



AN TÚDARÁS PÓILÍNEACHTA
POLICING AUTHORITY

**Policing Authority Submission to the Joint Oireachtas
Committee on Justice**

Garda Síochána (Powers) Bill

5 August 2021

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1. Introduction

1. The Authority welcomes the opportunity to make this submission to the Joint Oireachtas Committee on Justice, on the General Scheme of the Garda Síochána (Powers) Bill (the Bill). It is noted at the outset that the codification of powers presents a once in generation opportunity to carry out a more comprehensive and holistic assessment of the legislative provisions, rather than simply a mechanistic approach to consolidating existing powers.
2. The Authority made a number of submissions to the Department of Justice at earlier stages of the legislative process and it welcomes the fact that many of the observations it provided have been adopted in the latest iteration of this Bill.
3. It must be stressed that these powers allow for a significant infringement on the rights and liberties of the public and should be subject to significant scrutiny in their formulation, and ongoing oversight of their use by, the Garda Síochána and its personnel must be subject to public account. Additionally, the use of police powers represent heightened risks for the more vulnerable in society. These two themes are reflected in the observations on individual heads in section 2 below.

2. Observations on Individual Heads

Head	Authority comment
Part 1 – Preliminary and General	
Heads 1-4	No comments
Head 5 Regulations	In previously providing observations in earlier stages of the development of this Bill, the Authority outlined the requirement for Codes of Practice to capture those necessary requirements in exercising powers which may not be suitable for inclusion in primary legislation. The Authority welcomes the inclusion of Codes of Practice and provides observations on codes specified under the relevant heads of this Bill. While Head 5 seems to be clear that Codes of Practice are Statutory, it would be important to link the Codes of Practice referred to throughout the Bill to Head 5 to ensure that there is clarity about their status as statutory codes.
Part 2 - Protection of Fundamental Rights	
Head 6 Obligation to respect fundamental rights	<ul style="list-style-type: none"> - The Authority generally welcomes the inclusion of this head, but further consideration should be given to its wording. Under subhead (1) “due regard” may be strengthened with the word “protect”. Furthermore the removal of “only when necessary to achieve a legitimate objective, when provided for by law” and “proportionate to the objective to be achieved” from previous drafts would appear to be a regression. - Subhead (2) makes reference to “inhuman or degrading treatment” but should

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Head	Authority comment
	also include reference to “torture” and definitions of these should be included.
Head 7 Protection of the rights of children	Particular consideration must be given to children due to their heightened vulnerability and bearing in mind their physical, emotional, mental and intellectual maturity. Similar is true for vulnerable adults. While this head and Head 8 make provision for this, as do the Codes of Practice, such considerations are not as pervasive throughout the Bill as might be optimal for safeguarding these individuals.
Head 8 Protection of the rights of persons with impaired capacity	The Authority welcomes the possibility to include protections for persons with impaired capacity. However, subhead (2) should be further developed to include consultation with key stakeholders, including the Authority, in developing the guidelines, similar to the process employed in developing Codes of Practice elsewhere in the Bill.
Part 3 - Stop and Search	
Head 9 Power to stop and search for possession of prescribed articles	<ul style="list-style-type: none"> - In its observations at previous stages of the legislative process, the Authority noted that the evidence of effectiveness of stop and search powers is limited and they have the potential to negatively impact society and relations between the Garda Síochána and communities. They need to be cautiously exercised in a necessary and proportionate manner and must be subject to appropriate accountability mechanisms. - Under subhead (2) due regard needs to be given to the protection of a person’s privacy. In its previous submission, the Authority noted the lack of detail on intimate searches, and that if a more intimate search is required, an arrest should be carried out if required and the suspect brought to a Garda station where the search can be carried out. Further, particular attention should be given to searches involving gender differences between the Garda member and suspect, persons with disabilities, persons with mental health issues, persons whose first language is not English or Irish, and children. Religious dress may also be a consideration. The specifics of this requirement may be suitable for inclusion in a Code of Practice under Head 13.
Head 10	No comments
Head 11 - Right to be informed of the reason for a search	The steps introduced in this head are welcome. However, in addition to the information provided, there should be an obligation on garda members to inform the person being searched that a record will be created and be accessible to the person, as provided for under Head 12.
Head 12 – Record to be made of a search	<ul style="list-style-type: none"> - In addition to those details recorded of the person being searched, the record should also include the name of the garda member conducting the search and the names of any other members present. This would be of benefit in ensuring transparency and accountability in interactions and facilitate investigations in complaints processes.

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Head	Authority comment
	<ul style="list-style-type: none"> - The accessibility of a record under subhead (3) should be automatic and not subject to the submission of a written request. - There is an opportunity under this head and in the recording of other uses of police powers, which has not been capitalised upon, to pave the way for accurate recording of ethnicity, which will allow for oversight of and ensure equality and non-discrimination. Furthermore, in the context of a changing Ireland, a complete understanding of how legislation or policy can affect various sectors within the population requires such reporting. - In the 2019 ‘Concluding Observations’ of its examination of Ireland, the United Nations Committee on the Elimination of Racial Discrimination expressed: <i>“concern about the reportedly high incidence of racial profiling by the Gardaí (the police) targeted at people of African descent, Travellers and Roma and the disproportionately high representation of these ethnic minority groups in the prison system. It is also concerned about the absence of legislation proscribing racial profiling, the absence of independent complaint mechanisms dealing with racial profiling and the lack of statistics on racial profiling. The Committee regrets the lack of detailed information on legislative, disciplinary or other measures taken by the State party to prevent, prohibit and monitor ethnic profiling by the police force”</i>. - The Authority understands that the Garda Síochána needs to identify an appropriate legal basis to record ethnicity and to ensure compliance with General Data Protection Regulations (GDPR), which afford additional protections to such sensitive personal data. Express provision in legislation may assist in creating a firmer legal basis under Article 6 of the GDPR.
Head 13 - Code of Practice on searches	<ul style="list-style-type: none"> - The Authority welcomes the provision for introducing Codes of Practice in relation to the use of stop and search powers and welcomes that its earlier observations were adopted in this regard. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that stop and search is carried out in a manner which is compliant with Human Rights and the Code of Ethics. - The involvement of key stakeholders as consultees in the development of this Code is welcomed, however Subheads (7) to (9) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.

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Head	Authority comment
Part 4 – Search of premises	
Heads 14 to 17	No comments
Head 18 – Right to be informed of search	<ul style="list-style-type: none"> - Under subhead (1) provision is made to show a copy of the warrant to the occupier of the place named in the warrant. In the interests of transparency, it is recommended that the occupier should be given a copy at the time of exercising the warrant rather than solely shown it. - The occupier should also be provided with details on the grounds for issuing the warrant and the relevant details on the warrant should be clear and understandable. - Furthermore, the occupier should be provided with adequate time to read the warrant in advance of the search being carried out, provided there is no risk to the investigation or risk of the search being compromised.
Heads 19 and 20	No comments
Head 21 – Application for search warrant in urgent circumstances	<ul style="list-style-type: none"> - This head allows for the issuance of a warrant by a superintendent or higher rank in the case of urgent circumstances, excluding judicial oversight in the warrants process. It represents a weakening of both citizens’ rights and weakening of oversight of this area of policing. There has been no evidence provided for the requirement for this provision and it would appear that the Garda Síochána presently have timely access to judges for search warrants to be granted, while maintaining sufficient oversight. If it is accepted that the rationale for such provision is for rare and exceptional circumstances, the provisions in this head are not sufficiently prescriptive and do not contain sufficient safeguards and controls. - In the event that such a provision is retained, given the exceptional nature of such a warrant, it might be considered if a rank higher than superintendent may be considered for the authorisation of such a warrant. Furthermore, provision should be included for greater oversight of the issuance of such warrants, through strong internal oversight within the Garda Síochána and, at a minimum, retrospective judicial oversight and reporting by the Garda Síochána. - The retrospective recording of the grounds for issuing a warrant under this provision in subhead (6) is not an adequate control and should be limited to accurate and adequate recording at the time of issuing the warrant. - While it is accepted that disciplinary action may be provided for in the relevant Code of Practice under Head 22, given the scope for misuse of this provision, disciplinary action at a minimum should be specified for unjustifiable issuing of warrant under this provision.
Head 22 Code of Practice on search warrants	<ul style="list-style-type: none"> - The Authority welcomes the provision for introducing Codes of Practice in relation to the use of search warrants and welcomes that its earlier observations were adopted in this regard.

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Head	Authority comment
	<ul style="list-style-type: none"> - Under subhead (2) there is reference to the Code having safeguards for children and “vulnerable” persons. Vulnerability is not defined in the Bill and appears to have been left out in favour of the term “impairment”. For the purposes of consistency, this may require amendment. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that arrests are carried out in a manner which is compliant with Human Rights and the Code of Ethics. - The involvement of key stakeholders as consultees in the development of this Code is welcomed, however Subheads (6) to (8) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.
Part 5 – Arrest	
Head 23 to 32	No comments
Head 33 Code of Practice on arrest	<ul style="list-style-type: none"> - The Authority welcomes the provision for introducing Codes of Practice in relation to the use of arrest powers and welcomes that its earlier observations were adopted in this regard. However in common with other proposed Codes of Practice in the Bill there are a number of issues worthy of further consideration. - Under subhead (2) there is reference to the Code having safeguards for children and “vulnerable” persons. As per observations on previous heads, vulnerability is not defined in the Bill and appears to have been left out in favour of the term “impairment”. For the purposes of consistency, this may require amending. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that arrests are carried out in a manner which is compliant with Human Rights and the Code of Ethics. - The involvement of key stakeholders as consultees in the development of this Code is welcomed. However Subheads (6) to (8) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.

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Part 6 – Persons in Garda Custody	
Head 34	No comments
Head 35 Custody Officer	<p>In previous iterations of the Bill, the term “member in charge” was used. The Authority has noted the importance of the role of “member in charge” in previous commentary in relation to this Bill and other areas of its oversight work. The use of the term Custody Officer does not diminish this importance, as this person will be responsible for safeguarding those held in garda facilities. As per its previous submission, it is the Authority’s view that this role should be restricted to a minimum rank, should have specific training requirements, including the need for Continuous Professional Development (CPD) and should be held accountable for performing their function of protecting the rights of the detainee.</p>
Head 36 to 39	No comments
Head 40 Access to Medical Attention	<ul style="list-style-type: none"> - Subhead (1) of this head only provides for a member of the Garda Síochána to determine if medical assistance is required. There may be benefit to extending this to third parties including solicitors and relatives. There may also be benefit in extending this to relevant professionals who may be present in the context of increased multi-agency work which is anticipated through Policing Service for the Future reforms. - The current rigidity of subhead (2) would appear to undermine the determination of a medical professional in assessing whether a person in garda custody is fit for questioning. It is conceivable that a detainee would be ill or otherwise impaired and not require hospitalisation but that their illness or impairment would extend beyond a fixed time period, and that continuing to question such an individual may affect their ability to participate in an interview and would not be in the interests of their welfare. - In the context of mental health, criteria as to what constitutes fitness for questioning should also be established to ensure the welfare of those held in garda custody. Each case should be evaluated by medical professionals with sufficient training in mental health issues, and in the context of the length and conditions of detention and interview and the nature of the questioning. Provisions regarding fitness to be tried contained under Section 4 of the Criminal Law (Insanity) Act 2006 may be a suitable example for developing similar criteria for fitness to be questioned.
Head 41	No comments
Head 42 Access to Legal Representation	<ul style="list-style-type: none"> - The provisions under subhead (6) and (7) are deeply concerning as they effectively provide a member of the Garda Síochána to exclude a legal representative based on subjective criteria. It effectively removes a person’s choice as to which legal representative they wish to have represent them.

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	<ul style="list-style-type: none"> - If such a provision is to be retained, it should be accompanied by very strict and limiting criteria, with a high threshold and with a requirement for an evidence base on the part of a garda member using this provision. In the event of alleged professional misconduct of legal representatives by garda members, a report should be made to the relevant legal regulatory body for professional evaluation, but such an allegation should not be used as justification for removing a legal representative from an interview. This provision should only exist and legal representatives should only be removed where there is a significant risk to security.
Heads 43 to 58	No comments
Head 59 Custody Record	As per previous observations on recording, provision should be included for the recording of ethnicity.
Heads 60 to 63	No comments
Head 64 Code of Practice on custody and detention	<ul style="list-style-type: none"> - The Authority welcomes the provision for introducing Codes of Practice in relation to the custody and detention and welcomes that its earlier observations were adopted in this regard. - An element which might be included in the Code is the provision of training for garda personnel, to ensure that stop and search is carried out in a manner which is compliant with Human Rights and the Code of Ethics. - There is an absence of explicit mention of the particular safeguards to apply when the person is a child or a person with impaired capacity, despite these being present in other Codes of Practice in this Bill. Consideration should be given to specifying the need for such particular safeguards under this head. - The involvement of key stakeholders as consultees in the development of this Code is welcomed, however Subheads (9) to (11) provide for amendment or revocation of this Code without explicit provision for the same consultative process. This may allow for the views of key stakeholders to be diluted or excluded and it should be clarified that they are statutory codes and the same process should apply for change or revocation. - It would seem important to link the Code of Practice back to Head 5 which seems to clearly require the Codes to be statutory and laid before the Oireachtas by the Minister.
Head 65 to 68	No comments