

# Submission on the Policing, Security and Community Safety Bill

Irish Human Rights and Equality Commission

February 2023



**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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## Recommendations

The Commission makes the following recommendations on the legislation:

### Independence from executive control

#### Independence of Garda Commissioner

1. **Section 37 should be amended to clarify that a directive issued by the Minister cannot relate to a matter on which the Garda Commissioner must have absolute independence.**

#### Appointment process

2. **The legislation should be revised to create more inclusive and transparent reappointment processes for the Board of An Garda Síochána, the Garda Commissioner, the Deputy Garda Commissioner, members of the Policing and Community Safety Authority, the Police Ombudsman and the Deputy Police Ombudsman.**
3. **The legislation should be revised to ensure that the appointment and reappointment processes for the Independent Examiner of Security Legislation are transparent and sufficiently independent from executive control.**
4. **Experience or expertise in ‘human rights law and/or policy and practice’ should be included under section 16(3) as a factor for appointment to the Board of An Garda Síochána.**

#### Dismissal process

5. **The phrase ‘committed stated misbehaviour’ should be defined in the legislation.**
6. **Sections 19 and 20 should be revised to include fair procedures for the dismissal of members of the Board of An Garda Síochána.**
7. **Section 236 should be revised to include fair procedures for the dismissal of the Independent Examiner of Security Legislation.**
8. **Dismissal based on ‘stated reasons’ should be removed from the legislation, or at the very least should be defined within the legislation.**
9. **The legislation should be revised to include fair procedures for the dismissal process**

### Expression of opinion on Government policy

- 10. Provisions which restrict freedom of expression should be removed from the legislation.**

### Power to appoint persons and to enter into contracts

- 11. Provision for the funding of the Office of the Police Ombudsman, the Policing and Community Safety Authority and the Independent Examiner for Security Legislation, and their ability to enter into contracts, should be revised in light of the requirement of their independence from executive control.**

### Annual and other reports

- 12. Sections 137, 149, 181, 241, 242, and 243 should be revised to provide that the Policing and Community Safety Authority, the Police Ombudsman and the Independent Examiner of Security Legislation have the power to lay their reports directly before the Houses of the Oireachtas, rather than through the executive.**
- 13. Section 144 should be revised to provide the Policing and Community Safety Authority with the power to lay joint inspection reports before the Houses of the Oireachtas.**
- 14. Section 150 should be amended to provide that the Policing and Community Safety Authority may, of its own volition or at the request of the Minister, monitor and assess the measures taken by An Garda Síochána in relation to recommendations in the Authority's inspection report and for the Authority to submit a report to the Minister on the basis of their assessment of the measures taken or not taken.**
- 15. Section 150 should be revised to provide that the Policing and Community Safety Authority shall, after submitting the report to the Minister, publish a report under this section in a manner it considers appropriate.**

## Public Sector Equality and Human Rights Duty

16. Section 33(2) should be amended to provide that the Garda Commissioner shall have regard to the Public Sector Equality and Human Rights Duty and should act in accordance with the other matters under that subsection, in carrying out their functions.
17. Section 63 should be amended to provide that a strategic plan shall, in accordance with the Public Sector Equality and Human Rights Duty, set out an assessment of the human rights and equality issues An Garda Síochána believes to be relevant to the functions and purpose of An Garda Síochána and the policies, plans and actions in place or proposed to be put in place to address those issues.
18. Section 70 should be amended to provide that an annual report shall, in accordance with the Public Sector Equality and Human Rights Duty, include a report regarding the developments and achievements in relation to An Garda Síochána's policies, plans and actions to address the human rights and equality issues the Garda Commissioner believes to be relevant to the functions and purpose of An Garda Síochána.
19. The Garda Commissioner should be required to have regard to the Public Sector Equality and Human Rights Duty obligations of An Garda Síochána in creating the annual service plan.
20. The Board of An Garda Síochána should be required to have regard to its Public Sector Equality and Human Rights Duty obligations in creating the governance framework.
21. The Policing and Community Safety Authority should be required to have regard to its Public Sector Equality and Human Rights Duty obligations in creating the strategy statement, governance framework and annual report.
22. The Police Ombudsman should be required to have regard to its Public Sector Equality and Human Rights Duty obligations in creating the strategy statement, governance framework and annual report.
23. The Independent Examiner of Security Legislation should be required to have regard to their Public Sector Equality and Human Rights Duty obligations in creating their annual report.

## Collection and reporting of disaggregated data

- 24. Provision should be made for the improvement of the record keeping within An Garda Síochána, the collection of disaggregated equality data which should be included in the information made available to the Central Statistics Office, and the publication of this information in an accessible and timely manner.**
- 25. The Policing and Community Safety Authority should be given power to influence the quality, integrity and accessibility of such disaggregated equality data collection.**
- 26. The Police Ombudsman should be given the power to collect and publicly report data, including disaggregated equality data, on complaints.**
- 27. The State should provide a ring-fenced budget to the bodies, named under this legislation, to ensure they have the necessary resources to collect accessible and usable disaggregated equality data.**

## Preparation and submission of certain materials

### Strategy statement (sections 136 and 180)

- 28. Sections 136 and 180 should be amended to clarify how the draft strategy is published and who may make representations to the Policing and Community Safety Authority or Police Ombudsman.**

## Preliminary and general (Part 1)

### Definitions of 'at risk' and 'vulnerable' (section 2)

- 29. The definitions of 'at risk' and 'vulnerable' should be revised to ensure a recognition that people may be 'at risk' and/or 'vulnerable' to harm due to political, economic, social and cultural structures.**
- 30. The definitions of 'at risk' and 'vulnerable' should be revised to ensure alignment with international standards including the United Nations Convention on the Rights of Persons with Disabilities.**

#### Definition of 'policing services' (section 2)

- 31. The definition of 'policing services' should be revised to provide clarity on what the definition encompasses.**

#### Policing or security services (section 3)

- 32. The Independent Examiner of Security Legislation should review questions or disputes arising under section 3, and provide a report to the Minister, which must be considered by the Minister in making their determination.**

#### An Garda Síochána (Part 2)

##### Prosecution of offences by members of An Garda Síochána (section 10)

- 33. The power of An Garda Síochána to institute and conduct prosecutions in a court of summary jurisdiction should be removed from the legislation.**

##### Provision of information and documents by the Garda Commissioner (sections 13, 133 and 214)

- 34. Section 13 should be revised to clarify on what basis the Garda Commissioner must provide information to the Board of An Garda Síochána, the time frame in which it must be done, and whether it includes documentation to be furnished.**
- 35. Section 13(2) should be amended to provide for the review by the Independent Examiner for Security Legislation of any decision of the Garda Commissioner to exclude information on state security grounds.**
- 36. Provision should be made for the situation in which an agreement cannot be made within three months under section 13(3).**
- 37. Provision should be made to ensure that the Garda Commissioner has the capacity to meet the requirements of sections 133 and 214, ensuring that the Policing and Community Safety Authority and the Police Ombudsman are not delayed in carrying out their respective functions.**

##### Suspension and removal of Garda Commissioner and Deputy Garda Commissioner (sections 30 and 31)

- 38. The phrase 'serious misconduct' should be defined in the legislation.**

**39. The power to make a recommendation under sections 30 and 31 should be extended to the Policing and Community Safety Authority and the Police Ombudsman.**

**Directives from Minister (section 37)**

**40. Section 37(2) should be broadened to allow the Police Ombudsman to make recommendations to the Minister.**

**Code of ethics for members of Garda personnel (section 78)**

**41. Section 78(1) should be amended to provide that the Policing and Community Safety Authority shall issue a code of ethics which includes reference to human rights and equality standards, including the Public Sector Equality and Human Rights Duty.**

**42. Section 78(3) should be amended to provide that the Policing and Community Safety Authority shall have regard to human rights and equality standards, including the Public Sector Equality and Human Rights Duty, in preparing the code of ethics.**

**Special inquiries relating to administration, operation, practice or procedure of An Garda Síochána or conduct of members of Garda personnel (sections 82, 84 and 88)**

**43. Section 82 should be expanded to allow for requests by the Police Ombudsman.**

**44. Section 84 should be amended to provide that the Minister shall consult with the Authority before extending the time frame for the submission of the final report of the inquiry.**

**45. Section 88(3) should be amended to provide that the Minister shall publish the final report and any interim reports.**

## Community Safety (Part 3)

46. Part 3 of the Bill should be revised to ensure the effective implementation of principle of the effective participation of affected individuals and groups in the development, implementation, monitoring, evaluation and review of the national strategy for improving community safety.
47. Section 114(2)(c)(ii) should be revised to define the term diversity, and at a minimum, make reference to the following equality grounds: age, civil status, disability, family status, gender, ethnicity, including membership of the Traveller community, religious belief, sexual orientation and socio-economic status.

## Policing and Community Safety Authority (Part 4)

### Appointment of inspectors of policing services (section 141)

48. Section 141(2)(a) should be amended to define 'a senior officer'. Section 141(2)(a) should be further amended to include a condition that only a certain number of appointees as inspectors of policing services can be drawn from the ranks of senior officers from the police services of other States.

### Inspections or joint inspections and prescribed inspection body (sections 142–144)

49. Sections 142 and 144 should be revised to explicitly provide for unannounced inspection and joint inspection visits.
50. Section 143 should be revised to explicitly set out that the Policing and Community Safety Authority and a National Preventive Mechanism designated under the *Inspection of Places of Detention Bill* can carry out a joint inspection.

### Powers of the inspector of policing services (section 146)

51. Section 146(1)(b) should be amended to provide that the inspector of policing services has sole discretion in determining what information or documentation they may reasonably require for the purposes of the inspection.

### Memorandum of understanding concerning inspections (section 147)

52. The legislation should clearly set out the precise status of the memorandum of understanding.

- 53. The legislation should clearly set out the precise scope of the Policing and Community Safety Authority's powers to conduct inspections.**
- 54. Provision should be made for the situation in which an agreement cannot be reached on the memorandum of understanding.**
- 55. The memorandum of understanding should have regard to the Optional Protocol to the Convention against Torture.**

#### Reports of inspections undertaken at request of Minister (section 149)

- 56. Section 149(8)(a) should be deleted from the legislation.**
- 57. Section 149(7) should be amended to provide that the Garda Commissioner shall submit their written response to the Minister and the Policing and Community Safety Authority.**

#### Independent human rights adviser

- 58. The legislation should be amended to provide for an independent human rights adviser to be appointed by the Policing and Community Safety Authority to ensure oversight of the implementation of human rights and equality standards in policing.**

#### Police Ombudsman / Complaints, investigations and other matters (Parts 5 and 6)

- 59. The Bill should explicitly recognise that investigations by the Police Ombudsman should be conducted in line with the same principles and protections as criminal investigations.**
- 60. The Police Ombudsman should be sufficiently resourced so it can fulfil its mandate, and rely on its own staff or engage external experts to conduct prompt independent and impartial investigations.**

#### Investigatory powers (section 169)

- 61. Provision should be made for the public reporting of the results of Police Ombudsman investigations.**
- 62. The investigatory powers of the Police Ombudsman should be clarified and strengthened.**

#### Special Assistance (section 177)

- 63. Section 177 should be removed from the legislation.**

#### Definition of 'abuse of power for a sexual purpose' (section 189)

- 64. The definition of 'abuse of power for a sexual purpose' in section 189 should be revised to include the Garda Commissioner.**

#### Making, recording of complaints etc. (section 192) and Categories of complaints suitable for resolution by An Garda Síochána (section 196)

- 65. Provisions regarding the categories of complaints that can be resolved by An Garda Síochána under section 196 should be clarified.**
- 66. Further safeguards should be introduced into the Minister's power under section 196 to modify a draft list of categories of complaints suitable for resolution by An Garda Síochána.**
- 67. Further safeguards should be introduced into the Minister's decision-making process under section 192(8).**

#### Time limits for making complaints (section 193)

- 68. The time periods for making a complaint with the Police Ombudsman should directly reference reasonable accommodation for disabled people.**

#### Determination of admissibility of complaint (sections 194 and 195)

- 69. Complainants should be provided with further opportunity for submissions where the Police Ombudsman has made a preliminary decision to refer a matter to An Garda Síochána for resolution. Provision must be made for reasonable accommodation for disabled people.**

Notification to a member of Garda personnel who is the subject of the complaint (sections 195 and 204)

- 70. Consideration should be given to whether the provisions in sections 195 and 204, in relation to the notification of a member of Garda personnel who is the subject of the complaint or the subject of the investigation, comply with fair procedures.**

Establishment of arrangements for handling complaints suitable for resolution by An Garda Síochána (section 197)

- 71. Reference should be made to the principle of reasonable accommodation in the complaints process for disabled people.**

Notification to Police Ombudsman of incident of concern (section 200)

- 72. Section 200(1) should be amended to require notification “without delay”.**
- 73. The Independent Examiner of Security Legislation should undertake a review function in respect of decisions made under section 200(6).**

Investigation of matters relating to Garda Commissioner by Police Ombudsman (section 203)

- 74. The scope of the Police Ombudsman’s investigation should be clarified under section 203, and that the independence of the Police Ombudsman should be strengthened.**

Search of Garda Premises (section 207)

- 75. Section 207 should be revised to provide that a designated officer of the Police Ombudsman may, after being authorised by the Police Ombudsman, apply directly to the District Court, without the need to consult with the Garda Commissioner or receive a direction from the Minister. The application to the District Court for a search warrant should be on notice to the Independent Examiner of Security Legislation.**
- 76. Section 207 should be amended to provide for in camera hearings, appeals to the Circuit Court and the application of the Rules of Court.**

**77. Any restrictions on a person’s right to privacy, and fair procedures and fair trial rights under section 207 must be necessary and proportionate, and safeguards to this effect should be included in the legislation.**

**78. Limitations should be placed on the situations in which a judge may issue a warrant to search a computer, and to demand a password. Consideration should be given to the approaches in other jurisdictions to the legality of compelling the communication of a password.**

#### **Additional powers for purpose of undertaking investigations (section 208)**

**79. Disclosure of the information, documentation, or thing should be given where the Independent Examiner of Security Legislation determines that no prejudice to state security arises, or where the disclosure is proportionate, without the need for a direction from the Minister. A referral to the Minister could be made if redactions or conditions would render the disclosure proportionate, and the Minister could make directions to this effect.**

#### **Review of decisions by Police Ombudsman (section 221)**

**80. Express reference should be made to the obligation to provide reasonable accommodation in regard to time frames under section 221.**

### **Independent Examiner of Security Legislation (Part 7)**

#### **Objectives, functions and powers of Independent Examiner (section 231)**

**81. Section 231 should be revised to provide that one of the functions of the Independent Examiner of Security Legislation is to oversee the implementation of security legislation.**

**82. Section 231 should be amended to provide the Independent Examiner of Security Legislation with the power to monitor and make recommendations on the collection and reporting of data related to security services and the operation of security legislation.**

### Eligibility for appointment (section 234)

- 83. Section 234(1) should be revised to expand the eligibility criteria for the role of the Independent Examiner of Security Legislation to include non-judicial candidates who have significant expertise and experience.**

### Inspection function

- 84. The legislation should clarify whether the Independent Examiner for Security Legislation can, under section 144, carry out joint inspections with the Policing and Community Safety Authority.**

### Regulations (Part 8)

- 85. The regulations should be drafted and enacted in conjunction with the legislation, in order to promote certainty and clarity in the applicable principles, and to strengthen a human rights-based approach to policing.**
- 86. Regulations should be provided for in relation to effective and ongoing training for members of An Garda Síochána in the areas of human rights and equality, and in cultural competency.**
- 87. Regulations should be provided for to set specific targets for diversity in the recruitment procedures for An Garda Síochána.**
- 88. Regulations should be provided for which explicitly recognise that discrimination constitutes a breach of discipline.**

## Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). We have a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to examine any legislative proposal and report our views on any implications for human rights or equality.<sup>1</sup>

We welcome the opportunity to provide our submission on the *Policing, Security and Community Safety Bill*. We and our predecessor, the Irish Human Rights Commission ('the IHRC'), have previously made submissions and recommendations for legislative reform in this area;<sup>2</sup> particularly on the inadequacies and limitations of the Garda Síochána Ombudsman Commission,<sup>3</sup> human rights standards in policing,<sup>4</sup> including the requirement of transparency, the importance of collecting disaggregated equality data,<sup>5</sup> and the need to tackle racial profiling.<sup>6</sup> We remain available to assist if further scrutiny of the Bill is required and on any specific issue which may arise.

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<sup>1</sup> Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

<sup>2</sup> IHRC, [Review of the Garda Síochána Act, 2005 Submission of IHRC \(Designate\) to the Joint Oireachtas Committee on Justice, Defence and Equality](#) (4 April 2014). IHRC, [Submission of IHREC \(Designate\) to the Cabinet SubCommittee on Justice on the Establishment of an Independent Policing Authority](#) (May 2014). Notably, the IHRC previously commissioned a substantial piece of research by Professor Dermot Walsh in relation to human rights and An Garda Síochána: Dermot Walsh, *Human Rights and Policing in Ireland: Law, Policy and Practice* (Clarus Press, 2009).

<sup>3</sup> IHREC, [Recommendations of the Irish Human Rights And Equality Commission on the Garda Síochána \(Amendment\)\(No. 3\) Bill 2014](#) (November 2014).

<sup>4</sup> IHREC, [Submission to the Commission on the Future of Policing](#) (February 2018); IHREC, [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020).

<sup>5</sup> IHREC, [Letter from IHREC to Garda Commissioner Harris](#) (28 April 2020).

<sup>6</sup> IHREC, [Ireland and the Convention on the Elimination of Racial Discrimination Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report](#) (October 2019); IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (August 2021).

## Relevant human rights and equality standards

The legislation proposes reform in a wide variety of areas, with a central focus on strengthening accountability for members of An Garda Síochána ('AGS'). As such, a number of human rights and equality issues are engaged, as protected by the Constitution of Ireland, the European Convention on Human Rights ('ECHR'), European Union law, and international human rights law. It is noted that the efficacy of the legislation will have an impact on the broader rights of those who engage with the criminal justice system, such as the right to liberty and security of the person and personal data protection rights. In particular, the core rights and principles engaged by the creation of the accountability mechanisms in the legislation include:

The right to an effective investigation;<sup>7</sup>

A democratic and accountable police service;<sup>8</sup>

Fair procedures and fair trial rights;<sup>9</sup>

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<sup>7</sup> Articles 2 and 3 ECHR require States to take steps to prevent violations, and to undertake effective investigations into any potential violations. Article 13 ECHR guarantees the right to an effective remedy. The obligation to investigate will arise under Articles 2 and 3 where the death or serious harm is brought to the State's attention, even when no complaint has been made by a complainant: *Ergi v. Turkey* App. No. 40/1993/435/514, (ECtHR, 28 July 1998); *Bati v Turkey* App Nos. 33097/96 and 57834/00 (ECtHR, 3 June 2004); *Oneryildiz v Turkey* App no 48939/99 (ECtHR Grand Chamber, 30 November 2004) at [149]. The procedural obligation under Article 2 imposes a duty on the authorities to co-operate with the investigation: *Güzelyurtlu and others v Cyprus and Turkey* App. No. 36925/07 (ECtHR, 29 January 2019).

<sup>8</sup> The Patten Commission in Northern Ireland identified five aspects to police accountability: "There is democratic accountability, by which the elected representatives of the community tell the police what sort of service they want from the police, and hold the police accountable for delivering it. There is transparency, by which the community is kept informed, and can ask questions, about what the police are doing and why. There is legal accountability, by which the police are held to account if they misuse their powers. There is financial accountability, by which the police service is audited and held to account for its delivery of value for public money. And there is internal accountability, by which officers are accountable within a police organization." See Independent Commission on Policing for Northern Ireland (Great Britain), and Chris Patten, [A New Beginning: Policing in Northern Ireland: the Report of the Independent Commission on Policing for Northern Ireland](#) (Norwich, Eng: H.M.S.O. 1999) p. 22. See also Jim Murdoch and Ralph Roche, [The European Convention on Human Rights and Policing, A handbook for police officers and other law enforcement officials](#) (Council of Europe Publishing, 2013) pp. 110-111.

<sup>9</sup> The right to a fair trial is protected by Article 38 of the Irish Constitution, Article 6 ECHR, and Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'). Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') protects fair trial rights and provides for the right to an "effective remedy" before a tribunal.

The right to freedom of expression;<sup>10</sup> and

Non-discrimination, and equality before and under the law.<sup>11</sup>

International best practice in the area of police accountability can be found in the European Code of Police Ethics.<sup>12</sup> The Code includes standards on police status; organisation; function; accountability; qualifications; recruitment and training; the conduct of police investigations and interventions; the treatment of suspects, victims and witnesses; the rights of police personnel; and, transparency. Many of the principles of European Court of Human Rights ('the ECtHR') case law are reflected in the Code, reflecting the requirement for police operations to be conducted in accordance with the rule of law. In relation to the establishment of accountability mechanisms, guidance for best practice can be found in the Principles relating to the Status of National Institutions ('the Paris Principles').<sup>13</sup> While these Principles relate to national institutions created for the promotion and protection of human rights, they contain a number of relevant principles for ensuring the operation of independent mechanisms for police oversight and the investigation of complaints against police officers.<sup>14</sup>

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<sup>10</sup> The right to freedom of expression is protected by Article 40.6.1° of the Constitution, Article 10 ECHR, Article 19 ICCPR, and Article 11 of the Charter.

<sup>11</sup> This right is guaranteed under Article 14 ECHR, Article 26 ICCPR, Article 2 of the Convention on the Elimination of Racial Discrimination ('CERD'), and Article 4 and 5 of the Convention on the Rights of Persons with Disabilities ('CRPD'). Under section 42 of the Irish Human Rights and Equality Commission Act 2014, public bodies are required to have regard to the need to eliminate discrimination, promote equality, and protect the human rights of those availing of their services.

<sup>12</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum.

<sup>13</sup> General Assembly resolution 48/134, [Principles relating to the Status of National Institutions](#) (The Paris Principles) (20 December 1993). The General Observations of the Global Alliance of National Human Rights Institutions Sub-Committee on Accreditation, serve as important interpretative tools of the Paris Principles: GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018).

<sup>14</sup> See recommendations of the Commissioner of Human Rights of the Council of Europe and the United Nations Office on Drugs and Crime that regard should be had to the Paris Principles in establishing police oversight mechanisms; [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 8; United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) p. 25.

## Observations on the Bill

### Independence from executive control

The European Code of Police Ethics stipulates that the State control of police shall be divided between the legislative, the executive and judicial powers.<sup>15</sup> The Code states that the police shall enjoy sufficient operational independence from other State bodies in carrying out their given tasks, for which they should be fully accountable.<sup>16</sup> A fundamental requirement of the Paris Principles is that the national institution is, and is perceived to be, able to operate independently of government interference.<sup>17</sup>

We consider that the independence of AGS from executive control must be strengthened throughout the legislation. The powers of the executive in this regard must be clearly defined and accompanied by appropriate safeguards to minimise political influence. The independence of the Policing and Community Safety Authority ('the Authority'), the Office of the Police Ombudsman ('the Police Ombudsman'), the Board of An Garda Síochána ('the Board') and the Independent Examiner of Security Legislation ('the Independent Examiner') must be strengthened. Further safeguards are required regarding the level of Ministerial discretion in decisions which affect the functioning of these accountability mechanisms.

### Independence of Garda Commissioner

Section 34(1) sets out the Garda Commissioner shall be independent in the exercise of their functions. Under section 37(1), a Minister may issue the Commissioner with written directives concerning 'any matter' relating to AGS. This provision is not sufficiently clear to prevent the Minister issuing a directive to the Garda Commissioner on a matter that they must have absolute independence on. There is no obligation on the Minister to consult with the Garda Commissioner in advance of issuing of a directive. Section 37(3) sets out that the

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<sup>15</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, at [60].

<sup>16</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, at [15].

<sup>17</sup> General Assembly resolution 48/134, [Principles relating to the Status of National Institutions](#) (The Paris Principles) (20 December 1993). See also GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 39.

Garda Commissioner shall comply with any directive issued in performing their functions under this legislation. This mandatory obligation on the Garda Commissioner to comply with a directive is inconsistent with section 33(2)(k) which provides that the Garda Commissioner shall 'seek to ensure' their functions are carried out with 'due regard' to any directive issued to them. A Garda Commissioner cannot be independent in the exercise of their functions if they have a statutory obligation to comply with a directive which can concern 'any matter' relating to AGS. The European Code of Police Ethics states that the police should enjoy operational independence from the executive; the police shall enjoy discretion in carrying out specific tasks and should not receive any instructions of a political nature in exercising their powers.<sup>18</sup> This operational independence protects the police against the problems of partisan political control in law enforcement matters, and is an important feature of the rule of law. Section 37(1) as currently framed has the potential to significantly encroach on the independence of the Garda Commissioner in the exercise of their functions and erodes one of the central tenets of the legislation.

- 1. The Commission recommends that section 37 be amended to clarify that a directive issued by the Minister cannot relate to a matter on which the Garda Commissioner must have absolute independence.**

### Appointment process

The Paris Principles set out that the recruitment process for the national institution must be open to all, clear, transparent, and merit based.<sup>19</sup> Recruitment must be within the sole discretion of the institution itself, in order to function independently of the government.<sup>20</sup> The United Nations Office on Drugs and Crime ('UNODC') provides that for the true independence of oversight bodies of law enforcement, the bodies should be operated by

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<sup>18</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, at p. 41.

<sup>19</sup> General Assembly resolution 48/134, [Principles relating to the Status of National Institutions](#) (The Paris Principles) (20 December 1993).

<sup>20</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 39.

persons “chosen as a result of a competitive, transparent and independent selection process.”<sup>21</sup>

Section 17(5) provides that there is no requirement for an open competition for the reappointment of members of the Board. There is also no requirement for an open competition for the reappointment of the Garda Commissioner.<sup>22</sup> Given the need to ensure independence of AGS from executive control, and the public perception of same, it is recommended that further procedural safeguards are implemented in the appointments process.

Under section 125(5), where a member of the Authority is proposed to be reappointed, they are not required to participate in open competition for the role or to be recommended for reappointment by the Public Appointments Service. Section 170(3) sets out that both the Police Ombudsman and the Deputy Police Ombudsman can be reappointed for a further six-year term without an open competition.

Section 230(1) provides that the appointment of a person as the Independent Examiner shall be made by the Government on the passage of resolutions by Dáil Éireann and Seanad Éireann recommending the appointment of the person. However, sections 230 (2) and (4) provide that the Government may appoint the first Independent Examiner, before the establishment of the Office of the Independent Examiner, without the need for both houses of the Oireachtas to pass resolutions recommending the appointment. The level of executive involvement in the appointment process is deeply concerning, as it is essential for the public to perceive the Independent Examiner as independent for the accountability mechanism to operate effectively. The appointment process lacks sufficient independence, and transparency, as there is no requirement for the appointment to go through the public appointments process similar to the appointment process for the Garda Commissioner, Deputy Garda Commissioner, ordinary members of the Authority, the Police Ombudsman

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<sup>21</sup> United Nations Office on Drugs and Crime, [Resource book on the use of force and firearms in law enforcement](#) (2017) p. 173.

<sup>22</sup> Under section 26(7).

and Deputy Police Ombudsman.<sup>23</sup> Furthermore, there is no provision under section 232 for the process of the reappointment of the Independent Examiner of Security Legislation to take place within an open competition. We are of the view that it should be expressly legislated for in the Bill that the appointment of the Independent Examiner goes through the public appointments system.

- 2. The Commission recommends that the legislation be revised to create more inclusive and transparent reappointment processes for the Board of An Garda Síochána, the Garda Commissioner, the Deputy Garda Commissioner, members of the Policing and Community Safety Authority, the Police Ombudsman and the Deputy Police Ombudsman.**
- 3. The Commission recommends that the legislation be revised to ensure that the appointment and reappointment processes for the Independent Examiner of Security Legislation are transparent and sufficiently independent from executive control.**

Under section 15(3), the Minister must be satisfied that the candidate for the Board has sufficient expertise and experience in a number of areas; as set out under section 16(3). Although the Bill recognises the protection of human rights as a core policing principle, there is no requirement for members of the Board to have expertise or experience in this area.

- 4. The Commission recommends that experience or expertise in ‘human rights law and/or policy and practice’ be included under section 16(3) as a factor for appointment to the Board of An Garda Síochána.**

### Dismissal process

The Global Alliance of National Human Rights Institutions (‘GANHRI’) Sub-Committee on Accreditation, who clarify the content and scope of the Paris Principles, have advised that

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<sup>23</sup> In the UK, appointments to the role of the Independent Reviewer of Terrorism Legislation go through the public appointments process; see the [Public Appointments Order in Council 2017](#).

the dismissal process for the national institution must be transparent.<sup>24</sup> Under section 19, the Minister can remove a Board member for a number of reasons, including if, in the Minister's opinion, they have 'committed stated misbehaviour' or the removal is 'necessary for the effective and efficient performance by the Board of its functions'. The phrase 'committed stated misbehaviour' is not defined in the Bill; we are of the view that the meaning of this phrase should be clarified in the legislation. Under section 20, the Minister can remove all of the members if they are of the opinion that the Board's functions are not being performed in an effective and efficient manner. There is a lack of reference to any fair procedures in the removal process; there is no provision for Board members to be notified of their intended removal, the reasons for their removal or whether they can be heard and/or make submissions prior to their removal. In this situation, the Minister has the discretion to direct an independent review. The criterion of 'effective and efficient' performance is vague and allows the Minister a broad scope of discretion for removing Board members. Though the Minister may decide to direct a review under section 20(2), the Minister will appoint the reviewer and the Minister retains the final decision. Comparison may be made to section 30, whereby a number of steps must be taken in compliance with fair procedures in order to suspend the Garda Commissioner.

As the purpose of the Board is to provide an element of accountability for, and oversight of, AGS, it should be guided by the provisions of the Paris Principles. There should be an independent and objective dismissal process, and the grounds for dismissal should be clearly defined. If appropriate, the decision to dismiss should be supported by the decision of an independent body with appropriate jurisdiction. Dismissal should not be based solely on the discretion of the appointing authority.

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<sup>24</sup> The GANHRI Sub-Committee on Accreditation recommends that "The grounds for dismissal must be clearly defined and appropriately confined to only those actions which impact adversely on the capacity of the member to fulfil their mandate. Where appropriate, the legislation should specify that the application of a particular ground must be supported by a decision of an independent body with appropriate jurisdiction. The dismissal must be made in strict conformity with all the substantive and procedural requirements as prescribed by law. Dismissal should not be allowed based solely on the discretion of appointing authorities."; see GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 19.

Under section 236, the Government can remove the Independent Examiner for a number of ‘stated reasons’ including that they have ‘committed stated misbehaviour’. It is not clear the process required by the Government to remove the Independent Examiner. Is it required for the passage of resolutions by Dáil Éireann and Seanad Éireann recommending the removal, similar to the appointments process, before the Government can remove the Independent Examiner or is there no Oireachtas oversight of the dismissal process? The absence of any references to fair procedures in the removal process raises significant concern on the functional independence of the Independent Examiner.

- 5. The Commission recommends that the phrase ‘committed stated misbehaviour’ be defined in the legislation.**
- 6. The Commission recommends that sections 19 and 20 be revised to include fair procedures for the dismissal of members of the Board of An Garda Síochána.**
- 7. The Commission recommends that section 236 be revised to include fair procedures for the dismissal of the Independent Examiner of Security Legislation.**

Section 21 provides that the Board may establish committees to assist it in the performance of its functions. The Board may remove a member of a committee at any time ‘for stated reasons’.<sup>25</sup> Section 74 provides that the Board shall establish an audit committee as soon as practicable. The Board may remove a member of the audit committee at any time ‘for stated reasons’.<sup>26</sup> Section 128 provides that the Authority may establish committees of Authority, and provides that a member may similarly be removed ‘for stated reasons’.<sup>27</sup> Under section 129, the chief executive of the Authority may be removed by the Authority, with consent of the Minister, for ‘stated reasons’.<sup>28</sup> There is a similar provision in section 174 in regard to the chief executive officer of the Police Ombudsman.<sup>29</sup>

We note that this ground of dismissal is insufficiently clear or precise. As per the GANHRI Sub-Committee on Accreditation’s recommendations, the grounds for dismissal must be

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<sup>25</sup> Section 21(6).

<sup>26</sup> Section 74(5).

<sup>27</sup> Section 128(6).

<sup>28</sup> Section 129(9).

<sup>29</sup> Section 174(9).

clearly designed and confined to actions which impact adversely on the capacity of the member to fulfil their mandate.<sup>30</sup> There is no requirement for the ‘stated reasons’ to correlate to the performance of the duties of the committee members. No provision is made for fair procedures in the removal of committee members or the chief executives of the Authority or the Police Ombudsman in the above provisions.

- 8. The Commission recommends that dismissal based on ‘stated reasons’ be removed from the legislation, or at the very least be defined within the legislation.**
- 9. The Commission recommends that the legislation be revised to include fair procedures for the dismissal process.**

### Expression of opinion on Government policy

Section 72 sets out that the Garda Commissioner may be required by the Committee of Public Accounts to give evidence on a number of matters. As per subsection (3)(a), the Commissioner shall not “question or express an opinion on the merits of any policy of the Government or a Minister of the Government”. Similar provisions exist in section 73(9)(a) in relation to the Garda Commissioner giving evidence before an Oireachtas Committee, and in section 110(9)(a) for the Director of the National Office giving evidence before an Oireachtas Committee.

Under sections 139 and 140, the chief executive of the Authority shall not express an opinion on Government policy whilst carrying out their duties under these sections.<sup>31</sup> As per section 183(3)(a) the chief executive officer of the Police Ombudsman is restricted from expressing an opinion when giving evidence before the Committee of Public Accounts, and both the Police Ombudsman and the chief executive officer are restricted when giving evidence before an Oireachtas Committee under section 184(9)(a).

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<sup>30</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 19.

<sup>31</sup> Section 139(3) relates to attendance before the Committee of Public Accounts and section 140(9)(a) relates to attendance before other Oireachtas Committees.

These provisions restrict the freedom of expression of those in the relevant roles.<sup>32</sup> ECtHR jurisprudence establishes that the limits of acceptable criticism are wider for Government policy under Article 10 ECHR.<sup>33</sup> The State cannot restrict critique based on a general reference to upholding public morality or state security; such a restriction must be necessary and proportionate in a democratic society in order to be permissible.<sup>34</sup>

We note that the purpose of these restrictions on the freedom of expression are not clear. Freedom of expression additionally interlinks with the responsibilities of national institutions under the Paris Principles. A national institution is responsible for drawing the Government's attention to human rights violations and making proposals for solutions. It may be responsible, where necessary, for "expressing an opinion on the positions and reactions of the Government".<sup>35</sup> These restrictions are inconsistent with the objective of the draft legislation to strengthen independent external oversight. There is no clear justification for the restrictions, and therefore a proportionality analysis cannot be conducted.

**10. The Commission recommends that provisions which restrict freedom of expression be removed from the legislation.**

### Power to appoint persons and to enter into contracts

Section 172 provides that the appointment of persons as officers of the Police Ombudsman requires the consent of both the Minister for Justice and Minister for Public Expenditure and Reform. Similarly, section 176 provides that the Police Ombudsman's power to appoint

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<sup>32</sup> Article 40.6.1° of the Constitution provides specifically for "criticism of Government policy" within the right to freedom of expression, in addition to the expression of convictions and opinions. With the right to communicate facts in addition to commenting on them, as noted in *The Irish Times v Ireland* [1998] 1 IR 359, p. 405.

<sup>33</sup> The ECtHR noted in *Castells v Spain* that restrictions may be permissible in the interests of preserving public order; however: 'The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion': *Castells v Spain* App. No. 11798/85 (ECtHR, 23 April 1992) at [46]. The ECtHR has noted further protections provided to those in expressing opinions as part of a public debate on a political question of general interest: *Prager and Oberschlick v Austria* App. No. 15974/90 (ECtHR, 26 April 1995).

<sup>34</sup> *Heaney v Ireland* [1994] 3 I.R. 593, p. 607; *Handyside v UK* App. No. 5493/72 (ECtHR, 7 December 1976) at [49].

<sup>35</sup> General Assembly resolution 48/134, [Principles relating to the Status of National Institutions](#) (The Paris Principles) (20 December 1993).

consultants and advisers and to enter into contracts is subject to the approval of the Minister for Justice given with the consent of the Minister for Public Expenditure and Reform. A similar provision exists in relation to the Authority in sections 131–132 and the Independent Examiner in sections 237–238.

In all instances, the Minister for Justice and/or the Minister for Public Expenditure can refuse their consent, resulting in a veto over the appointment of officers, consultants, and advisers to the Police Ombudsman, the Authority and the Independent Examiner. This level of executive involvement in the funding of the Police Ombudsman, the Authority and the Independent Examiner may directly impact the independence and resources of the national institutions and their ability to effectively perform their functions. These accountability mechanisms should be sufficiently resourced to enable them to carry out their functions under this legislation.

**11. The Commission recommends that provision for the funding of the Office of the Police Ombudsman, the Policing and Community Safety Authority and the Independent Examiner for Security Legislation, and their ability to enter into contracts, be revised in light of the requirement of their independence from executive control.**

### Annual and other reports

The Paris Principles recognise that one of the key responsibilities of the national institutions is to submit annual, special and thematic reports to the Government and Parliament. These reports allow national institutions to raise concerns, make recommendations and monitor respect for human rights.<sup>36</sup> The GANHRI Sub-Committee on Accreditation has stated that it is preferable for national institutions to have explicit powers to table reports before the legislature rather than through the executive.<sup>37</sup>

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<sup>36</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 17.

<sup>37</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) pp. 30–31.

There are a number of provisions throughout the Bill which require the Authority (sections 137<sup>38</sup>, 149<sup>39</sup>); the Police Ombudsman (section 181<sup>40</sup>); and the Independent Examiner (sections 241,<sup>41</sup> 242,<sup>42</sup> 243<sup>43</sup>) to submit annual or other reports to the Minister or Taoiseach. The Minister or Taoiseach is responsible for laying the report before the Houses of the Oireachtas. As the publication of their respective reports is dependent on the approval of the Minister or Taoiseach, we are concerned about the independence of these bodies from executive control. These reports are vital in identifying issues in policing and setting out recommendations to address the concerns raised; therefore, any legislative measure which may restrict the publication of these reports is concerning. The public availability of these reports for scrutiny by the public is important for building trust in these institutions and contributes to the public's view of these bodies as truly independent accountability mechanisms.

We note our own statutory basis which provides that we have the power to lay our annual report<sup>44</sup> and a report under section 42 of the 2014 Act before both Houses of the Oireachtas. We are of the view that there can be measures included in the legislation to ensure that the accountability mechanisms may exclude material from their reports which would be prejudicial to State security or other matters. In this regard, we note that under section 148(4) the Authority may exclude from reports of inspections undertaken at its own initiative "any matter that, in its opinion, might facilitate the commission of an offence, prejudice a criminal investigation or jeopardise the safety of any person." Further, under section 246 where the Independent Examiner proposes to include in their report sensitive

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<sup>38</sup> Section 137 – Annual and other reports to Minister.

<sup>39</sup> Section 149 – Reports of inspections undertaken at request of Minister.

<sup>40</sup> Section 181 – Annual reports and special reports by Police Ombudsman.

<sup>41</sup> Section 241 – Annual report of Independent Examiner to the Taoiseach.

<sup>42</sup> Section 242 – Special reports of Independent Examiner to the Taoiseach.

<sup>43</sup> Section 243 – Report on effectiveness of office and functions by Independent Examiner to the Taoiseach.

<sup>44</sup> Section 29(3) of the *Irish Human Rights and Equality Commission Act 2014*.

information<sup>45</sup> provided to them, they must consult with the ‘relevant information holder’<sup>46</sup> and the Minister prior to submitting the report.

**12. The Commission recommends that sections 137, 149, 181, 241, 242, and 243 be revised to provide that the Policing and Community Safety Authority, the Police Ombudsman and the Independent Examiner of Security Legislation have the power to lay their reports directly before the Houses of the Oireachtas, rather than through the executive.**

Section 144 provides that the Authority may carry out joint inspections with prescribed inspection bodies. We note that section 144(2)(f) sets out that the Authority and the inspection body or bodies shall prepare a joint inspection plan which amongst other matters shall set out the arrangements in relation to reporting on the inspection by the Authority and the prescribed inspection bodies. However, there is no explicit provision giving the Authority the power to publish joint inspection reports and lay these reports before the Houses of the Oireachtas. As reports of joint inspections may highlight concerning practices in relation to policing services, the public availability of these reports will be critical for parliamentary and public scrutiny and accountability.

**13. The Commission recommends that section 144 be revised to provide the Policing and Community Safety Authority with the power to lay joint inspection reports before the Houses of the Oireachtas.**

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<sup>45</sup> Section 226 defines sensitive information as “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”.

<sup>46</sup> Section 246(5) provides that “In this section, “relevant information holder”, in relation to sensitive information, means the public body that provided the sensitive information to the Independent Examiner.”

Section 150 provides that the Authority, at the request of the Minister, can monitor and assess measures taken by AGS in response to recommendations set out in the Authority's inspection reports and provide a report of measures taken by AGS to the Minister. There is no provision for the Authority to provide a report on its own initiative without the direction of the Minister. Further, there is no provision for the Authority to make this report publicly available such as on its website or through another means.<sup>47</sup> The GANHRI Sub-Committee on Accreditation provides that national institutions should undertake rigorous and systematic follow-up action on the recommendations contained in their reports and should make publicly available detailed information on the measures taken or not taken by public authorities in response to the recommendations of the national institution.<sup>48</sup> If there is no provision for the Authority to authorise its own reports and publicly report the measures taken or not taken to improve the situation, the public may potentially not be aware of whether an issue raised in the initial inspection report remains a concern. This may have implications for the public's trust in AGS and their trust in the ability of the Authority to be an effective oversight mechanism.

**14. The Commission recommends that section 150 be amended to provide that the Policing and Community Safety Authority may, of its own volition or at the request of the Minister, monitor and assess the measures taken by An Garda Síochána in relation to recommendations in the Authority's inspection report and for the Authority to submit a report to the Minister on the basis of their assessment of the measures taken or not taken.**

**15. The Commission recommends that section 150 be revised to provide that the Policing and Community Safety Authority shall, after submitting the report to the Minister, publish a report under this section in a manner it considers appropriate.**

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<sup>47</sup> See language in section 148(3) which provides that the Authority shall ensure that a report of an inspection undertaken at the Authority's own initiative is published on a website maintained by or on behalf of the Authority or in such other manner as the Authority considers appropriate after submission to the Minister.

<sup>48</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 17.

## Public Sector Equality and Human Rights Duty

We are concerned about the potential watering down of the Garda Commissioner's statutory obligations under section 42 of the *Irish Human Rights and Equality Act 2014*. We note that Head 25 of the General Scheme of this Bill had provided that one of the functions of the Garda Commissioner is fulfilling the obligation on AGS under section 42. This provision has been removed from section 33 of the Bill. Instead, section 33(2)(c) provides that the Garda Commissioner '*shall seek to ensure*' their functions are carried out with '*due regard to*' the obligations of AGS under section 42. We note the mandatory nature of the Public Sector Equality and Human Rights Duty under section 42 and the requirement that a public body *shall* [emphasis added], in the performance of its functions, have regard to this duty.<sup>49</sup> The phrase 'seek to ensure' dilutes the requirement of 'due regard' as the Garda Commissioner does not have to ensure there is due regard for the Public Sector Equality and Human Rights Duty rather they simply have to seek to ensure there is due regard. This appears to equate to 'using one's best endeavours' and seems insufficient to comply with the mandatory statutory obligation set forth in section 42. We are of the view that section 33 should be revised in line with the text of section 42 to provide that the Garda Commissioner shall have regard to the mandatory obligations of AGS under Public Sector Equality and Human Rights Duty in performing their functions. The implementation of the Public Sector Equality and Human Rights Duty can play a positive role in mainstreaming human rights and equality standards in the policies, procedures and practices of AGS.<sup>50</sup> Therefore, we are of the view that any provision which seeks to restrict or limit the application of the legal obligations under the Public Sector Equality and Human Rights Duty should not be included within this legislation.

The requirement to have 'due regard to' also applies to the policing principles, the policing priorities, the security priorities, the strategic plan, and the annual service plan. We note

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<sup>49</sup> Section 42(1) provides: "A public body shall, in the performance of its functions, have regard to the need to— (a) eliminate discrimination, (b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and (c) protect the human rights of its members, staff and the persons to whom it provides services."

<sup>50</sup> See our guidance on implementing the Public Sector Equality and Human Rights Duty; IHREC, [Implementing the Public Sector Equality and Human Rights Duty](#) (2019).

that under Head 25(3) of the General Scheme of the Bill, the Garda Commissioner was required to seek to ensure their functions were carried out ‘in accordance with’ these matters. We are concerned about the potential dilution of the importance of these matters in the functions of the Garda Commissioner in the legislation.

**16. The Commission recommends that section 33(2) be amended to provide that the Garda Commissioner shall have regard to the Public Sector Equality and Human Rights Duty and should act in accordance with the other matters under that subsection, in carrying out their functions.**

We are of the view that the obligations of the Public Sector Equality and Human Rights Duty should be reflected throughout the legislation when referring to the functions and activities of the bodies under this legislation. Section 63 requires the Garda Commissioner to prepare, for submission to the Minister, every three years a strategic plan for AGS. Section 42(2)(a) of the IHREC Act 2014 requires public bodies to set out in a manner that is accessible to the public in its strategic plan an assessment of the human rights and equality issues it believes to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues. We note that Head 51(3)(a)(iv) of the General Scheme of the Bill had provided that a strategic plan shall specify “in accordance with section 42 of the Irish Human Rights and Equality Commission Act 2014 an assessment of the human rights and equality issues An Garda Síochána believes to be relevant to its functions and the policies, plans and actions in place or proposed to be put in place to address those issues”. However, this provision has been removed from section 63 of the Bill. This is concerning as the Public Sector Equality and Human Rights Duty is an ongoing obligation on public sector bodies, which must be incorporated as part of AGS’s overall strategic planning cycle.<sup>51</sup>

Section 70 requires the Garda Commissioner to prepare and submit an annual report on the performance of AGS to the Minister. Section 42(2)(b) of the IHREC Act 2014 requires public bodies to include in their annual reports developments and achievements in policies, plans and actions in place or proposed to be put in place to address human rights and equality

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<sup>51</sup> IHREC, [Implementing the Public Sector Equality and Human Rights Duty](#) (2019) p. 2.

issues relevant to the functions and purpose of the body. We note that Head 64(3)(g) of the General Scheme of the Bill had provided that an annual report shall include “in accordance with section 42 of the Irish Human Rights and Equality Commission Act 2014 the developments and achievements in relation to its policies, plans and actions to address the human rights and equality issues it believes to be relevant to the functions and purpose of the body”. However, this provision has been removed from section 70 of the Bill. This is concerning as the IHREC Act 2014 requires public bodies to report on developments and achievements in its annual report.<sup>52</sup>

There are a number of other provisions within the legislation which require actors and bodies to prepare documents and reports to send to the Minister or to the Taoiseach. Section 65 requires the Garda Commissioner to prepare an annual service plan for AGS, to be submitted to the Minister for approval. Under section 71, the Board shall submit a governance framework to the Minister as soon as practicable, following its establishment. Under section 135, the Authority shall submit a governance framework document to the Minister as soon as practicable, following its establishment. Section 136 requires the Authority to prepare a strategy statement every three years, to be submitted to the Minister. Section 137 requires the Authority to submit an annual report to the Minister. Section 179 requires the Police Ombudsman to submit a governance framework document to the Minister as soon as practicable, following its coming into operation. Section 180 requires the Police Ombudsman to submit a strategy statement to the Minister every three years. Section 181 requires the Police Ombudsman to submit an annual report to the Minister. Section 241 requires the Independent Examiner to submit an annual report to the Taoiseach. We consider that it is important that the Public Sector Equality and Human Rights Duty obligations of these actors and bodies is reflected in the preparation of these materials.

**17. The Commission recommends that section 63 be amended to provide that a strategic plan shall, in accordance with the Public Sector Equality and Human Rights Duty, set out an assessment of the human rights and equality issues An**

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<sup>52</sup> IHREC, [Implementing the Public Sector Equality and Human Rights Duty](#) (2019) p. 4.

Garda Síochána believes to be relevant to the functions and purpose of An Garda Síochána and the policies, plans and actions in place or proposed to be put in place to address those issues.

18. The Commission recommends that section 70 be amended to provide that an annual report shall, in accordance with the Public Sector Equality and Human Rights Duty, include a report regarding the developments and achievements in relation to An Garda Síochána's policies, plans and actions to address the human rights and equality issues the Garda Commissioner believes to be relevant to the functions and purpose of An Garda Síochána.
19. The Commission recommends that the Garda Commissioner be required to have regard to the Public Sector Equality and Human Rights Duty obligations of An Garda Síochána in creating the annual service plan.
20. The Commission recommends that the Board of An Garda Síochána be required to have regard to its Public Sector Equality and Human Rights Duty obligations in creating the governance framework.
21. The Commission recommends that the Policing and Community Safety Authority be required to have regard to its Public Sector Equality and Human Rights Duty obligations in creating the strategy statement, governance framework and annual report.
22. The Commission recommends that the Police Ombudsman be required to have regard to its Public Sector Equality and Human Rights Duty obligations in creating the strategy statement, governance framework and annual report.
23. The Commission recommends that the Independent Examiner of Security Legislation be required to have regard to their Public Sector Equality and Human Rights Duty obligations in creating their annual report.

### Collection and reporting of disaggregated data

UNODC have noted that a key element of effective police accountability is reliable statistics on police performance.<sup>53</sup> Section 77 sets out that the Garda Commissioner shall ensure that

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<sup>53</sup> United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) p. v.

statistical information regarding crime and criminal proceedings is compiled and stored. It must be made available to the Minister and the Central Statistics Office at the times and manner that the Minister may require. There is no requirement for this statistical information to include the collection of disaggregated equality data.<sup>54</sup> There is no requirement for the collection of data on specific issues, such as racial profiling, hate crime, safeguards against torture, or complaints. We note that there is no provision regarding the improvement of record keeping in AGS and, although there is reference to the Central Statistics Office, there is no requirement for this statistical data to be made public.

Section 122(2)(l) requires the Authority to keep itself ‘generally informed’ of trends and patterns in crime – and statistics in relation thereto, the use of force by AGS – and statistics in relation thereto, and complaints made against members of AGS. We note that the Commission on the Future of Policing in Ireland recommended in its report that the new Authority have the power to “influence data quality and integrity” in AGS.<sup>55</sup>

The publication of data on complaints is an essential element of the oversight of policing services and the complaints body itself. We note that concerns have been raised about the ability of the Garda Síochána Ombudsman Commission to effectively address and investigate complaints of racial profiling by Garda members.<sup>56</sup> Therefore, the collection and publication of data on complaints can provide transparency and accountability with regard to the Police Ombudsman’s powers and investigations. UNODC have noted that complaints data can be used “to identify underlying problems and causes” and “to identify the operational areas where the abuse of police powers is most likely to occur” in order for the oversight body to recommend systemic changes.<sup>57</sup> The Commissioner for Human Rights of the Council of Europe has noted the importance of the collection and publication of data on complaints:

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<sup>54</sup> See guidance from the European Union on equality data: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/equality-data-collection\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/equality-data-collection_en).

<sup>55</sup> Commission on the Future of Policing in Ireland, [The Future of Policing in Ireland](#) (September 2018) p. 46.

<sup>56</sup> Irish Network against Racism, [Alternative Report on Racial Discrimination in Ireland](#) (2019) pp. 23–24.

<sup>57</sup> United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) pp. 43, 55, 69–70.

“Statistical and empirical research and analysis of complaints is of fundamental importance to democratic and accountable policing. An [independent police complaints body] will be ideally placed at points where police operations and community experiences intersect and, therefore, able to provide the police and public with informed advice on how to improve the effectiveness of policing services and police community relations.”<sup>58</sup>

While the Garda Síochána Ombudsman Commission currently publishes statistics on complaints, we are of the view that data on complaints should be disaggregated on equality grounds. We are of the view that the legislation should explicitly set out that one of the responsibilities of the Police Ombudsman is to collect and report data, including disaggregated equality data, about complaints received and resolved.

We note that in the context of a changing and more diverse Ireland, the collection of disaggregated equality data including ethnicity and regular reporting for statistical purposes can help demonstrate fairness, non-discrimination and equality of treatment across all sectors of society, and better facilitate the design of evidence based policies and initiatives to address discrimination and inequalities. We note the focus on improved disaggregated data in the National Statistics Board’s Strategic Priorities for Official Statistics 2021-2026<sup>59</sup> and the current development of a national Equality Data Strategy, as well as EU Guidance on equality data<sup>60</sup>.

To support the collection and reporting of data requirements of the bodies under this legislation, we note our previous recommendation to the State that it provide a ring-fenced budget to public sector bodies to ensure they have the necessary resources to collect accessible and usable disaggregated equality data.<sup>61</sup> We have called for this equality data to

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<sup>58</sup> [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 15.

<sup>59</sup> [NSB Statement of Strategy 2021-2026.pdf](#).

<sup>60</sup> [Equality data collection | European Commission \(europa.eu\)](#).

<sup>61</sup> IHREC, [Ireland and the International Covenant on Civil and Political Rights: Submission to the Human Rights Committee on Ireland’s fifth periodic report](#) (2022) p. 12.

be published in an accessible format which can be readily utilised by the public, civil society organisations and independent researchers.<sup>62</sup>

- 24. The Commission recommends that provision be made for the improvement of the record keeping within An Garda Síochána, the collection of disaggregated equality data which should be included in the information made available to the Central Statistics Office, and the publication of this information in an accessible and timely manner.**
- 25. The Commission recommends that the Policing and Community Safety Authority be given power to influence the quality, integrity and accessibility of such disaggregated equality data collection.**
- 26. The Commission recommends that the Police Ombudsman be given the power to collect and publicly report data, including disaggregated equality data, on complaints.**
- 27. The Commission recommends that the State provide a ring-fenced budget to the bodies, named under this legislation, to ensure they have the necessary resources to collect accessible and usable disaggregated equality data.**

## Preparation and submission of certain materials

### Strategy statement (sections 136 and 180)

Section 180 requires the Police Ombudsman to submit a strategy statement to the Minister every three years. In advance of doing this, the Police Ombudsman is required to publish a draft of the strategy statement and allow ‘persons’ 30 days within which to make representations in writing in relation to same.<sup>63</sup> No detail is provided in the section in relation to whether the draft strategy statement is to be published publicly or privately, or to whom it is to be published, and there is no definition of the word ‘persons’ as utilised in

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<sup>62</sup> IHREC, [Ireland and the International Covenant on Civil and Political Rights: Submission to the Human Rights Committee on Ireland’s fifth periodic report](#) (2022) p. 12.

<sup>63</sup> Section 180(4).

the subsection. We note there is similar provision under section 136 in relation to the Authority.

**28. The Commission recommends that sections 136 and 180 be amended to clarify how the draft strategy is published and who may make representations to the Policing and Community Safety Authority or Police Ombudsman.**

## Preliminary and general (Part 1)

### Definitions of ‘at risk’ and ‘vulnerable’ (section 2)

Section 2 defines ‘at risk’ as:

“[I]n relation to an individual, means an individual (including an individual aged under the age of 18 years) who is at risk, at a particular point in time, of harm and who requires, whether due to his or her personal characteristics or personal circumstances, assistance in protecting himself or herself from such harm at that time”.

Section 2 defines ‘vulnerable’ as:

“[V]ulnerable”, in relation to an individual, means an individual –

(a) who is under the age of 18 years, or

(b) whose capacity to guard himself or herself against harm by another individual is significantly impaired through—

(i) a physical disability, illness or injury,

(ii) a disorder of the mind, whether as a result of mental illness or dementia,  
or

(iii) an intellectual disability.”

We welcome that the legislation sets out that one of the specific objectives of AGS in carrying out its functions is “preventing harm to individuals, in particular individuals, who

are vulnerable or at risk”.<sup>64</sup> However, we are concerned with associating vulnerability with age or disability. Disabled or older people are not inherently vulnerable, rather physical barriers and societal attitudes can result in situational vulnerability for disabled or older people. People can find themselves in situations of vulnerability due to “multiple and intersecting forms of discrimination, inequality and structural and societal dynamics that lead to diminished and unequal levels of power and enjoyment of rights.”<sup>65</sup> Rather than using the term ‘vulnerable’ to refer to people or groups, we use the term ‘structurally vulnerable’. We have defined ‘structurally vulnerable’ as:

“[S]omeone who is particularly vulnerable to human rights abuses due to political, economic, social and cultural structures.”<sup>66</sup>

Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency, ‘structural vulnerability’ refers to the political, economic, social and cultural structures which render certain sectors of the population particularly vulnerable to human rights abuses. The definition of ‘at risk’ in legislation is more aligned with this understanding of ‘structural vulnerability’ but still lacks recognition of the structures in society which contribute to a person being ‘at risk’. As one of the specific objectives of AGS in carrying out its functions is “preventing harm to individuals in particular individuals who are vulnerable or at risk”, it is important that members of AGS receive continuous training on the definitions of ‘at risk’ and ‘vulnerable’ and the meaning of structural vulnerability. Provision for training can be addressed in regulations under Part 8.

**29. The Commission recommends that the definitions of ‘at risk’ and ‘vulnerable’ be revised to ensure a recognition that people may be ‘at risk’ and/or ‘vulnerable’ to harm due to political, economic, social and cultural structures.**

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<sup>64</sup> Section 9(1)(f).

<sup>65</sup> See United Nations Office of the High Commissioner for Human Rights, [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#) (2018) p. 6.

<sup>66</sup> IHREC, [Observations and Recommendations on the General Scheme of the Criminal Justice \(Exploitation of Children in the Commission of Offences\) Bill 2020](#) (October 2021) p. 8.

**30. The Commission recommends that the definitions of ‘at risk’ and ‘vulnerable’ be revised to ensure alignment with international standards including the United Nations Convention on the Rights of Persons with Disabilities.**

### Definition of ‘policing services’ (section 2)

‘Policing services’ is defined in section 2 as meaning “does not include security services”. We are concerned that rather than stating what is encompassed in the definition of ‘policing services’, the term is defined by what is not included. This is in contrast to ‘security services’ which is given a detailed definition in section 3. As the definition will impact on the Authority’s role overseeing and assessing AGS’s performance of its functions relating to policing services, we are of the view that it should be clear in the legislation what is meant by ‘policing services’. If it is intended for the definition to include all other policing services and activities other than security services, this should be stated in the legislation to provide clarity.

**31. The Commission recommends that the definition of ‘policing services’ in section 2 be revised to provide clarity on what the definition encompasses.**

### Policing or security services (section 3)

Section 3 defines the functions of AGS that form ‘security services’ for the State. Under subsection (3), where a question or dispute arises as to whether a matter relates to policing or security services, the matter is submitted to the Minister for determination. Under subsection (4), that determination will be final. There is no provision for the Authority or the Independent Examiner to make submissions to the Minister nor is there any right of appeal to the decision. As the Minister’s decision directly impacts the scope of the Authority’s power and oversight, and that the sole avenue for challenging this decision is judicial review, it is recommended that further protections are incorporated into this provision. These safeguards will additionally serve the principles of fair procedures.

**32. The Commission recommends that the Independent Examiner of Security Legislation review questions or disputes arising under section 3, and provide a**

**report to the Minister, which must be considered by the Minister in making their determination.**

## An Garda Síochána (Part 2)

### Prosecution of offences by members of An Garda Síochána (section 10)

Section 10 preserves the power of AGS to institute and conduct prosecutions in courts of summary jurisdiction, in the name of the Director of Public Prosecutions ('DPP'). We note that fair trial rights require trials to be conducted in accordance with the concept of justice and fair procedures. It is submitted that the administration of justice is protected and promoted when criminal trials are prosecuted by those trained and qualified to do so. The dual role given to members of AGS under this provision, of both witness and legal representative of the State, lends an additional weight to the evidence of the prosecuting Gardaí. There is no requirement for AGS to hand over a prosecution to the DPP in situations where a defendant claims that they have been the subject of abuse of power or physical abuse at the hands of AGS. The reinforcement of AGS authority that accompanies this dual role may have the effect of either undermining the principle of impartiality in the Court's decision, or in creating public perception of same.

As noted by the Commission on the Future of Policing in Ireland in its 2018 report, although some Gardaí have become skilful prosecutors through experience, prosecuting Gardaí may not have the same level of training, particularly in the laws of evidence, as a professional legal representative.<sup>67</sup> As such, it is submitted that the use of prosecuting Gardaí in criminal prosecutions places a higher burden on the defendant's legal representative and on the Court to uphold and maintain fair trial rights. The prosecution of cases by legally qualified representatives of the DPP additionally serves as an element of accountability for police conduct. In line with the European Code of Police Ethics, the prosecution should scrutinise the lawfulness of police investigations.<sup>68</sup> This would prevent a situation whereby a

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<sup>67</sup> Commission on the Future of Policing in Ireland, [The Future of Policing in Ireland](#) (September 2018) p. 29.

<sup>68</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, p. 36.

defendant is prosecuted and cross-examined by the Garda that they allege to have breached their human rights.

**33. The Commission recommends that the power of An Garda Síochána to institute and conduct prosecutions in a court of summary jurisdiction be removed from the legislation.**

**Provision of information and documents by the Garda Commissioner (sections 13, 133 and 214)**

Under section 13, the Garda Commissioner shall provide the Board with all such information and other assistance as is necessary to enable it to perform its functions. This provision does not set out whether the Garda Commissioner provides this information and assistance of their own volition, or at the request of the Board. It is not clear as to whether they must also provide documentation to the Board. The definition of information in section 2 as “any representation of fact, whether in words or otherwise” implicitly encompasses documentation; however, the terminology of section 13 can be distinguished from that of section 35(2) which does place an obligation on the Garda Commissioner to provide documentation.<sup>69</sup> There is no temporal limit placed on the Garda Commissioner to provide information to the Board; for example, ‘without delay’. Under section 13(3) the written protocols on the operation of section 13 must be agreed within three months. However, there is no provision for the procedure to be taken if an agreement cannot be reached within the statutory timeframe.

Section 13(2) enables the Garda Commissioner to exclude information from the Board where they are of the subjective opinion it could be prejudicial to the interests of the security of the State. The Independent Examiner should have the authority to review such a decision to avoid any potential for abuse.

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<sup>69</sup> Under section 35(2) the Garda Commissioner has a duty to account to Government and provide, at the request of the Secretary General of the Department of Justice, any document in the power or control of An Garda Síochána, including material in the form of Garda records, statements made by members of Garda personnel and by other persons and reports.

- 34. The Commission recommends that section 13 be revised to clarify on what basis the Garda Commissioner must provide information to the Board of An Garda Síochána, the time frame in which it must be done, and whether it includes documentation to be furnished.**
- 35. The Commission recommends that section 13(2) be amended to provide for the review by the Independent Examiner for Security Legislation of any decision of the Garda Commissioner to exclude information on state security grounds.**
- 36. The Commission recommends that provision be made for the situation in which an agreement cannot be made within three months under section 13(3).**

Section 133 requires the Garda Commissioner to report to the Authority regarding policing services in order to allow the Authority to perform its functions. The Garda Commissioner must keep the Authority fully informed of matters relevant to its authority, to provide documents to the Authority on request, and to submit reports to the Authority as required. Section 214 provides that the Garda Commissioner shall, as soon as practicable, provide the Police Ombudsman with such information and documents as the Police Ombudsman may request for the purpose of, or in connection with, the exercise of any of the functions of the Police Ombudsman. We note that provision may be required to strengthen the capabilities of AGS to provide information to accountability mechanisms. It is imperative that the functions of the Authority and Police Ombudsman are not restricted by delays in the provision of information or documentation.

- 37. The Commission recommends that provision be made to ensure that the Garda Commissioner has the capacity to meet the requirements of sections 133 and 214, ensuring that the Policing and Community Safety Authority and the Police Ombudsman are not delayed in carrying out their respective functions.**

### **Suspension and removal of Garda Commissioner and Deputy Garda Commissioner (sections 30 and 31)**

Sections 30 and 31 set out the procedure by which the Garda Commissioner and Deputy Garda Commissioner can be suspended and removed. Under section 30(2), the Board may

recommend suspension to the Minister on the basis of allegations that the Commissioner or Deputy Commissioner has committed an offence or behaved in a manner that would constitute serious misconduct, or in circumstances where the Board is of the opinion that the suspension of the person from duty is in the public interest. The phrase 'serious misconduct' is not defined in the Bill. Under section 31(2), the Board may recommend to the Government the removal of the Commissioner or the Deputy Commissioner. There is no provision for the Authority or the Police Ombudsman to make a recommendation to the Minister. We note that these provisions may have the effect of undermining the effectiveness of the Authority and the Police Ombudsman. For instance, if Authority inspections highlight concerning practices in the administration and operation of policing services there would be no provision for the Authority to make a recommendation to suspend or remove the Garda Commissioner or Deputy Garda Commissioner. Further, if Police Ombudsman investigations revealed systematic wrongdoing within AGS, the Police Ombudsman would not have the power to make a recommendation of suspension or removal to the Minister/Government.

**38. The Commission recommends the phrase 'serious misconduct' be defined in the legislation.**

**39. The Commission recommends that the power to make a recommendation under sections 30 and 31 be extended to the Policing and Community Safety Authority and the Police Ombudsman.**

#### [Directives from Minister \(section 37\)](#)

Section 37(2) provides for the Authority to recommend that the Minister issue a directive concerning a specified matter relating to policing services. There is no provision for the Police Ombudsman to make a similar recommendation. The Police Ombudsman may note issues or trends arising from complaints received, and therefore be in an appropriate position to make a recommendation to the Minister.

**40. The Commission recommends that section 37(2) be broadened to allow the Police Ombudsman to make recommendations to the Minister.**

## Code of ethics for members of Garda personnel (section 78)

Section 78 provides for the Authority to issue a code of ethics for Garda members. Section 78(3) provides that the Authority, in preparing the code of ethics, shall have regard to the policing principles, policing standards from other EU states, and any relevant recommendations of the Council of Europe. There is no explicit reference to human rights and equality standards or the Public Sector Equality and Human Rights Duty. There is also no requirement for the code of ethics to include reference to human rights and equality standards or the Public Sector Equality and Human Rights Duty under section 78(1), which sets out the matters which the Authority should include in the code of ethics. This omission would appear to be inconsistent with the intention of the Bill<sup>70</sup> and the recognition by the Commission on the Future of Policing in Ireland that the first principle of policing is that “human rights are the foundation and purpose of policing”.<sup>71</sup>

- 41. The Commission recommends that section 78(1) be amended to provide that the Policing and Community Safety Authority shall issue a code of ethics which includes reference to human rights and equality standards in its text, including the Public Sector Equality and Human Rights Duty.**
- 42. The Commission recommends that section 78(3) be amended to provide that the Policing and Community Safety Authority shall have regard to human rights and equality standards, including the Public Sector Equality and Human Rights Duty, in preparing the code of ethics.**

## Special inquiries relating to administration, operation, practice or procedure of An Garda Síochána or conduct of members of Garda personnel (sections 82, 84 and 88)

Under section 82, the Minister may order an inquiry into AGS of their own volition, having consulted with the Authority, or on the request of the Authority. There is no similar provision for request by the Police Ombudsman. It is noted that the special inquiry relates to administration, operation, practice or procedure of AGS; however, it may be that the

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<sup>70</sup> Section 9(1)(c) provides that one of the objectives of AGS in carrying out their functions is “protecting and vindicating the human rights of each individual”.

<sup>71</sup> Commission on the Future of Policing in Ireland, [The Future of Policing in Ireland](#) (September 2018) p. ix.

Police Ombudsman receives complaints that show emerging trends in issues within AGS. In such circumstances, a power to make a recommendation may be appropriate.

**43. The Commission recommends that section 82 be expanded to allow for requests by the Police Ombudsman.**

Section 84 provides that the Minister may extend the time frame for the submission of the final report of the inquiry. The Minister shall consult with the ‘appointed person’ conducting the inquiry before extending the time frame for submission.<sup>72</sup> There is no provision for consultation with the Authority on extending the time frame, despite the Authority having a consultative role in the initial decision to establish the inquiry. Consultation with the Authority can be important in ensuring the Minister’s decision to extend the time frame is necessary and proportionate, and the consultation can also provide reassurance to the public in the conduct of the inquiry.

**44. The Commission recommends section 84 be amended to provide that the Minister shall consult with the Authority before extending the time frame for the submission of the final report of the inquiry.**

Section 88(3) provides that Minister “*may* [emphasis added], having consulted with an appointed person, publish all or such part of a final report or an interim report as he or she considers appropriate.” We are of the view that there is no impediment to requiring the Minister to publish the final report and any interim report. As noted above in the discussion on annual and other reports, procedures can be set out in the legislation to address circumstances where the publication of the report or elements of the report are prejudicial to the security of the state or other matters.

**45. The Commission recommends section 88(3) be amended to provide that the Minister shall publish the final report and any interim reports.**

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<sup>72</sup> Section 84(5).

## Community Safety (Part 3)

We welcome the intention to develop and implement a national strategy on community safety, as well as establish local community safety partnerships and area based neighbourhood community safety fora, as it is a recognition of the vital role that communities play in policing and crime prevention. It is also a recognition of best practice in policing, as the European Code of Police Ethics provides that:

“The police shall be organised in a way that promotes good police/public relations and, where appropriate, effective co-operation with other agencies, local communities, non-governmental organisations and other representatives of the public, including ethnic minority groups.”<sup>73</sup>

However, we consider that the provisions relating to community safety should be strengthened. This is required to ensure the participation of structurally vulnerable groups, and to address reports that diverse and minority groups have lower levels of trust in the police and tend to evaluate the police negatively and as biased.<sup>74</sup>

Section 106(4)(b) provides that the Minister shall consult with “such persons or groups representing community interests as he or she considers appropriate” in the preparation or revision of a national strategy for improving community safety. Section 106(5) provides that the Minister shall, prior to submitting the national strategy to Government for approval, invite members of the public and interested parties to make submissions on the national strategy. We welcome the commitment to ensuring public participation in the development of the national strategy; however, it is essential to ensure the participation of persons or groups representing community interests throughout the development and implementation of the strategy, in line with the principle of public participation.<sup>75</sup> The requirement of

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<sup>73</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, at [18].

<sup>74</sup> Following two consultations we organised in March 2021, young participants reported experiencing racial profiling by An Garda Síochána and a question was posed as to whether police officers are adequately trained to deal with ‘inter-racial atmospheres in Ireland.’ See IHREC, [Submission to the United Nations Committee on the Elimination of Racial Discrimination on the follow-up procedure to Ireland’s combined 5th to 9th periodic reports](#) (2022) p. 13.

<sup>75</sup> The principle of participation requires the active and informed participation of individuals in the development, implementation, monitoring and reviewing of legislative, executive and administrative decisions

ensuring effective participation extends beyond the development of the national strategy and includes ensuring affected groups are involved in the decision-making processes involving implementing, monitoring and reviewing this legislation; such as data collection, reporting and monitoring mechanisms. In ensuring the effective participation of individuals and groups in policing and crime prevention, this legislation should be accompanied by a focus on raising public awareness of the new local community safety partnerships and the new area based neighbourhood community safety fora.

**46. The Commission recommends that Part 3 of the Bill be revised to ensure the effective implementation of the principle of the effective participation of affected individuals and groups in the development, implementation, monitoring, evaluation and review of the national strategy for improving community safety.**

Section 114(2)(c)(ii) provides that the Minister shall make regulations concerning the operation of local community safety partnerships including the membership of safety partnerships, specifically the requirements for gender balance and diversity in the membership. We note that there is no definition of diversity within the Bill. To ensure meaningful engagement with the concept of diversity, it is suggested that it be explicitly defined and that structurally vulnerable groups are named within the legislation. The concept of diversity should at a minimum include: age, civil status, disability, family status, gender, ethnicity, including membership of the Traveller community, religious belief, sexual orientation and socio-economic status.<sup>76</sup>

**47. The Commission recommends that Section 114(2)(c)(ii) be revised to the define the term diversity, and at a minimum, make reference to the following equality grounds: age, civil status, disability, family status, gender, ethnicity, including membership of the Traveller community, religious belief, sexual orientation and socio-economic status.**

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that concern them; see United Nations Office of the High Commissioner for Human Rights, [Guidelines for States on the effective implementation of the right to participate in public affairs](#) (2018).

<sup>76</sup> See *Equal Status Acts 2000–2018* and the *Employment Equality Acts 1998–2018*.

## Policing and Community Safety Authority (Part 4)

### Appointment of inspectors of policing services (section 141)

Section 141 sets out the Authority's appointment process for inspectors of policing services. Under subsection 2(a) an applicant may be deemed suitable for the role by virtue of their service as a police officer in another state. Although there is some arm's length in this provision, as the potential appointees would be foreign police officers and/or foreign retired police officers, there remains an issue with impartiality.<sup>77</sup> Inspections performed by such persons may not be perceived as truly independent, as it would result in police officers being inspected by former police officers, albeit from another jurisdiction.

However, we can see some merit in retaining the provisions of section 141(2)(a) as it would allow the Authority to appoint individuals with practical, first-hand knowledge of policing. They may be a valuable source of knowledge and experience in conducting inspections. Further, there is no requirement that senior police officers from another State will be appointed as inspectors. We note the discretion in the legislation for the Authority to appoint individuals who have obtained relevant experience, qualifications, training or expertise appropriate to the position.<sup>78</sup> To address concerns about the potential loss of independence of the Authority and in recognition of the benefit of utilising the expertise and experience of non-police officer candidates, the legislation could include a condition that only a certain number of appointees as inspectors of policing services can be drawn from the ranks of senior police officers from another state. If the provision is retained, the provision should be clarified to specify what is meant by 'senior' officer; does it mean having attained a certain rank in the police service and/or a minimum number of years of service.

**48. The Commission recommends that section 141(2)(a) be amended to define 'a senior officer'. The Commission further recommends that section 141(2)(a) be amended to include a condition that only a certain number of appointees as**

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<sup>77</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, p. 69.

<sup>78</sup> Section 141(2)(b).

**inspectors of policing services can be drawn from the ranks of senior officers from the police services of other States.**

### Inspections or joint inspections (sections 142–144)

Provision is made for the Authority to conduct inspections either of its own volition (section 142) and/or jointly (144) with a prescribed inspection body. UNODC have observed that an important element of a police oversight mechanism is “the practice of making regular visits to places of police detention and places where police interrogate suspects.”<sup>79</sup> The GANHRI Sub-Committee on Accreditation have stated that the mandate of a national institution should “authorise unannounced and free access to inspect and examine any public premises, documents, equipment and assets without prior written notice”.<sup>80</sup> Any restriction on inspections for national security reasons should not “be unreasonably or arbitrarily applied and should be exercised under due process.”<sup>81</sup>

While the intention of these provisions is to provide for unannounced inspections of any Garda station or other premises where members of Garda personnel are assigned in connection with the provision of policing services, this is not clear from section 142 or 144.<sup>82</sup> We note that it may be intended to provide for unannounced visits under section 146(1)(a) which provides that the inspector of policing services may “enter a relevant location at any time”. However, we are of the view that provision for unannounced visits should be strengthened. This would correspond with section 122(5) which provides that the “Authority shall have all such powers as are necessary or expedient for the performance of its functions.” The power to conduct unannounced visits is a cornerstone of that, so there should be no unjustified interference with this power. However, the legislation provides that the Authority is required to provide the Garda Commissioner with a notice in writing of the inspection including information on the nature and particulars of the matters to be

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<sup>79</sup> United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) p. 25.

<sup>80</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 7.

<sup>81</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 43.

<sup>82</sup> Department of Justice, [General Scheme of the Policing, Security and Community Safety Bill Explanatory Memorandum](#) (27 April 2021) p. 16.

inspected, and the scope and terms of the inspection.<sup>83</sup> There is no provision requiring the Garda Commissioner to keep the notice of the inspection confidential or to put in place procedures to ensure that integrity of the inspection is not compromised.<sup>84</sup> With the mandatory requirement that the Garda Commissioner be notified, there is obvious potential for what was intended to be unannounced inspections to become announced.

It should be explicit in the legislation that the inspector of policing services can conduct unannounced inspection or joint inspection visits, without the requirement to inform the Garda Commissioner of the location or time of the visit. If notice is to be given to the Garda Commissioner, it should be as soon as practicable after an inspection has taken place. This would ensure that while there is no advance notification of an inspection, the Garda Commissioner would still be informed of the inspection.

We note that this legislation is being progressed at the same time as the *Inspection of Places of Detention Bill*,<sup>85</sup> which will ratify the United Nations Optional Protocol to the Convention Against Torture ('OPCAT'). That Bill provides for the designation of National Preventive Mechanisms ('NPMs') to inspect places of detention, and creates the role of the Chief Inspector of Places of Detention ('Chief Inspector') who will be the NPM for places of detention within the criminal justice sector including detention in Garda stations. We note that the Department of Justice has stated that the Authority will not be the NPM for Garda custody settings as this function will be carried out by the Chief Inspector.<sup>86</sup> Nonetheless, the inspection functions of the Authority will overlap with the obligations of the Chief Inspector although they differ in power and scope. Therefore, there needs to be a recognition in this legislation of how the Authority's inspection functions align and/or relate to the powers of a NPM and the requirements of OPCAT.

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<sup>83</sup> Section 142(5).

<sup>84</sup> Similar to the requirement under section 207(3) where the Police Ombudsman's consultation with the Garda Commissioner on a search of Garda premises shall be confidential and the Garda Commissioner is obliged to put in place procedures to ensure such consultation does not impair the integrity of investigations.

<sup>85</sup> See [General Scheme of the \*Inspection of Places of Detention Bill\*](#).

<sup>86</sup> Houses of Oireachtas Joint Committee on Justice, [Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill](#) (June 2022) p. 33.

For example, it is not clear from the legislation whether the Authority will be able to conduct joint inspections with a NPM such as the Chief Inspector. Section 144 provides that the Authority may conduct joint inspections with a prescribed inspection body and/or bodies. An inspection body is defined in section 143(3) as “a body established by or under an enactment whose functions include the conduct of inspections, examinations or investigations”.<sup>87</sup> Therefore, it would seem that the Chief Inspector or another NPM may be prescribed by the Minister as an inspection body, under this legislation, as their functions align with the definition of an inspection body. However, we are of the view that it should be clear in the legislation that the Authority can conduct a joint inspection with a NPM designated under the *Inspection of Places of Detention Bill*. This may require an amendment to the legislation if it is enacted before the *Inspection of Places of Detention Bill*.

If the Authority conducts a joint inspection with a NPM, the inspection must comply with the requirements of OPCAT. We note that section 119 provides that the definition of inspection includes a joint inspection. Therefore, the requirement of the Authority to give the Garda Commissioner a notice in writing of the inspection under section 142(5) arguably applies to sole and joint inspections conducted by the Authority. There should be no requirement for the Authority to inform the Garda Commissioner of a joint inspection undertaken with a NPM as this may impinge on the functional independence of a NPM.

**49. The Commission recommends that sections 142 and 144 be revised to explicitly provide for unannounced inspection and joint inspection visits.**

**50. The Commission recommends that section 143 be revised to explicitly set out that the Policing and Community Safety Authority and a National Preventive Mechanism designated under the *Inspection of Places of Detention Bill* can carry out a joint inspection.**

### [Powers of the inspector of policing services \(section 146\)](#)

Section 146(1)(b) requires any member of Garda personnel to provide any information or produce any documents that the inspector of policing services “may reasonably require”.

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<sup>87</sup> Section 143(3).

The only basis upon which a member of Garda personal may refuse to provide any information or documentation requested is on the grounds that it relates to the security of the State or it would endanger the life or safety of any person who has given confidential information.<sup>88</sup> However, we are concerned that issues may arise in practice where a member of Garda personnel may fail, refuse or neglect to provide information or documents on the basis it is an unreasonable request due it being too onerous, oppressive, or the documentation being too voluminous. There is no provision in the legislation as to who determines what is reasonable for the inspector to require. We are of the view that it should be at the sole discretion of the inspector of policing services who is making the request to determine what information or documents they reasonably require.

**51. The Commission recommends that section 146(1)(b) be amended to provide that the inspector of policing services has sole discretion in determining what information or documentation they may reasonably require for the purposes of the inspection.**

#### [Memorandum of understanding concerning inspections \(section 147\)](#)

Under section 147, the Garda Commissioner and the Authority will agree a memorandum of understanding concerning inspections within 3 months. There is no provision for the situation wherein no agreement can be reached. We note that it is not clear in the legislation on the precise status of the memorandum of understanding; is it binding, non-binding or an example of best practice. We are of the view that there should be clarity in the legislation as to the status of the memorandum of understanding and the consequences of any breach of procedures in the memorandum of understanding.

We are of the view that the development of the memorandum of understanding should have regard to the provisions of OPCAT as there is the potential within the legislation for the Authority to undertake joint inspections with a NPM. We consider that the provisions of the memorandum of understanding should not impinge on the powers given to the Authority and the inspector of policing services under the legislation. The powers of the Authority and

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<sup>88</sup> Section 146(2).

the inspector of policing services should be clearly set out in the legislation. The memorandum of understanding should set out further information on the circumstances in which the powers can be exercised and the procedures to be followed.

**52. The Commission recommends that the legislation should clearly set out the precise status of the memorandum of understanding.**

**53. The Commission recommends that the legislation should clearly set out the precise scope of the Policing and Community Safety Authority's powers to conduct inspections.**

**54. The Commission recommends provision be made for the situation in which an agreement cannot be reached on the memorandum of understanding.**

**55. The Commission recommends that the memorandum of understanding should have regard to the Optional Protocol to the Convention against Torture.**

#### [Reports of inspections undertaken at request of Minister \(section 149\)](#)

Section 149 provides that the Minister may request the Authority to carry out an inspection and submit an inspection report to the Minister and the Garda Commissioner. Under subsection (7) the Garda Commissioner shall, at the request of the Minister, submit a written response to the Minister to the report under this section, setting out their consideration of the report and what actions (if any) they propose to take in relation to the report. There is no requirement for the Garda Commissioner to submit this written response to the Authority; notwithstanding that the Authority conducted the inspection and set out recommendations for the Garda Commissioner in the inspection report. This can be contrasted with section 148(5) which provides that the Garda Commissioner shall, at the request of the Authority, submit a written response to the Authority's report undertaken at the Authority's own initiative, setting out their consideration of the report and what actions (if any) they propose to take in relation to the report. However, section 149(8)(a) does provide that the Minister '*may*' [emphasis added], where they consider it appropriate, provide a copy of the response received under subsection (7) to the Authority. This level of executive discretion is concerning as it directly impacts on the functions of the Authority to oversee the performance by An Garda Síochána of its function relating to policing services.

We note that one of the functions of the Authority is “to monitor and assess the implementation by An Garda Síochána of such recommendations arising from inspections as the Authority considers appropriate or as may be requested by the Minister”.<sup>89</sup> This function would be severely curtailed if there is no provision for the Garda Commissioner to send the written response to the Authority.

**56. The Commission recommends that section 149(8)(a) be deleted from the legislation.**

**57. The Commission recommends that section 149(7) be amended to provide that the Garda Commissioner shall submit their written response to the Minister and the Policing and Community Safety Authority.**

### Independent human rights adviser

We are of the view that external expertise and strategic advice are of fundamental importance to enhance human rights compliance in AGS. This allows for an independent perspective and protects the interests of the community, while harnessing external expertise in the field of human rights. We reiterate our recommendation that an independent human rights adviser should be appointed to the Authority.<sup>90</sup> This role would support the oversight of the implementation of human rights and equality standards in policing. The role would play an important element in securing and building public confidence in, and cooperation with, AGS.

**58. The Commission recommends that the legislation be amended to provide for an independent human rights adviser to be appointed by the Policing and Community Safety Authority to ensure oversight of the implementation of human rights and equality standards in policing.**

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<sup>89</sup> Section 122(2)(f).

<sup>90</sup> As previously submitted by IHREC in [Submission to the Commission on the Future of Policing](#) (February 2018); IHREC, [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020) p. 45; and by the Commission on the Future of Policing in Ireland, [The Future of Policing in Ireland](#) (September 2018) p. 12.

## Police Ombudsman / Complaints, investigations and other matters (Parts 5 and 6)

The European Code of Police Ethics states that the police shall be accountable to the State, the citizens, and their representatives, and that they shall be subject to efficient external control.<sup>91</sup> The creation of an effective and impartial complaints mechanism has been recognised as a core component of democratic and accountable policing in international law.<sup>92</sup> An independent and effective complaints mechanism is important for fostering the public's trust and confidence in the police, and will also "serve as a fundamental protection against ill-treatment and misconduct."<sup>93</sup> The Paris Principles recognise that a body must be able to hear and investigate complaints falling within its competence, and to inform the complainant of their rights and any remedies available to them.<sup>94</sup>

The Commissioner for Human Rights of the Council of Europe identified five principles for the effective investigation of complaints against the police, which engage Articles 2 and 3 ECHR:<sup>95</sup>

### i. Independence;<sup>96</sup>

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<sup>91</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, at [59].

<sup>92</sup> Referring to Article 8 of the UN General Assembly, [Code of Conduct for Law Enforcement Officials](#) (17 December 1979), and Paragraph 61 of [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, in Graham Smith, 'Every complaint matters: Human Rights Commissioner's opinion concerning independent and effective determination of complaints against the police' (2010) *International Journal of Law, Crime and Justice* 38(2) pp. 59-74.

<sup>93</sup> United Nations Human Rights Council, [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston – Addendum: Study on police oversight mechanisms](#), A/HRC/14/24/Add.8 (28 May 2010) para. 29. See also United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) p. 33.

<sup>94</sup> General Assembly resolution 48/134, [Principles relating to the Status of National Institutions](#) (The Paris Principles) (20 December 1993). See also GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 49.

<sup>95</sup> [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 3. The ECtHR has held that these procedural obligations are interrelated: *Tunç and another v Turkey* App. No. 24014/05 (ECtHR Grand Chamber, 14 April 2015) at [224]–[225].

<sup>96</sup> For an investigation to be effective, the ECtHR has held that "it may generally be regarded as necessary" for those responsible for the investigation "to be independent from those implicated in the events." The Court identified that this required both hierarchical and institutional independence, as well as practical independence: *Ramsahai and others v Netherlands* App. No. 52391/99 (ECtHR Grand Chamber, 15 May 2007)

- ii. Adequacy;<sup>97</sup>
- iii. Promptness;<sup>98</sup>
- iv. Public scrutiny;<sup>99</sup>
- v. Victim involvement.<sup>100</sup>

While the Commissioner noted that these principles must be adhered to for the investigation of a death or serious injury as a consequence of police practice, they provide a useful framework for the determination of all complaints, as best practice is the operation of an independent police complaints body, working in partnership with the police.<sup>101</sup> The

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at [324]. The independence of the investigation does not have to be absolute. The ECtHR held that Article 2 did not require the investigating body to be absolutely independent, but they must be “sufficiently independent of the persons and structures” under investigation. The adequacy of the degree of this independence is to be assessed in light of the specific circumstances of the case. Where independence is in dispute, the extent to which it has compromised the effectiveness of the investigation must be examined: *Tunç and another v Turkey* App. No. 24014/05 (ECtHR Grand Chamber, 14 April 2015) at [223]–[225].

<sup>97</sup> An investigation should be capable of gathering evidence to determine whether the behaviour complained of was unlawful; and it must be capable of leading to the identification and punishment of those responsible: [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 3. The ECtHR have held that this obligation is not one of “result”, but one of “means”, where the authorities have taken all reasonable steps available to them to secure the evidence concerning the incident: *Ramsahai and others v Netherlands* App. No. 52391/99 (ECtHR Grand Chamber, 15 May 2007) at [323].

<sup>98</sup> A fair and effective complaint investigation must be carried out promptly and expeditiously: *Ognyanova v Bulgaria* App. No. 46317/99 (ECtHR, 23 February 2006) at [114], [116]. Delay may have the effect of losing crucial evidence and preventing the completion of an adequate investigation; as well as resulting in the perception of impunity for those under investigation: *Aydin v Turkey* App. No. 57/1996/676/866 (ECtHR, 25 September 1997) at [108], *Bati v Turkey* App Nos. 33097/96 and 57834/00 (ECtHR, 3 June 2004) at [136], [147].

<sup>99</sup> The investigation must be transparent and should not be carried out in secret; however, the confidentiality and sensitive nature of the complaint needs to be taken into consideration, and may affect the degree of public scrutiny applicable in each case: *Isayeva v Russia* App. Nos. 5794/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005) at [213]. There should be a presumption that reports and documents will be disclosed to the complainant; which in addition to serving transparency provides the complainant with an opportunity to challenge the way in which their complaint was handled: [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 13, *Oğur v. Turkey* App. No. 21594/93 (ECtHR, 20 May 1999) at [92].

<sup>100</sup> The complainant should be consulted and kept informed of developments throughout the determination of their complaint: *Edwards v UK* App. No. 46477/99 (ECtHR, 14 March 2002) at [84]. Victim support and counselling should be made available to complainants throughout the course of their complaint: [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 14. In an Article 2 ECHR – right to life investigation, the family of the deceased person must be involved in the investigation, to the extent necessary to protect their interests: *Edwards v UK* App. No. 46477/99 (ECtHR, 14 March 2002) at [84]; *McCann and Others v. The United Kingdom* App. No. 18984/91 (ECtHR, 27 September 1995) at [162]–[163].

<sup>101</sup> See also the United Nations Human Rights Committee who have stated that “Investigations into allegations of violations of article 6 must always be independent, impartial, prompt, thorough, effective, credible and

ECtHR prescribes no single model of investigation or complaints mechanism; it recognises that some flexibility is required as to the form and procedure to be adopted by States.<sup>102</sup> We note that the conduct of investigations by the Police Ombudsman should be conducted in line with the same principles and protections as criminal investigations.<sup>103</sup> In this respect, it is recommended that this is expressly recognised in this legislation.

In order for the Police Ombudsman to fulfil its mandate and carry out its functions under this legislation, it should have adequate financial and human resources to have the capacity to investigate complaints in line with international standards including independence, adequacy and promptness.<sup>104</sup> The GANHRI Sub-Committee on Accreditation has observed that when a national institution “is provided with a mandate to receive, consider and/or resolve complaints alleging violations of human rights, it should be provided with the necessary functions and powers to adequately fulfil this mandate.”<sup>105</sup> The Sub-Committee has called for national institutions to be provided with sufficient funding to guarantee its independence and its ability to freely determine its priorities and activities.<sup>106</sup> The Sub-Committee has also called for the national institution to be provided with sufficient resources to permit the employment and retention of staff with the requisite qualifications and experience to fulfil the national institution’s mandate.<sup>107</sup> The UNODC has stated that independent complaints mechanisms should be “adequately resourced and funded, and be provided with sufficient funds to allow it to carry out comprehensive investigations and hire

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transparent”; United Nations Human Rights Committee, [General Comment No. 36 – Article 6: right to life](#), CCPR/C/GC/36 (3 September 2019) para. 28.

<sup>102</sup> *Al-skeini and others v. The United Kingdom* App. No. 55721/07 (ECtHR Grand Chamber, 7 July 2011) at [165].

<sup>103</sup> The rule of law requires that the complaints investigation must be carried out in accordance with the same procedures and safeguards that apply to a criminal investigation: [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 12; *Ramsahai v The Netherlands* App. No. 52391/99 (ECtHR, 15 May 2007) at [330].

<sup>104</sup> [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, pp. 3, 9; United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) pp. 54–55; GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) pp. 49–50.

<sup>105</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 49.

<sup>106</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 27.

<sup>107</sup> GANHRI Sub-Committee on Accreditation, [General Observations of the Sub-Committee on Accreditation](#) (Adopted by the GANHRI Bureau on 21 February 2018) p. 39.

skilled staff.”<sup>108</sup> Adequacy of resources will be important for ensuring investigations of complaints are impartial and independent, and it is also important for ensuring investigations are perceived by the public as having been conducted in this manner.<sup>109</sup>

**59. The Commission recommends that the legislation explicitly recognise that investigations by the Police Ombudsman should be conducted in line with the same principles and protections as criminal investigations.**

**60. The Commission recommends that the Police Ombudsman be sufficiently resourced so it can fulfil its mandate, and rely on its own staff or engage external experts to conduct prompt independent and impartial investigations.**

### Investigatory powers (section 169)

Section 169 sets out the objectives, functions, and powers of the Police Ombudsman. Under subsection (2)(f) the Police Ombudsman must report the results of investigations to the Garda Commissioner, the Minister, or the Authority, as appropriate. We note that there is little clarification on the scope of the powers or capabilities of the Police Ombudsman in conducting investigations. It is not clear as to whether the Police Ombudsman may question witnesses on inconsistencies in their statements, or whether statements are simply accepted, and an analysis of credibility is conducted at a later stage. We consider that explicit powers should be given to the Police Ombudsman to effectively address and investigate complaints of racial profiling by members of AGS.<sup>110</sup>

**61. The Commission recommends that provision be made for the public reporting of the results of Police Ombudsman investigations.**

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<sup>108</sup> United Nations Office on Drugs and Crime, [Handbook on police accountability, oversight and integrity](#) (2011) p. 70.

<sup>109</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, p. 69; United Nations Office on Drugs and Crime, [Resource book on the use of force and firearms in law enforcement](#) (2017) p. 160.

<sup>110</sup> The ECtHR have held that where there are indicators that the complained-of conduct relates to racial discrimination, a thorough examination of the facts must be conducted to uncover any possible racist motives. Failure to do this will result in a violation of Article 14 ECHR, in addition to Articles 2 or 3, where appropriate: *Nachova v Bulgaria* App. Nos. 43577/98 and 43579/98 (ECtHR, 6 July 2005) at [162]-[168].

## **62. The Commission recommends that the investigatory powers of the Police Ombudsman be clarified and strengthened.**

### **Special Assistance (section 177)**

Under section 177, the Police Ombudsman model would continue to use members of AGS, and/or officers from police services outside the State, for the purposes of conducting investigations. Such investigations will inherently be approached from the subjective police officer perspective, as distinct from international best practice of an objective observer who is guided by objective human rights standards. This method of investigation lacks complete independence and raises issues of perceived, or actual, bias. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') has stated, in relation to the practice of using police officers to carry out the operational aspects of the investigation, that it must be ensured that those officers are not from "the same service" as those under investigation and, ideally, the investigators should be "completely independent from the agency implicated."<sup>111</sup> The European Code of Police Ethics provides that public authorities must ensure effective and impartial procedures for complaints against police.<sup>112</sup> We note that the Committee on Justice in its pre-legislative scrutiny report on the General Scheme recommended that "consideration be given to reorganising the process of the Police Ombudsman's investigations so that serving Garda members would no longer be seconded to assist with the investigation."<sup>113</sup> Relying on AGS for assistance impacts on the independence of the Police Ombudsman; therefore, it is essential to ensure

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<sup>111</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [14th General Report on the CPT's activities covering the period 1 August 2003 to 31 July 2004](#) (21 September 2004) at [32].

<sup>112</sup> The commentary contained in the Code states: "Complaints against the police should be investigated in an impartial way. "Police investigating the police" is an issue which generally raises doubts as to impartiality. States must therefore provide systems which are not only impartial but also seen to be impartial, to obtain public confidence. Ultimately, it should be possible to refer such complaints to a court of law." [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, p. 69.

<sup>113</sup> Houses of Oireachtas Joint Committee on Justice, [Report on Pre-Legislative Scrutiny of the General Scheme of the Policing, Security and Community Safety Bill](#) (June 2022) p. 9.

the Office of the Police Ombudsman is adequately resourced so it can fulfil its mandate and employ skilled investigators to conduct investigations.<sup>114</sup>

**63. The Commission recommends that section 177 be removed from the legislation.**

**Definition of ‘abuse of power for a sexual purpose’ (section 189)**

Section 189 defines ‘abuse of power for a sexual purpose’ as:

“[A]ny behaviour by a member of Garda personnel which takes advantage of his or her position as such a member to misuse his or her position, authority or powers for a sexual purpose or an improper emotional relationship with any other person”.

‘Members of Garda personnel’ is defined in the same section as expressly not including the serving Garda Commissioner. This is a concerning oversight which should be addressed in the legislation.

**64. The Commission recommends that the definition of ‘abuse of power for a sexual purpose’ in section 189 be revised to include the Garda Commissioner.**

**Making, recording of complaints etc. (section 192) and Categories of complaints suitable for resolution by An Garda Síochána (section 196)**

Section 196(1) makes provision for a draft list of categories of complaints suitable for resolution by AGS to be prepared by the Police Ombudsman, having consulted with the Garda Commissioner, for approval by the Minister. This draft list cannot include complaints where the act or omission complained of would if proven constitute a criminal offence, constitute a breach of standards of professional behaviour that would justify conduct proceedings or which concern the death of, or serious harm to a person as a result of AGS operations, while in custody or while in care of AGS.

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<sup>114</sup> United Nations Human Rights Council, [Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston – Addendum: Study on police oversight mechanisms](#), A/HRC/14/24/Add.8 (28 May 2010) para. 46.

We note that the Explanatory Memorandum to the General Scheme articulates that “all complaints will require to be investigated by the Police Ombudsman other than minor service complaints (e.g. discourtesy, failure to return a call) which will be referred, where appropriate, to An Garda Síochána for resolution”.<sup>115</sup> However, this is not explicitly provided for in the legislation and does require clarification. We note that the Minister may modify the draft list,<sup>116</sup> and before approving the draft list consider whether the categories in it constitute matters that are not sufficiently serious to warrant an investigation by the Police Ombudsman<sup>117</sup>. There is no requirement for the Minister before making any modifications to consult with Police Ombudsman or for the Police Ombudsman to make submissions. The level of ministerial involvement in deciding which matters may be investigated may infringe on the functional independence of the Police Ombudsman as the Minister has considerable discretion in deciding whether a matter is ‘sufficiently serious’.

Under section 192, the Minister must conduct a review of the operation of the making and recording of complaints, within three years of commencement of this section.<sup>118</sup> Section 192(8) provides that following this review, the Minister may, by order, specify categories of complaints that are suitable for resolution by AGS. This may be done on the basis that the Minister considers that:

“[T]he efficiency and effectiveness of the procedures for resolving complaints and public confidence in those procedures do not require complaints received by An Garda Síochána to be referred to the Police Ombudsman in all instances”.<sup>119</sup>

This subsection sets out no procedures for how the categories of complaint to be resolved by AGS will be chosen. It does not require any consultation with the Authority or Police Ombudsman, beyond the review. There is no requirement for those bodies to make submissions to the Minister on the specific categories of complaint chosen, prior to the

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<sup>115</sup> Department of Justice, [General Scheme of the Policing, Security and Community Safety Bill Explanatory Memorandum](#) (27 April 2021) p. 18.

<sup>116</sup> Section 196(3).

<sup>117</sup> Section 196(4).

<sup>118</sup> Section 192(6).

<sup>119</sup> Section 192(8).

Minister's decision. It is unclear as to whether the Minister's decision under section 192(8) must comply with the limitations on the draft list of categories under section 196.

**65. The Commission recommends that the provisions regarding the categories of complaints that can be resolved by An Garda Síochána under section 196 be clarified.**

**66. The Commission recommends that further safeguards be introduced into the Minister's power under section 196 to modify a draft list of categories of complaints suitable for resolution by An Garda Síochána.**

**67. The Commission recommends that further safeguards be introduced into the Minister's decision-making process under section 192(8).**

### Time limits for making complaints (section 193)

In accordance with section 193(1) a complaint must be made within 12 months from the date of the act or omission giving rise to the complaint. There is provision within the legislation to extend this time period if the Police Ombudsman considers there is "good reason" for doing so.<sup>120</sup> We note that 12 months may be a short time period for certain structurally vulnerable persons or for disabled people.<sup>121</sup> It is welcomed that the test for extending time is less onerous than 'exceptional circumstances'; however, further provision could be made to ensure that reasonable accommodation will be made for disabled people.<sup>122</sup>

**68. The Commission recommends that the time periods for making a complaint with the Police Ombudsman directly reference reasonable accommodation for disabled people.**

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<sup>120</sup> Section 193(2).

<sup>121</sup> The United Nations Committee Against Torture have stated that "Complaints mechanisms shall be made known and accessible to the public, including ... to persons belonging to vulnerable or marginalized groups, including those who may have limited communication abilities."; United Nations Committee Against Torture, [General comment No. 3 \(2012\) Implementation of article 14 by States parties](#), CAT/C/GC/3 (13 December 2012) para. 23.

<sup>122</sup> The Commissioner of Human Rights of the Council of Europe has stated that a police complaints system should be "understandable, open and accessible and have positive regard to and understanding of issues" including disability; see [Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police](#) (12 March 2009) CommDH(2009)4, p. 3.

## Determination of admissibility of complaint (sections 194 and 195)

Section 194 sets out the procedures by which the Police Ombudsman determines whether it can investigate a complaint. If the Police Ombudsman determines that a complaint is inadmissible, it must notify the complainant and inform them of the reason for inadmissibility.<sup>123</sup> The complainant has no right of appeal against the determination of inadmissibility.

Pursuant to section 195(4), if the Police Ombudsman determines that a particular complaint is suitable for resolution by AGS, they are required to notify the complainant of this determination, and include information about the procedures thereafter. There is no provision for a complainant to make submissions in challenging this decision.

As part of the right to an effective investigation in ECtHR jurisprudence, a thorough investigation must involve the taking of full and accurate statements from the complainant, which covers all circumstances of the complaint.<sup>124</sup> Due to difficulties in communication, capacity issues, or disability, a complainant may not fill out complaint forms correctly, or include all relevant information at the first instance. In such circumstances, provision must be made to ensure that the complaint is fully understood by the Police Ombudsman, prior to a determination on jurisdiction.

**69. The Commission recommends that complainants be provided with further opportunity for submissions where the Police Ombudsman has made a preliminary decision to refer a matter to An Garda Síochána for resolution. Provision must be made for reasonable accommodation for disabled people.**

## Notification to a member of Garda personnel who is the subject of the complaint (sections 195 and 204)

As noted above, we recommend that this legislation explicitly recognises that investigations by the Police Ombudsman should be conducted in line with the same principles and

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<sup>123</sup> Section 194(10)(a).

<sup>124</sup> *Cobzaru v Romania* App. No. 48254/99 (ECtHR, 26 July 2007) at [71], [75].

protections as criminal investigations. In this regard, we note that under section 195 when the Police Ombudsman determines that a complaint is admissible and is suitable for resolution by AGS there is no requirement to notify the Garda member against whom the complaint is made. However, the Garda Commissioner and the complainant shall be notified if the Police Ombudsman determines that a complaint is admissible and is suitable for resolution by AGS.<sup>125</sup> This is in contrast to section 195(5)(c), where the Police Ombudsman is required to notify the member of Garda personnel if the Police Ombudsman determines the complaint warrants an investigation. This notification may be postponed if the Police Ombudsman “has a good reason to do so”.<sup>126</sup> In section 204(6), the Police Ombudsman may also postpone, if they have “good reason to do so”, a notification to the member of Garda personnel of the appointment of a designated officer to undertake an investigation.

We are concerned that these provisions in relation to notification to a member of Garda personnel against whom a complaint is made or who is the subject of an investigation may breach fair procedures and the right to be heard which presupposes that one is informed of any complaint made against them. The Irish courts have recognised that a person affected by or with an interest in the outcome of an administrative decision has the right to have adequate notice of this decision and be given an adequate opportunity to make their case before that administrative body.<sup>127</sup> The judgments emphasise the need for fair procedures to be afforded at an early stage in an investigative process that poses reputational risks for those investigated.<sup>128</sup> We are of the view that provisions which do not require notification

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<sup>125</sup> Section 195(4).

<sup>126</sup> Section 195(6).

<sup>127</sup> See *Ó Ceallaigh v An Bord Altranais* [2000] 4 I.R. 54: Geoghegan J “If a professional body is invested with the power of receiving complaints relating to a member of that profession and deciding whether an inquiry should be put in motion the outcome of which might lead to the person complained about being no longer able to practise his or her profession, that body cannot be said to be exercising its power lawfully and fairly without the person complained about being informed of the complaint and the board having sight of any response to such complaint. In the ordinary way I think it would be unthinkable for any professional body not to do this.” See also *Byrne v Irish Sports Council* [2013] IEHC 438 and *Guerin v Shatter* [2016] IECA 318.

<sup>128</sup> See *O’Callaghan v Disciplinary Tribunal* [2001] 1 I.R. 1: Geoghegan J “No matter how confidential the proceedings may be the word will get round the profession very fast that a particular solicitor is being investigated into with a view possibly to his being struck off the rolls. Unfortunately, it only requires then the occasional indiscretion for word to pass to outsiders which may include, in some instances, the circles from which the particular solicitor’s clients are mostly drawn. But all that is required, in my view, is that the solicitor be notified of the complaint and be given an opportunity of responding to it and that that notification and any response that may have been given to it should be before the Tribunal before it makes its decision as to whether there is a prima facie case for an inquiry ...”.

or postpone notification on the basis of “a good reason” may imply that Police Ombudsman investigations are not conducted in line with the same principles and protections as criminal investigations.

**70. The Commission recommends that consideration be given to whether the provisions in sections 195 and 204, in relation to the notification of a member of Garda personnel who is the subject of the complaint or the subject of the investigation, comply with fair procedures.**

### Establishment of arrangements for handling complaints suitable for resolution by An Garda Síochána (section 197)

Section 197 provides for the establishment and maintenance of effective and efficient arrangements for the handling of complaints suitable for resolution by AGS.

**71. The Commission recommends that reference be made to the principle of reasonable accommodation in the complaints process for disabled people.**

### Notification to Police Ombudsman of incident of concern (section 200)

Section 200(1) requires the Garda Commissioner to notify the Police Ombudsman of any incident of concern relating to the conduct of a member of Garda personnel. The draft statutory obligation is to notify “as soon as practicable.” We note that, as the subject matter of the notification is likely to be serious, a more robust temporal limit may be appropriate. This may be contrasted with subsection (3), in which the Police Ombudsman must inform the Garda Commissioner “without delay” on the action they decide to take in response to the notification.

The Garda Commissioner is only obligated to notify an incident of concern to the extent that to do so would not be prejudicial to the security of the State or would not endanger the life or safety of any person who has given information in confidence to a public body in relation to the enforcement or administration of the law.<sup>129</sup> The Garda Commissioner shall, as soon

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<sup>129</sup> Section 200(6).

as practicable, notify the Independent Examiner and the Police Ombudsman where they do not intend to notify an incident of concern.<sup>130</sup> There is no provision for the Independent Examiner or the Police Ombudsman to challenge or review such a decision. Therefore, the Garda Commissioner can unilaterally decide not to notify the Police Ombudsman of an incident of concern if, in their subjective view, the criteria of either section 200(6) (a) or (b) are satisfied. We submit that there must be some independent consideration or review of such an important decision, akin to the provision in section 207 of the Bill where the Independent Examiner can review the decision of the Garda Commissioner.<sup>131</sup>

**72. The Commission recommends that section 200(1) be amended to require notification “without delay”.**

**73. The Commission recommends that the Independent Examiner of Security Legislation undertake a review function in respect of decisions made under section 200(6).**

### Investigation of matters relating to Garda Commissioner by Police Ombudsman (section 203)

Under section 203, the Police Ombudsman may only investigate the conduct of the Garda Commissioner with the consent of the Minister given with the approval of the Government, and when there is a concern that they may have committed an offence or behaved in a manner that would constitute serious misconduct. We note that the principle of independence is not served in situations whereby the Police Ombudsman must obtain consent from the Minister to conduct an investigation. The phrase ‘serious misconduct’ is not defined in the Bill.<sup>132</sup>

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<sup>130</sup> Section 200(7).

<sup>131</sup> Under section 207, before issuing an authorisation to a designated officer to apply to the District Court for a search warrant for a Garda Síochána premises the Police Ombudsman shall consult with the Garda Commissioner to ensure that he or she does not object to the search on grounds relating to the security of the State. If the Garda Commissioner objects to the search of a Garda Síochána premises on grounds relating to the security of the State, the Garda Commissioner shall without delay notify the Police Ombudsman and the Independent Examiner, and the Examiner shall consider the matter.

<sup>132</sup> ‘Misconduct’ or ‘notifiable misconduct’ is defined in section 189; however, there is no definition of ‘serious misconduct’.

**74. The Commission recommends that the scope of the Police Ombudsman’s investigation be clarified under section 203, and that the independence of the Police Ombudsman be strengthened.**

**Search of Garda Premises (section 207)**

Under section 207(1), a designated officer carrying out an investigation under section 204 may with the authorisation of the Police Ombudsman apply to the District Court for a warrant to carry out a search of a Garda Síochána premises. While judicial oversight of a search warrant is a welcome safeguard in the legislation, we are concerned about the many stages of authorisation required before the Police Ombudsman can authorise a designated officer to apply to the District Court.

Prior to the grant of authorisation, the Police Ombudsman must consult with the Garda Commissioner, who may object to the search on grounds of state security.<sup>133</sup> Although the consultation process with the Garda Commissioner is confidential, the mandatory statutory requirement of a pre-authorisation consultation for every search undermines the principle of an independent investigation. It has the potential to impede the effectiveness of an investigation, which may result in the loss of the element of surprise, or the loss of potential evidence.

If the Garda Commissioner objects to a search of Garda premises for reasons relating to the security of the State, the matter is referred to the Independent Examiner without delay.<sup>134</sup> If the Minister is satisfied, upon considering the recommendation of the Independent Examiner, that the search of the premises “would not be prejudicial to the security of the State or is proportionate and necessary for the proper investigation of a matter concerning the death of, or serious harm to, a person as a result of Garda operations or while in the care or custody of An Garda Síochána”, they may issue directions specifying the part of the premises that may be searched.<sup>135</sup> Conditions may be attached to this search by the

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<sup>133</sup> Section 207(2).

<sup>134</sup> Section 207(14).

<sup>135</sup> Section 207(15).

Minister in the interests of state security.<sup>136</sup> There is no provision to review the Minister's directions, or any conditions placed upon the search. There is no provision for the Police Ombudsman to make submissions to the Minister in this regard. The justification for including the Minister in the authorisation process is unclear and appears to encroach on the independence of the Police Ombudsman guaranteed in the legislation.

We are of the view that consideration should be given to allowing the Police Ombudsman to apply directly to the District Court for a warrant without any requirement to consult with the Garda Commissioner. We consider that judicial authorisation is sufficient independent oversight of a search warrant rather than also requiring consultation with the Garda Commissioner and an additional layer of ministerial oversight. This would protect the independence of the Police Ombudsman and provide a degree of protection to the Police Ombudsman and the designated officers in conducting searches as it would be on foot of a search warrant issued by a judicial authority. There should be no requirement to consult with the Minister or receive a direction from the Minister as these elements compromise the independence and effectiveness of the investigation.

We are of the view that the application for a search warrant should be made to the District Court on notice to the Independent Examiner. As one of the express objectives of the Independent Examiner is "to support the Government in protecting the security of the State",<sup>137</sup> the Independent Examiner could appear before the District Court and voice any concerns they may have in relation to the security of the State in relation to the proposed investigation/search. The District Court judge could then determine the issue after having heard submissions from both the Police Ombudsman and the Independent Examiner. The District Court judge, rather than the Minister, would have the power to attach any conditions to the search warrant which would render the search proportionate.

In light of the sensitive nature of the application, we consider that the legislation should confirm that the application to the District Court shall be heard otherwise than in public. We note there is no provision for any appeal of the decision of the District Court; any right of

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<sup>136</sup> Section 207(16).

<sup>137</sup> Section 231(1)(b).

appeal should be addressed in the legislation. In this regard, we note the provisions in section 209(4)-(6) in relation to privileged legal material which makes provision for in camera hearings, appeals to the Circuit Court and the application of the Rules of Court.

**75. The Commission recommends that section 207 be revised to provide that a designated officer of the Police Ombudsman may, after being authorised by the Police Ombudsman, apply directly to the District Court, without the need to consult with the Garda Commissioner or receive a direction from the Minister. The Commission further recommends that the application to the District Court for a search warrant should be on notice to the Independent Examiner of Security Legislation.**

**76. The Commission recommends that section 207 be amended to provide for in camera hearings, appeals to the Circuit Court and the application of the Rules of Court.**

Section 207(10) allows a designated officer acting under the authority of a search warrant to require any person present at the Garda Síochána premises to give the password for any computer at the premises. Any person at the premises can be required to provide access to information accessible from such computer and allow examination of that information. A designated officer can personally operate the computer. We note that a similar provision is contained in Head 16 of the General Scheme of the *Garda Síochána (Powers) Bill*; which sets out the powers which can be exercised by a member of AGS when acting under the authority of a search warrant.

In our legislative observations on the General Scheme of the *Garda Síochána (Powers) Bill*, we expressed concern on the proportionality of the rights interference as it provides for a person operating under warrant to have access to the sensitive personal information on a person's computer or phone and to inspect a person's private, social, and professional life for evidence of criminal wrongdoing.<sup>138</sup> We note that courts in the United States and Canada have held that compelling a person to communicate their password amounts to a breach of rights including the right to liberty and the principles of fundamental justice,

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<sup>138</sup> IHREC, [Observations on the General Scheme of the Garda Síochána \(Powers\) Bill](#) (April 2022) pp. 53–56.

including the protection against self-incrimination and the right to silence.<sup>139</sup> We have recommended that consideration be given to the approaches in other jurisdictions to the legality of compelling the communication of a password.

We observed that two safeguards in the authorisation of warrants are recommended, at a very minimum:

that the judge issuing the warrant must authorise the exercise of the powers to demand a password and access a computer where satisfied that it is reasonably necessary; and

that such a requirement may only be made of a person at the place being searched where it is reasonably believed that evidence relating to an offence is to be found on the computer.<sup>140</sup>

We note that the power proposed to be given to designated officers under section 207(10) is limited to premises of the Garda Síochána, unlike the equivalent power proposed to be afforded to members of the Garda Síochána under Head 16 of the General Scheme of the *Garda Síochána (Powers) Bill*, which could potentially involve a private dwelling, and, as such, the nature of our concern is not as immediate. We also note that this provision may have been inserted in the legislation to ensure that designated officers have the same powers as members of the Garda Síochána. Whilst we consider that equivalence of powers between designated officers of the Police Ombudsman and members of the Garda Síochána is an important principle to maintain, this is without prejudice to the concerns that we have about this power more generally as noted above.

**77. The Commission recommends that any restrictions on a person's right to privacy, and fair procedures and fair trial rights under section 207 must be necessary and proportionate, and further recommends safeguards to this effect.**

**78. The Commission recommends limitations on the situations in which a judge may issue a warrant to search a computer, and to demand a password. The Commission**

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<sup>139</sup> *R. v Shergill* [2019] ONCJ 54; Commonwealth of Pennsylvania v Joseph J. Davis (J-42-2019).

<sup>140</sup> IHREC, [Observations on the General Scheme of the Garda Síochána \(Powers\) Bill](#) (April 2022) p. 54.

**further recommends consideration be given to the approaches in other jurisdictions to the legality of compelling the communication of a password.**

### [Additional powers for purpose of undertaking investigations \(section 208\)](#)

Under section 208, a designated officer may require information, documents, or things from individuals to be provided in the course of their investigation. If a person considers that the provision of such information would bear upon State security,<sup>141</sup> the matter may be referred to the Independent Examiner for review and recommendation to the Minister.<sup>142</sup> Akin to section 207, the Minister will make a determination on disclosure, and may issue a direction imposing any conditions or restrictions relating to State security that they deem appropriate.<sup>143</sup> There is no provision to review the Minister's directions, or any conditions placed upon the disclosure. There is no provision for the Police Ombudsman to make submissions to the Minister in this regard.

**79. The Commission recommends that disclosure of the information, documentation, or thing should be given where the Independent Examiner of Security Legislation determines that no prejudice to state security arises, or where the disclosure is proportionate, without the need for a direction from the Minister. A referral to the Minister could be made if redactions or conditions would render the disclosure proportionate, and the Minister could make directions to this effect.**

### [Review of decisions by Police Ombudsman \(section 221\)](#)

Where a complainant is informed of a decision that a complaint has been deemed inadmissible, or that it will be discontinued, they have 28 days from issue of the decision to submit a request for review. This time frame may be extended where the Police Ombudsman "considers that there is good reason for doing so".<sup>144</sup> We reiterate the importance of ensuring that the complainant's complaint is understood in full. Additionally, it may be appropriate for the principle of victim support, as recommended in international

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<sup>141</sup> Section 208(5).

<sup>142</sup> Sections 208(7)-(8).

<sup>143</sup> Sections 208(8)-(9).

<sup>144</sup> Section 221(2).

best practice, to be protected and provided for in the Police Ombudsman complaints procedure, where appropriate.

**80. The Commission recommends that express reference be made to the obligation to provide reasonable accommodation in regard to time frames under section 221.**

## Independent Examiner of Security Legislation (Part 7)

### Objectives, functions and powers of Independent Examiner (section 231)

We welcome the establishment of the role of the Independent Examiner to provide oversight of and continually review security legislation. We note that guidance on the functions of the Independent Examiner can be taken from Australia and the United Kingdom who have similar roles in their respective jurisdictions. This creation of this role follows the recommendation of the Commission on the Future of Policing in Ireland.<sup>145</sup> We note that one of the recommendations of the Commission on the Future of Policing in Ireland is that the Independent Examiner “would 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.”<sup>146</sup> We are concerned that this recommendation is not reflected in the legislation; with the focus of the Independent Examiner being on the oversight of the provisions of the legislation rather than oversight of the use of the powers under the legislation.<sup>147</sup> The absence of any oversight of how security legislation is being implemented may impact on one of the objectives of the Independent Examiner; “to promote public confidence in security legislation”.<sup>148</sup> We note that one of the functions of the Independent National Security Legislation Monitor (‘the INSLM’) in Australia is to independently review the “operation, effectiveness and *implications* [emphasis added]” of national security and counter-terrorism laws.<sup>149</sup>

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<sup>145</sup> Commission on the Future of Policing in Ireland, [The Future of Policing in Ireland](#) (September 2018) pp. xi, 38.

<sup>146</sup> Commission on the Future of Policing in Ireland, [The Future of Policing in Ireland](#) (September 2018) p. 38.

<sup>147</sup> Dr Vicky Conway, [Submission on the General Scheme of the Policing, Security and Community Safety Bill](#) (2021) p. 18.

<sup>148</sup> Section 231(1)(a).

<sup>149</sup> Section 6.1(a) of the *Independent National Security Legislation Monitor Act 2010*.

**81. The Commission recommends that section 231 be revised to provide that one of the functions of the Independent Examiner of Security Legislation is to oversee the implementation of security legislation.**

The provision for the publication of annual (section 241) and special (section 242) reports will be important resources for monitoring the operation and effectiveness of security legislation. In this regard, we note the detailed and informative reviews produced by the UK's Independent Reviewer of Terrorism Legislation ('the Independent Reviewer') and the INSLM.<sup>150</sup> We note in particular that the Independent Reviewer in their reports has consistently highlighted statistical gaps and inconsistencies, and has monitored any progress or changes in the collection and reporting of statistical data. As the collection and reporting of statistical data, including disaggregated equality data, will be vital in reviewing the operation and effectiveness of security legislation; we consider that the Independent Examiner should have a specific function to monitor and make recommendations on the collection and reporting of statistical data, including disaggregated equality data, on security services and legislation.

**82. The Commission recommends that section 231 be amended to provide the Independent Examiner of Security Legislation with the power to monitor and make recommendations on the collection and reporting of data related to security services and the operation of security legislation.**

**Eligibility for appointment (section 234)**

Section 234(1) provides that "a person shall be eligible for nomination or appointment as the Independent Examiner only where he or she holds or has held the office of judge of the High Court, the office of judge of the Court of Appeal or the office of judge of the Supreme Court." We are concerned about confining the eligibility for this role to a senior judge. There is no such legislative requirement in the UK or Australia,<sup>151</sup> where the role has also been

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<sup>150</sup> See <https://terrorismlegislationreviewer.independent.gov.uk/category/reports/> and <https://www.inslm.gov.au/reviews-reports>.

<sup>151</sup> In Australia, a person should only be appointed as the INSLM if they suitable qualifications, training or experience; section 11.3 of the *Independent National Security Legislation Monitor Act 2010*.

held by lawyers. There is no similar provision requiring the Police Ombudsman or Deputy Police Ombudsman to be a serving or retired senior judge, although they may be.<sup>152</sup> Restricting eligibility to senior judges may exclude people who have relevant experience and knowledge on security legislation including lawyers but also legal academics. The appointment process for the role of the Independent Examiner – which as recommended above should go through the public appointments process – should ensure that only individuals with the suitable experience and expertise will be appointed. In this regard, we note that section 230(5) provides criteria for the appointment of the Independent Examiner:

“A person shall not be appointed, or designated for appointment, by the Government as the Independent Examiner unless the Government is satisfied that the person is suitable to be so appointed by reason of his or her possessing such relevant experience, qualifications, training and expertise as are appropriate having regard, in particular, to the functions of the Independent Examiner under this Act and any other enactment.”

Therefore, restricting eligibility to senior judges serves to exclude lawyers or legal academics who may be able to demonstrate the necessary experience, qualifications, training and expertise for the role. Appointing an Independent Examiner with proven experience and knowledge will be important for fostering the public’s trust in the role and ensuring transparency in carrying out the functions of the role.

**83. The Commission recommends that section 234(1) be revised to expand the eligibility criteria for the role of the Independent Examiner of Security Legislation to include non-judicial candidates who have significant expertise and experience.**

### Inspection function

We note the potential for overlap between the functions of the Independent Examiner and the Authority as they are responsible for oversight of security services and policing services respectively.<sup>153</sup> As these areas are clearly linked and may often overlap, it is important to

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<sup>152</sup> Section 168(8).

<sup>153</sup> Garda Síochána Inspectorate, [Submission to the Houses of the Oireachtas Joint Committee on Justice: General Scheme of the Policing, Security and Community Safety Bill](#) (2021) pp. 5–6.

ensure there are no gaps in oversight. In this regard, it is not clear whether the Independent Examiner can undertake joint inspections with the Authority under section 144. One of the functions of the Independent Examiner is “to examine the efficiency and effectiveness of the delivery of security services”.<sup>154</sup> In carrying out this function the Independent Examiner may be required to conduct inspections, examinations or investigations which are functions of a prescribed inspection body under section 143 with which the Authority may conduct joint inspections. Therefore, it may be that the Independent Examiner may be prescribed by the Minister as an inspection body, under this legislation, as their functions align with the definition of an inspection body. However, this should be explicitly clear in the legislation.

It is also not clear how the functions of the Independent Examiner may relate to the *Inspection of Places of Detention Bill* and the requirements of OPCAT. We note that in the UK, the Independent Reviewer has been designated as a member of the UK NPM since 2017.<sup>155</sup> The Independent Reviewer has been given this designation as it has specific power to monitor the conditions of detention of persons detained for more than 48 hours under section 1 of the *Terrorism Act 2000*.<sup>156</sup> The Independent Reviewer has not undertaken its own visits rather they engage with independent custody visitors, also a member of the UK NPM, and are sent a copy of their reports.<sup>157</sup>

We note that section 30 of the *Offences Against the State Act 1939* provides for detention of up to 72 hours without charge.<sup>158</sup> We further note that the meaning of ‘security services’ under section 3 includes preventing, detecting and investigating offences under the *Offences against the State Acts 1939 to 1998*. Therefore, as individuals may be detained under the *Offences Against the State Acts* it is reasonable to assume that the Independent Examiner may have a role in examining and monitoring the conditions of detention of people detained under these Acts whether or not the role will be designated as a NPM.

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<sup>154</sup> Section 231(2)(c).

<sup>155</sup> See <https://questions-statements.parliament.uk/written-statements/detail/2017-01-12/HLWS412>. See also [https://terrorismlegislationreviewer.independent.gov.uk/about-me/#stat\\_function](https://terrorismlegislationreviewer.independent.gov.uk/about-me/#stat_function).

<sup>156</sup> See [https://terrorismlegislationreviewer.independent.gov.uk/about-me/#stat\\_function](https://terrorismlegislationreviewer.independent.gov.uk/about-me/#stat_function).

<sup>157</sup> Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2019* (2021) para. 5.28.

<sup>158</sup> IHREC, [Submission to the Independent Review Group on the Offences Against the State Acts](#) (2021) pp. 29–30.

**84. The Commission recommends that the legislation should clarify whether the Independent Examiner for Security Legislation can, under section 144, carry out joint inspections with the Policing and Community Safety Authority.**

## Regulations (Part 8)

Part 8 of the Bill provides for the creation of a number of regulations at the direction of the Minister, including regulations relating to the management of AGS, performance, conduct and standards of professional behaviour. The European Code of Police Ethics states that the police organisation shall contain efficient measures to ensure the integrity and proper performance of police staff, especially in guaranteeing respect for the fundamental rights and freedoms of the individual.<sup>159</sup> We recommend that regulations adopted under the legislation should set specific targets for diversity in the recruitment procedures for AGS. Regulations should provide for the regular evaluation of promotion policies to address underrepresentation of minority groups and groups that experience intersectional discrimination.

Section 254 provides that the Minister may, after consulting with the Garda Commissioner and the Police Ombudsman, make regulations providing for the procedures under which AGS may address misconduct by a member of AGS. Section 257 repeals a number of regulations, listed in Schedule 7, including the *Garda Síochána (Discipline) Regulations 2007*. We have previously commented, in relation to racial profiling, that discrimination does not explicitly constitute a breach of discipline within the *Garda Síochána (Discipline) Regulations 2007*.<sup>160</sup> The Advisory Committee on the Framework Convention for the Protection of National Minorities has called on the Irish authorities to amend the *Garda Síochána (Discipline) Regulations 2007* to explicitly specify that discrimination constitutes a breach of

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<sup>159</sup> [The European Code of Police Ethics](#), Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum, at [39].

<sup>160</sup> IHREC, [Developing a National Action Plan Against Racism: Submission to the Anti-Racism Committee](#) (August 2021) p. 67.

discipline.<sup>161</sup> The introduction of new regulations provides an opportunity to explicitly recognise that discrimination is a breach of discipline.

- 85. The Commission recommends that the regulations be drafted and enacted in conjunction with the legislation, in order to promote certainty and clarity in the applicable principles, and to strengthen a human rights-based approach to policing.**
- 86. The Commission recommends that regulations be provided for in relation to effective and ongoing training for members of An Garda Síochána in the areas of human rights and equality, and in cultural competency.**
- 87. The Commission recommends that regulations be provided for to set specific targets for diversity in the recruitment procedures for An Garda Síochána.**
- 88. The Commission recommends that regulations be provided for which explicitly recognise that discrimination constitutes a breach of discipline.**

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<sup>161</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, [Fourth Opinion on Ireland - adopted on 10 October 2018](#) (2019) ACFC/OP/IV(2018)005, para. 61.





Coimisiún na hÉireann um Chearta  
an Dulne agus Comhlonannas  
Irish Human Rights and Equality Commission



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