The Criminal Investigation of Suspects with Disabilities: The Impact of the UN Convention on the Rights of Persons with Disabilities

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Declaration

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England and Wales

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Lunacy Act 1890

Madhouses Act 1774

Police and Criminal Evidence Act 1984

The Mental Health (Care and Treatment) (Scotland) Act 2003

Vagrancy Act 1744

Scotland

Criminal Justice (Scotland) Act 2016

List of Abbreviations

AA	Appropriate Adult
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women; Committee on the Elimination of Discrimination Against Women
CMH	Central Mental Hospital
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DPO	Disabled Persons' Organisations
DPP	(Office of the) Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	Fundamental Rights Agency of the European Union
GP	General Practitioner
GSOC	The Garda Síochána Ombudsman Commission
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ID	Intellectual Disability

IHRC	Irish Human Rights Commission
IPRT	Irish Penal Reform Trust
LRC	Law Reform Commission
MIC	Member in Charge (of the Garda Station)
NGO	Non-Governmental Organisation
NI	Northern Ireland
NSW	New South Wales
OHCHR	United Nations Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol for the Convention against Torture
PACE	Police and Criminal Evidence Act 1984
PWDs	Persons with Disabilities
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States
WHO	World Health Organization
WNUSP	World Network of Users and Survivors of Psychiatry

Abstract

Donna Marie McNamara

People with disabilities are disproportionately over-represented as suspects of crime throughout the world, and experience greater barriers within the pre- and post-trial criminal process than suspects without disabilities. Evidence suggests that police officers are increasingly coming into contact with persons with disabilities and are acting as gatekeepers to mental health services, earning them the moniker "psychiatrists in blue." People with serious psychosocial disabilities are also more likely to experience stigma on the basis of their impairment, which may influence police officers' attitudes and treatment of persons with disabilities.

This thesis will analyse the current barriers to justice for suspects with intellectual and psychosocial disabilities within the Irish pre-trial process; from the initial arrest, through to their detention in police custody and police interrogation. From the initial contact with the police, the pre-trial process presents many critical obstacles for suspects with psychosocial disabilities. The outcomes associated with these obstacles often have dramatic and lasting effects on subsequent trial proceedings and ultimate determinations of guilt or innocence.

The objective of this thesis is to examine the existing laws and policies relating to persons with disabilities who have been arrested and to assess the accommodations in place to ensure their right of equal access to justice and secure their effective participation in the criminal and trial processes. It will demonstrate that the human rights provisions contained in the UN Convention on the Rights of Persons with Disabilities can play a critical role in informing and shaping criminal justice reforms in Ireland, with particular regard to the right of Access to Justice as provided under Article 13. This thesis will also draw upon comparative laws and practices, particularly from England and Wales, with a view towards identifying models of best practice which could be adopted in Ireland.

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CHAPTER 1

Introduction: Contextual Background, Objectives and Methodology

1.1 Introduction

In March 2018, Ireland became the last country in the European Union to ratify the UN Convention on the Rights of Persons with Disabilities (hereafter the CRPD/the Convention), eleven years after it was first signed in 2007. The Convention is the most important human rights treaty for persons with disabilities, as it requires all States Parties to remove obstacles within society so that all persons with disabilities can participate fully as equal citizens. In its relatively short lifetime, the Convention has already effected meaningful change worldwide, especially in the areas of legal capacity, personal decision-making, and independent living arrangements. However, the implications and obligations under the Convention have not yet been fully realised with respect to the broad area of the criminal justice process. Research in this area has centred on the reforms needed within the trial process, with a specific focus on the future of capacity defences such as the insanity defence and fitness to plead.[1]

[1] Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122; Piers Gooding and Tova Bennet, 'The Abolition of the Insanity Defense in Sweden and the United Nations Convention on the Rights of Persons with Disabilities: Human Rights Brinksmanship or Evidence It Won't Work?' (2018) 21(1) *New Criminal Law Review: In International and Interdisciplinary Journal* 141; Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23(3) *Griffith Law Review* 434 and Michael Perlin, ''God Said to Abraham/Kill Me a Son': Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 *American Criminal Law Review* 477.

This thesis will examine whether the Convention has the potential to influence and guide law reform within the pre-trial criminal justice process. An examination of the current shortcomings in the criminal process through the lens of a human rights framework could show how improved access to justice could be achieved for all parties of the justice system. While there are many barriers facing suspects of crime generally, persons with disabilities have traditionally experienced far greater infringements of their right to effective access to justice. For example, inaccessible police stations, courtrooms and prisons; inadequate training programmes for members of the police, lawyers and the judiciary; and a lack of procedural supports such as accessible reading material or assisted technology devices to enable communication.

1.1.1 Context of this Research

A key objective of this research is to identify the existing barriers to justice for persons with intellectual and/or psychosocial disabilities as suspects of crime in the Irish pre-trial criminal justice system.[2] The criminal justice system can be divided into three broad categories – pre-trial, trial and post-trial. The pre-trial process can be viewed as the least formal stage of the entire process as it often takes place within the confines of a police station as opposed to a public hearing in court or for a specified period of time in prison. This stage therefore presents a unique host of challenges and difficulties for suspects, especially suspects with disabilities. From the initial point of contact with the police, through to the arrest and subsequent detention in a police station, and police interrogation, the pre-trial process can be seen as an obstacle course for suspects.[3]

[2] A common theme within the Irish justice system is the parallel between juvenile justice and the treatment of adult offenders with disabilities. This is rooted in the Custody Regulations, which provide that people with mental disorders should be treated, for the purposes of the regulations, in the same manner as children under 17 (*Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987*, reg. 22(1)). Despite the similar barriers to justice faced by both categories of suspects, this thesis does not specifically consider the rights of young people with disabilities as suspects of crime.

[3] Yvonne Marie Daly, 'Assembly-Lines and Obstacle Courses: The Pre-Trial Process in Ireland' (PhD thesis, Trinity College Dublin, 2008).

An individual's first encounter with the criminal justice system usually involves contact with the police (referred to as An Garda Síochána in Ireland/the Gardaí), in the form of an arrest or an investigation. The police fulfil a fundamental role in society and enjoy extensive powers in relation to crime control, the maintenance of law and order, and further legal powers in relation to the arrest and detention of individuals in the investigation of criminal activity. As frontline operatives of the criminal justice system, police officers and the police as a collective unit, perform wide-ranging duties from the time an initial complaint is made in relation to a criminal offence, through to the arrest, detention, interrogation and subsequent decision to charge an individual.[4] During the investigation of criminal offences and in exercising their role more generally, the duties of the police will directly challenge and potentially interfere with the personal rights of the individual accused, including their right to privacy, property rights, the right to bodily integrity and most notably, freedom of liberty. The actions of the police can therefore become a barrier to justice and as such, it is necessary that they carry out their duties in a fair, just and reasonable manner, while respecting the law.

This thesis will consider the role of the Gardaí, alongside the laws and policies governing the pre-trial process at present, in order to identify whether suspects with disabilities are adequately protected and supported to participate on an equal basis with other suspects of crime. Using traditional and emerging theoretical concepts of disability, alongside the rights contained within the CRPD, it will be argued that the current pre-trial process is fundamentally flawed from the perspective of protecting the rights of all suspects, regardless of whether or not they have a disability. The pre-trial process presents barriers for all suspects of crime, but these barriers are potentially insurmountable to persons with disabilities – especially if supports are not in place to assist the individual to participate during the police investigation and interrogation stages. In employing the CRPD within the context of the pre-trial process, it is argued that greater procedural guarantees and reasonable accommodations are required to ensure the due process rights of all persons with disabilities in contact with the criminal justice system.

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[4] The ultimate decision to prosecute an individual lies with the Director of Public Prosecutions in Ireland, see Director of Public Prosecutions, 'What happens when a file goes to the DPP?' (Director of Public Prosecutions) <https://www.dppireland.ie/brief-guide-to-the-criminal-justice-system/category/2/#a43> accessed 13 June 2018.

1.2 A Note on Terminology

It is necessary to acknowledge that the issue of language and labelling is particularly problematic within the disability community as some terms cultivate the stigma associated with disability. This is best evidenced in Chapter Two (which addresses the historical treatment of persons with disabilities in Ireland), whereby certain terms will be used to refer to persons with disabilities which are now out-of-date and no longer acceptable. Labels such as "lunatic" were enshrined within legislation and were a part of the vernacular to describe persons with disabilities and in particular, persons with psychosocial disabilities.[5]

There is no universally agreed definition of disability and within this; the meaning of the term psychosocial disability remains even more elusive.[6] The World Health Organisation defines intellectual disability as 'a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired intelligence). This results in a reduced ability to cope independently (impaired social functioning), and begins before adulthood, with a lasting effect on development.'[7] Whereas, the term "psychosocial disabilities" will be used as the preferred term (as endorsed by the World Network of Users and Survivors of Psychiatry) to refer generally to 'users and survivors of psychiatry who experience or have experienced or are experiencing madness and/or mental health problems and/or are using or surviving, or have used or survived psychiatry/mental health services, as well as those of us who are perceived by others as having a mental disability/impairment.'[8] The term psychosocial in itself recognises the interaction between

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[5] *The Criminal Law (Insanity) Act* 2006 repealed the earlier *Trial of Lunatics Act* 1883. Of note, the *Assisted Decision-Making (Capacity) Act* 2015, which was introduced to provide for the repeal of the Criminal Lunatics (Ireland) Act 1838, has yet to be fully commenced. Therefore, the law still retains the term "lunatic".

[6] Paul Deany, 'Psychosocial Disability: one of the most misunderstood areas of disability' (Disability Rights Fund, 15 June 2016) <http://disabilityrightsfund.org/our-impact/insights/psychosocial-disability/> accessed 5 June 2018.

[7] World Health Organisation, 'Definition: Intellectual Disability' (World Health Organisation) <http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability> accessed 11 December 2017.

[8] World Network of Users and Survivors of Psychiatry, 'Implementation Manual for The United Nations Convention on The Rights Of Persons With Disabilities' (World Network of Users and Survivors of Psychiatry, 2008). [Hereafter World Network of Users and Survivors of Psychiatry].

both the psychological and the social and cultural components of one's disability,[9] which in turn best represents the social model of disability and its acceptance of disabling barriers within society such as stigma, discrimination and exclusion.[10] For the purposes of this thesis, the following conditions are referred to within the scope of "psychosocial disability" include schizophrenia, mood disorders (including depression and bipolar disorders), anxiety-spectrum disorders, attention deficit hyperactivity disorder, adjustment disorders (may involve excessive emotional or behavioural reactions to stressful situations) and personality disorders.[11]

1.2.1 Article 1 of the CRPD

Within the disability community, there is debate regarding the use of the term "disabled" to refer to persons with disabilities collectively.[12] As such, there is no precise definition of disability within the UN Convention on the Rights of Persons with Disabilities, aside from that which is contained in Article 1:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[13]

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[9] Ibid, 9: 'The psychological component refers to ways of thinking and processing our experiences and our perception of the world around us. The social/cultural component refers to societal and cultural limits for behaviour that interact with those psychological differences/madness as well as the stigma that the society attaches to labelling us as disabled.'

[10] Natalie Drew and others, 'Human rights violations of people with mental and psychosocial disabilities: an unresolved global crisis' (2011) 378 *Lancet* 1664.

[11] For further information, see: Ranna Parekh, 'What Is Mental Illness?' American Psychiatric Association, November 2015) <https://www.psychiatry.org/patients-families/what-is-mental-illness> accessed 6 June 2018.

[12] For an account of the "unsettled questions" raised in classifying mental health conditions as disabilities, see George Szmukler, Rowena Daw and Felicity Callard, 'Mental health law and the UN Convention on the rights of persons with disabilities' (2013) 37(3) *International Journal of Law and Psychiatry* 245. [Hereafter Szmukler and others].

[13] CRPD, Article 1 (emphasis added).

This definition is said to encompass both the physical and attitudinal barriers which challenge persons with disabilities in society.[14] The understanding of disability as a condition arising from such interaction with barriers that may hinder one's full and effective participation in society is an explicit endorsement of the social model of disability.[15] Article 1 further establishes three different levels of obligations on behalf of States parties, including the duty to promote (and foster recognition), to protect (prevent interference with) and also to ensure (the realisation of) the rights of persons with disabilities.[16]

During the negotiation stages of the Convention, participating parties failed to reach a finite definition of disability which would include all persons with disabilities. This disagreement is highlighted in the report of the third session of the negotiations, wherein it is noted that the term "disability" should be defined broadly.[17] Many of the participants involved in the Working Group were in agreement that the Convention should protect the rights of *all* persons with disabilities; indeed, some participants argued that no definition should be included to avoid 'limiting the ambit of the Convention.'[18] The chairperson of the Ad Hoc Committee, for example, proposed that there should be no definition, as this would create a risk that certain groups would be excluded from the Convention's remit.[19] This proposal was rejected, however, by organisations who argued that a definition was necessary to ensure that states would not 'adopt unduly narrow readings of the

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[14] Aisling de Paor and Charles O'Mahony, 'The Need to Protect Employees with Genetic Predisposition to Mental Illness? The UN Convention on the Rights of Persons with Disabilities and the Case for Regulation' (2016) 45(4) *Industrial Law Journal* 525, 549.

[15] Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999) 6-7.

[16] Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1, 26.

[17] United Nations Enable, 'Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (A/AC.265/2004/5, 9 June 2004) <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm#footnote12> accessed 11 December 2017.

[18] Ibid.

[19] In 2001, an Ad Hoc Committee was established to 'to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development.' General Assembly, 'Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities' Resolution 56/168 available < https://www.un.org/esa/socdev/enable/disA56168e1.htm> accessed 11 September 2018.

Convention.'[20] Overall, there was a general consensus among the participants that should a definition be included within the text of the Convention, it should reflect the ethos of the social model of disability, as opposed to the medical model.[21]

The difficulty experienced during the drafting of the Convention is acknowledged within the Preamble wherein it is stated 'that disability is an evolving concept.'[22] One could argue that the failure to clearly define what constitutes a disability could prove problematic; especially as it is expressly stated in the Convention that the disability in question must be "long term". This has sparked some debate concerning the types of disabilities which are afforded protection under the Convention, specifically in regards to certain mental health conditions as some may occur intermittently and therefore may not meet the standard of a "long term" disability.[23] The nature of mental health conditions, such as the experience of depression and schizophrenia, are characterised by a 'chronic and relapsing course with generally incomplete remissions, substantial functional decline, frequent psychiatric and medical comorbidities, and increased mortality.'[24] Therefore, it is argued that the very essence of psychosocial disability can be disabling, and may prevent an individual from participating fully in society and they may be at risk of discrimination as a result. Further, the definition of disability put forward in the CRPD is not exhaustive and must be interpreted in a broad sense to include all persons with long-term disabilities; which would include intermittent mental health conditions.[25]

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[20] Peter Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law' (2012) 75(5) *Modern Law Review* 752. Interestingly, this very problem arose under the EU Equality Framework Directive 2000, as seen in the case of *Chacón Navas v Eurest Colectividades SA* (2006) C-13/05, as the original text of the Directive did not include a definition of disability.

[21] United Nations Enable, 'Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (A/AC.265/2004/5, 9 June 2004) <http://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm#footnote12> accessed 11 December 2017.

[22] CRPD, subparagraph (E). See World Network of Users and Survivors of Psychiatry (Fn. 8), 9: 'During the negotiations, it was impossible for the parties to agree on a definition of disability that included all persons with disabilities and excluded no person with a disability. The Preamble of the Convention in subparagraph (e) recognizes "that disability is an evolving concept."'

[23] See Brendan Kelly, *Mental Illness, Human Rights and the Law* (RCPsych Books 2016); Szmukler and others (Fn. 12), 246.

[24] Gundugurti Prasad Rao, Vemulokonda Sri Ramya and Math Suresh Bada, 'The rights of persons with Disability Bill, 2014: How "enabling" is it for persons with mental illness?' (2016) 58(2) *Indian Journal of Psychiatry* 121, 123.

[25] Ibid: 'The use of the word 'include' in the statement above allows for a non-exhaustive description of 'disability' that is not settled; neither are the meanings of terms such as 'long-term' and 'impairments.''.

Article 2 also provides that for the purposes of interpreting the CRPD, discrimination on the basis of disability includes all forms of discrimination; direct, indirect, structural, multiple or other, as well as discrimination by association and discrimination based on assumed or future disability.[26] Fennell states that in terms of protecting the rights of persons with mental health conditions going forward, there must be a re-conceptualisation of mental health rights into disability rights as it 'lays greater emphasis on positive rights and upholds the social inclusion, anti-stigma and equality agenda, without losing sight of the key imperative of legality, due process and proportionality.'[27]

The use of "person-first" language (persons with disabilities/persons with autism) is preferable and will be employed throughout this thesis as it recognises that disability may be an aspect of one's identity, but it is not a defining trait, characteristic or status.[28] This approach has subsequently been adopted by the Convention and will be adhered to throughout this thesis. Writing on the importance of using person-first language, Blaska has stated:

> The philosophy of using person first language demonstrates respect for people with disabilities by referring to them first as individuals, and then referring to their disability when it is needed. This philosophy demonstrates respect by emphasizing what people can do by focusing on their ability rather than their disability and by distinguishing the person from the disability.[29]

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[26] European Foundation Centre, Study on Challenges and Good Practices in the Implementation of the UN Convention on the Rights of Persons with Disabilities (VC/2008/1214, Final Report, 2010) 54.
[27] Phil Fennell, 'Institutionalising the Community: The Codification of Clinical Authority and the Limits of Rights-Based Approaches' in Bernadette McSherry and Penelope Weller (eds.), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing 2010) 7.
[28] Lisa Schur, Douglas Kruse and Peter Blanck, *People with disabilities: Sidelined or mainstreamed?* (Cambridge University Press 2013) 6.
[29] Joan Blaska, 'The Power of Language: Speak and Write Using "Person First"' in Mark Negler (ed.), *Perspectives on Disability* (Health Markets Research 1993) 27.

1.2.2 Disability and Vulnerability

The use of language and labelling is particularly problematic within the disability community as some terms cultivate the stigma associated with disability. One especially problematic term is "vulnerable", as it depicts persons with disabilities as weak or in need of protection.[30] Within criminal justice law, policies and correlating literature however, the term vulnerable is used extensively to refer to a category of persons who may require supports or protections. The broad category of persons who may fall under the umbrella of "vulnerable" may include persons with disabilities, children, the elderly, persons from socio-disadvantaged backgrounds, non-nationals or persons seeking asylum, sex workers, and persons who do not speak the language of that country. Gender may also enhance vulnerability in certain countries or cases.[31] In this discussion, it is important to recognise the intersectional experience of disability which can lead to increased vulnerability in custody, for example children with disabilities and transgender individuals.

In many cases, the perception of vulnerability is akin to physical or mental weakness, which in turn illustrates deference to the medical model of disability and contributes to the stereotype of persons with disabilities as being dangerous, unfit to be interviewed, in need of protection and forcibly treated. Overreliance on labels such as mental illness within the criminal justice system could increase discriminatory practices, as opposed to ensuring equality of arms within all stages of the justice system. Moreover, there are a number of psychosocial disabilities which are episodic in nature; thus, the existence of certain labels is not indicative of an individual's mental status at all times. Therefore, it is important to note that disability and vulnerability are not interchangeable terms. In keeping with the social model of disability and the principles of the Convention on the Rights of Persons with Disabilities, States must treat all persons equally and, in that vein, it is also recognised that disability is not sufficient justification for different treatment.

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[30] Tom Shakespeare, 'Cultural Representation of Disabled People: dustbins for disavowal' (1994) 9(3) *Disability and Society* 283, 287. According to Shakespeare, disability charities objectify people with disabilities by creating a sense of pity and sympathy in 'normal' people, who are then motivated to donate money to the cause.

[31] See Committee on the Rights of Persons with Disabilities, *General comment No. 3 (2016) on women and girls with disabilities* (CRPD/C/GC/3, 25 November 2016) para 2: 'There is strong evidence to show that women and girls with disabilities face barriers in most areas of life.'

In some circumstances however, (where supports/reasonable accommodations have not been put in place), an individual with a disability can become more vulnerable than others. In the criminal justice process, an individual may experience a heightened sense of vulnerability in the face of negative or false stereotypes held by police officer, a lack of reasonable accommodations or procedural rights, failure to provide information in an understandable manner, and prolonged detention or forced medication on account of the existence of disability.

There is a multiplicity of factors which could increase vulnerability in custody. People with disabilities, people of colour, women, children, and the elderly, may be particularly at risk of stigmatisation, and subsequent criminalisation, by police officers. However, the co-existence of such factors can lead to an even bigger risk of vulnerability in custody, for instance if a suspect is both elderly and from an ethnic minority, or a suspect is a woman who has a learning disability.[32] As noted by a United Kingdom report regarding the welfare of vulnerable people in police custody, the 'expression "persons and groups in situations of vulnerability" is often used in human rights commentary to acknowledge the fact that vulnerability is not necessarily inherent to the individuals, but is created by their situation in detention.'[33] In this regard, an individual may experience vulnerability in one context, but not in another. Therefore, vulnerability will increase to some extent for all detainees while in police custody, but such vulnerability will 'particularly increase for people with a minority status as compared to the overall population and to the detaining officers.'[34]

Throughout this thesis, the term vulnerable will be used to refer to persons with disabilities as suspects of crime, for a number of reasons. First and foremost, all persons are vulnerable upon being arrested and detained, regardless of whether they have a disability or not.[35] The experience of being arrested and interrogated by the police can prove unsettling for many people, but such feelings may be even more heightened in the

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[32] See Her Majesty's Inspectorate of Constabulary, 'The welfare of vulnerable people in police custody' (Justice Inspectorates 2015) <http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf> accessed 27 November 2017.
[33] Ibid.
[34] Ibid.
[35] There is a theory that everyone is in an unequal relation to the state, thus every individual is vulnerable. See Martha Fineman and Anna Grear (eds)., *Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2014).

case of persons with disabilities who may not understand why they have been arrested or may not be able to communicate their needs to the officers. Secondly, where police officers have not been trained to properly identify signs or symptoms of disability, this makes the individual even more vulnerable as they may be deprived of proper procedural and reasonable accommodations to enable them to participate and co-operate effectively during police questioning.

Finally, as will be argued throughout this thesis, there is an evident lack of services available to assist persons with disabilities who have been arrested. Of most concern is the current lack of appropriate access to legal representation which affects all suspects in the Irish pre-trial process. While this is one of the most pressing human rights concerns regarding the criminal justice process in Ireland at present, it is arguably more detrimental to persons with disabilities who should be afforded greater procedural guarantees to ensure their rights while in custody are not violated, as discussed in Chapter 6. To conclude, while this writer does not see persons with disabilities as being vulnerable generally, the current barriers to justice and the lack of awareness and procedural guarantees within the pre-trial process create an environment in which some persons are more vulnerable than others, including persons with disabilities, children, non-English language speakers and persons seeking asylum.

1.3 Persons with Disabilities as Suspects of Crime

This thesis will explore the barriers and obstacles experienced by persons with "hidden" disabilities in the Irish criminal justice system, including persons with psychosocial disabilities, intellectual disabilities, learning disabilities and/or persons with autism-related disorders.[36] The World Health Organisation previously estimated that up to 40% of prisoners in Europe suffer from some form of mental illness.[37] Further studies carried out in Europe, Australia and the USA also reveal that people with disabilities are over-represented in the prison population, with particularly high rates of persons with psychiatric disorders and learning disabilities.[38] In their study, Fazel and Seewald estimate that one in seven prisoners present with major depression or psychosis.[39] A further study conducted in England and Wales also found that 36% of male prisoners sampled had some kind of disability or mental illness, with 18% presenting with signs of anxiety or depression.[40] This figure rose quite significantly for female prisoners, with 55% considered disabled, owing to the overrepresentation of females in the anxiety and depression group.[41]

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[36] At present it is unclear whether Autism Spectrum Disorder or Asperger's Syndrome are included within the definition of psychosocial disability (see Autism Asperger's Advocacy Australia, 'Submission on Psychosocial Disability to the Joint Standing Committee on the NDIS inquiry into the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition' (2017) <https://www.aph.gov.au/DocumentStore.ashx?id=e750c110-70c8-4040-b0c8-960006d3471e&subId=464232> accessed 12 June 2018.

[37] World Health Organization Europe, 'Prison health factsheet' as cited in Penal Reform International, 'Health in prisons: realising the right to health' (Penal Reform Briefing No. 2, 2007) 3.

[38] See: Tony Holland, Isabel Clare and Tanmoy Mukhopadhyay, 'Prevalence of 'criminal offending' by men and women with intellectual disability and the characteristics of 'offenders': implications for research and service development' (2002) 46(1) *Journal of Intellectual Disability Research* 6; Paula Ditton, *Special report: Mental health and treatment of inmates and probationers* (Department of Justice, Bureau of Justice Statistics, 1999); Terry Allen Kupers and Hans Toch, *Prison madness: The mental health crisis behind bars and what we must do about it* (San Francisco: Jossey-Bass, 1999); Adrian Mundt and others, 'Psychiatric hospital beds and prison populations in South America since 1990: does the Penrose hypothesis apply?' (2015) 72(2) *JAMA psychiatry* 112; Seena Fazel and others, 'Mental health of prisoners: prevalence, adverse outcomes, and interventions'(2016) 3(9) *The Lancet Psychiatry* 871; Seena Fazel and John Danesh, 'Serious mental disorder in 23 000 prisoners: a systematic review of 62 surveys' (2002) 359(9306) *The Lancet* 545; Susan Hayes, Phil Shackell, Pat Mottram and Rachel Lancaster, 'The prevalence of intellectual disability in a major UK prison' (2007) 35(3) *British Journal of Learning Disabilities* 162.

[39] Seena Fazel and Katharina Seewald, 'Severe mental illness in 33 588 prisoners worldwide: systematic review and meta-regression analysis' (2012) 200 *The British Journal of Psychiatry* 364, 368. [Hereafter Fazel and Danesh].

[40] Charles Cunniffe and others, Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey (UK Ministry of Justice 2012).

[41] Ibid, 5.

At present, there are no up-to-date statistics detailing the number of persons with disabilities in the Irish prison population, indicating an initial gap in research in this area. Therefore, it is difficult to determine the extent to which persons with disabilities (or indeed, which diagnosis occurs most frequently) appear as suspects, offenders, and prisoners within the Irish context. However, a number of small-scale research studies have been conducted which shed some insight into the prevalence of disabilities within the Irish context. A study conducted in 2000 for example, found that 28.8% of the prisoners sampled had a learning difficulty.[42] Whilst this percentage is quite high, it is not entirely representative of the entire Irish prison service as a whole, due to the limited number of prisoners engaged in this study. Furthermore, it is also considerably lower than the data suggests in regard to the prevalence of disabilities in prisons, including the WHO estimate of 40%, therefore it may be the case that the numbers of persons with disabilities are much higher in the Irish prison population.

Persons with mental health conditions have also been found to be over-represented within Irish prisons, with one study finding that the rate of psychosis among men in the remand prison population was far beyond the international average (almost twice).[43] Another study conducted in 2012 also found high rates of psychiatric morbidity within Irish prisons, with the rates ranging from 16% for male committals (27% for sentenced men), while 41% of women were found to have some type of mental illness (with 60% for sentenced women).[44] These findings correlate with the findings from England and Wales (as above), this study also demonstrated a significant difference in the prevalence of disability between the genders for all mental illnesses combined.

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[42] Michael Murphy and others, *A survey of the level of learning disability among the prison population in Ireland* (Department of Justice, Equality and Law Reform 2000) 14.

[43] Sally Linehan and others, 'Psychiatric morbidity in a cross-sectional sample of male remanded prisoners?' (2005) 22(4*) Irish Journal of Psychological Medicine* 128, 131. The study found that 7.6% of the participants had previously experienced some form of psychosis in the six months prior to interview, which compares with 4% found by Fazel and Danesh (Fn. 35).

[44] Harry Kennedy and others, Mental Illness in Irish Prisoners (National Forensic Mental Health Service 2012). [Hereafter Kennedy and others].

Concerns relating to the treatment of persons with psychiatric disorders within Irish prisons were highlighted during a visit by the Committee for the Prevention of Torture (CPT) in 2010,[45] wherein the poor living conditions and overcrowding issues within several Irish prisons were addressed.[46] Of note, the Committee found that Irish prisons continued to detain persons with psychiatric disorders which were too severe to be properly cared for within the prison environment, with many of these prisoners held in special observation cells for considerable periods of time. [47] It was therefore recommended that the Irish authorities take 'all necessary steps to further enhance the level of care available to prisoners suffering from a psychiatric disorder,[48] signalling a further need to address the concerns arising for such vulnerable individuals in criminal justice settings.

1.3.1 The Prevalence of People with Disabilities in Contact with the Police

In considering the numbers of persons with disabilities in contact with the police in the pre-trial phase of the criminal justice system, it is useful to consider the statistics available from other jurisdictions. In a leading study dating back to 1984, Teplin found that persons with mental illnesses are being criminalised and are at a significantly greater risk of being arrested (for similar offences) than persons who do not have a mental illness.[49] Subsequent studies carried out in countries such as Australia, Canada, England and Wales, and the United States, for example, have found high numbers of people with disabilities in contact with the police as suspects of crime. In Canada for example, the police department in Montreal carried out a study in 2002 and reported that they dealt with 3,000 calls annually requiring intervention for people with mental illnesses.[50] Whereas in America, approximately 10% of police encounters involve persons with mental health conditions,

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[45] Ireland ratified the Convention on 11 April 2002. The Committee consists of independent experts who carry out inspections of places of detention to examine the treatment of persons deprived of their liberty.

[46] Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 25 January to 5 February 2010 available <http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.htm> accessed 3 June 2018.

[47] Ibid.

[48] Ibid.

[49] Linda Teplin, 'Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill' (1984) 39(7) *American Psychologist* 794. In this study, it was found that police resolved most cases informally (72%), made an arrest in 16% of cases and initiated hospitalisation in 12% of cases.

[50] See Mental Health Commission An Garda Síochána, Report of Joint Working Group on Mental Health Services and the Police (2009) <https://www.mhcirl.ie/File/Rpt_JWG_MHS_Police.pdf> accessed 12 June 2018.

with some larger departments reporting an average of six encounters a month with persons in psychiatric distress.[51]

While the literature is clear that persons with disabilities are overrepresented as prisoners worldwide, there is less certainty in regard to the numbers of persons with disabilities in contact with the earlier stages of the criminal justice system in Ireland. One can extrapolate from the limited information available documenting the overrepresentation of persons with disabilities in the prison sector, that this is indicative of a similar problem throughout all three stages of the criminal justice process (pre-trial, trial, and disposal). There are no figures available documenting the numbers of people who come into contact with the Gardaí every year, but it has been estimated that 20,000 people are arrested annually.[52] Within this number, it is unclear what the breakdown is in terms of the demographic of person arrested and the factors which may have led to their alleged criminality. The need for further research and information to be carried out will be discussed further within this thesis, especially in relation to the number of suspects with disabilities in contact with the criminal pre-trial process as discussed further in Chapter 4.

1.3.2 Understanding the Wider Factors which Lead to Criminality

While this thesis looks at the treatment of suspects with disabilities within the pre-trial process, it is important to note that suspects and offenders within the criminal justice system are typically disadvantaged by a variety of psychological and social barriers arising from the post-Welfare State.[53] Eysenck and Gudjonsson previously observed that 'the relationship between mental disorder and crime is very complex,' and that it is the 'exception rather than the rule' for criminal behaviour to be attributed to a specific

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[51] Rebecca Vallas, Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons (Center For American Progress July 2016).
[52] Conor Lally, 'Most arrested not availing of right to solicitor presence at questioning' *The Irish Times* (22 September 2017) <https://www.irishtimes.com/news/crime-and-law/most-arrested-not-availing-of-right-to-solicitor-presence-at-questioning-1.3229668> accessed 13 June 2018.
[53] See William Glaser and David Florio, 'Beyond specialist programmes: a study of the needs of offenders with intellectual disability requiring psychiatric attention' (2004) 48(6) *Journal of Intellectual Disability Research* 591, 591-592: offenders are nearly always male, belong to a minority group, have experienced institutionalisation, abuse and neglect as a child, and have been segregated during their education.

psychiatric diagnosis.[54] Individuals are often influenced by a variety of social, interpersonal and personality factors in their actions, which may explain why two people with the same diagnosis often resort to different modes of behaviour.[55] A 2012 report published by the New South Wales Law Reform Commission also highlights the multiplicity of factors that can lead a person to commit criminal activity.[56]

Therefore, throughout this discussion it is necessary to acknowledge that disability is not a homogenous experience – suspects with disabilities can present with multiple different identities, of which their disability is only a small part of their identity (to be discussed further in Chapter 3). The barriers experienced by persons with disabilities as suspects of crime must not be considered in isolation of external factors including race, gender, age, nationality, socio-economic factors (etc.) It is recognised that persons with disabilities (particularly psychosocial disabilities) are particularly at risk of homelessness, unemployment, childhood abuse and neglect, poor access to healthcare and community services;[57] all of which could contribute to their overall treatment as suspects or crime.

In Ireland, the link between criminal offending and socio-economic factors such as homelessness is clear. People with disabilities, particularly people with psychosocial disabilities, are overrepresented among the homeless population, with recent figures suggesting that 71% of those who come into contact with the Dublin Simon Community have a mental illness.[58] Further research has also indicated that the links between substance abuse and criminal offending is also high,[59] and persons from "disadvantaged"

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[54] Hans Eysenck and Gisli Gudjonsson, *The Causes and Cures of Criminality* (Plenum Press 1989) 219.
[55] Gisli Gudjonsson and James MacKeith, 'A Specific Recognition Deficit in a Case of Homicide' (1983) 23(1) Medicine, Science and the Law 37-40, in Hans Eysenck and Gisli Gudjonsson, *The Causes and Cures of Criminality* (Plenum Press 1989) 219.
[56] New South Wales Law Reform Commission, People with cognitive and mental impairments in the criminal justice system: Diversion (Report 135 2012) xv: 'The higher rate of offending does not arise from any simple relationship between impairment and crime, but from impairment together with a multiplicity of other factors, such as disrupted family backgrounds, family violence, abuse, misuse of drugs and alcohol, and unstable housing.'
[57] Queensland Advocacy Incorporated, dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland (Queensland Advocacy Incorporated 2015).
[58] Shari McDaid, 'Homeless people with mental health difficulties need more than key in the door' *The Irish Times* (Dublin, 12 January 2015) <https://www.irishtimes.com/opinion/homeless-people-with-mental-health-difficulties-need-more-than-key-in-the-door-1.2062351> accessed 10 February 2018.
[59] See National Crime Council, Tackling the Underlying Causes of Crime A Partnership Approach (The Stationary Office 2002).

backgrounds are particularly at risk of coming into contact with the Gardaí.[60] For example, members of the Irish Traveller Community are particularly overrepresented within the Irish prison population and also within the forensic psychiatric system.[61]

In their report on *The Vicious Circle of Social Exclusion and Crime*, the Irish Penal Reform Trust commented on the existence of "uneven policing" in Ireland.[62] This concept refers to over-policing disadvantaged communities, which in turn results in greater crime detection than in more privileged areas and, therefore, greater rates of conviction and imprisonment.[63] One of the reasons for uneven policing include the perceived bias in policing with regards marginalised communities, such as the Travelling community for example, who have reportedly been exposed to a 'very different type of policing than other less socially disadvantaged people.'[64] The report found that Travellers have 'reported harsh and aggressive treatment at the hands of law enforcers […] police tend not to serve or protect them, but rather respond to disturbances that Travellers may cause to the settled community.'[65]

This thereby indicates a degree of uneven policing within Ireland, which is noteworthy for the purpose of this thesis as the experience of disability is not homogenous as discussed, it co-exists with other identities such as race, religion, gender, social and economic class etc. In this regard, it is possible that people with disabilities from socio-disadvantaged areas are even more exposed to the criminal justice system than people from wealthier backgrounds. Similarly, people of colour or from ethnic minorities, such as members of the travelling community, might face even an even higher risk of coming into contact with the

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[60] Ibid.
[61] Brendan Kelly, Hearing Voices (Irish Academic Press 2016) 266. In 2004, a Comhairle na nOspidéal Report on Consultant Psychiatrist Staffing in Ireland highlighted the three categories of patients which are most likely to fall within the remit of forensic psychiatry. Of these categories, persons who have not offended or who have not yet been charged with an offence but who have a mental illness characterised by violent behaviour was recognised. According to the Report, this violence is usually physical and of such a magnitude that is places others at risk. In these cases, the patients often present with a dual diagnosis of a major psychiatric illness such as schizophrenia or an affective disorder, which is also associated with a personality disorder, substance abuse or both. See Comhairle na nOspidéal, *Consultant psychiatrist staffing in the mental health services* (Comhairle na nOspidéal 2004).
[62] Irish Penal Reform Trust, The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor (Irish Penal Reform Trust 2012).
[63] Ibid, 13.
[64] Ibid.
[65] Ibid.

police.[66] The power of police officers to intervene in non-criminal cases under the Mental Health Act 2001 illustrates the extent of interaction between the police and people with disabilities in Ireland. In this way, people with mental disorders receive greater attention from the police and may be described as being "over-policed."[67] According to a report published in England and Wales, police may have a social-work function on account of their responsibilities to respond to people in need.[68] It has been said that officers have three choices in responding to an "irrational person" – they can transport them to a hospital, effect an arrest or resolve the matter informally.[69] In performing their role, police officers have become known as gatekeepers of the mental health system;[70] earning such monikers as "psychiatrists in blue",[71] and "street-corner psychiatrists".[72]

Previous research has also found a high prevalence of co-morbidity or dual diagnosis (DD) within Irish prisons, with drugs and alcohol dependence being present in between 61% and 79% of prisoners.[73] The term co-morbidity or DD refers to the co-occurrence of mental health illnesses with addiction.[74] The World Health Organisation previously defined comorbidity as the 'co-occurrence of a psychoactive substance use disorder and another psychiatric disorder.'[75] While the term comorbidity appears in Irish social policy and

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[66] Enda Kenny recognised traveller community as an ethnic minority in 2017, see Marie O'Halloran and Michael O'Regan, 'Travellers formally recognised as an ethnic minority' *The Irish Times* (Dublin 1 March 2017) <http://www.irishtimes.com/news/politics/oireachtas/travellers-formally-recognised-as-an-ethnic-minority-1.2994309> accessed 10 February 2018.

[67] Maria Docking, Kerry Grace and Tom Bucke, Police Custody as a "Place of Safety": Examining the Use of Section 136 of the Mental Health Act 1983 (IPCC Research and Statistics Series: Paper 11, 2008) 2, <http://webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/section_136.pdf> citing Rod Morgan and Tim Newburn, *The Future of Policing* (Oxford University Press 1997) and Robert Reiner, *The Politics of the Police* (Oxford University Press 2000).

[68] Docking and others (ibid), 2.

[69] Linda Teplin, 'Keeping the peace: police discretion and mentally ill persons' (2000) 244 *National Institute of Justice Journal* 8, 9. [Hereafter Teplin].

[70] Janet Durbin, Elizabeth Lin and Natalia Zaslavska, 'Police-citizen encounters that involve mental health concerns: results of an Ontario police services survey' (2010) 29(5) *Canadian Journal of Community Mental Health* 53; Richard Lamb, Linda Weinberger and Walter DeCuir, 'The police and mental health' (2002) 53(10) *Psychiatric Services* 1261.

[71] Robert Menzies, 'Psychiatrists in blue: Police apprehension of mental disorder and dangerousness' (1987) 25(3) *Criminology* 429.

[72] Teplin (Fn. 45), 9.

[73] Kennedy and others (Fn. 40), 42.

[74] Feinstein defines co-morbidity as 'any distinct additional clinical entity that has existed or that may occur during the clinical discourse of a patient who has the index disease under study.' Alvan Feinstein, 'The pre-therapeutic classification of co-morbidity in chronic disease' (1970) 23(7) *Journal of Chronic Diseases* 455, 467.

[75] World Health Organization, *ICD-10 Classification of Mental and Behavioural Disorders* (World Health Organization 1995) 7.

literature,[76] it has been criticised for being overly vague and inappropriate, as the word "morbid" suggests disease.[77] Research also indicates that the use of the term can lead to feelings of stigmatisation among service users.[78]

This thesis will use the term Dual Diagnosis, however it is recognised that this terminology is also problematic, most notably for being too vague (it may refer to the co-occurrence of mental illness and substance abuse, but also the co-occurrence of mental illness and intellectual disability).[79] Due to the nature of the research question, the discussion will consider both of these meanings in places. In particular, it is acknowledged that approximately 8,000 people in Ireland are diagnosed with an intellectual disability and a psychosocial disability, with almost half this number requiring specialist assessment and treatment (4,500).[80] Of this number, it is estimated that between 900-2,400 persons with intellectual disabilities will exhibit "challenging behaviour" (see Chapter 4), and up to two thirds of this category will also have a psychosocial disability.[81] The co-existence of intellectual disability and psychosocial disabilities is arguably a key variable within this research study, and therefore this researcher has chosen to include this category within the broad term Dual Diagnosis.

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[76] Sally Linehan and others (fn 39) and Health Service Executive, *A Vision for Change: Report of the Expert Group on Mental Health Policy* (The Stationary Office 2006).
[77] See John Cooper, 'Disorders are different from diseases' (2004) 3(1) World psychiatry: official journal of the World Psychiatric Association (WPA) 24.
[78] Liam MacGabhann and others, *Mental health and addiction services and the management of dual diagnosis in Ireland* (The Stationery Office, 2004) and Liam MacGabhann, Angela Moore, and Carol Moore, 'Dual diagnosis: evolving policy and practice within the Irish healthcare system' (2010) 3(3) *Advances in Dual Diagnosis* 17.
[79] Gregory O'Brien, 'Dual diagnosis in offenders with intellectual disability: setting research priorities: a review of research findings concerning psychiatric disorder (excluding personality disorder) among offenders with intellectual disability' (2002) 46(1) *Journal of Intellectual Disability Research* 21 and Anthony Graziano, *Developmental disabilities: Introduction to a diverse field* (Allyn & Bacon 2002).
[80] National Disability Authority, *Mental Health Services: Review of Access to Mental Health Services for People with Intellectual Disabilities* (National Disability Authority 2003) <http://nda.ie/Equality-/-Equality-Publications/Mental-Health-Services-.html?Open&Highlight=2,Review,of,Access,to,Mental,Health,Services> accessed 14 May 2018.
[81] Ibid.

1.4 Research Design and Central Research Question

The aim of this thesis is to identify the existing barriers to justice for persons with disabilities within the pre-trial criminal justice system and in particular to examine whether the United Nations Convention on the Rights of Persons with Disabilities can provide a useful framework for law and policy reform. While this research draws upon and compares the current practices to the protections and safeguards in place for other vulnerable persons, including children, the research applies to adults specifically. There are also a number of secondary research questions arising in this thesis:

a) What are the minimum procedural guarantees afforded to suspects of crime in Ireland?
b) What are the existing gaps in law and policy for persons with disabilities as suspects of crime?
c) What minimum standards should be in place to protect the rights of persons with disabilities in the criminal justice system?
d) Are there examples of best practice which can be employed?

In accordance with the main research question, the objective is to identify the current gaps in the law, policy and also the existing research and guidelines in relation to the rights of suspects with disabilities in the criminal justice system. While the research refers specifically to persons with intellectual disabilities and/or psychosocial disabilities as suspects of crime, there are several different parallels highlighted throughout the thesis with persons with disabilities as victims of crime or with persons involved with the justice system more generally. In a number of cases, references are also made to civil legislation such as the Mental Health Act 2001, which provides the Gardaí with powers to detain persons believed to be a risk to themselves or others in a Garda station.

1.4.1 Methodology

According to Chynoweth, there are a number of different styles or approaches which can be adopted within the pursuit of legal scholarship.[82] Drawing on a taxonomy of legal research presented by Arthurs,[83] Chynoweth makes a distinction between traditional or "pure" research undertaken in academia, and applied work which best suits legal practitioners and policy makers.[84] There is a further distinction then regarding traditional doctrinal research and interdisciplinary research, as represented by the horizontal axis below.[85]

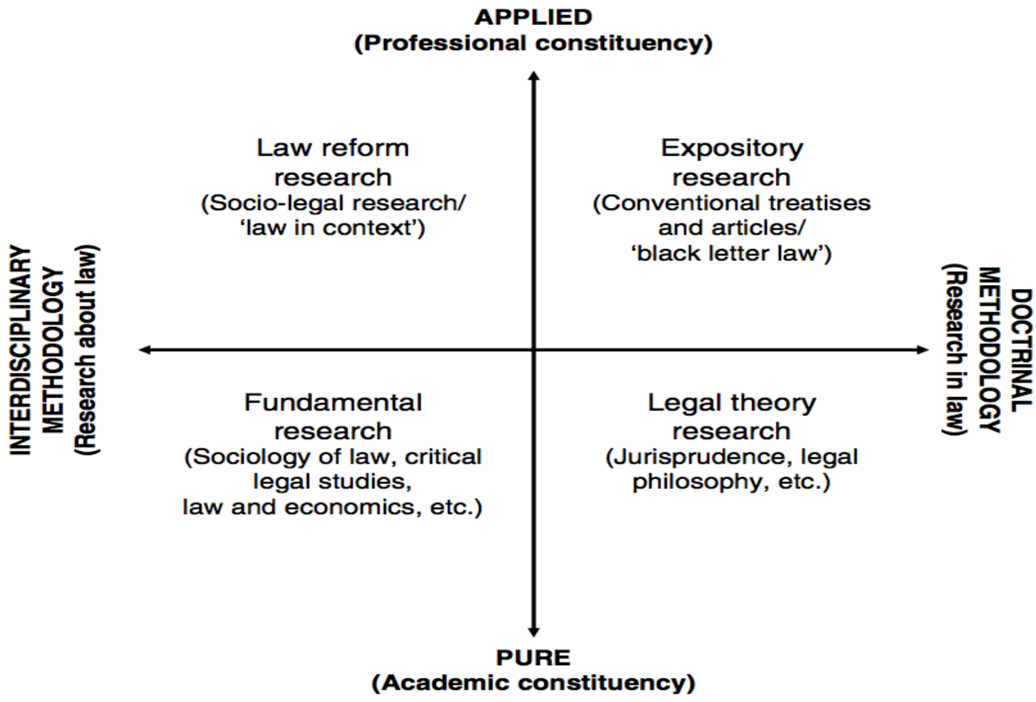

Figure 1: Legal research styles (Arthurs, 1983)

[82] Paul Chynoweth, 'Legal Research', in Andrew Knight and Les Ruddock eds., *Advanced Research Methods in the Built Environment* (Wiley-Blackwell: Chichester, West Sussex, 2008) 28. [Hereafter Chynoweth].
[83] H.W. Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Information Division, Social Sciences and Humanities Research Council of Canada: Ottawa, 1983) pp. 63–71
[84] Chynoweth (fn. 82), 29.
[85] Ibid.

For the purpose of answering the present research question, a mix of methodological approaches was engaged spanning the axis from traditional or "pure" doctrinal legal analysis to a more practical "law in context" or socio-legal approach. Incorporating such an approach enabled the researcher to examine the range of national and international laws governing the pre-trial system in Ireland, while also looking at the wider policies and guidelines which influence the criminal justice sector and the police practices of An Garda Síochána. More specifically, a socio-legal methodology is focused on how the law operates within society.[86] In doing so, this thesis will provide an in-depth account of the barriers to justice beyond those which are contained within the law itself; while also incorporating a holistic view of the existing barriers, with regard to systemic and attitudinal barriers which inhibit the full participation of suspects with disabilities. Furthermore, a socio-legal approach will ensure that the recommendations for reform will provide for real and meaningful change for all persons involved with the criminal justice system, including persons with disabilities themselves, the Gardaí and lawyers.

Aside from legal methodological approaches, this research also engages in historical and comparative methodologies. Within Chapter 2, for example, the researcher traces the rise of State intervention in the lives of persons with disabilities through the use of legislation in order to contain the problems associated with vagrancy. This discussion forms the basis for the subsequent Chapters examining the rise of the disability human rights movement and, in particular, the de-institutionalisation movement from the 1960s onwards.[87] Moreover, a comparative approach is also used to provide an overview of best practices from common law jurisdictions such as England and Wales, and Northern Ireland. Drawing upon these countries and models of best practice has helped increase understanding of how to approach the complex issues arising in this area and identify future orientations for Irish law. In particular, the *Police and Criminal Evidence Act* 1984 (PACE) in England and Wales offers significant guidance for the purpose of this discussion and will be used to a large extent in Chapter 5 to outline examples of how vulnerable persons can be supported within police custody.

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[86] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1-16.
[87] The policy of de-institutionalisation and its impact upon the criminal justice system will be discussed further in Chapter 4.

This thesis will also draw upon a range of empirical studies relating to persons with disabilities, in Ireland and internationally, within the criminal justice process. In addition to this, informal visits were undertaken by the researcher to a Sheriff's office in Syracuse, New York. During these visits, informal conversations were held regarding the experience of interacting with persons with disabilities, the accommodations in place for suspects with disabilities and the levels of awareness among police officers regarding disability and mental illness. Such conversations have helped to inform the research and have ensured that the research is best reflective of policing practices. Access was also granted to the researcher by the Garda Research Office to conduct a site visit to a station and carry out interviews with key Garda personnel. The aim of this exercise was to gain an insight into the operational practices of An Garda Síochána, including the training provided to Gardaí in respect of vulnerable suspects. The main impetus to conduct interviews was further necessitated due to the lack of resources and available information with respect to the prevalence of persons with disabilities as suspects of crime, the supports available to Gardaí in responding to challenging cases and the training delivered at Templemore Garda College in respect of disability and mental health awareness.

Unfortunately, access to a Garda station was not permitted during the course of this research and only two Gardaí agreed to be interviewed. Furthermore, a request for information was denied by Templemore Garda College in respect of the current training programme and materials delivered to Trainee Gardaí. While this created some difficulties for the purpose of completing the research project, the researcher was able to gain information in relation to Garda training from making a number of Freedom of Information requests (see appendices). Further information was elicited from parliamentary questions submitted by the researcher to Finian McGrath T.D. (Minister of State for Disability Issues), James Browne T.D. (Fianna Fáil Spokesperson on Mental Health) and Charlie Flanagan T.D. (Minister for Justice and Equality). Further information was also gathered from the Garda Inspectorate reports, the reports of the Garda Ombudsman and the reports published following Commissions of Inquiry set up to examine the practices of An Garda Síochána (namely, the report of the Morris Tribunal and the report into the Dean Lyons case).[88] The

[88] Frederick Morris*, Report of The Tribunal of Inquiry Set up Pursuant to the Tribunal of Inquiry (Evidence) Acts 1921-2002 into Certain Gardaí in the Donegal Division* (Vol. 3, Government Publications Office 2008) and

findings and information presented in these reports are particularly important in the context of Chapter 6, as they shed light on Garda interview practices and the training afforded to Gardaí at present.

1.4.2 Thesis Outline and Structure

This thesis is divided into seven chapters. Chapter 2 will chart the historical treatment of persons with disabilities in Ireland generally, to provide a backdrop for the plethora of issues which arise for all persons with disabilities in society and within the criminal justice system. This Chapter will then proceed to outline the role of the police as agents of State control. This will introduce the reader to the formation of policing in Ireland and the influences of police officers over persons with disabilities. Within this Chapter, the competing theoretical concepts underpinning traditional disability research will be discussed – the medical model of disability and the social model of disability. Chapter 3 will then consider the international human rights framework for persons with disabilities, with specific regard to the UN Convention on the Rights of Persons with Disabilities and its development.

Following the de-institutionalisation movement in the 1960s, evidence suggests that the rates of persons with disabilities in contact with the police have considerably increased, with police officers subsequently earning the moniker "psychiatrists in blue."[89] This discussion, along with the subsequent implications for policing, will be addressed in Chapter 4 which considers the initial barriers to justice during the police investigation and arrest. From the initial encounter with a member of An Gardaí, there are a number of human rights law implications arising, especially in regards to the use of force.

George Birmingham, Report of the Commission of Investigation: Dean Lyons Case (Department of Justice 2006) <http://www.justice.ie/en/JELR/Dean%20Lyons%20Commission%20of%20Investigation.pdf/Files/Dean%20Lyons%20Commission%20of%20Investigation.pdf> accessed 2 July 2018.

[89] Cross ref

Chapter 5 considers the broad range of issues arising following admission to a Garda station, namely the experience of being held in custody and the possibility of involuntary medical treatment. It is imperative for all suspects that sufficient safeguards are in place to avoid arbitrary deprivations of the right to liberty. Within this Chapter, it will be argued that while the experience of being arrested and taken into custody can be intimidating for all individuals, it is perhaps more intimidating for persons with disabilities (especially if they have hidden disabilities or psychosocial disabilities). As a result, it is imperative that reasonable accommodations are made available to support persons with disabilities as suspects of crime, for example by providing the assistance of an appropriate adult.

Chapter 6 will then examine the existing procedural guarantees in place for suspects held in detention, specifically the right of access to legal advice. The aim of this Chapter is to explore the unique challenges to persons with disabilities during the police interview; which is arguably the ultimate determinant of case progression (for example if the individual confesses). Finally, Chapter 7 will discuss final conclusions and recommendations which will bring together the issues and consider future orientations for reform in this area.

1.5 Summary

To date, the extent to which the UN Convention on the Rights of Persons with Disabilities will influence criminal justice law and policy has remained considerably underdeveloped. There is similarly no research currently available documenting the impact of the Convention on the pre-trial investigative stage, including arrest, detention and questioning. Furthermore, the UN Committee on the Rights of Persons with Disabilities has yet to consider this area and as such, there is little impetus for States Parties to reconsider existing laws in the pre-trial process to ensure compliance with the Convention. The aim of this research is to fill this existing void and to create a discussion regarding the status of persons with intellectual and psychosocial disabilities within the criminal pre-trial process. Part one will begin by discussing the historical context and the existing human rights protections for persons with disabilities pursuant to international law.

CHAPTER 2
Historical Perspectives and Theoretical Considerations

2.1 Introduction

This Chapter provides a theoretical context and investigates the historical treatment of persons with disabilities as suspects of crime, through the lens of disability studies; specifically the two main theories of disability, the medical model and the social model. Through a variety of sociological and medical influences, law and policies began to emerge in the eighteenth century which provided for the control and containment of persons with disabilities, particularly persons with mental illnesses, which is still evident today. Ireland adopted an extensive network of asylums in line with other European countries; however, higher rates of institutionalisation would suggest that we used the system more enthusiastically than our European counterparts.[1] Influenced by the desire to maintain control and social order, the rise of the asylum coincided with the rise of psychiatry and the somewhat paradoxical drive to care for "lunatics" within the asylum.[2] The emphasis on treating or containing the mentally ill, further demonstrates the public perceptions towards mental health during the eighteenth and nineteenth centuries and the resulting stigma and isolation of persons with disabilities.

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[1] Joseph Robins, *Fools and Mad: A History of the Insane in Ireland* (Institute of Public Administration 1986) 65-67. [Hereafter Robins 1986].

[2] Pauline Prior, 'Prisoner or patient? The official debate on the criminal lunatic in nineteenth-century Ireland' (2004) 15(2) *History of Psychiatry* 177, 185: Prior explains that the language used in the nineteenth century was more closely related to discourses of control than of care. [Hereafter Prior 2004].

The dichotomy between care and control will be explored in this Chapter, as a precursor to the following Chapters which address the treatment of suspects with disabilities within the pre-trial process.[3] It will be argued that this dichotomy remains relevant to modern criminological and criminal justice policies, which continue to struggle with the question of how to respond to vulnerable persons who come into contact with the justice system. In particular, the role of the police within this paradigm must be questioned – are police officers agents of State control? Or do they have a duty to assist in the provision of care to vulnerable members of society? It is necessary to consider this background and historical context before proceeding in the following Chapters to examine the existing barriers to justice and obstacles within the Irish pre-trial process for persons with disabilities.

2.2 The Early Marginalisation and Criminalisation of Disability

To explain the early treatment of persons with disabilities in Ireland, and understand their treatment today, it is necessary to look to the laws and social policies introduced during the period of the Poor Laws and the emergence of the Welfare State.[4] Indeed, the modern meaning ascribed to "disability" was first used within the old Poor Law as an administrative category to segregate certain members of society who were deemed unable or unfit for work.[5] The *Poor Relief Act* 1601 sought to introduce a coherent system under which parishes were obliged to provide poor relief for the deserving poor in an effort to curb the social problems associated with vagrancy and begging.[6] The distinction between the deserving and the undeserving poor sought to distinguish between those who were unable to work through no fault of their own (widows, orphans, the elderly and the sick), as opposed to idle-vagrants and beggars, i.e. the undeserving poor.[7]

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[3] For further information see Judith Laing, *Care or Custody? Mentally Disordered Offenders in the Criminal Justice System* (Oxford University Press 1999).
[4] Mel Cousins, *Explaining the Irish Welfare State: An Historical Comparative and Political Analysis* (Edwin Mellen Press 2005).
[5] Olivia Smith, *Disability Discrimination Law* (Round Hall/Thomson Reuters 2010) 13. [Hereafter Smith 2010].
[6] See Steven King, *Poverty and Welfare in England, 1700-1850* (Manchester University Press 2000) and Anthony McCashin, *Social Security in Ireland* (Gill & Macmillan 2004). [Hereafter McCashin 2004].
[7] See Lynn Hollen Lees, *The solidarities of strangers: The English poor laws and the people, 1700-1948* (Cambridge University Press 1998).

Unlike England, which experienced a growth in the economy at the turn of the eighteenth century, Ireland was experiencing a period of poor economic stability, made worse by the ongoing political turmoil and problems associated with over-population.[8] The maintenance of social order was therefore prioritised over economic progress, despite the large levels of poverty and unemployment.[9] Moreover, as Ireland was not bound by the *Poor Relief Act* 1601,[10] matters relating to persons with disabilities were dealt with by families or within the community.[11] Ultimately, family members were held responsible for the care of persons with disabilities or mental illnesses under the Brehon Law.[12] Despite this responsibility, Kelly has observed that the familial duty was often misplaced; there is an illusion that prior to the establishment of public asylums, the mentally ill lived 'charmed lives' but in reality, they died young and badly.[13] Most often, they were abandoned by their family or kept in very poor conditions, with evidence of people being kept in outhouses, huts or chained to a tree or a wall.[14]

Over time, the State came to play a greater role in the regulation of lunatics in an effort to maintain social order and contain the problem of homelessness. In England, the Vagrancy Act 1609 required counties to build a house of correction for 'keeping, correcting and setting to work of rogues, vagabonds, sturdy beggars and other idle and disorderly persons.'[15] State intervention came later in Ireland however; Reuber claimed that the 'Irish authorities had been slow and reluctant to accept any public responsibility for the poor.'[16] It was not until 1703 that the Workhouse was established to provide direct provision for the purpose of employing and maintaining the poor. Also known as Houses of Industry,

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[8] Robins (Fn. 1), 68.
[9] Mairéad Considine and Fiona Dukelow, *Irish Social Policy: A Critical Introduction* (Gill & Macmillan 2009) 2. [Hereafter Considine and Dukelow 2009].
[10] It was not until 1838 that a Poor Law was enacted in Ireland, formed by the *Poor Relief Act* 1838.
[11] Smith 2010 (Fn. 4), 14.
[12] In such cases where an incident was carried out in violation of social norms, Brehon Laws held those responsible for the care of a 'fool' or a 'lunatic' accountable for their failure to prevent such wrongdoings. Damien Brennan, 'Mental Illness and the Criminalisation Process' in Deirdre Healy and others (eds.), *The Routledge Handbook of Irish Criminology* (Routledge 2015) 542. [Hereafter Brennan 2015].
[13] Brendan Kelly, 'Mental Health Legislation and Human Rights in Ireland: What Next?' (Founders Day Programme, St Patricks University Hospital Dublin 9 October 2012) <https://www.youtube.com/watch?v=KOPhVSflZsA> accessed 20 June 2018.
[14] Smith 2010 (Fn. 4), 14.
[15] *Vagrancy Act* 1609, 7 Jac I c 4, s 2. See Phillip Fennell, 'Mental Health Law: History, Policy and Regulation' in Lawrence Gostin and others, *Principles of Mental Health Law and Policy* (Oxford University Press 2010) 6.
[16] Markus Reuber, 'The architecture of psychological management: the Irish asylums (1801-1922)' (1996) 26(6) *Psychological Medicine* 1179.

these establishments played an important role in ensuring social order and maintaining control.[17]

In contrast to the English system, there was much greater emphasis on the provision of medical relief within the Irish system, which utilised a dispensary system for physical ailments, not lunatic care.[18] The establishment of Infirmaries within the workhouses led to the unwanted increase in admissions for medical relief of lunatic paupers.[19] As Porter has stated:

> [C]ustodial institutions such as houses of industry, workhouses, houses of improvement, and houses of correction emerged throughout urban Europe, offering putative solutions to the problems of urbanisation, pauperisation and proletarianization, so they necessarily caught some mad people in their nets.[20]

Lunatic wards were subsequently introduced in four workhouses around Ireland,[21] to bring order to the workhouses (and also prisons) by means of segregating the insane.[22] Nevertheless, problems of overcrowding soon arose and further accommodations were considered necessary to provide a specialised institution for lunatics.[23] Within this section, the ways in which the State marginalised and, eventually, criminalised persons with disabilities will be addressed. As will be addressed later in section 3, these historical perspectives eventually contributed to a medicalised conception of disability which viewed persons with disability as objects of charity who were of low value to society. These

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[17] Considine and Dukelow 2009 (Fn. 8), 3.
[18] Oonagh Walsh, 'Lunatic and Criminal Alliances in Nineteenth Century Ireland' in Peter Bartlett and David Wright (eds.), *Outside the Walls of the Asylum: The History of Care in the Community 1750-2000* (The Athlone Press 1999) 134. [Hereafter Walsh 1999].
[19] Evidence from the North Dublin Union illustrates the increase in admissions for the provision of medical relief within workhouses; Virginia Crossman, *The Poor Law in Ireland: 1850–1914* (Liverpool University Press 2013).
[20] Roy Porter, 'Madness and its institutions' in Andrew Wear (ed.), *Medicine in Society Historical Essays* (Cambridge 1992) 282. [Hereafter Porter 1992].
[21] Pursuant to the *Prisons (Amendment) Act* 1787. See Markus Reuber, 'Moral Management and the Unseen Eye: Public Lunatic Asylums in Ireland, 1800-1845' in Greta Jones and Elizabeth Malcolm, *Medicine, Disease and the State in Ireland, 1650-1940* (Cork University Press 1998). [Hereafter Reuber 1998].
[22] Mark Finnane, Insanity and the Insane in Post-Famine Ireland (Croom Helm 1981) 21. [Hereafter Finnane 1981].
[23] Brendan Kelly, 'Mental Health Law in Ireland, 1821 to 1902: Building the Asylums' (2008) 76(1) *Medico-Legal Journal* 19. [Hereafter Kelly 2008].

perspectives therefore illustrate the historic vulnerability of these individuals, especially during the age of the asylum.

2.2.1 The Age of the Asylum

During the nineteenth century, a network of public lunatic asylums began to emerge throughout Ireland.[24] Political will to reform the existing social policy arose following evidence presented by a Committee in the House of Commons in 1817, which was set up to examine the lives of the lunatic poor in Ireland:

> When a strong man or woman gets the complaint [mental disorder], the only way they have to manage is by making a hole in the floor of a cabin, not high enough for the person to stand up in, with a crib over it to prevent his getting up. This hole is about five feet deep, and they give this wretched being his food there, and there he generally dies.[25]

This report, which was commissioned by the then Chief Secretary of Ireland, Robert Peel, was to enquire into the public care of the insane.[26] Peel, also known as the father of modern democratic policing, had two main objectives as Chief Secretary – the creation of a specialist police force and the establishment of a system of public asylums.[27] The Committee concluded that the 'extent of the accommodation which may be afforded by the present establishments in the several counties of Ireland' was 'totally inadequate for the reception of the lunatic poor.'[28] As a result, the Poor Relief (Ireland) Act was then

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[24] Considine and Dukelow 2009 (Fn. 8), 6.
[25] As cited in Arthur Williamson, 'The Beginnings of State Care for the Mentally Ill in Ireland' (1970) 1(2) *Economic and Social Review* 281, 283.
[26] Roy McClelland, 'The madhouses and mad doctors of Ulster' (1988) 57(2) *Ulster Medical Journal* 101, 107.
[27] Jennifer Brown, 'The Legal Powers to Detain the Mentally Ill in Ireland: Medicalism or Legalism?' (PhD Thesis, Dublin City University 2015) 22. [Hereafter Brown 2015[.
[28] Lunatic Asylums Ireland Commission, *Report of the Commissioners of Inquiry into the State of the Lunatic Asylums and Other Institutions for the Custody and Treatment of the Insane in Ireland: with Minutes of Evidence and Appendices* (Part 1 – Report, Tables and Returns) (Thom and Sons for Her Majesty's Stationary Office 1858) 34.

enacted in 1838,[29] and the introduction of a new Poor Law in England.[30] It subsequently became the first statutory system of welfare in Ireland.[31]

The asylum became of great social significance in Ireland.[32] They were seen as a welcome improvement to the earlier practice of consigning lunatics to the workhouses, particularly because there was a new-found emphasis on treating mental illness as opposed to punishing it.[33] In 1815, the Richmond Asylum was opened to replace the lunatic ward of the Dublin Workhouse and to provide accommodation for up to 300 people.[34] As Ireland's first public psychiatric hospital, it sought to provide recovery to patients.[35] Here the patients were segregated into classes, with 'those who are violently disordered, those who are incipiently disordered and those who appear to be restored but who are retained in a state of probation in order to enquire more particularly into the state of their intellects.'[36] On account of the perceived danger mentally ill persons posed to society, their detention in the asylum was often indefinite.

It was not long until Richmond also became seriously overcrowded.[37] In particular, there was an increase in the number of "incurable" patients for whom there was no proper accommodation (apart from the lunatic asylum) and a rise in the number of criminal and dangerous lunatics being referred from jails.[38] In 1817, a bill was passed through Parliament to allow for the establishment of a wider system of asylums, outside of Dublin.[39] In 1821, a number of district lunatic asylums were introduced to provide

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[29] This Act followed the Act of Union in 1800, which brought Ireland and Britain together as one political unit. As a result of this Act, Ireland lost political autonomy through a devolved parliament, and any further developments depended on decisions taken in London. See Considine and Dukelow 2009 (Fn. 8), 6.
[30] *Poor Law Amendment Act* 1834.
[31] See McCashin 2004 (Fn. 5).
[32] Finnane 1981 (Fn. 21), 13.
[33] Twenty-two asylums were built between 1810 and 1869, and admission rates increased steadily during the nineteenth century (see Considine and Dukelow 2009 (Fn. 8), 6-7).
[34] Eoin O'Brien, Lorna Browne and Kevin O'Malley (eds.), *The House of Industry Hospitals 1772-1787: The Richmond, Whitworth and Hardwicke (St. Laurences's Hospital): A Closing Memoir* (The Anniversary Press 1988) 36. [Hereafter O'Brien, Browne and O'Malley 1988].
[35] Brendan Kelly, 'One hundred years ago: The Richmond Asylum, Dublin in 1907' (2007) 24(3) *Irish Journal of Psychological Medicine* 108.
[36] Joseph Reynolds, *Grangegorman: Psychiatric Care in Dublin since 1815* (Institute of Public Administration, 1992) 22. [Hereafter Reynolds 1992].
[37] See O'Brien, Browne and O'Malley 1988 (Fn. 33), 36.
[38] See Reynolds 1992 (Fn. 35).
[39] Kelly 2008 (Fn. 22), 20.

compulsory detention for mentally ill persons who were convicted of sedition, murder or other offences.[40]

2.2.2 Criminalisation of Mental Illness

Further reforms were then introduced by way of the *Criminal Lunatics (Ireland) Act* 1838, which continued to govern committal procedures until the *Mental Treatment Act* 1945.[41] This Act provided for the transfer of individuals from prisons to an asylum if they were considered to be dangerous, mentally ill or intellectually disabled.[42] An individual could also be committed to an asylum by two Justices of the Peace on the basis of sworn evidence by a third party, usually a family member.[43] Notably, medical evidence was not required for the purpose of committing someone to the asylum under the 1838 Act.[44] In contrast to England, the 1838 Act linked the Irish prison and the asylum systems together, under the control of the Lord Lieutenant's Office. It soon became apparent that the Irish asylums were envisaged as 'tailored institutions for the imprisonment of the insane.'[45] Known as the 'dangerous lunacy' procedure, it soon became the admission pathway of choice for families,[46] in part because it dispensed with the need for a certificate of poverty and also because it gave the police full responsibility for the transportation of persons to the asylum, thereby removing any obligation on behalf of the relative.[47] Ultimately, this procedure became widely abused,[48] largely because of the relative ease with which people could be committed. The perception of dangerousness was the defining requirement for admission to an asylum under this legislation, although it was not necessary for the person in question to have committed a crime.[49]

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[40] Reynolds 1992 (Fn. 35), 74.

[41] Elizabeth Malcolm, '"Ireland's crowded madhouses": the institutional confinement of the insane in nineteenth and twentieth-century Ireland' in Roy Porter and David Wright (eds.), *The confinement of the insane: international perspectives, 1800-1965* (Cambridge Press 2003) 324. [Hereafter Malcolm 2003].

[42] Brendan Kelly, 'Criminal insanity in 19th-century Ireland, Europe and the United States: Cases, contexts and controversies' (2009) 32 *International Journal of Law and Psychiatry* 362, 363. [Hereafter Kelly 2009].

[43] Walsh 1999 (Fn. 17), 134.

[44] The law was subsequently reformed in 1867 and a medical certificate was required stating that the individual was a lunatic.

[45] Walsh 1999 (Fn. 17), 134.

[46] Brennan 2015 (Fn. 11), 547.

[47] Kelly 2009 (Fn. 41), 363.

[48] Pauline Prior, 'Dangerous lunacy: The misuse of mental health law in nineteenth century Ireland' (2003) 14 *Journal of Forensic Psychiatry and Psychology* 525.

[49] Brown 2015 (Fn. 26), 32.

The Central Mental Hospital in Dundrum, which to this date houses the only National Forensic Mental Health Service in Ireland, was then set up under the *Lunatics Asylums (Ireland) Act* (1845) to provide 'a central asylum for insane persons charged with offences in Ireland.'[50] The first secure facility for criminal lunatics in Europe,[51] it provided care and treatment to mentally disordered offenders detained there on foot of a court order or following a transfer from a prison or psychiatric hospital. In what could be said to be an enlightened decision (particularly in regards to its time), officials decided not to co-locate the hospital with a prison as 'lunatics were not criminals and should, therefore, not be treated in the same way or on the same premises – in other words, lunatics and criminals were different kinds of people and therefore warranted different institutional approaches.'[52]

Towards the end of the nineteenth century, the Dundrum Hospital, along with the district lunatic asylums were experiencing severe problems with overcrowding. One of the reasons for the significant increase in the number of patients in asylums was the apparent upsurge in "guilty but insane" verdicts in Irish courts during the 1880s, which led to an indefinite detention in Dundrum.[53] Prior to 1883, a person found not to have been responsible for his or her actions at the time of committing the alleged act received an acquittal. The exculpatory threshold was quite high however, as it required the disability to be of such a nature that the accused resembled a beast as opposed to a man.[54] The *Trial of Lunatics Act* 1883 revised the appropriate verdict in the case of insanity to 'guilty of the act or omission charged but insane, so as not to be responsible, according to law, for his actions at the time when the act was done or the omission made.'[55] If the jury returned a verdict of 'guilty but insane', the accused was detained in custody 'as a criminal lunatic, in such place and in such manner as the court shall direct till the pleasure of the Lord Lieutenant shall be

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[50] Brendan Kelly, 'Intellectual disability, mental illness and offending behaviour: forensic cases from early twentieth-century Ireland' (2010) 179 *Irish Journal of Medical Science* 409, 410. [Hereafter Kelly 2010].
[51] This facility predated the construction of the English equivalent, Broadmoor Asylum in 1863, which was established following an extensive reform of the law in England governing criminal lunatics. See Peter Bartlett and Ralph Sandland, *Mental Health Law: Policy and Practice* (3rd edn., Oxford University Press 2007).
[52] Prior 2004 (Fn. 2), 178
[53] Brendan Kelly, *Hearing Voices: The History of Psychiatry in Ireland* (Irish Academic Press 2016) 48-49. [Hereafter Kelly 2016].
[54] In the case of *R v Arnold* (1724) 16 St Tr 695 at 754, the jury was instructed that to be exempt from punishment, the accused must be a man 'that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast…'
[55] *Trial of Lunatics Act* 1883, s 2(1).

known.'[56] The upsurge in insanity verdicts is not unique to Ireland however, as there is evidence in other European countries which suggest an increase in the rate of insanity verdicts.[57]

A special report of the Inspectors of Lunatics to the Chief Secretary examined this alleged increase and illustrated the growth of institutional care during the nineteenth century.[58] Interestingly, the number of "idiots" and "lunatics" doubled between 1851 and 1891, with 14,945 "lunatics" and 6,243 "idiots" living in Ireland.[59] Of this number, there were very few people within the prisons system by 1871, but the number of lunatics within the workhouses steadily increased.[60]

Between 1854 and 1856, dangerous lunatics made up 41.8% of male admissions to district asylums, whereas female admissions amounted to 31.8%.[61] These figures increased steadily and by 1890, these figures rose to 75.7% for men and 67.3% for women.[62] As Finnane has observed, by 1914 the population of Ireland had declined by a third following the Great Irish Famine, however, the number of "insane" persons increased sevenfold.[63] According to Kelly, the 'one single, standout event among the many factors that set Ireland on a course towards mass institutionalisation of the mentally ill,' was the Criminal Lunatics (Ireland) Act 1838.[64]

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[56] Trial of Lunatics Act 1883, s 2(2). This can be seen in the 1800 case of Hadfield, wherein the court held that notwithstanding a successful plea of the insanity defence, the accused 'for his own sake, and for the sake of society at large, must not be discharged.' *Hadfields case* (1800) 27 Howells St Tr 1281.
[57] In the UK, rates of certified cases of mental illness rose from 12.66 per 10,000 in 1844, to 29.6 per 10,000 in 1890: See Len Bowers, *The Social Nature of Mental Illness* (Routledge 1998) 104.
[58] Inspectors of Lunatics to the Chief Secretary, *Alleged Increasing Prevalence of Insanity in Ireland* (Her Majesty's Stationary Office 1894) as cited in Health Research Board, *Mental Illness in Ireland 1750–2002: Reflections on the Rise and Fall of Institutional Care* (Health Research Board, 2004) 20. [Hereafter HRB Mental Illness in Ireland 2004].
[59] Ibid.
[60] Ibid, 20: By 1871 there was virtually none of either group remaining in prisons, the number of lunatics in workhouses continued to increase, from 494 in 1851 to 2,787 in 1891, while the number of idiots in this location remained steady, 1,129 in 1851 and 1,170 in 1891. Over the same 40 years the number of idiots in asylums increased from 202 to 996.
[61] Finnane 1981 (Fn. 21), 231.
[62] (With some regional variation). Ibid.
[63] Ibid, 222.
[64] Kelly 2016 (Fn. 52), 49.

The rise in the numbers of persons with mental illness detained in institutions during the nineteenth century can be attributed to a number of factors, including the impact of the Famine, a poor economy and political instability. Scull suggests another interesting theory for the rise of insanity however, that it was broadened by the psychiatric profession in order to accumulate more resources and power.[65] The influence of psychiatrists and their role in the criminalisation of persons with mental illnesses will therefore be considered in the following section.

2.2.3 The Influence of Psychiatry

According to Foucault, the intervention of psychiatry in the field of law can be traced back to the beginning of the nineteenth century, and in particular to a series of cases during the early nineteenth century concerning serious crimes, mostly murders.[66] In commenting on the role of psychiatrists within the legal system during this time, Foucault observed how they invented an 'entirely fictitious entity, a crime which is insanity':

> [P]sychiatrists have tried very stubbornly to - take their place in the legal machinery. They justified their right to intervene, not by searching out the thousand little visible signs of madness which may accompany the most ordinary crimes, but by insisting - a preposterous stance - that there were kinds of insanity which manifested themselves only in outrageous crimes, and in no other way.[67]

In considering the reasons why psychiatry and psychiatrists became concerned with insanity, Foucault argued that crime became an important issue as it was seen as a modality of power to be secured and justified.[68] Walsh also discusses the nature of a power dynamic between the patient and the physician which was evident during the nineteenth

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[65] Andrew Scull, *Museums of Madness: The Social Organisation of Psychiatry in Nineteenth-Century England* (Allen Lane 1979) and also Andrew Scull, *Social Order/Mental Disorder: Anglo-American Psychiatry in Historical Perspective* (Routledge 1989).

[66] Michel Foucault (translated by Alain Baudot and Jane Couchman), 'About the Concept of the "Dangerous Individual" in 19th Century Legal Psychiatry' (1978) 1 *International Journal of Law and Psychiatry* 1, 3.

[67] Ibid, 6.

[68] Ibid: 'If psychiatry became so important in the nineteenth century, it was not simply because it applied a new medical rationality to mental or behavioral disorders, it was also because it functioned as a sort of public hygiene.'

century, which in turn created a top-down power structure in mental healthcare.[69] Physicians within asylums were responsible for making all the decisions in respect for their patients' lives, generally without accountability. Smith explains that the rise in power of medicine legitimised the 'segregation of the physically and mentally impaired to such an extent that the lives of disabled people were made subject to medical power.'[70] O'Sullivan also addresses the issue of medicalisation:

> [M]edical professionals were authorised by the State to gatekeep welfare disbursements to [disabled] people. Doctors… became involved in the allocation of benefits, in assessing individuals for specialised equipment… in deciding educational needs and measuring work capabilities. To receive statutory provision, disabled people were required to have their "condition" validated … a particular perception of disability and disabled people became entrenched in the public mind. The medicalising of disability was complete.[71]

The emergence of psychiatry brought about a reconceptualization of lunacy. Unlike the earlier socially constructed perception of disability which developed during the eighteenth century, the increased medicalisation and the powers afforded to psychiatrists during the nineteenth century sparked a new understanding of insanity and mental illness. This new medicalised conception of disability had a significant impact on the lives of disabled people as the "personal tragedy" approach began to dictate the way in which people lived their lives: they became passive victims, dependent on family and friends, welfare benefits and services.[72] Increasingly, psychiatrists began to influence the definition of dangerousness and played an important role in identifying and explaining criminal conduct.[73] Following the aftermath of the First World War, the assumption that criminality could be explained in

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[69] Oonagh Walsh, 'The designs of providence: race, religion and Irish insanity' in Joseph Melling and Bill Forsythe (eds.), *Insanity, institutions, and society, 1800-1914: a social history of madness in comparative perspective* (Routledge 1999) 226. [Hereafter Walsh 1999].

[70] Smith 2010 (Fn. 4), 17.

[71] See Martin O'Sullivan, 'From Personal Tragedy to Social Oppression: The Medical Model and Social Theories of Disability' (1991) 16 *New Zealand Journal of Industrial Relations* 255, 257 as cited in Smith 2010 (Fn. 4), 17-18.

[72] See Michael Oliver, *The Politics of Disablement: A Sociological Approach* (Palgrave Macmillan 1990) and Colin Barnes and Geof Mercer, *Exploring Disability* (2nd edn., Polity 2010).

[73] Anne Rogers and David Pilgrim, *A Sociology of Mental Health and Illness* (3rd edn., Open University Press 2005) 8.

terms of an inherited disposition to bad conduct was replaced by an interest in environmental or psychological explanations for criminality, influenced by psychiatry.[74]

To understand the role of psychiatrists and their influence in defining and shaping public policies and attitudes in relation to mental health, it is necessary to briefly illustrate the shift towards medicalisation within the institutions. Throughout Europe, there was a growing realisation during the late eighteenth and early nineteenth century towards the prospect of curing those detained in asylums.[75] This led to increased use of different modes of treatment, such as moral management and moral therapy, in an effort to cure madness.[76]

The practice of moral management was especially common in the Richmond Hospital, an approach which was described as an alternative to the traditional treatments of its time; namely, blood-letting and the use of "circulating chairs."[77] This form of treatment originated in post-revolutionary France as an alternative to traditional, medical treatments for the insane.[78] In keeping with this approach, the doctor-patient relationship was prioritised and there was a perception that if disabled people cooperated with doctors, they could get better.[79] Although curing one's illness or impairment was an important objective, the differentiation between sickness and disability was often misconstrued. Nevertheless, there was a significant emphasis placed on compliance and adhering to medical advice within asylums and hospitals.[80]

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[74] Ibid.
[75] Porter 1992 (Fn. 19), 290.
[76] Ibid.
[77] Kelly 2008 (Fn. 22), 20.
[78] Brown 2015 (Fn. 26), 23. This approach believed that a cure for insanity was possible but through humane management as opposed to the orthodox medical treatments which were primitive in nature and mostly involved bloodletting, purging and physical restraints such as chains and manacles.
[79] Talcott Parsons, *The Social System* (Free Press 1951) 422.
[80] See Reuber 1998 (Fn. 20), 208-233; William Bynum, 'Rationales for Therapy in British Psychiatry, 1770–1835' in Andrew Scull (ed.), *Madhouses, Mad-Doctors, and Madmen: The Social History of Psychiatry in the Victorian Era* (Athlone/University of Pennsylvania Press 1981) 35.

Towards the end of the nineteenth century moral treatment was expanded to mean the abolition of restraint, separation of different groups of patients, provision of amusements, facilities for exercise, religious activities, and light, well-ventilated surrounding.[81] Although the principles of moral treatment were adopted by physicians within the Richmond Asylum and an asylum in Cork, the use of this practice did not expand throughout other Irish institutions.[82] The reasons for this are twofold, firstly the public asylum system operated as a means to control lunatics, beggars and the homeless, rather than to provide treatment. Secondly, the asylums were run by a layman who was not trained in medicine or moral management, any necessary treatment was provided for on a visiting basis only as most institutions did not have a resident physician.[83]

If mental health systems can be viewed through the lens of power structures, as argued by Foucault, then we must consider the other relevant parties within this paradigm beyond the physician and the patient.[84] Arguably, the police have become key operators within the mental health system, particularly following the period of de-institutionalisation in the twentieth century (to be discussed in Chapter 4). The following section will discuss how attitudes and public perceptions about disabilities have been shaped by two competing conceptual models of disability, the medical model and the social model.

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[81] Bowers 1998 (Fn. 56), 109 and see WL Parry-Jones, *The Trade in Lunacy* (Routledge 1972).
[82] Reynolds 1992 (Fn. 37), 15. The physician within this asylum emphasised the importance of moral treatment, comfort and a therapeutic environment.
[83] Brown 2015 (Fn. 26), 25.
[84] See Michael Foucault, *Madness and Civilisation* (Tavistock 1967). Many academics have commended the influence of moral treatment as a welcome improvement to the barbaric treatment of the eighteenth-century madhouse regimen including practices such as blood-letting, blisters, emetics, warm and cold baths (see Reynolds 1992 (Fn. 35), 16.) While this shift in approaches is to be praised, Foucault has been critical of the use of this practice. He argued that the practice of moral treatment represented a form of psychological control, thus it could not be seen as either an advance or liberation for persons with mental illnesses.

2.2 Conceptualising Disability

2.2.1 The Medical Model of Disability

The overreliance on institutional care alongside the rise of psychiatry has resulted in a medicalised conception of disability and mental health. According to Shakespeare, we 'are socialized into thinking of disability in a medical model way. We can view this as internalized oppression.'[85] The emphasis on treating mental illness and the importance placed on the doctor-patient relationship was fundamentally important to the control of disability during the rise of the Welfare State. The medicalisation of disability developed a sense of confidence among medical professionals that persons with disabilities could either be cured or rehabilitated in institutions. The large number of persons with disabilities, particularly persons with psychosocial disabilities, who were sent to Irish asylums for treatment, is indicative of how the medicalisation of disability was deeply engrained in society for many years. While the organised policy of confining people within asylums continued until the 1960s, to this day there is an overreliance on social care homes within Ireland and increasingly, young people with disabilities are being sent to nursing homes or convalescent homes.[86]

The segregation of people with disabilities over time has legitimised discrimination and oppression on the basis of disability and has normalised the treatment of persons with disabilities as a negative experience and one that should be avoided. One example of this was the categorisation of persons which was introduced within the old Poor Laws, with an emphasis on being "able-bodied."[87] This distinction created a legitimate means of segregating persons with disabilities from general society – to the effect that persons with

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[85] Tom Shakespeare, 'Disability, identity and difference' in Colin Barnes and Geof Mercer (eds.), *Exploring the divide: Illness and identity* (The Disability Press 1996) 94.

[86] Only 4% of persons with intellectual disability live in an independent setting: see Inclusion Ireland, *Deinstitutionalisation in Ireland; a failure to act* (Inclusion Ireland 2018) <http://www.inclusionireland.ie/sites/default/files/attach/basic-page/1655/deinstitutionalisation-ireland-failure-act.pdf> accessed 28 June 2018. As of 2017, there were more than 1,200 people under 65, most with disabilities, living in nursing homes (RTE, 'More than 1,200 people under 65 living in nursing homes for the elderly' (8 August 2017) <https://www.rte.ie/news/2017/0808/895907-disabilities-nursing-homes/> accessed 22 February 2018.

[87] See Olivia Smith, *Disability Discrimination Law* (Round Hall/Thomson Reuters 2010),

disabilities and mental illnesses were perceived as being "abnormal" and of lesser value in society.[88]

The medicalisation of disability has not only influenced the treatment and detention of persons with disabilities, it has also been used to categorise persons into two groups: "disabled" and "non-disabled".[89] This categorisation forms an integral part of the medical model and its perception of what is normal and abnormal. This dichotomy views persons with disabilities as inferior and in need of support from able-bodied members of society.[90] Accordingly, 'the normality-abnormality construct is an inherent feature of the medical model of disability where disability is perceived as an aberration which needs to be removed, corrected or hidden.'[91]

The perception of persons with disabilities as being "abnormal" can be compared to other human rights movements, such as gender and race equality, where it was typical for women to be perceived as "the other".[92] In this way, disabled persons – the other - are seen as being inferior to and different from able-bodied members of society. Johnstone has also argued that the normal-abnormal dichotomy implies that able-bodied people are 'normal, good, clean, fit, able, independent,' while disabled people are 'abnormal, bad, unclean, unfit, unable and dependent.'[93] It is in this way that the medical model of disability 'categorises the able-bodied as somehow "better" than or superior to people with disabilities.'[94]

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[88] See Robert Drake, *Understanding Disability Politics* (Macmillan 1999).
[89] Bradley Areheart, 'When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma' (2008) 83(1) *Indiana Law Journal* 181, 185. [Hereafter Areheart 2008].
[90] Barnes and Mercer 2003 (Fn. 87).
[91] John Swain, Sally French and Colin Cameron, *Controversial Issues in a Disabling Society* (Open University Press 2003) 81f.
[92] See Tom Shakespeare, 'Cultural Representation of Disabled People: Dustbins for Disavowal?' (1994) 9(3) *Disability & Society* 283: The concept of "otherness" was described as the means by which cultural values locate disable people as the "other".
[93] David Johnstone, *An Introduction to Disability Studies* (2nd edn., David Fulton Publishers 2001) 17.
[94] Ibid.

The medical model of disability or "medicalism" evolved from a perception that disability is derived from a medical or physical pathology.[95] This model has been the dominant conceptualisation of disability in western liberal democracies for over a hundred years on account of the rise of the Welfare State and the power afforded to medical professionals during the twentieth century.[96] While the notion of control and containment was fundamentally connected to the medicalisation of disability, another objective of this theory was rooted in the belief that disability is a medical condition which requires fixing, and all problems associated with it are a direct consequence of one's own physical or cognitive impairment.[97] To this end, medical model theorists place no emphasis on societal factors or the external barriers which may restrict or inhibit persons with disabilities, as the main focus is centred on their condition or impairment.[98]

In 1980, the World Health Organisation incorporated a medical model approach within the International Classification of Impairments, Disabilities and Handicaps (ICIDH), which sought to distinguish between the experiences of Impairment, Disability and Handicap.[99] In their assumption that disability is a result of one's own impairment, the WHO overlooked the range of social or physical barriers within society which may limit one's ability to participate in a manner which is considered "normal" for the able-bodied majority. In line with modern thinking on the conception of disability and current international standards,[100] the ICIDH now recognises that disability is a result of environmental

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[95] Also referred to as the individual model of disability, see Colin Barnes and Geof Mercer, *Disability (Key Concepts)* (Polity 2003). [Hereafter Barnes and Mercer 2003].

[96] Mary Crossley, 'Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project' (2004) 35 *Rutgers Law Journal* 861, 876: 'disability has been defined in predominantly medical terms as a chronic functional incapacity whose consequence was functional limitations assumed to result from physical or mental impairment.'

[97] World Health Organisation, *ICF: Introduction*, (WHO 2001) 20: The medical model views disability as a problem of the person, directly caused by disease, trauma or other health condition, which requires medical care provided in the form of individual treatment by professionals. Management of the disability is aimed at cure or the individual's adjustment and behaviour change. Medical care is viewed as the main issue, and at the political level the principal response is that of modifying or reforming health care policy.

[98] Kathryn Sullivan, *The Prevalence of the Medical Model of Disability in Society (*AHS Capstone Projects Paper 13, 2011) <http://digitalcommons.olin.edu/ahs_capstone_2011/13> accessed 20 June 2018.

[99] World Health Organization, *International Classification of Impairments, Disabilities and Handicaps (ICIDH)* () WHO 1980): Impairment is defined as '... any loss or abnormality of psychological, physiological or anatomical structure or function'; disability as '… any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being'; handicap '…any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being.

[100] Specifically, the UN Convention on the Rights of Persons with Disabilities A/RES/61/106.

barriers;[101] thereby displacing the medical model and endorsing the social model, which will be discussed below. However, the original emphasis on impairment reinforced the perception that disabilities were first and foremost a direct consequence of individual impairments in functioning; and secondly that cure, management and rehabilitation of the impairment were required.

While the medical approach is now widely discredited, there is still a close link between medicine and criminal behaviour. Criminal defences such as insanity, diminished responsibility and fitness to plead continue to operate on the basis of assessing one's mental capacity for the commission of a crime. It remains to be seen whether these defences will continue to exist into the future following the CRPD,[102] however it is argued that the medicalised approach has still been retained and applied within the criminal justice system. This discussion will be borne out throughout the thesis, particularly with regards to providing medical treatment in custody (Chapter 5) and questioning suspects (Chapter 6).

2.2.2 The Social Model of Disability

From the late 1960s, many began to criticise the medical model of disability and an alternative model was developed which sought to recognise the rights and abilities of persons with disabilities.[103] This theory was developed during the 1960s and the 1970s in response to concerns among disability rights advocates about the influence of the medical model and the distinction between persons based on physical or mental traits.[104] In contrast to its predecessor, the social model challenges the belief that individuals are

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[101] World Health Organization, 'ICIDH-2: International Classification of Functioning, Disability and Health' (WHO 2001).
[102] To be discussed further in Chapter 3, section 3.4.
[103] See generally: Vic Finkelstein, "'We" Are Not Disabled, "You" Are' in Susan Gregory and Gillian Hartley (eds.), Constructing Deafness (Continuum 1990); Sally French, 'Disability, impairment or something in between?' in John Swain and others (eds.), *Disabling Barriers, Enabling Environments* (Sage 1993) 17; Michael Oliver, *Understanding Disability: From Theory to Practice* (Macmillan Press 1996). [Hereafter Oliver 1996].
[104] See Thomas Carol, 'How is disability understood? An examination of sociological approaches' (2004) 19(6) *Disability & Society* 569; Giampiero Griffo, 'Models of disability, ideas of justice, and the challenge of full participation' (2014) 19(2) *Modern Italy* 147-159; Rannveig Traustadóttir, *Disability studies, the social model and legal developments* (Brill 2009); Colin Barnes and Geoffrey Mercer, *Implementing the social model of disability: Theory and research* (Disability Press 2004). [Hereafter Barnes and Mercer 2004].

“impaired” by their personal “condition”.[105] Rather, it views disability as a social construct which requires the general society to dismantle the physical and attitudinal barriers which seek to limit or prevent the participation of persons with disabilities.[106]

The social model of disability was influenced in particular by the economic and political crises which were ongoing in Britain in the wake of the post-World War II welfare model which led to the politicisation of disability. As Barnes and Mercer explain, many disabled people took the lead in calling for policy changes which created a generation of a disabled people’s movement.[107] The focus was on the impact of social and environmental barriers, such as inaccessible buildings and transport, discriminatory attitudes and negative cultural stereotypes – all of which were described as “disabling” people with impairments. This became the worldview of the British social model of disability – a model which rejected the individualised, medical model of disability and reflected a paradigm shift in thinking around the concept of disability.

In 1966, Paul Hunt challenged the medical model of disability and its preoccupation with the medical and personal suffering experienced by persons with disabilities.[108] In *Stigma: The Experience of Disability*, Hunt considered the normal-abnormal dichotomy posited by medical model scholars and argued that a distinction can be made between the social lives and interests of “able-bodied” and disabled people – the latter are ‘set apart from the ordinary’ as they create a direct ‘challenge’ to commonly held societal values as they are ‘unfortunate, useless, different, oppressed and sick.’[109]

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[105] See Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999) 6-7.
[106] Rosemary Kayess and Phillip French, 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1, 6. [Hereafter Kayess and French 2008].
[107] See Barnes and Mercer 2003 (Fn. 87).
[108] Barnes and Mercer 2004 (Fn. 102).
[109] Paul Hunt, *Stigma: The Experience of Disability* (Geoffrey Chapman 1966) 146.

In 1976, the British social model was then presented by the Union of the Physically Impaired against Segregation (UPIAS) in their *Fundamental Principles of Disability.*[110] According to these principles, disability is presented as a 'situation caused by social conditions.'[111] In order to appreciate the nature of the social model of disability 'it is necessary to grasp the distinction between the physical impairment and the social situation, called 'disability''.[112] This conception of a disabling society is premised on a clear distinction between impairment and disability. UPIAS's definition of a disability is expressed in socio-political terms and includes 'the outcome of an oppressive relationship between people with … impairments and the rest of society.'[113]

This model subsequently developed differently across jurisdictions, with noticeable differences between the American social model and the British social model in particular.[114] British social model theorists were particularly concerned with the political processes which resulted in the oppression of persons with disabilities. Whereas, in America social model theorists were concerned with the minority group model, which became used as a political strategy by oppressed groups in an attempt to gain legal rights and recognitions.[115] The central thesis of this movement was that the analysis applied to the marginalisation of racial minorities could also be applied to the disabled. Theorists such as Hahn, Albrecht and Wendell among others, consider disability as arising from social, cultural and political dimensions.[116] In contrast to the minority group model, the British social model theorists rejected the rights-based focus of their counterparts, preferring instead to focus on the

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[110] Union of the Physically Impaired Against Segregation, 'Fundamental Principles of Disability' (1976) 14 <http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf> accessed 28 December 2016.
[111] Ibid.
[112] Ibid.
[113] Vic Finkelstein, *Attitudes and Disability: Issues for Discussions* (World Rehabilitation Fund 1980) 47.
[114] See Claire Tregaskis, 'Social model theory: the story so far…' (2002) 17(4) *Disability & Society* 457.
[115] Gary Albrecht, 'American pragmatism, sociology and the development of disability studies' in Colin Barnes and Len Barton (eds.) *Disability Studies Today* (Polity Press 1996) 179.
[116] Harlan Hahn, 'Anti-Discrimination Laws and Social Research on Disability: The Minority Group Perspective' (1996) 14 *Behavioral Sciences and Law* 41; 46-47: 'All facets of the environment are moulded by public policy and government policies reflect widespread social attitudes or values; as a result, existing features of architectural design, job requirements ... that have a discriminatory impact on disabled citizens cannot be merely viewed as happenstance or coincidence. On the contrary, they seem to signify conscious or unconscious sentiments supporting a hierarchy of dominance and subordination between non-disabled and disabled segments of the population that is fundamentally incompatible with legal principles of freedom and equality.' See also: Gary Albrecht, *The sociology of physical disability and rehabilitation* (University of Pittsburgh Press 1976); Susan Wendell, *The rejected body: Feminist philosophical reflections on disability* (Psychology Press 1996). [Hereafter Wendell 1996].

social barriers and oppression within society for persons with disabilities. Oliver focused on the experience of disability within the social environment, as opposed to one's own personal impairment or condition.[117] Oliver attributes the teachings of the medical model to the stigmatisation of people with disabilities, as this system was inherently oppressive and excluded people with disabilities from society.[118]

Kayess and French argue that 'disability is understood and experienced as oppression by social structures and practices.'[119] In contrast to the medical model of disability, advocates in favour of the social model do not objectify a person by their impairment. Rather, this model argues that it is the social oppression of persons with disabilities that has disabled them, not their impairment. Many disabled activists saw the social model of disability as a means of identifying their own social oppression and enabling them to live more independent lives.[120] This became a key part of the negotiations for the UN Convention on the Rights of Persons with Disabilities (CRPD), which was heavily influenced by the social model teachings that barriers constructed by the "able-bodied" majority, are the main obstacles to persons with disabilities – not their physical or mental condition. This is reflected in the Preamble of the CRPD,[121] which recognises the 'attitudinal and environmental barriers that hinders full and effective participation.'[122] Further articles

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[117] Kayess and French 2008 (Fn. 104), 6.
[118] Oliver 1996 (Fn. 101). Shakespeare has added that we 'are socialized into thinking of disability in a medical model way. We can view this as internalized oppression.' See Tom Shakespeare, 'Disability, identity and difference' in Colin Barnes and Geof Mercer (eds.), *Exploring the divide: Illness and identity* (The Disability Press 1996) 94.
[119] Kayess and French 2008 (Fn. 104), 5.
[120] See Colin Barnes, Michael Oliver and Len Barton, *Disability Studies Today* (Polity Press 2002). Disabled people saw themselves as being in a position akin to ethnic minorities fighting for their rights to equality in America and as such, the social model became intrinsically linked to a rights-based movement away from the medical approach.
[121] Aisling de Paor and Charles O'Mahony, 'The Need to Protect Employees with Genetic Predisposition to Mental Illness? The UN Convention on the Rights of Persons with Disabilities and the Case for Regulation' (2016) 45(4) *Industrial Law Journal* 525, 549: ''[t]he rationale of many of the articles of the CRPD and the definitions further reflect the social model of disability ethos. In reaffirming the social model, Article 1(2) reflects the philosophy that limitations arise as a result of the interaction with various barriers in society.' [Hereafter de Paor and O'Mahony 2016].
[122] CRPD, Preamble para (e). See also para (k), which recognises that persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.

within the Convention also refer to the impact of societal barriers, including Articles 1,[123] 9,[124] and 30.[125]

While the social model has brought about an instrumental and systemic shift in the understanding and attitudes towards disability, Crossley has recognised that the fundamental shortcoming of this model is that by focusing on environmental barriers, the limitations caused by one's own bodily impairments are overlooked.[126]

> For some impairments, such as severe mental retardation, severe brain injury, and rapidly deteriorating medical conditions, limitations inextricable from the condition and independent of social factors may seem to overwhelm any social discrimination faced by persons with those impairments.[127]

The focus on the oppression of persons with disabilities in society and on developing a theory of disability as a social construct has been criticised for failing to recognise the personal experience of pain and limitation associated with one's impairment.[128] Wendell, a British social theorist writing from a feminist perspective, has distanced herself from the norm and has acknowledged that in some cases it is necessary to recognise one's physical impairment and the limitations flowing from that, as not all barriers are the result of a disabling environment.[129] This is an interesting point to consider in regards to the insanity defence and the future of capacity-based criminal defences more generally, in the wake of the CRPD. The operation of such defences relies on medical evidence which acts as a mitigating factor for persons whose mental capacity to commit the offence is called into question. In adopting a social model approach, which looks beyond the persons' diagnosis,

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[123] CRPD, Article 1. See Chapter 1, section 2.1.
[124] CRPD, Article 9: 'To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.'
[125] CRPD, Article 30 requires States Parties to remove barriers to enable persons with disabilities to participate in cultural life, recreation, leisure and sport.
[126] See also Tom Shakespeare, *Disability rights and wrongs revisited* (Routledge 2013).
[127] Mary Crossley, The Disability Kaleidoscope (1999) 74(3) *Notre Dame Law Review* 621, 657.
[128] National Disability Authority, 'Research with Children with Disabilities' <http://www.inis.gov.ie/website/nda/cntmgmtnew.nsf/0/851DE72FE32677F0802571CB005A165B/$File/research_children_disabilities_06.htm> accessed 18 June 2018.
[129] Wendell 1996 (Fn. 114), 45.

one could argue that it poses challenges for the plea of insanity – which only considers the mental status of the individual; thereby operating under the medical model approach. As discussed above, it may be that the criminal justice system has retained the medical model and has neglected to adopt the teachings of the social model approach.

To conclude, the fundamental difference between the medical model and the social model is that the former seeks to find medical solutions or a cure to adjust the individual to fit society, whereas the social model focuses on adjusting the social environment to fit individuals.[130] Given its broad scope, it has been said that no single restatement of the social model can satisfy everyone.[131] Consequently, it can be understood as encompassing a number of approaches to disability, ranging from civil or human rights approaches, minority rights approach and the social constructionist approaches, and is continuing to evolve under the influence of critical disability studies.[132]

The importance of conceptualising disability and assessing the impact of these two different schools of thought cannot be understated. In the medical profession, for example, the way in which nurses view and conceptualise disability may influence and/or determine how they care for patients with disabilities.[133] This is also the case for the wide range of criminal justice professionals, including judges, lawyers, police officers, social workers and prison guards. If for example, police officers view people with schizophrenia as dangerous or violent, this may increase the likelihood of the police using force to respond to the individual in question. The paradigm shift from the medical model of disability towards acceptance of the social model of disability and a rights-based approach is evident in current disability discourse, however challenging questions remain as regards its application within the criminal justice context (as will be explored later in this thesis). For example, it is argued that training and awareness-raising are essential tools to address the existence of stigma among police officers. The following section will examine the early

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[130] Areheart 2008 (Fn. 91), 189.

[131] Adam Samaha, 'What Good is the Social Model of Disability?' (2007) 74 *University of Chicago Law Review* 1251, 1257: 'It has no natural form independent of its application and the volume of writing on the model is almost staggering.'

[132] Kayess and French 2008 (Fn. 104), 6-7.

[133] Shirley Durell, 'How the Social Model of Disability Evolved' (2014) 110(50) *Nursing Times* 20, <http://www.nursingtimes.net/nursing-practice/specialisms/public-health/how-the-social-model-ofdisability-evolved/5077566.article> accessed 18 June 2018.

role of the police during the period of the Welfare State and their role in maintaining social order or control within society.

2.3 The Role of the Police

Police organisations play a fundamental role in ensuring the rule of law is upheld in all liberal, democratic States.[134] The role and importance of policing is legitimised by ensuring respect for the rule of law and the preservation of law and order within society. In pursuing this aim, Reiner suggests that policing is best viewed as an aspect of 'social control' which occurs universally and is designed to enforce rules or otherwise maintain security.[135] In the early model of policing, police officers had limited legal powers; their primary task involved patrolling the streets and acting as watchmen. However, to coincide with the increased role of the State in the lives of persons with disabilities, the police were also afforded more powers to maintain order and civil obedience.[136] Writing in 1840, De Tocqueville commented on the rise of State control, noting that:

> […] everywhere interferes more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise, and to coerce them.[137]

In Europe, the shift towards "State" law, influenced by increased urbanisation and the growing distinction between rich and poor, led to the expansion of State authority.[138] European countries began to exercise increased control over the lives of its citizens.[139] In England, this led to the "watershed moment" in the history of policing – the commencement of the *Metropolitan Police Act* 1829, which heralded significant changes in

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[134] Jim Murdoch and Ralph Roche, *The European Convention on Human Rights and Policing: A Handbook for Police Officers And Other Law Enforcement Officials* (Council of Europe 2013) 111.

[135] Robert Reiner, The politics of the police (Oxford University Press 2010) 3-8.

[136] In line with the increased emphasis on a crime control mandate, we have also seen a lessening of basic freedoms as the power of the police and other agencies has increased: See Andrew Sanders, Richard Young, Mandy Burton, *Criminal Justice* (Oxford University Press 2010).

[137] Alexis de Tocqueville, *Democracy in America* (Volume 2, Allard and Saunders 1840) 326.

[138] David Churchill, 'Rethinking the state monopolisation thesis: the historiography of policing and criminal justice in nineteenth-century England' (2014) 18 (1) *History and Societies* 131, 136.

[139] Bruce Lenman and Geoffrey Parker, 'The state, the community and the criminal law in early modern Europe' in Jennifer Davis and others (eds.), *Crime and the law: the social history of crime in Western Europe since 1500* (Europa Publications 1980) 44: 'the state's control over the everyday lives of its subjects […] grew ever closer.'

the response to the problems of crime and security.[140] The introduction of the London Metropolitan Police force in England subsequently 'nurtured an increasingly intrusive nineteenth-century state.'[141]

Reiner has observed that inevitably, the police began to emerge in socially divided areas and their work became concentrated around the interests of the dominant classes in society.[142]

While there are many ways in which a State exercises its control over social order and the lives of its citizens, the development of criminal law can be seen as one such tool which enabled the State to punish individuals who failed to adhere to the rule of law or who posed a threat to society. In this way, the police can therefore be viewed as enabling a regime as agents of State control – even in democratic States, which seek to uphold the status quo. As an organisation, the police are directly responsible for maintaining the status quo, investigating crimes and bringing alleged offenders to justice. Therefore, they play a fundamentally important role in maintaining social order and control.

2.3.1 Policing the Welfare State

The origins of policing in Ireland predate the London Metropolitan Police and can be traced back to the Dublin Police Act 1786, which established the Dublin Metropolitan Police.[143] Peel's new model of policing offered a new approach to governance which enabled the State to exert control over communities in an organised and efficient manner. This new police system was made up of salaried officers who were appointed to assist with law enforcement, the maintenance of public order and to apprehend offenders.[144] Under the

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[140] Alan Wright, *Policing: An Introduction to Concepts and Practice* (Routledge 2012) 6. See also Jean Marie McGloin, 'Shifting paradigms: Policing in Northern Ireland' (2003) 26(1) *Policing: An International Journal of Police Strategies & Management* 118, 120; Robert Reiner, 'Police Research in the United Kingdom; a Critical Review' (1992) 15 *Crime and Justice* 435. [Hereafter Reiner 1992]; Robert Reiner, *The politics of the police* (University of Toronto Press 1992); Robert Reiner, *The Politics of the Police* (3rd edn., Harvester Wheatsheaf 2000); Rob Mawby, *Comparative Policing Issues* (2nd edn., Unwin Hyman 1990).

[141] David Churchill, 'Rethinking the state monopolisation thesis: the historiography of policing and criminal justice in nineteenth-century England' (2014) 18 (1) *History and Societies* 131, 136.

[142] Reiner 1992 (Fn. 138) 435.

[143] Frederic William Maitland, *Justice and Police* (The Lawbook Exchange 1885) 108: "[A] full history of the new police would probably lay its first scene in Ireland and begin with the Dublin Police Act passed by the Irish Parliament in 1786."

[144] Ibid. See also Kevin Boyle, 'Police in Ireland Before the Union I' (1972) 7(1) *Irish Jurist* 115. [Hereafter Boyle 1972].

Vagrancy Act 1824, police officers were afforded powers to apprehend any individual with 'reasonable suspicion', and all vagrants, prostitutes, as well as persons who were idle or disorderly.[145]

Over the course of the nineteenth century, the history of policing in Ireland was dominated by the formation of the Royal Irish Constabulary, which was established by the Dublin Police Act 1836.[146] During this time, Dublin was policed by a separate force, the Dublin Metropolitan Police, which was in place up until the introduction of the Anglo-Irish Treaty 1921.[147] Following the establishment of the Irish Free State and the end of British home rule, a new police organisation was created, *An Garda Síochána* which replaced the Royal Irish Constabulary.[148] For much of the twentieth century, policing in Ireland was directly influenced and impacted by social and economic crises, such as high levels of emigration and lack of investment in services.[149] Indeed, one of the distinguishing features of Ireland's history in regards to policing is the very low rates of criminality during the twentieth century.[150] Accordingly, there was very little impetus or demand to introduce reforms to policing during this time.[151]

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[145] Clive Emsley, 'The birth and development of the police' in Tim Newburn (ed.), *Handbook of Policing* (2nd edn., Routledge 2012) 74.

[146] Boyle 1972 (Fn. 142), 115. It was not until 1867 that the force was given the title 'Royal Irish Constabulary'.

[147] The Garda Síochána replaced the R.I.C. in February 1922 and in April 1925, the Dublin Metropolitan Police was amalgamated with An Garda Síochána.

[148] The Garda Síochána was set up following the end of British home rule in Ireland, following the creation of the Irish Free State and the demise of the Royal Irish Constabulary. For further information on the establishment of the Gardaí, see Gregory Allen, *The Garda Síochána: Policing Independent Ireland, 1922-82* (Gill & Macmillan 1999) and Liam McNiffe, *A history of the Garda Siochana: a social history of the force 1922-52, with an overview of the years 1952-97* (Wolfhound Press 1997).

[149] Vicky Conway*, Policing Twentieth Century Ireland: A History of An Garda Síochána* (Routledge 2013) 158.

[150] Ian O'Donnell and Eoin O'Sullivan, *Crime Control in Ireland: The Politics of Intolerance* (Cork University Press 2001) and Peter Young, Ian O'Donnell and Emma Clare, *Crime in Ireland: trends and patterns, 1950 to 1998* (Institute of Criminology Dublin, Stationery Office 2001).

[151] Aogán Mulcahy and Eoin O'Mahony, 'Policing and Social Marginalisation in Ireland' (2005) Combat Poverty Agency Working Paper Series 05/02 <http://www.combatpoverty.ie/publications/workingpapers/2005-02_WP_Policing&SocialMarginalisation.pdf> accessed 28 June 2018.

2.3.2 The Police as Agents of State Control or Providers of Care?

Persons with disabilities have historically been subjected to greater measures of control and oppression by States,[152] dating back to before the time of the minimal State.[153] State intervention and institutionalisation became widespread during The Great Confinement, particularly during the eighteenth and nineteenth centuries when public asylums and prisons were severely overcrowded in Ireland.[154] The police played a particularly important role during this time as the law gave the police express powers to remove all 'loose, idle and disorderly' persons, thereby affirming the role of the police in the age of institutionalisation.[155] The Dublin Police Act 1842 provided further powers to police officers to apprehend individuals without a warrant, including:

> …[A]ll loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or being about to commit any felony, misdemeanor, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the morning lying or loitering in any highway, yard, or other place, and not giving a satisfactory account of themselves.[156]

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[152] See Amita Dhanda, 'Conversations between the proponents of the new paradigm of legal capacity' (2017) 13(1) *International Journal of Law in Context* 87.
[153] See Robert Nozick, *Anarchy, state, and utopia* (Vol. 5038, Basic Books 1974).
[154] See Ray Porter, 'Foucault's great confinement' (1990) 3(1) *History of The Human Sciences* 47.
[155] *The Dublin Police Act* 1836, s. 7: 'It shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons whom he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this Act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail, in the manner herein-after mentioned.'
[156] *Dublin Police Act* 1842, s. 27. This Act provided a comprehensive list of summary offences penalising various nuisances and breaches of public peace and order.

Malcolm has reviewed the history of institutionalisation within asylums in Ireland and found 'families, police, magistrates, clergy and doctors co-operated to take advantage of lax procedures so as to rid their communities of those deemed troubled or troublesome.'[157] The use of psychiatric detention as a means to secure social control is widely recognised internationally, with Morton suggesting that 'from the beginning, the institution functioned as an extra-legal prison, not only for "mental patients" but […] for persons who were confined without any pretence of illness or treatment.'[158] This practice indicates the emphasis of maintaining order within society, but it is also indicative of the stigmatisation surrounding mental illness and disability during the nineteenth and twentieth centuries, with an overwhelming desire to lock such individuals away.

Police powers to detain an individual at a police station were also introduced by the *Mental Treatment Act* 1945, which enabled members of An Garda Síochána to make an application for the detention of an individual who was believed to be of unsound mind.[159] The wide variety of persons and social issues were included within the scope of this Act, for example alcoholics and addicts, echoed the need to control certain people as a means to resolve social problems within society. Section 165 of the Act, which is titled '[r]emoval to Gárda Síochána station of person believed to be of unsound mind and requiring control', provides:

> Where a member of the Gárda Síochána is of opinion that it is necessary that a person believed to be of unsound mind should, for the public safety or the safety of the person himself, be placed forthwith under care and control, he may take the person into custody and remove him to a Gárda Síochána station.[160]

[157] Malcolm 2003 (Fn. 40) 322-326.
[158] Thomas Morton, 'The Pennsylvania hospital: Its founding and functions' in Thomas Szasz (ed.), *The Age of Madness: The History of Involuntary Mental Hospitalization Presented in Selected Texts* (Routledge & Kegan Paul 1975) 12-13.
[159] For a history of this legislation, see: Brendan Kelly, 'The Mental Treatment Act 1945 in Ireland: an historical enquiry' (2008) 19(1) *History of Psychiatry* 47, 55.
[160] *Mental Treatment Act* 1961, s. 165.

This provision was subsequently challenged in the case of *In Re Philip Clarke*.[161] In its judgment, the Supreme Court permitted the use of preventative detention on the basis that a person of unsound mind posed a potential risk to society. The applicant in this case initiated a *habeas corpus* application challenging the constitutionality of section 165, on the grounds that there were insufficient safeguards within the legislation to protect the individual's constitutional right to liberty, specifically because there was no requirement for judicial involvement in the determination of whether detention is necessary.[162] This argument was rejected by the Supreme Court, which was satisfied that adequate protections were provided within the scope of the 1945 Act.[163] In his judgment, O'Byrne J. ruled:

> We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others.[164]

This statement reflects the overwhelming desire within the country to control social order by confining people with mental illnesses to asylums for their personal safety or for the safety of the general public. The fear that people with disabilities and mental illnesses presented a danger within society has been a longstanding perception in Irish society (but also more generally, as discussed further below). The following section will consider the theory of dangerousness as it applies to persons with mental illnesses and the significance of this connotation with respect to criminal justice policies. Specifically, it will consider the perceived link between violence and mental illness.

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[161] *In re Philip Clarke* [1950] I.R. 235
[162] Bunreacht na hÉireann, Article 40.4.
[163] *In re Philip Clarke* [1950] I.R. 235, 247–248: 'The impugned legislation is of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt, present to the minds of the draughtsmen when it was proclaimed in Art.40.1 of the Constitution that, though all citizens, as human beings, are to be held equal before the law, the State may, nevertheless, in its enactments, have due regard to differences of capacity, physical and moral, and of social function.'
[164] Ibid.

2.4 The Dangerousness Debate

At the heart of the debate regarding disability and the criminal justice system is the stigma attached to certain types of disabilities, particularly psychosocial disabilities; an example of which relates to the perceived dangerousness of persons with psychosocial disabilities. Dangerousness can be seen as a 'propensity to engage in dangerous behaviours. Dangerous behaviour refers to acts that are characterised by the application or overt threat of force and are likely to result in injury to other persons.'[165]

Stereotypes of dangerousness feature frequently in research on mental illness,[166] to the extent that it is widely acknowledged that this stigma remains 'a powerfully detrimental feature of the lives of people with such conditions.'[167] The perception of dangerousness leads to fear among the general public, to the extent that people with serious psychosocial disabilities are othered or avoided.[168] Within the criminal justice framework, such stigmatisation raises various concerns including issues of credibility which cast doubt over one's ability to make a statement, to give a reliable confession and also to give evidence in court.[169] These concerns may explain, and enhance, the vulnerability of persons with disabilities as suspects of crime.

This perception of people with disabilities can have damaging consequences for the individuals concerned, especially if they come into contact with the criminal justice system. Disability has long been recognised as a source of stigma, particularly for persons with mental illness (e.g., schizophrenia) and intellectual disabilities.[170] According to Goffman, stigmas were inflicted through the marking or branding of certain individuals who had

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[165] Saleem Shah, 'Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas' in C.J. Frederick (ed.), *Dangerous behavior: A problem in law and mental health* (Government Printing Office 1978) 153.

[166] See Bruce Linkand others, 'Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance' (1999) 89(9) *American Journal of Public Health* 1328.

[167] Ibid.

[168] Patrick Corrigan and others, 'Challenging Two Mental Illness Stigmas: Personal Responsibility and Dangerousness' (2002) 28(2) *Schizophrenia Bulletin* 293, 303.

[169] Anne Rogers and David Pilgrim, *A Sociology of Mental Health and Illness* (3rd edn., Open University Press 2005) 26.

[170] Lisa Schur, Douglas Kruse and Peter Blanck, *People with disabilities: Sidelined or mainstreamed?* (Cambridge University Press 2013) 118-119. [Hereafter Schur, Kruse and Blanck 2013].

transgressed the norms or values of society.[171] The relationship between disability and stigma can be traced back to the old Poor Laws and the distinction between the deserving and undeserving poor.[172] The subsequent institutionalisation of the insane during the eighteenth and nineteenth centuries further legitimised internal prejudices among general society regarding disabilities and mental illnesses.[173]

Stigmatising attitudes and practices are most commonly caused by a lack of awareness about mental illness and the false image which has been created of the "lunatic" since the eighteenth century, since the days of Peels' early model of policing. If police officers are untrained in responding to persons experiencing a mental health crisis, for example, they may operate under the false impression that those individuals are dangerous or that they pose a risk to themselves or others. Misconceptions of people with psychosocial disabilities as being dangerous could also result in unlawful arrests or unreasonable use of force during the arrest.[174] Such misconceptions may be attributed to the stereotype of persons with psychosocial disabilities as being violent or uncontrollable.[175] To date, however, research has consistently found that there is a 'weak relationship between violence and mental illness (except in some instances of some psychotic illnesses).'[176] While some studies have indicated an increased propensity towards violence among subgroups of persons with very severe or untreated mental illness during periods of psychotic episodes

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[171] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963) cited in Smith 2010 (Fn. 4), 19.
[172] The history of eugenics is also relevant to consider in this regard, as it sought to segregate and eliminate genetic-based disease and disability all over the world. See Aisling de Paor and Peter Blanck, 'Precision medicine and advancing genetic technologies: Disability and human rights perspectives' (2016) 5(3) *Laws* 36, 42-43.
[173] For a discussion on the role of stigma and its impact upon the criminal process, see Aisling de Paor and Charles O'Mahony, 'The use of behavioural genetics in the criminal justice system: A disability & human rights perspective' (2017) 54 *International Journal of Law and Psychiatry* 16.
[174] Jim Ruiz and Chad Miller, 'An exploratory study of Pennsylvania police officers' perceptions of dangerousness and their ability to manage persons with mental illness' (2004) 7(3) *Police Quarterly* 359, 367.
[175] Patrick Corrigan, 'How stigma interferes with mental health care' (2004) 59(7) *American psychologist* 614, 616.
[176] Penelope Weller, 'Lost in Translation: Human Rights and Mental Health Law' in Bernadette McSherry and Penny Weller (eds.), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing 2010) 57. One study published in 1999 found that public fears are out of proportion with reality: 'When the symptoms of mental illnesses are presented in vignettes, people's fears are dramatically heightened. This occurs even though there is no mention of violent behavior in the vignettes. Furthermore, both the absolute magnitude of the percentages of people believing that violence is somewhat or very likely (depression, 33%; schizophrenia, 61%; alcohol dependence, 71%; and cocaine dependence, 87%). See Bruce Link and others, 'Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance' (1999) 89(9) *American Journal of Public Health* 1332.

or during psychiatric hospitalisations,[177] the vast majority of persons with psychosocial disabilities do not experience violent tendencies or behaviours.

Stereotypes and prejudices play a significant role in shaping attitudes towards persons with disabilities than suspects without disabilities;[178] therefore it is necessary to consider the impact of these stereotypes and how negative perceptions held by police officers can impact the treatment of persons with disabilities. Linked to the issue of stigma and the perception of dangerousness of persons with disabilities, an interesting consideration is whether the existence of a disability can influence police officers' discretion or change their approach to a situation. According to Waddington, factors influencing an officers' decision to make an arrest can range from their own personal beliefs to the opinions and values held by the police as a collective organisation.[179]

According to Ruiz, two of the most prevalent misconceptions held by police officers are that persons with mental illnesses are dangerous, violent and cannot be reasoned with.[180] These misconceptions can result in violent interactions between the police and persons with mental illnesses resulting from a number of factors; a fear of personal injury and a lack of understanding or empathy on the part of police officers,[181] and difficulties or reluctance to comply with instructions on the part of the person with mental illness.[182]

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[177] Jonathan Metzl and Kenneth MacLeish, 'Mental illness, mass shootings, and the politics of American firearms' (2015) 105(2) *American journal of public health* 240, 241. See generally: Matthew Large, 'Treatment of psychosis and risk assessment for violence' (2014) 171(3) *American Journal of Psychiatry* 256; Robert Keers and others, 'Association of violence with emergence of persecutory delusions in untreated schizophrenia' (2014) 171(3) *American Journal of Psychiatry* 332.

[178] Schur, Kruse and Blanck 2013 (Fn. 167), 120 citing Katrina Scior, 'Public awareness, attitudes and beliefs regarding intellectual disability: A systematic review' (2011) 32(6) *Research in Developmental Disabilities* 2164.

[179] P. A. J. Waddington, *Policing Citizens: Authority and Rights* (Psychology Press, 1999) and P.A.J Waddington, 'Police (canteen) sub-culture: An appreciation' (1999) 39(2) *The British Journal of Criminology* 287.

[180] Jim Ruiz, 'An Interactive Analysis between Uniformed Law Enforcement Officers and the Mentally Ill' (1993) 12 *American Journal of Police* 149, 153.

[181] Ibid.

[182] Amy Watson, Patrick Corrigan and Victor Ottati, 'Police responses to persons with mental illness: does the label matter?' (2004) 32 *Journal of American Academy of Psychiatry and the Law* 378, 379. [Hereafter Watson, Corrigan and Ottati 2004].

The issue of whether the existence of mental illness can in turn influence the police response, has been examined extensively in the context of the U.S.[183] One study found that information regarding the existence of a mental illness would not have an effect on an officer's response, rather it is the situation and the individuals' behaviour which dictates a response as opposed to stereotypes.[184] However, the same researchers also found a correlation between a diagnosis of schizophrenia and the perception of dangerousness among officers.[185] Moreover, it was found that if police officers are aware that an individual has schizophrenia, it 'significantly increased the officers' willingness to endorse legally mandated treatment.'[186]

In many cases, however, the police may not realise they are dealing with an individual with a mental illness on account of a lack of awareness. Therefore, it is necessary that appropriate training is provided for all police officers, in line with the State's obligations under Article 13 of the CRPD (to be discussed in Chapter 4).

2.4.1 Stigma and the Role of the Media

To this day, there is still a stigma attached to disability, particularly certain mental illnesses such as schizophrenia and schizoaffective disorder.[187] This is best evidenced in the media portrayals of people who have been found unfit to stand trial or not guilty by reason of insanity.[188] Previous research has documented the plethora of issues arising from the false

[183] H. Richard Lamb, Linda Weinberger and Walter DeCuir, 'The police and mental health' (2002) 53(10) *Psychiatric services* 1266 and Linda Teplin, 'Keeping the peace: police discretion and mentally ill persons' (2000) 244 *National Institute of Justice Journal* 8.
[184] Watson, Corrigan and Ottati 2004 (Fn. 180).
[185] Amy Watson, Patrick Corrigan and Victor Ottati, 'Police officers' attitudes toward and decisions about persons with mental illness' (2004) 55(1) *Psychiatric Services* 49, 52.
[186] Ibid.
[187] As de Paor and O'Mahony have stated, 'The stigma and negative attitudes associated with mental illness may vary and may reflect a lack of education about mental illness, from the perception that those with depression are emotionally weak to the view that individuals with schizophrenia have a split personality and are dangerous.' de Paor and O'Mahony 2016 (Fn. 119), 537.
[188] See for example: Barry Roche, 'Man who bludgeoned flatmate is acquitted as insane' *The Irish Times* (Dublin, 31 October 2017) <https://www.irishtimes.com/news/ireland/irish-news/man-who-bludgeoned-flatmate-is-acquitted-as-insane-1.3275806> accessed 28 June 2018; Stephen Breen, ''I Told Nanny To Duck But It Was Too Late' Young Irish Girl, Eight, Tells Of Horrifying Moment Maniac Killed Her Granny And Shot Her Mum At Dublin Home' *The Irish Sun* (Dublin, 28 December 2017) <https://www.thesun.ie/news/1978110/grieving-daughter-karina-dargan-relives-terrifying-moment-crazed-gunman-shot-her-and-mum-in-their-kitchen/> accessed 28 June 2018; Alison O'Riordan, 'Killer not guilty by reason of insanity' *The Irish Examiner* (Cork, 1 August 2015) < https://www.irishexaminer.com/ireland/killer-not-guilty-by-reason-of-insanity-345764.html> accessed 28 June 2018; 'Schizophrenic 'Muslim killer' not

portrayal of mental illness, such as perpetuating stigma and public fears associated with mental illness, fuelling resistance to community care and reluctance among employers to hire people with mental health histories.[189] Media coverage has also been found to contribute to increased instances of coercion in the treatment of persons with mental illnesses as the general public have been found to endorse forced treatment of those considered dangerous.[190]

The best way to address false stereotypes and misconceptions is to raise awareness and educate journalists about disability and mental health, especially in light of the State's obligations pursuant to Article 8 of the CRPD. In the event that a journalist is required to report on a story which involves violence and mental illness, Wahl argues that they should take care to put the actions of the individual into context.[191] One such way to achieve this would be to cite the existing research which demonstrates that violent actions are uncharacteristic of people with psychiatric disorders, rather than presenting the mental illness as the sole determinant for the act.[192]

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guilty by reason of insanity' *BBC News (*22 August 2017) <http://www.bbc.com/news/uk-england-london-41011324> accessed 28 June 2018; Conor Kane, 'Ruthless killer who stabbed Mairead Moran to death was 'so calm' and showed no emotion after violent attack' *The Irish Sun* (Dublin, 15 February 2017) <https://www.thesun.ie/news/586788/ruthless-killer-who-stabbed-mairead-moran-to-death-was-so-calm-and-showed-no-emotion-after-violent-attack/> accessed 28 June 2018.

[189] Otto Wahl, 'News media portrayal of mental illness: Implications for public policy' (2003) 46(12) *American Behavioral Scientist* 1594, 1595-1596. [Hereafter Wahl 2003].

[190] Bernice Pescosolido and others, 'News media portrayal of mental illness: Implications for public policy' (2003) 46(12) *American Behavioral Scientist* 1594, 1599: In the case of someone who has been diagnosed with schizophrenia, the rate of agreement for forced treatment was 95% if the individual posed a danger to others, whereas for a person with a major depression it was 94%. 'Respondents were slightly more likely to condone coercion if others, rather than the person himself or herself, are seen as in danger.'

[191] See Wahl 2003 (Fn. 187).

[192] Ibid, 1599.

2.5 Conclusion

This section has presented the understanding of persons with disabilities (especially mental illnesses) as dangerous, violent, recipients of care and in need of containment. The widespread policy of institutionalisation and the rise of psychiatry, culminated in the removal of persons with disabilities from society and the subsequent medicalised understanding of disability. Awareness raising and training in relation to disability and mental health forms an important tool to create meaningful change in the way we as a society treat persons with disabilities.

As discussed within this Chapter, the policies of control and containment have featured prominently throughout Irish social policy. Law and policy since the eighteenth century was primarily concerned with the segregation and treatment of persons with disabilities, particularly persons with mental illnesses who have traditionally been viewed as dangerous or violent. While societal views and perceptions of disability have changed drastically with the passage of time, the initial teachings of the medical model still affect the way in which persons with disabilities are treated, including as suspects and offenders within the criminal process. Furthermore, it is evident that the policy of institutionalisation still occurs to this day, with a growing number of persons with disabilities confined to social care homes and nursing homes throughout Ireland.

Following the global shift towards the de-institutionalisation of persons with disabilities in the twentieth century, there is evidence to suggest that more people with disabilities are coming into contact with the criminal justice system than ever before. Indeed, previous studies have demonstrated that there is a longstanding history of police involvement in the lives of people with disabilities around the world.[193] In the Irish context, this problem is compounded by an under-resourced mental health system,[194] the worsening homeless

[193] William Bingley and Philip Bean, *Out of Harm's Way: National Association for Mental Health's (MIND's) Research into Police and Psychiatric Action under Section 136 of the Mental Health Act* (MIND Publications 1991).

[194] Rebecca Murphy, Kate Mitchell and Shari McDaid, *Homelessness and Mental Health: Voices of Experience* (Mental Health Reform 2017) https://www.mentalhealthreform.ie/wp-content/uploads/2017/06/Homelessness-and-mental-health-report.pdf> accessed 28 June 2018.

crisis,[195] and the lack of community based support services available to provide support to persons with disabilities (particularly mental illnesses).[196] The effects of these failings will be further discussed in this thesis, particularly in regards to the CRPD and its emerging jurisprudence. The next Chapter will consider a new model of disability, the human rights model, and the international and regional human rights treaties that have emerged and have reshaped modern disability rights laws.

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[195] Fiona Gartland, 'Homeless people with mental health issues often turned away by hospitals' *The Irish Times* (Dublin, 15 June 2017) <https://www.irishtimes.com/news/social-affairs/homeless-people-with-mental-health-issues-often-turned-away-by-hospitals-1.3121310> accessed 12 June 2018.

[196] HSE National Vision for Change Working Group, *Advancing Community Mental Health Services In Ireland* (Dublin: Health Service Executive, 2012) and Patsy McGarry, 'International study criticises lack of mental health reform in Ireland' *The Irish Times* (Dublin, 16 January 2018) <https://www.irishtimes.com/news/social-affairs/international-study-criticises-lack-of-mental-health-reform-in-ireland-1.3357310?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fsocial-affairs%2Finternational-study-criticises-lack-of-mental-health-reform-in-ireland-1.3357310> accessed 12 June 2018.

CHAPTER 3
Disability in the Age of Human Rights Law: International and Regional Perspectives

3.1 Introduction

This Chapter will chart the rise of the international disability rights movement, leading to the UN Convention on the Rights of Persons with Disabilities (the Convention/CRPD). The objective is to critically examine the influence of international and regional human rights laws on Irish law and policy in this area. This Chapter will begin by highlighting the historic invisibility of persons with disabilities in international law, building upon the discussion in Chapter 2 of the social marginalisation of persons with disabilities from the late eighteenth century. It is argued that the lack of a specific legal instrument to provide for the rights of persons with disabilities (prior to the CRPD) enabled widespread human rights violations during the age of institutionalisation. In providing an overview of the regional human rights framework and benchmarks, section two will then consider the influence of the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) in the area of mental health and disability rights. It will be argued that the ECHR, and particularly the jurisprudence of the ECtHR, have played a significant role in shaping current mental health laws and policies throughout Europe and that they continue to influence law reform in this field. Section three will then outline how the CRPD came to be introduced, and the most relevant provisions in the area of criminal justice and policing.

3.2 The Legal Invisibility of Persons with Disabilities

Before the UN Convention on the Rights of Persons with Disabilities, people with disabilities were not recognised as a protected category of persons under international human rights law. The Universal Declaration of Human Rights - the first international human rights treaty and the 'legal baseline for modern international human rights law',[1] along with the International Convention on Civil and Political and Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), comprise what is referred to as the International Bill of Rights.[2] However, these treaties do not specifically include persons with disabilities within the list of protected categories.[3] In the absence of a specific disability Convention, persons with disabilities could not invoke protection based on their disability status alone – they were forced to resort to one of the pre-existing protections outlined in law such as freedom from torture or from gender discrimination.[4] In effect, persons with disabilities were 'virtually invisible citizens' within the international human rights framework and 'marginalized in nearly all cultures throughout history.'[5]

A small number of disability-based human rights norms were asserted under existing UN human rights treaties,[6] followed by the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care in 1991.[7] These Principles were welcomed for their guarantee to protect persons with mental illnesses from human rights

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[1] Mashood Baderin and Manisuli Ssenyonjo, 'Development of International Human Rights Law Before and After the UDHR' in Mashood Baderin and Manisuli Ssenyonjo (eds.), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing 2010) 3.

[2] Arlene Kanter, 'The Globalization of Disability Rights Law' (2003) 30 *Syracuse Journal of International Law and Commerce* 241, 5. [Hereafter Kanter 2003]

[3] Office for the High Commission for Human Rights, *CESCR General Comment No. 5: Persons with Disabilities* (Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, 9 December 1994).

[4] For example, The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Michael Ashley Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75, 76: 'For instance, a woman with a disability may not claim protection based on her disability status alone but may claim protection from torture or from sex discrimination.'

[5] Gerard Quinn and others, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability* (United Nations 2002) 23.

[6] Declaration on the Rights of Mentally Retarded Persons 1971 (Proclaimed by General Assembly resolution 2856 (XXVI), 20 December 1971) and Declaration on the Rights of Disabled Persons 1975 (Proclaimed by General Assembly resolution 3447 (XXX), 9 December 1975).

[7] GA Res 46/119, 17 December 1991.

abuses, such as prolonged use of physical restraint or involuntary seclusion.[8] However, the continued focus on treatment and protection was criticised for conforming with and upholding the medical model of disability.[9] Further reforms were introduced by way of the UN Standard Rules for the Equalisation of Opportunities for Persons with Disabilities in 1993,[10] however efforts to secure a specific disability-rights Convention remained unsuccessful.

In 2000, a World Summit on Disability attended by disability rights organisations issued a call to arms in Beijing, calling for an international legal convention on the rights of persons with disabilities to full participation and equality in society.[11] Known as the Beijing Declaration, 'it explicitly called for the creation of a UN Convention that would legally bind nations to promote the full inclusion of people with disabilities, the elimination of discriminatory practices, and an improved quality of life for people with disabilities.'[12] Now, for the first time, the CRPD imposed specific legal obligations on States Parties and provides for a range of legally enforceable rights for persons with disabilities, in addition to the general pre-existing human rights law instruments such as CEDAW or regional human rights courts, such as the ECtHR. While efforts to secure a specific disability-rights Convention continued up until the 21st Century, it is useful to examine the role of regional human rights systems (specifically the ECHR) and the protections afforded to persons with disabilities under this framework, before examining the existing protections within the CRPD.

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[8] Rosemary Kayess and Phillip French, 'Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1, 15

[9] Ibid.

[10] UN Standard Rules for the Equalisation of Opportunities for Persons with Disabilities 1993 (Proclaimed by the General Assembly, 20 December 1993) (Resolution 48/96 annex).

[11] Disabled Peoples International and others, *Beijing Declaration on the Rights of People with Disabilities in the New Century* (Declaration issued at the World NGO Summit on Disability, 12 March 2000).

[12] Arlene Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2014) 39. [Kanter 2014].

3.3 The European Convention on Human Rights

The European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter "ECHR") was signed in Rome in 1950 by the states of the Council of Europe, and came into effect in September 1953.[13] The Convention created a platform for the promotion and protection of human rights law in Europe, in line with the rights expressed in the Universal Declaration of Human Rights.[14] Ireland formally incorporated this Convention into law by the European Convention of Human Rights Act 2003 – the last Member State of the Council of Europe to incorporate the convention into domestic law.[15] The ECHR has increasingly played a key role in the interpretation of human rights in Ireland, particularly in relation to access to justice and the Courts have often looked to the jurisprudence of the European Court on Human Rights (ECtHR) in their judgments.[16]

The ECtHR, established in 1959, has jurisdiction to determine the application and scope of the rights contained within the Convention.[17] The role of the Court and its influence in creating a human rights culture among European signatory states cannot be understated and must be recognised as 'the frontrunner which predates other regional experiments' in the area of human rights law.[18] The ECtHR has been particularly persuasive and influential in cases regarding disability rights and mental health, especially in relation to the lawfulness of one's detention in an institution or social care setting.[19] This section will outline the relevant provisions of the ECHR and the jurisprudence of the ECtHR with regard to persons with disabilities.

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[13] Council of Europe, European Convention on Human Rights and Fundamental Freedoms (Council of Europe 1950).

[14] Katherine Lesch Bodnick, 'Bringing Ireland Up To Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002) 26(2) *Fordham International Law Journal* 396, 398.

[15] Gerard Hogan, 'Incorporation of the ECHR: Some Issues of Methodology and Process' in Ursula Kilkelly (ed.), *ECHR and Irish Law* (Jordan Publishing 2004) 13.

[16] See *Airey v Ireland* App no 6289/73 (ECHR, 9 October 1979).

[17] ECHR, Article 19.

[18] Christian Tomuschat, *Human Rights* (4th edn, Oxford University Press 2008) 239.

[19] Phil Fennell, 'Institutionalising the Community: The Codification of Clinical Authority and the Limits of Rights-Based Approaches' in Bernadette McSherry and Penelope Weller (eds.), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing 2010) 13-51. See *Stanev v Bulgaria* App no 36760/06 (ECHR, 17 January 2012); *HL v United Kingdom* App no 45508/99 (ECHR, 5 October 2004); *Glor v Switzerland* App no 13444/04) (ECHR, 30 April 2009); *Herzcegfalvy v Austria* App no 10533/83 (ECHR, 24 September 1992); *Aerts v Belgium* App no 25357/94 (ECHR, 30 July 1998); *Price v United Kingdom* App no 33394/96 (ECHR, 10 July 2001); *Winterwerp v Netherlands* App no 6301/73 (ECHR, 24 October 1979); and *Shtukaturov v Russia* App no 44009/05 (ECHR, 27 March 2008).

3.3.1 Analysing the Impact of the ECHR

The ECHR includes a number of individual rights including the right to life (Article 2), prohibition of torture (Article 3), right to liberty and security (Article 5), right to a fair trial (Article 6), the right to respect for private and family life (Article 8) and a prohibition of discrimination (Article 14). While each of these provisions are relevant and significant, arguably the most important for the purpose of this thesis are Articles 5 and 6.

(i) Article 5: The Right to Liberty

Article 5 provides that no one shall be deprived of their liberty save in accordance with a procedure prescribed by law, including in cases such as an arrest of an individual for non-compliance with the law.[20] Article 5 also permits deprivations of liberty for the 'prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.'[21] Article 5 is frequently engaged in cases relating to conditions of detention in psychiatric or treatment facilities.[22] In the absence of clear and rigorous grounds for detention of persons of unsound mind, the ECtHR has developed strong standards in respect of Article 5 applications.[23] First, the detention must be 'lawful' and cannot be arbitrary, the person must be of unsound mind and finally, they must be suffering from a mental illness that warrants confinement for the purpose of care and treatment.[24] In the seminal case of *Winterwerp v Netherlands,* the court established a test for determining whether someone is in fact of unsound mind:

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[20] ECHR, Article 5(1)(b).
[21] ECHR, Article 5(1)(e).
[22] *Saadi v United Kingdom* App no 13229/03 (ECHR, 29 January 2008) para 74: In this case, the court examined the meaning of lawful detention and stated that a deprivation of liberty pursuant to Article 5 will be lawful provided it was not 'arbitrary'; and that it would not be 'arbitrary' provided that it was 'carried out in good faith', that 'the place and conditions of detention [were] appropriate'; and that the length of the detention did not 'exceed that reasonably required for the purpose pursued.' See also; *Aerts v Belgium* (1998) 29 E.H.R.R. 50, in which the Court held that the detention of a person who is of unsound mind can only be lawfully effected in a hospital, clinic or other appropriate institution, not a prison. Finally, in the case of *Dybeku v Albania* [2007] E.C.H.R. 1109 wherein it was held that Article 5(1)(e) will be found to be violated if a person who is detained either wholly or partially on the grounds of unsoundness of mind must be detained in a hospital clinic or a similar institution.
[23] Lance Gable and Lawrence Gostin, 'Human Rights of Persons with Mental Disabilities: The European Convention of Human Rights' in Lawrence Gostin and others, *Principles of Mental Health Law and Policy* (Oxford University Press 2010) 130.
[24] *Winterwerp v Netherlands* App no 6301/73 (ECHR, 24 October 1979).

> The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.[25]

Overall, while many of applications pursuant to Article 5 relate to the conditions of detention of persons with disabilities, and specifically psychosocial disabilities in hospitals and psychiatric facilities,[26] the judgments delivered by the ECtHR also contribute to a wider understanding of persons with disabilities as rights-holders. This in turn significantly impacted upon domestic laws and policies throughout Member States, with countries including Ireland introducing legislation to protect the rights of persons with psychosocial disabilities within hospital settings.[27] Many of the judgments involving persons with disabilities, including *Winterwerp*, *HL v United Kingdom*,[28] and *Storck v Germany,*[29] played a vital role in bringing about a transformative shift across Europe in respect of persons with disabilities – even before the CRPD came into being.

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[25] Ibid, para 39.

[26] A significant number of cases on Article 5 also pertain to the absence of admission procedures which comply with the Winterwerp criteria and the absence of mechanisms to review the lawfulness of continued detention under Article 5. For example, *Romanov v Russia* [2005] E.C.H.R. 933; *Raffray Taddei v France* [2010] E.C.H.R. 312; *Shtukaturov v Russia* (2008) E.C.H.R 223 and *Stanev v Bulgaria* [2012] 1 M.H.L.R. 23.

[27] In Ireland, the *Mental Health Act* 2001 and the *Criminal Law (Insanity) Act* 2006 were introduced to ensure compliance with the ECHR.

[28] *HL v United Kingdom* App no 45508/99 (ECHR, 5 October 2004). This case involved an individual who had severe learning problems and autism. He was taken to a psychiatric hospital, where he was admitted as an informal patient, i.e. he was not legally detained under the Mental Health Act 1983. The applicant was found to lack capacity to make decisions relating to his treatment and so the clinical team made decisions which were believed to be in his best interests. The circumstances of his detention were such that his foster carers were not allowed visit in case he would want to leave with them. The case was eventually brought to the ECtHR following a House of Lords ruling (*R v Bournewood Trust, exp L* [1999] 1 AC 458) which found that the detention was lawful as it came within the doctrine of necessity. However, the ECtHR found that there was a breach of Article 5(1) as the applicant was admitted as an informal patient and as such there were no protections against arbitrary detention. For the purpose of deciding whether an individual has been deprived of their liberty under Article 5, the court held that in such cases where a hospital exercised 'complete and effective control' over the patient's 'care and movements,' this would amount to a breach of Article 5. See Phil Fennell, 'Doctor Knows Best? Therapeutic Detention under Common Law, the Mental Health Act, and the European Convention' (1998) 6 *Medical Law Review* 322.

[29] App no 61603/00 (ECHR, 16 June 2005) para 102. In this case, the applicant was detained in a private psychiatric hospital against her will. The ECtHR held that there was a clear breach of Article 5 as the State was 'obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge'.

In regards to criminal law, Article 5 further requires that everyone has the right to be informed, in a language they understand, of the reasons for their arrest and any of the charges against them.[30] The importance of this right and the significance of communicating with suspects in a language and manner they understand will be discussed further in Chapter 4, as it is a crucial ingredient for the purpose of effecting a lawful arrest.

(ii) Article 6: The Right to a Fair Trial

For the purpose of this thesis and in respect of examining the rights of suspects with disabilities in the pre-trial process, it is also necessary to consider Article 6 of the ECHR. Article 6 guarantees the right to a fair trial in civil and criminal matters,[31] and provides an extensive list of rights which must be upheld in legal proceedings including the right to be presumed innocent (Article 6(2)) and the right to legal assistance (Article 6(3)). The right to a fair trial commences once a person has been charged for the commission of a criminal offence, and remains in place until the charge is determined by a court or tribunal.[32] This provision has been subject to a plethora of case law, and is 'by far the most popular article … in terms of applications lodged and judgments delivered under its heading.'[33] In particular, this provision has been considered by the ECtHR on a number of occasions in respect to the right to have a solicitor present during police custody. This issue will be considered further within Chapter 6 which examines the rights of suspects during the police interrogation and the ongoing tension between the approach of the Irish courts and the ECtHR in this regard.

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[30] ECHR, Article 5(2).
[31] ECHR, Article 6(1).
[32] *Escoubet v Belgium* App No 26780/95 (ECHR, 28 October 1999). The ECtHR confirmed that measures taken before the charge including an arrest are not capable of attracting the procedural safeguards in Article 6. See Paul Mahoney, 'Right to A Fair Trial In Criminal Matters Under Article 6 E.C.H.R.' (2004) 4(2) *Judicial Studies Institute Journal* 107, 109
[33] Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 294, 295.

Article 3 of the ECHR is also relevant for the purpose of this thesis, as it provides for a prohibition on torture, inhuman or degrading treatment.[34] In *Kovalchuk v Ukraine,* for example, the ECtHR found that Article 3 had been violated because the police took advantage of the suspects' vulnerable emotional state and pressured them into giving a false confession.[35] The suspect in this case suffered from 'psychotic and behavioural disorders, [a] state of delirious withdrawal from alcohol, [and] hallucinations.'[36] The circumstances of the police interrogation were further exacerbated by the absence of procedural guarantees such as the presence of a lawyer during questioning. The Court therefore held that Article 3 had been violated in the context of this case.[37] This judgment has important implications for the purpose of this thesis as it reiterates the significance of affording procedural safeguards to suspects (such as the presence of a lawyer), and further recognises the ways in which one's vulnerability (in the form of mental health specifically) can inhibit their participation during the police interrogation process. When read together, Articles 6 and 3 of the ECHR have significant implications for the purpose of this research as they create clear and unambiguous protections for suspects of crime. The following part of this Chapter will now proceed to describe in greater detail the Convention on the Rights of Persons with Disabilities, which is the main legal benchmark for this research.

3.3.2 The Future of the ECHR in an Age of Disability Rights

The CRPD has been ratified by the European Union and the Council of Europe since December 2010, the first human rights instrument to which the EU has become a party.[38] Article 44 of the CRPD, alongside Article 12 of the Optional Protocol, permits the EU to act on behalf of its members in relation to international treaties.[39] The institutions of the EU

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[34] ECHR, Article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'
[35] *Kovalchuk v Ukraine* App No. 21958/05 (ECtHR 4 November 2010) para 60.
[36] Ibid.
[37] Ibid, para 61.
[38] European Commission, EU ratifies UN Convention on disability rights, Press Release, Brussels, 5 January 2010, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4&format=HTML&aged=0&language=EN&guiLanguage=en Last accessed 1st March 2018
[39] CRPD, Article 44(1): '"Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by this

are therefore committed to the rights contained within the Convention and are required to engage in the CRPD Committee's reporting process. In 2015, the Committee issued their first Concluding Observation in relation to the EU's compliance and among their recommendations, called upon the EU to ensure full harmonization with the provisions of the CRPD and actively involve representative organisations of persons with disabilities in this process, and to provide sufficient funding for co-ordination among European Union institutions.[40]

A clear distinction between the CRPD and the ECHR (from a practical application perspective) is that the rights set forth in the latter, coupled with the case law of the ECtHR, are sources of hard law in Ireland, therefore they are directly enforceable in Irish courts, as discussed above. The CRPD Committee will not be afforded the same status in Irish law and will most likely be used as mere persuasive authority in cases concerning persons with disabilities. Furthermore, the jurisprudence of the CRPD Committee, which is still in its infancy, is still somewhat underdeveloped. Whereas the ECtHR have provided considerable guidance and direction to member States in relation to Article 5 and have introduced significant procedural safeguards for persons with disabilities deprived of their liberty, thereby playing a defining role in the area of disability law in Europe to date.

In considering the right to liberty as set out in the CRPD and the ECHR, it would be amiss to overlook the apparent tensions which exist between the deprivation of liberty safeguards as set out under Articles 14 (CRPD) and 5 (ECHR).[41] While deprivations of liberty are permitted on a number of grounds as stated within the ECHR, including the detention of persons of unsound mind (as discussed above); Article 14 of the UN Convention contains an absolute prohibition of detention on the basis of disability.[42] This disparity creates a clear tension for States Parties of both the ECHR and the CRPD, and at present, there is no

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Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.)

[40] UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union (CRPD/C/EU/CO/1, 2 October 2015) Available here: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/226/55/PDF/G1522655.pdf?OpenElement

[41] Philip Fennell and Urfan Khaliq, 'Conflicting or Complementary Obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English Law' (2011) 6 European Human Rights Law Review 662, 663. [Hereafter Fennell and Khaliq].

[42] To be discussed further in section 3.5.3 below.

clear guidance available from the UN Committee on the Rights of Persons with Disabilities or the ECtHR to national courts and policy-makers navigating these issues.

In considering this tension, Fennell and Khaliq have argued that although the 'CRPD represents a radical approach to the rights of people with psychosocial disabilities, by comparison with the ECHR; it suffers a number of shortcomings.'[43] Of note, it is argued that the petitioning system introduced by the CRPD (namely, the Committee on the Rights of Persons with Disabilities) 'cannot provide effective protection against arbitrary detention.'[44] Whereas, in contrast, the ECtHR have developed a number of safeguards, such as the test in *Winterwerp*, to protect the right to liberty while also respecting the clinical judgment and expertise of medical professionals working in this area.[45] The authors argue that it is not 'politically realistic to expect a complete abandonment of institutional care of people with psychosocial disabilities.'[46] Rather, it may be more realistic to see the CRPD being used by lawyers in cases before national courts and the ECtHR, and 'how its provisions may provide support for extending European Convention rights and rights under domestic law and indeed challenging some of the approaches currently adopted.'[47]

It remains to be seen if and how the ECtHR will deal with the conflict between the rights contained within the CRPD and the ECHR, particularly in regards to the contrasting approaches in relation to the right to liberty. It is worth noting however that the ECtHR have previously indicated a willingness to apply the CRPD in the case of *Glor v Switzerland;*[48] wherein the Court commented that the text of the CRPD represented both the European and universal consensus on the rights of persons with disabilities.[49] It is likely that the ECtHR will continue to shape and inform human rights law in Europe, and in Ireland; however it is hoped that the CRPD will continue to inform the Court in the area of disability-rights and best practices.

[43] Fennell and Khaliq (Fn. 41), 673.
[44] Ibid.
[45] Ibid, 674.
[46] Ibid.
[47] Ibid.
[48] (App.no. 13444/04) Chamber judgment of April 30, 2009.
[49] *Ibid* 53.

3.4 UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities and its Optional Protocol (which is a separate instrument requiring separate signature and ratification) were adopted by the UN General Assembly of the United Nations in 2006 and is the first human rights treaty of the twenty-first century.[50] Following its adoption, the Convention gained international support to become one of the fastest ratified instruments in UN history.[51] The CRPD builds upon, and works in synergy with, previous international texts applicable to persons with disabilities, including the Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1994 and the World Programme of Action on Disabled Persons – however, unlike the CRPD, neither of these texts have the force of a legally binding treaty. The CRPD is to be welcomed therefore, as it has brought about a "paradigm shift" in the manner in which disability policy and practice is articulated and implemented in international law.[52]

As the disability rights movement gained momentum, the motto 'Nothing about us, without us!' was developed and later became synonymous with the CRPD negotiation process.[53] This motto featured predominantly throughout the treaty negotiations and became the guiding principle of the entire negotiation process. It has subsequently been enshrined within the text of the CRPD, particularly in Article 33 on national reporting and monitoring.[54] It is unclear where the phrase first originated, but Charlton notes that 'the slogan's power derives from its location of the source of many types of [disability] and its

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[50] United Nations, Convention on the Rights of Persons with Disabilities (2006) G.A. Res. 61/106 and UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006) G.A. Res. 61/106, Annex II.

[51] Piers Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities* (Cambridge University Press 2017) 1. [Hereafter Gooding 2017].

[52] Raymond Lang and others, 'Implementing the United Nations Convention on the rights of persons with disabilities: principles, implications, practice and limitations' (2011) 5 *European Journal of Disability Research* 206.

[53] See Richard Scotch, '"Nothing about Us without Us": Disability Rights in America' (2009) 23(3) *OAH Magazine of History*: *Disability History* 17.

[54] CRPD, Article 33(1): 'States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.'

simultaneous opposition to such oppression in the context of control and voice.'[55] Furthermore, he argues that the phrase 'resonates with the philosophy and history of the disability rights movement, a movement that has embarked on a belated mission parallel to other liberation movements.'[56] Essentially, the phrase refers to the necessity to include persons with disabilities during decision-making in relation to matters affecting them. Indeed, during the negotiation of the Convention, States were encouraged to include people with disabilities in their official delegations. According to Melish, 'these experts contributed an unusual degree of substantive expertise, sensitivity, receptiveness, creativity and commitment to the drafting committee.'[57]

The CRPD was therefore a landmark legal instrument, not least because it recognised the rights of persons with disabilities for the first time in international human rights law, but also because of the participatory nature of the negotiation process. The practice of including persons with disabilities themselves, and their representative organisations, resulted in a finished text which best represents their needs and the lived experiences.[58] It also marked a departure from the 'state-centric model of treaty negotiation', in which legal instruments and treaties were 'negotiated behind closed doors, away from the very people they are intended to benefit.'[59] The participation of disability rights organisations and persons with disabilities themselves has now become normalised at a national level, in the wake of the CRPD. In the Irish context, this was particularly evident during the drafting of the Assisted Decision-Making (Capacity) Act 2015,[60] which considered a wide range of expert groups and opinions throughout the drafting process.[61] This is particularly notable as Ireland had not yet ratified the Convention at that time.

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[55] James Charlton, *Nothing about us without us: Disability oppression and empowerment* (University of California Press 1998) 3.
[56] Ibid.
[57] Tara Melish, 'The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify' (2007) 14 *Human Rights Brief* 37, 43. [Hereafter Melish 2007].
[58] For example, Article 20 protects the right to personal mobility, and requires States Parties to 'take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities.'
[59] Melish 2007 (Fn. 57), 37.
[60] See: Mary Donnelly, 'The Assisted Decision-Making (Capacity) Act 2015: Implications for Healthcare Decision-Making' (2016) 22(2) *Medico-Legal Journal of Ireland* 65 and Brendan Kelly, 'The Assisted Decision-Making (Capacity) Act 2015: what it is and why it matters' (2017) 186(2) *Irish Journal of Medical Science* 351.
[61] In particular, the Centre for Disability Law and Policy in NUI Galway, Inclusion Ireland and Amnesty Ireland actively campaigned and consulted on draft texts of this Act.

3.4.1 A New Human Rights Model of Disability

As discussed in the previous Chapter, the disability rights movement developed during the 1960s in response to the medicalisation of disability and the predominant attitudes and policies which saw people with disabilities as objects of charity, in need of care and protection. The disability rights movement, which later gained momentum in the 1990s and into the twenty-first century, fought to promote and advocate for the human rights protection of persons with disabilities.[62] On the back of their activism which culminated in the CRPD, there is an argument that we have moved beyond the traditional models of disability (the medical model and the social model), into a new human rights era of disability.[63] This new model builds upon the 1948 Declaration of Human Rights, which provides that 'all human beings are born free and equal in rights and dignity.'[64] The human rights approach affirms that all people with disabilities are holders of rights and have the right to participate in all areas of society on an equal basis with others. This is reflective of the CRPD's paradigm shift, which marked a change towards recognising the human rights of all persons with disabilities.

The motivation to look beyond the social model can be seen in the General Assembly Resolution which formally established the Ad Hoc Committee in 2001,[65] in which it explicitly called for a Treaty based on a new human rights approach to disability. This can be seen as a marked departure from the earlier medical model and social welfare approaches enshrined in previous UN documents.[66] One prominent disability rights scholar (and leading participant in the CRPD negotiation process), Theresia Degener, argues that the CRPD extends our understanding of disability beyond the social model into a new human rights approach.[67] According to Degener, the human rights model builds upon the social model teachings and encompasses values which acknowledge the human dignity of

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[62] Katharina Heyer, 'A Disability Lens on Sociolegal Research: Reading Rights of Inclusion from a Disability Studies Perspective' (2007) 32(1) Law *& Social Inquiry* 261, 265.
[63] Theresia Degener, 'A Human Rights Model of Disability' in Peter Blanck and Eilionóir Flynn (eds.), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 31. [Hereafter Degener 2016].
[64] See Marcia Rioux and Bonita Heath, 'Human rights in context: Making rights count' in John Swain and others (eds.), *Disabling Barriers, Enabling Environments* (Sage Publications 2012) 319.
[65] Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (G.A. Res 56/168, 19 December 2001)
[66] Kanter 2014 (Fn. 12) 40.
[67] Theresia Degener, 'Disability in the Human Rights Context' (2016) 5(3) *Laws* 35.

persons with disabilities.[68] The importance of recognising dignity within human rights law stems from Degener's earlier work with Quinn, in which they wrote that:

> Human dignity is the anchor norm of human rights. Each individual is deemed to be of inestimable value and nobody is insignificant. People are to be valued not just because they are economically or otherwise useful but because of their inherent self-worth… The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main 'problem' outside the person and in society.[69]

In this regard, the individual is placed at the centre of all decisions affecting them, thereby recognising persons with disabilities as subjects of human rights law rather than objects of State control or confinement. This approach has subsequently been enshrined in Article 12 of the Convention, which recognises the individuals' right to exercise legal capacity and decision-making on an equal basis with others.[70] As such, Article 12 can be seen as one of the foremost important rights contained within the Convention, as it challenges traditional perceptions of persons with disabilities as passive recipients of care,[71] and establishes the right for all persons with disabilities to exercise their legal capacity (or legal agency).[72]

While the social model largely informed the CRPD and its definition of disability, the human rights model goes beyond the traditional social model in a number of ways.[73] Of note, the human rights approach differs from the social model in respect to the recognition of impairment. One of the main criticisms of the social model is that it ignores the effects of impairment for persons with disabilities (including pain), and how it affects

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[68] Ibid. See also Theresia Degener and Gerard Quinn, 'A Survey of International, Comparative and Regional Disability Law Reform', in Mary Lou Breslin and Silvia Yee (eds.), *Disability Rights Law and Policy* (Martinus Nijhoff 2002) 13.

[69] Ibid. Although, as noted by Degener subsequently, they did not distinguish between a human rights model and a social model at this stage. See Degener 2016 (Fn. 50).

[70] CRPD, Article 12. This provision is discussed further in section 5.4 below.

[71] Mike Oliver, 'A sociology of disability or a disablist sociology' in Len Barton, *Disability and Society: Emerging Issues and Insights* (Longman 1996) 18.

[72] See Anna Arstein-Kerslake and Eilionóir Flynn, 'The right to legal agency: domination, disability and the protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13(1) *International Journal of Law in Context* 22.

[73] See Gooding 2017 (Fn. 51), 47.

their knowledge and identity.[74] One such critic, Morris, writing from a feminist perspective, argues that the experience of one's impairment should not be ignored.[75] According to the human rights approach, impairment is seen as an element of diversity and one's personal identity.[76] Degener observes the social model 'does not seek to provide moral principles or values as a foundation of disability policy,' whereas the CRPD 'seeks exactly that.'[77] Degener also argued that the recognition of human diversity (as outlined in Article 3 of the Convention) is a 'valuable contribution to human rights theory in that it clarifies that impairment is not to be regarded as a deficit or as a factor that can be detrimental to human dignity.'[78]

This thesis affirms the human rights approach in recognising the experience of impairment as an aspect of a persons' identity. It is acknowledged that the experience of disability 'cannot be reduced to a singular identity: it is a multiplicity, a plurality.'[79] In particular, this thesis recognises the various different identities which suspects of crime may present with (for example, a woman with learning disabilities, a deaf-blind person in a wheelchair, or a member of a minority community who also has schizophrenia). Furthermore, it is also necessary to examine the array of social and economic factors which can influence a person's experience within the justice system and their ability to secure effective access to justice, and the prevalence of persons with dual diagnosis.[80]

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[74] Degener 2016 (Fn. 63), 41.

[75] Ibid, referencing Jenny Morris, *Pride against Prejudice* (New Society Publishers 1991) 10: 'However, there is a tendency within the social model of disability to deny the experience of our own bodies, insisting that our physical differences and restrictions are entirely socially created. While environmental barriers and social attitudes are a crucial part of our experience of disability—and do indeed disable us—to suggest that this is all there is to it is to deny the personal experience of physical or intellectual restrictions, of illness, of the fear of dying. A feminist perspective can help to redress this, and in so doing give voice to the experience of both disabled men and disabled women'.

[76] For a discussion on identity politics and the social model, see Tom Shakespeare and Nicholas Watson, 'The social model of disability: an outdated ideology?' (2002) 2 *Research in Social Science and Disability* 9. [Hereafter Shakespeare and Watson 2002].

[77] Degener 2016 (Fn. 63).

[78] Ibid, 43.

[79] Shakespeare and Watson (Fn. 76), 29.

[80] See Michael Timms, 'Dual Diagnosis in Mental Health' in Suzanne Quinn and Bairbre Redmond (eds.), *Mental Health and Social Policy in Ireland* (University College Dublin Press 2005) 130.

3.4.2 Committee on the Rights of Persons with Disabilities

Similar to the UN Convention on the Rights of the Child, which was introduced in 1990,[81] the CRPD has a specific quasi-judicial Committee which is tasked with reviewing State Parties implementation and compliance with the Convention.[82] All States Parties to the CRPD are required to submit regular reports on how the rights are being implemented. This process is carried out within two years of the State's ratification, and every four years thereafter.[83] The Committee on the Rights of Persons with Disabilities consists of independent experts – serving in their personal capacity – who provide an international forum for the sharing of ideas.[84] The members of the Committee are elected by States Parties and efforts must be made to ensure equitable geographical distribution, representation of different forms of civilisation, legal systems, gender balance and the inclusion of experts with disabilities.[85] One of the most important roles of the Committee is the power to issue General Comments on the rights contained within the CRPD. As sources of soft law, they are among the most persuasive and informative sources of the CRPD and are particularly important tools for interpreting the rights and obligations within the treaty.

The Committee is permitted to consider complaints from individuals or groups of individuals from State Parties who claim to be victims of a violation of their rights. The Optional Protocol to the CRPD creates additional functions for the Committee such as conducting inquiries in relation to a State Party following information received pertaining to alleged violations on the part of the State.[86] Whilst this is a significant development,

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[81] United Nations, Convention on the Rights of the Child (1989) G.A. Res. 44/25.

[82] Optional Protocol, Article 1: '[a] State Party to the present Protocol recognizes the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.'

[83] Office of the High Commissioner for Human Rights, 'Committee on the Rights of Persons with Disabilities' (United Nations) <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> accessed 21 June 2018.

[84] CRPD, Article 34(3): 'The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States parties are invited to give due consideration to the provision set out in article 4.3 of the present Convention.'

[85] CRPD, Article 34(4). See Degener 2016 (Fn. 50), 39: The Committee consisted of 18 independent experts in 2016 and all apart from one were persons with disabilities.

[86] Optional Protocol, Article 6(2).

there are two concerns which are worth noting. First, the opportunity to make a complaint to the Committee is only available to individuals from States who have signed and ratified both the Convention and the Optional Protocol. Therefore, Irish citizens cannot make a complaint to the Committee until Ireland ratifies the Optional Protocol,[87] therefore diluting the potential effectiveness and the practical application of this instrument in Ireland.

The second concern, which applies where State Parties have ratified both the Convention and the Protocol, is that making a complaint to the Committee may not be a viable option for some victims of human rights violations, such as in cases where the individual has been deprived of their liberty. It is apparent that although the CRPD has expressly provided for the recognition of disability rights as a human rights issue, the problem of invisibility persists in some countries and/or sectors. For example, in many countries, persons with disabilities are still denied their right to liberty and subjected to guardianship or other similar legal regimes.[88] The problem of invisibility also exists within the criminal justice system with respect to persons with disabilities as suspects, defendants, prisoners, victims and witnesses of crime as is highlighted by the lack of statistical information regarding the prevalence of persons with disabilities navigating the criminal process.

In an Irish context, this problem is exacerbated by the lack of research documenting the prevalence of disability within the criminal justice system, as discussed in the previous Chapter. In regards to the right of access to justice and the ability to initiate proceedings before the UN Committee, the question of resources and legal aid must be considered. For example, in the case of a person who has been detained on the basis of their disability (either through a formal legal process such as guardianship or on an informal basis such as within their own home), they may not have sufficient resources to allow them to make a complaint to the Committee or know about the Committee in the first place. Therefore, it is argued that the influence of the Committee may be limited in the context of hearing

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[87] Ireland ratified the UN CRPD on the 20 March 2018, to date the Irish Government have not ratified the Optional Protocol. See Kitty Holland, 'Ratifying UN laws on disability without appeal option 'ridiculous'' *The Irish Times* (Dublin, 13 March 2018).

[88] See Committee on the Rights of Persons with Disabilities, *General comment No. 5 on living independently and being included in the community* (CRPD/C/GC/5, 27 October 2017) para 26: 'Even if no formal laws are in place, other persons, such as families, caregivers or local authorities, sometimes exercise control and restrict an individual's choices by acting as substitute decision makers.'

individual complaints, provoking a need to consider additional strategies and safeguards in this area.

One way to counteract this concern would be to enhance the role and visibility of civil society organisations and Disabled Persons' Organisations (DPOs) in States Parties to provide supports and assistance to individuals with disabilities. The Convention has afforded a voice to members of the disability community and has inspired many groups to engage in politics and advocacy at a national level, in keeping with the motto of the CRPD. Kanter has observed that many organisations have been set up around the world with people with disabilities as their leaders, to advance the position of persons with disabilities in their countries.[89] These organisations play an important role in ensuring compliance with the CRPD at a national level, as they can submit reports to the CRPD Committee on State Party compliance.[90] Civil Society organisations, including DPOs, are also invited to an annual forum ahead of the Conference of State Parties to the CRPD, to discuss and share experiences and perspectives on disability rights.[91] Therefore, the participation of civil society organisations will continue to play an important role in the disability rights framework, and can offer the necessary assistance to individuals alleging violations of their rights under the CRPD.

Although Ireland has finally ratified the CRPD, the Government have yet to announce their intention to ratify the Optional Protocol which would allow for the Committee to hear claims from or on behalf of individuals in respect of a violation of their rights.[92] A failure to ratify the Optional Protocol would inherently limit the mandate of the CRPD and calls into question Ireland's commitment towards advancing the rights of persons with disabilities.

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[89] Kanter 2014 (Fn. 12), 298.

[90] Human Rights Council, *Report of the Special Rapporteur on the Rights of Persons with Disabilities* (A/HRC/31/62, 2016) para 36: The UN Special Rapporteur on the Rights of Persons with Disabilities defines representative organisations of persons with disabilities as non-governmental membership based organisations, led and controlled by persons with disabilities, that they are recognised by those they represent, and that they operate as individual organisations, coalitions or umbrella organisations of persons with disabilities.

[91] Department of Economic and Social Affairs Division for Inclusive Social Development, 'List of Non-Governmental Organization Accredited to the Conference of States Parties' (United Nations) < https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2/list-of-non-governmental-organization-accredited-to-the-conference-of-states-parties.html> accessed 21 June 2018.

[92] Optional Protocol, Article 1.

This approach would also impact Article 13 on the right of access to justice (the main benchmark for this thesis), which includes the right to have 'effective access to the systems, procedures, information, and locations used in the administration of justice.'[93] As such, the ratification of the OP is necessary and crucial to the implementation of the CRPD in Ireland to ensure compliance with the provisions and also to enable individuals (or groups of individuals) to exercise their right of access to justice at an appropriate forum.

3.5 Relevance and Application of the CRPD to Criminal Justice

As opposed to introducing new rights, the CRPD reaffirms fundamental human rights such as the right to exercise capacity and equal access to justice. Kayess and French have argued that the CRPD has changed the broader framework of human rights in a fundamental way, by extending disability rights, as opposed to creating new ones.[94] The interconnectivity between the rights contained in the Convention is also important to note, as together they will help to shape domestic disability law and policy in State Parties. In regards to the rights of persons suspected of criminal behaviour or activity, their rights must be interpreted in line with (*inter alia),* the right of access to justice,[95] the right to equality and non-discrimination,[96] liberty and security of person,[97] and the right to legal capacity.[98] Therefore, in addressing the right of access to justice for persons with disabilities as suspects of crime, it is necessary to have regard to each of these rights and how they may be impacted within the pre-trial process.[99]

[93] Janet Lord and others (eds.), *Human Rights. Yes! Action and Advocacy on the Rights of Persons with Disabilities* (Human Rights Resource Center 2009) Chapter 12, para. 12.1. [Hereafter Lord and others 2009].
[94] Kayess and French (Fn. 8), 20.
[95] CRPD, Article 13.
[96] CRPD, Article 5.
[97] CRPD, Article 14.
[98] CRPD, Article 12.
[99] Each of these rights will be analysed further within the context of the pre-trial process throughout Chapters 4, 5 and 6. Further rights will also be addressed within the context of the discussion including Article 8 (Awareness-Raising), Article 15 (Freedom from torture or cruel, inhuman or degrading treatment or punishment), Article 17 (Protecting the integrity of the person), Article 21 (Freedom of expression and opinion, and access to information) and Article 25 (Health).

It is also important to acknowledge that the individual rights contained in the CRPD must not be considered in a vacuum. Article 3 sets out a list of eight guiding principles of the Convention, which are intended to guide the interpretation of the Convention,[100] and include:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women, and
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[101]

These general principles represent the framework of the entire Convention and must be used as an aid for interpreting and implementing each of the provisions. Therefore, in considering the meaning and application of each of the rights contained within the CRPD, it is necessary to have further regard to the guiding principles to ensure compliance with the overall tenor of the Convention.

[100] Anna Lawson, 'The UN Convention on the Rights of Persons with Disabilities and European Disability Law: A Catalyst for Cohesion?' in Oddný Mjöll Arnardóttir and Gerard Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 88.
[101] CRPD, Article 3.

3.5.1 Access to Justice

The right of access to justice is one of the fundamental guarantees of international human rights law and is protected under several human rights treaties,[102] and it is the fundamental right underpinning the discussion of this thesis. The concept of access to justice is integral to the rule of law, and the right to equality before the law which is enshrined in international human rights jurisprudence. The right was established under Article 7 of the Universal Declaration of Human Rights, which states that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.'[103] However, it was not until the CRPD was adopted that the right of access to justice was expressly articulated in international law.[104] Previous Conventions, such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights, recognised the equality of all persons before the law, but this did little to address the barriers people with disabilities face in accessing justice.

During the drafting process of the CRPD, there was 'considerable support […] for the inclusion in the convention of language that would guarantee persons with disabilities access to justice.'[105] However, the right of access to justice as it now appears in Article 13 only developed towards the end of the drafting negotiations.[106] By 2005, many States had voiced their support for the concept of access to justice within the court system, as well as the right to an effective remedy for persons with disabilities who have experienced discrimination.[107] Therefore, there was little to no objection or lobbying required for its inclusion.[108] The most important reason for the inclusion of a single provision concerning

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[102] Particularly with regard to the right to equality before the law, the right to equal protection under the law, and the right to be treated fairly by a tribunal or court.
[103] Universal Declaration of Human Rights, Article 7.
[104] Anna Lawson and Eilionóir Flynn, 'Disability and Access to Justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities' (2013) 4 *European Yearbook of Disability Law* 7, 21.
[105] Ibid, 354.
[106] For example, see Kanter 2003 (Fn. 2) for an account of the difficulties encountered during the debates on Article 12.
[107] Grant and Neuhaus 2012 (Fn. 21), 354.
[108] Ibid.

access to justice is that this is an overarching principle which impacts a variety of other rights, as discussed above.[109]

Article 13 articulates that all persons with disabilities have the right of access to justice in an equal manner to others.[110] Access to justice 'is a broad concept, encompassing people's effective access to the systems, procedures, information, and locations used in the administration of justice.'[111] Therefore, the right of access to justice is described as an overarching principle, which is of critical importance in the enjoyment of all other human rights.[112]

(i) The Meaning and Development of Article 13

Article 13 of the Convention provides:

> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[113]

[109] Ibid.
[110] CRPD, Article 13.
[111] Lord and others 2009 (Fn. 93) Chapter 12, para. 12.1.
[112] Ibid and also Eilionóir Flynn, 'Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law' (2013) 17(4) *The International Journal of Human Rights* 491, 499.
[113] CRPD, Article 13(1).

According to an implementation manual for the CRPD prepared by the World Network of Users and Survivors of Psychiatry, this Article places an onus on States to:[114]

1. Provide accommodation to people with psychosocial disabilities in investigations and court proceedings. Such accommodations may include access to support networks, avoidance of emotional provocation, and acceptance of non-conventional types of communication;
2. Repeal laws whereby persons with psychosocial disabilities are disqualified from being complainants or witnesses and;
3. Abolish provisions whereby the trials of persons with psychosocial disabilities are postponed indefinitely and replace them with provisions that protect the due process rights of persons with psychosocial disabilities.

In order to ensure that these requirements are satisfied, States have a duty to examine all domestic legislation and policies and revise where necessary to comply with Article 13. For persons with disabilities as suspects of crime, Article 13 prescribes the right to be treated equally, gain access to general courts services and to gain full access to the environment of a court which includes the provision of interpretation services or improving physical accessibility.[115] Accordingly, it is necessary for all States Parties to identify barriers within the criminal process (from the pre-trial stage through to imprisonment) and for all such barriers to be removed to ensure persons with disabilities can assert their rights on an equal basis with non-disabled suspects.

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[114] World Network of Users and Survivors of Psychiatry, *Implementation Manual for the United Nations Convention on the Rights of Persons with Disabilities* (2008) 17 <http://www.wnusp.net/documents/WNUSP_CRPD_Manual.pdf> accessed 21 June 2018.

[115] See Grant and Neuhaus 2012 (Fn. 21)

The final version of Article 13 developed out of draft Article 9, on equal recognition as a person before the law.[116] During the fourth session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, a number of States submitted proposals to strengthen the Access to Justice provision.[117] Costa Rica, for example, proposed a new article on access to justice at the fourth session of the Ad Hoc Committee.[118] In the Fifth Session of the Ad Hoc Committee, Costa Rica once again argued on behalf of a separate article on access to justice, as Article 9 was primarily concerned with legal capacity.[119] It was not until the Seventh Session of the Ad Hoc Committee that access to justice became an individual right within the draft Convention, and became Article 13. Israel made a number of recommendations regarding the procedural accommodations that could be provided for people with disabilities, and Chile proposed training for all court officials, police and prison officers.[120]

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[116] See Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (U.N. Doc. A/AC.265/2004/5, 9 June 2004) noting that Japan proposed the following addition to Article 9: 'Take appropriate and effective measures to eliminate physical... and communication barriers and to reduce understanding difficulty of persons with disabilities in order to exercise all rights in judicial procedure which are provided in the international Covenant on Civil and Political Rights.'

[117] Kevin Cremin, 'What Does Access To Justice Require? — Overcoming Barriers To Invoke The United Nations Convention On The Rights Of Persons With Disabilities' (2016) 11(2) *Frontiers of Law in China* 280, 283. [Hereafter Cremin 2016].

[118] Ibid: States Parties to this Convention shall recognize that the full and effective enjoyment by persons with disabilities of equality before the law shall require the modification, adjustment and flexible application of legal procedures, practice and rules, including rules of evidence. The States Parties [sh]all take immediate and effective measures to provide such accommodation which shall include:

1) provision of information in plain language and other formats accessible to persons with disabilities;
2) provision of personal assistance to understand legal procedures, practices and rules;
3) recognizing and facilitating access to alternative modes of communication and communication technology, including sign language and Braille;
4) tak[ing] all necessary measures to ensure [that] everyone whose rights and freedoms as recognized in this convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed in an official capacity.

[119] UN Convention on the Human Rights of People with Disabilities Ad Hoc Committee, *Daily summary of discussion at the fifth session* (vol. 6 no. 3, 26 January 2005) cited in Cremin 2016 (Fn. 105), 284.

[120] Cremin 2016 (Fn. 117).

Article 13 thus developed as a mechanism to provide additional supports for people with disabilities to exercise their rights as set out in the Convention.[121] Nevertheless, despite the debates regarding its status and wording, the final provision is "comparatively brief."[122] States parties are required to ensure accommodations and supports to enable people with disabilities in all facets of their daily lives. This may include accessible transportation and buildings, overcoming social barriers and barriers within the workplace, education and healthcare services. Within the criminal justice system, reasonable accommodation may extend to accessible police stations, courthouses, prisons, but also extends to ensuring accessible information is provided to people at all stages of the criminal process, such as providing the charge sheet in braille or providing access to a sign language interpreter during questioning.[123] Importantly, the duty to provide accommodations under Article 13 cannot be limited by the principle of unreasonableness owing to the burden such a duty would place on the State, financial or otherwise.[124]

(ii) The Duty to Provide Training: Article 13(2)

In order to ensure effective access to justice for persons with disabilities, Article 13(2) requires States to provide training to criminal justice agents to ensure realisation of the right.[125] Article 13 can therefore be regarded as a useful tool for criminal justice reform, as it provides a starting point for criminal justice agents.

> In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.[126]

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[121] Quinn and others (Fn. 5), 4: '[A]dded allowance (or "reasonable accommodation") may be necessary to make rights "real" for people with disabilities. This positive normative development offers great promise for persons with disabilities.'
[122] Cremin 2016 (Fn. 117), 285.
[123] Committee on the Rights of Persons with Disabilities, *Draft General Comment on equality and non-discrimination* (CRPD/C/GC/6, 26 April 2018) para 52.
[124] Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge 2016) 36.
[125] CRPD, Article 13(2).
[126] CRPD, Article 13(2).

This is arguably one of the most important provisions within the CRPD for the purpose of this thesis, as it goes beyond formal recognition of substantive rights (such as the right to a fair trial as per Article 6 ECHR), to consider how the rights of persons with disabilities can be realised in practice. The duty to provide training to police officers in particular will be discussed further in the following Chapter, but it is important to note at this point the significance of this particular provision and its potential to effect practical and meaningful reforms to the criminal pre-trial process.

3.5.2 Right to Equality and Non-Discrimination

One of the most important rights listed in the Convention, and among the most relevant for the purpose of this thesis is that of non-discrimination,[127] which describes discrimination as:

> Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[128]

The principle of non-discrimination under Article 5 is a fundamental component of human rights law and is essential to the exercise and enjoyment of the rights specifically contained within the CRPD.[129] In essence, this provision prohibits all discrimination against people with disabilities, which would include circumstances in which reasonable accommodations are not put in place for the individual.[130] Within the context of the criminal justice system,

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[127] See for example: Gerard Quinn and Eilionóir Flynn, 'Transatlantic borrowings: the past and future of EU non-discrimination law and policy on the ground of disability' (2012) 60(1) *The American Journal of Comparative Law* 23 and Daniel Moeckli, 'Equality and non-discrimination' in Daniel Moeckli and others (eds.), *International Human Rights Law* (Oxford University Press 2010) 189.

[128] CRPD, Article 5.

[129] See Committee on Economic, Social and Cultural Rights, *General comment No. 20: Non-discrimination in economic, social and cultural rights* (E/C.12/GC/20, 2 July 2009).

[130] CRPD, Article 5 provides for the right to equality and non-discrimination and provides for the elimination of discriminatory laws and policies for persons with disabilities.

this will be explored further with regards to the accommodations that should be put in place to allow suspects with disabilities to participate on an equal basis with others.[131]

In keeping with the ethos underpinning the social model, the concept of reasonable accommodation has also been enshrined within the CRPD.[132] This principle is an inherent aspect of the right of non-discrimination, and is an interpretive principle which applies to all of the rights contained within the CRPD.[133] Article 2 of the Convention defines reasonable accommodation as:

> [Any] necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment, or exercise, on an equal basis with others of all human rights and fundamental freedoms.[134]

The duty to ensure reasonable accommodation is one of the clearest examples of the paradigm shift brought about by the CRPD, and how it can affect real and meaningful change in practice. States Parties must ensure that all efforts are made to ensure persons with disabilities are reasonably accommodated in exercising their human rights,[135] including their rights within police stations as suspects, or as victims or witnesses of crime. Therefore, it is argued that the CRPD goes beyond broad statements of equality as it creates a legal responsibility for States Parties to ensure the equal enjoyment of rights for all persons with disabilities. Within the context of the criminal justice system,

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[131] See Chapter 4 for further discussion on the appropriate adult safeguard.

[132] CRPD, Article 2: '"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.' See Bryan Lee, 'The U.N. Convention on the Rights of Persons with Disabilities and Its Impact upon Involuntary Civil Commitment of Individuals with Developmental Disabilities' (2010) 44 *Columbia Journal of Law & Social Problems* 393.

[133] Report of the Office of the United Nations High Commissioner for Human Rights, Equality and non-discrimination under article 5 of the Convention on the Rights of Persons with Disabilities (A /HRC/34/26, 9 December 2016) para 27.

[134] CRPD, Article 2.

[135] See Janet Lord and Rebecca Brown, 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities' in Marcia Rioux, Lee Ann Basser, and Melinda Jones (eds.), *Critical perspectives on human rights and disability law* (Martinus Nijhoff 2011) 273; Anna Lawson, 'People with psychosocial impairments or conditions, reasonable accommodation and the Convention on the Rights of Persons with Disabilities' (2008) 26 *Law in Context: A Socio-Legal Journal* 62; Frédéric Mégret and Dianah Msipa, 'Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality' (2014) 30(2) *South African Journal on Human Rights* 252.

incorporating a disability rights-based perspective requires States Parties to therefore look beyond procedural guarantees to holistically examine the safeguards and supports necessary to enable all suspects to participate in their case, such as the provision of reasonable accommodations (for example an appropriate adult safeguard which will be further discussed in Chapter 5).

The failure to provide reasonable supports was recently considered by the UN Committee on the Rights of Persons with Disabilities in the case of *Noble v Australia*.[136] Mr Noble, a man with an intellectual disability, was found unfit to stand trial in relation to alleged sexual assaults in 2001 and was subsequently incarcerated for almost a decade.[137] Mr Noble subsequently brought a case to the UN Committee in 2016, claiming, *inter alia*, that his rights pursuant to the CRPD had been violated.[138] In acknowledging the 'irreparable psychological effects that indefinite detention may have on a detained person',[139] and found that such detention amounted to inhuman and degrading treatment under Article 15.[140] The Committee also found that the applicant's right to a fair trial was suspended (on account of being found unfit to stand trial),[141] which thereby deprived him of the rights outlined under Article 5 of the CRPD.[142] Commenting on the duty to provide reasonable supports or accommodations, the Committee found that the State party did not provide any such supports to support Mr. Noble to exercise his legal capacity.[143] In particular, the Committee pointed to Article 12(3) which provides that States parties are required to provide access to supports to enable individuals to exercise their right to legal capacity.[144]

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[136] Committee on the Rights of Persons with Disabilities Decision: Communication No 7/2012, 16th session, UN Doc CRPD/C/16/D/7/2012 (15 August-2 September 2016) ('Noble v Australia').

[137] Piers Gooding, Bernadette McSherry, Anna Arstein-Kerslake and Louis Andrews, 'Unfitness to stand trial and the indefinite detention of persons with cognitive disabilities in Australia: Human rights challenges and proposals for change' (2016) 40 Melbourne University Law Review 816, 818. [Hereafter Gooding and others].

[138] Fiona McGaughey, Tamara Tulich and Harry Blagg. 'UN decision on Marlon Noble case: Imprisonment of an Aboriginal man with intellectual disability found unfit to stand trial in Western Australia' (2017) 42(1) Alternative Law Journal 67.

[139] *Noble v Australia* para 8.9. See also Gooding and others (fn. 72)

[140] CRPD, Article 15(1): 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.'

[141] Pursuant to the *Mentally Impaired Defendants Act* 1996 (WA).

[142] *Noble v Australia* para 7.9: 'However, in the present case, the Committee finds that the author has sufficiently substantiated the fact that the Act has had a direct impact on the enjoyment of his rights and therefore considers his claim under article 5 (1) of the Convention admissible.'

[143] Ibid para 8.4.

[144] CRPD, Article 12(3).

Finally, the Committee noted that requirement under Article 13(1) to ensure effective access to justice on an equal basis with others, which includes the provision of procedural and age-appropriate accommodations.[145] Therefore, the culmination of factors present in this case, including the indefinite detention and the failure to provide supports, resulted in a breach of Article 5, 12, 13, 14[146] and 15 of the CRPD.[147]

The Committee on the Rights of Persons with Disabilities have also articulated the connection between the right to reasonable accommodation under Article 5 and the principle of human dignity which is recognised in the Preamble to the Convention.[148] In *X v Argentina*, the applicant had been detained in pre-trial detention where he underwent spinal surgery.[149] In 2010, he suffered a stroke which resulted in a sensory balance disorder, a cognitive disorder and impaired visuospatial orientation.[150] Following this, an application was made to have the detention converted to a house arrest, in order to facilitate the applicant's outpatient treatment and to ensure access to an accessible living environment suited to his needs.[151] This application was rejected and he was transferred to the central prison hospital, where the Court ordered necessary arrangements should be made for the applicant to undergo rehabilitation therapy from there.[152] Following a number of years in which the applicant was transferred to different facilities, a case was brought before the UN Committee on the Rights of Persons with Disabilities, arguing (inter alia) that the determination regarding the appropriateness of holding him in a prison should take into account his health, the lack of infrastructure and the medical services and care available within this setting.[153] In regards to the circumstances of the case, the

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[145] CRPD, Article 13(1).
[146] The Committee also found that the detention was in violation of Article 14 (1) (b) which provides that 'the existence of a disability shall in no case justify a deprivation of liberty'.
[147] Noble v Australia para 8.10.
[148] CRPD, Preamble (a): 'Recalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.' See also Delia Ferri, 'Reasonable accommodation as a gateway to the equal enjoyment of human rights: from New York to Strasbourg' (2018) 6(1) Social Inclusion 40, 42.
[149] Committee on the Rights of Persons with Disabilities: Communication No. 8/2012, Eleventh session, CRPD/C/11/D/8/2012 (31 March–11 April 2014) ('X v Argentina') para 2.1.
[150] Ibid.
[151] Ibid para 2.3: 'Accordingly, he claimed that house arrest was the mode of detention most compatible with his treatment, since at home he had a trusted person to help him with daily tasks, facilities adapted to his disability and easy access to the FLENI Institute where he could undergo rehabilitation.'
[152] Ibid para 2.6.
[153] Ibid para 3.2.

Committee found that the lack of accessibility in place, coupled with the lack of reasonable accommodations, the detention was thereby incompatible with Article 17, which ensures respect for physical and mental integrity on an equal basis with others.[154]

Both of these cases, *Noble v Australia and X v Argentina,* illustrate the fundamental importance of the right to equality and non-discrimination pursuant to Article 5. In particular, they reaffirm the importance of providing reasonable accommodations to enable persons with disabilities to exercise their rights on an equal basis with others. The issues presented in both cases further demonstrate the cross-cutting nature of Article 5 and how it cannot be considered in isolation; it must be considered in conjunction with all of the other rights included within the CRPD including the rights of access to justice (Article 13), equal recognition before the law (Article 12), liberty (Article 14) and the right to be free from torture, cruel, inhuman or degrading treatment or punishment (Article 15).

3.5.3 The Right to Liberty

The right to liberty and security of the person is protected in Article 14 of the CRPD, which prohibits deprivation of liberty on disability-related grounds:

> States Parties shall ensure that persons with disabilities, on an equal basis with others:
> a) Enjoy the right to liberty and security of person;
> b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.[155]

This right reaffirms the well-established right to liberty which already appeared in international human rights laws, but reappears within the Convention as a disability-specific right. Article 14 is a non-discrimination provision; it guarantees the basic right to liberty and security of person to those with disabilities on an equal basis with others.

[154] Ibid para 8.6
[155] CRPD, Article 14(1).

Furthermore, it ensures that persons with disabilities who have been deprived of their liberty are afforded the same guarantees as others under international human rights law. During the drafting of the Convention, it was initially thought that there was little need to provide for a right to liberty, as pre-existing rights to liberty already applied to people with disabilities.[156] However, the inclusion of an express right to liberty and security of person is particularly pertinent as statistically, persons with disabilities have experienced higher rates of institutionalisation and deprivations of their liberty based on the existence of impairment,[157] as discussed in the previous Chapter.

As opposed to other rights in the Convention, Article 14 is also subject to immediate effect and is not subject to the clause of progressive realisation,[158] owing to the nature of the right and the fact that it is already well-established in international human rights law. According to the CRPD Committee in their Guidelines on Article 14, the CRPD includes an absolute prohibition of detention on the basis of impairment:

> [T]he Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others. This practice is incompatible with article 14; it is discriminatory in nature and amounts to arbitrary deprivation of liberty.[159]

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[156] Amnesty International Ireland, *Submission to the Interdepartmental Group to examine the issue of people with mental illness coming into contact with the criminal justice system* (Amnesty, 25 May 2012).
[157] Mental health laws (for example the *Mental Health Act* 2001) allows for the deprivation of liberty for care, observation or treatment.
[158] For example, Article 4(2) of the CRPD is subject to progressive realisation: 'With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.'
[159] Committee on the Rights of Persons with Disabilities, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities* (Adopted during the Committee's 14th session, September 2015) para. 6. [Hereafter Guidelines on Article 14].

This has led to considerable debate about whether perceived "dangerousness" can continue to be used to justify detention where an individual is seen to be at risk to themselves or others. According to the above statement, legislation permitting deprivation of liberty on the basis of dangerousness will be found to be incompatible with Article 14 as such an approach violates the right to non-discrimination.[160] As preventative detention is no longer permissible on the basis of dangerousness associated with disability, this raises a number of questions for the purpose of this thesis; specifically in regards to the discretionary powers afforded to the police to detain an individual in custody on the grounds of risk.[161]

For persons who have been deprived of their liberty unlawfully, Article 14(2) provides:

> States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.[162]

This essentially means that if a person with a disability is deprived of their liberty through any process (civil or criminal); they are entitled to due process guarantees which are available to all individuals under international human rights law, and shall be treated in line with the objectives and the principles as set out in the Convention.[163] In the absence of a right to bring a case before the CRPD Committee in Ireland (due to the failure to ratify the Optional Protocol),[164] individuals who are seeking to enforce their right to liberty will be forced to seek recourse in the Irish Courts or the ECtHR under Article 5. This creates a serious concern for the purpose of ensuring compliance with the CRPD and respect for the rights of persons with disabilities, as Article 5 permits deprivations of liberty for persons

[160] Ibid.
[161] *Mental Health Act* 2001, s. 12.
[162] CRPD, Article 14(2).
[163] Gerard Quinn, 'A Short Guide to The United Nations Convention on The Rights of Persons with Disabilities' (2009) 1 *European Yearbook of Disability Law* 89.
[164] See page 14 (Fn. 70).

who are of unsound mind.[165] Despite the strong safeguards read into Article 5 by the ECtHR, there remains a clear tension between the right to liberty as enshrined in the ECHR and the CRPD.[166]

3.5.4 Right to Legal Capacity

One of the hallmark provisions in the CRPD is Article 12, which provides that people with disabilities are entitled to equal recognition before the law and requires States Parties to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[167] This right includes both the ability to hold rights and to be an actor under the law (to be able to exercise such rights, for example the right to vote).[168] Capacity, in the legal sense, is a threshold requirement for persons to have the power to make enforceable decisions for themselves.[169] As such it is seen as one of the most influential rights in the Convention, particularly because 'it challenges literally centuries of legal practice which may now be directly contrary to Article 12.'[170]

One of the most important implications of Article 12 is in respect of culpability and criminal responsibility. According to a recent submission to the Subcommittee on Prevention of Torture for Thematic Discussion on Mental Health and Places of Deprivation of Liberty, persons with psychosocial disabilities – as persons with full legal capacity, can be held accountable for their actions through civil and criminal processes.[171] This is because Article 12 explicitly recognises the legal capacity rights of persons with disabilities on an equal basis with others 'in all aspects of life.'[172] In interpreting the text of the CRPD and in

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[165] See page 5.
[166] It is worth noting however that the ECtHR have previously indicated a willingness to apply the CRPD, in the case of *Glor v Switzerland* App no. 13444/04 (ECHR, 30 April 2009) wherein the Court commented that the text of the CRPD represented both the European and universal consensus on the rights of persons with disabilities.
[167] CRPD, Article 12(2).
[168] Elionóir Flynn and Anna Arstein-Kerslake, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32(1) *Berkeley Journal of International Law* 124, 127.
[169] Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law:* Capacity (Dublin, LRC CP 37 2005) para. 1.01.
[170] Nandini Devi, Jerome Bickenbach and Gerold Stucki, 'Moving towards substituted or supported decision-making? Article 12 of the Convention on the Rights of Persons with Disabilities' (2011) 5 *European Journal of Disability Research* 249.
[171] World Network of Users and Survivors of Psychiatry, *Submission to the Subcommittee on Prevention of Torture for Thematic Discussion on Mental Health and Places of Deprivation of Liberty* (22-23 February 2012) 4 <http://www.wnusp.net/documents/2012/WNUSP-IDA-SPTSubmissionFinal_small_text.doc> accessed 21 June 2018.
[172] CRPD, Article 12(2).

particular the rights to non-discrimination and the right to capacity, it is argued that there can be no justification for legal processes which provide a ‘separate track’ exclusively for people with disabilities (such as mental health laws).[173] As stated in the CRPD Committee’s Guidelines on Article 14, all persons (including persons with disabilities) have a duty to do no harm, and as such:

> Legal systems based on the rule of law have criminal and other laws in place to deal with the breach of this obligation. Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.[174]

In this respect, it is argued that the right to legal capacity under Article 12 is the benchmark from which other rights are engaged. In keeping with the right to exercise personal decision-making, it is implied that all persons have the freedom to take risks and make mistakes on an equal basis with others.[175] This applies even in cases where an individual has committed a criminal offence and as such, they must be held accountable on an equal basis with others. However, in keeping with the human rights model of disability as outlined above, it would be remiss to overlook the relevance of one’s impairment in this regard and how an individual might be disadvantaged by the traditional criminal process.[176] It is therefore imperative that appropriate and reasonable accommodations are made to address the systemic barriers within the criminal justice system which limit the participation of persons with disabilities, and provide suitable supports to enable all suspects to participate within their case.

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[173] Guidelines on Article 14 (Fn. 127), para. 14.
[174] Ibid.
[175] Ibid.
[176] See Degener’s human rights model as discussed above, see section 4.1.

To date, the application of Article 12 to the criminal justice system has mostly considered the potential implications of this provision to capacity-based criminal defences, such as fitness to plead, insanity and diminished responsibility.[177] While this thesis does not engage in this debate, it is important to acknowledge the possible implications which may arise on foot of a finding that an individual lacks capacity within the pre-trial process. According to the Criminal Law (Insanity) Act 2006,[178] following a finding that an individual is unfit to plead, the Court shall adjourn the proceedings[179] and commit him/her to the Central Mental Hospital in Dundrum (Ireland's only National Forensic Mental Hospital).[180] Until such time as medical evidence is produced which proves that the individual is fit to be tried, their trial cannot take place – meaning their guilt or innocence remains undetermined and they may be deprived of their right to liberty during this time. As such, their rights of access to justice (under Article 13) and liberty (Article 14) are essentially put on hold until such time as they are deemed to have capacity or found fit to be tried. It is in this way that capacity is intrinsically linked to the successful realisation of a multitude of other human rights and must be considered holistically in light of the overall spirit and tenor of the CRPD.

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[177] See Piers Gooding and Charles O'Mahony, 'Laws on unfitness to stand trial and the UN Convention on the Rights of Persons with Disabilities: Comparing reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122; Christopher Slobogin, 'An End To Insanity: Recasting The Role Of Mental Disability In Criminal Cases' (2000) 86 *Virginia Law Review* 1199; and Michael Perlin, ''God Said to Abraham/Kill Me a Son': Why the Insanity Defense and the Incompetency Status are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 *American Criminal Law Review* 477.

[178] Section 4(2), Criminal Law (Insanity) Act 2006: 'An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to—

(a) plead to the charge,
(b) instruct a legal representative,
(c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,
(d) make a proper defence,
(e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or
(f) understand the evidence.'

[179] Section 4(3)(b), *Criminal Law (Insanity) Act* 2006.

[180] Ibid.

3.6 Conclusion

This Chapter has focused on the legal protections afforded to persons with disabilities in regional (ECHR) and international (CRPD) human rights law and highlighted some of the conflict and divergences in standards between the two instruments. Having charted the development of disability human rights, from the initial invisibility of disability within human rights law, to the "nothing about us without us" movement, this Chapter sought to encapsulate the progression of the law and the jurisprudence of the Courts with respect to disability-related matters. As discussed in Chapter Two, persons with disabilities were traditionally viewed as objects of charity, medical treatment and social protection in accordance with the medical model of disability. However, with the adoption of the CRPD, persons with disabilities are now seen as subjects with rights, who are capable of claiming those rights and making decisions for their lives free of interference from others.[181] By recognising persons with disabilities as rights holders, the CRPD has in turn recognised the inherent dignity of all persons living with a disability.[182]

While the CRPD has become the defining legal instrument in the area of disability rights, it remains to be seen whether it will have the same influence as the ECHR, especially because it lacks the authority of a transnational court such as the ECtHR. Therefore, the role of the CRPD Committee may prove less persuasive and effective in practice than its regional counterpart in the settlement of inter-state or individual cases. In the context of Ireland, the incorporation of the ECHR into domestic law has solidified its status as a binding source of law. In contrast, the failure of the Irish Government to ratify the Optional Protocol of the CRPD undermines the status of the Convention and prevents persons with disabilities from bringing their case to the Committee for alleged violations of their rights under the Convention. The only possible avenue for the enforcement of disability rights is to initiate a case in the Irish courts and the ECtHR thereafter (once all domestic remedies have been exhausted). This presents a number of important considerations and challenges from an access to justice perspective, as it is both expensive and time-consuming to seek justice through the courts. Secondly, there is no guarantee that the text of the CRPD and

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[181] See United Nations, 'Convention on the Rights of Persons with Disabilities' (PowerPoint presentation) <www.un.org/disabilities/documents/ppt/crpdbasics.ppt> accessed 20 June 2018.
[182] Ibid.

its corresponding jurisprudence (General Comments, Concluding Observations in relation to States Parties compliance) will be upheld by domestic courts as international law is not afforded the same weight as Irish law or the ECtHR. There is, therefore, a compelling need to ratify the OP to ensure that persons with disabilities can enforce their rights under the CRPD and in particular their right of access to justice under Article 13.

The widespread ratification of the CRPD reflects a willingness on behalf of countries and governments, to recognise the rights of persons with disabilities, which, though overdue, is welcome. However, the text of the CRPD alone will not change human rights practices suddenly, 'nor will it change attitudes about people with disabilities overnight.'[183] However, one cannot deny the influence and impact of the Convention to date and the potential impact it may have on the implementation of human rights treaties more generally.[184] States Parties to the Convention are now obliged to review all existing national laws, policies and programmes to ensure compliance with the Convention's provisions. According to Article 4, States must 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.'[185] Furthermore, the influence of the CRPD, arising from its participatory drafting history and the stringent reporting and monitoring requirements,[186] ensures that it will continue to shape and inform laws relating to the rights of persons with disabilities.

[183] Kanter 2014 (Fn. 12), 298.
[184] Ibid.
[185] CRPD, Article 4.
[186] Kanter 2014 (Fn. 12), 298.

CHAPTER 4

Perspectives from the Front Line: Training and Awareness-Raising, the Investigation and Arrest

4.1 Introduction

This Chapter will provide a critical account of the arrest process, the powers of police officers and the barriers to justice which may arise for suspects with disabilities. Section one will discuss the age of de-institutionalisation and consider the increased contact between persons with disabilities and the criminal justice system, specifically the police. Following this, section two will then begin to focus on the barriers to justice experienced by persons with disabilities from their initial contact with the police, usually in the form of an arrest. Section three outlines the practical barriers which arise when a police officer arrests a person with a disability. It will acknowledge that while the role of police officers is to prevent and investigate crimes, and to bring criminals to justice,[187] it is also imperative that they seek to maintain and uphold the human rights of all persons, including suspects of crime. In this regard, it is argued that the UN CRPD may require further actions on behalf of the Gardaí to protect and provide for the rights of suspects with disabilities in police custody.

Throughout this Chapter, it is argued that clear and effective communication between the arresting officers and the suspect forms the basis of the arrest stage. In the event that a suspect cannot understand the reasons for their arrest, their right to remain silent or their right to consult a solicitor, then this could have serious consequences for their right to a fair trial and a range of fundamental human rights, as will be discussed in this Chapter.

[187] *Garda Síochána Act* 2005, s. 7(1).

4.1 De-Institutionalisation: Increased Contact between Persons with Disabilities and the Police

Since 1984, there has been an emphasis on de-institutionalisation in Ireland.[188] As discussed, in Chapter 2, the use of public asylums for the detention of persons with disabilities and mental illnesses was widespread throughout Ireland as a means of maintaining social order and control. The shift away from this model in the late twentieth century followed the civil rights movement in the U.S and an increased recognition of human rights laws internationally.[189] In contrast to the asylum setting, community-based services were seen as a progressive alternative to treating people with disabilities. While this suggested a more humane approach, evidence indicates that while the numbers of people detained in asylums decreased, the numbers of people with disabilities within the prison population increased.[190] Essentially, the de-institutionalisation movement worldwide led to a 'fragmented, dislocated world of bedsits, housing projects, day centres or increasingly prisons and the criminal justice system.'[191] As a result, persons with disabilities are increasingly coming into contact with agents of the criminal justice system, especially police officers in the first instance.[192]

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[188] See Department of Health and Children, *Planning for the Future: Report of a Study Group on The Development of Psychiatric Services* (Dept. of Health and Children 1984). According to the Commission of Inquiry on Mental Illness Report 1966 (Department of Health 1966) there were 21,075 patients registered in psychiatric hospitals at the end of 1961, representing a hospitalisation rate of 7.3 per 1,000 population. Forty years later, the rates of hospitalisation were significantly lower, with an 80% reduction in the number of patients in psychiatric hospitals to 3,996 in 2002.

[189] Linda Teplin, 'Keeping the peace: police discretion and mentally ill persons' (2000) 244 *National Institute of Justice Journal* 8.

[190] Penrose's hypothesis suggests that there is an inverse relationship between the number of prisoners and the number of psychiatric beds within Europe. Lionel Sharples Penrose, 'Mental disease and crime: outline of a comparative study of European statistics' (1939) 18(1) *Psychology and Psychotherapy: Theory, Research and Practice* 1.

[191] Ian David Cummins, 'Policing and Mental Illness in the era of deinstitutionalisation and mass incarceration: A UK Perspective' (2013) 6(4) *International Journal of Criminology and Sociological Theory* 92, 98.

[192] Ronald Kessler and others, 'Prevalence and treatment of mental disorders, 1990 to 2003' (2005) 352(24) *New England Journal of Medicine* 2515. See also A Roughton, *An investigation into the operation of section 136 of the Mental Health Act 1983 in the West Midlands* (Report to the West Midlands Police, 1994) 4: Contact between the police and people with mental illnesses 'is forming a significant part of modern policing as more and more hospitals and other institutions close in favour of community care alternatives.'

4.2.1 The Role of the Police

While the police played a historically important role in facilitating State intervention during the age of institutionalisation,[193] their involvement with people with disabilities has only increased during the period of de-institutionalisation.[194] Brennan explains that while the closure of the asylums was broadly welcomed, it ultimately reduced the availability of accommodation for those whose behaviour and social realities place them at the fringe of society.[195] This ultimately resulted in a new wave of institutionalisation, whereby people were increasingly accommodated within the prison setting both in Ireland and elsewhere.[196] Referred to as "trans-institutionalisation" or Penrose's hypothesis,[197] this can be said to indicate a new means of controlling people with disabilities; but within the criminal justice system as opposed to the earlier confinement of persons within asylums.

Nowadays, when the Gardaí come into contact with someone who is experiencing a crisis, or who has a disability, they must make a judgment call as to whether the individual should be arrested and brought to the station, or if they should be admitted to a hospital for medical attention.[198] As such, following the de-institutionalisation movement, the role of police officers covers both criminal and welfare themes, for:

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[193] See Chapter 2, section 4.

[194] Stefan Priebe and others, 'Reinstitutionalisation In Mental Health Care: Comparison of Data on Service Provision from Six European Countries' (2004) 330(7483) *BMJ* 123 and H. Richard Lamb, 'Does Deinstitutionalization Cause Criminalization?: The Penrose Hypothesis' (2015) 72(2) *JAMA Psychiatry* 105.

[195] Damien Brennan, 'Mental Illness and the Criminalisation Process' in Deirdre Healy and others (eds.), *The Routledge Handbook of Irish Criminology* (Routledge 2015) 553. See also Damien Brennan, *Irish Insanity 1800-2000* (Routledge 2014). [Hereafter Brennan 2014].

[196] See: Brendan Kelly, 'Penrose's Law in Ireland: an ecological analysis of psychiatric inpatients and prisoners' (2007) 100(2) *Irish Medical Journal* 373; Alo Jüriloo, Lauri Pesonen and Hannu Lauerma, 'Knocking on prison's door: a 10-fold rise in the number of psychotic prisoners in Finland during the years 2005–2016' (2007) 71(7) *Nordic Journal of Psychiatry* 543 and Seth Prins, 'Does transinstitutionalization explain the overrepresentation of people with serious mental illnesses in the criminal justice system?' (2011) 47(6) *Community Mental Health Journal* 716.

[197] Ralph Slovenko, 'The Transinstitutionalization of the Mentally Ill' (2002) 29 *Ohio Northern University Law Review* 641.

[198] Brennan 2014 (Fn. 9), 553.

…where a mentally disordered person has committed an offence it is often an individual officer's discretion which is the primary determinant of whether the case becomes a crime matter or a welfare matter.[199]

Brennan explains that in these cases, the most convenient and less risky option for the garda is to arrest and detain the individual in the garda station, rather than admitting them to hospital.[200] There are a range of factors for the Gardaí to consider in such cases, including the likelihood that the individual will be released from the hospital due to an already over-stretched health care system.[201] In some situations, it may be the case that detaining the individual in the garda station, whereby a doctor can be called to assess the individual and their needs, may be the only way for the officers to help the individual in question, especially if the garda has reasonable suspicion to suggest that the individual has committed an offence.

The relationship between the police and people with disabilities, particularly the way in which police respond to the needs and vulnerabilities of such individuals, needs to be further examined. In particular, there is a need for further research to explore the use of police discretion and the numbers of people admitted to hospital by the police versus the number of people who are arrested and formally charged. It would also be interesting to note whether the perception of dangerousness or dangerous impairments (such as schizophrenia), would impact an officers' decision to charge in comparison to impairments not typically associated with dangerousness (intellectual disability).[202] Researchers have

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[199] William Bingley and Philip Bean, *Out of Harm's Way: National Association for Mental Health's (MIND's) Research into Police and Psychiatric Action under Section 136 of the Mental Health Act* (MIND Publications 1991) 3.
[200] Brennan 2014 (Fn. 9), 553.
[201] There is, however, evidence to suggest that in one disadvantaged Dublin area the local garda station is being used as a revolving door to persons with psychosocial disabilities, as alternative community arrangements are unable to meet the demand in the area. See David Looby, 'Mentally ill forced to turn to guards' (The Independent, 10 September 2016) <https://www.independent.ie/regionals/goreyguardian/news/mentally-ill-forced-to-turn-to-guards-35023565.html> accessed 13 June 2018.
[202] See: Judith McBrien and Glynis Murphy, 'Police and carers' views on reporting alleged offences by people with intellectual disabilities' (2006) 12(2) *Psychology, Crime and Law* 127 and Amy Watson, Patrick Corrigan and Victor Ottati, 'Police responses to persons with mental illness: does the label matter?' (2004) 32 *Journal of American Academy of Psychiatry and the Law* 378.

found that, in general, predicting dangerousness is imprecise;[203] therefore officers are reliant on their skills and knowledge to determine how to respond, i.e. whether it is necessary to arrest the individual or bring them to hospital. It is clear that further work is necessary in this regard to determine the ways in which police officers exercise their discretionary powers in respect of persons with disabilities.[204] As a first step, training and awareness-raising is necessary for all police officers to acquire the appropriate skills and knowledge in relation to identifying persons with disabilities.

4.2 Training and Awareness-Raising for Police Officers

Throughout the text of the CRPD, the only reference made to policing and the criminal justice system appears in Article 13, which pertains to access to justice.[205] The meaning of access to justice is expressed within this provision as a broad statement of equality which requires all States Parties to promote training for agents working in the justice system, including police officers.[206] This provision recognises that training is a key component to accomplishing the right of access to justice in practice.[207] When viewed holistically with other rights and duties, such as non-discrimination and reasonable accommodation,[208] Article 13 can be seen as an important transformative tool for achieving criminal justice reform. The need for awareness raising, education and training is further reflected in Article 8 which provides that States must promote awareness-training programmes regarding persons with disabilities and their inherent rights.[209]

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[203] See Thomas Litwack and Louis Schlesinger, 'Dangerousness risk assessments: Research, legal, and clinical considerations' in Allen Hess and Irving Weiner (eds.), *The Handbook of Forensic Psychology* (2nd edn., John Wiley and Sons 1999).

[204] Egon Bittner, 'Police discretion in emergency apprehension of mentally ill persons' (1967) 14(3) *Social problems* 278.

[205] CRPD, Article 13(1).

[206] CRPD, Article 13(2).

[207] Esme Grant and Rhonda Neuhaus, 'Liberty and Justice for all: The Convention on the Rights of Persons with Disabilities' (2012) 19 *ILSA Journal of International and Comparative Law* 347.

[208] Office of the United Nations High Commissioner for Human Rights, *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities* (A/HRC/37/25, 27 December 2017) [Hereafter OHCHR Report on Access to Justice] 5 para 15: 'Access to justice under the Convention is a cross-cutting right that should be interpreted in line with all its principles and obligations. In particular, article 13 should be read in conjunction with article 5 on equality and non-discrimination, to ensure that persons with disabilities enjoy access to justice on an equal basis with others. Access to justice requires enabling rights for persons with disabilities, in particular equal recognition before the law (art. 12), and accessibility, including multiple means of communication and access to information (arts. 9 and 21).'

[209] CRPD, Article 8(1)(d).

There are two main imperatives for implementing mental health training and disability awareness-raising for police officers. Firstly, training can be seen as one of the most practical and effective measures in combatting stigma and negative attitudes among police officers. This was recognised in the Report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on Article 13, wherein it is noted that attitudinal barriers affect access to justice for persons with disabilities.[210] These barriers 'stem from lack of awareness of the rights of, and appropriate practices for, persons with disabilities in the justice system.'[211] To overcome such barriers, and in keeping with States' Parties obligations under the CRPD,[212] the OHCHR recommends mandatory (and properly funded) training,[213] to address issues such as how to combat prejudices and stereotypes held against persons with disabilities.[214] Secondly, it is argued that the ability of officers to identify and respond to signs or symptoms of disability or persons in distress is the first step towards access to justice for suspects with disabilities, as will be argued further in Chapter 5.

An examination of State Parties Reports and Concluding Observations on behalf of the CRPD Committee has revealed an emphasis on police training and awareness-raising regarding disability. With respect to Australia, one of the first countries to ratify the Convention, the Committee expressed concern at the lack of training for judicial officers, legal practitioners and court staff, a lack of guidance on access to justice for persons with disabilities, and the lack of alternative communication supports.[215] Among their recommendations, standard and compulsory training modules were recommended for all criminal justice personnel, and for all persons with psychosocial disabilities to enjoy equal substantive and procedural guarantees as others.[216] To date, the Committee have recommend training in the following areas:[217]

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[210] OHCHR Report on Access to Justice (Fn. 22), 15 para 59.
[211] Ibid.
[212] CRPD, Article 13(2) and Article 8.
[213] OHCHR Report on Access to Justice (Fn. 22), 15 para 59.
[214] Ibid, 16 para 60.
[215] CRPD/C/AUS/CO/1, para 27-30.
[216] Ibid, para 29: 'In particular to ensure that no diversion program me s to transfer individuals to mental health commitment regimes or requiring an individual to participate in mental health services are implemented; rather, such services should be provided on the basis of the individual's free and informed consent.'
[217] OHCHR Report on Access to Justice (Fn. 22), 16 para 60.

- The barriers faced by persons with disabilities in accessing justice (Lithuania);[218]
- The rights contained in the CRPD, such as participation on an equal basis with others (Slovakia, Armenia, Bosnia and Herzegovina, Republic of Moldova, Colombia and Ethiopia);[219]
- The Provision of procedural accommodations (Oman and Slovakia), and;[220]
- Overcoming gender and disability-based stereotypes (Cyprus).[221]

In their concluding observations in respect of Luxembourg, the Committee recommended 'mandatory and ongoing capacity-building programmes' to include training for law enforcement personnel on the provisions of the Convention.[222] In their Draft General Comment on equality and non-discrimination, the Committee have also provided a broad overview for States Parties in respect of Article 13(2), which includes appropriate training in the following areas:

- The complexities of intersectionality and that persons should not be identified solely on the basis of their impairment;[223]
- Diversity among persons with disabilities and their individual requirements to ensure their effective access to all aspects of the justice system on an equal basis with others;[224]
- The individual autonomy of all persons and the importance of legal capacity;[225]
- The centrality of effective and meaningful communications to successful inclusion;[226]
- Measures adopted to ensure the effective training of personnel (including lawyers, judges, prison staff, sign language interpreters and the police inter alia) on the rights of persons with disabilities.[227]

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[218] CRPD/C/LTU/CO/1, para 28.
[219] CRPD/C/SVK/CO/1, para 42(a); CRPD/C/ARM/CO/1, para 22; CRPD/C/BIH/CO/1, para 25; CRPD/C/MDA/CO/1, para [27 (b)]; CRPD/C/COL/CO/1, para 35(d); and CRPD/C/ETH/CO/1, para 30.
[220] CRPD/C/OMN/CO/1, para 28(a); CRPD/C/SVK/CO/1, para 42(b).
[221] CRPD/C/CYP/CO/1, para 18.
[222] CRPD/C/LUX/CO/1, para 27(b).
[223] CRPD/C/GC/6, para 55(a). Awareness-raising in respect of intersectionality should be relevant to particular forms of discrimination and oppression.
[224] Ibid, para 55(b).
[225] Ibid, para 55(c).
[226] Ibid, para 55(d).
[227] Ibid, para 55(e).

Aside from the above objectives, there are no further guidelines to States Parties in regards to the nuances of providing training in line with the CRPD, including issues relating to combatting stigma and false stereotypes, de-escalation, providing reasonable accommodations and respecting the rights contained within the CRPD, such as the importance of legal capacity and how to give effect to this right even in difficult situations (for e.g. cases where a vulnerable person rejects legal advice). In the absence of practical guidance, it is useful to examine existing training programmes provided to police officers to ensure they have the basic skills and knowledge in relation to disability and mental health.

4.2.1 Mental Health Training for Police Officers

The importance of providing training to police officers to respond appropriately to persons in distress is well-documented. According to Teplin, police officers who have not received training in regards to serious mental health could potentially respond more punitively than is necessary.[228] In the context of the CRPD and its application to the criminal justice system in Australia, it was said that insufficient police training is linked with higher than average arrest rates for people with disabilities.[229]

There are a number of mental health training programmes which have been developed for police officers around the world. Among the most well-known is the Crisis Intervention Team (CIT) training which was developed in Memphis Tennessee in 1988.[230] The aim of this training is to improve the interaction between police officers and persons experiencing a mental health crisis with a focus on communication skills, de-escalation and building partnerships with local mental health services.[231] To participate in this training, police

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[228] Linda Teplin, 'Keeping the peace: Police discretion and mentally ill persons' (2000) 1 National Institute of Justice 9, 12.
[229] Disability Rights Now, *Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) 77, [209] <http://www.afdo.org.au/media/1210/crpd-civilsocietyreport2012-1.pdf> 12 June 2018.
[230] Also referred to as the Memphis Model. See: Randolph Dupont and Sam Cochran, 'Police response to mental health emergencies: Barriers to change' (2000) 28 *Journal-American Academy of Psychiatry and the Law* 338.
[231] Michael Compton, Masuma Bahora, Amy Watson and Janet Oliva, 'A comprehensive review of extant research on crisis intervention team (CIT) programs' (2008) 36(1) *Journal of the American Academy of Psychiatry and the Law Online* 47.

officers are chosen for their empathy and communication skills.[232] Once they have completed the training (40 hours), officers engage in mental health crisis intervention alongside their regular police duties.[233]

This model has been found to improve the attitudes of police officers towards persons with psychosocial disabilities, while also improving the overall anxiety experienced by police officers in responding to challenging cases.[234] Further studies also report that officers who have received training in this model are less likely to exercise force in response to challenging persons:

> As such, it can be expected that in encounters between CIT trained officers and people with mental illness, violence and injury will be less likely than in similar encounters with non-CIT trained officers. This would suggest that CIT training could be particularly powerful in the prediction of the use of force.[235]

Interestingly, the advantages of collaboration between the police and mental health services (as per the above model) were recognised in a report published by the Irish Mental Health Commission and An Garda Síochána.[236] This report recognises that on top of training programmes, collaboration between the police and specialist services is critical for successful response.[237] The CIT model was thereby explored as a potential model of best practice for Ireland, however the report ultimately recommended that different models should be adopted depending on the size of the catchment area (for e.g. single mobile

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[232] Canadian Mental Health Association, *Study in Blue and Grey: Police Interventions with People with Mental Illness: A Review of Challenges and Responses* (Canadian Mental Health Association 2003) [Hereafter Canadian Mental Health Association] 12.
[233] Mental Health Commission and An Garda Síochána, *Report of Joint Working Group on Mental Health Services and the Police* 2009 (Dublin 2009) 74. [Hereafter Mental Health Commission and An Garda Síochána].
[234] Jennifer Teller, Mark Munetz, Karen Gil and Christian Ritter, 'Crisis intervention team training for police officers responding to mental disturbance calls' (2006) 57(2) *Psychiatric Services* 232.
[235] Melissa Morabito and others, 'Crisis intervention teams and people with mental illness: Exploring the factors that influence the use of force' (2012) 58(1) *Crime & Delinquency* 57, 61.
[236] Mental Health Commission and An Garda Síochána (Fn. 47), 72: 'There is a growing body of evidence to indicate that close collaboration and formal liaisons between the police and mental health systems facilitate a more effective response to psychiatric emergencies in the community. Close collaboration has been shown to result in more positive outcomes for service users, resulting in a reduction in homelessness, a reduction in re-arrests and a reduction in inappropriate criminalisation.'
[237] Ibid.

crisis teams work better in smaller cities).[238] Further recommendations outlined in the report include the introduction of a comprehensive approach to service delivery to ensure all service users can be provided for, the introduction of specific policies to enable all persons to gain access to appropriate treatments, and for the availability of easily accessible mental health resources.[239]

The recent ratification of the CRPD creates a newfound impetus to address these issues, especially in regards to training and awareness-raising. In keeping with the ethos of the Convention and the "nothing about us, without us" motto, it is further argued that a joint police and mental health model should include the expertise and experiences of service users themselves. As part of the CIT training, for example, officers receive training from a number of relevant stakeholders including mental health professionals, family advocates, consumer groups/service users and police officers;[240] thereby drawing on the wide range of experience and expertise from all parties.

4.2.2 Current Training for An Garda Síochána

The existing training programme in Ireland consists of a two year course at the Garda College in Templemore (and accredited by the University of Limerick), leading to a BA in Applied Policing for Garda Trainees.[241] The course includes an emphasis on both theory and practice, with subjects including the Foundations of Policing, Crime and Incident Policing, Policing with Communities, Officer and Public Safety, Station Roles and Responsibilities and Law and Procedures.[242] As part of the module Policing with the Communities, "mental illness awareness" is taught, which includes an overview of different categories of mental illness, the powers of the Gardaí, and transporting persons with mental illness.[243] As part of the assessment for this module, Trainee Gardaí are given a problem-based learning task in respect of an individual who may be suffering from one or more of the following:

[238] Ibid, 77.
[239] Ibid, 84.
[240] Canadian Mental Health Association (Fn. 46), 14.
[241] An Garda Síochána, 'The Garda College' <https://www.garda.ie/en/Careers/The-Garda-College/> accessed 10 June 2018.
[242] Ibid.
[243] Freedom of Information Request (FOI-000079-2018, 12/03/2018), see Appendix 1.

- Alzheimer's and Dementia;
- Depression/Bi-polar Disorder;
- Anxiety-Panic Attacks;
- Schizophrenia Obsessive Compulsive;
- Asperger's Syndrome and Autism;
- Self-Harm.[244]

To complete the task, Gardaí are required to research each of the aforementioned conditions and detail how they would 'deal with the potential challenges faced when presented with an individual displaying the characteristics of these mental illnesses.'[245] They are then required to research the relevant contact services for each illness and compile all of this information on a smartcard, before presenting to the class.[246] To date, a FOI request by the author has found that 1,850 trainee Gardaí have completed this module (out of 14,000 Gardaí).[247] It is important to acknowledge that this training has been introduced recently, thereby explaining the relatively low figure. There are no further details provided, therefore it is unclear if training is provided to those Gardaí who have qualified before the introduction of this module.

In regards to interviewing techniques, the 'vulnerability of suspects, witnesses and injured parties' is said to be embedded into all training courses.[248] While the difficulties associated with interrogating vulnerable suspects is addressed further in Chapter 6, it is useful to acknowledge here that training is provided to Gardaí in relation to the effect of memory during interviews, with a focus on enhanced cognitive interview skills.[249] This training

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[244] An Garda Síochána, Freedom of Information Request FOI-000230-2017 (14 June 2017) <https://www.garda.ie/en/Freedom-of-Information/Decision-Log/FOI-000230-2017-Decision.pdf> Accessed 13 June 2018.
[245] Ibid.
[246] Ibid.
[247] Recent investment in An Garda Síochána has seen an increase in garda numbers to 14,000 from 13,156 in June 2017. See: Conor Gallagher, 'Budget 2018: Extra 800 gardaí will bring force strength to 14,000' (The Irish Times, 10 October 2017) <https://www.irishtimes.com/news/crime-and-law/budget-2018-extra-800-garda%C3%AD-will-bring-force-strength-to-14-000-1.3251027> accessed 9 June 2018 and Freedom of Information Request (FOI-000238-2017, 19 June 2017) <https://www.garda.ie/en/Freedom-of-Information/Decision-Log/FOI-000238-2017-Decision.pdf> accessed 10 June 2018.
[248] FOI Request (n 53).
[249] Ibid.

incorporates further training in regards to mental illness and personality disorders, although no further information is available in this respect.

While training and awareness-raising is critical for police officers, it is important to acknowledge that further cross-partnership is necessary between An Garda Síochána and mental health services. This issue was previously raised in a 2009 report on mental health services and the police in Ireland, wherein it was stated that 'training on its own will not be effective unless the liaison partnership models of community mental health services are established.'[250] A Memorandum of Understanding was signed between An Garda Síochána and the Health Service Executive in 2010, which further recognised the need for an interagency approach in responding to cases involving the removal or return of persons to an approved centre under the Mental Health Act.[251] The recognition of a cross-partnership approach is very positive, however, to date there is no such agreement in place to provide a similar approach to vulnerable suspects who have been arrested and taken into Garda custody.[252]

Going forward, it will be interesting to note how the CRPD Committee envisions disability-rights police training in line with the Convention and Article 13. To date, the issue of training has featured extensively across the Concluding Observations in relation to States Parties compliance, but the recommendations are still somewhat underdeveloped. Nevertheless, the Committee's role in overseeing compliance with the Convention is crucial and creates an impetus among States Parties to ensure the rights contained therein are fully realised and respected.

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[250] Mental Health Commission and An Garda Síochána (Fn. 47), 18.

[251] An Garda Síochána and the Health Service Executive, Memorandum of Understanding Between An Garda Siochana and the HSE on the Removal to or Return of a Person to an Approved Centre in Accordance with Section 13 and Section 27, and the Removal of a Person to an Approved Centre in Accordance with Section 12, of the Mental Health Act 2001 (Dublin 16 September 2010).

[252] See Appendix 3.

4.3 The Arrest

A police officer's decision to arrest an individual symbolises the first formal step in the criminal justice process and challenges a number of fundamental human rights, specifically the right to liberty. An arrest can take place in many different ways; in a public place, on private property including one's own home,[253] or it can take place in the station in cases where the person is already in attendance to assist the police with their enquiries.[254] There are a number of ingredients involved in a lawful arrest, in light of the fundamental right to liberty enshrined in international human rights law and the Irish Constitution.[255] An arrest must be necessary,[256] non-arbitrary,[257] based on reasonable suspicion,[258] and the individual suspect must be informed (in a language they can understand) of the reasons for their arrest and the legislative basis for the arrest, the individual must also be informed of their right to remain silent and their right to receive legal advice.[259] The arresting officers are also required to only use reasonable force where necessary in the context of the arrest.[260] This section will examine the existing powers of arrest in Ireland, with a particular focus on the power dynamics between the officer and the suspect, as well as the importance of clear and accessible communication.

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[253] In order to conduct a search of one's home, Gardaí must receive consent or have a valid search warrant. Article 40.5°, *Bunreacht na hÉireann* provides that the 'dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.' At common law the unlawful entry onto the property of another without their consent will constitute a trespass.

[254] See Leonard Jason-Lloyd, *Introduction to Policing and Police Powers* (2nd edn., Cavendish 2005) 61.

[255] Bunreacht na h'Éireann, Article 40.4.1°: 'No citizen shall be deprived of his personal liberty save in accordance with law.'

[256] *State (Trimbole) v Governor of Mountjoy Prison* [1985] I.R. 550: In this case it was held that an arrest made for an ulterior purpose was an unlawful exercise of the power of arrest. Egan J. found that there had been no genuine suspicion that the accused had committed a scheduled offence contrary to s. 30 of the *Offences Against the State Act* 1939 and that the real purpose of the s.30 arrest of the prisoner was to ensure he would be available for arrest and detention once the relevant part of the Extradition Act 1965 came into force so that he could be extradited. Such an arrest was clearly not *bona fide*.

[257] According to the Human Rights Committee in the case of *Womah Mukong v Cameroon*, '"arbitrariness" is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.' See: *Womah Mukong v Cameroon*, Communication No. 458/1991 (U.N. Doc. CCPR/C/51/D/458/1991, 1994) para 9.8.

[258] Thomas O'Malley, *The Criminal Process* (Round Hall 2009) 292: O'Malley acknowledges the significance of this requirement as it 'represents an important guarantee of personal liberty, because it guards against the arbitrary and capricious use of arrest powers.' [Hereafter O'Malley].

[259] See Liz Campbell, Catherine O'Sullivan and Shane Kilcommins, *Criminal law in Ireland: cases and commentary* (Clarus Press, 2010) 359 – 360.

[260] *Criminal Law Act* 1997, s. 6.

4.3.1 Power Dynamics during an Arrest

The dynamics of power between police officers and vulnerable suspects must be considered in respect of the arrest process and the subsequent treatment of persons in custody. From the moment an individual comes into contact with a member of An Garda Síochána, in the form of an arrest or otherwise, there is an immediate transfer of power over that individual's right to liberty. As agents of State control, the Gardaí control every aspect of the pre-trial process, from the arrest, the decision to charge and interrogation. Within Ireland, these powers are pronounced by the lack of an inspection mechanism for garda stations to review the conditions of detention and garda practices.[261] The lack of an oversight mechanism in the context of police custody further compounds the powers conferred upon the Gardaí during the arrest and investigation of crimes.

Criminal justice policy to date has indicated that there is an 'imbalance of power between the might of the state and the individual defendant.'[262] The authority afforded to members of An Garda Síochána to carry out an arrest without a warrant is illustrative of a 'significant transfer of power to the police.'[263] This is apparent in respect of the "emergency" responses to combat the threat posed by paramilitaries during the time of the Troubles in Northern Ireland.[264] Further powers were also conferred upon members of the Gardaí in the wake of high profile gangland activity during the 1990s,[265] which led to increased

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[261] In October 2007, Ireland signed the Optional Protocol to the UN Convention against Torture which provides for the independent inspections of all places of detention, including Garda Stations, however we have yet to ratify this Protocol.

[262] Liz Campbell, Human Rights Lexicon: Human Rights in Criminal Justice (Human Rights in Ireland 17 March 2010) <http://humanrights.ie/constitution-of-ireland/human-rights-lexicon-human-rights-in-criminal-justice/> 10 March 2018.

[263] O'Malley (Fn. 72) 298, citing Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn., Oxford University Press, 2007) 121.

[264] Shane Kilcommins, 'Risk in Irish Society: Moving to a Crime Control Model of Criminal Justice' (2005) 2(1) *Irish Probation Journal* 20, 27: 'If anything, it could be said that in terms of a devaluation in due process values, Ireland is now a lodestar for other jurisdictions. This marks a complete reversal in Ireland's usual practice of criminal justice policy imitation from other western countries. Much, though not all, of the impetus for the tooling down of accused/offender rights must be construed against a backdrop of the "extra-ordinary" circumstances posed by the conflict in Northern Ireland. The "proportionate", "emergency" legal responses drawn up to combat the threat posed by paramilitaries have proved remarkably malleable in adjusting to more normal circumstances.'

[265] The murder of Veronica Guerin in 1996 marked a turning point in relation to the State's response to gangland activity. See: Dermot Walsh, 'An Irish Response' (1999) 88(350) *Studies: An Irish Quarterly Review* 110; Kilcommins (fn 63); Ian O'Donnell and Eoin O'Sullivan, 'The politics of intolerance—Irish style' (2003) 43(1) *British Journal of Criminology* 41; Colin King, 'Legal responses to organised crime in Ireland: Erosion of due process values' in Petrus van Duyne and others (eds.), *The relativity of wrongdoing: Corruption,*

powers of detention and encroachments on the right to silence.[266] A further example of the powers of police officers is in relation to stop and search of an individual,[267] an integral part of modern day policing. According to The Equality and Human Rights Commission in England and Wales, there is evidence that some forces exercise their powers based on stereotypical assumptions, as opposed to on the basis of intelligence or reasonable suspicion.[268]

Stop and search procedures are the ultimate exercise of power on behalf of the police, which enable them to maintain control and order within society. This raises a number of issues, particularly in regards to the issue of perceived bias or stigma towards persons from disadvantaged backgrounds, different races or ethnicities, or persons who are seen as dangerous due to the existence of a psychosocial disability.[269] As gatekeepers of the criminal justice system, police officers have sole responsibility for deciding whether an individual should be taken in for questioning or let go. Discretion is therefore, one of the most important tools available to officers when they are on the street, responding to difficult situations or making the decision to arrest an individual.[270] There are perhaps more options available to officers in respect of cases involving a person with psychosocial disabilities, as they can choose to formally process the individual through the criminal justice system, admit them as an involuntary patient to an approved centre under the

organised crime, fraud and money laundering in perspective (Wolf Legal 2015) 105; Barry Vaughan and Shane Kilcommins, 'A perpetual state of emergency: Subverting the rule of law in Ireland' (2004) 35 *Cambrian Law Review* 55 and Liz Campbell, 'Reconfiguring the pre-trial and trial processes in Ireland in the fight against organised crime' (2008) 12(3) *The International Journal of Evidence & Proof* 208.

[266] Yvonne Marie Daly, 'Is Silence Golden: The Legislative and Judicial Treatment of Pre-Trial Silence in Ireland' (2009) 31 *Dublin University Law Journal* 35.

[267] The Gardaí have several powers to stop and search an individual, such as under *Road Traffic Act* 1961 and the *Offences Against the State Act* 1939.

[268] Equality and Human Rights Commission, *Stop and think: A critical review of the use of stop and search powers in England and Wales* (EHRC 2010) 3: 'Black people are at least six times as likely to be stopped as white people; Asian people, around twice as likely.'

[269] The issue of racism among the police has been highlighted internationally, particularly in the United States. Anti-discrimination movements such as Black Lives Matter, have recently cast a spotlight on police violence and racial discrimination within America's criminal justice system, which has a longstanding record of criminalising minorities.

[270] While police discretion can refer to the actions and choices of individual police officers, it is important to note that the culture and training of the police can influence what they deem an "appropriate" response. Waddington has previously examined the link between culture and police discretion, '[i]t derives from the discovery that police work is rarely guided by legal precepts, but that police officers exercise extensive discretion in how they enforce the law.' Peter Waddington, 'Police (canteen) sub-culture. An appreciation' (1999) 39(2) *The British Journal of Criminology* 287.

Mental Health Act 2001,[271] or release them. Therefore, the balance of power during interactions between An Garda Síochána and persons with disabilities is very much weighted in favour of the former, with a range of discretionary variables at play, which may potentially deprive persons with disabilities of a range of human rights.

4.3.2 Garda Powers of Arrest

In the interests of maintaining public order and the rule of law, police officers have several powers to arrest and detain an individual as prescribed by legislation and common law. One of the most important ingredients of a lawful arrest is that the arresting officer in question has established reasonable suspicion.[272] This requirement is well-founded in Irish legislation,[273] and is also an inherent principle protected under Article 5 of the ECHR.[274] Once reasonable suspicion has been established, members of the Gardaí are conferred a wide range of powers to carry out an arrest – both with and without a warrant.[275] An arrestable offence is further defined in the Criminal Law Act 1997 as an offence for which a person of 'full capacity' and who has not been previously convicted, may be punished by a penalty of five years imprisonment or a more severe penalty,[276] and includes attempts to commit such an offence.[277] The Act does not provide further clarity in regards to what is

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[271] *Mental Health Act* 2001, s. 9 and s. 12.

[272] The nature of the test laid down by the Privy Council in *Shaaban Bin Hussein v Chong Fook Kam* [1970] A.C. 942: 'The circumstances of the case must be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence … suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end.'

[273] *Criminal Law Act* 1997, s. 4(1): 'Subject to *subsections (4)* and *(5)*, any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing an arrestable offence.' See also, *Walsh v Fennessy* [2005] 3 I.R. 516 and *People (D.P.P.) v Quilligan* [1986] I.R. 495.

[274] *Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157, para 32: "'reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.'

[275] *Criminal Law Act* 1997, s. 4 provides the legislative basis for arrests without warrants: 'Where a member of the Garda Síochána, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.' Note that the 1997 confers powers of arrest to all persons, otherwise known as a citizen's arrest, but more expansive powers are afforded to members of An Garda Síochána.

[276] As amended by the Criminal Justice Act 2006, s. 8: 'Section 2(1) of the Criminal Law Act 1997 is amended in the definition of "arrestable offence" by the substitution of "under or by virtue of any enactment or the common law" for "under or by virtue of any enactment".'

[277] *Criminal Law Act* 1997, s. 2(1).

meant by a person of full capacity; however it is presumed that this would refer to all persons above the age of criminal responsibility.[278] It is unclear whether the individuals' mental capacity is considered relevant for the purpose of effecting an arrest; arguably such a consideration would be contrary to Article 12 of the CRPD as it provides that persons with disabilities have the right to legal capacity on an equal basis with others.[279]

An arrest is seen as a continuing act which begins from the moment the individual is restrained and ends when they are released or remanded in custody by judicial decision.[280] The right to liberty is subject to certain exceptions in international and national laws, such as in the enforcement of criminal law.[281] Article 40.4.1° of the Constitution provides that no citizen shall be deprived of his liberty save in accordance with law.[282] Article 5 of the ECHR also permits States Parties to place restrictions on the right to liberty, including in cases such as conducting a lawful arrest of a person. To engage this right, the individual concerned must have been formally arrested and subsequently held in police custody as stated in General Comment No. 35:

> Deprivation of personal liberty is without free consent. Individuals who go voluntarily to a police station to participate in an investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.[283]

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[278] *Children Act* 2001, s. 52: '(1) Subject to *subsection (2)*, a child under 12 years of age shall not be charged with an offence. (2) *Subsection (1)* does not apply to a child aged 10 or 11 years who is charged with murder, manslaughter, rape, rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990 or aggravated sexual assault. (3) The rebuttable presumption under any rule of law, namely, that a child who is not less than 7 but under 14 years of age is incapable of committing an offence because the child did not have the capacity to know that the act or omission concerned was wrong, is abolished. (4) Where a child under 14 years of age is charged with an offence, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.'
[279] CRPD, Article 12(2).
[280] O'Malley (Fn. 72), 289.
[281] International Covenant on Civil and Political Rights Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person) (*CCPR/C/GC/35, 16/12/2014) [hereafter ICCPR General Comment 35] para 10: 'sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws.'
[282] The right to personal liberty is a longstanding right in Irish law, as acknowledged by the Supreme Court in *The State (Quinn) v. Ryan* [1965] IR 70.
[283] ICCPR General Comment 35 (Fn. 95), para 6.

Therefore, it is not enough that an individual attends the police station for an interview: the conditions of the detention must be such that the individual is not free to leave of their own free will.[284] The ECtHR has also provided clarity in relation to the lawfulness of one's arrest, noting that it must be non-arbitrary, meaning that it was 'carried out in good faith', that 'the place and conditions of detention [were] appropriate'; and that the length of the detention did not 'exceed that reasonably required for the purpose pursued.'[285]

4.3.3 Communication as a Key Element of Access to Justice

It is now well-established that when a person is arrested, they have a right to be informed in a language they understand, of the factual and legal basis for their arrest.[286] Essentially, a person is entitled to be informed of the nature of the charge or on suspicion of what crime they are being arrested.[287] Article 5(2) of the ECHR provides that 'everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.'[288] Communicating the arrest in a clear language is therefore a fundamental requisite for the commission of a valid arrest,[289] and it is a matter for the court to determine whether this right was satisfied.[290]

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[284] *DPP v Laing* [2017] IEHC 3: Similar issues were also discussed in this case, wherein the Court held that the detention of an individual must involve a deprivation of liberty, it is irrelevant where the detention takes place such as an interview room or in a cell, as the result is the same regardless; i.e. that the individual is not free to leave the Garda station.

[285] *Saadi v United Kingdom* App no. 13229/03 (ECHR, 29/1/2008).

[286] International Covenant on Civil and Political Rights, Article 9(2): 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.'

[287] *Christie v Leachinsky* [1947] A.C. 573, 583, per Viscount Simon. In this case, the House of Lords held that a policeman has a duty to inform the suspect of the true ground of his arrest, 'in other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.' The court proceeded to note that this requirement does not mean that the arresting officer should inform the individual of the reason for the arrest using technical or precise language, as the right to freedom of liberty is so fundamentally important it necessitates the use of ordinary language.

[288] ECHR, Article 5(2).

[289] ECHR, Article 6(3)(a): 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.'

[290] O'Malley (Fn. 72), 287.

There are a number of common law requirements which must be satisfied in order to conduct a lawful arrest.[291] First, the individual must be informed that they are being placed under arrest,[292] and secondly, they have the right to be told the reasons for their arrest (at the time of the arrest).[293] This duty goes beyond mere quotation of the relevant statutory provision or stating the common law power under which they are being arrested, as this alone will not amount to valid communication for the purpose of informing the individual of the reasons for their arrest.[294] The duty to use ordinary language to inform a suspect of the reasons for their arrest has subsequently been recognised within *The Criminal Justice (Miscellaneous Provisions) Act* 2009.[295] While this right is imperative for all persons, it is arguably more important in the case of persons with disabilities who may need communication supports and may not understand the reasons for their arrest. Many adults with intellectual disabilities and psychosocial disabilities communicate differently or non-verbally, and therefore require the support of interpretive aids. It is estimated that between 30% of children with autism, for example, remain non-verbal,[296] and it is further estimated that at least half of all children with autism have intellectual disabilities.[297]

People with disabilities may also find it difficult to understand conventional modes of expression or commands,[298] and may not recognise the meaning of hand gestures or facial expressions.[299] This is particularly relevant in the case of policing, as some suspects may not understand the police officers gestures, such as an officer guiding traffic or the gesture to put their hands behind their heads. According to The National Autistic Society (UK) guide

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[291] Yvonne Marie Daly, 'Assembly-Lines and Obstacle Courses: The Pre-Trial Process in Ireland' (PhD thesis, Trinity College Dublin, 2008) 104. [Hereafter Daly 2008].

[292] *Alderson v Booth* [1969] 2 QB 216; *DPP v McCreesh* [1992] 2 I.R. 239; *DPP v McCormack* [2000] 1 I.L.R.M. 241.

[293] *Christie v Leachinsky* [1947] A.C. 573.

[294] Daly 2008 (Fn. 105), 104.

[295] *Criminal Justice (Miscellaneous Provisions) Act* 2009, s. 10(2): 'A person arrested under this section shall, upon his or her arrest, be informed, in ordinary language, of the reason for the arrest and of his or her right to (a) obtain or be provided with professional legal advice and representation, and (b) where appropriate, obtain or be provided with the services of an interpreter.'

[296] See: Helen Tager-Flusberg and Connie Kasari, 'Minimally Verbal School-Aged Children with Autism Spectrum Disorder: The Neglected End of the Spectrum' (2013) 6(6) *Autism Research* 468.

[297] Maria Mody and John Belliveau, 'Speech and Language Impairments in Autism: Insights from Behavior and Neuroimaging' (2013) 5(3) *North American Journal of Medicine & Science* 157, 158.

[298] See Catherine Lord and others, 'Austism diagnostic observation schedule: A standardized observation of communicative and social behavior' (1989) 19(2) *Journal of Autism and Developmental Disorders* 185.

[299] Sebastian Walther and others, 'Nonverbal Social Communication and Gesture Control in Schizophrenia' (2015) 41(2) *Schizophrenia Bulletin* 338.

for criminal justice professionals, police officers are advised to keep all gestures to a minimum as they may prove distracting to persons with autism; if gestures are necessary, officers are advised to 'accompany them with unambiguous statements or questions that clarify their meaning.'[300] The guidelines further recommend officers use the individual's name at the start of each sentence, give slow and direct instructions, avoid the use of sarcasm, metaphors or irony, and ask direct questions.[301] Similar guidelines are not available in Ireland and it remains unclear how/what training members of An Garda Síochána receive in relation to these matters, indicating a need to further investigate the supports available for persons with disabilities in these circumstances, and the need for law and policy reform to recognise their rights in the context of the pre-trial process.

4.4 The Garda Caution

On arrest, and before the interrogation takes place, the arresting officer is required to issue a caution to suspects.[302] The basis for the caution is to inform the suspect of their right to silence and that anything they do say may be recorded and used as evidence against them.[303] Following the charge, the arresting garda will say:

> You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence.[304]

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[300] The National Autistic Society supported by the Association of Chief Police Officers, *Autism: a guide for criminal justice professionals* (London, 2011) [Hereafter The National Autistic Society] 19 <http://www.autism.org.uk/~/media/nas/documents/working-with/criminal-justice/autism-guide-for-criminal-justice-professionals-2011.ashx> Accessed 13/06/2018.

[301] Ibid.

[302] Otherwise known as the Miranda Warning in the U.S. See: *Miranda v Arizona* (1966) 384 U.S. 436.

[303] *Miranda v Arizona*, 444: The U.S. Supreme Court held that criminal suspects must be provided with certain warnings prior to an interrogation, including their right to remain silent, the potential use of their statements in subsequent court proceedings, and the right to legal counsel prior to questioning. The court recognised that custodial interrogation refers to questioning 'after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way'

[304] *Criminal Justice (Miscellaneous Provisions) Act* 1997 (Section 6).

The Garda caution, consisting of these 29 words, may be confusing for people with disabilities who may already be intimidated by the Gardaí and the circumstances of the arrest more generally. As such, there is concern that this statement may not be suitable for all persons with psychosocial disabilities, intellectual disabilities or learning disabilities. There is a real and substantial risk that such individuals may be at an increased risk of self-incrimination before access to a solicitor is obtained. It should be a mandatory requirement for officers to test the individuals understanding of the caution, such as by asking the suspect to acknowledge or repeat the caution in their own words.[305] The New South Wales Law Reform Commission argued, in their report on persons with intellectual disabilities and the criminal justice system, that the police caution is perhaps more important to persons with disabilities, 'owing to the added disadvantages they face in police questioning, which would be likely to affect the reliability of any answers.'[306] The Irish caution is also in need of reform as it fails to take account of inference-drawing provisions, which are required to be explained in ordinary language to the suspect (discussed further in Chapter 6), and which may be particularly confusing and inaccessible for persons with disabilities.

In England and Wales, the caution is arguably more complex than in Ireland – consisting of 37 words and including reference to the possible trial consequences of pre-trial silence:

> You do not have to say anything. But, it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.[307]

A study carried out by Murphy and Clare found that very few people could sufficiently understand this charge (only 8% of A-Level students, 7% of a group of ordinary people with IQ's in the normal range and only 48% of police officers could do so).[308] In the event that the individual does not understand the caution, a simplified version can be provided in the

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[305] See New South Wales Law Reform Commission, *People with an Intellectual Disability and The Criminal Justice System* (Report 80, 1996) paras 4.34 – 4.39.
[306] Ibid, para 4.34.
[307] *Criminal Justice and Public Order Act* 1994 (England and Wales), s. 34.
[308] Glynis Murphy and Isabel Clare, 'People with learning disabilities as offenders or alleged offenders in the UK criminal justice system' (1998) 91 *Journal of the Royal Society of Medicine* 178

officer's own words.[309] Furthermore, if a person who is 'mentally disordered or otherwise mentally vulnerable is cautioned in the absence of the appropriate adult, the caution must be repeated in the adult's presence.'[310] This provides an important safeguard for vulnerable suspects (including juveniles) who have been arrested by the police.[311] Therefore, while the English caution is on its face more complex, the requirement for police to explain it in their own words coupled with the requirement to repeat the caution in the presence of an appropriate adult is far more effective than the Irish practice. Such additional safeguards and accommodations are absent in the Irish system and arguably need to be considered in law and policy reform in this area.

It must also be acknowledged that arrests can often take place in highly pressurised environments. In the case of hostile situations or incidents where there is an immediate threat to a person's life, arresting officers may have to act quickly to make the arrest and therefore do not have the time to evaluate whether the individual suspect understands the charge or caution. Furthermore, in Ireland many arrests take place in the early morning,[312] when it is more likely for the person to be at home. In those circumstances, access to a solicitor could be delayed for a number of hours – making the individual more vulnerable and at a higher risk of self-incrimination while awaiting the provision of legal assistance, in the event they did not understand the caution in the first place.

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[309] Home Office, *Revised Codes of Practice for the Detention, Treatment and Questioning Of Persons By Police Officers: Police And Criminal Evidence Act 1984 (Pace) – Code C* (Home Office 2014) 35 para 10.D, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364707/PaceCodeC2014.pdf> accessed 16 June 2018.

[310] Ibid, para 10.12.

[311] The appropriate adult scheme will be discussed in Chapter 5.

[312] See *DPP v Gormley and DPP v White* [2014] IESC 17, Hardiman J. at para 5: 'For one reason or another, the detention of suspects for the purpose of interrogation often occurs very early in the morning. It may occur properly, discretely, tactfully and with due recognition for arrested persons' position as presumptively innocent persons. But it may occur in circumstances of unnecessarily heightened drama, sirens, breaking of doors, disturbance and trauma to spouses and children, and the rushing of handcuffed suspects out of their houses and into official vehicles. All of the people are presumptively innocent; most are innocent in fact and are not even charged at any stage.'

4.4.1 The CRPD and Accessible Communication

The CRPD provides protection for one's rights to freedom of expression and access to information under Article 21, which provides that States Parties:

> Shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice.[313]

The provision of information includes both accessible formats and the use of assistive technologies appropriate to different kinds of disabilities.[314] Article 21(b) further provides for 'facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.'[315] Article 21 is closely linked with Article 9 of the CRPD,[316] which provides that people with disabilities have the right to participate fully in all aspects of life and imposes an obligation on States parties to take appropriate measures to ensure access to information on an equal basis with others.[317] This provision also places an onus on States to provide training for stakeholders on accessibility issues facing persons with disabilities.[318]

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[313] CRPD, Article 21.

[314] Committee on the Rights of Persons with Disabilities, *General comment No. 2, Article 9: Accessibility* (CRPD/C/GC/2, 22 May 2014) [hereafter CRPD Committee General Comment No 2] para 5: 'The importance of ICT lies in its ability to open up a wide range of services, transform existing services and create greater demand for access to information and knowledge, particularly in underserved and excluded populations, such as persons with disabilities.'

[315] CRPD, Article 21(b): 'Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.'

[316] CRPD Committee General Comment No 2 (Fn. 128), para 38.

[317] CRPD Article 9(1)(b): 'To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: (b) Information, communications and other services, including electronic services and emergency services.'

[318] CRPD, Article 9(2)(c): 'States Parties shall also take appropriate measures: (c) To provide training for stakeholders on accessibility issues facing persons with disabilities.'

The rights contained within Articles 21 and 9 are further linked to the right of access to justice, under Article 13. In its Concluding Observations in relation to Canada, for example, the Committee on the Rights of Persons with Disabilities made the connection between access to information and Article 13. The Committee noted its concern for the lack of accommodation procedures for persons with psychosocial and/or intellectual disabilities and recommended the introduction of additional criteria to address issues regarding accessibility within the justice sector generally.[319] Such criteria would include the use of Braille, sign language interpreters and easy-read versions of documents, all of which should be provided free of charge to persons with disabilities, especially persons with psychosocial and intellectual disabilities.[320]

Respect for diverse forms of communication has also been recognised within the CRPD Committee's Draft General Comment on Equality, as a component of one's right to procedural accommodations under Article 13.[321] In order to ensure effective access to justice, the Committee notes that all processes must allow for participation, which include the 'recognition and accommodation of different forms of communication.'[322] While police officers are not expected to have the skills to communicate with all persons (regardless of language or disability), they should have the necessary skills to communicate that the individual is under arrest and has the right to remain silent, which may involve the use of written notes, gestures or the use of pictures.[323] This may suffice until such time as the suspect is brought to the station, at which time the services of an interpreter may be procured.[324] In England and Wales, for example, the custody officer is required to repeat

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[319] CRPD/C/CAN/CO/1, para 30(b).

[320] Ibid: 'Introduce additional criteria to the provision of accessibility in the justice sector, ensuring that the options available comprise Braille, sign language interpretation, alternative modes of communication and easy-read versions of documents, free of charge for all persons with disabilities, in particular persons with psychosocial and/or intellectual disabilities.'

[321] Committee on the Rights of Persons with Disabilities, *General comment on equality and non-discrimination: Advance Unedited Version* (CRPD/C/GC/6, 9/3/2018) 13 para 51: 'An illustration of a procedural accommodation is the recognition of diverse communication methods of persons with disabilities standing in courts and tribunals.'

[322] Ibid, para 52.

[323] United States Department of Justice, 'Commonly Asked Questions About The Americans With Disabilities Act And Law Enforcement' (2006) [Hereafter U.S DoJ, Commonly Asked Questions] 10 https://www.ada.gov/qanda_law.pdf accessed 12 June 2018 and U.S. Department of Justice, 'Model Policy for Law Enforcement on Communicating with People who are Deaf or Hard of Hearing' (2006) <http://www.ada.gov/lawenfmodpolicy.pdf> accessed 12 June 2018.

[324] To be discussed in Chapter 5.

the caution and the notice of the charge to all vulnerable suspects once the appropriate adult has arrived at the station.[325] The role of the appropriate adult will be further discussed in Chapter 5, however it is useful to note at this point their purpose and how their attendance in the police station can provide further protections for vulnerable suspects. At present, a similar service does not exist in Ireland, indicating a gap or shortcoming regarding accessibility of information and services needed in this field.

The obligation on arresting Gardaí to ensure that the individual suspect is informed of the reasons for their arrest may prove difficult in cases concerning persons with disabilities; however, this does not negate their obligations in this regard. It is imperative that vulnerable suspects are aware of their rights and do not answer questions without fully understanding their right to remain silent or the implications of this.[326] As stated in the case of *O'Laighleis,* an 'arrest must be for a lawful purpose; and since no one is obliged to submit to an unlawful arrest the citizen has a right before acquiescing in his arrest to know why he is being arrested.'[327] Persons with disabilities are also entitled to know why they are being deprived of their right to liberty and as such, police training should incorporate a strong emphasis on alternative communication techniques.[328]

4.4.2 Case Study

The following extract, taken from The National Autistic Society's guidelines for criminal justice professionals, illustrates an individual's lived experience of being arrested and the subsequent confusion arising during their encounter with the police:

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[325] *Police and Criminal Evidence Act* 1984 (Pace) – Code C, para 3.17. See Home Office, *Revised Code Of Practice For The Detention, Treatment And Questioning Of Persons By Police Officers* (Police Integrity and Powers Unit, Home Office, 2014).
[326] See Laura Crane and others, 'Experiences of Autism Spectrum Disorder and Policing in England and Wales: Surveying Police and the Autism Community' (2016) 46 *Journal of Autism and Developmental Disorders* 2028, 2029.
[327] *In Re O Laighléis* [1960] I.R. 93.
[328] See Yasmeen Krameddine and Peter Silverstone, 'How to Improve Interactions between Police and the Mentally Ill' (2014) 5 *Front Psychiatry* 186.

One afternoon I was driving at a roundabout and had a milkshake in my hand. A police car indicated to me to stop and I got out of the car. I had only just received a diagnosis of Asperger syndrome and didn't have a card on me about the disability. When I spoke to the police in my usual, rather direct way, they thought I was being rude. I told the police I had Asperger syndrome and asked if I could get a friend who could help me to explain myself, but they did not seem to understand the condition and I was told that I couldn't.

At this stage I became very nervous and tried to get away. In response, they called for back-up and tried to arrest me. When they tried to put the handcuffs on me it felt like an invasion of my space. I felt anxious and so the situation worsened. They shoved me into a van. I felt so scared that I responded by biting an officer.

At the station, my friend tried to explain my disability but the police didn't understand what Asperger syndrome was and were not open to her explanations. I had to give a statement but the two policemen who took this were those who had arrested me so it was very difficult to get them to understand. I waited to see a doctor, growing increasingly anxious. When they arrived they didn't have any knowledge of Asperger syndrome either. I felt I was being treated as if I were mad.

In the end I was allowed home, but to this day I don't really understand what the conclusion was. I don't know if I've been given a written caution or a verbal caution. The situation was very unclear and no one has explained it to me. I feel very strongly that had the police officers who initially spoke to me had an understanding of Asperger syndrome and autism, that I would not have experienced such a traumatic situation.[329]

[329] The National Autistic Society (Fn. 114), 11.

For people with disabilities, for example, as demonstrated in the extract above, it is imperative that the arrest is carried out appropriately and consideration must always be afforded to the individual circumstances as may be presented, particularly in the case of a person experiencing distress or anxiety due to the presence of the police or the overall experience of being arrested. At all times during an arrest, the arresting officers must have regard to the communication barriers which may inhibit the individuals understanding or response to the arrest. These issues present great difficulties to police officers, particularly in respect of identifying persons who may be vulnerable and in need of further accommodations or assistance (to be discussed further in the following Chapter). While the police are increasingly coming into contact with people with disabilities, it must be acknowledged that they are not mental health professionals and therefore do not have all the necessary skills and knowledge to perform this role. While training and awareness-raising can fill some of the voids in this regard, it is also necessary to build collaborative links with relevant stakeholders within Ireland, similar to the CIT ethos as above.[330]

In line with the UN Convention on the Rights of Persons with Disabilities, the following section will examine the question of how police officers should respond to suspects demonstrating "challenging behaviour".

4.5 Responding to "Challenging" Behaviour

Persons with disabilities present unique challenges for police officers, ranging from transporting wheelchair users to the police station and ensuring appropriate provisions for assistance animals, to the broader procedural challenges such as communicating the reasons for arrest in an accessible manner and providing appropriate supports while in police custody. In some cases, persons with disabilities may also present behavioural challenges or exhibit behavioural characteristics which an officer might perceive as being dangerous.[331] In investigating the contact between police officers and persons with

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[330] See section 4.2.1.

[331] See: Nicholas Chown, '"Do you have any difficulties that I may not be aware of?" A study of autism awareness and understanding in the UK police service' (2010) 12(2) I*nternational Journal of Police Science & Management* 256; Marie Henshaw and Stuart Thomas, 'Police encounters with people with intellectual disability: prevalence, characteristics and challenges' (2012) 56(6) *Journal of Intellectual Disability Research* 620; McCay Vernon and Katrina Miller, 'Obstacles faced by deaf people in the criminal justice system' (2005) 150(3) *American Annals of the Deaf* 283; John Monahan, 'Mental disorder and violent behavior: Perceptions

disabilities during an arrest, it is necessary to consider the trope regarding "challenging behaviour" and the effects that this misconception may have on the criminal justice process.

The term challenging behaviour is frequently used to describe a severe behavioural problem,[332] and may be caused by a number of different factors such as communication barriers (if the individual is non-verbal, or does not understand the officer), increased sense of anxiety or distress, or in the event that the individual is experiencing side effects from medication. The term may also be misleading however, as it implies that the individual's behaviour or actions are innate to them, and therefore they are predisposed to act in a certain way.[333] In the context of suspects with disabilities, it is therefore imperative that police training and education focuses on identifying signs of persons in distress, de-escalation techniques, and teaches officers to recognise that behaviour is context specific, rather than an innate response because the individual has a specific disability. Certain types of behaviour or resistance may also be the individual's way of communicating, especially if they are non-verbal,[334] and police may misinterpret this expression as challenging behaviour and respond with force.

Persons with disabilities, particularly psychosocial disabilities, are at an increased risk of force by police officers.[335] One plausible reason for the increased use of force against persons with disabilities could be the lack of appropriate training provided to police

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and evidence' (1992) 47(4) *American Psychologist* 511 and Scott Modell and Dave Cropp, 'Police officers and disability: Perceptions and attitudes' (2007) 45(1) *Intellectual and Developmental Disabilities* 60.

[332] The Irish College of Psychiatrists, *People with a learning disability who offend: forgiven but forgotten?* (The Irish College of Psychiatrists, 2007) 10.

[333] dis-Abled Justice, *Reforms to justice for persons with disability in Queensland* (Advocacy Incorporated, 2015) 42.

[334] Ibid.

[335] Office of The United Nations High Commissioner for Human Rights United Nations Office on Drugs and Crime, *Resource book on the use of force and firearms in law enforcement* (United Nations, 2017) [Hereafter UN Office on Drugs and Crime Resource Book] 34, citing Martin Schwartz, 'Police Use of Force to Restrain the Mentally Ill' (2015) 253 *New York Law Journal* 123 and Wesley Lowery, Kimberly Kindy and Keith Alexander, 'Police Shootings: Distraught People, Deadly Results' (The Washington Post, 30 June 2015) <http://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results/> Accessed 13 June 2018. While these articles deal with the U.S context, the risk of force is still greater for suspects with disabilities (particularly psychosocial disabilities) worldwide. This can be linked to behavioural traits associated with certain conditions, especially when co-occurring with substance abuse.

officers on how to identify signs and symptoms of disabilities.[336] According to a recent UN report on the use of force by police officers, it is recognised that in some cases, persons with 'psychosocial disabilities are perceived as having behavioural issues that diverge from the normalcy standards socially developed under prejudicial and misconstrued representations.'[337]

During an arrest, the use of certain weapons or restraint mechanisms can have a disproportionate effect on the health of persons' who are already in a heightened emotional state.[338] The use of tasers, police batons, pepper spray or handcuffs can exacerbate the individuals' distress and may amount to a violation of various rights under the CRPD, such as the right to dignity (Article 3), liberty (Article 14), freedom from torture, cruel, inhuman or degrading treatment (Article 15), freedom from exploitation, violence or abuse (Article 16), and also the rights to integrity (Article 17), privacy (Article 22) and health (Article 25). In Ireland, the vast majority of An Garda Síochána are unarmed, however, they are equipped with 'incapacitant spray,' and batons, which are also capable of causing serious harm to the individual in question. In 2017, for example, there were an estimated 502 instances of Garda use of incapacitant spray.[339]

In 2015, the Garda Ombudsman Commission commenced an investigation into the alleged abuse of a man with a psychosocial disability, who was homeless and considered "vulnerable."[340] The arresting Gardaí in question allegedly beat the individual with a baton and used pepper spray, before taking him to the station.[341] The investigation examined whether there was an abuse of authority on the part of one of the Garda members, and considered CCTV and audio footage which illustrated a number of instances of oppression, in terms of language and behaviour.[342] The transcripts from the event detail a number of derogatory comments made by the arresting garda to the individual suspect, including

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[336] Office of the High Commissioner for Human Rights, *Report on Mental Health and Human Rights* (A/HRC/34/32, 31/1/2017).
[337] UN Office on Drugs and Crime Resource Book (Fn. 149), 34.
[338] Ibid.
[339] See An Garda Síochána Ombudsman Commission, *Submission to the Commission on the Future of Policing In Ireland* (Dublin, 17/1/2018) [Hereafter GSOC Submission 2018] 7.
[340] An Garda Síochána Ombudsman Commission, *Investigation following a complaint of abuse of authority made in January 2015: A Garda Ombudsman report (under section 103 of the Garda Síochána Act 2005)* (Dublin, 2015).
[341] Ibid, 2.
[342] Ibid.

comments such as “you f-ing idiot”, “you clown” and “a prolific f-ing pest”.[343] One extract from the evidence is particularly revealing in terms of the attitudes towards the individual in question and the innate power imbalance between a suspect in custody and the Gardaí:

> **Time on camera: 18.47.53**
> Prisoner picks up clothes and starts to wander away in a disoriented manner.
> Garda 2: Where's he going?
> Garda 1: Come back here you f-ing idiot.
> Prisoner walks back and puts clothes back down on the bench.
> Garda 1: You'd better start complying with our directions or you'll be sprayed.
> Garda 1: Open your eyes you clown.
> Prisoner: I can't open them.
> Garda 1: I'll open them for you.[344]

The Garda Ombudsman Commission concluded that such behaviour ‘falls far short of the standard expected of professional police officers in the execution of their duties,’ and recommended disciplinary actions under the Garda Síochána (Discipline) Regulations 2007.[345] Most importantly, the Ombudsman also noted that such actions displayed a lack of understanding on the part of the garda in question, in respect to their obligations to ensure the human dignity and rights of a person in detention.[346] This reflects the central argument of this thesis, that greater awareness among police officers is necessary in ensuring compliance with international human rights laws, including the right to dignity.[347]

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[343] Ibid.
[344] Ibid, 3
[345] Ibid, 3-4.
[346] Ibid, 4.
[347] International Covenant on Civil and Political Rights, Article 10(1): ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.’ See also the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment.

The right to dignity is engaged at all times during an arrest and the subsequent detention in custody, and extends to the use of force by arresting officers and the use of handcuffs both during and after the arrest.[348] In keeping with the overall goal of the CRPD to promote respect for the inherent dignity of persons with disabilities,[349] police officers are obliged to protect the individuals' right to dignity in accordance with international human rights law. The right to dignity is further protected under Article 3 of the ECHR (to be discussed further in the following Chapter), which provides an absolute prohibition on the use of inhuman or degrading treatment.[350] For persons who have been deprived of their liberty, the use of unnecessary force may be found to be a violation of their right to dignity under Article 3.[351] The ECtHR has also found that the prohibition on the use of degrading treatment includes such actions which are designed to arouse feelings of fear, anguish or inferiority capable of humiliating or debasing the individual in question.[352]

4.5.1 Unnecessary Handcuffing

In the case of suspects with psychosocial disabilities, intellectual disabilities, autism and learning disabilities, it is argued that the police should be trained to apply handcuffs safely to the individual in question. This is particularly pertinent in the case of an individual who is experiencing distress and may be resisting arrest as the use of handcuffs may cause injuries to them. There is relatively little information available in regards to the safe application of handcuffs to persons with intellectual/psychosocial disabilities. However, research does indicate that persons with autism, for example, may become particularly agitated during an arrest and may actively resist an officer's attempt to apprehend them.[353] This may lead to a greater risk of injury in the event that handcuffs are applied, and could further heighten the individual's sense of anxiety or distress.

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[348] European Union Agency for Fundamental Rights, *Fundamental rights-based police training: A manual for police trainers* (Publications Office of the European Union 2013) 128.
[349] CRPD, Article 1.
[350] European Convention on Human Rights, Article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'
[351] *Ribitsch v Austria* App no 18896/91 (ECHR, 4/12/1995), para. 38.
[352] *Keenan v United Kingdom* App no. 27229/95 (ECHR, 3/4/2001), para. 109.
[353] See The National Autistic Society (Fn. 114).

Recent guidelines on the use of handcuffs have been published in the United Kingdom which state that any 'intentional application of force to the person of another is an assault. The use of handcuffs amounts to such an assault and is unlawful unless it can be justified.'[354] This is in line with the United Nations position on the use of force, which defines force as the 'physical means that may harm a person or cause damage to property,' including through the use of physical restraints such as handcuffs.[355] According to this report, handcuffs should only be used 'when there is an objective reason to believe the offender might escape or is likely to use violence against the law enforcement official or someone else.'[356]

In Ireland, the use of handcuffs to secure an individual suspect is generally permissible and is at the discretion of the arresting Garda officer.[357] For example, in *DPP v Pires*, the Court of Appeal recognised that the use of handcuffs to restrain an individual is common practice; however the Court conceded that it will not always be acceptable to use handcuffs in every case.[358] The Court considered the basis for using handcuffs in the circumstances of the arrest; namely the individual was intoxicated, larger than the arresting Garda in stature and he had to transport Mr. Pires to the station in a car that did not have an internal protective barrier.[359] Therefore, on account of the potential risks posed to the arresting Garda in question, the Court found that it was relevant to consider

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[354] Association of Chief Police Officer of England, Wales and Northern Ireland, *Guidance on the Use of Handcuffs* (Version 2, London 2010).

[355] UN Office on Drugs and Crime Resource Book (Fn. 149), 1.

[356] Ibid.

[357] Garda Síochána Ombudsman Commission, *2015 Annual Report* (2016) 27 <https://www.gardaombudsman.ie/docs/publications/AnnualReports/GSOC_AnnualReport_2015.pdf> Accessed 9 June 2018. The Irish Supreme Court has previously considered the lawful use of handcuffs in several cases. See *Director of Public Prosecutions (DPP) v Cullen* [2014] IESC *7,* para 25: Fennelly J. recognised the power of Garda officers to exercise discretion in the use of handcuffs and held that all members are 'fully entitled to and may well be obliged to apply handcuffs to an arrested person, where he or she genuinely believes that it is necessary to do so in the particular case.' Fennelly J. highlighted a number of factors which must be considered in regard to the lawful use of handcuffs, including the nature of the offence in question, the prevailing circumstances, the personality and character of the individual suspect.

[358] *The Director of Public Prosecutions v Pires & Ors* [2016] IECA 413, para 14: Referring to the ruling in Cullen wherein the Court recognised that the law permits the use of handcuffs where it is deemed appropriate and necessary, but not in all cases. This decision is to be a matter for the arresting Garda to decide based on the circumstances of the arrest. In considering the test applied, Mahon J. held that when considering the appropriateness of the use of handcuffs, a judge is required to apply a test of "primarily subjective" rather than "objective reasonableness" (para 26.)

[359] Ibid*,* para 31.

the officer's *own perspective* as to the risks involved in the arrest.[360] The Court concluded that there was no finding that the arresting Garda did not genuinely believe that the use of handcuffs was necessary in light of the circumstances as he perceived them to be at the time of the arrest.[361] The use of handcuffs is also permissible under the ECHR, but if there is no risk of the suspect's escape the use of handcuffs could become a breach of Article 3 (prohibition on torture).[362] This right provides for a prohibition against torture and states 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[363]

In light of the lack of information or specific policy guidance available on the use of handcuffs for suspects under arrest, it is useful to consider the guidelines for the use of handcuffs on juvenile offenders in Ireland.[364] Useful guidance can be gleaned from the Oberstown Handcuff Policy, which provides for the use of handcuffs in child detention. According to these guidelines on the use of restraints, handcuffs must only be used in certain circumstances where absolutely necessary and must be proportionate to the risk posed by the young person in question.[365] Furthermore, the Policy outlines that only those

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[360] Ibid, para 32: 'Cullen requires that the decision of the garda to use handcuffs when making an arrest in a drink driving case ought to be made on the basis of his, the officer's, perspective as to the risks that might arise if handcuffs were not used. In Cullen, Fennelly J. stated that "it is the police officer who must make that judgment".

[361] Ibid, para 33.

[362] 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' See *Mirosław Garlicki v Poland* App no. 36921/07 (ECHR, 14/6/2007): In this case, the applicant was arrested at the hospital where he worked and was placed in handcuffs in view of "hundreds" of staff, patients and visitors and the arrest was filmed continuously by one of the police officers. Furthermore, pictures of the applicant in handcuffs were taken and were later circulated to the media and were then published in all newspapers. In its judgment, the court noted that the use of handcuffs 'is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence.' The court acknowledged that the circumstances of the applicant's arrest may have exceeded the 'usual degree of humiliation that is inherent in every arrest and detention' and may therefore amount to degrading treatment in violation of Article 3.

[363] In *Kazakova v Bulgaria* Application no. 55061/00 (ECHR, 22 June 2006), the applicant was handcuffed to a radiator for one hour during the course of investigations into alleged theft. The ECtHR found that the use of handcuffs by police officers will not normally amount to an issue under Article 3 when they are used to affect a lawful arrest or detention and did not entail the use of force or such public exposure exceeding that which is necessary or reasonable in the circumstances. The court held that the circumstances of the applicant's treatment in the police station did not reach the requisite level of severity in order to fall within the scope of Article 3, as the use of handcuffs was for a limited period and furthermore, the restraint was within the privacy of the police station as opposed to being in the public view.

[364] Oberstown Campus, Handcuff Policy (Ref no. OCDC8, 19 July 2017) <https://www.oberstown.com/wp-content/uploads/2017/07/HandcuffPolicy_Final_V1.0-1.pdf> Accessed 12 June 2018.

[365] Ibid, 1.

staff who are trained in the use of handcuffs should apply handcuffs to young people and they should never be used as a measure of punishment.[366]

Further research is necessary in respect to the officers' discretion to apply handcuffs and in particular, whether Gardaí are more likely to use physical restraint in cases where the individual in question has a disability which the officer perceives as "dangerous". The decision to use handcuffs may be influenced by the existence of a mental illness, as officers might consider certain traits or symptoms as dangerous and pre-emptive measures may be used to control the individual. A 2011 Canadian study which examined how people with mental illness perceive and interact with police officers highlighted the overreliance on handcuffs in situations involving a person experiencing distress or in need of care.[367] In line with the CRPD provisions and benchmarks, training should be provided to officers in an effort to curb the false perceptions of dangerousness amongst police officers in respect of persons in distress and to alert them to the dangers of unnecessary or arbitrary use of handcuffs. As stated in the UN report on the use of force, in certain cases an individuals' condition may be aggravated by the use of handcuffs, which might make their use unreasonable and therefore amount to excessive force.[368]

There is a difficult balance to strike here admittedly; if a garda does not recognise that a person has autism (for example) and decides to use handcuffs, the person could become resistant or aggressive thereby providing further justification for the use of restraints. This issue speaks to the broader problems involved in regards to policing in the age of de-institutionalisation, particularly in such cases where individual police officers are not equipped with the necessary skills and knowledge in identifying vulnerable persons and responding as appropriate. Due consideration must also be paid to the health and safety of individual officers in these situations, particularly if the individual is showing signs of aggression. These concerns provide further impetus for incorporating a strong emphasis on de-escalation methods within all training for police officers as well as establishing cross-

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[366] Ibid.

[367] Johann Brink and others, *A Study of How People with Mental Illness Perceive and Interact with the Police* (Mental Health Commission of Canada 2011).

[368] UN Office on Drugs and Crime Resource Book (Fn. 149), 82.

collaboration between the police and mental health services to provide assistance where necessary.

4.5.2 Use of Force during Arrests

The use of force during an arrest must be proportionate and reasonable in the circumstances of the arrest.[369] An individual officer's use of discretion is particularly relevant in the context of effecting an arrest, specifically the decision to use force. The use of force during arrests may also be more likely if the police perceive that the suspect is dangerous, due to the presence of their disability, or because they have not been trained to properly identify symptoms of disability or mental illness. Indeed, a report published which examined the use of force by police in England and Wales found that a 'higher proportion of people with mental health concerns experienced force in the custody environment (24%) than people with no mental illness identified (13%).'[370]

The Eighth UN Congress on the Prevention of Crime and Treatment of Offenders adopts a number of principles regarding the use of force by police officers.[371] According to Article 3 of the Code of Conduct for Law Enforcement Officials,[372] police officers 'may use force only when strictly necessary and to the extent required for the performance of their duty.'[373] Article 3 acknowledges that the use of force should only be employed in "exceptional" cases, or where it is 'reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders,

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[369] *Lynch v Fitzpatrick and Others* (No. 2) [1938] I.R. 382, 405; Hanna J.: 'It goes back to the common law principle that it is lawful to use only a reasonable degree of force for the protection of oneself or any other person against the unlawful use of force, and that such repelling force is not reasonable if it is either greater than is requisite for the purpose or disproportionate to the evil to be prevented.'

[370] Independent Police Complaints Commission, Police use of force: evidence from complaints, investigations and public perception (Independent Police Complaints Commission 2016) 55.

[371] UN Code of Conduct for Law Enforcement (Adopted by General Assembly Resolution 34/169 ,17 December 1979)

[372] UN Code of Conduct for Law Enforcement Officials, GA Resolution 34/169 (1979). While not legally binding in Ireland, this Code (alongside UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials) have been used by An Garda Síochána as a valuable point of reference for human rights standards. See Irish Human Rights Commission, *Human Rights Compliance of An Garda Síochána* (Dublin 2009) 27.

[373] Ibid, Article 2: 'In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain upholds the human rights of all persons.'

no force going beyond that may be used.'[374] The use of firearms should also be considered as an extreme measure and every effort should be made by police officers to exclude the use of such weapons.[375] However, the Code of Conduct recognises that police officers may be required to use force during an arrest, but such force must adhere to the principle of proportionality.[376]

The CRPD also provides clear and unambiguous anti-torture protections; Article 15 for example, provides the right to freedom from torture, cruel, inhuman or degrading treatment or punishment.[377] According to Article 15(2), all States Parties to the Convention shall take all effective measures to prevent persons with disabilities from being subjected to torture, cruel, inhuman or degrading treatment or punishment on an equal basis with others.[378] Article 16 of the Convention further provides the right to freedom from exploitation, violence and abuse.[379] The right to be free from torture is 'a rule of special character in international human rights law,' essentially it cannot be derogated from under any circumstances.[380] It is acknowledged, however, that there may be times in which it is necessary for members of An Garda Síochána to use force in effecting an arrest, such as in cases where the individual is posing a threat or is exhibiting violent behaviour and such force is necessary in the interests of the safety of the individual concerned, the arresting officers and the general public. However, it is imperative that all members of the Gardaí are provided with basic training to identify signs or symptoms of persons in distress who may be in need of medical attention. It is also necessary for the officers to distinguish between behaviours which pose a real or an actual risk, and behaviours arising from the person's disability.[381]

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[374] UN Code of Conduct for Law Enforcement, Article 3 Commentary <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx> Accessed 13 June 2018).
[375] Ibid, C.
[376] Ibid, B.
[377] CRPD, Article 15(1): 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.'
[378] CRPD, Article 15(2).
[379] CRPD, Article 16.
[380] Janet Lord, 'Shared Understanding or Consensus-Masked Disagreement-The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities' (2010) 33 *Loyola of Los Angeles International and Comparative Law Review* 27, 32.
[381] U.S DoJ, Commonly Asked Questions (fn 117).

The use of force is permitted in a limited number of situations under Irish law, including in respect of non-fatal force which is governed by sections 18-20 of the *Non-Fatal Offences Against the Person Act* 1997.[382] The Act provides that the use of force in such cases must be reasonable in the circumstances as the defendant believes them to be.[383] Section 18(6) provides that force can only be used by a Garda acting in the course of duty if it is immediately necessary to prevent harm. The challenge herein lies in determining what actions or behaviours the Gardaí believe to be harmful – if an individual is acting erratically or is experiencing a mental health crisis, officers who are untrained in de-escalation techniques or who are unfamiliar with the signs of someone in distress, may resort to using force or restraints (such as handcuffs) and this would be lawful for the purpose of s. 18(6) as above.

The use of force by members of An Garda Síochána has been noted by the CPT on several occasions and has been the subject of a number of inquiries in recent years.[384] One such incident (referred to as the "Abbeylara Incident"), demonstrates the importance of providing training to police officers in responding to cases involving persons with psychosocial disabilities, specifically the value of de-escalation and communication techniques.[385] This case involved the fatal shooting of John Carthy, a man with a history of clinical depression and anxiety, by members of the Emergency Response Unit of the Gardaí in 2000.[386] The events of this incident led to a public outcry in relation to the Garda

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[382] Under this Act force may be used by a person to protect himself or another from injury, assault or detention, to protect his property or that of another, to prevent a crime or breach of the peace or in effecting or assisting in a lawful arrest.

[383] Section 18(3) provides that the circumstances giving rise to the need to use force may exist notwithstanding that the person against whom force is used could not be convicted by reason of infancy, duress, insanity or intoxication.

[384] Vicky Conway and Dermot Walsh, 'Current developments in police governance and accountability in Ireland' (2011) 55(2-3) Crime, law and social change 241, 248: 'It has been the subject of more inquiries and investigations over the past ten years than it experienced over its previous 80-year history.' See also: Council of Europe Report to the Irish Government 1993, 1998, 2002 and 2014. See Council of Europe, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 September 2014 (Council of Europe 2014) 15: 'The CPT recommends that the Irish authorities reiterate to An Garda Síochána officers that any form of ill-treatment (physical or verbal) of detained persons is not acceptable and will be punished accordingly.'

[385] See John O'Dowd, 'Knowing How Way Leads on to Way: Some Reflections on the "Abbeylara" Decision' (2003) 38 Irish Jurist 162 and Vicky Conway and Dermot Walsh, 'Current developments in police governance and accountability in Ireland' (2011) 55(2-3) *Crime, law and social change* 241.

[386] See Robert Barr, *Report of the Tribunal of Inquiry into the Facts and Circumstances Surrounding the*

response to persons experiencing a mental health crisis,[387] which subsequently resulted in the establishment of a Tribunal of Inquiry to investigate the circumstances of Mr Carthy's death.[388] According to the final report prepared by the Tribunal, there was a litany of failures on behalf of the Gardaí,[389] following which there was a review of the procedures for barricade incidents.[390] Among the findings, it was recommended that mental health professionals should be utilised by Gardaí during barricade incidents.[391] Furthermore, it was noted that the assistance of doctors, mental health professionals or counsellors should be sought in the event that they have previously treated the individual involved.[392] While this Report was published twelve years ago, the issues raised within the Abbeylara Incident and the recommendations made within the Report are still relevant to this day. As will be discussed further in the following Chapter, there remains a clear need to establish cross-sectoral links between the Gardaí and medical professionals (including mental health professionals) to provide 24 hour support to Gardaí and all persons in their custody.

The question of police use of force was considered more recently by the Irish courts in *McGuinn v The Commissioner of an Garda Síochána,*[393] which concerned the arrest of an individual at his place of work by five members of the Gardaí. The suspect in this case argued (*inter alia)*, that an officer 'placed a gun to his head spun him around and pinned him to a wall.'[394] With respect to garda powers of arrest, Fennelly J. held that officers may only use such force as was *reasonable* in the circumstances of the case and recognised that

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Fatal Shooting of John Carthy at Abbeylara, Co. Longford on 20th April 2000 (The Stationary Office 2006). [Hereafter Barr Tribunal 2006].

[387] Paul Kimmage, 'What the gardaí did at Abbeylara, and why' *The Irish Independent* (Dublin 11 June 2000) < https://www.independent.ie/irish-news/what-the-garda-did-at-abbeylara-and-why-26255018.html> accessed 27 June 2018.

[388] Pursuant to the *Tribunal of Inquiry (Evidence) Acts* 1921–2002.

[389] Barr Tribunal 2006 (Fn. 200). Among the recommendations, it was noted that a review should be conducted concerning the Garda response to siege situations, training for all new Garda recruits in relation to mental illness and the importance of establishing a relationship with psychologists.

[390] Report of the Garda Síochána Inspectorate, *Review of Practices and Procedures for Barricade Incidents* (February 2007)

[391] Ibid, 23: While it was acknowledged that there is a history of involvement between the Gardaí and Professor Harry Kennedy (Clinical Director at the National Forensic Mental Health Service, Central Mental Hospital); the Report found that a wider network of professionals should be available going forward.

[392] Report of the Garda Síochána Inspectorate, Review of Practices and Procedures for Barricade Incidents (February 2007) 23: 'While they would not necessarily respond to the scene, they should be debriefed to the greatest extent possible as to the subject's condition.'

[393] *McGuinn v The Commissioner of An Garda Siochana* [2011] IESC 33.

[394] Ibid.

this decision was a matter for the arresting garda to make having regard to factors such as urgency, danger and violence.[395] Fennelly J. proceeded to recognise that the law was "realistic" in this regard, but that it would be unlawful for officers to restrain a suspect without due consideration to the context, behaviour and the demeanour of the individual suspect and as a matter of principle, officers must only apply such force as was reasonable in the circumstances of the arrest.[396]

While the suspect in this particular case did not have a disability, it is important to note how difficult it might be for someone with a disability in these circumstances, especially in the event that the individual becomes distressed. Further research is necessary in respect to the use of force by An Garda Síochána and in particular, whether perceived dangerousness is a factor in the unnecessary use of handcuffs, thereby negatively impacting suspects with disabilities and potentially violating the right to liberty as set out in the CRPD.[397]

4.6 Conclusion

Recognising the value of disability awareness-raising and incorporating a human rights approach to policing is an essential part of building a more equal society for all. The jurisprudence being developed by the CRPD Committee, along with examples of best practices and reports of international human rights organisations and police organisations can help improve access to justice and dismantle barriers within the criminal justice system for persons with disabilities. As Perlin has argued:

> The extent to which [Article 13] is honored by signatory nations will have a major impact on the extent to which this entire Convention "matters" to persons with disabilities. It is still a very open question as to whether or not these rights will

[395] Ibid.
[396] Ibid: Moreover, the Court further confirmed that a blanket practice on applying handcuffs to all suspects could amount to an unlawful use of force 'suspects were automatically subjected to force accompanying their arrest and handcuffs would be used in some cases, such as this, when it was unnecessary.'
[397] CRPD, Article 14. To be discussed further in the following Chapter.

actually be given life, or whether they will remain little more than "paper victories".[398]

To ensure the realisation of the rights contained within the CRPD, it is argued that a full reconsideration must be paid to the criminal pre-trial process, and law and policy reform is needed. As discussed throughout this Chapter, there are a number of potential issues which arise following the arrest of a suspect with a disability; however these issues should never be used to justify the unlawful treatment of persons under arrest. The criminal justice system is an inherently complicated process, which creates serious barriers and challenges for persons who have traditionally been at risk of human rights abuses, especially persons with disabilities. Negative attitudes and prior assumptions about disability are an important consideration, especially in the pre-trial process, as they may amount to inappropriate/unnecessary use of force or restraints by the arresting officers. Communication barriers may also have long lasting implications for the case in question; particularly if the individual does not understand the Garda caution or the reasons for their arrest. It is submitted that clear guidance and training should be provided to all members of An Garda Síochána to create awareness of the issues presented in this Chapter, in line with Articles 8 and 13 of the UN Convention on the Rights of Persons with Disabilities. While this chapter focused on the initial point of contact between an individual suspect and the Gardaí, the following chapter will proceed to outline the barriers to justice arising during custody including access to a medical professional and the right to be released on bail.

[398] Michael Perlin, '"Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities' (2008) 13 *Texas Journal on Civil Liberties & Civil Right* 413, 418-419.

CHAPTER 5

Access to Justice in Police Custody: Identification, Access to Health Care and Safeguarding the Right to Liberty

5.1 Introduction

Once an individual has been arrested, there are a number of rights at stake, including the right to liberty, privacy, bodily integrity and dignity. The actions of police officers can directly affect many of these rights through police practices such as using force during an arrest, conducting full-body searches and the decision to detain an individual in custody. The experience of being arrested and taken to a police station can be intimidating for all individuals, but persons with disabilities are particularly vulnerable in this setting, especially if adequate supports or reasonable accommodations have not been put in place to enable them to exercise their rights on an equal basis with others. Existing procedural guarantees and constitutional rights which apply to all persons may be inaccessible or inadequate for persons with disabilities. Therefore, further protections and legal guarantees are necessary to ensure that suspects with disabilities are not disadvantaged within the pre-trial process. Similarly, certain attitudes and perceptions towards persons with disabilities may impact upon the full realisation of such rights in these settings, indicating a need to consider additional strategies such as education, training and awareness-raising.

This Chapter will outline the main human rights implications arising from the arrival at the Garda station. It begins by examining the arrival of persons to the garda station following their arrest and the role of the Member in Charge. Within this section, the identification of persons with disabilities will also be addressed, along with the challenges for police officers in performing this role. The right to receive medical assistance while in custody will then be

addressed in section 5.3, which considers the current practices for receiving medical attention in the garda station, including the impact for persons with disabilities in line with Article 25 of the CRPD. This is followed by an examination of the current procedures for identification parades. Section 5.5 will then consider the Appropriate Adult safeguard as an example of best practice. It will be argued that a similar safeguard should be introduced in Ireland to provide necessary supports to vulnerable persons in custody and to facilitate effective communication between suspects and the Gardaí, particularly during questioning. Finally, this Chapter will consider the right to liberty, as protected in Article 14 of the CRPD. Herein, it is argued that persons with disabilities are particularly at risk of arbitrary denials of bail due to the existence of disability and this creates clear tensions with Article 14 and the overall ethos and objectives of the Convention.

5.2 The Garda Station

This section will explore the key issues arising for persons with disabilities upon attending the garda station following an arrest. An individual can also attend the station voluntarily to assist in the investigation of a crime. In such cases, the individual is entitled to leave at any stage unless the Gardaí have reasonable suspicion to effect an arrest, as discussed in Chapter 4. While this thesis is concerned with the treatment of persons with disabilities both during and following an arrest, some of the issues raised in this discussion are also relevant to persons who attend the station on a voluntary basis – such as identification parades and police interview techniques.

5.2.1 Arrival at the Station and the Role of the Member in Charge

Once an individual has been arrested for questioning, they must be brought to a garda station within a reasonable time.[1] Upon arrival, the Member in Charge (MIC) of the garda station must inform the individual, using ordinary language, of the nature of the offence for which they have been arrested and that they have the right to access legal advice.[2] The

[1] *People (DPP) v Boylan* [1991] 1 I.R. 477.

[2] *The Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations* 1987,

role of the MIC (comparable with the role of the custody sergeant in England and Wales),[3] is outlined in the Custody Regulations 1987, which provide that they are responsible for overseeing the application of the Regulations in relation to persons in custody.[4] In so far as practicable, the garda performing this role should not be a member who was involved in the arrest of a person for the offence in respect of which he is in custody.[5] This may be impossible in rural garda stations, however, as they may not have the resources or the manpower to have someone fulfil this role at all times.[6] As such, there is a risk that in these circumstances, one of the arresting garda members will also have to complete the duties of the MIC – which includes maintaining the custody record and informing them of their rights.[7] The custody record must be kept for all persons in custody, and must outline everything that happens to the person including details of their interview and any information pertaining to medical assistance.[8] The European Code of Police Ethics also acknowledges the requirement for police officers to take an accurate custody record for

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Reg. 8(1): 'The member in charge shall without delay inform an arrested person or cause him to be informed— (*a*) in ordinary language of the offence or other matter in respect of which he has been arrested.' [Hereafter Custody Regulations].

[3] The custody sergeant is tasked with playing a key role in ensuring adherence to PACE and is responsible for ensuring risk assessments are carried out in respect of every individual who enters police custody. See: Ian Cummins, 'Boats against the current: vulnerable adults in police custody' (2007) 9(1) *The Journal of Adult Protection* 15. [Hereafter Cummins 2007].

[4] Custody Regulations (Fn. 2), reg. 5(1): 'The member in charge shall be responsible for overseeing the application of these Regulations in relation to persons in custody in the station and for that purpose shall visit them from time to time and make any necessary enquiries.'

[5] Ibid, reg. 4(3): 'As far as practicable, the member in charge shall not be a member who was involved in the arrest of a person for the offence in respect of which he is in custody in the station or in the investigation of that offence.'

[6] See the Report of the Garda Síochána Inspectorate, *Crime Investigation Report* (Dublin 2014) part 9 of 20 <http://www.gsinsp.ie/en/GSINSP/Crime%20Investigation%20-%20Full%20Report.pdf/Files/Crime%20Investigation%20-%20Full%20Report.pdf> accessed 20 June 2018: 'Outside of Dublin, the member in charge role is usually performed by a garda and the person is often a member attached to a regular unit. In divisions visited as part of this inspection, the Inspectorate found that a garda designated as member in charge will often have other daily responsibilities, such as looking after the public office and answering the main station telephone line.' [Hereafter Garda Síochána Inspectorate Report 2014].

[7] Custody Regulations (Fn. 2), reg. 6(1): 'A record (in these Regulations referred to as the custody record) shall be kept in respect of each person in custody.'

[8] Ibid, reg. 21(5): 'A record shall be made of any medical examination sought by the member in charge or person in custody, the time the examination was sought and the time it was carried out. If it is not practicable to accede to a request by a person in custody for medical examination by the doctor of his choice at his own expense, the relevant circumstances shall also be recorded.'

each detainee,[9] in accordance with previous guidance issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[10]

Maintaining an accurate and complete custody record is important for a number of reasons. First, the record can be used in evidence in court if there is an allegation that there has been a breach of the Custody Regulations. Secondly, in the case of a person with a disability, the custody record provides a statement of their health and medical treatment while they were in custody.[11] This may prove important for gardaí in such cases where the individual is to be administered medication regularly and it is their responsibility to ensure this is done accurately and where needed. The 2014 Garda Inspectorate Report acknowledged that many persons who are detained in garda stations are vulnerable due to medical conditions, mental illness or intoxication, and their behaviour may in turn present a 'significant safety risk' to themselves or to other persons in custody.[12] The role of the MIC is particularly important in such cases, and The Garda Inspectorate recognises the 'considerable responsibility' placed upon them.[13] Therefore, it is essential that training is provided to all gardaí fulfilling the MIC role to ensure that they are able to identify signs or symptoms of disability, which will now be considered in the next section.

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[9] The European Code of Police Ethics, *Recommendation 10* (adopted by the Committee of Ministers of the Council of Europe on 19 September 2001) and Explanatory Memorandum (adopted by the Committee of Ministers on 19 September 2001) 52. [Hereafter European Code of Police Ethics].

[10] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report on the CPT's activities* (1992) para 40: 'The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc.; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record.' [Hereafter CPT 2nd General Report].

[11] Section B 20 of the Custody Record asks for 'Any relevant particulars relating to physical or mental condition': See The Garda Ombudsman, The Death of Terence Wheelock: Report Pursuant to Section 103 Following Investigation (30 March 2010) <https://www.gardaombudsman.ie/publications/investigation-reports/?download=file&file=638> accessed 20 June 2018.

[12] Garda Síochána Inspectorate Report 2014 (Fn. 6), part 9 of 20.

[13] Ibid.

5.2.2 The Identification of Disability in Custody

Many of the issues raised throughout this thesis relate to the ability of the officer to identify and respond to signs or symptoms of disability. Previous research has found that the role of a custody officer is crucial for recognising vulnerability, as arresting officers may not recognise vulnerability due to their involvement in the arrest.[14] This point reiterates the need for an independent garda to fulfil the MIC role in so far as practicable. Once the officers are aware of the individual's requirements or needs, they can then adapt their policing practices and/or style of communication accordingly. Identification is also an important step in terms of access to justice, as the officers can only secure supports or reasonable accommodations where they are aware that the individual has a disability. In this regard, regular training and awareness-raising is imperative to familiarise officers with the key signs to be aware of and how to respond as necessary (for example, as reflected in the objectives of Article 8 of the Convention).[15]

The identification of vulnerability can be an extremely difficult task for police officers, especially in relation to hidden disabilities such as learning disabilities, hearing or visual impairments, brain injuries, and mental illnesses. For persons with dual diagnosis, the situation is even more complex as gardaí may not notice the signs or symptoms of a person's disability, particularly if they are intoxicated.[16] Such problems are not unique to police officers, as trained clinicians can also find it difficult to identify the signs or symptoms of disability.[17] While this fact may mitigate the low identification rates of vulnerable persons in custody, it is 'not safe to assume that vulnerable suspects will receive the additional legal safeguards (the presence of an appropriate adult) to which they are entitled,'[18] as vulnerabilities often go undetected. This issue can be addressed in

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[14] Susan Hayes, 'The intellectually disabled sex offender' (Sex Offenders: Management Strategies for the 1990s, Office of Corrections and Health Department Melbourne, 1990) 89.
[15] See discussion on training in Chapter 4, section 3.
[16] See Jonathan Clayfield, Kenneth Fletcher and Albert Grudzinskas, 'Development and validation of the mental health attitude survey for police' (2011) 47(6) *Community Mental Health Journal* 442.
[17] Luigi Mazzone, Liliana Ruta and Laura Reale, 'Psychiatric comorbidities in asperger syndrome and high functioning autism: diagnostic challenges' (2012) 11(1) *Annals of general psychiatry* 16 and Ramesh Shivani, Jeffrey Goldsmith and Robert Anthenelli, 'Alcoholism and psychiatric disorders: Diagnostic challenges' (2002) 26(2) *Alcohol Research and Health* 90.
[18] John Pearse and others, 'Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession' (1998) 8 *Journal of Community & Applied Social Psychology* 1, 16

part by mandating regular disability training for all police officers; however this will not mitigate all of the difficulties regarding the identification of vulnerable persons in custody. For example, it would be unreasonable to expect police officers to be able to identify and understand the very many different forms of disability, and the subsequent supports or adjustments required in turn. Furthermore, the way in which one diagnosis manifests may be different depending on the individual concerned, thereby presenting a major challenge to police officers.[19]

As police officers are not trained medical professionals, it is unrealistic to expect them to be able to identify and have the necessary skills to respond to all persons in their custody. Therefore, it is essential that An Garda Síochána build links with community services and mental health services to provide cross-sectoral supports to vulnerable suspects. An example of this would be the current practice of securing the services of an interpreter or translators for suspects who do not speak English.[20] In cases where the MIC believes that a person in custody requires interpretation assistance, they are required to take 'such steps as are reasonable in all the circumstances' to verify if the assistance of an interpreter is necessary.[21] The role of the interpreter in such cases is crucial to the success of the overall investigation and allows the interviewing gardaí to do their job while also respecting the individual needs of the suspect.[22] It is argued that specialist accommodations should also be made for suspects with disabilities, including the provision of an interpreter if someone

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[19] Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experience of People with Disabilities Reporting Crime Summary Report* (Victorian Equal Opportunity and Human Rights Commission 2014). [Hereafter Victorian Equal Opportunity and Human Rights Commission 2014].

[20] Custody Regulations (Fn. 2), reg. 12(8)(a): Where an arrested person is deaf or there is doubt about his hearing ability, he shall not be questioned in relation to an offence in the absence of an interpreter, if one is reasonably available, without his written consent (and, where he is under the age of seventeen years, the written consent of an appropriate adult) or in the circumstances specified in paragraph (7) (*a*) (iii).'

[21] Section 4(1) European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations 2013. The MIC must consider if the individual suspect knows the offence for which they have been arrested, if they can communicate effectively with their solicitor and if they are able to appreciate the significance of the questions put to him (section 4(2)). [Hereafter 2013 Regulations].

[22] It is recognised however, that the practice of obtaining an interpreter for suspects is not necessarily guaranteed in Ireland. Furthermore, even in such cases where the service of an interpreter is obtained, they may be untrained or lack any real experience in interpretation. For further discussion, see Irish Council for Civil Liberties, Grace Mulvey and JUSTICIA, *The right to interpretation and translation and the right to information in criminal proceedings in the EU May 2015* (Irish Centre for Human Rights 2015).

has communication difficulties,[23] or an appropriate adult who can facilitate "effective communication" while also playing a number of other roles to support persons in custody (to be discussed further below). The provision of such accommodation would further ensure compliance with the CRPD, as the denial of reasonable accommodations amount to a violation of the non-discrimination provision.[24]

(i) "Do you have any difficulties I may not be aware of?"

As vulnerability can often go unnoticed or undetected by police officers, it is necessary to consider alternative options which can be adopted alongside regular training and awareness-raising. In the United Kingdom, the National Autistic Society has proposed that all police officers should ask the question, 'do you have any difficulties that I may not be aware of?', upon coming into contact with someone whom they suspect may have autism.[25] It is suggested that a similar question should be asked by the MIC of all suspects taken into garda custody. There are a number of shortcomings in relation to this recommendation however. For instance, a person who has been arrested may not have been diagnosed or have had previous contact with mental health services; therefore, their first assessment could take place within the station following their arrest.[26]

Secondly, this question may overlook the fact that many people may choose not to disclose their disability to the police for fear of being stigmatised.[27] According to a recent report conducted in England and Wales, direct questions such as 'do you have a mental illness?' were unlikely to elicit a true response, especially if this is asked in a crowded

[23] At present, access to an interpreter can be obtained for persons who are deaf or if they have a speech impediment, but the 2013 Regulations do not recognise the needs of persons with other communication difficulties, such as persons with autism. See s. 12 of the 2013 Regulations (Fn. 21): 'Without prejudice to the provisions of any other enactment, where an arrested person is deaf or there is doubt about his or her hearing ability or where the person suffers from a speech impediment which significantly affects his or her ability to be understood, the member in charge shall make appropriate arrangements to take account of the person's circumstances.'

[24] CRPD, Article 5(3): 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.'

[25] Nicholas Chown, '"Do you have any difficulties that I may not be aware of?" A study of autism awareness and understanding in the UK police service' (2010) 12(2) *International Journal of Police Science & Management* 256.

[26] Cummins 2007 (Fn. 3).

[27] Ibid.

custody suite.[28] While the report found that the design of custody suites does not protect confidentiality, custody sergeants who took steps to take the individual to a quieter area away from others elicited more positive responses.[29] The fear of being stigmatised feeds into the way in which certain disabilities, particularly psychosocial disabilities, are portrayed in the media and throughout the course of history (see Chapter 2). The risk of stigmatisation stems from poor awareness-raising and a lack of training in matters related to disability, thereby further necessitating the need for all police officers to receive regular training as discussed previously.

The third shortcoming arises in such cases where the individual chooses to disclose their disability, but the officers do not believe them. There may be a number of variables at play here, including a lack of awareness about disability (and particularly hidden disabilities), false preconceptions about the nature of psychosocial disability, or the co-occurrence of dual diagnosis in which the individual appears intoxicated to the police. This problem was previously reported in a report of the Victorian Human Rights Commission, which found that some people felt discouraged from disclosing their disability during the reporting process or, in some cases, were forced to educate the police throughout the process.[30] Therefore, while the custody officer or MIC should ask all suspects the question 'do you have any difficulties that I may not be aware of?', at first point of contact, it is argued that this should not prevent further assessments or efforts to identify vulnerabilities among persons in custody, especially before and during questioning.

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[28] Her Majesty's Inspectorate of Constabulary (HMIC), *The welfare of vulnerable people in police custody* (HMIC 2015) 85. [Hereafter HMIC Report on Vulnerable Persons in Custody 2015].

[29] Ibid: 'A custody sergeant succeeded in gaining the cooperation of a very distressed and non-compliant man with learning difficulties. The detainee refused to get out of the police van. The sergeant talked to him at length in the van, finally leading him gently into the suite. During booking-in, he explained the meaning of complex terms and checked that the detainee understood, immediately arranging assessments for fitness to detain and pre-release planning.'

[30] Victorian Equal Opportunity and Human Rights Commission (2014) (Fn. 19).

The problem of non-identification was accurately summed-up in a submission to the Australian Human Rights Commission, where it was noted that:

> [I]f a disability is not identified, the crude criminal justice response to offending behaviour cannot be modified to meet the needs of the offender and minimise the risk of continued involvement in the system.[31]

As such, identification forms a critical step in the journey of vulnerable suspects and police officers must be afforded every support in carrying out this function, particularly as they are carrying out the role as "street corner psychiatrists" following the closure of the asylums.[32] To summarise, there are a number of obstacles in regards to identifying all vulnerabilities in custody, such as a lack of training and the issue of stigma surrounding psychosocial disabilities especially; however it is argued that these issues can be addressed, to a certain extent, by incorporating the principles of the CRPD into criminal justice policies. Article 8 can arguably play the most important role here, as it requires all States Parties to raise awareness throughout society and foster respect for the rights and dignity of all persons with disabilities.[33] If States take this duty seriously, this could have potential to address stereotypes across all sectors of society – including the media and the police – which in turn, could affect the issue of stigma (and the many forms this takes i.e. issues of non-disclosure among suspects) within the criminal justice system. As discussed, once the nature of the vulnerability has been identified, this will then enable the MIC to make any necessary arrangements to support the individual.

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[31] Central Australian Aboriginal Legal Aid Service, 'Submission to the Australian Human Rights Commission Consultation on access to justice in the criminal justice system for people with disability' (CAALAS, 2013) 6 <https://www.humanrights.gov.au/sites/default/files/Sub40%20Central%20Australian%20Aboriginal%20Legal%20Aid%20Service%20Inc_0.pdf> accessed 18 June 2018.

[32] Linda Teplin, 'Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill' (1984) 39(7) *American Psychologist* 794, as cited in Chapter 1 (Fn. 49). [Hereafter Teplin 1984].

[33] CRPD, Article 8(1)(a).

5.3 The Right to Medical Assistance and Treatment in Custody

To further evaluate the treatment of persons with disabilities in custody, this section will explore the right to receive medical assistance and the medical services available within the garda station. Upon arresting an individual and taking them into custody, there are a number of considerations for police officers to be aware of, especially in such cases where the individual is in distress and is in need of immediate medical care. Indeed, the individual suspect is said to be most vulnerable during the first few hours of custody and as such, the risk of abuse is highest during the early stage of detention.[34] It is therefore necessary to ensure access to a medical professional, and any necessary healthcare, especially in the initial period of detention, to assess the individual following their arrest and to conduct an assessment for any signs of vulnerability or distress. Such access to medical care ensures further compliance with the provisions of the CRPD, particularly Article 25.[35]

5.3.1 Access to a Medical Professional in Garda Custody

In England and Wales, a new programme has recently been rolled out which provides for psychiatric nurses to be based in custody suites in an effort to improve the experience of those in distress.[36] One of the most important functions of psychiatric nurses is to conduct a mental health assessment to identify vulnerable persons in custody, thereby removing this responsibility from the custody officers.[37] Such co-ordination across the policing and mental health service must be seen as a very welcome improvement, for all parties involved, as it provides an essential point of contact within the custody setting for both

[34] Association for the Prevention of Torture, *Monitoring Police Custody: A Practical Guide* (January 2013) 6 < https://apt.ch/content/files_res/monitoring-police-custody_en.pdf> accessed 19 June 2018.

[35] CRPD, Article 25: 'States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.'

[36] See Department of Health, *Extra funding for mental health nurses to be based at police stations and courts across the country* (Department of Health & Home Office 2014) and NHS England, 'The five year forward view mental health task force: Public engagement findings' (2015) <https://www.england.nhs.uk/mentalhealth/wp-content/uploads/sites/29/2015/09/fyfv-mental-hlth-taskforce.pdf> accessed 19 June 2018.

[37] BBC News, 'It has been estimated that police officers spend 15% to 25% of their time dealing with suspects with mental health problems' (4 January 2014) <https://www.bbc.com/news/health-25588547> accessed 20 June 2018.

police officers and vulnerable suspects themselves. Furthermore, access to a medical professional while in custody could act as a further safeguard for vulnerable suspects' in these settings, particularly in respect of their right to the highest attainable standard of health under Article 25 of the CRPD.[38]

In contrast to the introduction of specialist care within the police station in England and Wales, the Irish Health Service Executive (on behalf of the Gardaí) are currently trying to formalise arrangements for accessing the services of General Practitioners (GPs) to persons in custody.[39] According to recent reports, the Gardaí are seeking to establish a number of panels of medical professionals to provide medical assistance on a 24/7 basis.[40] The proposals state that in such cases where a GP has been requested, they are required to respond within 30 minutes in urban areas and within 45 minutes in rural areas, and their services may include the examination of detainees including those at risk of harm or suicide.[41] In relation to vulnerable persons, the GP may also be required to examine persons under the *Mental Health Act* 2001, examine their fitness to be interviewed and make any necessary determinations as to whether the individual should be transferred to hospital.[42]

Heretofore, access to a GP was operated on an informal basis within Garda divisions. According to information received from the Minister for Justice, in response to a Parliamentary Question submitted by the author (see Appendix 3), gardaí can avail of the on-call doctor service in dealing with persons who are experiencing mental ill health.[43] Therefore the proposed changes to the provision of medical care are to be welcomed to provide transparency and efficiency within the pre-trial process and also may go towards ensuring further compliance with the CRPD particularly Article 25. However, there are no further indications that specialist medical professions, such as psychologists or psychiatrists, are to be included among the membership of the panels of medical

[38] CRPD, Article 25.
[39] Lloyd Mudiwa, 'Gardaí to formalise GP work' (2017) *Irish Medical Times* <https://www.imt.ie/news/gardai-to-formalise-gp-work-14-06-2017/> accessed 18 June 2018.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Appendix 3.

professionals. At present, the services of one psychiatrist, Professor Harry Kennedy, are available to the Gardaí, but this is arguably not enough to provide emergency assistance where needed.[44] As such, the proposed arrangements to establish medical panels should ensure that specialised services are available to the Gardaí in difficult cases. It may be the case that the local GP lacks experience or training in identifying complex psychosocial disabilities, and is therefore unsuited to responding to situations involving suspects who are in crisis. It is argued that, similar to the reforms in England and Wales, mental health doctors and nurses should be included within the panel to ensure the availability of specialist care to all persons in custody.

5.3.2 The Provision of Healthcare in Custody

According to the European Code of Police Ethics, all persons who are detained in police custody shall have the right to have a medical examination by a doctor of their choice, where possible.[45] This requirement is one of the fundamental safeguards against the ill-treatment of suspects, as identified by the CPT, which apply from the outset of the deprivation of one's liberty.[46] In the case of vulnerable suspects in custody, there are a number of important considerations in respect of access to healthcare which need to be considered including access to a medical practitioner and to receive medication as appropriate.

In their 2014 report in relation to Ireland, the CPT noted their concern for the provision of health care services within garda stations.[47] Among their findings, it was found that stations are not equipped with medical facilities, and in one Dublin station, the examination room was "totally unsuitable."[48] In such cases where it is necessary for a doctor to carry out an assessment within the garda station, this should be done in private

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[44] An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Stations* (April 2015) <http://www.garda.ie/Documents/User/Code%20of%20Practice%20on%20Access%20to%20a%20Solicitor%20by%20Persons%20in%20Garda%20Custody.pdf> accessed 2 July 2018.

[45] European Code of Police Ethics (Fn. 9), 53.

[46] Ibid, citing CPT 2nd General Report (Fn. 10).

[47] Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 September 2014* (17 November 2015) 16 <https://rm.coe.int/pdf%20/1680727e23> accessed 20 June 2018.

[48] Ibid.

to protect the individual's rights to privacy and dignity.[49] Article 22(2) of the CRPD, for example, requires States Parties to protect the health information of persons with disabilities on an equal basis with others.[50] This is an important consideration for persons in custody and should be respected from the moment of their arrival to the garda station and their first encounter with the MIC, to any assessments carried out by a medical professional.

The CPT also acknowledged the ad-hoc practice of GP's attending at the station, with no formal duty doctor system in place.[51] The current lack of a formalised system means that there are also no guidelines in regards to information-sharing amongst medical professionals:

> [W]hile a doctor might maintain a personal medical record, they are not shared or available to other doctors who might be called subsequently to review the same prisoner. Such a state of affairs is unsatisfactory as the procedure is not only costly (150 Euros per call out) but it does not address the Garda's duty of care obligations.[52]

In their recommendations, the CPT noted that doctors should receive appropriate training in relation to the types of healthcare problems associated with persons in custody, such as drug and alcohol withdrawal. Furthermore, it was noted that formal arrangements should be introduced to provide for a duty doctor rota scheme and for all medical records to be accessible to all medical staff.[53] Accordingly, 'the current system is not serving as an effective safeguard against ill treatment and should be thoroughly reviewed.'[54]

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[49] HMIC Report on Vulnerable Persons in Custody (2015) (Fn. 28), 195: 'For example, a participant with a mental health condition was not able to discuss his/her needs with the doctor because a 'gang' of officers/staff ended the conversation before the detainee could answer the doctor's questions. The participant explained how the officers/staff also made a joke at his/her expense: "[The doctor] signed some document... It was just a document to say that the doctor had seen me and [the police] laughed, they said, 'That's good enough for a judge', and they were laughing, they were laughing, a group of them were laughing.'"

[50] CRPD, Article 22(2): 'States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.'

[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] Ibid.

The issue of medical treatment in custody also gives rise to serious human rights concerns and in particular, to the issue of consent to treatment (Article 12), the right to the highest attainable standard of health (Article 25) and arguably the right to integrity (Article 17). For persons who have been taken into custody, it is essential that they are afforded access to prescribed medicines as appropriate. In the event that access to medication is delayed while a person is in custody, this could have serious and long-term implications for both their physical and psychological welfare. Further problems arise during questioning, according to a report conducted in England and Wales, a lack of access to medication led to incoherent accounts of events during questioning and made it more difficult to convey their version of events to the officers.[55] In keeping with the obligations imposed under the CRPD, and especially Article 17 which recognises the right to respect for both physical and mental integrity, and Article 25 which provides for the right to health.

Article 12 of the Convention is also relevant as it recognises that all persons have the right to make decisions and have these decisions respected. Article 12(4) is of note, as it requires States Parties to ensure that effective safeguards are in place to prevent abuse, including measures that ensure that decisions are made free of conflict of interest and undue influence.[56] According to the CRPD Committee, the term undue influence includes signs of fear, aggression, threat, deception or manipulation.[57] It is argued that the experience of being apprehended and detained in custody can be challenging for all suspects, but this is especially the case for vulnerable suspects who may be in distress. As such, there is a heightened risk that the conditions of police detention may be such that the individual feels coerced to give their consent to be treated.

This raises concerns in regards to the nature of police detention itself, and the already vulnerable position of the suspect following their arrest. A key element of consent is that it protects a person's autonomy, which ensures that 'one's own actions and decisions are one's own.'[58] The law presumes that all people have the necessary level of capacity to

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[55] HMIC Report on Vulnerable Persons in Custody (2015) (Fn. 28), 195.
[56] CRPD, Article 12(4).
[57] Committee on the Rights of Persons with Disabilities, *General comment No. 1. Article 12: Equal recognition before the law* (CRPD/C/GC/1, 19 May 2014).
[58] Deirdre Madden, *Medicine, Ethics and the Law* (2nd edn., Bloomsbury Professional 2011) 365.

make decisions about medical intervention;[59] however persons with disabilities have historically been denied the right to make decisions in relation to their medical treatment.[60] In the context of the garda station, it is important that the individuals' right to the highest attainable standard of health is respected and all decisions to administer medication are made on the basis of obtaining free and informed consent from the individual concerned, as per Article 25.[61] In such cases where it is necessary to make changes to a pre-existing course of treatment or administer a new medication, it is imperative that the reasons why this is necessary are explained to the individual in an ordinary (and accessible) language and their consent is provided without undue influence from a third party such as a police officer or a solicitor.

5.4 Identification Parades

This section will examine the nature of identification parades and how suspects with disabilities can be reasonably accommodated to participate in them. The use of identification parades can be critical to the construction of a case, and such parades form an integral part of policing, therefore it is relevant to consider how police officers can accommodate vulnerable suspects during them.

The purpose of the identification parade is to allow a witness or a victim to identify a suspect from a line-up of individuals of similar resemblance to the accused. The composition of the parade is within the control of the police officers,[62] and in so far as possible, the members of the line-up should resemble the description of the perpetrator provided by the witness and they should not obviously stand out from the suspect.[63] In Ireland, the Gardaí regularly rely on identification parades, however there is no legislation at present to regulate these practices. The Court of Criminal Appeal has previously stated that a formal identification parade was the preferred method of obtaining identification

[59] Ibid, 367.
[60] CRPD Committee General comment No. 1 (Fn. 57), para 8.
[61] CRPD, Article 25(d): 'Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.'
[62] John Berry, 'The Perils of ID Parades' (2014) 19(4) *Bar Review* 92, 95.
[63] Ibid.

evidence, as opposed to informal methods such as showing the witness or the victim photographs to see if any of the photos match their previous description of the suspect.[64] The court also commented on the danger of mistaken identity in such cases where the conviction is 'wholly or substantially dependent on evidence derived from visual identification.'[65] As such, the Court proceeded to reaffirm well-established procedures for formal identification parades, as set out in *The People (Director of Public Prosecutions) v O'Reilly*:[66]

- The witness should be asked to identify the suspect from a line of 8 to 12 people, chosen because they look similar to the suspect (both physically in terms of height and age, but also in appearance, i.e. their dress and walk in life, similar detailed socioeconomic background etc.)
- The parade should be carried out by a garda who is independent of the investigation, and of the knowledge and information which it possesses.
- A full record of what has occurred should be taken during the parade, including details of the foils.
- The suspect is entitled to have their solicitor present and any "objection reasonably made" should be considered on the weight of its merits.[67]
- The suspect has the right not to participate and should be informed of this right.
- The suspect must not be seen before the parade by potential witnesses.
- The Gardaí have a duty to conduct the parade fairly, as dictated by the circumstances. Therefore, other safeguards may be necessary depending on the

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[64] *The People (Director of Public Prosecutions) v Mekonnen* [2011] IECCA 74.
[65] Ibid, para 14: 'This risk exists even where the opportunity for observation appears adequate. It exists even with a witness who conscientiously strives for truth and accuracy and who is convinced that in his present situation the threshold for both has been surpassed. It also exists even in the case of multiple witnesses, all of whom possess the same determination. Evidently, any slippage in such commitment increases the possibility of resulting injustice: the greater the slippage the greater risk. Hence, time after time courts at all levels have warned of such dangers. That is why a particular duty of enhanced scrutiny and critical appraisal is required in all cases where the issue is in play.'
[66] Ibid, para 17, referring to *The People (Director of Public Prosecutions) v O'Reilly* [1990] 2 I.R. 415.
[67] An Garda Síochána, Code of Practice on Access to a Solicitor by Persons in Garda Custody (April 2015) 11 < https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Code-of-Practice-on-Access-to-a-Solicitor-by-Persons-in-Garda-Custody.pdf> accessed 20 June 2018: A suspect may have a solicitor or a friend present during the formal identification parade. The presence of a solicitor is to ensure that the interests of the suspect are protected and to ensure the Garda conducting the parade adheres to the rules concerning the Conduct of Formal Identification Parades.

particular facts of the case. Gardaí must be vigilant and proactive in light of this duty.[68]

While it may be possible to ensure compliance with the above procedures for some people, it may be more difficult in such cases where the individual suspect has a visible or physical disability.[69] In such cases, identification parades should not be used as it may risk the suspect's right to due process and non-discrimination.[70] There are also a range of operational and practical difficulties which must be considered in regards to complying with these procedures, especially in respect of rural garda stations.[71] In some areas, it may not be possible to secure a sufficient amount of people of similar resemblance to the accused person. Furthermore, it may not be possible to locate a garda member independent of the investigation to carry out the parade. The final difficulty relates to the final procedure, the duty of the garda to conduct a fair parade. It is unclear what circumstances would fall into the category of unfair, however it is argued that in such cases where the suspect has an obvious disability, then this may amount to being unfair or disadvantageous to the suspect, especially if the other participants in the parade do not have a disability. In such cases, the use of an identification parade would give rise to a breach of the right to non-discrimination under the CRPD, and thus should be avoided.

In Scotland, guidelines were issued in 2007 regarding the conduct of identification parades,[72] wherein it was advised that in such cases where the suspect concerned has a

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[68] *The People (DPP) v O'Reilly* (Fn. 65). See *People (DPP) v Mekonnen* (Fn. 64), para 17: 'However, whilst every effort must be made to comply with these requirements and any others necessitated by the individual circumstances of any given case, there will of course be occasions where some single element(s) may have to yield to the practicality of the circumstances at hand.'

[69] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80 - 1996) para 4.68 <http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-80.pdf> accessed 20 June 2018. [Hereafter NSW Law Reform Report 1996].

[70] Ibid, recommendation 6(g): Herein, it was stated that identification parades should not be used for persons with an intellectual disability as it is likely to result in unfairness to the suspect, due to the 'the unusual manner or appearance of the particular suspect'.

[71] See Berry (Fn. 62), 95.

[72] Lord Advocate's Guidelines to Chief Constables, *Guidelines on the Conduct of Visual Identification Procedures* (February 2007) <http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20-%20Conduct%20of%20Visual%20Identification%20Parades%20-%20February%202007.PDF> accessed 22 June 2018.

known mental disorder,[73] they should be accompanied throughout the parade by a responsible adult, an appropriate adult or an interpreter.[74] The guidelines further provide that where necessary, this individual may assist the officer in communicating information to ensure that the suspect fully understands what is required of them.[75] Interestingly, the guidelines also pertain to persons with physical disabilities, including instances where the suspect is missing a limb; in such cases, the parade should be composed to conceal this.[76] For example, if the suspect is missing a leg, all other members of the parade should stand behind a counter.[77] There are no similar guidelines available to suggest the Gardaí must follow similar protocols. It is argued that going forward, in light of the principles of reasonable accommodation and non-discrimination under the CRPD, similar measures should be put in place to ensure that persons with disabilities are provided the same rights as other, non-disabled suspects.

5.5 The Appropriate Adult Safeguard

This section will consider the Appropriate Adult safeguard and the merits of this approach in providing supports to vulnerable suspects in custody. [78] In 1984, the Police and Criminal Evidence Act (PACE) was introduced to deal with the treatment of suspects undergoing police questioning in England and Wales.[79] Code C of PACE provides for the presence of an appropriate adult ("AA") for mentally disordered or mentally vulnerable suspects in custody.[80] In cases where a custody officer has a doubt about the mental state or mental

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[73] Ibid, 3: Including mental illness, learning disability, acquired brain damage or dementia, or a person who requires the services of an interpreter.
[74] Ibid, 7: 'Who is not and is not likely to become a witness in the case aside from in this capacity.'
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Lord Chancellors Department, *Who Decides: Making Decisions on Behalf of Mentally Incapacitated Adults* (Command Paper, Stationery Office Books 1997) cited in Home Office, *No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* (Department of Health 2000) 9-10: A vulnerable person has been defined as a person 'who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation.'
[79] Home Office, *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Police and Criminal Evidence Act (PACE) 1984 Code C* (Crown 2017). [Hereafter Code C].
[80] See Code C, para 3.5. 'Mentally vulnerable' applies to any detainee who, because of their mental state or capacity, may not understand the significance of what is said, of questions or of their replies. 'Mental disorder' is defined in the Mental Health Act 1983, section 1(2) as 'any disorder or disability of mind'.

capacity of a detainee, they are required to contact an AA as soon as practicable.[81] Most importantly, the individual must not be questioned or asked to provide a statement until the AA has arrived, unless it is urgent.[82]

The presence of a support person during the police interview is commonplace in many jurisdictions. In Scotland, the safeguard is currently provided on a non-statutory basis.[83] The Scottish Appropriate Adult Network was set up to facilitate and assist all adults with a mental disorder, regardless of whether they are being interviewed as a victim, witness, suspect or an accused.[84] In order to identify whether an AA is required, guidelines published in 2007 provide that police officers should look out for signs such as excessive anxiety, unusual mood level, incoherence, inability to understand or answer questions, unusual behavioural traits, agitation leading to physical activity which is not in keeping with the situation, or other signs of mental disorder.[85] These guidelines also acknowledge that there may be times when the individual has no visible signs of a mental disorder, therefore the investigating officer may wish to ask the interviewee if they have any mental health problems, learning disability or other communication needs which the police should be aware of.[86]

Similarly in Northern Ireland, an appropriate adult scheme was set up to support and assist vulnerable persons to understand what is happening to them and why.[87] Furthermore, a Registered Intermediary (RI) Scheme was also set up in Northern Ireland by the Department of Justice to assist those who have significant communication difficulties

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[81] Ibid.

[82] Code C, para 11.15: 'In such circumstances, the interview must be conducted by an officer of rank superintendent or above.'

[83] In April 2018, a consultation was announced to examine the basis for including appropriate adult services in the Criminal Justice (Scotland) Act 2016. Scottish Government, 'Establishing a statutory appropriate adult service in Scotland: consultation' (April 2018) <https://beta.gov.scot/publications/establishing-statutory-appropriate-adult-service-scotland/> accessed 18 June 2018. See also *Criminal Justice (Scotland) Act* 2016, s. 42.

[84] *The Mental Health (Care and Treatment) (Scotland) Act* 2003, s 328(1) defines mental disorder as 'any mental illness, personality disorder, learning disability however caused or manifested'.

[85] Scottish Government, *Guidance on Appropriate Adult Services in Scotland* (November 2007) <http://www.gov.scot/resource/doc/1099/0053903.pdf> accessed 20 June 2018.

[86] Ibid.

[87] Department of Justice, The Northern Ireland Appropriate Adult Scheme (NIAAS), *Annual Report 2014-2015* (MindWise) <http://www.mindwisenv.org/doc/AnnualReports/NIAAS%20AR%202014-15.pdf> accessed 20 June 2018. [Hereafter MindWise Annual Report 2014-2015].

arising from a mental health condition or a personality disorder.[88] An RI can assess one's level of communication and their needs, and provide a report to the police investigating the case about communication strategies and they can also attend the interview itself to facilitate communication.[89]

In Ireland, the role of an intermediary was recognised in the Criminal Evidence Act (1992), which provides for their use during court hearings to assist a person under 17 years to give evidence,[90] but there are no formal supports available to provide assistance to vulnerable suspects within the pre-trial process. Moreover, there are no trained intermediaries in Ireland to perform the role set out by the 1992 Act.[91] It is argued that in order to ensure access to justice for suspects during the pre-trial process, the introduction of an appropriate adult service could be most effective in terms of providing support to vulnerable suspects in police custody. This is especially important to comply with the requirement of reasonable accommodation, and to ensure respect for different modes and formats of communication as recognised by Article 21 CRPD.[92]

5.5.1 The Role of the Appropriate Adult

In England and Wales, the role of an AA may be performed by:

a) a relative, guardian or other person responsible for their care or custody;
b) someone experienced in dealing with mentally disordered or mentally vulnerable people (but who is not a police officer or employed by the police);
c) or, some other responsible adult aged 18 or over who is not a police officer or employed by the police.[93]

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[88] Department of Justice, Northern Ireland and MindWise, *Mental Health & Wellbeing and Personality Disorders: a guide for criminal justice professionals* (2016) < http://www.mindwisenv.org/doc/Guide%20CJS%20professionals%202016.pdf> accessed 20 June 2018.
[89] Ibid, 19.
[90] *Criminal Evidence Act* 1992, s 14.
[91] See comments by Maria McDonald in Cormac Fitzgerald, '"At the moment, court is a very frightening place for a child" - young victims in Ireland's legal system' *TheJournal.ie* (24 May 2016) <http://www.thejournal.ie/child-court-protection-2784424-May2016/> accessed 20 June 2018.
[92] CRPD, Article 21(b): 'Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.'
[93] Code C (Fn. 79), para 1.7 (b).

In all cases, the AA should be completely independent of the police investigation.[94] In the case of a suspect with a mental disorder or who is otherwise "mentally vulnerable", it is preferable for the appropriate adult to be someone experienced or trained in their care rather than a relative.[95] This is comparable to the Irish Custody Regulations, which provide a similar provision under regulation 22(2), which states that in cases where the member in charge knows or suspects the individual to be mentally handicapped, a responsible adult should be one who is experienced in 'dealing with the mentally handicapped.'[96] However, unlike England and Wales, there is no comparable scheme to provide for an appropriate adult in these circumstances.

According to PACE, an appropriate adult has three main functions: to advise the individual in custody about the process (not legal advice), to observe the interview to ensure it is being conducted properly and finally, to facilitate "effective" communication with the person being interviewed.[97] They may also inspect the custody record, intervene during an interview if necessary or if it is the interests of the detainee to facilitate "effective communication" with the police, and to request a break in the interview to allow the detainee to seek legal advice or to consult with the detainee.[98] Arguably, the presence of an AA is most critical during questioning to ensure that the individual understands their rights including the right to remain silent and to ensure that the interview is conducted properly and fairly.[99]

As will be discussed further in the following Chapter, suspects are particularly vulnerable in the closed quarters of an interrogation room; therefore it is imperative that appropriate supports are put in place especially in the case of vulnerable suspects. In order to provide supports to suspects with disabilities in this setting, it is argued that the attendance of an AA is the best option to facilitate communication between the officers and the individual suspect, which in turn may help to avoid false or unreliable confessions (and therefore

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[94] Code C, Notes for Guidance 1F: 'A solicitor or independent custody visitor present at the police station in that capacity may not be the appropriate adult.'
[95] Code C (Fn. 79), note 1D, 8.
[96] Custody Regulations (Fn. 2).
[97] Philip Fennell, 'Powers of the Police and Decision to Prosecute' in Lawrence Gostin and others (eds.), *Principles of Mental Health Law and Policy* (Oxford University Press 2010) 716.
[98] MindWise Annual Report 2014-2015 (Fn. 87).
[99] Code C (Fn. 79), 11.17.

ensure more effective compliance with the CRPD).[100] Research has also found that the mere presence of an AA can lead to a fairer approach to questioning by police officers and an even greater likelihood of legal representation being sought.[101] In England and Wales, the attendance of an AA is also mandatory in the case of voluntary interviews, thereby providing a safeguard to persons who attend the police station for questioning voluntarily and are therefore not entitled to the same rights and protections as those who have been formally arrested.[102]

5.5.2 The Case for an Appropriate Adult Scheme in Ireland

The main impetus for the introduction of an AA safeguard in Ireland arises due to the innate complexity of the criminal justice process. As the below figure illustrates in respect of the English criminal justice system,[103] the criminal process can become a 'bewildering sequence of events' for persons with disabilities.[104] An appropriate adult may become involved early in the process, during the arrest and interview, to provide assistance to the individual suspect and help them to understand the complicated process.

[100] Ibid, 11c 39.
[101] Sarah Medford, Gisli Gudjonsson and John Pearse, 'The efficacy of the appropriate adult safeguard during police interviewing' (2003) 8(2) *Legal and Criminological Psychology* 253.
[102] Code C (Fn. 79), 3.21(b): '…In the case of a juvenile or mentally vulnerable suspect, this must be given in the presence of the appropriate adult and for a juvenile, the agreement of a parent or guardian of the juvenile is also required.'
[103] Royal College of Psychiatrists' Faculty of Psychiatry of Intellectual Disability and Faculty of Forensic Psychiatry London, *Forensic care pathways for adults with intellectual disability involved with the criminal justice system* (Faculty Report FR/ID/04, February 2014) 18.
[104] Ibid.

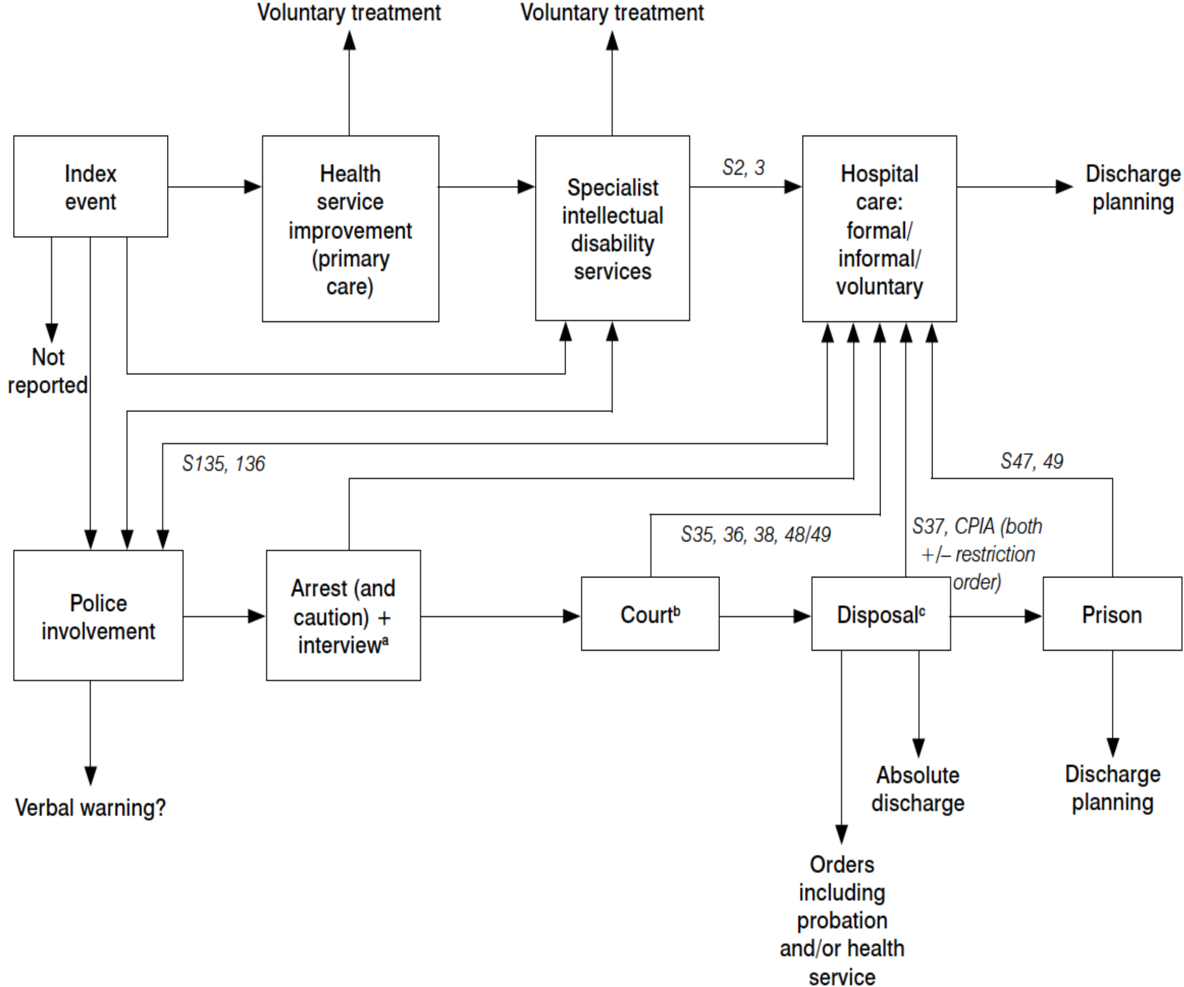

Fig. 1 Pathway of an offender with intellectual disability through the criminal justice system. S, Section (of the Mental Health Act 1983).
a. Appropriate adult (Police and Criminal Evidence Act 1984).
b. Special measures (Youth Justice and Criminal Evidence Act 1999).
c. Criminal Procedure (Insanity) Act 1964, Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (CPIA).

Figure 1: The Pathway of an offender with an intellectual disability through the criminal justice system in England and Wales

The implementation of the AA safeguard is not without difficulties however, with problems relating to delays in securing the attendance of an AA (which in turn leads to delays in the suspects' detention),[105] the overall cost involved, and inconsistencies in training for persons performing the AA role,[106] and also difficulties in the identification of vulnerable persons in custody.[107] Quinn and Jackson have also noted that while the main role of an AA is to facilitate communication between vulnerable persons and police officers, many do not perform this role.[108] These difficulties point to a greater need to review the existing services in place for vulnerable persons in custody to ensure the effectiveness of the AA safeguard.

In the context of Ireland – a country which does not currently have a similar service to support vulnerable persons in custody, these difficulties and implementation problems offer valuable lessons for introducing the safeguard. In particular, it is argued that the current practices of the National Appropriate Adult Network in England and Wales offer useful insights into best practices which could be incorporated here, including formalised training and clear operating standards. Aside from concerns around the substantive operation of an AA scheme, other matters would need to be considered in any proposed introduction of an Irish AA system, including, for example the issue of privilege and if it applies to conversations between the suspect and the AA. In the absence of such protections, an individual performing the AA role can be compelled as a witness in later court proceedings.[109] Under PACE, AA's are not afforded privilege,[110] thereby jeopardising the relationship between the individual suspect and the AA.

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[105] HMIC Report on Vulnerable Persons in Custody (2015) (Fn. 28), 83.
[106] In England and Wales, the National Appropriate Adult Network now offer a nationally accredited qualification to individuals performing the AA role. National Appropriate Adult Network (NAAN), *Appropriate Adult Provision in England And Wales* (Report prepared for the Department of Health and the Home Office, November 2010) 7.
[107] See Roxanna Dehaghani, 'He's just not that vulnerable: exploring the implementation of the appropriate adult safeguard in police custody' (2016) 55(4) *Howard Journal of Crime and Justice* 396 and Roxanna Dehaghani, 'Identifying vulnerability' (2017) 181(4) *Criminal Law and Justice Weekly.*
[108] Katie Quinn and John Jackson, 'Of Rights and Roles: Police interviews with young suspects in Northern Ireland' (2007) 47 *British Journal of Criminology* 234, 245.
[109] *A Local Authority v B* [2008] EWHC 1017 (Fam) Hedley J.: 'It is not that conversations with an AA are legally privileged but only that the presence of an AA at a conversation which would otherwise attract legal advice privilege does not destroy that privilege.'
[110] Code C (Fn. 79), 1E.

Following the recent ratification of the CRPD in Ireland and its provisions relating to reasonable accommodation and access to justice, it is argued that a similar scheme should be adopted here which would provide supports to persons with disabilities as suspects of crime. The introduction of such a service would help alleviate the current pressures on members of An Garda Síochána in performing the role as "psychiatrists in blue",[111] especially as they cannot be expected to be experts in mental health and disability. Going forward, the introduction of an AA service should be considered for inclusion into legislation, and formal training should be provided to persons similar to the training offered by the National Appropriate Adult Network. In keeping with the motto of the CRPD, "Nothing about us, without us",[112] this training should be designed by persons with disabilities who have experience of the criminal justice system and being questioned by the Gardaí.

The above sections illustrate some of the inherent operational challenges and shortcomings within the Irish criminal justice system in responding to the needs of vulnerable suspects. The lack of appropriate and reasonable accommodations to assist suspects during the pre-trial process, such as an AA, creates serious risks for suspects with disabilities. Such risks are bolstered in the case that they are not afforded access to a solicitor during questioning, as will be addressed in the following Chapter. The next section will consider the right to liberty as it applies in the context of an arrest and the nature of the right to bail in Ireland.

[111] See Teplin 1984 (Fn. 32).
[112] As discussed in Chapter 3 (Fn. 36), 8.

5.6 Safeguarding the Right to Liberty

When a person has been arrested and is brought to the station for questioning, they may be held in a cell for a prescribed period as defined in legislation.[113] Police cells, also referred to as holding cells, are used to detain people following an arrest and may also be used for people who are intoxicated for the protection of themselves or others.[114] There is considerably little information available documenting the experience of persons detained in Garda stations, which is most likely due to the lack of an independent system in place to provide regular monitoring and inspections of the conditions of detention in garda stations.[115] The reports of the CPT offer a key insight into this area. According to the 2014 report, in one Dublin garda station, vulnerable persons and juveniles were held in a holding cell in the reception area of the station. Within the cell, there was a concrete bench with wooden seating on the back wall, a mattress on the floor, and no provisions for a 'proper means of rest.'[116] This contravenes the European Code of Police Ethics guidelines in relation to the conditions of custody suites, which note that police cells shall be 'of a reasonable size, have adequate lighting and ventilation and be equipped with suitable means of rest.'[117] In considering these conditions, it was stated that 'the CPT trusts this cell will not be used for overnight accommodation.'[118] Such conditions arguably contravene the CRPD standards also, particularly in relation to protecting one's right to dignity.

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[113] *The Criminal Justice Act* 1984, for example, provides a legislative basis for the detention of persons arrested for offences punishable by five years' imprisonment or more, or attempts at such offences. If the member in charge of the garda station has reasonable grounds for believing that detention is necessary for the proper investigation of the offence then the person may be detained for six hours. This may be extended by a further six hours if a Garda, not below the rank of superintendent, has reasonable grounds for believing that such extension is necessary for the proper investigation of the offence. A further extension of 12 hours may be granted by a Garda not below Chief Superintendent if he has reasonable grounds for believing that such extension is necessary for the proper investigation of the offence. Section 4 of the 1984 Act (as amended) now provides for a maximum period of detention of 24 hours.

[114] *Criminal Justice (Public Order) Act* 1994, s 4: '[i]t shall be an offence for any person to be present in any public place while intoxicated to such an extent as would give rise to a reasonable apprehension that he might endanger himself or any other person in his vicinity.'

[115] Council of Europe, *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 September 2014* (Strasbourg 17 November 2015) 17: 'The CPT has repeatedly stressed that the inspection of detention facilities of law enforcement agencies by an independent authority can make an important contribution towards the prevention of ill-treatment of detained persons and, more generally, help to ensure satisfactory conditions of detention.'

[116] Ibid.

[117] European Code of Police Ethics (Fn. 9), 53.

[118] Ibid, 17.

At present, there are 564 Garda Stations in Ireland.[119] According to a Garda Inspectorate Report, there are a number of cells and detention rooms in garda stations, which are used to detain persons held in custody.[120] The number of cells and detention rooms in Ireland varies depending on the location, with one to three cells in rural areas, to approximately 12-20 cells and detention rooms in city stations.[121] The report found that there are a number of custody facilities at various district stations, and in the Dublin Metropolitan Region, there were 40 different locations in which a detained individual could be held.[122] In the absence of official statistics detailing the number of people taken into Garda custody (although some estimates suggest this number to be 20,000 annually – see Chapter 4), it is impossible to know how many people with disabilities are taken into custody as suspects of crime. This indicates the need for further research to be carried out in this area, in order to understand the true rate at which persons with disabilities are coming into contact with the criminal justice system and thus, providing a clearer mandate for the provision of extra supports or accommodations in this area.

5.6.1 Conditions of Detention

A report published by the National Policing Improvement Agency in the UK outlines principles for the safe detention and handling of persons in police custody.[123] This report states that detainees must be treated in a way that is dignified and takes into account their human rights and individual needs. In this regard, custody staff are required to be aware of, and respond to, any particular risks and vulnerabilities relating to people with mental ill health, learning disabilities/difficulties.[124] Furthermore, detainees should have access to health and social care services appropriate to their physical and mental health needs, any

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[119] An Garda Síochána, 'Organisational Structure' < https://www.garda.ie/en/About-Us/Organisational-structure/Organisation.html> accessed 20 June 2018.
[120] Detention rooms are used for young people in garda custody: see Garda Síochána Inspectorate Report (2014) (Fn. 6), part 9 of 21.
[121] Ibid.
[122] Ibid.
[123] National Policing Improvement Agency, *Guidance on the Safer Detention and Handling of Persons in Police Custody* (2nd edn., Produced on behalf of the Association of Chief Police Officers by the National Policing Improvement Agency, 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117555/safer-detention-guidance-2012.pdf> accessed 20 June 2018.
[124] Ibid.

force used is proportionate and lawful, and custody officer should undergo appropriate and adequate training.[125]

The experience of being arrested and the subsequent detention in a garda station was vividly described by Hardiman J. in *DPP v Gormley*.[126] Hardiman J. acknowledged the terrifying and destructive experience of being arrested and the consequences this can have on an innocent person, or a person who has no prior experience of the criminal law. In highlighting the conditions of garda custody, the judge recognised that many cells are unsanitary with foul smells, in a permanent state of semi-darkness, and the 'seating or bedding may be such that no reasonable person would wish to use it.'[127]

> The sense of being in someone else's power may be utterly overwhelming especially to an inexperienced or sensitive person, or to an entirely innocent person. The noisy closing of a cell door, and the turning of a heavy key, leaving one alone in fetid semi-darkness is not an ideal preparation for what may well be the most important confrontation of one's life.[128]

This judgment, which is profoundly important for all suspects unfamiliar with the Gardaí and criminal procedures, is particularly pertinent in the context of suspects with disabilities. These conditions explained above could exacerbate one's distress, especially in cases whereby the individual is sensitive to certain lighting or noises, or in such cases where the individual is uncomfortable being removed from their usual routine or environment and away from their family or friends. In this regard, and in keeping with the individuals' right to dignity and the duty to make reasonable accommodations as per the Convention, it is necessary to consider the ways in which being taken into custody can affect suspects and create further challenges or obstacles for them.

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[125] Ibid.
[126] *The People (DPP) v Raymond Gormley and The People (DPP) v Craig White* [2014] IESC 17; [2014] 2 IR 591.
[127] Ibid, Hardiman J. para 6.
[128] Ibid.

5.6.2 Protecting the Rights of Persons in Custody

A number of ECtHR cases have also considered the conditions of detention in police custody and are instructive in this discussion. For example, in *Price v United Kingdom*, the Court demonstrated that the right to protection against inhuman and degrading treatment also extended to persons with disabilities.[129] This case concerned an application under Article 3 ECHR, which provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[130] The complainant was a woman with severe physical disabilities who required the use of a wheelchair.[131] She was found in contempt of court during a civil proceeding and was detained in jail for seven days. The cell in which the applicant was detained was unsuitable for persons with disabilities and as a result, she was forced to sleep in her wheelchair for the duration of her time in jail.[132] Among the problems within the cell, the emergency buttons and light switches were out of her reach, the toilet was inaccessible and, on one occasion when she was assisted to the toilet, she was left there for hours 'until she agreed to allow a male nursing officer to clean her and help her off the toilet.'[133]

The Court found that this treatment violated the applicant's rights under the Convention as the conditions amounted to degrading treatment. The Court acknowledged that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of' the Convention.[134] The court recognised that while there had been no intent to cause harm to

[129] *Price v United Kingdom* App No 33394/96 (ECHR, 10 July 2001). [Hereafter *Price v United Kingdom].*
[130] ECHR, Article 3.
[131] *Price v United Kingdom* (Fn. 129)*,* para 7*:* She was described by the Court as "four-limb deficient" and "suffers from problems with her kidneys".
[132] Ibid, para 8: 'The applicant alleges that she was forced to sleep in her wheelchair since the bed was hard and would have caused pain in her hips, that the emergency buttons and light switches were out of her reach, and that she was unable to use the toilet since it was higher than her wheelchair and therefore inaccessible.'
[133] Ibid, para 15: 'The applicant further claimed that later that evening, a female nurse who was assisting her onto the toilet removed her bedclothes in the presence of two male prison nursing officers, thereby exposing her, naked from the chest down, to the male officers.'
[134] Ibid, para 24: 'The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.'

the complainant, the failure to accommodate her needs amounted to a violation of Article 3.[135]

This case highlights the difficulties for persons with disabilities within police custody,[136] and illustrates the importance of providing reasonable accommodations to persons with disabilities to ensure respect for Article 3 ECHR. Further regard can also be had to the provisions of the CRPD in relation to the prohibition against torture (as discussed in Chapter 4) and the right to respect for one's physical and mental integrity under Article 17.[137] In light of such obligations, it is clear that the conditions of one's detention in custody must have regard to their individual vulnerability and all necessary arrangements and supports should be put in place to protect their rights on an equal basis with others. Moreover, these issues illustrate the importance of providing training to police officers to provide them with the necessary skills and knowledge to identify signs or symptoms of disabilities. The following section will highlight the issue of bail and how persons with disabilities are particularly at risk of being denied the right to bail.

5.7 Arbitrary Denial of Bail and Pre-Trial Detention

The use of pre-trial detention is commonplace around the world and the Irish criminal justice system is no exception. There is a right to be released on bail in Ireland, but this right is not absolute and may be curtailed in a number of circumstances.[138] In certain cases, it may be necessary to detain an individual for the purpose of ensuring their presence at trial, to prevent the individual from interfering with the case or with witnesses, or to ensure the safety of members of the public and to prevent the commission of a serious offence. In such circumstances, the use of pre-trial detention will be deemed necessary

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[135] Ibid, para 30: 'There is no evidence in this case of any positive intention to humiliate or debase the applicant. However, the Court considers that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, an is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.'

[136] It is necessary to acknowledge that this case focused on a person with a physical disability, whereas the focus of this thesis is on those with intellectual and/or psychosocial disabilities; however the judgment is illustrative nonetheless as it considers the meaning of Article 3 in the context of police custody.

[137] CRPD, Article 17: 'Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.'

[138] See Irish Penal Reform Trust, *The practice of pre-trial detention in Ireland* (Irish Penal Reform Trust 2016) 1. [Hereafter IPRT The Practice of Pre-Trial Detention].

and will not contradict the fundamental human right to liberty. However, in the case of arbitrary denial of bail or where the continued use of detention is unnecessary, disproportionate or unlawful, then such pre-trial detention will be found to be in breach of the right to liberty as set out in both international and domestic laws.

Until the mid-1950s, the main reason for the use of pre-trial detention was to ensure the defendant's attendance at court.[139] The balance subsequently shifted and additional reasons for the continued detention of a person in custody were introduced, to coincide with Ireland’s ratification of the European Convention on Human Rights.[140] International human rights law favours the release of an accused person pending trial and does not permit the use of pre-trial detention save in exceptional circumstances. However, a report on the use of pre-trial detention published by the Open Society Justice Initiative claims that these safeguards are frequently ignored and as a result, ‘pretrial detainees are subjected to far worse detention conditions than convicted detainees. This is especially true in police stations and other short-term custody locations, which are seldom designed for prolonged detention but frequently used for this purpose.’[141]

The European Court of Human Rights has also stated that the use of pre-trial detention should only be used as an exceptional measure.[142] In the case of *Ambruszkiewiz v Poland*, the Court stated that:

> …[D]etention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.[143]

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[139] Ursula Smartt, ‘Does the Untried Prisoner have any Rights under the European Convention on Human Rights?’ (1997) 5 *European Journal of Crime, Criminal Law and Criminal Justice* 377, 378.
[140] Ibid.
[141] Open Society Justice Initiative, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk: A Global Campaign for Pretrial Justice Report* (Open Society Foundations 2011) 18.
[142] *Ambruszkiewicz v Poland* App No. 38797/03 (ECHR, 4 May 2006).
[143] Ibid, para 31.

As such, remanding an individual in custody should only occur in very serious cases, to avoid unnecessary encroachments on the individuals' right to liberty pursuant to Article 5 ECHR, Article 40.4.1 of the Irish Constitution and Article 14 of the CRPD.[144] The Irish laws and procedures in relation to bail will be considered in the following section, before considering the issue of bail for suspects with disabilities thereafter.

5.7.1 The Right to Bail in Ireland

In the seminal case of *People (Attorney General) v O'Callaghan,* Walsh J. held that it would be contrary to the concept of personal liberty enshrined in the Constitution if a person could be punished in respect of a matter on which he has not yet been convicted, or that he could be deprived of his liberty on the suspicion that he will commit offences (save in the most extraordinary circumstances as established by the Oireachtas).[145] Jurisdiction to award bail is set out in section 31 of the Criminal Procedure Act 1967.[146] This procedure, otherwise known as "station bail", permits the sergeant or the MIC to grant bail if they consider it prudent to do so.[147] To qualify for station bail, the individual enters into a bond to ensure that they will appear at the District Court and the amount of money is determined by the MIC of the station.[148] The majority of people released on bail in Ireland fall under the remit of Station Bail, however there are no official figures detailing the exact numbers.[149] Further, there are no official figures available detailing the number of people who have been denied bail and for what reasons.

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[144] Bunreacht na hÉireann, Article 40.4.1: 'no citizen shall be deprived of his personal liberty save in accordance with law.'
[145] *People (Attorney General) v O'Callaghan* [1966] I.R. 501.
[146] As amended by the *Criminal Justice Act* 2007.
[147] Criminal Procedure Act 1967, s 31 (as amended by the Criminal Justice Act 2007): 'Whenever a person is brought in custody to a Garda Síochána station by a member of the Garda Síochána, the sergeant or other member in charge of the station may, if he considers it prudent to do so and no warrant directing the detention of that person is in force, release him on bail and for that purpose take from him a recognisance, with or without sureties, for his due appearance before the District Court at the appropriate time and place.' Section 31(3): 'A sum of money equivalent to the amount of bail may be accepted in lieu of a surety or sureties. The money shall be deposited by the member of the Garda Síochána receiving it with the district court clerk for the district court area in which the Garda Síochána station is situate.'
[148] Courts Service Ireland, 'Bail' <http://www.courts.ie/offices.nsf/lookuppagelink/0F835AC1CFB039A080256E78003F26A2> accessed 20 June 2018.
[149] IPRT The Practice of Pre-Trial Detention (Fn. 138), 15.

While the right to be released on bail exists, it is not an absolute right as the Courts have been found to be overly deferential to the Gardaí and 'accept their objections to bail regardless of their merit.'[150] Furthermore, the issue of bail becomes a lot more problematic for vulnerable suspects, specifically suspects with psychosocial disabilities. Of note, there are no specific provisions detailing the right to bail for vulnerable suspects in Ireland – all applications are made and considered in light of the common law and the *Bail Act* 1997. According to the National Forensic Mental Health Service Report in 2011, 'the majority of mentally ill remand prisoners in Ireland have committed relatively minor offences for which bail would be considered, however, persons with mental illness often face significant obstacles in meeting bail requirements.'[151] Such obstacles include having no fixed abode, poverty and the subsequent inability to pay a bail bond, fractured family connections thereby having no one to vouch for them, or the presence of a thought disorder which can prevent the individual from being able to provide a coherent account of themselves to the court.[152] According to a previous report issued by the New South Wales Law Reform Commission, the nature of bail conditions themselves may prove problematic for some suspects, for example the duty to report regularly to a police station or restrictions in regards to movement may prove difficult for all suspects to understand.[153] Moreover, the report raises the important issue of being able to pay the bail bond, as a large percentage of persons with disabilities rely on social welfare and benefits, which may in turn disadvantage him or her from being able to be considered for release.[154]

The issue of bail raises questions regarding the issue of preventative detention among suspects who are considered "dangerous" because of their disability or diagnosis, particularly psychosocial disabilities. Refusals of bail based on perceived dangerousness or a risk to others may adversely affect persons with psychosocial disabilities due to false stereotypes or attitudinal barriers held by police officers.[155] If the Gardaí suspect a person to be a risk to themselves or others, they may exercise their legal powers under the Mental

[150] Ibid, 20.
[151] Mental Health Commission, *National Overview of Forensic Mental Health Services Ireland 2011* (Dublin 4 April 2012) 9 <http://www.mhcirl.ie/File/NOFMHS_report11.pdf> accessed 20 June 2018.
[152] Ibid.
[153] NSW Law Reform Report 1996 (Fn. 69), para 4.74.
[154] Ibid.
[155] As discussed in Chapter 4, s 4.1.

Health Act 2001 to admit the individual on an involuntary basis to an approved centre.[156] Aside from this power however there are no alternative options available to the Gardaí in these situations.[157] In the absence of community treatment settings or appropriate diversionary programmes, the only realistic options available to gardaí is to refuse bail and remand the individual in custody, or to admit them to an approved centre under the civil law. This thereby creates a divide within the pre-trial process, where persons with disabilities are disproportionately discriminated against on the basis of their disability, whereas those without may be released from custody pending trial. This scenario may be a direct violation of Article 14 of the CRPD, which provides that persons with disabilities have the right to liberty on an equal basis with others. As such, existing laws and policies which provide for the continued detention of persons due to the existence of a disability must be reviewed to ensure compliance with the CRPD.

5.7.2 The Right to Liberty in the UN Convention

In contrast to the right to liberty and the related powers to challenge unlawful deprivations of this right which exist under the ECHR and Irish law, Article 14 of the CRPD is rather vague does not specifically set out a list of due process guarantees. As such, it is argued that the existing laws and policies in Irish law will likely continue to operate in relation to the right to bail. However, one area in which the UN Convention could play a role is in relation to deprivations of liberty (or the refusal of bail) on the basis of disability. The right to liberty under Article 14 reaffirms the well-established right to liberty which already appeared in international human rights laws, but reappears within the Convention as a disability-specific right:[158]

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[156] Mental Health Act 2001, s 12(5).

[157] See Jimmy Martin and Bairbre Nic Aongusa, 'Mental Health and the Criminal Justice System – Working Together' (Association for Criminal Justice Research & Development Annual Conference: Mental Health in the Criminal Justice System - The deliverables of the Governments 'Vision for Change', 14 October 2011) <https://www.acjrd.ie/files/ACJRD_Mental_Health_in_the_Criminal_Justice_System_(2011)1.pdf> accessed 20 June 2018: 'The importance of the role of the Gardaí in this area can be gauged by the fact that in 2010 nearly a quarter of all applications for a person to be involuntarily admitted were made by members of the Garda Síochána.'

[158] The right to liberty is one of the most fundamental human rights that and is well established in international law. Article 3 of the Universal Declaration of Human Rights proclaims that everyone has the right to life, liberty and security of person. The right to liberty is further recognised in a number of soft law instruments including the Body of Principles for the Protection of all Persons under any form of Detention or

> 1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
>
> (a) Enjoy the right to liberty and security of person;
>
> (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

It is particularly pertinent for States Parties to the Convention to consider how the perception of dangerousness, or the existence of certain impairments, could influence decisions to remand suspects in custody until their trial.[159] Slobogins' work offers a possible solution to address such difficulties, namely the introduction of a jurisprudence of dangerousness to guide decision-makers in making decisions based on perceived risk due to the existence of a psychosocial disability.[160] This would require a set of principles to be used in decisions relating to when and to what degree the suspect can be deprived of their liberty if there is a perceived risk of harm to themselves or others.[161] The creation of such a set of principles may help to ensure deprivations of liberty based on the existence of disability are not arbitrary (in line with the ECHR),[162] and provide support to police officers carrying out the difficult task of being "street-corner psychiatrists" without formal medical training.[163] However, this solution would appear to be at odds with Article 14 CRPD, which prohibits all deprivations of liberty based on the existence of disability. While the guidance of the UN Committee is still undeveloped in this area, it is clear that disability cannot be used as a criterion to deprive an individual of their right to liberty. As discussed in Chapter 3, this raises a clear tension between the right to liberty as provided within the ECHR and the CRPD, and it remains to be seen how future cases will navigate these issues.

Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

[159] See Chapter 3, 25.

[160] Christopher Slobogin, *Minding Justice Laws that Deprive People with Mental Disability of Life and Liberty* (Harvard University Press 2006) 103.

[161] Ibid. See also Christopher Slobogin, 'A jurisprudence of dangerousness' (2003) 1 Northwestern University Law Review 98.

[162] See Chapter 3, section 3.2.1.

[163] Teplin (Fn. 32).

5.8 Conclusion

The police station is in itself one of the most intimidating environments a person can experience and can lead to heightened feelings of vulnerability for all suspects. Therefore, it is important that the law provides appropriate safeguards and guarantees for suspects during their time in custody. It is especially important that appropriate accommodations are made for vulnerable suspects, such as suspects with disabilities.[164] This Chapter has focused on the extent to which personal rights and freedoms are restricted or removed following the arrest and detention of a person suspected of committing a crime. In applying the provisions of the CRPD to these areas, it is apparent that there is potential to reassess the current nature of police detention to ensure suspects with disabilities are not unfairly or disproportionately affected in comparison to other suspects. It is apparent that in addressing many of the issues raised in this Chapter, training and awareness-raising is particularly imperative to provide all gardaí with skills and knowledge to respond to vulnerable persons in custody (pursuant to Article 8 CRPD), but additional supports or services may also be required such as an appropriate adult or a medical professional.

In order to gain an understanding of the factors which impact upon suspects with intellectual and psychosocial disabilities within the pre-trial process, it is recognised that further empirical data is necessary to appreciate the extent to which persons with disabilities are represented as suspects within the Irish criminal justice system. The lack of reliable and up-to-date information makes it difficult to determine the true realities of the barriers to justice experienced by persons with disabilities within police custody. As stated, this research does not seek to provide generalisable data in respect of the prevalence of persons with disabilities as suspects within the Irish pre-trial process. Rather, it is concerned solely with how the CRPD could be used to address the current shortcomings within this process from a rights-based perspective. Within the context of police custody, this Chapter has identified a number of key barriers for suspects with disabilities, including issues relating to identification, the provision of healthcare and access to bail. It has been

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[164] House of Lords and House of Commons Joint Committee on Human Rights, *Deaths in Custody* (Third Report of Session 2004-05, vol 1, 2004) para 3 <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/15/15.pdf> accessed 27 November 2016: 'the majority of people entering custody are extremely vulnerable individuals … by taking people into custody the state takes upon itself a particular duty of care, because of their vulnerability, and a special responsibility to ensure their protection and to uphold their human rights.'

argued that existing practices within the Irish pre-trial process may contravene the standards set forth within the CRPD, particularly in relation to access to reasonable accommodations, the rights to the highest attainable standard of health, integrity and liberty pursuant to Article 5, Article 25, Article 17 and Article 14. Going forward, it is argued that further empirical work is necessary to determine the extent to which these rights are in jeopardy within the context of garda custody from a disability-rights perspective.

The following Chapter will outline the procedural and evidentiary issues arising from being in Garda custody, specifically the right to receive legal advice and the right to silence. While these stages of the pre-trial process could all be considered in isolation, when read together they provide an overarching account of the many different obstacles faced by suspects in custody.

CHAPTER 6

Ensuring Access to Justice for Persons with Disabilities during the Police Interview

6.1 Introduction

This Chapter examines the barriers which arise during the interrogation stage of the pre-trial process, and particularly how such barriers impact upon the rights of persons with disabilities. The police interview is an integral component of the pre-trial process and is a critical stage in the overall process of case construction.[1] The interview provides a critical opportunity for police officers to gain relevant information about the case ideally using non-accusatorial, open ended questions designed to attain a full account from the interviewee.[2] While the experience of being arrested and interrogated can be intimidating for anyone, it is argued that this experience can be even more difficult for persons with disabilities, especially in cases where procedural guarantees and reasonable accommodations have not been put in place, or in the event that the police officers are untrained in interviewing persons with disabilities.

[1] James Williams, 'Interrogating justice: A critical analysis of the police interrogation and its role in the criminal justice process' (2000) 42 *Canadian Journal of Criminology* 209, 211. See also Michael McConville and John Baldwin, *Courts, Prosecution and Conviction* (Clarendon 1982); Michael McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge 1991); John Baldwin, 'Police interview techniques: Establishing truth or proof?' (1993) 33(3) *British Journal of Criminology* 325; Rene Martin, *Admissibility of Statements* (9th edn., Canada Law Book 1999); Frank Belloni and Jacqueline Hodgson, *Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain* (Macmillan Press 2000).

[2] Steven Drizin and Richard Leo, 'The problem of false confessions in the post-DNA world' (2003) 82 *North Carolina Law Review* 891, 911. [Hereafter Drizin and Leo 2003].

This Chapter examines the barriers which arise during the interrogation stage of the pre-trial process, and particularly how such barriers impact upon the rights of persons with disabilities. The greatest barrier within the Irish pre-trial process is arguably the lack of a recognised right to have legal representation present during the police interview. While this right is well-established in other jurisdictions and in international human rights law, the Irish jurisprudence in relation to the right to have a solicitor present during garda interviews is much more complicated.

The first section will examine the operational difficulties and considerations which arise in the context of interviewing persons with intellectual and psychosocial disabilities. Within this section, the case of Dean Lyons will be examined as an example of the barriers faced by persons with disabilities during the garda interview.[3] The second section of this Chapter will then detail the existing garda interviewing model, also referred to as GSIM, and will address the existing safeguards outlined in the Custody Regulations. Section three will examine the nature of the right to legal advice in custody and the particular importance of this right for persons with disabilities.

6.2 Recognising the Impact of Psychological Vulnerabilities

Within the pre-trial process, special consideration must be afforded to the police interview, 'for it is at that stage that a suspect's fate is as a rule sealed.'[4] The nature of police questioning, the officers' style of questioning and language used to pose questions can all have a direct impact on the individual's responses. Other variables such as how long the crime lasted, how long ago the crime took place or if the individual was intoxicated, can also affect how an individual responds to questions.[5] While these variables are out of the control of the police officers, they do retain complete control over the type of questions asked during questioning which is crucial in regards to the accuracy and

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[3] George Birmingham, Report of the Commission of Investigation: Dean Lyons Case (Department of Justice 2006) <http://www.justice.ie/en/JELR/Dean%20Lyons%20Commission%20of%20Investigation.pdf/Files/Dean%20Lyons%20Commission%20of%20Investigation.pdf> accessed 2 July 2018. [Hereafter Dean Lyons Report].

[4] John Baldwin, 'Police interview techniques: Establishing truth or proof?' (1993) 33(3) *British Journal of Criminology* 325, 326.

[5] Mark Kebbell and Elizabeth Gilchrist, 'Eliciting Evidence from Eyewitnesses for Court Proceedings' in Joanna Adler and Jacqueline Gray (eds.), *Forensic Psychology: Concepts, Debates and Practice* (2nd edn., Routledge 2010) 146.

completeness of the interview.[6] Therefore, interviewing officers must be cognisant of their use of language in order to ensure that the individual understands the questioning and their rights. Officers should also be mindful of their non-verbal communicative styles and behaviour, as certain gestures or psychological methods which could influence the individual to make an incriminating statement or false confession.[7]

At all times, the police interview should be conducted with respect for an individual's fundamental human rights, including the persons' right to dignity and right not to be discriminated against. This is in keeping with the guiding principles of the CRPD, which should be used to guide the interpretation and application of Article 13 in the context of police interviews, as discussed in Chapter 3.[8] The following section will consider the barriers faced by vulnerable persons during police interviews.

6.2.1 Conducting Interviews with Vulnerable Persons

Gudjonsson's work on police interviews and psychological vulnerabilities of persons in custody serves as the leading example within the field. According to Gudjonsson, police interviews can go wrong and result in "undesirable consequences".[9] In cases where the interview has gone wrong, there may be long-lasting consequences for the person, and also for the proper investigation of the crime especially in the event a suspect confesses to a crime they did not commit. If the apprehension of the actual perpetrator has been prevented, they could continue to commit crimes which can have a damaging effect on policing and society more generally.[10]

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[6] Ibid.
[7] See Richard Leo, Police Interrogation and Social Control (1994) 3 *Society & Legal Studies* 93.
[8] For further information see Chapter 3, section 3.5.
[9] Gisli Gudjonsson, *The psychology of interrogations and confessions: A handbook* (John Wiley & Sons 2003) 34 and Gisli Gudjonsson, 'Psychological vulnerabilities during police interviews. Why are they important?' (2010) 15(2) *Legal and Criminological Psychology* 161, 169: Gudjonsson identifies a number of ways in which a police interview can go wrong, including false confessions due to coercion, inadmissible confessions, coerced confessions resulting in resentment, coercion resulting in post-traumatic stress disorder, undermining public confidence and the "boomerang" effect (achieving the opposite effect from what was originally intended i.e. in coercing a suspect to confess, the suspect may feel rushed or unfairly treated and may withhold their confession).
[10] Gisli Gudjonsson, 'Psychological vulnerabilities during police interviews. Why are they important?' (2010) 15(2) *Legal and Criminological Psychology* 161, 169. [Hereafter Gudjonsson 2010].

There are a number of factors which must be considered when interviewing vulnerable persons, including the impact of memory and suggestibility (which correlates with memory capacity). Essentially, the poorer the person's memory, the more suggestible they are likely to be.[11] This is particularly relevant for persons with intellectual disabilities or persons experiencing psychiatric distress, who may have difficulty recalling information or details to the police.[12] Previous research has demonstrated the value of "free narrative" in police interviews with vulnerable persons.[13] This method requires an open-ended style of questioning in which the interviewee is free to give as much information as possible before progressing to direct or focused questions. The benefits of such an approach include longer, more accurate and detailed accounts of the events.[14] Allowing the suspect to freely recall the event, without prompting them or interrupting them, may further improve the relationship between the police officer and the suspect.

An important consideration for interviewing officers is whether the suspect understands the questions. Previous research has indicated that in some instances, persons with severe disabilities such as learning disabilities may be unable to understand the nature of the right to remain silent, the context of their interrogation or the implications of making a confession.[15] In such situations, their right to participate in the investigation is seriously limited especially if they have not been afforded access to a solicitor or a support person such as an appropriate adult. As discussed in Chapter 4, it is imperative that officers use clear language when communicating with persons with disabilities.[16]

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[11] The size of the correlation between memory and suggestibility is similar to that of IQ, according to Gisli Gudjonsson and Isabel Clare, 'The relationship between confabulation and intellectual ability, memory, interrogative suggestibility and acquiescence' (1995) 19 *Personality and Individual Differences* 333. See also Gisli Gudjonsson and Lucy Henry, 'Child and Adult Witnesses with Intellectual Disability: The Importance of Suggestibility' (2003) 8 *Legal and Criminological Psychology* 241, 243.

[12] For a discussion on the impact of memory, see: Lucy Henry and Gisli Gudjonsson, 'Eyewitness Memory, Suggestibility, and Repeated Recall Sessions in Children with Mild and Moderate Intellectual Disabilities' (2003) 27(5) *Law and Human Behavior* 481. [Hereafter Henry and Gudjonsson 2003]; Rebecca Milne and Ray Bull, 'Interviewing witnesses with learning disabilities for legal purposes' (2001) 29(3) *British Journal of Learning Disabilities* 93.

[13] Michael Byrne and Eimear Guckian, 'Best practice for conducting investigative interviews' (2011) 37(2/3) *The Irish Psychologist* 69, 70. Citing Michael Lamb and others, 'Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD investigative interview protocol' (2007) 31 *Child Abuse & Neglect* 1201.

[14] Ibid, 70.

[15] See Morgan Cloud and others, 'Words without meaning: The Constitution, confessions, and mentally retarded suspects' (2002) 69 *The University of Chicago Law Review* 495.

[16] See Chapter 4, section 4.3.

(i) Establishing Rapport

The existence of a positive rapport between the parties is vital to the overall investigative process and is well-documented in the literature.[17] Of note, the existence of a positive rapport has been found to be mutually beneficial to both police officers and individual suspects. For the police, studies have found that establishing rapport elicits more information which is imperative to case construction, whereas for suspects, they have been found to value how the interviewer responds to them and treats them during the course of the interview.[18] In some cases, this was linked to their decision to make a confession.[19]

Interrogation methods were originally designed to elicit incriminating statements, admissions or a confession from the suspect, normally through the use of confrontational, manipulative or aggressive psychological methods.[20] The aim was to incriminate the suspect, and so the practice of building a positive rapport between the suspect and the interviewing officer may not have been a priority. Because it was designed to break the anticipated resistance of an individual who was presumed guilty, it was intentionally structured to induce stress, promote isolation, and feelings of anxiety, fear, powerlessness, and hopelessness.[21] In recent years, An Garda Síochána have made attempts to move away

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[17] See generally: Allison Redlich, Christopher Kelly and Jeaneé Miller, 'The who, what, and why of human intelligence gathering: Self-reported measures of interrogation methods' (2014) 28(6) *Applied Cognitive Psychology* 817; Dave Walsh, and Ray Bull, 'What really is effective in interviews with suspects? A study comparing interviewing skills against interviewing outcomes' (2010) 15(2) *Legal and criminological psychology* 305; Ray Bull and Julie Cherryman, *Helping to identify skills gaps in specialist investigative interviewing: Enhancement of professional skills* (Home Office, Research, Development and Statistics Directorate 1996).

[18] Paul Christiansen, Laurence Alison and Emily Alison, 'Well begun is half done: Interpersonal behaviours in distinct field interrogations with high-value detainees' (2018) 23(1) *Legal and Criminological Psychology* 68, 69.

[19] Ulf Holmberg and Sven-Åke Christianson, 'Murderers' and sexual offenders' experiences of police interviews and their inclination to admit or deny crimes' (2002) 20(1-2) *Behavioral Sciences & The Law* 31.

[20] Drizin and Leo 2003 (Fn. 2), 911. For example, negative methods, used in response to uncooperative suspects, include isolating the individual, attacking their alibi, interrupting their denials, and inducements. On the other hand, police officers may adopt positive methods such as offering sympathy to the individual or introducing "themes" which are used to normalise and minimise the crime, and making the suspect believe that confessing is in their best interests.

[21] Ibid.

from an aggressive approach to questioning, however it is important to acknowledge the historic reliance on such methods as seen in the 1984 Kerry Babies case.[22]

The importance of establishing rapport with a suspect is now an essential component of the garda interviewing model (discussed further below). Similarly, in England and Wales, the PEACE model also recognises the importance of building rapport with the suspect before discussing the crime and its details.[23] While the move away from relying on an aggressive style of questioning is welcomed, one must also have regard to the practical difficulties which may arise in the case of a difficult suspect who does not wish to co-operate with the Gardaí. In this regard, there is a lack of information available documenting how gardaí are trained or expected to establish and maintain rapport with a suspect.

In the context of this research, further practical difficulties may arise in the case of a suspect with a disability, especially if the Gardaí conducting the interview are unaware of the disability or the signs associated with the condition. For example, a person with attention deficit hyperactivity disorder (ADHD) may appear disorganised and unable to concentrate or listen, and have an impaired or limited attention span.[24] Such symptoms may manifest in the form of fidgeting, an inability to stay seated or to wait, and can further impact upon one's social functioning skills.[25] Such behaviours create clear tensions from a policing perspective, especially in the confines of the interrogation room. In the event that the officers are unaware of the existence of a disability, or are not aware of the associated behaviours or characteristics of a condition such as ADHD, it may be impossible for the officers in question to establish a positive rapport with the individual.

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[22] This case concerned an investigation into the interrogation methods of the Garda "Heavy Gang" following the murder of a new-born baby in Co. Kerry. See generally: Vicky Conway, *Policing twentieth century Ireland: a history of an Garda Síochána* (Routledge 2014) 174; Kevin Lynch, *Report of the Tribunal of Enquiry into "The Kerry Babies Case"* (Dublin 1985); Yvonne Marie Daly, 'Commentary on the report of the tribunal of inquiry into 'The Kerry Babies Case'' in Mairead Enright, Julie McCandless and Aoife O'Donoghue (eds.), *Northern / Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart 2017) 195-203.

[23] See David Walsh and Rebecca Milne, 'Keeping the PEACE? A study of investigative interviewing practices in the public sector' (2008) 13(1) *Legal and Criminological Psychology* 39. [Hereafter Walsh and Milne 2008].

[24] American Psychiatric Association, *Diagnostic And Statistical Manual Of Mental Disorders Fifth Edition DSM-5* (2013) 32 < https://www.sciencetheearth.com/uploads/2/4/6/5/24658156/dsm-v-manual_pg490.pdf> accessed 2 July 2018. [Hereafter DSM-5].

[25] Ibid.

As discussed in Chapter 2, the existence of stigma is especially relevant in examining the treatment of persons with disabilities, particularly persons with psychosocial disabilities. Within the context of the police interrogation, the existence of stigma may create further barriers for the individual suspect – especially in relation to rapport building. Further research is necessary to determine how individual members of An Garda Síochána understand mental health and to further assess individual attitudes and perceptions about persons with psychosocial disabilities.[26] In the absence of such findings at present, it is difficult to determine the extent to which stigma or stereotyping exists within policing in Ireland, and how such views potentially impact upon the investigation or treatment of suspects of crime. However, with a view to addressing these issues, regular training and awareness-raising should include an emphasis on overcoming stereotypes, particularly in regards to the conditions which are most often associated with dangerousness (for example schizophrenia). This would further ensure compliance with the CRPD, particularly in relation to the principle of non-discrimination,[27] while also providing police officers with the skills to establish rapport even in challenging cases.

(ii) False Confessions

Confession evidence forms a key component of the adversarial criminal justice model and thus, obtaining a confession from a suspect is a key priority during the pre-trial investigation.[28] Assessing the credibility of statements made by suspects is one of the most difficult tasks according to Gudjonsson.[29] However, it is imperative that all police officers have regard to the possibility of unreliable or involuntary statements which could have significant implications on the investigation of crimes.[30]

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[26] Aisling de Paor and Charles O'Mahony, 'The Need to Protect Employees with Genetic Predisposition to Mental Illness? The UN Convention on the Rights of Persons with Disabilities and the Case for Regulation' (2016) 45(4) *Industrial Law Journal* 525, 537: 'The stigma and negative attitudes associated with mental illness may vary and may reflect a lack of education about mental illness, from the perception that those with depression are emotionally weak to the view that individuals with schizophrenia have a split personality and are dangerous.'

[27] CRPD, Articles 5 and 8(2)(ii).

[28] See George Thomas and Richard Leo, *Confessions of guilt: From torture to Miranda and beyond* (Oxford University Press 2009).

[29] Gudjonsson 2010 (Fn. 10), 161.

[30] Gisli Gudjonsson, 'Testimony from persons with mental disorder' in Anthony Heaton-Armstrong, Eric Shepherd and David Wolchover (eds.), *Analysing witness testimony* (Blackstone Press 1999) 63: 'This aspect of credibility is related to the witness's memory of the event in question, cognitive functioning (intelligence,

For a confession to be admissible in court, it must be voluntary.[31] An involuntary statement is one which has been obtained on the basis of a threat, an inducement or in circumstances of oppression.[32] The law in relation to the voluntariness of confessions is particularly relevant for the purpose of this research, as persons with disabilities are said to be at an increased risk of self-incrimination. The Irish Courts have considered the nature of voluntariness in the context of confessions on a number of occasions, most notably in the case of *People (D.P.P.) v Pringle, McCann and O'Shea,* in which O'Higgins C.J. recognised that:

> [W]hat may be oppressive to a child, an invalid, or an old man or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the accused person is of tough character and an experienced man of the world.[33]

In applying such a subjective approach to the context of the present research, it may be the case that trial judges will have regard to the existence of one's disability in assessing the admissibility of confessions, especially in such cases where the individual did not have access to a solicitor.[34] There is also a danger that a "confession" from a person with a disability may never be voluntary in the legal sense, due to the variety of factors discussed below.

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memory capacity, tendency to confabulate), personality (suggestibility, compliance, acquiescence), and mental state (anxiety, depression, feelings of guilt, a state of shock, post-traumatic stress disorder, drug or alcohol intoxication or withdrawal symptoms).'

[31] *Ibrahim v R* [1914] A.C. 599 and *A.G. v McCabe* [1927] I.R. 129.

[32] *R v Priestly* (1965) 50 Cr. App. Rep. 183; [1966] Crim. L.R. 507; *People (D.P.P.) v Breathnach* (1981) 2 Frewen 43 and *People (D.P.P.) v Lynch* [1982] I.R. 64.

[33] *People (D.P.P.) v Pringle, McCann and O'Shea* (1981) 2 Frewen 57, 82.

[34] Ibid. In his judgment, O'Higgins C.J had regard to the number of times the individual suspect was afforded access to his solicitor: 'Those visits and the advice he obtained must have strengthened his resolve and assisted in counteracting any weakness of will which the conditions of his custody and the questioning by the gardaí may have produced.'

There are a number of factors which may influence a person to confess to a crime or make a false confession. For example, a person under the age of 21 has been found to be more likely to confess than older adults,[35] extroverts are less likely to collaborate than their introverted counterparts and tend to resist questioning,[36] and people with feelings of guilt have been found to be more likely to confess.[37] The nature of one's disability is also relevant to consider, as people with depression have been found to experience excessive feelings of misplaced guilt, alongside impaired memory and concentration levels.[38] Further concerns also arise in the context of persons with ADHD have been found to make decisions quickly, without considering the long-term consequences of such decisions, thereby increasing the risk of false confessions in order to achieve a short-term reward, such as the termination of the interview.[39]

People with intellectual disabilities have been found to possess a strong desire to please those in positions of authority (including police officers).[40] They are also at a high risk of acquiescence or coercion into making incriminating statements or confessions.[41] According to Gudjonsson and Clark, people with learning disabilities are also generally more suggestible than others, as they have an impaired memory capacity which makes them more susceptible to suggestion, particularly with regard to acquiescing to leading questions.[42] Moreover, people with learning disabilities have also been found to be less

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[35] Michel St –Yves and Nadine Deslauriers-Varin, 'The Psychology of Suspects Decision - Making during Interrogation' in Ray Bull, Tim Valentine and Tom Williamson (eds.), *Handbook of Psychology of Investigative Interviewing Current Developments and Future Directions* (John Wiley & Sons 2009) 1, 3-4. [Hereafter St-Yves and Deslauriers-Varin 2009]. Citing, *inter alia*, John Baldwin and Michael McConville, *Confessions in Crown Court Trials* (HMSO Royal Commission on Criminal Procedure Research Study No. 5., 1980); John Pearse and others, 'Police interviewing and psychological vulnerabilities: predicting the likelihood of a confession' (1998) 8 *Journal of Community and Applied Social Psychology* 1.

[36] St-Yves and Deslauriers-Varin 2009 (ibid), 3-4. Citing Gisli Gudjonsson and Jon Sigurdsson, 'The Gudjonsson Confession Questionnaire –Revised (GCQ - R): Factor structure and its relationship with personality' (1999) 27 *Personality and Individual Differences* 953.

[37] Ibid.

[38] Lauren Rogal, 'Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilites Act as a Safeguard' (2017) 47 *New Mexico Law Review* 64, 70. [Hereafter Rogal 2017]. Citing DSM-5 (Fn. 24), 125.

[39] Ibid.

[40] See Gisli Gudjonsson and Noel Clark, 'Suggestibility in police interrogations: A social psychological model' (1986) 1 *Social Behavior* 83. [Hereafter Gudjonsson and Clarke 1986]; Judith Cockram, Robert Jackson and Rod Underwood, 'People with an intellectual disability and the criminal justice system: The family perspective' (1998) 23(1) *Journal of Intellectual and Developmental Disability* 41.

[41] See Drizin and Leo 2003 (Fn. 2) and Frances Chapman, 'Coerced internalized false confessions and police interrogations: The power of coercion' (2013) 37 *Law & Psychology Review* 159.

[42] Gudjonsson and Clarke 1986 (Fn. 40)

able to cope with the uncertainty and expectations of questioning,[43] and with unfamiliar and stressful demands.[44] The existence of these traits and behavioural tendencies raise serious concerns about the protections extant in the pre-trial process for persons with disabilities of this nature, as false and incriminating statements could lead to wrongful convictions and miscarriages of justice.[45]

The likelihood of procuring a false confession has previously been recognised in the report of the Morris Tribunal, which was set up to examine allegations of corruption within An Garda Síochána.[46] Herein, it was recognised that certain features of a suspect's personality are relevant in the making of false confessions, for example, the person may be more suggestible to give in to leading questions, they may be more vulnerable than others to being misled by subtle questioning or to pressure, they may be unable to cope with uncertainties or expectations, and they may be significantly compliant and eager to please persons in authority.[47] In summary, it is imperative for police officers and trial judges to be aware of the increased vulnerability of persons with disabilities in assessing the admissibility of confessions. The following section will provide an example of a case in which a person's vulnerabilities impacted the Garda investigation.

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[43] Ibid. See also Henry and Gudjonsson 2003 (F. 12), 243.

[44] Robert Perske, 'Thoughts on the Police Interrogation of Individuals with Mental Retardation' (1994) 32 *Mental Retardation* 377.

[45] See Gisli Gudjonsson, 'False Confession' (2001) 14 P*sychologist* 588; Gisli Gudjonsson, 'Unreliable Confessions and Miscarriages of Justice in Britain' (2002) 4 *International Journal of Police Science and Management* 332; Gisli Gudjonsson, *The psychology of interrogations and confessions: A handbook* (John Wiley and Sons 2003); Richard Ofshe and Richard Leo, 'The Decision to Confess Falsely: Rational Choice and Irrational Action' (1997) 74 *Denver University Law Review* 979; Richard Ofshe and Richard Leo, 'The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions' (1997) 16 *Studies in Law, Politics and Society* 189.

[46] Frederick Morris*, Report of The Tribunal of Inquiry Set up Pursuant to the Tribunal of Inquiry (Evidence) Acts 1921-2002 into Certain Gardaí in the Donegal Division* (Vol. 3, Government Publications Office 2008) 1188, para 15.24.

[47] Ibid.

6.2.2 The Dean Lyons Case

Many of the challenges for persons with disabilities that might present within the pre-trial process and in particular, during the interview process, are evident in the case of Dean Lyons.[48] This case concerned the investigation into the high profile murders of two women in Grangegorman, Dublin, in March 1997.[49] Dean Lyons was described in the report as "borderline mentally handicapped," was arrested on suspicion of the murders and subsequently made a confession in garda custody. The circumstances of this case are particularly relevant in the context of this research, as Dean Lyons personified the wider socio-economic characteristics which lead to an increased likelihood of criminalisation and further exacerbate one's vulnerability in police custody. Not only did Mr Lyons have a low IQ,[50] he had also developed an addiction to heroin and was homeless. In 2006, a Commission of Investigation was set up to examine the circumstances which led to the making of a false confession and the practices of the investigating gardaí.[51] The Commission, which consisted of George Birmingham S.C. as the sole member, found a number of shortcomings in relation to the garda interviews of the suspect.

(i) The Investigation

At the outset of the investigation, Mr Lyons was among a long list of suspects for the murders.[52] On the 26 July 1997, he was approached by two gardaí as a person of interest in the case and was asked to accompany them to the garda station to provide samples on a voluntary basis.[53] During the course of the initial interview, Mr Lyons was given details

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[48] Dean Lyons Report (Fn. 3).

[49] See: Conor Lally, 'Chaos hit Grangegorman inquiry when two men admitted killings' *The Irish Times* (Dublin 20 April 2015) <https://www.irishtimes.com/news/crime-and-law/chaos-hit-grangegorman-inquiry-when-two-men-admitted-killings-1.2182484> accessed 2 July 2018.

[50] Dean Lyons Report (Fn. 3) 53: As a child, he had been assessed by a psychologist who found that his 'intellectual functioning was within the lower end of the borderline range of ability. 'This report recorded a full-scale IQ of 70 (made up of a verbal skill of 80, performance IQ of 63,) […] His relatively high verbal skill made it more difficult for those dealing with him to recognize his difficulties and his need for assistance. I have discussed his literacy level with his then remedial teacher, who makes the point that his technical reading skills were well in advance of what he understood. In other words, he could read words without knowing what they meant.'

[51] A Commission of Investigation was set up on the 7th February 2006 pursuant to the *Commissions of Investigation Act* 2004.

[52] Dean Lyons Report (Fn. 3), 57.

[53] Ibid. The doctor who subsequently attended the station to take such samples wrote in his report: 'of note, I have taken samples from a large number of subjects at Bridewell Garda Station in relation to the murder in Grangegorman.'

about the murders by gardaí and was asked hypothetical questions, such as how he would explain if his fingerprints were found at the scene.[54] He subsequently became 'very nervous and began to shake. He was asked whether there was something bothering him and he began to cry.'[55] The report outlines that Mr Lyons then confessed to the murders, without offering details or any new information, and was subsequently cautioned and arrested.[56] While in custody, Mr Lyons was interviewed four times for a combined period of 6 hours and 35 minutes, by three different teams of gardaí.[57] He repeatedly waived his right to a solicitor.[58] On 27 July 1997, Dean Lyons was charged with murder following a 24 hour detention in custody.[59] Throughout questioning, the lack of apparent knowledge about the murders was evident:

> Question: "Are you aware of any of the injuries that these ladies received?"
> Answer: "No."[60]

During the course of the interview, Mr Lyons offered a number of inconsistent answers to the Gardaí in response to their questions. Of note, while he seemed to possess a limited knowledge of the murders during the initial stages of the investigation, the second interview was described as a "quantum leap" in terms of the evidence provided as he explained specific details, contradicting his earlier statements.[61] According to the report, the only explanation for the 'radical improvement' in Mr Lyons' memory during the course of the day, or to explain how he was starting to provide the right answers to questions 'he had been getting wrong all day,' is that he acquired such information from the Gardaí.[62] The suspect was described as exceptionally suggestible and had an abnormal tendency to give in to leading questions, which offers an explanation for his false confession. Within

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[54] Ibid.
[55] Ibid, 58.
[56] Ibid, 58-59: 'What is noteworthy about what would otherwise be a routine procedure is that Dean Lyons, when the reasons for his arrest were explained to him in ordinary language by Sergeant O'Meara, as is usual, responded by saying that he had killed the two women in Grangegorman.'
[57] Ibid. Each interview comprised two members of An Garda Síochána.
[58] Ibid, 59.
[59] *Criminal Justice Act* 1984, s. 4.
[60] Dean Lyons Report (Fn. 3), 61.
[61] Ibid, 128.
[62] Ibid, 132-133.

the transcripts, there are several examples of leading questioning, which influenced Mr Lyons' answers to the questions:

> Question: "What happened when you met her?"
> Answer: "I stabbed her a few times to stop her screaming."
> Question: "I put it to you that this did not happen in the hallway but happened in the bedroom, would you agree."
> Answer: "Yes."[63]

In analysing the confession, expert evidence was presented to the Commission which stated that the taped interview contained language which was beyond Mr Lyons' intellectual capacity.[64] It was found that the suspect had a habit of "mirroring", or repeating the words used by the Gardaí.[65] It was therefore concluded that although Mr Lyons was not abused or ill-treated during his detention in garda custody, the nature of the interviews and the repeated use of leading questions led to the suspect making a false confession. The report also commented on the use of certain terminology used by the interviewing gardaí which appeared to confuse Mr Lyons, including the use of terms such as "can you account" and the word "confide".[66] The report notes that such difficulties in comprehension might have given the Gardaí some indication that the suspect was a 'person of very limited intelligence,' even though he appeared reasonably articulate.[67]

Interestingly, a number of junior gardaí expressed doubts about Mr Lyons and if he had committed the crimes despite his confession; such concerns were ignored by senior officials.[68] These findings illustrate the challenges and practical difficulties for members of An Garda Síochána in identifying signs or symptoms of disability, as discussed in the previous Chapter. Furthermore, the contrasting opinions held by junior gardaí and senior members of the force is especially interesting and reaffirms a number of the points previously mentioned, such as the need to ensure regular and up-to-date training for all

[63] Ibid, 115-116.
[64] Ibid, 135.
[65] Ibid, 135.
[66] Ibid, 98.
[67] Ibid, 98.
[68] Ibid, 126-127.

Gardaí and the possibility of uncertainty among officers in dealing with persons with hidden disabilities.

(ii) Analysing the Impact of the Dean Lyons Case

This case offers a clear example of the challenges which arise during the course of an investigation and the barriers which arise for persons with disabilities. From the initial interaction with a police officer, through to the formal interview, there are grave risks to the individual's rights to a fair trial and particularly the right against self-incrimination. These risks are even greater in the event that an individual is questioned without the presence of a solicitor and/or a support person, or if the officers are untrained and/or unaware of the individuals' vulnerability. It is also useful to examine this case from the perspective of the Gardaí, as it illustrates the potential complications which arise during an investigation and the importance of identifying vulnerable suspects.

It is argued that the CRPD can offer a blueprint for reconsidering these issues and for strengthening the rights of suspects such as Dean Lyons. While there are many potential challenges which arise in the context of a police interrogation, the first step is to examine the culture and prevailing attitudes of police officers towards persons with disabilities. As discussed previously in Chapter 4, training and awareness-raising is one of the most important tools recommended by the CRPD to foster respect for the rights and dignity of persons with disabilities, as outlined in Article 8(1),[69] and is particularly relevant in the context of addressing the presence of stigma among police officers. Above all, garda practices and procedures should ensure compliance with Article 5 of the CRPD, which provides the rights of equality and non-discrimination for all persons. Certain interview techniques and approaches to questioning could amount to a violation of Article 5 in such cases where the police officers failed to 'take all appropriate steps to ensure that reasonable accommodation is provided.'[70] For example, the failure to provide appropriate supports to Dean Lyons such as the presence of a solicitor, coupled with the failure to use

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[69] CRPD, Article 8(1)(a).
[70] CRPD, Article 5(3).

plain language during questioning, could amount to discrimination on the basis of disability.

6.3 Garda Investigative Interviewing Techniques

This section will review the Garda Síochána Interviewing Model (GSIM), which was introduced in 2007 in response to a number of scandals within the Gardaí,[71] including the failures identified in the investigation of Dean Lyons. First, however, it is worth noting that a person does not need to be arrested to be interviewed by the Gardaí. As seen in the case of Dean Lyons, an individual can be invited to attend the station voluntarily for the purpose of answering questions about a case or to assist in an investigation.[72] In such circumstances, there are fewer obligations upon the officers as would be the case if the individual was arrested pursuant to legislation.[73] Although the individual has presented to the station on a voluntary basis, they are still at risk of self-incrimination and procedural safeguards such as the presence of a solicitor should still be mandatory.[74] In England and Wales, individuals who attend the station voluntarily are entitled to the same safeguards as those who have been arrested,[75] which also includes the attendance of an appropriate adult.[76]

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[71] Including the Dean Lyons scandal. Interestingly, Professor Gisli Gudjonsson was consulted in the design of the GSIM. See An Garda Síochána, Freedom of Information Request FOI-000404-2017 (13th October 2017) <https://www.garda.ie/en/Freedom-of-Information/Decision-Log/FOI-000404-2017-Decision.pdf> accessed 2 June 2018.

[72] In such cases where an individual has attended voluntarily, they are entitled to leave the station at any point. It is important to note that once they become a suspect in relation to the offence, they must be arrested. See *D.P.P. v McLoughlin* [1979] I.R. 85; *D.P.P. v Coffey* [1987] I.L.R.M. 727 and *D.P.P. v Shaw* [1982] I.R. 1.

[73] See Tracey Maclin, 'A Comprehensive Analysis of the History of Interrogation Law, With Some Shots Directed at Miranda v Arizona' (2015) 95 *Boston University Law Review* 1387; Paul O'Mahony, 'The ethics of Police Interrogation and the Garda Síochána' (1996) 6(1) *Irish Criminal Law Journal* 46.

[74] See the case of *J.M. (A Minor) v Member in Charge Coolock Garda Station* [2013] 2 I.R. 175 which involved the voluntary attendance of a minor at a garda station. As the interview was pre-arranged, the Court was satisfied that this gave the individual time to secure the attendance of a solicitor.

[75] Home Office, *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Police and Criminal Evidence Act (PACE) 1984 Code C* (Crown 2017 para 3.21. [Hereafter Code C].

[76] Ibid, 3.21(b).

6.3.1 The Garda Síochána Interviewing Model

The GSIM is similar, but not identical, to the PEACE interviewing model,[77] employed in England and Wales.[78] Similar to PEACE, the Garda model adopts an inquisitorial style of questioning,[79] and is designed to seek a reliable account of knowledge from the individual.[80] The aim of the interview is to seek as much information as possible from the individual, using effective, non-coercive, questioning techniques.[81] The garda interviewing model is further designed to be flexible to adapt to the characteristics of interviewees, as opposed to their status as a witness, suspect, or as a victim.[82] Of note, it was designed to ensure compliance with the ECHR and constitutional rights within all interviewing practices.[83]

The interviewing garda must be amenable to accommodate both cooperative and uncooperative individuals.[84] It is also designed to be rapport-led, with an emphasis on creating a non-judgmental and non-coercive atmosphere.[85] These principles reflect the best practices outlined by Gudjonsson, as above. Training is delivered to Garda Members from Level 1 to Level 4:

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[77] See: Colin Clarke, Rebecca Milne and Ray Bull, 'Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision and the Presence of a Legal Advisor' (2011) 8(2) *Journal of Investigative Psychology and Offender Profiling* 149; Colin Clarke and Rebecca Milne, 'National Evaluation of the PEACE Investigative Interviewing Course' (Police Research Award Scheme 2001) <https://www.researchgate.net/profile/Colin_Clarke3/publication/263127370_National_Evaluation_of_the_PEACE_Investigative_Interviewing_Course/links/53da3b620cf2e38c63366507.pdf> accessed 3 June 2018.

[78] Walsh and Milne 2008 (Fn. 23), 39.

[79] John Pearse, 'Challenge, Compromise and Collaboration: Part of the Skill Set Necessary for Interviewing a Failed Suicide Bomber' in John Pearse (ed.), *Investigating Terrorism: Current Political, Legal and Psychological Issue*s (John Wiley & Sons 2015) 47: 'In the UK the police interview is recognized as the only inquisitorial element in an otherwise overtly accusatorial legal system.'

[80] Geraldine Noone, 'An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects' in John Pearse (ed.), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (Wiley Blackwell 2015). [Hereafter Noone 2015].

[81] Gavin Oxburgh, Trond Myklebust and Tim Grant, 'The question of question types in police interviews: a review of the literature from a psychological and linguistic perspective' (2010) 17(1) *The International Journal of Speech, Language and the Law* 45, 47.

[82] Gisli Gudjonsson and John Pearse, 'Suspect Interviews and False Confessions' (2011) 20 (1) *Current Directions in Psychological Science* 33, 35. [Hereafter Gudjonsson and Pearse 2011].

[83] An Garda Síochána, Freedom of Information Request FOI-000404-2017 (13th October 2017) <https://www.garda.ie/en/Freedom-of-Information/Decision-Log/FOI-000404-2017-Decision.pdf> accessed 2 June 2018.

[84] Gudjonsson and Pearse 2011 (Fn. 82), 35.

[85] Noone 2015 (Fn. 80).

Level 1	Front-line Gardaí	Basic interview skills	Equips members/trainee Gardaí with a sound understanding of the Garda Síochána Interviewing Model.
Level 2	Operational investigators and investigative supervisors	Basic interview skills	Designed for all Garda members who have participated in Level 1 training. Increases members' skills in interviewing.
Level 3	Pre-selected investigators (Gardaí and sergeants)	Advanced skills for serious crimes	Designed for pre-selected investigators who have participated in Level 2 training. Increases skills for those who deal with serious and complex investigations.
Level 4	Pre-selected advisor(s)	Aimed at supervisors to provide support and guidance to Level 3 interviewers	Designed for pre-selected personnel who have successfully participated in Level 3 training. Members will act as interview advisors.

Figure 2: **Garda Interview Model Training.**[86]

There is very little information available on the GSIM; the only authoritative source is by Geraldine Noone, a Garda and trainer in investigative interviewing at the Garda College, who provides an in-depth overview of the different phases of the interview process.[87] According to Noone, interviewees are categorised into the following nine categories:

[86] Ibid, 301 and An Garda Síochána Inspectorate, *Crime Investigation* (2014) part 9 <http://www.drugsandalcohol.ie/22967/1/GSI_Crime_Investigation_Full.pdf0.pdf> accessed 2 June 2018.
[87] John Pearse (ed.), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (Wiley Blackwell 2015) xii.

- Cooperative injured party
- Un-cooperative injured party
- Cooperative witness
- Uncooperative witness
- Vulnerable witness
- Cooperative suspect
- Un-cooperative suspect
- Interview-resistant suspect
- Vulnerable suspect.[88]

Vulnerable persons can be further categorised on the basis of age, intellectual disability, mental health, addiction, psychological vulnerability and intimidation.[89] In some cases, the nature of the individual's vulnerability may be known to the Gardaí in advance of the interview, in which case support measures can be put in place such as the presence of an appropriate adult or support person, or using a specialist interviewer.[90] In cases involving vulnerable persons, Level 3 trained Garda Interviewers should be tasked to carry out the interview as they are trained to identify and manage vulnerable interviewees.[91] Specifically, such training involves 'interview planning, identifying and managing vulnerabilities, appropriate ethical and legal measures, managing appropriate adults, suggestibility, eliciting free narrative, questioning and appropriate challenge.'[92] It may be the case that an individual's vulnerability was not identified until after the interview, in which case Noone notes that the integrity of their testimony will be preserved if the interview was conducted within the parameters of the GSIM, with regard to the importance of free narrative.[93]

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[88] Noone 2015 (Fn. 80), 295.
[89] Ibid, 299.
[90] Ibid.
[91] Ibid, 299-300. See also: An Garda Síochána, *Garda Síochána Policy on the Investigation of Sexual Crime, Crimes against Children, Child Welfare* (2nd edn., 2013) para [33.3.5]<http://www.garda.ie/Documents/User/Policy%20on%20the%20Investigation%20of%20Sexual%20Crime,%20Crimes%20Against%20Children%20and%20Child%20Welfare%202014%2002%2024%20HQ%20Dir%2048%2013.pdf> accessed 2 June 2018.
[92] Noone 2015 (Fn. 80), 299.
[93] Ibid, 300.

Only appropriately trained interviewers, who are aware of the reality and the dynamics of suggestibility and false confessions, should be deployed to interview vulnerable subjects.[94] According to a Freedom of Information request obtained for the purpose of this research (see Appendix 1), there are currently 307 members trained to Level 3 and 40 trained to Level 4 of the GSIM.[95] A further request for information (by the author) on the specific nature of the training conducted, and specifically training in respect of interviewing suspects with disabilities, was refused by the Garda Freedom of Information Office.[96] Therefore, the specific nature of the training remains unclear, particularly in relation to interviewing persons with disabilities as suspects of crime and how gardaí can identify vulnerable persons, indicating a further gap in research and information in this area.

The following section will examine the specific procedural protections relevant to the garda interview, before proceeding to examine the nature of the right to have a solicitor present during questioning.

6.2.2 The Custody Regulations and Existing Protections for Vulnerable Suspects during Questioning

The current law governing garda interviews in Ireland is set out in the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (the Custody Regulations, 1987) and in the Judges' Rules. While the Regulations create a number of obligations for gardaí to observe during questioning, they lack the force and authority of legislation – thus, there are very little consequences in cases where they have been breached.[97] Nevertheless, the Regulations create clear procedures to be followed during garda interviews. For example, all interviews are to be conducted in a fair and humane manner, must not last longer than four hours,[98] the interview should also take

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[94] Ibid, 300.
[95] An Garda Síochána, Freedom of Information Request FOI-000079-2018 (12 March 2018).
[96] Ibid.
[97] Moreover, s. 7(3) of the *Criminal Justice Act* 1984 arguably undermines the strength of the Custody Regulations: 'A failure on the part of any member of the Garda Síochána to observe any provision of the regulations shall not of itself render that person liable to any criminal or civil proceedings or of itself affect the lawfulness of the custody of the detained person or the admissibility in evidence of any statement made by him.'
[98] *The Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations* 1987, Reg. 12(2). [Hereafter Custody Regulations].

place in a room specifically set aside for that purpose,[99] and a record must be kept by the interviewing garda or by another garda present during the interview.[100] Additionally, an arrested person must not be subjected to ill-treatment of any kind or the threat of ill-treatment during the interviewing.[101] The Irish courts have also discussed the parameters of garda interrogation, stating that it is clear that interrogation is not intended to be a 'genteel encounter':

> It is clear that the very word "interrogation" means more than some form of gentle questioning and, provided there are no threats or inducements or oppressive circumstances, then the gardaí are always entitled to persist with their questioning of a suspect.[102]

Some reference is made within the Regulations to vulnerable persons in custody, specifically "mentally handicapped" persons;[103] a label which has been widely disparaged and is not referred to within the text of the CRPD.[104] In such a case where there is a suspect whom the 'member in charge suspects or knows to be mentally handicapped',[105] they must be treated akin to a person under the age of seventeen years and a responsible adult can attend during questioning.[106] Where practicable, the responsible adult must be a person who is experienced in 'dealing with the mentally handicapped.'[107] There is also no information available to indicate whether the attendance of a responsible adult is ever procured. In the absence of an established appropriate adult safeguard within Ireland, it is unclear what (if any) arrangements exist to provide support and assistance to vulnerable persons in custody. In the event of a minor who has been taken into custody, it is likely

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[99] Ibid.
[100] Ibid, Reg. 12 (11). It shall include particulars of the time the interview began and ended, any breaks in it, the place of the interview and the names and ranks of the members present.
[101] Ibid, Reg. 20 (1).
[102] *D.P.P. v McCann* [1998] 4 I.R. 397, O'Flaherty J. para 410. According to Noone (2015 (Fn. 80), 264) gardaí will always refer to this 'genteel encounter' quote when asked about their right to challenge or to engage in robust interrogation techniques during interviews. However, Noone observes that their interpretation of the term can often prove problematic due to the lack of clear guidelines about its nature and severity.
[103] Custody Regulations (Fn. 98), Reg. 22.
[104] See Robert Schalock, Ruth Luckasson and Karrie Shogren, 'The renaming of mental retardation: Understanding the change to the term intellectual disability' (2007) 45(2) *Intellectual and developmental disabilities* 116.
[105] Custody Regulations (Fn. 98), Reg. 22(1).
[106] Ibid.
[107] Custody Regulations (Fn. 98), Reg. 22(2).

that the member in charge will contact a local social worker along with the parents, whereas in the case of a vulnerable adult, it may be left to the discretion of the member in charge to decide if a responsible adult is necessary and if so, it is likely to be a family member due to the lack of alternative services.

While the Regulations provide that the interview must take place in a room set aside for the purpose of interviewing, there are no further requirements relating to the accessibility of the room.[108] For example, a person who has autism may require specific lighting within a room or may become overstimulated by certain sounds or objects.[109] A failure to accommodate persons with disabilities during the interview, or the failure to remove existing structural or environmental barriers such as the lighting, may adversely affect the individual suspect and prove harmful to the investigation as a whole. Furthermore, what constitutes a 'fair and humane' interview for one person may not be fair or humane for a person with a disability. Certain interviewing techniques, for example, could prove disadvantageous to vulnerable suspects or to persons who are more suggestible than others. Therefore, it is argued that the ambiguity within the Regulations pertaining to what constitutes fairness needs to be addressed, particularly with respect to suspects with disabilities. It is argued that the CRPD is most relevant in this regard as it offers a practical framework for States Parties to use in reconsidering issues relating to accessibility. Article 9 specifically requires all States to take all appropriate measures to eliminate obstacles and barriers to accessibility for persons with disabilities.[110] Moreover, the teachings of the social model of disability, as discussed in Chapter 2,[111] are particularly useful in this regard and should be used to inform law and policy reform within the criminal justice system.

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[108] Apart from under the legislation which provides that garda stations should be accessible to persons with disabilities. See *The Disability Act* 2005, which obliges public bodies to ensure that their buildings and services are accessible to people with disabilities.
[109] See Anne Donnellan, David Allan Hill, and Martha Leary, 'Rethinking autism: implications of sensory and movement differences for understanding and support' (2013) 6 *Frontiers in integrative neuroscience* 124 and David Whalen, John Askey and Patrick Mann, 'Disability Awareness Training: A Train the Trainer Program for First Responders' (The Arc National Center on Criminal Justice & Disability) <https://www.thearc.org/document.doc?id=4801> accessed 28 June 2018.
[110] CRPD, Article 9(1).
[111] See Chapter 2, section 2.2.2.

6.4 Procedural Guarantees for Suspects during the Interrogation

Throughout this thesis, Article 13 on the right of access to justice has been used as a benchmark for assessing the existing barriers to justice for persons with disabilities as suspects of crime within the pre-trial process. The right of access to justice can be interpreted in two ways.[112] First, it can be construed in a narrow way to refer to 'the means for securing vested rights, particularly through the use of courts and tribunals'[113] and may refer to the procedural barriers which arise in taking a case, such as the lack of access to legal aid.[114] However, when it is considered more broadly, it can refer to both the legal procedure and the subsequent outcome; access to justice in that sense, is seen as both 'a process and a goal'.[115]

Article 13 is therefore an overarching broad principle which includes both procedural and age-appropriate accommodations.[116] Unlike the requirement to provide reasonable accommodations as outlined in Article 5, the obligation to provide procedural accommodations is not limited by disproportionality.[117] Examples of procedural accommodations can include the recognition of diverse forms of communication methods,[118] as discussed in Chapter 4.[119] In their General Comment on Article 12, the CRPD Committee also acknowledged the interrelationship between Articles 12 and 13, and noted that all States Parties must 'ensure that persons with disabilities have access to legal

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[112] See Eilionóir Flynn, *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, 2016).
[113] Jeremy McBride, 'Access to Justice for Migrants and Asylum-seekers in Europe' (2009 CDCJ) 2, para 6. See also Patricia Hughes, 'Law Commissions and Access to Justice: What Justice Should We be Talking About?' (2009) 46 *Osgoode Hall Law Journal* 773, 778.
[114] Janneke Gerards and Lize Glas, 'Access to justice in the European Convention on Human Rights system' (2017) 35(1) *Netherlands Quarterly of Human Rights* 11, 13.
[115] Ibid. See United Nations High Commissioner for Human Rights and the Office of the High Commissioner and the Secretary-General, *Access to justice for children Report of the United Nations High Commissioner for Human Rights* (United Nations General Assembly, A/HRC/25/35, 2013) para [4].
[116] See Chapter 3, section 3.5.1 and also CRPD, Article 13(1).
[117] Committee on the Rights of Persons with Disabilities*, General comment No. 6 (2018) on equality and non-discrimination* (CRPD/C/GC/6 March 2018) paras 51 and 25d: 'Assessing whether the modification imposes a disproportionate or undue burden on the duty bearer; the determination of whether a reasonable accommodation is disproportionate or unduly burdensome requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned.'
[118] Ibid, para 51.
[119] Chapter 4, section 4.4.3.

representation on an equal basis with others.'[120] The right to receive access to legal advice while in custody is an essential component of the right of access to justice and the right to a trial in due course of the law. This section will consider the importance of procedural guarantees, specifically the right to receive legal advice and the right to remain silent.

6.4.1 The Right to Legal Representation

The right to have a solicitor present during the course of an interrogation has been considered by the Irish courts on a number of occasions.[121] Until the case of *DPP v Gormley and DPP v White*,[122] the courts maintained the position that suspects had the right of *reasonable access* to receive legal advice while in custody.[123] The first reference to pre-trial legal advice was introduced by the *Criminal Justice Act* 1984, which specified the right to be informed of the right of access to a solicitor.[124] The nature of this right incorporated the right to consult with one's solicitor in private;[125] however, the Courts have failed to recognise an express right to have a solicitor present in the interrogation room.[126]

In *Gormley,* the Supreme Court called for the State to finally 'organise its systems' in regard to providing a meaningful right of access to a solicitor while in custody.[127] The Court adopted a comparatively broader approach than was seen in previous case law and held

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[120] Committee on the Rights of Persons with Disabilities*, General comment No. 1 (2014) Article 12: Equal recognition before the law* (CRPD/C/GC/1 April 2014). [Hereafter General Comment on Article 12].
[121] *The People (D.P.P.) v Healy* [1990] 2 I.R. 73; *In Re Article 26 and the Emergency Powers Bill*, 1976 (1977) I.R. 159; *People (D.P.P.) v Madden* [1977] IR 336; *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390; *D.P.P. v Buck* [2002] 2 I.R. 269.
[122] This judgment referred to two separate but similar cases.
[123] *The People (Director of Public Prosecutions) v Healy* [1990] 2 I.R. 73, 81: 'The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory.'
[124] Criminal Justice Act 1984, s. 5.
[125] *People (D.P.P.) v Finnegan (*Unreported, *Court of Criminal Appeal* 15th July 1997).
[126] *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390. Herein, the court stated that the concept of reasonable access does not extend to the solicitor's presence in the interview room.
[127] *D.P.P. v Gormley and D.P.P. v White* [2014] I.E.S.C. 17, para 13: 'Is it really necessary to bring persons to a garda station in such dramatic and disorienting circumstances? Is it necessary to do so with no notice at all, so as to make the delay in taking legal advice inescapable? In some cases, this will be necessary, but is this so in every case? Much expense to the State, and trauma to innocent persons, might be easily avoidable. And if early morning raids are thought necessary from a Garda point of view, should the detained person pay for this in the form of extended detention periods, to allow legal advice to be taken?'.

that a suspect is entitled to legal advice prior to being questioned by Gardaí.[128] In looking to case law from the ECtHR and the U.S Supreme Court, the Court noted that procedural guarantees were typically applied from the time an arrest is made, which includes the right to have access to legal advice prior to questioning.[129] Clarke J. held that the right of early access to a solicitor was a component of the right to a fair trial in due course of the law; therefore one also has a right not to be interrogated without having had the opportunity to consult with one's requested solicitor.[130] The Court further concluded that it is essential that these matters be regulated by the Irish legislature, 'in order to vindicate the right to legal advice.'[131] While this case marked a turning point in the courts' attitude towards the right of access to a solicitor, it stopped short of establishing a right to have a solicitor present *during* questioning as this was not an issue raised by the parties.[132]

Following the Supreme Court's ruling in *Gormley*, the Director of Public Prosecutions issued a circular to allow for the presence of solicitors during questioning where such advice was requested by the detained individual. Then, one year later, a Code of Practice was issued on behalf of the Gardaí,[133] followed by Guidelines issued by the Law Society of Ireland,[134] to facilitate the presence of a solicitor during questioning. Within the Garda Code, it is stated a suspect should not be interviewed prior to receiving legal advice, 'except in wholly exceptional circumstances,' or save in the case that the suspect expressly waived this right.[135] The Code further recognised that following *Gormley*, it is now necessary to permit the presence of a solicitor during questioning where this has been

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[128] Of note, the *Criminal Justice Act* 2011 recognised that the interview should not take place until the suspect has had the opportunity to consult with their solicitor, but this has yet to be commenced.
[129] *D.P.P. v Gormley* (Fn. 127), section 7.
[130] Ibid, para [9.13]: 'The conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process'
[131] Ibid, para 10.
[132] Hugh McDowell, 'Reasonable Access People (DPP) v. Gormley' (2014) 2 *The Legal Eagle* 3 < https://www.kingsinns.ie/cmsfiles/lsdsi/The-Legal-Eagle-Issue-2-2013-2014.pdf> accessed 3 June 2018.
[133] An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Stations* (April 2015) <http://www.garda.ie/Documents/User/Code%20of%20Practice%20on%20Access%20to%20a%20Solicitor%20by%20Persons%20in%20Garda%20Custody.pdf> accessed 2 July 2018. [Hereafter Garda Code of Practice 2015].
[134] Law Society of Ireland, *Guidance for Solicitors Providing Legal Services in Garda Stations* (December 2015) < https://www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf> accessed 2 July 2018. [Hereafter Law Society Guidelines 2015].
[135] Garda Code of Practice 2015 (Fn. 133), 3.

requested by the suspect.[136] The role of the solicitor in this regard is to monitor the interview, and to intervene where appropriate to seek clarification, challenge improper questioning, advise a client not to reply or to request the suspension of the interview.[137] In contrast, the Guidelines issued to solicitors performing this role are comparatively broader, and include the need for solicitors to monitor the detainee's demeanour and their health during long interviews.[138] Solicitors are also advised to monitor interview tactics used by the Gardaí to illicit information, for example questions like 'you need to help yourself here' and 'we want to try and help you' are recognised as tactics aimed to provide inappropriate reassurance to the suspect in an effort to disarm them.[139] While neither document is legally binding, they hold persuasive merit and must be seen as a very positive move in the direction towards respecting the rights of suspects in custody. To secure the presence of a solicitor going forward, legislation is needed to give effect to the role of the solicitor and strengthen the rights of persons in custody.

Despite the move towards allowing solicitors to attend the interview, it is somewhat surprising that recent figures on the take-up would suggest the majority of suspects are choosing to waive this right.[140] Approximately 7% of suspects had their solicitor present during questioning in 2015, with a slight increase to 8% in 2016.[141] While this demonstrates an improvement in terms of ensuring the right of access to a solicitor, and in turn the right of access to justice more broadly, the figures suggest that more work needs to be done to address the reasons behind this low take-up, including awareness-raising and enhancing public knowledge on the right to have a solicitor present and providing training to both members of the Gardaí and solicitors in facilitating this right.[142]

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[136] Ibid, 8.
[137] Ibid.
[138] Law Society Guidelines 2015 (Fn. 134), para 7.18.
[139] Ibid, 7.19.
[140] Conor Lally, 'Most arrested not availing of right to solicitor presence at questioning' *The Irish Times* (Dublin 22 September 2017) <https://www.irishtimes.com/news/crime-and-law/most-arrested-not-availing-of-right-to-solicitor-presence-at-questioning-1.3229668> accessed 2 July 2018.
[141] See 'Call for suspect's right to a solicitor during interviews to be enshrined in law' *RTÉ* (22 September 2017) <https://www.rte.ie/news/2017/0922/906785-garda-interviews/> accessed 2 July 2018.
[142] Training is currently being delivered to solicitors by the Law Society in conjunction with Dublin City University – see below (Fn. 186).

Following the decision in *Gormley*, and the directions provided by the DPP in relation to the attendance of solicitors during questioning, it appeared that suspects could have a solicitor present at all times during their interrogation.[143] However, a recent Supreme Court decision in the case of *DPP v Doyle,* would appear to roll back the right to have a solicitor present during interview.[144] While in the circumstances of this case the suspect was not denied access to a solicitor, and had never requested that the solicitor be present during the interviews, he later attempted to assert this right at trial. This proved difficult for two reasons; first, the right to have a solicitor present did not exist at the time of this investigation.[145] The appellant in this case was arrested and interrogated in 2009, before the ruling in *Gormley* and the subsequent circular issued by the DPP.[146] Secondly, even if the court's decision in *Gormley* was seen to permit the attendance of solicitors during the interrogation, this was at best a right mentioned as *obiter dicta*,[147] – and therefore, not binding upon later courts.

The Court acknowledged the important weight attached to the jurisprudence of the ECtHR in *Gormley*, but Charleton J. stated that 'there is no decision of the European Court of Human Rights stating that there must be a solicitor in the room during the time when a person is being questioned by police in relation to a crime.'[148] Indeed, in considering Article 6 of the ECHR, and in particular Article 6(3)(c) on the right to receive legal assistance, the ECtHR have adopted a cautious approach in considering access to legal advice during police custody.[149] However, the recent ruling in the case of *Salduz v Turkey,* the Grand Chamber confirmed that access to a lawyer during the pre-trial process is required, unless there are compelling reasons to restrict such access.[150] It was held that in order for Article 6 to remain sufficiently 'practical and effective', access to a lawyer should be provided from the

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[143] Dara Robinson, 'If I could turn back time: Access to lawyers after DPP v Barry Doyle' (2017) *Law Society Gazette* 22 <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-2017/april-2017-gazette.pdf#page=25> accessed 4 April 2018. [Hereafter Robinson 2017].
[144] *D.P.P. v Doyle* [2017] I.E.S.C. 1. [Hereafter D.P.P. v Doyle].
[145] Ibid. For this reason, O'Malley J. reserved her position as to the existence of a constitutional right to have a solicitor present during questioning, as it does not properly arise as an issue on the facts of this case.
[146] Robinson 2017 (Fn. 143).
[147] Ibid.
[148] *D.P.P. v Doyle* (Fn. 144).
[149] Ed Cape and others, *Effective Criminal Defence in Europe* (Intersentia 2010) 44.
[150] *Salduz v Turkey* App. no. 36391/02 (ECHR 27 November 2008); (2009) 49 E.H.R.R. 19, para 54. (Hereafter Salduz 2000).

moment of the first interview with a suspect.[151] In particular, it was acknowledged that the 'crucial moments' arise in the beginning of criminal proceedings, during the first stages of the investigation, which in turn may determine the outcome of the proceedings.[152] Having regard to the vulnerability of persons in custody, it was held that the only way to compensate for this is to ensure the assistance of a lawyer, who can help to ensure respect for the individual's right not to incriminate himself.[153] In their ruling, which was later approved by the Irish Supreme Court in *Gormley*, the Grand Chamber held '[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interview without access to a lawyer are used for a conviction.'[154] However, the Courts ruling in the subsequent *Doyle* case would appear to be a disappointingly narrow reading of the decision in *Salduz;*[155] nevertheless members of the Court did signal their willingness to find in favour of such a right for solicitors to attend interviews in future cases.[156]

The current status of the right to have a solicitor present during garda interviews is therefore unclear following the Courts' ruling in *Doyle*. Nevertheless, while the court refused to recognise the existence of such a right in law, the recent guidelines produced by the DPP, the Gardaí and the Law Society would appear to signal an acceptance or a willingness to recognise a suspect's right of access to a solicitor during questioning. This is arguably one of the most important procedural guarantees afforded to suspects and is

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[151] Ibid. The ECtHR reiterated the ambit of Article 6 in the case of *Panovits v Cyprus* App. No. 4268/04 (First Section) (ECHR 11 December 2008)*,* which concerned a similar set of facts (both Salduz and Panovits concerned a minor) relating to access to legal advice prior to questioning. Taking note of the status of the applicant as a minor and the fact that he had not been assisted by a guardian; the Court further noted that the authorities had an obligation to provide sufficient information on the right to consult a lawyer before questioning. One year later, the Court also noted the rights of a suspect to be assisted by a lawyer in the case of *Dayanan v Turkey* App. no. 7377/03 (Unreported, ECHR 13 October 2009) para 32: 'In accordance with the generally recognised international norms, which the Court accepts and which form the framework for its caselaw, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned'.

[152] Salduz 2000 (Fn. 150).

[153] Ibid, para 54: 'Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination'.

[154] Ibid, para 55.

[155] *DPP v Doyle* (Fn. 144), para 154. Interestingly, in his dissenting judgment in *Doyle*, McKechnie J. conceded to the 'prevailing trend amongst fellow members' of the EU and stated that there is currently an 'inequality which exists in the interview room.' He further stated that the admissibility of the incriminating statements made during the interview 'will be much more readily established where the highest protection has been afforded to the rights of the suspect during the interview process.

[156] In particular, Justices MacMenamin, O'Malley and O'Donnell.

even more important for suspects with disabilities. However, as outlined above, further work needs to be done to address the reasons for the low take-up of this right and legislation is also necessary to provide statutory recognition of such a right.

6.4.2 The Pre-Trial Right to Silence

As discussed above, persons with disabilities are especially vulnerable during the police interview as they are at an increased risk of self-incrimination. While the recent developments in respect of the right to have a solicitor present during garda questioning are to be welcomed, further concerns remain in regards to the number of inference-drawing provisions in Irish law which allow Courts to draw inferences from a person's silence.[157] As Daly has commented, Ireland may be the first country to interfere with the right to silence in modern times, with incursions dating back to the Offences Against the State Act 1939 and the Constitution of the Irish Free State.[158] While the right to silence, or the privilege against self-incrimination, is one of the most fundamental safeguards within the criminal justice process,[159] the ability to draw inferences poses one of the greatest challenges to the rights and interests of suspects and in particular, suspects with disabilities.

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[157] The nature of the right against self-incrimination was discussed in the case of *People (D.P.P.) v Finnerty* [1999] 4 IR 364, wherein Keane J stated that adverse inferences could not be drawn from an accused's failure to give evidence and the jury must be told this. Thus, the prosecution were not allowed to introduce evidence that the accused had said nothing when questioned about the rape. See Yvonne Marie Daly, 'Unconstitutionally obtained evidence in Ireland: protectionism, deterrence and the winds of change' (2009) 19(2) *Irish Criminal Law Journal* 40; Yvonne Marie Daly, 'Is Silence Golden: The Legislative and Judicial Treatment of Pre-Trial Silence in Ireland' (2009) 31 *Dublin University Law Journal* 35 and Yvonne Marie Daly, 'Judicial oversight of policing: investigations, evidence and the exclusionary rule' (2011) 55(2-3) *Crime, Law and Social Change* 199. In the case of *Saunders v United Kingdom* (1997) 23 E.H.R.R. 313; [1996] E.C.H.R. 19187/91*,* the ECtHR considered that the notion of a fair trial presupposed that the prosecution must prove its case without resorting to evidence obtained through coercion in defiance of the accused's will.

[158] Yvonne Marie Daly, 'The Right to Silence: Inferences and Interference' (2014) 47 *Australian & New Zealand Journal of Criminology* 59, 64-65. [Hereafter Daly 2014].

[159] *Heaney and McGuinness v Ireland* [1996] 1 I.R. 580. In this case, a constitutional challenge was brought against section 52 of the Offences Against the State Act 1939, which required a person in custody to give an account of his movements if asked by the Gardaí. wherein the Supreme Court recognised that the right to silence is a constitutional right protected by Article 40.6, as a corollary right to freedom of expression

Although the right to silence is widely recognised as a basic right for all suspects who are arrested, it is even more necessary in respect of persons with disabilities who are perhaps more likely to experience infringements of this right. Once an individual has been arrested, they 'cannot be compelled to speak against his/her own interest under official questioning by the police.'[160] However, as addressed in section 6.2 above, previous research indicates that persons with disabilities are more suggestible than others, are more likely to confess to crimes they did not commit, and have a desire to please those in positions of authority, especially police officers.[161] Such behaviours enhance the vulnerability of suspects with disabilities, as they may choose to waive their right to remain silent, without fully understanding the implications for doing so. In the context of inference drawing provisions, the situation becomes even more challenging and complex, as they may not understand the operation of such provisions and the admissibility of adverse inferences at trial, in respect of persons who have chosen to remain silent.

In such cases where it is necessary to invoke inference drawing provisions, there are a number of safeguards outlined in law, for example, any inference drawn cannot be the sole or main basis for a conviction. Moreover, an inference cannot be drawn unless the accused was told of the consequences of their failure to account and given the opportunity to consult a solicitor.[162] Therefore, Gardaí are required to inform the suspect, in a language they understand, of their intention to invoke the inference provisions and remind suspects of their right to remain silent.[163] This involves explaining the relevant inference provision, including their effect (i.e. alert the suspect that if they wish to remain silent, this silence may have consequences and may later be used as evidence at trial), and that the garda reasonably believes the facts link the suspect to the offence in question.[164]

[160] Daly 2008 (Fn. 158), 62.
[161] See, Sheree Brewin and Andrew Bailey, 'Appropriate adults provided for vulnerable people who are questioned under caution by the police: Implications for public policy in the criminal justice review in Northern Ireland' (2004) 6(4) *International Journal of Police Science & Management* 247, 254.
[162] *The Criminal Justice Act* 2007.
[163] See Garda Code of Practice 2015 (Fn. 133), para 7.1.
[164] Ibid.

In light of the seriousness of such inference provisions, it is recognised in the Garda Code of Practice that all suspects should be afforded access to legal advice prior to an adverse inference interview.[165] The Guidelines issued by the Law Society in relation to the role of a solicitor during garda interviews also outline the role of the solicitor in this regard, and state that solicitors may need to advise their clients that, in the event inference provisions are being invoked, the effect of the right to silence should be explained.[166] Of course, in this regard, it must also be acknowledged that solicitors attending the garda station may be unaware of the individual's disability or may not have the necessary skills or experience to identify signs of disability, including signs of psychosocial disabilities. During the pre-interview consultation, it is imperative that solicitors are alert to any signs or indications of vulnerability and in such an event where the suspect chooses to disclose their disability, they should be advised of the importance of alerting the Gardaí. In respect of adverse inference interviews, it is even more important that the solicitor ensures the individual suspect understands the nature of their right to remain silent, and the arising implications of such silence at trial.

The existence of inference drawing provisions indicates that there is no absolute right to silence in Ireland.[167] While a suspect cannot be forced to answer, their refusal in certain circumstances may be used as evidence in their trial.[168] Therefore, the rules and procedures relating to the use of silence must be explained clearly to every suspect, both before and during garda interviews.

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[165] Ibid: 'The opportunity to draw an adverse inference from a suspect's silence or refusal to comment will not however apply if the suspect has not been afforded a reasonable opportunity to obtain legal advice.'
[166] Law Society Guidelines 2015 (Fn. 134), 11.
[167] The European Court of Human Rights has also considered the nature of adverse inferences and have established a clear link between the right to silence and the right to legal advice. In *Murray v UK* (1996) 22 E.H.R.R. 29*,* the European Court held that the right to silence is not an absolute right, inferences could be drawn from the accused's silence, however, the court proceeded to state that 'it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation.'
[168] *Criminal Justice Act* 2006, s. 72(A) (as inserted by the *Criminal Justice (Amendment) Act* 2009), now permits inferences to be drawn at trial directly from a failure to answer any question material to the investigation of an offence of participating in or contributing to any activity of a criminal organisation.

6.5 Recommendations for the Realisation of the Rights of Suspects with Disabilities during the Interview Process

Throughout this Chapter, and the thesis more generally, a number of barriers have been identified within the Irish pre-trial process for suspects with disabilities. An important step towards addressing these barriers is to prioritise training and awareness-raising among Gardaí to be able to identify signs or symptoms of disability. Arguably, the identification of vulnerable suspects and in particular, their psychological vulnerabilities, is even more important within the context of the Garda interview. Certain interview techniques or approaches may be unsuitable for vulnerable persons and could in turn influence their responses. Therefore, this research acknowledges the impact of psychological differences and the issues which can arise during the interview if due consideration is not given to the persons' disability or vulnerability.

Indeed, recognising psychological vulnerabilities and the differences between individuals is an important part of human diversity and is recognised within the General Principles of the CRPD.[169] This is also closely connected with the human rights model of disability, as discussed in Chapter 3, which recognises the existence of impairment as part of one's overall identity.[170] Specifically, the human rights model recognises the implications of one's own impairment as opposed to focusing solely on the physical environment as per the social model.[171] By recognising the existence of impairment, this enables police officers to put supports in place for the individual – thereby enabling the person to participate on an equal basis with others during their investigation and questioning. This is even more imperative in the case of serious crimes, which can have long lasting consequences for the person if they are convicted and found guilty.

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[169] CRPD, Article 3(d): 'Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.'
[170] Chapter 3, section 3.4.1.
[171] Chapter 2, section 2.2.2.

The principle of reasonable accommodation also recognises the existence of impairment, as it requires States to recognise the characteristics relating to disability and to make adjustments as necessary.[172] Such accommodations may include a different style of questioning in cases involving persons with a perceived disability and ensuring access to legal representation at all times. If we reflect on the case of Dean Lyons, the report acknowledged the lack of accommodations made to support the suspect during questioning, despite a number of junior Gardaí expressing doubts as to his behaviour and the reliability of his confession. There is, therefore, a clear need to provide training and awareness-raising to Gardaí to identify persons with disabilities in their custody, as this is essential for the realisation of the rights contained within the CRPD, including the rights of equality and non-discrimination (Article 5) and dignity and integrity (Article 17). This section will outline the main recommendations to address the existing barriers for persons with disabilities during the interview process.

6.5.1 Strengthening Procedural Safeguards

The provision of access to a solicitor for vulnerable suspects is key to recognising and securing their rights in criminal justice settings, and should be provided (unless the individual has expressly chosen to waive this right) regardless of whether the individual is under formal arrest, or has attended the station on a voluntary or informal basis. A key policy priority should therefore be to introduce an express right of access to a solicitor during questioning, and to outline the role and responsibilities of solicitors in attending the interviews.

[172] See Lisa Waddington, 'EU Disability Anti-Discrimination Law: the UN CRPD, reasonable accommodation and CJEU Case Law' (Academy of European Law Conference on Discrimination on the grounds of disability: Reasonable accommodation, December 2014) <http://www.era-comm.eu/oldoku/Adiskri/07_Disability/2014_Dec_WADDINGTON_EN.pdf> accessed 7 April 2018: 'Reasonable accommodation recognizes the relevance of "impairment" - if one ignores the impact of an impairment, and treats a person with a disability in exactly the same way as one treats a person without a disability, a de facto situation of inequality will arise.'

As the CRPD and its jurisprudence are still in its infancy, it is useful to look to the right to legal representation within Europe. In 2013, the European Commission introduced a number of proposals to strengthen procedural safeguards for suspects and accused persons. Of these proposals, a Directive on the Right of Access to a Lawyer in Criminal Proceedings was adopted by the European Parliament and the Council of the European Union,[173] alongside non-binding Recommendations on procedural safeguards for vulnerable persons.[174] Unfortunately, Ireland has not yet opted in to the Directive and as of now, it is unclear when/if we will. Within the Recommendations, the Commission outline the procedural rights of all vulnerable suspects and most importantly, they provide that appropriate measures should to be taken 'to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty.'[175] This follows the ratification of the CRPD by the European Union in 2010,[176] and underpins the importance of ensuring reasonable accommodations to all persons with disabilities in line with Article 2 and Article 5 of the Convention.[177] An example of the supports or accommodations listed in the Recommendations includes the provision of an appropriate adult to accompany the individual during police interviews.[178] While these Recommendations are not binding, they do hold persuasive merit and should be regarded as an influential source of information in regard to enhancing the rights of vulnerable persons in custody.

[173] Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Directive 2013/48/EU).
[174] European Commission Recommendation, Recommendations on procedural safeguards for vulnerable persons (Commission Recommendation 2013/C 378/02) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H1224(02)&from=en> accessed 2 July 2018. [Hereafter The Recommendations 2013].
[175] Ibid, section 3.14.
[176] European Commission Vice-President Reding, EU ratifies UN convention on disability rights (Press Release 5 January 2011) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4> accessed 3 July 2018.
[177] JUSTICIA European Rights Network, 'Interim Position Paper on Vulnerable Suspected and Accused Persons in Criminal Proceedings Reform Presented by the European Commission on 27 November 2013' (December 2013) 10-11 <http://eujusticia.net/images/uploads/pdf/Interim_JUSTICIA_Paper_on_Vulnerable_Suspected_and_Accused_Persons.doc> accessed 2 July 2018.
[178] The Recommendations (Fn. 174), para 9.

Further impetus to strengthen the procedural rights and guarantees of suspects also arise following the ECtHR's ruling in *Salduz*.[179] Following this ruling, the UK Supreme Court considered the issue of pre-trial legal advice in the case *Cadder v Her Majesty's* Advocates.[180]

In the wake of *Cadder,* Scotland introduced new legislation which provides for the attendance of solicitors during questioning.[181] Of note, the Act provides for compulsory attendance for solicitors in cases involving children and suspects with a mental disorder.[182] Mandatory attendance for solicitors during police questioning, such as this new Scottish provision, would address many of the problems for persons with psychological vulnerabilities during the pre-trial interview, however as will be discussed below, such a provision arguably contravenes Article 12 of the CRPD.

(i) Defining the Role of the Solicitor

Going forward, there is a clear need to implement legislation which recognises the right of suspects to have a solicitor present during garda interviews and defines the main responsibilities of the solicitor in performing this role. It is especially necessary to determine whether the solicitor should play the role of a passive observer, or if they can play a more active role in which they are entitled to challenge questions and interrupt the Gardaí to advise their client.

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[179] The ruling in Salduz (Fn. 150) is said to have 'caused legal earthquakes' around Europe according to Dimitrios Giannoulopoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries' (2016) 16(1) *Human Rights Law Review* 103.

[180] *Cadder v Her Majesty's Advocates* [2010] U.K.S.C. 43, para 48. In his ruling, Lord Hope referred to the jurisprudence of the ECtHR and held that 'Contracting States are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to a lawyer before he is subjected to police questioning.'

[181] *Criminal Justice (Scotland) Act* 2016.

[182] Ibid, s. 33: 'A person may not consent to being interviewed without having a solicitor present if— (a)the person is under 16 years of age; (b)the person is 16 or 17 years of age and subject to a compulsory supervision order, or an interim compulsory supervision order, made under the Children's Hearings (Scotland) Act 2011, or (c)the person is 16 years of age or over and, owing to mental disorder, appears to a constable to be unable to— (i)understand sufficiently what is happening, or (ii)communicate effectively with the police.'

The most pressing concern at the moment is the lack of training to solicitors in attending and advising clients during an interrogation.[183] This is even more concerning in the context of suspects with disabilities, as solicitors (like the Gardaí) are not trained medical professionals and therefore may be unable to recognise the signs or symptoms of persons with disabilities. Indeed, this point has been made by the Law Society of Ireland, in their practice notes on Advising a Mentally Disordered Client, in which it is stated that the fundamental problem for solicitors is recognising the signs of illness.[184] In many cases, it is noted that solicitors are likely to have experienced cases in which the Gardaí failed to notice or acknowledge signs of such illnesses, 'through, no doubt, benign oversight.'[185] The Law Society makes a number of recommendations for solicitors who have been called to advise persons in custody:

> Bearing in mind their lack of formal training in medicine, solicitors should be alert to symptoms exhibited in thought, speech or action of the detained person. If concerns arise, instructions should be taken from the detainee as to whether they are currently under medical care or on medication. It is perhaps advisable to be as diplomatic as possible in this questioning, as many such detainees are not anxious that their disability comes either to the attention of their advisor or indeed the Gardaí.[186]

In such cases where the solicitor has concerns regarding the mental health of a person in custody, they are advised to inform the individual concerned and recommend the client to instruct them to alert the Gardaí and seek medical intervention.[187] During any such examinations by a doctor, the solicitor is advised to be present as jurisprudence suggests

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[183] Training is currently being offered on a voluntary basis by the Law Society in conjunction with Dublin City University, as part of a wider European project, SUPRALAT, which aims to strengthen suspects rights in pre-trial proceedings through practice-oriented training. To date, almost 50 solicitors have completed this training. See Law Society of Ireland, 'SUPRALAT Garda station solicitor training-Leitrim' <https://www.lawsociety.ie/productdetails?pid=1432> accessed 2 July 2018.

[184] Law Society of Ireland, 'Advising a Mentally Disordered Client' (*Criminal Law Committee Mental Health Subcommittee*, 2009) <https://www.lawsociety.ie/Solicitors/Practising/Practice-Notes/Advising-a-Mentally-Disordered-Client/#.Wzo0vNhKiCQ> accessed 3 July 2018.

[185] Ibid.

[186] Ibid.

[187] Ibid: 'The client should be advised that it is not proposed to discuss the case with the gardaí, merely their state of health. The obligation will then be on the gardaí to organise a medical examination.'

that admissions made to a doctor may be admissible as evidence.[188] Solicitors are also encouraged to keep careful records, particularly in such cases where the Gardaí have refused to secure a medical examination on the request of a solicitor.[189] As discussed in the previous Chapter, the right to receive access to medical care in custody is of the utmost importance, therefore it is essential that new legislation provides that in such cases where a solicitor raises concerns as to their client's health or wellbeing, the Member in Charge of the station should make arrangements to facilitate access to a medical practitioner as soon as possible. Interestingly, the Garda Code of Practice on Access to a Solicitor makes reference to cases in which a solicitor raises an issue in relation to the fitness of their client to be interviewed.[190] In these circumstances, the services of Professor Harry Kennedy of the Central Mental Hospital in Dundrum, are available to the medical practitioner if further advice is needed in respect of suspects with psychosocial disabilities.[191]

(ii) Securing Access to Legal Advice: Practical Considerations

Despite recent moves to permit the attendance of solicitors during the garda interrogation, the low take-up rates among suspects would suggest that further work is necessary to determine the obstacles and factors at play. For example, in the case of suspects with disabilities, they may be unaware of the importance of the right to a solicitor and choose to waive this right, perhaps because of their desire to please the interviewing gardaí. Persons with disabilities may also experience difficulties in exercising their right to legal advice in a meaningful way; for example, by researching and nominating the names of a solicitor to the Gardaí, or by securing the presence of a solicitor in advance of attending the station (such as where they have been requested to attend voluntarily).[192] These concerns underpin the importance of the obligation to provide reasonable accommodations to persons with disabilities to enable them to realise their rights set out

[188] Ibid.

[189] Ibid: 'Further down the line, as is now well established, the possibility exists that an issue at trial of contentious exchanges during the detention phase will fall to be ruled upon. That being so, it is incumbent upon the solicitor, not only for the sake of the client, but also for him/herself, to have a clear, accurate, dated and timed, contemporaneous record of events at the garda station.'

[190] Garda Code of Practice 2015 (Fn. 133), 9.

[191] Ibid.

[192] New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80 1996) para 4.82.

in the CRPD, such as access to justice. In such cases where the Member in Charge becomes aware of one's disability, it is imperative that they provide assistance to the individual suspect in respect of choosing an appropriate solicitor, especially in such cases where the individual is not able to assert this right for themselves.[193]

Another area of concern is the lack of a duty solicitor scheme in Ireland, similar to that in operation in England and Wales.[194] This point was made by Clarke J. in *Gormley*, wherein he noted the obstacles facing suspects who choose to exercise their right to legal advice.[195] The absence of such a scheme to provide 24 hour legal support in Ireland is most salient in the context of vulnerable suspects who may not be able to understand the meaning or the importance of the role of a solicitor. However, it is also recognised that the attendance of a solicitor may not be enough to bridge the gap between the individual and the barriers within the criminal justice process. For persons with serious intellectual or psychosocial disabilities, they may require further supports such as the assistance of an interpreter or an appropriate adult who has experience of working within the disability sector to provide assistance. Access to such services, including the establishment of an appropriate adult service should also be provided within legislation to facilitate communication between the individual suspect, the Gardaí and the solicitor.

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[193] Garda Code of Practice 2015 (Fn. 133), 4: 'In the event that a suspect does not know or nominate a solicitor, but is seeking legal advice, it will fall to An Garda Síochána to contact a solicitor on his/her behalf. In these circumstances it is prudent for the member in charge to provide the suspect with a list of solicitors practising in the locality and contact the solicitor of his/her choice. The detention of a suspect may be considered unlawful if An Garda Síochána deliberately contacts a solicitor who, on account of distance from the station or some other factor, is likely to take a considerable time to arrive at the station.'

[194] See Andrew Sanders and others, *Advice and assistance at police stations and the 24 hour duty solicitor scheme* (Lord Chancellor's Department 1989); Rosemary Pattenden and Layla Skinns, 'Choice, privacy and publicly funded legal advice at police stations' (2010) 73(3) *The Modern Law Review* 349.

[195] *D.P.P. v Gormley* (Fn. 127) para 10: 'The State has not seen fit, as other States have, to provide for some system of duty solicitors, impartial and properly qualified and experienced, to advise a person in such circumstances. Therefore, it is for the arrested person to nominate his own solicitor. A solicitor is unlikely to be in his or her office at 6 or 7am, awaiting a call from a garda station. A solicitor contacted early in the morning is likely to be contacted (as in one of these cases) through some contact arrangement such as an out-of-hours number. He or she is then likely to have to put off his or her existing arrangements for the day: attending at the office to receive correspondence and sign outgoing correspondence; attending at Court; keeping appointments with clients; attending meetings with the lawyers for other parties, conferring with Counsel and generally attending to the work of a solicitor's office. This may include the need to attend other persons in custody.'

6.5.2 Recognising the Right to Refuse Supports

This research has identified a number of barriers within the criminal pre-trial process in Ireland and has made a number of recommendations to address such barriers in the context of persons with disabilities, including the support of an appropriate adult and access to a solicitor during the interview. While it has been hypothesised that greater supports are necessary to enable suspects with disabilities to participate on an equal basis with others, one must also have regard to an individual suspect's right to refuse supports.

The right to refuse supports has been recognised by the CRPD Committee as an integral component of Article 12.[196] In their Concluding Observations regarding Armenia, the Committee noted that the provision of both procedural, gender and age-appropriate accommodations should be provided on the basis of free-choice and preference of persons with disabilities.[197] Therefore, although Article 12 extends the right of all persons with disabilities to utilise supports to assist them in making decisions, it also affords them the right to exercise legal capacity without the help of supports.[198] This is in keeping with the non-discrimination provision safeguarded within the Convention under Article 5.[199] As such, while suspects with disabilities should be afforded access to supports to enable them to participate on an equal basis with others, they should also be allowed to decline any such support if this decision is made on the basis of free and informed consent. Thus, persons with disabilities are afforded the same rights to take risks and make mistakes as persons without disabilities.[200]

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[196] General Comment on Article 12 (Fn. 120), para 29(g): 'The person must have the right to refuse support and terminate or change the support relationship at any time'.
[197] CRPD/C/ARM/CO/1, para 22.
[198] This is acknowledged in General Comment on Article 12 (Fn. 120), para 18: 'at all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected'.
[199] CRPD, Article 5(2).
[200] General Comment on Article 12 (Fn. 120), para 22. A number of cases from the European Court of Human Rights have affirmed the right of suspects to waive their right to legal representation for example, provided that this decision is made freely and unequivocally. *Tarasov v Ukraine (App. No. 17416/03)* (Unreported, ECHR 31October 2013), para 93: 'The Court further reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner, and must be attended by minimum safeguards commensurate to the waiver's importance.'

Nevertheless, this writer acknowledges the tension that the Convention creates in this area. While the right to make and have ones decisions respected is now one of the most well-known rights safeguarded by the Convention, it may jeopardise the fairness of ones investigation if they choose not to avail of supports to assist them. This may include basic minimum procedural rights afforded to all suspects, including the right of access to a solicitor; but it may also include the right of access to accessible information or the support of an appropriate adult. There is also a concern that persons with disabilities may be more likely to waive their rights due to a desire to co-operate with the police in order to speed up the process,[201] feelings of innocence,[202] police coercion or being misled into a false sense of security by police,[203] or for reasons such as a lack of experience of being arrested as previous studies have found that persons who have no prior records are more likely to waive their rights than those who have previous experience of the criminal process.[204]

While it is necessary to have regard to these challenges and concerns, it must also be acknowledged that 'States parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to equal recognition before the law.'[205] As such, all suspects – including suspects with disabilities, have the right to choose whether they wish to avail of supports and such decisions should be respected by the Gardaí. In such cases where an individual has decided to waive their rights, and this decision has been made freely and without undue influence, it is imperative that the interviewing gardaí remind the suspect that they have the right to change their mind at any stage of the interrogation.[206] In such an event, the Garda Code of Practice provides that the Member in Charge 'will ensure that the solicitor chosen is contacted without delay.'[207]

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[201] As discussed above, (Fn. 39).
[202] Saul Kassin and Rebecca Norwick, 'Why People Waive Their "Miranda" Rights: The Power of Innocence' (2004) 28(2) *Law and Human Behavior* 211, 212.
[203] Ibid.
[204] Ibid.
[205] General Comment on Article 12 (Fn. 120), para 24.
[206] Garda Code of Practice 2015 (Fn. 133) 7-8.
[207] Ibid.

6.6 Conclusion

An individual's responses to police questioning may be influenced by a number of factors, not least their ability to give a reliable account of the events or because of the way in which they were questioned.[208] At the core of the police interview is the secrecy in which it is usually conducted.[209] This is even more problematic in Ireland, as the right to have a solicitor present during questioning remains unclear. This Chapter argues that a broad approach must be taken in regards to access to justice under Article 13. To do so, States Parties must consider both procedural guarantees and reasonable accommodations necessary to enable persons with disabilities to participate on an equal basis with others. By ensuring reasonable accommodations (such as access to an appropriate adult) and strengthening existing procedural guarantees, suspects with disabilities will be in a better position to participate as equal with others and to assert their right to a fair trial.

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[208] Henry and Gudjonsson 2003 (Fn. 12), 242.

[209] As the U.S. Supreme Court noted in the seminal case of *Miranda v Arizona* (1966) 384 U.S. 436: '…[i]nterrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.'

CHAPTER 7
CONCLUDING DISCUSSION

7.1 Introduction

At the outset of this research, it was noted that Ireland has now become the last country in the European Union to ratify the UN Convention on the Rights of Persons with Disabilities.[1] In March 2018, the Irish Minister of State for Disability Issues, Finian McGrath T.D., made a commitment to use the Convention to 'better equip and resource people with disabilities to improve their quality of life.'[2] However, there is a long way to go in terms of realising this commitment and to ensuring compliance with the Convention generally, and especially within the criminal justice system.

In this thesis, the barriers to justice for persons with disabilities within the pre-trial process were explored through the lens of a disability rights-based approach. Throughout the discussion, it has been argued that the CRPD, and specifically Article 13, can be used as a blueprint to consider the barriers to justice which prevent persons with disabilities from accessing justice on an equal basis with others. It has been suggested throughout this thesis that by applying the rights, principles and objectives of the Convention (such as reasonable accommodation, respect for diversity and inclusion, and awareness-raising) within the context of the pre-trial criminal process, suspects with disabilities would be better equipped and enabled to participate in the process on an equal basis with others.

This Chapter will reflect on the preceding Chapters and the barriers which persons with disabilities encounter when they come into contact with the pre-trial criminal process as suspects of crime. It then considers practical recommendations for law and policy reform to ensure compliance with the CRPD.

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[1] See Chapter 1, 1.
[2] Finian McGrath T.D., 'Ratification of the United Nations Convention on the Rights of Persons with Disabilities' (7 March 2018) <http://www.finianmcgrath.ie/?p=14242> 7 June 2018.

7.2 Reviewing the Aims and Objectives of this Study

One of the aims of this thesis was to consider *if* and *how* the Convention on the Rights of Persons with Disabilities could offer insights into criminal justice law and policy reform. As stated in Chapter 3, the Convention, on the back of the disability rights movement, has significantly altered the legal and political landscape pertaining to the rights of persons with disabilities. While there has been much written about the implications of ratifying the Convention with respect to civil legislation, there is comparatively little information available about how the Convention effects (if at all) the criminal justice process. The overall objective of this thesis was to fill this void and examine the potential ways in which the CRPD could be used as a blueprint for criminal justice reform, specifically as a means to address the barriers to justice for persons with disabilities within the pre-trial process. As discussed throughout this thesis, persons with disabilities are particularly vulnerable during this stage of the criminal justice system due to a number of factors, including a lack of training and awareness-raising among police officers, difficulties in identifying persons with "hidden disabilities", and a lack of procedural and/or reasonable accommodations to enable persons with disabilities to participate in their case on an equal basis with others.

This research required the adoption of an interdisciplinary approach to bring together the many relevant fields including human rights law, disability rights, criminal justice, criminal procedure, and the law of evidence. Moreover, an interdisciplinary approach was also necessary to understand the historical, cultural, legislative, and procedural influences as well as contexts which play a role in shaping the current pre-trial process and the treatment of suspects therein. This is best evident within Chapter 2, which sought to provide an historical account of the ways in which the State began to play an increasingly prominent role in the lives of people with disabilities. This context is especially relevant for the purpose of this thesis as the police were afforded specific powers to detain individuals within asylums and institutions, thereby illustrating the longstanding history of police involvement in the lives of people with disabilities in Ireland. Following the de-institutionalisation movement in the 1960s (as discussed in Chapter 4), evidence suggests

that the rates of persons with disabilities in contact with the police have considerably increased, with police officers subsequently earning the moniker "psychiatrists in blue."[3]

The CRPD of course mandates access to justice, non-discrimination, awareness raising and training, and all of these issues are hugely relevant in the context of the pre-trial process - which is one of the most important stages of the criminal justice system, and the one where an individual is most alone. Issues such as the manner of the arrest, interrogation methods and the right to bail were discussed using a disability rights-based perspective and it was found that there is considerable potential for the CRPD to be applied to inform law and police reforms in these areas. For example, the relevance of the CRPD is clearly evident in regards to the right to be informed (in a language you understand) of the reasons for the arrest,[4] the right of access to bail,[5] the right to the receive access to healthcare in custody,[6] and the right to integrity at all times.[7] While it is acknowledged that police officers are not expected to have all the necessary skills to be able to communicate with all persons (regardless of language or disability), all officers should be obliged to make reasonable adjustments to their everyday policing procedures, including the use of written notes, gestures or the use of pictures to ensure accessible communication, and facilitating access to a medical professional, a support person and/or a solicitor as soon as possible.

Throughout the discussion, the author has identified a broad number of ways in which the traditional criminal justice process discriminates against persons with disabilities, by failing to put in place any accommodations to support persons with greater needs. For example, traditional police practices such as the use of identification parades, traditional interrogation techniques and the typical use of handcuffs could present far greater complications to persons with disabilities than other suspects leading to potential disadvantage, stigmatisation and other mistreatment. It is argued that, based on the current information available, reforms are necessary in the Irish pre-trial process both in terms of legislative changes to give effect to greater procedural rights (i.e. legislative

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[3] Robert Menzies, 'Psychiatrists in blue: Police apprehension of mental disorder and dangerousness' (1987) 25(3) Criminology 429.
[4] CRPD, Article 21 and see Chapter 4, section 4.3.3.
[5] CRPD, Article 14 and see Chapter 5, section 5.7.2.
[6] CRPD, Article 25 and see Chapter 5, section 5.3.
[7] CRPD, Article 17.

pronouncement of the right to have a solicitor present throughout interview), reasonable accommodations to persons in custody (i.e. the service of an appropriate adult) and greater emphasis on training and awareness-raising amongst all members of the Gardaí. Such a multifaceted approach would ensure respect for the diversity of persons who come into contact with the criminal pre-trial process and further ensure compliance with the CRPD.

7.3 Recommendations

The issues raised throughout this thesis give rise to a number of recommendations for reform within the Irish pre-trial process. Alongside the text of the CRPD, the jurisprudence of the UN Committee, international examples of best practices and reports of international human rights organisations and police organisations, it has been argued that a disability rights-based approach can dismantle existing barriers within the criminal justice system for persons with disabilities. While it is necessary to ratify the Convention and give effect to its provisions including Article 13, it is also recognised that legislative reform alone is insufficient to ensure access to justice. Wider reforms are also necessary to consider the range of barriers in place within the pre-trial process, including attitudinal barriers held by police officers. This section reiterates the main recommendations as discussed within the preceding Chapters.

This thesis has provided a deeper insight into the range of structural barriers within the criminal pre-trial process for suspects with disabilities. Of note, Chapter 6 considered a number of essential guarantees and safeguards, such as the right to receive legal advice and the right to remain silent. As discussed, the right to have a solicitor present during questioning has yet to be recognised within Ireland, notwithstanding the importance of this right. This issue is even more worrying in respect of suspects with disabilities as research has shown them to be more suggestible and at risk of providing false confessions.

The second recommendation proposed within this thesis relates to the appropriate adult safeguard. While the provision of procedural guarantees such as the attendance of a solicitor during questioning is perhaps the most pertinent, it is also necessary to consider what reasonable accommodations are required to enable communication between the police conducting the investigation and the suspect. In this regard, it is argued that an appropriate adult service, similar to England and Wales, should be introduced within Ireland to provide supports to persons within police custody. As discussed in Chapter 5, the main impetus for this arises out of the innate complexity of the pre-trial process and the multiplicity of barriers which exist therein for suspects with disabilities. An appropriate adult may become involved early in the process, during the arrest and interview, to provide assistance to the individual suspect and help them to understand the complicated process. Ensuring appropriate systems, services and support for suspects with disabilities, such as the provision of an appropriate adult safeguard, should be a priority going forward in light of Ireland's ratification of the CRPD to ensure compliance with Articles 5 and 13.

The third recommendation relates to training and awareness-raising for all members of the Gardaí. Challenging false stereotypes or preconceived views about psychosocial disability, in particular, poses one of the most difficult tasks with regard implementing a right-based culture among the Gardaí. The problem of "attitudinal barriers" was highlighted in a report entitled 'Access to Justice for People with Disabilities as Victims of Crime in Ireland', which was published in 2012.[8] According to the authors of this study, the attitudes and dispositions of police officers, as gatekeepers to the criminal justice system, can greatly impact the experience of an individual victim seeking legal redress.[9] While this report specifically considering the status of the vulnerable victim in Irish law, this finding applies equally to suspects with disabilities, who are also at an increased risk of being stigmatised on the basis of their disability. As frontline agents of the justice system, all Gardaí should undergo regular training, with a view to learning about the importance of early identification, alternative interrogation methods and how best to facilitate the needs of suspects with disabilities. Essentially, it has been argued that incorporating greater human

[8] Claire Edwards, Gillian Harold and Shane Kilcommins, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (University College Cork 2012) 59 <http://nda.ie/nda-files/Access-to-Justice-for-People-with-Disabilities-as-Victims-of-Crime-in-Ireland1.pdf> accessed 4 June 2018.
[9] Ibid.

rights protections and disability awareness programmes, in line with Article 13 of the CRPD, can potentially address the systemic, institutional and attitudinal barriers within the justice system for all persons with disabilities. While the existing module offered to new Trainee Gardaí at Templemore is to be welcomed, further training programmes are necessary for existing Gardaí who qualified before this module was created. There is also an argument in favour of providing in-depth training to one member of every unit, similar to CIT training as discussed in Chapter 4. This would ensure that while all officers are equipped with the basic skills and knowledge in relation to persons with disabilities, there is at least on officer available to respond to crisis situations or who has the ability to identify signs or symptoms of persons with hidden disabilities.

Finally, a cross-sector evaluation should be conducted within Ireland, as oftentimes the police station (and by extension, the criminal justice system), is used inappropriately for people in need of community supports and/or medical treatment. In this regard, the availability of a wide range of supports should be reviewed, as police officers may not be best equipped to deal with people experiencing personal distress.[10] In 2006, a review carried out in Northern Ireland, the Bamford Review of Mental Health and Learning Disability, made a number of recommendations regarding the treatment of people with disabilities in the justice system.[11] One of the recommendations stated that all people with learning difficulties and mental health problems, if detained within police stations, should be offered necessary support, treatment and care, and where appropriate would be redirected to suitable services.[12] More recently in Ireland, diversion was highlighted as an important feature in the first interim report by the interdepartmental group to examine issues relating to people with mental illness in contact with the criminal justice system.[13]

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[10] Lord Bradley, in his review, noted that although there is a high prevalence of mental disorder among those who present to the police, there is often a lack of service provision for this highly vulnerable group. See Lord Bradley, The Bradley Report: Lord Bradley's review of people with mental health problems or learning disabilities in the criminal justice system (April 2009) <https://www.rcpsych.ac.uk/pdf/Bradley%20Report11.pdf> 3 June 2018.

[11] The Bamford Review of Mental Health and Learning Disability, The Bamford Review of Mental Health and Learning Disability: Northern Ireland Forensic Services (Belfast October 2006) 15 < https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/Forensic%20Services%20Report.pdf> accessed 3 June 2018.

[12] Ibid.

[13] Interdepartmental Group to examine issues relating to people with mental illness who come in contact with the criminal justice system (First Interim Report, Department of Justice and Equality 2016) < http://justice.ie/en/JELR/interdepartmental-group-to-examine-issues-relating-to-people-with-mental-illness-who-come-in-contact-with-the-criminal-justice-system_first-interim-report.pdf/Files/interdepartmental-

Among the recommendations, this report advised that An Garda Síochána implement a diversion policy which could be used in cases involving adults with mental illness who may have committed a minor offence. This report also recommended a review of the implications of Ireland's ratification of the Convention on the Rights of Persons with Disabilities with regard to existing criminal law, specifically the *Criminal Law (Insanity) Act* 2006 and the *Mental Health Act* 2001. While these recommendations are welcomed and of course necessary, it is regrettable that this report (and existing research more broadly) has overlooked the difficulties for suspects with disabilities navigating the criminal process itself. This thesis has attempted to fill this void to provide a realistic overview of the barriers for persons with intellectual and psychosocial disabilities from the initial point of contact with the police, through to their interrogation and their right to bail.

7.4 Final Reflections

Notwithstanding the potential for tangible law and policy reform and the scope to realise the rights of persons with disabilities, it is necessary to recognise a number of challenges and practical issues which arose within the context of this research. First, it is important to acknowledge the lack of statistical information available within the Irish criminal justice system, including the number of people who are arrested annually. While limited information is available in regard to the number of people with disabilities within the Irish prison population (see Chapter 1), there is considerably less information available in relation to the pre-trial process which makes it difficult to assess the true nature of the problem within Ireland. Going forward, there is a case for greater monitoring within the criminal justice system. Article 31 of the CRPD, for example, addresses the need for States Parties to collect data and statistics in order to monitor the implementation of the CRPD.[14] Therefore, a clear policy priority should be for An Garda Síochána to conduct, and make available, yearly reports which document the number of persons who have been taken

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group-to-examine-issues-relating-to-people-with-mental-illness-who-come-in-contact-with-the-criminal-justice-system_first-interim-report.pdf> accessed 4 June 2018.

[14] CRPD, Article 31(1): 'States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall: (a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities; (b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.'

into custody, the breakdown of this number (in terms of gender, age, nationality and the presence of disability – if known or suspected) and furthermore, the number of people who were released or charged. Such transparency would allow policy-makers and researchers to better understand the operational practices of An Garda Síochána and the trends within our justice system relating to offending and criminal behaviour.

There is a concern that many reported crimes committed by people with disabilities remain untried as decisions not to investigate or prosecute are made by the Gardaí and the Director of Public Prosecutions on the basis of disability/mental illness. This raises several concerns from an administration of justice perspective, as the suspect does not get the opportunity to prove their innocence. There are many practical difficulties which arise on foot of this concern, particularly from a non-discrimination perspective, as the CRPD prevents all forms of discrimination on the basis of disability.[15] Therefore, in interpreting the Convention strictly, decisions not to prosecute on the grounds of disability are no longer permissible. There is also an argument that as Article 12 recognises the legal capacity of all persons equally (as discussed in Chapter 3, all persons with disabilities can be held accountable (i.e. culpable) for their actions on an equal basis with others. The existence of reasonable accommodations and procedural guarantees (such as the right to a solicitor), may therefore dissuade Gardaí from making decisions not to prosecute an individual due to the existence of their disability as they will be afforded all necessary supports and accommodations to participate on an equal basis with others. While there is a much larger debate needed in relation to the questions raised by Article 12 and the arising implications in respect of the criminal law, it is important to recognise how the existence of a disability could impact the ultimate decision or approach taken in regard to whether the case should be prosecuted or not.

[15] CRPD, Article 5.

One of the most difficult challenges within policing (and the criminal law more generally), is how to strike a balance between respecting the rights of the suspect and the rights of the victim and the public interest.[16] In recent years, there has been an increased focus on rights of victims of crime in Ireland.[17] Of note, a number of reforms and accommodations have been introduced in favour of the victim, such as the EU Victims' Directive,[18] and the Criminal Justice (Victims of Crime) Act 2017, which gave domestic effect to that Directive and introduced a range of legislative protections for victims of crime in Ireland.[19] Among these protections are the right to information in an accessible manner,[20] and provision for a victim to be accompanied by a legal representative when making a complaint to the Gardaí.[21] This is in stark contrast to the protections which exist for suspects of crime at present, particularly in regards to the right to have a solicitor present during questioning. This thereby creates an imbalance within the criminal justice system in Ireland, whereby victims of crime have the *right* to have a solicitor present, but suspects do not.

There is, admittedly, a further balance to be struck in criminal law, and in policing more specifically; that of respecting the rights of the accused person, and public safety, more generally. For instance, there is an argument which needs to be considered in respect of the "dangerousness" criterion, which allows gardaí to detain an individual if they are a risk to themselves or others.[22] While this may amount to a deprivation of liberty based on the existence of a disability under Article 14 of the CRPD, this may need to be balanced against the interests of society. This debate can be contrasted with a similar, ongoing debate,

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[16] This is best illustrated in the Irish context by the existence of the non-jury Special Criminal Court in Ireland and the restrictions on the right to bail. The existence of the Special Criminal Court has come under repeated scrutiny by international human rights bodies for its failure to observe due process rights, but, to this day it continues to be used – with a second court in effect from 2016 to deal with the backlog of cases. The tension between the seemingly competing public interest and the rights of suspects/defendants may be the ultimate obstacle to reform within the pre-trial and trial process in Ireland.

[17] Department of Justice, Equality and Law Reform, 'A Human Rights Approach to Policing' (Irish Council for Civil Liberties Seminar, 4 March 2003): The then Minister of State at the Irish Department of Justice, stated that 'the very purpose of police powers is to vindicate the human rights of victims or potential victims of crime and the wider rights of society.'

[18] Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[19] The Act was commenced in part on 27th November 2017.

[20] *Criminal Justice (Victims of Crime) Act* 2017, s. 7. Interestingly, section 7(1)(a) provides that the gardaí must offer the victim information in relation to services providing support, such as appropriate specialist services (including psychological support services) and any such services offering alternative accommodation.

[21] Ibid, s. 14(2).

[22] As discussed in Chapter 5, section 5.7.2.

regarding the offending rates among remand prisoners.[23] It is difficult to traverse these tensions; however, greater investment in community treatment programmes and supported living arrangements could arguably prevent the individual from coming into contact with the criminal justice system in the first place. For those who commit a criminal offence, especially minor offences, all options in regard to restorative justice programmes should be considered as a preference for all suspects, specifically persons with disabilities. For those who have committed serious offences, or for those who have repeatedly committed criminal acts, a range of support services (such as an appropriate adult) should be available to allow the individual to navigate the maze of the criminal justice system and enable them to participate on an equal basis with other suspects.

One unfortunate but unavoidable challenge of the research process was the lack of access to An Garda Síochána and their training or interrogation materials. As an organisation, the Gardaí generally refuse access to researchers. On this occasion, clearance was granted to the researcher to conduct a field visit of a Garda Station and conduct several interviews. Unfortunately, access to a station was not in fact facilitated in the end and only two gardaí agreed to be interviewed, indicating the inherent difficulties in accessing such information. Further Freedom of Information Requests elicited a limited insight into the training of the Gardaí, but no substantial information on the nature of the training and education was received. While these issues speak to the renowned lack of transparency within the Gardaí, it is envisioned that there may be further avenues for research in this area in the future. The researcher aims to build upon the relationship with the Garda Research Office in order to conduct further fieldwork in the future.

[23] See Seán McCárthaigh, 'One in eight crimes last year carried out by people on bail' *Irish Examiner* (Cork, 24 April 2017) <https://www.irishexaminer.com/ireland/one-in-eight-crimes-last-year-carried-out-by-people-on-bail-448549.html> accessed 23 June 2018; Conor Lally, 'Analysis: Debate on denying prisoners bail is over before it begins' *The Irish Times* (Dublin, 14 October 2015) <https://www.irishtimes.com/news/crime-and-law/analysis-debate-on-denying-prisoners-bail-is-over-before-it-begins-1.2390676?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fcrime-and-law%2Fanalysis-debate-on-denying-prisoners-bail-is-over-before-it-begins-1.2390676> accessed 23 June 2018.

7.5 Going Forward: Recommendations for Further Research

As addressed throughout the preceding Chapters, there are a plethora of barriers within the criminal justice process which actively discriminate against persons with disabilities and in turn, prevent them from exercising their rights on an equal basis with others. While this thesis has highlighted and addressed these issues, there are several other avenues for further research to explore these individual barriers to justice and examine how the Convention can be used to address them. For example, further research could consider the label of dangerousness and the legal powers afforded to gardaí to detain persons due to a perceived risk of danger to themselves or others.[24] The CRPD embodies a new approach to disability studies and offers a new blueprint for States Parties to recognise the rights of persons with disabilities, in theory and in practice. Therefore, going forward, it could prove influential and have practical application in many areas of criminal law reform.

Previous research has considered the meaning of policing, the role of the police within society and the changing nature of modern policing in recent times.[25] However, questions still remain regarding the role and the responsibilities of the police during interactions with vulnerable citizens and whether the nature of policing itself, can be regarded as a barrier to justice. In particular, there are a number of concerns in relation to the extent of police powers and discretion during the pre-trial investigative stage of the criminal justice system with respect to ensuring the objective of law and order. The ability to detain individuals based on a perceived risk that they may pose a danger to themselves or others, which is currently mandated under Irish mental health law, highlights the extensive powers given to police officers to intervene in situations involving persons with disabilities.[26] It also highlights the importance of exercising police discretion, which is an important part of everyday policing, but could reveal discrimination or perceived bias against persons with disabilities and/or mental health illnesses.

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[24] See Appendix 3, 2.

[25] Robert Reiner, *Chief Constables: Bobbies, Bosses, Or Bureaucrats?* (Oxford University Press 1991); Robert Reiner, *The politics of the police* (University of Toronto Press 1992); P.A.J Waddington, *Policing Citizens: Police, Power and the State* (Routledge 1998) and P.A.J. Waddington, *Calling the Police: The Interpretation Of, and Response To, Calls for Assistance from the Public* (Avebury 1993).

[26] Mental Health Act 2001, s. 12.

It is therefore necessary to consider the nature of policing in Ireland with respect to disability awareness and the response to disability-related matters. In the absence of formalised cross-sectoral supports between the Gardaí and mental health services, coupled with the current backlog within the Irish health service generally in respect of mental health care, the Gardaí are being forced to respond to persons experiencing crisis situations as there are no alternatives. Consequently, mental health emergencies have become a policing problem within this country and members of the Gardaí will continue to operate as street corner psychiatrists or psychiatrists in blue. A cross-sectoral study should be conducted going forward to establish how gardaí can be supported in performing this role with a view towards establishing a formal relationship between the Gardaí and mental health services. A key policy priority should therefore be to explore alternatives for the Gardaí, aside from resorting to effecting an arrest or admitting a person to hospital, in cases concerning people with psychosocial disabilities.

7.9 Conclusion

Throughout this thesis, a range of issues have been uncovered which require further research and analysis. The aim of this discussion was to examine *if* and *how* the Convention on the Rights of Persons with Disabilities can be used to influence reform of the criminal justice system. The aim of the UN Convention on the Rights of Persons with Disabilities is to protect and promote the rights of all persons with long term disabilities and to dismantle existing societal barriers which discriminate against persons with disabilities. In keeping with this ethos, the rights outlined in the Convention are comparatively broader than other human rights treaties and can be open to interpretation in a wide variety of contexts, including criminal justice. A holistic reading of the Convention is needed for any analysis of the rights contained therein, and within the context of this thesis there are a number of provisions referred to throughout; specifically, Article 8, Article 9, Article 12, Article 13 and Article 14.

In conclusion, this research expanded on the existing research on the UN Convention on the Rights of Persons with Disabilities and applied its rights and principles within the context of the pre-trial criminal justice system. While the context of this research concerned the Irish laws and processes specifically, the discussion and application of the rights and principles outlined in the Convention could also be considered to address existing barriers to justice within other States Parties to the CRPD. It is one of a few studies exploring the nature of Article 13 specifically from the perspective of persons suspected of crime and their treatment while in police custody. As such, this research sheds new light on the plethora of issues and barriers encountered by suspects from their initial point of contact with the police, through to their interrogation and release. This is also one of the very few studies documenting the relationship between the Gardaí and suspects with disabilities, and thus it offers a new perspective on the difficulties experienced by both parties during their interactions with each other.

To conclude, the author recognises that the responsibility is not, and should not be, on members of An Garda Síochána to accommodate and respond to persons experiencing a mental health crisis or to persons in distress. Undoubtedly, the rate with which persons with disabilities and particularly mental health issues are coming into contact with the police is due to wider social and political shortcomings, such as the lack of investment in healthcare, community treatment and social housing. Until such issues have been addressed, persons with disabilities will most likely continue to come into contact with the criminal justice system, and as such, Gardaí will need to be able to respond to their needs and be able to identify signs and symptoms of distress. Article 13 can therefore prove beneficial in this regard, as it creates an impetus among all States Parties to provide training to all agents of the criminal justice system. Going forward, a key priority on behalf of the CRPD Committee and States Parties should be to consider the ways in which the CRPD can influence real and meaningful criminal justice reforms which accommodate all persons equally.

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Appendix 1: Freedom of Information Request A

An Garda Síochána

Oifig Saorála Fáisnéise,
An Garda Síochána, Teach áth Luimnigh,
Lárionad Gnó Udáras Forbartha Tionscail,
Baile Sheáin , An Uaimh,
Contae na Mí.
C15 DR90

Freedom of Information Office,
An Garda Síochána, Athlumney House,
IDA Business Park,
Johnstown, Navan,
Co Meath.
C15 DR90

Teileafón/Tel: (046) 9036350

Láithreán Gréasain/Website:
www.garda.ie

Bí linn/Join us

Ríomh-phoist:/Email: foi@garda.ie

Ms. Donna Maire McNamara
Donamarie.mcnamara8@mail.dcu.ie

Re: Freedom of Information Request FOI-000079-2018
Request Part-Grant

Dear Mr. McDermott,

I refer to your request, dated and received on 13th February, 2018 which you have made under the Freedom of Information Act 2014 (FOI Act) for records held by An Garda Síochána.

Part 1(n) of Schedule 1 of the FOI Act states that An Garda Síochána is listed as a partially included agency *"insofar as it relates to administrative records relating to human resources or finance or procurement matters"*. Therefore, only administrative records that relate to human resources, finance or procurement shall be considered.

Your request sought:

1. *Any internal briefing documents that the force disseminates to members of An Garda Siochana in order to facilitate them assisting/interviewing a detained person who is believed to have a disability or a mental illness*
2. *How many members of An Garda Síochána (and their rank) have received training in identifying/responding to persons with mental illnesses?*
3. *Records of the number of persons detained in Garda Stations who were assessed by a psychologist/psychiatrist in 2017.*
4. *Information relating to the number of Gardaí who are trained to Level 3 (or above) in the Garda Síochána Interviewing Model.*

I wish to inform you that I have decided to part-grant your request on the 12th March, 2018. For ease of reference I have numbered your request 1-4 inclusive.

The purpose of this letter is to explain my decision.

Seirbhísí gairmiúla póilíneachta agus slándála a sholáthar le hiontaoibh, muinín agus tacaíocht na ndaoine ar a bhfreastalaímid
To deliver professional policing and security services with the trust, confidence and support of the people we serve

1. **Findings, particulars and reasons for decision to deny access**

On receipt of your correspondence, your request was forwarded to the Garda College in Templemore where a search was conducted for the records sought.

In respect of point no. 2 of your request wherein you seek the following:

2. *How many members of An Garda Síochána (and their rank) have received training in identifying/responding to persons with mental illnesses?*

I can advise 1,850 Trainee Gardaí have received mental health awareness training which is delivered in ***Policing with Communities Module – Unit 5*** of the BA in Applied Policing Programme.

In respect of point no. 4 of your request wherein you seek the following:

4. *Information relating to the number of Gardaí who are trained to Level 3 (or above) in the Garda Síochána Interviewing Model.*

I can advise that there are 307 Gardaí trained to Level 3 of the Garda Síochána Interviewing Model. I can further advice there are 40 Gardaí trained to Level 4 of the Garda Síochána Interviewing Model.

I am refusing point no. 1 and point no. 3 of your request wherein you seek the *following:*

1. *Any internal briefing documents that the force disseminates to members of An Garda Siochana in order to facilitate them assisting/interviewing a detained person who is believed to have a disability or a mental illness*

and

3. *Records of the number of persons detained in Garda Stations who were assessed by a psychologist/psychiatrist in 2017.*

Section 6(2)(a) of the FOI Act provides that an entity specified in Schedule 1, Part 1 of the Act shall, subject to the provisions of that Part, be a public body for the purposes of the FOI Act. Schedule 1, Part 1 contains details of bodies that are partially included for the purposes of the FOI Act and also details of the certain specified records that are excluded. If the records sought come within the description of the exclusions of Part 1, then the FOI Act does not apply and no right of access exists.

Part 1(n) of Schedule 1 of the FOI Act provides that An Garda Síochána is not a public body for the purposes of the FOI Act other than in relation to administrative records relating to human resources, or finance or procurement matters.

The term "administrative records" is understood to mean records relating to the processes of running and managing a business or organisation. I am therefore refusing your request as it is falls outside the scope of the FOI Act insofar as the records do not meet the criteria of administrative records as defined in the Act.

Seirbhísí gairmiúla póilíneachta agus slándála a sholáthar le hiontaoibh, muinín agus tacaíocht na ndaoine ar a bhfreastalaímid
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2. Right of Appeal

In the event that you are not happy with this decision you may seek an Internal Review of the matter by writing to the address below and quoting reference number **FOI-000079-2018.**

Freedom of Information Office, An Garda Síochána, Athlumney House, IDA Business Park, Navan, Co. Meath, C15 DR90.

Please note that a fee applies. This fee has been set at €30 (€10 for a Medical Card holder). Payment should be made by way of bank draft, money order, postal order or personal cheque, and made payable to Accountant, Garda Finance Directorate, Garda Headquarters, Phoenix Park, Dublin 8.

Payment can be made by electronic means, using the following details:

Account Name: Garda Síochána Finance Section Public Bank Account
Account Number: 10026896
Sort Code: 900017
IBAN: IE86BOFI90001710026896
BIC: BOFIIE2D

You must ensure that your FOI reference number FOI-000079-2018 is included in the payment details.

You should submit your request for an Internal Review within 4 weeks from the date of this notification. The review will involve a complete reconsideration of the matter by a more senior member of An Garda Síochána and the decision will be communicated to you within 3 weeks. The making of a late appeal may be permitted in appropriate circumstances.

Please be advised that An Garda Síochána replies under Freedom of Information may be released in to the public domain via our website at www.garda.ie

Personal details in respect of your request have, where applicable, been removed to protect confidentiality.

Should you have any questions or concerns regarding the above, please contact me by telephone at (046) 9036350.

Yours sincerely,

Sharon Kennedy **SUPERINTENDENT**
SHARON KENNEDY
FREEDOM OF INFORMATION OFFICER

12 **MARCH, 2018**

Appendix 2: Freedom of Information Request B

An Garda Síochána

Oifig Saorála Fáisnéise,
An Garda Síochána, Teach áth Luimnigh,
Lárionad Gnó Udáras Forbartha Tionscail,
Baile Sheáin , An Uaimh,
Contae na Mí.
C15 DR90

Freedom of Information Office,
An Garda Síochána, Athlumney House,
IDA Business Park,
Johnstown, Navan,
Co Meath.
C15 DR90

Teileafón/Tel: (046) 9036350

Láithreán Gréasain/Website:
www.garda.ie

Bí linn/Join us

Ríomh-phoist:/Email: foi@garda.ie

Ms. Donna Marie McNamara
donnamarie.mcnamara8@mail.dcu.ie

Re: Freedom of Information Request FOI-000144-2018
Request Granted

Dear Ms. McNamara,

I refer to your request, dated and received on 5th April, 2018 which you have made under the Freedom of Information Act 2014 (FOI Act) for records held by An Garda Síochána.

Part 1(n) of Schedule 1 of the FOI Act states that An Garda Síochána is listed as a partially included agency *"insofar as it relates to administrative records relating to human resources or finance or procurement matters"*. Therefore, only administrative records that relate to human resources, finance or procurement shall be considered.

Your request sought:

- *How many members of An Garda Síochána (and their rank) are trained in Levels 1 and 2 of the Garda Síochána Interviewing Model?*
- *How many members have received interview training post-2012?*
- *How many members have received pre-interview disclosure training?*

I wish to inform you that I have decided to grant your request on the 30th April, 2018.

The purpose of this letter is to explain my decision.

1. Findings, particulars and reasons for decision to deny access

On receipt of your correspondence, your request was forwarded to the Garda College in Templemore where a search was conducted for the records sought. Figures were supplied by each Division to the Garda College, Crime Training Faculty. The following table details the number of members trained in level 1 & 2 of the GSIM (Garda Síochána Interviewing Model).

1

Seirbhísí gairmiúla póilíneachta agus slándála a sholáthar le hiontaoibh, muinín agus tacaíocht na ndaoine ar a bhfreastalaímid
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Rank	Amount	Training
Inspector	58	Level 1 Investigative Interviewing
Sergeant	1,040	Level 1 Investigative Interviewing
Garda	5,924	Level 1 Investigative Interviewing
Reserve Garda	28	Level 1 Investigative Interviewing
Rank	**Amount**	**Training**
Inspector	34	Level 2 Investigative Interviewing
Sergeant	698	Level 2 Investigative Interviewing
Garda	4,674	Level 2 Investigative Interviewing

Training commenced on March 2014. Since April 2015 all members attending level 2 investigative interview training received pre-interview disclosure training. To-date 5,028 members have received pre interview disclosure training.

2. Right of Appeal

In the event that you are not happy with this decision you may seek an Internal Review of the matter by writing to the address below and quoting reference number **FOI-000144-2018.**

Freedom of Information Office, An Garda Síochána, Athlumney House, IDA Business Park, Navan, Co. Meath, C15 DR90.

Please note that a fee applies. This fee has been set at €30 (€10 for a Medical Card holder). Payment should be made by way of bank draft, money order, postal order or personal cheque, and made payable to Accountant, Garda Finance Directorate, Garda Headquarters, Phoenix Park, Dublin 8.

Payment can be made by electronic means, using the following details:

Account Name: Garda Síochána Finance Section Public Bank Account
Account Number: 10026896
Sort Code: 900017
IBAN: IE86BOFI90001710026896
BIC: BOFIIE2D

You must ensure that your FOI reference number FOI-000144-2018 is included in the payment details.

You should submit your request for an Internal Review within 4 weeks from the date of this notification. The review will involve a complete reconsideration of the matter by a more senior member of An Garda Síochána and the decision will be communicated to you within 3 weeks. The making of a late appeal may be permitted in appropriate circumstances.

Seirbhísí gairmiúla póilíneachta agus slándála a sholáthar le hiontaoibh, muinín agus tacaíocht na ndaoine ar a bhfreastalaímid
To deliver professional policing and security services with the trust, confidence and support of the people we serve

Please be advised that An Garda Síochána replies under Freedom of Information may be released in to the public domain via our website at **www.garda.ie**

Personal details in respect of your request have, where applicable, been removed to protect confidentiality.

Should you have any questions or concerns regarding the above, please contact me by telephone at (046) 9036350.

Yours sincerely,

Sharon Kennedy **SUPERINTENDENT**
SHARON KENNEDY
FREEDOM OF INFORMATION OFFICER

02 **MAY, 2018**

Seirbhísí gairmiúla póilíneachta agus slándála a sholáthar le hiontaoibh, muinín agus tacaíocht na ndaoine ar a bhfreastalaímid
To deliver professional policing and security services with the trust, confidence and support of the people we serve

Appendix 3: Parliamentary Question

OIFIG AN AIRE DLÍ AGUS CIRT AGUS COMHIONANNAIS
OFFICE OF THE MINISTER FOR JUSTICE AND EQUALITY

Mr James Browne T.D.,
Dáil Éireann
Leinster House
Dublin 2

2 July 2018

Dear Deputy Browne,

I refer to your Parliamentary Question No's 304, 305 and 306 for answer on Tuesday, 27 February 2018 the text of which was as follows:-

"To ask the Minister for Justice and Equality if members of An Garda Síochána receive specific training in relation to dealing with persons suspected to be suffering with mental health issues; and if he will make a statement on the matter."

"To ask the Minister for Justice and Equality if mental health response units are available for members of An Garda Síochána to contact in cases of a mental health emergency; and if he will make a statement on the matter."

"To ask the Minister for Justice and Equality if An Garda Síochána has a dedicated mental health unit; and if he will make a statement on the matter."

At the time I responded that I would request the information sought by you from the Garda Commissioner and that I would write directly to you on receipt of same.

I am informed by the Garda Commissioner that An Garda Síochána use an interagency response to deal with people with mental health issues and in this regard there is a Memorandum of Understanding between the Health Service Executive (HSE) and An Garda Síochána which is referred to when Gardaí are dealing with mental health incidents. The Memorandum of Understanding is a joint initiative by An Garda Síochána and the HSE to maximise interagency co-operation and to promote the welfare and safety of persons with mental ill health. In addition, members of An Garda Síochána can also use the on call doctor service when

51 Faiche Stiabhna, Baile Átha Cliath 2, D02 HK52 / 51 St. Stephen's Green, Dublin 2, D02 HK52
Teileafón/Telephone: (01) 602 8202 Íosghlao/Lo-call: 1890 221 227 Ríomhphost/Email: info@justice.ie

dealing with such incidents. There is no dedicated mental health unit as this interagency response is the response at present.

Further, section 12 of the Mental Health Act 2001, which provides for Garda powers to take persons believed to be suffering from a mental disorder into custody, may be invoked by the Gardaí where they come into contact with a mentally ill person in a crisis situation. In such situations, it may appear that the person is a danger to himself/herself or to others. Section 12 may be invoked to ensure that a medical assessment and admission to an approved centre and treatment in accordance with that Act are accessed.

The Memorandum of Understanding between An Garda Síochána and the HSE has been developed in order to provide an appropriate response in respect of the removal or return of persons to approved centres in accordance with the Mental Health Act 2001. An Garda Síochána and the HSE are the key agencies empowered by law to carry out these functions. Mutual understanding and cooperation is essential in ensuring that these roles are carried out effectively.

I am further informed by the Commissioner that the during Phase 1 of the Applied Policing Programme, Trainee Gardaí are exposed to and challenged with the issues surrounding vulnerable persons suffering from mental illness.

The training programme is delivered using a problem based learning approach (PBL), and includes a module on Policing with the Communities. As part of this module under Unit 5 - Mental Illness Awareness, trainees focus on the area of the elderly and mental illness and look at areas such as types of mental illness, Garda powers and procedures and transportation of persons with a medical illness. It also contains information on the various community and social services involved in the area.

I am advised by the Commissioner that in addition to this and as part of the BA programme, the trainees attend a 2 day internationally recognised ASIST suicide prevention programme which is co-delivered with the HSE. The ASIST programme is a suicide first aid programme which equips students with the skills required to discuss suicide with a person at risk and to make an intervention to reduce the immediate risk of suicide.

In April 2014 An Garda Síochána as part of the Continuous Professional Development Core Programme for operational members, provided training on Mental Illness Awareness in keeping with the Mental Health Act 2001. The programme also covered areas of the types of mental illness, Garda powers and procedures and transportation of persons with a mental illness. This topic will be included in the Core Programme for 2018.

The vulnerability of suspects, witnesses and injured parties is also embedded in all training courses for Investigative Interviewing with Level 3 Investigative Interviewing addressing the area of memory through the use of enhanced cognitive interview skills. The areas of personality disorders and mental health are also covered on these training courses.

I hope that this information is of assistance.

Yours sincerely

Charlie Flanagan T.D.
Minister for Justice and Equality.

Appendix 4: Data Processing Agreement

DATA PROCESSING AGREEMENT
RESEARCHING

The Experience of Persons with Disabilities as Suspects of Crime in Ireland

Dated: 23rd January 2018

Between

An Garda Síochána

And

Donna Marie McNamara
DATA PROCESSING AGREEMENT

This Agreement dated the **23rd January 2018** sets out the terms and conditions under which personal data held by the specified data controller will be disclosed to the specified data processor. This Agreement is entered into with the purpose of ensuring compliance with the principles of the Data Protection Act 1988 as amended ("the Act"). Any disclosure of data must comply with the provisions of the Act.

1. **The Parties**

   1.1. This Agreement is between An Garda Síochána, (herein after called the "Data Controller") of **Garda Headquarters, Phoenix Park, Dublin 8**; **Donna Marie McNamara** (herein after called the "Data Processor"), of Melrose, Ballynanum, Edenderry, Co. Offaly

2. **Purpose**

   2.1. The purpose of this Agreement is to allow for the undertaking of a Doctorate in Law research study Human Rights Law **("the Purpose")].**

   2.2. **This Purpose is consistent with the original purpose of the data collection.**

3. **Definitions**

   3.1. In this Agreement, the expressions **"Data Controller"**, **"Data Processor"**, **"Personal Data"**, **"Sensitive Personal Data"**, **"Processing"**, **"Commissioner"** have the same meaning as in the Act.

3.2. "**Research data**" is defined as police recorded crime information including 'Personal Data' and 'Sensitive Personal Data' in the form of raw data provided by the Data Controller to the Data Processor.

3.3. "**Aggregated Data**" is defined as Research Data grouped together to the extent that no living individual can be identified from that Aggregated Data or any other data in the possession of, or likely to come into the possession of any person obtaining the Aggregated Data.

3.4. "**Agreement**" means this data processing agreement together with the Schedule and all other documents attached to or referred to as forming part of this Agreement.

3.5. Headings are inserted for convenience only and shall not affect the construction or interpretation of this Agreement and, unless otherwise stated, references to clauses and schedules are references to the clauses of and schedules to this Agreement;

3.6. Any reference to any enactment or statutory provision shall be deemed to include a reference to such enactment or statute as extended, re-enacted, consolidated, implemented or amended and to any subordinate legislation made under it; and

3.7. The word 'including' shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word, and the word 'include' and its derivatives shall be construed accordingly.

4. Information provision

4.1. *It is recognised that the Purpose requires access to the Research Data, which may have been previously protectively marked by the Data Controller.*

4.2. The Research Data will be provided over a set time period to be agreed in advance by both parties.

4.3. Ownership of the Research Data shall at all times remain with the Data Controller. For the avoidance of doubt, the Data Processor undertakes to ensure that no response to any request for information whether pursuant the Act or any request to utilise the information for further research purposes will be acceded to without the consent of the Data Controller and consideration by him of any exemptions, in respect of the Act appropriate reservations and safeguards in respect of research requests.

4.4. Aggregated Data compiled from the Research Data, and processed pursuant to this Agreement, will come entirely under the control of the Data Controller and may only be processed in accordance with this Agreement.

4.5. The recipient(s) of the research findings (including Aggregated Data) for the purposes of this Agreement is/are: **An Garda Síochána** and **Dublin City University.**

5. Use, Disclosure and Publication

5.1. The Research Data will be used solely for the Purpose set out at clause 2, above.

5.2. The Research Data shall not at any time be copied, broadcast or disseminated to any other third parties, except in accordance with this Data Processing Agreement.

5.3. Subject to 5.4 below, the Research Data will not be matched with any other Personal Data otherwise obtained from the Data Controller, or any other source, unless specifically authorised by the Data Controller.

5.4. It is acknowledged that data matching will occur to the extent that sets of Aggregated Data may be applied to sets of other Aggregated Data obtained from public sector bodies for the Purpose.

5.5. The Research Data will not be disclosed to any third party without the written authority of the Data Controller.

5.6. The only exceptions to clauses 5.2. to 5.5. above will be where any person is required to give evidence in legal proceedings.

5.7. Access to the Research Data will be restricted to those researchers of the Data Processor directly involved in the processing of the Research Data in pursuance of the Purpose.

5.8. No steps will be taken to contact any party who may be identified in the Research Data.

6. Data Protection and Human Rights

6.1. The use and disclosure of any Personal Data shall be in accordance with the obligations imposed upon the parties to this Agreement by the Act and the European Court of Human Rights Act 2003.

6.2. **The parties agree and declare that the Research Data will be used and processed with regard to the rights and freedoms enshrined within the European Convention on Human Rights.**

6.3. The Data Processor undertakes to comply with the provisions of the Act.

6.4. The receipt by the Data Processor from any Data Subject of a request to access to the Data covered by this Agreement must be immediately reported to the Data Controller to assess if the Data Controller wishes to claim any exemptions.

6.5. The Data Processor shall give reasonable assistance as is necessary to the Data Controller in order to enable him to:

6.5.1. Comply with request for subject access from the Data Subjects;
6.5.2. Respond to Information Notices served upon him by the Commissioner;
6.5.3. Respond to complaints from Data Subjects;
6.5.4. Investigate any breach or alleged breach of the Act.

in accordance with his statutory obligations under the Act.

6.6. **This Agreement acts in fulfilment of part of the responsibilities of the Data Controller as required by the Act 2003.**

7. Confidentiality

7.1. **The parties shall not use or divulge or communicate to any person (other than those whose need to know the same for the Purpose, or without the prior written authority of the Data Controller) any Personal Data obtained from the Data Controller, which it shall treat as private and confidential and safeguard accordingly.**

7.2. The Data Processor shall ensure that any individuals involved in the Purpose and to whom Research Data is disclosed under this Agreement are aware of and comply with this Agreement.

7.3. The restrictions contained in 7.1 shall cease to apply to any Personal Data which may come into the public domain otherwise than through unauthorised disclosure by the parties to the Agreement or any other party.

7.4. For the avoidance of doubt, the obligations of confidentiality imposed on the parties by this Agreement shall continue in full force and effect after the expiry or termination of this Agreement.

7.5. Respect for the privacy of individuals should be guaranteed in any research project requiring the use of Personal Data.

7.6. No steps to attempt to identify any person from the Research Data or Aggregate Data will be made by any data matching or other exercise.

8. Retention, Review and Weeding.

8.1. **All Research Data will be retained by The Data Processor until no later than the end December 2018. At the conclusion of this period the Research Data will be returned/destroyed.**

8.2. The Data Controller shall maintain a record of all Disclosed Data to the Data Processor, this will enable a check to be made that all Disclosed Data has been returned/destroyed.

9. Security

9.1. The Data Processor recognises that the Data Controller has obligations relating to the security of data in his control under the Act. The Data Processor will continue to apply those relevant obligations as detailed below on behalf of the Data Controller during the term of this Agreement.

9.2. **The Data Processor agrees to apply appropriate security measures, commensurate with the requirements of the Act. In particular, the Data Processors shall ensure that measures are in place to do everything reasonable to:**

9.2.1. Make accidental compromise or damage unlikely during storage, handling,
use, processing transmission or transport;
9.2.2. Deter deliberate compromise to opportunist attack; and
9.2.3. Promote discretion in order to avoid unauthorised access.

9.3. **The Research Data shall be processed by the Data Processor without unreasonable delay.**

9.4. The Data Controller will wish to undertake suitability checks on any persons having access to An Garda Síochána premises and the Research Data and further reserves the right to issue instructions that particular individuals shall not be able to participate in the Research Project without reasons being given for this decision. The Data Processor will ensure that each person who will participate in the Research Project understands this and provides their written consent as necessary.

9.5. Any security incidents, breaches and newly identified vulnerabilities must be reported at the earliest opportunity to the Data Controller. The security report must contain the location of the premises, the person reporting the incident, the date and time of the incident and time at which it came to notice and brief details including the impact.

9.6. The Data Controller reserves the right to undertake a review of security provided by the Data Processor and may request access to the Data Processor premises for this purpose. Failure to provide sufficient guarantees in respect of adequate security measures will likely result in the termination of the contract.

9.7. The parties hereto undertake to comply with all or any reasonable requirements concerning the storage, access or use of any Research Data.

9.8. Any archived copies of the Research Data created by back up and recovery procedures will be deleted at the termination of the contract.

9.9. The Data Processor undertakes not to use the services of any sub-contractors in connection with the processing of the Research Data without the prior written approval of the Data Controller.

9.10. The Data Processor undertakes to ensure that all research data and copies thereof are secured when not in use and that upon termination of the Agreement, all such documents or copies thereof shall be securely disposed of or destroyed in a manner to make retrieval or reconstruction not possible.

10. Indemnity

10.1. **In consideration of the provision of the Research Data for the Purpose the Data Processor undertakes to indemnify the Data Controller its members and civilian personnel against any liability, which may be incurred by such person or authority as a result of the Data Processor's breach of this Agreement.**

10.2. Provided that this indemnity shall not apply:

10.2.1. where the liability arises from information supplied which is shown to have been incomplete or incorrect, unless the person or authority claiming the benefit of this indemnity establishes that the error did not result from any wilful wrongdoing or negligence on his part;

10.2.2. unless the person or authority claiming the benefit of this indemnity notifies the relevant Data Processor as soon as possible of any action, claim or demand to which this indemnity applies, permits the Data Processor to deal with the action, claim or demand by settlement or otherwise and renders the Data Processor all reasonable assistance in so dealing;

10.2.3. to the extent that the person or authority claiming the benefit of this indemnity makes any admission which may be prejudicial to the defence of the action, claim or demand.

11. Termination and Variation

11.1. Subject to the provisions of paragraph 8.1 this Agreement shall terminate in **December 2018** or the completion of the Purpose, whichever be the later.

11.2. **The Data Controller may at any time by notice in writing terminate this Agreement forthwith if the Data Processor is in breach of any material obligation under this Agreement.**

11.3. **In the event that any party wishes to exit from this Agreement, that party shall serve a notice, in writing, to the offices of the other party of a date not less than 30 days from the date of the said notice, on which the party proposed to exit the Agreement.**

11.4. In the event that either party wishes to vary any term of this Agreement that party will give notice, in writing to the offices of the other party, explaining the effect of and reason for the proposed variation. The parties shall within 30 days of receipt of such a notice meet to discuss the variation.

12. Miscellaneous

12.1. **This Agreement constitutes the entire agreement between the Parties as regards the subject matter hereof and supersedes all prior oral or written agreements regarding such subject matter.**

12.2. **If any provision of this Agreement is held by a Court of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the remaining provisions of this Agreement, which shall remain in full force and effect.**

12.3. **The validity, construction and interpretation of the Agreement and any determination of the performance, which it requires shall be governed by the Laws of Ireland and the Parties, hereby submit to the exclusive jurisdiction of the Irish Courts.**

Signed on behalf of An Garda Síochána

…………………...………………... Name and Position

Signed for and on behalf of and duly authorised by Y

Appendix 5: Undertaking of Confidentiality

UNDERTAKING OF CONFIDENTIALITY

I, *Donna Marie McNamara*, as a researcher involved in the research as defined in the Agreement between the **An Garda Síochána**, and Donna Marie McNamara, Melrose, Ballynanum, Edenderry, Offaly to which this Undertaking is appended, hereby acknowledge the responsibilities arising from this Agreement.

I understand that my part in fulfilling the Purpose means that I may have access to the Research Data and that such access shall include

a) reading or viewing of information held on computer or displayed by some other electronic means, or

b) reading or viewing manually held information in written, printed or photographic form.

I undertake that; -

1. **I shall not communicate to nor discuss with any other person the contents of the Research Data except to those persons authorised by An Garda Síochána.**

2. **I shall not retain, extract, copy or in any way use any Research Data to which I have been afforded access during the course of my duties for any other purpose.**

3. I will only operate computer applications or manual systems that I have been trained to use.

4. I will comply with appropriate physical and system security procedures made known.

I understand that the Research Data is subject to the provisions of the Data Protection Act 1988 as amended and that by knowingly or recklessly acting outside the scope of this Agreement I may incur criminal and/or civil liabilities.

I undertake to seek advice and guidance from the a relevant official Data Controller in the event that I have any doubts or concerns about my responsibilities or the authorised use of the Research Data and/or Aggregate Data defined in the Data Processing Agreement

I have read, understood and accept the above.

Name Donna Marie McNamara

Signed *Donna Marie McNamara*

Date 23rd January 2018

Appendix 6: Research Approval – An Garda Síochána

An Garda Síochána

Aonad Taighde An Garda
Coláiste An Ghárda Síochána
An Teampall Mór
Contae Thiobraid Árann

Tel / Teileafón: (0504) 35489

Fax / Facs: (0504) 35455

Garda Research Unit
An Garda Síochána T
Templemore,
Co Tipperary.

Web site: www.gard

E-mail: research@g

Date: 09th of Februar

Ms. Donna-Marie McNamara,
Melrose,
Ballynanum,
Edenderry,
Co.Offaly.

Re: Approval to conduct Research into An Garda Síochána

Your request to conduct research within the Garda organisation, as described in the External Research Protocol document you submitted, has been approved by the Garda Síochána Research Review Board.

The chosen topic; '*The Experience of Persons with Disabilities as Suspects of Crime in Ireland*' is one that is important, relevant and timely.

At this stage approval has been granted to commence the fieldwork. Upon completion, please supply this office with a copy of any findings. Upon completion of your thesis please forward a copy of same to this office. This will be available in the Garda College Training Library unless operational reasons restrict it.

Regards,

Caroline Copeland.

Garda Caroline Copeland,
Garda Research Unit.

cc. Garda Síochána Research Review Board.

Appendix 7: Ethics Application

Dublin City University
RESEARCH ETHICS COMMITTEE

NOTIFICATION FORM FOR **LOW-RISK PROJECTS**

Application No. *(office use only)* DCUREC/2017/____

Section A: Applicant Details

PROJECT TITLE:	Identifying Obstacles in the Criminal Justice Process for Suspects with Disabilities in Light of the Convention on the Rights of Persons with Disabilities
APPLICANT NAME:	Donna Marie McNamara
SCHOOL/UNIT:	School of Law and Government
APPLICANT EMAIL:	Donnamarie.mcnamara8@mail.dcu.ie
If a student applicant, please provide the following additional information:	
Programme of Study:	PhD in Law
Supervisor Name:	Associate Prof Yvonne Daly Dr Aisling de Paor
Supervisor Email:	yvonne.daly@dcu.ie aisling.depaor@dcu.ie

Section B: Questions

1. Notification Review is reserved for low-risk social studies that fall under the following classifications. Please indicate your project type below:

Please mark as appropriate:	
	Anonymous Survey (the topic will not elicit significant difficulties for participants)
	Observation (without audio or visual recording) of a public setting
	Questioning participants regarding their opinions on products or services
	Questioning students about standard educational practices
	Study will monitor the impact of participants' daily activities
X	Questioning public figures/professionals in their professional capacity regarding their professional activities
	Analysis of existing anonymised data which has been provided to the researcher by a third party
	Collection of biological samples which are anonymised and do not require invasive techniques (e.g. hair, nails).
	Other ***Please explain:***

2. Please provide a justification for why your study is considered to be low-risk?

The research will involve semi-structured interviews with members of An Garda Síochána about their experience of investigating persons with disabilities as suspects of crime. The aim of the discussion will be to focus solely on their professional role and activities. It is not within the objectives of this study to discuss any personal details or information relating to cases, but simply to give an account of their experience arresting and questioning persons with disabilities, what support they can access in difficult cases and what changes they would like to see made. The aim of this research is to include the voice and the experience of Garda members, to ensure that the recommendations made within this PhD have practical relevance.

While the participants will be interviewed because of their professional role, disclosure of identity is not required for this study and so anonymity and confidentiality will be maintained, unless otherwise expressly agreed between the interviewee and the researcher. I plan to disseminate my research in a monograph, academic articles and conference papers.

As professionals, these participants are not vulnerable interviewees and, accordingly, no substantial ethical issues arise.

3. Please describe how your participants will be recruited?

The researcher has already been in contact with a member of the Garda Research Unit to discuss the project and the levels of interest that Gardaí would have in engaging in this project. From this discussion, a number of key stakeholders have been identified as most relevant for the purpose of this research. Contributions will therefore be sought from the following units:

- A participant from the Garda Bureau of Community Diversity and Integration
- Garda Access Officer
- Detective Inspector Enda Mulryan, National Interview Advisor
- 2-3 Garda members attached to a regular operational policing unit

The researcher intentionally chose a small number of participants to enable greatest access to the most relevant Gardaí and to enable greatest buy-in to the project. While the sample size is quite small, the proposed participants have been carefully chosen by the researcher in light of their levels of expertise in this area. Therefore, the researcher is aware of the limited ability to generalise findings to the larger population based on this small-scale study.

Potential discussants will be contacted in advance by the Garda Research Office, as per their protocol for working with researchers. A recruitment advertisement will be disseminated to the Garda Research Office, who have agreed to liaise with me to recruit the most relevant Gardaí.

All participants will be provided with both a plain language statement and an informed consent form. As such they will have a complete understanding of any ethical considerations including confidentiality and data storage.

4. Informing your participants – Plain Language Statement

A Plain Language Statement (PLS) should be used in all cases. This is written information in plain language that you will be providing to participants, outlining the nature of their involvement in the project and inviting their participation. The PLS should specifically describe what will be expected of participants, the risks and inconveniences for them, and other information relevant to their involvement. Please note that the language used must reflect the participant age group and corresponding comprehension level – if your participants have different comprehension levels (e.g. both adults and children) then separate forms should be prepared for each group. The PLS can be embedded in an email to which an online survey is attached, or handed/posted to individuals in advance of their consent being sought. ***A copy of the PLS should be attached to this application****. See link to sample templates on the website:* http://www4.dcu.ie/research/research_ethics/rec_forms.shtml

Please confirm whether the following issues have been addressed in your plain language statement for participants:

	YES or NO
Introductory Statement (PI and researcher names, school, title of the research)	YES
What is this research about?	YES
Why is this research being conducted?	YES
What will happen if the person decides to participate in the research study?	YES

How will their privacy be protected?	YES
How will the data be used and subsequently disposed of?	YES
What are the legal limitations to data confidentiality?	YES
What are the benefits of taking part in the research study (if any)?	YES
What are the risks of taking part in the research study?	YES
Confirmation that participants can change their mind at any stage and withdraw from the study	YES
How will participants find out what happens with the project?	YES
Contact details for further information (including REC contact details)	YES

If any of these issues are marked NO, please justify their exclusion:

5. Capturing consent – Informed Consent Form

*In most cases where interviews or focus groups are taking place, an Informed Consent Form is required. This is an important document requiring participants to indicate their consent to participate in the study, and give their signature. If your participants are minors (under 18), it is best practice to provide them with an assent form, while their parents/guardians will be given the Informed Consent Form. In cases where an anonymous questionnaire is being used, it is enough to include a tick box in the questionnaire (underneath the information section for participant), where the participant can indicate their consent. See link to sample templates on the website: http://www4.dcu.ie/research/research_ethics/rec_forms.shtml. **A copy of the Informed Consent Form should be attached to this application.***

Note – IF AN INFORMED CONSENT FORM IS NOT BEING USED, THE REASON FOR THIS MUST BE JUSTIFIED HERE:

Important Notes:

- **Please ensure you attach any *additional* relevant documentation to your application:** **E.G.** copy of Survey/Questionnaire, copy of Interview/Focus Group schedule, copy of permission/approval from external sources (i.e. approval to access individuals in an organisation, school, community group)
- **The application should consist of one electronic file only.** The completed application must incorporate the plain language statement, informed consent form and all supplementary documentation
- **All sections of the application form must be answered**. The completed application must be proofread and spellchecked before submission to REC
- **Your application must be e-mailed to the DCU Research Ethics Committee at rec@dcu.ie . Student applicants must cc their supervisor on that e-mail** – this applies to *all* student applicants (masters and postgraduate). **The form should be approved and signed by the supervisor in advance of submission to REC.**

Applications which do not adhere to these requirements will not be accepted for review and will be returned directly to the applicant. The administrator to the Research Ethics Committee will assess, on receiving such notification, whether the information provided is adequate.

Please note: Project supervisors have the primary responsibility to ensure that students do not take on research that could expose them and the participants to significant risk, such as might arise, for example, in interviewing members of vulnerable groups such as young children. In general, please refer to the REC Guidelines for further guidance on what research procedures or circumstances might make a higher level of ethical approval necessary.
See https://www4.dcu.ie/researchsupport/research_ethics/guidelines.shtml

DECLARATION BY PRINCIPAL INVESTIGATOR(S)

In the case of student applicants the Principal Investigator is their supervisor.

The information contained herein is, to the best of my knowledge and belief, accurate. I have read the University's current research ethics guidelines, and accept responsibility for the conduct of the procedures set out in the attached application in accordance with the form guidelines, the REC guidelines (https://www4.dcu.ie/researchsupport/research_ethics/guidelines.shtml), the University's policy on Conflict of Interest, Code of Good Research Practice and any other condition laid

down by the Dublin City University Research Ethics Committee. I have attempted to identify all risks related to the research that may arise in conducting this research and acknowledge my obligations and the rights of the participants.

If there exists any affiliation or financial interest for researcher(s) in this research or its outcomes or any other circumstances which might represent a perceived, potential or actual conflict of interest this should be declared in accordance with Dublin City University policy on Conflicts of Interest.

I and my co-investigators or supporting staff have the appropriate qualifications, experience and facilities to conduct the research set out in the attached application and to deal with any emergencies and contingencies related to the research that may arise.

Electronic Signature(s):

Principal investigator(s):

Print Name(s) here: Donna Marie McNamara

Date: 6th February 2018

Supervisors:

Print Name(s) here: Yvonne Daly

Date: 06-02-18

Supervisors:

Print Name(s) here: Aisling de Paor

Date: 07-02-18

DUBLIN CITY UNIVERSITY
Plain Language Statement

I, Donna Marie McNamara from the School of Law and Government at Dublin City University am carrying out a PhD project called "Identifying Obstacles in the Criminal Justice Process for Suspects with Disabilities in Light of the Convention on the Rights of Persons with Disabilities".

The aim of this project is to explore how the Irish criminal justice system accommodates vulnerable suspects and to examine international law and practices in this area. It is widely reported that police officers regularly come into contact with persons with disabilities worldwide, as suspects, victims and witnesses of crime. This project will examine the interactions between members of An Garda Síochána and persons with disabilities. I hope to gain an understanding about what members of the Gardaí find difficult about investigating suspects with disabilities, how prepared they feel to respond to vulnerable suspects' needs and what changes they would like to see, among other things.

The interviews are designed to be semi-structured and will last up to one hour, at a time and place that suits you. I would like to record this interview, but this will be kept confidential and secured safely. The information from these interviews will be used as part of my PhD, which will be stored in the library at Dublin City University. Quotations from these discussions may be used, but nobody will be identified unless they have provided full consent. I also hope to develop my thesis into a book in 2019 and I plan to publish academic articles about this area. If you want to receive more information about the proposed publication of this research, please get in touch.

I do not see any risks to you being interviewed and I will not be asking you to discuss confidential information. If you wish to remain anonymous, this will be respected and no one will know that you have taken part in this study. All data relating to the research will be kept until December 2018, but if you want it destroyed before then just let me know. Your participation will be confidential unless otherwise expressly agreed. However, you are advised that the confidentiality of the information provided cannot always be guaranteed by the researcher and can only be protected within the limitations of the law – i.e., it is

possible for data to be subject to subpoena, freedom of information claim or mandated reporting by some professions.

By taking part you will help me to make recommendations for practical improvements which will be good both for you as a Garda and persons with disabilities who come into contact with the justice system. It will also be valuable to include the perspectives of the Gardaí in future discussions about this topic and to create more awareness about the difficulties faced by both parties when they come into contact with each other.

Taking part in this study is completely voluntary. You can change your mind at any point.

Contact the Researcher:

Donna McNamara

School of Law and Government

Dublin City University

Donnamarie.mcnamara8@mail.dcu.ie

0858259192

If participants have concerns about this study and wish to contact an independent person, please contact:

The Secretary, Dublin City University Research Ethics Committee, c/o Research and Innovation Support, Dublin City University, Dublin 9. Tel 01-7008000, e-mail **rec@dcu.ie**

DUBLIN CITY UNIVERSITY
Informed Consent Form

Donna Marie McNamara, from the School of Law and Government at Dublin City University, is carrying out a PhD called "Identifying Obstacles in the Criminal Justice Process for Suspects with Disabilities in Light of the Convention on the Rights of Persons with Disabilities". The purpose of this research is to explore how the Irish criminal justice system responds to people with disabilities as suspects of crime, particularly persons with intellectual disabilities and mental illnesses.

The researcher will carry out interviews with approximately 5-6 Gardaí, including a participant from the Garda Bureau of Community Diversity and Integration and the Garda Access Officer. Participants in this study are asked to take part in an interview which will last one hour. The aim of these discussions is to include the experiences of Gardaí and the difficulties they face in arresting and questioning persons with disabilities, and to consider practical recommendations for reform.

Please complete the following (circle Yes or No for each question):

I have read the Plain Language Statement (or had it read to me)	Yes/No
I understand the information provided	Yes/No
I have had an opportunity to ask questions and discuss this study	Yes/No
I have received satisfactory answers to all my questions	Yes/No
I am aware that my interview will be audio-recorded	Yes/No
I understand that the transcript of my interview will be kept for a period of one year, but that I can request destruction in advance of this	Yes/No
I am aware that I may withdraw from the research study at any point	Yes/No

My identity will be kept completely confidential, unless otherwise agreed between the researcher and the interviewee. Keeping my identity confidential means not only that the researcher will not reveal my name to anyone, but also that she will not reveal identifying factors about me or what I have told her.

I understand that my participation will be confidential, but that the confidentiality of the information provided cannot always be guaranteed by researchers and can only be protected

within the limitations of the law – i.e., it is possible for data to be subject to subpoena, freedom of information claim or mandated reporting by some professions.

I have read and understood the information in this form. I understand that my participation is entirely voluntary. Any questions have been answered by the researcher, and I have a copy of this consent form. Therefore, I consent to take part in the project.

Participant's Signature: ______________________________

Name in Block Capitals: ______________________________

Date: ______________________________

INTERVIEW GUIDE

Definition and Identification

- Does An Garda Síochána have a definition of disability?
- If so, what is this?
- What information is available to you for identifying persons with disabilities?
- If a person is suspected of having a disability, what protocols are followed?
- How do you assess whether a person is competent for questioning?
- Do you have access to support in your interactions with persons with disabilities? If so, what kinds of supports are available to you?

Prevalence

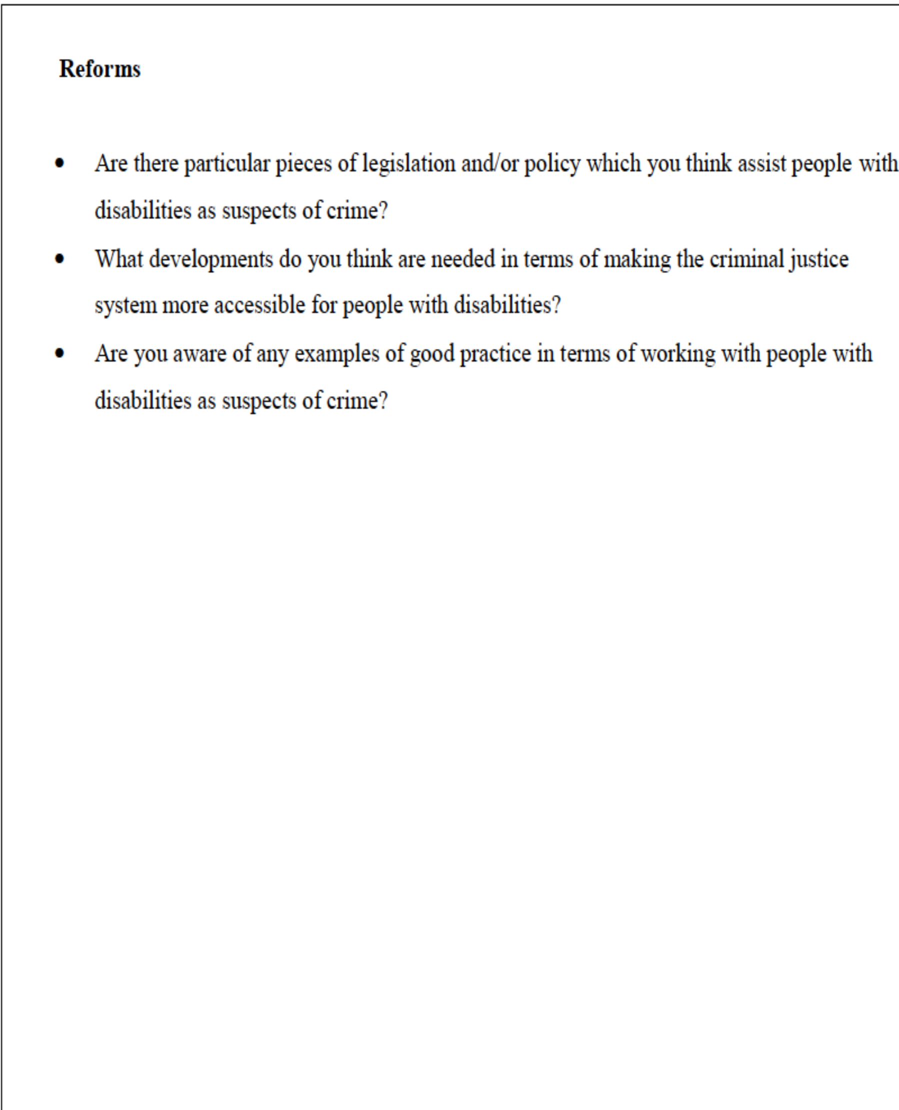
- To what extent have you dealt with people with disabilities in your role?
- To what extent have you dealt with people with disabilities who are suspect of crime?
- Do you keep a record of cases that involve people with disabilities? If so, is this a general record or disability-specific?
- Do you keep a record of suspects who receive medical attention in custody?
- In your experience, how often would a General Practitioner or a Psychiatrist or a Psychologist attend a station to assess a suspect?
- In your experience, how often would a person with a disability have access to a solicitor while in custody?

Training

- Have you received training in terms of working with people with disabilities?
- If so, what did this training involve?

Specific

- What challenges, if any, have you faced in responding to a person with a disability?
- What barriers, if any, arise during an investigation involving a suspect with a disability?
- What adjustments, if any, have been made to facilitate the needs of people with disabilities in Garda stations?
- What adjustments, if any, have been made to facilitate the needs of people with disabilities who have been arrested?
- What adjustments, if any, are made during an interview with a person with a disability?



Reforms

- Are there particular pieces of legislation and/or policy which you think assist people with disabilities as suspects of crime?
- What developments do you think are needed in terms of making the criminal justice system more accessible for people with disabilities?
- Are you aware of any examples of good practice in terms of working with people with disabilities as suspects of crime?

Appendix 8: Ethics Approval

Ollscoil Chathair Bhaile Átha Cliath
Dublin City University

Ms Donna Marie McNamara
School of Law and Government

16th March 2018

REC Reference: **DCUREC/2018/033**

Proposal Title: **Identifying Obstacles in the Criminal Justice Process for Suspects with Disabilities in Light of the Convention on the Rights of Persons with Disabilities**

Applicant(s): **Ms Donna Marie McNamara, Associate Prof Yvonne Daly, Dr Aisling de Paor**

Dear Donna Marie,

This research proposal qualifies under our Notification Procedure, as a low risk social research project. Therefore, the DCU Research Ethics Committee approves this project.

Materials used to recruit participants should state that ethical approval for this project has been obtained from the Dublin City University Research Ethics Committee.

Should substantial modifications to the research protocol be required at a later stage, a further amendment submission should be made to the REC.

Yours sincerely,

Dónal O' Gorman

Dr Dónal O'Gorman
Chairperson
DCU Research Ethics Committee

DCU
Research & Innovation

Taighde & Nuálaíocht Tacaíocht
Ollscoil Chathair Bhaile Átha Cliath,
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