

# ICCL Submission on the General Scheme of the Garda Síochána (Powers) Bill

August 2021

## Executive Summary

ICCL welcomes the codification of the powers of search, arrest and detention in this Bill. The Bill offers the opportunity to provide much needed clarity, consistency and transparency regarding the scope and use of these powers by An Garda Síochána. It also offers the opportunity to ensure that police powers in Ireland conform strictly to human rights law and standards, in particular on the rights to liberty and freedom of movement, privacy, bodily integrity, equality and non-discrimination, and the right to a fair trial. It is well established by human rights law that interferences with these rights must be prescribed by law, necessary in a democratic society and proportionate to a legitimate aim. We welcome the many references to human rights and the requirement for necessity and proportionality in the exercise of police powers throughout the Bill.

However, ICCL urges government to ensure that the opportunity to ensure the exercise of police powers in this country conforms with the highest standards of human rights law is not missed. We recommend that the scope and use of powers are as limited as possible to achieve criminal justice aims and we recommend that the Bill contains more robust safeguards to protect all individuals against disproportionate interferences in their fundamental rights.

Our submission outlines our concerns on a Head to Head basis, as summarized below:

On **Head 2** we recommend the amendment of the definition of ‘reasonable suspicion’ to reflect relevant case law, in particular to include that the grounds, when judged objectively, are fair and reasonable.

On **Head 6**, we recommend amending the provision on the obligation to respect fundamental rights to make it more meaningful by setting out in detail how it will be implemented, such as by providing for human rights training for all members of AGS.

On **Head 7 and 8**, we recommend that the legal and policy framework should provide more clarity on the exercise of police powers in relation to children and more safeguards for persons with impaired capacity generally. And we recommend wider consultation when developing guidelines and regulations under these Heads.

On **Head 11, 12 and 13** in relation to search powers, we recommend that gender, ethnicity and other protected characteristics are included in the record of stop and searches, as well as the geographic location of where the search is taking place. We

recommend the provision of additional information, a requirement of consent where there is no arrest, and specific limitations on the scope of a search.

On **Head 14 and 15**, we recommend that judicial approval should always be sought for the search of a premises and we recommend the removal of the provision that a superintendent can issue a search warrant. We recommend adding additional safeguards, in line with the ECHR, to protect journalists' freedom of expression in respect of the issuing of and use of search warrants, in particular in the context of the right to keep sources anonymous.

On **Head 16**, we strongly recommend the removal of the power to compel a password as part of powers that can be exercised under the general search warrant provision. We recommend that AGS members should be required to seek a separate warrant to seek permission to look into a person's device or obtain data from a phone company to track a device. We underline the dangers underpinning this provision in light of ongoing failures by AGS to conform with data protection law, as identified by the Data Protection Commission, and in light of developing technology that can capture a person's most intimate private life, such as Alexa and Siri technology.

Under **Head 19**, we recommend the removal of the provision that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material. We consider this would potentially constitute an unbalanced and far-reaching power that is unnecessary and could be a disproportionate interference with the right to privacy.

Under **Head 23 to 28**, ICCL expresses its opposition to the creation of a power of arrest without warrant for non-serious offences. ICCL recommends maintaining the current position that the power of arrest without warrant should only apply to serious offences.

We recommend narrowing the definition of the breach of the peace to ensure clarity and accessibility, referencing penalties, and distinguishing between serious and minor breaches of the peace.

Under **Head 35**, we believe it should be specified that the custody officer role should be carried out by someone of a minimum rank to reflect the importance of this role, and there should be specific training for the role.

Under **Head 38-47**, among others, we recommend the removal of the provision allowing for police questioning of an accused person prior to legal advice; the removal

of restrictions on access to a lawyer during police questioning; guarantees that access to a legal representative is facilitated in private; and the removal of the possibility for extending detention periods beyond 24 hours as a 24 hour limit for detention is appropriate for the vast majority of crimes.

Under **Head 61** we recommend better oversight of garda detention, including the ratification of the UN Optional Protocol to the Convention against Torture.

Under **Head 65**, we call for more safeguards around the use of lethal force and call on government to remove the provision introducing a general offence for obstruction and, alternatively, we call for the penalty for this new offence to be appropriate and reasonable.

Under **Head 68**, we strongly recommend the removal of the provision relating to the admissibility of evidence. We consider that questions of admissibility should remain firmly with the Courts.

Finally, we recommend a periodic review of the Act should be enshrined within the legislation.

## Introduction

1. ICCL welcomes the opportunity to make a submission on the Garda Síochána (Powers) Bill, published on 14 June 2021.<sup>1</sup> ICCL previously made a submission to the Department of Justice and Equality on the codification of police powers of arrest, search, and detention in May 2020. ICCL reiterates its belief that codifying these powers in statute will provide much needed clarity, consistency and transparency regarding the scope and use of these powers. Legislating in this area also represents an opportunity to ensure that police powers are in line with Ireland's human rights obligations.
2. This submission sets out the relevant legal framework and then examines each part of the Bill. The Bill is divided into seven parts - Preliminary and General; Protection of Fundamental Rights; Stop and Search; Search of Premises; Arrest; Persons in Garda Custody; and Miscellaneous Provisions. Then it examines provisions for codes of practice and highlights the need to incorporate a periodic review of the Bill. Finally, it makes recommendations to strengthen safeguards in the Bill and the Bill generally.

## Relevant Legal Framework

3. There is a need for a human rights-based approach to policing. ICCL has consistently called for this.<sup>2</sup> The Commission on the Future of Policing in Ireland's (CoFPI) highlighted that "Human rights are the foundation and purpose of policing."<sup>3</sup> The State is required to ensure that the actions of An Garda Síochána (AGS) comply with human rights law and standards, which are protected by the Irish Constitution, the European Convention on Human Rights (ECHR), the European Charter of Fundamental Rights and Freedoms and the UN human rights treaties that Ireland has ratified. AGS has a statutory duty to promote equality, eliminate discrimination, and protect the human rights of members, staff, and the persons to whom they provide services.<sup>4</sup>

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<sup>1</sup> This submission was written by ICCL policy officer Elizabeth Carthy with additional input from ICCL Head of Legal and Policy Doireann Ansbro, ICCL policy officer Olga Cronin and ICCL fellow Gemma McLoughlin-Burke.

<sup>2</sup> See for example, Alyson Kilpatrick, ICCL, *A Human Rights Based Approach to Policing in Ireland*, 2018.

<sup>3</sup> Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, 18 September 2018.

<sup>4</sup> Irish Human Rights and Equality Commission Act 2014, section 42.

4. Where a Garda exercises the power of search, arrest or detention they are interfering with an individual's rights, including the right to liberty and freedom of movement, right to privacy, right to bodily integrity, right to equality/non-discrimination, and the procedural rights that form part of the right to a fair trial. It is well established by human rights law that interferences with these rights must be prescribed by law, necessary in a democratic society and proportionate to a legitimate aim. There is a need to include specific safeguards in the exercise of these police powers to ensure compliance with human rights law.

## Part 1 of the Bill: Preliminary and General

5. This part contains some preliminary and general provisions, including setting out relevant definitions.

### Head 2

6. Head 2(2) contains a definition of reasonable suspicion. ICCL previously recommended that a statutory definition of reasonable suspicion should be included in this legislation as an important safeguard, in particular in the context of the power of search. The Bill defines reasonable suspicion as: "a person reasonably suspects something at a relevant time if he or she, acting in good faith, has grounds at the time for the suspicion and those grounds, when judged objectively, are reasonable."<sup>5</sup> The explanatory note highlights that this definition has been included "for the purpose of clarity" and is "intended to reflect the current case law". The Supreme Court has provided guidance on reasonable suspicion highlighting different principles, including that "The reasonable cause to suspect must be **fair and reasonable** and **honestly held** on the basis of information available to a member of An Garda Síochána at the relevant time".<sup>6</sup> ICCL welcomes the inclusion of a definition of reasonable suspicion in the Bill. However, ICCL considers that this definition should be amended to include that the grounds, when judged objectively, are **fair and reasonable**.

### **Recommendation:**

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<sup>5</sup> Garda Síochána (Powers) Bill, Head 2(2).

<sup>6</sup> *DPP (O'Mahony) v. O'Driscoll* [2010] IESC 42.

- Amend the definition of reasonable suspicion to include that the grounds, when judged objectively are fair and reasonable.

## Part 2 of the Bill: Protection of Fundamental Rights

7. This part includes important provisions in relation to the protection of fundamental rights, including provisions on the protection of the rights of children and protection of the rights of persons with impaired capacity.

### Head 6

8. Head 6 sets out an obligation to respect fundamental rights in exercising powers under this Bill.<sup>7</sup> This is an important and welcome provision. As ICCL has previously noted, the exercise of police powers necessarily entails a consideration of human rights.<sup>8</sup> ICCL also recommended that this Bill should include detailed references to human rights law and standards. The State is required to ensure that the actions of AGS comply with human rights law and standards<sup>9</sup> and AGS has the obligation to actively prevent discrimination and ensure equality of treatment to all individuals it interacts with.<sup>10</sup> Thus, ICCL recommends that this provision be made more meaningful by setting out more detail on how the provision will be implemented. This could be done by providing for training for members of AGS as to the appropriate human rights standards that apply when policing.

### Head 7

9. Head 7 provides for the protection of the rights of the child. Child specific safeguards are welcome. Ireland has not opted into the EU directive on procedural safeguards for children, however, it represents an important benchmark in this area. The proposed safeguards include the notification of an “appropriate person” that “the power is to be, or has been, exercised in respect of the child”, the recording of the fact that the power has been exercised in respect of a child and its circumstances, and the taking of any necessary and

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<sup>7</sup> Garda Síochána (Powers) Bill, Head 6.

<sup>8</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 2.

<sup>9</sup> As protected by the Irish Constitution, the European Convention on Human Rights, (ECHR) the European Charter of Fundamental Rights and Freedoms and the UN human rights treaties that Ireland has ratified.

<sup>10</sup> Irish Human Rights and Equality Commission Act 2014, section 42.

appropriate measures to protect the rights of the child.<sup>11</sup> The Bill states that the Minister may make regulations prescribing measures to protect the rights of the child and any other measures or actions that AGS may take to safeguard children.

10. This provision complements section 58 of the Children Act 2001 which provides for the notification of an arrest of a child to their parent or guardian or another person reasonably named by the child. An appropriate person is defined similarly in this Bill as a parent or guardian of the child or where a parent or guardian cannot be contacted, “another adult reasonably named by the child.”<sup>12</sup> In relation to the police questioning of children, article 61 of the Children Act 2001 provides that this cannot be done unless in the presence of a parent or guardian (including another adult reasonably named by the child) or in their absence, another adult (not a member of AGS) nominated by the member in charge of the station.
11. Research recently conducted by Ursula Kilkelly and Louise Forde on children’s rights during police questioning highlighted that there needs to be clarification as to who constitutes an “appropriate adult” under section 61. Kilkelly and Forde recommended that “an independent, trained and Garda Síochána vetted panel of adults be established to support children without parental support during police questioning.”<sup>13</sup> ICCL considers that this Bill offers an opportunity to implement their call to develop the legal and policy framework to address the issue of parents, guardians and “other” or “appropriate” adults.

## **Head 8**

12. *Head 8 provides for the protection of the rights of persons with impaired capacity:* The inclusion of a provision on the protection of the rights of persons with impaired capacity is also a positive step. This provision outlines that where a member of AGS “knows or suspects that the person in respect of whom the power is being, or is to be, exercised is a person with impaired capacity the member may take any measures which they deem necessary and

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<sup>11</sup> Garda Síochána (Powers) Bill, Head 7(1).

<sup>12</sup> *Ibid.* Head 7(4).

<sup>13</sup> Ursula Kilkelly and Louise Forde, *Children’s Rights and Police Questioning: A Qualitative Study of Children’s Experiences of being interviewed by the Garda Síochána*, 2020, p. 48.



appropriate to protect the rights of the relevant person that the person may not be capable of taking himself or herself".<sup>14</sup>

13. ICCL considers that this provision gives undue discretion to Gardaí as to the measures they may deem necessary and appropriate. ICCL recommends that this be amended to "any reasonable measures" to curtail this discretion.
14. It also sets out that the Garda Commissioner, with the consent of the Minister, may issue guidelines for the treatment of persons with impaired capacity. It is unclear why this Head refers to guidelines and the previous Head in relation to children refers to regulations. ICCL recommends that the procedures and protections for dealing with both children and persons with impaired capacity should be put on a statutory footing, instead of being side-lined as "guidelines" or "regulations." If the powers are to have a statutory basis, the protections and safeguards which are balanced against these powers should also have one. Safeguarding children and persons in vulnerable situations is too important to leave to regulations. There is also a legal implication if these procedures are not put on a statutory footing as evidence which is illegally obtained will be assessed by a Court as to whether it is admissible. Evidence which is obtained in breach of a regulation or guideline is not so assessed.
15. In addition, prior to submitting the procedures and protections for dealing with both children and persons with impaired capacity, under Part 2, the Garda Commissioner should have to consult with the following about the content of the procedures and protections: (a) the Policing Authority; (b) the Irish Human Rights and Equality Commission, (c) the Mental Health Commission, (d) Ombudsman for Children.

### **Recommendations:**

- Update the provision on the obligation to respect fundamental rights in exercising power to make it more meaningful by setting out detail as to how it will be implemented, such as by providing for human rights training for all members of AGS.

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<sup>14</sup> Garda Síochána (Powers) Bill, Head 8(1).

- Amend the provision in relation to the protection of persons with impaired capacity to “any reasonable measures” which the Garda deems necessary and appropriate to protect the rights of the relevant person that the person may not be capable of taking himself or herself.
- Develop the legal and policy framework to address the issue of parents, guardians and “other” or “appropriate” adults in the context of this Bill to provide clarity on the exercise of police powers in relation to children generally.
- Clarify specific safeguards that may be taken when exercising powers in respect of persons with impaired capacity.
- Ensure that the safeguards and protections in relation to procedures for dealing with children and persons with impaired capacity are put on a statutory footing.
- Before creating procedures and protections, the Garda Commissioner should have to consult with: (a) the Policing Authority; (b) the Irish Human Rights and Equality Commission, (c) the Mental Health Commission, and (d) Ombudsman for Children.

### **Part 3 of the Bill: Stop and Search**

#### **Head 9**

16. This part provides for a stop and search power for possession of prescribed articles and a power to search vehicles and persons in vehicles for evidence of an offence. While the Bill provides for some safeguards, ICCL has identified some areas of concern. A search of a person is one of the most invasive experiences an individual can be subjected to and in recognition of this there is a need for strong safeguards.

#### **Head 11**

17. *Right to be informed of the reason for a search:* The Bill also provides for a right to be informed of the reason for a search.<sup>15</sup> The member of AGS conducting the search has to inform the person being searched that they/their vehicle is about to be searched; the reason or reasons for the search; and the legal basis for the search. This is somewhat in line with ICCLs previous recommendation that:

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<sup>15</sup> Garda Síochána (Powers) Bill, Head 11.

"The legislation should provide a requirement that any person who is the subject of a search must be informed of the reason they are being searched and what gave rise to the reasonable suspicion grounding it. This is in line with the right to information and with the High Court decision of *DPP v. Rooney*.<sup>16</sup> The person being searched must be informed of any penal consequence of failing to comply."<sup>17</sup>

18. ICCL reiterates this recommendation and highlights that information on the penal consequence of failing to comply should be provided.

19. *Lack of requirement of consent to be searched*: The Bill does not include a requirement of consent to be searched. ICCL reiterates its previous recommendation that there be a requirement of informed consent to be searched where there has been no arrest as it is an important safeguard against abuse of the power to search. Further:

"A requirement of consent would mitigate the risk to due process rights, including the risk that a Garda may examine items found, such as wallets and mobile phones, looking for evidence that might be later used in a criminal prosecution for the offence under suspicion or any other offence. Any such evidence found would not normally be admissible by virtue of the fact that the arrest-type formalities were not followed".<sup>18</sup>

20. Thus, ICCL recommends that a requirement of consent to be searched where no arrest has been carried out.

## Head 12

21. *Record to be made of a search carried out under Head 9 or 10*: The Bill provides that a record of all searches must be kept. This record will contain the name, address, and date of birth of the person, the time and date of the search, the reason of the search, the power under which the search was conducted, the outcome of the search and such other information as is provided

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<sup>16</sup> [1992] 2 IR 7.

<sup>17</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 6. See *DPP (Ryan) v. Mulligan* [2009] 1 IR 794; *DPP (Sheehan) v. Galligan* (Unreported, High Court, 2 November 1995).

<sup>18</sup> Dermot Walsh, *Criminal Procedure*, (2<sup>nd</sup> ed, Round Hall, 2016), para 8-62.

for in the Code of Practice. The record does not include gender, ethnicity or other protected characteristics. It also does not include the geographic location of where the search is taking place. Recording this type of data is important in order to identify patterns and trends in the use of this power. Omitting the recording of protected characteristics and geographic location is a gap that should be remedied in the bill. While this information might be included in the Code of Practice, given the importance of recording this information, ICCL recommends that it is included in the Bill.

22. *Anonymised data at electoral district level:* The Bill should provide for the anonymisation of the record of search data, save for protected characteristics and geographic data at an Electoral Division level, and publish this aggregated data bi-annually.

23. *Consultation with Data Protection Commission:* The Garda Commissioner should consult with the Data Protection Commission in respect of the anonymisation of this data, and the publication of the same.

### Head 13

24. *Need for limitations on the scope of a search:* The Bill does not provide for limitations on the scope of a search, instead this is to be addressed in a Code of Practice, as outlined in Head 13. ICCL previously recommended that the scope and limits of a stop and search should be included in the legislation and highlighted that this would be “undoubtedly more effective than having the limitations simply set out in codes of practice. Evidence in subsequent trials can be excluded if personal searches are unlawful, but evidence flowing from a search carried out in breach of a code of practice can (and usually is) admitted in court on a discretionary basis”.<sup>19</sup> ICCL reiterate its previous recommendation in relation to limits, they should “include the duration or length of the stop, the level of intimacy permitted and safeguards triggered by the search”.

25. It is also important that the bill clearly distinguish the powers to stop and search from powers of arrest. The scope of the power to search under the stop and search power should be far more restricted than the search powers

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<sup>19</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 10.

permissible when the person is arrested and detained, in terms of length and intimacy.

26. Alternatively, if government decides to proceed on the basis of a code of practice, to ensure the most rights-respecting codes of practice are created, Head 13 should include that the Mental Health Commission and Ombudsman for Children be consulted along with the Policing Authority, the Garda Síochána Inspectorate, and Irish Human Rights and Equality Commission.

### ***Recommendations:***

- Include gender, ethnicity and other protected characteristics in the record of stop and searches and include the geographic location of where the search is taking place.
- This part of the Bill should provide for the anonymisation of the record of searches data, save for protected characteristics and geographic data at an Electoral Division level, and publish this aggregated data bi-annually.
- The Garda Commissioner should consult with the Data Protection Commission in respect of the anonymisation of this data, and the publication of the same.
- Include information on the penal consequence of failing to comply within the right to be informed of the reason for a search.
- Include a requirement of consent to be searched when there has been no arrest.
- Provide for specific limitations on the scope of a search, including in relation to safeguards.
- The Mental Health Commission and Ombudsman for Children should be consulted in respect of the code of practice on searches.

### **Part 4 of the Bill: Search of Premises**

27. This part provides for a general search warrant power and powers under search warrants.

#### **Head 14**

28. Head 14 sets out that a member of AGS, an authorised officer of the Competition and Consumer Protection Commission or a designated officer of the

Office of the Director of Corporate Enforcement may apply for a search warrant.

## Head 15

29. Head 15 provides for a general search warrant provision, as recommended by the Law Reform Commission (LRC). As ICCL previously noted: "The current system underpinning search warrants is complex and vague. This lack of precision and clarity is problematic from a rights perspective. ICCL agrees with the LRC that a standard search warrant power is necessary."<sup>20</sup>
30. ICCL considers it positive that a search warrant must be issued by a judicial authority. However, we note that Head 15(6) is not in line with the LRC's recommendation that an urgent application should be made to the High Court. ICCL would question whether such an application would be appropriate at the District Court level and urge government to provide clarification on why LRC's recommendation was departed from in this instance.
31. However, the provisions under Head 15 fail to take into account a recent High Court case concerning a journalist who refused to give AGS the password to his phone, and the comments made by Mr Justice Garrett Simmons, who warned: *"The interpretation of the legislative provisions governing search warrants contended for by both parties has the consequence that there is, arguably, no statutory procedure prescribed under domestic law whereby the right to protection of journalistic sources is attended with legal procedural safeguards commensurate with the importance of the principle at stake. This might well represent a breach of the European Convention on Human Rights."*<sup>21</sup> A District Court judge who has to consider an application for a search warrant, under this Head, should have to consider additional legal procedural safeguards in respect of journalists and publishers who have a constitutional right to protect their sources but who may find themselves subjected to a search.

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<sup>20</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 13.

<sup>21</sup> *Emmett Corcoran Oncor Ventures Limited T/A "The Democrat" v Commissioner of An Garda Síochána, Director of Public Prosecutions*, [2021] IEHC 11, par 22. Accessible here: <[https://www.courts.ie/acc/alfresco/c1afcb9f-46e8-4a6c-9c6a-e8c1b0709ae8/2021\\_IEHC\\_11.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/c1afcb9f-46e8-4a6c-9c6a-e8c1b0709ae8/2021_IEHC_11.pdf/pdf#view=fitH)> See also: Baker, N. *Judge warns about 'potential deficiency' in law in case involving journalist's mobile*, Irish Examiner, January 4, 2021. Accessible here: <<https://www.irishexaminer.com/news/courtandcrime/arid-40200825.html>>

32. As previously held by the European Court of Human Rights in the case of a journalist in Latvia who reported on items provided by an anonymous source and whose home was subsequently searched with the authorities seizing a personal laptop, an external hard drive, a memory card and four flash drives:

"The Court considers that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse."

33. The Court held that while the interference with the journalist's Article 10 rights (Freedom of expression and right to send and receive information) was prescribed by law and that it was aimed at preventing disorder or crime and protecting the rights of others, the authorities' reason for the search were neither relevant nor sufficient<sup>22</sup>. ICCL urges government to ensure that sufficient and adequate safeguards are in place to protect journalists' freedom of expression.

## Head 16

34. *Powers under search warrant, including compelling a password*: The Bill sets out the powers that can be exercised under a search warrant, which include to enter, at any reasonable time or times, within the validity period of the warrant, the place named on the warrant, to search the place, to seize any material found there, and to search any persons present where the person with the warrant is a member of AGS.<sup>23</sup>

35. It also includes the power to "require any person at that place who appears to him or her to have access to or to have under his power or control the information held in any such computer or which can be accessed by the use of that computer - to give to him or her any password or encryption key nec-

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<sup>22</sup> *Nagla v Latvia*. Application no.: 73469/10, paras. 101-102 Accessible here: <<http://hudoc.echr.coe.int/fre?i=001-122374>>

<sup>23</sup> Garda Síochána (Powers) Bill, Head 16.

essary to operate it, to otherwise enable him or her to examine the information accessible by the computer in a form in which the information is visible and legible, to produce the information in a form in which it can be removed and in which it is, or can be made, visible and legible."<sup>24</sup>

36. This provision to compel any person at the location pertaining to the warrant to recall and truthfully disclose the password to their devices is a significant power and deeply concerning. Although there are currently similar powers under the Section 48 (5) (b) (i) of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and Section 7 of *Criminal Justice Offences Relating to Information Systems Act 2017*, this bill will **vastly expand** the reach of this highly intrusive power to a much wider range of suspected offences. Worse, no offence will need to be suspected in respect of search warrants secured by members of the Competition and Consumer Protection Commission, or and/or the Office of the Director of Corporate Enforcement<sup>25</sup>.
37. The bill also provides the power to "(a) to make and retain a copy of any document, record or electronically stored information, (b) where necessary, to use electronic equipment to [search for and] copy electronically stored information". And it provides a Garda will be able to "operate any computer at the place which is being searched or cause any such computer to be operated by a person accompanying the person acting under the authority of the warrant, including by use of any password or other information found in the course of the search".
38. This means that gardai will be able to not only take a copy of everything on a person's phone, computer or electronic device storing information during the search but also use passwords found on a device, to access other services where the person has information stored. ICCL believes that this power to compel a person to communicate a password which may lead to the discovery of incriminating material, either relevant to the search warrant or otherwise, that could eventually be used against them in a criminal prosecution may constitute a breach of the right to silence and privilege against self-incrimination.

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<sup>24</sup> *Ibid.* Head 16.

<sup>25</sup> Explanatory Note of Part 4, Head 14, General Scheme of An Garda Síochána (Powers) Bill



The right to silence is a key part of the right to a fair trial, protected by the Constitution and by Article 6 of the European Convention on Human Rights<sup>26</sup>.

39. We would also highlight the proliferation of connected devices with sensors and recording capabilities that are now used in people's private homes and lives, i.e. smart doorbell cameras, virtual/digital assistants, Amazon Alexa's microphones which can capture private conversations inside homes and cars, or wearables such as Fitbit which can track a person's movements and vital signs. These devices, which can track a detailed description of people's lives, have already been used for law enforcement purposes in the US.<sup>27</sup> Serious privacy concerns have been raised in Ireland in respect of contractors capturing and listening to Siri users' private information and interactions.<sup>28</sup> ICCL would be particularly concerned that this provision may ultimately allow Gardaí to access inadvertent recordings of private conversations and private life.

40. ICCL has increased concerns about the privacy and data protection implications of this power in light of the Data Protection Commission recently finding AGS had infringed a plethora of provisions in the Data Protection Act 2018 in respect of the use of ANPR cameras, access to CCTV monitoring rooms, governance issues, and general transparency<sup>29</sup>.

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<sup>26</sup> *Murray v UK* (1996) EHRR 29, para. 45. The European Court of Human Rights held: "...There can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6... By providing the accused with protection against improper compulsion by the authorities, these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6."

<sup>27</sup> Wired, *Alexa, Play My Alibi: The Smart Home Gets Taken to Court*, August 31, 2020. Accessible here: <https://www.wired.com/story/gadget-lab-podcast-470/> See also Cappellino A, Expert Institute, *The Amazon Echo: Expert Witness in a Murder Trial?*, February 21, 2021. Accessible here: <https://www.expertinstitute.com/resources/insights/amazon-echo-expert-witness-murder-trial/> See also NBC News, *Amazon's Alexa may have witnessed alleged Florida murder, authorities say*, November 2, 2019. Accessible here: <https://www.nbcnews.com/news/us-news/amazon-s-alexa-may-have-witnessed-alleged-florida-murder-authorities-n1075621>

<sup>28</sup> *The Journal*, *Hundreds of Cork-based Apple contractors lose jobs after hearing Siri users' private conversations*, August 29, 2019. Accessible here: <https://www.thejournal.ie/job-losses-apple-cork-siri-recordings-4786859-Aug2019/>

<sup>29</sup> Data Protection Commission, *DPC Ireland 2018-2020 Regulatory Activity Under GDPR*, Appendix 1, Accessible here: <https://www.dataprotection.ie/en/news-media/latest-news/dpc-ireland-2018-2020-regulatory-activity-under-gdpr>. See also: Data Protection Commission, *Annual Report 2020*, chapter 6. Accessible here: <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-publishes-2020-annual-report>

41. ICCL also has concerns about the principles of necessity and proportionality, in particular because it is not in any way clear to ICCL how many Garda investigations have been or are being thwarted by devices which cannot be accessed because of a lack of passwords. It is crucial to know this because AGS have access to and are using Europol's Decryption Platform, up and running since 2013, which is available to national law enforcement authorities of all EU member states to send lawfully obtained evidence for decryption. This platform is supervised by the European Data Protection Supervisor.<sup>30</sup>
42. It's worth noting that Europol, as recently as 2020, highlighted that only five member states had a legal provision compelling a suspect to hand over such passwords to police - Ireland, Belgium, France, Croatia and the UK. Europol said: "In the other Member States, such a provision is considered to conflict with the *nemo tenetur* principle [privilege not to self incriminate]." An expansion of this power, as provided for in this bill, will solidify Ireland's position as an outlier in the EU. ICCL urges government to remove this expanded power<sup>31</sup>.
43. ICCL strongly recommends that given the vast amount of private information a garda may have access to on a personal device, where a Garda is seeking permission to look into a person's device, including by requesting a password, or obtain data from a phone company to track a device, they should be required to seek a separate warrant to the warrant required to search a person's house. This will ensure better oversight and reduce the scope for unreasonable interferences with the right to privacy.

## Head 18

44. *Right to be informed of search:* The Bill provides that the person acting under the authority of a search warrant shall show it to the occupier of the place to

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<sup>30</sup> Europol: *Europol and the European Commission inaugurate new Decryption Platform to tackle the challenge of encrypted material for law enforcement investigations*, December 18, 2020. Accessible here: <<https://www.europol.europa.eu/newsroom/news/europol-and-european-commission-inaugurate-new-decryption-platform-to-tackle-challenge-of-encrypted-material-for-law-enforcement>>

<sup>31</sup> Europol and Eurojust, *Second report of the Observatory Function on Encryption*, pages 12/13. Accessible here: <<https://www.europol.europa.eu/publications-documents/second-report-of-observatory-function-encryption>>

be searched before the search and provide them with a notice setting out different information, including a summary of powers which may be exercised and an explanation of the rights and obligations of the occupier and owner. This is positive.

## Head 19

45. *Seizing privileged material*: The Bill provides that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.<sup>32</sup> As ICCL previously noted this would “potentially constitute an unbalanced and far reaching power that is unnecessary and could potentially be a disproportionate interference with the right to privacy. This would be a radical departure from the existing law and could widen the scope for abuse of the power.”<sup>33</sup> ICCL recommends that this provision be removed.

## Head 21

46. *Superintendent can issue a search warrant in exceptional circumstances*: The Bill states that a superintendent can issue a search warrant in exceptional circumstances if satisfied this is necessary for the proper investigation of an offence and circumstances of urgency give rise to the need for the immediate issue of the search warrant. These warrants shall be valid for 24 hours. The LRC recommended that only a court should be able to issue a search warrant, ordinarily the District Court but provision could be made for the High Court to issue one in urgent cases.<sup>34</sup> ICCL previously agreed with this, highlighting how “the European Court of Human Rights has suggested that the best practice approach to search warrants is to require judicial supervision in order to ensure the interference with article 8 privacy rights is proportionate”.<sup>35</sup>

47. We recommend the removal of the provision that a Superintendent can issue a search warrant.

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<sup>32</sup> *Ibid.* Head 19.

<sup>33</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 14.

<sup>34</sup> Law Reform Commission, *Search Warrants and Bench Warrants*, 2015, para. 8. 23.

<sup>35</sup> *Camenzind v. Switzerland* [1997] ECHR 99.

### **Recommendations:**

- Remove the provision that a superintendent can issue a search warrant in exceptional circumstances and provide that only a court is able to issue a search warrant.
- Ensure sufficient and adequate safeguards in line with the ECHR are in place to protect journalists' freedom of expression in respect of the issuing of search warrants.
- Remove the power to compel a password as part of powers that can be exercised under the general search warrant provision and require that AGS must seek a separate warrant to seek permission to look into a person's device or obtain data from a phone company to track a device.
- Remove the provision that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.

### **Part 5 of the Bill: Arrest**

This part codifies arrest powers and includes some safeguards, which could be strengthened.

#### **Head 23**

48. *Power to arrest without warrant:* The Bill provides for a general power of arrest without warrant. As ICCL has noted:

"A single piece of legislation that dictates the power to arrest without warrant would provide clarity and consistency and ensure the law is accessible. However, existing powers of arrest without warrant must not be expanded beyond those that currently exist for serious "arrestable" offences, as per section 4 of the Criminal Law Act 1997."<sup>36</sup>

49. The Bill provides for a power to arrest without warrant anyone whom a member of AGS suspects on reasonable grounds to be committing a serious offence or has committed a serious offence (which is an offence punishable by 5 years imprisonment or more). It also provides that a member of AGS may

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<sup>36</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 17.

arrest without warrant someone who they suspect on reasonable grounds is committing or has committed a non-serious offence, if they have reasonable grounds, to believe it is necessary for a specific purpose, including preventing harm, preventing the continuation of the offence, and ensuring the person appears before the court. This is an expansion of the power to arrest without warrant.

50. ICCL strongly opposes the introduction of a power of arrest without warrant for non-serious offences.<sup>37</sup> ICCL recommends maintaining the current position that the power of arrest without warrant should only apply to serious offences.

#### **Head 24**

51. *Head 24* abolishes the common law power of arrest for breach of the peace.<sup>38</sup> ICCL has previously noted that “ICCL considers that the common law offence of breach of the peace is an imprecise and vague offence. It encompasses behaviour which is serious enough to constitute a criminal offence, as well as behaviour falling short of other thresholds in criminal law.” The Bill provides for a statutory basis for the power of arrest for breach of the peace. However, it is defined broadly and does not specify what the penalties are, if convicted, and does not distinguish between serious and minor breaches of the peace. ICCL recommends greater precision in this provision to reflect this.

#### **Head 27**

52. *Head 27* sets out when and how a caution shall be administered. It updates the caution to: “You are not obliged to say anything unless you wish to do so, but whatever you do say will be recorded and may be given in evidence.” This means the current requirement of contemporaneous note taking by AGS during electronically recorded interviews is no longer needed. ICCL welcomes this update.

#### **Head 28**

53. *Head 28* provides for the right to information on arrest, including that the person is being arrested, the reason for the arrest, and where applicable that

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<sup>37</sup> *Ibid.* p. 18.

<sup>38</sup> Garda Síochána (Powers) Bill, Head 24.

they are being taken to a Garda custody facility.<sup>39</sup> This provision does not reference relevant rights, such as access to a lawyer. ICCL considers this should be added to the provision.

### **Recommendations:**

- Narrow the definition of the breach of the peace to ensure clarity and accessibility, make reference to what the penalties are, if convicted, and distinguish between serious and minor breaches of the peace.
- Do not expand the power of arrest without warrant to non-serious offences; instead maintain the current position that the power of arrest without warrant should only apply to serious offences.
- Include reference to relevant rights in the right to information on arrest.

## **Part 6 of the Bill: Persons in Garda Custody**

This part sets out provisions in relation to persons in Garda custody, including their rights, powers of detention, and powers in relation to detained persons.

### **Head 35**

54. *Custody officer:* Head 35 provides for a custody officer role, which would replace the role of member in charge. Similar to the member in charge, the custody officer is set out to be “as far as practicable” a member not involved in the arrest of a person or investigation of that offence. ICCL recommends changing this wording to reflect the fact that only in exceptional circumstances should the custody officer be an officer involved in the arrest or investigation of the person.

55. Previous recommendations relating to the role of member in charge include that it should be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.<sup>40</sup> This Bill does not reflect these recommendations. It states that a superintendent shall issue instructions as to who is to be the custody officer of each Garda custody facility.<sup>41</sup>

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<sup>39</sup> *Ibid.* Head 28.

<sup>40</sup> Yvonne Daly and Vicky Conway, *Submission to Law Reform Commission for Fifth Programme of Law Reform, Regulation of Detention in Garda Custody*, p. 3.

<sup>41</sup> Garda Síochána (Powers) Bill, Head 35.

## Head 38-42

56. *Rights of persons in custody:* Heads 38-42 outline the rights of persons in custody, including information to be given to a person in Garda custody following an arrest, rest periods, access to medical information, and notification to third persons and consular authorities. These are positive developments. However, it appears that the right to silence is not included in the list of right to be explained to persons in custody under Head 38. ICCL recommends that this right is included as a matter of priority.

## Head 43

57. *Questioning of an accused person prior to legal advice:* The Bill allows adults to waive their right to consult with a legal representative. It also provides for the police questioning of a suspect who has not yet consulted with a legal representative, if a Garda of the rank of inspector or above authorises it. To authorise it, they must have reasonable grounds for believing that to delay the questioning would involve a risk of interference with or injury to other persons, serious loss of, or damage to property, the destruction of or interference with evidence, accomplices being alerted or hindering the recovery of property.<sup>42</sup> This provision may be a disproportionate interference with the constitutional right of access to a lawyer. ICCL recommends that this provision be removed. We are particularly concerned with Head 43(2) which provides that “*A person who refuses to consult with a legal representative who has made himself or herself available for the purpose of consulting with the person shall, in so refusing to consult with the legal representative, be deemed to have waived his or her right to consult a legal representative*”. This is a clear interference with the right to choose one’s own lawyer. ICCL calls for the removal of this section.

58. *Access to a lawyer during police questioning:* The Bill also provides for access to legal representation. Access to a lawyer, including during police questioning, is an important right. The Supreme Court has suggested that a right to have a lawyer present during police questioning may form part of the right of access to a lawyer.<sup>43</sup> The Bill sets out that a lawyer can accompany their client at police interviews. This is positive as it is currently not provided for on a

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<sup>42</sup> Garda Síochána (Powers) Bill, Head 43.

<sup>43</sup> DPP v Gormley and White [2014] IESC 17; Violet Mols, *Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers*, 2017, 8(3) New Journal of European Criminal Law, p. 304.

statutory basis but there is a DPP directive facilitating this.<sup>44</sup> However, the Bill states where a member not below the rank of inspector “reasonably believes that the presence of a legal representative... would prejudice any investigation or criminal proceedings regarding the offence, or, owing to the behaviour of the person, would be unduly disruptive, the member may require that the person concerned absent himself or herself from the interview”.<sup>45</sup> If the inspector decides to exclude a legal representative, they shall inform the person that they may be accompanied by another legal representative. The limitations on the right of access to a lawyer provided for in the Bill seem overly broad and carries serious potential for abuse, especially given the importance of this right. ICCL recommends that these restrictions on access to a lawyer during police questioning be removed.

59. The Bill provides detail on consultation with a legal representative - that it shall take place in private but can take place in sight but out of hearing of a member of AGS. This does not seem sufficiently private, especially given the importance of these consultations. The Bill also sets out that the right to consult means the right to consult in person or by telephone if the detained person consents to a phone consultation.

#### **Head 44 - 45**

60. *Detention periods:* The Bill provides that the initial period of detention for serious/arrestable offences is 6 hours. This can be extended in 6 hour periods by an inspector up to 24 hours. A chief superintendent may extend a further 24 hours in respect of schedule 5 offences and 2 or more offences which don't arise out of the same set of facts. As previously recommended:

“The ICCL would propose that a 24 hour limit for detention, as currently stands under Section 4 of the Criminal Justice Act, 1984, is appropriate for all crimes. This provision has been sufficient to allow the investigation of some of the most serious crimes in Ireland, such as rape and murder. Consequently, we cannot see the reason for an arbitrary distinction between the detention periods. If a differentiated detention period is introduced, we believe that it should

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<sup>44</sup> See for example, Aine Bhreathnach and Shalom Binchy, *The Experiences of Criminal Defence Solicitors in Garda stations during Covid-19, 2020*.

<sup>45</sup> Garda Síochána (Powers) Bill, Head 42.



only be permissible to extend it with judicial oversight. Therefore all applications to extend the detention period past 24 hours should be made to a judge who makes the final decision.”

61. ICCL reiterates this recommendation that a 24 hour limit for detention is appropriate for generally all crimes and any further extension should require an application to a Court.

#### **Head 47**

62. ICCL notes that in the Notes under Head 47, there is reference to the fact that “the rank of Garda officer authorised to apply to the Court for an extension of detention under this Head has been set at superintendent, rather than chief superintendent under the existing powers. Given that the Court is the effective safeguard for the detained person’s rights under this Head, this change would appear to be appropriate given the operational issues arising under the new Garda operating model.” ICCL would welcome more information on why the rank of garda who can apply for an extension has been changed and what is meant by “operational issues arising under the new Garda operating model”.

#### **Head 51**

63. *Need for further detail on use of the power to take photograph, fingerprint and palm print:* The Bill provides for a power to take photographs, fingerprints and palm prints of those who have been arrested for a serious offence or offences. However, no detail is provided on how long this information is kept, stored or when and how it is destroyed. A robust framework for data protection must be in place and ICCL recommends the inclusion of such a framework in this Bill.

#### **Head 59**

64. *Custody record:* It is positive that the custody record may be electronic. There is a need to record the number of arrests/detained persons and publish this information. The custody record should also gather information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated. If an electronic record is used, it should not be possible to alter information once entered and the record should give full details as to when information is inputted and by who. ICCL

recommends that safeguards for the use of an electronic custody record be included.

### **Head 60 and 61**

*65. Electronic recording of interviews:* The Bill provides for the electronic recording of interviews. If the recording equipment is not available or fails to work at the start of an interview or during it, a member shall make a written note of the interview. ICCL welcomes this provision.

*66. Need for oversight of detention:* ICCL recommends the introduction of a human rights-compliant oversight scheme of police detention, such as the independent custody visiting scheme in Northern Ireland.<sup>46</sup> This is an important safeguard to protect the rights of detained persons. ICCL reiterate its recommendation to ratify OP-CAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including Garda stations.

### **Recommendations:**

- Specify that the custody officer role should be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.
- Remove the provision allowing for police questioning of an accused person prior to legal advice.
- Remove the restrictions on access to a lawyer during police questioning.
- Ensure that access to a legal representative is facilitated in private.
- Remove the possibility for extending detention periods beyond 24 hours as a 24 hour limit for detention is appropriate for all crimes.
- Ensure that the custody record gathers information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated.
- Include provisions to safeguard the use of an electronic custody record, such as giving full details as to when information has been inputted and by whom

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<sup>46</sup> ICCL, *Submission to the Department of Justice on the codification of police powers*, May 2020, p. 26.

- Provide detail on how long photograph, fingerprint and palm print information is kept and stored for and when and how it is destroyed.
- Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including Garda stations.

## Part 7 of the Bill: Miscellaneous Provisions

This part sets out miscellaneous provisions. This submission examines two of these submissions as they are particularly important.

### Head 65

67. *Need for further detail on the use of reasonable force:* The Bill provides that a Garda may use such force as is reasonably necessary to compel a person to comply with a requirement to stop a vehicle, to enter a premises or to open or inspect any container, to effect or maintain an arrest.<sup>47</sup> Force can only be used where in the circumstances, "the person believes them to be necessary to achieve the legitimate aim being pursued, and the degree of force is no more than is reasonably necessary for that purpose."<sup>48</sup>

68. The Bill also provides for a situation where a member of AGS may use lethal force in effecting an arrest - where the circumstances are such that the member believes that a person is doing or about to do something likely to cause serious harm to, or the death of, another person and they can't prevent the serious harm or death in another way, the force may include force likely to cause serious harm to a person or the person's death. If the member believes this use of force is necessary, they must, if practicable, first call on the person to stop doing the act. The use of lethal force is an extraordinary power that must be safeguarded and used as a measure of last resort. ICCL recommends that the Bill should include more detail on the use of lethal force and related safeguards, such as appropriate training.

69. ICCL considers that the Bill should explicitly reference the state's legal obligation to protect life. The use of firearms should be specifically addressed with reference to international standards on the use of force. In particular, it should be made explicit that the use of firearms is permitted only where there is an

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<sup>47</sup> Garda Síochána (Powers) Bill, Head 65.

<sup>48</sup> *Ibid.*

imminent risk to life<sup>49</sup> and any use of force must be as minimal as possible to preserve life.<sup>50</sup>

70. We note that the current Garda public order incident command policy<sup>51</sup> states:

The fundamental principle underpinning this policy is that any action taken must comply with the fundamental principles of legality, necessity (**absolute necessity in terms of lethal force**), proportionality and accountability and is applied in a non-discriminatory manner in accordance with the principles of the European Convention on Human Rights (ECHR).

71. ICCL recommends including the requirement of “absolute necessity in terms of lethal force” and a corresponding reference to relevant principles of the ECHR, including non-discrimination.

72. We note that current oversight legislation provides that the Garda Commissioner shall refer any matter that appears to indicate that the conduct of an AGS member may have resulted in death or serious harm to someone to the Garda Síochána Ombudsman Commission (GSOC).<sup>52</sup> Yet, GSOC investigations face different barriers and constraints. The Commission on the Future of Policing in Ireland noted there are numerous problems with the current structures and processes for handling complaints about police misconduct, including in relation to the resourcing of GSOC.<sup>53</sup> The Policing, Security and Community Safety Bill establishes a new Garda Ombudsman and contains a similar provision in relation to investigations into deaths and serious harm caused by members of AGS.<sup>54</sup>

## Head 67

73. *Offence under this Bill – Provision of information and obstruction:* The Bill provides for a broad power to demand personal details where a member of AGS

<sup>49</sup> See for example the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

<sup>50</sup> Garda Policy on Use of Force (including Firearms) was set out as an urgent priority area for review by the Garda Human Rights Strategy Document 2020-2022. It is not clear what use of force model is currently used by An Garda Síochána as it does not appear on the Policy Document page of garda.ie: see <https://www.garda.ie/en/about-us/publications/policy-documents/> (accessed 21.1.21)

<sup>51</sup> <https://www.garda.ie/en/about-us/publications/policy-documents/public-order-incident-command-policy.pdf> p.7

<sup>52</sup> Garda Síochána Act, 2005, section 102.

<sup>53</sup> Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, 18 September 2018, p. 48.

<sup>54</sup> Garda Síochána (Powers) Bill, Head 164.

has reasonable grounds to suspect that a person has committed or is committing an offence or is in possession of a relevant article. It also provides for an offence if someone gives a false or misleading response, obstructs or attempts to obstruct any member acting under the powers conferred under this Bill or following specific directions given by a Garda. The penalty upon summary conviction is Class A fine and/or up to 12 months imprisonment or upon conviction on indictment a fine of €30,000 and/or up to 5 years imprisonment). This is a significant penalty, especially if convicted on indictment. The new broader power to demand personal details, expanded powers of arrest and search, and penalty for obstruction and failure to comply would result in the criminalisation of conduct that was not previously an offence. ICCL recommends that the criminal law be a measure of last resort and submits that such a severe penalty is inappropriate and unreasonable and that this Bill should refrain from creating new criminal offence, including broad offences of obstruction.

### **Recommendations:**

- Include more detail on the permitted use of lethal force and further safeguards, including more explicit references to relevant rights and thresholds.
- Review and amend the provision introducing a general offence for obstruction and reduce the penalty for this new offence to ensure that it is appropriate and reasonable.

### **Impact of the Bill on the admissibility of evidence**

#### *74. Codes of practice on search, search warrants, arrest, custody and detention:*

The Bill provides for codes of practice in relation to search, search warrants, arrest, custody and detention.<sup>55</sup> The Bill sets out that a breach of one of the Codes "shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the admissibility in evidence thereby obtained."<sup>56</sup> However, it will render them liable to disciplinary proceedings.

### **Head 68**

75. Part 7 of the Bill contains a general provision relating to the admissibility of evidence. Head 68 provides that "A failure by a person exercising any powers

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<sup>55</sup> Garda Síochána (Powers) Bill, Head 13; Head 22; Head 33; Head 64.

<sup>56</sup> *Ibid.*

under this Bill to comply with any provision of this Bill shall not, of itself, affect the admissibility in evidence of any evidence seized or otherwise obtained through the use of that power."<sup>57</sup> The need for this provision is unclear as the questions of admissibility should lie exclusively with the Courts.

76. Ireland has an exclusionary rule applying to evidence in breach of the accused's constitutional rights, including the right to liberty, the right to be tried in due course of law, the right to the inviolability of the dwelling, and the right to bodily integrity, which was set out by the Supreme Court in *DPP v JC*<sup>58</sup>. The powers in this Bill and the proposed codes of practice in relation to search, search warrants, arrest, custody and detention will infringe upon these constitutional rights.

77. These provisions highlighting that a failure to comply with codes of practice and the Bill will not affect the admissibility of evidence in and of itself are problematic and unnecessary. Given that a failure to comply with codes of practice and the Bill could entail a breach of constitutional rights, unconstitutionally obtained evidence should continue to be assessed by the Courts under the exclusionary rule. It is unclear why the provisions relating to the admissibility of evidence obtained due to failure to comply with codes of practice are necessary.

**Recommendation:**

- Remove the provision relating to the admissibility of evidence obtained due to failure to comply with the Bill.
- Remove the provisions relating to the admissibility of evidence obtained due to failure to comply with codes of practice.

**Need to include a review of the Act**

78. The Bill should incorporate the need for a periodic review of how the powers are operating. These are significant powers and should be regularly reviewed to ensure they are being exercised in compliance with human rights.

**Recommendation:**

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<sup>57</sup> *Ibid.* Head 68.

<sup>58</sup> [2017] 1 IR 417.

- Include a periodic review of the Act.

## Summary of Recommendations

### Definition of reasonable suspicion

1. Amend the definition of reasonable suspicion to include that the grounds, when judged objectively are fair and reasonable.

### Protection of fundamental human rights

2. Update the provision on the obligation to respect fundamental rights in exercising power to make it more meaningful by setting out detail as to how it will be implemented, such as by providing for human rights training for all members of AGS.
3. Amend the provision in relation to the protection of persons with impaired capacity to “any reasonable measures” which the Garda deems necessary and appropriate to protect the rights of the relevant person that the person may not be capable of taking himself or herself.
4. Develop the legal and policy framework to address the issue of parents, guardians and “other” or “appropriate” adults in the context of this Bill to provide clarity on the exercise of police powers in relation to children generally.
5. Clarify specific safeguards that may be taken when exercising powers in respect of persons with impaired capacity.
6. Ensure that the safeguards and protections in relation to procedures for dealing with children and persons with impaired capacity are put on a statutory footing.
7. Before creating procedures and protections, the Garda Commissioner should have to consult with: (a) the Policing Authority; (b) the Irish Human Rights and Equality Commission, (c) the Mental Health Commission, and (d) Ombudsman for Children.

### Stop and search

7. Include gender, ethnicity and other protected characteristics in the record of stop and searches and include the geographic location of where the search is taking place.

8. Include information on the penal consequence of failing to comply in the right to be informed of the reason for a search.
9. Include a requirement of consent to be searched when there has been no arrest.
10. Provide for specific limitations on the scope of a search, including in relation to safeguards.
11. The Mental Health Commission and Ombudsman for Children should be consulted in respect of the code of practice on searches.

### **Search of premises**

11. Remove the provision that a superintendent can issue a search warrant in exceptional circumstances and provide that only a court is able to issue a search warrant.
12. Ensure sufficient and adequate safeguards in line with the ECHR are in place to protect journalists' freedom of expression in respect of the issuing of search warrants.
13. Remove the power to compel a password as part of powers that can be exercised under the general search warrant provision and require that AGS must seek a separate warrant to seek permission to look into a person's device or obtain data from a phone company to track a device.
14. Remove the provision that privileged material can be seized provided that this is done by means whereby the confidentiality of the material can be maintained pending the determination by the court of the issue as to whether the material is privileged material.

### **Arrest**

14. Narrow the definition of the breach of the peace to ensure clarity and accessibility, make reference to what the penalties are, if convicted, and distinguish between serious and minor breaches of the peace.
15. Do not expand the power of arrest without warrant to non-serious offences; instead maintain the current position that the power of arrest without warrant should only apply to serious offences.
16. Include reference to relevant rights in the right to information on arrest.

### **Persons in Garda custody**



17. Specify that the custody officer role should be carried out by someone of a minimum rank to reflect the importance of this role, held for a specific duration, and there should be specific training for the role.
18. Remove the provision allowing for police questioning of an accused person prior to legal advice.
19. Remove the restrictions on access to a lawyer during police questioning.
20. Ensure that access to a legal representative is facilitated in private.
21. Remove the possibility for extending detention periods beyond 24 hours as a 24 hour limit for detention is appropriate for all crimes.
22. Ensure that the custody record gathers information on ethnicity and other protected grounds to be able to analyse issues of discrimination as to who is arrested and how they are treated.
23. Include provisions to safeguard the use of an electronic custody record, such as giving full details as to when information has been inputted and by whom
24. Provide detail on how long photograph, fingerprint and palm print information is kept and stored for and when and how it is destroyed.
25. Ratify OPCAT and create an effective and independent National Preventive Mechanism to inspect all places of detention, including Garda stations.

### **Miscellaneous provisions**

26. Include more detail on the use of lethal force.
27. Reconsider the provision introducing a general offence for obstruction and reduce the penalty for this new offence to ensure that it is appropriate and reasonable.

### **Admissibility of evidence**

28. Remove the provision relating to the admissibility of evidence obtained due to failure to comply with the Bill.
29. Remove the provisions relating to the admissibility of evidence obtained due to failure to comply with codes of practice.

### **Need to include a review of the Act**

30. Include a periodic review of the Act.

