



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

Irish Human Rights and Equality Commission

Observations on the General Scheme of the Garda Síochána (Powers) Bill

April 2022

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Recommendations

Obligation to respect fundamental rights (Head 6)

The Commission recommends that the rights and protections noted in Head 6 are broadened generally, with explicit reference to the principles of equality, non-discrimination and dignity.

In preparation for the ratification of the Optional Protocol to the Convention against Torture, the Commission recommends that the rights and protections under Head 6 are aligned with the protections of the *Convention against Torture*.

Protection of the Rights of Children (Head 7)

The Commission recommends the introduction of an ‘appropriate adult scheme’, in line with the UK National Appropriate Adult Network.

The Commission recommends that further limitations are placed on the circumstances in which a child may be questioned prior the provision of legal advice, or without the presence of a legal representative.

The Commission further recommends that Head 6 is extended to allow for an individual assessment to be conducted for children, and for this provision to confirm that the deprivation of liberty is a measure of last resort, and strictly proportionate.

Protection of the Rights of Persons with Impaired Capacity (Head 8)

The Commission recommends that the scope of Head 8 is broadened to include the definition of disability under the CRPD.

The Commission recommends that this provision includes an express obligation for Gardaí to exercise their powers in a manner that takes account of the rights and inherent dignity of all persons with disabilities. There should be an obligation on the Gardaí to take all reasonable steps needed to protect the rights of a person with a disability.

The Commission recommends that Head 8 is extended to provide for the training of Gardaí on how to meet the needs of person with disabilities; that provisions are included to facilitate the appointment of an intermediary or advocate; and that there is a

recognition of the State's obligation to provide reasonable accommodation for persons with a disability in custody.

The Commission recommends that limitations are placed on the circumstances in which persons with certain disabilities may be questioned prior the provision of legal advice, or without the presence of a legal representative.

Power to stop and search for possession of prescribed articles (Head 9)

The Commission recommends that any extension of the power of stop and search in legislation must be necessary and proportionate.

The Commission recommends that the limitations of the power of stop and search must be clearly delineated, and it notes that Head 9(6)(a) and 9(6)(f) should be amended to ensure compliance with Article 8 ECHR.

The Commission recommends that the scope of a stop and search power should be restricted in the context of a dwelling and that a provision equivalent to section 1(4) of the PACE Act is incorporated into the Bill.

Power to search vehicles and persons in vehicles for evidence of offence (Head 10)

The Commission recommends that safeguards are introduced to the Garda power of Head 10, in line with section 4 of the PACE Act.

Right to be informed of the reason for a search (Head 11)

The Commission recommends that Head 11 is extended to provide for a notice of search to be left in a vehicle where a Garda has conducted an unattended search, in line with section 2(6) of the PACE Act.

Record to be made of a search (Head 12)

The Commission recommends that Head 12 is amended to include an express requirement to record the racial and ethnic origin of the person being searched, and the location at which the power is exercised.

The Commission recommends that the legislation expressly references non-discrimination in the use of stop and search powers, and that provision should be made for appropriate training.

The Commission recommends that Head 12 be amended to provide that a person who is subject to a search under this provision should be informed at the time they are being searched that a record of the search is being made and that they are entitled to receive a copy of the record.

Code of Practice on searches (Head 13)

The Commission recommends that fundamental requirements as to how a search is to be carried out should be included in the legislation.

The Commission recommends that, where a person is required to comply with a search, they should be informed that failure to comply is a criminal offence.

The Commission recommends that stronger wording to prohibit racial profiling is included in the legislation and that this is accompanied by detailed guidelines, developed in consultation with relevant groups.

The Commission recommends that provisions on the collection and retention of data, for the purpose of collecting and reporting disaggregated equality data, are included in the legislation.

The Commission recommends that clarifications should be made in the primary legislation as to how the power of stop and search is to be used. The Commission recommends that there is clarity on how the Codes of Conduct can be amended, and further notes that the terminology of 'impaired capacity' should be extended to cover disabilities under the CRPD.

Application and issuing of warrant (Head 15)

The Commission recommends that the safeguards included in the general warrant power of the *Criminal Justice (Miscellaneous Provisions) Act 1997* are removed only where it is necessary and proportionate.

The Commission further recommends that emergency remote applications are made to a High Court judge, and that the resulting warrant lasts only 24 hours.

Powers under search warrant (Head 16)

The Commission recommends that any restrictions on a person's right to privacy and fair trial rights under Head 16 must be necessary and proportionate, and further recommends safeguards to this effect.

The Commission recommends limitations on the situations in which a judge may issue a warrant to search a computer, and to demand a password or encryption key. The Commission further recommends consideration be given to the approaches in other jurisdictions to the legality of compelling the communication of a password or encryption key.

Period of validity of search warrant (Head 17)

The Commission recommends that, at a minimum, the possibility for an extension of a warrant for an offence under the Misuse of Drugs Act 1977 should be removed. If the warrant cannot be executed within 30 days, it would appear appropriate for an entirely fresh application to be made for a new warrant.

Right to be informed of search (Head 18)

The Commission recommends that there should be a general obligation on the Gardaí conducting the search to provide the occupier of a property with the warrant for the search.

Saving for privileged information (Head 19)

The Commission recommends that Head 19 is amended to provide for the particular steps to be taken as part of a search, with greater provisions of oversight, in order to provide protections for privileged and sensitive material.

Extended power of seizure (Head 20)

The Commission recommends that Head 20 is amended to include provisions on how a decision to seize materials is arrived at, how relevance is determined, and how the input of the affected person is factored into the decision-making process.

The Commission recommends that a provision is included to determine the timeframe in which a decision is to be made, and steps to be taken where Gardaí determine that seized material is not covered by the warrant.

Application for search warrant in urgent circumstances (Head 21)

The Commission recommends that the power of Head 21 is removed in its entirety. Alternatively, the Commission recommends that a number of safeguards are put in place to ensure that this power is used only in exceptional circumstances.

Arrest without warrant by member of the Garda Síochána (Head 23)

The Commission recommends that certain offences are excluded from the ambit of Head 23, or that more stringent pre-conditions are provided for arrest for minor offences.

Arrest for breach of the peace (Head 24) & Arrest without warrant by other persons (Head 25)

The Commission recommends that the words “*any person*” is replaced with “*a member of the Garda Síochána*” in Head 24. The Commission further recommends that additional safeguards are introduced to Head 25, in line with section 24A of the PACE Act.

Right to information on arrest (Head 28)

The Commission recommends that any exceptions to Head 28 are set out in the primary legislation.

Custody officer (Head 35) and Detention after arrest for investigation of serious offence (Head 44)

The Commission recommends that the role of custody officer is restricted to Gardaí holding at least the rank of Sergeant. The Commission also recommends that the duties of the Custody Officer should be prescribed in the legislation. The Commission further recommends that the level of training required for this role is set out in the primary legislation.

Search of person in Garda custody facility following arrest (Head 37)

The Commission recommends that fundamental principles in relation to the search of person in Garda custody facility following arrest are set down in primary legislation.

Information to be given to person in Garda custody following arrest (Head 38)

The Commission recommends that the right of access to materials, in accordance with Article 7 of Directive 2012/13/EU, should be provided in the legislation. Head 38 should be amended to refer to the wording of Article 7, and should fully comply with the obligations of the Directive.

The Commission recommends that the right to an interpreter should be included in the legislation, and this should extend to persons with certain disabilities, as appropriate.

Access to medical attention (Head 40)

The Commission recommends that greater safeguards are introduced to Head 40 in relation to the decision of when medical treatment is necessary.

Access to legal representation (Head 42) and Questioning of an accused person prior to legal advice (Head 43)

The Commission recommends the removal of Head 42(6) from the legislation. The Commission recommends that Head 43(4) is amended to provide for safeguards, in compliance with Article 6 ECHR.

The Commission recommends that the situations in which the right of access to a solicitor may be waived under Head 43(1) is limited and clarified, in line with Article 6 ECHR.

Provision should be made to allow for this waiver to be withdrawn or revoked.

The Commission recommends the removal of the provision in Head 42(2) which excludes the time spent in, and awaiting, legal consultation from the period of permitted detention.

Maximum period of detention (Head 45), Extended period of detention for Schedule 5 offences (Head 47), and Judicial powers on hearing applications for detention extension (Head 48)

The Commission recommends that the length of detention for offences should not be extended unless it can be shown that such measures are necessary and proportionate.

The Commission recommends that safeguards already in place for the application to extend detention should not be lowered.

The Commission recommends the removal of Head 45(3) or, alternatively, the implementation of further safeguards for this provision.

Release from detention (Head 50)

The Commission recommends the retention of Head 50 as a fundamental part of the ‘floor of rights’ required for detention to be lawful.

Power to take photograph, fingerprint and palm print (Head 51)

The Commission recommends that Head 51 is amended to provide for requirements on the storing, retention, and deletion of data collected under this power.

Use of reasonable force to take photograph, fingerprint and palm print (Head 52)

The Commission recommends that, in relation to Head 52, safeguards for the rights to privacy and bodily integrity are reduced only where it is necessary and proportionate to do so.

Custody record (Head 59)

The Commission recommends that the custody record should contain a record of the detainee’s race or ethnicity for the purpose of equality data collection.

Code of Practice on custody and detention (Head 64)

The Commission recommends that fundamental matters relating to the permissible length of time spent in detention should be set down in primary legislation.

The Commission recommends that provision is made to facilitate the ratification of OPCAT, and that the role of the NPM should be accommodated in Head 64.

The Commission further recommends that clarity should be introduced as to the consultation process for the amendment, revocation, and replacement of Codes of Practice.

Use of Reasonable force (Head 65)

The Commission recommends that the legislation should include express obligations to make a record of the use of force, and for an investigation into the use of force to occur where it results in injury or death.

The Commission recommends that Head 65 is amended for absolute clarity as to the standards against which lethal force is to be measured.

The Commission recommends that provision is made for a detailed and comprehensive statutory code on the circumstances in which force, including lethal force, may be used.

The Commission further recommends that Head 65 is amended to recognise the requirement that Garda operations are to be planned in such a way as to minimise the risk to life.

Provision of information and obstruction (Head 67)

The Commission recommends that limitations are placed on the power under Head 67, and that the maximum penalty is reduced, for the purposes of proportionality.

The Commission recommends that the Code of Practice under Head 13 should also cover the making of demands under Head 67(1).

Effect of failure to comply with Act on admissibility of evidence (Head 68)

The Commission recommends the removal of Head 68 from the legislation.

Introduction

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

The Commission welcomes the opportunity to provide the Joint Committee on Justice with its submission on the *General Scheme of the Garda Síochána (Powers) Bill*. The codification of Garda powers has the potential to ensure greater transparency and clarity in the law. However, it is imperative that this process avoids compounding issues already identified in the scope and exercise of Garda powers, and avoids causing a regression in regard to human rights protection.

The Commission has previously recommended that the Department of Justice consider enhancing the protection of rights in the codification process, in line with its Public Sector Equality and Human Rights Duty obligations under section 42 of the *Irish Human Rights and Equality Commission Act 2014*.²

The consolidation of Garda powers touches upon a number of rights and equality issues. The Commission and its predecessor, the Irish Human Rights Commission ('the IHRC'), have previously made submissions in these areas, including racial profiling,³ training for members

¹ Section 10(2)(c) of the *Irish Human Rights and Equality Commission Act 2014*.

² IHREC Letter to the Department of Justice, May 2020; IHREC, 'Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland' (August 2020) p. 46.

³ IHREC Letter (n 2); IHREC, 'Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report' (October 2019) pp. 9, 136-138; IHREC, 'Submission to the Commission on the Future of Policing (February 2018) pp. 10-13; IHREC, Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland' (August 2020) p. 46.

of An Garda Síochána,⁴ the collection of disaggregated data,⁵ citizen's arrest,⁶ and the judicial authorisation of search warrants.⁷ The Commission and the IHRC have additionally made submissions on the topics of the right of access to a lawyer during interview,⁸ the right to silence,⁹ the use of reasonable force,¹⁰ and the powers surrounding detention.¹¹

The consolidation and development of the legislation on Garda powers requires careful consideration. A balance must be struck between the rights of the citizen to have an effective police force, capable of detecting and prosecuting crime, and the rights of the individual to enjoy the full range of their human rights and freedoms. Any limitations placed upon of the rights of an individual under this legislation must comply with the principles of legality, necessity, and proportionality.

Background to the legislative proposals

The law governing the powers of An Garda Síochána in the areas of arrest, search, and detention is set out in and limited by a variety of sources, including the Constitution of Ireland, statute, and common law. In September 2018, the Commission on the Future of Policing in Ireland published a report recommending that legislation defining police powers in these areas should be codified, and supported with statutory codes of practice.¹²

⁴ IHREC, 'Ireland and the Convention against Torture: Submission to the United Nations Committee against Torture on Ireland's second periodic report' (July 2017) p. 25; Submission on the Future of Policing (n 4) p. 10; IHREC, 'Ireland and the Convention on the Elimination of Racial Discrimination: Submission to the United Nations Committee on the Elimination of Racial Discrimination on Ireland's Combined 5th to 9th Report' (October 2019) p. 9; IHREC, 'Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland' (August 2020) pp. 45-46.

⁵ IHREC Letter (n 2).

⁶ IHRC, 'Observations on General Scheme of Garda Síochána Bill 2003' (November 2003) p. 30.

⁷ IHRC, 'Observations on the Scheme of the Criminal Justice Bill 2003' (January 2004) pp. 2-3, 12-13, 41.

⁸ IHREC, Submission to the UN Committee against Torture on the List of Issues for the Third Examination of Ireland (January 2020) p. 15; IHREC, Submission on the Future of Policing (n 4) p. 21; Submission to UNCAT (n 4) pp. 23-24.

⁹ Submission to UNCAT (n 4) pp. 23-24.

¹⁰ Observations on Criminal Justice Bill (n 7) pp. 35, 42-43.

¹¹ Ibid, p. 18; IHRC, 'Observations on the Criminal Justice Bill 2004' (November 2004) pp. 3-4; Submission for Fifth Periodic Report (n 2) p. 47; Submission to UNCAT (n 4) p. 24; Submission on the Future of Policing (n 4) p. 28; Submissions on the Garda Síochána Bill (n 6) p. 7.

¹² Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, (September 2018) p. 11.

The recommendation to consolidate legislation in the areas of arrest, search, and detention was previously submitted by the Garda Síochána Inspectorate in 2014,¹³ and a similar recommendation to consolidate the law on search warrant powers was made by the Law Reform Commission in 2015.¹⁴

The Department of Justice published the *General Scheme of the Garda Síochána (Powers) Bill* on 14 June 2021, following the Commission on the Future of Policing in Ireland's recommendations. It noted that the purpose of the Bill was to provide a “*clear and transparent statutory basis*” for existing police powers, and that the Bill would have a “*strong focus*” on human rights.¹⁵

Relevant human rights and equality standards

The legislation engages a wide variety of human rights and equality issues, as protected by the Constitution of Ireland, the European Convention on Human Rights (‘ECHR’), European Union law, and international human rights law.

The application of these rights to the context of policing is addressed in a number of international standards on policing; most notably, the European Council's European Code of Police Ethics, the UN Code of Conduct for Law Enforcement Officials, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

The core rights and principles engaged by the Scheme include:

- The right to liberty;
- The right to privacy;
- The right to bodily integrity and the right to life;

¹³ Garda Inspectorate, *Report of the Garda Síochána Inspectorate: Crime Investigation*, (October 2014) p. 21, 57.

¹⁴ Law Reform Commission, *Report on Search Warrants and Bench Warrants*, (LRC 115 – 2015) [2.26]

¹⁵ Department of Justice, ‘Garda powers to be modernised and updated under new Bill from Minister Humphreys’ (14 June 2021) accessible at <[Garda powers to be modernised and updated under new Bill from Minister Humphreys](#)>

- The right to inviolability of the dwelling;
- Fair procedure and fair trial rights, including:
- The right to silence and the privilege against self-incrimination;
- The right of reasonable access to a solicitor;
- Interpretation and translation rights; and
- Non-discrimination, and equality before and under the law.

The use of a Garda power will often engage a number of overlapping human rights; for example, the power of search interferes with the rights to liberty, bodily integrity, and privacy. This section of the submission will address the standards of the rights separately, each referencing the type of Garda power to which it applies.

The right to liberty

The right to liberty is protected under Article 40.4.1° of the Constitution, Article 5 ECHR, and Article 9 of the International Covenant on Civil and Political Rights ('ICCPR'). The Garda powers of arrest, 'stop & search', and detention, all interfere with this right. This interference will only be permissible where it is necessary, proportionate, and prescribed by law. The Draft Heads propose changes to the ordinary police powers relating to search, arrest, and detention which risks a conflation with extraordinary powers¹⁶ including in relation to extending periods of detention after arrest. This may have serious implications for adherence to human rights standards and fairness.

The Commission stresses the importance of ensuring the alignment of the legislation with the rights guaranteed under the Constitution and interpreted in Irish case law.

¹⁶ Such as the provisions under the *Offences Against the State Acts*.

Arrest

Under Article 40.4.1° of the Constitution, “no citizen shall be deprived of his personal liberty save in accordance with law”. As such, an arrest must be based on a power conferred by law, and must be effected in a manner prescribed by law.¹⁷ A person may not be deprived of their liberty in a manner that is unconstitutional, or for a reason that is inconsistent with the Constitution.¹⁸ The law providing this power of arrest must protect the essence of the right to liberty.¹⁹

The Supreme Court has held that there is a “*floor of rights*” that is fundamental to the protection of arrested persons. This requires that there is clarity as to the reasons for the arrest, no arrest without reasonable suspicion, and the restoration of liberty where there is no longer a reasonable suspicion.²⁰ In regard to reasonable suspicion, the Court held that:

*“No arrest of any kind can take place unless there is a reasonable suspicion in the mind of the arresting officer that a criminal offence, one categorised in law as enabling arrest, has been committed and that the person to be arrested has committed that offence.”*²¹

Subject to certain exceptions,²² a person being arrested by a member of An Garda Síochána must be informed that they are under arrest, and be told of the reason for the arrest.²³

Under Article 5 ECHR, no one may be deprived of their liberty, save where in accordance with a procedure prescribed by law, and for one of the six purposes set out in the exhaustive list of Articles 5(1)(a) to (f).²⁴ The European Court of Human Rights (‘ECtHR’) has

¹⁷ *DPP v O’Loughlin* [1979] IR 85; *McMahon v Leahy* [1984] IR 525, p. 547.

¹⁸ Forde, M. and Leonard, D., *Constitutional Law of Ireland* (Bloomsbury Professional, 2013) [15.01]

¹⁹ *King v Attorney General* [1981] IR 233, p. 257.

²⁰ *Kevin Braney v Ireland and the Attorney General* [2020] IESC 7 (Unreported, Supreme Court, 12th February 2021) [24].

²¹ *Ibid*, [21].

²² For example, if the suspect already knows why they are being arrested (*Re Ó Laighléis* [1960] IR 93), or if the suspect has created a situation that makes the communication of the reasons practically impossible: *Christie v Leachinsky* [1947] AC 573, [25].

²³ *Christie v Leachinsky* [1947] AC 573; *Re Ó Laighléis* [1960] IR 93.

²⁴ *Saadi v United Kingdom* (App. No. 13229/03, 29th January 2008) [42]-[43].

held that the law prescribing arrest must be accessible, precise, and foreseeable in its application.²⁵ It must contain adequate safeguards against arbitrary or excessive detention.²⁶ As any interference with Article 5 must be proportionate, including to the seriousness of the suspected offence itself,²⁷ an arrest must be strictly necessary for its intended aim. It should not be effected in situations where less stringent measures would be sufficient.²⁸

Where a person is arrested on “*reasonable suspicion of having committed an offence*” for the purpose of bringing him or her before a competent legal authority, there must be information that would satisfy an objective observer that an offence may have occurred.²⁹ Under Article 5(2), a person who is arrested must be “*informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*”.

These principles are reflected in the European Code of Police Ethics, which sets out that police investigations must be based upon a reasonable suspicion of an actual or possible crime, that deprivation of liberty must be as limited as possible.³⁰ Persons deprived of their liberty must be informed of the reasons for the deprivation and any charge against them.³¹

Stop & Search

The Garda power of a ‘stop and search’ infringes the right to liberty, in addition to the rights of privacy and bodily integrity.

The Irish Courts have not expressly ruled that a stop and search power must be based on the existence of a ‘reasonable suspicion’, as a constitutional requirement. However, the

²⁵ *Ruslan Yakovenko v Ukraine* (App. No. 5425/11, 4th June 2015) [58].

²⁶ For example, *Alparslan Altan v Turkey* (App. No. 12778/17, 16th April 2019).

²⁷ *Vasileva v Denmark* (App. No. 52792/99, 25th September 2003).

²⁸ *Ladent v Poland* (App. No. 11036/03, 18th March 2008) [54] – [55].

²⁹ *Sahin Alpay v Turkey* (App. No. 16538/17 20th March 2018) [103]; *Kavala v Turkey* (App. No. 28749, 10th December 2019); *Demirtas v Turkey* (No.2) (App. No. 14305/17 22nd December 2020).

³⁰ Council of Europe: Committee of Ministers, *Recommendation Rec(2001)10 of the Committee of Ministers to Member States on the European Code of Police Ethics*, 19 September 2001, Rec(2001)10.

³¹ *Ibid*, [54] – [55].

Supreme Court has noted, in the context of the stop and search power conferred by section 23 of the Misuse of Drugs Act 1977, that:

*“the power to search on suspicion, based upon reasonable cause, could be construed as an extension of the ordinary power of arrest on suspicion of the commission of an offence.”*³²

In *Human Rights and Policing in Ireland*, Walsh submits that the existence of a reasonable suspicion is an absolute minimum prerequisite for a stop and search, as *“anything less would create a situation in which the individual could be deprived of certain fundamental rights at the subjective discretion”* of a Garda.³³

In relation to Article 9 ICCPR, the UN Human Rights Committee has emphasised the need to ensure that stop and search powers are not exercised in an arbitrary or discriminatory manner. The use of such powers must be *“authorized by law, necessary and proportionate.”*³⁴

Detention

The Irish courts have recognised the possibility that legislation prescribing detention may be unconstitutional where it fails to adequately vindicate the right to liberty.³⁵ This may have implications for the maximum pre-charge detention periods possible for a suspect.

In *Re The Emergency Powers Bill, 1976*,³⁶ the Supreme Court held that the seven-day pre-charge detention period permitted by the Bill was constitutional, as it was an exceptional emergency measure that had been adopted under the emergency procedure of Article

³² *O’Callaghan v Ireland* [1994] 1 IR 555, p. 562; applied in *Devoy v Ireland* [2004] 4 IR 481.

³³ Walsh, D., *Human Rights and Policing in Ireland: Law, Policy and Practice*, (Clarus Press, 2009) [9-12].

³⁴ ‘Joint report to the Human Rights Council: Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’, UN Doc. A/HRC/31/66, para. 43.

³⁵ *People (Attorney General) v. O’Callaghan* [1966] IR 501, pp. 509 and 516; *King v. Attorney General* [1981] IR 233, p. 257.

³⁶ *Re The Emergency Powers Bill, 1976* [1977] IR 159

28.3.3° of the Constitution. The Court noted that a “*statutory provision of this nature which makes such inroads upon the liberty of the person must be strictly construed*”.³⁷

However, the Supreme Court has also held that extended periods of detention may be legislated for in relation to specific offences, based on the “*gravity of an offence, or the social turmoil caused by a particular criminal activity*”.³⁸ There will be no contravention of the Constitution or the ECHR, as long as the suspect is protected by the “*floor of rights*”.³⁹

The ECtHR has not put a finite limit on the length of preliminary detention, but it instead determines permissible interference with Article 5 based on the circumstances of each case. For example, in *Brogan v United Kingdom*, the applicants had been detained for varying periods on suspicion of terrorist offences, with the shortest length of detention at four days and six hours, and the longest at six days and 16 hours.⁴⁰ The Court held that even the shortest of these periods of detention fell outside the strict constraints as to time permitted under Article 5(3), notwithstanding the “*undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism*”.⁴¹

In *Kandzhov v Bulgaria*,⁴² a detention period of three days and 23 hours in respect of minor and non-violent offences was found to violate Article 5(3). Conversely, in *Medvedyev v France*,⁴³ the Court held in a majority judgment that a pre-trial detention period of 13 days was acceptable in circumstances where the applicants were intercepted at sea, and the return journey to France took time.

As noted above, under Article 5 ECHR, the legislation permitting detention must contain adequate safeguards against arbitrary or excessive detention.⁴⁴ There must be

³⁷ Ibid, p173.

³⁸ *Braney v Ireland* (n 19).

³⁹ Ibid.

⁴⁰ *Brogan v United Kingdom* (App. No. 11209/84, 29th November 1988).

⁴¹ Ibid, p. 7.

⁴² *Kandzhov v Bulgaria* (App. No. 68294/01, 6th November 2008).

⁴³ *Medvedyev and Others v France* (App. No. 3394/03, 29th March 2010).

⁴⁴ *Alparslan Altan v Turkey* (n 25).

proportionality between the ground of detention relied upon under Article 5(1), and the detention in question.⁴⁵

In relation to Article 9 ICCPR, the Human Rights Committee has expressed concern that the seven-day detention period provided for under the *Criminal Justice (Drug Trafficking) Act 1996* may raise compatibility issues.⁴⁶

The right to privacy

The right to privacy is protected under Article 40.3.1° of the Constitution as an unenumerated right,⁴⁷ and by Article 8 ECHR and Article 17 ICCPR.

The exercise of a stop and search power by An Garda Síochána infringes upon a suspect's right to privacy. In order for the infringement to be permissible, the power must be necessary, proportionate, and prescribed in law.

The Supreme Court noted in *O'Callaghan v Ireland* that the Oireachtas had the power to legislate for a search power, insofar as it was not oppressive to all or some citizens, and as long as the interference with personal rights was reasonably proportionate with the aim of the public benefit.⁴⁸ In the exercise of this power, a person cannot be subject to unnecessary harassment, distress or embarrassment, as this would be an abuse of powers and an unconstitutional violation of their rights.⁴⁹

The use of coercion in the exercise of this power had additional implications for fair process rights. If failure to comply with a requirement in relation to a search is a criminal offence,

⁴⁵ *Ruslan Yakovenko v Ukraine* (n 24).

⁴⁶ UN Human Rights Committee (HRC), *Report of the UN Human Rights Committee (Volume 1)*, 1998, A/53/40 [438]

⁴⁷ *Kennedy v Ireland* [1987] IR 587.

⁴⁸ *O'Callaghan v Ireland* (n 31) pp. 556, 562.

⁴⁹ *Ibid*, p. 563.

the person being searched must be informed that that is the case, save where the consequences of failure to comply are “*notorious*”.⁵⁰

The ECtHR has held that the use of coercive powers conferred by legislation to require an individual to submit to a detailed search of his or her person, clothing, and personal belongings is a clear interference with the right to respect for private life.⁵¹

A search will violate Article 8 unless three conditions are met:

- (a) The search must be prescribed by law. That law must clearly indicate the scope of the discretion conferred on the authorities and the manner of its exercise. It must also confer adequate legal safeguards against abuse.⁵²
- (b) The search must be in pursuit of a legitimate aim, such as the prevention of crime.
- (c) The search must be necessary and proportionate in pursuit of that legitimate aim. The public interest in the exercise of the power must outweigh the subjective disadvantage which the interference poses to the right to respect for private life.⁵³

The manner in which the police power is used will have an impact on whether Article 8 is violated. For example, a strip search may be a permissible interference with Article 8 if it is provided for under law, and is a necessary and proportionate measure. If a search is carried out in a manner that involves debasing elements and humiliation, it may violate Article 8, and it may amount to inhuman or degrading treatment in violation of Article 3 ECHR.⁵⁴

Similarly, the right to privacy will be engaged where the fingerprints, photographs, and bodily samples are taken from a suspect.⁵⁵ The use of force in this regard must be

⁵⁰ *DPP v Galligan* (Unreported judgment of the High Court, Laffoy J., 2nd November 1995); *Mulligan v DPP* [2008] IEHC 334, [2009] 1 IR 794; *DPP (at the suit of Garda Adrian Langan & Garda Mark Shortt) (prosecutor) v Freeman* [2010] IEHC 379, [2011] 1 IR 301; *DPP v Fitzsimons* [2015] IEHC 403.

⁵¹ *Gillan and Quinton v United Kingdom* (App. No. 4158/05, 12th January 2010).

⁵² *Ibid*, [77]; *Beghal v United Kingdom* (App. No. 4755/16, 28th February 2019) [87], [88], [109].

⁵³ *Colon v The Netherlands* (App. No. 49458/06, 15th May 2012) [95].

⁵⁴ *Wainwright v United Kingdom* (App. No. 12350/04, 26th September 2006) [42] – [43].

⁵⁵ Walsh (n 32) pp. 89-90, 99.

prescribed by law and must be necessary in a democratic society for the purposes of achieving a legitimate aim.⁵⁶

The European Code of Police Ethics reflects these principles, noting that police shall only interfere with an individual's right to privacy where strictly necessary, and only for a legitimate objective.⁵⁷

The right to bodily integrity and the right to life

The right to bodily integrity is protected by Article 40.3.1° of the Constitution.⁵⁸ Articles 3 and 8 ECHR have the effect of protecting the individual against arbitrary interference by the State,⁵⁹ and against torture or inhuman or degrading treatment. The right to life is protected by Article 2 ECHR, and similar protection is provided by Articles 6, 7, and 9 ICCPR.

Gardaí are permitted by common law and statute to use reasonable levels of force in the execution of their duties.⁶⁰ In the context of arrest, the Supreme Court has held that the force used must be reasonable in the circumstances. However, the determination of whether the force was reasonably necessary in the circumstances is to be made by the arresting Garda, and the Courts have shown a generous margin of appreciation in this regard.⁶¹

The use of force in the exercise of Garda powers may interfere with Article 8 ECHR. Where the use of force meets the minimum level of severity necessary to amount to inhuman or degrading treatment, there will be a violation of Article 3 ECHR. This will depend on all of

⁵⁶ *X v The Netherlands* (App. No. 8239/78, 4th December 1978); *Y.F. v Turkey* (App. No. 24209/94, 22nd July 2003).

⁵⁷ *European Code of Police Ethics* (n 29) [41].

⁵⁸ *Ryan v Attorney General* [1965] IR 294.

⁵⁹ *X v The Netherlands* (n 53) [23].

⁶⁰ *Dowman v Ireland* [1986] ILRM 111; For example: Non-Fatal Offences Against the Person Act 1997, section 18.

⁶¹ *DPP v Peter Cullen* [2014] IESC 7, [2014] 3 IR 30; *DPP v Pires*, *DPP v Corrigan*, *DPP v Gannon* [2018] IESC 51, [2019] 1 ILRM 248.

the circumstances of the case, including the nature of the force used, its physical and mental effects, and the personal characteristics of the person subject to the force.⁶²

Where lethal force is used, Article 2 ECHR will be violated unless the force was no more than absolutely necessary, and it was inflicted:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.⁶³

The ECtHR has noted that requirement of ‘absolute necessity’ for Article 2 indicates that “*a stricter and more compelling test of necessity must be employed from that normally applicable*”.⁶⁴ The force must be “*strictly proportionate*” to the achievement of its aim, and may only be used for a specific objective set out in Article 2(2).⁶⁵

The state agent using lethal force must hold an honest and genuine belief that the use of force is necessary. The Court will have regard to whether this belief was subjectively reasonable, in that it was based on subjective good reasons, in assessing whether the belief was genuine.⁶⁶

Article 2 applies not just to the execution of the lethal force itself, but to the operation in which the lethal force is deployed. If an operation is not organised in a way designed to minimise risk to life insofar as is possible, Article 2 may be violated.⁶⁷

The ECtHR has also held that Article 2 imposes a positive obligation on States to put in place an adequate legislative and administrative framework to safeguard against arbitrariness and

⁶² *Selcuk and Asker v. Turkey* (App. No. 23184/94, 24th April 1998) [76].

⁶³ Article 2(2) of the European Convention on Human Rights.

⁶⁴ *McCann v United Kingdom* (App. No. 18984/91, 27th September 1995) [149].

⁶⁵ *Ibid.*

⁶⁶ *Armani Da Silva v United Kingdom* (App. No. 5878/08, 30th March 2016) [248].

⁶⁷ *McCann v United Kingdom* (n 63)

abuse of force.⁶⁸ In *Makaratzis v Greece*, the Court held that the “slender” Greek legislation setting out the variety of situations in which lethal force could be deployed, together with a stipulation that it should be used only when absolutely necessary and when all less extreme methods have been exhausted, was not sufficient to meet the requirements of Article 2.⁶⁹

Where an agent of the State has used lethal force, Article 2 places an obligation on the State to conduct an effective official investigation into the matter.⁷⁰

Detailed guidance on the use of lethal force can be found in international policing standards, including: the European Code of Police Ethics,⁷¹ the UN Code of Conduct for Law Enforcement Officials,⁷² and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁷³

The right to inviolability of the dwelling

The right to inviolability of the dwelling is protected by Article 40.5 of the Constitution. The search of a residence will interfere with this right, in addition to privacy rights and protection of property rights.⁷⁴

In order for a search of a dwelling to be lawful, it must be expressly authorised by statute.⁷⁵ The interference with constitutional rights must be rationally connected and proportionate to the objective to be achieved, and it must impair those rights as little as possible.⁷⁶

⁶⁸ *Makaratzis v Greece* (App. No. 50385/99, 20th December 2004) [58].

⁶⁹ *Ibid*, [62].

⁷⁰ *McCann v United Kingdom* (n 63) [320].

⁷¹ European Code of Police Ethics (n 29).

⁷² UN General Assembly, *Code of conduct for law enforcement officials*, 5 February 1980, A/RES/34/169

⁷³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

⁷⁴ The right to property is protected under Article 40.3.2°, which provides that the State shall by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

⁷⁵ *Freeman v DPP* [1996] IEHC 61, [1996] 3 IR 565

⁷⁶ *Damache v DPP & Others* [2012] IESC 11, [2012] 2 IR 266.

In some circumstances, a statutory provision may lawfully permit entry to a dwelling without the need for a warrant;⁷⁷ however, this is very much the exception. A statute permitting entry to a dwelling will generally only be considered to be a proportionate interference with rights where it imposes a requirement to obtain a search warrant from a competent, detached authority exercising an independent jurisdiction.⁷⁸

The person issuing the warrant should be independent of the issue, and “*should be independent of An Garda Síochána*”, to provide effective independence.⁷⁹ However, there may be exceptions to this requirement in “*urgent*” situations.⁸⁰

The search of a property is an interference with the right to respect for private life, family life and the home, as protected by Article 8 ECHR, in addition to Article 1 of Protocol 1 ECHR. The search must be in accordance with law and must be a proportionate measure aimed at meeting a legitimate objective such as the prevention of disorder and crime.⁸¹ To be proportionate, a search must have “*adequate and effective safeguards against abuse*”.⁸² In assessing this, the ECtHR places significant weight on whether the search was judicially authorised.⁸³

The issue of a warrant by a judicial authority may not, in and of itself, amount to an adequate safeguard under Article 8. The Court must examine the particular circumstances to determine whether the limitations on the powers were an adequate protection against arbitrary interference.⁸⁴ The proportionality of the use of power may depend on the severity of the suspected offence, whether the search was based on reasonable suspicion, and the limitation on the scope of the warrant.⁸⁵

⁷⁷ *Deighan v Hearne* [1986] IR 603.

⁷⁸ *DPP v Balfe* [1998] 4 IR 50, p. 61.

⁷⁹ *Damache v DPP* (n 75) pp. 281, 285.

⁸⁰ *Ibid*, p. 281.

⁸¹ See, for example, *Funke v France* (App. No. 10828/84, 25th February 1993); *Buck v Germany* (App. No. 41604/98, 28th April 2005); and *Aleksanyan v Russia* (App. No. 46468/06, 22nd December 2008).

⁸² *Funke v France* (n 80) [56].

⁸³ *Camezind v Switzerland* (App. No. 21353/93, 16th December 1997) [45].

⁸⁴ *Stefanov v Bulgaria* (App. No. 65755/01, 22nd May 2008) [39].

⁸⁵ *Ibid*, [38].

Under Article 17(1) ICCPR, no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. The Human Rights Committee has stated that public authorities should only be able to obtain information relating to a person's private life where it is "*essential in the interests of society*".⁸⁶ Permissible interferences with this right must be set out in detail in legislation.⁸⁷

Fair procedures and fair trial rights

The right to fair procedures and the right to a fair trial are engaged by the use of Garda powers in a number of areas.

The right to silence and the privilege against self-incrimination

The right to silence and the privilege against self-incrimination are protected under the Constitution,⁸⁸ and under Article 6 ECHR and Article 14(3)(g) ICCPR.

Under this right, the use of coercion to compel a person to make an incriminating statement is prevented. Although this privilege is recognised as going to the heart of fair procedures under Article 6 ECHR, it is not absolute.⁸⁹ The ECtHR has noted that Article 6 will be violated only where the degree of compulsion applied "*destroys the very essence*" of the privilege.⁹⁰

The extent to which this right applies beyond statements or admissions is unclear. The ECtHR has noted that there is a distinction between statements and "*material... which has an existence independent of the will*".⁹¹ As such, the use of compulsory powers to obtain

⁸⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.

⁸⁷ Ibid.

⁸⁸ *Heaney v Ireland* [1996] 1 IR 580.

⁸⁹ *Ibrahim v United Kingdom* (App. No. 50541/08, 13th September 2016) [266],[269]; *Murray v United Kingdom* (App. No. 18731/91, 8th February 1996).

⁹⁰ *Ibrahim v United Kingdom* (n 88) [269].

⁹¹ *Saunders v United Kingdom* (App. No. 19187/91, 17th December 1996) [69].

documents and bodily samples would not be protected by the privilege. However, the Court has not been consistent in applying this principle in practice.

In *Funke v France*, the applicant had been convicted for failing to furnish certain documents to customs officers.⁹² The ECtHR held that this process breached the applicant's Article 6 rights, as it was a calculated attempt to compel him to provide evidence of offences he had allegedly committed. Similar conclusions were reached in *J.B. v Switzerland* and *Chambaz v Switzerland*,⁹³ where the applicants were fined for failing to hand over documents in the context of tax evasion proceedings. In *Jalloh v Germany*, the Court held that the forcible administration of emetics to cause a suspect to regurgitate a bag of drugs that he had swallowed was a violation of right to silence.⁹⁴ Although the bag had an existence independent of the will of the accused, it had been retrieved from him with a considerable degree of force.

The ECtHR has not considered whether the exercise of a power of compulsion to disclose a password or encryption key to a computer might breach Article 6. However, this matter has been considered by other courts. The English Court of Appeal has held that such passwords are akin to bodily samples, insofar as they exist independently of the suspect's will.⁹⁵ A similar conclusion was reached by the Belgian Court of Cassation.⁹⁶ However, courts in the United States and Canada have held that, in relation to their respective constitutions, the compelling of the disclosure of a password does breach the privilege against self-incrimination.⁹⁷

⁹² *Funke v France* (App. No. 10828/84, 25th February 1993).

⁹³ *J.B. v Switzerland* (App. No. 31827/96, 3rd May 2001); *Chambaz v Switzerland* (App. No. 11663/04, 5th April 2012).

⁹⁴ *Jalloh v Germany* (App. No. 54810/00, 11th July 2006).

⁹⁵ *R v S(F) and A(S)* [2008] EWCA Crim 2177, [2009] 1 WLR 1489.

⁹⁶ *Procureur-Generaal Bij Het Hof Van Beroep te Gent v M.A.* (Belgian Court of Cassation, 4th February 2020).

⁹⁷ For example, *R. v Shergill* [2019] ONCJ 54 and *In re Subpoena Duces Tecum* 670 F.3d 1335 (11th Cir.

2012). Notably, whether the password is 'testimonial' and protected in US jurisprudence may depend on the precise information held by the State. See: *United States v. Fricosu*, 841 F. Supp. 2d 1232, 1235 (D. Colo. 2012).

The right of reasonable access to a solicitor

The right of reasonable access to a solicitor is protected by the Constitution,⁹⁸ Article 6 ECHR, Article 14(3) ICCPR, and by EU law.

Various rights have been recognised as part of this constitutional protection, including: the right to be informed of the right of access; the right to be informed when the solicitor arrives at the Garda station; the right to be afforded a meaningful opportunity to obtain legal advice; and the right to speak to a solicitor in private, and prior to any questioning.⁹⁹

The Irish Courts have not yet recognised a constitutional right of the presence of a solicitor during interview.¹⁰⁰ However, ECtHR jurisprudence on this point has developed since it was last considered by the Supreme Court.

Under Article 6(3)(c) ECHR, the ECtHR has held that a suspect has the right to legal representation from the time of their arrest. They are entitled to confer in private with their lawyer prior to interview, and to have the lawyer physically present during police interview.¹⁰¹

Although the right of access to a lawyer is not absolute, any restrictions on the right must be exceptional, temporary, and based on the individual assessment of the particular case.¹⁰²

The rights of the suspect may not be unduly prejudiced.¹⁰³ If there are no compelling reasons for the restriction of access to a lawyer, there is a presumption that Article 6 has been violated. However, if the overall proceedings have been fair, there may be no violation.¹⁰⁴

⁹⁸ *DPP v Healy* [1990] 2 IR 73.

⁹⁹ *People (DPP) v Finnegan* (Unreported judgement of the Court of Criminal Appeal, 15th July 1997); *DPP v Buck* [2002] IESC 23, [2002] 2 IR 268; *DPP v O'Brien* [2005] IESC 29, [2005] 2 IR 206; *DPP v A.D.* [2012] IESC 33, [2012] 2 IR 332; *The People (DPP) v Gormely and White* [2014] 2 IR 591.

¹⁰⁰ *DPP v Doyle* [2017] IESC 1, [2018] 1 IR 1; *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390.

¹⁰¹ *Beuze v Belgium* (App. No. 71409/10, 9th November 2018) [124], [133]-[134].

¹⁰² *Ibrahim v United Kingdom* (n 88).

¹⁰³ *Salduz v Turkey* (App. No. 36391/02, 20th November 2008) [55].

¹⁰⁴ *Doyle v Ireland* (App. No. 51979/17, 23rd May 2019) [102].

The right of a suspect to have “*legal assistance of his own choosing*” is also not absolute.¹⁰⁵ State authorities must have regard to the suspect’s wishes as to their choice of legal representation; however, the State may override those wishes when there are “*relevant and sufficient grounds*” for holding that this is necessary in the interests of justice.¹⁰⁶ Where no such reasons exist, there may be a violation of Article 6(1), depending on the overall fairness of the proceedings.¹⁰⁷

A suspect may waive their right of access to a lawyer. The threshold for waiver is high. A waiver, once invoked:

*“must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be”*¹⁰⁸

In relation to EU law, Ireland has opted into Directive 2012/13/EU,¹⁰⁹ which has direct effect.¹¹⁰ Under Article 3 of the Directive, Member States shall ensure that suspects are promptly provided with information regarding:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed of the accusation, in accordance with Article 6;
- (d) the right to interpretation and translation; and
- (e) the right to remain silent.

¹⁰⁵ Article 6(3)(c) of the European Convention on Human Rights.

¹⁰⁶ *Dvorski v Croatia* (App. No. 25703/11, 20th October 2015) [78]-[79].

¹⁰⁷ *Ibid.*

¹⁰⁸ *Pishchalnikov v Russia* (App. No. 7025/04, 24th September 2009) [77].

¹⁰⁹ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

¹¹⁰ *DPP v O’Sullivan* [2018] IESC 15, [58].

In addition to this information, a suspect must be provided with a Letter of Rights upon arrest that outlines their legal entitlements,¹¹¹ including the right of access to a lawyer and the right to remain silent. Under Article 7 of the Directive, the State shall ensure that a suspect or their legal representative has access to the “*materials of the case*” at any stage in the proceedings.¹¹² The question of whether this obliges the Gardaí to furnish disclosure to a suspect and their solicitor, prior to interview, has not yet been decided by Irish courts.¹¹³

Interpretation and translation rights

The right of a suspect to be informed of the charge against them in a language that they understand, and to be provided with an interpreter if they cannot understand the language used in Court, is expressly protected by Article 6(3) ECHR and Article 14(3) ICCPR.

Ireland has opted-in to Directive 2010/64/EU,¹¹⁴ on the right to interpretation and translation in criminal proceedings.¹¹⁵ Under Article 2, a suspect who does not speak the language of the criminal proceedings must be provided with interpretation facilities, without delay. Where necessary to safeguard the fairness of the proceedings, interpretation must be made available for communications between the suspect and their legal representative.

This right to interpretation includes appropriate assistance for suspects with hearing or speech impediments.¹¹⁶ Where an arrested person suffers from a hearing or speech

¹¹¹ Directive 2012/13/EU (n 108) Article 4.

¹¹² Ibid, Article 7.

¹¹³ *Maloney and Ennis v Member in Charge of Finglas Garda Station* [2017] IEHC 279, (Unreported judgment of the High Court, Noonan J., 9th May 2017).

¹¹⁴ Transposed into Irish law through: .I. No. 565/2013 - European Communities Act 1972 (Interpretation and Translation in Criminal Proceedings) Regulations, 2013; S.I. No. 564/2013 - European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013.

¹¹⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

¹¹⁶ Ibid, Article 2(3).

impediment, the member in charge must make “*appropriate arrangements to take account of the person’s circumstances.*”¹¹⁷

Non-discrimination, and equality before and under the law

The prohibition of discrimination is articulated in Article 14 ECHR and Article 26 ICCPR.

Under these provisions, persons shall enjoy the rights of both Conventions without discrimination “*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”

Ireland is a party to the UN Convention on the Elimination of All Forms of Racial Discrimination, which obliges States to implement a policy of eliminating racial discrimination in all of its forms.¹¹⁸ States must undertake not to engage in any act of racial discrimination, and to ensure that all public authorities act in compliance with this obligation.¹¹⁹

Ireland is a party to the UN Convention on Rights of Persons with Disabilities. Under Article 4, States are obliged to ensure and promote the full realisation of all human rights for all persons with disabilities, without discrimination of any kind on the basis of disability. Under Article 5 of the Convention, States must take all appropriate steps to provide ‘reasonable accommodation’ for persons with disabilities. This is defined as:

“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”

Persons with disabilities must be ensured access to justice on an equal basis with others and,¹²⁰ if deprived of liberty, they are entitled to the guarantees of international human

¹¹⁷ Ibid, Regulation 12.

¹¹⁸ Article 2 of the UN Convention on the Elimination of All Forms of Racial Discrimination.

¹¹⁹ Ibid.

¹²⁰ Article 13 of the UN Convention on the Rights of Persons with Disabilities.

rights law on an equal basis to others. The treatment of persons with disabilities must be compliance with the objectives and principles of the Convention, including by the provision of reasonable accommodation.¹²¹

Under section 42 of the Irish Human Rights and Equality Commission Act 2014, public bodies are required to have regard to the need to eliminate discrimination, promote equality, and protect the human rights of those availing of their services.

¹²¹ Ibid, Article 14.

General Observations on the Draft Heads of the Bill

As noted above, the process of codification should be compliant with the Public Sector Equality and Human Rights Duty.¹²² It should avoid a regression in rights protections where practice is more developed than the legislation. In this context, the Commission has already noted that the Draft Bill Heads relating to search, arrest, and detention risk the conflation of ordinary police powers with extraordinary powers. This may have the effect of normalising the use of extraordinary powers. The Commission strongly urges that a clear distinction is maintained between these types of powers in the codification process.

The Commission notes that comprehensive disaggregated equality data collection is a fundamental tool in the oversight of police powers. There is a need for a coordinated and systematic approach in the collection of equality data, which includes special category data on racial or ethnic origin.

As emphasised by the European Commission subgroup on equality data, the collection and processing of this data must comply with the principles and safeguards in the EU General Data Protection Regulation ('GDPR'), in addition to constitutional and EU data law protections.¹²³

The Commission submits that the collection of special categories of personal data can be done lawfully by An Garda Síochána within current European and Irish data protection legislation.¹²⁴ Section 49 of the *Data Protection Act 2018* allows for the processing of special categories of personal data where it respects the essence of the right to data protection and it is necessary and proportionate for the administration of justice, or to fulfil a statutory function.

Notwithstanding the Commission's view that a legal basis for An Garda Síochána to collect race and ethnicity data already exists, the Commission is of the view that the drafting of this

¹²² Section 42 of the *Irish Human Rights and Equality Commission Act 2014*.

¹²³ European Commission High Level Group on Non-discrimination, Equality and Diversity, Subgroup on equality data, 'Guidance note on the collection and use of equality data based on racial or ethnic origin' (September 2021) p. 29.

¹²⁴ As noted previously by IHREC in its 'Submission to the United Nations Committee on the Elimination of Racial Discrimination on the follow-up procedure to Ireland's combined 5th to 9th periodic reports' (March 2022) pp. 2-3.

legislation provides an opportunity to create a specific statutory basis and requirement for this data collection. These legislative measures should ensure that members of An Garda Síochána have the necessary powers to collect and process this data, and to ensure that the processing is proportionate.

The General Scheme does not include provision for the situation of a person attending at a Garda station voluntarily. It is suggested the rights of such persons are included in Part 6 of the Bill, and comparison can be made to section 29 of the Police and Criminal Evidence Act 1984 (PACE Act) in this regard.¹²⁵

¹²⁵ Section 29 provides that a person attending voluntarily at a police station will be entitled to leave at will unless they are placed under arrest. They must be informed at once that they are under arrest if a decision is taken to prevent them leaving at will.

Specific Observations on the Draft Heads of the Bill

Obligation to respect fundamental rights (Head 6)

The Commission welcomes the inclusion of an obligation on members of An Garda Síochána to act with due respect for fundamental rights. It is recommended that the language and terminology used in connection with ‘fundamental rights’ and ‘fundamental principles’ is broadened. The principle of equality and the need to respect and protect human dignity should be explicitly recognised, in addition to the principle of non-discrimination. This is important as the Garda Síochána will be engaging with persons who may be placed in a situation of vulnerability in this interaction for example due to their membership of particular minority groups, factors such as limited English language skills or structural vulnerabilities such as homelessness and drug/alcohol use. It may be intended to address the duties and responsibilities of members of An Garda Síochána in these interactions within the codes of practice or training provided to members of An Garda Síochána. However, it is important to ensure that the fundamental legal rules governing the exercise of An Garda Síochána’s powers are set down in the legislation rather than left to be addressed in codes of practice. This is to ensure that the fundamental legal principles are subjected to adequate and effective democratic scrutiny during the legislative process. The precise scope of the powers provided to An Garda Síochána should be outlined within the legislation; while the 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.

Although this provision does note that powers cannot be exercised in a manner that amounts to inhuman or degrading treatment, it is recommended that the legislation fully incorporates the protections of the *Convention against Torture*.¹²⁶ In particular, the obligations to educate and train law enforcement on the prohibition against torture,¹²⁷ the need for systematic review of the procedures relating to persons in custody,¹²⁸ and the

¹²⁶ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹²⁷ Ibid, Article 10.

¹²⁸ Ibid, Article 11.

requirement of impartial investigation where an act of torture is suspected,¹²⁹ should all be incorporated into the draft legislation.

The Commission recommends that the rights and protections noted in Head 6 are broadened generally, with explicit reference to the principles of equality, non-discrimination, and dignity.

In preparation for the ratification of the Optional Protocol to the Convention against Torture, the Commission recommends that the rights and protections under Head 6 are aligned with the protections of the *Convention against Torture*.

Protection of the Rights of Children (Head 7)

The Commission welcomes the additional and reinforced protections for the rights of children under Head 7. The Commission echoes the comments of Dr Conway on the benefits of creating an appropriate adult scheme, in line with the UK National Appropriate Adult Network.¹³⁰

The Commission notes the importance of strengthening children's rights in the area of fair trial rights. Under Head 42(6), a Garda not below the rank of Inspector may require that a suspect's legal representative is absent from interview in certain situations. Under Head 43(4), a Garda not below the rank of Inspector may authorise questioning of a suspect prior to legal advice in certain situations. Neither provision includes an exception for the questioning of children. A lawyer plays a particularly important role in safeguarding the interests of a child in detention, and the legislation should greatly limit the circumstances in which a child can be deprived of that safeguard.

Although Ireland has not opted-in to EU Directive 2016/800/EU, it is recommended that its protections on the right of the child in criminal proceedings is considered. In particular, it is recommended that a provision including the right to an individual assessment, for the

¹²⁹ Ibid, Article 12.

¹³⁰ Submission of Dr Vicky Conway, DCU on the General Scheme of Garda Síochána (Powers) Bill (12 October 2010)

purpose of taking into account the specific needs of a child, is included in Head 7.¹³¹ This Head should confirm that the deprivation of liberty of a child is a measure of last resort, and limited to the shortest appropriate period of time.¹³²

The Commission recommends the introduction of an ‘appropriate adult scheme’, in line with the UK National Appropriate Adult Network.

The Commission recommends that further limitations are placed on the circumstances in which a child may be questioned prior the provision of legal advice, or without the presence of a legal representative.

The Commission further recommends that Head 6 is extended to allow for an individual assessment to be conducted for children, and for this provision to confirm that the deprivation of liberty is a measure of last resort, and strictly proportionate.

Protection of the Rights of Persons with Impaired Capacity (Head 8)

Head 8 relates to the protection of rights of persons with ‘impaired capacity’. The provision is framed in weak terms, stating that a Garda “*may*” take any measures which they deem necessary and appropriate to protect the rights of the person. There is no obligation to take such measures.

This provision places the decision on the type and extent of the measures necessary and appropriate on the Garda exercising the power in question. The Commission reiterates the comments of Dr Conway on the requirement for further guidance on the use of this discretion.¹³³

This provision applies only to persons of “*impaired capacity*”, a term which is defined as a person:

¹³¹ Article 7 of DIRECTIVE (EU) 2016/800 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

¹³² Ibid, Article 10.

¹³³ Submission of Dr Vicky Conway (n 129) p. 3.

- a. suffering from a disorder of the mind, intellectual disability or physical disability which renders him or her, at the time—
 - (i) unable to understand what is happening or to make decisions;
 - (ii) unable to understand a caution;
 - (iii) unable to act in their own best interests during interview;
 - (iv) unusually suggestible or compliant; or
 - (v) unable to communicate effectively with members of the Garda Síochána.
- b. under the influence of any substance which renders him or her, at the time, unable to understand what is happening or to make decisions affecting his or her rights or treatment.

While this definition covers persons with disabilities of a certain kind, it does not appear to capture all persons covered by the UN Convention on the Rights of Persons with Disabilities (CRPD), which applies to those with *“long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”*.¹³⁴

Under the requirements of the CRPD, Gardaí are obliged to protect, promote and ensure the rights of persons with disabilities when exercising their powers. This is important as persons who have an intellectual disability, a psychosocial disability or who are neuro diverse may be made vulnerable in their engagements with members of An Garda Síochána. In addition there may be particular concerns where there is an intersection with homelessness or drug use.¹³⁵ Procedural accommodations should be in place to facilitate persons with disabilities in effectively participating in a Garda investigation. Where a person with a disability is

¹³⁴ Article 1 of the UN Convention on the Rights of Persons with Disabilities.

¹³⁵ The Garda Síochána Inspectorate review of custody records found that over 48% of these records showed that the person in custody had recently consumed or had a dependency on alcohol, drugs or both; 25% of the records showed that the person had poor mental health or had engaged in self-harm and almost 14% showed that the person had drug or alcohol issues as well as poor mental health. See Garda Síochána Inspectorate, [Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations](#) (July 2021) p. 22. Research has shown that persons with intellectual disabilities are over-represented in the criminal justice system; see Gautam Gulati et al., [‘Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; thematic analysis informed by 1537 person-years’ experience’](#) (2021) 75 *International Journal of Law and Psychiatry* 1–9.

detained, they should receive reasonable accommodation where necessary, in order to preserve their rights. Garda custody facilities should be accessible locations, and appropriate training must be provided to Gardaí.

The General Scheme does not make any provision to ensure that Garda custody facilities are accessible locations. Further, there is no provision for the training of Gardaí in dealing with persons with disabilities. It is unclear as to whether these issues may be remedied in the form of a code of practice.

The Commission notes that a person with an intellectual disability may require appointment of an intermediary or an advocate to assist in understanding their rights and the reasons for their detention. An intermediary may be required for communicating with a legal representative, or for participating in an interview. The General Scheme makes no provision for the appointment of any such persons.

The Commission notes that the provision of legal advice and representation is an indispensable safeguard for persons with certain disabilities, such as intellectual disabilities and psychosocial disabilities. In similar fashion to the observations made in relation to Head 7, it is noted that Head 42(6) and Head 43(4) do not contain exceptions for the questioning of persons with disabilities or impaired capacity. Additionally, there is no provision for reasonable accommodation to be made for a detained person during the course of detention: in terms of, for example, the manner in which interviews are conducted.

The Commission recommends that the scope of Head 8 is broadened to include the definition of disability under the CRPD.

The Commission recommends that this provision includes an express obligation for Gardaí to exercise their powers in a manner that takes account of the rights and inherent dignity of all persons with disabilities. There should be an obligation on the Gardaí to take all reasonable steps needed to protect the rights of a person with a disability.

The Commission recommends that Head 8 is extended to provide for the training of Gardaí on how to meet the needs of person with disabilities; that provisions are included to facilitate the appointment of an intermediary or advocate; and that there is a

recognition of the State's obligation to provide reasonable accommodation for persons with a disability in custody.

The Commission recommends that limitations are placed on the circumstances in which persons with certain disabilities may be questioned prior the provision of legal advice, or without the presence of a legal representative.

Power to stop and search for possession of prescribed articles (Head 9)

Part 3 of the General Scheme deals with the Garda power to stop and search, with Head 9 as the major provision. It provides that where a Garda has reasonable grounds to suspect that a person is in possession of, using, or carrying a 'relevant article', they may stop and search that person without warrant. The term 'relevant article' is broadly defined. It includes: a controlled drug; a firearm, realistic imitation firearm, or other offensive weapon; a syringe or blood in a container; any article intended for use in the commission of an offence; or "*anything stolen or obtained unlawfully*".

Head 9(1) also permits a Garda to stop and search any vehicle in which they suspect that a relevant article may be found. The member may require the driver to refrain from removing anything from the vehicle; to move the vehicle to a more suitable location for the search; or stay with the vehicle until completion of the search. The Garda may also take the vehicle to a suitable location or cause it to be taken there. Head 67 provides that it is a criminal offence to obstruct a search or to fail to comply with a requirement made in relation to a search.

The fact that Head 9 makes the existence of a reasonable suspicion the cornerstone for the exercise of the stop and search is to be welcomed. However, the Head also expands powers of stop and search in certain respects and any such expansion must be necessary and proportionate.

The definition of 'relevant article' contained in Head 9(6)(f) means that a Garda may also stop and search where there are grounds to believe a person has "*any article intended for use in the commission of an offence, if possession of that article in the said circumstances constitutes an offence*". This is a new ground for a stop and search which is not presently

provided under law. The explanatory notes indicate that this is intended to provide a power of search on suspicion that an offence under section 15 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* has been committed. Previously, such a search could only be conducted under warrant.¹³⁶ The explanatory note does not provide detail as to why it is appropriate to now provide for a power of warrantless search.

The Commission submits that the power to stop and search should not be expanded in this way unless there is clear evidence to establish that it is necessary.

It is noted that the formulation of Head 9(6)(f) is broader than the offence of Section 15 of the 2001 Act. It could conceivably cover possession of any false instrument or documentation. There is a risk that this provision legislation will fail to comply with the Article 8 ECHR requirement to clearly set out the scope of any discretion conferred on the authorities. Similarly, Head 9(6)(a) allows for a search on suspicion that a person is in possession of “*anything stolen or obtained unlawfully*”. Although this phrasing has been extracted from section 29 of the *Dublin Police Act 1842*, it is unclear in its ambit. It may refer to the possession of information which was leaked in breach of confidence, or recordings which were made unlawfully. As such, the Commission recommends that the wording of these provisions should be amended to refer the precise offences that they are intended to cover. Guidance may be found in sections 1(7)-(8) of the PACE Act.¹³⁷

Under the present law, a person may only be brought to a Garda station for the purpose of search where they are suspected to be in possession of controlled drugs.¹³⁸ Head 9(2) expands this power. It allows a Garda to require a person to travel to a Garda custody facility for the purpose of being searched in any situation, regardless of the nature of the suspected offence. Additionally, a person is not free to refuse. Failure to comply is

¹³⁶ Granted under either section 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, or section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997.

¹³⁷ Sections 1(7)-(8) set out the power of search for a person suspected to be in possession of a ‘prohibited article’. This term is defined, including an article that is ‘made or adapted for use in the course of or in connection with an offence’ covered by the subsection. The specific offences covered by the subsection are then set out.

¹³⁸ Misuse of Drugs Act 1977, section 23(1A).

punishable summarily by 12 months imprisonment, or on indictment by up to five years imprisonment.

The Commission notes that the detention of a person at a Garda station for a search clearly increases the extent to which the search interferes with their rights. There is no apparent necessity for permitting a Garda to interfere with rights to this extent in all cases where a person is suspected of possessing a ‘relevant article’. Further, there are no limits or safeguards regulating the exercise of the power: Head 9(2) simply provides that a Garda may require the person to attend the Garda custody facility where the Garda “*decides to search a person*”. There is no need for the Garda to have reasonable grounds for believing that it is necessary to bring the person to the facility for a search.

The Commission notes that, as a detained person has the same constitutional protection as an arrested person, the protections of Part 6 of the General Scheme should clearly be noted as applying to persons subject to a search power.

Head 9 permits a Garda to detain a person’s vehicle and search it where there is reasonable suspicion that a person is in possession of, or using, a ‘relevant article’, regardless of the nature of the suspicion. The Garda is also empowered to take the vehicle to a different location for the purposes of search, without first requesting the driver to bring the vehicle there. This is an expansion of existing statutory powers.

At present, a search of a vehicle is only permitted where a Garda has a suspicion that a person is in possession of stolen items, drugs, or offensive weapons.¹³⁹ The only situation in which a Garda can take a person’s vehicle away for purposes of a search is where it is suspected that drugs are in the vehicle.¹⁴⁰ In those circumstances, the Garda must first request the driver to take the vehicle to that location, and that request must be refused by the driver. In expanding these existing powers, Head 9 further increases the extent to which Garda powers of stop and search may interfere with a person’s rights. Such expansion must be necessary and proportionate for all situations that may be covered by the power. The

¹³⁹ See Dublin Police Act 1842, section 29; Misuse of Drugs Act 1977, section 23; and Firearms and Offensive Weapons Act 1990, section 16.

¹⁴⁰ Misuse of Drugs Act 1977.

Commission submits that a power allowing a Garda to personally take a vehicle away, without the need to first request the driver to move, is disproportionate.

The powers under Head 9 can be exercised in any public place, or in any other place where the Garda is present under a power of entry authorised by law or to which or in which they were expressly or impliedly invited or permitted to be. This would allow the broad powers of search and detention in Head 9 to be exercised in respect of a person in their own home without the need for a warrant, in circumstances where a Garda was expressly or impliedly invited to enter.

The Commission recommends that a provision equivalent to section 1(4) of the PACE Act is incorporated into the Bill. This section states:

“If a person is in a garden or yard occupied with and used for the purposes of a dwelling or on other land so occupied and used, a constable may not search him in the exercise of the power conferred by this section unless the constable has reasonable grounds for believing—

(a) that he does not reside in the dwelling; and

(b) that he is not in the place in question with the express or implied permission of a person who resides in the dwelling.”

The Commission recommends that any extension of the power of stop and search in legislation must be necessary and proportionate.

The Commission recommends that the limitations of this power must be clearly delineated, and it notes that Head 9(6)(a) and 9(6)(f) should be amended to ensure compliance with Article 8 ECHR.

The Commission recommends that the scope of a stop and search power should be restricted in the context of a dwelling and that a provision equivalent to section 1(4) of the PACE Act is incorporated into the Bill.

Power to search vehicles and persons in vehicles for evidence of offence (Head 10)

Head 10 provides a further power to stop and search vehicles. Where a Garda has reasonable grounds to suspect that one of the offences set down in Schedule 2 of the General Scheme “*has been, is being or is about to be committed*”, the Garda may stop and search a vehicle to ascertain whether any person in the vehicle is involved in the offence, or whether evidence relating to the offence is in the vehicle or on any person in the vehicle. The Garda need not believe that the vehicle or persons inside it are connected to the suspected offence in order to stop and search the vehicle.

Head 10 confers an additional power to search “*any person in or accompanying the vehicle*” where the Garda has a reasonable suspicion that a person in or accompanying the vehicle has committed, is committing or is about to commit the offence, or that evidence relating to the offence is in the vehicle or on the person. This provision replicates, and expands upon, section 8 of the *Criminal Law Act 1976*, extending to situations where there is a reasonable suspicion of a trafficking offence.

The Commission notes that the safeguards on the power contained in Head 10 may be improved to ensure a proportionate interference with rights. Head 10 effectively allows vehicles to be stopped and searched anywhere in the State, once there is a reasonable basis for believing that an offence under Schedule 2 has been, is being, or is about to be, committed. The Commission recommends that safeguards are introduced in line with section 4 of the PACE Act. This legislation provides that a road check must be authorised by a police officer not below the rank of superintendent, and that the road check must be operated in the locality in which it is suspected that a person linked to the offence is located.

The Commission recommends that safeguards are introduced to the Garda power of Head 10, in line with section 4 of the PACE Act.

Right to be informed of the reason for a search (Head 11)

Head 11 provides that, prior to carrying out a search, the Garda shall inform the person being searched that a search is about to happen, the reason for the search, and the legal basis for the search. It cannot be assumed that everyone has knowledge of the scope of Garda powers due to, for example, limited English proficiency, an intellectual disability or a psychosocial disability. Therefore, it is important that this information is provided in an accessible manner to ensure persons understand their obligations and rights when being searched.

This provision does not set out the information to be provided to the owner of a vehicle, where a Garda has conducted a search when it was unattended.

The Commission recommends that Head 11 is extended to provide for a notice of search to be left in a vehicle where a Garda has conducted an unattended search, in line with section 2(6) of the PACE Act.¹⁴¹

Record to be made of a search (Head 12)

Head 12 requires that a record of the stop and search must be made. As noted above, the Commission considers that the drafting of this legislation provides an opportunity to create a statutory basis and requirement for the collection of equality data. The Commission recommends that Head 12 is amended to include an express requirement to record the racial and ethnic origin of the person being searched, and the location at which the power is exercised.

The Commission submits that the legislation should directly reference non-discrimination in Part 3 on stop and search powers. The Commission also recommends that legislative proposals on collecting race and ethnicity data should be accompanied by training for Members of An Garda Síochána in the areas of cultural competence, human rights, and equality.

¹⁴¹ This section sets out that where an unattended vehicle is searched, a constable must leave a notice stating that they have searched it, the name of their attached police station, and that an application for compensation may be made to the station where there was damage caused.

Head 12(3) provides that the person who is the subject of the search concerned shall be entitled to a copy of the record, on request in writing, at any time before the record is destroyed. It is unclear whether a member of An Garda Síochána shall inform a person at the time they are being searched that a record will be made of the search and their entitlement to receive a record of the search. While it may be intended to address this in a code of practice, the Commission is of the view that a person should be informed at the time they are being searched that a record of the search is being made and that they are entitled to receive a copy of the record.

The Commission recommends that Head 12 is amended to include an express requirement to record the racial and ethnic origin of the person being searched, and the location at which the power is exercised.

The Commission recommends that the legislation expressly references non-discrimination in the use of stop and search powers, and that provision should be made for appropriate training.

The Commission recommends that Head 12 be amended to provide that a person who is subject to a search under this provision should be informed at the time they are being searched that a record of the search is being made and that they are entitled to receive a copy of the record.

Code of Practice on searches (Head 13)

Head 13 provides that a Code of Practice will be drafted for the purpose of providing guidance on the power of stop and search. The Code is to set out the circumstances in which a search may be conducted; the procedure to be followed; the scope and extent of the search; the safeguards to apply when the subject of a search is a child or a person with impaired capacity; and other matters the Commissioner deems appropriate.

The Commission notes that fundamental requirements as to how a search is to be carried out have not been addressed in Part 3 of the General Scheme. These requirements are of such crucial importance that they should be set down in the primary legislation, rather than a Code.

The Commission recommends, for example, that provisions should be added to Part 3 to provide that a search must be carried out without causing unnecessary harassment, distress or embarrassment. These provisions should delimit the circumstances in which strip searches and invasive searches may take place, and the safeguards which should apply. Comparison may be made to section 55 of the PACE Act in this regard.¹⁴² Part 3 should also provide that, where a person is required to comply with a search, they should be informed that failure to comply is a criminal offence.

The Commission welcomes the principle included in Head 13(4)(d), which implies that racial profiling is prohibited. However, the Commission recommends that this wording is strengthened, and that racial profiling is expressly prohibited.

The Commission suggests the following amendment to Part 3:

“a member of the Garda Síochána shall not rely, to any degree, on the race, colour, descent or national or ethnic origin of a person as the basis for exercising any of the powers provided for under this Act in respect of that person.”

It is submitted that this articulation covers the key features of racial profiling, as considered by the Committee on the Elimination of Racial Discrimination. As recommended by the Committee, detailed guidelines should be developed on this issue, in consultation with relevant groups.¹⁴³ This could form a part of the Codes of Practice which are already provided for in the legislation.

Head 13(3) sets out that the Code of Practice shall set out the information to be recorded during a search, the means of storing information, and the circumstances in which it is retained, disclosed, or destroyed. Head 12 notes that where a search does not result in seizure of a prohibited article or evidence of an offence, the record shall be retained for a period established in the code of practice and then destroyed.

¹⁴² This section sets out the circumstances in which an intimate search may be carried out, the location of the search, the authorisation necessary, and the person qualified to conduct the search.

¹⁴³ Committee on the Elimination of Racial Discrimination, “Concluding observations on the combined fifth to ninth reports of Ireland” (23rd January 2020) CERD/C/IRL/CO/5-9 at p. 3, [15]-[16].

The General Scheme makes no express provision for data collected on the use of stop and search to be processed and reported. Further provisions are required for this purpose. The Commission makes the following recommendations:

- (a) It is necessary to introduce a requirement for a record to be made in respect of the exercise of all Garda powers, including the use of search warrants and arrests;
- (b) There should be an express requirement to record the relevant personal characteristics of the person subjected to the Garda power;
- (c) Consideration should be given to the extent of the characteristics which should be recorded by a Garda. If very extensive, this might result in a situation where a stop and search or other action could involve intrusive and extensive questioning about personal matters, further heightening the extent of the interference it poses;
- (d) Provision should be made so as to respect the principle of self-identification in data collection: for instance, section 3 of the PACE Act requires a police officer to record *“the ethnic origins of the person as described by the person or, if different, the ethnic origins of the person as perceived by the constable”*;
- (e) Clarification should be provided as to when the record needs to be made. For instance, section 3 of the PACE Act states that a record of a stop and search shall be made on the spot, or, if that is not practicable, as soon as practicable after the completion of the search;
- (f) The legislation should include an obligation to process and report this information; and
- (g) The Data Protection Commissioner should be included in the list of consultant bodies for the purpose of creating the Codes of Conduct.

The Commission further notes that there is a lack of legal certainty and clarity in Head 13(7)(b), which allows for amendments to be made to Codes of Conduct. “*Minor and technical*” amendments need not be submitted to the Minister for approval. Further recommendations relating to this lack of clarity are addressed under Head 64.

The Commission further notes that the terminology of ‘impaired capacity’ is included under this Head.

The Commission recommends that fundamental requirements as to how a search is to be carried out should be included in the legislation.

The Commission recommends that, where a person is required to comply with a search, they should be informed that failure to comply is a criminal offence.

The Commission recommends that stronger wording to prohibit racial profiling is included in the legislation and that this is accompanied by detailed guidelines, developed in consultation with relevant groups.

The Commission recommends that provisions on the collection and retention of data, for the purpose of collecting and reporting disaggregated equality data, are included in the legislation.

The Commission recommends that clarifications should be made in the primary legislation as to how the power of stop and search is to be used. The Commission recommends that there is clarity on how the Codes of Conduct can be amended, and further notes that the terminology of ‘impaired capacity’ should be extended to cover disabilities under the CRPD.

Application and issuing of warrant (Head 15)

The Commission welcomes aspects of Head 15. For instance, the warrant regime has been appropriately limited to circumstances where there are objectively reasonable grounds to suspect that certain specific criminal offences have occurred, or where the warrant is

necessary to facilitate the functions of a designated officer. However, there are developments in Head 15 that may have the effect of regressing rights protections.

Under the present law, the only general power to apply for a search warrant is provided under section 10 of the *Criminal Justice (Miscellaneous Provisions) Act 1997*. This provides that an application for a warrant can only be made in respect of an “*arrestable offence*”, an offence punishable by a term of imprisonment of five years or more. This application must be made by a Garda not below the rank of sergeant. These limitations are factors ensuring that the search power is proportionate. However, both safeguards have been removed in Head 15.

Head 15 would allow a Garda of any rank to apply for a warrant, in respect of any indictable offence, as well as certain summary offences, regardless of the applicable penalty.

Although there are legislative provisions that allow Gardaí of any rank to apply for warrants in respect of offences punishable by a term of imprisonment of less than five years, the introduction of a general warrant power to this effect must be justified by sufficient reasons.

The Commission recommends that Head 15(6) is amended so that emergency warrant applications are made to a High Court judge. This is for reasons of practicality; one duty High Court judge could deal with warrant applications for any place in the State, whereas District Court judges would be limited to issuing warrants for their assigned District Court area. The Commission recommends that the warrant should have a 24-hour period of validity, rather than the same validity period as a normal warrant due to the urgent nature of the application.

The Commission recommends that the safeguards included in the general warrant power of the *Criminal Justice (Miscellaneous Provisions) Act 1997* are removed only where it is necessary and proportionate.

The Commission further recommends that emergency remote applications are made to a High Court judge, and that the resulting warrant lasts only 24 hours.

Powers under search warrant (Head 16)

The Commission notes that there are significant grounds for concern as to the proportionality of the rights interference permitted under Head 16.

Head 16 empowers a Garda to require any person present at the place of search to hand over the password or encryption key for any computer, including a mobile phone, located at that place, as well as any information which is lawfully accessible by means of that computer. Any person at the place can be required to provide access to information accessible from such computer and allow examination of that information. A Garda can personally operate the computer.

By virtue of Heads 16 and 66, a Garda could seize the information on the computer where there are grounds suspecting that it relates to any criminal offence whatsoever. Head 20 would then operate to allow a Garda to copy the information on the computer.

The Commission notes that Head 16 allows a Garda operating under warrant to have access to the sensitive personal information on a person's computer or phone and to inspect a person's private, social, and professional life for evidence of criminal wrongdoing. This amounts to a very extensive interference with a person's rights, with the significant potential for abuse. The United States Supreme Court has held that a warrant is required for a search of a phone.¹⁴⁴ Courts in the United States and Canada have held that compelling a person to communicate their password amounts to a breach of rights including the right to liberty and the principles of fundamental justice, including the protection against self-incrimination and the right to silence.¹⁴⁵

There are no limits on Gardaí exercising these powers. Gardaí are permitted to act in this way in any case where a warrant issues, regardless of the nature of the offence being investigated and regardless of whether there are reasonable grounds to suspect the computer might have information relevant to the offence being investigated. There is no requirement for the judge issuing the warrant to consider whether it is appropriate for Gardaí to be able to exercise such powers, nor can a judge decide that Gardaí should not be

¹⁴⁴ *Riley v. California*, 573 U.S. 373 (2014).

¹⁴⁵ *R. v Shergill* [2019] ONCJ 54; *Commonwealth of Pennsylvania v Joseph J. Davis* (J-42-2019).

able to exercise the powers. They would simply be provided as a matter of course with every warrant.

It is also significant that there is real coercive force behind these powers, as per Head 67. If a person resists any of the requirements made by Gardaí, for example, in refusing to give a password, that is a criminal offence punishable by up to five years imprisonment on indictment.

It is noted that similar powers to Head 16 are contained in certain statutory provisions.¹⁴⁶ The legality of these measures has not been considered by the Irish courts. However, they may be proportionate powers in the particular contexts in which they appear. All of the statutes presently providing such powers involve offences of a certain minimum gravity, or offences where there is some logical requirement for a search of computer systems. The Commission submits that the fact that extraordinary powers have been provided in certain contexts does not justify providing them as a feature of all warrants.

The Commission notes that the inclusion of such wide-reaching powers as a matter of course in every warrant amounts to a disproportionate interference with human rights. Two safeguards are recommended, at a very minimum:

- (a) that the judge issuing the warrant must authorise the exercise of the powers to demand a password or encryption key and access a computer where satisfied that it is reasonably necessary; and
- (b) that such a requirement may only be made of a person at the place being searched where it is reasonably believed that evidence relating to an offence is to be found on the computer.

The Commission recommends that more robust protection should be provided, in line with sections 49 and 50 of the UK *Regulation of Investigatory Powers Act 2000*, which limits the circumstances in which access to a device can be granted.

¹⁴⁶ For example, Criminal Justice (Theft and Fraud Offences) Act 2001, section 48; Criminal Justice (Offences Relating to Information Systems) Act 2017, section 7; Companies Act 2014, section 787; Finance Act 2001, section 136; Sea Fisheries and Maritime Jurisdiction Act 2006, section 17A; Proceeds of Crime Act 1996, section 14.

The Commission further notes that exercising a power to demand the provision of a password or encryption key may infringe on the privilege against self-incrimination under the Constitution and Article 6 ECHR. As noted above, there is no clear answer to this issue at present. Whilst a distinction may be drawn between a biometric encryption key and a password, it is arguable that this amounts to compulsion of a statement which is used to incriminate that suspect. This compulsion would be made in circumstances where a person does not have the right to consult with a solicitor.

The Commission suggests that it is appropriate to proceed on the basis that such a provision may infringe the right to silence, and aim to ensure that any infringement with the right to silence is proportionate. At a minimum, the Commission recommends that restrictions should be introduced on the power to demand a password or encryption key, and that the penalty for failure to comply is reduced. This penalty is significantly higher than the equivalent penalties in current legislation.¹⁴⁷

Head 16 appears to authorise an unlimited number of entries to the premises during the period of validity of the warrant. The Commission notes that this appears to be excessive, and provides scope for abuse. It is recommended that limitations are put in place, in line with sections 8(1C) and 16(3B) of the PACE Act.¹⁴⁸

Head 16 provides that Gardaí or officers who are executing a warrant may be accompanied by such other persons they wish. These persons are permitted to have access to the information held in any computer at the place which is being searched. The Commission echoes the recommendation of the Law Reform Commission that specific permission should be sought from the Court issuing the search warrant for this purpose, and that this must be stated on the issued search warrant.¹⁴⁹

¹⁴⁷ For example, a period of six months in section 49 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

¹⁴⁸ Section 8(1C) sets out that a warrant may authorise entry on more than one occasion if the justice of the peace is satisfied that it is necessary. Section 16(3B) sets out that where a warrant authorises multiple entries, a premises may only be searched more than once if written authorisation is given by an officer of at least the rank of inspector.

¹⁴⁹ Law Reform Commission (n 142) p. 114, [5.67].

The Commission recommends that any restrictions on a person's right to privacy and fair trial rights under Head 16 must be necessary and proportionate, and further recommends safeguards to this effect.

The Commission recommends limitations on the situations in which a judge may issue a warrant to search a computer, and to demand a password or encryption key. The Commission further recommends consideration be given to the approaches in other jurisdictions to the legality of compelling the communication of a password or encryption key.

Period of validity of search warrant (Head 17)

The Commission notes that a warrant in respect of an offence under the Misuse of Drugs Act 1977 is automatically provided with a validity period of 30 days. It appears that it can be extended in the same way as any other warrant under Head 17, meaning that the warrant could be valid for 51 days in total. The warrant would operate to authorise multiple separate entries to the premises during that period, presenting the possibility for extensive interferences with rights. The Commission notes that this appears to go far beyond what is proportionate.

The Commission recommends that, at a minimum, the possibility for an extension of a warrant for an offence under the Misuse of Drugs Act 1977 should be removed. If the warrant cannot be executed within 30 days, it would appear appropriate for an entirely fresh application to be made for a new warrant.

Right to be informed of search (Head 18)

The Commission notes that there is no obligation under Head 18 for the Garda to provide the occupier with a copy of the search warrant. If Gardaí choose not provide the occupier with a copy, the occupier is required to apply to the District Court to obtain a copy of the warrant. Further, there is no requirement for the Gardaí to leave a copy of the warrant or

communicate the reason for a search where the occupier is not present at the time of the search.

The Commission echoes the Law Reform Commission's recommendation that there should be an obligation to give a copy of the warrant to the owner or occupier, or it should be left in a prominent location, with provision for the warrant to be withheld in exceptional cases only.¹⁵⁰ Comparison can be made to sections 16(5) to (7) of the PACE Act.¹⁵¹

The Commission recommends that there should be a general obligation on the Gardaí conducting the search to provide the occupier of a property with the warrant for the search.

Saving for privileged information (Head 19)

Head 19 provides that nothing in Head 16 *"shall compel the disclosure by any person of privileged material or authorise the seizure or examination of material that is privileged by or under any enactment or rule of law"*. However, material can be seized even though it is apprehended that the material is privileged, provided that this is done through means whereby the confidentiality of the material can be maintained. Head 19 then provides that an application shall be made to the High Court within 14 days for a determination as to whether the material is privileged.

The Commission notes that amendments are required to ensure that this provision effectively protects privileged material. Head 19 should make clear what types of privilege it applies to. It is suggested that, at a minimum, it should apply to legal professional privilege and the right of a journalist to protect sources. The Commission further notes that public interest privilege and informer privilege should be acknowledged, and clear definitions

¹⁵⁰ Ibid, p. 111, [5.53] – [5.54].

¹⁵¹ These sections set out that where an occupier of a premises is present for the execution of a warrant, the constable shall identify themselves, and supply a copy of the warrant to the occupier. Where the occupier is not present, this applies to another person present at the property. If there is no person present, a copy of the warrant shall be left in a prominent place.

should be provided as to the items covered by privilege. Comparison may be made to sections 10 to 14 of the PACE Act.¹⁵²

The Commission recommends that provision should be made in Head 19 to ensure that Gardaí conducting a search will not access and view privileged material. It should also make clear provision as to how material should be managed or separated in a manner that ensures Gardaí do not access privileged material. Comparison may be made to the approach modelled in the PACE Act and the *Police and Criminal Evidence (Northern Ireland) Order 1989*.¹⁵³ That legislation prohibits the seizure of journalistic materials under an ordinary warrant. Instead, an application must be made for an order to access such materials. There is an *inter partes* hearing as to whether that order should be granted, and this application must succeed for the police to obtain the material.

The Commission notes that the General Scheme fails to provide clear protection to sensitive material which, although not privileged, should not be freely disclosed; for example, counselling records, medical records, and business records. Comparison may be made to the PACE Act 1984, which deems such matters to be “*excluded material*”, and requires a similar application to be made to obtain the information.

In lieu of adopting the above procedure, the Commission recommends that any application for the determination of privilege should be made in a period of seven days, rather than 14 days.¹⁵⁴

The Commission recommends that Head 19 is amended to provide for the particular steps to be taken as part of a search, with greater provisions of oversight, in order to provide protections for privileged and sensitive material.

¹⁵² These sections define ‘items subject to legal privilege’, ‘excluded material’, ‘personal records’, ‘journalistic material’, and ‘special procedure material’. These terms are relevant for Schedule 1 of the Act.

¹⁵³ Schedule 1 of the Police and Criminal Evidence Act 1984; Schedule 1 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

¹⁵⁴ For example, as per section 795 of the Companies Act 2014.

Extended power of seizure (Head 20)

The Commission recommends that Head 20 is extended to provide further delineation as to how materials can be lawfully seized. It is submitted that it is appropriate to address these fundamental procedures in primary legislation, rather than leaving them entirely to a Code of Conduct.

The Commission recommends that Head 20 is amended to include provisions on how a decision to seize materials is arrived at, how relevance is determined, and how the input of the affected person is factored into the decision-making process.

The Commission recommends that a provision is included to determine the timeframe in which a decision is to be made, and steps to be taken where Gardaí determine that seized material is not covered by the warrant.

Application for search warrant in urgent circumstances (Head 21)

Head 21 permits a Garda not below the rank of superintendent to issue a search warrant in “*exceptional circumstances*”. As noted above, the optimal standard of rights protection is provided by a warrant procedure which involves a judge or a person who is independent of An Garda Síochána. The Commission submits that the optimal standard, which includes the additional safeguard of information being given under oath, should only be departed from where there is good justification.

The Commission notes that the power for Gardaí to issue a warrant may have been justified in previous decades, as it would not always be possible to physically attend court or a judge’s home to apply for a warrant in emergency situations. However, video link technology is now readily available and facilitates the making of urgent applications to a judge. In those circumstances, the Commission submits that there is no continued justification for allowing a Garda to issue a search warrant, even in circumstances of urgency. It has not been demonstrated that there is such difficulty in accessing a judge as to

justify this provision, and this argument echoes previous submissions of the Law Reform Commission and the Morris Tribunal.¹⁵⁵

In lieu of the removal of the power under Head 21, the Commission recommends safeguards to ensure that it is used only in exceptional circumstances.

Head 21 proposes that a Garda should be permitted to issue a warrant for any indictable offence and for any summary offence in an enactment specified in Schedule 3. This is a dramatic extension of the Garda power to issue warrants, which had previously been limited to specific offences.¹⁵⁶ There would appear to be no justification to normalising a power that has previously only been provided for exceptional cases. The Commission recommends that Head 21 should be revised to similarly apply to certain specific offences, where it would be truly proportionate to allow a warrant to be issued by a Garda.

The Commission reiterates its suggestion in relation to Head 15(6), to provide that emergency applications are to be made to a High Court judge, rather than a District Court judge. It is noted that the current Head 15(6) procedure would often be impractical, due to the unavailability of a judge, and this would lead to a greater number of applications under Head 21. As matters stand, there is always a High Court judge on duty to deal with emergency matters. As the High Court has full original jurisdiction, an application for a warrant to search any premises in the State could be dealt with by that duty judge. There would be far more reality to such emergency applications being dealt with, and it would reduce the number of applications that must be made under Head 21

The Commission recommends that the power of Head 21 is removed in its entirety. Alternatively, the Commission recommends that a number of safeguards are put in place to ensure that this power is used only in exceptional circumstances.

¹⁵⁵ Law Reform Commission (n 142) p. 86, [4.34]; Morris, Sixth Report of the Tribunal of Inquiry into Certain Gardaí in the Donegal Division (2008) [6.23] - [6.24].

¹⁵⁶ See Offences Against the State Act 1939, section 29; Official Secrets Act 1963; Criminal Assets Bureau Act 1996; and Misuse of Drugs Act 1977.

Code of Practice on search warrants (Head 22) and Code of Practice on arrest (Head 33)

The Commission reiterates its recommendations made in relation to Head 13, on the importance of setting out fundamental principles in primary legislation, rather than a Code of Practice. This is noted in the context of search warrants under Head 22, and in the context of arrest under Head 33. The Commission notes that the legislation should specifically set out the human rights standards that regulate the manner in which an arrest may be made.

The Commission further notes that ‘vulnerable person’ is not defined under either Head, and reiterates its submission in relation to the definition of disability under the CRPD.

Arrest without warrant by member of the Garda Síochána (Head 23)

Part 5 of the General Scheme provides for a number of powers of arrest. The most significant provision is Head 23, which provides a general power of arrest. It is to be welcomed that the arrest power in Head 23 is premised on reasonable suspicion, as required under the human rights standards considered above. However, careful consideration must be given to the extent to which this provision expands Garda powers.

At present, Gardaí have powers of arrest covering a broad range of offences. Section 4 of the *Criminal Law Act 1997* provides a power of arrest for ‘arrestable offences’, offences punishable by a term of imprisonment of five years or more. This is complemented by an array of arrest powers for specific offences. However, there are a considerable number of minor offences which Gardaí have no power to arrest for: for example, common road traffic offences like speeding, driving with no insurance, or breaking a red light; for litter type offences; or certain public order offences, such as engaging in offensive conduct in a public place.¹⁵⁷

Head 23 would provide Gardaí with a power to arrest in respect of all such minor offences. The Commission submits that this is a problematic development. At a basic level, it would

¹⁵⁷ Criminal Justice (Public Order) Act 1994, section 5.

likely mean an increase in arrests. Broadening the scope of arrest powers increases the possibilities for abuse. Further, it is not clear that permitting arrests for all minor offences would be a proportionate interference with the right to liberty.

Although Head 23(3) provides that an arrest for a minor offence may only be carried out where one of six conditions is fulfilled, the Commission submits that these conditions do not provide an adequate safeguard against arbitrary or excessive detention.

Four of the conditions could be easily fulfilled in many cases. Head 23(3)(f) allows a person to be arrested where the Garda considers it reasonably necessary to charge the person with the offence. As a person can only be “*charged*” for an offence, as opposed to being summonsed, after an arrest has taken place, this condition appears to be self-fulfilling and of little substance. The condition under Head 23(3)(d) is so broadly framed as to be easy to satisfy in most cases. The conditions of Head 23(3)(a) “*preventing harm*”, and 23(3)(b) “*preventing the continuation of the offence*”, are similarly broad.

The Commission suggests that, given these issues, there should be a clear justification for increasing Garda powers in this way. There does not appear to be one. There is no evidence to suggest that the expansion of powers of arrest is required to address operational issues faced by Gardaí.

The Commission notes that the expansion of arrest powers cannot merely be the by-product of convenience in codifying police powers. It must be a considered exercise, supported by justifications, and any increased interference with the rights to liberty and privacy must be necessary and proportionate. For an example of compliant legislation in this area, comparison can be made to section 24 of the PACE Act.¹⁵⁸

The Commission recommends that certain offences are excluded from the ambit of Head 23, or that more stringent pre-conditions are provided for arrest for minor offences.

¹⁵⁸ Section 24 permits arrest without warrant only where the constable has reasonable grounds for believing that arrest is necessary for one of 10 purposes, as set out in the section.

Arrest for breach of the peace (Head 24) & Arrest without warrant by other persons (Head 25)

Heads 24 places the common law power of arrest for breach of the peace on statutory footing, and Head 25 provides for ‘citizen’s arrest’.

The Commission notes that certain issues arise under Head 24. This provision allows for preventative detention, where there are reasonable grounds to believe that a breach of the peace will occur. The definition of breach of the peace is imprecise and vague, with a broad scope. It is submitted that these issues are compounded with the provision that “*any person*” may exercise the power of arrest under Head 24. An ordinary citizen does not have specialist training in how to effect an arrest or determine when there are reasonable grounds, and is not subject to a code of ethics. Further, they are not within the remit of a complaints body and there is no mandatory obligation on the citizen to hand the arrested person over to the Gardaí. Instead, Head 25(4) provides a passive obligation that the arrested person is to be transferred to the Gardaí as soon as practicable.

Head 25 provides for the power of citizen’s arrest, but includes a number of safeguards to prevent excessive and arbitrary detention. In order to enhance the protection of the right to liberty, the Commission recommends that consideration is given to the requirements of section 24A of the PACE Act.¹⁵⁹

The Commission recommends that the words “*any person*” is replaced with “*a member of the Garda Síochána*” in Head 24. The Commission further recommends that additional safeguards are introduced to Head 25, in line with section 24A of the PACE Act.

¹⁵⁹ Section 24A allows for citizen’s arrest where it is not reasonably practicable for a constable to effect the arrest, and there are reasonable grounds to believe that arrest is necessary to prevent the person: causing physical injury to himself or any other person; suffering physical injury; causing loss of or damage to property; or making off before a constable can assume responsibility for him.

Right to information on arrest (Head 28)

The Commission welcomes this provision, in addition to the provision of Head 27.

This imposes an express requirement to provide the information which must be supplied in accordance with the Constitution and Convention. However, as noted above, there are certain exceptions in case law to the general rule that a person must be informed that they are under arrest and of the reason for the arrest. If it is intended that there would be exceptions to the rule in Head 28, then these should be set out in order to ensure clarity in the law. Comparison may be made to section 28 of the PACE Act.¹⁶⁰

The Commission recommends that any exceptions to Head 28 are set out in the primary legislation.

Custody officer (Head 35) and Detention after arrest for investigation of serious offence (Head 44)

Head 35 provides that ‘custody officers’ are to replace the role of the member in charge in relation to the detention of suspects. A custody officer may be a member of An Garda Síochána, or a member of the civilian staff of An Garda Síochána. Head 44 allows for an arrested person to be detained in a Garda custody facility, so long as the custody officer has *“reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence or offences”*.

The Commission notes that the concept of the custody officer approving the detention of a suspect is capable of acting as a safeguard against arbitrary and excessive detention. However, it is concerning that a custody officer may be a civilian staff member, rather than a Garda member. This would be a departure from the current situation, where a member in charge is required to be a member of An Garda Síochána. There may be a disparity of power where a civilian staff member is required to assess a Garda member’s grounds for arrest, weakening the effectiveness of the protections that would be otherwise provided by the

¹⁶⁰ Section 28(5) sets out that this section does not require a person to be informed that they are under arrest or the ground for arrest if it is not reasonably practicable to do so, due to the person’s escape from arrest prior to the information being given.

custody officer mechanism. It would be more effective to require that the custody officer is a member of An Garda Síochána.

The mechanism would have greater effect if the custody officer was required to hold a particular rank, such as Sergeant, and if a requirement was imposed for the custody officer to be a person independent of the arrest or investigation, unless there are exceptional circumstances which justify a departure from that requirement. Recommendations to this effect were made in the Report of the Morris Tribunal in relation to the position of member in charge. It noted the member in charge “*should be a Garda of considerable experience of sergeant rank at least*” and they should have “*considerable independence from the Gardaí carrying out the investigation*”.¹⁶¹ The Commission recommends that the duties of the Custody Officer should be prescribed in this legislation; comparison can be made to the provisions under Part IV of the PACE Act.¹⁶²

The Commission recommends that the primary legislation set out the level of training necessary for a person to undertake for the role of ‘custody officer’.

The Commission recommends that the role of custody officer is restricted to Gardaí holding at least the rank of Sergeant. The Commission also recommends that the duties of the Custody Officer should be prescribed in the legislation. The Commission further recommends that the level of training required for this role is set out in the primary legislation.

Search of person in Garda custody facility following arrest (Head 37)

Head 37 provides that where a person has been brought to a Garda custody facility, a Garda may search the arrested person. No provision is made as to the manner in which this search is to take place, or the limits on what can be done.

The limits on the nature in which searches may be carried out have been set out above. The Commission notes that it would be appropriate to create provisions providing clear limits as

¹⁶¹ Morris (n 152) p. 1260 – 1261.

¹⁶² For example section 37 of the PACE Act sets out the duties of a custody officer before charge and section 38 sets out the duties of a custody officer after charge.

to the nature of the search that can be provided, and setting out whether invasive and/or strip searches are permitted in any circumstances. Comparison may be made to sections 54 to 55 of the PACE Act.¹⁶³

The Commission recommends that fundamental principles in this area are set down in primary legislation.

Information to be given to person in Garda custody following arrest (Head 38)

Head 38 deals with the right of a detainee to information. The Commission notes that this provision is largely in compliance with Directive 2012/13/EU. However, further refinement is needed.

While the notice to be provided under Head 38(4) refers to a right of access to case materials, there is no actual right of access contained in the General Scheme. Part 6 should specifically set out a right to access the documents referred to in Article 7(1) of the Directive. Further, in order to comply with the Directive, the notice to be given under Head 38(4) should make specific mention of the right to remain silent.

The Commission notes that, although Head 38 provides for detainees to be informed of their right to an interpreter, the right itself does not appear to be provided in the General Scheme. It may be the case that the right is adequately provided for in the *European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations 2013*. However, as those Regulations refer to concepts that do not appear in the General Scheme, such as the member in charge, this legislation is not necessarily compatible. In any event, as the legislation is intended as a consolidation of the law, the Commission contends that it would be appropriate to expressly include the right to an interpreter in its provisions.

¹⁶³ Section 54 sets out the procedure and safeguards for conducting a search of a person detained at a police station. Section 54A sets out the procedure for conducting searches for the purposes of identification, and section 54B outlines the procedure for conducting a search of a person answering bail at a station. As noted above, an intimate search may only be conducted in line with the provisions of section 55.

The Commission notes that the right to an interpreter should expressly extend to the right to an interpreter for persons who have hearing or speech impediments that significantly affect their ability to be understood.¹⁶⁴ As noted above, provision should be made for persons requiring the appointment of an intermediary or advocate.

The Commission recommends that the right of access to materials, in accordance with Article 7 of Directive 2012/13/EU, should be provided in the legislation. Head 38 should be amended to refer to the wording of Article 7, and should fully comply with the obligations of the Directive.

The Commission recommends that the right to an interpreter should be included in the legislation, and this should extend to persons with certain disabilities, as appropriate.

Access to medical attention (Head 40)

Head 40 provides for access to medical attention for persons in Garda custody. This provision places the discretion to decide whether treatment is necessary solely in the hands of An Garda Síochána. There is no provision that would allow the input of the detainee's legal representative, parent, or guardian, into the decision-making process of whether treatment is required.

The Commission recommends that greater safeguards are introduced to Head 40 in relation to the decision of when medical treatment is necessary.

Access to legal representation (Head 42) and Questioning of an accused person prior to legal advice (Head 43)

Heads 42 and 43 deal with the right of reasonable access to a solicitor. The Commission welcomes the principles of Heads 42(2), (3), and (5) which protect this right. However, under Head 42(6), a member not below the rank of Inspector may require the legal

¹⁶⁴ European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations 2013 (S.I. No. 564/2013), regulation 12; See also: of the Irish Sign Language Act 2017, section 6(1).

representative to leave the interview if they reasonably believe that the presence of the legal representative would “*prejudice any investigation or criminal proceedings regarding the offence, or, owing to the behaviour of the person, would be unduly disruptive*”.

The ability to remove a lawyer on the basis that they are “*unduly disruptive*” risks creating situations in which lawyers are removed for engaging in the sort of effective participation in interviews that is required under Article 6. Further, the provision appears to allow for permanent, rather than temporary, removal of the lawyer, and seems to contemplate that the interview would continue after removal.

Head 43(4) sets out that a member not below the rank of Inspector may authorise the questioning of a person who has not yet consulted with a legal representative, in certain situations. Any authorisation must be recorded in the custody record and set out in a notice to the detainee. However, it does not appear that the member granting the authorisation is required to record why it is being given.¹⁶⁵

The Commission notes that this exception provides a broad power to restrict access to a solicitor, which runs the risk of falling foul of the threshold set by the ECtHR. Further, it does not meet the standard of exceptionality required under Article 6 ECHR. The Commission recommends that one safeguard to be applied is that the authorisation must be given by a Garda of a superintendent or chief superintendent rank. Comparison may be made to section 58(6) of the PACE Act, which states that a delay in allowing access to a solicitor is only permissible where “*an officer of at least the rank of superintendent authorises it*” and that there must be a “*substantial risk*” of one of the situations listed in Head 43(4) arising if questioning is delayed.

Head 43(1) provides that the right of access to a solicitor may be waived by a person other than a person under the age of eighteen provided they have been informed of the right in a manner and in language that they understand and expresses clearly that they wish to waive that right. It may also be waived through a refusal to consult with a legal representative who has made himself or herself available for the purpose of consulting with the person. It

¹⁶⁵ A similar exception is contained in section 5A of the Criminal Justice Act 1984, as inserted by the Criminal Justice Act 2011. This provides that the necessary authorisation is to be provided by the member in charge. However, the provision has not yet been commenced.

appears from the language used that once the right is waived, it is gone in its entirety and need not be provided for again in future. There is no provision made to revoke a waiver.

The Commission notes that this provision must comply with Article 6 ECHR. Waiver may only occur where there has been a voluntary, knowing, and intelligent relinquishment of the right of access, in circumstances where the detainee could have reasonably foreseen what the consequences of the conduct would be. This standard would not appear to be met by Head 43, insofar as it provides that refusal to meet a lawyer can amount to waiver. It is questionable whether such a refusal could be said to amount to a knowing and intelligent relinquishment of the right of access in its entirety.

Further, Head 43(1) appears to set out that this would apply when any legal representative makes themselves available, rather than a representative requested by the detainee. The Commission notes that it is not reasonable for a detainee to foresee that they had waived their right to legal advice, simply by refusing to consult with any lawyer who happened to be in the station and available for a consultation. This may be an interference with the right for a detainee to choose their own lawyer.

It is noted that Head 42(2) provides that *“the period of time commencing from the time the person makes a request to consult with a legal representative and ending upon the conclusion of such a consultation, shall be excluded in reckoning a period of detention”*. The Commission notes that such an interference with the right to liberty, taking into consideration the entire period of time that a suspect may spend in custody, must be necessary and proportionate under Article 5 ECHR.

The Commission recommends the removal of Head 42(6) from the legislation. The Commission recommends that Head 43(4) is amended to provide for safeguards, in compliance with Article 6 ECHR.

The Commission recommends that the situations in which the right of access to a solicitor may be waived under Head 43(1) is limited and clarified, in line with Article 6 ECHR. Provision should be made to allow for this waiver to be withdrawn or revoked.

The Commission recommends the removal of the provision in Head 42(2) which excludes the time spent in, and awaiting, legal consultation from the period of permitted detention.

Maximum period of detention (Head 45), Extended period of detention for Schedule 5 offences (Head 47), and Judicial powers on hearing applications for detention extension (Head 48)

Heads 45, 47 and 48 provide for the maximum periods of detention that may apply to a person detained under Head 44.

Under these provisions:

- A person detained for a single serious offence may be detained for up to 24 hours from the time of arrest. This comprises an initial detention period of six hours. The detention can be extended in blocks of up to six hours each by a Garda not below the rank of Inspector, if they have reasonable grounds for believing that such further detention is necessary for proper investigation of the offences.
- A person who has been arrested on suspicion of having committed *“two or more serious offences which do not arise out of the same set of facts”* may be detained for up to 48 hours from the time of arrest. After the initial 24-hour period of detention has ended, a Garda not below the rank of Chief Superintendent can grant another extension of detention for a further period of up to 24 hours if they have reasonable grounds for believing that such further detention is necessary for proper investigation of the offences.
- A person who has been detained in respect of an offence set down in Schedule 5 of the General Scheme can be detained for up to 168 hours from the time of arrest. After the initial 24-hour period of detention has ended, a Garda not below the rank of Chief Superintendent can grant an extension of up to 24 hours. A Garda not below the rank of Superintendent may thereafter apply to a judge of the District or Circuit Court for a further extension of 72 hours and a final extension of 48 hours. The judge must conduct a hearing at which the detained person may make submissions. The

judge may only grant the extension where satisfied that further detention is necessary for proper investigation of the offences and that the investigation is being conducted diligently and expeditiously.

Heads 39, 40, 42, and 49 provide that certain periods shall be excluded in calculating the period of time that a suspect has spent in detention. These include any portion of a rest period which is taken between midnight and 8 a.m.; the period during which the detainee is receiving medical treatment or is certified as unfit to be questioned; the period commencing from the time the person makes a request to consult with a legal representative and ending upon the conclusion of the consultation; and the period during which the detainee is absent from the place of detention in connection with a court application relating to the lawfulness of his or her detention.

At present, the *Criminal Justice (Drug Trafficking) Act 1996* permits the detention of persons who are arrested for drug trafficking offences for up to 168 hours. The *Criminal Justice Act 2007* permits detention of 168 hours for persons arrested for murder involving the use of a firearm or an explosive; capital murder; possession of firearms or ammunition with intent to endanger life or cause serious injury; a false imprisonment offence involving the use of a firearm; or an organised crime offence under Part 7 of the *Criminal Justice Act 2006*. A person who is arrested for any other 'arrestable offence' may be detained under the *Criminal Justice Act 1984* for up to 24 hours.

The Commission notes that the provisions of the General Scheme would significantly extend these powers of detention. The first change would be a significant extension of the offences in respect of which a person can be detained for 168 hours, to include the following: any murder offence, manslaughter, and human trafficking offences.

The explanatory note to Schedule 5 states that the proposed extension is "*for consistency and to facilitate the investigation of specific complex offences*". The reference to "*consistency*" appears to be an argument that, as 168 hours detention is permitted for certain murder offences at present, every suspected homicide offence should attract the same detention period. The reference to "*specific complex offences*" may be linked to the inclusion of human trafficking offences. There may be a basis for contending that the investigation of certain trafficking offences is complex; however, it is not clear that this

justifies a sevenfold increase in the permissible detention period. The Commission submits that this is a stark and disproportionate way of dealing with that situation.

As Head 42 provides that time spent waiting for a person to consult with a legal representative is to be excluded from reckoning the time of detention, it is submitted that the argument that additional time is required for detention in respect of the above offences is undermined.

It has not been demonstrated in a concrete manner that the periods of detention currently provided under legislation are inadequate, or that a maximum period of 168 hours detention is required for the offences set out above. Any extension of the periods of detention raises the possibility that Ireland may be in breach of its human rights obligations, as it has not been shown to be necessary or proportionate. Further, there is a risk that a 168-hour period of detention, introduced as an exceptional measure in the *Criminal Justice Act 2007*, could become normalised over time.

Under Head 45, a Garda not below the rank of chief superintendent may direct that a person is detained for a further 24 hours, where the person is arrested on suspicion of committing two or more serious offences that do not arise out of the same set of facts.

The Commission notes that this provision would pose considerable practical difficulties. There are likely to be many occasions on which it will be unclear whether offences can be said to “*arise out of the same set of facts*” or not. For example, it would not be clear if the arrest of a suspect on suspicion of a number of burglaries, all committed in short succession, would be determined as “*the same set of facts*”. In a situation in which a person is arrested on suspicion of robbery, and is then found to be possession of an offensive weapon following a search, it is not clear as to whether these offences arise out of “*the same set of facts*”. This terminology has been drawn from section 6 of the *Criminal Justice Act 1951*, a provision on the addition of summary counts to an indictment, rather than detention of suspects. It has not been the subject of clear judicial analysis.

The Commission notes that the lack of certainty and clarity in this provision risks a lack of compliance with Article 5 ECHR. As there are a lack of clear safeguards in the place, it may also amount to a disproportionate interference with rights.

The Commission recommends that, if it is shown that a further period of detention is necessary for the proper investigation of multiple offences, the approval of additional detention should take place on an incremental basis, in line with the system of Head 45.

The Commission notes that Head 47 reduces the safeguards in place for the applications to court for an extension of detention. At present this application must be made by a Garda not below the rank of Chief Superintendent. Head 47 allows the application to be made by a Garda of Superintendent rank. The Commission notes that this modification should not be made unless necessary and proportionate.

The Commission recommends that the length of detention for offences should not be extended unless it can be shown that such measures are necessary and proportionate.

The Commission recommends that safeguards already in place for the application to extend detention should not be lowered.

The Commission recommends the removal of Head 45(3) or, alternatively, the implementation of further safeguards for this provision.

Release from detention (Head 50)

The Commission welcomes this provision which requires the release from custody of a person if there are no longer reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence to which the detention relates.

The Commission recommends the retention of this provision as a fundamental part of the ‘floor of rights’ required for detention to be lawful.

Power to take photograph, fingerprint and palm print (Head 51)

The Commission notes that Head 51 does not contain provision as to how the photographs, fingerprints, and palm prints of suspects will be stored, how long they will be retained for, and when they will be deleted.

The Commission recommends that Head 51 is amended to provide for requirements on the storing, retention, and deletion of data collected under this power.

Use of reasonable force to take photograph, fingerprint and palm print (Head 52)

The Commission notes that the rank of Garda who may authorise the use of force to obtain photographs, fingerprints, and palm prints under Head 52 has been reduced from superintendent to inspector.¹⁶⁶

The Commission recommends that safeguards for the rights to privacy and bodily integrity are reduced only where it is necessary and proportionate to do so.

Custody record (Head 59)

The Commission reiterates its submission on the importance of collecting information on race and ethnicity, for the purpose of creating a comprehensive disaggregated equality data collection. In line with the above suggestion, any information collection should be accompanied by provisions on the appropriate storing and retention of this information for processing and reporting.

The Commission recommends that the custody record should contain a record of the detainee's race or ethnicity for the purpose of equality data collection.

Code of Practice on custody and detention (Head 64)

The Commission reiterates the general submissions made in relation to Head 13 regarding the storing and retention of data. Under Head 64(5), the Code of Practice would prescribe the recording and the processes of storing, retaining, and destroying such information. The Commission notes that, if there is fundamental information which should be recorded in all

¹⁶⁶ The current rank is superintendent, as set down in Criminal Justice Act 1984, section 6A(2)(a).

cases, this should be specified in the legislation rather than being left for the Code of Practice.

Under Head 64(3), the Code of Conduct would provide for the maximum period of time that could be excluded in reckoning a period of detention, in relation to access to a solicitor under Head 42(2). The Commission submits that this is a fundamental matter which should be set down in primary legislation.

The Commission notes that Ireland signed the *Optional Protocol to the Convention Against Torture* (OPCAT) in 2007, but has not yet ratified the treaty. Once ratified, the State must grant the Subcommittee on Prevention of Torture and the national preventive mechanism (NPM) access to places of detention under its jurisdiction and control. The Commission notes that the process of consolidation allows an opportunity for this access to be facilitated. Express provision could be made for the Code of Practice to refer to matters relevant to OPCAT.

Article 19(b) of OPCAT states that the NPM is tasked with making “*recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty*”. The Commission recommends that Head 64 is amended to provide the intended NPM with a more involved role in formulating the content of a Code of Practice in this area.

The Commission further notes that the Code of Conduct may be revoked or amended without consultation. There is no clarity as to whether a consultation would be required for a replacement Code.

The Commission recommends that fundamental matters relating to the permissible length of time spent in detention should be set down in primary legislation.

The Commission recommends that provision is made to facilitate the ratification of OPCAT, and that the role of the NPM should be accommodated in Head 64.

The Commission further recommends that clarity should be introduced as to the consultation process for the amendment, revocation, and replacement of Codes of Practice.

Use of Reasonable force (Head 65)

The Commission welcomes the provisions of Head 66 which pose appropriate restrictions on the use of force. However, the Commission notes that the General Scheme is inadequate in the manner in which it restricts lethal force.

Lethal force is dealt with by Head 65(6). It provides that where a Garda is seeking to effect or maintain an arrest and the circumstances are such that the member believes a person is doing, or is about to do, something likely to cause serious harm to, or the death of, another person, and they cannot prevent the serious harm or death in another way, the force used may include “*force likely to cause serious harm to a person or the person’s death*”.

Although it is not clear, it appears to be intended that this provision must be read in conjunction with Head 65(5), meaning that the force must still be “*reasonably necessary*” in the circumstances. If this interpretation is correct, Head 65(6) does not go far enough in restricting the use of lethal force.

Lethal force cannot be used where it is “*reasonably necessary*”; only where it can be considered absolutely necessary. Less extreme means must be insufficient to prevent harm, and the use of lethal force must be strictly unavoidable to protect the life of another.

Head 65(7) states that, before using lethal force, a Garda must “*if practicable, first call on the person to stop doing the act.*” This falls short of the safeguards required under Article 10 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. These principles provide that, prior to discharging a firearm, police officers must identify themselves as officers and give a clear warning of the intention to use the firearm, with sufficient time for the warning to be observed, save in limited circumstances.¹⁶⁷ This should be the minimum level for any warning provided.

The Commission additionally notes that the provisions in the General Scheme governing the use of force resembles the sort of “*slender*” legislative scheme which was found to be in violation of Article 2 by the ECtHR.¹⁶⁸ The ECtHR has also held that in making assessments where deliberate lethal force is used, it will take into consideration not only the actions of

¹⁶⁷ Basic Principles (n 72) Provision 10.

¹⁶⁸ *Makaratzis v Greece* (n 67).

the agents of the State who administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.¹⁶⁹ It is suggested that to ensure compatibility with the Convention, the legislation is expanded to provide a detailed and comprehensive statutory code on the circumstances in which force, including lethal force, may be used. The Commission notes that, at the very least, there should be provision for the making of a Code of Practice on the use of such force.

The Commission notes that Head 65 provides solely for the use of force by individual Gardaí. As noted, Article 2 ECHR requires that police operations are to be planned in such a way as to minimise the risk to life. The Commission suggests the inclusion of obligations to this effect within the legislation.

The Commission notes that Head 65 does not make any provision for reporting requirements relating to the use of force that results in injury or death, nor does it mandate an investigation into the use of force in any circumstances.

The Commission recommends that the legislation should include express obligations to make a record of the use of force, and for an investigation into the use of force to occur where it results in injury or death.

The Commission recommends that Head 65 is amended for absolute clarity as to the standards against which lethal force is to be measured.

The Commission recommends that provision is made for a detailed and comprehensive statutory code on the circumstances in which force, including lethal force, may be used.

The Commission further recommends that Head 65 is amended to recognise the requirement that Garda operations are to be planned in such a way as to minimise the risk to life.

¹⁶⁹ *McCann v United Kingdom* (App. No. 18984/91, 27th September 1995) [150].

Provision of information and obstruction (Head 67)

Head 67 provides that where a Garda has reasonable grounds to suspect that a person has committed, or is committing an offence, or is in possession of a relevant article within the meaning of Head 9, the member may require the person to provide his or her name, address, and date of birth. Failure to comply is a criminal offence attracting a penalty of up to five years imprisonment on indictment.

The Commission notes that this provision effectively amounts to a stop and search power. This is an expansion of Garda powers, which currently permits a demand for information only in relation to certain offences.¹⁷⁰ The Commission notes that limitations akin to those found in Heads 11 and 12 have not been placed on this power.

The Commission recommends that restrictions are placed on this power to prevent abuse. The Garda exercising the power should be required to set out the reason for the demand and the potential criminal consequences of failing to comply. It is recommended that the Garda should be required to provide a written record of this request. The maximum applicable penalty should be greatly reduced, as it is greatly disproportionate to the penalties for similar provisions currently in place.¹⁷¹

The Commission recommends that limitations are placed on the power under Head 67, and that the maximum penalty is reduced, for the purposes of proportionality.

The Commission recommends that the Code of Practice under Head 13 should also cover the making of demands under Head 67(1).

¹⁷⁰ See Public Order Act 1994, section 24.

¹⁷¹ For example, six months for failure to comply with section 24 of the Public Order Act 1994.

Effect of failure to comply with Act on admissibility of evidence (Head 68)

Head 68 provides that a failure of a Garda to comply with the General Scheme will not necessarily affect the admissibility of the evidence.

The explanatory notes state that the purpose of Head 68 is to ensure that the admissibility of evidence remains a matter for the court. If this is the intention, there is no need include a provision to the effect of Head 68. The Commission notes that the courts have applied the evidential rules above for decades without such provisions existing in the legislation dealing with arrest, detention, and search. Such a provision should be actively avoided, as it may inadvertently affect how the rules of admissibility apply. Head 68 may well be interpreted as imposing some additional hurdle that needs to be cleared before a breach of constitutional rights might result in exclusion of evidence. Any such possibility should be avoided.

The Commission recommends the removal of Head 68 from the legislation.