



**Observations on the Scheme of the
Garda Síochána Bill 2003**

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1. Introduction

The Human Rights Commission (HRC) welcomes the opportunity to comment on the Scheme of the proposed Garda Síochána Bill 2003 at the Heads of Bill stage and looks forward to participating in a wide-ranging consultation process around the provisions of this most significant legislative initiative. The position advanced in this submission uses as its starting point the human rights standards relating to policing that are set out in the international treaties to which Ireland is a party and analyses their relevance for the areas of reform identified in the present Heads of Bill.¹ We hope that our submission will be a valuable contribution to the discussion around the drafting process of the proposed Bill and we look forward to undertaking a deeper analysis of the detail of the Bill at a later stage in the legislative process.

The review of legislation, policy and practice in relation to the operation of the criminal justice system, and in particular the activities and accountability of law enforcement officials, is a key area of work for the HRC as identified in the HRC's Strategic Plan, "*Promoting and Protecting Human Rights in Ireland: A Plan for 2003-2006*". In the view of the HRC, the issue of policing is central to the protection of human rights in a democratic society. Police officers are entrusted by the State to uphold the rule of law and to safeguard the lives, safety and property of the citizens of the State. However, in carrying out these functions, police officers are empowered to limit the rights and freedoms of persons, thereby creating the potential for tension between human rights and policing. The unique powers of police officers mean that it is imperative that the police exercise their powers in accordance with the human rights of all persons and that appropriate systems of training and accountability are put in place to protect against the potential abuse of those powers.

The HRC would also emphasise that the protection and promotion of the human rights of those who come into contact with the Garda Síochána and the rights of members of the police service need not be viewed as contradictory, but rather they can be seen as mutually reinforcing. Certainly, common sense indicates that if we are to expect police officers to be effective in promoting and protecting human rights and to act with high levels of respect for the public, we must also ensure that they enjoy equivalent levels of respect and protection of rights at an institutional level. The recommendations contained here, then, are made from the perspective that a human rights view of policing is one that serves the best interest of all stakeholders, including the members and management of the Garda Síochána who are committed to creating a police service based on best international standards.

¹ Under section 2 of the Human Rights Commission Act 2000, human rights are defined, for the purposes of the functions of the HRC as encompassing those rights and freedoms set out in the Constitution and those set out under international law. In relation to the present Heads of Bill, the HRC has decided to focus its analysis on those rights set out under international law. The HRC is mindful that several constitutional norms are also of relevance to this area of policy (see fn. 59 below in relation to due process rights) and we may return to examine some of those constitutional points in our comments on the detail of the Bill when published.

Placing human rights at the core of policing philosophy and practice is part of that process and a main theme of the seminal *Report of the Independent Commission on Policing for Northern Ireland* (hereinafter the Patten Report) is that it sets out how human right standards can be incorporated as a central element of police policy and practice. The Report represents a comprehensive study of policing structures and contains a broad-ranging set of recommendations based on best international practice in the field of policing. The Report also makes clear that the reform of policing structures, management and practice is an initiative that is not unique to these islands. On the contrary, the Patten Report refers to the international challenge of transforming policing from a model of a police force to one of a police service.²

We recall here also that in signing the Belfast Agreement the Irish Government committed itself to ensuring that the protection of human rights in this State would be at least as strong as that pertaining in Northern Ireland.³ In our view, this core principle of equivalence requires that Irish reforms in the area of policing should be referenced to the strong emphasis on human rights' protections in the recommendations contained in the Patten Report. Therefore, Patten represents more than just a model of international best practice; it is also a standard which the Irish Government has committed itself to achieving, and therefore against which any programme of Garda reform must be measured.

The HRC endorses the approach taken by the Patten Commission and believes that the recommendations for police reform contained in the Report set the standard of human rights policing to which all common law jurisdictions should aspire. We recall the foundational proposition of the Patten Report as set out in the opening lines of its examination of the applicability of human rights to policing:

“The fundamental purpose of policing should be...the protection and vindication of the human rights of all...Article 28 of the Universal Declaration of Human Rights states: ‘everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised’. The role of the police is to help achieve that social and international order. They must, for example, uphold the laws that safeguard the lives of citizens. There should be no conflict between human rights and policing. Policing means protecting human rights”.⁴

The Report goes on to point to the contribution that human rights can make to the effective policing of the community, starting from the position that effective policing relies on the consent and respect of the community for the police service, and upon the mutual cooperation of the community with the police. Poor judgment by police

² Patten C., *“A New Beginning: Policing in Northern Ireland, The Report of the Independent Commission on Policing for Northern Ireland”*, September 1999, at para. 1.5.

³ See Chapter 6, para. 9 of the Intergovernmental Agreement signed between Ireland and the United Kingdom at Belfast on 10th April 1998.

⁴ Patten at para. 4.1.

officers in using their powers to limit a person's human rights and freedoms can lead to problematic relationships between the police and the communities they serve and this in turn renders policing ineffective. As the Patten Report points out:

“Human rights are not an impediment to effective policing but, on the contrary, vital to its achievement”.

The most significant aspect of the proposed Heads of Bill is undoubtedly the proposal for the establishment of a Garda Inspectorate. The HRC has already made clear its position in relation to the need for an independent and effective Body for dealing with complaints against members of the Garda Síochána in our Position Paper, “*A Proposal for a New Garda Complaints System*”.⁵ In that Paper we indicated our preference for a Garda Ombudsman over a Garda Inspectorate as the best means of improving the promotion and protection of human rights with regard to police accountability, endorsing the Patten Report recommendations and the earlier “*Review of Police Complaints in Northern Ireland*”, conducted by Senator Maurice Hayes and published in January 1997. The main points of our analysis in that Paper were:

- The importance of separating the oversight of police efficiency and effectiveness from the investigation of complaints;
- The greater powers and level of independence that is generally associated with the institution of Ombudsman;
- The need to clearly demark the independence of the Complaints Body from any supervisory agency and from the Garda Síochána; and
- The added advantage of equivalence and comparability of institutions on a cross-border basis, particularly in the context of the commitment of the Irish Government to greater cooperation between the Garda Síochána and the Police Service of Northern Ireland (PSNI),

We believe that the success in recent years of the Office of Police Ombudsman in Northern Ireland, and indeed in other jurisdictions such as South Africa, supports this view and we wish to strongly restate our preference for the establishment of a Garda Ombudsman here. In this Paper, we will set out in greater detail the requirements of international law in the area of independent investigation of complaints against police officers, standards that are increasingly pointing towards a clear preference for the Ombudsman model. For example, in its concluding observations on Ireland's second periodic report under the International Covenant on Civil and Political Rights the UN Human Rights Committee explicitly recommended that the Irish Government consider the establishment of a Garda Ombudsman's Office.⁶

⁵ HRC, December 2002.

⁶ See para. 3.3.5 below.

The urgency of the present situation in relation to complaints against members of the Garda Síochána can be seen by reference to the recently published report of the European Committee for the Prevention of Torture on their 2002 visit to Ireland. In that Report the Committee referred to a significant number of complaints of ill-treatment which it received from persons in custody and made the following comments:

“The number and consistency of the allegations of ill-treatment heard by the delegation lend them credibility. Moreover, in some cases, the delegation's doctors gathered medical evidence consistent with the allegations received.”⁷

The Committee goes on to recount a number of particularly serious allegations of ill-treatment concerning garda stations in Dublin and Cork where detainees displayed serious bruising and other injuries. The Committee also referred to the incidents of May 6th 2002 in Dublin and the subsequent investigations into alleged Garda misconduct. Recalling its recommendations in its two earlier reports in relation to training and the investigation of complaints, the Committee expressed some frustration with the slow pace of legislative reform in Ireland:

“...The Committee can only encourage the Irish authorities to continue to give a very high priority to establishing an inspection and complaints body which is, and is seen to be, independent and impartial.”⁸

In summation then, the HRC welcomes the publication of the proposed Heads of Bill and particularly the proposals contained therein for a new system of investigation of complaints against members of the Garda Síochána. However, while we propose to analyse the provisions of the proposed Heads of Bill by reference to the requirements of international law on their own merits, we wish to make clear that we remain convinced that the most appropriate means of achieving the effective independent investigation of complaints is through the establishment of a Garda Ombudsman and we strongly urge the Minister for Justice Equality and Law Reform to reconsider this issue in drafting the proposed Bill. Therefore, in this submission any comments made in relation to the proposed Garda Inspectorate are intended as general points which should apply to whatever Complaints Body is proposed in the final Bill.

⁷ CPT Inf (2003) 36, para. 12.

⁸ Ibid. para. 18.

2. Executive Summary of the Main Human Rights Principles Relevant to the Proposed Bill

2.1 Human Rights as a Central Element of Law Enforcement

The international human rights conventions Ireland has ratified are binding on the State including through the actions and omissions of its agents. The advancement and attainment of the human rights standards and objectives contained in these treaties should be a core value and underpinning principle of law enforcement. In drafting the present Bill, consideration should be given to how the importance of human rights to policing policy and practice can be reflected in statute. Furthermore, all legislation pertaining to the powers and duties of law enforcement officials, including legislation relating to arrest, detention and interrogation of suspects, should be kept under continuing review by reference to their compliance with human rights standards.⁹

In the performance of their duties and functions, members of the Garda Síochána should have regard to the principles of human rights as set out in international law and the Constitution. The State is also under an obligation to protect the human rights and freedoms of all members of its police service.¹⁰

2.2 Code of Ethics

Human rights also need to be explicitly placed at the core of the functions of the Garda Síochána by means of an enforceable Code of Ethics and/or Code of Conduct.¹¹ This Code should reflect contemporary international standards of human rights and policing as they have been developed within the UN and the Council of Europe. Models for this Code exist in the UN Code of Conduct for Law Enforcement Officials and the European Code of Police Ethics.

The Code should specify that it will be a disciplinary offence for officers to breach the Code, and it should also place a duty on all members of the police service to inform the authorities of any breach of the Code that they may become aware of.¹²

⁹ UN CAT, Article 11.

¹⁰ European Code of Police Ethics, para. 20.

¹¹ Article 10 of CAT; Article 2 of the UN Code of Conduct for Law Enforcement Officials.

¹² UN Code of Conduct, Article 8.

2.3 Training and Recruitment of Law Enforcement Officials

The State is under a positive obligation to proactively prevent human rights violations from occurring.¹³ International law states that training and education in human rights is an important aspect of this obligation in instilling in members of the police service a respect for the human rights of the community they serve and promoting an understanding of their role as protectors of persons' human rights. As a general principle, a member of a police service who is properly and adequately skilled and trained will be better equipped to carry out his/her duties successfully; exercise his or her judgment appropriately; and not to resort to ill treatment or the abuse of his or her powers.¹⁴

Human rights education should be mainstreamed into all aspects of the training of law enforcement officials and particular emphasis should be placed on education around issues of equality, discrimination and combating racism.¹⁵ The State must also ensure that the police service is properly representative of all sections of society and that candidates joining the service are suitable persons for carrying out police functions.¹⁶

2.4 Safeguards Against Mistreatment of Persons by Law Enforcement Officials

As part of its positive obligation to proactively prevent violations, the State must put in place adequate and effective safeguards to minimise the risk of any violations of human rights by police officers taking place.¹⁷ Such measures include the keeping of correct and adequate records in relation to the circumstances and conditions of any detention.¹⁸ Other preventive measures such as the electronic recording of interviews in police custody¹⁹ and access of suspects to lawyers during custody are also of central importance in this context.²⁰

In its report on its most recent visit to Ireland, the CPT Committee also urged the Government to consider extending the right of access to a

¹³ Article 2(1) of CAT; Article 2 of the ICCPR.

¹⁴ Article 7 ICCPR; General Comment 20 of the Human Rights Committee; Article 2 of CAT; and CPT Committee 2002 Standards (see paragraph 2.4 above). The issue of training has also been dealt with by the Committee on the Elimination of All Forms of Racial Discrimination (CERD) in its General Comment 13.

¹⁵ Human Rights Committee General Comment 21, at para. 4.

¹⁶ See para. 5.9 below.

¹⁷ Article 2 ICCPR.

¹⁸ Article 11 CAT; General Comment 20 of the Human Rights Committee. During its most recent visit to Ireland, the CPT Committee found that adequate custody records were not being kept at one of the garda stations it visited, (CPT 2002 Report on Ireland at para. 24).

¹⁹ CPT 2002 Report on Ireland, para.25.

²⁰ Ibid. para.21.

lawyer to include the right to have a lawyer present during interrogation.²¹

At the legislative level, all Garda practices and powers in relation to the arrest and detention of persons, including the regulation of matters such as interrogation methods, should also be kept under regular review from a human rights perspective.²²

2.5 Effective Investigation of Complaints

Where there are reasonable grounds for believing that a violation of a person's human rights has occurred as a result of the actions or omissions of law enforcement officials, an effective official investigation must be carried out.²³ This investigation must also be initiated by the State of its own motion, and not merely as a response to a complaint received.²⁴

In relation to each of the required characteristics of an effective investigation set out below, where the actions or omissions complained of relate to a serious violation of fundamental human rights, such as the right to life or the right to freedom from torture, the standards required of any investigation will be higher than the general requirement for effective investigation.

(a) Independence: the Complaints Body responsible for carrying out the investigation must be independent from those implicated. In practice, this means a lack of institutional connection between the Complaints Body and the person(s) being investigated.²⁵ In particular, the involvement of police officers from within the same police force in any such investigation will seriously compromise its independence.²⁶ The persons carrying out the investigation must be independent in a practical sense, in that there should not be reliance on evidence or information solely from the source being investigated.²⁷

Not only must the investigators be independent, but they must also be seen to be so.²⁸ The extent of the control of the Government over the

²¹ Ibid. para.22.

²² General Comment 20 of the Human Rights Committee; Article 11 CAT.

²³ Articles 2,6 & 7 ICCPR; General Comment 20 of the Human Rights Committee; Articles 12, 13 & 14 CAT; Article 2, 3, 5, 8 & 13 ECHR and the CPT Reports on its visits to Ireland in 1993, 1998 and 2002 (see section 3.2 below).

²⁴ See *McKerr* case at para. 94.

²⁵ Concluding Observations of Human Rights Committee on Ireland second periodic report; Report of CPT Committee's first visit to Ireland.

²⁶ ECHR Article 13; Concluding Observations of the Human Rights Committee on Ireland's second national report under the ICCPR, para. 13-14; UN CAT Article 12.

²⁷ *Ergi v. Turkey* (2001) 32 EHRR 388.

²⁸ Report of CPT Committee's first visit to Ireland, para. 55.

appointment, remuneration and dismissal of the Complaints Body investigating police misconduct may also undermine its independence.²⁹

(b) **Effective Powers**: the Complaints Body must have the means and mandate to carry out an effective investigation into whether the conduct complained of has occurred and the identity of those responsible. In general it should have the power to compel witnesses and to secure evidence including the evidence of eyewitnesses, forensic evidence and, in relation to alleged violations of the right to life, a complete and accurate autopsy report.³⁰ Where serious violations have occurred, the investigatory body should have the power to identify and punish those responsible.³¹

(c) **Burden of Proof**: if the alleged violation has taken place during a period of police detention, custody or interrogation and the events lie wholly within the knowledge of the authorities, where there is reasonable evidence to suggest ill-treatment may have occurred the burden of proof rests on the authorities to provide a satisfactory and convincing explanation.³²

(d) **Promptness**: the investigation should be launched promptly to maintain public confidence and to avoid the appearance of collusion, particularly, in instances involving allegations of serious violations of human rights or where a delay might result in serious or irreversible harm.³³

(e) **Public Scrutiny**: the investigation must be open to some degree of public scrutiny to maintain public confidence in the investigation procedure. In cases involving allegations of serious violations of human rights, the alleged victims or their families should be involved.³⁴

Again the HRC restates its strong belief that the most effective way of meeting the requirements for independent and effective investigation of complaints set out here is by the establishment of an Office of Garda Ombudsman along the lines of that established in Northern Ireland.

²⁹ Article 13 ECHR; see for example the case of *Khan v United Kingdom*, discussed below at 3.1.1.

³⁰ For a clear statement of the ECHR law on this point see the judgment of the Court in *Keenan v. United Kingdom* (2001) 33 EHRR 913 at para. 122.

³¹ See the Turkish cases of *Kurt, Aksoy*, and *Kaya* (discussed at 3.1.2-3.1.3 below).

³² The question of evidential burdens has been examined by the European Court in a number of cases including *Tomasi v. France* (1993) 15 EHRR 1.

³³ See *Keenan* above. See also *Yasa v. Turkey* (1999) 28 EHRR 408.

³⁴ *Gulec v Turkey* (1999) 28 EHRR 121; *McKerr et al.*

2.6 Due Process Rights of Members of the Garda Síochána

In the determination of a person's civil rights, or of a criminal charge against a person, that person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.³⁵ There should be 'equality of arms' between the parties and the parties should have the opportunity to have knowledge of, and comment on, any observations filed or evidence adduced by the other party. In particular, in relation to criminal charges, the accused person should enjoy the right to remain silent and the right not to incriminate himself or herself.³⁶

2.7 Restrictions on the Freedom of Expression

Restrictions on the right to freedom of expression can be justified only where they are in accordance with national law and in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.³⁷ Every restriction must be necessary in a democratic society and proportionate to the legitimate aim pursued.³⁸

³⁵ Article 6 ECHR.

³⁶ See case of *Saunders v. United Kingdom* below.

³⁷ Article 10 ECHR.

³⁸ See case of *Handyside v United Kingdom* below.

3. Relevant Standards of International Human Rights Law

Ireland has ratified four major international conventions that are of primary relevance to the functioning and accountability of the police. These are the International Covenant on Civil and Political Rights (ICCPR); the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT).³⁹ Interpretative guidance as to the main provisions of the treaties is provided by: the General Comments of the various UN treaty monitoring bodies; the Concluding Observations of the treaty bodies in relation to individual state reports; the Reports of the European Committee for the Prevention of Torture (CPT Committee); and the case law of the European Court of Human Rights. Section 4 below deals with a number of additional ‘non-binding’ international instruments which are also of relevance here. The standards set out in that section have been used by the European Court and the various treaty monitoring bodies to develop further the requirements of the four treaties referred to here.

3.1 European Convention on Human Rights and Fundamental Freedoms (ECHR)

A key characteristic of the system of human rights protections established under the ECHR is that the Convention creates positive obligations on the State to promote and protect the rights contained in the Convention. Under the Convention, rights such as the right to life and the right to freedom from torture require, not only that the State refrains from direct violations of those rights, but also that the State must take preventive measures to ensure violations of rights do not occur and remedial action to ensure accountability and justice where violations have already taken place.

Section 3(1) of the European Convention on Human Rights Act 2003 provides that,

“[E]very organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions”.

Therefore, in addition to the general legislative obligation to ensure that the proposed Bill is compatible with the ECHR, there is also the obligation that all

³⁹ It should be noted that, although not examined in detail here, other UN human rights treaties are also relevant to police practice. See, for example, the case of *L.K. v Netherlands* (No. 4/1991) taken under the Optional Protocol to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the same Committee’s General Comment 13 on police training referred to above at para. 2.3.

public bodies, including the Garda Síochána, are under a specific statutory obligation to take account of the ECHR in their operations.

In broad terms, the application of the ECHR in the area of policing falls into two categories:

- (i) Those rights that can be categorised as the rights of ‘victims’ of human rights violations and which centre on the right to effective investigation of and the provision of remedies for such violations; and
- (ii) The rights of law enforcement officials, including the rights to fair procedures and due process of persons accused of criminal offences and the rights of officials, subject to the public good, to freedom of expression.

3.1.1 Article 13 – The Right to an Effective Remedy.

Article 13 of the ECHR reads as follows:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

Article 13 requires that there is an effective remedy to enforce the substance of the Convention rights in the national legal order where the claimant has an arguable complaint that his/her Convention rights have been violated. The remedy before the national authority should concern both the determination of the claim and any appropriate redress. The remedy required by Article 13 must also be effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.⁴⁰

The Court has given some guidance as to the standard of investigative independence required by the ECHR in the case of *Khan v. United Kingdom*.⁴¹ In that case the Court considered the effectiveness of the Police Complaints Authority (PCA) in the UK as an effective remedy in relation to allegations of violations of Article 8 (the right to privacy) and Article 6 (the right to a fair trial) of the ECHR. The Court, recalling the previous decision of the Commission in the *Govell* case,⁴² noted that complaints could only be referred to the PCA in circumstances where they were concerned with death or serious injury, or where the complaint was of a type specified by the Secretary of State. In other circumstances the Chief Constable of the area where the

⁴⁰ *Aksoy v. Turkey*, (1997) 23 EHRR 553.

⁴¹ *Khan v. United Kingdom*, (2001) EHRR 1016.

⁴² *Govell v. United Kingdom*, Application no. 27237/95.

complaint was lodged decided whether or not he or she was the appropriate authority to decide the case.

Significantly, the Court noted the important role played by the British Secretary of State in appointing, remunerating and, in certain circumstances, dismissing members of the PCA. In addition, the Court observed that the PCA was required to have regard to any guidance given to it by the Secretary of State with respect to the proffering or withdrawal of disciplinary charges and criminal proceedings. Taking all of these factors into consideration, the Court concluded that the system of investigation of complaints embodied in the PCA did not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13.

3.1.2 Articles 2 & 13 – The Right to an Effective Remedy and the Right to Life

The European Court of Human Rights has set higher procedural standards regarding investigation and effective remedies in cases relating to allegations of serious violations of the right to life and the right to freedom from torture, inhuman and degrading treatment under Articles 2 and 3 of the ECHR. This is in recognition of the fundamental nature of these rights from which no derogation is permitted.

In relation to the right to life, in the *Keenan* case the Court stated:

“Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure”⁴³.

In the four recent cases of *McKerr*,⁴⁴ *Shanaghan*,⁴⁵ *Jordan*,⁴⁶ and *Kelly & Ors.*⁴⁷ (all four judgments were delivered together on 4th May 2001), the Court issued a clear summation of the principles that have been developed by the Court in its jurisprudence over a number of years in relation to the effective investigation of deprivations of the right to life, setting out the basic requirements for any such investigation. These requirements have recently been restated in the case of *Finucane v United Kingdom*.⁴⁸

⁴³ *Keenan v. United Kingdom*, (2001) 33 EHRR 1357.

⁴⁴ *McKerr v. United Kingdom*, Application No. 28883/95.

⁴⁵ *Shanaghan v. United Kingdom*, Application No. 377715/97.

⁴⁶ *Jordan v. United Kingdom*, Application No. 24746/94.

⁴⁷ *Kelly & Ors. v. United Kingdom*, Application No. 30054/96.

⁴⁸ Judgment delivered on July 4th 2003.

The essential purpose of such investigations is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The authorities must act of their own initiative once the matter has come to their attention, and they cannot leave it to the initiative of the next of kin or others to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.⁴⁹

The Court also stated that for the investigation to be regarded as being effective it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection, but also a practical independence from those implicated. Therefore the investigation should not rely on evidence or information solely from the source under investigation and must by implication have the power to gather evidence independently. Where the events leading to the death and injury lie wholly or in large part within the exclusive knowledge of the authorities, the Court regards the burden of proof as resting on the authorities to provide a satisfactory and convincing explanation.⁵⁰

The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.⁵¹ The Court makes clear that this is not an obligation of result, but rather an obligation of means. The investigating authority must have the mandate to establish the key issues of responsibility and liability and must have taken the reasonable steps available to them to secure the evidence concerning the incident including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

The requirements of promptness and reasonable expedition are also important. A prompt response by the authorities in investigating the use of lethal force is essential to maintain public confidence in their adherence to the rule of law and in preventing the appearance of collusion. The Court further requires that there should be a sufficient element of public scrutiny of the investigation and its results to secure accountability in practice as well as in theory.⁵²

⁴⁹ *McKerr* at para. 94 (similar statements appear in the other three judgments).

⁵⁰ *Ibid.* para. 92.

⁵¹ *Jordan* at para 107.

⁵² *Jordan* at para.s 108-109

3.1.3 Articles 3 & 13 – The Right to an Effective Remedy and the Right to Freedom from Torture

In relation to an effective remedy for violations of the rights protected under Article 3 of the ECHR, the Court has made similar statements in judgments in the cases of *Aksoy*,⁵³ *Aydin*⁵⁴ and *Kurt*⁵⁵ to those set out above in relation to Article 2. However, in relation to Article 3, the Court has not provided as detailed a list of requirements in relation to the investigation of alleged incidents as it has in relation to the right to life. The Court has reiterated the principle that an effective official investigation should be carried out in all cases where an individual raises an arguable claim that they have been mistreated. In the *Assenov* case the Court stated,

“[T]his investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible”.⁵⁶

The Court went on to state that if this were not the case the prohibition on torture and inhuman or degrading treatment, despite its fundamental importance, would be ineffective in practice.

3.1.4 Article 6 – The Due Process Rights of Persons under Investigation

In addition to the rights of victims of human rights abuses, the ECHR also requires that the human rights of persons who may be accused of criminal offences or human rights violations are protected. Article 6 of the ECHR requires that in the determination of a person’s civil rights and obligations, or of any criminal charge against him/her, that person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proven guilty. Article 6(3) lists the minimum rights that everyone charged with a criminal offence is entitled to, including the right to be informed of any accusation; to be allocated adequate time and facilities for the preparation of a defence; to defend oneself in person or through legal assistance of one’s own choosing (or, when the interests of justice so require, to be given free legal assistance in cases where a person does not have sufficient means); and to examine witnesses.

It should also be noted that the protection of Article 6 takes effect from the time when a person is charged with a criminal offence. In the *Eckle v. Germany* case the Court defined a charge as “the official notification given to

⁵³ *Aksoy v. Turkey*, (1997) 23 EHRR 553.

⁵⁴ *Aydin v. Turkey*, (1998) 25 EHRR 251.

⁵⁵ *Kurt v. Turkey*, (1999) 27 EHRR 373.

⁵⁶ *Assenov v. Bulgaria*, (1999) 28 EHRR 651 at para. 102.

an individual by the competent authority of an allegation that he has committed a criminal offence”.⁵⁷

A number of specific features have emerged from the case law that can be regarded as the ingredients of fair procedure. The concept of equality of arms is taken to require a fair balance between the parties in the proceedings. The right to an adversarial process means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by another party.

In the case of *Saunders v. United Kingdom*,⁵⁸ the Court also held that the right to silence and the right not to incriminate oneself are generally recognised international standards that lie at the heart of the notion of a fair criminal procedure.⁵⁹

3.1.5 Article 10 – The Right to Freedom of Expression

In the Scheme of the Garda Síochána Bill 2003 it is proposed that the disclosure of information by a member of the Garda Síochána or one of its employees where that information has come to his/her knowledge by virtue of his/her office will be liable for criminal prosecution. This proposal raises issues under Article 10 of the ECHR with regard to the right to freedom of expression and the conditions under which that freedom may be the subject of formalities, conditions, restrictions or penalties.

Where a person faces criminal proceedings as the result of his/her exercise of the right to freedom of expression, as is envisaged under the present Bill, the European Court has determined that this amounts to a ‘restriction’ or ‘penalty’ within the meaning of Article 10(2), and that the State will have to justify its national law as coming within the terms of Article 10(2).⁶⁰ Article 10 (2) states that any such restrictions must be prescribed by law, must be necessary in a democratic society and must be justified under one of the following categories:

- (i) The interests of national security, territorial integrity or public safety;
- (ii) The prevention of disorder or crime;
- (iii) The protection of health or morals;
- (iv) The protection of the reputation or rights of others;

⁵⁷ *Eckle v Germany*, (1983) 5 EHRR 1.

⁵⁸ *Saunders v United Kingdom*, (1997) 23 EHRR 313.

⁵⁹ In this context, the constitutional right to due process and to protection of one’s good name under Bunreacht na hEireann, as developed in cases such as *In re Haughey* and the recent *Abbeylara* case, are also of relevance. We do not intend to analyse this area of Irish law here, except to make the point that, in general, those rights are afforded a stronger level of protection at the constitutional level than they are under international law.

⁶⁰ *Zana v. Turkey*, (1999) 27 EHRR 667.

- (v) The prevention of the disclosure of information received in confidence; or
- (vi) The maintenance of the authority and impartiality of the judiciary.

In the *Handyside*⁶¹ case the Court clearly stated that every such restriction or penalty must also be proportionate to the legitimate aim pursued.

The former European Commission examined a number of cases concerning restrictions imposed where civil servants had publicly criticised their employers and suffered disciplinary measures, and determined that State employees and service personnel have a special ‘duty of discretion’, meaning that their freedom to criticise government policies in a public manner is curtailed.⁶² Nonetheless, in this area too any restrictive measures must be strictly proportionate, and the motives of a ‘whistle-blower’ and his or her ability to substantiate criticisms of policy or administrative practice are relevant factors which must always be considered.

3.2 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The importance attached by the Council of Europe to the prohibition against torture contained in Article 3 of the ECHR led to the adoption in 1987 of a specific European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The Convention provides for the establishment of a Committee of experts, the European Committee for the Prevention of Torture (CPT Committee), to visit States parties and to report on the treatment of persons deprived of their liberty.

3.2.1 Ireland’s Compliance with the CPT

In its report on its first visit to Ireland the CPT Committee called for urgent action to be taken about complaints of alleged mistreatment of persons detained in garda stations and emphasised the important preventative effect of such investigation. The Committee went on to state that an effective complaints’ procedure must be, and be seen to be, fully independent and impartial and criticised the lack of independence and objectivity of the existing Garda Síochána Complaints Board noting that the lack of public confidence in the complaints system undermined its capacity.⁶³ In its report on its 1998 visit, the Committee once again emphasised the fundamental

⁶¹ *Handyside v. United Kingdom*, (1979-1980) 1 EHRR 737.

⁶² *Haseldine v. United Kingdom*, admissibility decision of 13th May 1992.

⁶³ Council of Europe Document CPT/Inf (1995) 14, at para. 54-55.

importance of an effective complaints and inspection procedure,⁶⁴ and reiterated the point again in its recent report on its 2002 visit, noting that,

“[T]he CPT’s delegation heard accounts of solicitors discouraging clients from filing a complaint. In the circumstances the CPT can only conclude that this Body, which has been under review for a number of years, is failing to contribute to the prevention of ill-treatment”.⁶⁵

As already outlined in section 1 above, the most recent visit of the CPT Committee recounted a significant number of allegations of serious mistreatment of suspects by members of the Garda and again called for urgent action on the issue of independent investigation of complaints.

3.2.2 Substantive Standards set by the CPT

In addition to its periodic reports, the CPT regularly issues a set of substantive standards to indicate to the national authorities its views regarding the manner in which persons deprived of their liberty ought to be treated. These standards are increasingly being referred to by the European Court of Human Rights in its judgments. In its 2002 set of standards, for example, the CPT stated,

“[T]he CPT wishes to emphasise the great importance it attaches to the training of law enforcement personnel...There is arguably no better guarantee against the ill-treatment of a person deprived of his liberty than a properly trained police or prison officer. Skilled officers will be able to carry out successfully their duties without having recourse to ill-treatment and to cope with the presence of fundamental safeguards for detainees and prisoners”.⁶⁶

3.3 International Covenant on Civil and Political Rights (ICCPR)

3.3.1 Article 2 – General Duty to Protect Rights without Discrimination

Article 2 of the Covenant requires States parties to the Covenant to respect and ensure to all individuals within its territory and subject to its jurisdiction their most fundamental human rights, such as the right to life, the right to freedom from torture, inhuman and degrading treatment and the right to liberty. The ICCPR further requires States to respect and ensure to persons the rights recognised in the Covenant without discrimination on any grounds such as

⁶⁴ CPT/Inf (1999) 16, para. 16.

⁶⁵ CPT/Inf (2003) 36, para. 18.

⁶⁶ CPT/Inf/E (2002) 1 at para. 59. The issue of training was also addressed by the Committee in its most recent report in relation to Ireland where it recommended the introduction of integrated human rights training, CPT/Inf (2003) 36, para. 15.

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3.3.2 Article 6 – The Right to Life

In accordance with Article 6 of the Covenant, all persons have the right to life and the arbitrary deprivation of life is prohibited. In its General Comment 6, the Human Rights Committee (the name of the treaty body which monitors States' compliance with the ICCPR) observes that the deprivation of life by the authorities of the State is a matter of the "utmost gravity", and the State should take measures to prevent and punish arbitrary killing by its security forces.⁶⁷ The Human Rights Committee also stated that the law of the State should strictly control and limit the lawful circumstances in which lethal force may be used by the authorities. This duty extends to creating an obligation on the State to establish, "effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".⁶⁸

3.3.3 Article 7 – The Right to Freedom from Torture or Inhuman or Degrading Treatment or Punishment

Article 7 prohibits torture or cruel, inhuman or degrading treatment or punishment. In line with the principle of the positive obligation on States to take measures to further the objectives set out in the Covenant, the Human Rights Committee, in its General Comment 20, provides guidance on what measures are required within the domestic setting to ensure the effective prohibition of torture and inhuman or degrading treatment.⁶⁹ In particular, paragraph 10 provides that, in order to prevent the occurrence of treatment in contravention of Article 7,

"Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training".⁷⁰

Other important preventative measures highlighted by the Human Rights Committee include the systematic review of the rules, instructions, methods and practices governing interrogation and the putting in place of arrangements for the strict formal registering and recording of the circumstances and details

⁶⁷ General Comment 6, adopted at the Human Rights Committee's 16th Session, 1982, at para. 3.

⁶⁸ Ibid. at para. 4.

⁶⁹ General Comment 20, adopted at the Human Rights Committee's 44th Session, 1992.

⁷⁰ Ibid. para. 10.

of any custody and of the treatment of persons subjected to any form of arrest, detention or imprisonment. This obligation requires that the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings.⁷¹

Where it is alleged that there has been an occurrence of torture, or cruel or inhuman treatment or punishment the Human Rights Committee have stated that, in accordance with Article 2 (3),

“The right to lodge a complaint against maltreatment prohibited by Article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.⁷²

3.3.4 Article 9-10 – The Right to Liberty and Security of Person

Article 9 guarantees to everyone the right to liberty and security of person and prohibits arbitrary arrest and detention. Persons can only be deprived of their liberty if their arrest or detention is in accordance with the grounds and procedures established by law and where fair and proper procedure is followed. All persons who are arrested are guaranteed a number of due process rights including: the right to be informed of the charges against him/her; the right to be brought promptly before a judge and to a trial; the right to appeal the lawfulness of the detention; and the right to compensation in the event of an unlawful arrest or detention.

Article 10 of the ICCPR deals with the rights of persons deprived of their liberty and General Comment 21 sets out the absolute nature of States’ obligations in this regard:

“Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷³

3.3.5 Examination of Ireland’s Compliance with the ICCPR

⁷¹ Ibid. para. 11.

⁷² Ibid. para. 14.

⁷³ General Comment 21, adopted at the Human Rights Committee’s 44th Session, 1992, at para. 4.

In its two examinations of Ireland's reports under the ICCPR to date, the Human Rights Committee has applied the standards outlined above to the particular circumstances of An Garda Síochána. The Committee has been particularly critical of the State's failure to provide for an independent investigation and complaints' procedure to investigate allegations of unlawful conduct by the police. In its Concluding Observations on Ireland's second periodic report under the ICCPR, the Human Rights Committee made the following comments:

“The Committee regrets that the [Garda Complaints] Board is not fully independent, in that investigations of complaints against the Garda are often entrusted to members of the Garda without consultation with the Board. It emphasises that the availability of recourse to the courts to address allegedly unlawful conduct by the police does not displace the need for independent and transparent investigation of allegations of abuse. ... Consideration should be given to the establishment of a police ombudsman. In the case of death resulting from action by members of the Garda, the State party should ensure that allegations are investigated by an independent and public process”.⁷⁴

The Human Rights Committee, therefore, made clear that the provision of an independent, transparent and public complaints procedure to investigate allegations of misconduct by the police is necessary to ensure Ireland is in compliance with its international commitments under the ICCPR and that special higher standards of investigatory independence are required in cases involving the use of lethal force.

3.4 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

As its title indicates, the provisions of the CAT (ratified by Ireland in April 2002) apply to both grievous human rights abuses constituting acts of torture and to the broader category of cruel, inhuman or degrading treatment or punishment whereby the acts or omissions of a State seriously interfere with the dignity or security of an individual. The CAT treaty monitoring body, the Committee Against Torture, places particular emphasis on the vulnerability of persons in police custody, or subject to police interrogation. States parties are required to take a number of concrete actions to prevent the violations of rights prohibited under the Convention and to provide an effective remedy to the victims of such violations. The CAT, then, can be seen as developing further some of the main provisions contained in the ICCPR.

3.4.1 Articles 2 & 10 – Requirement to Provide Human Rights Training

⁷⁴ UN Doc. A/55/40, paras. 13-14.

Article 2 of the CAT requires States to take “effective legislative, administrative, judicial or other measures to prevent acts of torture”. Article 10 provides these measures include the requirement that States ensure that,

“[E]ducation and information regarding the prohibition against torture are fully included in the training of law enforcement personnel...public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment”.

3.4.2 Articles 10 & 11 – Code of Ethics and Review of Law and Practice

Article 10 provides that the prohibition of torture and inhuman or degrading treatment must be included in any Code of Ethics or other rules or instructions that govern the duties and functions of law enforcement officials. Article 11 requires States to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment with a view to preventing cases of torture, inhuman or degrading treatment.

3.4.3 Articles 12-14 – Right to an Investigation and an Effective Remedy

Where there are reasonable grounds for believing that a violation of the rights protected under the CAT has occurred, Article 12 provides that there should be a prompt and impartial investigation. Article 13 requires that the person who alleges he/she is a victim of such a violation should have the right to complain, to have his/her case heard promptly and impartially, and to protection from intimidation as a consequence of giving evidence. The right of the victim to redress and fair and adequate compensation is also provided for in Article 14, including the provision for as full a rehabilitation as possible.

4. Non-Binding Standards of International Human Rights Law

The application of the Covenants and Conventions discussed in the preceding section to the field of law enforcement has been developed further by both the United Nations and the Council of Europe, in more detailed Recommendations, Principles and Codes of Conduct. As previously mentioned, the Human Rights Committee has made frequent reference to these standards in its General Comments⁷⁵ and Concluding Observations,⁷⁶ as has the UN Committee Against Torture.⁷⁷ The European Court of Human Rights has also consulted these principles in cases such as those concerning the right to life.⁷⁸

These Codes, Principles and Recommendations, while not directly legally binding on States, are used by the treaty monitoring bodies and the European Court of Human Rights as interpretative guides as to how the legal obligations set out in the principal treaties should be implemented in practice at the domestic level pointing towards international best practice in the area. Many of the key principles contained in the treaties, such as the need for independent investigation of human rights abuses and the need for human rights training, are developed in more detail in these instruments.

4.1 UN Code of Conduct for Law Enforcement Officials 1979

The first such instrument is the UN General Assembly Resolution, *Code of Conduct for Law Enforcement Officials*,⁷⁹ which contains a detailed set of principles that sets the standard for the proper conduct of law enforcement officials in the carrying out of their duty. The Code provides a ‘blueprint’ for national codes of conduct and codes of ethics for law enforcement officials and is particularly relevant to the proposed Heads of Bill in light of the provision in Heads 15 and 25 for a revised Attestation and Code of Ethics for An Garda Síochána.

Significantly, the UN Code of Conduct makes clear at the outset that it applies to all law enforcement officials who exercise police powers, including the powers of arrest or detention. Article 2 of the Code of Conduct sets out the general duty of law enforcement officials to respect and protect human dignity and maintain and uphold the human rights of all persons.

The Code goes on to provide that no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel inhuman or degrading

⁷⁵ See in particular General Comment 21, Humane Treatment of Persons Deprived of their Liberty.

⁷⁶ See for example, concluding observations on United States CCPR/C/79/Add.50; Estonia, CCPR/CO/77/EST, 31st March 2003; Cyprus CCPR/C/79/Add.39, 21st Sept. 1994; United States CCPR/C/79/Add.50 30 Oct. 1995.

⁷⁷ See for example, concluding observations on Tunisia, A/54/44 paras. 88-105.

⁷⁸ See for example the cases of *McKerr*, *Shanaghan*, *Jordan* and *Kelly & Ors*, discussed below.

⁷⁹ Adopted by General Assembly Resolution 34/169 of 17th December 1979.

treatment, stating that force may only be used in the course of duty and that any use of force must be strictly necessary.⁸⁰ The Code also requires that law enforcement officials are to ensure the full protection of the health of persons in their custody.⁸¹

Other provisions of the Code include a prohibition on corruption⁸² and guidelines in relation to the handling of confidential information whereby any matters of a confidential nature in the possession of law enforcement officials must be kept confidential unless the performance of duty or the needs of justice strictly require otherwise.⁸³ The Code also requires that, where a law enforcement official has reason to believe that there has been a violation of the Code, he or she is required to report the matter to their superior authorities and where necessary to other appropriate authorities or organs.⁸⁴

4.2 European Code of Police Ethics

A further standard for any proposed Garda Code of Conduct or Code of Ethics is provided by the *European Code of Police Ethics* which was adopted by a Recommendation of the Committee of Ministers of the Council of Europe on 19th September 2001.⁸⁵ The preamble to the Code provides that one of the main purposes of the police in a democratic society governed by the rule of law is,

“[T]o protect and respect the individual’s fundamental rights and freedoms as enshrined, in particular in the European Convention of Human Rights”.

The recommendation goes on to state that police operations must always be conducted in accordance with the national law and international standards accepted by the country.⁸⁶ In relation to the organisational structure of the police the Recommendations provide:

“The police organisation shall contain efficient measures to ensure the integrity and proper performance of police staff, in particular to guarantee respect for individuals’ fundamental rights and freedoms as enshrined, notably in the European Convention on Human Rights”.⁸⁷

⁸⁰ Articles 3 & 5.

⁸¹ Article 6.

⁸² Article 7.

⁸³ Article 4.

⁸⁴ Article 8.

⁸⁵ Recommendation (2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics.

⁸⁶ Ibid. para. 3.

⁸⁷ Ibid. para. 20.

In relation to the training of police personnel, the recommendations provide that police training should be based on the fundamental values of democracy, the rule of law and the protection of human rights.⁸⁸ Paragraph 29 provides,

“Practical training on the use of force and limits with regard to established human rights principles, notably the European Convention on Human Rights and its case law, shall be included in police training at all levels”.⁸⁹

4.3 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990

The UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*⁹⁰ provides a detailed set of principles specifically addressing the use of force and firearms by police officers and other officials exercising police functions. These Principles have a particular relevance in relation to the protection of the right to life. Paragraph 7 of the Principles states,

“Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law”.

The text also addresses cases where the use of force or firearms by law enforcement officials leads to injury or death. Paragraph 22 of the Principles reads,

“Government and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequence, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control”.

4.4 UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989

The regulation of the use of lethal force by police officers and other public officials is described in more detail in the UN *Principles on the Effective Prevention and Investigation of Extra-legal Arbitrary and Summary Executions*, which deals with, among other issues, the investigation of

⁸⁸ Ibid. para. 26

⁸⁹ Ibid para. 29.

⁹⁰ Adopted on 7th September 1990 by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders.

suspected cases of unlawful killing or what are referred to as ‘extra-legal, arbitrary and summary executions’.

Paragraph 9 of the Principles provides that there should be a “thorough, prompt and impartial investigation of all suspected cases” and that Governments shall maintain “investigative offices and procedures to undertake such inquiries”. The purpose of the investigation must be to determine the cause, manner and time of death, the person responsible, and any pattern or practice that may have brought about that death. The investigation should include an adequate autopsy, collection and analysis of all the physical and documentary evidence and statements from witnesses.

The powers required of the investigation authority are set out in paragraph 10 as follows,

“The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witnesses, including the officials allegedly involved and to demand the production of evidence”.

Paragraph 11 provides that Governments shall pursue investigations through an independent commission of inquiry in cases in which the established investigative procedures are inadequate because of:

- (i) Lack of expertise or impartiality;
- (ii) The importance of the matter;
- (iii) The apparent existence of a pattern of abuse; or
- (iv) Where there are complaints from the family of the victim about these inadequacies or other substantial reasons.

Members of such a commission shall be chosen for their recognised impartiality, competence and independence as individuals.

5. Analysis of the Scheme of the Garda Síochána Bill 2003

5.1 The Functions of the Garda Síochána

Head 6 sets out the functions of the Garda Síochána, which have never before been provided for in statute. However, notably, this makes no reference to a duty on members of the Garda to uphold and protect human rights. This omission is especially striking, given that the prioritisation of human rights is currently provided for in the existing Garda *Declaration of Professional Values and Ethical Standards* as core values that should underpin all Garda activity.

The HRC recommends that consideration be given to including in this proposed Bill a reference to the principle that all functions of the police service should be carried out having regard to the human rights of all persons and without discrimination on the grounds of race, gender, religion, age, sexual orientation, disability, family status or any other ground.

5.2 Garda Attestation or Oath

Head 15 provides that every member of the Garda Síochána who is appointed should make the following attestation:

“I hereby solemnly and sincerely before God declare and affirm that I will faithfully discharge the duties of a member of the Garda Síochána with fairness, integrity, diligence and impartiality, upholding the Constitution and the laws and according equal respect to all people; that while I continue to be a member I will to the best of my skill and knowledge discharge all my duties according to law; and that I do not belong and that I will not while I remain a member form, belong or subscribe to any political party or secret society whatsoever”.

Again, the oath does not declare that a member of the Garda Síochána should be committed to upholding human rights. We believe that this divergence from the standards set out in the existing *Declaration of Professional Values and Ethical Standards* should be addressed.

We would also be concerned that the references to a deity in the declaration could raise issues under Article 9 of the ECHR and Article 18 of the ICCPR, which guarantee the right to freedom of thought, conscience and belief.⁹¹

⁹¹ See General Comment 22 of the Human Rights Committee, para. 2, and the case of *Buscarini and Ors. v San Marino* (2000) 30 EHRR 208 in relation to court oaths. The issue was also examined in detail in a 1990 Law Reform Commission Report (LRC 34-1990).

The HRC believes that every member of the Garda Síochána should know, comply with and apply international human rights law. In order to underline the importance of human rights at the core of the functions of the police service, the oath or attestation that every member of the Garda Síochána makes upon appointment should include a declaration, not only to uphold the Constitution and the laws of the State, but also to uphold the fundamental human rights of each person.

We also recommend that references to God contained in the attestation should be reconsidered in light of the case law of the ECHR and with respect for the freedom of members of the service to express any other religious beliefs, including non-theistic beliefs and the right not to express any religious beliefs.

In this context, we note that there is provision in the existing Court Rules for evidence to be vouched by means of an affirmation in place of an oath, in recognition of the long-standing acceptance of the need to respect the rights of all individuals to freedom of religion, thought and conscience.

5.3 A Code of Ethics for the Garda Síochána

Head 25 of the proposed Bill provides that the Garda Commissioner shall issue, and may from time to time revise, a Code of Ethics for the purpose of laying down standards of conduct and practice for members of the Garda Síochána. This Head proposes to provide a statutory basis for such a Code of Ethics. There is already a strong commitment to uphold the human rights of all persons in the current *“Declaration of Professional Values and Ethical Standards”*, however this declaration does not have a statutory basis.

Under Head 25(3) the Commissioner is required to take all steps to ensure that every member of the Garda Síochána is aware of and understands any Code issued. However there is no provision for a dedicated body to ensure that the Code of Ethics is effectively applied and complied with in practice. We note that paragraph 63 of the European Code of Police Ethics requires that “codes of ethics of the police, based on the principles set out in the present recommendation, shall be developed in member states and *overseen by appropriate bodies*”.

The HRC welcomes the proposed consultation process in the drafting of a Code of Ethics, whereby the Commissioner is to consult with the HRC and any other groups in drafting the proposed Code. The HRC is committed to participating constructively in any such process and believes that that process should be as wide-ranging as possible, involving all persons and bodies with an interest in the issue.

The HRC recommends that the human rights commitments contained in the current *Declaration of Professional Values and Ethical Standards* be reiterated and strengthened in the new statutory Code of Ethics to be issued by the Commissioner.⁹²

The HRC recommends that to ensure that the Code of Ethics sets an effective standard of conduct and practice for the members of the Garda Síochána, disciplinary proceedings should result where it is alleged that there has been a breach of the Code by a member of the Garda Síochána. The new Garda Complaints Body should have the mandate to refer to the Code of Conduct when examining a complaint alleging misconduct by a particular garda and to keep under regular review the overall compliance of members of the police service with the Code. Individual members should also be under obligation to report any serious violations of the Code of Ethics by their fellow members and be protected for reporting any violation of the Code.⁹³

5.4 Criminal Sanction for the Disclosure of Information

Head 26 provides for the imposition of a criminal sanction where a garda, or another person employed by the Garda Síochána, discloses information that has come to his/her knowledge by virtue of his/her office. Head 47 of the proposed Bill provides a similar provision in relation to members and employees of the proposed Inspectorate. This proposed provision raises concerns under Article 10 of the ECHR in relation to the freedom of expression. We note that the case law of the ECHR provides that civil servants are regarded as having a general duty of discretion curtailing their freedom to publicise information that has come to their knowledge by virtue of their position, but that this obligation is subject to the principle of proportionality.⁹⁴

We further note that Head 30 creates an offence of ‘causing disaffection’ within the service. We would question the need for such a provision and are concerned that this provision could potentially be used to curtail a member who is attempting to express legitimate concern about management or other practices within the Garda.

We recommend that any provision for criminal sanctions against members for the disclosure of information should be subject to the test set out under Article 10 of the ECHR that the State must demonstrate that the criminal punishment is:

⁹² Article 10 of CAT.

⁹³ Article 8 of the UN Code of Conduct for Law Enforcement Officials.

⁹⁴ *Handyside v United Kingdom*, discussed above at 2.3.5.

- (a) **Necessary in a democratic society and**
- (b) **Proportionate to a legitimate aim under Article 10 (2)**

While acknowledging that the objective of Head 26 may be considered to constitute a legitimate aim, the HRC is concerned that, in these circumstances, the provision in the Heads of Bill for penalties of a fine of €30,000 and/or imprisonment for a period of up to five years may be considered disproportionate to the legitimate aim being pursued, with reference to the test of proportionality under Article 10.

5.5 The Exercise of Garda Powers by ‘Non-Gardaí’

Head 32 of the proposed Bill provides that a designated person engaged in security duties, who is employed by a body to which the Bill applies (which is undefined), shall while on the property owned or occupied by that body have the same powers of arrest and entitlement to use reasonable force as a member of the Garda Síochána. The relevant body shall not designate a person under the proposed Head unless it is satisfied that the person is suitable to exercise the powers, the person is capable of effectively exercising those powers, the person has received adequate training in the exercise of those powers and, where the body is dealing with a contractor, the contractor is a fit person to supervise the exercise by the person of those powers.

The HRC is seriously concerned about any proposals for the exercise of police powers by ‘non-gardaí’. We believe that individuals who have not undergone any serious period of police training and education should not be granted legal power to arrest and use reasonable force. In this context, we also are concerned that their designation as a suitable person is at the discretion of their employer rather than under the supervision of the Commissioner or Garda authorities.

The HRC wishes to emphasise that the UN Committee Against Torture has made clear that the provisions of the CAT apply to all persons exercising law enforcement functions, regardless of their legal status.⁹⁵ The UN Code of Conduct is equally clear on the applicability of the Code to all persons exercising such functions.

The HRC recommends, therefore, that no person should be legally entitled to exercise police powers who is not subject to the Garda Code of Ethics and, more significantly, does not fall within the remit of an independent Complaints Body for the investigation of any complaints against that person.

⁹⁵ See para. 2.21 above.

5.6 Proposals for a Garda Inspectorate

Part 4 of the proposed Heads of Bill proposes to establish a Garda Inspectorate to deal with complaints against members of the Garda Síochána. This new body would be comprised of three persons, at least one of whom would be a woman, and will be appointed by Government. As already discussed, the reasoning behind the preference of the HRC for the establishment of a Garda Ombudsman over an Inspectorate is laid out in detail in our publication “*A Proposal for a New Garda Complaints System*”.

5.6.1 The Appointment and Dismissal of the Inspectorate

Head 35 of the proposed Bill provides the members of the Inspectorate shall be nominated and appointed by the Government, following the passing of Resolutions to that effect by the Oireachtas. The Government is required to have regard to the requirements of independence and knowledge of international standards in the criminal justice field and the person must be suitably qualified to carry out the functions of the job.

Head 36 provides the Government may dismiss a person from his/her job as a member of the Inspectorate where among other grounds the Government are satisfied, “he or she is unable or unfit to carry out his or her functions, or for any other stated reason he or she should be dismissed”.

Head 45 also provides for the transfer of staff to the Inspectorate from the current Garda Síochána Complaints Board.

It is imperative that whatever institution is established for the investigation of complaints against members of the Garda it must be both independent and seen to be independent by members of the public. The HRC recommends that, in order to ensure that the Complaints Body most effectively meets the standards of independence of investigation required by international human rights law, the relevant appointment and dismissal processes need to be sufficiently independent of the Government and be fully transparent.⁹⁶

We recommend that a transparent appointment process be put in place whereby the position(s) on the Complaints Body be publicly advertised, and that the criteria for the selection of the candidates should also be made public. Prospective candidates should be assessed by a suitably qualified advisory body that should have regard to the required independence of the Body and to the expertise and qualifications of the candidates in the field of human rights as well as the field of criminal justice. The HRC also

⁹⁶ See para. 4.4 (a) above.

welcomes the stated intention of Government to provide for the Oireachtas to have role in the appointment of the Body

The HRC is also concerned at the proposal in Head 45 to allow for the general transfer of all staff from the existing Garda Síochána Complaints Board to the new Complaints Body. It is an important aspect of functional independence that the new Complaints Body must have autonomy in the appointment of its staff. The HRC recommends that the provision for automatic transfer of staff should be removed.

5.6.2 The Distinction between Formal and Informal Investigations

Heads 49 to 52 provide for the procedures to be followed in the conduct of investigations into complaints against members of the Garda Síochána. It is proposed that, where a complaint has been received from a member of the public by the proposed Complaints Body, the Complaints Body would be able to make arrangements for the informal resolution of complaints or for the matter to be processed by the formal investigation complaints body. An informal resolution could be carried out where the Complaints Body is satisfied that the complaint does not warrant further investigation and where the complainant and the person against whom the complaint is made consent to this course of action.

Where the complaint relates to circumstances where a person died or suffered serious injury as a result of Garda operations, or while in Garda custody or care, the Inspectorate will always conduct a formal investigation immediately. In all other cases the Inspectorate may decide to carry out a formal investigation itself.

The HRC notes that the proposed Inspectorate is obliged to carry out a formal investigation of a complaint only in those cases alleging death or serious injury. The HRC is of the view that this may be too narrow a definition of serious cases and that other categories of complaints will also warrant a formal investigation.⁹⁷ For example, while informal proceedings may be adequate to address certain types of complaints, substantiated allegations of torture or of serious harassment or abusive behaviour on the grounds of race or sexual orientation would require a formal investigation by an independent Complaints Body, regardless of whether they led to serious injury.

⁹⁷ See for example the recent ECHR cases of *Khan v. United Kingdom* discussed at para. 2.3.1 above and *PG and JH v. United Kingdom*, judgment of 25th September 2001, both of which concerned violations of the right to privacy.

The HRC recommends that, while the Complaints Body should have discretion to decide which complaints require formal investigation, consideration should be given to ensuring that a broader standard of ‘serious cases’ is used and that formal investigation is not restricted to the narrow category referred to under this Head.

5.6.3 The Referral of a Complaint by the Inspectorate for Investigation by a Member of the Garda Síochána

Under the present proposals, the Inspectorate will be authorised to refer a complaint to the Commissioner for formal investigation by a member of the Garda Síochána. Where a complaint is referred to the Commissioner for formal investigation he or she is required to appoint a member of the Garda Síochána to investigate the complaint formally on behalf of the Inspectorate. In appointing the member, the Commissioner cannot appoint a member who has previously been involved in any capacity in relation to the case. The Inspectorate may require that they must give approval to the person that the Commissioner has decided to appoint. The Inspectorate may supervise the investigation of the complaint and should notify the Commissioner to that effect.

The Inspectorate is not required to obtain the consent of the parties involved, in particular the complainant, when exercising its discretion to refer the case to the Commissioner for investigation by a member of the Garda Síochána.

The HRC recommends that the consent of the person making the complaint should always be required before the Complaints Body can refer a case to the Commissioner, in order to ensure public confidence in the Complaints Body as a fully independent body. We believe that, in practice, the provision that the Garda Commissioner would recommend to the Complaints Body the member to investigate the complaint may have the effect of fundamentally undermining the independence of the investigatory system.

Moreover, the HRC notes that under the present proposals an anomalous situation may arise whereby, if the proposed Inspectorate decides to refer the investigation to the Commissioner, the member designated to conduct the investigation would have more effective powers to conduct the investigation than the Complaints Body itself were it to conduct the investigation (the inadequacies in the powers of the Inspectorate are examined below).

We believe that the current proposals in relation to the referral of complaints between the Garda Commissioner and the Complaints Body are seriously flawed and pay insufficient regard to the principle of independent investigation. We recommend that, in

relation to any complaints that are to be investigated by members of the Garda Síochána, the members to conduct the investigation should be chosen by the independent Complaints Body from a panel of investigating officers that have been approved by the Complaints Body. These members should then conduct any investigation under the supervision of the Complaints Body.

5.6.4 The Powers of the Inspectorate

The proposed Garda Inspectorate has the following powers under the Scheme of the Garda Bill 2003:

- (i) The power to investigate complaints alleging both criminal and disciplinary misconduct by a member of the Garda Síochána under Head 50(1);
- (ii) The power to determine the manner and the procedure for the conduct of a formal investigation under Head 51(2);
- (iii) The power to hold a formal hearing in the case of a formal investigation under Head 51(3);
- (iv) The power to compel the production of evidence and to compel the appearance of persons holding such evidence under Head 51 (4);
- (v) The power of the Inspectorate to launch an investigation of its own motion under Head 52(5); and
- (vi) The power to refer the case to the DPP under Head 53.

Certain mandatory powers are also provided for under this Head. Under Head 52(4) the Inspectorate is obliged, after consultation with the Commissioner, to investigate any matter that appears to the Inspectorate to indicate that the conduct of a member of the Garda Síochána resulted in the death of a person. Under Head 52(2) the Commissioner is also required to refer to the Complaints Body any matter that appears to the Commissioner to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of a person (see section 5.6.2 above).

The Minister and the Commissioner have a number of powers and obligations in relation to the referral of cases to the Inspectorate. Head 48 provides that the Minister may request the Inspectorate to examine a practice or policy of the Garda Síochána in order to identify any potential to avoid or reduce the future incidence of complaints related to that practice or policy. Under Head 52(1), the Minister, after consultation with the Inspectorate and the Commissioner, can refer to the Inspectorate any matter that appears to the Minister to indicate that a member of the Garda Síochána may have committed a criminal offence or behaved in a way that would justify disciplinary proceedings.

Under Head 55, it is also proposed that any complaint must be received within 6 months of the alleged incident. The Head does, however, make provision

for cases outside the time limit to be considered in exceptional circumstances or where they are referred to the Inspectorate by the Minister.

The proposed Inspectorate does not have an independent power to initiate an examination of a policy or practice of the Garda Síochána in order to identify any potential to avoid or reduce the future incidence of complaints related to that practice or policy. The Inspectorate can only do this at the request of the Minister.

As a general point, the proposed Complaints Body does not have the same powers as a member of the Garda Síochána to arrest and hold suspects when it is investigating a criminal offence, even where the behaviour under investigation has led to death or serious injury. It is therefore possible to conceive of a case involving serious allegations of wrongdoing where, given the inadequate powers of the Inspectorate, the Inspectorate may feel compelled to refer the case to the Commissioner for a more thorough and effective investigation to be carried out.

This anomalous situation could seriously undermine the effectiveness of a Complaints Body and its ability to independently gather evidence for the purposes of an effective investigation as required under the ECHR and ICCPR. In particular, the Inspectorate does not have the power to preserve a crime scene or preserve evidence that it believes will be of relevance to its investigation.

The HRC recommends that the investigatory staff of any new Complaints Body should be given the same powers as members of the Garda Síochána to arrest and hold suspects in the investigation of allegations of a criminal offence and also in relation to the preservation of a crime scene.

We further recommend that the Complaints Body should not be required to consult with the Commissioner before launching an investigation of its own motion under Head 52(5), or before launching a formal investigation where it believes the conduct of a member of the Garda Síochána may have resulted in the death of a person under head 52(4). In the view of the HRC, to require a Complaints Body to consult with the Garda Commissioner in this way runs counter to the principle of independence under the ECHR.⁹⁸

We believe that the time limit of 6 months for complaints is inadequate, notwithstanding the provisions for exceptional extensions of that period. A particular difficulty with this period is the practical reality that books of evidence in criminal proceedings are often not served within that period. We recommend that, in

⁹⁸ See para. 2.3.3 above.

order to ensure the effective right to access to the remedy of an independent investigation of a complaint, the time limit should be extended to 12 months, which in itself should be extendable in exceptional circumstances, notably when the conduct of the member(s) impugned only comes to light after expiry.

Finally, we recommend that the new Complaints Body should have an independent power to initiate an examination where it is concerned that a policy or practice is contributing to criminal or disciplinary misconduct.⁹⁹

5.7 Local Policing Committees

Head 23 of the Bill provides for Local Policing Committees (LPC) to be established which would be comprised of representatives of the Garda Síochána and local authorities.

The HRC views the proposal for a greater emphasis on community policing as being consistent with Ireland’s consensual, constabulary model of policing and as an initiative which has the potential to improve the capacity of the Garda to promote and protect human rights in the community.

However, the HRC is concerned that the LPCs envisaged under the Bill, where involvement is restricted to the Garda and local authorities, are too narrowly constituted to adequately reflect the community needs.

We intend to return to this issue in greater detail at a later stage. As an initial point, however, we believe that the objectives behind the introduction of community policing are more likely to be realised by the involvement of community groups in local policing structures, and in particular by the involvement of groups with particular policing needs and groups which experience high levels of contact with police.

5.8 The Due Process Rights of the Garda under Investigation

Head 50(3) provides, in the case of a complaint made directly to the Inspectorate which it deems admissible, that it should immediately inform the Commissioner who must notify the member as soon as possible. Head 51(3) provides that in the case of the holding of a formal investigation, the Inspectorate shall afford the complainant and member of the Garda Síochána an opportunity to be heard and to adduce evidence at a hearing to be held by the Inspectorate.

⁹⁹ Article 11 of CAT.

The HRC recommends that the due process rights of a garda being investigated should be strongly protected by the Inspectorate, in particular where the complaint relates to alleged criminal behaviour. Particular regard should be had for the right to silence and the right against self-incrimination as protected under Bunreacht na hEireann and Article 6 of the ECHR.

5.9 Recruitment

A final factor in ensuring that the police service is effective in promoting and protecting human rights, and one that is not currently addressed in the Heads of Bill, lies in the recruitment of members to the Garda Síochána. On one level, it is crucial that stringent selection procedures are put in place to ensure that only candidates who are adequately qualified and who are determined to be suitable persons to carry out policing functions are accepted into the police service. Criteria in such a process should include tests as to the candidates' attitude to ethnic and racial minorities, persons with disability, women, children, older persons and other minority groups. We note for example that recently in the United Kingdom, there has been increasing focus on putting in place vetting procedures at the recruitment and training stages to help identify candidates with racist views.

On another level, if the police service is to be successful in promoting and protecting the human rights of everyone in Irish society, it must become a truly representative service. The Human Rights Commission is aware of the low representation of women among senior management positions within the Garda Síochána and of the overall low levels of representation of racial minorities and members of the Traveller community within the Garda Síochána. We note that in an effort to address the issue of representation within the Police Service of Northern Ireland, police management there commissioned an independent expert human resources organisation to manage its recruitment process (as was recommended in para. 15.7 of the Patten Report).

The HRC recommends that consideration be given to establishing an expert recruitment body or agency under the proposed Bill which would be better placed to ensure a more representative police service that can meet the needs of a more diverse society.