

James Lawless, TD  
Chair of the Joint Committee on Justice  
Leinster House  
Kildare Street  
Dublin  
D02 XR20

13 February 2024

Sent via email: [james.lawless@oireachtas.ie](mailto:james.lawless@oireachtas.ie)

**Re: Garda Síochána (Recording Devices) Act 2023**

Dear Deputy Lawless,

As I'm sure you're aware, we issued [Legislative Observations](#) in response to the publication of the General Scheme of the *Garda Síochána (Digital Recording) Bill*, now the *Garda Síochána (Recording Devices) Act*. In accordance with our mandate, we monitored the Act as it progressed through the legislative process to analyse the extent to which our recommendations to improve the compliance of the legislation with human rights and equality standards were addressed.

While the Act has been signed into law by the President, we consider that there are a number of substantive issues which remain outstanding in the legislation. In the attached, we set out observations for consideration by you and the members of the Joint Committee on Justice on these issues that raise human rights and equality concerns within the legislation. This submission should be read in conjunction with our legislative observations, where our concerns and recommendations are set out in detail.

We note that the Commission will have a consultative role in the development of the codes of practice under the Act and we look forward to further engagement on these issues to ensure human rights and equality standards are central to the operation and oversight of the technologies provided for within this legislation.

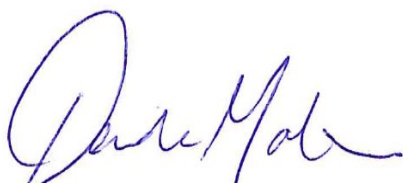
Further, we note the publication of the General Scheme of the *Garda Síochána (Recording Devices) (Amendment) Bill* and the invitation to make a submission to the Committee.

Unfortunately, we have not been in a position to make a submission in the stated timeframe. However, we welcome that these proposals will undergo pre-legislative scrutiny due to the significant implications facial recognition technology poses for fundamental human rights and equality in the State. It is important to examine its compliance with key human rights and equality standards, including the proposed EU Artificial Intelligence Act and the draft Council of Europe Convention on artificial intelligence, human rights, democracy, and the rule of law. We look forward to engaging with this important legislation as it further progresses through the legislative process.

We recognise that the *Garda Síochána (Recording Devices) Act* and the development of the legislative proposals on facial recognition technology forms part of a wider programme of legislative reform of policing powers and structures in the State, alongside the *Garda Síochána (Powers) Bill* and the *Policing, Security and Community Safety Bill*. In implementing such legislative reforms, it is important to recall the Commission on the Future of Policing's assertion that "human rights are the foundation and purpose of policing".

Many thanks in advance for your consideration of these issues.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Deirdre Malone', is positioned above the printed name and title.

Deirdre Malone  
Director

## Observations on the Garda Síochána (Recording Devices) Act

### **Safeguards in the use of technology**

We are concerned about the adequacy and effectiveness of safeguards in the legislation to ensure the use of technology is necessary and proportionate. We recommend a number of strengthened safeguards to mitigate against intrusions on the fundamental rights of individuals with the use of these recording technologies.

**Proportionality assessments:** Section 9(4) provides that the operation of a recording device shall be necessary and proportionate to the functions of An Garda Síochána. We are concerned that it is unclear within the legislation how the requirements of proportionality and necessity will be satisfied in this section and in other sections that refer to necessity and proportionality.<sup>1</sup> The legislation should be sufficiently clear and transparent to ensure that it is accessible and that individuals can foresee the circumstances in which the respective powers under the legislation may be used.<sup>2</sup> The codes of practice should be clear on the elements of a proportionality assessment to ensure the intrusion caused by the use of these technologies complies with human rights and equality principles.

**Powers provided to members of An Garda Síochána:** Section 47(2)(a) provides that the codes of practice shall include provisions relating to the procedures to be followed by members of An Garda Síochána in the operation of the Act. It is important to ensure that the fundamental legal rules governing the exercise of An Garda Síochána's powers are set down in legislation rather than left to be addressed in codes of practice. The precise scope of the powers provided to An Garda Síochána should be outlined within legislation; while codes of practice should set out further information on the circumstances in which the powers may be exercised and the procedures to be followed by members of An Garda Síochána when exercising these powers.<sup>3</sup>

**Obligations for members of An Garda Síochána in using the technology:** We note that the provision in Head 3(3) of the General Scheme that “a failure to observe any provision of this Act or of any code of practice made thereunder on the part of any member of the Garda Síochána shall render that member liable to disciplinary proceedings” has been

---

<sup>1</sup> Including sections 15, 18, 19, 20, 22, 27, 28, 42(3).

<sup>2</sup> IHREC, [Submission to the Minister for Justice on the General Scheme of the Garda Síochána \(Digital Recording\) Bill](#) (April 2022) pp. 27–30.

<sup>3</sup> *ibid*, p. 41.

removed from the Act. This omission is concerning as these technologies will have significant impacts on the rights of individuals so the consequences of any violation of the rights of individuals should be clear. The obligations on the members of An Garda Síochána under this legislation should be clear and precise, and the legislation should set out clearly the consequences that follow from a failure to observe a provision of the Act or any code of practice.<sup>4</sup>

**Notification of recording in a public setting:** We note that there is no requirement in the legislation for members of An Garda Síochána to notify people in public places or any other places, apart from a private dwelling, that they are being recorded. A member of An Garda Síochána operating a recording device or body-worn camera under this legislation should inform an individual in an accessible language or format that they are being filmed and recorded.<sup>5</sup>

**Covert recording:** Section 9(5)(a) provides that the operation of recording devices shall, in so far as practicable, be overt. We are concerned that this language provides a legislative basis for covert recording to be used without any clear safeguards in place. A handheld recording device should be visible when being operated by a member of An Garda Síochána.<sup>6</sup>

**Recording in a private dwelling:** Section 9(1)(a)(ii)(II) provides that a recording device may be operated by a member of An Garda Síochána in any other place where they were “expressly or impliedly invited or permitted to be”. It is unclear what amounts to an implied invitation or permission. This should be sufficiently clarified to ensure that individuals are aware of the circumstances and conditions in which members of An Garda Síochána may operate a recording device or body-worn camera in their private dwelling.<sup>7</sup>

**Recording of victims of domestic violence:** Section 9(3) provides that a member of An Garda Síochána may record an individual in circumstances where the member of An Garda Síochána believes on reasonable grounds that domestic violence is occurring or may have occurred. Consideration should be given to whether this intrusion on the right to privacy

---

<sup>4</sup> *ibid*, pp. 21–22.

<sup>5</sup> *ibid*, pp. 31–32.

<sup>6</sup> *ibid*, pp. 30–31.

<sup>7</sup> *ibid*, pp. 32–33.

for victims of domestic violence, sexual violence or rape is proportionate and necessary in the response to domestic, sexual or gender-based violence crimes.<sup>8</sup>

**Emerging technologies:** We note that the definition of ‘recording device’ in section 2 of the Act appears to be sufficiently broad to address emerging technologies. We are concerned that the emerging technologies, which may pose significant privacy concerns, could come under this definition without any ability by members of the Oireachtas to scrutinise the inclusion of these technologies in the legislation.<sup>9</sup> There needs to be provision for legislative amendment or review to enable members of the Oireachtas to have oversight of the technologies included in the definition of recording device.

### **Codes of practice**

Codes of practice are a welcome inclusion in the Act, as they provide guidance on applying the legislation.

**Human rights and equality considerations:** We note that section 47, which sets out a number of provisions which shall be included within codes of practice, does not refer to human rights and equality standards as provisions to be included within codes of practice. We call for provisions in relation to human rights and equality considerations to be included within codes of practice.<sup>10</sup> The codes of practice should be equality and human rights proofed, and should be made accessible to the public.

**Use of recording technologies before codes of practice come into operation:** It is not clear in the legislation that provisions related to recording technologies do not become operational until the Minister publishes a code of practice and it comes into operation. This omission is concerning as it may mean these technologies are utilised in the community before the codes of practice are published or the data protection and human rights impact assessments are carried out, and before the members of An Garda Síochána have read and understood the codes of practice. It should be made explicitly clear that the provisions related to recording technologies do not become operational until the code of practice comes into operation.<sup>11</sup>

---

<sup>8</sup> *ibid*, p. 23.

<sup>9</sup> *ibid*, pp. 17–18.

<sup>10</sup> *ibid*, pp. 41–43.

<sup>11</sup> *ibid*, pp. 43–44.

### **Access and retention of data**

We are of the view that particular consideration needs to be given to the rights of data subjects, and the retention and storage of data.

**The rights of data subjects:** The rights of data subjects are not addressed in the legislation nor does the Act set out effective remedies for individuals whose rights are violated under the legislation. Section 47(2)(b) provides that the codes of practice should include provisions relating to the confidentiality, security, storage, access, retention, erasure and destruction of data gathered as a result of the operation of the Act. While codes of practice are useful guidance to the exercise of the powers under this legislation, the explicit rights of data subjects should be set out in the legislation so that there is a legislative basis for protecting these rights.<sup>12</sup> .

**Sharing and storage of ANPR data:** We note that there is no reference in Part 3 to the sharing and storing of images of occupants of cars, in particular passengers. Consideration should be given to the sharing and storage of the images of occupants of cars, particularly images of passengers, in the drafting of the codes of practice to ensure that the intrusion on rights that the practice presents remains proportionate and necessary.<sup>13</sup>

### **Guarantee of a fair trial and procedural fairness**

**Admissibility of evidence:** Section 48(3) provides that a failure to observe any provision of an order made under this Act, or a code of practice, on the part of any member of Garda personnel in the performance by him or her of any function under this Act, shall not (without prejudice to the power of the court to exclude evidence at its discretion) of itself affect the admissibility of any evidence thereby obtained. As the admissibility of evidence is a matter for the courts, the inclusion of this provision may lead to unintended consequences for the existing rules of admissibility by creating an additional hurdle to the exclusion of evidence obtained unlawfully or in breach of constitutional rights.<sup>14</sup>

**No requirement to exhibit device in proceedings:** Section 48(4)(c) sets out that a device from which evidence is sought to be adduced in court proceedings is not required to be exhibited as part of those proceedings. The inclusion of this provision is concerning as it

---

<sup>12</sup> *ibid*, pp. 56–58.

<sup>13</sup> *ibid*, p. 50.

<sup>14</sup> *ibid*, p. 51.

may affect the right to a fair trial if issues related to the operation and use of the device arises.<sup>15</sup>

## **Transparency**

**Transparency in the location of CCTV and ANPR cameras:** We are concerned that the legislation does not include any requirement to erect appropriate signage in areas where CCTV and/or ANPR is in operation to ensure that individuals are informed of the processing of their personal data.<sup>16</sup> Further, the legislation does not provide that information on the processing of personal data by CCTV and ANPR cameras should be available in an accessible format to the public on the Garda website and on leaflets in Garda stations.

**Profiling in the location of CCTV:** We are concerned about the adequacy of safeguards within the legislation to prevent the blanket surveillance of particular communities, as the Act does not prescribe the criteria for the selection of locations where CCTV is to be installed.<sup>17</sup> There is no description of what evidence or data will be used to support the installation of CCTV in a given area, which may lead to over-policing of the same areas and same communities. We note that the European Parliament in adopting its position on the proposed EU Artificial Intelligence Act recently voted to ban the use predictive policing systems (based on profiling, location or past criminal behaviour).<sup>18</sup>

## **Judicial authorisation**

We are concerned that the legislation grants substantial powers concerning CCTV to the Garda Commissioner and other Garda personnel without incorporating sufficient judicial oversight of these powers.

**Authorisation for the installation and operation of CCTV:** Sections 27 and 28 provide that the Garda Commissioner may respectively authorise members of An Garda Síochána and local authorities to install and operate CCTV. We are of the view that judicial authorisation should be sought by the Garda Commissioner or a senior Garda member on their behalf for

---

<sup>15</sup> *ibid*, pp. 50–51.

<sup>16</sup> *ibid*, pp. 36–38.

<sup>17</sup> *ibid*, pp. 22–26, 33–36, pp. 38–40.

<sup>18</sup> European Parliament, [MEPs ready to negotiate first-ever rules for safe and transparent AI](#) (press release, 14 June 2023). Equinet (the European Network of National Equality Bodies) and ENNHRI (the European Network of National Human Rights Institutions) have called for a clear and effective ban on predictive policing, see [Joint Equinet and ENNHRI Statement on EU Artificial Intelligence Act Trilogue](#) (November 2023).

the installation and operation of CCTV.<sup>19</sup> An authorisation granted should be time-limited, and the Garda Commissioner or a senior Garda member on their behalf should be required to apply to court to vary or renew an authorisation.

**Modification of an authorisation:** Section 31 provides that a member of An Garda Síochána or a local authority, who have an authorisation, can make amendments or additions to the CCTV without being required to first apply to the Garda Commissioner for a new authorisation. Instead, they can notify the Garda Commissioner afterwards who may modify the authorisation or order them to apply for a new authorisation. We are concerned that there is no requirement to get a further authorisation before making a change such as installing more cameras, or installing new technology which increases the visual area captured or results in significant additional processing. We are of the view that any modifications to CCTV should require the Garda Commissioner or a senior Garda member to apply for judicial authorisation.<sup>20</sup>

**Authorisation of the processing of third party CCTV:** Section 40 provides that an application for an authorisation or a variation or renewal should be heard otherwise than in public. We are of the view that an application for an authorisation, or the variation or renewal of an authorisation, shall only be heard otherwise than in public on exceptional or emergency grounds.<sup>21</sup> The material grounding an application for an authorisation should be reviewed by a suitably qualified independent person before the Court makes an order on the authorisation.

**Approval of the processing of third party CCTV:** Section 42 provides that a member of An Garda Síochána can apply to a Superintendent for approval to access third party CCTV for a period of up to 72 hours. There is no judicial oversight of this provision, which may lead to concerns that it becomes routine that members of An Garda Síochána will rely on this provision rather than apply for judicial authorisation for access.<sup>22</sup>

---

<sup>19</sup> IHREC, [Submission to the Minister for Justice on the General Scheme of the Garda Síochána \(Digital Recording\) Bill](#) (April 2022) pp. 33–36.

<sup>20</sup> *ibid*, pp. 33–36.

<sup>21</sup> *ibid*, pp. 45–48.

<sup>22</sup> *ibid*, pp. 48–49.



## **Independent oversight**

A key element of the monitoring of the implementation of this legislation will be the need for the use of the technologies to be subject to independent and effective oversight.

**Oversight mechanism:** We are concerned that there is no provision in the legislation to ensure that recording technologies will be subject to independent oversight. The use of recording devices, body-worn cameras, drones, emerging technologies, facial recognition (if introduced), CCTV and ANPR should be subject to independent and effective oversight by either an existing body, such as the Policing Authority, or the establishment of a new body, such as an independent group on emerging technologies to ensure these technologies comply with human rights and equality standards.<sup>23</sup>

**Body-worn cameras:** We call for each individual use of a body-worn camera to be subject to independent oversight to ensure its use remains proportionate, and in compliance with human rights and equality principles.<sup>24</sup>

**Drones:** We recommend the use of drones for policing purposes be subject to a Human Rights Impact Assessment prior to the first use of drones under this legislation.<sup>25</sup>

**Review of the operation of the Act:** Under section 49, a designated judge is only responsible for reviewing Part 3 – ANPR and Part 6 – Processing by members of Garda personnel of third-party CCTV. We recommend that this legislation in its entirety should be the subject of independent oversight to ensure its compliance with human rights and equality standards.<sup>26</sup>

**Collection and publication of disaggregated equality data:** An important aspect of the oversight of this legislation is the collection and publication of disaggregated data on the use of the powers under this legislation. However, there is no provision for the collection of disaggregated data in the legislation. We call for the implementation of this legislation to be accompanied by the collection and reporting of detailed disaggregated data.<sup>27</sup>

---

<sup>23</sup> *ibid*, pp. 17–18, 24, 26, 51–54.

<sup>24</sup> *ibid*, p. 24.

<sup>25</sup> *ibid*, p. 26.

<sup>26</sup> *ibid*, pp. 51–54.

<sup>27</sup> *ibid*, pp. 53–54.

### **Inclusion of new provisions in the legislation since the General Scheme**

We note that a number of new provisions have been included in the Act that were not included in the General Scheme – principally Part 3 on ANPR and Part 4 on recording of certain telephone calls to and from An Garda Síochána. These provisions engage fundamental rights and we are concerned that these provisions did not undergo pre-legislative scrutiny.

**Automatic Number Plate Recognition:** The provisions in sections 18 and 19, which could lead to focussed monitoring of a vehicle for up to 9 months, pose a significant intrusion on the rights of individuals. It is not clear as to why it would be necessary to monitor a vehicle for up to 9 months. We are concerned that the lack of clarity on these provisions is a direct consequence of the provisions not being subject to pre-legislative scrutiny. We are of the view that judicial authorisation should be required for all applications to utilise ANPR to monitor the movements of a particular vehicle. We call for the principles of necessity and proportionality to be considered when an application for the use of ANPR technology is used; and that any such tracking is limited to three-month periods. Section 19 provides that a member of An Garda Síochána can apply to a member of An Garda Síochána of a rank of sergeant or above in order to search ANPR data that has been retained by An Garda Síochána. We are concerned that this is a weak safeguard, as it only a sergeant rather than a superintendent or chief superintendent who can approve. We are also concerned that the phrase ‘retained ANPR data’ lacks clarity; particularly, when there has been no scrutiny of this provision in pre-legislative scrutiny.

**Recording of Calls to or from Garda Síochána:** We note that this Part addresses an outstanding recommendation from the Fennelly Commission of Investigation. However, the Fennelly Commission also recognised the general right of individuals to have the privacy and confidentiality of their communications with An Garda Síochána respected, noting confidential and sensitive information, which is recorded and retained must be protected from improper use and exploitation through appropriate legal, technological and procedural safeguards.<sup>28</sup> While the Fennelly Commission emphasised the importance of safeguards,<sup>29</sup> there is limited reference to the rights of data subjects in the legislation

---

<sup>28</sup> Department of the Taoiseach, [Report of the Fennelly Commission](#) (April 2017) p. 688.

<sup>29</sup> The Fennelly Commission called for consideration to be given to the right of the public to know what is being recorded, for how long the recordings are retained, and by whom and in what circumstances they may be accessed. This should include consideration of whether it is appropriate to preface the answering of calls to Garda stations with an automatic message indicating that the call is recorded. However, they noted that such a message might discourage

including the recordings of solicitor phone calls and the retention and deletion of recordings. While it may be intended to address the rights of data subjects in a code of practice, we are concerned that this may not be an adequate safeguard. Further, it is not clear whether there would be a recorded message informing someone that they will be recorded or if it is the responsibility for a member of An Garda Síochána to inform an individual that they are being recorded. Recording of calls may deter victims, such as domestic violence, from reporting crimes and engaging with An Garda Síochána. We recommend that any provision to record phone calls to or from An Garda Síochána should provide for adequate safeguards for the rights of data subjects including the recording of solicitor phone calls, and the retention and deletion of recordings. Any procedure for an authorisation to process recorded phone call data, should be in line with the general principles of data protection, and the principles of necessity and proportionality.

---

callers with the result that valuable information could be lost. See Department of the Taoiseach, [Report of the Fennelly Commission](#) (April 2017) p. 687.