

Policing, Security and Community Safety Bill 2023: Independent Examiner of Security Legislation

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Introduction

The [Policing, Security and Community Safety Bill 2023](#) (the “Bill”) was published on 19 January 2023 [Bill No. 3 of 2023]. According to the [Explanatory Memorandum](#):

“This Bill is an important part of the Government’s policing reform plan – *A Policing Service for Our Future* (APSFF) – developed to implement the recommendations of the 2018 *Report of the Commission on the Future of Policing in Ireland* (CoFPI) and fulfils a commitment in the *Programme for Government: Our Shared Future*.”

Given the length and complexity of the Bill and the discrete nature of certain aspects of it, the L&RS has produced three separate *Notes* on the Bill. This *Note* provides an overview of the proposed establishment of an Independent Examiner of Security Legislation as set out at Part 7 of the Bill. Separate L&RS Notes will consider two other key themes:

1. Community Policing and Community Safety; and
2. Governance, Oversight and Accountability Mechanisms.

Each of the three Notes will provide an overview of the policy and legislative context for this Bill, with particular reference to the recommendations of the CoFPI. The Notes will also discuss selected provisions in the Bill relevant to each of the key themes.

The L&RS has also produced a [Bill briefing page](#) which provides links to a wide range of sources on the Bill, including stakeholder and academic commentary (available internally only).



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Contents

Introduction	0
Background to the Bill	2
Current position in Ireland – oversight of state security and security legislation	3
What is national security?	3
Security services	3
Oversight of national security	5
Review of Security Legislation	6
Once-off reviews	6
Annual review of the operation of parts of the Offences Against the State Acts	7
The role of the designated judge	7
Security oversight bodies in other jurisdictions	8
Independent Reviewer of Terrorism Legislation in UK	8
Independent National Security Legislation Monitor in Australia	9
Comparison of different models	9
Proposals set out in the Bill	11
Objectives of the Independent Examiner	11
Appointment of the Independent Examiner	12
Functions of the Independent Examiner	13
Review of security legislation	13
Oversight of implementation of specified security legislation	15
Review of security services	15
Reviews of refusals/objections to requests from policing oversight bodies	16
Powers to obtain information	18
Reporting obligations of the Independent Examiner	19
Offences in relation to the confidentiality of sensitive information	20
Conclusion	21
Contact:	22

Background to the Bill

As mentioned in the introduction, the Bill was developed to implement the recommendations of the [Commission on the Future of Policing in Ireland](#) (COFPI). The Explanatory Memorandum states:

In addition to CoFPI, the Bill draws on other reports including the reports of the Effectiveness and Renewal Group in relation to the Department of Justice, the reports of the Disclosures Tribunal, and reports of the Policing Authority and the Garda Síochána Inspectorate.

The COFPI was appointed by Government in May 2017 to conduct an extensive review of policing in Ireland. On 18 September 2018, the COFPI published its final report and [Key Recommendations](#) in which it outlined its vision for strengthening An Garda Síochána (AGS) and the overall framework for policing, security and community safety in Ireland. The Report was issued following an extensive public [consultation](#).

The COFPI examined the dual role of An Garda Síochána as a state security agency as well as a police service.¹ The COFPI recommended the establishment of an Independent Examiner of Terrorist and Serious Crime Legislation, based on the model used in the United Kingdom (Recommendation 9). The COFPI stated that the proposed examiner could:

“...act as an adjudicator to consider requests for information from policing oversight bodies which have been rejected in whole or in part by the police on the grounds of national security, and where the oversight bodies wish to appeal that decision.”²

The COFPI also identified “a need for a comprehensive and robust review of the legislative framework within which police and other agencies operate in the area of national security”.³

Pursuant to the publication of [A Policing Service for our Future](#) and Government Decision S180/20/10/1002C, the Government approved the establishment, in principle, of the role of Independent Examiner of Terrorist and Serious Crime Legislation.

On 27 April 2021, the [General Scheme of the Policing and Community Safety Bill](#) was published, which provided, at Part 7, for the establishment of an Independent Examiner for Security Legislation. Subsequently, the Minister for Justice forwarded the General Scheme of the Bill to the Joint Committee on Justice for pre-legislative scrutiny (PLS). On 20 October 2021 and 15 February 2022, the Committee held public engagements with several stakeholders as part of the PLS process. In June 2022, the Joint Committee’s [Report on PLS](#) was published offering 12 recommendations for amendments to the legislative proposals, none of which related to the proposed establishment of the Independent Examiner.

On 22 November 2022, the Minister for Justice, Helen McEntee TD, published a draft of the Policing, Security and Community Safety Bill 2022. A [Regulatory Impact Analysis](#) was published alongside the draft Bill; however, it was stated that the security aspect of the legislation was outside the scope of that publication. The [Policing, Security and Community Safety Bill 2023](#) was then published on 19 January 2023.

¹ Further commentary on the historical context of Governance, Oversight and Accountability within An Garda Síochána is provided in the L&RS Note on *Policing, Security and Community Safety Bill 2023: Governance, Oversight and Accountability Mechanisms*.

² Report of the [Commission on the Future of Policing in Ireland](#) (2018) (hereafter ‘COFPI Report’), p 38.

³ [COFPI Report](#), p 38.

Current position in Ireland – oversight of state security and security legislation

What is national security?

According to O'Connor and Lynn:

“... whilst the term is increasingly prevalent, what ‘national security’ means has not been comprehensively set out in Irish law. It is referred to in legislation and in the European Convention on Human Rights, but again is not defined.”⁴

The 2015 [White Paper on Defence](#) elaborated on what is meant by national security in Ireland as follows:

“..., the concept of national security was principally associated with defending the sovereignty of nation states. In this context, the focus of national security, for most countries, was towards external threats from hostile forces. ... Given our particular history, the threat of internal subversion of the State was also a key national security focus. These remain fundamental components of national security and responsibility for these matters rests with the Department of the Taoiseach, the Department of Foreign Affairs and Trade, the Department of Defence and the Defence Forces and the Department of Justice and Equality and An Garda Síochána.” (p.1-2)

Speaking at a conference on national security in September 2022, Dermot Woods, Director of the National Security Analysis Centre (NSAC), made the following observations about the contemporary national security landscape:

“... we face an increasing threat from foreign interference and disruption, from espionage — traditional or cyber — from disinformation, from attacks on our democratic systems, from economic interference, from intellectual property theft and from a generally increased aggressive stance by some hostile states.”⁵

Mr. Woods also mentioned threats posed by right-wing extremism and “the ‘residual risk’ of armed groups on the island of Ireland”.⁶

Security services

In 2020, the National Security Analysis Centre (NSAC) was established by the Government as part of the implementation of *A Policing Service for the Future*.⁷ The NSAC is the secretariate to the National Security Committee, which is chaired by the Secretary General to the Government, and it comprises representatives at the highest level from the Departments of Justice, Defence, Foreign Affairs, the Environment, Climate and Communications and from An Garda Síochána and the Defence Forces.⁸

⁴ O'Connor and Lynn (2019) [National Security Law in Ireland](#), (Bloomsbury), para 1.01.

⁵ O'Keeffe “Ireland 'is facing an increasing threat from foreign interference'” *Irish Examiner* 23 September 2022.

⁶ Gallagher “Spying and right-wing extremism listed among main national security threats to Ireland” *Irish Times* 23 September 2022.

⁷ [State Bodies, Dáil Éireann Debate, 14 July 2021](#).

⁸ [National Security Committee, Dáil Éireann Debate, 22 June 2021](#).

According to a [Ministerial Brief](#) prepared for the Minister for Defence in 2022, given that Ireland has a predominantly unarmed police force, “the Defence Forces provide internal security supports to An Garda Síochána on an on-going basis”. These services include the following:

- **Garda Air Support Unit (Gasu)** The Air Corps supports An Garda Síochána in the operation of two helicopters and a fixed wing aircraft, which form the GASU
- **Explosive Ordnance Disposal (Eod)** EOD teams regularly respond to requests made by An Garda Síochána for Defence Forces assistance in dealing with a suspect device or for the removal of old ordnance
- **Static Guard and Cash Escorts for The Central Bank** The total cost of this service annually is in the region of €1.3m
- **Joint Task Force on Drug Interdiction** the Joint Task Force (JTF), which was established in 1993, enhances co-operation between An Garda Síochána, the Revenue Commissioners and the Naval Service in enforcing the law in relation to drug trafficking at sea
- **Prison Security** At the direction of Government, the Defence Forces provide security at Portlaoise Prison. They also provide prisoner escorts to and from the courts and hospitals, at the request of An Garda Síochána
- **Security At Key Locations** Also at the direction of Government, Military Police provide a 24/7/365 presence in Government Buildings in support of An Garda Síochána and to support the security needs within the Government Buildings/Leinster House complex. At the request of An Garda Síochána, the Defence Forces provide static 24/7/365 security at the Irish Industrial Explosives premises in Enfield, Co. Meath
- **Fishery Protection** The Naval Service conducts routine maritime surveillance patrols throughout Ireland’s maritime jurisdiction on a day-to-day basis
- **Air Ambulance** The Air Corps provide a long-standing emergency inter-hospital transfer service within Ireland and to the United Kingdom in support of the HSE
- **Ministerial Air Transport Service** The MATS is delivered primarily by the use of the Learjet 45 aircraft which came into operation in 2004.⁹

In its Report, the COFPI noted this dual function of AGS as a police service and a state security agency is “unusual”.¹⁰ O’Connor and Lynn state “...the force occupies a uniquely dominant position in Ireland’s national security apparatus”.¹¹ AGS’s website lists its security services as follows:

- [Garda National Crime & Security Intelligence Service](#) The role of this section is to identify and analyse the threat to the State from terrorists and organised crime gangs.
- [Special Detective Unit \(SDU\)](#) is responsible for the investigation of threats to State security and the monitoring of persons who pose a threat to this on both national and international fronts.
- [Special Tactics & Operations Command \(STOC\)](#) was established in August 2017 and has a number of specialist teams including the Emergency Response Unit (ERU), National Negotiator and within Dublin, the Armed Support Unit (ASU). In December 2016 the Armed Support Unit was launched in the Dublin Metropolitan Region under the control of Detective Chief Superintendent Special Detective Unit.

⁹ Department of Defence (2022) [Ministerial Brief](#), pp 30-33.

¹⁰ [COFPI Report](#), p 35.

¹¹ O’Connor and Lynn (2019) [National Security Law in Ireland](#), (Bloomsbury), para 1.37.

Oversight of national security

In its 2018 report, the COFPI stated that “there should be special arrangements” for the oversight of national security given the highly sensitive information involved and the concerns expressed by both the Policing Authority and the Garda Síochána Ombudsman Commission in relation to refusals by police to assist with their requests for information on grounds of national security.¹²

In her submission to the pre-legislative scrutiny process in October 2021, Dr Vicky Conway, who was a member of the COFPI, stated:

“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.”¹³

According to the [Explanatory Memorandum](#) to the Policing, Security and Community Safety Bill:

“The establishment of the office of the Independent Examiner of Security Legislation presents a significant development in enhancing the national security infrastructure, providing an independent review of security legislation to ensure that it is effective and contains sufficient safeguards for the protection of human rights, the operation of such legislation and the examination of the delivery of security services.” (p.3)

¹² [COFPI Report](#), p 38.

¹³ [Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill](#), p 18.

Review of Security Legislation

In its report recommending the establishment of an Independent Examiner for Security Legislation, the COFPI stated:

“We also see a need for a comprehensive and robust review of the legislative framework within which police and other agencies operate in the area of national security – what powers they should have, how they exercise those powers so as to respect fundamental rights, and what safeguards are in place against abuse or misuse. As the nature and range of threats to national security are changing fast, as are the technologies in play, it is important that these issues should be under constant review.”¹⁴

According to O'Connor and Lynn “...terrorism in one form or another has posed a constant threat to the security of Ireland”.¹⁵

Once-off reviews

Over the years several individuals and Committees have been appointed by Government to review several pieces of security legislation. For example:

- The [Independent Review Group to examine the Offences against the State Acts](#) (OASA Review) was appointed by Minister for Justice, Helen McEntee on 16th February 2021. Mr Justice Michael Peart, former Judge of the Court of Appeal, is Chair of the six person expert review group. The Group published an Interim Report in April 2021 and at the time of writing, the Group was still concluding its work.
- [The Hederman Report on the Offences against the State Acts](#) was published in 2002. This involved a comprehensive review of the legislation by a committee under the Chairmanship of former Supreme Court Judge Anthony Hederman.
- The Government appointed Mr Justice Murray “to examine the legislative framework in respect of access by statutory bodies to communications data of journalists held by communications Service Providers”. A key component of this work involved reviewing the operation of the [Communications \(Retention of Data\) Act 2011](#). The final [report](#) (known as ‘the Murray Report’) was published in 2017.

In its submission to the ongoing OASA Review, the Irish Human Rights and Equality Commission recommended the repeal of the Offences Against the State Acts, including the abolition of the Special Criminal Court, and made the following recommendations in relation to other pieces of security legislation:

- The scope of the definition of ‘terrorist activities’ should be narrowed in the Criminal Justice (Terrorist Offences) Act 2005.
- The penalty under section 5 of the Criminal Justice (Amendment) Act 2009 should be qualified and revised downwards to take account of the level at which the accused directs a criminal organisation.
- The State monitor the usage of *ex parte* hearings under Part 4 of the Criminal Justice (Amendment) Act 2009 to ensure that they are used sparingly, and only in cases of absolute necessity.¹⁶

¹⁴ [COFPI Report](#), p 38.

¹⁵ O'Connor and Lynn (2019) [National Security Law in Ireland](#), (Bloomsbury), para 1.27.

¹⁶ IHREC (2021) [Submission to the Independent Review Group on the Offences Against the State Acts](#).

Annual review of the operation of parts of the Offences Against the State Acts

Section 18 of the [Offences Against the State \(Amendment\) Act 1998](#)¹⁷ and section 8 of the [Criminal Justice \(Amendment\) Act 2009](#)¹⁸ provide that certain sections will cease to be in operation unless both Houses of the Oireachtas pass resolutions to continue them in operation for a further period of time. These sections also require that before these resolutions may be passed, the Minister for Justice must lay a report before the Houses of the Oireachtas on the operation of the sections in question over the previous period.

For example, in the [2022 Report](#) on the operation of section 8 of the Criminal Justice (Amendment) Act 2009, it was recognised that the provision:

“... represents a departure from the normal practice of jury trial, it is the Minister's view that it is appropriate to keep the provision under review and to enable the Oireachtas to have the opportunity, periodically, to consider the need for the Section. It is proposed, therefore, to continue section 8 in operation for a further period of 12 months beginning on 30 June 2022 (at p 6).”

Therefore, these provisions require a certain level of review by Government, which is informed by Garda authorities, and then reviewed by parliament. It is not clear what, if any, role the proposed Independent Examiner of Security Legislation will have in relation to this.

The role of the designated judge

The operation of three pieces of surveillance legislation is currently overseen by a High Court judge (known as a ‘designated judge’), namely:

- [Postal Packets and Telecommunications Messages \(Regulations\) Act 1993](#)
- [Criminal Justice \(Surveillance\) Act 2009](#)
- [Communications \(Retention of Data\) Act 2011](#)

Commenting on the role of designated judge under [section 12 of the Criminal Justice \(Surveillance\) Act 2009](#), Kilcommins and Spain commented:

“First, the ex post facto nature of the reviews conducted by the judge have been criticised, whereby reviews of requests for disclosure are undertaken on an annual basis with no prior judicial authorisation necessary. Secondly, the thoroughness of the reviews undertaken by the designated judge has also been called into question. The reports provided are typically a short one-to-two-page report with very little alteration in content or form beyond the dates from year to year. Reports to date have suggested that the designated judge has spent very short periods of time in each of the organisations under review. For example, the reports indicate that the designated judge typically spends a half a day reviewing the use made by each organisation of their powers under the Act. It is difficult to imagine that oversight of the Act is as thorough and comprehensive as required given the level of requests, which average over 12,000 annually.”¹⁹

¹⁷ Sections 2 to 12 and 14 and 17 of the [Offences Against the State \(Amendment\) Act 1998](#).

¹⁸ The Act provides that certain offences, related primarily to organised crime, under Part 7 of the Criminal Justice Act 2006 are scheduled offences for the purposes of Part V of the Offences Against the State Act 1939. Section 8(1) provides that the ordinary courts are deemed inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to these offences.

¹⁹ Kilcommins and Spain (2017) “GSOC, the Legislative Process and the Privacy Rights of Citizens” *Irish Criminal Law Journal* 27(4), 145-152.

Commenting on the role of designated judge under [section 12 of the *Communications \(Retention of Data\) Act 2011*](#), it has been stated:

“...when the oversight role is a part-time function of a busy judge with no staff, specialist training or technical advisors, this lack of detail does not instil confidence and suggests an over-reliance on the entities supposedly being monitored.”²⁰

Security oversight bodies in other jurisdictions

According to a briefing paper prepared by the Department of Justice, “in designing the functions of the office regard was had to security oversight arrangements in other jurisdictions”. During its term, the COFPI also engaged with two senior UK barristers who held the office of the Independent Reviewer of Security Legislation in the UK.²¹

Independent Reviewer of Terrorism Legislation in UK

According to the [website](#) of the UK Independent Reviewer, “the tradition of independent review of terrorism legislation stretches back to the 1970s”. The current iteration of the Independent Reviewer of Terrorism Legislation was established by the Terrorism Act 2006.

[Section 36 of the *Terrorism Act 2006*](#) requires an individual to be appointed by the Secretary of State to review and report annually on the operation of the provisions of the Terrorism Act 2000 and Part 1 of the *Terrorism Act 2006*. Over time, the statutory functions have been amended and the Independent Reviewer is now required to review and report annually on the operation of several specific pieces of terrorism legislation.²² The Reviewer also forms part of the National Preventive Mechanism established to meet the UK’s obligations under the United Nations [Optional Protocol to the Convention Against Torture](#) (OPCAT).²³

According to the [website](#) of the Independent Reviewer, he/she may be requested to provide non-statutory functions, such as to provide specific reports to a Minister; give evidence to Parliament; and/or contribute to public debate through the media, academic conferences or otherwise.

It may be of interest to note that although the legislative provision establishing the role does not provide any details on the qualifications required to carry out the role, all office holders to date have been practicing barristers. However, since 2011 Clive Walker, Emeritus Professor of Criminal Justice Studies at the School of Law, University of Leeds, has served as Special Adviser to the Independent Reviewer and was reappointed to this position in 2019. In that capacity, Professor Walker produces regular bulletins of reading matter relevant to the Independent Reviewer’s functions, and may also assist on specific projects. An individual may be appointed to the role of Independent Reviewer for a 3 year term on a part-time basis. The appointment is renewable, and it is not pensionable.

²⁰ TJ McIntyre (2016) [Judicial Oversight of Surveillance: The Case of Ireland in Comparative Perspective, p 17.](#)

²¹ [COFPI Report](#), p 107-8.

²² Annual review of the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 is required by section 36 of the 2006 Act. Annual review of the operation of the Terrorism Prevention and Investigation Measures Act 2011 was required by section 20 of that Act. Annual review of the Terrorist Asset-Freezing etc. Act 2010 (Part 1) was required by section 31 of that Act.

²³ The [General Scheme of the Inspection of Places of Detention Bill](#) was published in June 2022. Once enacted, Ireland will ratify the Optional Protocol to the Convention Against Torture (OPCAT) and will establish a National Preventative Mechanism.

Independent National Security Legislation Monitor in Australia

The [Independent National Security Legislation Monitor](#) was established by legislation in 2010.²⁴ The 2010 Act sets out the functions and powers, including information gathering powers, and reporting obligations of the Monitor, as well as the terms of appointment. According to the National Monitor's website, reviews may be carried out for one of five reasons, some of these reasons are set out in the legislation and in other cases the Monitor may instigate a review of his/her own volition. Speaking about the role at a [national security conference in Galway](#) in September 2022, Mr Grant Donaldson SC, the Independent National Security Legislation Monitor in Australia, described his power to hold public hearings as "very critical" and noted the absence of such provisions in the Irish proposals.²⁵

Outlining the role of Independent National Security Legislation Monitor in Australia, Dr James Renwick CSC SC, who held the role from 2017 to 2020, stated:

"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."²⁶

Comparison of different models

According to the Irish Council for Civil Liberties (ICCL):

"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."²⁷

Commenting on the operation of both the UK's Independent Reviewer and the Australian Monitor, an academic commentator has stated:

"Independent review offers forms of scrutiny not offered 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-

²⁴ [Independent National Security Legislation Monitor Act 2010](#).

²⁵ O'Keeffe, "Bill allows security services to withhold information from new watchdog" *Irish Examiner* 23 September 2022.

²⁶ Joint Committee on Justice (2022) [Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill](#) (hereafter 'PLS Report'), p. 91.

²⁷ ICCL (2021) Submission to PLS, para. 32, available in [PLS Report](#).

terrorism practice. Most importantly, they do all this in the public domain, enabling and enhancing parliamentary and public debate on anti-terrorism laws”²⁸

The current office holder in the UK, Jonathan Hall QC, has stated that:

“The role of the UK Reviewer does not call for the same degree of statutory underpinning because its key features – its complete independence from government, plus access to secret and sensitive national security information and personnel, are well established through custom and practice. Officials know that withholding information would not be tolerated.”²⁹

In November 2022, Jonathan Hall QC debated the merits of reviewing or monitoring terror laws with Professor James Renwick CSC SC, Australia’s former Independent National Security Legislation Monitor. The moderator closed the event with the conclusion that both systems operate within a particular constitutional and national security landscape and have both evolved to reflect this and had significant impacts in each jurisdiction. For example, the [invitation to the event](#) noted the impact that both offices had as follows:

“Jonathan Hall’s review of released terrorist offenders (managed under MAPPA) led directly to the enactment of Chapter 4 of Part 10 of the Police, Crime, Courts and Sentencing Act 2022 (with new powers to manage released terrorist offenders). James Renwick’s report on deprivation was considered in the recent decision of the Australian High Court (their Supreme Court) to strike down certain deprivation powers as unconstitutional.”³⁰

While these models informed the development of the proposals to establish the Independent Examiner of Security Legislation in Ireland, John O’Callaghan, Deputy Secretary General of Department of Justice, speaking at a conference on national security in September 2022, cautioned that what was being designed was for an Irish context. Reacting to concerns about the withholding or redacting of information from the Independent Examiner, he noted :

“Ireland was a small country and was a “taker of intelligence” from foreign agencies and that the concern was that the oversight system would not disadvantage Irish agencies in terms of their access to that intelligence”.³¹

²⁸ Blackbourn, “Independent reviewers as alternative: an empirical study from Australia and the United Kingdom”, in Davies and deLondras (eds) *Critical Debates on Counter-Terrorism Judicial Review* (2014, Cambridge), p 181.

²⁹ Jonathan Hall, The role of the Independent Reviewer of Terrorism Legislation, (2022) *Judicial Review*, 27(1), 24-27.

³⁰ The debate is also available to watch [here](#).

³¹ O’Keeffe “Ireland ‘is facing an increasing threat from foreign interference’” *Irish Examiner* 23 September 2022.

Proposals set out in the Bill

The proposals in relation to the Independent Examiner of Security Legislation are set out at Part 7 of the Bill. This part comprises of 5 chapters as follows:

- Chapter 1: Preliminary and General (ss. 226-227)
- Chapter 2: Establishment of office of Independent Examiner (ss. 228-229)
- Chapter 3: Independent Examiner (ss. 230 – 240)
- Chapter 4: Reporting (ss. 241-246)
- Chapter 5: Information (ss. 247-248)

In its entirety, Part 7 contains 22 sections, which is a relatively small part of the overall Bill which contains 293 sections and seven Schedules. In light of the relative brevity of Part 7, it has been possible to consider the proposals in the Bill in greater detail than has been possible in the other two *Notes* in this series. This section of the Note will examine the key proposals of Part 7 of the Bill. Before discussing this in detail, it is important to note that the Independent Examiner will form part of the wider governance and accountability framework pertaining to AGS³². This point was made clear by GSOC in its 2023 observations on the published Bill:

GSOC notes that given the central role the Independent Examiner will have in ensuring the progression of certain of the Police Ombudsman’s operations, it is crucially important that the office of the Independent Examiner is established and up and running on the commencement of the Parts of the Act relating to the functions of the Police Ombudsman.³³

Objectives of the Independent Examiner

The Bill (section 231) sets out the objectives of the Independent Examiner as follows:

- (a) to promote public confidence in security legislation,
- (b) to support the Government in protecting the security of the State,
- (c) to ensure that information relating to his or her functions is made available to the public to the greatest extent possible without prejudicing the security of the State, defence or international relations, and
- (d) to ensure that his or her functions are performed in a timely, efficient and effective manner.

These objectives largely mirror those set out in Head 194 of the General Scheme, which Dr Vicky Conway, former member of the COFPI, stated did not fully align with the recommendations of the COFPI, which proposed the Examiner should:

“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”.³⁴

³² This will be discussed further in the *L&RS Note on Policing, Security and Community Safety Bill 2023: Governance, Oversight and Accountability Mechanisms*.

³³ GSOC (2023) [GSOC Observations on the Policing, Security and Community Safety Bill 2023](#), p 29.

³⁴ [COFPI Report](#), p. 38.

Commenting on the Bill, Professor Donncha O’Connell, former member of the COFPI, also stated that the Independent Examiner will require adequate resourcing to fulfil its functions.³⁵ During pre-legislative scrutiny, the Garda Síochána Inspectorate 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.”³⁶

Appointment of the Independent Examiner

Applications for appointment to the position of Independent Examiner are only open to either serving or former members of the superior courts.

Critiquing this provision of the Bill (section 234(1)), Professor Donncha O’Connell, former member of the COFPI, has stated:

“This is not a good idea and was not recommended by the commission [on the Future of Policing]. It should be revisited when the Bill is being debated. If we are serious about holding the Government and its diffuse security services to account with real effectiveness, we must get this right.”³⁷

In her submission to the pre-legislative scrutiny process, Dr Vicky Conway, who was also member of the COFPI, also stated:

“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.”³⁸

During PLS, the ICCL also called upon government to “...ensure that the Reviewer appointed is not at risk of actual or apparent bias.”³⁹

The Bill also provides for the provision of staff and services to the Independent Examiner (section 237) as well as the power to appoint consultants and advisers (section 238). AGS has expressed 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.”⁴⁰

³⁵ Donncha O’Connell, [Opinion: Resources need to be put into the promised reform of policing](#), *Irish Times*, 6 December 2022.

³⁶ [PLS Report](#), p 43. Issues related to governance and accountability will be discussed further in the *L&RS Note on Policing, Security and Community Safety Bill 2023: Governance, Oversight and Accountability Mechanisms*.

³⁷ Donncha O’Connell, [Opinion: Resources need to be put into the promised reform of policing](#), *Irish Times*, 6 December 2022.

³⁸ [Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill](#), p. 19.

³⁹ ICCL (2021) PLS submission, para 36, available in [PLS Report](#).

⁴⁰ AGS (2021) Submission - Joint Committee on Justice: General Scheme of the Policing Security and Community Safety Bill, para. 2.7.26.1, available in [PLS Report](#).

Functions of the Independent Examiner

The legislation provides that the Independent Examiner will have three core functions, namely:

1. Review of security legislation
2. Review of security services
3. Review of refusals to comply with requests from policing oversight bodies

Each of these functions will be briefly discussed below.

Review of security legislation

The Bill (section 231(2)(a)) proposes that the Independent Examiner will be tasked with reviewing the operation and effectiveness of security legislation. The security legislation that will fall within the remit of the Independent Examiner is listed in the Bill (section 226) and summarised in Box 1 below. The Bill (section 227) also provides for further legislation to be added to this list by means of secondary legislation. Such an order may be made by An Taoiseach, subject to consultation with the Independent Examiner and, where appropriate, a Government Minister.

Box 1: Security legislation

- [Postal Packets and Telecommunications Messages \(Regulations\) Act 1993](#). This provides for the interception of postal packets and telephone conversations.
- [Criminal Justice \(Surveillance\) Act 2009](#). This allows for the use of surveillance and tracking devices for the purpose of covert surveillance.
- [Communications \(Retention of Data\) Act 2011](#). This obliges service providers to retain the metadata arising from the use of phones and various electronic devices. This Act has recently been amended by the [Communications \(Retention of Data\) \(Amendment\) Act 2022](#) which seeks to provide for the retention of certain data by electronic communications services of and its disclosure. This is discussed in more detail in the [L&RS Bill Digest](#).
- Offences against the State Acts 1939 to 1998. The [1939 Act](#) is divided into six parts, and creates several offences (for example, usurpation of government, the printing of seditious or treasonable documents, and the prohibition of unauthorised military drilling), prohibits unlawful organisations, and provides for a power of internment and for the establishment of the non-jury ‘Special Criminal Courts’. The [Offences Against the State \(Amendment\) Act 1972](#) allows for a chief superintendent to give evidence that he (or she) believes that the accused is a member of an unlawful organisation. The [Offences Against the State \(Amendment\) Act 1998](#) allows the court (or jury) to draw inferences from an accused’s failure to mention particular facts when questioned, charged or informed.
- [Criminal Law Act 1976](#)
- [Criminal Justice \(Terrorist Offences\) Act 2005](#)
- [Criminal Justice \(Money Laundering and Terrorist Financing\) Act 2010](#)

The Independent Examiner also has some discretion to review other enactments if he/she considers that such legislation “relates to the protection of the security of the State” and he/she must inform the Minister of this opinion (section 231(7) of the Bill).

The Bill stipulates that this review will include an examination of whether the legislation:

- is effective and proportionate in its objectives in so far as they relate to the protection of the security of the State,
- contains sufficient safeguards for the protection of human rights,
- is necessary for the protection of the security of the State.

The reference to human rights and concepts such as proportionality and necessity reflects the core principles of policing set out by the [COFPI](#), with the first principle being that “human rights are the foundation and purpose of policing”. This also reflects the recognition that security legislation can have an impact on individual rights.

For example, the Supreme Court has held that State access to private communications within the home engages the protection of the dwelling as guaranteed by Article 40.5 of the Constitution.⁴¹ In the leading case on privacy and surveillance, *Kennedy v Ireland*, Hamilton P stated:

“The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words ‘deliberately, consciously and unjustifiably’ because an individual must accept the risk of accidental interference with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference.”⁴²

The right to privacy is also protected by Article 8 of the European Convention on Human Rights (ECHR).⁴³ The case law of the European Court of Human Rights demonstrates that this right may also be interfered with by States in response to the threat of terrorism provided that certain safeguards are put in place, namely if the interference:

- is “in accordance with the law”, i.e. provided for in legislation,
- pursues a “legitimate aim”, such as the protection of national security,
- is necessary in a democratic society - in terrorist cases, the national authorities must demonstrate that they struck a fair balance between the exercise of individual rights and the necessity for the State to take effective measures for the prevention of terrorist crimes.⁴⁴

In her submission to the PLS process, Dr. Vicky Conway, former member of the COFPI, stated:

“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.”⁴⁵

⁴¹ *Schrems v Data Protection Commissioner* [2014] 3 IR 75, para 48.

⁴² *Kennedy v Ireland* [1987] 1 IR 587, p 593.

⁴³ The ECHR has been indirectly incorporated into Irish law by the [European Convention on Human Rights Act 2003](#).

⁴⁴ Council of Europe (2022) [Guide to the case-law of the European Court of Human Rights](#), p. 7-8.

⁴⁵ [Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill](#), p. 19.

In its submission to PLS, AGS recommended that an emphasis should be placed on the implementation of security legislation and that the Independent Examiner should consider whether security legislation:

- (i) Is adequate for the purposes for which it was put in place; and
- (ii) Addresses gaps in the legislative framework regarding the security of the State. [sic]⁴⁶

These recommendations from stakeholders during the PLS process have not been incorporated into the published Bill.

Oversight of implementation of specified security legislation

In addition to reviewing the [Postal Packets and Telecommunications Messages \(Regulations\) Act 1993](#), the [Criminal Justice \(Surveillance\) Act 2009](#) and the [Communications \(Retention of Data\) Act 2011](#), as outlined above, the Bill proposes that the Independent Examiner will assume the existing oversight roles undertaken by a “designated judge” of the High Court.⁴⁷

Regarding the [Criminal Justice \(Surveillance\) Act 2009](#), AGS expressed concerns, in its PLS submission, that this:

“...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].”⁴⁸

AGS also expressed concerns about the proposed amendment to section 8 of the [Postal Packets and Telecommunications Messages \(Regulations\) Act 1993](#),⁴⁹ in relation to the power of the Independent Examiner to communicate with An Taoiseach or a relevant Minister on any matter concerning interceptions. AGS recommended that instead of the legislation stipulating that the Independent Examiner may communicate “if he or she thinks it desirable to do so”, there should be a requirement for such communication to take place “if he or she forms a concern regarding the conduct of the information holder”.⁵⁰

Review of security services

Section 231(2)(c) of the Bill proposes that the Independent Examiner will “examine the efficiency and effectiveness of the delivery of security services”. “Security services” are defined in section 226 of the Bill as “services related to protecting the security of the State”. While this section does not provide a list of these services, some of the security services currently provided by An Garda Síochána and others are outlined earlier in this [Note](#).

⁴⁶ AGS (2021) Submission - Joint Committee on Justice: General Scheme of the Policing Security and Community Safety Bill, available in [PLS Report](#).

⁴⁷ This relates to the operation of the statutory frameworks for data retention (section 278 of the Bill), interception of communications (section 269 of the Bill) and surveillance (section 274 of the Bill). The current position in the law regarding the “designated judge” was outlined briefly earlier in this [Note](#).

⁴⁸ AGS (2021) Submission - Joint Committee on Justice: General Scheme of the Policing Security and Community Safety Bill, para 2.7.14.1, available in [PLS Report](#).

⁴⁹ Section 269(f) of the Bill.

⁵⁰ AGS (2021) Submission - Joint Committee on Justice: General Scheme of the Policing Security and Community Safety Bill, para. 2.7.13.1, available in [PLS Report](#).

In its submission to the PLS process, AGS recommended:

“...that it [AGS] 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.”⁵¹

In its submission to the PLS process the Policing Authority indicated that clarification was required regarding what constitutes ‘security services’.⁵² The Garda Síochána Inspectorate also indicated that the lines between security services and policing services are not always clearcut. It noted as an example that “...those who pose a threat to national security may also be involved in serious criminality that is covered by policing services”.⁵³

This review of security services is not set out in the UK or Australian legislation establishing similar bodies. Addressing this at a conference in Galway in September 2022, Mr Grant Donaldson SC, the Independent National Security Legislation Monitor in Australia (INSLM), explained that a separate agency was created, the [Inspector General of Intelligence and Security \[IGIS\]](#), to review the operation of security services. Speaking of the Irish proposals, Mr Donaldson stated:

“From what I apprehend the Irish reviewer role is going to be something of a hybrid between my role in Australia and the inspector general’s role — and that’s going to be a very big job.”⁵⁴

Reviews of refusals/objections to requests from policing oversight bodies

The Bill (sections 231(2)(b) and 240 in conjunction with other provisions) proposes that the Independent Examiner will have the power to carry out reviews and issue recommendations in relation to the following:

- (a) a refusal by the Garda Commissioner to comply with a request to provide information or a document to the Authority⁵⁵ or the Police Ombudsman;
- (b) an objection by the Garda Commissioner to a search of Garda Síochána premises notified to the Independent Examiner by the Garda Commissioner; and
- (c) a refusal by a person to provide any information, document or thing or to answer any question referred to the Independent Examiner by the Police Ombudsman.

The legislation provides that the Independent Examiner may seek further information from AGS or interview an individual in connection with such a review. Once a review has been completed, the Independent Examiner must send a written recommendation to the Minister.

⁵¹ AGS (2021) Submission - Joint Committee on Justice: General Scheme of the Policing Security and Community Safety Bill, para. 2.7.1.1, available in [PLS Report](#).

⁵² Policing Authority (2021) [Submission to the Joint Oireachtas Committee on Justice on the Policing, Security and Community Safety Bill](#), p 4.

⁵³ GSI (2021) [Submission to the Houses of the Oireachtas Joint Committee on Justice: General Scheme of the Policing, Security and Community Safety Bill](#), pp 23-34.

⁵⁴ O’Keeffe [New watchdog will be at odds with our notoriously secretive security services](#), *Irish Examiner* 23 September 2022.

⁵⁵ The reference to ‘Authority’ here relates to the body to be established under Part 4 of the Bill which will be known as the Policing and Community Safety Authority or An tÚdarás Póilíneachta agus Sábháilteachta Pobail. This body will absorb some functions of the existing Policing Authority and the Garda Síochána Inspectorate and will be discussed in more detail in the other L&RS Notes on this Bill.

In its submission to the PLS process, GSOC expressed concerns about the lack of time limits imposed on the Independent Examiner in reviewing such requests for information. GSOC noted that this could give rise to delays in investigations which may give rise to other issues in relation to “fair procedures, preservation of evidence, or ensuring witness cooperation.”⁵⁶ In that regard GSOC expressed the view that the draft legislation should be amended to:

“Provide for a time limit on the Independent Examiner for reviews of requests for information made by oversight bodies, from the time of notification.”⁵⁷

The Bill does not contain any time limits, but it does provide that the Independent Examiner and the Garda Commissioner may agree a Memorandum of Understanding related to handling such requests. In its 2023 observations on the published Bill, GSOC recommended that:

protocols and agreed turnaround timelines are developed to ensure that there is clarity of process for An Garda Síochána and the Police Ombudsman in their engagement with the Independent Examiner. Provision for the development of such protocols could be added to Chapter 3.⁵⁸

In its pre-legislative scrutiny submission, the Policing Authority also recommended that:

“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”⁵⁹

AGS has stated:

“...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'.”⁶⁰

⁵⁶ GSOC (2021) [Observations on Heads 5 and 6 of the General Scheme of the Policing, Security and Community Safety Bill](#), p. 7.

⁵⁷ GSOC (2021) [Observations on Heads 5 and 6 of the General Scheme of the Policing, Security and Community Safety Bill](#), p. 7.

⁵⁸ GSOC (2023) [GSOC Observations on the Policing, Security and Community Safety Bill 2023](#), p 29.

⁵⁹ [PLS Report](#), p 229.

⁶⁰ AGS (2021) Submission - Joint Committee on Justice: General Scheme of the Policing Security and Community Safety Bill, para. 2.7.16.5, available in [PLS Report](#).

Powers to obtain information

The Bill (section 239) provides the Independent Examiner with statutory powers to assist him/her in carrying out their functions, by requiring an “information holder” to:

- produce information, a document or thing, or
- attend before the Independent Examiner.

An “information holder” is defined in section 226 of the Bill as:

- (a) An Garda Síochána,
- (b) the Permanent Defence Force, or
- (c) a Minister of the Government or any other public body—
 - (i) with responsibilities relating to national security and protecting the security of the State, including the safeguarding of critical infrastructure, the economic well-being of the State and international relations,
 - (ii) responsible for, or involved in, the development, implementation or operation of security legislation, or
 - (iii) in possession of information, documents or any other thing which, in the opinion of the Independent Examiner, is relevant to his or her work.

The Bill allows for the drafting of a Memorandum of Understanding in relation to the sharing of information, documents, or things. Where an information holder is to appear before the Independent Examiner, a written notice must be provided (section 239(4)) and the information holder must sign a declaration of the truth (section 239(4)).

An information holder may, however, exclude or redact information for the purposes of safeguarding international intelligence sources or concealing the identity of a person, where revealing the identity might endanger the life or safety of any person (section 239(5)). This provision attracted some criticism at a conference on national security in September 2022, particularly from individuals who hold/have held similar roles in other Northern Ireland, the UK and Australia. It was felt that such a provision would restrict the individual in carrying out his/her functions.⁶¹

In addition, in his PLS submission, Dr James Renwick CSC SC, who held the role of Independent National Security Legislation Monitor in Australia from 2017 to 2020, suggested that the Irish model should include a power of compulsion for the following reason:

“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.”⁶²

Speaking of this power the current Australian office holder, Grant Donaldson SC, noted that this power of compulsion operates “...irrespective of national security classification or sensitivity” and it is a criminal offence not to produce information or attend a hearing when summoned.⁶³

⁶¹ O’Keeffe [“Ireland 'is facing an increasing threat from foreign interference'”, Irish Examiner](#) 23 September 2022.

⁶² [PLS Report](#), p 88.

⁶³ O’Keeffe [New watchdog will be at odds with our notoriously secretive security services](#), *Irish Examiner* 23 September 2022.

Reporting obligations of the Independent Examiner

The Bill provides for three types of reports to be produced by the Independent Examiner, namely:

- mandatory annual reports
- discretionary special reports
- report requested by An Taoiseach related to the effectiveness of the office.

These reports must be laid before the Houses of the Oireachtas and published online (section 244 of the Bill). An Taoiseach must provide a response to any report of the Independent Examiner within three months (section 245 of the Bill). These reports will be set out in more detail below.

Section 241 of the Bill sets out what the **annual report** should include. In particular it requires an annual report on the operation and effectiveness of the [Postal Packets and Telecommunications Messages \(Regulations\) Act 1993](#); the [Criminal Justice \(Surveillance\) Act 2009](#) and the [Communications \(Retention of Data\) Act 2011](#). All other security legislation should be reviewed at least once every three years. The annual report must provide details of certain requests and recommendations made by the Independent Examiner. The legislation also requires the inclusion of “general statements” regarding the performance of the office of the Independent Examiner and any notifications received from the Garda Commissioner in relation to “incidents of concern” related to national security. Critiquing the requirement to provide “general statements”, Dr Vicky Conway stated:

“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.”⁶⁴

The Independent Examiner may also produce discretionary **special reports** (section 242 of the Bill).

If requested by An Taoiseach, the Independent Examiner will be required to produce a report on **effectiveness of the office of the Independent Examiner** (section 243 of the Bill), the [Postal Packets and Telecommunications Messages \(Regulations\) Act 1993](#), the [Criminal Justice \(Surveillance\) Act 2009](#), and the [Communications \(Retention of Data\) Act 2011](#).

Where an annual report or special report contains “sensitive information”⁶⁵, the Independent Examiner must reach an agreement with the relevant Minister or information holder in relation to its publication. In its PLS submission the Irish Council for Civil Liberties cautioned “it is essential that these provisions do not unduly restrict the public accountability of the Examiner”.⁶⁶

⁶⁴ [Submission of Dr Vicky Conway, DCU on the General Scheme of the Policing, Security and Community Safety Bill](#), p 19.

⁶⁵ The definition of sensitive information is set out in section 226 of the Bill and is produced in full in the next section of this *Note*.

⁶⁶ ICCL (2021) PLS Submission, para 39, available in [PLS Report](#).

Offences in relation to the confidentiality of sensitive information

Section 247 of the Bill creates new offences in relation to the disclosure of “sensitive information” by any of the following individuals:

- the Independent Examiner,
- a member of staff of the office of the Independent Examiner,
- an individual who was under contract with or engaged by the Independent Examiner, or
- any other employee or a contractor.

“Sensitive information” is defined as follows in the Bill (section 226 of the Bill):

information received by the Independent Examiner in the course of performing his or her functions that, were it to be disclosed to a third party might—

- (a) prejudice or impair the security of the State, defence or international interests or matters relating to Northern Ireland,
 - (b) endanger the life or safety of any person,
 - (c) identify, or provide details of, a source of information, other assistance or operational methods used in the delivery of security services or policing services,
 - (d) reveal information about particular policing or security operations, criminal investigations or prosecutions that have been, are being or are proposed to be undertaken by an information holder,
 - (e) reveal information provided to the State by an international body or the government of a state, other than the State, where the international body or government of that state does not consent to its disclosure,
 - (f) prejudice the giving to the State of further sensitive information by an international body or the government of a state, other than the State, or prejudice the giving to an international body of further similar information by other states,
- or
- (g) prejudice the cooperation of an international body or the government of another state with the State.

A person found guilty of disclosing sensitive information intentionally or recklessly will be liable on summary conviction to a maximum penalty of a class B fine or a term of imprisonment of not more than 12 months. A person found guilty of this offence on indictment will be liable to a fine not exceeding €50,000 or a term of imprisonment of not more than 5 years.

Where a person discloses sensitive information and receives “any gift, consideration or advantage as an inducement”, he/she will be guilty of an offence and the penalty on indictment increases to a fine not exceeding €75,000 or a term of imprisonment of not more than 7 years.

The operation of these offences are without prejudice to the operation of the [*Official Secrets Act 1963*](#).

Conclusion

During the pre-legislative scrutiny debate, the establishment of the Independent Examiner of Security Legislation was generally welcomed by stakeholders. As mentioned above, the COFPI recommended the establishment of this role and the purpose of Part 7 of the Bill is to give effect to that recommendation. The influence of the COFPI report on the development of the office of Independent Examiner is evident in the human rights concepts enshrined in the review of security legislation, namely a consideration of whether such legislation is necessary and proportionate.

While the pre-legislative scrutiny report did not offer any recommendations in relation to Part 7 of the Bill, many stakeholders made recommendations to amendments to the legislative proposals. As noted above, many of the recommendations put forward by stakeholders have not been addressed in the published Bill – for example, in relation to the proposed review of security services and review of requests from policing oversight bodies. However, commentators speaking at a conference on national security in Galway in September 2022, noted that the operationalisation of these functions will depend on resourcing. In its February 2023 observations, GSOC also highlighted the fact that the Independent Examiner role will be intertwined with other governance agencies and as such the delivery of their respective mandates will be shaped by one another. International contributors at the Galway conference pointed to the experience in other jurisdictions and noted that the creation of such offices has been shaped by individual constitutional and national security landscapes. It also appears from the discussion of the UK and Australian models above that individual office holders have had considerable scope in shaping the office and functions have evolved along with national security landscapes. Irish commentators have expressed concerns about the limitations placed on eligibility for appointment, noting that academics or other suitably qualified candidates would be excluded under the current proposals.

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