Submission to Commission on the Future of Policing in Ireland

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From: [redacted] ---- 20 January 2018

Deadline for submissions is no later than the **31 January 2018.** Email submissions@policereform.ie
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Fixed Penalty Notices – Reform of System required:

The main issue that gave rise to the demands for current reform was the discovery of widespread cancellation of penalty points in favour of certain persons, who were aware of a "secret" system of appeal, which was not subject to oversight.

My submission primarily focuses on that issue, its undermining in general terms of the Rule of law, and the replacement system, which I contend is ALSO in contravention of the Rule of Law.

A number of claims and subsequent reports indicated that many persons who uniquely had become aware of an un-broadcast system where certain Gardai (of whatever rank) could access the pulse system and apparently change the status of various offences, such that penalty points were not issued. The discretion exercised has largely been seen to have been somewhat arbitrary in general, and not subject to independent oversight.

However, the idea that Gardai should be able to cancel FPNs [fixed penalty notices] post issuance never seemed to have been called into question, only the degree to which such discretion was used.

Hence, efforts at improving the system focused on ensuring more formality in the process.

The new system details are viewable on the Garda website here:
http://www.garda.ie/Controller.aspx?Page=13233

Here, reference is made to the ("Administrative") creation of a new *Cancelling Authority* which steps in to the shoes, so to speak, of the courts, as the only authority specified in legislation, to deal with "two" categories of potential cancellations. –

One, refers to "procedural" problem cases, i.e. Category A, AND

"***Category B***

Apart from the statutory exemptions laid down, there is no legal provision whereby a concession is extended to any particular individual. However, applications for cancellation will be considered in ***exceptional circumstances*****."**

This above statement taken from the website should ring alarm bells for persons familiar with Administrative Law as outlined by the High Court and Supreme Court in Ireland. -

For example, in the case of *O'Brian v PIAB*, the decision by the PIAB to not allow lawyers represent claimants with the PIAB, was held to have been an unconstitutional administrative action. The court held that, "

> "Nor can extraneous policy factors, (e.g. the conviction that solicitors are "unnecessary" to the process) justify attempts (whether direct or indirect) to merely tolerate the presence of

> solicitors, still less attempts to frustrate solicitors as they try to ensure that their clients' interests are protected, or attempts to exclude lawyers from the process entirely. If this could be done by policy **it would amount *de facto* to an unconstitutional amendment of the law through administrative action**,[1]

In another case, perhaps more on point, in *Dunne v Donohoe*[2] [2002], the court stated that adding requirements (the need to have secure storage) to the awarding of gun licences, the superintendant was acting *ultra vires* of the provisions of the Firearms Acts. –

> "By imposing extra conditions, the superintendant **was assuming the power of the legislature**, thus violating the Constitution's provision that only the Oireachtas can enact law

Hence, the courts frown upon the Gardai, or other statutory agencies adopting "legislative roles", even when there are clear public interest claims for doing so, or where such actions interfere in other constitutional rights, such as the right to be represented by lawyer in a legal matter.

The constitution has and the Garda Acts have clear constitutional and statutory routes respectfully, for dealing with such public interest claims to the need to amend the law.

The Gardai can communicate any concerns to the relevant minister in relation to any over-harshness in the issuing of FPNs unfairly (as per the 2005 GS Act). The Government can then bring the matter before the Dail, and outline the need for amending legislation.

The Gardai, could seek delegated powers, for example (and I'm not advocating this), to alter certain rules/procedures, but any such powers would have to satisfy the "Principles and Policy" test, and would also have to be implemented in compliance with constitutional justice.[3]

Further Grounds for not setting up an authority without a statutory footing: There are a number of grounds as to why a Cancelling Authority is not Rule of Law compliant.

1) Mixing legislative and adjudicative roles within the same body is not a good idea, in terms of separation of powers. For example, the ECHR court said in *McGonnell v United Kingdom*, (2000) 30 EHRR 289. - See para 55—

   > "….the Court considers that any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue."

2) The details of the rules are not in the public domain, apart from some outline on the Garda website, but the constitution requires that laws (and I would argue rules, as well) are required to be published in Iris Oifigiúil (See Article25.4.2). Also, S.32(1)(ii) of the FOI Act, 2014, exempts records relating to the Cancellation Authority, scuppering any scrutiny.
3) Justice is not administered in public, which is required by Article 34, unless there are Statutory Exceptions (And these are also limited). Whereas, Article 37, allows for non-judge adjudicators, in some cases, such adjudication, is not removed from the direction of Article 34, to conduct justice in public.

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[1] *O'Brien v The PIAB (Board) & AG* [2005] IEHC 100
[2] See- the comments of Keane C.J. *in Dunne v Donohoe* [2002] 2 I.R. 533 at 543.
[3] Justice Brian Walsh said, "It is sufficient to say … setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures." (*Glover v BLN Ltd and Others*, [1973] IR 388)

4) Democracy is undermined by "secret justice", as citizens are not in a position to lobby for stricter procedures to be applied by Gardai determined rules (laws), and the DPP or road safety campaigners may not be made aware of any patterns of overly-lenient decisions.[4] Hence open-justice serves democracy as well as ensuring oversight of decision makers.[5]

5) Repeat-offenders will likely become more familiar with the degree of tolerance permitted, allowing them to better tailor their driving behaviour to fly-under the radar of certain laws, which other drivers won't be aware of, leading to effective inequality before the law, as a result of the lack of transparency of procedures and outcomes.

Discretion -

Much is made of the use of discretion to ensure fairness in the system. However, discretion needs to be curtailed, within certain limits to avoid politicising policing, and undermining the Rule of Law. Gardai make decisions in many cases, at 1st instance, when assessing a person's driving on the open road. She decides, on the spot, to issue a FPN or not. This is a both NECESSARY and APPROPRIATE use of her discretion. If exercised inappropriately the penalised person can appeal the matter to court, where a judge can adjudicate the matter in public. In my view, allowing a THIRD SECRET level (Or SECOND, in the case of GATSO initiated FPNs) of adjudication/discretion is not compatible with the Rule of Law, and is not necessary, proportionate or appropriate.

Consideration should also be given to reducing 1st instance discretion, especially related to drunk-driving. For example, in the 19th century, Ireland had to introduce roving Royal Magistrates, due to fears that local magistrates would favour locally connected persons, and it is understandable that local Gardai living within small rural communities might not want to be seen to be zealous in implementing random drink-driving-patrols. Newly qualified Gardai could be tasked as temporary traffic-corps officers, and moved around the country, on a random basis, to conduct flash patrols, perhaps in conjunction with the RSA, who could identify (non-compliance) blackspots.

Even, if a case can be made that this will overburden the courts, then such a problem should be dealt with by the creation of a statutory based FPN Authority, which ensures transparent procedures, has adjudicators who are statutorily protected from any influence by persons of higher rank[6], and who conduct public hearings in a forum easily accessible to the public[7], and preferably publishes the outcomes of all such cases on a public website.

However, I'm not convinced that there is a need for such an authority. The UK has a similar system, where most persons are deterred from pursuing appeals by the threat of double points, and where the courts, and only the courts, adjudicate claims of unfair/mistaken FPNs. (We should avoid developing complex solutions for problems which may never materialise, in reality). But, in any event, any such FCN/Cancellation Authority would be better housed within a separate independent entity, such as the RSA. Additionally, the falsification of public records needs to be made an offence under law, and not just a disciplinary matter; currently, falsification is only an offense if done in response to an FOI request, but not otherwise (See- Section 52 of the FOI Act, 2014).

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[4] See- New Jersey State constitution, Art 1.2(a); "Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it."

[5] K Fitzpatrick 'Courts need to expand view of open justice' *Irish Times* of 16 June 2014 available at http://www.irishtimes.com/news/crime-and-law/courts-need-to-expand-view-of-open-justice-1.1831537.

[6] See- ECHR case of *Findlay v UK* (App. No. 22107/93).

[7] See- *Irish Times v Ireland* 1998 SC.

Public Rights at stake:

Also, there is public money at state as well as pubic rights to safer roads, as cancelled points result in lessor fines being collected by government. The general public's right to life and bodily integrity can be interfered with, if persons who should be deprived of their licences, are inappropriately allowed to retain their licences. The variation of monies collected could be seen to collide with a number of constitutional provisions, such as the Money-bills section, the right to only have laws that are publicly debated/enacted/published and decisions on their implementation overseen by independent judges acting in public. The current secret system has no statutory basis, and individual decisions cannot be appealed by the public, as the public is not made aware of such decisions - the administration of justice therefore bypasses judicial oversight. Secret justice scuppers the public's right to elect politicians, who pass laws for their benefit, which are monitorable as to their effectiveness, and hence the competence of the legislators is also unmonitorable, rendering the democratic safeguard of elected office redundant as a way of securing public rights.

In my view, the public and the FPN applicant, each has a right to independent and transparent adjudication of public and individual rights respectively. It is not clear, how adjudicators are appointed to the Cancellation Authority, and what safeguards are in place[8], but in any event, such safeguards are not secured in statute.[9] Best practice mandates that public rights adjudication is conducted by a tribunal established by law, is held in a public forum, and is subject to judicial oversight. Each of these safeguards, which Rule of Law demands, appear to be missing here.

According to a UN document, the independent decision-making power of the Judiciary also comprises, "jurisdiction over all issues of a judicial nature and ... exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law". [10] Hence, an administrative process, without statutory basis, arguably circumvents a normal flow of some cases to the courts for adjudication, and therefore circumvents the statutory requirement to have such appeals dealt with by courts alone.

For all the above reasons, I would recommend that all "procedural" issues in relation to FPNs should be handled by the RSA only, and this should be put on a statutory footing. Second, "Category B" cases should be dealt with by the courts. If this proves in some way problematic, in terms of volume (of which there is no evidence from the UK), then a statutory review body could be established within the RSA, subject to transparency and judicial (review) oversight.

A non-statutory middle layer of discretion (either between Gardai and the Courts, or between GATSO vans and the courts) is not compatible with the Rule of Law.

Protected Disclosures – Section 5(5) of the PID Act 2014, needs to be repealed. The Department of Justice has outlined the over-expansive exception this represents (See submission at per.ie) , which the equivalent UK Act saw no need to create. Plus, unethical as well as illegal conduct also needs to be expressly encompassed as protected disclosures.

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[8] What happens, if the prosecuting officer is of higher rank to the adjudicator/s? See the case of *Findlay v UK*, in regard to the dual role of prosecutor/convenor; *Findlay v UK* (Application no. 22107/93) ECHR.

[9] For example, the ECHR court found that a military tribunal was not sufficiently independent - "They are nominated by their superiors and they do not exactly have the same constitutional safeguards as for the other three members who are military judges." See- *Tanisma v TURKEY*, App No 32219/05.

[10] According to Principle 3 of the Basic Principles, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers.*
https://www.google.ie/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjyxuf5sOTYAhWnDsAKHSMeBVoQFggpMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FPublications%2Ftraining9Titleen.pdf&usg=AOvVaw2Rg4L1yQE1uguBdDR82oRO

GSOC reform:

Speaking in Dublin, Nuala O'Loan pointed to the success of the police ombudsman's office in Northern Ireland.[11] She identified various flaws with GSOC:
(1) Gardaí should not be seconded to GSOC- "that is recognised as a non-starter". She also advises "it is cheaper to have civilians" investigating Gardaí.
(2) Oversight of the Commissioner was required.
(3) GSOC needs full investigative power including access to PULSE which "has been the subject of major problems".
(4) A six months complaint period is insufficient. And
(5) "GSOC is not properly empowered or resourced".

The fifth problem has recently been confirmed. I recommend taking her advice into account.

I would also suggest that all complaints to GSOC, including admissibility decisions[12], should be published on a public website, from the outset. This would help flag up resource constraints, by allowing the public to view any delays in dealing with complaints. Certain details, such as names could be redacted to create some anonymity where appropriate.

The Road Safety Authority {RSA)

I suggest that it might be better to allocate the prosecution of all unpaid FPNs to the RSA, and assign the lead prosecutorial role to the RSA in prosecuting all road traffic offences, whereby either an RSA prosecutor office would be created, which would prosecute in the district courts around the country, or alternatively supervise the prosecution of offences. The pulse system in regard to traffic offences could be mirrored within the RSA (thus, providing oversight of the FPN system). The fact that some 50% of cases are not fully pursued should not be accepted as satisfactory. Also, the loophole, which apparently allows the drivers of company cars to escape, on the claim that the driver was not identified, needs to be closed off. For example, a lead driver could be assigned to a car, and any other drivers would have to be nominated by the lead driver, or else he/she gets the points (In other words, the burden of proof needs to be adjusted, such as with the possession of drugs for supply). Loopholes undermine public trust in the fairness of the policing system.

I hope the above suggestions assist the Commission in responding to its *terms of reference*, in particular, its proposals to ensure –

> *that policing is constrained by, accountable to and acts only within the law; AND*
> *that policing powers and procedures, like the law, are clearly established & publicly available*

Nelson Mandela said that the rule of law ... "refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes."; secret justice does not provide the appropriate structure to ensure that the public rights to safer roads are appropriately balanced and publicly monitored.

Adherence to the Rule of Law, transparency in decision making, and effective oversight need to the hallmarks of future policing in Ireland. End of submission.

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[11] Nuala O'Loan, 'Strengthening Police Accountability in Ireland', Farmleigh House Conference (20 June 2014) < http://www.justice.ie/en/JELR/2014.06.20%20Dublin%20Police%20Accountability.pdf/Files/2014.06.20%20Dublin%20Police%20Accountability.pdf >.

[12] For example, the CJEU has recently ruled in the case of *Nowak v Data Protection Com*., a preliminary reference from the Supreme Court, that a claim, which was originally categorised as "frivolous or vexatious" was valid. Hence "screening" decisions also need transparency.