

RIGHTS-BASED POLICING: HOW DO WE GET THERE?

A submission to the Commission on the Future of Policing in Ireland



30 January 2018

ABOUT THE ICCL

Founded in 1976, for over 40 years the Irish Council for Civil Liberties (ICCL) has worked to defend and strengthen constitutional rights protections and to ensure the full implementation of European and other international human rights standards in Ireland.

In our work, the ICCL draws on the tradition of civil liberties activism in many countries, including the civil rights movements in Northern Ireland and the United States. It has developed strong partnerships with civil society organisations in Ireland and networks and alliances with similar organisations internationally.

Domestically focused and internationally informed, the ICCL has played a leading role in some of Ireland's most important human rights campaigns, including the campaigns for legal divorce and contraception and for decriminalisation of homosexuality and marriage equality. The ICCL has also been a leading force for the introduction of equality legislation and for the ratification and incorporation of international human rights treaties.

The ICCL was a founder member of the International Network of Civil Liberties Organisations (INCLO), and was a founder of the JUSTICIA European Rights Network of 19 civil society organisations working in the area of procedural rights, defence rights and victims' rights.

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FOREWORD

The Irish Council for Civil Liberties (ICCL) welcomes the establishment of the Commission on the Future of Policing in Ireland, having long campaigned for the overhaul of laws, structures and practices concerning policing in Ireland. Indeed, ICCL's establishment in 1976 was a reaction to proposals for extensive emergency powers legislation and allegations of systemic mistreatment of suspects by an identified group of Gardaí who were referred to as "The Heavy Gang".

Over the intervening forty years, Garda reform has been at the heart of ICCL's work. We campaigned for the establishment of the Policing Authority, the Garda Síochána Ombudsman Commission and the Garda Inspectorate as necessary oversight bodies. Policing was a common thread throughout our early and subsequent campaigns challenging emergency powers; our work defending freedom of association and assembly; and our participation in national debates on immigration, gender violence and respect for private and family life. In short, issues about An Garda Síochána have always been centre stage in Irish human rights discourse. Now it is time to move human rights discourse to centre stage at An Garda Síochána.

From a human rights perspective, policing is the most important sphere of public administration and defines the interface between individuals and the State. Gardaí have unique functions in protecting the public from human rights violations and in vindicating the rights of victims through investigation and prosecution. The unique powers and functions of An Garda Síochána mean that officers and managers must balance and interpret often competing rights in a wide range of their everyday tasks. The unique nature and extent of Garda powers carry at all times the potential for human rights violations to occur – from violations of liberty and privacy, up to violations of bodily integrity, torture or, even on occasions, violations of the right to life.

The ICCL acknowledges that major steps have been taken by successive governments, in response to the various controversies, to increase the accountability and effectiveness of An Garda Síochána, notably since the enactment of the Garda Síochána Act 2005. The establishment of the Garda Ombudsman Commission (GSOC), the Garda Inspectorate and the Policing Authority were all welcome, as are more recent amendments to the 2005 Act to broaden the powers of GSOC and the Inspectorate. These oversight bodies have made significant and valuable contributions and recommendations regarding further reform of the force. Initiatives such as the enactment of the Protected Disclosures Act 2014 and the Policing Authority's publication of a Code of Ethics for the Garda Síochána in 2017 are also welcome. In addition, it is important to acknowledge the work underway to implement the Garda Modernisation and Renewal Programme 2016-2021 on foot of thorough reports from the Garda Inspectorate and the recommendations of other statutory oversight bodies and stakeholders.

It remains the case, however, that these reforms have ultimately not been successful in resolving the structural difficulties within Irish policing. Over the past 15 years, the structures and practices of An Garda Síochána have been subjected to unprecedented scrutiny and criticism, and justifiably so. The Fennelly Commission and the O'Higgins Commission reports have given a detailed insight into continuing deficient management structures and breaches of discipline: problems that have persisted since Mr Justice Morris made similar findings well over a decade ago. The Inspectorate's report in 2015 noted that many of its previous recommendations, while accepted by An Garda Síochána, had gone unimplemented.

In the midst of the stream of investigations and reform efforts over the past 15 years, the ICCL has consistently called for human rights-based reform of An Garda Síochána. The ICCL has not been alone in this; the IHREC (and formerly the IHRC) have also made these calls.

We acknowledge that An Garda Síochána itself has undertaken several initiatives to incorporate human rights principles into policing. For example, An Garda Síochána established a Human Rights Office and a Human Rights Working Group in 1999, which commissioned Ionann Management Consultants to carry out a Human Rights Audit of the force, published in 2004. In response to the Ionann Audit, the Garda Commissioner drew up a Human Rights Action Plan and established a Strategic Human Rights Advisory Committee. A Human Rights Training Unit was also established.

In sum, much good work has been done over many years by those within and outside An Garda Síochána to ensure human rights inform Irish policing. However, these efforts have not penetrated throughout the organisation and have not been effective in providing solutions to the management and operational problems which have continued to dog the organisation. The ICCL believes that only by integrating a human rights culture throughout the organisation can these kinds of initiatives truly take root. Now is the time to build on this work to set out an ambitious, human-rights based, vision for the next phase of reform.

The value of a human rights framework, as we saw in the Patten reform process in Northern Ireland, is in the potential of human rights to support a shift from a negative to a positive police culture where the police service can support stronger communities. We are encouraged to see that the Commission on the Future of Policing has recognised human rights as a foundational aspect of a reformed approach to policing. It is also noticeable that section 3 (B) of the Garda Síochána Act 2005 (as amended) now states as a 'policing principle' that policing services are to be provided 'in a manner that respects human rights'. We also welcome the centrality of human rights to the Garda Code of Ethics, published by the Policing Authority in 2017.

We are now at a crucial moment for Irish policing where political will for reform and public demand for radical change are aligned. The ICCL believes that this Commission on the Future of Policing in Ireland, with its broad mandate and terms of reference, can address the key structural and organisational challenges facing Irish policing. We are deeply ambitious for this reform process. The fundamentals of Irish policing carry great potential and the ICCL believes that Ireland should aspire to achieve best practice standards of human rights policing.

In this submission, we put forward an optimistic case for a broad-based Garda reform process that will allow Irish policing to move beyond the various scandals of recent decades and begin a process of building a police service which reflects the principles and values of human rights, and which enjoys the confidence, trust and support of our communities.



*Liam Herrick
Executive Director
Irish Council for Civil Liberties
January 2018*

EXECUTIVE SUMMARY

The ICCL's overarching proposal is that the Commission on the Future of Policing should place human rights at the core of its recommendations for reform of policing in Ireland. Human rights should be understood to be a foundational framework encompassing all aspects of policing and connecting policing to other aspects of state treatment of individuals.

This submission is aspirational in its vision and as such does not attempt to name all of the human rights abuses which have occurred over the years in the policing arena. Some examples are necessary to illustrate certain points, but others have been omitted so as to allow the focus to remain on our vision for a police force which respects the human rights of all those who interact with it.

First, we address the question of *why* human rights should be understood as foundational to all aspects of policing through a discussion of: what human rights actually mean, what Ireland's key human rights obligations are, the relevance of human rights to policing at all operational levels, and the need to constantly strengthen Ireland's implementation of its human rights obligations.

Then we make preliminary recommendations regarding concrete steps that are necessary in order to embed human rights in the future of policing in Ireland. This submission is not a comprehensive audit of the measures necessary to embed human rights; rather it is a starting point for further research which should continue into the future (including by dedicated human rights experts in each of the institutions involved in policing) if human rights are to be embedded in policing in Ireland.

We make four groups of recommendations:

- 1. The creation of a comprehensive framework for embedding human rights in all aspects of policing**

This would include a statutory basis for embedding human rights and a human rights monitoring index to evaluate their embedding. We also recommend that Human Rights Officers, with the authority to engage with and make recommendations in all areas, be employed in each of the policing institutions. Crucially, we call for a statutory mechanism to implement the recommendations of the Commission on the Future of Policing in Ireland.

- 2. Strengthening of accountability to the public through greater transparency, legal accountability, and independent oversight**

We recommend a presumption in favour of publishing all internal Garda policies and practices, in line with principles of **transparency**.

In the area of **legal accountability** we call for better protection of the rights of suspects through legislating for access to a lawyer, and doctor and/or psychiatrist, in detention as well as through keeping detention records and interview transcripts.

We recommend a review of Garda disciplinary procedures, the discontinuation of the practice of individual Gardaí prosecuting suspects, a thorough review of every step of the process of ensuring the right to an effective remedy, and the establishment of a statutory scheme for witness protection.

Further, we call for a review of structures and procedures relating to the detention of older people and people with disabilities as well as the role of individual Gardaí in the process of detaining persons and in protecting individuals from arbitrary detention.

With regard to **independent oversight**, we call for the ratification of the Optional Protocol to the UN Convention against Torture (OPCAT) and establishment of a National Preventive Mechanism (NPM) which inspects and reports on conditions in all places of deprivation of liberty in the State. This is one of the most urgent recommendations we make, given the European Committee on the Prevention of Torture (CPT)'s findings that there was evidence of ill-treatment in Garda custody as recently as 2015.

We call for an independent oversight mechanism within the Department of Justice and Equality to oversee complaints of Garda misconduct, and another to oversee surveillance and data retention practices.

We acknowledge the difficulties faced by oversight mechanisms such as the Policing Authority and GSOC. We recommend a thorough review of the relationship between the Policing Authority, the Minister and the Department of Justice, and An Garda Síochána. We also recommend better resourcing of GSOC and a review of its statutory powers.

We recommend the establishment of an Ombudsman for Victims to consider complaints from victims of crime. Further, we call for the provision of legal aid to victims of human rights violations by state actors.

3. An overhaul of the systems of State security and surveillance

Regarding the question of whether 'state security' operations should be separated from public order and community policing, our primary concern relates to the need for accountability and oversight of national security functions. A human rights perspective requires that the principles of legality, proportionality and accountability be respected. We call for an overhaul of the systems of oversight and accountability of all agencies or institutions exercising national security functions.

We recommend that, as part of a wholesale reconfiguration of the law on state surveillance and data protection, there should be a statutory unified supervisory authority with parliamentary accountability that is capable of overseeing *all* state surveillance. We also recommend that a mechanism of parliamentary oversight be established, with sufficient controls and security clearance to ensure effective independent oversight of all state surveillance and data protection methods.

4. Fostering a culture of respect for human rights and equality

It is clear to ICCL that for our vision to materialise, we need commitment to human rights principles on the part of Gardaí at every level. This will only follow the integration of human rights training into all aspects of Garda education; training which should not only encompass European standards relating directly to policing, victims' rights and suspects' rights, but should also cover the principal standards set out in the ECHR and UN treaties. Further, the reform of Garda management and human resources structures must be grounded in a commitment to protect human rights, including the human rights of Gardaí. The provision of adequate

resources to community policing is also essential to enable the State's human rights obligations to be met in all areas with which policing interacts.

We are encouraged by efforts observed over the past number of years to reform An Garda Síochána so that the organisation respects the rights of all those who interact with it. We are ambitious in our vision of a force that commands the trust of the public, protects the most vulnerable populations in our society, and properly investigates and holds to account those who violate the rights of others. And we are steadfast in our belief that all of this can be achieved, as long as there is a strong commitment and appetite for real reform on the part of all those involved with An Garda Síochána.

PART A: WHY HUMAN RIGHTS ARE FOUNDATIONAL TO ALL ASPECTS OF POLICING

1. WHAT ARE HUMAN RIGHTS?

From a political and legal perspective, the concept of ‘human rights’ essentially means the core set of claims that individuals are entitled to make on the State regarding how they are treated. The generally agreed basis for human rights is the inherent dignity of every person. Our equal dignity means that we are each entitled to be treated with a minimum level of respect and that we are each entitled to have access to the freedoms and supports that are necessary to live a meaningful life.

Some human rights are absolute, meaning that the State can never justify interfering with them no matter the circumstances. These include the right to be free from torture and other cruel, inhuman or degrading treatment, and the right to be free from slavery. Many other human rights are understood to be ‘limited’ or ‘qualified’ rights. This means that the State may only interfere with them under strict circumstances and subject to criteria that are set out in law.

Human rights are not only about prohibiting certain state action. All human rights also require the State to take positive action to some degree: for example, through the enactment of legislation and policies, the enforcement of legal requirements, the provision of socio-economic resources or other measures. When individuals and communities are in situations of vulnerability, the State has heightened positive obligations towards them to ensure that their dignity and rights are respected.

According to numerous provisions of the Irish Constitution and a range of European and international legal treaties, the Irish State has guaranteed that it will respect and vindicate the human rights of all people in Ireland. These legal instruments, along with court judgments and other sources of law, explain the practical obligations which such human rights guarantees place upon the State and the conditions under which the State may interfere with limited and qualified rights. If the State fails to comply with these requirements it is responsible for human rights violations and ought to be held to account.

2. IRELAND'S HUMAN RIGHTS OBLIGATIONS

In this section we set out Ireland's key human rights obligations which are of relevance to the role and functions of policing.

2.1. Human rights under Irish law

(a) *The Irish Constitution*

The 1937 Constitution of Ireland is based directly on the concept of human rights. Its Preamble states that the purpose of the Constitution is:

‘to promote the common good, with due observance of Prudence, Justice and Charity, **so that the dignity and freedom of the individual may be assured**, true social order attained, the unity of our country restored, and concord established with other nations’.

The Constitution also proclaims that Ireland is a democratic state. A core aim of democracy is to enable individuals to equally enjoy their human rights.¹ The rights explicitly protected by the Constitution include the rights to equality before the law,² to life,³ to personal liberty,⁴ to respect for the person,⁵ to respect for one's good name,⁶ to respect for one's property,⁷ to respect for one's home,⁸ to freedom of expression,⁹ to freedom of peaceful assembly,¹⁰ to freedom of association,¹¹ to marry,¹² to receive an education,¹³ to respect for one's rights as a child,¹⁴ and to freedom of religion.¹⁵ The Constitution has also been found by the courts to implicitly protect a range of other human rights, including the right to respect for one's private life,¹⁶ the right to freedom from torture and inhuman or degrading treatment,¹⁷ and the right to bodily integrity.¹⁸

(b) *European Union (EU) Law*

Ireland's membership of the European Union (EU) has brought with it wide-ranging obligations to implement EU law in Ireland. The principle of 'primacy of EU law' means that, in areas where EU law applies to Ireland, EU law takes precedence over domestic law including the Constitution. There are numerous pieces of EU legislation which apply to the actions of An Garda Síochána and GSOC (among other state bodies). These include EU data protection laws and the EU Victims Directive.¹⁹

Whenever EU law applies to individuals in Ireland, the EU Charter of Fundamental Rights (EU Charter) also applies. The EU Charter protects the same rights as the European Convention on Human Rights (ECHR) but goes further. The Charter also protects, for example, the right of every individual to the protection of their personal data;²⁰ the rights of the elderly to lead a life of dignity, independence and participation;²¹ the right of persons with disabilities to independence, integration and participation;²² the right to fair and just working conditions;²³ the right to social security and social and housing assistance;²⁴ the right to health care;²⁵ and the right to consumer protection.²⁶

(c) *European Convention on Human Rights (ECHR)*

Ireland has been a party to the ECHR since February 1953. The ECHR was a response to the oppression and tyranny of the Second World War, and Ireland was one of the first states to ratify the Convention. The ECHR was incorporated directly into Irish law in 2003. The European Convention on Human Rights Act 2003 obliges every 'organ of the state' to act in a manner that is compatible with the State's obligations under the ECHR. Individuals can rely on the ECHR Act 2003 to assert their ECHR rights in the Irish courts.

The ECHR prohibits discrimination and protects (among other rights) the rights to life; liberty; a fair trial; respect for one's private and family life; freedom from torture and inhuman or degrading treatment or punishment; freedom from slavery and forced labour; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association; access to education; free elections and protection of property. Crucially, the ECHR also protects the right to an effective remedy for violations of the Convention.

Regarding the treatment of individuals in police custody and other forms of detention, the European Court of Human Rights interprets the ECHR in accordance with Standards set by the European Committee for the Prevention of Torture (CPT). The CPT is a mechanism that inspects places of detention in Council of Europe member states and publishes authoritative standards explaining how states must treat individuals who are detained. The CPT was established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which Ireland ratified in 1988.

2.2. Ireland's human rights obligations under international law

(i) *Belfast / Good Friday Agreement*

Human rights and equality guarantees are a cornerstone of the 1998 Belfast/Good Friday Agreement between the Irish and British governments. In the Agreement, the Irish government undertook to strengthen the protection of human rights in its jurisdiction and promised that it would 'ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland'.

The Belfast/Good Friday Agreement provided for the reform of policing in Northern Ireland so that (among other things) policing 'conforms with human rights norms' and is 'based on principles of protection of human rights and professional integrity'. In addition, regarding political administration in Northern Ireland, the Agreement mandated 'arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR'.

(ii) *Other Council of Europe treaties*

Ireland has ratified several other Council of Europe human rights treaties, in addition to the ECHR. These include:

- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ratified 14 March 1988)
- Revised European Social Charter (ratified 4 November 2000)
- Framework Convention for the Protection of National Minorities (ratified 7 May 1999)

(iii) *International human rights treaties*

Ireland is party to a whole host of additional international human rights treaties. These include International Labour Organisation treaties prohibiting forced labour and servitude, and the following United Nations treaties:

- International Covenant on Civil and Political Rights (ratified 8 December 1989)
- International Covenant on Economic, Social and Cultural Rights (ratified 8 December 1989)
- Convention on the Elimination of All Forms of Discrimination Against Women (ratified 23 December 1985)

- Convention on the Rights of the Child (ratified 28 September 1992)
- International Convention on the Elimination of All Forms of Racial Discrimination (29 December 2000)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified 11 April 2002)

2.3. European and international human rights standards concerning policing

All of the above-mentioned legal instruments (including the Constitution, EU Charter and ECHR) place wide-ranging obligations upon An Garda Síochána – as an institution of the State – to act in particular ways. Descriptions of how policing must be conducted in order to comply with human rights can be found in the case law of the Irish courts, the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and in the jurisprudence of the UN human rights treaty bodies. Descriptions of policing obligations can also be found in guidelines and standards published by Council of Europe and UN bodies, including the following:

- European Code of Police Ethics (Recommendation Rec(2001) 10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001)²⁷
- Council of Europe, CPT Standards (compiled from the annual reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment)²⁸
- Council of Europe, Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police (12 March 2009)²⁹
- Council of Europe Parliamentary Assembly, Declaration on the Police (8 May 1979)³⁰
- UN Code of Conduct for Law Enforcement Officials (17 December 1979)³¹
- UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) (17 December 2015)³²
- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)³³
- UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (9 December 1988)³⁴
- UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (14 December 1990)³⁵
- UN Office of the High Commissioner for Human Rights, Manual of the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (2004)³⁶
- United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147
- UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (24 May 1989)³⁷
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985)³⁸
- Committee Against Torture, General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007)³⁹
- Committee Against Torture, General Comment No 3, 'Implementation of article 14 by States parties' (13 December 2012)⁴⁰
- UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer: Extra-custodial use of force and the

prohibition of torture and other cruel, inhuman or degrading treatment or punishment' (20 July 2017)⁴¹

3. WHY ALL ASPECTS OF POLICING AFFECT HUMAN RIGHTS

An Garda Síochána is the most powerful manifestation of the State in the lives of the general public. Given its powers, An Garda Síochána is the institution most often called upon to implement the State's obligations to protect individuals in situations of vulnerability. Equally because of its powers, it is also the institution at greatest risk of disproportionately or otherwise unlawfully interfering with individuals' rights.

One of the several objectives of An Garda Síochána listed at section 7 of the Garda Síochána Act 2005 is 'vindicating the human rights of each individual'.⁴² In fact, the objective of vindicating human rights should be understood to permeate all of the functions and objectives of An Garda Síochána, for reasons including the following:

1. Much Garda activity is concerned with the preservation of **democracy**, which is a constitutional bedrock of the Irish State. As explained above, a core aim of democracy is to ensure that individuals are equally entitled to exercise their human rights and that the State affords all people equal respect for their inherent dignity. Therefore, efforts to preserve democracy require An Garda Síochána to respect and protect individual rights. For example: efforts by An Garda Síochána to fight crime or the threat of terrorism must not undermine the very democracy they seek to protect by perpetrating ill-treatment or torture, or by systematically violating individuals' privacy rights.
2. The **State's positive obligations to protect the human rights of individuals** will require Garda action in certain situations. These obligations will also require the provision of resources by government to An Garda Síochána so that Gardaí are in a position to respect, protect and fulfil human rights. For example: the State's human rights obligations require An Garda Síochána to take effective measures to protect from threats to life or to bodily integrity which they know or ought to know about, to initiate effective investigations into such conduct, and to provide information and other assistance to victims. By way of another example: the State must provide adequate legal, medical and other services to individuals who are detained by An Garda Síochána in order to safeguard detainees' rights to a fair trial and to treatment with dignity.
3. Through legislation and the common law, the Irish people and the courts have given An Garda Síochána coercive powers in order to carry out their functions. These coercive powers bring An Garda Síochána into direct contact with individuals, often non-consensually. **Their coercive powers heighten the risk that An Garda Síochána will violate rights**, for example: by the excessive use of force, by unnecessarily or disproportionately interfering with family or private life, or by unnecessarily or disproportionately denying someone the right to protest. Regarding surveillance, for example, former Chief Justice John L Murray in his 2017 review of the law on the data retention stated that:

'the statutory framework mandating communications retention constitutes a serious threat to fundamental rights as recognised in the Irish Constitution, the European Union Charter on Fundamental Rights and the European Convention on Human Rights and Fundamental Freedoms... It follows that a balance has to be struck between ensuring that the state and its authorities have effective and legitimate tools at their disposal in the fight against serious crime and threats to the security of the state, on the one hand, and the protection of fundamental rights and freedoms, on the other...Safeguarding rights in such circumstances is necessary to protect against disproportionate interference as well as the arbitrary exercise, misuse or abuse of the statutory powers by State bodies.'⁴³

4. In the course of all of their activities, the Gardaí may make mistakes or act wrongfully. Because of the impact of their actions on individual rights, **mistakes or wrongdoing by An Garda Síochána will often give rise to the right to redress**, including an effective investigation.
5. In order to carry out their functions, many members of An Garda Síochána work in stressful and/or dangerous situations. Their **unique workplace environment heightens the risk that the human rights of individual Gardaí will be violated** and requires that the State provide effective measures to protect them from ill-treatment, discrimination or other human rights violations.
6. It is frequently the case that individuals who have been involved in crime or are accused or suspected of being involved in crime, may be in vulnerable positions, in the sense that they may be suffering from ill-health or mental health difficulties, may be homeless or suffering from addiction, and they may be dependent on the State for healthcare, housing or other basic necessities. **Respecting the human rights of vulnerable individuals in the course of exercising policing powers may require special measures and cooperation with other State agencies.**
7. Although not specifically recognised in the list of objectives set out in section 7 of the Garda Síochána Act, members of An Garda Síochána routinely provide assistance to members of the public, including in emergencies of all kinds. This includes assistance to individuals who are dependent on the State and to whom other more appropriate State services are unavailable. In other words, members of An Garda Síochána frequently interact with people in vulnerable situations to whom the State owes a duty of care in accordance with its human rights obligations. In this way, **policing interacts with a range of other sectors in which the State holds human rights obligations towards children and adults, and where the State may be failing in those obligations.**

4. IMPLEMENTATION AND ENFORCEMENT OF HUMAN RIGHTS OBLIGATIONS IN IRELAND

It is one thing for human rights guarantees to be enshrined in legally binding instruments. It is another for the State to actually implement its obligations on a day-to-day basis in its dealings with all individuals and groups of people. Creating a society where all individuals in reality enjoy their human rights requires the translation of the constitutional and treaty guarantees into the legislation, structures, policies, practices and culture of the institutions and individual representatives of the State.

Ireland is currently going through a period of transition whereby it is grappling with a history of grave and systematic human rights abuses perpetrated against people marginalised in society. This includes the systemic abuse of children in inadequately monitored church-run institutions, the widespread arbitrary detention and forced labour of women, children and people with or perceived to have disabilities, and the routine forcible separation and degrading treatment of unmarried families. Numerous institutions of the State were involved in these abuses, including An Garda Síochána. In order to guarantee that similar abuses do not happen in the future, we need to reform the structures and the culture that allowed them in the past. Within the specific history of Irish policing, over recent decades individual rights have been violated or compromised by Garda malpractice or failings of Garda management. These violations of rights cover a wide range of areas of policing, but include violations of suspects' rights in Garda custody, abuse of the due process rights of suspects, illegal gathering of evidence, and illegal use of surveillance and interception.

A key reason for the systematic abuses that have occurred during Ireland's history is that the human rights guarantees in the Constitution and in European and international treaties have not been recognised by, or filtered down to, the laws, policies and actions of State institutions. These systematic abuses – including abuses uncovered more recently concerning the practices of An Garda Síochána – demonstrate that the Irish superior courts and European courts are not sufficient safeguards for the protection of rights. Individuals who are on the receiving end of mistreatment perpetrated or apparently accepted by the State, or who depend on the State, are rarely in a position to assert their rights in court. Even if some people do take on the burden of court action, the remedies available to individual litigants usually do not extend to all others who are affected.

Effective protection of human rights can only be achieved by state institutions taking proactive action to embed human rights in all of the ways that they behave, including through policing. In 2014, the Irish Human Rights and Equality Act established a 'Public Sector Equality and Human Rights Duty',⁴⁴ recognising this very point. This Public Sector Duty requires all public bodies in Ireland to embed their equality and human rights obligations (deriving from the constitutional and treaty guarantees discussed above) in their planning and policy processes. According to section 42(1) of the Act, every public body:

'Shall in the performance of its functions, have regard to the need to:

1. eliminate discrimination,
2. promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and
3. protect the human rights of its members, staff and the persons to whom it provides services.'

The Irish Human Rights and Equality Commission explains in its guidance on the Public Sector Duty⁴⁵ that this section of the Act requires all public bodies to incorporate their human rights and equality obligations into the following core planning and policy processes:

1. In preparing strategic plans, public sector bodies must assess and identify the human rights and equality issues that are relevant to their functions. These issues must relate to all of its functions as a policy maker, employer and service provider.
2. Public bodies must then identify the policies and practices that they have in place or that they plan to put in place to address these issues.
3. In their annual reports or equivalent documents, public bodies must report in a manner accessible to the public on their developments and achievement in that regard.

PART B: CONCRETE STEPS NECESSARY TO EMBED HUMAN RIGHTS IN IRISH POLICING

What follows are preliminary recommendations regarding reforms that the ICCL believes are necessary to achieve human rights-based policing in Ireland. It is not possible in the space of these submissions to thoroughly explore the entire content of the above-mentioned sources of law, guidance and comparative best practice examples. This is a task that the ICCL will continue to undertake and it is a task that the ICCL wishes to see undertaken on a continuous basis in the future by human rights experts embedded in all of the institutions concerned with policing in Ireland, in consultation with all stakeholders.

It is important to acknowledge that there is already a wealth of information, advice and comparative examples available to those who are committed to creating a system of human rights-based policing in Ireland. This existing body of knowledge includes (and goes beyond):

- the reports of the Garda Inspectorate, the Garda Síochána Ombudsman Commission, the Policing Authority, and numerous Oireachtas reports and reports of independent judicial inquiries and non-statutory inquiries;
- the previous work of the Garda Strategic Human Rights Advisory Committee;
- the reports and submissions of the Irish Human Rights and Equality Commission (and the former Irish Human Rights Commission) concerning human rights-based policing;
- the reports of the European and international human rights bodies that have made recommendations concerning Ireland following the gathering of evidence, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the United Nations Committee Against Torture and the United Nations Human Rights Committee;
- the work of academics, including Dermot Walsh's publication, *Human Rights and Policing in Ireland* (Clarus Press 2009); the comparative expertise available in other jurisdictions, most notably Northern Ireland,⁴⁶ and from international and regional organisations concerned with human rights-based policing.⁴⁷

In this part of our submission, we summarise the key steps which ICCL believes should now be taken to support the implementation of human rights across all aspects of policing.

1. A COMPREHENSIVE FRAMEWORK FOR EMBEDDING HUMAN RIGHTS

The ICCL's primary recommendation is that a comprehensive human rights-embedding framework should be created to ensure that respect for human rights is integral to everything that is done by individual members of An Garda Síochána and each of the institutions of policing in Ireland.

(a) A statutory basis for all of the key mechanisms that are required to embed human rights in all aspects of policing

The ICCL welcomes the fact that human rights are already included as both a 'policing principle' and an objective of An Garda Síochána in the Garda Síochána Act 2005 (as amended). However, legislation should provide more specifically for compliance with the State's human rights obligations regarding policing. We recommend that ensuring compliance with the State's human rights obligations be enshrined as a statutory function of all of the policing oversight bodies. We make further specific recommendations regarding the need to put human rights on a statutory footing below.

(b) Human Rights Officers with the authority to engage with and make recommendations in all areas in each of the policing institutions

In order for the State's human rights obligations to be respected in all areas of policing in the future, it is essential that every institution with responsibility for policing is staffed with a sufficient number of human rights experts who have the authority to continuously monitor and provide input into laws, policies, practices and cultural aspects of policing.

Within An Garda Síochána there should be human rights experts embedded in all areas, including human resources, operations and training. Human rights experts should also be employed to work within GSOC, the Inspectorate, the Policing Authority, the Department of Justice and any future bodies with responsibility for aspects of policing.

There is an absolute need for regulation and oversight of state security operations in order to ensure compliance with the State's human rights obligations. In areas where access to policies and practice needs to be restricted for security reasons, it is essential that there is provision for special security clearance to be given to some human rights experts to enable them to continuously monitor human rights compliance by the policing institutions.

(c) Human rights monitoring index

We recommend that the Commission re-visit the work carried out in the previous decade by members of the Strategic Human Rights Advisory Committee (SHRAC) who drafted a Human Rights Monitoring Framework. The aim of the framework was to provide an index against which the compliance of An Garda Síochána with its human rights obligations could be assessed on an ongoing basis. The SHRAC's work followed the finding in the 2004 Garda Human Rights Audit by Ionann Management Consultants⁴⁸ that:

[T]here do not appear to be mechanisms in place at present to allow for systematic and routine monitoring of the use of police powers in relation to human rights issues. Nor are

there central, strategic mechanisms to assess the impact of existing and new policies and practices and to recommend changes as needed.

We recommend that such an overarching framework should extend to the human rights compliance of all institutions involved in policing and should be reviewed by human rights officers or experts who together form a team that can work together and enable the transfer of knowledge.

(d) A statutory mechanism for following up on the Commission's recommendations

The ICCL welcomes the Commission's stated intention to place human rights at the core of its recommendations on the future of policing. We stress the importance of ensuring that the Commission's recommendations are actually implemented, and comprehensively. We believe that a statutory mechanism to ensure implementation over time is advisable.⁴⁹ In this regard, we also note the establishment of an Implementation Oversight Group to oversee implementation of the recommendations of the Penal Policy Review Group (PPRG), a body with a similar remit to review policy in another area of Irish justice policy. The ICCL believes that a similar implementation structure may add value in this area.

2. ACCOUNTABILITY AND OVERSIGHT STRUCTURES

This section discusses ways in which the (a) transparency, (b) legal accountability, and (c) independent oversight of policing could be improved to ensure compliance with the State's human rights obligations.

The following Principles of the European Code of Police Ethics are of particular relevance:

- Principle 3: Police operations must always be conducted in accordance with the national law and international standards accepted by the country.
- Principle 4: Legislation guiding the police shall be accessible to the public and sufficiently clear and precise, and, if need be, supported by clear regulations equally accessible to the public.
- Principle 59: The police shall be accountable to the state, the citizens and their representatives. They shall be subject to efficient external control.
- Principle 60: State control of the police shall be divided between the legislative, the executive and the judicial powers.
- Principle 61: Public authorities shall ensure effective and impartial procedures for complaints against the police.
- Principle 62: Accountability mechanisms, based on communication and mutual understanding between the public and the police, shall be promoted.

The areas of state surveillance and use of personal data could be included in this section, but we address them in a discrete section further on in our submission (see Section 3 on 'Surveillance, Privacy and State Security').

2.1. Transparency

(a) Garda policies should be publicly available

The ICCL believes that a human rights-based approach to policing requires the publication of policies to the extent possible. If there are genuine security concerns that prevent the publication of certain policies, they should nonetheless be available to human rights officers in An Garda Síochána and the oversight mechanisms.

In 2009, the IHRC called for the publication of the Garda Code and Garda operational policies in order to enable human rights-proofing of the policies and allow for independent external assessment and oversight.⁵⁰ The IHRC noted that '[w]ithout publication it cannot be assessed whether internal Garda policies contain adequate and effective safeguards to protect the individual from arbitrary or unjustifiable interference with their rights.'⁵¹

Some Garda policies have been published.⁵² However, in 2009 the IHRC found that, for the most part, the broad discretionary powers of An Garda Síochána in the area of operational policing were 'not circumscribed by transparent guidance in the form of accessible written Garda policies or by guidance in the form of Ministerial regulations or codes of practice.'⁵³ In 2016, the Independent Review Mechanism (IRM) reported that it required the assistance of the Chief Superintendent, Crime Policy and Administration, to access approximately 22 HQ Directives relevant to victim support, family liaison officers and the offering of reasons for decisions in the prosecution or non-prosecution of crimes.⁵⁴ The IRM stated that it had not had full access to the training afforded to family liaison officers and their coordinators.⁵⁵

The ICCL welcomes the proposal in the Garda Síochána (Amendment) Bill 2017 (Private Member's Bill) to specify as one of the functions of the Policing Authority: 'to cause to be published and made accessible to the public all sections of the Garda Code and Garda operational policies and procedures, save where such publication would undermine national security or crime prevention and detection as decided by the Authority in consultation with the Garda Commissioner'.

A related issue that the ICCL suggests the Commission should consider is whether the current Freedom of Information restrictions that apply to An Garda Síochána should be reviewed.

(b) Statistical data on Garda actions and practices should be readily available

The provision of statistical data regarding policing operations and the ways in which An Garda Síochána and GSOC are implementing their human rights obligations is an important accountability mechanism and a key aspect of human rights-based policing. It is important to highlight the following:

- Accurate recording of data requires effective systems and laws relating to the recording and use of personal data by An Garda Síochána. In Section 3 below, we discuss the need for review of the legislation and oversight structures governing state surveillance and use of personal data. The need for a radical overhaul of laws, structures and practices in this area is demonstrated by, among other things, the findings in the Fennelly Report, the Central Statistics Office's current difficulties in determining how and to what extent the Gardaí have been recording incidents of domestic abuse,⁵⁶ and the continuing delay in publication of the Garda review into the classification of homicides.⁵⁷
- The ICCL's report to the UN Committee Against Torture in 2017 noted the absence of publicly available statistics on the number of allegations of torture or ill-treatment against members of the Garda, and requested that the State provide detailed information on all complaints filed with GSOC which may relate to ill-treatment and on the final outcome of such complaints processed by GSOC.⁵⁸ In its Concluding Observations on Ireland, the Committee Against Torture recommended that the State should '[c]ollect data on the performance of the police with respect to provision of fundamental safeguards against torture to persons deprived of their liberty, including data on cases in which police officers have been subjected to disciplinary or other measures for failing to respect such safeguards, and provide this information in its next report to the Committee.'⁵⁹
- The ICCL welcomes the government's (albeit delayed) commitment to conduct a second SAVI (Sexual Abuse and Violence in Ireland) study and notes that both the UN Committee Against Torture⁶⁰ and UN Human Rights Committee⁶¹ requested in their most recent Concluding Observations on Ireland that the State gather data on the extent of violence against women, including domestic and sexual violence, in order to ensure the full implementation of its obligations to prevent and protection from such violence.
- Section 36 of the Criminal Justice (Victims of Crime) Act 2017 requires An Garda Síochána, GSOC and the Courts Service, among others, to compile and provide to the Minister for Justice statistical information regarding the operation of the Act. The ICCL believes that this is an important mechanism for enhancing awareness of and ensuring the protection of the rights of victims of underreported and under-acknowledged crimes, including hate-motivated crimes.

- Dr Vicky Conway has noted that ‘very little is known about the exercise of police powers of stop and search in Ireland’.⁶² This is of significant concern to the ICCL because the use of stop and search powers is an area where An Garda Síochána have huge discretion and where their use of force against the person risks interfering with dignity, privacy and even the right to freedom from ill-treatment if used arbitrarily. Dr Conway notes that: ‘A Garda Inspectorate Report (Report on the Investigation of Serious Crime (2014)) included the first publication of data on stop and search, revealing that between June 2013 and July 2014, 145,776 stops were recorded by police. Nothing else is known about the contexts of these stops, or how many go unrecorded, but given the ruling in *Gillan and Quinton v UK* (2010) 50 EHRR 15 that stop and search engages an individual’s right to privacy, this lack of transparency is of great concern.’⁶³

2.2. Legal accountability

(a) Garda policies should contain clear guidelines on human rights obligations

The Garda Inspectorate, the Irish Human Rights and Equality Commission (formerly the IHRC) and the Garda Strategic Human Rights Advisory Committee (SHRAC) are among those who have highlighted over the past decade the lack of policies to guide members of An Garda Síochána and others in the application of human rights and other legal requirements concerning all aspects of policing.

In 2007 The Policy sub-group of the SHRAC drafted and recommended a new policy-making package, which contained (a) a policy indicating how policy will, in future, be made within the organisation; (b) a policy-writing template; (c) an audit tool/template for human rights proofing policy once drafted; and (d) a consultation template (given the central importance of consultation in policy-writing). The ICCL understands that this policy-making package was not implemented. The Policy-sub group explained at the time that this new approach was necessitated by the following troubling situation:

The primary mechanism for the dissemination of policy within the Garda Síochána ...is the publication of the Garda Code and the issuing of HQ Directives... There is no standard template for a HQ Directive other than the headed paper, nor is there anything to distinguish between the different types or importance of directives. Policy directives are not distinguished from other types of directives. There is no acknowledgement system for the receipt of policy for all members other than on an ad hoc basis with the issue of some booklets and publications. In many cases procedures/guidelines are not issued with policy or are embedded in the policy document. Currently policy is not human rights/equality proofed...there is no overall monitoring body to assure that policy complies with standards. A clear sign off protocol does not exist which reflects policy ownership and responsibility.

In 2009, the IHRC stated that:

Key areas of policing, such as the areas identified in the Walsh study should be subject to detailed and accessible human rights based codes of practice. The areas identified in the Walsh study which require further guidance in the form of detailed human rights based policies or codes of practice include: arrest, detention, interviewing, taking fingerprints, photos and bodily samples, entry, search and seizure, stop, search and question, public order, use of force, use of surveillance methods, use of the witness protection programme, handling of Garda confidential information, protecting the rights of victims, treatment of children in Garda custody and the use of ASBOs [Anti-Social Behaviour Orders] and fixed penalties.⁶⁴

In 2015, meanwhile, the Garda Inspectorate's *Changing Policing in Ireland* report stated that the 'Inspectorate has consistently found gaps between the development and implementation of policy and an absence of effective governance, leadership and intrusive supervision needed to ensure that policy aims are actually delivered'.⁶⁵

With one caveat, the ICCL welcomes the proposals in the Garda Síochána (Amendment) Bill 2017 (Private Members Bill) to specify the Policy Authority's authority to establish policies and procedures for An Garda Síochána which shall be binding on all members of An Garda Síochána and to review the adequacy and appropriateness of the policies and procedures which underpin the operation of An Garda Síochána. The ICCL recommends that the Bill is amended to state explicitly that consideration shall be given to the State's human rights obligations in the establishment and review of all policies and procedures.

(b) The Garda Discipline Regulations should be reviewed

In recent years, GSOC, the Independent Review Mechanism and the Irish Human Rights Commission have all recommended the revision of the Garda Síochána (Discipline) Regulations 2007. The ICCL echoes these recommendations and highlights the following:

- The Garda Code of Ethics, with its emphasis on human rights, is an extremely important development in the process of embedding respect for human rights in all aspects of policing. However, the ICCL is concerned about the fact that a breach of the Code is not necessarily a breach of the Garda Síochána (Discipline) Regulations – as stated in the Code.
- Related to the above, the ICCL is concerned that GSOC's remit extends only to 'misbehaviour', defined in section 82 of the Garda Síochána Act 2005 (as amended) as conduct that constitutes a criminal offence or a breach of discipline. Certain human rights violations may therefore fall outside of GSOC's purview – i.e. if not explicitly categorised as breaches of discipline and if not criminal.
- The Criminal Justice (Victims of Crime) Act 2017 places a range of obligations on An Garda Síochána and GSOC regarding their interactions with victims of crime. This legislation is intended to support implementation of the EU Victims Directive in Ireland. It is an important step towards remedying many of the problems identified by the Independent Review Mechanism in 2014. However, in order to fully address the history of systematic failures in communication with and other treatment of victims of crime, breaches of the obligations contained in the Criminal Justice (Victims of Crime) Act 2017 ought to be explicitly categorised as disciplinary offences in revised Garda Discipline Regulations.⁶⁶

(c) The rights of individuals in Garda custody need greater protection in law

(i) Right of access to a lawyer

People who are held in police custody in Ireland do not have a statutory right to have a legal representative present while being questioned by the Gardaí.

Although the Government established a Standing Committee to advise on Garda interviewing of suspects in 2010, Ireland has not 'opted into' the EU Directive on the right of access to a lawyer in

criminal proceedings and on the right to communicate upon arrest, the provisions of which would assist Ireland in addressing concerns regarding access to legal representation. The Directive was formally adopted by the European Parliament on 10 September 2013.

The State must urgently establish on a statutory basis the right of access to a lawyer from the very outset of deprivation of liberty by An Garda Síochána, including during the initial interview or interrogation. This could be effected by implementation in Irish law of the EU Directive on the Rights of Access to a Lawyer.

In the course of the Council of Europe Committee for the Prevention of Torture (CPT) visit to Ireland in 2014, the Irish authorities confirmed by that all persons detained by An Garda Síochána are specifically asked if they want to consult a solicitor and concludes that “the position now is that An Garda Síochána cannot question a detained person who has requested legal advice until such time as that advice has been obtained”. The CPT was also informed that solicitors are permitted to participate in police interviews and “to intervene where appropriate”, and that the practice of advising detained persons of their right to have legal representation present during an interview was being actively implemented.⁶⁷

It is important to note the following background to the issue:

- The ICCL understands that following the Supreme Court cases of *DPP v Gormley* and *DPP v White* in 2014, the Director of Public Prosecutions directed that where a detained person requests a solicitor to be present, no interview should proceed until the detainee has an opportunity to consult with a lawyer.⁶⁸ However, the more recent Irish Supreme Court decision in *DPP v Doyle*,⁶⁹ where the Supreme Court ruled that suspects were not entitled to representation during interviews, is a stark reminder that no such right exists in Irish law, contrary to international and European legal standards. The *Doyle* case was concerned with the right of access to a lawyer during questioning, and while the Supreme Court found that the accused person’s right of access to a lawyer was effectively vindicated in the circumstances of that case, it also found that the constitutional right to reasonable access to a lawyer did not extend to a right to have a solicitor present during Garda interviews. This case draws attention to the continuing failure of the Irish Government and the Oireachtas to put in place effective regulations on the rights of accused persons to access legal advice and to access a solicitor while being questioned, as had been highlighted by ICCL in a previous case in 2014, where we noted that Ireland has chosen not to incorporate the EU Directive into law, despite playing a key role in the drafting of the Directive.
- The Irish position also appears to run counter to ECHR jurisprudence. In the case of *Saldut v Turkey* (2008) the European Court of Human Rights (ECtHR) held that: ‘[I]n order for the right to a fair trial to remain sufficiently “practical and effective” ... Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.’ *Saldut* also established that the ‘rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.’ This principle is important as Ireland continues to allow inferences to be drawn from the silence of a suspect or accused person.

- The European Court has subsequently upheld this right in a number of cases (*Dayanan v Turkey*, 2009; *Borg v Malta*, 2016); and it was also established in the UK Supreme Court case of *Cadder* (2010) that a detained suspect must have access to legal advice before questioning. In 2015, the ECtHR confirmed and extended this protection in *AT v Luxembourg* (2015). *AT v Luxembourg* drew on the EU Directive on Right of Access to a Lawyer and found that you cannot waive a right that you do not have, that the right to access a lawyer includes a right to prior consultation before questioning and if access to a lawyer is denied, a remedy may be needed even in the absence of a confession or incriminating statement. Accordingly, the consultation between the lawyer and his client upstream of the interrogation must be unequivocally enshrined in legislation.

(ii) Keeping records of detention and interview transcripts

In its Concluding Observations on Ireland in 2017, the UN Committee against Torture registered its concern at ‘reports that fundamental safeguards against torture for persons deprived of their liberty are not always respected in practice, including reports that the right to have a legal representative present during police interrogations is not provided in law and that the police do not consistently keep accurate detention records or use closed-circuit monitoring of interview rooms.’⁷⁰

The Committee recommended that Ireland ‘Expedite the drafting of the Inspection of Places of Detention Bill and ensure that this or other national legislation promptly establishes an independent body tasked with inspecting police stations and monitoring the provision by the police of all fundamental safeguards against torture to persons deprived of their liberty, including respect for the right of prompt access to a lawyer; the rigorous keeping of detention records, including in a centralized register; and systematic closed-circuit monitoring of interview rooms’.

(iii) Right of access to a doctor or psychiatrist

The ICCL believes that there is a need for a review of the extent to which the State (through its provision of resources) and An Garda Síochána in practice are ensuring the right of individuals in police custody to access healthcare. The conclusions of the European Committee for the Prevention of Torture (CPT) following its visit to Ireland are deeply troubling:

The provision of health care services within police custody suites remains somewhat problematic; police stations are not equipped with medical facilities; the room for examination of detained persons at Pearse Street Garda Station was totally unsuitable. Local doctors are called on an as required basis by the custody officer with no formal duty doctor rota in place. Detained persons complained to the delegation that the examinations were perfunctory. However, while a doctor might maintain a personal medical record, they are not shared or available to other doctors who might be called subsequently to review the same prisoner. Such a state of affairs is unsatisfactory as the procedure is not only costly (150 Euros per call out) but it does not address the Garda’s duty of care obligations. Doctors should undergo appropriate training in the management of those healthcare problems associated with detention in police custody such as drug and alcohol withdrawal. Further, more formal arrangements should be put in place for a duty doctor rota and for annotated medical records to be made and kept in a secure place, accessible to medical staff only. From the CPT’s standpoint, the current system is not serving as an effective safeguard against ill- treatment and should be thoroughly reviewed.⁷¹

(d) Consideration should be given to the separation of policing and prosecution

It is a core requirement of the European Code of Police Ethics that police personnel should have no part in prosecuting crime, even if minor. Article 6 of the Code states: 'There shall be a clear distinction between the role of the police and the prosecution, the judiciary and the correctional system; the police shall not have any controlling functions over these bodies.' Members of An Garda Síochána routinely act as prosecutors at District Court level in Ireland, and the ICCL believes that there is a need for consultation on whether policing and prosecution should be separated in order to ensure greater accountability regarding both the conduct of investigations and the prosecution process.

(e) There is a need for greater legal protection from arbitrary detention

The ICCL is concerned that the Gardaí (among other state employees and agencies) may be involved in bringing individuals by force to places where they are deprived of their liberty in the absence of legal safeguards. Arbitrary detention is a serious violation of basic human rights, and at present the State does not have sufficient legal or structural protections in place to guarantee the right to liberty of many people, particularly those who need support to make their wishes known or who are dependent on others for care.

- **Detention of people with disabilities and older people.** The ICCL is deeply concerned that there is no state regulation or supervision of deprivation of liberty in settings where people in Ireland are frequently detained, including social care homes and nursing homes.⁷² In its Concluding Observations on Ireland last year the UN Committee Against Torture called on the State to expedite the enactment of legislation and a monitoring framework to protect from arbitrary detention in residential and congregated care centres for older people and people with disabilities.⁷³ We note the current consultation by the Department of Health on draft Heads of Bill on deprivation of liberty safeguards.⁷⁴ We urge the Commission to recommend swift action and sufficient resources to protect against unlawful deprivation of liberty, including through the proper resourcing of the new Decision Support Service.
- **Definition of 'voluntary' patient under the Mental Health Act 2001.**⁷⁵ Section 2 of the 2001 Act defines a 'voluntary patient' as 'a person receiving care and treatment in an approved centre who is not the subject of an admission order or a renewal order'. Numerous human rights bodies, including the UN Human Rights Committee, the European Committee for the Prevention of Torture (CPT), and the Irish Human Rights and Equality Commission, have been calling for years for the revision of this definition of 'voluntary' patient because it does not protect individuals who are *de facto* detained, while not under a formal order. Following its visit to Ireland in 2010, the CPT stated that 'many so-called "voluntary" patients were in reality deprived of their liberty; they were accommodated in closed units from which they were not allowed to leave and, in at least certain cases, were returned to the hospital if they left without permission. Further, if staff considered it necessary, these patients could also be subjected to seclusion and could be administered medication for prolonged periods against their wish'.⁷⁶ The ICCL supports the view of the IHREC (previously IHRC) and the UN Human Rights Committee that the definition of 'voluntary patient' under the Mental Health Act 2001 should be amended to include only those individuals who have provided informed consent to their admission to a psychiatric healthcare setting and to treatment and continue to do so.⁷⁷

(f) The witness protection programme should be put on a statutory basis

As stated in the report of the Independent Review Mechanism (IRM) in 2016, the Witness Protection Programme has no statutory basis.⁷⁸ The IRM concluded that ‘there is sufficient [*sic*] to suggest that the programme would benefit from being placed on a statutory basis and that its structure should be streamlined to enable real traffic or communication between the administrative and the operative branches.’ The IRM recommended that ‘such review as does take place to enable statutory framing of the structure, administration, financing, operation and liabilities of the WPP also contemplates the inclusion of accountability and review, for instance through judicial involvement.’ The ICCL emphasises the need to ensure that the witness protection programme complies fully with the State’s human rights obligations.

(g) There is a need for greater legal protection of the right to an effective investigation

The ICCL believes that there is an urgent need for a thorough review of whether the various state mechanisms of investigation which concern police conduct adequately protect the rights of victims (including next of kin) to an effective investigation.

Under the ECHR (and therefore also the EU Charter and ECHR Act 2003) and international human rights treaties, there is a right to an effective investigation where there are credible allegations that the right to life or the right to freedom from torture or ill-treatment has been violated (whether by private individuals or by state officials or institutions). Allegations of unlawful deprivation of liberty or grave interferences with the right to respect for private and family life may also give rise to the right to an effective investigation.⁷⁹

Inadequate investigations – whether into unexplained deaths, suspected criminal behaviour, or alleged misconduct by members of An Garda Síochána or other State institutions – are often a huge source of trauma for those affected. Furthermore, real or perceived impunity for human rights violations and/or criminal conduct by members of An Garda Síochána can cause lasting harm to relations between communities and An Garda Síochána.

(i) *The following mechanisms should be reviewed in order to ascertain their compliance with the right to an effective investigation:*

- Access to the courts
- Investigations by GSOC
- Investigations by An Garda Síochána following referral from GSOC
- Special inquiries relating to An Garda Síochána under section 42 Garda Síochána Act 2005 (as amended)
- Commissions of Investigation under the Commissions of Investigation Act 2004
- Non-statutory reviews, such as, for example, the Independent Review Mechanism and the Inter-departmental Committee to establish the facts of State interaction with the Magdalen Laundries
- Coroners’ inquests

(ii) Requirements of an effective investigation

According to the European Court of Human Rights, an effective investigation is one which conforms to the following requirements:⁸⁰

- **Independence:** The investigation must be carried out by a body with both institutional and practical independence from those implicated in the events.⁸¹
- **Effectiveness:** The investigation should not be reliant solely on evidence or information from the source being investigated.⁸² It should have full investigatory powers to compel witnesses and it should be capable of securing evidence.⁸³
- **Promptness and reasonable expedition:** The investigation should be undertaken in a prompt and timely fashion in order to maintain public confidence.⁸⁴
- **Thoroughness:** the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions.⁸⁵ They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence.⁸⁶ Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.⁸⁷
- **Public Scrutiny:** There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.⁸⁸
- **Initiated by the State:** The authorities must act once the matter comes to their attention rather than leaving it to the next of kin to instigate.⁸⁹
- **Involvement of victim:** The victim must be involved to the extent necessary to safeguard their legitimate interests.⁹⁰ In the case of *Edwards v United Kingdom*,⁹¹ the ECtHR found that the parents of a man killed in prison were denied their right to an effective investigation notwithstanding that an inquiry, chaired by independent experts and assisted by lawyers, was commissioned by the Prison Service, Essex County Council and North Essex Health Authority and sat for 10 months and heard from about 150 witnesses. The ECtHR held that Mr and Mrs Edwards were not 'involved to the extent necessary to safeguard their interests' on the grounds that the inquiry was held in private and:

‘The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the Inquiry Panel. They had to wait until the publication of the final version of the Inquiry Report to discover the substance of the evidence about what had occurred.’⁹²

At the international level, the requirements of an effective investigation into alleged or suspected torture or ill-treatment have been interpreted in the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA Res 55/89 of 4 December 2000)⁹³ The UN Principles state the following requirements:

- The purposes of an investigation include (i) clarification of the facts and establishment and acknowledgement of individual and State responsibility for the victims and their families; (ii) identification of measures needed to prevent recurrence; and (iii) facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State (Principle 1);
- The investigators are not just independent but also competent and impartial, and that they have access to impartial medical or other experts (Principle 2);
- The investigation has all necessary budgetary and technical resources for effective investigation and the authority to summons witnesses and demand the production of evidence (Principle 3(a));
- Alleged victims of torture or ill-treatment and their legal representatives are informed of and have access to any hearing, have access to all information relevant to the investigation, and be entitled to present other evidence (Principle 4);
- In cases of an 'apparent existence of a pattern of abuse', States shall 'ensure that investigations are undertaken through an independent commission of inquiry or similar procedure'. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve (Principle 5(a));
- The investigators' report is made public and that it includes conclusions and recommendations based on findings of fact and applicable law, including detailed descriptions of events that were found to have occurred and the evidence upon which such findings were based (Principle 5(b)); and
- Medical examinations conducted for investigative purposes conform to established standards of medical practice and result in an accurate written report, communicated confidentially to the person affected (Principle 6).

It is also important to consider the Irish constitutional requirements of fair procedures and the Council of Europe standards for investigation of complaints against the police⁹⁴ in this context.

(iii) Need for review of particular elements

It appears to the ICCL that the following issues may give rise to violations of the right to an effective investigation and ought to be reviewed:

- **Legal representation is not generally available** to individuals who complain of human rights violations by An Garda Síochána or other state officials or institutions, and this risks preventing the victim's involvement to the degree necessary to safeguard their legitimate interests. The inaccessibility of legal representation may prevent an investigation happening at all.
- **Legal aid** may be necessary to:
 - ensure the implementation of rights under Criminal Justice (Victims of Crime) Act 2017;

- allow for Judicial Review applications to be taken in court;
 - allow for plenary actions to be taken against State officials or institutions in court; and
 - ensure the participation of victims in investigations by GSOC, under s42 Garda Síochána Act 2005 (as amended), by Commissions of Investigation and by non-statutory reviews and inquest.
- **There is no statutory right to advocacy for older people or people with disabilities** and this may prevent a victim's involvement in an investigation to the degree necessary to safeguard their legitimate interests.
- **The procedures applicable to investigations frequently are not publicly available and the absence of legal representation compounds the lack of transparency.** For example:
 - Commissions of Investigation under the Commissions of Investigation Act 2004 do not always make their procedures publicly available or give reasons for their decisions to hold private hearings.
 - Section 42 of the Garda Síochána Act 2005 (as amended) does not make clear whether these investigations may be held in public.
 - Regarding the Coroner, the 2016 report of the Independent Review Mechanism concluded that access to information and documents 'has proven less than automatic to concerned family members and next-of-kin and particularly those who have not availed of legal advice'.⁹⁵
 - Regarding GSOC, the Independent Review Mechanism recommended in 2016 that 'It is advisable that GSOC in corresponding with complainants who are at risk of being excluded from its process through a lapse of time, indicates the period from which it is calculated by GSOC that time has started to run. Further invitations extended to complainants to provide good reason to merit extension of time should bear sufficient information to enable such complainants (generally acting without assistance or advice) to know the grounds or reasons likely to find favour in the consideration of the extension of time.'⁹⁶
 - It is unclear what the procedures are for Garda disciplinary investigations when complaints are referred from GSOC.
- **The secrecy of investigations may be disproportionate.** By way of a few examples:
 - Commissions of Investigation under the Commissions of Investigation Act 2004 and inquiries under s42 Garda Síochána Act 2005 (as amended) are exempt from the application of the Freedom of Information Acts;
 - Commissions of Investigation are immune from requests for access to personal data;
 - In the ongoing Commission of Investigation into Mother and Baby Homes and Certain Related Matters, witnesses before the investigation committee are not permitted to have a transcript of their evidence. As with all Commissions of Investigation, it is an offence carrying a penalty of up to five years' imprisonment for *any person* to disclose or publish any evidence given or the contents of any document produced by a witness while giving evidence in private.
- **Inquiries may lack independence.** Inquiries under s42 Garda Síochána Act 2005 (as amended) depend on the Minister for Justice (rather than the Oireachtas) for their terms of reference and allocation of resources. Non-statutory inquiries (such as the Inter-departmental Committee to establish the facts of state interaction with the Magdalen Laundries, for example) may also lack independence.

- **There is a need for complete overhaul of the coroner system**, as the IHRC has recommended and the ICCL has previously called for.⁹⁷ The Independent Review Mechanism (IRM) also made this recommendation in 2016, noting that at present the Coroner is rendered 'powerless ...in preparation of inquests to command interview of witnesses overlooked by an investigation team and the directing of potential avenues of investigation as yet unexplored'.⁹⁸ The IRM also found that, although there is a means of access to legal assistance or full legal aid for next of kin, '[t]he means whereby this is achieved is very cumbersome and requires some insight and knowledge on behalf of next of kin in order to apply'.⁹⁹ The ICCL notes with concern the reported concerns of families that they 'don't automatically get copies of the garda files that are collated for the inquest'.¹⁰⁰ The Department of Justice announced in May 2017 that it would bring forward a Coroners (Amendment) Bill 2017.¹⁰¹ It is essential to ensure that this is done without delay and that the revised system is fully human rights compliant.

2.3. Independent Oversight

(a) Ratification of the Optional Protocol to the UN Convention against Torture (OPCAT)

Along with the IHREC¹⁰² and numerous other organisations,¹⁰³ the ICCL has been calling for many years for Ireland to ratify the Optional Protocol to the UN Convention against Torture (OPCAT). Ireland signed the OPCAT on 2 October 2007 but never ratified the instrument. The OPCAT requires member states to establish a National Preventive Mechanism, which is an independent body that conducts inspections (which may be unannounced) and reports on the conditions in any institution where people may be deprived of their liberty in the state.

It is an internationally recognised fact that individuals who are detained, whether in police custody, prison, care institutions or elsewhere are at heightened risk of experiencing ill-treatment or even torture due to the imbalance of power in the situation. In addition, the State is obliged under the rule against torture and ill-treatment to ensure that individuals who are detained receive respectful treatment and the basic resources necessary to protect their dignity. Furthermore, the State is under particular obligations to protect the fair trial rights of criminal suspects who are being detained in police custody. The work of a National Preventive Mechanism is essential to ensure that the human rights of people who are deprived of their liberty are protected and fulfilled. The vast majority of countries in Europe have ratified the OPCAT and established a National Preventive Mechanism, and Ireland's continuing failure to do so increases the risk of violations of the rights of people in vulnerable situations.

It is essential that the State ratifies the OPCAT immediately and sets about establishing a National Preventive Mechanism that encompasses all places where individuals may be, and are, deprived of their liberty. The text of OPCAT makes clear that the State does not need to have its National Preventive Mechanism in place before ratifying the instrument, but can seek advice and assistance from the UN Subcommittee for the Prevention of Torture in establishing the NPM thereafter.¹⁰⁴ The development of an NPM should be informed by inclusive consultation with civil society and all those involved in and affected by deprivation of liberty.

Numerous human rights bodies have called on Ireland to ratify the OPCAT. Among the recommendations that have been made are the following:

- In 2017, the UN Committee against Torture noted that ‘existing bodies (the Inspector of Prisons, the Prison Visiting Committees, HIQA and the Inspector of Mental Health) do not systematically carry out visits to all places of deprivation of liberty such as Garda stations, residential care centres for people with disabilities, nursing homes for the elderly and other care settings’.¹⁰⁵ The Committee recommended that Ireland should ‘(a) Immediately ratify the Optional Protocol and establish a national preventive mechanism, ensuring that this body has access to all places of deprivation of liberty in all settings; (b) Ensure that existing bodies which currently monitor places of detention as well as civil society organizations are allowed to make repeated and unannounced visits to all places of deprivation of liberty, publish reports and have the State party act on their recommendations.’¹⁰⁶
- In 2017, the UN Committee against Torture also expressed its concern at ‘reports that fundamental safeguards against torture for persons deprived of their liberty are not always respected in practice, including reports that the right to have a legal representative present during police interrogations is not provided in law and that the police do not consistently keep accurate detention records or use closed-circuit monitoring of interview rooms.’¹⁰⁷ The Committee stated that it was ‘concerned at the present lack of an independent authority empowered to monitor conditions of detention in police stations around the country and that the provision of fundamental safeguards by the police is not effectively monitored.’¹⁰⁸ The Committee recommended, among other measures, that Ireland: ‘Expedite the drafting of the Inspection of Places of Detention Bill and ensure that this or other national legislation promptly establishes an independent body tasked with inspecting police stations and monitoring the provision by the police of all fundamental safeguards against torture to persons deprived of their liberty, including respect for the right of prompt access to a lawyer; the rigorous keeping of detention records, including in a centralized register; and systematic closed-circuit monitoring of interview rooms’.¹⁰⁹
- In November 2015, following its visit to Ireland, the European Committee on the Prevention of Torture (CPT) requested ‘to be informed about the progress towards ratification and of the envisaged structure of the National Preventive Mechanism that will be tasked to implement the Optional Protocol (OPCAT)’.¹¹⁰ The Committee summarised evidence that it had received of ill-treatment in police custody, which it argued highlighted the need for ratification of OPCAT and the establishment of an NPM:

‘The CPT’s delegation again heard from persons with past experience of detention that the treatment by the Gardaí has progressively improved. Nevertheless, in the course of the visit, the delegation received several allegations of physical ill-treatment and verbal disrespect by Gardaí; the allegations of ill-treatment mostly involved blows with batons, as well as slaps, kicks and punches to various parts of the body. Some of the allegations concerned juveniles... The majority of the allegations concerned the time of arrest or during transport to a Garda station, but a few related to the time when the persons were being held in the station. ...One person alleged that when he was arrested and taken to Pearse Street Garda Station in May 2014 he was left completely naked for some time after being strip-searched and was also subjected to a baton blow for “bad-mouthing” a police officer. Another person who was arrested on the street in Dublin in mid-September 2014 stated that after he had been handcuffed behind his back a police officer had punched him in the ribs. Upon his committal to Cloverhill Prison, the nurse had noted “painful right chest wall”. These cases are illustrative of the information gathered by the delegation in the course of the 2014 visit, and demonstrate that there can be no room for complacency in the Irish authorities’ commitment to prevent ill-treatment.’¹¹¹

(b) Department of Justice and Equality

Regarding the receipt of complaints concerning policing and potential Garda malpractice by the Department of Justice and Equality, the ICCL is concerned by the findings of the Independent Review Mechanism (IRM), which reported in July 2016.¹¹² The IRM was described by the Department of Justice as a ‘triage’ system, whereby six barristers with experience in criminal law reviewed 320 complaints – both historic and recent – that had been made to the Department of Justice regarding Garda conduct. The IRM’s report suggests the need for a new system of clear human rights-based policy for, and independent oversight of, the handling of complaints by the Department of Justice by experts in human rights law on an ongoing basis. The ICCL draws the Commission’s attention to the following:

- The IRM reported that ‘Divisions such as “Garda Division” review correspondence containing allegations of Garda wrongdoing on a continuing basis’ and that the appointment of the IRM (which had two Senior Counsel and four Junior Counsel available at all times) was therefore ‘to a degree an enhancement of the function already discharged by the Department of Justice and Equality’.¹¹³
- The IRM reported that it was a painstaking task putting together a narrative overview of the complaints made by each person because, for example, ‘[m]any of the files under review contained a disjointed sequence of letters and emails directed to different State agencies’ and ‘[s]ome of the files commenced with letters of complaint more than a decade old, together with fresh material furnished over the ensuing years’.¹¹⁴
- The IRM established a line of communication with GSOC in order to discover which of the complaints to the Department of Justice had also been submitted to GSOC and what the status of the complaint was within GSOC in the absence of this knowledge within the Department.¹¹⁵
- The IRM noted that there are numerous ways in which complaints make their way to the Department of Justice (most commonly through public representatives), and that ‘[f]or each single case in which Ministerial action has been taken of a statutory nature or otherwise there must be hundreds for which none is recommended’.¹¹⁶
- In its report, the IRM recommended to the Minister for Justice that ‘it may be worthwhile for the Minister and her successors to consider the occasional retention of counsel or other experts both to allay fears that matters worthy of action have been overlooked or to devise appropriate systems enabling closure being brought to long standing matters giving rise to public disquiet’.¹¹⁷

In light of the above, the ICCL believes that there is a need to consider whether the practice of the Department of Justice in handling complaints relating to Garda conduct is human rights compliant, and how it could be reformed.

(c) Policing Authority

The ICCL welcomes the important work that the Policing Authority has carried out to date, including its oversight of the implementation of recommendations by the Inspectorate among others. We share the assessment of the Policing Authority, in its report under section 62 (O) of the Garda Síochána Act 2005 of December 2005 that it has been effective ‘in bringing transparency, independent challenge, a growing rigour and persistence to performance oversight’.¹¹⁸

However, we also note in the same report that the Authority points to the ongoing challenges related to the respective statutory roles of the Authority and the Minister for Justice and Equality when it comes to overseeing the performance of the Garda Síochána, including the continuing line of

accountability from the Garda Commissioner to the Minister and the exclusion of the Authority from overseeing state security functions. The ICCL reiterates the recommendation that it made in 2014 during the consultation on the establishment of the Policing Authority: that there is a need for consideration of which powers and functions currently vested in the Garda Policy Division of the Department of Justice and Equality should be transferred to the Policing Authority.

The ICCL believes that the Policing Authority's mandate should be reviewed as part of a wider review of the relationship between the Minister, Department, Authority and Garda Síochána in order to ensure more effective independent oversight of policing and human rights compliance within policing.

As set out in Section 1 above, we recommend that the Policing Authority is staffed with a full-time human rights expert who can both assist the Authority to ensure that compliance with human rights obligations is embedded in all of the Authority's oversight work and work with human rights experts in the other policing oversight institutions and An Garda Síochána to ensure a comprehensive approach to embedding human rights in policing.

(d) Garda Síochána Ombudsman Commission (GSOC)

The ICCL strongly supports the role of GSOC as the primary agency to investigate complaints against An Garda Síochána and is gravely concerned that the government is failing to provide GSOC with the resources necessary to enable it to carry out its statutory functions.¹¹⁹ In addition, the ICCL is concerned that GSOC does not have sufficient statutory powers to effectively investigate allegations of human rights violations by members of An Garda Síochána. The ICCL welcomes the publication of GSOC's recent detailed report to the Department of Justice and Equality in which it proposes extensive changes to its legislative mandate.¹²⁰ We support GSOC's calls for full independence from government, for it to be responsible for the investigation of all complaints (discontinuing the referral of non-criminal complaints back to An Garda Síochána for investigation), and for the introduction of measures to allow GSOC to investigate more effectively. We urge GSOC, the Commission on the Future of Policing and the Oireachtas to also consider the need for one or more human rights experts to be embedded in GSOC so as to keep under constant review the extent to which it is financially and statutorily empowered to function, and functions in practice, in a human rights-compliant manner.

The ICCL highlights the following issues in particular regarding the functioning of GSOC. Our concerns echo in large part the concerns that GSOC has raised with the Department of Justice and Equality:

- In 2017, the UN Committee against Torture concluded as follows regarding GSOC's ability to respond to complaints of torture or cruel, inhuman or degrading treatment:
 - 19. While expressing its appreciation for the establishment of the Garda Síochána Ombudsman Commission, the Committee is concerned about:
 - (a) The capacity of the Commission to function independently and effectively and to investigate allegations of torture and ill-treatment, including because of financial and staffing limitations;
 - (b) The "leaseback" practice whereby complaints referred to the Commission are referred back to the Garda for investigation, which amounts to the police investigating itself;
 - (c) The absence of information on the number of complaints which may relate to torture and ill-treatment and the low number of prosecutions initiated against the members of the Garda;
 - (d) Limited public awareness about the Commission's activities and responsibilities.

20. The State party should:

- (a) Strengthen the independence and effectiveness of the Garda Síochána Ombudsman Commission to receive complaints relating to violence or ill-treatment by the police and to conduct timely, impartial and exhaustive inquiries into such complaints;
 - (b) Try persons suspected of acts of violence or ill-treatment and, if they are found guilty, sentence them to punishment commensurate with the gravity of their acts;
 - (c) Provide information on the number of complaints filed with the Commission which may relate to torture or ill-treatment and on the final outcome of such complaints processed by the Commission;
 - (d) Ensure that victims have access to effective remedies and reparation;
 - (e) Sensitize the public about the existence and functioning of the Commission.
- GSOC remains dependent on Minister for Justice and Equality regarding its funding, rather than being a fully independent body accountable only to the Oireachtas.
 - GSOC is not statutorily obliged to investigate all allegations of human rights violations by members of An Garda Síochána. This was criticised by the European Committee for the Prevention of Torture (CPT) following its visit to Ireland in 2014, which stated that ‘it goes without saying that any police action which may fall within Article 3 of the European Convention on Human Rights, notably allegations of excessive use of force at the time of apprehension, should be investigated by an independent body such as the Ombudsman Commission’.¹²¹ One reason for this gap is that GSOC is only empowered to investigate complaints of ‘misbehaviour’, which s82 Garda Síochána Act 2005 (as amended) defines as a criminal offence or breach of discipline. As discussed above, the Garda Code of Ethics, while placing human rights obligations at its core, states that a breach of the Code of Ethics is not necessarily a breach of discipline. Another reason for this is that GSOC is only *obliged* to investigate allegations of death or serious harm by a member of An Garda Síochána, pursuant to s91 Garda Síochána Act 2005 (as amended). If a complaint does not involve such allegations GSOC may refer the complaint to An Garda Síochána to investigate, either supervised by GSOC or unsupervised. GSOC’s public information booklet suggests that, in practice, GSOC investigates all complaints alleging criminal conduct.¹²² However, if the complaint alleges a human rights violation that is considered a disciplinary offence but not a criminal offence, and not an incident involving death or serious harm, it appears that such complaint will fall to be investigated by An Garda Síochána.
 - GSOC has insufficient powers to ensure effective oversight of investigations by An Garda Síochána where complaints to GSOC are referred back to An Garda Síochána. GSOC made several complaints in this regard to the Oireachtas Joint Committee on Justice and Equality in 2016.¹²³ The Independent Review Mechanism also highlighted the problem.¹²⁴
 - GSOC does not have, and has called for, the mandate and resources to deliver reports on systematic problems it identifies. GSOC stated to the Oireachtas Joint Committee on Justice and Equality in 2016 that it currently reports to An Garda Síochána on system-wide issues which it identifies, so that lessons can be learned from its cases and the likelihood of further complaints reduced. A statutory basis for this work seems necessary in order for GSOC to be assured of the resources that it requires to continue this function, and in order to place an obligation on An Garda Síochána to respond to GSOC’s reports and recommendations on systemic issues. The ICCL believes that any such statutory function should explicitly include monitoring the compliance of An Garda Síochána with its human rights obligations.

- The ICCL believes that the following issues also need to be considered:
 - National security restrictions remain in place which can exclude GSOC from certain garda stations and prevent GSOC from accessing certain information.
 - GSOC has to notify the Commissioner and the Minister of its intention to search Garda stations.
 - It is not clear if GSOC has sufficient resources to ensure the full implementation of its obligations under the Criminal Justice (Victims of Crime) Act 2017.
 - Section 85 of the Garda Síochána Act 2005 (as amended) provides for forwarding of complaints from An Garda Síochána to GSOC, but there is no similar mechanism for the forwarding of complaints to the Department of Justice regarding Garda conduct.

(e) Garda Inspectorate

The ICCL recognises the hugely valuable work that the Garda Inspectorate has done in devising wide-ranging recommendations for the fundamental reform of policing in Ireland. In its submissions to the Oireachtas Joint Committee on Justice and Equality in 2016,¹²⁵ the Inspectorate recommended that it be given further statutory powers to enhance its effectiveness, including (a) the power to oversee the implementation of its recommendations, and (b) the power to carry out unannounced visits to Garda stations (the Inspectorate noted that unannounced inspections of Garda stations would be a feature of a National Preventive Mechanism under the OPCAT if Ireland were a party to the instrument).

The ICCL believes that the Garda Inspectorate's functions should be enhanced as it suggests, and that the Inspectorate's expertise and functions should be made part of a comprehensive, independent and effective oversight system including the Inspectorate, the Policing Authority, GSOC and other independent statutory oversight mechanisms that the Commission may deem necessary (including an independent agency for the oversight of state surveillance and use of personal data). As with GSOC, the ICCL recommends that the Inspectorate should be made accountable to the Oireachtas rather than the Minister for Justice.

(f) The courts

The courts ought to provide an effective remedy to individuals who have experienced human rights violations through the conduct of state officials or the institutions they represent, including not just An Garda Síochána but also the Department of Justice and GSOC, among other state bodies. It is a matter of deep concern to the ICCL, and one which we believe warrants serious consideration by the Commission and by all stakeholders, that legal aid is generally not available to individuals who have suffered human rights violations at the hands of state institutions and officials.

(g) An Ombudsman for Victims

The discussion in Section 2.2 (g) above of the numerous ways in which the right to an effective investigation may be hampered, in addition to the need for a mechanism to ensure the implementation of all of the obligations contained in the new Criminal Justice (Victims of Crime) Act 2017, leads the ICCL to believe that there is an urgent need for the establishment of an Ombudsman for Victims. This mechanism should assist and take measures to ensure the systematic protection of the rights of not only victims of crime, but also victims of any human rights violation by a state official or institution.

3. SURVEILLANCE, PRIVACY AND STATE SECURITY

The ICCL recognises the need for An Garda Síochána and GSOC to have technology at their disposal in order to effectively protect the human rights of all individuals in Ireland, and indeed to assist with international efforts to prevent crime. However, it is essential for the protection of human rights, democracy and the rule of law that all methods of surveillance and interferences with privacy comply with the requirements of the Irish Constitution,¹²⁶ the EU Charter of Fundamental Rights and the ECHR. Under these legal instruments, State interferences with privacy may only occur where (a) authorised by law, (b) necessary for the pursuit of a legitimate aim, and (c) proportionate to the aim being pursued, including that there is no less intrusive means of achieving such aim, and that the safeguards in place strike an appropriate balance between promoting public interest objectives and safeguarding human rights.

In this section we set out our concerns that the actions of An Garda Síochána, among other state agencies (including the Defence Forces and GSOC), in relation to surveillance and the use of personal data are not sufficiently constrained by law or overseen by independent and effective monitoring authorities. We also highlight our concern that the concept of ‘state security’ currently operates to prevent accountability in the area of surveillance and the use of personal data, despite the fact that the State’s human rights obligations still apply here.

As the Commission on the Future of Policing and other policing institutions and stakeholders consider the question of whether ‘state security’ operations should be separated from policing in general, we emphasise that ‘state security’ operations need to be equally human rights-compliant and accountable as ‘ordinary’ policing. A human rights perspective requires that the principles of legality, necessity, proportionality and accountability be respected at all times.

Currently, according to the Garda Síochána Act 2005 (as amended), the Minister for Justice and Equality has the final say over whether a particular aspect of policing falls into the ‘state security’ category. This is particularly problematic in a context where both the Gardai and the Department of Justice and Equality have competence for both security and ‘ordinary’ policing functions. The present institutional structure carries the clear danger of excessively broad security exemptions being applied to policing functions. In relation to accountability of state security functions, whatever institutional arrangement is recommended by the Commission, there needs to be full accountability in the sense of comprehensive legal provisions and well-resourced structures of independent oversight.

This section recommends a wholesale reconfiguration of the law and oversight structures concerning state surveillance and data protection – in *all* areas of policing.

(a) Legislation on state surveillance requires reform

The ICCL is gravely concerned that numerous forms of surveillance being carried out by An Garda Síochána and GSOC (among other state agencies) fail to satisfy the base requirements of legality, necessity and proportionality and therefore are systematically violating the rights of individuals in Ireland – and in the area of data retention, almost all people in Ireland. The rights being violated include the right to privacy, the right to freedom of expression and information, and the right to protection of personal data. Depending on how the information is used, many other rights may be violated through unlawful surveillance, including the right to a fair trial and the rights to freedom of association and assembly.

The Fennelly Commission Report¹²⁷ demonstrates a history of apathy on the part of both An Garda Síochána and the Department of Justice towards their obligations under the Constitution, the EU

Charter and the ECHR to prevent unlawful, unnecessary and disproportionate surveillance. Mr Justice Niall Fennelly reported in March 2017 that no consideration whatsoever was given by Garda management or the Department of Justice (which paid for the equipment) to the question of the lawfulness or otherwise of systematically recording calls on non-999 phone lines in stations throughout the country from 1995 onwards. Mr Justice Fennelly found that no written policies existed to dictate which lines were to be recorded, who could authorise the addition or removal of lines from recorders, for how long the recordings were to be kept, what the conditions of access to the recordings were, and when the recording should be destroyed. The report concluded that the recording systems were contrary to the common law, infringed the right to privacy in the Constitution, violated Article 8 ECHR, and infringed EU Directives and the EU Charter of Fundamental Rights.

In April 2017, former Chief Justice Mr Justice John L Murray completed his Review of the Law on the Retention of and Access to Communications Data,¹²⁸ in light of concerns over the accessing by GSOC of journalists' communications data in order to identify their sources for the purposes of an investigation. Mr Justice Murray found that the indiscriminate and unsupervised manner in which An Garda Síochána, GSOC and other state agencies are currently entitled to require communications providers to retain and provide access to subscriber 'metadata' is wholly contrary to the requirements of the EU law and the ECHR.¹²⁹

Both the Fennelly Report and the Murray Report, and continuing flaws in the government's efforts to legislate in the area of surveillance (discussed below), should serve as major warning signs that the institutions of the State, on the whole, either do not currently understand or do not respect the limitations imposed on the State by fundamental rights guarantees.¹³⁰

The following surveillance regimes, among others, require urgent revision:

- **Communications (Retention of Data) Act 2011 and Heads of Communications (Data Retention) Bill 2017.** The 2011 Act currently obliges communications service providers to retain metadata (such as date, time, location, user name, address, phone number and IP address) of everyone's phone calls, text messages, emails and internet communications. The Act requires providers to disclose the data upon request by senior members of An Garda Síochána, the Defence Forces or GSOC, among other state bodies. The EU Directive 2006/24 upon which the 2011 Act is based was declared invalid by the Court of Justice of the European Union (CJEU) in the 2014 case of *Digital Rights Ireland*.¹³¹ The CJEU ruled that the Directive breached the EU Charter of Fundamental Rights because it failed to require adequate safeguards against unlawful access to individuals' data. The subsequent 2016 judgment in *Tele2* establishes without doubt that Ireland's 2011 Act is unlawful.¹³² In November 2017, the ICCL and Digital Rights Ireland made submissions on the Heads of the Communications (Retention of Data) Bill 2017 to the Oireachtas Joint Committee on Justice and Equality,¹³³ pointing out that the proposed new legislative regime is still incompatible with EU and ECHR law, including because of the overly broad criteria according to which data may be accessed and the absence of an effective independent oversight body.
- **Criminal Justice (Mutual Assistance) Act 2008.** As Mr Justice Murray discussed in his Review, the Minister for Justice and Garda Síochána use the procedure for obtaining court orders under this 2008 Act to gain access to data retained under the Communications (Retention of Data) Act 2011, for the purpose of providing such data to foreign law enforcement authorities. The Murray Review makes clear that this system has insufficiently rigorous criteria for access and inadequate safeguards regarding the use of the data by foreign authorities to comply with the EU Charter and the ECHR.

- **Postal Packets and Telecommunications Messages (Regulations) Act 1993.** This Act allows for ‘phone tapping’ (including the interception of mobile phone calls and text messages) without oversight by the judiciary or an independent tribunal. The ICCL believes that the absence of independent oversight renders this system incompatible with the EU Charter and the ECHR, and Digital Rights Ireland and others have repeatedly highlighted that such a system of internal approval is open to human rights abuse.¹³⁴
- **CCTV surveillance.** Section 38 of the Garda Síochána Act 2005 (as amended) permits the Garda Commissioner to authorise the setting up of CCTV surveillance throughout the country, including by private groups, while the Minister for Justice sets the requirements for access and control. There is no requirement for authorisation by a judge or independent tribunal before CCTV can be used or accessed. The ICCL believes that the system needs to be evaluated for compliance with the State’s human rights obligations.
- **Interception of the content of internet communications.** There is no legislative basis for the interception of the content of internet communications. In November 2016, the Department of Justice published a ‘Policy Document on proposed amendments to the legislative basis for the lawful interception of communications’.¹³⁵ The proposal seeks, essentially, to extend the existing regime for interception of traditional telephony to the internet. No judicial authorisation would be required, among other shortcomings. Digital Rights Ireland has published a detailed analysis of the unlawful nature of the proposal.¹³⁶
- **Use of informants.** There is no legislation in Ireland regulating the use of informants or undercover police. In 2006, the ICCL made a number of key recommendations for human rights-based reforms of covert policing on foot of the Morris Tribunal reports.¹³⁷ The ICCL called for Garda covert policies and practices to be set out in law and subject to external scrutiny by a High Court judge, for example; for policies and supervisory procedures to be human rights-proofed; and for members of An Garda Síochána engaged in covert policing to undergo training on human rights-based policies. Digital Rights Ireland has also called for human rights-compliant regulation of informants and undercover policing in Ireland.¹³⁸

(b) Data Protection legislation requires review

The Fennelly Report demonstrates that historically there have been large gaps in the understanding of, and structures to ensure compliance with, the data protection obligations of An Garda Síochána. The Central Statistics Office’s current difficulties in determining how and to what extent the Gardaí have been recording incidents of domestic abuse¹³⁹ suggest the ongoing nature of the problem.

We welcome that An Garda Síochána is currently recruiting a Chief Data Officer who will report to the Deputy Commissioner, Strategy and Governance, on foot of recommendations from the Garda Inspectorate. We are nonetheless concerned at the enormity of the task of ensuring compliance with the data protection obligations of the Garda Síochána and GSOC, among other state bodies, and urge the Commission on the Future of Policing to consider the following:

- **Is the Irish legal regime concerning data protection human rights-compliant?** The Department of Justice published Heads of the Data Protection Bill 2017 in May 2017.¹⁴⁰ The purpose of the proposed legislation is to implement the EU General Data Protection Regulation and the related Data Protection Directive for law enforcement bodies. According to Article 4(2) of the Treaty on the European Union, ‘national security remains the sole

responsibility of each EU Member State’. Because EU Directives do not cover the area of ‘national security’, the ICCL is concerned that the proposed Irish legal regime on data protection will fail to legally regulate (by way of obligations to demonstrate necessity and proportionality, and independent and effective oversight) the treatment of personal data for ‘national security’ reasons. A 2015 report by the European Union Agency for Fundamental Rights (EU FRA) on surveillance by intelligence services in EU member states provides an important reminder that even where there are no EU Directives in place, the ECHR still applies and the EU Charter may still be determined by the CJEU to apply.¹⁴¹ In addition, the Irish Constitution and all of Ireland’s international human rights obligations apply.

- **Are the policies and procedures for the use of the PULSE system human rights-compliant?**
The ICCL is highly concerned at the findings of the Independent Review Mechanism (IRM) in May 2014 regarding PULSE, to which both An Garda Síochána and GSOC have access. The IRM stated that: ‘It appears an entry to the system is readily achieved yet removal from it, or correction of it, is either very difficult or impossible. The possible consequences are many: for instance, the wrongful denial of “station bail” due to mistaken entries on PULSE, the inaccurate outcome of Garda vetting and the mistaken targeting for Garda attention of persons inaccurately classed as worthy of same.’¹⁴²

(c) There is a need for independent oversight of state surveillance and use of personal data

The system of oversight of state surveillance and treatment of personal data appears to be wholly insufficient to ensure the lawfulness, necessity and proportionality of interferences with individuals’ rights. In basic terms, the deficiencies include that:

- where there is no legislation governing surveillance there is no effective independent oversight;
- the ‘designated judge’ and ‘complaints referee’ roles established by the Postal Packets and Telecommunications Messages (Regulations) Act 1993 and Communications (Retention of Data) Act 2011 (and proposed by the Heads of the Communications (Retention of Data) Bill 2017) are insufficiently resourced to carry out effective independent oversight and do not publish sufficient information to ensure public confidence;
- the Data Protection Commissioner is denied a comprehensive oversight function in the area of policing because of the ‘state security’ exceptions in current data protection legislation and the proposed ‘national security’ exception in the Heads of the Data Protection Bill 2017; and
- there is no parliamentary oversight of state surveillance and treatment of personal data.

The ICCL recommends that, as part of a wholesale reconfiguration of the law on state surveillance and data protection, there should be a statutory unified supervisory authority with parliamentary accountability that is capable of overseeing *all* state surveillance and that supplements the Data Protection Commissioner’s current role by overseeing the treatment of personal data in the ‘state security’ context (or the treatment of personal data in the entire area of policing). This authority should consist of at least one full-time judge supported by a secretariat with sufficient technical expertise and financial resources to provide detailed support including formalised public reports. We also recommend that a mechanism of parliamentary oversight be established, with sufficient controls and security clearance to ensure effective independent oversight of all state surveillance and data protection methods.

The glaring deficiencies in the oversight of state surveillance and treatment of personal data in Ireland are discussed in detail in the recent submissions by the ICCL and Digital Rights Ireland to the Joint Oireachtas Committee on Justice and Equality regarding the Heads of the Communications (Retention of Data) Bill 2017.¹⁴³ The deficiencies are also addressed by Digital Rights Ireland generally,¹⁴⁴ and in the joint report by Privacy International and Digital Rights Ireland to the UN Human Rights Council in 2015.¹⁴⁵ It is important to briefly highlight the following:

- **European law requires independent and effective supervision of state surveillance and use of personal data.** The CJEU has through a series of judgments held that independent and effective supervision of state authorities' access to personal data is an essential component of the right to personal data protection, particularly in the surveillance context.¹⁴⁶ In 2017 the EU FRA issued a comprehensive report on the EU fundamental rights framework regarding state surveillance. It explained the aspects of the independent and effective supervision required by EU and ECHR law, including that:
 - 'EU Member States should ensure that oversight bodies' mandates include public reporting to enhance transparency. The oversight bodies' reports should be in the public domain and contain detailed overviews of the oversight systems and related activities (e.g. authorisations of surveillance measures, on-going control measures, *ex-post* investigations and complaints handling).'¹⁴⁷
 - 'EU Member States should grant oversight bodies diverse and technically-qualified professionals'.¹⁴⁸ (The ECHR also held in *Klass v Germany* that supervisory mechanisms must be 'vested with sufficient competence to exercise an effective and continuous control'¹⁴⁹ over state surveillance activities.)
- **The 'Designated Judge' and 'Complaints Referee' functions** under the Postal Packets and Telecommunications Messages (Regulations) Act 1993 and Communications (Retention of Data) Act 2011 (and proposed by the Heads of the Communications (Retention of Data) Bill 2017) **are insufficient to provide independent and effective supervision.** Currently, a Designated Judge of the High Court reports annually to the Taoiseach on the operation of these pieces of legislation and whether the state authorities are complying with their statutory obligations. In addition, a Complaints Referee (normally a serving judge of the Circuit Court) is appointed to receive and investigate complaints from persons who believe that their communications have been unlawfully intercepted. These judicial functions are part-time roles of already busy judges with no staff, specialist training or technical advisors.¹⁵⁰ As Transparency International and Digital Rights Ireland have pointed out, the annual reports of the Designated Judge are formulaic, non-descriptive and rarely more than a page or two in length.¹⁵¹ The investigations and decisions of the Complaints Referee, meanwhile, are not published. It is worth noting that numerous EU countries explicitly require by law that oversight bodies have internal technical competence.¹⁵²
- **The need for effective parliamentary oversight.** Ireland and Malta are the only two countries in the EU that do not provide for parliamentary oversight of intelligence activities.¹⁵³ The EU FRA has stated that a full range of actors including parliament must be involved in holding intelligence services accountable.¹⁵⁴ The UN Office of the High Commissioner for Human Rights (OHCHR) has also stated that 'the involvement of all branches of government in the oversight of surveillance programmes...is essential to ensure the effective protection of the law'.¹⁵⁵ Parliamentary oversight is crucial precisely because of the secretive nature of security and intelligence activities.¹⁵⁶ It counters the risk of regulatory capture of a solely judicial

mechanism of accountability, whereby a small pool of judges hearing only from state agencies may come to lose their objectivity.¹⁵⁷

- **Current ‘state security’ exception to the Data Protection Commission’s functions.** The Data Protection Commissioner’s mandate to oversee the compliance of An Garda Síochána and GSOC with their data protection obligations is currently undermined by a legislative carve-out regarding matters of state security, which provides that data protection law ‘does not apply to... personal data that in the opinion of the Minister [for Justice] or the Minister for Defence are, or at any time were, kept for the purpose of safeguarding the security of the State’.¹⁵⁸ This is coupled with specific exclusions elsewhere in the legislation.¹⁵⁹ Consequently, while the DPC has examined surveillance in the criminal justice context – for example, a 2014 audit of An Garda Síochána reviewed access to retained telecommunications data¹⁶⁰ – this power does not extend to the state security context if the Executive objects to its use. Furthermore, while the 2011 Act permits the designated judge to communicate with the DPC in the exercise of his function, as of July 2016 there was ‘no record of the Designated Judge having ever contacted the Office of the Data Protection Commissioner as per section 12(4) since the inception of the Act’.¹⁶¹ In seven EU member states, data protection authorities have powers over intelligence services that are equivalent to their powers over all other data controllers.¹⁶²

4. A CULTURE OF RESPECT FOR HUMAN RIGHTS AND EQUALITY

Notwithstanding that the above recommendations largely concern laws and structures, the ICCL acknowledges that human rights-based reform of policing requires a holistic approach. This includes a change of attitude towards policing in Ireland by and towards those involved in it, and the revision of management structures in order to secure a culture of respect for and pride in human rights.

The ICCL agrees with the assessment of Dr Vicky Conway that:

There is often a distinction between the law in books and the law in action. Police culture, the norms and beliefs which develop within the occupation, can shape how police use that discretion, how they interpret, apply and respond to those laws. In order to reach a state where human rights considerations naturally influence the use of discretion, efforts must go beyond promulgating appropriate regulations and engage with the dominant police culture... When it comes to how human rights standards can influence policing, this can be conceived of as a two-stage process. Most immediately, the relevant regulations and procedures must be revised to ensure that they are human rights compliant. What perhaps presents the greater challenge is altering the attitudes and beliefs of those that apply and enforce the laws and regulations to ensure that human rights principles underlie all actions. The aim of reform should be that human rights values, rather than the specific legal requirements, inform every action of persons exercising these powers.¹⁶³

We also highlight the view of the Committee on the Administration of Justice in Northern Ireland, based on extensive comparative research into human rights-based policing practices internationally:

Experience from elsewhere shows that a representative police service will never be achieved by a piece-meal approach. The ethos, culture and composition of policing can only be effectively changed as part of a holistic process aimed at overhauling the philosophy, policies and practices of policing...neither 'rule tightening' nor 'cultural change' will be effective on its own. Cultural change will be effective only if systems of accountability are there as a back-up to discipline those who continue to infringe people's rights. Conversely, changing the rules without working to ensure cultural change within the organisation is only likely to increase resentment amongst the rank-and-file about those rules.¹⁶⁴

Crucially, human rights-based policing also requires a new vision on the part of the State and elected representatives, whereby policing is seen as something that is all about people – and that includes the rights of the people who are affected by, and who carry out, policing.

(a) Community policing

Community policing requires real commitment on the part of government and the policing institutions, and the provision of adequate resources to enable the State's human rights obligations to be met in all areas with which policing interacts.

The ICCL, in partnership with Dr Johnny Connolly, is currently engaged in research on the meaning and methods of effective human rights-based community policing and intends to publish this research in due course. The ICCL believes that engagement with communities, and responsiveness on the part of both An Garda Síochána and the State more broadly to the full range of human rights issues which arise for individuals and communities who interact with An Garda Síochána, is crucial to effective policing.

The ICCL makes the following preliminary observations about community policing:

- Community policing needs to be properly respected and resourced by the State as a vital part of policing. Gardaí who engage in community policing need to be fully supported and the community policing structures and practices in communities need to be long-term and consistent.
- Communities should be properly involved in the development of operational priorities, policies and practices – in a way that goes beyond mere consultation without any obligation to act upon the community's concerns.
- Structures should be established to enable communities and An Garda Síochána to make known to the State, and to place an onus on the State to respond to, human rights issues that are affecting the people and communities who come into contact with policing (this may include, for example, discrimination, lack of access to adequate social care services, or socio-economic deprivation).

(b) Garda management and human resources structures

The reform of Garda management and human resources structures must be grounded in a commitment to ensuring respect for and protection of human rights.

The ICCL recognises and welcomes that the Garda Inspectorate has already provided detailed recommendations for the reform of management structures, the implementation of which the Policing Authority is beginning to oversee. As stated above, we recommend that the existing recommendations and the process of reform of Garda management be infused by human rights commitments and structures to ensure human rights compliance.

- **Regarding recruitment**, the ICCL reiterates its recommendations following publication of the Morris Tribunal Reports that reforms of recruitment practices are required in order to change the culture within An Garda Síochána.¹⁶⁵ Research by the Committee on the Administration of Justice in Northern Ireland demonstrates that a variety of approaches have been taken internationally, including 'bridging' schemes, targets for recruitment of under-represented groups, lateral entry schemes, mentoring schemes, fast-tracking for promotion of candidates identified as having high potential, particularly from under-represented groups and changes in the testing process.¹⁶⁶
- **Regarding discipline**, the ICCL believes that there is a need to review the procedural fairness of disciplinary proceedings, as recommended by GSOC¹⁶⁷ and the IHRC previously.¹⁶⁸

(c) Human rights-based training

The ICCL recommends that all training of Gardaí (including continuing education and training) incorporates human rights. Training should address the human rights obligations of An Garda Síochána from an operational perspective, through problem-based learning. As the Patten report recommended: the aim of human rights education should be that 'respect for the human rights of all, including suspects, should be an instinct rather than a procedural point to be remembered'. The ICCL believes that there is a need to re-visit and consider how to use the human rights-based training that was developed in the last decade, when the Garda Strategic Human Rights Advisory Committee was most active.

The ICCL highlights that there is an obligation on the State under Article 25 of the EU Victims Directive to 'ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.' The submission by the Victims' Rights Alliance to the Commission on the Future of Policing also raises this point.

It is also important to note the concern expressed by the UN Committee Against Torture to Ireland in 2017 'at the absence of specific training for public officials on the absolute prohibition of torture and on dealing with victims of gender-based violence, including domestic and sexual violence, as well as at the lack of training programmes on documenting injuries and other health consequences resulting from torture and ill-treatment, based on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) (art. 10)'.¹⁶⁹ The Committee recommended that the State:

- Make training on the provisions of the Convention and the absolute prohibition of torture, as well as on non-coercive interrogation methods, mandatory for public officials, in particular police and prison staff, including members of the Defence Forces, as well as for all other officials who come into contact with persons deprived of their liberty;
- Provide mandatory training on gender-based and domestic violence for police and other law enforcement officials, social workers, lawyers, prosecutors, judges and other public officials dealing with victims of gender-based violence, including domestic and sexual violence;
- Include information about the Convention and the absolute prohibition of torture in relevant training materials for law enforcement and other public officials;
- Ensure that the Istanbul Protocol is made an essential part of the training of all medical professionals and other public officials involved in work with persons deprived of their liberty; and
- Systematically collect information on the training of public officials and law enforcement personnel and develop and implement specific methodologies to assess its effectiveness and impact on the reduction of the incidence of torture.¹⁷⁰

APPENDIX: Selected ICCL Publications on Policing

- ICCL, 'Policy Paper on Police Reform: Why Patten Should Apply Here and How this can be Achieved' (March 2003), <https://www.iccl.ie/wp-content/uploads/2017/11/ICCL-policy-paper-on-police-reform2003.pdf>
- ICCL, 'Preliminary Submission to the European Committee for the Prevention of Torture (CPT)' (March 2006), <https://www.iccl.ie/wp-content/uploads/2017/11/Preliminary-Submission-to-the-European-Committee-for-the-Prevention-of-Torture-March-2006.pdf>
- ICCL, 'Implementing Morris: An Agenda for Change: Placing Human Rights at the Core of Policing in Ireland' (November 2006), <https://www.iccl.ie/wp-content/uploads/2017/11/Implementing-Morris-An-Agenda-for-Change-Placing-Human-Rights-at-the-core-of-Policing-in-Ireland-November-2006.pdf>
- An Garda Síochána and ICCL, 'The European Convention on Human Rights Act 2003: A Short Guide' (April 2007), <https://www.iccl.ie/wp-content/uploads/2017/11/Garda-Pocket-Human-Rights-Guide-published-in-association-with-An-Garda-S%C3%ADoch%C3%A1na-April-2007-1.pdf>
- ICCL, 'Civil Society Report on the List of Issues for the Fourth Periodic Examination of Ireland under the International Covenant on Civil and Political Rights' (2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNGO%2fIRL%2f14876&Lang=en
- ICCL, 'Report to the UN Committee Against Torture for the List of Issues Prior to Reporting under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' (16 August 2013), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_NGO_IRL_15586_E.pdf
- Shane Kilcommins, Claire Edwards and Tina O'Sullivan, *An International Review of Legal Provisions and Supports for People with Disabilities as Victims of Crime* (ICCL, December 2013), https://www.iccl.ie/wp-content/uploads/2017/11/ICCL_INT_Review_Publication_web_singlepages_2013.pdf
- ICCL, 'Civil Society Report to the Fourth Periodic Examination of Ireland under the International Covenant on Civil and Political Rights' (June 2014), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_CSS_IRL_17445_E.pdf
- ICCL, 'Review of the effectiveness of the legislation relating to oversight of An Garda Síochána by the Oireachtas Joint Committee on Justice, Defence and Equality: Submission by the Irish Council for Civil Liberties (ICCL)' (15 April 2014), https://www.iccl.ie/wp-content/uploads/2017/11/OirJusticeGardaActSub_Apr14.pdf
- ICCL, 'Know Your Rights: Criminal Justice and Garda Powers' (2nd edn, June 2014), <https://www.iccl.ie/know-your-rights-2/criminal-justice/>

- ICCL, ‘Response of the Irish Council for Civil Liberties (ICCL) to the Public Consultation on Establishing an Independent Policing Authority’ (30 May 2014), <https://www.iccl.ie/wp-content/uploads/2017/11/ICCL-Submission-on-Establishing-an-Independent-Policing-Authority-May-2014.pdf>
- ICCL, ‘Submission to the UN Committee Against Torture for the State Examination of Ireland’s Second Periodic Report’ (26 June 2017), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fIRL%2f27963&Lang=en

ENDNOTES

¹ As acknowledged, for example, by Gavan Duffy J in *The State (Burke) v Lennon* [1940] IR 136; Kenny J in *Ryan v Attorney General* [1965] IR 294; and Budd J in *O’Donovan v Attorney General* [1961] IR 114.

² Article 40.1

³ Article 40.3

⁴ Article 40.4

⁵ Article 40.3

⁶ Article 40.3

⁷ Article 40.3

⁸ Article 40.5

⁹ Article 40.6

¹⁰ Article 40.6

¹¹ Article 40.6

¹² Article 41.4

¹³ Article 40.3.2

¹⁴ Article 42A

¹⁵ Article 44.2

¹⁶ See for example *Kennedy v Ireland* [1987] *Irish Reports* 587.

¹⁷ See for example *The State (C) v Frawley* [1976] IR 365.

¹⁸ See for example *Ryan v Attorney General* [1965] IR 345; *The State (Richardson) v The Governor of Mountjoy Prison* [1980] ILRM 82.

¹⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>

²⁰ Charter of Fundamental Rights of the European Union 2000 OJ (C 364) 1, Article 8

²¹ Article 25

²² Article 26

²³ Article 31

²⁴ Article 34

²⁵ Article 35

²⁶ Article 38

²⁷ Recommendation Rec(2001) 10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, <https://polis.osce.org/node/4711> (as well as setting out a blueprint for a human rights based philosophy of policing, the Code calls upon member states to introduce national codes of police conduct reflecting the principles set out in the Code)

²⁸ www.coe.int/en/web/cpt/standards

²⁹ Opinion CommDH(2009)4 (12 March 2009), <https://rm.coe.int/16806daa54>

³⁰ Council of Europe Parliamentary Assembly, Declaration on the Police (Council of Europe Parliamentary Assembly, Resolution 690, 8 May 1979), <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16101&lang=en>

³¹ United Nations General Assembly, Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>

³² UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UNGA Res 70/175 (17 December 2015) UN Doc A/RES/65/230, https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

³³ United Nations, 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), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>

³⁴ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res 43/173 (9 December 1988) UN Doc A/RES/43/173, <http://www.un.org/documents/ga/res/43/a43r173.htm>

³⁵ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990, <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

³⁶ United Nations, Office of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No 8/Rev 1 (2004), <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>

³⁷ United Nations, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, <http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>

³⁸ United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc A/RES/40/34 (29 November 1985), <http://www.un.org/documents/ga/res/40/a40r034.htm>

³⁹ Committee Against Torture, General Comment No 2, 'Implementation of article 2 by States Parties' (23 November 2007), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en

⁴⁰ Committee Against Torture, General Comment No 3, 'Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f3&Lang=en

⁴¹ UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer: Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment' (20 July 2017) UN Doc A/72/178, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/223/15/PDF/N1722315.pdf?OpenElement>

⁴² According to section 7 of the Garda Síochána Act 2005, the 'function of the Garda Síochána' is:
to provide policing and security services for the State with the objective of:

- (a) preserving peace and public order,
- (b) protecting life and property,
- (c) vindicating the human rights of each individual,
- (d) protecting the security of the State,
- (e) preventing crime,
- (f) bringing criminals to justice, including by detecting and investigating crime, and
- (g) regulating and controlling road traffic and improving road safety.

⁴³ Mr Justice John L Murray, *Review of the Law on the Retention of and Access to Communications Data* (April 2017), [http://www.justice.ie/en/JELR/Review of the Law on Retention of and Access to Communications Data.pdf/Files/Review of the Law on Retention of and Access to Communications Data.pdf](http://www.justice.ie/en/JELR/Review%20of%20the%20Law%20on%20Retention%20of%20and%20Access%20to%20Communications%20Data.pdf/Files/Review%20of%20the%20Law%20on%20Retention%20of%20and%20Access%20to%20Communications%20Data.pdf) 19, 20, 21.

⁴⁴ Irish Human Rights and Equality Commission Act 2014, s42

⁴⁵ <https://www.ihrec.ie/app/uploads/2016/09/Public-Sector-Equality-and-Human-Rights-Duty-Leaflet.pdf>

⁴⁶ See for example the Human Rights Annual Reports produced for the Northern Ireland Policing Board by its Human Rights Advisor, Alyson Kilpatrick BL, available at www.nipolicingboard.org.uk

⁴⁷ For example, International Committee of the Red Cross, *International Rules and Standards for Policing* (Geneva, 2015), <https://www.icrc.org/eng/assets/files/other/icrc-002-0809.pdf>

Jim Murdoch and Ralph Roche, *A handbook for police officers and other law enforcement officials* (European Union and Council of Europe 2015), http://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

⁴⁸ Ionann Management Consultants, *An Garda Síochána: Human Rights Audit* (2004), <http://www.garda.ie/Documents/User/garda%20human%20rights%20audit.pdf>

⁴⁹ Moore and O'Rawe highlight as a failing of the post-Patten implementation process that the Oversight Commissioner recommended by Patten was not appointed until *after* legislation had been drafted and debated in Parliament and an implementation plan already drawn up by government. See Linda Moore and Mary O'Rawe, 'A New Beginning for Policing in Northern Ireland?' in Colin Harvey (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford 2001) 185

⁵⁰ Irish Human Rights Commission, *Policy Statement: Human Rights Compliance of An Garda Síochána* (April 2009), <https://www.ihrec.ie/documents/4ret-ihrc-policy-statement-human-rights-compliance-of-an-garda-siochana-april-09-doc/12-13>

⁵¹ *ibid.*

⁵² For example, An Garda Síochána, *Guidance on the Recording, Investigation and Management of Missing Persons*, [http://www.garda.ie/Documents/User/Guidance%20on%20the%20Recording%20Investigation%20and%20Management%20of%20Missing%20Persons%20\(External\).pdf](http://www.garda.ie/Documents/User/Guidance%20on%20the%20Recording%20Investigation%20and%20Management%20of%20Missing%20Persons%20(External).pdf)

⁵³ Irish Human Rights Commission, *Policy Statement: Human Rights Compliance of An Garda Síochána* (April 2009), <https://www.ihrec.ie/documents/4ret-ihrc-policy-statement-human-rights-compliance-of-an-garda-siochana-april-09-doc/12-13>

⁵⁴ Independent Review Mechanism, *Overview Report* (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 16

- ⁵⁵ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 23
- ⁵⁶ <http://www.irishexaminer.com/ireland/stand-off-over-garda-abuse-figures-cso-in-deep-investigation-of-quality-of-pulse-crime-records-465740.html>
- ⁵⁷ See for example, RTE News, 'Policing Authority seeks review over homicide figures' 29 January 2018, <https://www.rte.ie/news/ireland/2018/0129/936693-policing-authority/>
- ⁵⁸ ICCL, Submission to the UN Committee Against Torture for the State Examination of Ireland's Second Periodic Report (26 June 2017) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fIRL%2f27963&Lang=en
- ⁵⁹ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en paras 9-10
- ⁶⁰ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en paras 31-32.
- ⁶¹ United Nations Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland (19 August 2014) UN Doc CCPR/C/IRL/CO/4, para 8.
- ⁶² Vicky Conway, 'Human Rights and Policing in Ireland' in Suzanne Egan (ed.) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015) 346.
- ⁶³ Ibid.
- ⁶⁴ Irish Human Rights Commission, *Policy Statement: Human Rights Compliance of An Garda Síochána* (April 2009), <https://www.ihrec.ie/documents/4ret-ihrc-policy-statement-human-rights-compliance-of-an-garda-siochana-april-09-doc/13>, citing Dermot Walsh, *Human Rights and Policing in Ireland: Law, Policy and Practice* (Clarus Press 2009), 766-770.
- ⁶⁵ Garda Inspectorate, *Changing Policing in Ireland: Delivering a Visible, Accessible and Responsive Service* (2015) http://www.gsinsp.ie/en/GSINSP/1286-ChangingPolicinginIreland_Low-Full.pdf/Files/1286-ChangingPolicinginIreland_Low-Full.pdf, 2.
- ⁶⁶ See Independent Review Mechanism recommendations regarding the need to amend the Discipline Regulations: Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf>, 20, 21, 22.
- ⁶⁷ Report of CPT visit to Ireland 16 to 26 September 2014, at para 14. <https://rm.coe.int/1680696c9a>
- ⁶⁸ In the course of the Council of Europe Committee for the Prevention of Torture (CPT) visit to Ireland in 2014, the Irish authorities confirmed by that all persons detained by An Garda Síochána are specifically asked if they want to consult a solicitor and concludes that "the position now is that An Garda Síochána cannot question a detained person who has requested legal advice until such time as that advice has been obtained". The CPT was also informed that solicitors are permitted to participate in police interviews and "to intervene where appropriate", and that the practice of advising detained persons of their right to have legal representation present during an interview was being actively implemented. See Report of CPT visit to Ireland 16 to 26 September 2014, at para 14. <https://rm.coe.int/1680696c9a>.
- ⁶⁹ Decision of 18th January 2017
- ⁷⁰ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en para 7
- ⁷¹ CPT, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 September 2014 (Strasbourg, 17 November 2015), 16, <https://rm.coe.int/pdf%20/1680727e23>
- ⁷² See for example Caroline O'Doherty, 'Review of 25,000 in care required as law on consent changes' *Irish Examiner* (8 January 2018), <https://www.irishexaminer.com/ireland/25000-elderly-and-vulnerable-people-held-illegally-in-care-homes-465461.html>. See also Sage Support and Advocacy Service, Submission to the United Nations Committee Against Torture (2017) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fCSS%2fIRL%2f27965&Lang=en.
- ⁷³ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en, paras 35 and 36
- ⁷⁴ To form part of the Assisted Decision-Making (Capacity) Act 2015 <http://health.gov.ie/wp-content/uploads/2017/12/Public-Consultation-paper-on-draft-deprivation-of-liberty-proposals.pdf>
- ⁷⁵ Mental Health Act 2001 (revised), <http://revisedacts.lawreform.ie/eli/2001/act/25/revised/en/html#SEC2>
- ⁷⁶ Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010, p.60. Available at: <http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.pdf>. (accessed 7/8/13)
- ⁷⁷ See IHRC, Submission to the Department of Health and Children on Revised Mental Health Legislation (2011); see also United Nations Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland (19 August 2014) UN Doc CCPR/C/IRL/CO/4 para 12

⁷⁸ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 30.

⁷⁹ See *El Masri v Macedonia* (2013) 57 EHRR 25.

⁸⁰ See also Recommendations of the Irish Human Rights and Equality Commission on the Garda Síochána (Amendment) (No 3) Bill 2014 (November 2014), https://www.ihrec.ie/download/pdf/ihrec_observations_on_the_garda_sochna_amendment_no_3_bill_2014_nov_2014.pdf pp5-6

⁸¹ See for example *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20; *Ergi v. Turkey*(2001) 32 EHRR 388.

⁸² See for example *Keenan v. United Kingdom* (2001) 33 EHRR 913.

⁸³ See for example *Khan v. United Kingdom* (2001) EHRR 1016.

⁸⁴ See *Gulec v. Turkey* (1999) 28 EHRR 121; *McKerr v United Kingdom* (2002) 34 EHRR 20.

⁸⁵ *El Masri v Macedonia* (2013) 57 EHRR 25, paras 183-185; See also *Assenov (1999) 28 E.H.R.R. 652* at [103]; and *Batı v Turkey* (2006) 42 E.H.R.R. 37at [136] (extracts).

⁸⁶ See *Tanrikulu v Turkey* (2000) 30 E.H.R.R. 950 at [104]; and *Gül v Turkey* (2002) 34 E.H.R.R. 28 at [89].

⁸⁷ See *Boicenco v Moldova* (41088/05) 11 July 2006 at [123].

⁸⁸ Ibid.

⁸⁹ See further IHRC April 2009 at pp. 28-33.

⁹⁰ See for example *Güleç v Turkey* (1999) 28 EHRR 121; See also *El Masri v Macedonia* (2013) 57 EHRR 25 para 185

⁹¹ *Paul and Audrey Edwards v the United Kingdom* App No 46477/99 (ECtHR, 14 March 2002)

⁹² para 84

⁹³ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Recommended by General Assembly resolution 55/89 of 4 December 2000, Office of the United Nations High Commissioner for Human Rights (hereinafter, “UN Principles”), <http://www2.ohchr.org/english/law/investigation.htm>

⁹⁴ Thomas Hammarberg, *Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police*, CommDH (2009) 4) <https://rm.coe.int/16806daa54>

⁹⁵ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 41

⁹⁶ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 34

⁹⁷ The ICCL called for reform of the inquest system in ICCL, ‘Report to the UN Committee Against Torture for the List of Issues Prior to Reporting under the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment’ (16 August 2013), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_NGO_IRL_15586_E.pdf

⁹⁸ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 41

⁹⁹ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 41, 42

¹⁰⁰ <http://www.westmeathexaminer.ie/news/roundup/articles/2017/04/28/4139190-fight-to-cut-road-deaths-continues/>

¹⁰¹ <http://www.justice.ie/en/JELR/Pages/PR17000170>

¹⁰² Irish Human Rights and Equality Commission, *Ireland and the Optional Protocol to the UN Convention Against Torture* (2017) <https://www.ihrec.ie/our-work/cat/opcat/>

¹⁰³ Irish Penal Reform Trust, OPCAT ratification campaign: <http://www.iprt.ie/opcat>

¹⁰⁴ See Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006) (2003) 42 ILM 26, Arts 11 and 24.

¹⁰⁵ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en, para 7.

¹⁰⁶ Ibid para 8.

¹⁰⁷ Ibid para 9.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid para 10.

¹¹⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Government of Ireland on the visit to Ireland carried out from 16 to 26 September 2014, <https://rm.coe.int/pdf%20/1680727e23> 12.

¹¹¹ Ibid 12-14.

¹¹² The Independent Review Mechanism was a non-statutory review established by the Minister for Justice in May 2014, whereby a panel of barristers with experience in criminal law examined historic and recent complaints made to the Department of Justice alleging Garda malpractice. See Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf>

¹¹³ Ibid 2.

¹¹⁴ Ibid 3.

¹¹⁵ Ibid 4.

¹¹⁶ Ibid 49.

¹¹⁷ Ibid 50.

¹¹⁸ At page 1

¹¹⁹ See for example, RTE News, 'GSOC too understaffed to investigate protected disclosures, says chairperson' (15 January 2018), <https://www.rte.ie/news/ireland/2018/0114/933224-gsoc-protected-disclosures/>

¹²⁰ Garda Síochána Ombudsman Commission, *Proposal for Legislative Change: Submission to the Department of Justice and Equality* (December 2017), <file:///C:/Users/maeve.orourke/Downloads/GSOC-Proposal-for-Legislative-Change-Dec-2017.pdf>

¹²¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Government of Ireland on the visit to Ireland carried out from 16 to 26 September 2014, <https://rm.coe.int/pdf%20/1680727e23> 14.

¹²² Garda Síochána Ombudsman Commission, Frequently Asked Questions: Will GSOC send my complaint back to the Garda Síochána? <https://www.gardaombudsman.ie/about-gsoc/faqs/will-gsoc-send-complaint-back-garda-siochana/>

¹²³ See Oireachtas Joint Committee on Justice and Equality, *Report on Garda Oversight and Accountability* (December 2016), <https://www.oireachtas.ie/parliament/media/committees/justice/Report-on-Garda-Oversight.pdf>

¹²⁴ Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf> 36-37.

¹²⁵ Oireachtas Joint Committee on Justice and Equality, *Report on Garda Oversight and Accountability* (December 2016), <https://www.oireachtas.ie/parliament/media/committees/justice/Report-on-Garda-Oversight.pdf>

¹²⁶ See *Schrems v Data Protection Commissioner* [2014] 3 IR 75, for example.

¹²⁷ Mr Justice Niall Fennelly, Report of the Commission of Investigation into Certain Matters relative to An Garda Síochána and other persons (31 March 2017), https://www.taoiseach.gov.ie/eng/Fennelly_Commission/Fennelly_Commission.html

¹²⁸ Mr Justice John L Murray, *Review of the Law on the Retention of and Access to Communications Data* (April 2017), http://www.justice.ie/en/JELR/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf/Files/Review_of_the_Law_on_Retention_of_and_Access_to_Communications_Data.pdf

¹²⁹ It is important to note – as Mr Justice Murray did in his review – that although the Irish Constitution also protects the right to privacy, where EU law applies in Ireland it takes precedence over the Irish Constitution and therefore is the most relevant source of law. It is further worth noting that the EU Charter incorporates ECHR law.

¹³⁰ We urge the Commission to read, among other sources of information regarding the routine violation of privacy rights in Ireland, (a) the recent publications by Digital Rights Ireland (www.digitalrights.ie), (b) the joint submission by the ICCL and Digital Rights Ireland on the Heads of Bill of the Communications (Data Retention) Bill 2011, Irish Council for Civil Liberties and Digital Rights Ireland, *Submission to Joint Committee on Justice and Equality on the Communications (Retention of Data) Bill 2017 General Scheme Pre-legislative Scrutiny* (16 November 2017), <https://www.iccl.ie/category/resources/publication/other/>; and (c) the report by Privacy International and Digital Rights Ireland to the UN Human Rights Council's most recent Periodic Review of Ireland: Privacy International and Digital Rights Ireland, *The Right to Privacy in Ireland: Stakeholder Report for the Universal Periodic Review, 25th Session – Ireland* (September 2015), https://www.digitalrights.ie/dri/wp-content/uploads/2015/12/Ireland_UPR-Stakeholder-Submission-DRI-and-Privacy-International_FINAL.pdf

¹³¹ *Digital Rights Ireland v The Minister for Communications, Marine and Natural Resources & Others* (Joined cases C-293/12 and C-594/12).

¹³² The 2011 Act was intended to give effect to EU Directive 2006/24 on the retention of data generated by public electronic communications. In the 2014 case of *Digital Rights Ireland* the CJEU declared the Directive invalid and contrary to the EU Charter because it failed to make express provision for sufficient safeguards for the protection of the fundamental rights of citizens as guaranteed by the EU Charter. In the 2016 case of *Tele2* numerous countries' laws establishing a system of indiscriminate communications data retention, based on the invalidated Directive, were held likewise by the CJEU to be contrary to the EU Charter of Fundamental Rights.

As set out by Mr Justice Murray, relying on the caselaw of the Court of Justice of the European Union (CJEU):

- Automatic and indiscriminate retention of communications data is a serious infringement or curtailment of nationally and internationally recognised fundamental rights;
- Communications data may only be retained and accessed when strictly necessary for the prevention of serious crime and terrorism, and for other purposes prescribed in Article 15(1) of Directive 2002/58;
- 'Strict necessity' means when no other less intrusive means of achieving such purposes is reasonably available, and mere utility or potential utility is not the test;
- Retention and access to communications data is still only permitted when accompanied by robust safeguards protecting the fundamental rights affected by it; and
- Administrative safeguards are not enough as there is an ever-present risk that they will be undercut by the demands and exigencies of investigatory agencies for access to retained communications data in pursuit of their own objectives.

¹³³ Irish Council for Civil Liberties and Digital Rights Ireland, *Submission to Joint Committee on Justice and Equality on the Communications (Retention of Data) Bill 2017 General Scheme Pre-legislative Scrutiny* (16 November 2017), <https://www.iccl.ie/category/resources/publication/other/>

¹³⁴ See, for example, Privacy International and Digital Rights Ireland, *The Right to Privacy in Ireland: Stakeholder Report for the Universal Periodic Review, 25th Session – Ireland* (September 2015), https://www.digitalrights.ie/dri/wp-content/uploads/2015/12/Ireland_UPR-Stakeholder-Submission-DRI-and-Privacy-International_FINAL.pdf

¹³⁵ Department of Justice and Equality, Policy Document on proposed amendments to the legislative basis for the lawful interception of communications, [http://www.justice.ie/en/JELR/Amendments to the legislative basis for the lawful interception of communications policy paper.pdf/Files/Amendments to the legislative basis for the lawful interception of communications policy paper.pdf](http://www.justice.ie/en/JELR/Amendments%20to%20the%20legislative%20basis%20for%20the%20lawful%20interception%20of%20communications%20policy%20paper.pdf/Files/Amendments%20to%20the%20legislative%20basis%20for%20the%20lawful%20interception%20of%20communications%20policy%20paper.pdf)

¹³⁶ Digital Rights Ireland, ‘Extending Irish interception of communications to the Internet’, 25 November 2016, <https://www.digitalrights.ie/extending-irish-interception-of-communications-to-the-internet/>: ‘the proposals aim to extend a deeply flawed system without addressing the fundamental problems which make the existing system in breach of international fundamental rights standards...

- Surveillance based on political authorisation (rather than a judicial warrant) is undesirable, inconsistent with caselaw such as *Digital Rights Ireland* and unnecessary.
- International human rights standards require that particularly sensitive communications – particularly between journalists/source and lawyer/client – should receive special protection. Irish interception law fails to do this at the moment and would not do so under these proposals.
- The oversight mechanism is ineffective – the existing “designated judge” mechanism is a part-time job of a busy High Court judge with no technical expertise or staff, is completely lacking in transparency and has failed to pick up on multiple issues with the data retention system. This would remain as is.
- International human rights standards require some form of notification after surveillance where this is possible without jeopardising investigations or compromising national security. Irish law already recognises this in the case of physical bugs – but there is no provision for notification in the case of interception and this will continue under these proposals.
- The existing system has almost no controls on downstream use of intercepted communications – i.e. whether intercepted material is accessed for relevance and deleted if irrelevant or intercepted by mistake, how intercepted material is shared with other state agencies or other countries, when intercepted material must be deleted, and so on. And this would not be addressed.’

¹³⁷ Irish Council for Civil Liberties, *Implementing Morris: An Agenda for Change: Placing Human Rights at the Core of Policing in Ireland* (November 2006), <https://www.iccl.ie/wp-content/uploads/2017/11/Implementing-Morris-An-Agenda-for-Change-Placing-Human-Rights-at-the-core-of-Policing-in-Ireland-November-2006.pdf>

¹³⁸ Privacy International and Digital Rights Ireland, *The Right to Privacy in Ireland: Stakeholder Report for the Universal Periodic Review, 25th Session – Ireland* (September 2015), https://www.digitalrights.ie/dri/wp-content/uploads/2015/12/Ireland_UPR-Stakeholder-Submission-DRI-and-Privacy-International_FINAL.pdf, 19.

¹³⁹ <http://www.irishexaminer.com/ireland/stand-off-over-garda-abuse-figures-cso-in-deep-investigation-of-quality-of-pulse-crime-records-465740.html>

¹⁴⁰ Department of Justice and Equality, ‘Tánaiste publishes General Scheme of Data Protection Bill 2017’ (12 May 2017), <http://www.justice.ie/en/JELR/Pages/PR17000155>

¹⁴¹ European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU: Volume 1: Member States’ legal frameworks* (2015), 11, citing Anderson, D., Independent Reviewer of Terrorism Legislation (2015), p. 71.

¹⁴² Independent Review Mechanism, Overview Report (July 2016), <http://www.justice.ie/en/JELR/IRM%20Overview%20Report.pdf/Files/IRM%20Overview%20Report.pdf>, 26

¹⁴³ Irish Council for Civil Liberties and Digital Rights Ireland, *Submission to Joint Committee on Justice and Equality on the Communications (Retention of Data) Bill 2017 General Scheme Pre-legislative Scrutiny* (16 November 2017), <https://www.iccl.ie/category/resources/publication/other/>

¹⁴⁴ www.digitalrights.ie

¹⁴⁵ Privacy International and Digital Rights Ireland, *The Right to Privacy in Ireland: Stakeholder Report for the Universal Periodic Review, 25th Session – Ireland* (September 2015), https://www.digitalrights.ie/dri/wp-content/uploads/2015/12/Ireland_UPR-Stakeholder-Submission-DRI-and-Privacy-International_FINAL.pdf.

¹⁴⁶ Cited in European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), see in particular CJEU, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others*, 8 April 2014, para. 68; CJEU, C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, 6 October 2015, para. 41 and 66. See also Working Group on Data Protection in Telecommunications (2017).

¹⁴⁷ European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), p12.

¹⁴⁸ European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), p11.

¹⁴⁹ *Klass v Germany*, Application no 5029/71 (ECtHR, 6 September 1978) para 56

¹⁵⁰ See Privacy International and Digital Rights Ireland, *The Right to Privacy in Ireland Stakeholder Report Universal Periodic Review 25th Session – Ireland* (September 2015) at para 28.

- ¹⁵¹ See Privacy International and Digital Rights Ireland, *The Right to Privacy in Ireland Stakeholder Report Universal Periodic Review 25th Session – Ireland* (September 2015) at paras 24-32.
- ¹⁵² European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), p12.
- ¹⁵³ European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), p66.
- ¹⁵⁴ European Union Agency for Fundamental Rights, *Surveillance by Intelligence Services: Fundamental Rights , Safeguards and Remedies in the EU: Volume II: Field Perspectives and Legal Update* (Luxembourg, 2017) p65
- ¹⁵⁵ Office of the United Nations High Commissioner for Human Rights, 'The Right to Privacy in a Digital Age,' June 30, 2014, 12–13, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.
- ¹⁵⁶ European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), citing Born H and Leigh I, *Making intelligence accountable: Legal standards and best practice for oversight of intelligence agencies* (Parliament of Norway Publishing House, Oslo, 2005) 16.
- ¹⁵⁷ European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), p56
- ¹⁵⁸ The Data Protection Acts 1988 and 2003, Section 1(4).
- ¹⁵⁹ For example, any restrictions on the processing of personal data 'do not apply if the processing is... in the opinion of a member of the Garda Síochána [of a certain rank] or an officer of the Permanent Defence Force [of a certain rank] and is designated by the Minister for Defence under this paragraph, required for the purpose of safeguarding the security of the State'. (The Data Protection Acts 1988 and 2003, Section 8.)
- ¹⁶⁰ Data Protection Commissioner, 'An Garda Síochána: Final Report of Audit,' March 2014, 61, available at: <http://www.garda.ie/Documents/User/An%20Garda%20S%C3%ADoch%C3%A1na%20ODPC%20Report%20Final.pdf>.
- ¹⁶¹ Email of 18 July 2016 from the Office of the DPC in connection with EU Fundamental Rights Agency report into surveillance oversight. On file with TJ McIntyre.
- ¹⁶² European Union Agency for Fundamental Rights report, *Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU* (2017), p56.
- ¹⁶³ Vicky Conway, 'Human Rights and Policing in Ireland' in Suzanne Egan (ed.) *International Human Rights: Perspectives from Ireland* (Bloomsbury 2015), 341 – 343.
- ¹⁶⁴ Committee on the Administration of Justice, *Human Rights on Duty* (1997), 35 - 40
- ¹⁶⁵ ICCL, *Implementing Morris: An Agenda for Change: Placing Human Rights at the Core of Policing in Ireland*, <https://www.iccl.ie/wp-content/uploads/2017/11/Implementing-Morris-An-Agenda-for-Change-Placing-Human-Rights-at-the-core-of-Policing-in-Ireland-November-2006.pdf>
- ¹⁶⁶ Committee on the Administration of Justice, *Human Rights on Duty* (1997) 45
- ¹⁶⁷ GSOC, *Response to the Invitation from the Joint Committee on Justice, Defence and Equality for Submissions on the Effectiveness of Legislation relating to oversight of An Garda Síochána*, July 2014, 15.
- ¹⁶⁸ Irish Human Rights Commission, *Policy Statement: Human Rights Compliance of An Garda Síochána* (April 2009), <https://www.ihrec.ie/documents/4ret-ihrc-policy-statement-human-rights-compliance-of-an-garda-siochana-april-09-doc/21-22>
- ¹⁶⁹ Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2&Lang=en para 13.
- ¹⁷⁰ *ibid* para 14.