



Professor David Kaye
Clinical Professor of Law
United Nations Special Rapporteur on the
Freedom of Opinion and Expression (2014 – 2020)

401 E. Peltason Dr., Ste. 3800-C
Irvine, CA 92697-8000
(949) 824-2427
dkaye@law.uci.edu

Opening Statement of Professor David Kaye
Joint Committee on Justice
Tithe an Oireachtais/Houses of the Oireachtas

*With respect to the
General Scheme of the Garda Síochána (Recording Devices) (Amendment) Bill 2023*

Prepared on 8 February 2024

Members of the Joint Committee on Justice:

Thank you very much for the opportunity to appear before you today. I applaud the Committee's effort to place law enforcement use of facial identification technology under the rule of law. However, generally speaking, I am concerned that the law as drafted faces fundamental defects that would render it inconsistent with Ireland's obligations under international and European human rights law.

In this statement, I address key points concerning fundamental rights that bear scrutiny, alongside with our submitted comments which offer an overview of international human rights law relevant to facial identification. Paragraph 4 and footnote 8 of the written comments identify some of my work on digital surveillance, including my role as the United Nations Special Rapporteur on freedom of opinion and expression from 2014 to 2020.

First, facial identification technologies deeply affect people's lives, especially when used in public places like streets, parks, train stations, and malls. It can create anxiety about the loss of anonymity or being wrongly flagged, imposing a burden on freedom of movement and the right to assembly. Notably, this applies whether such technologies are used in real-time or on past footage. Retrospective use might even a long-lasting impact since it can analyze data from *any time* in the past.

Second, due to this chilling effect and the state obligation to promote and protect fundamental rights, international human rights law imposes, at a minimum, the strictest constraints, if not a prohibition of, the use of facial identification data obtained in a publicly accessible place. The rationale behind such constraint is that the rights at stake – such as privacy, freedom of expression and opinion, peaceful assembly, and movement – are not only rights held by individuals but are also essential to democratic

societies, as repeatedly confirmed by European and international human rights law, their mechanisms and their jurisprudence.

Third, if, notwithstanding the grave risks to fundamental rights, legislators decide to allow law enforcement use of the technology on data of publicly accessible places, any such framework must, at a minimum, ensure that such use *always* meets international human rights standards, namely, the requirements of legality, necessity and proportionality, and legitimacy. More specifically, at the very least, any such law would require the following:

- Minimization of the chilling effect by establishing a specific time frame between data capture and use of facial identification;
- Mandating strict checks and balances, crucially by requiring prior judicial approval and robust public disclosure;
- Specification of which data sources are used for identification, allowing the public to anticipate police use of the technology and self-regulate their behavior; and
- Notification to the public and to individuals subject to facial identification in order to guarantee the right to effective remedies as required by international human rights law.

I hope my suggestions help ensure that this law fully respects international human rights standards.

Thank you very much.