

**Joint Committee on Justice Pre-legislative scrutiny of the general scheme of the
Garda Síochána (Powers) Bill 2021**

Opening Statement of the Data Protection Commission

08 December 2021

I thank the committee for the invitation to contribute to today's meeting on the general scheme of the Garda Síochána Powers Bill. I am one of the Deputy Commissioners at the Data Protection Commission (DPC), with responsibility the DPC's supervision, guidance and international affairs functions. Also in attendance is Gary Russell, Assistant Commissioner, from the DPC's supervision section.

While the proposed Bill before the Committee gives rise to a broad range of issues from both a policy and legal perspective, I will limit my comments to matters relating to the processing of personal data and the requirements of data protection law.

As a general observation, I would like to emphasise that the obligations on public authorities and bodies processing personal data for law enforcement purposes flow from EU law and in particular from the 2016 EU law enforcement directive (Directive 2016/680), transposed into Irish law by the Data Protection Act, 2018. The 2018 Act requires that any legislation enacted concerning the processing of personal data for law enforcement purposes must specify the objectives and purposes of the processing, and the personal data to be processed. Legislation must also meet the standards of clarity, precision and foreseeability in accordance with the case law of the Court of Justice of the European Union and the European Court of Human Rights.

The DPC has conducted and concluded a number of investigations since 2018 into public authorities and personal-data processing, particularly in the context of surveillance technologies deployed. What is evident as a trend in the findings of these investigations is that the legislative underpinning for those bodies and their functions has not been updated to reflect the requirements of the Law Enforcement Directive.

Article 8 of the LED states:

'1. Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and that it is based on Union or Member State law.

2. Member State law regulating processing within the scope of this Directive shall specify at least the objectives of processing, the personal data to be processed and the purposes of the processing.'

In the context of this Bill, it is essential the Department of Justice, An Garda Síochána and the Oireachtas consider carefully all elements of the powers of An Garda Síochána that necessitate the processing of personal-data and include provision for this processing in the legislation and/or in the proposed statutory codes of practice. While the DPC has identified a number of comments it wishes to make on the Bill, it is not best placed to identify if all powers that will necessitate personal-data processing have been included as required.

In the time remaining I will highlight a few of the observations we made in our written submission to the Committee.

Part 1 of the Bill provides, inter alia, for Regulation making powers, including statutory codes of practice. Such Regulations and Codes of Practice will be important in assisting An Garda Síochána to uphold the data protection rights of individuals when exercising powers contained within the Bill by providing further clarity and granularity on the manner in which powers should be exercised. We recommend that the preparation of Codes of Practice should, as appropriate, be accompanied by Data Protection Impact Assessments and the approved codes made available to the public in a transparent and in an easily accessible manner.

Part 2 of the Bill concerns the protection of fundamental rights. We welcome the objective of this Part of the Bill and note that the protection of fundamental rights will include those rights enumerated by the EU Charter of Fundamental Rights including the right to data protection. In this regard, the implementation of the provisions to protect the rights of children and persons of "impaired capacity" should have due regard to the

data protection rights of such persons. It is our view that the Regulations as provided for in Head 7 and Guidelines in Head 8 should include whatever measures and safeguards are required to protect the personal data of such persons, particularly in circumstances where it is necessary to identify and contact a parent, guardian or other responsible person.

Part 3 of the Bill concerns stop and search powers. It is noted that the requirement in Head 12 to record name, address and date of birth is on a “where known” basis. It will be important to ensure that this Head is not used to justify the collection of personal data that the Gardaí are not entitled to by way of statute.

Part 4 of the Bill concerns the search of premises. The powers in this Part of the Bill are expansive. While we acknowledge that the power to require passwords and encryption keys relates only to searches carried out under warrant, and not to stop and search events under Heads 9 and 10, this provision requires further careful consideration so that all necessary safeguards are provided in both law and practice to ensure limited and proportionate use of the power. We recommend that the Code of Practice provided for in Head 22 include provisions addressing the data protection rights of individuals and ensuring compliance with the Law Enforcement Directive more generally.

Part 6 of the Bill concerns persons in Garda custody. We note that Head 51 provides the power to take photographs, fingerprints and palm prints, replacing elements of section 6 of the Criminal Justice Act 1984, which is repealed by this Bill. As special category personal data, it is recommended that provisions are included to give the reasons for processing the data and the retention thereof, with reference to the Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014 if necessary.

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

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

I hope these comments will be of assistance to the committee and I am very happy to answer the questions members may have.