

**Recommendations of the Irish Human  
Rights And Equality Commission on the  
Garda Síochána (Amendment)(No. 3) Bill  
2014**

**November 2014**



**An Choimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**

**Irish Human Rights and Equality Commission**

## 1. Introduction

1. The Irish Human Rights and Equality Commission (“the Commission”) was established pursuant to the Irish Human Rights and Equality Commission Act 2014 (“2014 Act”). The Commission has a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding, and to promote understanding and awareness of the importance of human rights and equality.<sup>1</sup> The Commission is tasked with reviewing the adequacy and effectiveness of law, policy and practice relating to the protection of human rights and equality, and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality.<sup>2</sup> Specifically, the Commission can, of its own volition, examine any legislative proposal and report its views on its implications for human rights and equality.<sup>3</sup> The Commission would like to take this opportunity to provide Government with its recommendations in relation to the Garda Síochána (Amendment)(No. 3) Bill 2014 (“2014 Bill”).

2. Accountability in the policing structure of the State has been a significant theme in the work of the former IHRC and continues to be a core priority for the newly formed Commission.<sup>4</sup> In the context of its recommendations and submissions in this field, the Commission has outlined the diverse components of a robust and effective accountability infrastructure for the policing service. One key component of that oversight infrastructure is a comprehensive and effective complaints mechanism that is capable of acting independently and impartially in response to a broad range of complaints from members of the public and others, which relate to the operation of the policing function. This mechanism should be mandated to undertake an effective investigation where there are allegations of criminal conduct, serious misconduct, breaches of disciplinary standards or other systemic lapses in service provision by members of An Garda Síochána, as well as in situations where a death or serious harm has occurred during the course of Garda operations.

3. The Garda Síochána Act, 2005 (“2005 Act”), addressed a very significant gap in accountability in the policing structure through the establishment of the Garda Síochána Ombudsman Commission (“GSOC”). GSOC plays a crucial oversight function

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<sup>1</sup> Section 10(1)(a)-(e) of the 2014 Act.

<sup>2</sup> Section 10(2)(b) and section 10(2)(d) of the 2014 Act.

<sup>3</sup> Section 10(2)(c) of the 2014 Act.

<sup>4</sup> See for example, IHREC (designate), *Submission of IHREC (Designate) to the Cabinet Sub-Committee on Justice on the Establishment of an Independent Policing Authority*, May 2014 [IHREC May 2014]; IHREC (designate), *Submission to the Joint Oireachtas Committee on Justice, Defence and Equality*, April 2014 [IHREC April 2014]; IHRC, *Policy Statement: Human Rights Compliance of An Garda Síochána*, April 2009 [IHRC April 2009]; IHRC, *Observations on the Garda Síochána Bill 2004*, February 2004 [IHRC 2004]; IHRC, *Observations on the Scheme of the Garda Síochána Bill, 2003*, November 2003 [IHRC 2003]; IHRC, *A proposal for a New Garda Complaints System*, December 2002.

concerning the activities of An Garda Síochána. It is important that this oversight role is further enhanced. The Commission has ongoing concerns in relation to key human rights deficits in the legislative framework of GSOC that have not been addressed in the amendments proposed under the 2014 Bill.<sup>5</sup> The Commission is of the view that without addressing the remaining inadequacies in GSOC's legislative mandate, the capacity of GSOC to provide full, robust and comprehensive oversight of the full range of complaints that can arise as a result of Garda conduct will remain unduly restricted. The recent important report by the Garda Inspectorate on the question of crime investigation, which reveals, among other issues, "systemic operational deficiencies" within some of the policies and practices of the Garda Síochána, further underlines the urgency of the reforms to strengthen GSOC's mandate.<sup>6</sup>

4. The 2014 Bill presents a crucial opportunity for Government to demonstrate its stated commitment to enhancing oversight and accountability within An Garda Síochána, and in many respects the 2014 Bill represents a welcome move in the right direction within the overall package of justice reforms that the Government has announced. In particular, the Commission is pleased to note that some of the measures proposed in the 2014 Bill are in line with recommendations previously made by the former IHRC.<sup>7</sup> Specifically, the Commission welcomes the proposal to include the Garda Commissioner within the investigative remit of GSOC (albeit subject to "the consent of the Minister"); the conferral of additional powers on GSOC for criminal investigations; the extension of the mandate of GSOC to enable it to examine Garda practices, policies and procedures at its own initiative without Ministerial consent; the extension of the mandate of the Garda Inspectorate to carry out inspections or inquiries on its own initiative, without prior consent from the Minister for Justice and Equality; the extension in the period of time within which complaints can be submitted from 6 to 12 months; and the requirements relating to the timely supply of information to GSOC by An Garda Síochána.<sup>8</sup>

5. The Commission welcomes the Government's publication of the General Scheme of the Garda Síochána Bill 2014 to provide for the establishment of a new Policing Authority which it will consider in due course. In general, the Commission recommends that the Policing Authority should have a defined relationship with

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<sup>5</sup> See in particular IHRC 2004; IHREC April 2014; IHREC May 2014. See further *Report of the Review of An Garda Síochána Act 2005*, Joint Oireachtas Committee on Justice, Defence and Equality, October 2014 [Joint Committee 2014]; GSOC, *Response to the Invitation from the Joint Committee on Justice, Defence and Equality for Submissions on the Effectiveness of Legislation relating to oversight of an Garda Síochána*, July 2014 [GSOC 2014].

<sup>6</sup> Garda Inspectorate, *Report of the Garda Inspectorate on Crime Investigation*, Oct. 2014 at p. 1.

<sup>7</sup> See for example, IHRC 2009 where the Commission recommended that section 106 of the 2005 Act should be amended to allow GSOC to instigate a review on its own initiative of a practice, policy or procedure of An Garda Síochána at p. 18; see further IHRC 2004.

<sup>8</sup> See sections 7, 5, 10, 11, 4 and 9 respectively.

GSOC that would ensure that GSOC maintains independence, but at the same time allows for the monitoring of the recommendations issued by the Policing Authority on all matters of concern which may warrant an investigation by GSOC.<sup>9</sup> The Commission will return to the relationship between GSOC and the Policing Authority in the context of its consideration of the General Scheme of the Garda Síochána Bill 2014.

6. In relation to the 2014 Bill, the Commission has ongoing concerns surrounding the following key issues:

- the limited scope of mandatory formal investigations by GSOC to only those situations involving “death or serious harm”;
- the requirement that GSOC’s investigation of the Garda Commissioner should be “subject to the consent of the Minister”;
- the continued involvement of An Garda Síochána in investigating disciplinary matters, including serious disciplinary problems;
- the ongoing use by GSOC of police officers of An Garda Síochána rather than its own independent pool of investigators;
- the restrictions on the operation of specific GSOC powers on the grounds of national security;
- the inadequacies in the structural independence of GSOC, when reviewed against the best practice standards contained in the *UN Paris Principles*.

7. The Commission urges the Government and the Oireachtas Select Committee on Justice and Equality (“Oireachtas Committee”) to give full consideration to its recommendations during Committee Stage. Where necessary and appropriate, the Commission echoes some of the recommendations made by GSOC to the Oireachtas Committee.<sup>10</sup> Generally, the Commission is of the view that GSOC’s recommendations relating to the operation of its legislative framework should fully inform parliamentary debate. Also, the Commission will refer where appropriate to the recommendations of the Joint Oireachtas Committee on Justice, Defence and Equality in its recent *Report on the Review of the Garda Síochána Act 2005* to whom the Commission made a submission in April 2014.

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<sup>9</sup> See further IHREC May 2014 supra note 4.

<sup>10</sup> See GSOC 2014 supra note 5.

## 2. The Scope of Complaints Subject to GSOC Oversight

### 2.1 Scope of Mandatory GSOC Investigation - “Death or Serious Harm”

8. The 2005 Act provides that only complaints regarding “death or serious harm” to a person that occur as a result of Garda operations or while in the custody or care of An Garda Síochána are subject to mandatory investigation by GSOC.<sup>11</sup> All other complaints that do not meet the threshold of “death or serious harm” may effectively be referred to the Garda Commissioner for an investigation to be carried out by members of An Garda Síochána. Also, the 2005 Act provides that the Garda Commissioner is required to refer any matter that appears to the Commissioner to indicate that the conduct of a member of the Garda Síochána may have resulted in death or serious harm to GSOC.<sup>12</sup> “Serious harm” is defined in a manner similar to the Non-Fatal Offences Against the Person Act 1997, as an injury that creates a substantial risk of death, causes serious disfigurement, or causes substantial loss or impairment of mobility of the body as a whole or of the function of any particular bodily member or organ.<sup>13</sup>

9. The Commission notes that in its May 2014 submission to the Joint Oireachtas Committee, GSOC asserted that the “definition of serious harm does not encompass, for example, sexual offences of a serious nature...including matters relating to child defilement, child grooming, or rape”.<sup>14</sup> GSOC expressed the concern that the investigation of members of the Garda Síochána by the Garda Síochána in relation to such serious offences raises concerns of impartiality, fairness to the Garda members under investigation, fairness to the investigating Garda members, fairness to alleged victims and questions of public confidence in the process.<sup>15</sup>

10. When assessed from a human rights perspective, the Commission is of the view that restricting a mandatory formal GSOC investigation to the narrow category of cases of “death or serious harm” may result in the 2005 Act failing to fully comply with the procedural obligations of the State under Article 13 of the ECHR, combined with some of the other rights protected in the ECHR, in particular Article 2

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<sup>11</sup> Section 91 of the 2005 Act, see further sections 95 and 98.

<sup>12</sup> Section 102 of the 2005 Act.

<sup>13</sup> Section 82(1) of the 2005 Act.

<sup>14</sup> See GSOC 2014 supra note 5 at p. 15.

<sup>15</sup> Ibid. In particular, GSOC recommended that the investigation of serious offences allegedly committed by members of the Garda Síochána should be conducted by GSOC, and that provision should be made to allow the legislature to decide what serious offences it considers appropriate for independent investigation, see GSOC 2014 at p. 15. Also, the Joint Oireachtas Committee in its October 2014 report asserted that the definition of “serious harm” is too vague and recommended the amendment of section 91(1) to define stated actions which constitute “serious harm”, including an expansion of the scope of its definition. See Joint Committee 2014 supra note 5 at p. 6.

concerning the right to life and Article 3 concerning the prohibition against torture, inhuman and degrading treatment or punishment. Article 13 of the ECHR, among other human rights treaty rights, requires the State to undertake an effective investigation where there are credible allegations of a violation of the human rights defined in the other articles of the Convention, such as Article 2 and Article 3.<sup>16</sup> The core elements of an effective independent investigation have been outlined in numerous judgments of the European Court of Human Rights (ECtHR).<sup>17</sup> In keeping with this line of jurisprudence, there are certain essential requirements of an effective investigation:

- a. **Independence:** The investigation must be carried out by a body with both institutional and practical independence from those implicated in the events.<sup>18</sup>
- b. **Effectiveness:** The investigation should not be reliant solely on evidence or information from the source being investigated,<sup>19</sup> it should have full investigatory powers to compel witnesses and it should be capable of securing evidence.<sup>20</sup>
- c. **Promptness and reasonable expedition:** The investigation should be undertaken in a prompt and timely fashion in order to maintain public confidence.<sup>21</sup>
- d. **Public Scrutiny:** there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.<sup>22</sup>
- e. **Involvement of next of kin:** The next of kin must be involved to the extent necessary to safeguard their legitimate interests.<sup>23</sup>
- f. **Initiated by the State:** The authorities must act once the matter comes to their attention rather than leaving it to the next of kin to instigate.

11. The legal obligation to undertake an effective investigation is triggered where there are reasonable grounds for believing that a violation of a person's human rights has occurred, for example, under Article 2 relating to the right to life, and under Article 3 relating to the prohibition of torture or other ill-treatment, including through acts or omissions by law enforcement officials. Certain ECHR rights are

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<sup>16</sup> See further Article 27 of the International Covenant on Civil and Political Rights; General Comment No. 20 Human Rights Committee.

<sup>17</sup> See further IHRC, *Observations on the Garda Síochána Bill 2004*, 2004.

<sup>18</sup> See for example *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20; *Ergi v. Turkey*(2001) 32 EHRR 388.

<sup>19</sup> See for example *Keenan v. United Kingdom* (2001) 33 EHRR 913.

<sup>20</sup> See for example *Khan v. United Kingdom* (2001) EHRR 1016.

<sup>21</sup> See *Gulec v. Turkey* (1999) 28 EHRR 121; *McKerr v United Kingdom* (2002) 34 EHRR 20.

<sup>22</sup> *Ibid.*

<sup>23</sup> See for example *Güleç v Turkey* (1999) 28 EHRR 121.

particularly relevant to the policing function, in particular, Article 2 and Article 3 of the ECHR.<sup>24</sup>

12. In considering the range of conduct that should come within the mandatory investigation remit of GSOC, the scope of potential violations of human rights to which the procedural obligations apply is of core relevance. Beyond circumstances of “death and serious harm”, the definition of ill-treatment under Article 3 of the ECHR in particular should inform the scope of situations in which a mandatory GSOC investigation should be carried out. Rather than provide an exhaustive analysis of the full range of human rights issues that can arise in the context of police conduct here, the Commission will focus in this analysis on conduct that can come within the meaning of Article 2 and Article 3 of the ECHR, in order to provide a snapshot of the types of areas that are currently not subject to a mandatory independent and effective investigation.

13. In accordance with Article 3, the State and its agents are prohibited from engaging in all forms of ill-treatment across a broad spectrum that includes torture through to degrading treatment and punishment.<sup>25</sup> While a breach of Article 3 will always require a certain minimum threshold of severity to be reached, the nature of what actions will constitute a breach of Article 3 is relative and will depend on all the factors in the case. In *Ireland v. The United Kingdom*, for example, the ECtHR set out the following factors as relevant in determining the existence of inhuman treatment: “the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the victim”.<sup>26</sup> In defining degrading treatment, the ECtHR has stipulated that treatment that causes in its victims “feelings of fear, anguish and inferiority capable of humiliating and debasing them” amounts to degrading treatment.<sup>27</sup> In adopting a progressive approach in its interpretation of “degrading treatment”, the ECtHR has treated the Convention as a living instrument that should be interpreted in the light of evolving perceptions of common human rights standards within Council of Europe member States.<sup>28</sup> Therefore, the ECtHR has interpreted Article 3 to apply to a broad spectrum of acts and contexts that can give rise to both physical harm and mental suffering, including, for example, prison and

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<sup>24</sup> See further IHRC April 2009 at pp. 28-33.

<sup>25</sup> The ECtHR has recognised that there is a three-tier hierarchy of proscribed forms of ill-treatment: torture, inhuman and degrading treatment or punishment and degrading treatment or punishment, see further *Tyrer v. United Kingdom*, (Application No. 3856/72) Judgment of 25 April 1978; *Selmouni v. France*, (Application No. 25803/94) Judgment of 28 July 1999.

<sup>26</sup> See *Ireland v. United Kingdom* Judgment of 19 January 1978. See further IHRC, *Follow-Up Report on State Involvement with Magdalen Laundries*, June 2013.

<sup>27</sup> See *Wiktorko v. Poland*, (Application 14612/02) Judgment, 31 March 2009 at paras 44 and 54.

<sup>28</sup> See in particular *Selmouni v. France*, (Application No. 25803/94) Judgment of 28 July 1999.

detention conditions, corporal punishment, conditions of detention on death row, and sex and racial discrimination.<sup>29</sup>

14. Additionally, the ECtHR has developed a line of jurisprudence outlining the scope of the State's positive obligations to prevent unlawful death under Article 2 and to prevent ill-treatment under Article 3 of the ECHR amongst a number of ECHR treaty rights. The relevant ECHR test in these cases interrogates whether the State and its agents knew or ought to have known that there is a real and substantial risk of death or ill-treatment occurring in a particular case.<sup>30</sup> In the context of Article 3 jurisprudence, where the cohort of individuals under consideration is a vulnerable group, the positive obligations on State authorities to protect their personal integrity are enhanced and the burden on the State authorities to take reasonable steps to prevent ill-treatment is more onerous.<sup>31</sup> For example, in a series of cases the ECtHR has addressed the scope of the State's positive obligations to prevent and detect child abuse in both public and private institutions, as well as within the family home.<sup>32</sup>

15. Where there is evidence of discriminatory treatment based on personal characteristics such as race, sex, ethnic origin or religious belief, or where a person with a disability is detained in a police station, the threshold relating to degrading treatment under Article 3 is more likely to be reached.<sup>33</sup> Therefore, a robust and independent investigation that meets the procedural requirements of Article 13 of the ECHR is also triggered where the alleged conduct of police officers fails to meet the positive obligations that have been developed under Article 3.

16. In the context of the procedural requirements surrounding an alleged violation of Article 2 of the ECHR following a suspicious death, the ECtHR has found that an investigation must be, *inter alia*, thorough, impartial and rigorous, and must

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<sup>29</sup> See for example *Price v. United Kingdom*, (Application No. 33394/96) Judgment of 10 July 2001, (conditions of detention in a police station for a severely disabled woman were held to amount to degrading treatment); *A v. United Kingdom*, (Application no. 3455/05) Judgment of 23 September 1998; *Soering v. United Kingdom*, (Application No. 14038/88) Judgment of July 7<sup>th</sup> 1989; *Cyprus v. Turkey*, (Application no. 25781/94) Judgment of 10 May 2001. See further IHRC, *Follow-Up Report on State Involvement with Magdalen Laundries*, June 2013 at pp. 92-97.

<sup>30</sup> See for example *A v. The United Kingdom*, (Application no. 3455/05) Judgment of 19 Feb 2009; *Z v. United Kingdom*, (Application no. 29392/95) Judgment 10 May 2001; *Louise O' Keefe v. Ireland*, (Application No. 35810/08) Judgment 28 January 2014; *Scozzari and Giunta v. Italy* (2002) 35 EHRR 12.

<sup>31</sup> *Ibid.* See in particular *A v. The United Kingdom* at para. 22.

<sup>32</sup> *Ibid.* See further IHRC, *Amicus Brief in the European Court of Human Rights case of Louise O' Keefe v. Ireland*, 30 September 2011.

<sup>33</sup> See for example *Cyprus v. Turkey*, (Application no. 25781/94) Judgment of 10 May 2001 where the Court found that various interfering measures against Greek-Cypriot community members by the Turkish-controlled authorities constituted degrading treatment in view of discriminatory treatment based on ethnic origin, race and religion, paras. 309-310; see further *Price v. United Kingdom*, (Application No. 33394/96) Judgment of 10 July 2001.



be broad enough to encompass the circumstances surrounding the death, including such matters as the planning and control of the operation in question where policing is at issue.<sup>34</sup> Therefore, in *Giuliani and Gaggio v. Italy*, for example, the ECtHR found a procedural breach of Article 2 read together with Article 13 where the investigation by the Italian Government failed to examine the overall context of a policing operation, and whether the manner in which it was planned, managed and executed was sufficient to prevent incidents of excessive use of force resulting in death.<sup>35</sup>

17. In light of the requirements of the ECHR outlined above, the Commission echoes the concerns of GSOC that the concept of “serious harm” does not encompass a range of serious offences and other misconduct that may not reach the threshold of “death or serious harm” as defined under the 2005 Act, but could involve physical injury or serious psychological harm or suffering that could potentially come within the meaning of Article 3 of the ECHR. As currently defined, for example, a GSOC mandatory investigation with all of the guarantees relating to practical and functional independence that would ensue, is not required in the following scenarios: where it is alleged that a police officer has engaged in rape, or sexual harassment during the course of operating their powers<sup>36</sup>; where it is alleged that police officers have used excessive or unnecessary force resulting in physical injury during a detention procedure; where there are allegations of serious omissions by the police service in fulfilling their duty to protect the public, including situations involving vulnerable individuals such as children or others with limited capacity<sup>37</sup>; and where there are allegations of discriminatory treatment on the specified grounds, including, for example, allegations involving racial profiling during the operation of the police function.<sup>38</sup>

18. Furthermore, in line with the procedural obligations flowing from Articles 2 and 13 of the ECHR, the Commission considers that where a death has allegedly resulted from an act or omission by members of An Garda Síochána, in addition to the specific investigation initiated by GSOC, the State is under an obligation to

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<sup>34</sup> See further *Filipovi v. Bulgaria*, (Application no. 24867/04) Judgment of 4 December 2012.

<sup>35</sup> See *Giuliani and Gaggio v. Italy*, (Application No. 23458/02) Judgment of 25 August 2009 at paras. 252-255.

<sup>36</sup> See for example *Aydin v. Turkey*, Judgment 25 September 1997 (Grand Chamber of the Court considered a rape committed by a State official against a detainee as torture).

<sup>37</sup> See further *A v. The United Kingdom*; *Z v. United Kingdom*. See also, *Kurt v. Turkey* (Application no. 24276/94) Judgment, 25 May 1998. The Applicant in that case was the mother of a man whom she alleged had been taken into State custody and then disappeared. The Court found that the failure of the State to investigate her complaints constituted a breach of Article 3, as “she was the victim of the authorities’ complacency in the face of her anguish and distress”. The Court also found a breach of Article 13, as she had no available remedy at the domestic level in respect of her complaint.

<sup>38</sup> See further Ombudsman for Children, *Garda Síochána Act 2005 (Section 42) (Special Inquiries relating to Garda Síochána Order 2013)*, July 2014.

ensure that a wider investigation capable of meeting the various procedural elements of Articles 2 and 13 is in place. Such an investigation should include an examination of the broader context in which policing operations take place, and should be capable of examining the extent to which the operation was planned, managed and executed in a manner that could prevent incidents of excessive use of force resulting in death. In this regard, the requirements of Articles 2 and 13 of the ECHR can be partially met, for example, where a criminal prosecution takes place following the referral of a file to the Director of Public Prosecution by GSOC under the 2005 Act. Where a criminal investigation does not occur, and an investigation of the death takes place under the coronial system, in accordance with the unilateral declaration issued by the State accepting a breach of Article 2 of the ECHR in *NicGibb v. Ireland*, such an investigation would not fully meet the requirements of Article 2.<sup>39</sup> In the *NicGibb* case, in which the Commission sought liberty to appear, the State issued a unilateral declaration which was accepted by the ECtHR, accepting a breach of Article 2 of the ECHR in respect of the investigation of a Garda operation to prevent a robbery, which resulted in the shooting dead of one of the suspects. In its unilateral declaration, the State accepted that the cumulative state response did not meet Article 2 requirements. In particular, the State accepted that there was no prosecution; that the internal Garda investigation into the incident did not adequately discharge the State's procedural obligation under Article 2; and that the Coroner's inquest of death by misadventure was not an investigation capable of determining whether the force used against the deceased was justified in the circumstances.<sup>40</sup> The State made a commitment to establish a Commission of Investigation under the Commission of Investigation Act, 2004, to independently investigate the death in question. In commenting on the outcome of this case, the Commission noted that insofar as the Commission of Investigation established will only address this specific case, the Commission is concerned that the structural weaknesses in our system of inquests in their inability to meet the requirements of Article 2 of the ECHR remain.<sup>41</sup> The Commission notes that legislative proposals to amend the coronial system to take account of the jurisprudence of the ECtHR have not been progressed, despite the clear need to bring Irish law into line with its obligations under Article 2.<sup>42</sup>

19. Finally, the Commission considers that the limited nature of a mandatory GSOC investigation is not in line with best practice in comparative jurisdictions. In terms of best practice, an important comparative legal framework to consider for the purposes of law reform in this equation is the law governing the Police

<sup>39</sup> *NicGibb v. Ireland*, (Application no. 17707/10) Decision 25 March 2014.

<sup>40</sup> *Ibid.* paras. 2 and 3.

<sup>41</sup> IHREC, Summary Analysis of *NicGibb v. Ireland*, <http://www.ihrec.ie/publications/list/nicgibb-v-ireland-summary-analysis>.

<sup>42</sup> *Ibid.*

Ombudsman for Northern Ireland (“the Police Ombudsman”); not least because of the human rights equivalence requirements of the Good Friday/Belfast Agreement, but also because the Ombudsman is regarded as a model of best practice for police accountability more generally.<sup>43</sup> A formal investigation is required to be undertaken by the Police Ombudsman where the matter complained of involves a “serious complaint”, or where it referred to the Police Ombudsman because it appears to involve a criminal offence or behaviour that would justify disciplinary proceedings.<sup>44</sup> A “serious complaint” is defined as a complaint alleging that the conduct complained of resulted in death or serious injury to a person or, “of such other description as may be prescribed”.<sup>45</sup> In particular, a “serious complaint” cannot be subject to informal resolution and it cannot be subject to an investigation by members of the police service.<sup>46</sup>

20. In light of the foregoing, the Commission reiterates its recommendation that all complaints, unless *prima facie* suitable for a mediated resolution by GSOC under the 2005 Act, should be subject to a mandatory formal investigation by GSOC appointed officers.<sup>47</sup> In addition, the Commission recommends that legislative amendments to the coronial system to take account of the jurisprudence of the ECtHR, should be progressed without further delay.

## ***2.2 Investigation of complaints against the Garda Commissioner***

21. The 2014 Bill proposes to insert Section 102(B) into the 2005 Act to provide that GSOC may, if it appears to it desirable in the public interest to do so, investigate any matter that gives rise to a concern that the Garda Commissioner may have committed an offence, or behaved in a manner that would constitute serious misconduct.<sup>48</sup> The Commission welcomes the proposal to bring the Garda Commissioner within the investigative remit of GSOC, a measure that it has recommended in previous submissions.<sup>49</sup> It notes, however, that this new power can only be exercised by GSOC “subject to the consent of the Minister”.<sup>50</sup> Although it is true that if the Minister declines to give his or her consent “he or she shall inform the Commission [i.e. GSOC] of his or her reasons for the refusal”, no clear rationale

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<sup>43</sup> See further Policing Northern Ireland Act 1998; Christopher Patten, *A New Beginning: Policing in Northern Ireland, the Report of the Independent Commission on Policing for Northern Ireland*, 1999.

<sup>44</sup> Section 53 of the Policing Northern Ireland Act 1998.

<sup>45</sup> Section 50(1) of the Policing Northern Ireland Act 1998.

<sup>46</sup> Section 53(2) of the Policing Northern Ireland Act 1998.

<sup>47</sup> IHREC April 2014 at p. 6.

<sup>48</sup> Section 7 of the 2014 Bill.

<sup>49</sup> See IHREC April 2014; IHREC May 2014.

<sup>50</sup> Section 102(B)(1).

has been advanced for permitting the Minister to curtail the investigative remit of GSOC in this manner.<sup>51</sup>

22. The IHREC considers that it would be preferable that it should be a matter for GSOC alone to determine whether or not it is appropriate for it to conduct an investigation into the activities of the Garda Commissioner.

### ***2.3 The Role of An Garda Síochána in Investigating Disciplinary Matters***

23. The Commission notes that the 2014 Bill does not amend the 2005 Act in a manner that would enhance the capacity of GSOC to undertake comprehensive oversight of Garda disciplinary matters. Under the 2005 Act, An Garda Síochána may undertake investigations, either supervised or unsupervised by GSOC, into complaints relating to disciplinary matters.<sup>52</sup> The standards of conduct for members of An Garda Síochána are established by reference to a Code of Ethics, and are outlined in secondary legislation under the Garda Síochána (Discipline) Regulations 2007 (“2007 Regulations”). Schedule 5 of the 2007 Regulations defines acts or conduct constituting breaches of discipline, and includes matters such as neglect of duty (including failure to promptly carry out any lawful order or to carry out a duty), and oppressive conduct towards a member of the public (including unnecessary violence towards any person with whom the member is brought in contact).<sup>53</sup>

24. In its 2014 submission to the Joint Oireachtas Committee, GSOC stated “[w]e believe that the concept of gardaí conducting investigations on our behalf is questionable in terms of its independence and effectiveness” and propose the discontinuation of gardaí investigating complaints under the Garda Síochána (Discipline) Regulations 2007.<sup>54</sup>

25. When assessed from a human rights perspective, the Commission shares the concerns of GSOC that the system of members of An Garda Síochána investigating other Gardaí without independent oversight in the context of disciplinary matters does not foster public confidence that An Garda Síochána is subject to comprehensive and robust oversight in a manner that is fully human rights compliant.<sup>55</sup> As outlined in Article 59 of the Council of Europe European Code of Police Ethics, “[t]he police shall be accountable to the state, the citizens and their

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<sup>51</sup> Section 102(B)(3).

<sup>52</sup> See Sections 94(7), 97(1)(b) and 123 of the 2005 Act, see further GSOC 2014 at p. 11.

<sup>53</sup> Schedule 5 of the 2007 regulations outlines 30 different acts or conduct that constitute a breach of discipline. See in particular Schedule sections 4(a)(ii) and 9.

<sup>54</sup> See further GSOC 2014 at pp. 11-12.

<sup>55</sup> Ibid.

*representatives. They shall be subject to sufficient external control*".<sup>56</sup> Moreover, in light of the analysis above relating to the scope of treatment that can come within Article 3 of the ECHR, for example, the Commission considers that, particularly in cases of more serious disciplinary matters, an investigation should be undertaken by GSOC, unless *prima facie* suitable for a mediated resolution. This is particularly important where a member of the public or a member of the Garda Síochána has suffered physical harm or serious psychological suffering as a result of breaches of discipline by police officers.

26. The Commission is further concerned that the 2014 Bill does not propose to amend the relevant sections of the 2005 Act to permit GSOC and the Garda Inspectorate to recruit a pool of independent investigators in place of designated officers. In its review of the 2005 Act, the Joint Oireachtas Committee has recommended that sections 73, 74 and 91 *inter alia* of the 2005 Act should be appropriately amended to permit GSOC and the Garda Inspectorate, through the proposed Policing Authority or otherwise, to recruit a pool of independent investigators in place of designated officers.<sup>57</sup>

27. The Commission recommends, in line with GSOC, that all complaints, including those relating to disciplinary matters under the 2007 Regulations and the Code of Conduct, should be formally investigated by GSOC, unless *prima facie* suitable for a mediated resolution by GSOC officers. The Commission further recommends, in line with the Joint Oireachtas Committee, that sections 73, 74 and 91 *inter alia* of the 2005 Act should be amended to permit GSOC and the Garda Inspectorate to recruit a pool of independent investigators in place of designated officers.

### **3. Restrictions on Specific GSOC Powers in the Context of National Security**

28. The Commission has previously noted the fact that in Ireland we have a combined policing and State security service. The Commission has recommended that issues of national security policing should be subject to effective oversight, including in particular the oversight of the proposed Policing Authority.<sup>58</sup> The combined policing and national State security function has served to restrict the scope of GSOC's powers under the 2005 Act, insofar as national security is a ground

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<sup>56</sup> The European Code of Police Ethics, Council of Europe Recommendation, Rec (2001) 10.

<sup>57</sup> See further Joint Committee 2014 at p. 6.

<sup>58</sup> See IHREC April 2014 at p. 8; see IHREC May 2014 at p.

that operates to restrict certain of the investigative functions of GSOC under various provisions of the 2005 Act.<sup>59</sup>

29. The Commission notes with concern that the Government has not taken this crucial opportunity to amend the 2005 Act in accordance with numerous recommendations issued by the Commission since 2004.<sup>60</sup> As previously noted, while national security is a legitimate objective on the part of the State, the manner in which it restricts the functions of GSOC, and the width of the discretion conferred on the Minister for Justice and the Garda Commissioner are not sufficiently calibrated to ensure transparency and accountability.<sup>61</sup>

30. Specifically, the Commission is concerned that the provisions in Sections 96, 99 and Section 126 of the Garda Síochána Act, 2005, are unnecessarily restrictive. GSOC has powers of compellability in relation to investigations under section 95 (investigations not involving an offence), and as such may require any person possessing information and/or documentation and/or a thing, relevant to an investigation to provide same to GSOC, or may require the person to attend before GSOC for that purpose. However, the Minister, at the request of the person required to provide information to GSOC, may decide that certain information not be disclosed to GSOC if same would be prejudicial to the security of the State.

31. Section 99 of the Act provides that a Garda station may be searched by a GSOC designated officer where the officer has reasonable suspicion that an offence has been committed. However, subsection 99(3) provides that certain stations, which contain information, documents or things relating to the security of the State, may be designated by the Minister under Section 126 of the Act and may only be searched to the extent specified by the Minister. Notification must be given to the Garda Commissioner and the Minister for Justice in respect of any proposed GSOC authorisation to search such a station. The Minister may then make directions as to the extent of any proposed search of the station in question.

32. Under the ECHR, national security is recognised as a legitimate ground for limiting the rights and freedoms protected in the ECHR.<sup>62</sup> Nevertheless, the IHREC is of the view that the objective of protecting national security can be achieved without creating this category of designated stations, which could potentially be open to abuse.<sup>63</sup> The Commission notes that investigating staff of the GSOC are

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<sup>59</sup> Ibid.

<sup>60</sup> See further IHRC 2004; IHRC 2003.

<sup>61</sup> See further IHREC April 2014 at p. 8.

<sup>62</sup> See Articles 8-11 of the ECHR.

<sup>63</sup> The GSOC Commissioners highlighted in their Two Year Report that on occasion in the past when malpractices have been revealed in certain quarters of the Garda Síochána, the excuse of State

bound by the same duties as members of An Garda Síochána, which include the Official Secrets Act, 1963. Furthermore, any warrant for a search of a station will be restricted to material relevant to the specific complaint. It is also significant that monitorings from international bodies, notably the Council of Europe's Committee for the Prevention of Torture (CPT), have the power to enter and inspect any part of any Garda station without prior notice. Therefore to restrict the powers of the GSOC in this way would seem anomalous.<sup>64</sup>

33. The former IHRC has previously pointed out that alternative measures could be put in place to meet the objective of protecting national security. For example, categories of documents (as opposed to individual Garda stations), could be designated for the purpose of state security. The material which a senior member of An Garda Síochána claims to be related to matters of national security could be sealed and a procedure provided whereby the nature of such material would be assessed by a judge.<sup>65</sup>

34. The Commission reiterates its recommendation that the restrictions under the 2005 Act that pertain to national security be reformulated and more narrowly drawn to ensure there is independent oversight of all police functions, albeit with safeguards in relation to national security concerns.

#### **4. The Structural Independence of GSOC**

35. As the Commission has previously outlined, there are a number of aspects of the operation of GSOC which are subject to the control or direction of the Minister for Justice and Equality.<sup>66</sup> In this regard, the Commission has recommended that the statutory underpinning to GSOC under the 2005 Act be reviewed overall, to ensure full structural and operational independence for the organisation.<sup>67</sup> At the operational level, the Commission welcomes the proposal in the 2014 Bill that would allow GSOC to carry out an examination on its own initiative of a practice, policy or procedure of the Garda Síochána for the purposes of reducing the prevalence of complaints.<sup>68</sup> At the structural level, the Commission notes that in its submission to the Joint Oireachtas Committee, GSOC asserted that while it is appointed by and

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security has been advanced by way of attempted justification. See Garda Síochána Ombudsman Commission, Report to the Minister for Justice, Equality and Law Reform on (a) the effectiveness of the Ombudsman Commission and (b) the adequacy of the functions assigned to it under the Garda Síochána Act 2005, March 2008, p. 20.

<sup>64</sup> See also IHRC, *Observations on the Garda Síochána Bill 2004*, February 2004, p. 11.

<sup>65</sup> *Ibid.*

<sup>66</sup> See IHREC April 2014 at pp. 7-8.

<sup>67</sup> *Ibid.*

<sup>68</sup> See section 10 of the 2014 Bill.

answerable to the Oireachtas, the financing of GSOC is currently a matter for the Minister for Justice and Equality and the accounting officer of GSOC is currently the Secretary General of that Department.<sup>69</sup> GSOC recommended that in the interests of independence and public confidence in the system, GSOC should be designated as a fully independent body.<sup>70</sup>

36. In order to guarantee the structural independence of GSOC and in line with GSOC's own recommendation, the Commission recommends the designation of GSOC as a fully independent body with full accountability to the Oireachtas.

## **5. Summary of Recommendations**

37. In conclusion, the IHREC makes the following recommendations:

- a. The Commission recommends that all complaints, unless *prima facie* suitable for a mediated resolution by GSOC under the 2005 Act, should be subject to a mandatory investigation by GSOC officers;
- b. The Commission recommends that it should be a matter for GSOC alone to determine whether or not it is appropriate for it to conduct an investigation into the activities of the Garda Commissioner;
- c. The Commission recommends, in line with GSOC, that all complaints, including those relating to disciplinary matters under the 2007 Regulations and the Code of Conduct, should be formally investigated by GSOC, unless *prima facie* suitable for a mediated resolution by GSOC officers;
- d. The Commission recommends that legislative amendments to the coronial system to take account of the jurisprudence of the European Court of Human Rights should be progressed without further delay.
- e. The Commission recommends, in line with the Joint Oireachtas Committee, that section 73, 74 and 91 *inter alia* of the 2005 Act should be amended to permit GSOC and the Garda Inspectorate to

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<sup>69</sup> GSOC 2014 at p. 4.

<sup>70</sup> Ibid. While only applicable to National Human Rights Institutions (NHRIs), the *UN Paris Principles* may provide some useful benchmarks in the context of establishing and enhancing the independence of statutory bodies such as GSOC going forward. See further *National institutions for the promotion and protection of human rights*, UN General Assembly Resolution 48/134, 1993.



**recruit a pool of independent investigators in place of designated officers.**

- f. The Commission recommends that the restrictions under the 2005 Act that pertain to national security be reformulated and more narrowly drawn to ensure there is independent oversight of all policing functions, albeit with safeguards in relation to national security concerns;**
- g. The Commission recommends the designation of GSOC as a fully independent body, with full accountability to the Oireachtas.**