DÁIL ÉIREANN

AN COMHCHOISTE UM DHLÍ AGUS CEART AGUS COMHIONANNAS

JOINT COMMITTEE ON JUSTICE AND EQUALITY

Dé Céadaoin, 15 Samhain 2017

Wednesday, 15 November 2017

Tháinig an Comhchoiste le chéile ag 9 a.m.

The Joint Committee met at 9 a.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Colm Brophy,	Frances Black,
Jack Chambers,	Martin Conway.
Clare Daly,	
Peter Fitzpatrick,	
Jim O'Callaghan,	
Mick Wallace.	

I láthair / In attendance: Deputy Donnchadh Ó Laoghaire.

Teachta / Deputy Caoimhghín Ó Caoláin sa Chathaoir / in the Chair.

General Scheme of the Communications (Retention of Data) Bill 2017: Discussion (Resumed)

Chairman: I ask everybody to switch off their mobile phones as they interfere with the recording apparatus in the committee rooms.

The purpose of today's meeting is to conclude our pre-legislative scrutiny of the general scheme of the communications (data retention) Bill 2017. I welcome from the Irish Council for Civil Liberties, ICCL, Mr. Liam Herrick, executive director; Ms Elizabeth Farries, information rights project manager; and Ms Maeve O'Rourke, senior research and policy analyst. We are also joined by Mr. Seamus Dooley, Irish secretary of National Union of Journalists. I thank them all for their attendance today to discuss this important legislation. Both groups will be invited to make an opening statement to be followed by a question and answer session.

Before we begin, I draw witnesses' attention to the situation regarding privilege. You are protected by absolute privilege in respect of the evidence you are to give this committee. If you are directed by the committee to cease giving evidence in relation to a particular matter and you continue to so do, you are entitled thereafter to only a qualified privilege in respect of your evidence. You are directed that only evidence connected with the subject matter of these proceedings is to be given and you are asked to respect the parliamentary practice to the effect that, where possible, you should not criticise or make charges against any persons or entity by name or in such a way as to make him, her or it identifiable. Members should be aware that under the Salient Rulings of the Chair, Members should not comment on, criticise or make charges against a person outside the House, or any official by name in such a way as to make him or her identifiable.

I invite Mr. Herrick to make the opening remarks on behalf of the ICCL and I will then invite Mr. Dooley to make his opening statement at which point will offer members the opportunity to ask questions.

Mr. Liam Herrick: On behalf of the Irish Council for Civil Liberties, I thank the committee for inviting us to appear today. I will make some brief introductory remarks and then hand over to Ms Elizabeth Farries, who will deal with the substance of the submission we have made. The committee will have already received a joint written submission submitted jointly by the Irish Council for Civil Liberties and Digital Rights Ireland, which made a presentation to the committee last week.

As many of the members are aware the Irish Council for Civil Liberties is Ireland's leading independent human rights organisation. It monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Kadar Asmal and Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns over the past 40 years. These have included campaigns on police reform, the legalisation on divorce, children's rights, the decriminalisation of homosexuality and the introduction of enhanced equality legislation.

In the area of information rights, the ICCL has previously given submissions to the 2016 commissioned review of Communications (Retention of Data) Bill 2009. We have previously pursued privacy rights litigation with our colleagues from the United Kingdom, Liberty, at the European Court of Human Rights regarding the UK's surveillance systems.

We appeared before the European Court of Human Rights again last week in a case also

involving an alliance of international organisations concerning the UK's continuing systems of mass surveillance today. We are also a member of an international network of civil liberties organisations, which includes 13 independent human rights organisations from the global north and global south, including, for example, the American Civil Liberties Union, which works together to promote fundamental rights and freedoms, and has identified digital information and privacy rights as central to its mandate. It is one of the most pressing international human rights issues facing human rights activists around the world today.

We affirm also the primacy of European law underpinning our submissions. Data retention and disclosure legislation must be compatible with applicable EU law as it is interpreted in light of express guarantees in the Charter of Fundamental Rights of the European Union. At stake in this matter is our right to privacy guaranteed by Article 7, the protection of personal data guaranteed by Article 8, and the freedom of expression and information guaranteed by Article 11.

The independent review commissioned by the Minister for Justice and Equality gave recommendations that also affirm EU and European Convention on Human Rights, ECHR, law. The former Chief Justice Mr. John Murray headed the review, and refers in his report to two key judgements by the European Court of Justice. The first of these is the case of Digital Rights Ireland *v.* The Minister for Communications. That challenge, which was against the data retention regime in Ireland, was referred by the Irish High Court to the European Court of Justice, and resulted in the invalidation of Directive 2006/24/EC, the EU Data Retention Directive. The second judgement to which he refers is the judgement of the European Court of Justice in the case of Tele2 Sverige AB *v.* Post-Och Telestyrelsen*,* which, building on the Digital Rights Ireland decision, sets out strict and binding standards which must be met to make any national system of data retention permissible under EU law and under the EU Charter of Fundamental Rights.

We welcome the general scheme of this Bill. We are fully in support of the recommendations of the Murray review. We offer these submissions in order to ensure that the recommendations in the Murray review can be fully implemented, and in our written submission we identify a number of key areas where we feel that the Bill, at this heads of Bill stage, currently does not fully meet the requirements of the recommendations.

I will now hand over to my colleague, Ms Elizabeth Farries, who will address the key substantive points which we raise in our written submission.

Ms Elizabeth Farries: I would like to thank the committee for giving me an opportunity to speak today. To that end, and in response to our discussions last week, I have summarised some key recommendations drawing from our written submissions, which the committee received and we discussed last week. There is a lot to cover. At the core of this discussion is the explicit protection of journalistic sources. I will leave that to the words of Mr. Seamus Dooley when he speaks, but I note at the outset that we absolutely advocate implementing the Murray review recommendations in that regard.

Moving to the issue of strict necessity, Ms Geraldine Moore said last week that the system of data retention and access, as laid out in the Bill, is most balanced, proportionate and fair. However, as Deputy Jack Chambers noted, and as per the decision in Tele2, proportionality in this instance is insufficient. As per Tele2, a ministerial order for data retention should only be made where strictly necessary. Under the scheme of the Bill, heads 5 and 6, detailing these ministerial orders, fail to meet that strict standard. They instead apply the weaker standard of proportionality, and that is incompatible with the standard laid out in Tele2.

The next subject is targeted data retention. It was noted last week that the finding in Tele2 limits legislation to require that data retention be based on targeted and objective evidence. This limitation does not appear to be implemented under the heads of Bill. Heads 5 and 6, for example, give a largely unfettered power to make rules requiring general traffic and controlled data retention. The language in the Bill allows access to data that is "likely to assist", as opposed to requiring objective evidence that "reveals a link" with serious criminal offences. As a result, it falls significantly short of the standard set in Tele2.

Now we have the issue of limited third-party access. Last week, Deputy Jim O'Callaghan posited that provision for safeguarding the security of the State might be used against people in the political sphere, or people not directly connected to a crime, for example financial officers. Mr. Dermot Woods said that this would not be the case. However, it could be a problem for third-party access. Head 8 permits access to data of entirely unconnected third parties, again on the more permissive grounds that the data is "likely to assist" in protecting the State. This permissive stance clashes with EU law. To uphold the requirements of Tele2, the person whose information is demanded must in some way, again, be implicated in a crime. They cannot simply be a third party.

That leads to the larger discussion about the precision of how we define data. Ms Moore said last week that there were no final decisions made about what specific categories of data might be the subject of ministerial orders. That said, it was clarified for Senator Ó Donnghaile that, as per head 3, the Bill does not apply to the content of communications. It is only meant to apply to the data around it. However, under head 1, as the scheme of the Bill is written currently, "traffic and location data" is given an exceptionally wide and substantially more permissive definition that might inadvertently include the content that the Bill is supposed to be setting aside. It includes any "data processed for the purpose of sending, receiving or storing communications". This definition is so permissive that it could conceivably permit ministerial orders to require Internet Service Providers, ISPs, to log Uniform Resource Locators, URLs. A URL is not in and of itself "content", but it often reveals the content of a web page, for example a news article that someone is reading. That goes beyond the remit of the Bill as defined.

There is also the issue of notification. Last week, the need for proper notification was raised. The Chair commented that surely people in Ireland must be entitled to know when our data is being accessed. The response last week was that a person would automatically be informed if their data was disclosed. We respectfully submit that this is not the case. Under head 15 of the Bill there are a range of exemptions for notification, include a vague catch-all at subhead 2(a), where notification would not be "consistent with the purposes for which the authorisation or approval concerned was issued or granted". This is very vague. It creates a lot of leeway around who gets to know their data is being looked at and who does not. We therefore urge that notification in this context means fully upholding the requirements of Tele2, that those whose data is retained must be notified as soon as possible, that is, as soon as it is not liable to jeopardise an investigation.

There is also the issue of judicial remedies. Deputy Mick Wallace posed a question that we had not addressed in our submissions, but one which is very important, and that is why the Bill does not have a judicial remedy. The Murray review recommends one, and this is a principle supported by EU legislation and the European Court of Human Rights. We understand that the Minister is getting advice on this matter, and to this advice we add our recommendation that a judicial remedy should absolutely be implemented. As former Chief Justice Murray wrote, it is necessary "bearing in mind the coercive character of a data retention system, and the concomi-

tant risk to fundamental rights associated with it".

Last week, Deputy Wallace also queried why the Bill has not, as per the Murray review, instituted a robust independent supervisory authority. In response, we heard that the Bill went with what was previously in place, which was said to be working quite well. That is to say a designated judge of the High Court was charged with oversight and all was well. We also heard that each year the judge examines the use of powers under the legislation in a detailed way, and so could very quickly identify if there was a problem, including any acts of abuse. We respectfully submit that this has not been the case, and that the overview system has not worked very well at all. In fact, as a Deputy recalled for us, there are not detailed examinations each year.

Instead there have been annual reports, which have exclusively consisted of a few formulaic paragraphs which are put together very quickly, without any formal processes in place. It is our submission that this is not a sufficiently detailed examination. We further argue that a judge alone does not have sufficient resources, or even competence, to exercise comprehensive control over State surveillance. The oversight role at this stage is described as "*ad hoc*, after the fact, part-time function of a busy judge with no staff, specialist training or technical advisors" in Privacy International and Digital Rights Ireland's report, entitled The Right to Privacy in Ireland - Stakeholder Report Universal Periodic Review 25th Session – Ireland. The judge, therefore, is at risk of becoming over-reliant on the feedback from the agencies that they are supposed to be overseeing. They need the agencies to tell them everything is all right so they can sign off on it.

Generalist judges cannot on their own be expected to have the sort of specialist knowledge necessary to assess the technological complexities in a surveillance system. As surveillance becomes rapidly more technologically complex, it changes, year-to-year and month-to-month. Judges increasingly lack the specialist knowledge needed to provide adequate oversight. We want Ireland to keep up with the trend of EU member states, and to do that we recommend replacing the designated judge with a unified independent supervisory agency. We recommend that this independent agency should include parliamentary accountability. According to the European Union Agency for Fundamental Rights, which put a 2017 report out following its 2015 report, Ireland and Malta are currently the only two countries in the EU that do not provide for parliamentary oversight of intelligence agencies. We also recommend that the independent body be chaired by a judge in a nearly full-time position, and be supported by a secretariat with a sufficiently technical expertise needed to make the decisions required in these instances. They need the resources to provide detailed support, including formalised reports available to the public. There are examples in the EU where these more fulsome aspects of intelligence agency oversights are included. We address this need at length in pages ten to 14 of our written submission to the committee.

We thank the committee for giving the Irish Council for Civil Liberties, ICCL, the opportunity to speak with it today. We have other recommendations itemised in the written submission, and summarised in a list that may be before the members. If it is not then I will circulate it to members after the meeting. We hope to have the opportunity to speak with the committee more generally about the Bill.

Chairman: I thank Ms Farries.

Mr. Séamus Dooley: I thank the Chairman and members of the committee for the opportunity to address the committee as part of the pre-legislative scrutiny of this Bill. I know that the committee members are busy legislators. The National Union of Journalists, NUJ, shares many

of the concerns of ICCL and Digital Rights Ireland. I do not propose to reiterate much of what has been said. We especially share the concerns around the definition issue and the importance of providing adequate resources to ensure there is a digital oversight regime that is something more than a mere pretence at oversight.

This Bill has profound implications for journalists and for media organisations. The NUJ believes that the highest level of protection, under both Irish constitutional and international law, must be afforded to journalists in respect of privacy in their communications. The media plays a crucial role in maintaining accountability and transparency in the workings of civic society in a democratic state. Where the rights of the media are undermined the ability of journalists to shine a light into the darkest corners are severely curtailed. While there is an individual right of privacy afforded to citizens, the rights afforded to journalists in the exercise of their professional function are different and are rooted in a public good that extends beyond the individual rights of citizens.

The general scheme of the communications (data retention) Bill 2017 does not make adequate provision for the protection of sources or afford the level of judicial oversight recommended by Mr. Justice John Murray in his review of the legislative framework, as pointed out earlier. In the terms of reference for the review Mr. Justice Murray was asked to take into account the principle of protection of journalistic sources, the need for statutory bodies with investigative and, or, prosecution powers to have access to data in order to prevent and detect serious crime, and current best international practice in this area. The committee will be aware that Mr. Justice Murray found that current data retention legislation amounts to mass surveillance of the entire population of the State and recommended a series of changes to the current statutory framework, which he found was in breach of European law. The former Chief Justice came up with an unambiguous statement in this regard. The general scheme of the Bill before the committee sets aside the key recommendations of Mr. Justice Murray, and this is as concerning as it is curious. In scrutinising the proposed legislation I respectfully suggest that the committee have due regard to the recommendations of Mr. Justice Murray.

The NUJ welcomed the establishment of the Murray review in January 2016. In establishing the review the Minister announced that it would be completed within three months. In October 2016 the former Minister for Justice and Equality, Deputy Frances Fitzgerald advised the NUJ that the report was at an advanced stage. The report was presented by Mr. Justice Murray in April 2017 but published in October 2017. Perhaps this timeline tells its own story about the urgency with which this issue has been treated.

The fact that the Minister for Justice and Equality published the Murray review and the general scheme of the Bill simultaneously is a clear acknowledgement that the two are interlinked and my comments today are predicated on the NUJ's submission to Mr. Justice Murray, which I have provided to the committee. The events leading to the establishment of the review provided a context to our submission. The NUJ was gravely concerned at revelations in January 2016 that the Garda Síochána Ombudsman Commission, GSOC, had authorised its investigators to demand access to the mobile phone records of two NUJ members on foot of its powers under section 98 of the Garda Síochána Act, exercised in the context of a disclosure request for telephone records made under section 6 of the Communications (Retention of Data) Act 2011.

We met with the Minister for Justice and Equality and with GSOC and raised our concerns with both. In the case of GSOC we had a robust but respectful exchange of views on general principles. The Communications (Retention of Data) Act 2011 covers the retention and storage of historic data pertaining to all electronic communication, including fixed line and mobile

telephone, internet communication and text messages. It is being done without the consent of those affected. As Mr. Justice Murray has pointed out, the arrangement is indiscriminate in application and scope, affecting the retention and storage of journalists' communications data pertaining to the time, date, location and frequency of a journalist's telephone calls and can thus identify sources. Location data linking a journalist's telephone calls with those of another caller before or after a sensitive meeting in which that person was known to have been involved can fatally compromise confidential sources of information, including from whistleblowers, and it was in this context that the NUJ expressed particular concern at the actions of GSOC. The Minister subsequently announced the Murray review. The NUJ's approach to the protection of sources is firmly rooted not just in journalistic ethics but in international conventions. Our submission to the Murray review is included in our submission to the committee.

It is worth noting that head 18 of the Bill makes provision for a High Court judge to keep the operations of the provisions of the Bill under review. Committee members will perhaps understand a degree of scepticism on our part against the backdrop of the decision not to incorporate key recommendations of the former Chief Justice into the new legislation. There is an irony in having a provision in a scheme to review, by a High Court judge, a Bill that ignores the recommendations of a former Chief Justice who was appointed by the Minister who then introduces a new Bill with lesser provisions and will get a judge to review it.

The NUJ suggests the communications (retention of data) Bill 2017 should incorporate the recommendations on journalistic sources made by Mr. Justice Murray. For ease of reference I have included those recommendations in my submission to the committee but I do not propose to read them into the record. They are recommendations Nos. 231 to 237, inclusive, from the Murray report. It is welcome that Mr. Justice Murray recognises that the protection of journalistic sources is of vital importance to journalists in the exercise of their professional activities and the attention of the committee is drawn, in particular, to his recommendation that any exception which permits the identification of journalistic sources or which might oblige a journalist to disclose them should be subject to prior control by a judicial or independent administrative authority. Mr. Justice Murray recommends that applications be made to a High Court judge. The designation in the scheme of a judge of the District Court, or a panel of District Court judges acting as authorising judges, seems to me to reflect an overall view in this scheme that is not welcome. In a sense this decision is reflective of the low priority given under the general scheme to the recommendations of Mr. Justice Murray. In publishing the general scheme the Minister for Justice and Equality acknowledges that while there are problems with the current legislation it is not unconstitutional. This appears to set a low bar indeed. The current legislation in regard to the protection of sources is in conflict with the European Court of Human Rights and demonstrably undermines the fundamental rights of journalists. One should not approach a new piece of legislation by saying that we do not believe the current legislation is unconstitutional. It should not be the case that a journalist or any other citizen should have to go to the Supreme Court to vindicate their rights. The Minister has ignored the recommendation of the designation of a supervisory authority to ensure the legislation is not abused. This is also regrettable.

The NUJ shares many of the concerns expressed by Digital Rights Ireland, which has done so much work in this area, and the ICCL whose record needs no acknowledgement from me. In particular, we share the concern that the general scheme does not reform the structure for oversight of data retention and does not comply with EU law. Head 22 seeks to abolish the current power of the complaints referee to award compensation to individuals whose data has been accessed in contravention of the legislation.

There is urgent need for legislative reform in this area. In regard to the issues of specific concern to the National Union of Journalists we believe the report of Mr Justice Murray provides a framework for meaningful reform. We respectfully suggest that that framework is not adequately provided in the scheme before the members this morning.

Chairman: I thank Mr. Dooley. We will open the meeting to questions from the members. No one has indicated yet that they wish to speak which is unusual.

Deputy Jim O'Callaghan: I will.

Chairman: Please continue.

Deputy Jim O'Callaghan: I thank the witnesses for coming in for their presentation. I want to begin by asking Ms Farries about the ICCL's fourth recommendation, it is titled "limited third party access". She said that she would like the Tele2 decision upheld, in particular that the person whose information is demanded must be in some way implicated in the crime before access to their data can be granted. Head 8 was referenced. If one looks at heads 8, 5 or 6, the language used is similar. It permits a member of An Garda Síochána in particular to seek access of data relating to a person who is suspected of a crime but also of a person who is not involved or implicated in the crime, but who may have data that would be likely to assist it. Does the ICCL object to that happening?

Ms Elizabeth Farries: I do on the grounds that it is not consistent with Tele2 as noted. According to Tele2, "Access can, as a general rule, be granted, in regard to the objective of fighting crime, only to the data of individuals suspected of planning, committing or having committed a serious crime". So the reference that the Deputy described under the general scheme of the Bill is that there has been space allowed for these additional parties to have their data accessed in a way that contravenes Tele2 and therefore European law.

Deputy Jim O'Callaghan: To be devil's advocate, if one is a member of An Garda Síochána and one is investigating a crime, it is not always the case that one will only interact with suspects. There may be information available from some other entity which would be relevant to the crime. For instance, gardaí may seek access from a company involved in online gambling which might have data that is relevant to the commission of an offence, but there is no suggestion that the company itself would be involved in that criminal activity. I am concerned that the ICCL recommendation could limit the Garda in fighting crime.

Ms Elizabeth Farries: It is that balance that is always struck in these broad principles between our fundamental right to privacy and the ability of investigative agencies to do their jobs. In this case, the balance has been struck by limiting that third party access at the European Court, it has not been limited here in a way that could open it to litigation if it went through.

Deputy Jim O'Callaghan: So one would only permit it in circumstances where the person whose data is accessed is a suspect.

Ms Elizabeth Farries: That is correct.

Deputy Jim O'Callaghan: On the judicial remedy, courts are limited in a remedy they can provide. Does Ms Farries think that the remedy for unlawful access should be damages or does she suggest some other sort of remedy to a successful litigant?

Ms Elizabeth Farries: Damages is exactly correct. The remedy now is the complaint ref-

eree who cannot offer even compensation. Compensation might be added back in but as Deputy Wallace said, it needs to go to a higher level, as per the Murray review.

Deputy Jim O'Callaghan: I note the point Ms Farries makes about the independent agency. It seems to be an argument made consistently by the people who come before the committee on this issue, that they are slightly concerned about a body of District Court judges being given expertise in this area. Some have suggested that a separate independent body should be set up. I have an open mind but the courts are there to curtail the excesses of the Executive. Would Ms Farries agree that irrespective of level - whether District, Circuit or High Court - judges are appropriate arbiters to determine whether there has been a breach or needs to be appropriate oversight, and how that oversight should be exercised?

Ms Elizabeth Farries: The High Court is appropriate for giving orders to release the data, which was the recommendation of the Murray review with respect to journalists' data. If, as was submitted last week, we want to have a consistent standard for everyone, then it is for the High Court to give those orders. At a larger level, judicial oversight through judgments is helpful but it is a very specialised area that generalist judges are often ill-equipped to deal with in terms of the technological expertise. To that end, we need to have someone who is designated, with proper advice, either on a contractual basis or an employed agent to oversee this in a way that necessitates the protections of our fundamental rights and freedoms. This is a new landscape. Simply having a panel of judges that occasionally look at these matters is not sufficient.

Deputy Jim O'Callaghan: I will keep an open mind on the matter. My view would be that the courts are responsible for protecting and supervising our rights. As a Member of the Oireachtas, I am concerned at the idea of setting up another statutory quango that could just become much larger than is required.

I have a couple of questions for Mr. Dooley before I hand over to my colleagues. I thank him for coming before the committee. I agree with the findings of former Chief Justice, Mr. Justice Murray, but when delegates from the Department of Justice and Equality came before the committee last week we asked them why there was not particular protection for journalists in the heads of scheme. They argued that in addition to journalists, doctors have an oath of confidentiality towards their clients, and then there are lawyers and priests. Their argument was that rather than identifying one group such as journalists, it would be better to have a general method whereby there can be exemptions for people under different headings. What would Mr. Dooley make of this?

Mr. Séamus Dooley: It is a convenient argument but it is not consistent with the European Court of Human rights or with the rulings that are provided in appendix A in the NUJ submission to the committee. Mr. Justice Murray has accepted the delay in his report arose because he used additional time to study international judgments. The idea that it is inconvenient because it complicates law and it would be easier if everyone was put into the same little box and wrapped up in the same ribbon is unacceptable to me. There are particular issues in regard to the confidentiality of sources in journalism. Of course it is not easy and there are difficulties but once the dam has been breached at all there is a real difficulty.

Deputy Jim O'Callaghan: Mr. Justice Murray states that access to a journalist's retained communications data for any purpose, including for the purpose of identifying his or her source, should in principle be permitted only when the journalist is the object of investigation for suspected commission of a serious criminal offence. That is a situation where the journalist is the suspect, which relates to the point I made earlier regarding unlawful activity which poses

a serious threat to the security of the State. Does Mr. Dooley agree with Mr. Justice Murray's finding?

Mr. Séamus Dooley: The unlawful activity which threatens the security of the State is not the leaking or receipt of inconvenient information by a whistleblower which are the issues which concern us. That goes back to the first point raised with the ICCL. It is very important that the law be framed as tightly as possible so that there is not some imaginative use of the law in order to go on forays beyond gaining information which is needed for the prosecution of a crime.

Deputy Clare Daly: I thank the witnesses for coming in. This Bill was well decimated by Digital Rights Ireland last week, which has teed us up nicely on the details, so I will look at the issues more broadly here. The ICCL recommendations are very clear, they very much follow on from what we discussed last week and can be built on so I will not repeat them.

Deputy O'Callaghan referred to heads 8 and 9, which I had planned to raise. I understand what the witnesses say and the quote from Tele2 on access being granted in regard to fighting crime only, to the data of individuals suspected of planning, committing and having committed a serious crime. The Tele2 judgment ended with "or of being implicated in one way or another in such a crime", which broadens the scope. However, Ms Farries said heads 8 and 9 would not implement the limitation strictly enough. They allowed for a broader approach by permitting data likely to assist in prevention and detection, thus taking the end part of the quote too far. I have not probably explained my point very well.

Ms Elizabeth Farries: Is the Deputy referring to the third party in such cases?

Deputy Clare Daly: Ms Farries made the point that heads 8 and 9 are much broader than the Tele2 judgment.

Ms Elizabeth Farries: Yes, absolutely. It is a broadening of the language, whereas Tele2 requires a direct and targeted link based on objective evidence. The language in what the Deputy read out is more general and widens the scope of surveillance, including the situations where somebody can ask for data.

Deputy Clare Daly: It requires a radical review. When the legislation was first mooted we suggested that reviewing data retention in isolation was a knee-jerk reaction and not helpful. Does the ICCL have a view on the other surveillance legislation in this State, such as the draconian powers given to the State by the Criminal Justice (Surveillance) Act 2009 and the telecommunications Acts, which allow for the interception of parcels? Could they be reviewed in tandem with this legislation? Would it be helpful or confusing? Does it need to be done? Mr. T. J. McIntyre said the Department of Justice and Equality would only act on reform of surveillance when forced to do so by litigation such as that brought by Digital Rights Ireland. Does the ICCL share that view?

Ms Elizabeth Farries: The ICCL shares the view that a more holistic review of this legislation, in conjunction with other legislative pieces, is necessary. We agree with what Mr. McIntyre said last week to the effect that there has been a reactive, piecemeal and fragmented response to the various issues that have been raised and to the controversies that have happened over the past ten years. I cannot speak to the remit of the specific items of legislation to which the Deputy referred but I certainly agree that we need a multi-legislative review.

Chairman: If our guests would like to make further interventions, they should please feel

comfortable about doing so.

Mr. Liam Herrick: As well as a broad review of different legislative schemes for different forms of intelligence gathering, surveillance and retention, the sharing of intelligence data by this jurisdiction and other jurisdictions, where there appears to be no oversight and there are no safety checks and balances, is also an issue. As we have seen from our international co-operation with peer organisations in other jurisdictions, this is an international phenomenon as there are poor systems of surveillance in other jurisdictions too. However, we are particularly notable in having no parliamentary system of oversight and an under-resoured and weak form of oversight, even in the limited area in which it operates.

Deputy Clare Daly: This is really important. Mr. Justice Murray spoke of the mass surveillance of virtually the entire population of the State. I note that the ICCL lodged an FOI request to the Department of Justice and Equality and the Defence Forces on precisely the point Mr. Herrick made about intelligence sharing with other countries. This is huge and there is obviously a bigger picture. What response did the ICCL get to its FOI request? Is there anything we should know? Did the request seek documents on the extent to which information is shared outside the State? It would be an issue of enormous concern to citizens.

Ms Elizabeth Farries: The project the Deputy mentioned relates to the International Network of Civil Liberties Organisations, INCLO, an organisation with 13 members of which we are one. Nine of us sent similar requests to our governments inquiring about information relating to intelligence-sharing. In all nine countries, the requests were denied for reasons of secrecy and sensitive information. The end result demonstrates the ongoing opacity of intelligence-sharing systems, not only in Ireland but across the globe. We should not have to rely on people like Edward Snowden to reveal documents that show these things are happening - we should be allowed to see them.

Deputy Clare Daly: It puts the onus on us to look at the bigger picture. The Communications (Data Retention) Bill 2017 only deals with communications data and personal data are outside its scope, but do the witnesses have a view on the personal data in vast databases which are shared by public bodies without any oversight? I refer to the mandatory, but not compulsory, public services cards and health identifiers where data are retained without any legislative basis at all.

Ms Elizabeth Farries: This certainly relates to privacy rights. The ICCL held a public meeting on the issue last month when we spoke out against public service cards. We invited people from the UK and in Scotland the Government has been unsuccessful in implementing their introduction. There has been a large response from knowledgeable people about the forms of surveillance within those cards and we have made it very clear that there are rights-infringing problems and no legislative basis for those cards without proper consultation. Nonetheless, the Government is still pushing them forward and investing huge sums of money in a PR campaign to convince the public that they are useful to have, for access to social services, pensions etc. The inherent privacy problems, meanwhile, are being pushed under the carpet.

Mr. Liam Herrick: It is a separate question but it identifies broader questions about our approach to privacy generally. A statutory body is in place with competence in this area but the Data Protection Commissioner's mandate is very broad and there are questions of resources. On the specific question of data retention, it seems the functions and expertise of the Data Protection Commissioner have been under-utilised. Even though we have a statutory body with competence in this area, we are not fully utilising it.

Deputy O'Callaghan spoke about the primary role of the Judiciary and he is absolutely right. However, while there are High Court judges in complex technical cases of this nature who have the opportunity to familiarise themselves with all the information on a case and develop expertise - and the Irish courts have dealt with some very complex cases in this area - there are also part-time judges with a heavy workload in other areas and no resources or support, who are asked to exercise a very complex and challenging oversight function in a technical area where the State has a huge amount of information. Perhaps the fact that we are one of only two countries in Europe which operate this system of oversight indicates that it is not fit for purpose, although this is no criticism of those who have had such functions in Ireland and who have exercised them very effectively within the limited confines of what they are asked to do.

Deputy Clare Daly: The ICCL has teed this up very well. Mass surveillance is a very broad issue and Deputy Wallace and I have raised Garda oversight and surveillance in the context of the GSOC bugging scandal, as well as the limitations in our legislation in this respect. We do not agree with the State being empowered to get its hands on anyone's private information, whatever his or her profession. All citizens should be protected, and I do not believe that anyone should get access to anybody's information in the absence of judicial oversight. The public would have huge sympathy, for example, for protecting journalists who try to highlight the inconvenient truths of the State. We can all agree with that. The circumstance that gave rise to the review was actually unethical behaviour by journalists who wrongfully leaked information from the Garda in a disgustingly intrusive manner into the tragic death of a young woman. Some of the sources GSOC also targeted in its attempts to bring to justice the garda responsible for that criminal conduct also related to my own case, when I was arrested. GSOC requested information for journalists' records on that. I can guarantee that there was nothing of interest to the public in any of it. It was a gross violation of my privacy. Mr. Justice Murray did say that journalists have duties and obligations in weighing the public interest against the invasion of citizen's privacy. What is the view of the NUJ on how well those duties and obligations have been enforced by the Irish media in recent years, particularly with regards to privacy, and are there any other measures that could be put in place?

Mr. Séamus Dooley: The end does not justify the means. That is the cornerstone. The fact that in any individual case there may be justification for an inquiry does not mean that one can simply ignore established rights internationally. We expect journalists to behave in an ethical manner. The NUJ has a code of conduct and expects its members to adhere to that. Newspaper organisations are members of the Press Council of Ireland. Broadcasting organisations are expected to adhere to the Broadcasting Authority of Ireland, BAI, code. I do not think that all of the members of the NUJ adhere at all times to the strict editorial and ethical standards it has. I would not claim that all politicians are good all of the time. I would not claim that any profession is without unethical behaviour. We do not own the media. We do not control the media, and it is not compulsory to be a member of the NUJ. I am equally clear that I would not be in favour of the State controlling the press any further. There are very severe restrictions relating to defamation which curb the media at present. While I understand that there are genuine concerns about infringements I would caution against that as being the basis for not implementing the Murray report.

Deputy Clare Daly: No one is arguing for State control of the media. I quoted Mr. Justice Murray's comments about the duties and obligations of journalists. I was asking the witness how he thought that duty and obligation to not invade people's privacy could be protected. He said that there is a code of conduct in the NUJ but not all journalists are members. Are there any other mechanisms that could be used?

Mr. Séamus Dooley: Adherence to the code of conduct of the NUJ would resolve the issue, but when the State has refused to deal with concentration of ownership and where significant owners of media in Ireland refuse to recognise trade unions, that is a very real difficulty.

Deputy Clare Daly: I believe Mr. Herrick wanted to respond.

Mr. Liam Herrick: There are a couple of aspects to this. I refer to comments last week to the effect that journalists are just another category. Legally that is clearly not the case, and we need to emphasise very strongly that the jurisprudence of the European Court of Human Rights is very clear that journalists must be afforded special protections given their central role in terms of democratic debate in society and the right to freedom of expression under the European Convention of Human Rights. That is the first point, and it is very clearly acknowledged by the Murray review.

Another question concerns where data of a personal nature are retained lawfully, for example by An Garda Síochána. The responsibility is on that body to control that data appropriately, to treat it with integrity and to not allow it to be disseminated in a way that would be unlawful or potentially prejudicial or damaging to the rights of individuals. That is the other side of the question. To return to Deputy O'Callaghan's earlier question, we must, when assessing the question of proportionality and restricting appropriately the circumstances and the type of data which can be retained, be mindful of the potential risk of misuse of data. Unfortunately, in recent years we have had a number of very damaging instances where State agencies that had lawfully retained data of a very broad nature have then disseminated or failed to control that data. That is the context here. We can look at it from the point of view of unethical journalistic behaviour. The more central issue is that a State agency which has data of the most serious kind, that potentially violate individual rights, has been very loose and casual about how that data is shared. That is the data retention point which goes to the type of tight controls and oversight we are calling for.

Deputy Clare Daly: The witness is talking about circumstances where the State's use of that information, in terms of Garda information, was leaked. There is a certain irony in the fact that the appropriate attention being put on the State's surveillance mechanism arose out of the circumstances where GSOC attempted to bring to justice the garda or State agent who was responsible for that violation. That is how the attention was focussed on this issue, and we felt that there was a certain irony in that suddenly becoming huge news, when for years we have been diligently ploughing away at the broader issues of surveillance and the need for these issues to have a spotlight on them. That viewpoint was not aired in any media outlet, although in fairness, *TheJournal.ie* did have some good articles on the broader issues of data retention.

The Murray report, the European Court of Justice and the European Court of Human Rights all hold that journalists have a particular status when it comes to privacy. Being someone who does not believe that the State should have any empowerment to access anyone's data, what would be wrong with the threshold that was so high that all citizens benefited? What particular measures would Mr. Dooley put in place for journalists that other citizens would not be entitled to avail of in that regard? Could we not have the gold standard for everybody? If we cannot, what differences would the witness put in place for journalists that everyone else would not get? There is a difficulty in deciding what a journalist is these days. I know many people talk about journalists who rehash Government press statements without any analysis. How would Mr. Dooley define a journalist? He has said that because of media ownership union membership is restricted, but how is it defined and where does it fit in?

Mr. Séamus Dooley: Tongue in cheek, I would be delighted if every journalist had to be a member of the NUJ. We do not believe in the licensing of journalists, as happens in France. It is difficult to define what a journalist is. In some respects everyone is a journalist or a photographer. It is a difficult one. We represent full-time professional journalists, people who make their living as journalists and adhere to the code of conduct. I would be opposed to an academic qualification and some form of a limit on the profession because it is important that there is a diversity of voices. A full-time professional journalist who makes his or her living from journalism is as near as I can go to a definition. I would be very reluctant to have a situation where who is or is not a journalist was prescribed by the law. That might sound like a cop out, but I believe that it would be very dangerous if the State or some other body were to license who can and cannot be a journalist.

The adherence to the NUJ or Press Council of Ireland code is supposed to meet certain standards. I am against the notion that there is an absolute right to privacy in all circumstances. The NUJ code, and the code of practice of the Press Council of Ireland, envisages that there may be circumstances where privacy can be intruded upon in the public interest. One then has to prove that public interest. Without naming anyone I can think of a very well known situation where a character chased down Westmoreland Street by Charlie Bird was clearly evading a report and was clearly guilty of a form of corruption. Does a journalist in that situation have a right to confront that person on the street? Does he have to make an appointment? Does a journalist telephone a person, saying that it is believed that the person is guilty of wrongdoing and that he or she wants to talk to the individual about it and could he or she come and see the individual? Journalism does not work that way. Journalists must make an ethical decision that the right to invade privacy is in the public interest. It must be an overriding public interest that one cannot get the information required in any other way. To say that journalists can never invade privacy is to provide a shield that I think has consequences.

Deputy Clare Daly: I did not hear anybody saying that. I quoted from the statement by the former Chief Justice, Mr. Justice John Murray on precisely that point, on the need to weigh the public interest against the invasion of a citizen's privacy. I think people would cheer for many examples of crusading journalists bringing people in elevated positions who were engaged in wrongdoing to the public notice. Clearly there has not been enough of that. What we have seen is voyeuristic intrusion in people's private lives for media titillation and to increase flagging newspaper sales.

Given the point made by Mr. Dooley about the difficulties of defining a journalist, is it not the case that a bar that is so high that it would protect citizens as well as journalists, that would protect everybody would be good enough for journalists? What additional conditions would be required to protect a journalist that another would not benefit from?

Mr. Séamus Dooley: I am sorry if I misunderstood the question but I am not sure how one would achieve that bar. I believe in strong privacy rights for all, but when Deputy Daly referred to a bar that would protect everybody, there are people whose privacy should not be protected.

Deputy Clare Daly: I am referring to a provision in data protection legislation. I am talking about giving the State the power to access somebody's information. What extra protection do journalists need that another citizen would not need? We know the Department's argument, albeit warts and all, and we know the Bill needs to be dramatically changed. What about bringing up the standard that would apply to everybody and not having a specific standard that would apply to journalists only? I know Ms Farries would like to respond.

Mr. Séamus Dooley: I have an informed view. I think that stronger judicial oversight may deal with the issue that Deputy Daly refers to.

Chairman: Before Ms Farries comes in, there are other members wishing to speak.

Deputy Clare Daly: This is the key point because of the particular status of journalists.

Chairman: I am indicating that if Deputy Daly has further supplementary questions, we would bring her in at the end, because there are others indicating. Does Ms Farries wish to add a further comment?

Ms Elizabeth Farries: The Minister states there should be no exception and that there should be equal treatment for everybody in the legislation. In order to adhere to EU law, the equal treatment would need to be raised to a level that includes those prescribed protections, which means for this legislation there could be no authorisation of data access at the level of the District Court, it would always need to be a High Court judge. In addition, the emergency situation exceptions, where a journalist can go straight to the agencies without a judicial intervention at all would have to be eliminated also. To raise the level up to acknowledge journalistic special privileges would require very stringent legislation.

Deputy Clare Daly: That is a perfect solution to me. That sounds exactly the way the legislation should look like.

Deputy Donnchadh Ó Laoghaire: I thank the witnesses for their presentations. I have one of two questions, on the back of Deputy Daly's point and the protections that exist for data under EU law and under the judgment in Tele2.

Mr. Dooley has given us a general sense of the principles and so on. I suppose I would broadly accept the fact that there is a specific role for journalists in terms of public debate, a democratic society and all the rest. The difficulty that we will face is that the heads of a Bill are in line with the proposal from the ICCL and from the NUJ that as it stands, the Bill is inadequate in terms of protecting journalistic sources and the right to protect sources. If that is to be changed we will need to find a precise wording, a precise formulation. I think we will need some guidance on this. There will have to be some kind of definition of who will benefit from that specific protection. I appreciate the point that Mr. Dooley made about not supporting a system of specific accreditation, as exists in France. I am not familiar with the system. How has EU jurisprudence dealt with providing some kind of definition or clarity as to who is a journalist and the category of people who specifically benefit from that kind of enhanced protection? I am not taking away from the fact that it is required. How has the EU nailed down who journalists are and why they are entitled to this protection?

Mr. Séamus Dooley: I suppose the answer to that question is that the EU has not done so, in the sense that what Deputy Ó Laoghaire is talking about is journalistic behaviour. It is to allow for action which has a journalistic purpose. Journalists are ordinary citizens as well. I mentioned France because it is the only country in Europe of which I am aware that has a licensing system. The bar is that journalists must be acting in the public interest, for the public good and must be behaving in a particular way and be able to access information for journalistic purposes. That purpose is above and beyond the purpose of somebody else.

The court has never recommended for instance that there should be a system of registration or a definition of journalists. The reason the courts have not done so is that with the exception of an actual licensing system, there is no way around it.

Deputy Donnchadh Ó Laoghaire: This may be an issue we will have to return to. In order to amend the Bill it will require a specific provision. I am not sure how that will be done. There may be something in terms of the principles of journalistic behaviour.

Ms Elizabeth Farries: The review advocates adopting the definition of journalist contained by the Council of Europe recommendations. That specifies that for the purposes of this Recommendation, and I quote, "the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information". That would not cover somebody who tweets or who updates on Instagram. There is a regular and professional obligation.

Mr. Séamus Dooley: That is what I meant by referring to the activity, that it is something a person does on an ongoing basis as distinct from somebody who simply decides that he or she is a journalist for a hobby.

Deputy Donnchadh Ó Laoghaire: That is useful. I was listening to Mr. Dooley refer to people who engage and making their living as a full-time journalists. I am sure that many journalists would say they are not making a good living from it at present.

On the issue of a supervisory body, can the witnesses give an example? We have been told that Ireland and Malta do not have such a body. Is there any particular model that we should be looking at? To whom should we look? I take Deputy O'Callaghan's point about an additional quango, but if we are to explore the idea, are there models of best practice that we should consider?

Ms Elizabeth Farries: The FRA review has comprehensive and extensive reports from 2017 and 2015 which we quote in our submissions and that goes through all the member states of the European Union and describes various attributes of their oversight bodies. I think it was Belgium that had a very good model in terms of independent judges, technical support sufficient resources, reports to Parliament and public reports. This is a great report that gives comprehensive examples of piecemeal ideas that can be brought together as a whole.

Deputy Donnchadh Ó Laoghaire: I have three more questions but I will ask them together. I want to better understand point 5 regarding the specific preclusion of data. In terms of why content should be precluded, provided that the threshold of strict necessity is met, would it not be the case that data should be considered and shared?

In terms of the overall legislation and the heads of the Bill, if it is formulated in the manner currently outlined and there are no changes to its general principles, could it be struck down as being contrary to EU law as laid down in Tele2? Is it so far out of line that it could be struck down yet again?

I am partially playing devil's advocate on this point but under the requirements of Tele2 that the person whose information is demanded must in some way be implicated in the crime before access to their data may be granted, which is point 4 in the presentation, is there a danger that the Garda or another body might be tempted to deem somebody a suspect although he or she is not such, with the intent to access information in pursuit of an investigation?

Ms Elizabeth Farries: Whether content should be shareable is not within the remit of the Bill. Head 2 says the Bill does not deal with content and the Deputy's question does not, therefore, arise in that context.

In terms of whether it would be struck down, the Bill as presented is invalid according to EU law and the recent cases of Tele2 and Digital Rights Ireland. As to whether there is a danger the Garda would act unethically, there is always a danger that public servants could act unethically. Irrespective of that, the legislative guidance needs to be framed according to what an ethical public servant would do, which in that case would be to focus on direct suspects.

Deputy Jack Chambers: I thank the witnesses for their presentations. To follow up on a point made by Deputy Ó Laoghaire, Digital Rights Ireland last week said that the scheme as presented will inevitably end up in the courts and be appealed. Do the witnesses wish to reiterate that they feel the scheme as presented, if enacted, would not be permissible according to EU law?

Ms Elizabeth Farries: That is correct.

Deputy Jack Chambers: If we create a two-tiered approach incorporating a strict necessity threshold, would the witnesses prefer, as Deputy Daly seems to wish, that everyone would have a high threshold regardless of their profession, background or potential category or do they feel there should be a separate threshold for journalists as proposed by Mr. Justice Murray? Which approach would the witness prefer to see?

Ms Elizabeth Farries: Strict necessity is not only applied to journalists, it is applied across the board.

Deputy Jack Chambers: Across the board. Would Ms Farries like there to be a higher threshold than that for everybody in order that everyone receive the specific or special protection or should there be a split categorisation as Mr. Dooley stated?

Ms Elizabeth Farries: Our submissions should not be taken as accepting that data retention as a principle is permissible or desirable. We are addressing the requirements needed to bring the general scheme into line with EU law and ECHR norms.

Deputy Jack Chambers: Would Ms Farries prefer to have the model proposed by Deputy Daly whereby there would be a special protection for every citizen to match the special protection for journalists or would she have split protection?

Ms Elizabeth Farries: Those principles are the floor and not the ceiling. We certainly advocate for the higher protections. We would perhaps advocate an even higher level of protection. We do not advocate for data retention at all. In this context, if one is to retain data, one must follow EU law such that the legislation will not be invalidated. The level of protection should be raised to require permission of a High Court judge in all instances.

Deputy Jack Chambers: In terms of the Bill and the current architecture around the District Court and the referee to the Circuit Court and the High Court providing a supervisory role, the Department last week said it would like there to be a pooled skill level at District Court level but Ms Farries feels that would be unworkable and would not give adequate protection to citizens.

Ms Elizabeth Farries: If it were to be kept at the higher standard for journalists, the District Court would not be involved.

Deputy Jack Chambers: It would not be appropriate.

Ms Elizabeth Farries: If the District Court were to be involved, there would need to be the

oversight body to ensure the District Court pool was responding appropriately to the applications. The larger the pool, the more generalised the knowledge and the less technical expertise the individual judges will have in dealing with these applications.

Chairman: Mr. Dooley wishes to come in on that point.

Mr. Séamus Dooley: We absolutely agree with the ICCL point in terms of the overall approach to data retention. If we are to have a scheme and Bill it should at least be consistent with European law and Mr. Justice Murray's findings. It beggars belief that the Government, having commissioned Mr. Justice Murray to complete a report and he having done so, would then set aside his findings. In my previous career I was a District Court reporter for a long time and have dealt with District Court judges all my life. Many of them are very fine men or women who are very good generalists. The problem with a panel of District Court judges is they are not all appointed for their knowledge of the complexities of digital law and data retention and, second, this area evolves on a daily and weekly basis. The technological developments in regard to data retention are extremely complex. It is not possible to appoint a panel of judges and expect them to have the level of expertise required to make judgments in this area or to have sufficient knowledge without adequate resources. That will not happen. The idea of a workshop arranged every now and again by the President of the District Court does not do justice to the complexity of this area.

Deputy Jack Chambers: I fully agree that there must be a higher threshold in terms of the courts architecture.

A point mentioned by Deputy Ó Laoghaire is that if there were to be a split protection, might it be possible for someone, possibly a law enforcement agency, to try to explore or discover a source's communications with a journalist as a means to reach the journalist? Has that been explored in any way or is there any academic research on that issue? If there is a split protection a law enforcement agency could reroute its investigation towards whom it suspects of being the source and that would undermine the journalist's protection. Deputy Daly's point may be relevant in that regard. If there were split protection, could that scenario be the means through which a law enforcement agency would reach a journalist and undermine his or her protection? It is a very hypothetical point.

Ms Elizabeth Farries: That is a very academic question that I agree could be the subject of a thesis, for example. I am not sure what the end result would be.

Mr. Séamus Dooley: I am not convinced it is a particularly hypothetical question.

Chairman: We will not seek a thesis this morning.

Mr. Liam Herrick: If we think about recent examples where this scenario has evolved, we will find that very often the State agency might be wishing to identify who the source is. That is why the journalist is the primary target. If the agency had access to the identity of the source, it might have less interest in investigating the correspondence or data of the journalist in question. It is a practical matter. That is more likely to be the scenario. We know this is an area of great potential risk. The State and its agencies might always have a legitimate or - very often - illegitimate interest in identifying the relationship between journalists and sources. As members will be aware, Ireland's particular history in respect of this issue goes back to cases in the 1970s and 1980s when, under the cover of national security investigations or other legitimate purposes, State agencies sought information about relationships between journalists and

sources. In some cases, these inquiries might well have stepped over into the political sphere. We all know what the practical realities of this can be.

Deputy Mick Wallace: If we were to give special privilege to journalists, how does Mr. Dooley propose that we would adequately protect all of those in receipt of information or publishing news, especially those employed outside traditional media organisations in the context of the democratisation of information by the Internet? Since 2006, WikiLeaks has dramatically changed the relationship between whistleblowers and the public and the way information is made public.

Mr. Séamus Dooley: It is not a question of whether we should give journalists special protections. Journalists have certain protections under existing European law. We are saying that the scheme before the committee this morning is not in compliance with that law. We are not talking about protection in the future. Journalists already have protection. If I understand the Deputy's question correctly, he is concerned about how other people can be protected. I think robust whistleblower legislation is the appropriate way to extend the protection the Deputy is talking about. I am not sure I fully understand the Deputy's point. The best way to protect sources is to introduce whistleblower legislation that is stronger than the legislation we have at present. Like the issue of data protection, this is an international issue. National legislation alone does not protect sources in the global environment in which information is currently exchanged.

Deputy Mick Wallace: We can agree that the existing whistleblower legislation does not amount to much. Does the ICCL think there should be safeguards for all the professionals whose communications have traditionally enjoyed confidentiality, including lawyers, medical practitioners and parliamentarians?

Ms Elizabeth Farries: The Deputy is asking whether the legislation should reflect other protected classes of citizens and not just journalists specifically. It depends on how one looks at it. I suppose they are entitled to protections. If we raise the bar, everyone will be subsumed. Questions relating to journalists alone have been raised as part of what has been described as a fragmented approach. We are speaking today about journalists in the context of a scandal that involved journalists. If someone has special protections that are recognised at EU level, the legislation should certainly reflect that.

Mr. Liam Herrick: Some of those rights might be protected in other legislation. The Deputy has referred to the whistleblowers legislation. We have not considered in detail the specific circumstances of those categories because they have not been named or identified in the Bill. Perhaps we could revisit those categories in more detail at subsequent stages. Up to this point, we have not had a proposal to consider.

Deputy Mick Wallace: The submission to the committee that has been jointly made by the ICCL and Digital Rights Ireland recommends that consideration should be given to the role of parliamentary oversight as part of a wider review of surveillance packages generally in Ireland, including interception of communications, use of surveillance devices and use of covert human intelligence sources. I ask the witnesses to elaborate on this matter, which we have challenged on a number of occasions in the Dáil Chamber. We raised the system of governing the surveillance with a former Minister for Justice and Equality, but we did not get much joy. Will the witnesses elaborate on the recommendation they have made in this area?

Ms Elizabeth Farries: Is the Deputy asking us to elaborate on what parliamentary over-

sight means?

Deputy Mick Wallace: Yes. What do the witnesses envisage?

Mr. Liam Herrick: I will answer that question. As Ms Farries has mentioned, the European Union Agency for Fundamental Rights has done a comprehensive analysis of how the various models used in member states operate. As a practical measure, it is worth reflecting on. Where parliamentary committees have specific competence in relation to matters of national security and surveillance, etc., they typically operate in a manner that is different from other parliamentary committees. Members might be familiar with the operation of security committees in the Westminster Parliament or in the US parliamentary system. Members of those committees are subject to special security clearance standards and special protections. The secrecy and privacy restrictions on the operation of such committees differ from the standard restrictions. If we go down this road, it is likely that the committee will have to operate in a manner that differs from the operation of existing parliamentary committees here. There are plenty of models from other jurisdictions - both common law and civil law countries - where committees of this type have operated. It is now the norm that there should be such a committee, but it might require a different approach here from what we do more generally.

Deputy Mick Wallace: In its Bill, the Government has ignored many of the Murray recommendations. Would the witnesses disagree with any of those recommendations or would they take all of them on board?

Ms Elizabeth Farries: As I said earlier, we are taking the recommendations on board as a minimum standard and as a reflection of EU law. We could go further. We could raise standards of data protection. That is not within the remit of our submissions today. As I said earlier, the recommendations represent a floor and not a ceiling.

Deputy Mick Wallace: Dr. T.J. McIntyre and Mr. Simon McGarr, who have probably done more work than most people on this issue, spoke at this committee last week. Would the witnesses disagree with anything they offered us last week?

Ms Elizabeth Farries: We wrote the submissions with Dr. McIntyre. The submissions made by Dr. McIntyre and Mr. McGarr reflect what we have written. We agree fully with what they said.

Mr. Liam Herrick: We co-operate with Digital Rights Ireland on a broad range of work in this area, including issues like the public services card. We are coming from the same perspective, which is that Ireland needs to comply with its human rights obligations under EU law and the European Convention on Human Rights with regard to respect for the right to privacy. Our mandates are very similar in that respect.

Deputy Mick Wallace: It was implied in a court case last week that a Minister may evade data protection law by making sure the only way he or she receives official information is orally. What do the witnesses think of that?

Ms Elizabeth Farries: I thank the Deputy for drawing the case to my attention. I have a news feed that sends details of relevant cases to my email account. It is just being perfected, so I missed the case mentioned by the Deputy. Did he say this happened last week?

Deputy Jim O'Callaghan: The case may have involved a Mr. Wallace.

Deputy Mick Wallace: The case involved the former Minister, Alan Shatter, and the Data Protection Commissioner.

Deputy Jim O'Callaghan: And the Deputy.

Ms Elizabeth Farries: I thank Deputy Wallace for bringing me up to speed.

Deputy Mick Wallace: Does Ms Farries have any comment to make on the case?

Ms Elizabeth Farries: Did the decision come out last week?

Deputy Mick Wallace: Yes.

Ms Elizabeth Farries: Was it a written decision?

Deputy Mick Wallace: It was from the court case. Maybe Ms Farries will have a look at it and get back to us on it.

Ms Elizabeth Farries: I would love to have a look at it.

Deputy Mick Wallace: I thank Ms Farries. Dr. McIntyre said last week that for many years, there has almost been mass surveillance of the total public population of Ireland. This is very different because a State organisation, namely NAMA, has been allowed to shred its emails after a certain period has elapsed following the departure of a worker. What do the witnesses think of that?

Mr. Liam Herrick: We have not looked specifically at the question of NAMA but two public policy objectives arise. One is the protection of the rights of citizens and the second is transparency and access to information by the public having regard to the actions of the State. They are two very different things. There is a danger in some of the language which has been used by Government in bringing forward proposals of this type to present as equivalent the protection of the privacy of the State as an entity and the protection of the privacy of individuals. The fundamental starting point we come from is that they are two completely separate things. The interest we all have in a democratic society in good governance and transparency in the operation of State agencies is a completely different objective to the protection of the privacy of individuals. They are not incompatible; in fact, they are mutually reinforcing. It is not the subject matter that is before us today but we do not disagree at all with the values the Deputy articulates on the transparency of State agencies which have the power to impact on individuals rights. I suppose we are talking about protecting the privacy of individuals from the State, which is a different matter.

Deputy Mick Wallace: I agree that my question does not relate directly to the Bill, but I thought I would ask as the ICCL was here. We have a situation in which the Minister for Finance was able to give NAMA permission, just like that, to go ahead and obliterate those emails. Is there a need for extra protections so that the Minister of the day cannot just give permission to a State agency to destroy its emails?

Mr. Séamus Dooley: After the establishment of NAMA, the NUJ called for it to be covered by the Freedom of Information Act in full and said it should operate with complete transparency. The answer to the Deputy's question is therefore "No, that should not arise". I cannot imagine any justification where there could be a blanket decision to obliterate data in which the public has an interest from a State agency. NAMA is an agency which has an impact on and profound implications for the lives of citizens and it should therefore operate with complete

transparency.

Deputy Mick Wallace: Gardaí have serious problems getting information out of NAMA which probably hides behind privacy protections to avoid providing it. It is difficult for the Garda to get warrants to go into NAMA and access the information it needs within the agency. I can see that there is a conflict in that we are trying to protect privacy rights but we also believe that people working for public bodies should be held to account.

Chairman: It is not within the ambit of this Bill but I am allowing Deputy Wallace to ask the questions.

Deputy Mick Wallace: I am finding the responses interesting so the witnesses will have to forgive me for asking extra questions.

Chairman: In deference, if the witnesses are comfortable and happy to respond, it would be welcome.

Ms Elizabeth Farries: I thank the Deputy for bringing that to our attention, but I do not think I can respond adequately. I would like to look at what he has said further and follow up on it if he would like. He has several pieces of information to send to the ICCL for our consideration. I thank him for that.

Chairman: If there is an additional short supplementary from Deputy Jim O'Callaghan, he may come in. If anyone else wishes to take the opportunity, this is it. We will then close this session.

Deputy Jim O'Callaghan: I want to make one short comment and ask one short question. We have been speaking a lot about protecting journalists and suggesting they are a separate group. We need to be more precise in our language. I am as guilty in this regard as anyone. The protection that exists in law is a protection of the confidentiality of journalists' sources. That confidentiality and protection is not there for the benefit of journalists because they are journalists; it is there to protect the source in the same way that legal professional privilege is there to protect the confidentiality of the client, not the lawyer. We do a disservice to the debate and to journalists to treat them as a separate group who should be given separate protection. That is not the point, rather it is about protecting their sources.

Having said that, I ask one question of the ICCL. Deputy Wallace asked the ICCL why other legally protected rights should not be recognised in the legislation and one can use the examples of doctors or lawyers. Legal professional privilege is recognised at European Court of Human Rights level. It is not mentioned in the Bill and I do not think journalists are mentioned in it either. Why not, given the point that Deputy Wallace raised? If there is to be protection of the confidentiality of journalistic sources, why should there not also be a protection within the legislation for other legally recognised rights, including legal professional privilege, which is for the benefit of the client not the lawyer?

Ms Elizabeth Farries: It is an important question. As Mr. Herrick said, there may be other statutory protections in place outside of this legislative framework. As such, I cannot answer the question or speak to it.

Mr. Liam Herrick: We have reflected on those issues raised in the Murray review and the Bill. This is an important issue on which we need to reflect. Deputy O'Callaghan's comment about being more specific about journalistic sources is a very helpful one. He is absolutely cor-

rect and we endorse those comments completely. It is about a very specific circumstance that we are talking but it has been the subject of extensive jurisprudence in the Strasbourg court.

Ms Elizabeth Farries: For the record, any comments I have made have been specifically about journalistic sources. I apologise if my language has been lax in that regard.

Deputy Jim O'Callaghan: I have been as guilty of it as anyone.

Mr. Séamus Dooley: I agree with what Deputy O'Callaghan has said. There may well be merit in looking at the legislation in terms of the other groups that were mentioned, but while there is currently no explicit protection in Irish law for the sources of journalists, recognised protections exist for some of the other groups referred to.

Chairman: On behalf of the committee, I thank all of our guests for their contributions and for engaging with the committee. It has been a very informative session this morning at the close of our two sequences of engagements on the draft heads of the Bill. I thank the members for their engagement also. The committee will prepare a report on this important legislation and that will be laid before the Houses of the Oireachtas. The committee will suspend for a moment to allow the witnesses to leave and then go into private session. I appeal to members to stay as there is a build-up of work to address. We will get through it quickly.

The joint committee went into private session at 10.40 a.m. and adjourned at 11.25 a.m. until 9 a.m. on Wednesday, 22 November 2017.