12

The text incorporates holding the Garda Commissioner to account for the performance of his or her functions ... and so on, including the establishment of a number of bodies to participate in that process.

It does not include holding those bodies to account for any of their actions, which is somewhat perplexing in the notion that they would, or could be, the epitome of perfection.

This section and the entire Draft Bill has also neglected to address the safeguarding of the safety, security, wellbeing and welfare of the Garda organisational membership and their essential resourcing. Is there a belief that the Garda Síochána membership do not require such support, only scrutiny and oversight, as if this is the case it is a perverse ideal and one contrary to the espoused focus on human rights, equality and diversity protections. Surely the Irish Constitution is intended to protect all, not only those whom the Gardaí police?

2.2 Part 1 – Preliminary and General Matters.

2.2.1 Head 2

- Page 16 – “policing services” has excluded the provision of ‘security services’ whereas in Head 3 security services are defined clearly indicated these are key policing functions. Is there a particular reason for this? Clarity is required.
- Page 17 – “relevant divisional officer” has not included the possibility of more than one divisional officer overlapping the relevant safety partnership functional area. The reference to the chief superintendent should be replaced by a chief superintendent.

2.2.2 Head 3 – page 18

- (1) (a)(i) does not mention the Official Secrets Act, 1963. It does leave it open to include this Act but this is surely a fundamental legislative piece relative to this area which should be specifically mentioned.
- (3) Is it feasible to leave the issue of a dispute as to categories to the Minister when the Commissioner is best placed to decide on this issue? This is an unnecessary delay risk as set out given the potential importance and urgency of any issues arising.
- (4). No timeframe is set out for decision making which places additional unacceptable risk on the Commissioner and the Garda organisation where the delay will, in all likelihood, have negative implications for the organisation.
2.3 Part 2 – An Garda Síochána

2.3.1 Head 6 – page 21

- (1) Why are ‘the’ and ‘An’ both interchanged as a prefix for An Garda Síochána?
- (2) The word ‘shall’ should be used instead of ‘may’ in terms of the continued funding of An Garda Síochána. The use of ‘may’ could be taken as being an optional decision whereas this is not the case.

2.3.2 Head 8 – page 23

- (1) This section makes no mention of ‘offending’ prevention. It refers only to crime whereas many of the undesirable conducts encountered during policing fall within the lower categorisation of offences as opposed to crimes.
- (1) (i) An Garda Síochána share this responsibility with the Road Safety Authority which should be mentioned here. It is not a sole responsibility.
- (2) This firmly puts the onus of responsibility on An Garda Síochána to co-operate with other agencies but is silent on their (other Agencies) onus to co-operate fully in this regard with An Garda Síochána.
- (5) ‘Shall not’ should be inserted in place of ‘…is not to be taken…’ in the first line of this subhead.

2.3.3 Head 9 – page 24

- (4) and (5) Both subheads need qualification to establish the circumstances where the Director of Public Prosecutions can, or may, take such action as set out.

2.3.4 Head 10 – page 26

- This Head is silent on the position of the Commissioner in respect of his or her becoming a member of the Board. Head 11(5) prohibits the Commissioner being a member of the Board but specifies a clear function thereat. Is it feasible or realistic to have the Commissioner charged with running the organisation but him or her being prohibited from being on the proposed Board? This is especially problematic when the Commissioner is charged with being the Accounting Officer for An Garda Síochána under Head 58 (1) but has no defined input into the crucial decision-making apart from a possibility of being allowed speak at a meeting of the Board. Is it now proposed that the Commissioner will relinquish his or her reporting role in terms of expenditure and that the Board will take responsibility for this?
(4) From a diversity and inclusion perspective the reference to gender in this subhead may require review. In the context the language utilised seems to be out of date and overtly confined to only female and male.

2.3.5 Head 11 – page 29

(8) This subhead is extremely vague and potentially open to significant adverse misinterpretation. The specific powers of the Board need to be set out so that they can be examined, analysed, assessed and debated. As it stands this is not reasonable and would appear to completely stymie and veto the Commissioner from managing the organisation without continued interference with the essential Garda functions and responsibilities.

As a selected committee, its independence from the Oireachtas could come into question.

2.3.6 Head 12 – page 31

(10) The notion that the Board shall regulate its procedures by rules or otherwise is extremely vague and open to misinterpretation. Surely, where a Board is established for the stated purposes of governance and oversight, it must have similar transparent and accountable structures clearly in place for its own maintenance.

(11) This subhead seems to authorise the Board operating outside of any stated policies and procedures. Is this not exactly the opposite of what it is established to monitor and enforce?

2.3.7 Head 13 – page 32

(1) The inclusion criteria, or rather the exclusion criteria, does not include former members of the various houses of the Oireachtas or European Parliament or Local Authority, or the other bodies listed. This still potentially leaves it open to political affiliations and allegiances.

(3) This does not include former politicians or journalists who have previously been involved in challenging the state functions, powers or actions to address criminality or subversive activity.

Is there a compellability to permanent secrecy by those selected as Board members? It does not appear to be included under Head 67 where references are made to code of ethics and integrity, which is not the same as compellability to secrecy.

Head 37 (Member’s solemn declaration) should also be fully applicable to each member of the Board.
2.3.8 Head 17 – page 37

- (2) The Board’s expenses become payable from the Commissioners resources. This means that the cloak of independence proffered as existing between the Board and An Garda Síochána becomes non-existent. The scarce resources available to the Commissioner to manage policing will become partially depleted due to servicing this demand and pressure will be on the Commissioner to ensure the Board are well resourced. This will effectively deplete the resources available to the various section of An Garda Síochána to manage their obligations and requirements.

2.3.9 Head 18 – page 38

- (1) This is an added drain on resources available to the Commissioner and not an independent function of An Garda Síochána.
- (2) & (4) This takes away a senior Garda staff member with additional staff members from normal functions which reduces personnel resources and remains part of the staffing costs of An Garda Síochána.

2.3.10 Head 20 – page 41

- This Head has not included any option for consideration of the views of the Commissioner and does not include tenure of office provisions.

2.3.11 Head 21 – page 42

- (3)(b) & (4) This has not taken into account where more than one of the Deputy Commissioners are appointed on the same date to their position.

2.3.12 Head 23 – page 45 & 46

- (5) (a) The reference to failure to act with due diligence and effectiveness has not accounted for resourcing issues which may be responsible for any perceived failures to so act.
- (5) (c) The best interests of An Garda Síochána is a vague and ambiguous term. This could be open to partisan misinterpretation by political intervention.
- (6) The Government appears to have taken precedence in the relevant decision making from the Minister in all other instances. It means that the Minister is bypassed which effectively removes any higher-level appeal mechanism for the Commissioner apart from recourse to the High Court.
- (7)(d) This appears to give the Board an inordinate amount of influence and power in the decision-making in this aspect.
• (9) Undue delay is not defined; no timeframe is established to determine decision-making timelines. This belies the principles of natural justice advocated elsewhere in the document.

• (10) This cannot epitomise the principles of natural justice as it primarily constitutes a one sided statement of dismissal in the absence of any real judicial process. The provisions of Head 24 appear to be at the choosing of the Government, not mandatory.

2.3.13 Head 24 – page 47 & 48

• (1) (a) & (b) – The person chosen or the enquiry mentioned are not defined, they do not have established clear criteria or parameters and are tasked by the Government without a clearly established visible process to permit the Commissioner to defend his or her name or position in the circumstances. No right to appeal any aspect of this procedure is laid out under this Head.

(6)(b) This provides for the Board to be advised of the result as a priority before the Commissioner as it is laid out, which is contrary to natural justice.

2.3.14 Head 25 – page 49

• (1) (d) & (e) – These appear to put an even higher reporting onus on the Commissioner as this now includes the Minister, the Authority and laterally the Board under subhead 5 of this Head.

2.3.15 Head 26 – page 51

• (2)(b) This is extremely broad and does not provide for the exigencies of the service, scarce resources, crisis or other issues arising over which the member has little or no control. It is too prescriptive whilst at the same time being overarching in covering all possible situations illogically.

• (2)(a), (2)(b) & (2)(4) There is no clarity in regard to the actual context of the words punctual and prompt. One duty might involve a simple report which can be very quickly attended to whereas another duty/matter/investigation might require months to complete and still be an appropriate and timely response.

2.3.16 Head 27 – page 52

• (a) & (b) Both belie the aforementioned provisions where the actions of the Commissioner are scrutinised by the Board, the Ministers and the Government in terms of acting in the best interest of An Garda Síochána. It has the appearance of a catch-all set of Heads to ensure that the Commissioner is bound by oversight but can take responsibility for certain activities without advising the Board, the Ministers and the Government.
This seems to protect the other parties when it suits and let the Commissioner be cast adrift when it comes to the more controversial aspects of policing such as dealing with particular groups or individuals as set out in (b) (i) & (ii). The perception of portraying of ‘clean hands’ by the other parties seems arbitrary. This is especially pronounced when Head 28 (1) demands a full report in the aftermath, presumably to decide on the performance.

2.3.17 Head 28 – page 53

- (2) In line with subhead (1), the Commissioner is obliged to provide not just a report but also all requested documentary material. This contradicts the independence perception of Head 27. It begs the question of the constitutionality of such a demand given the claim of independence of the legislature.

This Head is silent on the extent to which the records required and mentioned remain confidential given the implications of leakage, which would most certainly affect operational activities and potential legal actions following Garda activity.

2.3.18 Head 29 – page 54

- (5) This must include a provision that any publication cannot breach privilege, operational trade craft details or interference with an investigation.

2.3.19 Head 30 – page 55

- (5) A clear timeframe should be established to avoid arbitrary and unreachable timelines being specified by the Minister.

2.3.20 Head 32 – page 57

- (1) (b) A clear definition of what bank accounts of any description may be opened would be much more reasonable than having to seek the prior consent of the said Minister in each instance. This is unworkable, cumbersome, inefficient and adversely disproportionate to the responsibilities and remit of the office holder of Commissioner.

- (2) The same principles apply here, clear parameters of where contracts should be set out as opposed to seeking approval each time one is necessary.

2.3.21 Head 36 – page 61

- (1) Should Student Garda be a subheading of Garda as they are in a slightly different position than Garda members? They do not have full policing powers but may be
deployed in the operational environment on occasion as part of their training programme and regime.

• (2) This is a matter which needs to be fully discussed with the Garda Associations given its implication for the membership, makeup of the ranks and changes to not only work practices but also to numbers of supervisory ranks.

2.3.22 Head 37- page 63

• Is there retrospection included in this Head for all current members as the vast majority of current existing members, save those who were attested since 2016/2017 have not been so appointed? It would be logical to include a provision stating that all existing members at the time this Draft Bill becomes law would be deemed members in line with their current employment status. The Head as it is set out appears to be a backdoor method of having all members sign the Code of Ethics afresh, in some instances for the multiplicity of times doing so.

2.3.23 Head 38 – page 64

• Why is the approval of the Board necessary to appoint a member deemed suitable following a selection process? This appears to contradict the rationale behind the Boards remit.

2.3.24 Head 39 – page 65 & 66

• (2) Does this refer to the rank or the job held? It is ambiguous. It has serious implications for An Garda Síochána if the Board can effectively approve the removal of a member of any rank from their current position. Why would the Board have a say in the operational decision making concerned?
• (5) **Undue delay** needs to be clearly defined, as elongated suspensions are inappropriate, arbitrary, and not conducive to proper organisational management.
• (7) Any such issued statement is in breach of natural justice and the presumption of innocence. It may adversely affect an appeal or subsequent decision making processes.

2.3.25 Head 40 – page 67 & 68

• (2)(b) This may be prejudicial to a person; particularly those subject of inquiry and potential self-incrimination through compliance with such a direction. It is contrary to the principles of natural justice. This is particularly relevant to reports, confidential matters and personal documentation.
(4) How can such a matter be prosecuted?
How and under whose direction can proceedings be initiated?
Is this a summary matter?
Is it a hybrid offence or does the member have a right of election?
Who is the prosecutor in such an instance?
What presumptions are established?
What defences are available to the accused person?

(5) This clearly implies that compliance with subhead 4 could result in a prosecution under that section.

(6) (d) & (e) Both subheads are listed after all other parties, particularly the Authority and the Board have been notified. This is not in keeping with the established principles of fairness or entitlements to appeal.
No timeframe is listed for complaint with the notification obligations, which has significantly adverse implications for appeal parameters.

2.3.26 Head 41 – page 69

(3) This section does not contain equivalent provisions in terms of an enquiry to be conducted as set out in similar circumstances under Head 40. This Head (41) relates to ranks below the rank of Chief Superintendent and the clear implication and indication is that it should be much easier to dismiss members of those lower ranks than Chief Superintendents or Assistant Commissioners. This is not equitable or fair.

(3) (b) & (c) No timeframe is provided relative to response times allowable for members who have been given time to respond to a stated basis for opinion grounding dismissal, from the Commissioner. This completely contradicts the clear timeframes set out in Head 103 for Authority members. Again differing criteria are being established for differing groups which is not a fair allocation of powers conferred under legislation.

2.3.27 Head 42 – page 70

(2) & (3) These subheads directly contradict each other in basic terms regarding powers but subhead 3 also ignores immunities and privileges listed in subhead 2. This begs the question if subhead 2 should be included at all.

2.3.28 Head 43 – page 71

(1) The notion of equivalence between grades for Garda Staff and ranks of Garda members is not agreed or established. Therefore it is not possible to adhere to such a provision.
This subhead also ignores the presumption of innocence or due process in terms of investigative powers where a potential criminal act is suggested.
• (2) This subhead fails to account for a reasonable excuse for not answering any such direction.
• (3) The potential level of penalty set out as being dismissal is overly penal given the possible range of issues being addressed. This is akin to saying any person found guilty of theft may face 14 years imprisonment without setting out the lower range of penalties also.

2.3.29 Head 45 - page 73

• (1) This subhead seems to indicate that Garda Staff personnel may be allocated Garda powers. This needs to be clarified and clearly set out as this is a major issue in terms of their management, the role of Garda members and the responsibilities of Superintendents.
• (3) (a) Surely the rates of pay for Garda Staff are to be in line with public sector rates. This is similar to the ranks order pay rates already established for Garda members. If not, then each promoted Garda member would be also entitled to negotiate their own salary conditions.
• (6) Is this an intended subhead as no such notification has been received by the Associations in this regard to date? Surely, the time for its discussion is now and not post implementation of enacted legislation?

2.3.30 Head 46 – page 74

• (2) (a) & (b) Is this to be a different declaration to that accepted by new Garda members? Are Garda staff to be similarly bound by the same rules and undertakings?

2.3.31 Head 48 – page 76

• (2) This subhead is not reasonable given the existing agreements in place with the ICPSA and also the various legal and Industrial Relations representatives engaged with continually. This is in addition to the various bodies and groups engaged with as part of their functioning, not least being the Workplace Relations Commission and Labour Court. As this subhead it laid out it is clearly unconstitutional and completely contrary to industrial relations processes and protocols. It is partially addressed under subhead 5 but not sufficiently.

It has the appearance of being in place to muzzle legitimate Associations and the work they undertake on behalf of their members.
• (3) This effectively prevents the formation of any other representative association established to address pay, pensions or conditions of employment. This is a very broad legislative block to legitimate activity on behalf of members without sight
of any number of potentially relevant situations where this may become necessary. This subhead needs to be redrafted to take potential legitimate eventualities into account.

- **(4)** This subhead avoids and ignores any appeal provision. This places the Minister as the final arbitrator in a situation where the Minister will, in all likelihood, have a vested interest in the decision making process. This is not in the spirit of industrial relations protocols or the intended constitutional protections for all citizens.

- **(5)** This subhead interferes with the independence of the legitimate activities and decision making of the Associations. It places a reporting onus on the Associations in relation to all of their actions and engagements. It is potentially the ultimate abuse of privacy in this area.

- It also ignores existing agreements and arrangements already in place under subhead *(5)(a).*

### 2.3.32 Head 49 – page 77

- **(2)** The word ‘must’ at the end of the first line of this subhead should be replaced by ‘shall’ which is a recognised term in such circumstances.

- **(2)(a), (b),(c)** This subhead does not include the Associations or Garda members in any way in terms of consultation, idea sharing or relevant inputs.

### 2.3.33 Head 50 – page 78

- **(2)** The word ‘shall’ should replace the word ‘must’ on line two of this subhead.

- **(2)(a) & (b)** The Associations should be specifically included in this subhead, it is essential to not ignore their important role in the management of all areas of performance.

### 2.3.34 Head 51 – page 80/81

- **(1)** In line with best international practice any 3-year strategic plan must be accompanied by a 3-year, or preferably a 5-year, budget from the exchequer. This should be included in this subhead.

- **(3)(v) & (vi)** This seems more akin to an operational plan than a strategic plan when this level of detail is included.

- **(4) (a)** This includes the Authority effectively deciding what the strategic plan will be in terms of policing services as any rational interpretation of this subhead would be that the approving Minister (under subhead *(6)* ) would be briefed by the Authority in advance .

- **(6) (b) & (7)** The Commissioner is not included in the consultation which seems perverse given his or her drafting of the plan.
2.3.35 Head 53 – page 84

- As per Head 53(1) and Head 55(1) the annual plan should form part of a 3 or 5 year budget plan.

2.3.36 Head 56 – page 91

- (2) & (7) The Commissioners autonomy to plan is extremely restricted by both subheads. The Board and the Minister can veto all, or any aspect, of the submitted plan to the detriment of the Commissioners policing and resource intentions. The significant difficulty will lie later on when issues arise regarding scarce resources and the Commissioner being held to account for what he or she was directed to submit.

2.3.37 Head 58 – page 94

- (3) (a) This sub head is a clear contradiction of the proposed and existing Code of Ethics in place for An Garda Síochána by which the Commissioner is also bound. This sub head prevents the Commissioner from voicing his or her legitimate concerns regarding this area of responsibility. It is firmly resting any responsibility for inadequacies in performance due to resourcing issues on the shoulders of the Commissioner without recourse to explaining the full facts of the situation.

2.3.38 Head 59 – page 95

- (5) This firmly places the onus on the Commissioner to take High Court action against the Government established body. It is not a reasonable onus of responsibility without the intervention of the Minister or Government as in many of the other sections. As this is potentially a controversial area it seems that the Minister and Government or Board or Authority are protected whereas the Commissioner is left significantly exposed and alone.

- (9)(a) This is identical to the issues raised in Head 58(3)(a) where again the Commissioner is prevented from providing a relevant opinion if the circumstances merit it.

2.3.39 Head 60 – page 97

- (2) (a) (3) (9) This Head is somewhat confusing as it effectively purports to have the Board establish an audit committee but this contains three of its own members who will then be reporting to the Board. In effect this reflects the constant criticism levelled against An Garda Síochána of investigating itself, thus rendering
its independence questionable. The Board retains autonomy to appoint a chairperson and to remove any member it wishes. This is reiterated in Head 62(7) where the audit committee reviews its own effectiveness and reports to the Board.

- **(2)(b)** The level of professional qualification in accounting or auditing should be clearly stated as this could be a low level qualification which would become open to question.

- **(9)** The provision of secretarial services and other resources by the Commissioner is completely at variance with either independence or prudent usage of the Commissioners budget, which as a result will be diverted away from other policing related issues. The Board and all of its functions should be funded and resourced by the exchequer, independently of An Garda Síochána.

### 2.3.40 Head 61 – page 98

- **(3)** Does this have any impact on agreed reports relating to various issues addressed during conciliation and arbitration and the WRC? If it does then this is a significant industrial relations issue which must be addressed within that forum.

### 2.3.41 Head 62 – page 99/100

- **(4)** Does this include Superintendents as this needs to be fully fleshed out given its implications for individual Superintendents being held to account in such a manner? What does attend a meeting of the committee entail exactly?

- **(5)** Does this include the District audits/inspections processes currently in place?

- **(7)** This is addressed under Head 60 and relates to self-governance, which is questionable practice.

### 2.3.42 Head 63 - page 101

- **(1)** Who is to be consulted in advance of the preparation of the governance document and the said principles? Are the Associations to be included in any discussions?

- **(1)(d)** There are significant shortcomings in existence regarding protected disclosures within An Garda Síochána which must be addressed in advance of this document being prepared. There is no existing policy to address receipt and management of anonymous correspondence, this must be addressed in conjunction with the protected disclosures policy.
2.3.43 Head 64 – page 102

- (3) (h) This is a very broad option to include and leaves An Garda Síochána open to additional critical commentary outside of what is otherwise listed in the Head.

2.3.44 Head 66 – page 103/104

- (1) (a) Is this a new code of ethics? Why is the current one being replaced if that is the case?
- 1(b) What are the new provisions to include under this sub head? What safeguards are being established to protect from false, vexatious, mischievous or misleading complaints?
- (4) Does this code of ethics also relate to both the Board, the Audit Committee and the Authority?
- (7) Is this a renewal of the previously controversial process whereby members are repeatedly requested to sign the code of ethics? Why is this the case?

2.3.45 Head 67 - page 106/107

- This Head is silent on ethical conduct by the various parties mentioned whilst not working and in fact specifically excludes this aspect. This is problematic in two respects given that the onus is on all Garda members to behave ethically at all times and also there is no apparent consideration relative to behaviour of the named parties whilst off duty – not working which could potentially impinge on their suitability for the role assumed. By not mentioning this aspect it will be difficult to take affirmative action against them otherwise.
- (9) On what legal basis is a code of ethics admissible in proceedings, either in a court or other tribunal as stated? How can this be used in evidence if no specific offence is committed relative to that document?
- A code of ethics is not mentioned here in respect of either the Authority or Board members.

2.3.46 Head 68 – page 108/109

- (1) There is no mention of the Authority or Garda Ombudsman Commission members in this subhead. Surely they must be included.
- (4) This subhead should include making a disclosure to the Board or the Audit Committee.
2.3.47 Head 69 – page 111/112/113

- (6)(a) & (b) The Board should be included in these subheads.
- (7) Due process must be visible in terms of the enquiry, self-incrimination and the legal entitlements of any person being investigated.
- (9) How can this be processed as a contempt of court given the absence of a court sitting? How can any perceived contempt be purged? When is the contempt deemed to have expired? Who deems that the case? What is the position relative to legal representation and its entitlements?
- (10) This appears to be double jeopardy and in reality is two bites of the cherry. If contempt of court is deemed applicable then it is not in line with any due process to also have a person subject to disciplinary proceedings for the same incident.
- (11) Does this subhead mean that any documents supplied arising from contempt of court proceedings cannot be used in any proceedings given that contempt of court is essentially not a criminal matter?

2.3.48 Head 70 – page 114

- (3) Does the vicarious liability in place not extend to each individual member?
- (3)(a) This subhead appears to be a new departure from the existing position and adversely affects each member employed in the organisation.
- (3)(b) This subhead also follows the same principles established relating to vicarious liability.

2.3.49 Head 71 – page 116

- (1) (c) Normal costs applicable for any other individual should be included here and no costs apportionable to any members arising out of proceedings relating to their work.

2.3.50 Head 79 – page 127

- (1) (b) The usage of spouse in the context of this subhead would appear outdated and should be replaced by partner.

2.3.51 Head 83 – page 132/133

- (3) This subhead is silent in relation to emergencies where action is taken to address the crisis encountered. The ...with reasonable cause.... clause should be included to address this.
- (5)(a) This should include performances in schools and other local venues.
2.4 Part 3 - Community Safety

2.4.1 Head 85 – page 136

- (2)(c) This subhead should include the principle bodies concerned to establish a clear menu of agencies involved.

2.4.2 Head 87 – page 141

- (4)(c) This subhead should clarify whose responsibility the development and implementation of policing plans are. This is clearly a role for An Garda Síochána whereas the National Office being established is surely a support for that as opposed to owning this function.

2.4.3 Head 89 – page 145

- This is similar to other Heads and subheads previously referred to in that the process seems to lack full transparency or accountability with the Minister and Government leaving crucial decisions to appointed persons who are also bound to report to them. This needs to be reviewed.

2.4.4 Head 95 – page 154

- (1) This subhead needs clarity in that it is vague and ambiguous as regards ‘taking responsibility’ and ‘providing support’. The continued bequeathing of responsibility onto An Garda Síochána where gaps exists in other service provision in a wide range of non-policing issues cannot prevail. Clear delineation of responsibility and defining support provision must be established for each party to this aspect, is vital.

- (2) The addition at the end of this subhead ‘...cooperate as appropriate with An Garda Síochána and each other’ needs to be fully set out in clear unambiguous terms. The net effect of this subhead seems to be that An Garda Síochána are delegated overall responsibility for all mentioned aspects whereas ‘...the prevention of harm to individuals in particular those who are vulnerable or at risk,...’ refers to a wide ranging and extensive grouping, many of whom should not have to be dealt with by An Garda Síochána as other agencies are clearly established to deal with their needs. Grouping prevention of harm to vulnerable individuals into the same context as crime prevention is not helpful, productive or intuitive.

This is one of the major social issues regularly falling within the extended scope of An Garda Síochána who are not equipped, trained or suitably empowered to address those issues. This subhead appears to further confuse this important issue and once
again vests in An Garda Síochána responsibility for issues not appropriate for policing intervention.

2.5 Part 4 – Establishment and Functions of Policing and Community Safety Authority

2.5.1 Head 100 – page 159

• (1) Is a selection competition the same as a recruitment competition?

2.5.2 Head 102 – page 163

• (1) This subhead, similar to the composition of the Board has not excluded former politicians, former members of either houses of the Oireachtas or European Parliament. Surely the purpose of the Authority is to provide a non-political grouping to assume the role prescribed. This needs to be clearly and transparently demonstrated within the remit of the legislation. Oversight body interchangeability is not conducive to transparent governance and should be excluded given the potential for conflict and previous public transmission of individual views on policing issues. Surely impartiality and absence of demonstrable independence are crucial characteristics of any proposed member charged with responsibility for overseeing the same traits of An Garda Síochána personnel. Absence of conflict of interest is an essential aspect of selection criteria for this forum.

• (2)(a) Should this include also those who were previously declared insolvent or bankrupt, also?

2.5.3 Head 104 – page 167/168/169

• There is no meaningful mention in this Head or section relative to ensuring that the Gardai have the resources, personnel and support, including welfare supports to equip them to meet the onerous range of responsibilities foisted upon them. Holding an organisation to account without adequately supporting their infrastructure, conditions of working and welfare needs is hardly conducive to good governance.

• Similarly, the setting of targets structures must be clearly established and set out to ensure that realistic and reasonably attainable objectives are set and subject of assessment.

• (1) The stated objective of the Authority mentions independent and transparent assessment of the performance of An Garda Síochána. It is essential that independent and transparent assessment actually occur.
The **presumption of guilt** cannot be allowed to be the starting point of any assessment and commentary by the Authority members. All of them, including the Chairperson, must not cast judgement in advance of any formal assessment and confine their public commentary, social media exclamations, and other attributable utterances to neutral matters.

- **(2)(b)** Is the review of performance of An Garda Síochána in the first line of this subhead not an identical function of the Board? Is such duplication necessary?
- **(2)(ii)** Why are the other agencies under **Head 85** not included in this subhead? It is concerning that An Garda Síochána would be the only organisation subject to formal oversight in this regard and certainly would indicate a potential partisan approach.
- **(2)(k)(i)** This subhead should include a provision prohibiting a repeat of the emotive commentary emanating from the Policing Authority around the use of Spit-Hoods during the Covid-19 pandemic. It is neither helpful nor productive to fuel fears of equipment abuse where no evidence, either anecdotal or actual, ever existed to support this ill-conceived presumption.
- **(2)(k)(iii)** Why is this subhead necessary when the Garda Ombudsman already have a clear role in respect of investigating, reporting and oversight of complaints made against Garda members? Will the Authority take responsibility to address the number of false, malicious, vexatious and deliberately contrived complaints against the Gardai?
- **(2)(n)** How is it intended to assess **best policing practice**? Is there any intention to recognise already existing best policing practices in this jurisdiction as this seems to be sadly absent in the legislation focus?
- **(4)** This is a very broad statement where it states ‘**Subject to this Act, the Authority may do anything which it considers necessary to perform its functions**’. What governance is in place to ensure an ethical, legal and human rights adherence approach is taken by the Authority? What are the Code of Ethics, Confidentiality and Impartiality requirements, procedures and related documentary structures for the Authority members? Are they being held to be above reproach in all areas?

This draft legislation appears to have ignored the fact that all Garda members and personnel have full human rights, constitutional and legal entitlements and that the presumption of innocence, rather than the presumption of guilt applies.

### 2.5.4 Head 106 – page 171/172

- **(11)** This seems to authorise self-governance, which is the absolute corollary of why the Authority principle is established. The prescriptive focus of **Head 104** is somehow absent in this subhead.
2.5.5 Head 107 – page 173

- (3) The committee membership referred to here requires clear parameter in terms of its constituents. Inclusion criteria must be set out in unambiguous terms. The danger of over politicisation of the Authority through this avenue must be fully mitigated through the legislation.
- (6) This again needs to be clearly set out given the governance role of the Authority.

2.5.6 Head 108 – page 174

- (1)(c) Does this refer to external police becoming Authority members or employees or to become engaged for other purposes? The intent of this subhead is not clear from its wording.
- (3) This subhead is completely devoid of parameters or oversight provisions.

2.5.7 Head 109 – page 175/176

- (2) This contains no stated timeframes for compliance, unlike those for An Garda Síochána.

2.5.8 Head 110 – page 177

- (3)(c) Are there limits on the numbers employable in this regard?
- (3)(d) The budgetary constraints imposed on An Garda Síochána appear to differ to those attributable to the Authority.

2.5.9 Head 111 – page 179/180

- (4) Are there any limits to the term of office? The head is silent in this regard unlike for the various other parties throughout the Draft Bill.
- (5)(a) What is deemed to be the appropriate experience, qualifications, training and expertise for the appointment? Is a criteria established in this regard?
- (7) The process or its operation to remove the Chief Executive is not set out. It seems unusual that the Authority can remove its Chief Executive albeit with the approval of the Minister. Why is the Minister not responsible for making the decision simpliciter, as opposed to yet another layer of self-governance?
- (10) The Authority seem to be able to veto the Chief Executive as opposed to the Minister holding this power. This is again akin to self-governance.
2.5.10 Head 114 – page 183/184/185

- (1) This is a very vague subhead. All relevant powers should be clearly listed and explicitly stated as in any legislation.
- (3)(a) Unannounced visits needs to be clearly defined and set out in respect of exactly what this means, the scope of the visit, entitlements of the visiting personnel in addition to those present when the proposed visit occurs. Including it in a memorandum of understanding alone is not an ideal protection for workers present at the time and whose legitimate activities will be invariably interfered with.
- (3)(c) A list of suitable persons needs to be included here as it is not acceptable to allow the accompanying of just any person to participate in such a visit. All legislation limits the persons who can attend on a search warrant execution and this is akin to that process.

The purpose of the visits must be clearly set out, in documentary form, in advance of each visit and served on the person in charge of the Garda premises before the commencement of the visit for scrutiny, and to allow necessary enquiries to be conducted to ensure no operational activity is compromised as a result.

- (4) The provisions herein should be clearly posted in prominent locations in each Garda station and a copy served on the members present upon arrival by the Inspectors party.
- (6) This subhead provides an option for the Authority to appeal the Commissioners decision but what provisions are envisaged to allow an appeal by the Commissioner in relation to any adverse outcome from that process?

2.5.11 Head 115 – page 186

- (1) Who determines ‘where it is appropriate’ to conduct a joint inspection? This should be clearly set out.
- (2) This subhead is silent in relation to service of the joint inspection plan on the Commissioner in advance of the search. Operational integrity and non-interference with sensitive and critical operational activities, whether intended or otherwise, must be preserved by the Commissioner.
- (3) Is it intended that the Garda Ombudsman be one of the ‘prescribed inspections bodies’? If so, this would be a clear breach of process and well outside the scope of fair procedures, ethical activities or human rights entitlements. The use of the word ‘appropriate’ in this context is open to selective interpretation and must be clearly defined.

2.5.12 Head 116 – page 187

- (2) The Commissioner must be afforded an opportunity in advance of submission of any report to the Minister to provide an assessment of its contents prior to its tendering. This is a normal practice to allow for accuracy and balanced reporting.
• (6) This subhead needs to provide a realistic timeframe provision given the complexity of issues faced from such reporting. It must also have a provision allowing the Commissioner address any resource shortage as a factor in addressing any issues highlighted, identified or prioritised in the report.

2.5.13 Head 117 – page 188

• (1) The Commissioner should have sight of the report prior to its finalisation to address any obvious anomalies contained therein.
• (3) The right to exclude any material should also be vested in the Minister on consulting with the Commissioner who is best placed to make a reasoned assessment of this risk.
• (4) This is a reflection of the submission under subhead (1) of this Head but should be clearly set out as to occur in advance of the reports completion and submission to the Minister.

2.5.14 Head 118 – page 189

• (1) This Head and subhead is silent on resourcing any such remedial or reactive active activity by the Commissioner. The Commissioner cannot be expected to address new and/or emerging issues without adequate resourcing.
• (3) Resourcing should be specifically stated under this subhead.

2.5.15 Head 119 – page 190

• (2)(b) This must exclude secret or confidential material, the release of which could and possibly would prejudice sensitive and ongoing operational matters.
• (4) The publication of a report or any part of it under this Head must be subject to clear limitation to prevent operational risk relative to investigations, security or risk to individuals.

2.5.16 Head 120 – page 191

• (2)(b) This subhead must contain the clause preventing release of any prejudicial information causing operational or individual personal risk.

2.5.17 Head 122 – page 193/194

• (9) This subhead limits freedom of speech to an extent protecting the Minister but is silent on the issue of Authority members utilising social and other media to air personal views on An Garda Síochána, its members and actions.
2.5.18 Head 123 – page 195

- This Head is completely silent on a code of ethics, confidentiality or impartiality process set out in practice and evidenced in documentary form. Head 125 (page 197) similarly omits to reference to any such documents or codes of practice, process or ethics.

2.5.19 Head 126 – page 198

- (1) This subhead is silent in respect of the Authority members apart from the Chief Executive. It has a reference to staff of the Authority which is presumed not to include the Authority members who would appear to be excluded under (1)(a). This is surely an error of omission or an oversight, which must be corrected. Are people mentioned and to which this code of conduct refers obliged to sign in acknowledgement of its receipt and intended compliance as per the requirements of An Garda Síochána members? Is this document to be published on the internet or the Authority website? If so, this should be prescribed as per similar provisions for other organisations listed in this Draft Bill.

2.5.20 Head 127 – page 200

- This Head is silent on publication or posting of any material or commentary relevant to their role and to policing by the individual Authority members. Impartiality must be the cornerstone of this organisation and its members must not air personal views, which display bias or feed into public opinion.
- (2) This section does not include ‘prejudices the safety or reputation of any member of An Garda Síochána including Garda Staff’ when referring to ‘likely to have harmful effect’.

2.6 Part 5 – Office of the Garda Síochána Ombudsman

2.6.1 Head 140 – page 216

- (6) As with other Heads of this Draft Bill former politicians, including Oireachtas or European Parliament members should be excluded in addition to those listed in (6)(a) to (d) inclusive. A similar provisions relative to former members of those organisations listed under (6)(f) and (g) should be included. The principles of impartiality and absence of political influence must not be just stated, it must be fully visible and transparent.
2.6.2 Head 141 – page 218/219

- This Head should include a provision that the personnel considered as Garda Ombudsman and Deputy Ombudsman should not be members of, or affiliated to, any political party whatsoever.

2.6.3 Head 142 – page 220

- (1)(a) The referred to term ‘temporarily unavailable’ should be explained under this subhead. Clarity is required to avoid misinterpretation.

2.6.4 Head 143 - page 221/222/223

- (2)(a) This subhead needs to include ‘timely’ in addition to efficient and effective manner. The time taken to investigate complaints is a constant source of adverse impact on Garda members.

  Clear timelines need to be established, set out, and strictly adhered to, as the current situation leaves Garda members in limbo for considerable, extended and unexplained periods with little or no apparent transparency or accountability for those investigated.

- (2)(b) This subhead has no mention of promoting confidence in those who are subject of investigation, the vast majority of whom are not guilty of any wrongdoing.

  The victim’s legislation is equally relevant to An Garda Síochána members as it is to others. This omission needs to be rectified either in this subhead or in an additional subhead. The Garda Ombudsman have a duty to investigate impartially, not based on a presumption of guilt.

- (3) Garda staff are included in this aspect of the role and remit of the Garda Ombudsman without any explanation or justification. This is a huge departure and cognisance must be given to how practical this actually is.

  - Garda staff do not have the same powers as Garda members.
  - Garda staff are not bound by the same disciplinary regulations as Garda members.
  - Garda staff have differing roles and functions to Garda members, those being primarily to support operational policing, principally in either an administrative or technical aspect, albeit with some management responsibility in some cases, though not for operational decisions.
  - This does not differentiate between Garda staff members who are intended to be deployed in pivotal front line engagements with the public and those in the other capacities.
  - This creates an even bigger risk to Garda management who will be required to account for the actions of Garda staff and Garda members in terms of
their supervision as part of their role and responsibilities from a Garda Ombudsman investigative perspective.

- This has not been the subject of any advance warnings or discussion with either the Garda Associations or Garda Staff Unions representative bodies.
- This is a completely new work practice without any appropriate inputs, structures, processes or remuneration considerations proposed.
- Is this within the current terms of employment of Garda staff members?
- Given the proposed inclusion of Garda staff as provisionally set out, is there consideration being given to also include the Board and Authority members, their staff, employees and contractors/consultants? This is most relevant given their role in directing the Commissioner and Garda management, which filters down to operational members and staff in terms of actions and activities performed. Intrusive oversight bears responsibilities and directive activities require accountability.
- In line with the investigative remit and associated powers of the Garda Ombudsman, what processes are in place to allow for complaints in relation to their actions, inactions or activities?
- Is there a proposed code of ethics for the Garda Ombudsman, those seconded thereto and their staff?

- (3)(e) What are the parameters of the reporting under this subhead as investigations are meant to be necessarily confidential given the reputational, integrity and professional implications for the subjects of the investigations? The reporting framework set out in this subhead has independence implications from the Garda Ombudsman and it is notable that a distance is clearly in place with the Minister in this regard.
- (3)(f) This subhead contains no definitive times lines for investigation completion and this is an essential aspect of the legislative enactments to ensure fairness, transparency and due process to those subject to investigation. This includes both Human Rights and Constitutional entitlements.
- (3)(h) This is a self-appraisal and self-governance aspect, which needs to be fleshed out to establish clear governance, accountability and transparency.
- (4) The allocation of ...all powers that are necessary... to conduct their activities is way beyond constitutional or legislative boundaries. This is not conducive to proper allocation of legislative powers, particularly where previous Oireachtas debates, particularly in relation to proposed statues, have steadfastly resisted such provisions.
- Any, and all intended powers to be allocated to the Garda Ombudsman, must be set out clearly, unambiguously and in specific terms for scrutiny, consideration and full debate during the various stages of the Draft Bill progressing to potential implementation stage.
- (6) The systems and procedures for the handling of complaints with the conduct of investigations need to be clearly established and set out as part of an appendix
to this legislation. Timelines must be clearly established and set down to ensure adherence, albeit with the normal provisions for appropriate extensions of time. This subhead does not mention conclusion of investigations, the notification to the person subject of the complaint and the relevant timelines. This is a separate matter to the conduct of the investigations.

- **(8) & (9)** The scope of the direction referred to must be clearly set out in both subheads. This is particularly relevant to the proposed *(and strenuously objected to)* powers of search set out in this draft Bill where those to whom it is directed are serving members of An Garda Síochána assigned to this role on a temporary or secondment basis.

Any direction must show its scope and limits in line with legal provisions, constitutionality and human rights consideration. Any such direction must be in writing and discoverable in line with standard authorisations and legal powers afforded to persons exercising statutory functions.

- **(11)** The authorisation or direction mentioned herein must be in writing for the reasons set out in subhead *(8) & (9)* submission heretofore.

This Head is silent in respect to the notification of Garda members that they are subject to complaint in relation to an issue or issues. They are entitled to the normal considerations in this regard and the entitlements must be clearly set out.

2.6.5 Head 144 – page 224

- **(1)** The circumstance where the Deputy Garda Ombudsman may assume the functions of the Garda Ombudsman are not included in this subhead and should be clearly set out and outlined.

2.6.6 Head 153 – page 235/236

- The Minister and Government should have a role to overrule such a committee request under subhead *(6)* having been declined in accordance with the rationale set out. The High Court as the first option for such adjudication is hardly conducive to good governance.

2.6.7 Head 154 – page 237

- **(2)(b)** Natural justice and the Irish Constitution provide for the absolute entitlement of the subject of investigation to be aware of his or her accuser’s identity. The entitlement to defend oneself from accusation and allegation must be fully protected for Garda members in the same way as for the public and all other members of society.
Investigations based on anonymous allegations, concealed behind the cloak of such legislative protection, is not conducive to ensuring natural justice or individual entitlements.

- (2) This subhead does not contain any provision or recognition of the reality that false, malicious and vexatious complaints are frequent, deliberate and intentionally constructed to discredit Gardai of all ranks for nefarious purposes. This needs to be included.
- (4) Part of the investigation may include disclosure of information to the subject of the complaint as a necessary part of the investigation. This is an essential aspect of any investigation and omitting it from the list is extremely unhelpful.

2.7 Part 6 – Complaints, incidents of concern, investigations and other matters.

2.7.1 Head 157 – page 242/243/244

- (1) ‘Admissible complaint’ needs to be clearly defined.

‘Complaint’ must be further explained to clearly a definitively outline what recognition or cognisance is given or afforded to anonymous material submitted and how they are treated. The complaint definition must encompasses the types of alleged conduct, which may be included under its categorisation.

‘Conduct regulations’ must be clearly set out and agreed with the Representative Associations in advance of the considered implementation of this draft Bill or any amended version of it.

‘Frivolous, Vexatious, False, Mischievous or Misleading complaints’ must be clearly defined. The expressed intent of the legislation must be protection of all, not just a selection of society.

‘Gross Misconduct’ should be clearly defined as its interpretation can be somewhat subjective.

‘Incident of concern in relation to the conduct of a member of Garda personnel’ is ill conceived in that this should include ‘alleged conduct complained of,’ instead of
conduct, simpliciter. The presumption of innocence as opposed to the presumption of guilt must never be ignored.

‘Performance management system’ – (a) refers to Performance Regulations. Are they different to conduct regulations? What is the intention here? Are they in addition to, replacing or to a supplement to the Conduct or Disciplinary Regulations? Any such regulations must be subject to consultation with the Representative Associations.

- (3) Any referred to notification in writing or by electronic means must be signed in an agreed and established format, which must be specified under this subhead.

2.7.2 Head 158 – page 245/246

- (2)(b) & (c) How can such a distinction be made between the parties if the process refers to both Garda members and Garda personnel? Equity must apply.
- (4) Anonymous complaints must be specifically omitted from this categorisation in the interests of fairness and transparency.
- (5)(a) This should be within a period of 6 months; otherwise, this is potentially open to abuse.
- (5)(b) The exact criteria for extension of time for making a complaint must be clearly, unambiguously and definitively set out. This is not an arbitrary decision and must be representatives of the legislative, constitutional and human rights entitlements of those subjects of intended complaints.

2.7.3 Head 159 – page 247

- (2)(c) What is meant by a senior Garda staff member? Is this at Principle Officer or higher level?
- (7) The Garda Ombudsman Commission is established to investigate complaints but this subhead is providing an opt-out of responsibility for selected complaint investigations which returns the responsibility to An Garda Síochána. Surely, this is the opposite of the intention of the establishment of this body. Why are An Garda Síochána vested with responsibility for addressing issues for which other bodies have responsibility? This again leaves An Garda Síochána open to criticism for self-investigation despite having no other option. It also adds a continuing resourcing issue on top of scarce resources continually required to take on additional responsibilities.
2.7.4 Head 160 – page 249/250/251

- (3)(a) This is a replication of the points raised under Head 159 (7).
- (7)(c) This is the first reference to Garda personnel under this Head and subsequent Heads refer infrequently to this aspect, which appears to be as a ‘by the way’ addition to the role and responsibilities of An Garda Síochána. It is not currently the role of the Gardaí to investigate disciplinary matters against Garda staff. They are currently subject of a separate set of disciplinary regulations, which are investigated by Garda Staff, not Garda management or supervisory ranks.
- (8) Good reason must be clearly explained and set out definitively for clarity and to remove any potential misuse of this provision.
- (10) This subhead requires significant clarification on its intended application. The scope of matters which can refer to a retired member must be limited to criminal investigation matters only. All other matters cannot be addressed within the realm of the complaint process to the Garda Ombudsman who do not have any entitlement to deal with any such matters, as they are employment issues.

2.7.5 Head 161 – page 252

- (1) This is giving An Garda Síochána responsibility to do the job of the Garda Ombudsman which belies to intent of the criticism from various lobby groups of self-investigation.
- (3) This subhead has the clear appearance of a presumption of guilt of the Garda members subject of the complaint in terms of the language usage, the tone of the text and the stated aspects of each element.
- (3)(c) & (e) Exemplifies the previous point with no mention in this subhead or Head of any resolution to the advantage of the presumption of innocence or the exoneration of a member in the event of a false, malicious, vexatious or biased complaint.
- (3)(d) This Head is silent on obligations to notify members of the existence of complaints or the identity of those making complaints against them to allow them to put complaints into proper context and be in a position to properly defend actions where necessary and appropriate. This subhead only refers to notification of progress.
- (3)(e) This again refers to Garda personnel whereas Garda staff investigate Garda staff under their employment conditions and contracts of working.
- (3)(g) This only provides for a review by, or on behalf of, a complainant. It is silent on the entitlements of a Garda member to seek such a review. This is inequitable.
- As with other Heads, this Head is silent on anonymous complaints.

2.7.6 Head 163 – page 255

- (2)(a) & (b) This subhead refers to Head 60 complaints which appear to be minor issues (non-criminal, non-conduct proceedings related or non-death related matters
as outlined under Head 161 - (2) (a), (b) & (c)). In that case how can these provisions related to retired persons and what possible sanctions are intended to follow in the event of an adverse finding against those persons? The Head is completely silent on these aspects and appears to be completely at variance with the principles of natural and efficient justice. 

(4) This has no mention of notification of the Garda members’ subject of the complaint and is silent in this regard.

2.7.7 Head 164 – page 256

- (2) This subhead ignores the receipt of early information or evidence to demonstrate that the Garda members were not responsible for the death or serious harm to a person. It should contain a provision to stop the investigation when that is the case.

2.7.8 Head 165 – page 257

- (1) This subhead should also include specific reference to complaints relative to Head 164 as outlined above.

2.7.9 Head 166 – page 259/260/261

- (1) A clear procedure/policy needs to be established to address anonymous complaints as none currently exists which is visible and transparent.
- (2) The parameters of this subhead need to be fleshed out considerably as it is extremely broad and wide-ranging. In particular, in common with subhead (3), (5) & (7) it does not contain any statute of limitations or timeframes within which this may occur which contravenes all other processes in place relative to periods for initiating investigations.
- (8) The subhead is silent on any obligations to notify the members subject of a complaint or such an investigation.

2.7.10 Head 167 – 262/263

- This Head is silent on protections for those subjects of the complaints where there is a possibility that the person using this facility to make a protected disclosure is themselves subject of investigation. It is essential that any such abuse or perceived abuse of this facility be addressed to prevent it occurring.
- This Head is also silent on anonymous complaints falling within the ambit of protected disclosures. This is not conducive to the preservation of legal, constitutional or human rights protections and entitlements for Garda members.
- This Head is similarly silent on vexatious, malicious, false and deliberately misleading disclosures and the action to be taken against the person making such disclosure.
• (6) If no complainant is available is it proper to continue with an investigation as set out?

2.7.11 Head 168 – page 264

• (3) There is an absolute and full appreciation for the necessity to investigate criminal offending allegations subject to statutory timeframes established even when a member has retired. It is not understood why this would, or could, reasonably extend to any other matter, which is no longer part of any contract of employment. This is not a realistic or reasonable application of the public resources.

• (3)(c) This does not seem rational where no Garda member is believed to be involved. Does the legislature intend that the Garda Ombudsman take over an investigative role against citizens other than An Garda Síochána as this is not outlined anywhere else in the legislation?

2.7.12 Head 169 – page 265/266

• (1) This subhead is clearly intended to advance the powers range of the Garda Ombudsman without clearly specifying which legislative enactments it refers to. It would appear, on its face to be a potentially covert method of enhancing powers without specifying the details. This is further exacerbated by the terms of subhead (4) which cements the ideal that all powers attributed to An Garda Síochána in statute become apportioned to the Garda Ombudsman. The use of ‘including those relating to the following matters’ (line 6 under subhead (1)) should be replaced by... ‘are confined to the following matters’

Where State public servant bodies have been established or re-established previously, for instance the Revenue Commissioners and the Defence Forces, they have been supported by specific legislation, which clearly specifies their powers individually in detail. This does not, in the normal course, attribute powers of An Garda Síochána to the other bodies in broad terms.

• (2)(d) The reference to expanding the powers of the Postal and Telecommunications Services Act, 1983 and the Criminal Justice (Surveillance) Act, 2009 are at best completely contrary to the intent of the principle legislations. Perusal of the Dáil and committee stage debates will demonstrate the intent of the legislature in this regard. Criticisms have been levelled against An Garda Síochána relating to the managing of such enhanced intrusive powers and significant oversight is established in this regard.

The inclusion of a subhead or a Head to further specific enlargement of such powers is incompatible with the public interests without adequate transparent rationale.
2.7.13 Head 170 – page 267/268/269

- **(1)** This subhead completely ignores the established principles of the Damache ruling, which was directly responsible for the enactment of specific legislation through the Oireachtas to address the identified issues of independence, investigative integrity and judicial oversight of any intended breach by the State of the constitutional entitlements of inviolability protections. This protection extends to any premises occupied either in whole, or in part, for business, domicile, leisure, entertainment or other purposes.

The inclusion of this subhead is a clear breach of the Constitution, the human rights and legal entitlement of any occupants of any premises identified as a Garda premises. Does this now extend to areas from where Garda members were obliged to work during the course of the Covid-19 pandemic such as their homes?

It is devoid of legal oversight and completely belies the provisions of Head 169(1) where it refers to attaining the powers of An Garda Síochána. It appears that the same powers allocation does not include the intention that the same rules, processes and regulations apply to both organisations. This cannot be the case.

- **(3)** This subhead is forcing the Commissioner to consent to such a search and become complicit in the actions of the Garda Ombudsman where the security of the State concerns are not proffered. This will leave the Commissioner and Garda Síochána equally liable for any action taken by its members relative to such a breach of their entitlements to attain natural justice.

- **(4)** This implies that the only potential leakage of information could be from the Commissioner. It implicitly places the integrity of the Garda Ombudsman on a higher plain that that of the Commissioner which is perverse.

- **(6)** Data protection concerns are applicable to Garda members and must also apply to the Garda Ombudsman. Efforts to force access to Garda information systems and records for apparent trawling of data cannot be countenanced or permitted through legislation or procedural impositions. How can a Minister assume a judicial function as per the Damache ruling?

- **(8)(b)** The authorisation to search any person found in premises is one which is not usually spuriously authorised. It is strenuously and rigidly protected by the Courts. It is only authorised under search warrant or within explicit legislative provisions. It is not an applicable as a general power without legal and justifiable reasoning. This is not a fair application of the law where a Garda premises could contain innumerable persons working there oblivious to any investigation, allegation or involvement in any aspect of the matter being investigated.

- **(9)(a)** The power to demand names and addresses is similarly protected as with the matters raised in subhead (8)(b) and as presented is seriously open to potential abuse.

- **(9)(b)(ii)** This is not reasonable given the objections raised in (8)(b) & (9)(a) above.

- **(11)** The definition of document storage facility clearly includes all information and database systems held by An Garda Síochána many of which contain sensitive, secret and confidential information. This includes the Pulse system and all other data systems which are subject of data protections legislation and which may not even be
accessible by the majority of Garda members. This cannot be allowed to change given the core responsibilities of An Garda Síochána, to protect the community served.

2.7.14 Head 171 – page 270/271/272

- **(1)(a)(b)** This subhead has no recognition of the legal, constitutional or human rights entitlements of persons and what is proposed is tantamount to providing the Garda Ombudsman unlimited powers to do whatever they choose. This is not in the interests of natural justice and any such deviation from the norms of investigation procedures must be fully justifiable, necessary, proportionate and legitimate, all of which aspects must be clearly demonstrable.
  The subhead is silent on any such demands being in writing which they must be. Is (1)(b) an arrest/detention as it appears to amount to virtually the same thing.
  What entitlements do the persons being required to comply with this subhead provisions have?
  Is legal representation or any other person entitled to attend, accompanying that person?
  Is there an appeal against such a requirement being issued?
  If so, who is the adjudicator on that matter?
- **(2)** Is this subhead in line with employment law provisions and the terms of employment of Garda members?
  This subhead is also silent on the need to have the demands issued in a written document.
- **(3)** This subhead is silent on the possibility and often the probability that the requested person may well not be in a position to answer or comply with a request for documents and have a reasonable justification for this.
- **(6)** The Minister is the employer of the both Garda Ombudsman and the Garda members but is taken to be impartial in terms of deciding on release of sensitive information. This is not a true demonstration of independence.
- **(7)** This is silent on reasonable justification apart from the security of the State, which is not a practical application of the legislation.

2.7.15 Head 172 – page 273

- **(1)(a)** This subhead is silent on anonymous complaints, which are unsupported.
- **(2)** This subhead and the entire Head is silent on any action taken when complaints are seen to be false, malicious or vexatious, apart from discontinuing the investigation.

2.7.16 Head 173 – page 274/275

- **(1)** This subhead has no completion timeframes set out for investigation, file completion and submission for directions.
(2)(b) The onus is placed in this subhead on the Director of Public Prosecutions to inform the Garda Ombudsman of the progress of a prosecution and its results. This is not in keeping with normal practice where the prosecution management reverts to the prosecuting authority, in this instance the Garda Ombudsman, who then keep themselves informed of progress by attending proceedings and liaising with the relevant State Solicitor and prosecuting Counsel.

(4) This is clearly double jeopardy, where additional measures are in place to ensure action is taken, even where a person is acquitted following proceedings or a direction not to prosecute. This is contrary to natural justice and the constitutional entitlements of all citizens.

(5) This subhead appears to have ignored the fact and long standing principle that all investigations are confidential and conducted for a singular purpose. This subhead is silent on any restriction being imposed on the Garda Ombudsman to only report on the facts and not supply material gathered during the investigation to any of the listed bodies.

2.7.17 Head 174 – page 276/277

(2) This subhead is empowering the Garda Ombudsman to direct the Garda Commissioner to conduct certain duties. This is not in the spirit of all of the other oversight provisions in place. In essence this is yet another of the many Masters holding the Commissioner to account. The Garda Ombudsman was never intended as a body, which could direct activities in An Garda Síochána. The word ‘shall’ in this subhead is misplaced and not in the spirit of the responsibilities and authority of the Garda Commissioner who is not reportable to the Garda Ombudsman Office.

(3)(a) A document being deemed incontrovertible evidence of a report within its body until the contrary is proven is not a reasonable standard of proof in any criminal proceedings. This, yet again, is championing a presumption of guilt as opposed to the presumption of innocence principle, which is perverse and wrong. The onus in any proceedings firmly rests with those bringing the proceedings and the proposition that a report of a review conducted being factual does not stand up to any legal scrutiny. The only presumption that should be afforded to the document is that the person, who purported to sign it, signed it.

2.7.18 Head 175 – page 278

(4) This subhead appears to ignore the fact that the investigative responsibility rests with the Garda Ombudsman who can further the investigation in line with proper procedure and practice irrespective of whom is being investigated. Is the Minister now intended to be a witness in any proceedings initiated against a Commissioner?
2.7.19 Head 177 – page 281

- (1) This subhead is silent on the existence of agreed protocols and is silent on reasonableness in terms of any request and the ability to comply with any requests made.
  
  It is also silent on the fact that any such referred to request must be in writing.

2.7.20 Head 179 – page 283

- (1) The extension of time to institute summary proceedings is not a fair reflection of the need for efficient justice and the delay proposed is tantamount to justice denied. This is an arbitrary timeline, which flies in the face of the provisions of the Petty Sessions (Ireland) Act 1851, enacted specifically to ensure the administration of justice in summary matters remains timely. The extension to 18 months follows relatively swiftly in the slipstream of the previous extension to 12 months. This is not equitable, fair, transparent or in the interests of natural justice.

2.7.21 Head 181 – page 285/286

- (1)(d) There is no listed rationale for establishing this joint investigation team. The criteria needs to be clearly and unambiguously set out, otherwise this subhead could potentially become utilised to have the Garda Síochána doing investigations continually when they are the responsibility of the Garda Ombudsman

- (1)(g) This subhead could be misinterpreted as allowing the Garda Ombudsman to impose itself on a Garda Síochána investigation at will.

- (1)(j) Why would An Garda Síochána be responsible for training the Garda Ombudsman? It is accepted that agreements can be entered into but the indication of responsibility becoming that of An Garda Síochána is not realistic.

- (1)(k) This subhead should include notification of members who are subject of complaint and investigation. The current situation whereby the Garda Ombudsman are not obliged to inform a Garda member of the identity of a complainant is not in keeping with natural, constitutional of human rights provisions or entitlements.

2.7.22 Head 182 – page 287

There is nothing in this Head which empowers a member of An Garda Síochána to seek a decision review in relation to any aspect of the Garda Ombudsman’s decision. This is inequitable.

- (2) & (3) The discretion to extend the period under subhead (1) must be clearly set out, its outline in these subheads is too vague and not consistent with transparency or reasonableness. The member complained of should be allowed to have a reasonable input into this decision also.

- (6) This provision is completely contrary to case law where new information must be available to support a decision change in terms of an investigation conducted.
2.7.23 Head 184 – page 290

- (1) Making a false or misleading report or statement is already catered for under criminal legislation. It is an arrestable offence, which may be punishable on indictment. This subhead is incompatible with this legislation and seems to perceive this type of activity when directed against a Garda member as being a lesser offence than if it occurred against a member of the public. It cannot be deemed a summary offence as it will be strictly limited in its prosecution due to time limits for commencing summary offence proceedings. Investigative delays would result in it becoming non-prosecutable due to time expiry for summary prosecution.

2.7.24 Head 185 – page 291/292

- (6)(b) This is identical to the point in Head 173 (2)(b) where: The onus is placed in this subhead on the Director of Public Prosecutions to inform the Garda Ombudsman of the progress of a prosecution and its results. This is not in keeping with normal practice where the prosecution management reverts to the prosecuting authority, in this instance the Garda Ombudsman, who then keep themselves informed of progress by attending proceedings and liaising with the relevant State Solicitor and prosecuting Counsel.
- (7) This again constitutes double jeopardy, which is not in the interests of natural justice and ignores the rights and entitlements of the Garda member in this jurisdiction when compared to those of any other citizen.
- This head is silent on notification of the Garda member of the complaint or investigation.

2.7.25 Head 186 – page 293/294

- (6) Delay is a significant factor here and is prejudicial to the best interest of the Garda member concerned. This subhead is silent in this regard.

2.7.26 Head 187 – page 295

- (1) & (2) These subheads appear to intend to exonerate the Garda Ombudsman for responsibility to rigorously protect the good name of Garda members in such listed instances. The responsibility to ensure the non-publication of defamatory material must rest with the information holder, in this instance the Garda Ombudsman. Exoneration for actions, simpliciter, is not a reasonable remedy or protection of one party over the others’ interests. The cover of ‘absence of malice’ is not an acceptable provision to exonerate those who fail to adhere to data protection responsibilities in such situations.
2.7.27 Head 189 – page 297

- Does this Head intend that the Garda Ombudsman conduct the actual inquest proceedings? Interruption of inquest proceedings cannot be ignored, forgotten or allowed to be repeated under this or any other Head.

2.7.28 Head 190 – page 298

- (1) This subhead is silent on the legal entitlements of all citizens in relation to their right to remain silent, to not self-incriminate and to seek legal advice. The subhead does not specify what type of proceedings are the subject of the said proposed direction.
- (4) This subhead fails to include that in criminal investigations the aforementioned (1) entitlements exist.

2.8 Part 7 – Independent Examiner of Security Legislation

2.8.1 Head 194 – page 302

(C) One of the roles of the Independent Examiner will be to make information available to the greatest extent. Despite consideration of the protections to be put in place this could damage Ireland’s international reputation and place the lives of certain individuals at risk. It needs to be clarified “to whom” this information will be made available.

2.8.2 Head 195 – page 303

- (1)(b)(iii) This subhead needs to include that the Garda members have the same rights protections as all other individuals and that these rights protections are within the remit of the Independent Examiner.
- (2) This subhead is extremely broad and the inclusion of ...’may do anything’... is not advisable given its wide interpretation and potential for misinterpretation.
- (3) This subhead needs to specify the consultation process and include the Garda Commissioner as a named party to any such consultation where appropriate and the actions affect An Garda Síochána.

2.8.3 Head 197 – page 305

There is no protection offered under this head to protect the source or type of information to be provided and whether or not the provision of certain material could be considered lawful.
• (2) This subhead should include the Commissioner in addition to the oversight bodies.

2.8.4 Head 198 – page 306

• (1) The ‘Information Holders’ should be listed, albeit not an exhaustive but a reasonably representative list.
• (4) The requirement to sign a declaration of the truth of an answer to a question is an assumption of deceit on behalf of the person. There is no requirement to do this when giving evidence in court or to a tribunal.
• (5) The parameters for engagement in this subhead must be clearly set out. Is this in addition to the various oversight processes in place such as the judicial body established to oversee the implementation of the Criminal Justice (Surveillance) Act, 2009?

2.8.5 Head 199 – page 307

• It must be clarified who will decide if information is sensitive or not. Is it the Examiner who makes this decision and if so who has oversight of the Examiners decision.

2.8.6 Head 208 – page 320

• This Head should contain a provision wherein any issues arising affecting operational policing should be shared with the Commissioner in advance of its reporting to ensure all material facts are included and any urgent action can be addressed as a priority.

2.8.7 Head 209 – page 321

• This Head is a self-review and is silent on any independent evaluation of the office of the Examiner. Perhaps a review by a panel of Judges every three years would be an appropriate consideration.

2.8.8 Head 210 – page 322

• It must be clarified who will decide if information is sensitive or not. Is it the Examiner who makes this decision and if so who has oversight of the Examiners decision.
• (2) This subhead must specifically include the Commissioner given the responsibilities held and implications for policing of any such information release.
• (5) Consideration must be given to the sensitivities of two separate reports, which heightens the risk of information leakage.
The 30 year archive release of information is a prime example of what needs to be considered in this regard.

(6) This subhead is confusing in terms of what its intent is. ‘Unclassified version’ must be clearly and definitively defined. Then the actual redaction process needs to be set out so that it ensures that the redaction itself does not result in the identification of the sensitive issue(s) and leads to unnecessary high-risk speculation or assessments.

2.8.9 Head 212 – page 324
- (1) This subhead does not specify to whom the response from the Taoiseach be issued. Is it to the Independent Examiner, the Information holders or any other affected parties?
- (3) Does this subhead mean that the entire document is then made public? Clarification should be included.
- (4) Consideration should be given to the replacement of may respond privately with shall respond privately if he or she chooses to respond to that version.

2.8.10 Head 215 – page 328
- (3) This subhead should include a provision prohibiting the utilisation of the office to further their own political ideals, ideologies, agendas or views.

2.9 Part 8 – Regulations and Miscellaneous Provisions

2.9.1 Head 218 – page 331
- (2) This subhead should include consulting with the Garda Associations and representative bodies who may have differing, but no less relevant views to the Commissioner and the other listed parties.

2.9.2 Head 219 – page 332/333
- This Head is somewhat hidden away at the end of the Bill despite the fact that it is of the utmost relevance to the management of An Garda Síochána.
- (1) The Garda Associations and representative bodies are not mentioned as parties with whom consultation must take place. This is an important omission and needs to be urgently reconsidered.
- (1)(a) Is there a hidden intention to change the rank structure and ranks order for An Garda Síochána? Are supervisory ranks being reduced in numbers to facilitate the creation of other ranks and if so what negotiations are involved in their establishment and/or reduction in terms of workload, responsibilities, scope, powers and roles? What remuneration considerations are included?
• (1)(d) Will this involve a set and established process and not one which changes from competition to competition without any consultation, as is currently the case?
• (1)(h) This is not in keeping with the public sector pay negotiations and the uniqueness of An Garda Síochána. The Garda Associations and representative bodies must be included in this subhead as having a clear role. Changes to either pay or allowances are a major industrial relations issue and cannot be subsumed into criminal legislation without clear rationale and structures being discussed, debated and agreed.
• (1)(i) The retirement age issue inclusion here is highly inflammatory as it is currently the topic of separate discussions and purported legislative changes. It should not be included in this legislation. Retirement ages need to be fixed and consistent, not subject to arbitrary or individual concession making as currently exists.
• (1)(j) Pension entitlements cannot be the subject of a subhead hidden at the end of a proposed Bill. Pensions are an established public sector entitlement based on service, pay rates, and upon attaining minimum or maximum age. They cannot be interfered with by inclusion of such a subhead given their implications and consequences.
• (1)(k) The delay in promoting members due to bureaucratic and unfair interpretations of complaints made, in many instances where the affected party has no prior knowledge of the issue at hand, must be addressed. Currently this appears to be within the gift or discretion of the Policing Authority soon to be replaced by the enlarged Authority. It is manifestly unfair, unprincipled and based on a presumption of guilt as opposed to innocence grounded on complaints or issues, which are invisible to the affected party. This subhead must address this issue fairly, independently and without bias.
• (1)(l) The meaning of this subhead is not clear. Its intent needs to be clearly set out and explained.
• (3)(d) This is an extremely broad provision and is potentially open to extended misinterpretation. This must be clearly set out and limited in its applicability.

2.9.3 Head 220 – page 334

• Are these regulations intended to replace the Garda Síochána (Disciplinary Regulations), 2007 in whole or part?
• (1) Any such consultation process must involve and include the Garda Associations and representative bodies.
• (2)(a) The issues must be clearly set out and not left in broad, vague terms open to misinterpretation.
• (2)(c) ‘Improve’ is a very vague term and must be specifically defined.
• (4) The replacing of ‘may’ with ‘shall’ will provide clarity as opposed to vagueness in any proposed regulations.
• (4)(a) Is this another form of disciplinary investigation focus? This is extremely vague and clarity is required to address the intent of these regulations.
• (4)(b) What is meant by different forms of action and in particular why is it arbitrarily based on rank? This subhead is extremely broad and open to misuse and misinterpretation.

2.9.4 Head 221 – page 335/336/337

• (1) Are these regulations also intended to replace the Garda Síochána (Disciplinary Regulations) 2007 in whole or part?
• (2) There is no mention of developmental approach to issues arising in terms of addressing action to be taken. This is an essential consideration for any new regulations and will assist in promoting a positive approach to addressing any conduct issues as opposed to solely a disciplinary mind-set.
• (3)(b) A sanction already exists for this purported breach under Head 77(2)(a) so how can it result in double punishment or double jeopardy? This is neither equitable nor fair.
• (3)(e) As Head 170 is considered to be unconstitutional and contrary to existing case law this subhead cannot remain in this form.
• (5)(e) This subhead appears to empower a subsequent higher ranking/level panel to refuse to accept the decision of the initial panel without any appeal by the parties involved. This is not in the interests of fair and equitable application of any regulations.
• (6)(f) The inclusion of this provision relative to the administering of the oath or affirmation needs to include a clear outline of any consequences of failure to adhere to the obligations of the person taking the oath or affirmation. Is it included under subhead (8)(b) in place of the offence of perjury?
• (6)(l) The protections afforded by this subhead neglect to take appropriate cognisance of the absolute onus of responsibility to prevent such publication of statements or reports by, or on behalf of, the panel.
• (7) This subhead needs to be clear on what acts it refers to and what actions can or cannot be taken.
• (8) This subhead appears to place a criminal liability in disciplinary proceedings with the imposition of a criminal sanction where ‘Conduct Regulations’ proceedings are instigated. Is this constitutional, equitable, lawful and in compliance with human rights entitlements?
• (9) This subhead appears to imply that if the incorrect approach is taken in terms of proceedings then another chosen approach can then be adopted. Is this constitutional, equitable, lawful and in compliance with human rights entitlements?

2.9.5 Head 222 – page 338

• (1) The Garda Associations and representative bodies should be included in this subhead in terms of consultative entitlements in advance of regulations being made.
• (2) This subhead differentiates between Garda members and Garda Staff members whereas earlier subheads include both under the remit of the Garda Ombudsman.
investigations. Both sets of individuals and groups have differing roles and terms of employment, so they should be addressed separately.

2.9.6 Head 225 – page 341

- (1) Why is the Garda Síochána Reward Fund being dissolved?

2.9.7 Head 228 – page 344/345/346/347

- (4)(a) The reasons for any such search must be approved and outlined.
- (4)(c) This needs to exclude its provisions from relating to An Garda Síochána members on duty in those venues.

2.10 Part 9 – Consequential Amendments

2.10.1 Head 230 – page 349

- What is the effect of this amendment on retirement age for An Garda Síochána members? This is especially pertinent given the current issues around the deliberations on increasing the retirement age beyond the age of 60 years.

2.10.2 Head 236 – page 355

- The definition of `member` referred to excludes Garda staff from the provisions of the Criminal Justice (Offences relating to Information Systems) Act, 2017. Is it intended to exclude Garda staff from responsibility herein?

2.10.3 Head 243 – page 362/363/364

- The amendments to the Criminal Justice (Surveillance) Act, 2009 as amended and listed are not explained or listed throughout the Bill and require full explanation in terms of their applicability, expansion of powers and investigative capacity. Accountability, transparency and the appearance of those must be evident in this regard.
2.10.4 SCHEDULE 2 (Head 45(7)) - page 376

- **(1) & (2)** This should include the person themselves as being a part of any agreement made.

2.10.5 SCHEDULE 7 (Head 224) – page 390/391

- An explanatory document is required urgently to set out any, and all, proposed changes to pay, allowances or employment conditions including disciplinary, promotion and pension matters.
AGSI SUBMISSION

Submission to the Joint Committee on Justice
General Scheme of the Policing Security and Community Safety Bill

22nd October 2021
Executive Summary.

The Policing, Security and Community Safety Bill, has its genesis in the Commission on the Future of Policing in Ireland (CoFPI) Report published in 2018. This report set out that reform and transformation of the Garda Organisation was needed and that the service must be strengthened significantly to meet existing challenges and future demands.

The AGSI (the Association) would welcome any reform and change agenda that better serves the public and efficiency of the daily workings of the Garda Organisation. However, the AGSI would assert that the Bill as set out, does not provide the ‘clear vision for policing’ as envisaged by CoFPI but instead creates a multi-layered, confusing and complex system of Boards and Bodies, some of whose functions are similar but all who require independent and individual accountability, to such a degree one would question how the Organisation can function when different layers of oversight may have different visions for how it can operate effectively.

The extended powers proposed to be granted to GSOC are without proper justification and it is our belief that these powers will encroach on the legal, constitutional and privacy rights of members of AGSI whom, as citizens as well as members of An Garda Siochana must be afforded these basic rights. The Bill fails to recognise that the CoFPI Report recommended that GSOC should be superseded by a new independent complaints body where incidents are investigated rather than individuals, to find fault where appropriate, identify what needs to be learned, and make recommendations for change as required. Instead, what the Bill has done is proposed a broad and vague number of powers which are not in line with constitutional safeguards. These powers operate on the premise of ‘presumption of guilt’ in the first instance by an individual member. Concerning too is the complete lack of oversight for the newly proposed GSOC and whom they are accountable to when fair procedures against AGSI members are breached or when frivolous or vexatious complaints are made. There has been considerable disquiet in relation to a failure on the part of the Ombudsman in
their existing guise to tackle frivolous and vexatious complaints and they have been publicly criticised in relation to a failure to bring prosecutions where complaints of this nature are made.

There is no reference in the Bill to the newly established Garda Anti-Corruption Unit and where it fits into the governance, accountability and investigative structures and it appears that members could be subject to multiple investigations by various bodies relating to the same issue.

The Bill also fails to give a context or rationale for the many proposed changes but instead takes poetic licence with the CoFPI Report and uses it as a basis for changes that go beyond the recommendations contained in that Report.

**Conclusion.**

In conclusion, the AGSI believe that the drafting of legislation must be underpinned by a protection of the Constitutional rights of citizens. This Bill in its current form does not uphold those protections that must be applied equally to members of An Garda Siochana as every other citizen.

The multiplicity of boards and agencies, many whose functions are similar will cause confusion and complexities as regards who is responsible for what and what strategic vision should be followed.

Overall, AGSI believe the Bill will create more difficulties than positive reform for An Garda Siochana in its current format.
1. Background

1.1 The Commission on the Future of Policing was established by Government and was tasked with undertaking a comprehensive examination of all aspects of policing including all functions carried out by An Garda Síochána. In September 2018 the final Report was published and in December 2018 the Government accepted the recommendations contained within the Report.

2. Introduction

2.1 In April 2021, Minister McEntee published a draft Bill, entitled, ‘General Scheme Policing, Security and Community Safety Bill’.

2.2 The Bill redefines the functions of An Garda Siochana and asserts that it will provide for a new framework for policing, security and community safety aimed at improving the performance and accountability of the policing and security services to the benefit of the safety of communities.

2.3 As an Association, AGSI believe the Bill raises serious concerns about the Constitutional, Human and Employment rights of the members we represent. An absence of fair procedure towards Gardai is evident in the new powers proposed for the Office of the Garda Siochana Ombudsman (formerly GSOC) to such an extent we foresee that the Association and Garda Organisation will face a raft of legal and constitutional challenges relating to matters contained within the Bill. In an unprecedented turn of events, the Commissioner of An Garda Siochana has also publicly expressed significant reservations about the Bill, as currently drafted and is quoted as saying it, “falls well short of our shared ambition for a transparent, accountable, trusted and effective policing service for the future”. He describes the powers to be given to a newly-structured Garda Ombudsman as “draconian” and “disproportionate” while a proposed new
Policing and Community Safety Authority risks encroaching on the operational independence” of the office of Garda Commissioner.

### 2.4

AGSI is disappointed that although the Bill will have far reaching consequences for the members of our Association, and despite what has been asserted i.e., that they have “consulted widely with stakeholders” no consultation has taken place with AGSI by Government to date, during the drafting of this Bill. Vagueness, ambiguity, and a lack of clarity in many Heads along with complicated and layered up governance system along with a multiplicity of persons and bodies to account to makes this Association question how the Organisation can actually operate on a day-to-day basis. The Scheme as is it published seems to have forgotten the values and ethos of the Organisation in putting our communities first and has the potential to create a culture where members will feel that the threat of discipline and a possible breach of regulations must be to the forefront of their minds in every interaction they have with the public instead of the priority thought of serving the needs of the people. There is a genuine anxiety in AGSI that the Organisation is becoming increasingly punitive and that the mentoring, training and guidance needed for people who makes mistakes or ‘do the wrong thing but for the right reasons’ will no longer be possible because of an over-regulated Organisation. This creates difficulties for our members as first line supervisors as the Scheme pays little regard to how problems are resolved informally in the first instance. Management by discipline is what appears to be foremost in this scheme.

### 3. Concerns of the AGSI General Scheme

The Scheme consists of 9 Parts with 252 heads and 7 schedules. It proposes that the Bill, when enacted, will repeal the Garda Siochana Act 2005, (as amended) in its entirety.
3.1 The Bill does not provide a rationale or context to allow AGSI to understand fully why the necessity arises for many of the changes that are proposed in the Bill and indeed there is a complete absence of any published information which would allow for an understanding of the changes as they are set out.

3.2 What is clear is that the origins of the Bill lie within the report of the Commission on the Future of Policing in Ireland (CoFPI) however the AGSI assert that the proposed Bill does not provide for the “clear vision and roadmap for strengthening An Garda Síochána and the broader national framework for policing, security, and community safety” as stated in the COFPI Report. On the contrary it provides an array of multiple bodies with complex and ambiguous responsibilities; it creates confusion about the actual role of the Garda Commissioner as a CEO and has the potential to have several oversight groups with different visions for the Organisation. The Bill fails to recognise the newly established Anti-Corruption Unit within the Garda Organisation and the many Policies currently under development by that Unit.

3.3 How, when and by whom an investigation is carried out is an issue of high importance for AGSI members, and the Bill is lacking in any detail as to where the Anti-Corruption Unit sits in the governance, accountability and investigative functions not only within the Organisation but also where the Unit sits as regards investigations by the renamed GSOC. This lack of detail means that AGSI members could potentially be subject to multiple investigations on the same issue at the same time but by different bodies. This is unacceptable and stifling to the workings of An Garda Síochána.

3.4 Of the greatest concerns to AGSI are the expanded powers given to GSOC, which are set out as follows; “The three person Garda Síochána Ombudsman Commission will be replaced with an Ombudsman
Deputy Ombudsman model so that it will have a clear and publicly identifiable head. It will also become a vote holding body to reinforce its independence. It will have an expanded remit in terms of garda personnel and the allegations of wrongdoing by garda personnel which come within its jurisdiction to investigate. The system for the handling and investigation of allegations of wrongdoing will also be substantially reformed to support a streamlined, simplified approach with appropriate safeguards that will be to the benefit of complainants, An Garda Síochána and the wider public.” These powers will encroach on the legal, constitutional and privacy rights of members of AGSI whom, as citizens as well as members of An Garda Síochana must be afforded these basic rights. The broad and vague nature of the powers to be bestowed are not in line with constitutional safeguards, in our opinion.

3.5 Remarkably, the Bill fails to engage with the ever-increasing difficulties as they have emerged with regard to data and the interrogation of data in the context of privacy rights.

3.6 The Bill asserts to provide “safeguards”. Such “safeguards” as are proposed, are not particularly evident and there appears to nothing new in terms of identifiable safeguard for AGSI and its members.

3.7 The Bill in our view, does not take into account the already significant oversight, accountability, disciplinary, ethical, legal and other regulatory systems both internally within the Organisation and Externally that members of AGSI are subjected to and the Association would question the Bill on proportionality and fair procedures.

3.8 ‘Conduct Regulations’ and Conduct Code are referred to throughout the Bill – AGSI have no knowledge of the Regulations or Code proposed and where they fit into or replace the current Discipline Regulations which our
members are subjected to. The Bill also refers to Disciplinary Proceedings and clarity is needed where and in what circumstances these can arise.

3.9 The Garda Síochána Act 2005 Section 39 is explicit when it states “A member of the Garda Síochána shall, when directed to do so by a member of a higher rank, account for any act done or omission made by the member while on duty”. The proposed changes set out in the Bill now move to complicate this requirement, by its extension of the duty to account to include all Garda Personnel. While recognising that all employees have to be accountable, the mixing of Ranks and Grades here is complex and there are currently no agreed reporting structures in place between Gardaí and our Civilian colleagues.

3.10 Garda members, Garda staff, Garda personnel and Garda reserves are all referred to in the Bill. Various elements of governance, regulations, conduct and legislation apply, but there is confusion as to what elements of the Bill apply to all or some of the workers within the Organisation. This must be rectified.

4. Heads of Bill

The AGSI cannot in the absence of clarity or context comment on all 252 Heads as set out in the Bill, but instead will concentrate on the parts which appear most relevant and impact on the membership that we represent, while also making observations on other sections of significance.

4.1 Head 2 - Garda member, Garda staff, Garda personnel and Garda Reserve member are all contained in this section but there is also reference in the Bill to ‘person’. This will need clarification.

4.2 Head 11 – Role of the Board of An Garda Síochana – While the role of the Board is set out in this Head, what is not clear is where the role and
functions of the Board sit with the other oversight and governance bodies proposed in the Bill, particularly the newly established Policing and Community Safety Authority. A concern here is that each oversight group will function in the achievement of its own roles and responsibilities and operate as ‘organisational silo’s’ with different visions and at cross purposes with each other. When the role of the Board and Authority are compared, the similarities of function in areas such as performance, strategy, governance, training, recruitment and policy matters, creates serious questions as to who has overall responsibility for these areas and what is the need for all the layers governance if their functions are the same. What will happen if the vision of one, differs from the other and which will receive priority? When the functions of both these groups are similar the need for both is questionable.

4.3 Head 16 – Committees of the Board – The establishment of committees by the Board is set out in this Head and AGSI view this as another layer, in an already multi-layered system, particularly where the role and functions of such committees is not fully set out.

4.4 Head 18 – Provision of services to the Board – This Head sets out that ‘The Garda Commissioner shall provide the Board with such resources, including accommodation, facilities, services and staff as the Board reasonably determines are necessary for the due fulfilment of its functions’. This is concerning to AGSI as many of its members are waiting years for proper accommodation and facilities in their place of work and while it is recognised that the Board will need to function, the AGSI would assert that these resources can be provided directly by Government and that the priority within the Organisation should be towards Operational matters.

4.5 Head 35 – Garda Personnel – The multiplicity of names attached to An Garda Síochána, Garda member, Garda Staff, Garda personnel could potentially be confusing to the public. When a member of the public phones a Garda Stations they believe, they are talking to member of An
Garda Síochána when quiet often they are not. While the importance of inclusivity in the workplace is recognised, members of the public should be made aware of whom they are speaking to and what actions/decisions are made by that first responder to the call.

4.6 Head 36 – Ranks, numbers in each rank, terms and conditions – The Association is concerned about Subhead (2) which states ‘Subhead (1) may by regulations be modified to add or remove any rank below that of Assistant Garda Commissioner’. If what is suggested here is that the Commissioner can potentially add to or reduce the rank structure, then this must be clarified. Is the Bill suggesting that a whole rank within the rank structure can simply be eliminated and if so, what would the process be around this? Much more clarity would be needed here. Moreover, the ranks specified in Subhead (1) do not include the Garda Reserve which is recognised presently within the Organisation.

4.7 Head 37 – Members solemn declaration – This Head proposes a new affirmation and removes the option to swear the oath – AGSI see no reason why there cannot be a choice in this Subhead.

4.8 Head 41 – Appointment of persons below rank of Chief Superintendent and dismissal of such members for reasons of public confidence – Until such time as procedure either in the Statute, proposed Bill or proposed Discipline Regulations are provided it is not possible for the AGSI to comment. More detail should have been provided here.

4.9 Head 42 – Appointment of Reserve Members – This Head differs considerably from Sect 15 of the Garda Síochána Act 2005 as amended, which was specific in its reference to the appointment of Garda Reserve members to assist. The Scheme now states that the Commissioner can appoint persons as Reserve members, who have the same powers, immunities and privileges and duties as a person appointed to the rank of Garda. While it goes onto state that the Commissioner, following consultation with the Authority will decide the range of powers to be exercised, what is missing here is the reference to any kind of training.
The Act of 2005 was specific in that it stated, ‘**a person is not eligible to be appointed as a reserve member unless he or she has completed the prescribed training.**’ Moreover, if they have the same powers as Gardai, are they not just part time Gardai but without the appropriate remuneration and conditions of Service?

4.10 **Head 43 Duty of members of Garda Personnel to account** – This Head refers to the duty of ‘Garda Personnel’ to account, and is a change from a member of An Garda Siochana having to account to a member of higher rank as is set out specifically in the 2005 Garda Siochana Act. This will in AGSI’s view create confusion as no agreed reporting structures or equivalence on Grade/Rank currently exist. In fact, what Grade/Rank is higher than the other has been disagreed for a number of years and this Head is unclear in its current content. More concerning is the fact that this higher-grade person can inform a Garda that such failure to account can lead to dismissal, but in the view of AGSI this will be problematic in the absence of clearly agreeing what Grades/ranks are actually higher than each other.

4.11 **Head 45 – Appointment of members of Garda staff** – This Head sets out that Garda staff will now be recruited by the Garda Commissioner which is a change from the current practice. We are aware from our colleagues in the Unions their concerns about this and believe that a consultation and engagement with all Unions and Associations should have been undertaken on the effect and impact of this major workplace change.

4.12 **Head 46 – Garda staff undertaking** – This Head lack clarity in Subhead (2) referring to the declaration. It states that this declaration must be given before a garda staff’s supervisor. It is unclear to AGSI who is referred to as supervisor in this Head and clarity is needed.

4.13 **Head 48 – Representative Associations** – This Head fails to give recognition to the current existence of Staff Associations already established within the Garda Organisation and under Regulations. It does
not state how these existing Regulations are to be dealt with. It also refers
to the admission of ‘trainees’ to an Association but does not refer to the
Garda reserves, and consultation in relation to this with existing Staff
Associations. Again, further detail is required before detailed comment can
be made.

4.14 Head 66 – Code of ethics for Garda personnel – The consultation with
Staff Associations before a Code of Ethics is established under this head is
to be welcomed. What is not clear however is why the Department of Public
Expenditure and Reform must be involved in the consultative process.
Perhaps clarity could be provided here. It is also unclear what the process
is and how the reporting of wrongdoing will be done by an individual
member. Given that one of the current methodologies for the reporting of
wrongdoing is through GSOC or alternatively through the Protected
Disclosures Policy, there is also the matter of the newly established Anti-
Corruption Unit and where the proposed reporting of wrongdoing will
happen under their Policies. This is a prime example of the confusing
and conflicting detail contained in the Scheme, which will not serve
the organisation well in our view. One of the barriers to reporting
wrongdoing is unwieldy and complex processes and any system designed
for reporting purposes must be such that those utilising it feel safe within it.

4.15 Head 70 – Liability for certain acts of members of An Garda
Siochana – The AGSI are curious as to why this section of the Bill only
applies to Garda members. Given the earlier sections relating to
wrongdoing and the duty to account why is it that this section does not
apply equally to all.

4.16 Head 104 – Objective and Function of the Authority – This Head
sets out the functions and objectives of the Authority. However, when the
functions and objectives of the Board of An Garda Siochana are
examined, there appears to be dual responsibility under both of these
bodies, and clarity would be needed here on what exactly the remit of
each of these would be.
4.17 **Head 106 – Meetings and business of the Authority** – It is disappointing to see that the Authority does not have prescribed meetings with the Garda Staff Associations and Unions. This should be considered so that the Authority can have a view of the Organisation and its functions from a perspective other than Management.

4.18 **Head 114 - Powers of Inspector of Policing Services** – This subhead states that an MOU on joint inspections should be drawn up and AGSI and its representatives should be involved in this process and have a clear and full understanding of what joint inspections consist of and when and how they can occur as currently we do not have this knowledge.

4.19 **Head 115 - Joint Inspections** – This Head raises concerns from AGSI's perspective. It is not specified what the rational for these joint inspections is and why they are necessary. As AGSI members are frequently the 'member in charge' at Garda Stations and it must be clear to our members, particularly in unannounced visits who is the member is answerable to and in what circumstances.

4.20 **Head 143 - Objectives, functions and powers of Garda Ombudsman** – the Bill refers to “public confidence” in the investigation but remarkably makes no reference to confidence on the part of the Gardai it states: “to promote public confidence in the processes for the resolution of complaints made by members of the public and in the investigations referred to in paragraph (a).” This completely ignores the right of the Gardai to have confidence in the Ombudsman and any investigation conducted. As you may be aware there has occurred considerable disquiet in relation to a failure on the part of the Ombudsman in their existing guise to tackle frivolous and vexatious complaints. The Ombudsman has already been publicly criticised in relation to a failure to bring prosecutions where complaints of this nature are made. Notably the offence of providing false information is considered as a summary offence.
only. NOTE: It is an offence under section 12 of the Criminal Law Act, 1976 to knowingly make ‘a false report or statement tending to show that an offence has been committed’. It is also an offence under section 110 of the Garda Síochána Act, 2005 (as amended) to provide information to GSOC in relation to a complaint or investigation which the person ‘knows to be false or misleading’. Similarly, it is an offence under section 12 of the Criminal Law Act, 1976 to knowingly make ‘a false report or statement tending to show that an offence has been committed’. This has been the subject of more recent controversy. It is widely reported that members of the gardaí who were commended for brave actions in a recently publicised case, were, then subjected to a complaint of a particularly vexatious nature. “Devoy complaints” This brings into play a more problematic feature of the existing legislation. Under the current regime, many complaints have taken an excessive period of time to investigate and to conclude. This is a competence and resources issue. Despite these failings the Bill in its present format does not place any constraint upon the Ombudsman to conduct or conclude investigations in a timely fashion. No regard seems to have had for Garda members nor has any input been sought from members or their representative body.

4.21  **Head 154 - Confidentiality of information obtained by Garda Ombudsman** – Clarity is need her as to where Subhead 6 fits into the current Garda Anti-Corruption Policy in relation to confidentiality of information and breaches of same.

4.22  **Head 157 – Interpretation – New Definition of Conduct** – This Head contains a proposed expansion of the definition of Conduct from what is defined under the Act of 2005. It now includes sets out Conduct to include ‘acts, omissions, statements, and decisions (whether actual, alleged or inferred)’ This proposed definition is vague, without the necessary clarity for a member to know how and in what circumstances their actions would constitute a breach and is absurd in its current format. AGSI would have to question how a breach of conduct could occur on an inferred decision and what criteria is used in the determination of same. In what
circumstances could a member of AGSI be investigated for a breach of conduct in regard to this aspect of the definition and as an Association we would question what was lacking in the already existing definition to expand it in this manner.

This Subhead goes onto define ‘incident of concern’ and refers to the fact that it can include and allegation where a member may have behaved in a manner that constitutes misconduct. What is the criteria for the determination of an ‘incident of concern’ and how will this be decided? It should be noted that AGSI members have been subjected to many frivolous and vexatious complaints and this Subhead does not appear to provide any safeguards for AGSI members and this must be considered.

‘Notifiable misconduct’ is the next matter defined and again there is further ambiguity here. Although these definitions must be read in conjunction with Head 165, the process for the actual making of a complaint is unclear as is the reference to ‘the seniority in rank and grade of a member of garda personnel’. The threshold for complaints of notifiable misconduct does not appear to exist. What is or is not an acceptable standard must be clearly understood by both the members and the public, otherwise every interaction with a member of the public could potentially fall into this category.

The definition of ‘Serious Harm’ is expanded here to include ‘abuse of power for sexual gain’. The Association would assert that assault causing ‘serious harm’ has a legal definition already, and in most cases is immediately identifiable once it has occurred. Abuse of power for sexual gain is recognised by this Association as extremely serious in nature, but to establish its veracity after a complaint, some investigation will have to take place as it may not be as immediately apparent. ‘Abuse of power for sexual gain’ is Organisationally proposed to be dealt with under the new Garda Anti-Corruption Policies.
Head 158 – Supplementary provisions in relation to complaints - This Subhead is concerning to AGSI in several areas. It fails to give recognition to the Local Intervention process which has been co-developed and implemented with GSOC recognition and support and is described by them in the following text.

The Local Intervention process is aimed at resolving certain service-level types of complaints against members of the Garda Síochána at a local level without the need for the matter to enter a formal complaints process.

All cases received by GSOC are recorded initially on the case management system (CMS) as ‘queries’ and are not upgraded to complaints until there is sufficient information available to allow GSOC to make an admissibility determination. A complaint can only be admitted for investigation if it meets the criteria set out in legislation. The Local Intervention (LI) process engages at the ‘query’ stage, before an admissibility decision is made.

When a complaint is received by GSOC, GSOC decides whether or not the matter is suitable for LI. Only service-level issues, such as discourtesy or low level neglect-of-duty type complaints, are considered.

Examples of the issues which are considered for LI are:

- Poor quality or standard of service
  - Inefficient or no service
  - Incivility/impoliteness/rudeness
  - Lack of communications or response

If GSOC is of the view that the complaint is suitable for LI, GSOC contacts the person making the complaint, explains the LI process and asks if the person will consent to having the matter dealt with in this way. The person is also informed that if LI is unsuccessful and their complaint is referred back for a decision to be made as to its admissibility, if it is determined as admissible, information obtained as part of the LI process can be used at that point to discontinue the complaint.
If the complainant consents, GSOC refers the matter to a nominated Garda Inspector who manages the process on behalf of the Garda Síochána. (If the person does not consent, GSOC will decide if the allegation will be admitted for investigation in line with the criteria and processes set out in legislation.)

The nominated Garda Inspector contacts the complainant by phone to identify what actions or outcomes he/she is seeking to achieve. Typically, the Inspector then has a discussion with the garda member concerned to explore what may have led to the issue. The process is not about apportioning blame, it is about addressing the issue raised and learning from what has happened in order to prevent a reoccurrence.

The Inspector contacts the complainant again to advise on the action taken to address the matter:

- If the complainant is satisfied with the response, the Inspector notifies GSOC and GSOC confirms with the complainant that he or she is satisfied. GSOC then closes the file.
- If the attempts to resolve the matter through LI are unsuccessful, the complaint is referred back to GSOC which decides if the complaint should be admitted for investigation.
- If it is decided that the complaint is admissible, GSOC may rely on the information gathered during the Local Intervention process to discontinue the complaint. For example, if the information gathered explains the alleged breach, say, the matter complained about is civil and therefore outside the remit of AGS, GSOC will inform the complainant the breach is being considered for discontinuation. The complainant will be given the opportunity to further explain to their complaint, in order to see if it warrants investigation.

It is the view of AGSI that this Intervention process, should be maintained as it dealt with at the appropriate level, timely and allows for the speedy resolution of matters to the satisfaction of all parties. We would also ask the Committee to consider the GSOC Annual Report 2020 where the scheme and its success was referred to and complimented.
In Subhead 2 – the Scheme states that a complain shall not apply to the conduct of a member while the member was not on duty, ‘**unless the conduct alleged, if proved, be likely to bring discredit on the Garda Siochana**’. This is gravely concerning. The AGSI would now question were the work life of a member begins and ends and how is the private life of a member now preserved when off duty. There is a complete lack of any definition as to what constitutes ‘discredit’ and in what circumstances this might apply/be invoked. Members of An Garda Siochana have often, when off duty invoked their Garda Powers, by declaring themselves as a member of the Organisation and showing their Garda ID. Effectively this then places them ‘on duty’. In these circumstances it would be more acceptable that a complaint could follow as the member was ‘on duty’, while ‘off duty’. The rights of members to have a private life outside of work must be recognised and AGSI would assert that this Subhead must be reviewed.

Of further concern to AGSI in this Subhead relates to section 3, where it states, ‘**a complainant under this Part need not identify the member of garda personnel who is the subject of a complaint in order to fall within subhead 1**’. What the Subhead does not state that once the member is identified, how and when will they be notified that a complaint has been made against them. This must happen so that the principles of natural justice and fair procedure apply to the member of AGSI as soon as possible after identification. It is unacceptable that fair principles would not apply to Gardai as they would to any other member of Society.

Subhead 5 goes onto describe the 12-month time limit for the making of a complaint. It further goes onto state, ‘**The Garda Ombudsman may extend the time for making a complaint if he or she considers that there is a good reason for doing so**’. It is widely known within the Association the exceptionally lengthy period of time it takes GSOC to resolve some complaints with no accountability or explanation by GSOC. Members of this Association and their families have suffered severe anxiety and stress, their professional and private lives have been turned up-side down with their reputations destroyed while they have waited for up to periods of 5 years for
GSOC to conclude investigations where no wrongdoing has been found. One can only describe the conduct of GSOC as shameful in some cases, with AGSI having first-hand evidence and examples of prolonged and unnecessary delays in investigations, poor processes and procedures, a failure to respond to letters from our AGSI solicitors and members left in an unknown state of anxiety and worry. How is this acceptable, and how will this Bill address this very serious matter? Who can establish what if any training GSOC Officers received, are they qualified and skilled in the investigation of complaints? Where are the safeguards for members of AGSI that investigations will in fact conclude in a timely and effective manner? There is no evidence whatsoever to support this in the Bill, in fact the converse is suggested and AGSI would assert that the fairness aspect that members should be entitled to is missing in this Subhead.

4.23 Head 159 – Making, recording of complaints etc.

This Subhead sets out the process for the making of a complaint but is confusing in that it states it ‘shall be referred to the Office of the Garda Ombudsman without delay’. It does not clarify the position where complaints may be suitable for resolution by An Garda Siochana as per the later Heads of the Scheme.

4.24 Head 160 – Determination of admissibility of complaint, suitability for resolution by An Garda Siochana etc.

There appears to be no time limit now for making a complaint and so this subhead is concerning to AGSI on a number of fronts. Subhead 5 details that the Ombudsman can ‘make such enquiries as he or she thinks fit’. No time limit is attached to the making of these enquiries meaning that as such there is no time limit to an investigation as the ‘enquiries’ could go on for some time before the decision to deem it admissible or not is made. This is completely contrary to the fair procedures and natural justice that members of AGSI are entitled to and is unacceptable. Additionally, the reference to vexatious and
frivolous complaints and its removal as a reason for inadmissibility is concerning. It is widely recognised that complaints are made, by some people purely for vexatious and frivolous reasons and AGSI cannot understand why the Ombudsman would not want to highlight this and the harmful effect it has had and can have on members. This should be reinstated.

Under Subhead 7, and with reference to Subhead 8, the process for notifying a member or not of a complaint is detailed. Why will the Garda Commissioner now not be notifying members that they are the subject of a complaint, when will the Organisation be then notified and how will the appropriate welfare and other supports for a member be put in place? What are examples of a ‘good reason’ that GSOC would postpone telling a member they are the subject of a complaint? Absent also is the detail on joint protocols for how these notifications would occur and in what circumstances. Overall it appears that there is a serious absence of fair procedure and natural justice in these powers and questions arise about the Constitutional rights of Gardai as citizens in uniform.

Under Subhead 9, should the member concerned not also be notified?

Subhead 11 is stating that even when a complaint is inadmissible, nothing prevents the Garda Commissioner from taking any action he deems appropriate. What is being suggested here? clarity would be welcome.

**4.25 Head 162 – Arrangements for handling complaints suitable for resolution by An Garda Siochana**

As previously stated AGSI is of the view that the Committee should refer to the GSOC Annual Report 2020 to give clarity to the reasons why the Local Intervention works and should be retained.

**4.26 Head 165 – Notification to Garda Ombudsman of incident of concern in relation to conduct of member of Garda personnel.**
This Subhead refers to ‘joint investigation teams’. AGSI are very concerned that this section lacks clarity, and is asking if in effect, our members are subjected to two or more investigation teams on the same issue. How is it decided who the lead investigator is, why is this necessary? Which investigation would take precedence; how can this be practically applied? This is confusing and greater clarity is needed here.

4.27 Head 166 – Investigation into matters in the Public Interest

This Subhead outlines that a formal investigation in the public interest may take place if ‘a member of Garda personnel may have behaved in a manner that may have breached the standards of professional behaviour and which if proved would justify conduct proceedings’ This is vague and unspecific. What exactly is a matter ‘of public interest’? Is this determined by public outcry on some social media platform which does not give context but creates sufficient interest for ‘keyboard warriors’ to wade in and dramatize matters, or is it based on an informed position where certain criteria as set out, is met and there is a genuine need to satisfy the public that professional behaviour was not breached. It is an enormous power to give to the Ombudsman if they can simply decide on what merits a ‘public interest’ enquiry if this is not balanced by some criteria which sets out what constitutes same.

4.28 Head 168 – Formal investigations – This subhead seats out that the Garda Ombudsman may defer the making of an appointment under subhead (1) or where such an appointment has already been made, direct that the investigation concerned be suspended where the subject matter of the investigation is already under investigation by another body. We believe that 2(a) needs to be much more specific as to what bodies or other bodies of investigation would bring about the suspension of the investigation by GSOC. The absence of this type of detail could make an investigation never ending and the bodies in question should be specified in order to give more insight as to what the sub-section is about.
The Subhead goes onto mention retired members of An Garda Siochana. Where the investigation in non-criminal in nature, what is the obligation for retired members to co-operate with an investigation, and what is the Bill suggesting is the scope and powers for this? What protections are proposed/suggested for retired members. AGSI would assert that where a member is retired and the matter is non-criminal in nature, the same rules that apply to all others in public office equally apply to retired Gardai.

4.29 Head 169 – Powers equivalent to member of An Garda Siochana when undertaking formal investigation.

This Subhead does not make distinctions between criminal and disciplinary proceedings but instead refers to ‘formal investigations’. This is very concerning as a member will not know what type of investigation is being undertaken, and therefore will not know what rights and entitlements should be afforded to them. Is every investigation to be treated as if it were a criminal investigation, even if the Ombudsman knows that is not the case? The powers granted to the Ombudsman are equal in this Subhead to those afforded to the Gardai, however AGSI would ask if those powers are necessary/appropriate if the matter relates to a disciplinary matter only.

It would also appear that the formal sanction under the previous legislation of a designated officer to investigate a ‘particular matter’ is now not required and much greater clarification is needed in relation to that.

4.30 Head 170 – Search of Garda Premises

AGSI have concerns about the extensive powers granted in this Subhead. It allows the Ombudsman the power to search any person who is in the Garda Station at the time of the search even though they may have no connection whatsoever to the matter under investigation. Where is the legal basis for this, particularly for members who are in a Garda Station with a prisoner, witness
or member of the public in a matter which is totally unconnected with the matter under investigation.

Concerning also, is the fact that GSOC are issuing authorisations for such searches to each other. Where is the independence? what are the reasons why GSOC cannot swear for a warrant to search in front of a judge in a similar manner to Gardai?

Again here, because it’s a formal investigation, and this is not defined as previously highlighted, the matter under investigation may not even be criminal in nature. This is a wide sweeping power and appears disproportionate.

Where are the protections for members of AGSI here who are going about their work and can be suddenly searched for reasons unknown to them and for matters of which they are not connected to in any way?

4.31 Head 171 – Additional powers for purpose of undertaking of formal investigation.

This Subhead is a further example of the diminution of the rights of AGSI when investigations are being conducted. Under the Garda Siochana Act 2005, Section 95, members of the Organisation have the right to make representations themselves, or through their representatives and to make submissions.

This Subhead again, is providing the Ombudsman with maximum powers for what could be a minor disciplinary matter, and here again the classification of ‘formal investigation’ has no definition or criteria attached to it.

Again, AGSI would say there is disproportionate powers available to the Ombudsman here and this should be re-visited with increased powers available for matters of a serious criminal nature only. What is proposed here is that the Ombudsman can utilise all the powers attached to a serious criminal investigation, even though the matter being investigated could be of a non-criminal nature. This relates back to the definition of ‘formal investigation’.
A basic right when a member is being investigated, is to know of the matter that they are being investigated for. Given that fact that this section effectively allows the Ombudsman to ‘detain a member for questioning’, the full legal entitlements proposed to be vested in the Ombudsman in this section should be revisited to ensure they comply with the legal entitlements of our members.

4.32 Head 174 – Other actions by Garda Ombudsman following formal investigation.

This Subhead makes reference back to Subhead 168 (4) concerning the submission of a report on a formal investigation. It then goes onto state that if the Ombudsman is of the opinion that the report discloses matters as set out in Sections (a) (b) or (c) of the Subhead then it will be forwarded to the Commissioner, Minister or Authority. It can then result in performance, conduct or dismissal proceedings.

In a situation where a member can be dismissed and based on an ‘opinion’, of the Ombudsman this Subhead must be revisited to check if it has due regard for the process that members would be entitled to if there is a suggestion that they can sanctioned up to and including dismissal.

Is the opinion in this case, evidence of actual facts, gathered in accordance with law or merely the opinion of a GSOC officer based on a criterion which is unknown and may have no legal standing?

Where are the safeguards for members here? they appear seriously lacking in our view.

4.33 Head 176 – Duty to keep certain persons informed.

The subhead states that the Ombudsman shall on his ‘own initiative or on request provide the following persons with sufficient information to keep them informed of the progress and results of a formal investigation’. AGSI would assert that up-dates should be provided routinely and at least every quarter as to the status and progress of an investigation. One of the most remarkable
aspects of this Bill is the sheer lack of unrestricted and unaccountable powers vested in the Ombudsman to extend time limits for investigations to such an extent that there is actually no end date to them.

Moreover, the Subhead at (g) states that a member, if known will be kept informed. AGSI would assert that this should happen as soon as the identity of the member becomes known.

4.34 Head 179 – Extension of time limit for instituting summary proceedings for offences.

It should be known that the 6 months which apply to citizens is already set at 12 months and now it is sought to increase this again to 18 months. AGSI would assert that the 12 months is sufficient time and should not be extended.

4.35 Head 181 – Protocols.

The AGSI are interested in (j) of the suggestion around the provision of training as set out here. This raises the question of what training member of GSOC actually have as investigators, particularly given the extensive powers that are proposed in this Bill. Is it a case that investigators are not actually trained but are going to rely on An Garda Siochana to provide them with training in investigation techniques? Is it a criterion in the Ombudsman recruitment policy that they are qualified/trained investigators? and if not why not.

AGSI have many members who are waiting some time for the provision of training and would assert that if Organisational training is available then it should be provided to our members in the first instance.

The use of detention facilities and the joint investigation teams are matters that require further clarity here also.
4.36 Head 182 – Review of decisions by Garda Ombudsman.

This Subhead is concerning in sections (2) and (6). It allows for the review of the 21 days to be extended where the Ombudsman is satisfied that circumstances exist that warrant the extension. It does not set out what these circumstances might be and what criteria would be applied in deciding to grant an extension to the 21-day limit.

Moreover at (6) it also sets out that the Ombudsman can review its own decision anytime but sets no limits on this. In effect this actually means that a decision can be made, then revisited, with no time limit attached. This could result in disciplinary or conduct findings being opened years after a matter is closed. Where is the fairness to the member here?

4.37 Head 190 – Duty of members of garda personnel to account to designated officer.

This Subhead raises serious concerns for AGSI in the expansion of the powers of the Designated Officer. What the position is regarding the member answering questions in something which may ultimately be a disciplinary matter. What will happen to the responses/information/documents provided and can they be used against that member in disciplinary proceedings. Does this Subhead only apply where it’s an investigation relating to a criminal matter? As its set out it is a sweeping power and one that must have the appropriate legal safeguards for members.

4.38 Head 219 – Regulations relating to management of Garda Siochana

The suggestion that the Commissioner at section 1 (a) can remove any rank within the Organisation is a serious one and no reference is made here to a consultative process with the Representative bodies on this matter.

It is also concerning that the pay of members and their allowances can be determined without consultation, this is unfair and must be reconsidered.

Clarity is needed on (n) and what is meant here for Associations
4.39 Head 220 – Performance Regulations

Clarity is needed in this Subhead if these regulations are different to, or in addition to, the present disciplinary regulations and where they fit in relation to same.

4.40 Head 221 – Conduct Regulations.

Clarity is needed in this Subhead if these regulations are different to, or in addition to, the present disciplinary regulations and where they fit in relation to same and where they fit with performance regulations in the previous subhead.

4.41 Head 222 – Regulations relating to standards of professional behaviour.

Clarity is needed in this Subhead if these regulations are different to, or in addition to, the present disciplinary regulations. Are they in addition to the regulations in the previous subheads or is this another additional proposal?

4.42 Head 225 – Dissolution of the Garda Siochana Reward Fund

The AGSI are opposed to the dissolution of this fund owing to the first hand experiences we have in how the fund supports the vital services provided for by the Garda Welfare Section.
General Scheme of the Policing Security and Community Safety Bill

Views of the Garda Representative Association

Part 1 – Preliminary and General Matters

Head 1 – Short title and commencement
1.1 Nothing arises.

Head 2 – Interpretation
2.1 Nothing arises.

Head 3 – Security Services
3.1 Nothing arises.

Head 4 – Repeals
4.1 Nothing arises.

Head 5 – Expenses
5.1 Nothing arises.

Part 2 – An Garda Síochána
Chapter 1 - General

Head 6 – Continuation of Garda Síochána
6.1 Nothing arises

Head 7 – Principles of Policing
7.1 Nothing arises

Head 8 – Functions of An Garda Síochána
8.1 The Association is concerned that the requirement at Head 8(1)(f) is unduly onerous and too ambiguous. It is submitted that obligation to prevent harm and to perform a function in the prevention of crime is inherent among the enumerated objectives contained under this head.
The Association is not satisfied that Head 8(5) sufficiently protects against the imposition of a positive obligation on an individual Member of An Garda Síochána as the sub-paragraph is directed towards civil responsibility of the State to an individual and not towards the responsibility of any individual Garda Member. The Association is conscious that the creation of any responsibility over and above those encompassed in the Oath of office or the Garda Code of Ethics creates a potential burden for an individual Garda Member in the conscientious performance of their duties.

Observation 1
The Association argues that sub-paragraph Head 8(1)(f) ought to be removed

Head 9 – Prosecution of offences by Members of An Garda Síochána

9.1 Nothing arises.

Chapter 2 – Board of An Garda Síochána

Head 10 – Establishment and Membership of the Board

10.1 The Association is of the opinion that the most important experience and expertise that Members of the Board must have is that “connected with the functions of An Garda Síochána”. It is this expertise that encourages trust and confidence in the performance of the vital role that the Board will undertake. This function is contained at Head 10(3)(a) and warrants particular attention.

Head 11 – Role of the Board

11.1 The Board of An Garda Síochána has a role in the operation of An Garda Síochána and, therefore, it should recognise the Association role in representing its members as a relevant stakeholder within the parameters of its function as set out under Head 48 and the relevant Regulations. It is acknowledged that this role may be consultative one if that would assist the Board in the performance of its functions and the performance of the Association of its representative function.

Observation 2
The Association argues that the Board should recognise the role of the Association as a stakeholder in decision-making

Head 12 – Meetings of Board and procedures

12.1 Nothing arises.

Head 13 – Ineligibility for appointment, disqualification for office, cessation of membership
13.1 The Association notes that retired Members of An Garda Síochána will qualify for appointment to the Board and believes that to be a positive due to the experience and expertise particular to the function of An Garda Síochána that they will bring.

Head 14 – Removal of member of Board from office

14.1 Nothing arises

Head 15 – Removal of all members of Board from office

15.1 Nothing arises

Head 16 – Committees of Board

16.1 Nothing arises

Head 17 – Remuneration and expenses of members of Board and committees

17.1 Nothing arises

Head 18 – Provision of services to Board

18.1 It is noted that the Commissioner shall provide to the Board resources including “garda staff” which therefore excludes Garda Members (as defined). The Association submits that garda personnel ought to be in a position to be appointed and a competition held in accordance with the CPSA code of practice.

Chapter 3 – Garda Commissioner, Deputy Garda Commissioner

Head 19 – Appointment of Garda Commissioner

19.1 Nothing arises

Head 20 – Appointment of Deputy Garda Commissioner

20.1 Nothing arises

Head 21 – Power of Deputy to perform functions of Garda Commissioner

21.1 Nothing arises

Head 22 – Resignation of Garda Commissioner, Deputy Garda Commissioner

22.1 Nothing arises

Head 23 – Suspension and removal of Garda Commissioner and Deputy Garda Commissioner

23.1 Nothing arises
Head 24 – Inquiry into any matter giving rise to notification under head 23(7)

24.1 The Association is concerned that the Inquiry which may be directed by the Government is not held in private. Although conscious of the public interest in such an inquiry, statements made may require the protection afforded under sub-heading (5) and, therefore, privileged statements are envisaged.

Chapter 4 – Functions, duties of Garda Commissioner

Head 25 – Functions of Garda Commissioner

25.1 Nothing arises

Head 26 – Direction and control of An Garda Síochána

26.1 Nothing arises

Head 27 – Independence of Garda Commissioner

27.1 Nothing arises

Head 28 – Duty of Garda Commissioner to account to Government, and provide information to Attorney General

28.1 Nothing arises

Head 29 – Duty of Garda Commissioner to provide information

29.1 Nothing arises

Head 30 – Directive from Minister

30.1 Nothing arises

Head 31 – Delegation of powers, functions or duties of Garda Commissioner

31.1 Nothing arises

Head 32 – Powers relating to contracts, bank accounts etc

32.1 Nothing arises

Head 33 – Arrangements for obtaining views of public

33.1 Nothing arises

Head 34 – Provision of police services for certain events etc

34.1 Nothing arises

Chapter 5 – Garda Personnel
Head 35 – Garda Personnel

35.1. Nothing arises

Head 36 – Ranks, numbers in each rank, terms and conditions

36.1 Insofar as this Head deals with the terms and conditions of employment of Members of Garda Rank within An Garda Síochána (and indeed even its very existence) the Association requires recognition as a stakeholder in accordance with its function as set out under Head 48 and the relevant Regulations.

Head 37 – Member’s solemn declaration

37.1 The Association notes that only those members appointed after the commencement of this head shall be required to make the solemn declaration.

Head 38 – Appointment of persons to ranks of Assistant Garda Commissioner and Chief Superintendent

38.1 Nothing arises

Head 39 – Suspension, removal of persons appointed to rank of Assistant Garda Commissioner or Chief Superintendent

39.1 Nothing under this Head determines how the Commissioner shall form the opinion that the person concerned has acted in a manner which could give rise to his or her removal from office. This is unfair and lack the basic requirements of fair procedures to enable the person concerned to properly engage with the opportunity to make representations envisaged by Head 39(3)

Observation 3
The Association argues that the procedure to form the opinion under Head 39 should be clearly defined in the legislation or in Regulations made under the legislation when enacted in the interests of fairness.

Head 40 – Inquiry into an matter giving rise to notification under head 39(3)

40.1 The Association is concerned that the Inquiry which may be directed is not held in private. Although conscious of the public interest in such an inquiry, statements made may require the protection afforded under sub-heading (5) and, therefore, privileged statements are envisaged.

Head 41 – Appointment of persons to ranks below rank of Chief Superintendent and dismissal of such members for reasons of public confidence

41.1 The Association is greatly concerned that the Head of the bill dealing with appointment to any rank is not dealt with as a discrete head, given its importance.
41.2 To ensure promotion opportunities the Association believes that promotion to ranks below that of Chief Superintendent should be confined to current Members of An Garda Síochána only.

Observation 4
The Association believes that the power to promote to ranks below that of Chief Superintendent should be dealt with under a discrete Head

Observation 5
The Association argues that promotion to those ranks should be confined to current Members of An Garda Síochána only.

41.3 Nothing under this Head determines how the Commissioner shall form the opinion about a member’s conduct. It is submitted that the power of summary dismissal is an exceptional one and must be exercised in accordance with fair procedures and natural and constitutional justice. The absence of a transparent and fair procedure through which the Commissioner forms his or her opinion is inherently unfair and unsafe.

Observation 6
The Association argues that the procedure to form the opinion under Head 41 should be clearly defined in the legislation or in Regulations made under the legislation when enacted in the interests of fairness.

Head 42 – Appointment of reserve members

42.1 Nothing arises

Head 43 – Duty of members of Garda personnel to account

43.1 The Association vociferously objects to any requirement that may result in a Garda Member being required to account to a member of Garda Staff, of any grade. The Association does not accept that there is equivalency between ranks within An Garda Síochána and grades within the civil service.

Observation 7
The Association objects to any requirement that may result in a Garda member being required to account to a member of Garda Staff of any grade

Head 44 – Admission of Garda trainees

44.1 Nothing arises

Head 45 – Appointment of members of Garda Staff
45.1 The Association requires to be recognised as a stakeholder regarding the implementation of Head 45 and the introduction of Garda Staff

Head 46 – Garda Staff undertaking

46.1 Nothing arises

Head 47 – Power to appoint consultants and advisors

47.1 Nothing arises

Head 48 – Representative Associations

48.1 The Association requires to be recognised as a stakeholder regarding the implementation of Head 48 and, in particular, the making of regulations relating to their role, function and constitution.

Chapter 6 – Accountability and funding of An Garda Síochána

Head 49 – Head 65

Nothing arises

Chapter 7 – Codes of ethics, standards of integrity, unauthorised disclosure of information

Head 66 – Code of ethics for members of garda personnel

66.1 The Association notes that the establishment of a code of ethics shall now be enshrined in the legislation.

The Association requires and welcomes the opportunity to be recognised as a stakeholder regarding the implementation of Head 66.

Head 67 – Standards of integrity, codes of ethics for members of committees, advisors or consultants etc

67.1 Nothing arises

Head 68 – Confidentiality of certain information

68.1 Nothing arises

Chapter 8 – Special inquiries relating to administration, practice or procedure

Head 69 – Special inquiries relating to administration practice or procedure

69.1 Nothing arises
Chapter 9 – Liability

Head 70 – Liability for certain acts of members of An Garda Síochána

70.1 The Association welcomes the inclusion of Head 70

Head 71 – Legal Aid for members of An Garda Síochána

71.1 Nothing arises

Chapter 10 International Service and Cooperation with police services, law enforcement agencies or other relevant person outside the State

Head 72 – Head 83

Nothing arises

Part 3 – Community Safety

Head 84 – Head 95

Nothing arises

Part 4 – Establishment and Functions of Policing and Community Safety Authority

Head 96 – 139

Nothing arises

Part 5 – Office of the Garda Síochána Ombudsman

Head 139 – Head 156

The Association notes that the powers and functions of the Garda Ombudsman and its designated officers are extensive however there is no oversight provision and there ought to be given the nature and extent of their powers.

Observation 8
The Association argues that there must be oversight of the operation and exercise of the powers provided to the Garda Ombudsman.

Part 6 – Complaints, incidents of concern, investigations and other matters

The Association believes that the Garda Síochána Ombudsman Commissioner currently has all of the powers, privileges and rights required to perform its function adequately, proportionately and fairly.
Gardaí are entitled to all of the protections of the constitution and the criminal law when subject to an investigation.

The Association has carefully considered An Garda Síochána’s submission in relation to Part 6 of the Bill and adopts the submission in relation to Part 6 only of the Bill in its entirety.

Part 7 – Independent Examiner of Security Legislation

Head 191 – Head 201

Nothing arises

Part 8 – Regulations and Miscellaneous Provisions

Head 218 – General Power to make regulations

The Association requires recognition as a stakeholder in accordance with its function as set out under Head 48 and the relevant Regulations in relation to the implementation of Head 218

Head 219 – Regulations relating to Management of Garda Síochána

The Association requires recognition as a stakeholder in accordance with its function as set out under Head 48 and the relevant Regulations in relation to the implementation of Head 219

Head 220 – Performance Regulations

The Association requires recognition as a stakeholder in accordance with its function as set out under Head 48 and the relevant Regulations in relation to the implementation of Head 220

Head 221 – Conduct Regulations

The Association requires recognition as a stakeholder in accordance with its function as set out under Head 48 and the relevant Regulations in relation to the implementation of Head 221

Head 225 – Dissolution of the Garda Síochána Reward Fund

The Association believes that the fund is an extremely valuable and important resource and should be maintained and continue to be operated as it is.
Principal Clerk,
Oirachtas Committee on Justice,
Dáil Éireann,
Kildare Street,
Dublin 2
F.A.O. Mr Alan Guidon,

Re: Draft Submission to Dáil Committee on Justice: General Scheme of the Policing & Community Safety Bill

A Chara,

The genesis of the Policing and Security and Community Safety Bill (the Bill) is the Report on the Commission on the Future of Policing in Ireland (CoFPI), published on 18th September 2018. CoFPI identified shortcomings from a cultural, accountability, management and structural perspective within An Garda Síochána many of which are addressed within this Bill.

However, the Association of Garda Chief Superintendents, whose function is to represent members of Chief Superintendent within An Garda Síochána as per S.I. 64/1962 as amended, is unequivocally of the view that not only does the Bill, as drafted, fail to transpose the spirit and intention of CoFPI recommendations but more importantly significant sections therein impede upon long established constitutional rights in respect to the dignity, privacy and human rights of those working for and within the organisation. It is our collective view that the Association

A.G.C.S. Executive Committee: Chairman: Chief Superintendent David Dowling, General Secretary: Chief Superintendent Fergus Healy, Treasurer: D.Chief Superintendent Aidan Giacken, Chief Superintendents Lorraine Wheatley, John Nolan, Tom Myers
will be left with no alternative but to take to task its content, by way of legal challenge before the Courts, if the Bill is passed into law in its current draft.

The totality of the offending provisions exposes complete systemic disregard for the principles of ‘proportionality and fairness’ to employees of An Garda Síochána which, will result in protracted, expensive and time-consuming legal challenges as it has real potential adversely impact the rights of the employees appointed and employed by the State to run the policing service provided to the citizenship of the State itself.

This submission seeks to highlight the concerns of the Association of Garda Chief Superintendents, who represent the rank of all forty-seven (47) Chief Superintendents currently deployed now and in the future.

Concerns

It is offered that the Bill:

1. Regularly confuses the concept of oversight with control and provides powers that facilitates unnecessary encroachment on the individual office holder.
2. Creates overburden some accountability frameworks removing managers from their core duty of managing front-line policing services.
3. Expands significantly the powers, remit and duties of those external bodies in a manner that dilutes and removes the essential independence of the policing service provided to the Community, from an investigative, administrative, employment and stakeholder engagement perspective.
4. Is drafted with ambiguity as to the roles of regulatory and oversight bodies, creating complex and unwieldy oversight, directly impacting the individual, which in the absence of a dispute resolution mechanism, will result in an unnecessary levels of litigation in defending actions or decisions taken in the course of one’s duty to police.
5. Erodes the legal and constitutional rights of the membership of An Garda Síochána in a manner that lacks reasonableness, proportionality and necessity, effectively purporting to assert the Constitutional, Human and Employee Rights as currently provided for in the State. The Bill undermines the legal protections afforded to the citizenship of the State, despite the fact that the membership of An Garda Síochána is drawn from the civil community for the benefit of the Community.
6. Provides unregulated, unsupervised and unquestionable powers to GSOC that are absent of any test of reasonableness, suspicion and proportionality creating a questionable disparity with those imposed on An Garda Síochána when investigating those under suspicion or investigation.
7. In an effort to strengthen the investigative Authority of GSOC, who has a singular role of oversight in policing allows for flagrant disregard for basic
rights and natural justice adversely impacting those employed in An Garda Síochána.

8. Removes the line between alleged criminal behaviour of Garda personnel, which could result in repeated claims of abuse of power by GSOC forcing multiple and repeated court challenges.

While it is accepted that the Garda workforce may be subject to more rigorous rules than the society it polices, such restrictions must be with good reason, proportionate and necessary in a democratic society. It is clearly obvious that a number of heads within this bill are outside that the balance needed to be ‘proportionate and fair’. It must be borne in mind that the police service itself is made up of citizenry, drawn from the society, it polices.

An Garda Síochána is a civil policing group and the constitutional rights enshrined by Bunreacht na hÉireann, apply to that grouping (circa 15,000 personnel), subject to Article 40.1.

The membership, whilst tasked with policing society within a legislative framework, now appears to find itself, the subject to far more stringent legislative provisions, within this bill, than society.it polices. The Bill goes way beyond what is necessary in a democratic society to provide the principles of “fairness and proportionality”, something which the Association of Garda Chief Superintendents is seriously concerned.

The powers being afforded to the Ombudsman in this Bill are far in excess of what is legal, necessary and proportionate. The Bill as it stands, shows little regard to international human rights instruments or constitutional principles of fair procedure and is seriously flawed as a result. In any civilised society within the western world no other police force finds its membership the subject of what can only be described as draconian and clumsily drafted legislative proposals presented to the Oireachtas.

Finally, the Association is willing to make itself available to the Committee to discuss our concerns and the impact this Bill will have on the individual lives of those employed from within society to carry out a vital and complex service to the people of Ireland.

Is mise le meas,

Fergus Healy

General Secretary

22 October 2021.
Submission to the Oireachtas Committee on Justice on the General Scheme of the Policing, Security and Community Safety Bill

27 October 2021
Table of Contents

TABLE OF CONTENTS ........................................................................................................2

1. EXECUTIVE SUMMARY .............................................................................................2

2. PART 5: OFFICE OF THE GARDA SIÔCHÁNA OMBUDSMAN ........................................5

   2.1 HEAD 139 CONTINUATION OF GARDA SIÔCHÁNA OMBUDSMAN COMMISSION UNDER NAME OF OFFICE OF THE GARDA SIÔCHÁNA OMBUDSMAN .................................................................5
   2.2 HEAD 142: ACTING GARDA OMBUDSMAN ....................................................................5
   2.3 HEAD 143: OBJECTIVES, FUNCTIONS AND POWERS OF GARDA OMBUDSMAN .................................................................5
       2.3.1 Head 143(3) ...........................................................................................................5
       2.3.2 Head 143(6): Fair, timely and effective handling of complaints and investigations ..........6
   2.4 HEAD 150: SPECIAL ASSISTANCE .............................................................................7
   2.5 HEAD 154: CONFIDENTIALITY OF INFORMATION OBTAINED BY GARDA OMBUDSMAN ...................................................8

3. PART 6 COMPLAINTS, INCIDENTS OF CONCERN, INVESTIGATIONS AND OTHER MATTERS ..............................................................................................................9

   3.1 HEAD 157: INTERPRETATION ...................................................................................9
       3.1.1 “Complaint” ..........................................................................................................9
       3.1.2 “Incident of concern” ............................................................................................9
   3.2 HEAD 158: SUPPLEMENTARY PROVISIONS IN RELATION TO COMPLAINTS .........................................................................10
       3.2.1 Complaints ‘on behalf’ of a person .......................................................................10
       3.2.2 Provision for review of requirement to automatically refer complaints to the Ombudsman .....10
   3.3 HEAD 159: MAKING, RECORDING OF COMPLAINTS ETC. .....................................11
       3.3.1 Complaints made to members outside a Garda Station ..........................................11
   3.4 HEAD 161: CATEGORIES OF COMPLAINTS SUITABLE FOR RESOLUTION BY AN GARDA SIÔCHÁNA ........................................11
   3.5 HEAD 163: IF COMPLAINT SUITABLE FOR RESOLUTION BY AN GARDA SIÔCHÁNA IS REFERRED UNDER HEAD 160 ....11
   3.6 HEAD 164: MATTER CONCERNING DEATH OF, OR SERIOUS HARM TO, A PERSON .................................................................12
   3.7 HEAD 165: NOTIFICATION TO GARDA OMBUDSMAN OF INCIDENT OF CONCERN IN RELATION TO CONDUCT OF MEMBER OF GARDA PERSONNEL ........................................................12
   3.8 HEAD 166: INVESTIGATION OF MATTERS IN THE PUBLIC INTEREST ..........................13
   3.9 HEAD 167: PROTECTED DISCLOSURES RELATING TO GARDA SIÔCHÁNA ................13
   3.10 HEAD 168: FORMAL INVESTIGATION; HEAD 169: POWERS EQUIVALENT TO MEMBER OF AN GARDA SIÔCHÁNA WHEN UNDERTAKING FORMAL INVESTIGATION; HEAD 171: ADDITIONAL POWERS FOR PURPOSE OF UNDERTAKING FORMAL INVESTIGATION .................................................................14
   3.11 HEAD 170: SEARCH OF GARDA PREMISES ................................................................14
   3.12 HEAD 172: POWER TO DISCONTINUE FORMAL INVESTIGATION ................................16
   3.13 HEAD 175: INVESTIGATION OF MATTERS RELATING TO GARDA COMMISSIONER BY GARDA OMBUDSMAN ..................16
   3.14 HEAD 176: DUTY TO KEEP CERTAIN PERSONS INFORMED .....................................17
   3.15 HEAD 177: PROVISION OF INFORMATION TO GARDA OMBUDSMAN BY GARDA SIÔCHÁNA ......................................................17
   3.16 HEAD 179: EXTENSION OF TIME LIMIT FOR INSTITUTING SUMMARY PROCEEDINGS FOR OFFENCES ...................................17
   3.17 HEAD 180: SAME CONDUCT MAY FORM BASIS FOR COMPLAINT OR CHARGE ..............18
   3.18 HEAD 181: PROTOCOLS ............................................................................................18

4. MISCELLANEOUS OBSERVATIONS ..............................................................................19

   4.1 PART 1, HEAD 2: INTERPRETATION ........................................................................19
   4.2 PART 2, HEAD 43: DUTY OF MEMBERS OF GARDA PERSONNEL TO ACCOUNT .................................................................19

Submission to the Oireachtas Committee on Justice on the General Scheme of the Policing, Security and Community Safety Bill
1. **Executive Summary**

The Garda Síochána Ombudsman Commission ("GSOC") thanks the Oireachtas Committee on Justice for the opportunity to submit its observations and comments on the General Scheme of the Policing, Security and Community Safety Bill.

The General Scheme of the Policing, Security and Community Safety Bill has been developed on the basis of the recommendations by the Commission on the Future of Policing in Ireland (CoFPI) in its report published in September 2018 and the subsequent Government Decision on the Future of Policing in Ireland.

GSOC welcomed the CoFPI report which recognised the importance of independence when dealing with complaints about police conduct and which set out changes which GSOC believes are necessary to improve public confidence in police oversight. Many of the recommendations echoed GSOC’s Proposal for Legislative Change which was submitted to the Department of Justice and Equality in December 2017, including that all complaints about the police should be routed through GSOC to determine what action needs to be taken.

GSOC also welcomed the commitment made by Government to implementing the findings of CoFPI in its plan ‘A Police Service for the Future’, of which the passage of the General Scheme of the Policing, Security and Community Safety Bill is a core feature.

GSOC has been operational for 14 years, in which time it has built up a significant amount of expertise and insight into policing and policing oversight mechanisms in Ireland. Since its establishment GSOC has dealt with almost 30,000 complaints in addition to over 1,500 referrals from An Garda Síochána. GSOC has also undertaken numerous other investigations into Garda conduct, whether at the request of the Minister for Justice or the Policing Authority or on its own initiative.

Drawing on this experience, GSOC has consistently commented on the need for reform and modernisation of policing in Ireland. Bearing this in mind, the Ombudsman Commission broadly welcomes the reforms proposed in the General Scheme of the Bill and its significant proposals to greatly strengthen the independent oversight of the handling and investigations of wrong doing by Garda personnel. In particular, the Commission welcomes the key proposals to restructure GSOC as a complaints body with greater financial independence, an expanded remit to include Garda staff and enhanced investigation procedures to support timely and effective resolution of complaints and investigations.

Since the publication of the CoFPI report, GSOC has engaged with the Department of Justice during the drafting of the General Scheme and has offered its views, based on GSOC’s operational and institutional experience over the past fourteen years, on the provisions to be set out in the legislation.

This submission to the Committee is largely drawn from the observations which GSOC has made to the Department during the drafting of the Scheme over these last two years. For the purposes of our submission, GSOC is concentrating on providing observations to Parts 5 and 6 of the Scheme, given that it is these sections which most directly affect the future
operation and functions of GSOC as a restructured policing Ombudsman. A small number of additional observations regarding other provisions which are of particular relevance to the Ombudsman’s remit are also added.

GSOC would like to draw the Committee’s attention to some core areas where the legislation and its implementation will require particular attention to ensure the operation of a successful oversight model. These are:

- Ensuring meaningful enhancement of the reformed policing Ombudsman’s institutional and operational independence, in line with the recommendations of the Commission for the Future of Policing.

- Ensuring that the expansion of the reformed body’s functions and competencies is accompanied by a commensurate expansion of capacity in the form of resources, personnel and expertise that guarantee the ability to deliver them. Limitations on resourcing during the lifetime of GSOC have contributed to the issues it has faced in delivering on its mandate. Adequate resourcing of GSOC is a core recommendation of the Commission for the Future of Policing.

- Ensuring that the expanded obligations placed on a reformed Ombudsman body, particularly with regard to timely completion of investigations and provision of information, are accompanied by matching statutory obligations for transparency and cooperation on all other parties, including An Garda Síochána and the proposed Independent Examiner of Security Legislation.

These areas will be touched upon throughout the submission. The broader provisions of the scheme are also of interest to GSOC, and during the passage of the legislation in the Oireachtas, GSOC remains at the disposal of this Committee, the Department and all stakeholders, to provide views and guidance.
2. Part 5: Office of the Garda Síochána Ombudsman

2.1 Head 139 Continuation of Garda Síochána Ombudsman Commission under name of Office of the Garda Síochána Ombudsman

GSOC notes the concerns highlighted by the Commission on the Future of Policing with regard to GSOC’s name, and how this may relate to perceptions of independence.¹

GSOC is of the view that while the perceived independence of the reformed body is of crucial importance, such perception will be grounded, first and foremost, in the degree to which it can, in practice, exercise its mandate efficiently, effectively, and independently. This will depend primarily on the broader provisions of this Bill, and appropriate resourcing of the reformed body.

GSOC is open, however, to further discussion on how the reformed body may be named, and whether or not inclusion, for example, of the terms ‘Independent’ and ‘policing’ in its name may be useful to clarify the organisation’s nature and independence.

2.2 Head 142: Acting Garda Ombudsman

Head 142(2) currently provides that the Deputy Garda Ombudsman may act as the Garda Ombudsman for a maximum of 2 months.

GSOC believes that this time limitation is too short. In the event, for instance, of the Ombudsman leaving the post permanently, a 2 month period is unlikely to be sufficient for the purpose of running a recruitment competition to fill the vacancy.

GSOC would suggest that Head 142(2) provide for a period of 4 months, which may be extended if necessary, during which the Deputy Garda Ombudsman may act as Garda Ombudsman.

2.3 Head 143: Objectives, functions and powers of Garda Ombudsman

2.3.1 Head 143(3)

Under Head 143(3), the Scheme of the Bill provides that the function of the Garda Ombudsman is to “receive complaints made by members of the public concerning the conduct of a member of garda personnel”, and to receive “notifications from the Garda Commissioner ... about incidents of concern

¹ The Commission on the Future of Policing in Ireland report highlighted that ‘a complaints mechanism should be independent and be perceived to be so. The name ‘Garda Síochána Ombudsman Commission’ currently presents a problem as some people assume that the office is part of An Garda Síochána.’ It recommended that GSOC should ‘have a new name, making it clear that it is not part of An Garda Síochána. Commission on the Future of Policing in Ireland (2018), The Future of Policing in Ireland p48, 49.
in relation to the conduct of members of garda personnel that are not the subject of a complaint from a member of the public”.

In the context of this draft legislation, and part 6 thereof, ‘garda personnel’ means both members, and members of garda staff. According to Department of Justice figures, as of the end of January 2021, there were over 3,124 Garda staff employed within the Garda workforce, undertaking administrative and technical duties.

GSOC notes the extension of its remit in this regard, which is in keeping with Commission on the Future of Policing’s recommendation that An Garda Síochána “should be seen and treated as a single organisation with a single workforce”. 2 As this expansion will no doubt pose challenges for the organisation it is essential that these proposed measures are accompanied by an appropriate allocation of resources, funding and expertise to ensure that the new body has the capacity to carry out this statutory function as envisaged.

**GSOC stresses the importance of adequate funding, staffing and resourcing to enable the reformed body to manage such a significant expansion in its investigative remit.**

### 2.3.2 Head 143(6): Fair, timely and effective handling of complaints and investigations

Head 143(6) states “The Garda Ombudsman shall establish and maintain efficient and effective systems and procedures for the handling of complaints and the conduct of investigations in a fair, timely and effective manner”.

GSOC firmly believes in the principle that complaints and investigations should be completed in a fair, timely and effective manner. This is fundamental to both the administration of justice and effective oversight.

GSOC is concerned, however, that the current draft scheme places such statutory obligations solely on the oversight body, while omitting to place similar obligations on other key actors on whose cooperation the timely completion of investigations depends.

In order to conduct its investigations, GSOC regularly requires information from An Garda Síochána. Such information is provided on foot of a protocol pursuant to Section 108 of the Garda Síochána Act 2005 (‘the 2005 Act’). A similar provision is set out in Head 181 (h) of this scheme.

However, GSOC has made clear the challenges it has historically faced in securing cooperation, information and documentation from An Garda Síochána in practice. 3 This remains a significant impediment to the timely completion of complaints and investigations. Without the placement of a clear obligation on An Garda Síochána for timely and full cooperation with the reformed body, GSOC would be concerned that its ability to conduct investigations in a “fair, timely and effective manner” may be compromised.

---

There also appear to be no time limits placed on the proposed new Independent Examiner of Security Legislation in its role of carrying out reviews of requests for information made by oversight bodies. This has the potential to cause additional delay in investigations where such reviews may arise. Such delays raise a number of potential issues, whether with respect to the right of Garda members to fair procedures, preservation of evidence, or ensuring witness cooperation.

GSOC notes that there is no statutory requirement for timeliness in comparable legislation for other oversight bodies, such as the Ombudsman Act 1980, or the Ombudsman for Children Act 2002. GSOC would welcome clarification on the definition of timely, and the standard against which this requirement should be measured.

Finally, GSOC would again observe that in the context of a significant expansion of the remit of the reformed oversight body, its ability to conduct its work in a timely manner will heavily rely on the degree to which it is granted appropriate funding and resources.

The placement of a statutory obligation of timeliness on GSOC in the absence of clarity on how this is to be interpreted; without corresponding statutory obligations on other key actors; and without adequate resourcing, may risk seriously undermining the ability of the reformed body to function, and negatively affect public confidence in police oversight.

GSOC is of the view that in order for the obligation of timeliness to be effective, the bill should be amended to:

- Place a clear corresponding obligation on An Garda Síochána of timely and full cooperation with the reformed body, including through the inclusion of a linking provision between heads 143 and 181.

- Provide for a time limit on the Independent Examiner for reviews of requests for information made by oversight bodies, from the time of notification.

- Provide further clarity on standards against which the obligation of timeliness in the legislation should be benchmarked.

2.4 Head 150: Special Assistance

Head 150(1) provides that the reformed body may enter into arrangements with:

“(a) the Garda Commissioner for the engagement of members of garda personnel below the rank of Garda Commissioner who have agreed to be considered for service under such arrangement;

(b) any police service outside the State for the engagement of police officers from that service;

(c) any other body for the engagement of other persons.”
GSOC notes that there may be circumstances where the new Ombudsman may wish to seek special assistance from police officers who are employed in organisations other than a police service. GSOC is also of the view that these categories should be expanded to include a broad provision to encompass other individuals with suitable skills and expertise as the Ombudsman may consider appropriate.

GSOC would suggest that Head 150(1), paragraph (c) is amended to read:

“(c) with any other body for the engagement of police officers or other persons.”

and an additional subparagraph be added to Head 150(1) to read:

‘(d) with any other person the Ombudsman considers appropriate’.

2.5 Head 154: Confidentiality of information obtained by Garda Ombudsman

It is GSOC’s experience, in the conduct of investigations into alleged misconduct by a member which involve a child or children, appropriate sharing of information with Tusla, the Child and Family Agency, may be vital to the investigative process. Consequently, it would be helpful if Tusla were named as an organisation, under Head 154(4) with whom the Garda Ombudsman could share necessary information in the appropriate circumstances. Furthermore, in order that information-sharing is not just based on exceptions to a prohibition, but is positively permitted with specified bodies to provide for the performance of our functions, it is suggested that the bodies specified at Head 154(4) should also be named at Head 229 which provides for a statutory information sharing gateway.

GSOC strongly suggests that Tusla, the Child and Family Agency is added to the bodies named under Head 154(4), to facilitate appropriate information sharing during the investigation of allegations involving children.
3. **Part 6 Complaints, incidents of concern, investigations and other matters**

3.1 **Head 157: Interpretation**

3.1.1 **“Complaint”**

Head 157 provides that ‘complaint’ means “a statement (whether oral, written or electronic) expressing dissatisfaction with an act or omission by a person who, at the time of the act or omission concerned, was a member of garda personnel”.

GSOC welcomes that the legislation broadens the manner in which members of the public can make complaints. It is the practice of GSOC to provide proactive assistance and reasonable accommodation to all those for whom communication is a barrier to making a complaint, whether due to disability, language or literacy barriers, or any other reason. GSOC believes that the expansion provided for in the General Scheme will enhance the Ombudsman’s ability to provide accessible systems for the submission and receipt of complaints and consents from members of the public.

GSOC is however of the view that the definition of ‘complaint’ should be broader, and should encompass any statement or information that indicates possible misconduct by a Garda member. This would be more in keeping with the view of the Commission on the Future of Policing.

**GSOC believes that subparagraph (1) of Head 157 should be amended so that the definition of “complaint” includes, in addition to dissatisfaction with an act or omission, any statement or information indicating possible misconduct by a Garda member.**

3.1.2 **“Incident of concern”**

Head 157 provides that an ‘incident of concern’ means:

“any matter which is not and has not been the subject of a complaint under head 159 or a referral under head 165 but in the case of which there is an allegation that a person,

(a) who is a serving member of garda personnel, or

(b) who, at the time of the conduct concerned was a member of garda personnel, may have

(i) committed an offence, or

(ii) behaved in a manner that constitutes notifiable misconduct”

GSOC is concerned that this definition limits applicable misconduct incidents/allegations to those that are ‘notifiable’. GSOC is of the firm view that the Garda Ombudsman should be notified of all allegations of misconduct which may amount to a breach of discipline and that it should be for the Garda Ombudsman to determine how to assess and address such allegations.
3.2  Head 158: Supplementary provisions in relation to complaints

3.2.1  Complaints ‘on behalf’ of a person

The provision under 158(4) to allow the making of a complaint ‘on behalf’ of a person, is a useful provision, invoked in the main in relation to complaints on behalf of children and vulnerable adults. A significant number of complaints made to GSOC under the analogous provisions in the 2005 Act are made on behalf of young people aged between 16 and 18.

In GSOC’s view, it would be appropriate from a children’s rights perspective for this legislation to recognise the capacity of young people age 16 years and above to make a complaint to the Garda Ombudsman in their own right. This would be in keeping with the approach of other legislation, for example, on the provision of consent for dental and medical treatment,\(^4\) and would empower those who may not, for reasons outside their control, have willing adults to act on their behalf.

GSOC believes that the inclusion of a provision in line with other legislation, e.g. Section 23 of the Non-Fatal Offences against the Person Act 1997, would be appropriate to allow persons aged between 16 and 18 to make a complaint to the Garda Ombudsman in their own right.

3.2.2  Provision for review of requirement to automatically refer complaints to the Ombudsman

Head 159(6) and (7), provide that the Minister shall “review the operation of this head in so far as it requires An Garda Síochána to refer all complaints received concerning a member of garda personnel to the Office of the Garda Ombudsman” after a period of 3 years in operation. The provisions allow for the possibility that certain categories of complaint may be rescheduled to be dealt with by An Garda Síochána instead of the reformed body.

GSOC is extremely concerned at this provision. It effectively places a three-year lifespan on what should be a fundamental and permanent reform: a statutory obligation on the Garda Commissioner to refer all complaints to the Garda Ombudsman. The provision is not in keeping with a core recommendation of the Commission on the Future of Policing that “all complaints about the police should be routed through the IOPO” and that “IOPO should investigate all such complaints itself, without recourse to Garda investigators”.\(^5\) It has the potential to fundamentally undermine the enhancement of police oversight which is the aim of this Bill.

GSOC strongly requests the deletion of Head 159(6) and (7), viewing these provisions as having the potential to seriously undermine the aims of the Bill, and the recommendations of the Commission on the Future of Policing.

\(^4\) Under section 23 of the Non-Fatal Offences against the Person Act 1997, people 16 years and above may consent to medical or dental treatment without parental consent.

3.3_head 159: Making, recording of complaints etc.

3.3.1 Complaints made to members outside a Garda Station

Head 159 (c) provides that where a complaint is made to An Garda Síochána in any place other than a Garda Station, such a complaint must be made to “a member not below the rank of superintendent or a senior garda staff member”.

In GSOC’s view, such a restriction of rank may cause difficulty. It is more likely that members at Sergeant and Inspector level are dealing with the public outside of a garda station. These members should be empowered to take a complaint, if necessary, to be referred to the Garda Ombudsman.

GSOC believes that it should possible for a complaint to be made to a garda member at the rank of Sergeant or above at a place other than a garda station.

3.4_head 161: Categories of complaints suitable for resolution by An Garda Síochána

Under Head 161 (1) to (4), provision is made for the submission to the Minister by the reformed body and An Garda Síochána of a draft list of categories of complaints suitable for resolution by An Garda Síochána. Such a list is would be subject to approval by the Minister.\(^6\)

In GSOC’s view that, in the interests of practicality and efficiency, agreement of such a list should be a matter between An Garda Síochána and the Garda Ombudsman, and should not require ministerial approval.

GSOC requests that further consideration be given to the requirement that the list of categories of complaint provided for under this Head be subject to ministerial approval.

3.5_head 163: If complaint suitable for resolution by An Garda Síochána is referred under Head 160

Head 163(3) provides that:

“If, in the course of seeking to resolve a complaint in accordance with the arrangements established and maintained under head 162, it appears to the Garda Commissioner that the complaint may not be suitable for resolution by An Garda Síochána by reason of its seriousness the Garda Commissioner shall refer the complaint to the Garda Ombudsman together with the reason for the referral.”

---

\(^6\) Complaints provided for in this Head relate to matters that fall outside serious matters such as criminal offence, breach of professional standards, and incidents where death and serious harm occur. As such, they would broadly fall under the rubric of ‘performance management’ complaints.
GSOC observes that this subhead makes no reference to the evidence and material that may have been compiled in the course of seeking to resolve the complaint. In the event of referral back to the Garda Ombudsman, such material would also be required in order for the complaint to be progressed.

**GSOC recommends that 163(3) be amended to include a requirement that, on referral of a complaint back to the Ombudsman, An Garda Síochána also refer on all relevant material.**

### 3.6 Head 164: Matter concerning death of, or serious harm to, a person

Head 164 (1) provides that:

“1) The Garda Commissioner shall, without delay, refer to the Garda Ombudsman any matter that appears to the Garda Commissioner to indicate that the conduct of a member of garda personnel may have resulted in the death of, or serious harm to, a person.”

GSOC is of the view that the prompt referral of matters indicating that the conduct of a member of garda personnel may have resulted in death or serious harm is essential. GSOC regularly experiences delays in such referrals under the current legislation. GSOC views it as essential that the new legislation precludes the possibility of such delays.

### 3.7 Head 165: Notification to Garda Ombudsman of incident of concern in relation to conduct of member of Garda personnel

Head 165(1) provides that

“Subject to subhead (5) the Garda Commissioner shall, as soon as practicable, and in accordance with protocols agreed under head 181, notify the Garda Ombudsman of any incident of concern in relation to the conduct of a member of garda personnel (an “incident of concern”).”

GSOC is also of the view that this provision should not preclude information on the security of the State being furnished to the Garda Ombudsman.

**GSOC recommends the amendment the inclusion of the phrase “including incidents of concern that relate to the security of the State” in subparagraph (1) so that it reads:**

"Subject to subhead (5) the Garda Commissioner shall, as soon as practicable, and in accordance with protocols agreed under Head 181, notify the Garda Ombudsman of any incident of concern, including incidents of concern that relate to security of the State, in relation to the conduct of a member of garda personnel."
3.8 Head 166: Investigation of matters in the public interest

According to the scheme’s Explanatory Memorandum “The Garda Commissioner is empowered to refer a matter to the Ombudsman where he or she believes it in the public interest such as allegations of past wrongdoing.”\(^7\)

GSOC believes that in this context, Head 166 may provide for the referral of historic or legacy cases to the reformed body. To date, such investigations have not been practicable due to the lack of a legislative remit.

GSOC is of the view that, if the intention of this Head is to provide that the reformed body conduct investigations into historical and legacy cases, more detailed provision in statute will be necessary, including appropriate safeguards and clarifications on time limits, notifications, reporting requirements and related matters.

GSOC stresses that the expansion of the reformed body’s remit beyond that of contemporary police oversight body, into the investigation of historical cases, is a significant step. Such a step would not be practicable without a significant and dedicated allocation of resources and specialist expertise to such a function, distinct from the body’s other functions.

3.9 Head 167: Protected disclosures relating to Garda Síochána

GSOC notes that the deadline for the transposition of the EU Whistleblowing Directive\(^8\) falls on 17 December 2021.

As a member of the Network of European Integrity and Whistleblowing Authorities (NEIWA), GSOC has been engaging with the Department of Public Expenditure and Reform on the transposition process, and recently submitted observations to the Joint Committee on Finance, Public Expenditure and Reform and Taoiseach as part of the Pre-Legislative Scrutiny of the transposition legislation, the Protected Disclosures (Amendment) Bill 2021.

Given that Head 167 was drafted based on the Protected Disclosures Act 2014, GSOC would expect that the Head will require significant revision to reflect the new Protected Disclosures legislation.

It is GSOC’s view that further consideration may need to be given to ensure that Head 167 is aligned appropriately with the Protected Disclosures (Amendment) Bill 2021, and with the rights and protections afforded to disclosers under the EU Whistleblowing Directive.

\(^7\) Department of Justice (2021), General Scheme of the Policing Security and Community Safety Bill: Explanatory Memorandum. P. 18.

3.10 **Head 168: Formal investigation; Head 169: Powers equivalent to member of An Garda Síochána when undertaking formal investigation; Head 171: Additional powers for purpose of undertaking formal investigation.**

Given the interrelated nature of heads 168, 169 and 171, GSOC proposes to comment on them together in this section.

GSOC has highlighted the challenges it faces due to the unnecessarily complex processes provided for under the current Act for the initiation and conduct of formal investigations. It has clearly signalled the need, in the context of reform of policing oversight legislation, to streamline the process of investigation, making it simpler, fairer, timelier and more accessible for complainants, Garda members, investigators and others associated with the investigative process.

GSOC therefore strongly welcomes the provisions contained in Heads 168, 169 and 171, which permit a streamlined approach while also upholding constitutional and procedural safeguards which are the right of every citizen. GSOC is of the view that these provisions have the potential to significantly improve the efficiency of investigations by reducing the practical difficulties caused by the current processes of gathering evidence, and improving these processes, as part of the conduct of investigations. Those being investigated pursuant to Heads 168, 169 and 171 retain the protection of well-established procedural safeguards, which remain a requirement in any investigation.

GSOC would further note that the approach taken under these heads to the initiation and conduct of formal investigations is entirely in keeping with best practice in neighbouring jurisdictions and with other statutory bodies provided with civil and criminal investigative powers in this jurisdiction.

GSOC would finally observe that An Garda Síochána enjoys similar powers to those outlined under these Heads in the conduct of its investigations – powers that, far from giving rise to procedural or constitutional concerns, provide protection and reassurance to members of the public.

*In welcoming the provisions contained in Heads 168, 169 and 171 GSOC is of view that they address a clearly defined, and long-signalled, gap in Ireland’s policing accountability infrastructure, and will significantly improve the efficiency, timeliness and fairness of investigations.*

3.11 **Head 170: Search of Garda premises**

Head 170(3) provides that:

Before issuing an authorisation to search a Garda Síochána premises the Garda Ombudsman shall consult with the Garda Commissioner to ensure that he or she does not object to the search on grounds relating to the security of the State.”

---


The requirement for the Garda Ombudsman to seek the authorisation of the Garda Commissioner in relation to the search of a Garda Station is not compatible with the principle that the Ombudsman should be independent in the investigation of complaints. Nor is it with the obligation to seek out and preserve evidence that has a bearing, or potential bearing, on an investigation.

GSOC is strongly of the view that the requirement that the search of Garda premises be subject to the authorisation of the Garda Commissioner should be removed. GSOC, however, has no objection to alternative approaches to the authorisation, oversight, and operation of the search of Garda premises, including through judicial oversight.

Head 170(6) provides that:

“If satisfied, after considering the recommendation of the Independent Examiner, that the search of a Garda Síochána premises or of a part thereof would not be prejudicial to the security of the State or that such search is proportionate and necessary for the proper investigation of a matter concerning the death of, or serious harm to, a person as a result of Garda operations or while in the care or custody of the Garda Síochána, the Minister shall issue directions specifying the part of the document storage facility or the part of the premises that may be searched.”

GSOC notes that, in cases where the Garda Commissioner has objected to the search of a garda station for reasons relating to the security of the state, but the Independent Examiner has found that such a search would not be prejudicial, this subsection effectively restricts the search of Garda premises to investigations of matters concerning death or serious harm. As such, it represents a significant, and unworkable, limitation on the ability of the Garda Ombudsman to conduct searches in the course of its investigations. GSOC further notes, in light of its recommendation on Head 170(3) above, that judicial, rather than ministerial, authorisation of searches may be a more appropriate approach in this subsection.

GSOC is of the view that Head 170(6) should be amended to ensure that the search of Garda premises can be conducted in the context of the Garda Ombudsman’s broad investigative remit, rather than only in the context of matters concerning death or serious harm.

GSOC recommends that Head 170(6) be amended in provide for judicial, rather than ministerial, directions.

With regard to the term ‘garda premises’, GSOC also notes the importance of clarity that this includes Garda cars and the property on which a Station is located.

GSOC requests that for the purposes of this head, the definition of ‘Garda Premises’ should include the curtilage of a Garda station and Garda vehicles.
3.12  Head 172: Power to discontinue formal investigation

This Head details the circumstances under which the Garda Ombudsman can discontinue the formal investigation of a complaint or other matter. GSOC is of the view that a number of further circumstances should be provided for.

**GSOC requests that under subparagraph (1) (a) a provision also be made for the discontinuation of an investigation where the complainant has disengaged with the Garda Ombudsman.**

**GSOC requests that Head 172 is amended to include an expressed power to discontinue investigations initiated under Head 164 in circumstances where it is subsequently established that the conduct of the member of the garda personnel has not resulted in the death of, or serious harm to a person.**

Head 172(2)(b) provides for the discontinuation of an investigation if the Garda Ombudsman is of the opinion that “continuing with the investigation would interfere with, or conflict with the functions of another statutory body”. However the Head is silent on whether or not this encompasses the functions of An Garda Síochána or the Courts.

**GSOC requests that further clarity is provided in Head 172 to ensure the Garda Ombudsman may discontinue an investigation where it is of the opinion the investigation would interfere with a Garda investigation or the operation of the Courts.**

3.13  Head 175: Investigation of matters relating to Garda Commissioner by Garda Ombudsman

Head 175 provides for the Garda Ombudsman to

“investigate any matter that gives rise to a concern that the Garda Commissioner may have—

(a) committed an offence, or

(b) behaved in a manner that would constitute serious misconduct.”

This power is, however, “subject to the consent of the Minister given with the approval of the Government”.

GSOC is of the view that the requirement to seek ministerial approval for such an investigation is not in keeping with the reformed body’s independence or the recommendations of the Commission on the Future of Policing. GSOC would further note that there is no analogous requirement for Ministerial approval of investigations in to police leadership in neighbouring jurisdictions such as Northern Ireland or London, where the Chief Constable of the PSNI and the Commissioner of Police of the Metropolis, respectively, also enjoy a significant state security brief.

In addition GSOC believes that the term ‘serious misconduct’ in paragraph 1(b) could be more clearly defined.
3.14 Head 176: Duty to keep certain persons informed

Head 176(1) provides a list of persons and entities who “Garda Ombudsman shall of his or her own initiative or on request provide [...] with sufficient information to keep them informed of the progress and results of a formal investigation”.

GSOC requests that this provision is amended to read:

‘The Garda Ombudsman shall of his or her own initiative or on request provide the following persons with sufficient information to keep them informed of the progress and results of a formal investigation and any outcome of either disciplinary or criminal proceedings’.

3.15 Head 177: Provision of information to Garda Ombudsman by Garda Síochána

Head 177 provides that “the Garda Commissioner shall, as soon as practicable, provide the Garda Ombudsman with such information and documents as the Garda Ombudsman may request for the purpose of, or in connection with, the exercise of any of his or her functions.”

GSOC welcomes the provisions made under Head 177, as they provide a much-strengthened statutory basis for information sharing between the Ombudsman and An Garda Síochána.

Head 177 also provides for referral to the Independent Examiner, where requested, documents which, in the view of the Garda Commissioner, relate to the security of the State. GSOC recalls, in this regard, its earlier observations on the need for the imposition of defined timelines on the review process.

GSOC requests that Head 177 stipulates a time limit for the review by the Independent Examiner of requests for information made under this head.

3.16 Head 179: Extension of time limit for instituting summary proceedings for offences

Head 179(1) provides that “summary proceedings in respect of a matter relating to an offence reported to the Director of Public Prosecutions under this Part may be instituted within 18 months from the date of the offence.”

It is GSOC’s experience that an 18 month time limit for instituting summary proceedings can present difficulties, particularly where a complaint is made late in the 12 month time frame for making a complaint. It is GSOC’s view that the expansion of this time limit to 24 months would assist both the Garda Ombudsman and the DPP in processing the necessary files. A two year timeline would be more in line with similar provisions made for other bodies.

GSOC is of the view that the current 18 months limit for initiation of summary proceedings in Head 179 should be extended to 2 years.
3.17  Head 180: Same conduct may form basis for complaint or charge

GSOC notes that paragraph 2 of this head makes reference to complaints, but is silent on referrals, or on notifications on incidents of concern.

GSOC recommends that Head 180(2) be amended to read:

“However if a complaint or referral is made, or an incident of concern notified to the Garda Ombudsman or a matter is subject to investigation by the Garda Ombudsman, concerning the conduct of a member of the Garda workforce, the person concerned may not be charged with an offence relating to that conduct except by or with the consent of the Director of Public Prosecutions.

3.18  Head 181: Protocols

The focus of this Head is currently on the agreement of protocols between the Garda Ombudsman and the Garda Commissioner. As already noted above, GSOC benefits from cooperation and information sharing with other agencies in the carrying out of its functions. GSOC is of the view that the legislation should explicitly state that the reformed body is free to formalise such cooperation, including via the agreement of protocols, as it considers appropriate.

GSOC believes that this section will require further clarification so as to ensure that the Garda Ombudsman is empowered to make arrangements via protocols, including for the sharing of information, with other agencies as it considers appropriate.
4. Miscellaneous observations

While Parts 5 and 6 of the scheme form the primary focus of this submission, GSOC wishes to highlight the following provisions which also have relevance to its work.

4.1 Part 1, Head 2: Interpretation

Head 2 of the Scheme defines ‘member’ as:

“(a) a member of any rank (including the Garda Commissioner) appointed under Part 2, under an enactment repealed by this Act or under an enactment repealed by the former Act, and (b) a reserve member, but does not include a member of garda staff”

It has been the experience of GSOC that complaints in relation to probationary personnel can be made. GSOC has also experienced issues with regard to the extent of its remit where Gardaí are seconded or appointed to other bodies, such as the Criminal Assets Bureau.

For the avoidance of doubt, and to ensure adequate oversight, GSOC is of the view that the interpretation of the term ‘member’ should be expanded to include probationers, as well as Gardaí seconded or appointed to other bodies or agencies.

The interpretive provisions should also make clear that a trainee is distinct from a probationer. A probationer holds the rank of Garda and is assigned to a Garda Station and will therefore be subject to oversight by the new Ombudsman.

4.2 Part 2, Head 43: Duty of members of Garda Personnel to account

Head 43 provides that:

“A member of garda personnel shall, when directed to do so by a member of garda personnel of a higher rank or grade, account for any act done or omission made by the member concerned while on duty.”

This restates in part section 39 of the current Garda Síochána Act, 2005 but it removes in its entirety any reference to the Garda Ombudsman which was inserted by the Criminal Justice Act, 2007.

The inclusion of GSOC in this provision is essential. It is regularly utilised by GSOC in the course of its investigations and has greatly enhanced GSOC’s ability to ascertain the truth in investigations into serious disciplinary matters.

Its removal would represent a significant limitation of the reformed body’s capacity to investigate Garda discipline.

GSOC is of the firm view that a reference to GSOC designated officers be added to Head 43, in line with the current provisions of section 39 of the Garda Síochána Act 2005, as amended by the Criminal Justice Act 2007.
Submission to the Oireachtas Committee on Justice

on the

General Scheme of the Policing Security & Community Safety Bill
AHCPS SUMMARY POSITION

Dear Members
Dáil Committee on Justice

The Association of Higher Civil and Public Servants (AHCPS) members comprise Principal and Assistant Principal Officer grades in An Garda Síochána, representing the middle and senior manager positions in the organisation. We welcome the opportunity to make this submission on behalf of our members.

The Policing, Security and Community Safety Bill is a consequence of the report of the Commission on the Future of Policing in Ireland (COFPI) published on 18th September 2018. AHCPS welcomed the opportunity to meet with the Commission in the completion of their work and their subsequent report.

Our first concern at the publication of the general scheme centres on the absence of consultation with our union as a representative of staff directly impacted by this proposed legislation.

It is interesting to note that the Government’s paper on the implementation of the ‘Report of the Commission on the Future of Policing’ highlights the paramount role of proper stakeholder engagement:

‘Stakeholder engagement is essential for the successful implementation of a Policing Service for our Future. Indeed, communications and engagement have been identified as a critical enabler of the programme of reform. Effective communication builds consensus, cooperation, and support with both internal and external stakeholders. Engagement increases understanding and ownership of the reform…..It is important to acknowledge that an important factor in ensuring that continued progress is made in implementing A Policing Service for our Future will be effective and timely stakeholder engagement across a number of fronts, including within the organisations central to the reform (e.g. An Garda Síochána, Department of Justice), across public sector organisations who have a stake in individual projects/actions, and with staff unions and representative associations’. (Page 6. Implementing the Report of the Commission on the Future of Policing in Ireland Scaling Phase Iteration October 2020 – March 2022).

At the publication of the Bill, the Minister stated that “the scheme reflects enormous work by a dedicated team in my department who engaged extensively with key stakeholders including all government departments, An Garda Síochána and the policing oversight bodies’.

That has not been our experience.

It is deeply troubling to AHCPS that the thousands of staff who will be impacted by the proposed reforms were apparently not deemed by Government to be key stakeholders in this process. Staff of all grades were effectively bypassed in all discussions on the drafting of the bill and seem to have been deliberately treated so. This does not inspire confidence in the process, or the limited re-assurances provided in the bill for existing Garda Staff.

Secondly, the Heads of Bills on the ‘Policing, Security & Community Safety Bill’ as published raises two significant issue of concern for AHCPS and its members, namely:
1. If enacted the bill would effectively strip our civilian members in An Garda Síochána of their civil service employee status, resulting in civilian staff becoming direct employees of An Garda Síochána without the protection of central Civil Service policies and agreements.

2. Civilian staff will come under the remit of the new policing complaints body that will replace GSOC. Effectively that means civilian staff who have no police powers would be subject to the same rigours of any complaint procedure as sworn members. These staff unlike sworn members, are unlikely to be trained or acquainted with such formal ‘investigations’ or have peer support or legal representation like sworn members.

The intention to have the Garda Commissioner take sole responsibility for Garda Staff changes the status of our members in An Garda Síochána from civil servants to public servants and is neither appropriate nor warranted. To include such a far-reaching measure in this Bill without prior engagement with the staff associations representing this cohort of staff is unacceptable and completely disregards the legitimate concerns of Garda Staff and any IR process around this issue. This measure should not progress within the draft heads of Bill and proper engagement between the Department of Justice, Representative Unions and An Garda Síochána is required prior to any legislation being enacted.

The far-reaching investigative powers being afforded to the proposed new ombudsman are excessive, disproportionate and trample on the recognised internal civil service processes and guidelines afforded to civil servants in the course of their duties. It also raises the question of individual legal challenges as the proposed investigative powers do not afford individuals the right to natural justice and remove the lines between criminal conduct and internal employment issues. This measure should not progress within the draft heads of Bill until proper engagement has taken place between the Department of Justice, Representative Unions and An Garda Síochána.

A short engagement recently took place for the first time with officials from the Department of Justice attended by Garda HR. It was made clear to staff representatives that should the legislation as drafted become operational all new entrants would be subject to the legislation from day one, including new staff being recruited.

While schedule 2 refers to head 45(7) as it applies to the terms and conditions of existing Garda Staff, no such provision has been made in the draft legislation for the continuation of the terms and conditions enjoyed by existing staff to continue to apply to new entrants, only that these conditions under Head 45(1) & 45(3) including terms and conditions relating to remuneration and allowances can be determined by the Commissioner with the approval of the Minister with the approval of the Minister for Public Expenditure & Reform. The absence of clarity on this matter is concerning to AHCPS as the legislation being contemplated as it applies to new staff is in its present form is ambiguous in its interpretation. Again, this issue needs proper engagement between the Department of Justice, Representative Unions and An Garda Síochána prior to any legislation being enacted.

AHCPS has consulted our Garda Staff members to ensure they were afforded the opportunity to have their respective views heard. The level of disappointment at the turn of events with the publication of the bill was self-evident. The range of legitimate concerns far exceeded those covered by Head 45(7) and Schedule 2. This is not surprising due to the lack of any prior engagement with staff / staff representatives by the Department and those working at the Ministers direction. The consensus from staff was to remain a part of the overall Civil Service.
to benefit from the terms and conditions that being a civil servant brings such as: having their terms and conditions decided at central level; having access to interdepartmental competitions and access to civil service mobility for career development. The latter is a very important point as it allows our members transfer for career or work life balance to a different department or work location. The Civil Service Mobility Scheme was expanded only as recently as November 2020 to include Assistant Principal Officers and integrate the existing PO Mobility Scheme. This was a historic development for the AP Grade negotiated with DPER and is already bearing fruit for individuals and employers. No mobility scheme exists within the Public Service other than promotion via open competition and access to the civil service is also confined to open competition. The suggestion now of losing access to CS Mobility is a bitter blow to our members and leaves them potentially positioned outside the civil service. It is particularly unfair to those who did not see a long-term career as a Garda Staff member or wanted to extend their career development elsewhere before returning to An Garda Síochána.

Our member consultation process has made it abundantly clear most respondents in this broad engagement process are angered at the continual lack of consultation on a matter that will directly and negatively impact on their terms and conditions working in An Garda Síochána.

It is a fact that when An Post became a semi-state company, and later some employees crossed over to Premier Lotteries Ireland, all retained civil service status. This also applied in the setting up of the Irish Aviation Authority. There is no reason why this cannot apply within An Garda Síochána although it is questionable in the first instance why civilian staff cannot entirely remain as civil servants rather than public servants under the proposed new structure.

**In conclusion, it is the view of AHCPS that the draft Policing Security & Community Safety Bill in its present iteration proposes to change the conditions of our members by progressing a one organisation agenda through legislation that enforces the full rigors of a new policing ombudsman on civilian staff with no sworn powers.**

This is all being pursued without any proper engagement and consultation between the Department of Justice, representative unions, and An Garda Síochána. To enact this legislation as currently drafted will only serve to undermine the IR process that is now urgently required and will negatively impact on the terms and conditions of our members in An Garda Síochána. It also has the potential to result in a disgruntled workforce in imposing measures without agreement. No due consideration has been afforded to existing civilian staff appointed to An Garda Síochána as part of the wider civil service. This is neither fair nor equitable and does not conform with fair procedures and natural justice.

The submission below offers further specific observations for consideration by the committee on matters of concern to AHCPS on specific Heads. We would welcome the opportunity to meet with you to discuss further our observations and concerns.

Many thanks for your time and consideration in reviewing this submission.

Billy Thompson
Assistant General Secretary, AHCPS.
22nd October 2021
Part 1 - Preliminary and General Matters

Head 2 Interpretation

- *Member of Garda personnel*” means a member and a member of Garda staff;

- The change to including both sworn members and Garda Staff within an all-encompassing title under this Bill as “Garda Personnel” is neither warranted nor appropriate and we have serious concerns at its use throughout this draft bill. It is our view that this measure is being proposed based on the desire of the Garda organisation to progress a one organisation agenda and it is our position that proper engagement has to take place between all representative unions, An Garda Síochána and the Department of Justice prior to any legislation being enacted that will if enacted only serve to frustrate the IR process. Under Head 4 the position of AHCPS in relation to Garda staff is further elaborated.

- The clear position of AHCPS in relation to Head 2 is that this definition of Garda Personnel is not appropriate and should be removed throughout this draft bill and the current title of “Garda member” and “Garda Staff” should remain and referenced where appropriate for clarity.

Part 2 – An Garda Síochána

Chapter 4 Functions, duties of Garda Commissioner

Head 31 Delegation of powers, functions, or duties of Garda Commissioner

- Delegation of Functions – At present the delegation down of certain functions particularly HR functions to Garda Staff is subject to agreement at the civil service general council and any inclusion with regard to a delegation of functions on a legislative basis without a clear definition of same would not be acceptable to AHCPS.

Chapter 5 Garda Personnel

Head 43 Duty of members of Garda personnel to account

- The duty to account as written will replace section 39 of the 2005 act and this head if enacted would have the effect to bring Garda Staff into its remit. This would bring the issue of equivalence into consideration and as such this will need further clarity and discussion and would require engagement with AHCPS as there is currently no formal agreement on equivalency between grades and ranks.
**Head 45** Appointment of members of Garda staff

- AHCPS has serious concerns regarding the totality of this Head. If enacted, Head 45 will effectively change the status of our members in An Garda Síochána from civil servants to public servants and this in our view is neither appropriate nor warranted. To include such a far-reaching measure in this Bill without prior engagement with the staff associations representing this cohort of staff is unacceptable and the view of AHCPS is that further engagement between the Department of Justice, Representative Unions and An Garda Síochána is required prior to any movement to include such a provision into legislation.

- Schedule 2 refers to head 45(5) & 45(7) as it applies to the terms and conditions of existing Garda staff, no such provision has been made in the draft legislation for the continuation of the terms and conditions enjoyed by existing staff to continue to apply to new entrant Garda Staff.

**Head 46** Garda staff undertaking

- AHCPS has serious concerns regarding the totality of this Head. Civilian members of staff are not sworn members of An Garda Síochána and do not have sworn powers attached to their roles and therefore should not have to have the same rigors of a solemn declaration applied to their roles. A situation where this is given before the staff member’s supervisor and may be recorded is in the view of AHCPS neither appropriate nor acceptable and it is the position of AHCPS that Head 46 should be removed in its entirety. Due to the lack of prior engagement from the Department of Justice there is no clarity as to the purpose or need for such a solemn declaration.

**Chapter 9** Liability

**Head 70** Liability for certain acts of members of An Garda Síochána

- This Head should be amended to include Garda Staff.

**Head 71** Legal aid for members of An Garda Síochána

- This Head should be amended to include Garda Staff.
Part 5 - Office of the Garda Síochána Ombudsman

AHCPS position in relation to the totality of heads 139 to 190
Similar to their counterparts in other civil service offices that engage with members of the public, Garda staff have the same agreed recognised internal civil service processes and guidelines that are afforded to all civil servants.

AHCPS are of the firm view that the investigative powers being afforded to the proposed new ombudsman in relation to Garda Staff are excessive and unwarranted and we are completely opposed to the inclusion of Garda Staff under Part 5 and 6 (heads 139 to 190.) It is therefore our strong position that this measure should not be progressed within the draft heads of Bill and that proper engagement between the Department of Justice, Representative Unions and An Garda Siochana is required prior to any movement to include such a provision into legislation.

Head 150 Special Assistance
• Head 150 (4) excluded Garda Staff from compensation for any injuries incurred while serving with the Garda Ombudsman and it is the view of AHCPS that this should be revisited.

Part 6 – Complaints, incidents of concern, investigations, and other matters

Head 157 Interpretation
• Under the following headings “complaint”, “incident of concern in relation to the conduct of a member of Garda personnel” (a) & (b), “member of Garda personnel”, “notifiable misconduct (b) (c) & (d), references the term Garda Personnel and the position referenced in Head 2 is reiterated in relation to Head 157
• The AHCPS position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 157

Head 158 Supplementary provisions in relation to complaints
• Section 2(c) references Garda staff and the AHCPS position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to this section
• The AHCPS position as previously outlined in relation to the totality of heads 139 to 190 is reiterated in relation to Head 158
LAW SOCIETY SUBMISSION

GENERAL SCHEME OF THE POLICING, SECURITY AND COMMUNITY SAFETY BILL

COMMITTEE ON JUSTICE

FEBRUARY 2022
ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors’ profession in Ireland. The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors’ profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.
Contents

1. Introduction ......................................................................................................................... 4
2. Independent Governance ...................................................................................................... 5
3. Collaborative Approach ....................................................................................................... 6
4. Adequate Resourcing ........................................................................................................... 7
5. Human Rights and Equality Standards .................................................................................. 8
1. Introduction

1.1. The Law Society of Ireland ('the Society') welcomes the introduction of the General Scheme of the Policing, Security and Community Safety Bill ('the General Scheme') as a vital part of the government’s commitment to implementing the recommendations of the Commission on the Future of Policing in Ireland (CoFPI) which issued its recommendations in late 2018. It also supports the commitment from the Department of Justice ('the Department') to human rights and equality values in developing policing services to improve the safety of individuals and communities and to enhance independent governance and accountability.

1.2. The Society is the educational, representative and co-regulatory body for the solicitors’ profession in Ireland. This submission provides views from members of the Society’s Human Rights & Equality Committee, which is comprised of solicitors with extensive experience and expertise in national and international human rights, as well as comprehensive knowledge of policing services. It should be noted that Committee member, Shalom Binchy, is also a member of the Policing Authority. Further, a consultant to the Committee, Noeline Blackwell, was a member of the CoFPI. The views expressed in this submission do not reflect the views of the Policing Authority or the CoFPI.

1.3. In preparing this submission, the Society notes the expanse of issues to be addressed by the Department’s work which spans a number of legal areas. As such, the Society has chosen to focus on human rights and equality concerns, identifying where amendments to the General Scheme may be appropriate and addressing the wider issue of the effective administration of justice in the State.
2. **Independent Governance**

2.1. The Society considers the enhancement of independent governance and monitoring of An Garda Síochána as a positive development. The roles and duties of any new agencies will require to be clearly outlined and every precaution taken to ensure that additional bureaucratic processes do not inhibit the principal aim of the General Scheme in making communities safer. In particular, we welcome the introduction of the new Policing and Community Safety Authority (‘the Authority’), the increased independence of the Ombudsman and the expanded remit of that office.

2.2. Although Head 154 addresses the confidentiality of information obtained by the Ombudsman and his officers, we are concerned that complainants, particularly vulnerable complainants, may still be fearful of retribution for making a complaint against a member of An Garda Síochána. In this regard, the Society suggests that consideration be given to strengthening the function of the Ombudsman to allow people to raise concerns without necessarily making a complaint. In making this recommendation, the Society is mindful of the need to balance the rights of the complainant in respect of confidentiality and privacy against the right of the accused to fair procedures and a defence.

2.3. The Society notes that Head 104 makes provision for the Authority to conduct, at its own initiative, inspections in relation to any particular aspects of the operation and administration of An Garda Síochána which relate to policing services. Greater clarity will be needed in respect of what such inspections might involve e.g. the precise powers to be granted, and compliance with international instruments such as the Optional Protocol to the Convention Against Torture (OPCAT) once ratified by the State.

2.4. The Society has called for the State to progress ratification and implementation of a number of outstanding international treaties, including OPCAT, as a matter of priority in its March submission on Ireland’s Third National Report to the UN Universal Periodic Review 2021. To do so would greatly enhance governance, oversight and accountability by introducing an effective means to ensure the independent professional scrutiny of police services as a means to enhance the promotion of excellence in policing standards.
3. Collaborative Approach

3.1. The Society welcomes the commitment to an all-government collaborative approach to community safety. In particular, we note the provision under Head 74 to empower the Garda Commissioner to exchange information with relevant persons or bodies within and outside the State. While the Society recognises the provision as a component in inter-agency collaboration, we would emphasise the vital balance to be struck between the right to privacy and the right to access information. Further, we would advise that further consideration be given to the potential for the General Data Protection Regulation (GDPR) to act as an obstacle to information sharing, which must be further considered in establishing how the exchange of information will operate (between agencies and organisations) in practice.

3.2. While noting that the proposed legislation will obligate the Authority to share information, the Society suggests that this be expanded to ensure that other agencies are similarly bound to such a collaborative approach. This is particularly important within the context of Minister McEntee’s confirmation that the legislation will involve a ‘whole of government’ approach with departments and agencies (such as health and social services, education authorities and local authorities, the Gardaí and the wider community) working together.
4. **Adequate Resourcing**

4.1. While we are aware that the proposed legislation involves considerable change to existing systems, including the establishment of new agencies and services, we would emphasise the need to ensure that adequate resourcing is put in place to assist in the delivery of effective change. While we very much welcome the commitment to enhance community policing, it is an example of an area which, unless properly resourced, will not be truly effective across communities.

4.2. The Society has been informed anecdotally that certain communities are experiencing what they regard as a lack of visibility of policing services on the ground, and a particular lack of community guards. This has a direct impact on the relationship between An Garda Síochána and the communities they serve, which can often lead to a breakdown in trust and connection.
5. Human Rights and Equality Standards

5.1. The Society welcomed the Minister’s confirmation that ‘this legislation will, when enacted, underpin the human rights focus of policing in Ireland’ and commends the emphasis given to the human rights commitment.

5.2. In order to ensure that the new approach to policing in Ireland will be suitably grounded in human rights and equality values, the Society recommends that the new Authority amend the Code of Ethics to include a specific requirement to adhere to human rights standards. Breach of the Code could then (presumably like any other such breaches) fall to be considered as a disciplinary matter.

5.3. It is unclear whether a human rights impact assessment (HRIA) has already been conducted in relation to the General Scheme. If so, the contents of same should be made publicly available to assist stakeholders in fully assessing the impact of the proposed legislation.

5.4. If not yet completed, the Society recommends that any HRIA should adequately consider the full extent of resources required to ensure the legislation’s effectiveness and the human rights and equality implications of same.

For further information please contact:

Fiona Cullen
Policy and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 672 4800
Email: f.cullen@lawsociety.ie