



Briefing for Second Stage Debate on Policing, Security and Community Safety Bill 2023

16 February 2023

Introduction

1. The Irish Council for Civil Liberties (ICCL) broadly welcomes the Policing, Security and Community Safety Bill, (PSCS Bill). This Bill introduces some welcome reforms, in line with recommendations by the Commission on the Future of Policing in Ireland (CoFPI). ICCL fully supports the key recommendation of the CoFPI that An Garda Síochána, (AGS), must be transformed from a police force to a community focused police service with human rights as its “purpose and foundation”.¹
2. This Bill introduces important organisational and structural reforms recommended by CoFPI. In particular, ICCL welcomes newly strengthened oversight bodies, including the creation of an Independent Examiner for National Security Legislation, and reforms to the Garda Síochána Ombudsman Commission, to be renamed the Office of the Police Ombudsman.
3. However, ICCL considers that the opportunity to create robust oversight mechanisms meeting international standards of best practice will be lost without some key amendments to the Bill. The new Independent Security Examiner must have access to all relevant information and its primary function must be to assess whether security legislation is being used in a manner compatible with Ireland’s human rights obligations.
4. The independence of the new Police Ombudsman must be better protected, and its powers strengthened to ensure it can carry out meaningful independent investigations into complaints against AGS.
5. The new Policing and Community Safety Authority, replacing both the Policing Authority and the Garda Inspectorate, must be equipped to provide robust oversight and inspections of AGS.
6. We make a number of other observations in the briefing below, including on the failure to implement CoFPI’s recommendation to remove prosecutorial powers from AGS and the need to ensure disaggregated data is collected by AGS.
7. ICCL will provide a more detailed briefing for third stage consideration by the Justice Committee at a later date.

A. Prosecutions by Members of An Garda Síochána

8. International standards are clear that properly trained, independent prosecutors are vital to ensure that police investigations are conducted in line with human rights law and best practice.² The Bill

¹ ICCL made a comprehensive submission to the COFPI. See further Alyson Kilpatrick, ICCL, *A Human Rights Based Approach to Policing in Ireland*, 2018.

² ‘The European Code of Police Ethics’, Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum

retains the power of An Garda Síochána (AGS) to instigate and conduct prosecutions in the District Court³ in direct contravention of the recommendation by the Commission on the Future of Policing (CoFPI) that prosecutorial decisions should be removed from AGS and that the practice of police prosecuting cases in court should cease.⁴

9. During pre-legislative scrutiny of the Bill, Government confirmed that they accepted this recommendation from CoFPI, subject to detailed analysis and cost.⁵
10. We call for all steps to be taken to facilitate the removal of prosecutorial powers from AGS, including allocation of sufficient funding to the DPP, and for this provision to be removed from the PSCS Bill.

B. Strength & Independence of the Police Ombudsman

11. A properly equipped, empowered and independent Ombudsman is vital to ensure proper oversight and accountability of AGS. This Bill provides for the creation of a new Office of the Police Ombudsman to replace the Garda Síochána Ombudsman Commission, (GSOC). ICCL is concerned that the Bill does not ensure the full independence of the Ombudsman and limits its jurisdiction in some key aspects. ICCL supports many of the recommendations made by GSOC in its observations on the Bill.⁶

Duty to cooperate

12. In line with GSOC's recommendations, we highly recommend that there should be an explicit statutory obligation on AGS to fully cooperate with the new Police Ombudsman in a full and timely manner.

Independence

13. The proper functioning of the Ombudsman is dependent on the full independence and transparency of the body. ICCL supports GSOC's submissions in relation to sections 179, 180 and 181 of the Bill. S.179 provides that the Ombudsman must submit a governance framework to the Minister. GSOC rightly points out that this risks undermining the institutional independence of the Ombudsman and is unnecessary given that a governance framework is already provided for by the Civil Service Corporate Governance Code. S.180 and S.181 provide that the Minister should lay the Ombudsman Strategy Statement and Annual Reports before the Oireachtas, which is not consistent with the practice of other Ombudsman Offices in Ireland. The Police Ombudsman should lay its own Strategy Statement and Reports before the Oireachtas to maintain its actual and perceived independence.

Ombudsman Jurisdiction

14. S.189 defines 'incidents of concern' and states that the new Ombudsman will only have jurisdiction over complaints against a garda member who has: I) committed an offence, or (II) behaved in a manner that constitutes notifiable misconduct. GSOC points out in their submission that 'notifiable

³ Policing, Security, and Community Safety Bill 2023, section 10.

⁴ Commission on the Future of Policing, *The Future of Policing in Ireland*, 2018, pp. 29-30.

⁵ See the Joint Committee on Justice, Report on pre-legislative scrutiny of the Policing, Security and Community Safety General Scheme, p.19. The Department of Justice confirmed in writing that "subject to detailed analysis and evaluation of the cost to the Exchequer, the Government accepted the CoFPI's recommendation that prosecution decisions should be under the remit of an expanded state solicitor or national prosecution service."

⁶ GSOC Observations on PSCS Bill 2023, available here <https://www.gardaombudsman.ie/news-room/archive/gsoc-publishes-its-observations-on-policing-security-and-community-safety-bill/>

misconduct' limits the jurisdiction of the Ombudsman as some incidents may be of relevance to public confidence in policing that are not notifiable, or don't necessarily constitute misconduct, for example the discharge or loss of a Garda firearm or less than-lethal weapon. ICCL supports GSOC's view that incidents of concern should in all cases be notifiable to the Police Ombudsman, regardless of whether or not the incident constitutes 'notifiable misconduct'.

15. Section 200(6) sets out that the Garda Commissioner is not obligated to notify an incident of concern to the Ombudsman, if it would be be prejudicial to the security of the State or would endanger the life or safety of a person who gave information in confidence. Where this section applies, the Garda Commissioner must notify the Independent Examiner and the Police Ombudsman as soon as practicable. However, no provision is made for whether or how the Ombudsman may challenge this decision, or how the Independent Examiner may review this decision. To ensure appropriate scrutiny, this section should include a requirement that the Garda Commissioner can only refuse to notify the Ombudsman where appropriate and necessary. The Independent Examiner should have a clearer role in reviewing the use of this section.
16. S.201 should be amended to provide that the jurisdiction of the Ombudsman includes matters and complaints that have been previously raised.

Power of Search

17. The Bill restricts GSOC's ability to search a Garda Station, requiring permission from the Garda Commissioner, who may object on the grounds of State security.⁷ Where an objection is made, the matter will be notified to the Independent Examiner for review, who may then make a recommendation to the Minister.
18. There is no provision for the Ombudsman to make submissions to the Minister. There is no process by which the Minister's directions, or any condition placed upon the search, may be reviewed. Once an objection is made under Section 207, the Minister may direct the search only where it:

*“(a) would not be prejudicial to the security of the State, or
(b) is proportionate and necessary for the proper investigation of a matter concerning the death of, or serious harm to, a person as a result of Garda operations or while in the care or custody of An Garda Síochána”*

There is no provision for the Minister to undertake a proportionality analysis in circumstances that do not relate to the death or serious harm of a person in custody.

19. The mandatory statutory requirement for a consultation with the Garda Commissioner prior to the application for every search undermines the Ombudsman ability to conduct an independent investigation. It can potentially interfere with the speed and effectiveness of an investigation and may result in the loss of evidence. ICCL supports the recommendations of GSOC to remove the mandatory requirement of a consultation with the Garda Commissioner.

Reviews of refusals to provide information

⁷ PSCS Bill 2023, s.207.

20. ICCL notes that the Independent Examiner may review refusals by the Garda Commissioner or Information Holders to cooperate with the Ombudsman, including a refusal to provide information to the Ombudsman or permit a search of a garda station on the grounds of national security. The Examiner may then make a recommendation to the Minister following review. However, there is no mechanism to determine whether and how often the Examiner's recommendations are followed by the Minister or to require the Minister to respond. We recommend that a duty is placed on the Minister to respond to recommendations made under section 240.

C. The Policing and Community Safety Authority

21. The Bill proposes to replace the Policing Authority and the Garda Inspectorate with a Policing and Community Safety Authority, responsible for overseeing and assessing the performance of AGS in an "independent and transparent manner".⁸
22. On oversight, we consider there is a missed opportunity to task the Authority with oversight of the Community Safety Partnerships provided for in Part 3 of the Bill. This should be considered by Government.

Inspections

23. In terms of the inspection function of the new Authority, ICCL notes that the General Scheme referred explicitly to the power to carry out inspections relating to policing services, including in relation to adherence to "human rights standards and cooperation with other public service bodies to enhance community safety". The Bill refers only to the power "to carry out inspections". We consider the explicit language on human rights should be reintroduced.
24. Reference to cooperation with the new Inspector of Places of Detention, as provided for in the General Scheme of the Inspection of Places of Detention Bill 2022, should be included in this Bill given the importance of ensuring inspections of places of garda custody are informed by the expertise of policing oversight bodies. It is vital that these two key pieces of legislation work together to provide for a robust mechanism of inspecting places of garda custody, in compliance with the Optional Protocol to the UN Convention against Torture (OPCAT).
25. ICCL is concerned that the Bill only provides for unannounced inspections (which are required under OPCAT) by way of a Memorandum of Understanding (MOU).⁹ As noted by the Garda Síochána Inspectorate (Inspectorate) in its submission on the General Scheme¹⁰ and the Policing Authority's submission,¹¹ the details of these unannounced inspections being left to an MOU is undesirable. The power to carry out unannounced inspections should be provided for in this Bill.
26. The Garda Síochána Act 2005 allows for the conducting of inspections by the Inspectorate in relation to security services.¹² The creation of the Independent Examiner removes oversight of security services from the Authority and limits its inspection powers to "policing services".¹³ However, the Bill

⁸ S.122 (1)

⁹ Section 147(2)(a).

¹⁰ The Garda Síochána Inspectorate's submission to the Houses of the Oireachtas Joint Committee on Justice (the Committee) on the General Scheme of the Policing, Security and Community Safety Bill 2021, p.5, para 2 available at: <https://www.gsinsp.ie/submission-to-the-commission-on-policing/> (accessed 14 February 2023).

¹¹ The Policing Authority's submission to the Houses of the Oireachtas Joint Committee on Justice (the Committee) on the General Scheme of the Policing, Security and Community Safety Bill 2021, p.14 available at: https://www.policingauthority.ie/assets/uploads/documents/PA_submission_to_JOC_on_Justice_PSCS_Bill.pdf (accessed 14 February 2023).

¹² Garda Síochána Act 2005

¹³ Policing, Security, Community Safety Bill 2023, S.146(1)

does not provide specifically for inspection powers for the Independent Examiner, beyond the ability to request “appropriate facilities and accommodation be made available within the premises of an information holder to permit the examination of information, documents or things and to put questions to individuals and where he or she so requests an information holder shall comply with the request.”¹⁴ This power is subject to approval by the Minister¹⁵ and can therefore be considered a far more limited power than the inspections that the Garda Inspectorate can currently undertake.

27. ICCL considers that this creates a potential gap in oversight that must be remedied by providing for joint inspections by the Authority and the Independent Examiner or sole but independent, unannounced inspections by the Independent Examiner.

D. Independent Examiner of Security Legislation

28. Part 7 of the Bill will create an Independent Examiner of Security Legislation. This is an extremely important position that will provide vital oversight of the exercise of police powers in the context of national security that hitherto have not been subject to independent examination. International standards and best practice in other jurisdictions require that national security concerns should not be used as a shield to avoid scrutiny or accountability for the misuse of powers. Human rights cannot be jettisoned in pursuit of national security but should only ever be interfered with in a proportionate manner, where necessary and where such interference is as minimal as possible to achieve particular legitimate aims, including national security.

Lack of access to relevant information

29. ICCL is extremely concerned that the Bill as currently drafted provides for a potentially toothless body that will not have full access to the information required to fulfil its oversight function. Independent Security Examiners in other jurisdictions such as the UK, Northern Ireland and Australia have full access to all information and documents that they request. This Bill provides in S. 239(5) that information holders can withhold information from the Independent Examiner in order to “safeguard international intelligence sources” or “conceal the identity of a person, where to reveal the identity of the person might endanger the life or safety of any person”.
30. ICCL considers that this lack of confidence in the ability of an independent examiner to protect sources is misplaced and out of line with other jurisdictions. The first exception is so broad as to potentially provide a shield for AGS as regards all national security operations that rely on intelligence from abroad. Given the nature of transnational crime, cyber attacks and other modern threats to national security it is likely that the vast majority of national security operations will rely on some form of intelligence from abroad. As such, the function of this Examiner could be impossible to carry out from the outset.

Transparency

31. ICCL regrets the narrowing of language in the Bill which may result in hindering the Examiner’s ability to make information public. A key function of the role is to ensure transparency as far as possible in the operation of security legislation in Ireland. The section in the General Scheme that sets out exceptions to the Examiner’s duty to make information public has been significantly expanded. The

¹⁴ PSCS Bill, S.239 (6)

¹⁵ PSCS Bill, S.239 (7)

General Scheme provided that information should not be made available where it may prejudice the security of the state or risk a threat to life. The Bill now provides that the Examiner should not make information relevant to their functions public where such information might prejudice “international relations”. ICCL considers this is far too broad an exception given the lack of definition of international relations and the potential for most information relevant to national security to have the potential to impact international relations. ICCL recommends removing “international relations” in this section.

Appointments

32. ICCL regrets the narrowing of potential appointees to the post of Independent Examiner to only those who hold or have held judicial office.¹⁶ This is narrower than the General Scheme where Senior Counsel could be appointed. It is also narrower than other jurisdictions which do not limit appointments in such a manner.

E. Collection of Disaggregated Data

33. The Bill refers to the need to compile and store “*statistical information*” by the Garda Commissioner.¹⁷ Section 122(2)(l) sets a function of the Policing and Community Safety Authority (the Authority) to keep itself generally informed of the “*trends and patterns... and statistics in relation thereto*” regarding the use of force by AGS and in relation to crimes committed. No reference is made to the need to collect disaggregated equality data.
34. Given the vital role that disaggregated data plays in ensuring transparency, accountability, and evidence-based responses, ICCL recommends that provision be made in this Bill for the collection of disaggregated data relating to all areas of policing, in particular the use of police powers, based on equality grounds, socio-economic status, geographic location, and ethnicity.

¹⁶ PSCS Bill 2023, S.230(6)

¹⁷ Section 77 of the PSCS Bill 2023.