

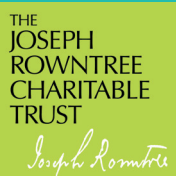
CONFERENCE REPORT
DUBLIN 24 OCTOBER 2023

ICCL-CAJ Conference Report

POLICE SURVEILLANCE NORTH AND SOUTH

Covert Intelligence, Facial Recognition
Technology, Oversight and Human Rights





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List of Abbreviations

AGS	An Garda Síochána
CAJ	Committee on the Administration of Justice
CHIS	Covert human intelligence source
CHIS Act	Covert Human Intelligence Sources Act 2021
CoFPI	Commission on the Future of Policing in Ireland
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRT	Facial recognition technology
ICCL	Irish Council for Civil Liberties
Independent Examiner	Independent Examiner of Security Legislation
Patten Commission	Independent Commission on Policing for Northern Ireland
PSNI	Police Service of Northern Ireland
PSCS Act	Policing, Security and Community Safety Act 2024

Executive Summary

This report summarises the issues identified and discussions held during the conference, *Policing Surveillance North and South: Covert Intelligence, Facial Recognition Technology, Oversight and Human Rights*, hosted by the Irish Council for Civil Liberties (ICCL) and the Committee on the Administration of Justice (CAJ) in Dublin on Tuesday 24 October 2023. This conference was the second in a series of events co-hosted by ICCL and CAJ as part of our joint *Policing for Peace* project, which aims to advance a programme of research, policy, advocacy and coalition-building on human rights-based policing reform across the island of Ireland.

The conference brought together members of the policing oversight bodies, academics, practitioners, civil society, civil servants and affected communities to discuss how to embed human rights law and principles in police surveillance and oversight. This report summarises the key points from each panel discussion, the issues identified and recommendations for reform.

The first section on surveillance and covert intelligence covers the keynote plenary, the first panel discussion and a video developed by Creggan Enterprises' Focus Project at Ráth Mór. The video depicts how local women and children in Creggan, Derry experience national security policing by the Police Service of Northern Ireland (PSNI) and was screened at the conference. Speakers in this section include investigative journalists Barry McCaffrey and Trevor Birney; Baroness Nuala O'Loan, first Police Ombudsman for Northern Ireland, 1999-2007; Prof. David Kaye, former United Nations Special Rapporteur on Freedom of Opinion and Expression, 2014-2020; and John Wadham, Human Rights Advisor to the Northern Ireland Policing Board.

The second section presents the discussions of the second panel, which considered the human rights implications of facial recognition technology (FRT), with panellists Dr Abeba Birhane, Senior Advisor in AI accountability with the Mozilla Foundation and Adjunct Assistant Professor at Trinity College



THE CONFERENCE BROUGHT TOGETHER MEMBERS OF THE POLICING OVERSIGHT BODIES, ACADEMICS, PRACTITIONERS, CIVIL SOCIETY, CIVIL SERVANTS AND AFFECTED COMMUNITIES TO DISCUSS HOW TO EMBED HUMAN RIGHTS LAW AND PRINCIPLES IN POLICE SURVEILLANCE AND OVERSIGHT.

Dublin, and Dr Daragh Murray, Senior Lecturer at Queen Mary University in London and Fellow of the Institute of Humanities and Social Sciences.

The third section of this report outlines the final panel discussion which explored different models for oversight of national security, arising from the Commission on the Future of Policing in Ireland's (CoFPI) recommendation for the establishment of an independent oversight body to review national security arrangements. Jonathan Hall KC, Independent Reviewer of Terrorism Legislation, and Prof. Marie-Breen Smyth, Independent Reviewer of National Security Arrangements for Northern Ireland, spoke about their roles in national security oversight in the UK and Northern

Ireland, respectively, and shared lessons learned for the upcoming establishment of the Independent Examiner of Security Legislation (Independent Examiner) in Ireland.

The event concluded with a summary of key points from Dr Maria Murphy, Associate Professor, Maynooth University, and concluding remarks from ICCL Executive Director, Liam Herrick, which are summarised at the end of this report. Recommendations specific to each panel are included at the end of each respective section, with a full list of recommendations from all panels and more general recommendations pertaining to policing surveillance at the beginning of the report.

Recommendations

OVERALL FOR BOTH JURISDICTIONS

Ensure that the human rights standards found within the framework of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) – including the principles of proportionality, necessity, legality, and non-discrimination – are embedded in laws and policies regulating the use of covert policing.

COVERT INTELLIGENCE FOR THE GOVERNMENT OF IRELAND:

In the context of compliance with the ECHR, ICCPR and the principle of equivalence of rights in the Good Friday Agreement, the Government of Ireland should introduce legislation regulating the use of covert human intelligence sources (CHIS) in a manner which complies with the human rights safeguards found within Article 8 and the broader provisions of the ECHR to address the current lack of legal basis for its use. Any proposed legislation should address the boundaries of permitted conduct, including the prohibition of criminal offences and highlight the absolute moratorium of any acts which constitute human rights violations (e.g., murder, kidnapping, torture).¹

Amend the Policing, Security and Community Safety Act 2024 (PSCS Act) to provide for the Independent Examiner of Security Legislation to have adequate security clearance to investigate all documents and have access to all relevant information. The Independent Examiner should only be refused access to documents on specific grounds and the phrase “national security” should not be used to withhold access to documents to protect the reputation of national security services.

In the upcoming Garda Síochána (Powers) Bill, the Government should ensure adequate protection of journalistic sources under the general search warrant provisions in compliance with the recent High Court ruling highlighting the lack of protection of journalistic sources, Article 10 of the ECHR and applicable jurisprudence from the European Court of Human Rights (ECtHR).²

¹ As ICCL publications have previously recommended, any law regulating covert human intelligence sources should include authorisation and use of: covert human intelligence sources; interception; surveillance; collection, use, and retention of personal data; an independent appeals and/or complaints mechanism; and oversight of all covert activity by an independent person or body. For more detailed information on ICCL's previous work on covert intelligence, please see Alyson Kilpatrick BL, *A Human Rights-Based Approach to Policing* (Dublin, IE: Irish Council for Civil Liberties, 2018), <https://www.iccl.ie/wp-content/uploads/2018/09/Human-Rights-Based-Policing-in-Ireland.pdf>, p. 109.

² 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>; *Nagla v Latvia*. Application no.: 73469/10 (2013), paras. 101-102 Accessible here: <<http://hu-doc.echr.coe.int/fre?i=001-122374>>.

FOR NORTHERN IRELAND:³

Legislation should establish the Commissioner for Covert Law Enforcement in Northern Ireland, which was recommended by the Patten Commission. but has not yet been established.⁴ The Commissioner would be responsible for overseeing surveillance, use of informants and undercover operations, and interceptions of communications, of all agencies in Northern Ireland exercising statutory powers.

Legislation and practice should also address the “accountability gap” entrenched by the 2006 formalisation of the role of MI5 primacy over covert “national security” policing in Northern Ireland. This arrangement should be independently reviewed. Should MI5 retain a role in Northern Ireland policing, it should be subject to the same accountability bodies and arrangements as the PSNI: the Police Ombudsman and the Policing Board of Northern Ireland.

FOR BOTH JURISDICTIONS:

Introduce a precise, clear definition of national security that is guided by regional and international human rights law.

The definition should be broader than threats to the State and identify how national security is a shared, communal security affecting all communities and relate to the duties to safeguard all lives within the jurisdiction. Without prejudice to broader exemptions,⁵ ensure that the use of national security qualifications to prevent disclosure of information to the public or in legal proceedings is, in particular, limited to non-disclosure of operational methodologies which are lawful and not obsolete. In particular ensure that “national security” restrictions cannot be used to conceal state culpability for human rights violations in the covert sphere.⁶

Develop detailed law and policies to provide for the timely handling and adequate management of digital evidence in order to effectively balance the needs of law enforcement to gather intelligence with individuals’ human rights protected in the ECHR, including the right to privacy and family life.

³ Whilst most justice powers are transferred to the Northern Ireland Assembly, there are specific exemptions for powers concerning national security, including MI5, are retained by Westminster, as is the content of The Regulation of Investigatory Powers Acts. For further information see: Holder, T., & Verdirame, C., “The national security doctrine in Northern Ireland legislation”, Northern Ireland Legal Quarterly 67, no. (2016): <https://doi.org/10.53386/nilq.v67i1.97>.

⁴ The Report of the Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland*, September 2019, <https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf>, at para. 6.44 recommended the establishment of a “Commissioner for Covert Law Enforcement in Northern Ireland” – a senior judicial figure with a remit to oversee surveillance, use of informants and undercover operations; with powers to inspect the police and other agencies acting in their support and compel disclosure of documents; responding to direct representations or referrals from the Police Ombudsman or Policing Board, and powers to act on their own initiative to ascertain if covert policing was being used within the law and only when necessary;”

⁵ Such as for example the administration of justice or non-disclosure of information which would put lives at risk.

⁶ ICCL, *Briefing for Second Stage Seanad Debate on Policing, Security and Community Safety Bill (2023)*, October 2023, <https://www.iccl.ie/wp-content/uploads/2023/10/ICCL-Briefing-on-Policing-Security-and-Community-Safety-Bill-2023.pdf>, p. 5-6.

FOR POLICING SERVICES

An Garda Síochána should develop a written policy on covert intelligence, including regulating the use of covert human intelligence sources (CHIS/informers) and undercover police, which incorporates the relevant human rights standards and their practical application. This policy should include adequate guidelines regarding informant recruitment, including whether officers will be placed as informants. The credibility of CHIS should be constantly reviewed, as well as their involvement in potential criminal activity. Mechanisms set up to oversee the use of covert human intelligence sources must maintain a critical relationship. The informant's compliance with human rights must be continuously reviewed, and any decisions made on the role or actions of the informant should be based on human rights compliance, rather than a desire to achieve particular law enforcement outcomes.

An Garda Síochána and the PSNI must commit to ensuring a human rights-based approach in all areas of covert policing, including surveillance and informant handling. This should ensure that the approach is proportionate and non-discriminatory including in relation to minority communities. Senior management should take a leadership role in advocating for the use of a human rights-based approach and actioning implementation of such.

FOR POLICING OVERSIGHT BODIES

The new Policing and Community Safety Authority should meet with Garda covert human intelligence sources to discuss the specific human rights obligations applicable to covert policing and how to ensure human rights are respected in their work. It should also meet with the community to discuss regulating police surveillance, particularly in discussions around regulating informers.

Both the Policing Board and the new Policing and Community Safety Authority should ensure that they have the capacity and structures to monitor covert policing policy and practice. This includes, in particular, ensuring as a matter of practice and post-operational accountability the proportionality and lawfulness of executive policing operations driven by intelligence-led or national security policing. This includes the vital role of the independent human rights legal advisor to the Policing Board as a fully vetted independent office capable of advising the Board on covert policing compliance.

Ombudsmen should have sufficient powers, structures and resources to ensure they are able to sufficiently enforce policing policy and broader conduct rules in the area of covert policing.

FACIAL RECOGNITION TECHNOLOGY

Dr Farries, Dr Birhane and Dr Murray called on the Department of Justice to abandon its plans to introduce FRT in Irish policing. Should they go ahead with those plans, the panellists outlined the minimum safeguards which must be in place before any deployment of FRT by An Garda Síochána to ensure minimum human rights compliance. The full list of questions is found in Appendix 1.

The following recommendations apply to the use of police surveillance through FRT, North and South.

FOR BOTH JURISDICTIONS

Prohibit the use of facial recognition technology by law enforcement as the technology is inherently flawed, racist and misogynistic.

Government and policing services should provide evidence that FRT is strictly necessary compared to less intrusive, alternative measures.

Any law and policy governing the use of FRT by law enforcement should robustly address bias, discrimination, misidentification and mass surveillance concerns; detail how personal data will be processed; explain who would be subjected to an FRT search and when; and include the publication of a data protection impact assessment.

FOR POLICING SERVICES

Allow for independent auditors to have access to training datasets and models for audit purposes.

Provide adequate technical training to members on using FRT, data protection training and training on risks including differential treatment, function creep and unwarranted intrusions.

Publish the demographic data for arrests, stop and searches, and any other police actions resulting from the use of FRT.

OVERSIGHT

FOR THE GOVERNMENT OF IRELAND

Ensure that the provisions establishing the powers and jurisdictions of the Office of the Independent Examiner of Security Legislation are as least equivalent to those provided for by the Independent Reviewer of Terrorism Legislation⁷ in the UK (the model recommended by CoFPI). This includes expanding the eligibility of the role to include senior counsel, the scope of access to relevant information, and the level of transparency regarding public information.

Provide for adequate funding and human resources for the new Independent Examiner of Security Legislation. Based on the cost of the Independent Reviewer of Terrorism Legislation in the UK, €247,000 should be provided to cover the cost of the Independent Examiner and a special advisor.⁸

FOR MEMBERS OF THE OIREACHTAS

Continue to put pressure on Government, for instance through private members time or parliamentary questions, to increase political engagement on the issue of adequate, robust and sufficient independent oversight of national security.

FOR THE INDEPENDENT EXAMINER OF SECURITY LEGISLATION

Engage with and develop meaningful relationships with media, civil society, academics, policing services and political parties to build widespread public confidence in the role.

⁷ See Counter Terrorism and Security Act 2015.

⁸ For more information, please see ICCL, Pre-Budget Submission 2024: Investing in Rights, July 2023, <https://www.iccl.ie/wp-content/uploads/2023/07/ICCL-Budget-2024.pdf>.

Introduction

EVENT AND POLICING FOR PEACE PROJECT OVERVIEW

The Irish Council for Civil Liberties (ICCL) and the Committee on the Administration of Justice (CAJ) are key players in the police reform process and have played a significant role in advocating for a rights-based approach to policing within both jurisdictions. This document explores the issues identified and discussions held during our conference **Police Surveillance North and South: Covert Intelligence, Facial Recognition Technology, Oversight and Human Rights**.

This conference was the second in a series of events co-hosted by ICCL and CAJ as part of our joint *Policing for Peace* project, which aims to advance a programme of research, policy, advocacy and coalition-building in relation to human rights-based policing reform across the island of Ireland. Each event considers a different thematic aspect of policing and human rights. Our first event in Derry (June 2023) discussed the issues of racial profiling and immigration enforcement, and further seminars will be held on public order policing and protest.⁹

The conference brought together civil servants, members of the policing oversight bodies, academics, practitioners, civil society and affected communities to discuss the current and future landscape of police surveillance and oversight. The agenda focused on how to embed a human rights perspective in these issues. This document will summarise the key points from each panel, the issues identified and recommendations for reform.

This report builds on ICCL and CAJ's historic work on police reform and both organisations continue to call on both governments and police services to fully commit to a human rights-based approach to policing. The goal of the conference – and this policy document – is to encourage collaboration between ICCL and CAJ, to share best practices, and to develop and advance law and policy recommendations to further embed a human rights-based approach to policing in both jurisdictions. This also complies with the principle of equivalence found in the Good Friday Agreement



to ensure that there are equivalent human rights protections in the North and South.

ICCL's Policing for Peace project is supported by the Joseph Rowntree Charitable Trust. This event was supported by the Community Foundation and Community Foundation Northern Ireland programme.

KEY ISSUES REGARDING SURVEILLANCE AND POLICING ON THE ISLAND OF IRELAND

The use of surveillance, both by the State and by police services as a State body, and its compatibility with domestic, regional and international human rights law is a pressing human rights issue.

⁹ The Committee on the Administration of Justice and the Irish Council for Civil Liberties, *Racial Profiling in Law Enforcement*, forthcoming 2024.

Policing surveillance can include the use of covert intelligence and facial recognition technology, but it can also affect society more broadly – including through the surveillance of journalistic sources (discussed in the keynote plenary by the lived experiences of investigative journalists Barry McCaffrey and Trevor Birney). Policing surveillance can also impact victims of crime, such as the victims of the Loughinisland massacre, and citizens generally, as was highlighted by the experiences of women and families in Derry, captured in the video developed by the Focus Project at Ráth Mór. Due to its broad scope, surveillance has an impact on a variety of human rights issues, including:

- Right to life;
- Prohibition of torture and ill-treatment;
- Right to liberty and security;
- Right to privacy;
- Right to respect for family and private life;
- Right to a fair trial;
- Freedom of expression, including the right to seek, impart, and receive information;
- Freedom of assembly and association; and
- Equality and non-discrimination.

The paramount recommendation of both the Commission on the Future of Policing in Ireland (CoFPI) and the Independent Commission on Policing for Northern Ireland (Patten Commission) was that human rights should be the foundation and purpose of policing. As such, having police surveillance that is compliant with human rights law and standards – including that the use of surveillance is provided in law, is necessary to meet a pressing need, and is proportionate to meet that need – is essential to further advance human rights-based police reform in both jurisdictions.

Emerging policing technologies such as facial recognition technology and the use of covert intelligence have led to an expansion of police surveillance powers across Ireland. The lack of oversight and regulation in these areas has been raised and is occurring within a broader context of generational police reform and expanded police powers moving forward in the Oireachtas.¹⁰

In the North, significant reforms to legislation and police practice have taken place since the Good Friday Agreement and Patten Commission, although the latter's recommendation for a specific Commissioner for Covert Law Enforcement in Northern Ireland remains unimplemented. In the covert intelligence sphere, the handling of informants and their permitted conduct has long been a touchstone issue in Northern Irish policing reform, with further reforms driven by the Police Ombudsman's Operation Ballast report (2007).¹¹ UK legislation now formalises a system of authorising criminal conduct by informants and the PSNI policy has been partially declassified.¹² More recently, the Northern Ireland Policing Board produced a thematic Human Rights Review of Privacy and Policing (2023).¹³ Recent revelations regarding police use of surveillance powers against a journalist and internally against officers has driven further debate regarding the regulation and oversight of such powers and the circumstances in which they can be used.

Given this context, this conference aimed to explore the compatibility of police surveillance with human rights law and principles through three thematic issues: covert intelligence, facial recognition technology and oversight. This document will provide an overview of the keynote plenary and the panels, identify key issues, and provide recommendations for reform. Due to overlap in subject matter between the keynote plenary and the covert intelligence panel, the key issues identified and recommendations will be included in one section to avoid repetition.

¹⁰ See Policing, Security and Community Safety Act 2024; Garda Síochána (Recording Devices) Act 2023; General Scheme for the Garda Síochána (Recording Devices) (Amendment) Bill 2023; General Scheme for the Garda Síochána (Powers) Bill 2021.

¹¹ Police Ombudsman for Northern Ireland, Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Junior and related matters, 2007, <https://www.policeombudsman.org/PONI/files/9a/9a366c60-1d8d-41b9-8684-12d33560e8f9.pdf>.

¹² See Covert Human Intelligence Sources (Criminal Conduct) Act 2021.

¹³ Northern Ireland Policing Board, *Human Rights Review of Privacy and Policing*, 2023, <https://www.nipolicingboard.org.uk/files/nipolicingboard/2023-07/Human%20Rights%20Review%20of%20Privacy%20and%20Policing%20-%20Tagged.pdf>.

Keynote Plenary and Panel 1: Surveillance and Covert Intelligence

CHAIR: Daniel Holder, Director, CAJ

PRESENTERS:

Barry McCaffrey and Trevor Birney, investigative journalists
Baroness Nuala O’Loan, First Police Ombudsman for Northern Ireland, 1999-2007
Prof. David Kaye, Former United Nations Special Rapporteur on Freedom of Opinion and Expression, 2014-2020
John Wadham, Human Rights Advisor to the Northern Ireland Policing Board

SURVEILLANCE AND COVERT INTELLIGENCE ISSUES IDENTIFIED

- Covert intelligence is used by police services everywhere and where properly handled, can be essential to effective policing and the pursuit of justice. Its use can be justified to protect citizens, but there must be effective regulation and oversight. Intelligence gathering cannot supersede the safety of citizens. There are particular issues regulating the permitted conduct of covert human intelligence sources (CHIS) and informants.
- Article 8 of the European Convention on Human Rights (ECHR) (right to privacy and for respect of family life, home and correspondence) is the immediate human right implicated. The framework within Article 8 provides a roadmap for how covert intelligence can be used in a manner which complies with human rights.
- There is an absence of legislation in the South on the use of CHIS. Any proposed legislation should address not just the contracting, but also the regulation of the permitted conduct of informants, including the framework when informants commit criminal offences, and its compatibility with human rights.
- Journalists have a critical role in democratic society to hold governments accountable and to promote transparency where evidence of wrongdoing is brought to light.
- Reform to current covert intelligence law and policy will probably be necessary in the short term to ensure that law enforcement agencies can still exercise their powers to tackle serious crime and protect national security because of rapid changes in police technology.

OVERVIEW OF KEYNOTE PLENARY AND PANEL 1

The keynote plenary featured investigative journalists Barry McCaffrey and Trevor Birney, who were subject to the arrest and search of their media premises by the PSNI following their *No Stone Unturned* documentary about informant involvement in the 1994 Loughlinisland massacre.

Baroness Nuala O’Loan, first Police Ombudsman for Northern Ireland, spoke in the keynote and first panel discussion about her experience regulating covert informant handling and oversight of covert policing. Prof. David Kaye, former UN Special Rapporteur on Freedom of Expression and Opinion (2014-2020), concluded the session with an international human rights perspective on regulation and oversight of surveillance.

The first panel discussed the regulation of informants in Northern Ireland and the advent of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 (CHIS Act). Panellists noted that activism and strategic litigation by civil society organisations and journalists have contributed to stronger norms and frameworks of police accountability and regulation. Panellists also noted areas for improved regulation, such as establishing a human rights-focused police accountability body and excluding certain crimes that constitute human rights violations (up to and including murder) from the scope of crimes that can be authorised under the CHIS Act. The panel also addressed the lack of a legal framework regulating the activities of undercover police or informants in the South. It was stated that this is not ECHR compatible and is serves neither Gardaí nor civilians.

Daniel Holder, Director of CAJ, opened the discussion and provided an overview of the relevant legal framework for covert policing. Article 8 of the ECHR is applicable to both jurisdictions and the use of covert intelligence by both police services must comply with the legal test provided for under Article 8(2): that any interference with Article 8 must be provided for in law, is necessary in a democratic society, and is proportionate and in pursuit of a legitimate aim. Permitted legitimate aims includes, most notably, the prevention of

crime. Applying covert policing to lawful expressive activity is likely to be unlawful. He then spoke to how different jurisdictions have varying approaches regarding the use of covert intelligence, particularly the use of covert human intelligence sources. Some jurisdictions may have express legal limits on what types of activities that informants can engage in, e.g., Norway has prohibited the commission of criminal offences by informants and Canada and the United States have express limits in primary legislation.

THE EXPERIENCE OF SURVEILLANCE OF INVESTIGATIVE JOURNALISTS

Following an introduction from Mr Holder, the keynote plenary began with Barry McCaffrey and Trevor Birney speaking to their personal experiences of surveillance by the PSNI following their work on the documentary *No Stone Unturned*. Mr McCaffrey and Mr Birney's contributions highlighted the real-life impact of surveillance and served to frame the importance of surveillance being subject to sufficient oversight and being used in a lawful and human rights compliant manner. In their case, the PSNI raided their homes and office in 2018 and seized thousands of sensitive journalistic files and documents. Despite having a warrant saying that they were only looking for documents relating to *No Stone Unturned*, additional documents were seized. They were arrested and questioned under the Official Secrets Act in a purported attempt to find a whistleblower.

Mr McCaffrey described his experience as "humanity taken away from you". He also outlined how their daily lives and families were affected by their surveillance and its consequences: their homes were raided by armed police, they spent a year challenging the PSNI through judicial review, they were placed under strict bail conditions, and Mr Birney had restrictions on his freedom of movement— even travelling for work from Belfast to Dublin. A judicial review in 2019 ruled that the search warrants against them were unlawful and the judge could "see no overriding requirement in the public interest which could justify an interference with the protection of journalistic sources in this case".¹⁴ Following the decision, they received a



¹⁴ In the Matter of an Application by Fine Point Films and Trevor Birney for Judicial Review and in the Matter of an Application by Barry McCaffrey and in the Matter of an Application by PSNI and Durham Constabulary for Search Warrants [2020] NIQB MOR11288, para 55.

public apology from then PSNI Chief Constable Simon Byrne and agreed to substantial damages.

Mr McCaffrey was subject to additional targeted surveillance by the PSNI. In March 2023, the Investigatory Powers Tribunal informed Mr McCaffrey that the PSNI had covertly obtained his telephone records in an attempt to identify another source from a different investigation (relating to allegations of financial corruption within the PSNI) following a 2013 phone call Mr McCaffrey had with the PSNI's Press Office. The PSNI did not follow the standard rule of seeking a production method in front of a court when they felt they needed information from the journalists. Mr McCaffrey and Mr Birney believe that the PSNI abused the protection of journalistic sources and used the Regulation of Investigatory Powers Act and communication data legislation to avoid judicial scrutiny of their actions as any application to identify journalistic sources from a legitimate press inquiry would be refused.

Mr McCaffrey concluded by emphasising that the use of covert surveillance to identify journalistic sources is widespread and demonstrates the need for proper, independent oversight of police use of covert intelligence to ensure that police are held to account and not allowed to treat journalistic protection of sources as a crime.

Baroness Nuala O'Loan then spoke about the role of covert policing in policing (detailed below), the impact of the Legacy Act on criminal proceedings relating to the conflict, and her work on covert policing as the first Police Ombudsman for Northern Ireland. Baroness O'Loan articulated that Mr McCaffrey and Mr Birney's experiences demonstrate police's lack of accountability, and the difference between legislation and reality when journalists try to reveal human rights violations regarding policing and security services. She pointed out that their treatment sends a message to other journalists investigating crime and security issues. She said that Mr McCaffrey and Mr Birney's personal experiences emphasise that effective oversight of covert intelligence is essential to ensure accountability and transparency of policing.



THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK FOR SURVEILLANCE

Prof David Kaye then concluded the keynote plenary. Like the preceding speakers, he focused on the right to privacy and how at UN level, there has been rigorous norm creation around privacy in the digital age through various soft law documents.¹⁵ UN Special Procedures have worked to advance norm consolidation regarding the limitations on surveillance, the responsibilities of companies in the information communications technology sector, and limits on States in the context of counter-terrorism measures and the protection of journalists and their sources. These documents have provided narrow meanings for broad phrases, such as national security and public order, to ensure robust protection of human rights when they are used as grounds for interference in the right to privacy. When regulating surveillance in a manner that is compliant with human rights norms, there should be clarity and precision of law, the surveillance should be carried out in the least restrictive and intrusive manner possible, and any interference should not be excessive in relation to achieving the objective. Prof. Kaye also highlighted areas where he has seen a clash between the perceived or articulated needs of the State and the human rights principles of legality, necessity

¹⁵ For example, please see UN General Assembly, "The Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights," Geneva, 30 June 2014, A/HRC/27/37, <https://digitallibrary.un.org/record/777869?ln=en&v=pdf>; UN General Assembly, "Surveillance and human rights – Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," Geneva, 28 May 2019, A/HRC/41/35, <https://digitallibrary.un.org/record/3814512?ln=en&v=pdf>; UN General Assembly, "Reinforcing media freedom and the safety of journalists in the digital age: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan," Geneva, 20 April 2022, A/HRC/50/29, <https://digitallibrary.un.org/record/3973716?ln=en&v=pdf>; UN General Assembly, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," Geneva, 6 September 2016, A/71/373, <https://documents.un.org/api/symbol/access?j=N1627827&t=pdf>.

and proportionality, including in digital security (particularly encryption) and the widespread use of spyware and targeted surveillance across EU Member States.

Prof. Kaye also discussed the ongoing negotiations for a proposed UN treaty to address cybercrime and how it furthers the trans-nationalisation of surveillance as it includes obligations of States to seek information across borders in the context of their alleged policing operations and investigations. The level of surveillance and information-sharing required to fulfil such obligations is inconsistent with human rights law and standards, including the principle of proportionality identified in the International Covenant on Civil and Political Rights (ICCPR). He noted that the cybercrime treaty is something to be cautious about and that its potential impact on human rights should be monitored closely.¹⁶

Referring to the protection of journalists and journalistic sources raised by Mr McCaffrey and Mr Birney, Prof. Kaye noted continuing pressure on journalists to give up their sources and to give up some measure of their digital security; however, regional progress has been made to provide another layer of normative protection, including the EU Whistleblowing Directive (transposed into Irish law by the Protected Disclosures (Amendment) Act 2022) and the EU Media Freedom Act.

Despite the progress in agreeing to these norms at the regional and international levels, Prof. Kaye noted that the real challenge has been ensuring that these norms are meaningfully implemented in domestic law and that their implementation is adequately monitored so that they can be fully effective.

COVERT INTELLIGENCE AND HUMAN RIGHTS

Baroness Nuala O’Loan spoke to the role of covert policing and its compatibility with human rights in the keynote plenary and Panel 1. Firstly, she identified that all forms of covert policing interfere with the right to privacy in the ECHR and that lawful and unlawful covert policing are differentiated on the basis of whether they comply with the restrictions provided for under Article 8 of the ECHR. She noted that covert policing can take many



forms: recruitment, handling and management of informants, use of interception of communication powers, accessing communication data, and carrying out surveillance on persons. Furthermore, she identified how covert intelligence can be very effectively used, such as in the reinvestigation of the murder of Daniel Morgan. She also identified the complex history of the use of CHIS specifically in Northern Ireland, including informants using the system to their own advantage, failure to arrest informants for crimes which they had allegedly confessed to, creating misleading interview notes, and blocking searches.

Baroness O’Loan discussed the human rights framework relevant to covert intelligence as she believes that it is “fundamental that there is total compliance with the law that regulates such activities”. She elaborated on the legal test for determining whether covert intelligence complies with the safeguards contained within Article 8:

Legality: The use of covert intelligence must be provided for in law.

Necessity/legitimate aim: Covert intelligence is being used as necessary to achieve a legitimate aim, such as the prevention and detection of crime or national security.

Proportionality: Covert intelligence must be used in a limited way to achieve a legitimate aim, such as the prevention and detection of crime. The use of covert intelligence must be proportionate to the desired goal.

The human rights framework informed discussions on the current domestic legal framework for covert intelligence in both jurisdictions, detailed below.

¹⁶ Deborah Brown, “No Consensus on Proposed Global Cybercrime Treaty,” Human Rights Watch, 6 September 2023, <https://www.hrw.org/news/2023/09/06/no-consensus-proposed-global-cybercrime-treaty>.

THE LEGAL FRAMEWORK FOR COVERT INTELLIGENCE

Panel 1 began with a brief overview of regulations on covert intelligence in the UK. Discussions on a regulatory framework for surveillance first began between 1998 and 2000. In 2000, the UK Human Rights Act came into force, as did the Regulation of Investigatory Powers Act. In 2016, the Investigatory Powers Act was passed, introducing further regulations on police surveillance. In 2021, the CHIS Act was passed, allowing informants to commit authorised crimes with immunity from criminal proceedings. Over the past two decades, civil society has tested the UK's compliance with Article 8 of the ECHR through a series of cases. The most recent decision in this series was handed down by the European Court of Human Rights (ECtHR) in September 2023—in this instance, the ECtHR found the UK in breach of Article 8. These cases demonstrate the important role that civil society organisations play in constructing norms and frameworks around regulating police surveillance. It is clear that informal codes of practice do not replace a robust regulatory framework.

TENSION BETWEEN USE OF INFORMERS AND HUMAN RIGHTS

In the first panel, John Wadham, Human Rights Advisor to the Northern Ireland Policing Board and Baroness Nuala O'Loan discussed the tension between the use of informers and human rights. Debates around regulating informers largely take shape in two ways. First, some argue that placing limits on specified criminal offences within the CHIS Act would put informers at risk of being 'tested' and discovered by the people they are surveilling, while others argue that regulation is already necessitated by UK commitments under the ECHR and Human Rights Act, and such express limits are a feature of legislation in other jurisdictions. Mr Wadham also underlined the Human Rights Act and Articles 2 and 3 (the right to life and prohibition on torture) of the ECHR which, due to their absolute nature, already restrict any authorisation. This is important as there is currently no legislation or legal framework in the South regarding CHIS.

Secondly, there is a tension between gathering intelligence for crime prevention and complying with human rights frameworks and norms. Baroness O'Loan noted that the human rights compatibility

of informant use introduces a profoundly difficult question for legislators, as informants are often involved in crime and indeed are generally only useful to police when they are involved in serious criminality. On the other hand, as CAJ noted, informer impunity schemes may erode the rule of law and trust between the community and police. Baroness O'Loan also noted here that if a State body is aware of a threat to life, they must act to prevent it. There have been many situations in the past in the North where the State failed to act to prevent a death and this has created significant issues, including the difficulty of attributing responsibility, as the State does not hold records of omissions to act.

On this note, CAJ highlighted that other jurisdictions have completely outlawed the authorisation of criminal activity for informants or have put express limits on the authorisation, and questioned whether the CHIS Act creates more problems than benefits. One example discussed was paramilitary housing intimidation: when authorised crimes by CHIS cease to be considered criminal offenses by the police, how are detectives to inform a family that they are investigating, including where suspects may have been caught or identified in the act but can face no criminal proceedings? There is a concern that when informants are involved in authorised criminal activity, there is now a *de facto* immunity situation.

Compatibility of the Authorisation of Criminal Conduct with Human Rights Law

The scope of potential authorised criminal offences was discussed at length by both Baroness O'Loan and Mr Wadham, in part due to the history of the use of CHIS in the North. Baroness O'Loan emphasised that the authorisation of criminal offences must balance the need to prevent crime against the obligation to uphold and protect human rights. One example of a permissible criminal offence which complies with human rights law is membership of a prescribed organisation, as the criminal conduct authorisation is likely to be proportionate in the context of the particular objective. Other CHIS authorisations such as online sting operations to catch sex offenders are also likely to provide a proportionate response. Baroness O'Loan agreed, however, that the absence of limitations in the CHIS Act in context of historical use may erode community trust in police, undermining the ability of the police to engage with the public and damaging the circle of intelligence which progresses the prosecution of crime.

The panellists discussed which authorised crimes could be permitted under the CHIS Act and agreed that offences constituting human rights violations could not lawfully be an authorised crime, as this would violate Article 2 (right to life) and other provisions of the ECHR. A noteworthy case that underscores this point is that of Stakeknife, an informer in the Irish Republican Army who was implicated in several other informers' deaths. To illustrate the complexity in putting boundaries around informer action, Baroness O'Loan asked the hypothetical question of whether it would be okay for the State to authorise an informer under the CHIS Act to drive the getaway car after a murder is committed. While murder itself is the biggest "line in the sand", where does the State draw the boundary around authorising other criminal activity?

Oversight for use of informants is vital. Mr Wadham noted the importance of independent accountability mechanisms – 'outsiders' reviewing police practices. He discussed the need for all police accountability bodies to have a human rights focus, highlighting the importance of roles such as the Policing Board of Northern Ireland and the Human Rights Advisor. He emphasised that this body which? should not just regulate the way police do their job, but it should actively promote police compliance with human rights frameworks. The person Advisor? should have security clearance to access all types of documents regardless of their security status. It was discussed that despite all of the issues with the PSNI which had been raised during the panel, the PSNI is more aware of the need to understand and promote human rights – including the principles of proportionality and necessity – than many other police services, and that they are willing to engage in conversations about human rights in policing.



¹⁷ While this video was shown before the third panel on oversight on the day of the conference, ICCL felt the recommendations arising from it were best placed in this chapter.

OTHER SURVEILLANCE AND COVERT INTELLIGENCE ISSUES RAISED:

LEGACY: On the topic of immunity for crimes, the UK Legacy Act was briefly discussed, including how immunity for crimes contributes to a lack of community trust in policing. The Independent Commission for Reconciliation and Information Recovery (ICRIR) is the new body set up by the Legacy Act to review Troubles-related crimes. Baroness O'Loan described how the Legacy Act may impede State accountability as the ICRIR will have restricted access to information from authorities that they may reasonably require and that onward disclosure of information can be denied on the basis of vague and imprecisely defined national security grounds and anything to do with covert intelligence.

PROTECTION OF JOURNALISTIC SOURCES:

Police surveillance and intimidation of journalists was another theme explored by the panellists. Baroness O'Loan highlighted the case of journalist Liam Clarke, who was arrested in 2003 in connection with his investigatory work. The PSNI in this case lacked proper warrants and failed to comply with other procedures around examining journalistic evidence. The PSNI ended up paying significant damages, and she said it is appalling to hear that the intimidation and wrongful surveillance of journalists has continued in certain cases. Mr Wadham explained that over the past decade, activism by journalists has resulted in stronger regulations on police surveillance and data collection.

PERSONAL EXPERIENCES OF NATIONAL SECURITY POLICING:

A video was screened which presented the testimonies of women and children with experiences of executive policing operations flowing from national security covert policing in Derry.¹⁷ The people in the video outlined that this has been taking place for 10-20 years, but it has recently increased in scale. The families experience ongoing harassment and misuse of police powers daily: stop and searches, house raids, assault, extensive interviews, multiple arrests or rearrests, scare tactics, surveillance (including finding bugs in their homes and PSNI officers being parked outside their homes), police checkpoints and confiscated mobile phones. Families have lost access to child benefits and wages due to bank accounts, including the accounts of children and young people, being closed.

SURVEILLANCE AND COVERT INTELLIGENCE CONCLUSION

The keynote plenary and first panel discussed at length the issue of covert intelligence and its compatibility with human rights law. The following recommendations provide a framework for increased protection of human rights and ensuring there is efficient regulation and oversight of surveillance and covert intelligence.

SURVEILLANCE AND COVERT INTELLIGENCE RECOMMENDATIONS FOR THE GOVERNMENT OF IRELAND:

In the context of compliance with the ECHR, ICCPR and the principle of equivalence of rights in the Good Friday Agreement, the Government of Ireland should introduce legislation regulating the use of covert human intelligence sources (CHIS) in a manner which complies with the human rights safeguards found within Article 8 and the broader provisions of the ECHR to address the current lack of legal basis for its use. Any proposed legislation should address the boundaries of permitted conduct, including the prohibition of criminal offences and highlight the absolute moratorium of any acts which constitute human rights violations (e.g., murder, kidnapping, torture).¹⁸

Amend the Policing, Security and Community Safety Act 2024 (PSCS Act) to provide for the Independent Examiner of Security Legislation to have adequate security clearance to investigate all documents and have access to all relevant information. The Independent Examiner should only be refused access to documents on specific grounds and the phrase “national security” should not be used to withhold access to documents to protect the reputation of national security services.

In the upcoming Garda Síochána (Powers) Bill, the Government should ensure adequate protection of journalistic sources under the general search warrant provisions in compliance with the recent High Court ruling highlighting the lack of protection of journalistic sources, Article 10 of the ECHR and applicable jurisprudence from the European Court of Human Rights (ECtHR).¹⁹

¹⁸ As ICCL publications have previously recommended, any law regulating covert human intelligence sources should include authorisation and use of: covert human intelligence sources; interception; surveillance; collection, use, and retention of personal data; an independent appeals and/or complaints mechanism; and oversight of all covert activity by an independent person or body. For more detailed information on ICCL's previous work on covert intelligence, please see Alyson Kilpatrick BL, *A Human Rights-Based Approach to Policing* (Dublin, IE: Irish Council for Civil Liberties, 2018), <https://www.iccl.ie/wp-content/uploads/2018/09/Human-Rights-Based-Policing-in-Ireland.pdf>, p. 109.

¹⁹ 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>; Nagla v Latvia. Application no.: 73469/10 (2013), paras. 101-102 Accessible here: <<http://hu-doc.echr.coe.int/fre?i=001-122374>>.

FOR NORTHERN IRELAND:²⁰

Legislation should establish the Commissioner for Covert Law Enforcement in Northern Ireland, which was recommended by the Patten Commission. but has not yet been established.²¹ The Commissioner would be responsible for overseeing surveillance, use of informants and undercover operations, and interceptions of communications, of all agencies in Northern Ireland exercising statutory powers.

Legislation and practice should also address the “accountability gap” entrenched by the 2006 formalisation of the role of MI5 primacy over covert “national security” policing in Northern Ireland. This arrangement should be independently reviewed. Should MI5 retain a role in Northern Ireland policing, it should be subject to the same accountability bodies and arrangements as the PSNI: the Police Ombudsman and the Policing Board of Northern Ireland.

FOR BOTH JURISDICTIONS:

Introduce a precise, clear definition of national security that is guided by regional and international human rights law.

The definition should be broader than threats to the State and identify how national security is a shared, communal security affecting all communities and relate to the duties to safeguard all lives within the jurisdiction. Without prejudice to broader exemptions²² ensure that the use of national security qualifications to prevent disclosure of information to the public or in legal proceedings is, in particular, limited to non-disclosure of operational methodologies which are lawful and not obsolete. In particular, ensure that “national security” restrictions cannot be used to conceal state culpability for human rights violations in the covert sphere.²³

Develop detailed law and policies to provide for the timely handling and adequate management of digital evidence in order to effectively balance the needs of law enforcement to gather intelligence with individuals’ human rights protected in the ECHR, including the right to privacy and family life.

²⁰ Whilst most justice powers are transferred to the Northern Ireland Assembly, there are specific exemptions for powers concerning national security, including MI5, are retained by Westminster, as is the content of The Regulation of Investigatory Powers Acts. For further information see: Holder, T., & Verdirame, C., “The national security doctrine in Northern Ireland legislation”, Northern Ireland Legal Quarterly 67, no. (2016): <https://doi.org/10.53386/nilq.v67i1.97>.

²¹ The Report of the Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland*, September 2019, <https://cain.ulster.ac.uk/issues/police/patten/patten99.pdf>, at para. 6.44 recommended the establishment of a “Commissioner for Covert Law Enforcement in Northern Ireland” – a senior judicial figure with a remit to oversee surveillance, use of informants and undercover operations; with powers to inspect the police and other agencies acting in their support and compel disclosure of documents; responding to direct representations or referrals from the Police Ombudsman or Policing Board, and powers to act on their own initiative to ascertain if covert policing was being used within the law and only when necessary;”

²² Such as for example the administration of justice or non-disclosure of information which would put lives at risk.

²³ ICCL, *Briefing for Second Stage Seanad Debate on Policing, Security and Community Safety Bill (2023)*, October 2023, <https://www.iccl.ie/wp-content/uploads/2023/10/ICCL-Briefing-on-Policing-Security-and-Community-Safety-Bill-2023.pdf>, p. 5-6.

FOR POLICING SERVICES

An Garda Síochána should develop a written policy on covert intelligence, including regulating the use of covert human intelligence sources (CHIS/informers) and undercover police, which incorporates the relevant human rights standards and their practical application. This policy should include adequate guidelines regarding informant recruitment, including whether officers will be placed as informants. The credibility of CHIS should be constantly reviewed, as well as their involvement in potential criminal activity. Mechanisms set up to oversee the use of covert human intelligence sources must maintain a critical relationship. The informant's compliance with human rights must be continuously reviewed, and any decisions made on the role or actions of the informant should be based on human rights compliance, rather than a desire to achieve particular law enforcement outcomes.

An Garda Síochána and the PSNI must commit to ensuring a human rights-based approach in all areas of covert policing, including surveillance and informant handling. This should ensure that the approach is proportionate and non-discriminatory including in relation to minority communities. Senior management should take a leadership role in advocating for the use of a human rights-based approach and actioning implementation of such.

FOR POLICING OVERSIGHT BODIES

The new Policing and Community Safety Authority should meet with Garda covert human intelligence sources to discuss the specific human rights obligations applicable to covert policing and how to ensure human rights are respected in their work. It should also meet with the community to discuss regulating police surveillance, particularly in discussions around regulating informers.

Both the Policing Board and the new Policing and Community Safety Authority should ensure that they have the capacity and structures to monitor covert policing policy and practice. This includes, in particular, ensuring as a matter of practice and post-operational accountability the proportionality and lawfulness of executive policing operations driven by intelligence-led or national security policing. This includes the vital role of the independent human rights legal advisor to the Policing Board as a fully vetted independent office capable of advising the Board on covert policing compliance.

Ombudsmen should have sufficient powers, structures and resources to ensure they are able to sufficiently enforce policing policy and broader conduct rules in the area of covert policing.

Panel 2: Facial Recognition Technology

CHAIR: Dr Elizabeth Farries, Co-Director of the Centre for Digital Policy, University College Dublin

PRESENTERS:

Dr Abeba Birhane, Senior Advisor in AI accountability with the Mozilla Foundation and Adjunct Assistant Professor, Trinity College Dublin

Dr Daragh Murray, Senior Lecturer, Queen Mary University in London and Fellow, Institute of Humanities and Social Sciences

FACIAL RECOGNITION TECHNOLOGY ISSUES IDENTIFIED

- Facial recognition technology (FRT) is a probabilistic technology, meaning it relies on probability as it attempts to identify a person. It does so by comparing a biometric template created from a face detected in an image or video against a reference database of biometric templates. An FRT search generally results in the production of a list of potential candidates accompanied by similarity scores. A threshold value is fixed to determine when the software will indicate that a probable match has occurred. Should this value be fixed too low or too high, it can create a high false positive rate (i.e., the percentage of incorrect matches identified by the technology) or a high false negative rate (i.e., the percentage of true matches that are not detected by the software), respectively. There is no single threshold setting which eliminates all errors. There is no guarantee that a person considered a “true match” will be featured at the top of the candidate list accompanied by the greatest similarity score; nor is there any guarantee that the person running the FRT search will choose the correct candidate.
- Yet, however defective FRT may be in respect to a given application, it is a technology which can enable powerful mass surveillance by stripping people of their anonymity, reducing people to walking licence plates, and tilting the power dynamic inherent in police-civilian interactions further into the hands of police. Various courts have referred to police use of FRT as “novel and untested” and “highly intrusive”.²⁴
- Enabling Garda use of FRT will vastly expand the surveillance capabilities of An Garda Síochána.
- A Garda power to apply FRT to live or recorded moving images, video data, or any imagery and footage Garda can legally access (as is currently provided for in the General Scheme of the Garda Síochána (Recording Devices) (Amendment) Bill 2023) will have a chilling effect on people’s rights to privacy, freedom of expression, freedom of assembly and association, non-discrimination, presumption of innocence, and fair trial rights.

²⁴ See *State v. Arteaga*, 476 N.J. Super. 36; *Glukhin v. Russia* (judgment), ECHR No. 11519/20 (2023), Accessible here: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-14142%22%5D%7D>.

- FRT is inherently misogynistic and racist and will have acute harmful effects for communities which already experience inequalities and discrimination, including over-policing. Concerns about who will be disproportionately affected by harmful effects of FRT are heightened by the fact that An Garda Síochána has not revealed what reference database they intend to use. Anyone in a reference database who is not the person that An Garda Síochána is seeking to identify will be in a perpetual virtual line-up and at risk of misidentification. FRT performances decline when confronted with variables including age, gender, ethnicity, race, or racialisation.
- In some data sets underpinning FRT, Black men are more likely to be classified as “criminal”, rather than human.
- FRT performances also rapidly decline when they involve images taken from CCTV or video footage because a multitude of factors, including lighting, pose, pixelation, whether a person is wearing a scarf, mask, hat, etc., have a significant impact on the reliability of an FRT return. This is why some police units in the US have been found to use Google Images to search for specific facial features, such as a mouth or a pair of eyes, when they find those features are either hidden or missing from an image taken from CCTV, but they want to use them in an FRT search.²⁵
- ‘Accuracy’ figures from the National Institute of Standards and Technology (NIST), often cited by supporters of Garda use of FRT, do not represent the proposed Irish application of FRT.²⁶
- Data obtained through FRT can be combined with other data collected by the State or the police and be used to infer someone’s personal characteristics in order to monitor and track individuals.
- It is best not to implement FRT as it is inherently flawed and extremely invasive.

OVERVIEW OF PANEL 2

The second panel explored the use of FRT by police services, with a particular focus on the plans for FRT use by An Garda Síochána.²⁷

FRT is one form of surveillance technology that is now being increasingly used by police services worldwide as part of day-to-day policing. It has formed part of the broader policy context of discourse around surveillance technology since the 1970s, shifting away from human rights concerns to more positive portrayals of surveillance technology. While the final CoFPI report urges digital innovation in policing, it does not call for facial surveillance. The issues associated with FRT as described below appear incompatible with the paramount recommendation from CoFPI – that human rights are the foundation and purpose of policing.

Generally, there are two main types of FRT: live (when FRT algorithms are run across a surveillance camera

network in real time) and retrospective (when FRT is applied to recorded footage, imagery, or static stills taken from CCTV *after* an event, such as footage from social media or a body-worn camera). A third, more limited type of FRT is operator-initiated FRT (when a police officer uses an application on their phone to check the identity of someone against a database).

It is important to note here that facial recognition algorithms used in FRT do not provide a binary answer (i.e., yes or no) to confirm whether a photo matches the footage. Rather, it provides a probability score. In other words, an FRT search does not definitively confirm the identity of the person that police are seeking to identify. Rather, police run an FRT search, and, in return, receive a list of probable candidates. There is no guarantee that the ‘true match’ would be at the top of the list. Nor is there any guarantee that the police official running the search would choose the ‘true match’ from the list, wherever it lies.

²⁵ Clare Garvie, “Garbage in, garbage out: face recognition on flawed data,” Georgetown Law Center on Privacy & Technology, n.d., <https://www.flawedfacedata.com/>.

²⁶ Abeba Birhane (@Abebab), “ “Cloudwalk_mt_007” is evaluated for performance using datasets from US visa applications, border kiosks, & mugshots (across age groups, demographics, & 2 genders) as a probe dataset,” X, 16 February 2024, <https://twitter.com/Abebab/status/1758501986180206742>.

²⁷ See Garda Síochána (Recording Devices) Act 2023; General Scheme for the Garda Síochána (Recording Devices) (Amendment) Bill 2023.

FRT IS AN INVASIVE FORM OF SURVEILLANCE TECHNOLOGY

FRT is an invasive form of surveillance technology. Data arising from FRT can be combined with other information the police have collected on individuals (such as intercepted communications data) and contribute to a surveillance state. The collected data can then be used to infer someone's personal characteristics and beliefs (such as their sexual orientation or political opinion) to help police build or develop profiles to monitor and track individuals. These beliefs can also be inferred by the technology on its own as it not only seeks to identify people, but it also pins them to a time and place. While this type of tracking by police can be perceived as dystopian or repressive (as associated with the surveillance of the Uyghur population in China or of Palestinians by the Israel Defence Forces), this desire to monitor, track, and profile individuals through FRT has been identified in English data protection impact assessments as something the Cheshire Constabulary wish to adopt.

FRT IS INHERENTLY RACIST AND MISOGYNISTIC

FRT brings up significant human rights concerns. Apart from being powerful yet defective, the technology is inherently racist and misogynistic. Its use has considerable equality implications and is particularly harmful for those who are already dealing with inequalities and discrimination in society. For example, if Gardaí were to use images of convicted or incarcerated people as its database of images (which is the current practice in the UK), then members of communities who are disproportionately represented in the criminal justice system would be at risk of being disproportionately affected by the risks associated with FRT. In Ireland, members of the Travelling community are disproportionately represented in the criminal justice system and thus FRT could significantly impact them. This is contrary to the general obligation under human rights law to take measures to ensure that government actions do not result in discrimination and that they do not have a particular impact on those who are already subject to inequalities and discrimination.



FRT performances decline when confronted with variables including age, gender, ethnicity, race, or racialisation. Dr Birhane's research speaks to the racial and gender biases contained within FRT algorithms and the intersectional impact as well. The models underpinning FRT are more likely to mislabel and mischaracterise Black men and Black women as a 'chimpanzee', 'gorilla', 'orangutan', 'suspicious person', 'criminal', or 'thief', and in some data sets Black men are more likely to be classified as a 'criminal' rather than a human.²⁸

Dr Birhane also spoke to the research of Buolamwini and Gebru (2018), which involved auditing three FRT systems that were deployed by three companies (Face++, IBM and Microsoft). The research found that the error rate for dark females was 34.7%, compared to 0.3% for white males. More recent studies have shown that the technology is not improving in its accuracy. Dr Birhane addressed how the racist nature of FRT has had significant real-life implications in the United States, where six Black people (five men and one woman) have been misidentified, wrongfully arrested and detained due to FRT errors.

FRT systems are trained on datasets of images that could contain millions or billions of images. But Dr Birhane explained that as the training dataset grows for these models, they become

²⁸ For more information please see Sandhini Agarwal et al., "Evaluating CLIP: Towards Characterization of Broader Capabilities and Downstream Implications," arXiv, (2021), <https://arxiv.org/pdf/2108.02818.pdf>.

more inaccurate and more likely to misclassify people. This misclassification has a severely harmful racial impact, with Dr Birhane stressing that misclassification almost always happens with respect to darker skinned people. Additionally, there is a lack of transparency and intentional obfuscation of the datasets used by the private companies who make FRT algorithms. Dr Birhane spoke about the rapid speed with which FRT datasets and models are developing and that, even as an expert in the field, it is difficult to monitor and audit new models and datasets where possible. This research and the lack of transparency of data sets, demonstrates the real-life consequences and human rights violations that can result from the unreliable and inaccurate nature of FRT.

Neither An Garda Síochána nor the Department of Justice have explained how they will satisfy themselves that their use of FRT will not be discriminatory. If they cannot do this, the citizens and residents of Ireland are being asked to simply tolerate a level of discrimination in Irish policing. This is unacceptable.

Since this conference, the Joint Oireachtas Committee on Justice has held pre-legislative scrutiny hearings on the Draft General Scheme of the Garda Síochána (Recording Devices) (Amendment) Bill 2023. The Joint Oireachtas Committee on Justice found severe deficiencies in the scheme and their subsequent report published in February 2024 highlighted many issues, including:

- The need for a “rationale” for introducing FRT in Irish policing to be published;
- The lack of clarity on the part of An Garda Síochána about how they intend to use FRT;
- That An Garda Síochána and the Department of Justice need to urgently clarify what facial image reference databases they intend to compare images against; how they would be used; how a reference database would be populated if An Garda Síochána were to make their own; and what the criteria would be to add a person to a database;
- The need for the Minister for Justice to address FRT accuracy issues; and
- The need for the Minister for Justice to address FRT discrimination and inherent bias concerns.²⁹

RETROSPECTIVE FRT COULD BE WORSE THAN LIVE FRT

Dr Murray spoke about the different types of FRT and their human rights implications. Both live and retrospective forms of FRT bring up serious human rights concerns. Dr Murray spoke of police deployments of live FRT in England, which usually occur for a specified period of time or at a specific event (such as at a protest or football match), with the police advertising its use via social media and/or with physical signage in the affected area. Live FRT could be used more extensively as provided for in UK law, but it is currently being used in a more limited manner.

The application of FRT to recorded video material of past events vastly increases police surveillance capability, strengthens the concept of a surveillance state and potentially removes the idea of a person being anonymous in a public space. It provides for the ability to track, monitor, and profile significant numbers of people. This has chilling consequences for people’s rights to privacy, freedom of movement, freedom of assembly and association, and freedom of expression and could influence real-time events and the choices people make. Dr Murray warned that retrospective FRT is potentially more problematic for fundamental rights than live FRT:

“The application of FRT removes the possibility of anonymity within a city. It allows police forces to look at what happens in a city, not only at a moment, but back in time. That’s an incredibly powerful thing and I don’t think we fully understand the consequences of that.”

Dr Murray told how, in the UK, the use of retrospective FRT is far more concealed and secretive compared to that of live FRT. Many police units in the UK have detailed policy frameworks on the use and regulation of live FRT, but this is not the case for retrospective use. He also pointed to a number of Freedom of Information requests and media reports which show that nearly every police service in the UK is using retrospective FRT. This is contrary to the current law, which provides that if police are to use FRT, they must have a publicly accessible framework so that

²⁹ Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Garda Síochána (Recording Devices) (Amendment) Bill 2023*, February 2024, https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2024/2024-02-27_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-garda-siochana-recording-devices-amendment-bill-2023_en.pdf.

people know FRT is being used in addition to why, when and how it is being used.

Dr Murray explained that the use of FRT, which is a technology that was almost restricted to an intelligence context, is now becoming part of daily policing in the UK. He spoke about how the long-term chilling effects of using such a powerful surveillance tool are not fully appreciated or understood, nor have they been fully explored by those who wish to use FRT.

Fundamentally, FRT is unreliable. Dr Murray's independent review of the use of FRT by the Metropolitan Police in London found that FRT was only accurate 19% of the time and that the Metropolitan Police did little to identify, mitigate or respond to the bias and discrimination inherent in FRT. Similarly, a court case in the UK (*Ed Bridges v South Wales Police* – the world's first legal challenge against police use of FRT) revealed that the police did not satisfy themselves that the technology they were using was not discriminatory, as they were obliged to do by law under a public sector equality duty (a legislative obligation for government bodies to respect the human rights of their staff and service users, and to combat discrimination). The *Ed Bridges* ruling also noted that the lack of access to private company data regarding the possible discriminatory impact of the FRT the police were using was *not* a sufficient reason for the South Wales Police not to satisfy themselves that the tool was not discriminatory. The UK Court of Appeal held that even if companies are opaque and do not share certain data, the police must either not use the technology or carry out their own investigation into the technology's discriminatory impacts.³⁰ Following this decision, the South Wales Police has investigated FRT and released a study claiming that it is not discriminatory. However, the study was not independent, it was not tested in operational settings and the images used to test the algorithm were different from the typical images used by the police applying FRT. In other words, the police force's own assessment did not reflect its actual use of this invasive and intrusive technology.

The *Ed Bridges* case was also significant as it found that the South Wales Police's use of FRT breached privacy rights, data protection laws and equality laws. It held that the police were given too much discretion in regard to who would be selected to be placed on a watch list and where the live FRT would



be deployed. It also found that the policies on the use of FRT did not sufficiently set out the terms on which the discretionary powers could be exercised. As such, the Court of Appeal held that the policies did not have the necessary quality of law. Given that the Court ruled on the legality of the measure and found it wanting, it did not need to address the other principles of necessity and proportionality.

Ultimately, the Court of Appeal found that policing powers under the common law were sufficient for the use of FRT, provided they were limited by the policy framework produced by the police. Therefore, the new question when determining legality should be whether the police powers provided for under the common law are a sufficient basis for the use of FRT. Dr Murray pointed out how currently, in the UK, if you have a non-intrusive surveillance power, then you do not need an explicit legal basis. On the other hand, if you have an intrusive surveillance power, then you do need an explicit legal basis. Dr Murray warned that rapidly changing technology that is becoming more sophisticated (such as FRT) needs to be considered when evaluating whether a measure falls under an intrusive or non-intrusive surveillance power.

Historically, an intrusive power has been seen as something that invades a home, goes inside a private property or involves an element of physical coercion such as physically taking someone's fingerprint or DNA. Given that the data associated with FRT can be linked to other data about a person, such as the time and place they are located, where they go, who they meet, where they worship, or what kind of bars and protests they attend, FRT should be viewed as more invasive than a fingerprint. Also, when a person is fingerprinted, they know they are being fingerprinted. When someone is subject to an FRT search, especially when it is carried out retrospectively, they are likely to have no idea such a search is being carried out. Dr Murray suggested that the UK law will be subjected to a fresh legal challenge soon.

³⁰ For more information please see *R (Bridges) -v- CC South Wales & ors* [2020] EWCA Civ 1058.

FRT CONCLUSION

FRT is a rapidly evolving surveillance technology that will greatly expand the mass surveillance powers of the State. Not only will there be an immediate impact on the right to privacy, but there will also be long-term chilling effects on people's freedoms of assembly, association and expression, and there will be significant equality implications. As Dr Murray expressed, "we can't see the chilling effect, it's like the frog in the kettle, like until it's too late, and that's a really big, big concern". The following recommendations provide a framework to address the potential use of FRT in Ireland and to ensure the highest protection and respect for human rights.

FRT RECOMMENDATIONS

The panellists recommended that due to FRT being inherently flawed and raising serious human rights concerns, the Government of Ireland should abandon the General Scheme for the Garda Síochána (Recording Devices) (Amendment) Bill 2023 and its plans to introduce FRT.

Should the Government continue to go ahead with the plans to introduce FRT in Irish policing, Dr Birhane referred to a letter sent by her, other academic experts (Dr Elizabeth Farries, University College Dublin; Dr TJ McIntyre, University College Dublin; Prof. Barry O'Sullivan, University College Cork; Prof. Michael Madden, University of Galway; and Dr Ciara Bracken-Roche, Maynooth University), ICCL, and Digital Rights Ireland to the Data Protection Commission.³¹ The letter referred to guiding research from the Centre for Technology and Democracy, at the University of Cambridge. This research examined the use of FRT by police in England and Wales and found that its use failed with respect to a plethora of fundamental rights.³² In turn, they outlined that minimum safeguards must be in place before any deployment of FRT by An Garda Síochána in order to ensure minimum human rights compliance. The full list of questions is found in Appendix 1.

The following recommendations apply to the use of police surveillance through FRT, North and South.

FOR BOTH JURISDICTIONS

Prohibit the use of facial recognition technology by law enforcement as the technology is inherently flawed, racist and misogynistic.

Government and policing services should provide evidence that FRT is strictly necessary compared to less intrusive, alternative measures.

Any law and policy governing the use of FRT by law enforcement should robustly address bias, discrimination, misidentification and mass surveillance concerns; detail how personal data will be processed; explain who would be subjected to an FRT search and when; and include the publication of a data protection impact assessment.

FOR POLICING SERVICES

Allow for independent auditors to have access to training datasets and models for audit purposes.

Provide adequate technical training to members on using FRT, data protection training and training on risks including differential treatment, function creep and unwarranted intrusions.

Publish the demographic data for arrests, stop and searches, and any other police actions resulting from the use of FRT.

³¹ For the full text of the letter please see <https://www.iccl.ie/wp-content/uploads/2024/03/PolicingFRT.13April2023-1.pdf>.

³² Evani Radiya-Dixit, "A Sociotechnical Audit: Assessing Police Use of Facial Recognition", 2022, <https://www.mctd.ac.uk/wp-content/uploads/2022/10/MCTD-FacialRecognition-Report-WEB-1.pdf>.

Panel 3: Oversight

CHAIR: Prof. Donncha O’Connell, Professor of Law, University of Galway, and former member of the Commission on the Future of Policing in Ireland

PRESENTERS:

Jonathan Hall KC, UK Independent Reviewer of Terrorism Legislation

Prof. Marie Breen-Smyth, Independent Reviewer of National Security Legislation for Northern Ireland

OVERSIGHT ISSUES IDENTIFIED

- The current Independent Examiner of Security Legislation provided for in the Policing, Security and Community Safety Act 2024 is not the same as the equivalent role in the UK (the Independent Reviewer of Terrorism Legislation) despite the recommendation from CoFPI.
- With the new Independent Examiner, there will be different standards for national security oversight on both sides of the island. This could be contrary to the principle of equivalence found in the Good Friday Agreement.
- There are significant concerns regarding the efficacy of the proposed Independent Examiner, including its independence, the eligibility of the role, and access to and transparency of information.
- Having weak oversight of national security will undermine other police reform efforts and have an overall negative effect on implementing a human rights-based approach to police reform moving forward. Full root and branch reform identified in both the Patten report and the final report of CoFPI must also apply to national security policing and oversight.
- Jonathan Hall KC and Prof. Marie Breen-Smyth have similar, albeit different roles, and shared practices that Ireland should learn from, including the importance of public engagement, impartiality, engaging with the community, and necessary culture change within policing and national security organisations.



OVERVIEW OF PANEL 3

The third and final panel explored different models for oversight of national security, arising from CoFPI's recommendation for the establishment of an independent oversight body to review national security arrangements in Ireland, as AGS is responsible for both policing and security services in Ireland.³³ CoFPI specifically recommended that Ireland model its oversight body on the equivalent body in the UK – the Independent Reviewer of Terrorism Legislation.³⁴

At the time of the conference, the Policing, Security and Community Safety Act 2024 (PSCS Act), which establishes the Independent Examiner of Security Legislation position, was moving through the Oireachtas. Since the publication of the General Scheme, ICCL has expressed significant concern that the Independent Examiner is a significantly weaker version of such an oversight body.

This panel invited two experts in similar roles and in similar jurisdictions to discuss how Ireland could create an Independent Examiner with sufficient powers to ensure robust compliance with human rights law. The panel was chaired by Prof. Donncha O'Connell, former member of CoFPI, who has written extensively on the deficiencies present in the current Independent Examiner position.³⁵

The panel was preceded by the screening of a video developed by Creggan Enterprises' Focus Project at Ráth Mór, which depicts how local women and children in Creggan, Derry experience national security policing by the Police Service of Northern Ireland (PSNI).

OVERSIGHT ISSUES IDENTIFIED

The Independent Examiner is Not Equivalent to the Independent Reviewer of Terrorism Legislation in the UK

Prof. O'Connell opened the panel discussing the fact that the current Independent Examiner is not equivalent to the role in the UK, despite CoFPI's recommendation. He highlighted how, in practice, this means that there will be different standards for national security oversight in the North and South. The Independent Examiner will not have the same powers in terms of access to and transparency of information, including when information is withheld or redacted. Information is essential to this role, so this limitation could have a significant impact on the potential efficacy of the office.³⁶ The eligibility of the role is also limited to senior judges, which is more restrictive than the eligibility provided for the role of Independent Reviewer of Terrorism Legislation in the UK. Prof. O'Connell noted how during his engagement with the office of the Independent Reviewer of Terrorism Legislation as a member of CoFPI, they expressed that restricting the eligibility of the role was not desirable.

Prof. O'Connell stated that weak regulation and oversight does not work and will undermine other reform efforts arising from CoFPI. A key concern regarding both the Independent Examiner and the new Office of the Police Ombudsman (Fiosrú) is whether they will be truly independent. The mandate and powers of the Independent Examiner office are important as the role has significant responsibilities regarding oversight for both security legislation and security services. This is dissimilar from the equivalent body in Australia, where there are two distinct offices for such oversight.³⁷ Prof. O'Connell also raised the issue of the lack of political engagement on this important matter and that having an effective and truly autonomous Independent Examiner is critical.

³³ The Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland*, September 2018, [https://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland\(web\).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland\(web\).pdf](https://policereform.ie/en/POLREF/The%20Future%20of%20Policing%20in%20Ireland(web).pdf/Files/The%20Future%20of%20Policing%20in%20Ireland(web).pdf), p. 35.

³⁴ See Counter Terrorism and Security Act 2015.

³⁵ For his most recent work, please see Donncha O'Connell, "What a sorry and very Irish saga: A squandered opportunity to strengthen national security," Irish Times, 14 February 2024, <https://www.irishtimes.com/opinion/2024/02/14/a-sorry-and-very-irish-saga-policing-acts-excessive-compromises-on-oversight-of-national-security/>.

³⁶ For more information please see Irish Council for Civil Liberties, *Human Rights as the Foundation and Purpose of Policing: Analysing the Extent of the Implementation of the Recommendations from the Commission on the Future of Policing in Ireland*, forthcoming 2024.

³⁷ See the Independent National Security Legislation Monitor and the Inspector-General of Intelligence and Security.

Independent Examiner of Terrorism Legislation (UK)

Jonathan Hall KC first spoke about his role as the Independent Examiner of Terrorism Legislation. His duties include commenting on legislation and speaking to the Home Office and government. One of his functions is to try to enrich and enliven public debate. On that note, he spoke to his broad level of public engagement, including media interviews and engagement with Muslim organisations, police services, political parties and the Home Office. He emphasised how he engaged with individuals and organisations from all sides of the political spectrum and that people knew that they could come to him for independent and informed views on pressing issues. He believes that interacting with the public and press will have more of an impact on public consciousness of review than the publication of his annual report, but the independent, evidence-based recommendations provided within the annual report can inform government, police, opposition parties, media and academics. He noted that he has decided to review both standing legislation and legislation going through Parliament.

Mr Hall KC also addressed how the scope of his mandate is quite limited compared to that of the Independent Examiner (review of security legislation, review of security services and review of refusal to comply with requests for denial of access to information) and that he is solely responsible for review of counter-terrorism legislation, including sanctions. He noted how the legislation establishing his role allows him the latitude to choose from a breadth of areas of “the operation of terrorism legislation” to focus on. Mr Hall KC identified how in practice, this breadth of focus means that his role is broader than simply examining statute law; it also includes analysing the real impact of terrorism legislation on individuals’ lives. He uses this expansive mandate to determine how to guide his work and noted that he has chosen to focus his next thematic report on artificial intelligence and terrorism.

Responding to the criticism identified by Prof. O’Connell and ICCL that the current Act only provides for the Independent Examiner to be a senior judge, Mr Hall KC outlined his belief that having the widest pool of candidates eligible for the role is important (although any reviewer should be a lawyer and must have sufficient technical legal knowledge). He noted that the role is created by

the person who first occupies the role and not the statutory function. He also highlighted the vital importance of the role in communicating with academia and the media and of being prepared to have meaningful relationships with officials and civil society rather than simply analysing legislation.

In terms of access to information, he expressed that he would not personally support provisions that would empower the withholding of information. He also said that it is up to the State to decide how to share intelligence information, but it must be done in a planned manner. Similarly, Mr Hall KC noted that the Independent Examiner must be trusted, otherwise the public can never have confidence in them doing their role. He stressed that there is always more that can be put in the public domain about national security matters. He additionally noted that for the new Independent Examiner role to be effective, it needs to be adequately resourced.

Mr Hall KC concluded by referencing Dr Jessie Blackburn’s academic work on oversight and how his role, and that of the proposed Independent Examiner, is only one element of the “counter-terrorism review assemblage” alongside civil liberties groups, such as ICCL and CAJ. Mr Hall KC also believes that the media should be included in this group, as it can play a significant role in the ability of the Independent Reviewer to connect with the public and the Independent Reviewer can be on hand to provide legal context if any mistakes are made by the media.

Independent Reviewer of National Security Arrangements for Northern Ireland

Prof. Marie Breen-Smyth then spoke about her role as Independent Reviewer of National Security Arrangements for Northern Ireland. Her role is more limited than Mr Hall KC’s as the scope of her role is to oversee national security arrangements for Northern Ireland. In practice, her role is largely confined to a former special branch, known as the C3 Intelligence Branch, working with MI5. She noted how she has security clearance to access intelligence documents, alongside her colleague John Wadham (Human Rights Adviser to the Northern Ireland Human Rights Policing Board), in her additional role as the Independent Reviewer of Justice and Security (where she reviews the use of non-jury trials in Northern Ireland).³⁸

³⁸ As of February 2024, Dr Jonny Byrne is now the Independent Reviewer of Justice and Security. For more information, please see, “Criminology lecturer appointed as Northern Ireland independent reviewer of justice and security,” Irish Legal News, accessed 14 February 2024, <https://www.irishlegal.com/articles/criminology-lecturer-appointed-as-northern-ireland-independent-reviewer-of-justice-and-security>.

Prof. Breen-Smyth is the first woman, first person from Northern Ireland and first person living in Northern Ireland to do this job. She believes these characteristics are significant, as there is a perception that work regarding intelligence and national security is hidden from the general public and that it is a hidden aspect of the state. This often inspires fear and mistrust, including fear and mistrust of the State itself and of policing and security services. She then spoke to the community trust in her role and how individuals have approached her about national security concerns that they might not have raised with her predecessor, who was based in London.

She also noted the difficulties in accessing information in a police service, as she largely deals with senior management, since the level of knowledge regarding national security varies by rank. She discussed the idea of “black boxes” within policing, which are the people who are behind intelligence barriers. She described the effect of this phenomenon as the intelligence functions of the policing service being like smaller organisations within organisations. In practice, this means that there will be some people in a police service who will know some intelligence-related information, and some people who will not. She concluded this point by saying how an organisation is the sum of its parts, and this ‘black box’ culture within law enforcement means some parts of the organisation may be more accessible than others. She also identified how this structure can impair access to information for reviewers.

Furthermore, in terms of accessibility of information, she raised the issue of the impact of policing culture and the attitudes she’s observed when calling the PSNI to make an appointment with the Chief Constable. Specifically, she described policing culture as “impenetrable” and outlined how this culture can limit oversight roles.

Discussing the importance of law and regulations for providing powers to oversight bodies, Prof. Breen-Smyth pointed out the need to understand their limitations. Other factors, such as culture change within an organisation, can have a greater impact in inspiring confidence. Specifically, she identified how the security and intelligence service can believe they are separate from the body politic of national security. She also addressed the practical scope of national security; it is not confined to the security of the police, government, and army, but it is the security of all the people in the state – including those talked about by the women in the Creggan Enterprises’ Focus Project video, introduced by Amie Gallagher, a community development worker from Creggan in Derry. National security is a shared, communal security.

Prof. Breen-Smyth concluded by emphasising that there needs to be a balance between intelligence-gathering and law enforcement and referenced the experiences depicted in the Creggan video. She also stated that police handling of digital material and evidence was abysmal, as exemplified by the video where women spoke to their experience of losing multiple mobile phones and not receiving them back from the PSNI.



OVERSIGHT CONCLUSION

The final panel discussed different models for oversight of national security in the context of CoFPI's recommendation to establish an independent oversight body to review national security in Ireland, which derives from the unique dual responsibility of An Garda Síochána for both policing and security services. Jonathan Hall KC and Prof. Marie Breen-Smyth spoke to their experiences in comparable roles in other jurisdictions to provide insight into how national security oversight roles work in practice. The following recommendations provide a framework for robust, strong and independent oversight of national security arrangements in Ireland.

OVERSIGHT RECOMMENDATIONS

FOR THE GOVERNMENT OF IRELAND

Ensure that the provisions establishing the powers and jurisdictions of the Office of the Independent Examiner of Security Legislation are as least equivalent to those provided for by the Independent Reviewer of Terrorism Legislation³⁹ in the UK (the model recommended by CoFPI). This includes expanding the eligibility of the role to include senior counsel, the scope of access to relevant information, and the level of transparency regarding public information.

Provide for adequate funding and human resources for the new Independent Examiner of Security Legislation. Based on the cost of the Independent Reviewer of Terrorism Legislation in the UK, €247,000 should be provided to cover the cost of the Independent Examiner and a special advisor.⁴⁰

FOR MEMBERS OF THE OIREACHTAS

Continue to put pressure on Government, for instance through private members time or parliamentary questions, to increase political engagement on the issue of adequate, robust and sufficient independent oversight of national security.

FOR THE INDEPENDENT EXAMINER OF SECURITY LEGISLATION

Engage with and develop meaningful relationships with media, civil society, academics, policing services and political parties to build widespread public confidence in the role.

³⁹ See Counter Terrorism and Security Act 2015.

⁴⁰ For more information, please see ICCL, Pre-Budget Submission 2024: Investing in Rights, July 2023, <https://www.iccl.ie/wp-content/uploads/2023/07/ICCL-Budget-2024.pdf>.

Event Conclusion

Dr Maria Murphy, Associate Professor, Maynooth University, provided concluding reflections on the conference and gave a summary of the key points addressed during the discussions. She noted that the event discussed how to put human rights at the fore of surveillance issues and that a human rights-based approach is not limited to rights such as the right to privacy and freedoms of assembly, expression and association, but that it also includes obligations arising from equality, non-discrimination and fair trial rights.

To begin, she identified how the event discussed different issues, but that all had common themes. One key theme among all the panels was transparency, which is crucial in areas that are quite secretive, such as covert intelligence and national security. She identified the importance of media and journalists in advancing transparency, including by bringing issues to light and holding governments accountable, as well as their role in engaging with oversight bodies. Transparency was also addressed with regard to human rights issues involving informants, including analysing the benefit to law enforcement of the use of informants compared with its compatibility with human rights protections.

She also brought up the legal framework for regulating surveillance, including the right to privacy under Article 8 of the ECHR and the vital importance of legality in ensuring any infringement or restrictions on rights are proportionate and necessary. She raised the normative framework that has been addressed at the UN level (addressed by Prof. David Kaye) and how in the last ten years since the Snowden revelations, there has been progress in increasing acceptance of norms for using surveillance, both for government and for private actors, but these norms must be transposed and utilised in domestic legal systems.

Regarding the FRT panel, she raised the importance of differentiating between live and retrospective FRT. In particular, she highlighted Dr Murray's point that retrospective FRT may be more problematic than live FRT from a human rights perspective, as the restrictions on retrospective FRT should be provided for in law but often are not. She also emphasised how FRT is inherently discriminatory

and how this has significant consequences on people's lives, including wrongful arrests and detentions.

On the final panel on oversight, she reiterated Prof. Marie Breen-Smyth's point about how culture is an important element in surveillance for ensuring protection in practice and that law should not be the only element in oversight. Prof. Murphy addressed the need for specialised bodies with access to privileged information and how Ireland has a patchy history of challenges for well-resourced and independent oversight bodies. She concluded by raising the importance of independence in areas such as national security oversight. She also emphasised how the final panel made clear that while the existence of an oversight body for national security is an improvement over not having an oversight body at all, amendments are necessary for the Independent Examiner role in its current form to be made more robust if it is to achieve its considerable goals.

She concluded by acknowledging the role of CAJ and ICCL in advocacy in these areas. She identified the limitations of law in remedying institutional injustices that may be present in these areas, but she also noted that the law can be used as one tool and that we must remind governments of their international obligations to abide by these laws. Her final note was to encourage all attendees to continue fighting for increased human rights protections for police surveillance.

Concluding Remarks



Liam Herrick, Executive Director of ICCL, provided the concluding remarks and thanked the event organisers and speakers. The aim of the Policing for Peace project is to provide a forum for dynamic conversation about police reform in both jurisdictions and to determine the highest possible standard of reform and oversight.

The purpose of the event was to discuss three difficult surveillance questions as part of a wider process of police reform North and South. The issues identified and discussed within each panel provide the basis for the recommendations for law and policy drafted in this document and listed in detail in the beginning of this document.

Following this conference and the publication of the document, the next steps in the Policing for Peace project include a seminar on protest and the launch of ICCL's annual policing conference examining the police reform agenda in its entirety.

ICCL and CAJ are leading civil society organisations in bringing issues like surveillance to the public forum. As raised by Prof. Donncha O'Connell, there is still a difficulty in getting public, government, and media engagement on these issues and events like this conference are essential to discussing what are very important questions for Irish democracy. Similarly, there are a small number of funders who are willing to finance this work, and Mr Herrick expressed ICCL's and CAJ's gratitude to the Joseph Rowntree Charitable Trust and Community Foundation Ireland for their support.

This programme of work acknowledges that there is still significant work to be done in this area and that the problems discussed at the event are quite profound. For instance, there is a complete lack of legal framework for CHIS in the South and, despite a clear recommendation from CoFPI to adopt an oversight body based on the Independent Examiner of Terrorism Legislation role in the UK, the current Independent Examiner role in the PSCS Act falls short of this model.

The surveillance issues discussed at the event and the common themes of transparency, oversight, and accountability relate to a deeper problem in the South: a significant institutional resistance to effective oversight, transparency and accountability. This resistance is also relevant to comments made by speakers and attendees regarding legacy matters.

For wider context, Mr Herrick acknowledged how the North is ahead of the South in terms of human rights-based police reform and oversight. Despite this, challenges continue to arise there, too, including with covert intelligence and intelligence oversight.

While ICCL welcomes the possibility of Ireland to bring an inter-state case against the UK regarding the incompatibility of the Legacy Act with human rights law at the European Court of Human Rights, there have never been historical investigations regarding human rights violations in the South related to policing or national security, such as the Sallins train robbery case. Therefore, while ICCL would welcome an inter-state case, the Government of Ireland does not aspire to meet the same standard itself.⁴¹ Of relevance here is the principle of equivalence, requiring equivalent human rights standards (including in all policing matters) on both sides of the border, which Mr Herrick described as "the most neglected provision in the Belfast Agreement".

The Policing for Peace project and its associated events thus demonstrate the need for cross-border collaboration and information sharing to pursue increased human rights protections in policing on both sides of the border.

Both ICCL and CAJ believe strongly in the value of this conversation, of engaging with all stakeholders concerned with policing and policing accountability on this island, and of working towards a common goal of a true human rights-based approach to policing that respects the human rights of all communities on the island. The recommendations for governments and policing services in the North and South contained within this report aim to achieve this goal.

⁴¹ It is important to note that after the conference, the Government of Ireland officially lodged an inter-state application against the United Kingdom (pursuant to Article 33 of the ECHR) on 19 January 2024 regarding the incompatibility of certain provisions of the Legacy Act with the ECHR, namely Articles 2 (right to life), 3 (prohibition of ill-treatment and torture), 6 (fair trial rights), 13 (right to an effective remedy) and 14 (prohibition of discrimination). For more information, please see "New inter-State application brought by Ireland against the United Kingdom" European Court of Human Rights Press Release, accessed 13 May 2024, <https://hudoc.echr.coe.int/fre-press#%7B%22itemid%22:%5B%22003-7854820-10910604%22%5D%7D>.

Appendix 1

In the second panel discussion, Dr Birhane referred to a letter sent by her, other academic experts and organisations including ICCL and Digital Rights Ireland.⁴² The letter referred to research examining the use of FRT by police in England and Wales and found that its use failed with respect to a plethora of fundamental rights. The letter outlined the minimum safeguards which must be in place before any deployment of FRT by An Garda Síochána in order to ensure minimum human rights compliance.

CLEAR OBJECTIVE CRITERIA

Are there clear, objective, and limited criteria concerning third-party access to the data collected or retained, including what data can be shared, with whom it can be shared, and for what specific purpose it can be shared?

NECESSARY IN A DEMOCRATIC SOCIETY

Has An Garda Síochána identified less intrusive alternative measures and proven that FRT is strictly necessary compared to these measures by using scientifically verifiable evidence?

Has An Garda Síochána shown that FRT does not disproportionately limit the human rights of affected persons, including those who are misidentified or impacted by unwarranted intrusions?

Has An Garda Síochána pre-established minimum thresholds to be met for the FRT system's accuracy (precision, false positive rate, true positive rate) to inform the legal test of strict necessity for personal data processing?

DATA PROTECTION STANDARDS

Has An Garda Síochána carried out and published a data protection impact assessment and appropriate policy document for sensitive data processing?

Beyond social media or website publishing, has An Garda Síochána used other means to inform potential data subjects, or most people in their jurisdiction, in advance about when, where, why, and how FRT will be (or is currently being) used and how they can exercise their individual rights?

Are there clear measures to ensure data subjects can exercise their individual rights, including the rights to rectification and erasure, and object with clear justifications if exemptions apply?

Has An Garda Síochána published their procurement contracts and data-sharing agreements with other parties?

⁴² For the full text of the letter please see <https://www.iccl.ie/wp-content/uploads/2024/03/PolicingFRT.13April2023-1.pdf>.

CONSULTATION

Has An Garda Síochána proactively considered views or directly consulted with the public (especially marginalised communities) on their views of the particular type of FRT to be used and justified disregard for their views if relevant?

Are there transparent, proactive consultations with civil society and independent experts on the particular type of FRT to be used?

Are An Garda Síochána required to consider advice from consultations and transparently explain the outcome, including providing a justification if the advice is not followed?

Are there clear, proactive processes for the public (especially marginalised communities) to influence if and how FRT is implemented?

Are all FRT materials accessible to people with disabilities and provided in immigrant languages?

DEMOGRAPHIC IMPACT, INCLUDING MARGINALISED GROUPS

Has An Garda Síochána carried out and published an equality impact assessment?

If the technology is deployed, will An Garda Síochána publish the demographic makeup of the population where FRT is used?

For each deployment, will An Garda Síochána publish the demographic data for arrests, stop and searches, and other outcomes resulting from the use of FRT?

Will An Garda Síochána evaluate and publish the demographic makeup of the training dataset to ensure the dataset is representative of the population where it is to be used?

Will An Garda Síochána evaluate and publish FRT's performance across demographic groups (in different conditions that match FRT's operational use) to ensure that FRT performs well and similarly across the population?

EXPRESSION AND ASSEMBLY IMPACTS

Has An Garda Síochána assessed FRT's potential 'chilling effect' on the rights to freedom of expression and assembly in order to inform the legal test of 'necessary in a democratic society'?

Does An Garda Síochána preclude using FRT to identify those peacefully participating in an assembly?

INDEPENDENT EVALUATION AND SAFEGUARDS

Will An Garda Síochána ensure that independent auditors have access to training datasets and models in order to audit datasets and models?

Are there safeguards precluding the use of FRT with an unsuitable low-quality probe or image?

Will performance tests be carried out for precision, false positive rate, and true positive rate similarly across demographic groups?

TECHNICAL TRAINING FOR OFFICERS

Is training for the particular type of FRT to be used mandated for An Garda Síochána officers using the technology?

Are there clear standards for technical training on using FRT, data protection training, and training on risks including differential treatment, function creep, and unwarranted intrusions?

VETTING THE TECHNOLOGY

Will there be a documented, non-operational research trial of FRT with informed consent from participants before the operational use of FRT for policing?

OVERSIGHT AND REDRESS

Are there clear measures for An Garda Síochána to document cases of harm resulting from the use of FRT, such as differential treatment, function creep, or unwarranted intrusions?

Does An Garda Síochána have a whistleblower protection policy to protect persons who reveal FRT misuse?

Is there a clear redress mechanism (beyond judicial review and usual complaint procedures) for harmed individuals and groups to participate in an investigation into An Garda Síochána use of FRT?

Are there clear measures to ensure that the redress mechanism is procedurally fair?

Is regular oversight from an ethics committee mandated throughout the life of the FRT project?

Are there clear processes for the committee to influence if and how FRT is implemented, including the power of veto for the FRT project?

Is the committee an independent body from An Garda Síochána organisations with members having non-policing backgrounds and with safeguards to ensure the committee's sustainability, even without political support?

Is the committee diverse in terms of demographic makeup and independent expertise in human rights, equality, and data protection?

Are detailed meeting minutes published, including briefing papers, discussions, and conclusions?

HANDLING OF BIOMETRIC DATA

Have An Garda Síochána established a proposed legal basis for the acquisition of biometric data used for FRT policing? We would have concerns in particular if data were to be acquired, for example, from databases used to establish the Public Services Card or passports.



Irish Council for
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FOR ALL OUR RIGHTS. NO EXCEPTIONS.

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