Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **The Prisons (Interference with Wireless Telegraphy) Act 2018 has come into force. It empowers the Home Secretary to authorise mobile phone service or network providers to block phone/internet signals in prisons. The aim is to help combat the carrying on of criminal activities from within prison, but the Act's provisions raise deeper issues of privatisation in criminal law enforcement and surveillance.**

- **In a recent decision in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, the UK Supreme Court decided by a three to two majority that the harsher treatment on parole eligibility for a single category of prisoners does not amount to unlawful discrimination contrary to Article 14 of the European Convention on Human Rights. However, the majority's reasoning is not entirely convincing.**

- **On the 18th December 2018, the Irish government published an Implementation Plan for the recommendations contained in the report of the Commission on the Future of Policing in Ireland. The style and substance of the Plan do not inspire confidence that the Commission recommendations will be implemented in full or wholly to the effect envisaged by the Commission.**

Mobile Phones in Prison

The Prisons (Interference with Wireless Telegraphy) Act 2018 was one of three Acts to receive the Royal Assent on the 20th December 2018, although it will only come into force when the Home Secretary makes the relevant regulations. It began life as part of the Prisons and Courts Bill which fell at the last election. Subsequently, its provisions were carved out of that Bill and re-presented as a Private Members Bill which was supported by the government and the opposition.

Superficially, the Act appears quite innocuous. Essentially, it amends the Prisons (Interference with Wireless Telegraphy) Act 2012 to permit mobile phone service or network providers to interfere with phone signals in prisons. It consists of a mere two sections and a schedule. One of the sections inserts four new subsections in the 2012 Act, while the other is a technical section. The schedule effects consequential amendments to three sections of the 2012 Act. However, there may be more to the Act than meets the eye.

Problems caused by the use of illicit mobile phones in prison are increasing rapidly as mobile phone technology and design are advancing. Devices no larger than a finger can be easily smuggled into prisons and have the capacity to provide the full range of electronic (including internet) communications. They are being used by some prisoners to carry on criminal activities outside prison, including: terrorism and organised crime operations, contract murders, the importation of large quantities of drugs and firearms into the UK, the intimidation of witnesses and the continued

harassment of victims of abusive behaviour as well as the importation of drugs and contraband into prison. They also, of course, present a potent threat to the internal safety and security of prisons, especially by facilitating the importation of drugs and contraband, and generally helping to drive the illicit economy within prison.

Attempts to combat the use of illicit mobile phones (and related devices) in prison through the conventional criminal law have proved unsuccessful. It is an offence to possess or use a mobile phone in prison without authorisation, but prosecutions are rare due largely to the inherent difficulties in finding such easily concealed devices and in identifying the user. In recent years the focus of control has switched to disconnecting phones and blocking mobile phone signals in prisons.

Regulations issued under the Serious Crime Act 2015, for example, empower a County Court in England and Wales, or Sheriff's Court in Scotland to issue an order compelling a mobile network operator to disconnect mobile phone handsets and SIM cards that are found to be operative without authorisation in a prison. Blocking a mobile phone signal to the prison is not so straightforward, as it is generally a criminal offence to interfere deliberately with wireless telegraphy. However, the Prisons (Interference with Wireless Telegraphy) Act 2012 stipulates that such action is lawful for the purpose of detecting or preventing the use of illegal mobile phones in prison when it is carried out by someone "authorised" under that Act. Moreover, the Home Secretary is empowered to authorise the governor of a prison to interfere deliberately with wireless telegraphy in his or her prison to prevent the use of illicit phones or to detect or investigate their use. In other words, an authorised governor can deploy equipment to detect and block mobile phone signals and to investigate the use of illicit phones in the prison.

The Prisons (Interference with Wireless Telegraphy) Act 2018 amends the 2012 Act essentially to harness the "unrivalled technical knowledge, specialised expertise and ingenuity" of the phone companies and network operators to block the use of unauthorised mobile phones (including any device capable of transmitting or receiving images, sounds or information by electronic communication) in prison. Accordingly, it empowers the Home Secretary to authorise a Public Communications Provider (PCP) to interfere with wireless telegraphy to prevent the use of a mobile phone (or similar device), or to detect or investigate the use of such an item, in a prison in England and Wales. The authorisation can relate to a single prison or type of prison or to prisons/institutions generally.

A PCP so authorised will be in the same position as an authorised governor of the prison or prisons concerned. It will have the power to deploy and activate equipment to block phone signals to the prison, detect mobile phone usage within the prison and record traffic data information on such phone usage. Pursuant to directions from the Home Secretary, information obtained from the interference must be provided to the governor of the prison concerned or to the Home Secretary. These directions will also specify the frequency or occasions on which the information must be provided. Separate direction issued to the governor concerned will specify information that must be provided to the independent communications regulator OFCOM. The information supplied to a governor pursuant to these provisions must be destroyed after three months, unless the governor orders its further retention on

specified grounds. The Home Secretary must also give directions to an authorised PCP on the circumstances in which the use of interference equipment must be modified or stopped. A PCP must comply with any such directions.

Although an authorised PCP will be acting independently in interfering with wireless telegraphy in a prison, it would appear that the governor of the prison concerned will retain ultimate responsibility for the interference in his or her institution. Accordingly, it is the governor in question who will be responsible for providing the information on interference activities to the independent regulatory body OFCOM.

It is easy to appreciate the importance of effective measures to prevent the use of illicit mobile phones in prison. That, however, should not divert attention from some of the less obvious implications of the deceptively innocuous provisions of the 2018 Act. One of the most striking features is the extent to which it facilitates the delegation of criminal law enforcement power and responsibility to private commercial operators. A PCP is in the business of providing phone and internet connectivity and services for profit. Policing how, and the extent to which, phones are being used in prisons is not part of its core business. Nevertheless, when authorised under the Act by the Home Secretary, a PCP acquires that broad responsibility in respect of the prison or prisons in question.

Significantly, this responsibility is different in kind from recording and retaining the traffic data of mainstream customers' phone usage; data which the operator may be required to make available to the police etc on request on a case by case basis for the investigation of crime. A PCP authorised under the 2018 Act will be expected to act on its own initiative in blocking phone signals and in detecting and collecting data on the use of illicit phones. In other words, it will be functioning effectively as a police or criminal law enforcement authority in combating the use of illicit phones in prison. Authorising and depending on a private commercial operator to discharge such functions, which are not its core business, raise serious questions about oversight, accountability and transparency in respect of these public law enforcement powers and responsibilities.

The Act is strangely silent on key matters such as *when* the Home Secretary can authorise a PCP to conduct interference in respect of a prison. Equally, it is not clear what, if any, criteria will inform a decision by an authorised PCP to initiate (and cease) an interference. It is stated that the Home Secretary must specify descriptions of information that should be provided from an interference, as well as the frequency and occasions on which the information is to be provided. However, those directions relate to the gathering of traffic data in the course of an interference, rather than to the act of interference itself. It is possible, of course, that further guidance will be provided in communications between the Home Secretary and PCPs. Nevertheless, the fact that they are not addressed more fully in the Act leaves much scope for the exercise of these sensitive powers to be shaped behind the scenes by the executive and the private commercial operators.

Also notable is the silence on the financial costs associated with the conduct of an interference and how they will be defrayed. It would be surprising if the PCPs are left to pick up the tab, which could be substantial. Nevertheless, the Act does not address this matter.

Although the Act presents the appearance of prison governors remaining central to the interference regime, there can be little doubt that the centre of gravity will move decisively to the PCPs as it is they who will have the expertise and technology to block signals and detect illicit usage. Indeed, in one respect, the attempt to retain the centrality of prison governors may prove counterproductive to effective oversight and accountability. Although a PCP conducts interference on its own initiative and independently of the prison governor concerned, it must provide information about the interference to the prison governor rather than directly to OFCOM. This weakens the efficacy of the independent check as OFCOM will be dealing with a third party, rather than the body conducting the interference and gathering the information.

Another key issue concerns management of the threat to phone and internet users outside the prison walls. Some prisons are adjacent to occupied residential, retail etc premises. Cardiff prison, for example, is adjacent to university student accommodation. Where the phone/internet signal in a prison is blocked pursuant to telegraphy interference by the PCP concerned, there is a risk of collateral interference for customers in the vicinity of the prison. This can also entail the phone/internet traffic data of people outside the prison being recorded and retained, with a consequent risk of disclosure to third parties.

Once again, the Act is not very forthcoming on how this issue will be addressed. It merely states that the Home Secretary must give directions to the PCP specifying the circumstances in which the use of the interference equipment must be modified or discontinued. In particular, these must include directions aimed at ensuring that a disproportionate interference outside a prison is avoided. Clearly, this accepts a degree of outside interference so long as it is not disproportionate; a concept that is not further defined. Other potential, but indirect, protections are a requirement to satisfy the Home Secretary that any equipment to be used is fit for purpose, and the limited oversight and monitoring role provided by OFCOM.

An issue that should not be forgotten is that illicit mobile phones in prison will not necessarily be used for criminal or disruptive purposes. Many studies have shown that retaining strong ties with family and loved ones on the outside can have a major beneficial effect on a prisoner's mental health and recidivism risk. For some prisoners, illicit mobile phones are the only practicable means of maintaining that vital contact. Typically, the landline phones notionally available to them for this purpose in the prison are prohibitively expensive and frequently inaccessible due to prison conditions. It is critically important, therefore, that interference with mobile phone signals in a prison are complemented with measures to ensure that prisoners have effective means to maintain phone contact with family on the outside. Commendably, the government is currently investing in the installation of phones in prisoners' cells. If implemented fully and quickly, that should prove a valuable safeguard, especially for vulnerable prisoners.

Quite separately, it is worth noting that while the Act extends to England, Wales and Scotland, it does not actually apply in Scotland even though the 2012 Act applies in Scotland. It is not entirely clear why this is so. In the course of the parliamentary debates, it was indicated that the matter had been discussed with the Scottish government which declined to expand the

2012 Act along the lines of the 2018 Act. Unfortunately, the debates do not shed any further light on the reasons why the Scottish government was not in favour of the measures.

Finally, it remains to be seen whether the Home Secretary will deploy the 2018 Act as the primary means for combating illicit mobile phone usage in prisons. An argument can be made for confining it to local situations in which resort to the expertise of PCPs is unavoidable to deal with a temporary and severe threat where action by the prison governor has proved inadequate. The reality is that the latter is producing dividends. In 2016, for example, almost 20,000 mobile phone and SIM cards were confiscated in prisons in England and Wales (an average of 54 per day). In the course of the parliamentary debates on the 2018 Bill (as it then was), these figures were presented as a crisis which necessitated resort to the unusual use of PCPs in frontline law enforcement activity. They could just as readily have been presented as proof that the established measures were already working effectively.

Eligibility for Parole

The law in England and Wales recognises several different categories of custodial sentence. These include: a determinate sentence; an extended determinate sentence (EDS); a special custodial sentence (passed in relation to certain offenders of particular concern); and a discretionary life sentence. Each has its own particular specifications. The net effect is that offenders convicted of similar offences could find themselves subject to quite different custodial regimes depending on which particular sentence type was applied to them on conviction. One such difference concerns eligibility for parole. In *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, the Supreme Court had to address whether more stringent conditions on parole eligibility for EDS prisoners, relative to other categories of prisoners, constituted discrimination in contravention of Art.14 of the European Convention on Human Rights (ECHR). It handed down its decision a few weeks ago.

The appellant in *Stott* was sentenced to an EDS in respect of 10 rape offences. An EDS can only be imposed on an offender where, among other things, he has been convicted of a specified violent or sexual offence, and the court considers that there is a serious risk of harm to members of the public from his further offending. The sentence consists of a determinate custodial term plus an "extension period" during which the prisoner is released under licence. The extended period is fixed in accordance with what the court considers necessary for protecting members of the public from serious harm occasioned by the risk of thr offender committing further offences.

A prisoner subject to an EDS is eligible to apply for release on licence (parole) during the course of his custodial term, but only after he has served two-thirds of that term. Critically, prisoners subject to other forms of determinate custodial sentences (including the special custodial sentence which is also expressly associated with offenders who present a risk of danger to the public) can apply for parole when they have served half of their custodial term. Even prisoners serving a discretionary life sentence can apply for parole after they have served half of their specified minimum term (which is usually understood to be the term that would have been imposed had a determinate sentence been imposed on

them). It is also significant that some of these other prisoners are entitled to be released on parole automatically when they have served the relevant portion of their custodial term, while an EDS prisoner can only be so released where the Parole Board is satisfied that his confinement is no longer necessary for the protection of the public.

The appellant argued that these (and other) differences in treatment constituted unlawful discrimination in the enjoyment of this right to liberty contrary to Article 14 ECHR (taken together with the Article 5 guarantee of the right to liberty). The appellant had failed in his application to the Divisional Court, and the Supreme Court dismissed his appeal against that decision by a 3 to 2 majority. In doing so, the Supreme Court provided some important clarification on the application of Art.14 ECHR to the differential treatment of categories of sentenced offenders.

Article 14 ECHR stipulates that the rights and freedoms governed by the Convention shall be secured without discrimination on any grounds such as: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status* (emphasis added). A key question for the Court in *Stott* was whether "other status" should be interpreted narrowly to link it closely, although not exclusively, to inherent or acquired personal characteristics (such as sex, nationality, religion or political opinion) or more broadly so that it could encompass a status associated with his own actions (such as acquisition of property) or a treatment applied by a third party (such as treatment as a particular category of prisoner).

In its previous decision in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, the House of Lords (as it then was) had taken the narrower approach and held that a prisoner's classification as "a long-term prisoner serving a sentence of fifteen years or more" did not come within the scope of "other status" for the purpose of Art.14. In reaching that decision, the Court was influenced by its view that the "other status" had to exist independently of the treatment being complained about. In other words, it had to be a pre-existing condition personal to the applicant.

The European Court of Human Rights, however, was not persuaded by that argument. When the same case reached it, the European Court emphasised that "other status" must be given a wide meaning. It was not limited to characteristics which are innate or inherent to the person. It also stressed that any exception to the protection offered by Art.14 should be narrowly construed. The Court went on to hold that the applicant's classification as a long-term prisoner did qualify as a status for the purpose of Art.14. It must be said, however, that the European jurisprudence on Art.14 is not entirely coherent in its application to the differential treatment of offenders on the basis of classifications imposed by domestic law. It would not be surprising if the Grand Chamber of the European Court of Human Rights revisits this area in the foreseeable future.

Clearly, the Supreme Court in *Stott* had to decide whether to depart from its own decision in *Clift* in favour of the broader interpretation adopted by the European Court of Human Rights. By a four to one majority on this issue, it followed the latter approach and held that categorisation as an EDS prisoner is a recognisable status for the purpose of Art.14. The fact that the

status of EDS prisoner did not exist independently of the discriminatory treatment alleged by the appellant did not preclude that result.

It does not follow, however, that the difference in parole treatment between an EDS prisoner and other categories of prisoner would necessarily amount to unlawful discrimination in the enjoyment of his right to liberty in contravention of Art.14. The appellant would also have to show that he was in an analogous situation to prisoners in other categories who benefited from the more favourable parole treatment. Moreover, he would have to establish that there was no objective justification for the difference in treatment between them.

By the slimmest of majorities (3 to 2), the Court held that the appellant had failed to establish unlawful discrimination within the meaning of Art.14. Although there was some difference of emphasis among them, the broad thrust of the majority judgments was that the status of an EDS prisoner is not sufficiently analogous to the other categories of prisoner, and that there is objective justification for their difference in treatment.

Giving the leading judgment for the majority, Lady Black explained that the variations between each of the sentencing regimes are such that each must be viewed as a distinct regime, rather than as a discrete variation within a single sentencing regime. It is not appropriate, therefore, to treat the early release status of a prisoner sentenced under one regime as wholly comparable or analogous to that of a prisoner sentenced under another regime. The early release provisions in one regime must be viewed holistically in the context of the other aspects of that regime which, of course, differ from the components of the other regimes. It follows that differential treatment in respect of early release alone does not necessarily constitute discrimination within the scope of Art.14. Much will depend on whether there is objective justification for the difference in treatment, and whether the means adopted to achieve that objective are proportionate and appropriate.

The EDS regime was considered to have a legitimate aim of enhancing public protection and confidence in sentencing. Given that it was concerned with offenders who posed a danger to the public, it was appropriate to require them to serve a longer portion of their sentence before they became eligible for release on parole. The problem, however, was that even discretionary 'lifers' became eligible for parole earlier, although they typically would be guilty of similar offending and would present an even greater danger to the public.

The majority's reasoning in overcoming that problem is not entirely convincing. They considered that the EDS prisoner benefited from advantages denied to the 'lifers'; most particularly, the fact that the EDS prisoner would eventually serve his full sentence and be free of the licence requirement, while the 'lifer' would be subject to the licence requirement for the rest of his life. It is not entirely clear how that justifies the EDS prisoner having to serve a longer portion of his sentence in prison than the 'lifer' in order to address a danger to the public which is also presented by the 'lifer'. Noting that the European Court of Human Rights allows a wide margin of discretion in matters of prisoner and penal policy, Lady Black said that the Supreme Court must afford a similar respect for the policy choices of parliament in sentencing. Looking at the EDS sentencing package as a whole, she

concluded that the parole differential was justified as a proportionate means of achieving the government's legitimate aim.

The two minority judges, Lady Hale and Lord Mance, acknowledged that the different sentence categories reflect distinct packages in which, for example, an EDS prisoner enjoys certain advantages over a life sentence prisoner. Nevertheless, they were not persuaded that that was sufficient to distinguish them from other categories of prisoner in respect of the core issue, namely eligibility for release on parole. More fundamentally, they could find no objective justification for the EDS prisoner being treated more severely than the life sentence prisoner in respect of the timing of eligibility for parole. They considered that the other burdens suffered by life sentence prisoners cannot be viewed as some sort of counter-balance to their more lenient treatment on the timing of their parole eligibility. Such burdens are inherent in the nature of a life sentence.

One other point worth adverting to concerns the division of a custodial sentence into a punishment component and a risk management (or preventative) component. This division seems firmly established in respect of life sentences in England and Wales. The specified portion that must be served before the prisoner is eligible for parole is the punishment component, while any period spent in custody beyond that point is deemed preventative. As part of his argument that the EDS prisoner was penalised more severely relative to other categories of prisoner serving a similar custodial sentence, the appellant in *Stott* argued that the division also applied in respect of a determinate sentence (such as the EDS). This argument was rejected by the majority who explained that the objectives of punishment (as well as deterrence, rehabilitation and protection of the public) applied for the full period of the determinate sentence. Eligibility for parole, therefore, did not signal the end of a punishment period in a determinate sentence. That was another reason why the majority did not consider the EDS prisoner analogous to a life sentence prisoner for the purpose of Art.14 ECHR.

The fact that the decision in *Stott* was by a 3 to 2 majority, coupled with the fact that the majority were not entirely unanimous or persuasive in their reasoning, suggests that the issue may be revisited in another case, or even in an application to the European Court of Human Rights.

Implementing Police Reform in Ireland

The report of the Commission on the Future of Policing in Ireland was published in September 2018 (see *Criminal Justice Notes* 2018). It is the first comprehensive review of policing structures, processes and values since the Garda Siochana was established over 90 years ago, and it offers extensive recommendations for significant change in policing, spanning: function, recruitment, training, discipline, governance, accountability, performance management, communications, technology, civilianisation, inter-agency partnerships, community policing, human rights, transparency and external oversight, among others.

Observers of Irish policing will know that there is a long history of proposed reforms being frustrated by inaction and obfuscation at the levels of government and senior Garda management. Adapting the successful precedent of the Patten Commission on police reform in Northern

Ireland, the Commission astutely recommended the establishment of an Implementation Group to drive forward and secure the full implementation of its recommendations over a four-year period. The Irish government accepted the Commission's recommendations in full; including, for the most part, its recommendations on implementation. Commendably, the government has moved quickly on implementation planning. In December, and signalling a break with tradition, it published some detail on the implementation structures, together with a four-year plan for the roll-out of the Commission's recommendations.

Unfortunately, the Implementation Plan is a dense document. It is not written in a style that will be easily accessible to the interested reader. There is also a concern that the implementation structures are more complex and government-dominated than they need to be. The combination of these two aspects may yet serve to obscure and dilute the substantive implementation of the Commission's recommendations.

Helpfully, the Implementation Plan bundles the recommendations into five distinct workstreams, consisting of: leadership and accountability; people; structures and operations; independent oversight; and partnerships. Rather confusingly, however, they are complemented by three "enablers", namely: change capacity; communications and engagement; and legislation. These are presented as "enablers for the overall success of the programme". However, apart from listing the legislative measures required to implement some recommendations, there is no further explanation of what these enablers will embrace beyond what is stated in the individual workstreams.

The substance of the Plan itself is set out across four phases dubbed: Building Blocks (first six months); Launching (6-12 months); Scaling (12-30 months); and Consolidation (30-48 months). The Building Blocks signify the commencement of those elements in each of the work streams that are considered key to the overall reform process. Launching involves the implementation of those essential elements with a view to laying concrete foundations for reform. Scaling refers broadly to continuation of reforms in the first two phases and commencement of most of the other elements in each of the work streams. Consolidation refers to the completion of ongoing reforms and the remaining elements in each of the workstreams. Such phasing is, of course, entirely sensible insofar as it essentially reflects a scale of implementation priorities. It is a pity, however, that it is obscured by terminology such as "Launching" and "Scaling" that can only serve to confuse the non-specialist reader.

A more substantial challenge lies in the manner in which the individual actions are presented in each of the Phases. The Plan does not provide a text which engages the reader with the substance of pertinent Commission recommendations and the implementation actions that will be taken on them in each Phase. Instead, it presents complex tables that merely state the actions that will be taken in each Phase, grouped together under the separate workstreams. The individual actions are cross-referenced to the relevant paragraph numbers in the Commission's report. It follows that the user has to read the Implementation Plan alongside the Commission's report and, typically, engage in tedious and disruptive reading of several discrete parts of that report for each implementation action. To complicate

matters further, the user will have to move backwards and forwards across each of the Phases in order to get a coherent grasp of the actions on any single element within a work stream, or even of the workstream as a whole. The implementation actions for the 2019 Phases (Building Blocks and Launching) alone are further broken down into separate quarterly phases. While the greater detail is welcome from one perspective, the overall effect is to render the material more complex and inhibiting.

The check-box style of the Implementation Plan may serve management needs of government and the implementation bodies, but they will do little for the wider interests of transparency, community engagement and public awareness of the changes that will be rolled out under cover of implementation. Arguably, they render it more difficult for interested observers to assess whether the Implementation Plan delivers fully on the substance and spirit of the Commission's recommendations. The heavy focus on the chronological phase in which a topic will be addressed, at the expense of substantive detail on the substance of what is planned, leaves much scope for implementation by box-ticking. The lack of detail on the substance of the boxes also leaves scope for more controversial reforms to be progressed without generating the public attention and scrutiny that they deserve. The treatment of national security and human rights respectively is illustrative of these concerns.

The Commission's recommendations on national security are significant and controversial, especially for the Garda function, organisation and oversight. The only real hint of the roll out of these recommendations in the Implementation Plan is two lines on the establishment of a Strategic Threat Analysis Centre, coupled with a few scattered statements that literally do no more than state a commitment to: identify requirements for Garda security and intelligence capability; conduct a legislative review for national security; implement national security review findings; and draft/enact a Bill for an "independent examiner". The lack of detail on what is envisaged on each of these actions leaves substantial scope for the government to pursue its own political and security interests under cover of implementing the Commission's reform recommendations.

The difference in treatment of the independent examiner, relative to the other components of the national security plans is also revealing in this context. The independent examiner is intended as a form of oversight in respect of national security (a vital substitute for mainstream oversight mechanisms). However, the enactment of the necessary Bill to establish the office is scheduled for the last Phase (Consolidation) of the Implementation Plan. By contrast, the establishment of the Strategic Threat Analysis Centre and the appointment of a national security coordinator are scheduled for the first Phase (Building Blocks).

The Commission strongly emphasised the importance of human rights for all aspects of policing, including oversight. Commendably the Implementation Plan also foregrounds human rights. Nevertheless, it is lacking in the detail necessary to convince that the thrust of the Commission's recommendations will be realised. The Commission, for example, recommended the adoption of statutory codes of practice to inform the exercise of police powers in the interests of fairness and transparency. In the Implementation Plan, however, this has inexplicably become the codification of legislation on arrest, search and detention. This suggests

that the codes would merely define the existing police powers in question, rather than provide detail on how those powers should be exercised.

Among its human rights recommendations, the Commission also called for the establishment of a human rights adviser to assist its proposed oversight body (currently the Policing Authority) in assessing policing compliance with human rights obligations. In the Implementation Plan this is diluted to the Policing Authority merely considering the recruitment of a human rights adviser. There is no reference at all to the Authority (or its replacement body) actually appointing such an adviser. It is not until the final Consolidation Phase that there is a reference to the proposed replacement for the Policing Authority assessing Garda compliance with human rights obligations.

It is also worth drawing attention to the implementation machinery. As noted above, it appears more complex and government-dominated than it needs to be. The Commission recommended an Implementation Group composed of key stakeholders from the Garda and the government. It should be independently chaired by an "individual of high standing, well respected in Irish public life", and supported by an Office with the appropriate expertise and resources.

The government has established the core Implementation Group and the supporting Office as recommended, but it has appointed one of the Commission members as the Chair. Moreover, it has also established "a High Level Steering Board" chaired by the Secretary General of the Department of the Taoiseach (Prime Minister) "to support and guide the work of" the Implementation Group. Ostensibly, this additional Board is justified on the basis of its capacity to act as "a clearing house for issues that cannot be resolved" by the Group, and to overcome blockages experienced in the implementation of the Plan. An alternative interpretation is that it is there to protect vested political and institutional interests in the sensitive police reform process.

It is important to recall that there has been no shortage of enlightened reform proposals on vital aspects of policing in Ireland from at least as far back as the 1970s. These have included the extensive and acclaimed recommendations of the Morris Tribunal of Inquiry and the copious recommendations of the Garda Inspectorate. However, vested interests within the Garda and government have managed quietly to ensure that too many of them have either not been implemented at all, or have been implemented in a manner that has defeated the motivation behind them. For all their weaknesses, therefore, the very fact that the implementation machinery has been established and the Implementation Plan published is a significant plus. Nevertheless, there remains the risk that the Commission's recommendations will meet a similar fate to many of the recommendations that have preceded them. At the very least, they are at risk of being cherrypicked in a manner that will further tighten the control of vested interests at the expense of transparency and human rights in policing. The content and style of the Implementation Plan do not inspire confidence that these risks will not materialise.