

Police Custody in Ireland

Edited by Yvonne Daly



“This edited book provides a welcome addition to the literature on police custody, filling an important research gap, particularly in the context of policing in Ireland. This is a must read for researchers, policy makers and practitioners in the field. It covers a range of topics which shed light on how to bring improvements to the treatment of people in police custody, including those with a variety of specific needs.”

Liz Aston, *Professor of Criminology, Edinburgh Napier University and Director of the Scottish Institute for Policing Research*

“The focus of this important text is on the keystone issue of the treatment of people in police custody. Pulling together new empirical research on different aspects of police custody, it highlights the significance of this issue, the challenges posed by different dimensions of the police role, and its impact on individuals and groups characterised by vulnerabilities. With contributions marked by empirical rigour, careful analysis and sharp insight, this book is a most welcome addition to the growing literature on policing in Ireland and to wider debates about police power and individuals’ rights.”

Aogán Mulcahy, *Associate Professor, School of Sociology, University College Dublin*

“This is an excellent, much-needed collection on an important and under-researched topic: police custody in Ireland. An Garda Síochána has the opportunity in the coming years to transform its use and administration of police custody. This collection is essential reading for anyone involved, concerned or interested in what must be achieved through that process – especially given the attention it pays to so many especially vulnerable groups.”

Ian D. Marder, *Assistant Professor in Criminology, Maynooth University and Deputy Director of the Maynooth Research Centre for Criminology*



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POLICE CUSTODY IN IRELAND

Police Custody in Ireland brings together experts from policing studies, law, criminology, and psychology, to critically examine contemporary police custody in Ireland, what we know about it, how it operates, how it is experienced, and how it might be improved.

This first-of-its-kind collection focuses exclusively on detention in Garda Síochána stations, critically examining it from human rights and best practice perspectives. It examines the physical environment of custody, police interview techniques, existing protections, rights, and entitlements, and experiences of specific communities in custody, such as children, ethnic minorities, non-English speakers, the Mincéir/Traveller community, and those with intellectual disabilities or Autism Spectrum Disorder. *Police Custody in Ireland* gives a snapshot of garda custody as it is now and makes important recommendations for necessary future improvements.

An accessible and compelling read, this book will be of interest to those engaged in policing and criminology, as well as related areas of interest such as human rights, youth justice, and disability studies.

Yvonne Daly is Professor of Criminal Law and Evidence at Dublin City University, Ireland.



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In memory of Dr Vicky Conway



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CONTRIBUTORS

Editor

Yvonne Daly is Professor of Criminal Law and Evidence in the School of Law and Government at Dublin City University. She is an expert on criminal evidence and procedure, with a specific research focus on effective criminal defence and the legal regulation of criminal investigations. She is committed to research with real-world impact, and her work on access to legal assistance in police custody, on the right to silence, and on the consequences of improperly obtained evidence has been foundational in the creation of training for police station lawyers. She has published widely on criminal evidence and procedure, and in 2023 she published *Criminal Defence Representation at Garda Stations* (Bloomsbury Professional), a first-of-its-kind study which she undertook with her late colleague and friend Dr Vicky Conway. Yvonne is currently Vice-Chair of COST Action CA22128 (ImpleMendez), which aims to develop research networks to support the worldwide implementation of the so-called “Mendez Principles” on effective investigative interviewing.

Chapter Authors

Doireann Ansbro is a barrister and former Head of Legal and Policy at the Irish Council for Civil Liberties. She worked on policing reform and the strengthening of oversight bodies throughout her time at the ICCL and has a broader interest in the application of international human rights standards at the national level.

Lorraine Boran is Associate Professor in the School of Psychology, Dublin City University, where she researches cognitive neuroscience, with a specific

focus on neurodiversity, brain imaging, and cognitive function. Her work also includes the application of gamified interventions to support cognition in Autism Spectrum Disorder (ASD). Her more recent research includes an interdisciplinary focus on neurolaw, legal psychology, and criminal law. In particular, she is interested in how neuroscience can inform the pre-trial investigative interview of suspects with ASD, and how to co-design, with the Autism community, supports during the interview, as well as police officer training.

Ray Bull is (part-time) Professor of Criminal Investigation at the University of Derby and Emeritus Professor of Forensic Psychology at the University of Leicester. His main topic of expertise is “Investigative Interviewing” on which he has published a large number of journal articles and book chapters/books including Bull, R. (2019) *Roar or PEACE: Is it a tall story?* in R. Bull and I. Blandon-Gitlin (Eds.) *International handbook of legal and investigative psychology*. He regularly conducts workshops/training on investigative interviewing around the world.

Alan Cusack is Associate Professor of Law and Director of Policing Studies at the University of Limerick. He is an expert on vulnerable witnesses, with a particular interest in the experiences of persons with intellectual disabilities in the criminal justice system. He has published widely in national and international journals, and has acted as an Expert Advisor to the Minister for Justice, the Garda Commissioner, the Strategic Human Rights Advisory Committee, the European Commission, the High Level Taskforce on Mental Illness, Rape Crisis Network Ireland, and the Department of Justice.

Roxanna Dehaghani is Reader in Law at Cardiff University. She is an expert on criminal process, with a specific focus on the innate and structural vulnerability of the accused, particularly pre-trial, and the ways in which law, policy, and practice can effectively ameliorate vulnerability. Her research has real-world impact – her research on vulnerable suspects in police custody and the appropriate adult safeguard has resulted in significant changes to law and practice.

Colum P. Dunne is Professor, Director of Research, and Head of the School of Medicine at the University of Limerick. He is a Fellow of the Royal Academy of Medicine in Ireland and the Royal Society of Medicine (London).

Louise Forde is Senior Lecturer in Law in the School of Law, Brunel University London. She researches in the area of children’s rights and youth justice and has an interest in participatory research involving children. She has published in *Youth Justice*, the *International Journal of Children’s Rights*, and other academic journals. Together with Prof Ursula Kilkelly, she was awarded a Policing Authority bursary to undertake the first analysis in Ireland of children’s rights during police questioning.

Gautam Gulati is Consultant Forensic Psychiatrist with the Health Service Executive (HSE) and Adjunct Professor at the University of Limerick. A medical doctor, he trained in Forensic Psychiatry at Oxford and has worked in consultant posts in the United Kingdom and Ireland with extensive experience across prisons and as an expert witness for higher courts. He has completed a Doctor of Medicine (MD) by Research in Prison Psychiatry and a Doctor of Philosophy (PhD) in Law, and has been elected as Fellow of the Royal College of Psychiatrists (FRCPsych) and the Royal College of Physicians of Ireland (FRCPI).

Amanda Haynes is Professor of Sociology at the University of Limerick. She is recognised for her expertise in the areas of hate crime, policing, stigma, and minorities' access to justice. She has made significant contributions to the field through her publications, including the co-edited collection *Critical Perspectives on Hate Crime: Contributions from the Island of Ireland* (Palgrave Macmillan, 2017). Her work has been funded by the European Commission and the Irish Research Council. She currently serves as a co-director of the European Centre for the Study of Hate at the University of Limerick, where members conduct research designed for policy, practice, and cultural impact.

Sindy Joyce is an Indigenous Mincéir/Irish Traveller, Sociologist, Human Rights Defender (HRD), and a member of President Michael D. Higgins' Council of State. Her research focuses on Human Rights, racism, hate crime, ethnicity/identity, and social/political constructions of Irish Travellers and Irish Travellers' access to justice. In 2019, she was part of the Irish delegation to present evidence to the United Nations Committee on the Elimination of Racial Discrimination on the treatment of Travellers in Ireland and in 2022 to the International Covenant on Civil and Political Rights on Irish Travellers Access to Justice. She was on the anti-racism committee for the National Action Plan Against Racism 2023.

Shane Kilcommins is Professor of Law, Provost and Deputy President at the University of Limerick. He is a Fulbright scholar and has been appointed an expert with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. He has also worked as part of a team of inspectors for the Inspector of Prisons, chaired the consultative forum on the Victims' Charter, and been a member of An Garda Síochána's Expert Review Group on Recruit Education and Entry Pathways and Learning and Development. He has published widely in the areas of criminal law, evidence law, criminal procedure, penology, and legal philosophy.

Ursula Kilkelly is Professor of Law at the School of Law, University College Cork. She is an expert on international children's rights law, with particular

regard to children in conflict with the law. She has published multiple monographs and edited collections and is editor of *Youth Justice*, with Stefaan Pleysier of KU Leuven. In 2022/2023, she was a Rotating Honorary Chair in Enforcement of Children’s Rights at Leiden University. Together with Dr Louise Forde, she was awarded a Policing Authority bursary to undertake the first analysis in Ireland of children’s rights during police questioning.

Gearóidín McEvoy is Marie Skłodowska-Curie Research Fellow at Birmingham Law School at the University of Birmingham. Her focus at present looks at the legal recognition of sign languages in the United Kingdom, Ireland, and Finland and how Deaf people are impacted by these laws. She completed her PhD at the School of Law and Government at Dublin City University on how users of minority languages access their right to a fair trial, studying Irish speakers and Irish Sign Language users in Ireland. Her PhD was supervised by Dr Tanya Ní Mhuirthile and the late Dr Vicky Conway.

Lucy Michael is an expert on racist discrimination and violence, experiences of victims, and the roles of statutory institutions and civil society in combating hate crime and exclusion. She has conducted research with a wide range of public and private sector bodies including the International Organisation for Migration and UK Home Office, as well as Irish and UK-based public authorities and NGOs. She is co-author of the highly regarded INAR iReport.ie system used to map racism in Ireland and works with communities affected by discrimination to identify opportunities for capacity building through research.

Jane Mulcahy works on REPPP’s Greentown programme at the University of Limerick. She has research expertise in the area of criminal justice and penal policy. She hosts a podcast called “Law and Justice” where she often covers the topics of safety, attachment, and trauma. She was awarded a Justice Media Award in the best local radio show/podcast category by the Law Society of Ireland for her three-part documentary series “Humanising Human Rights” on Ireland’s review under the UN Convention Against Torture in Geneva in 2017. She has designed an adult education course on the topic of “Childhood Trauma, Consequences and Essential Responses.” She was appointed by the Irish Government to serve as a member of the Policing Authority in July 2023.

Jennifer Schweppe is Professor of Law at the University of Limerick. She specialises in research which explores the relationship between minority communities and criminal justice institutions. She has published widely in the area of hate crime, including two major collections with Oxford University Press and Palgrave Macmillan, and key articles in the *Journal of Hate*

Studies; the Oxford Handbook Online in Criminology and Criminal Justice; Criminal Justice Policy Review; Crime, Law and Social Change; and the European Journal on Criminal Policy and Research. She is one of only four independent experts appointed by the Council of Europe to its Committee of Experts on Hate Crime, tasked by the Committee of Ministers with drafting the comprehensive Recommendation on combating hate crime.

Layla Skinns is Professor of Criminology and Criminal Justice in the Centre for Criminological Research at the University of Sheffield. A key focus of her research is police powers in police detention, in England and Wales and other parts of the Anglophone world and how one researches in this setting. Over the last 15 years, she has led large police custody research projects, including the ESRC-funded “good” police custody study. She has published widely in the field of policing and criminal justice, most recently including *Police powers and Citizens’ rights* (Routledge, 2019) and *Criminal Justice* (Oxford University Press, 2021).

Dave Walsh is Professor of Criminal Investigation at De Montfort University, Leicester, UK. He works with many academics and law enforcement agencies around the world, advising on their investigation and interview methods. He has published over 70 peer-reviewed journal articles, books, and book chapters on the subject of criminal investigation. He has a worldwide reputation as one of the leading scholars in this subject area. He is also Action Chair of a European Co-operation in Science and Technology (COST) Action (CA22128; ImpleMendez) that involves a team of more than 100 researchers from over 40 countries building research networks and research capacity to develop strategies for assisting in the worldwide implementation of the “Mendez Principles”.

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This volume is the product of a conference on police custody in Ireland that I hosted, at the Law Society of Ireland, in September 2022. That was one of a number of joint initiatives that my friend and colleague Dr Vicky Conway and I had been planning and working on together over the spring and summer of that year. As usual, one of us had come up with the notion that a conference on police custody was necessary and that we should organise it, and the other had immediately jumped on board in support, both at the same time cursing the fact that we'd had another good idea that we now couldn't help but bring to fruition! Sadly, Vicky passed away in July 2022, and her loss has been immense for so many. Even the President of Ireland, Michael D. Higgins, paid tribute to Vicky and her work, stating that she will be remembered as a brilliant academic and as a passionate campaigner for social justice.

It has been extremely important to me to make sure that all of our existing plans were seen through to completion, and the publication of this edited collection is the last of those. I imagine that we would have had a lifetime of joint research initiatives, notions, and good ideas ahead of us, and while that's not now to be I will do my best to be guided by the enquiring, courageous, and people-centred spirit of Vicky's work in my own research into the future, and will feel the depth of her friendship forever.

I want to thank each of the contributors to this book for their wonderful chapters, and their positivity in being a part of this collection. From the first contact that Vicky and I made with people to ask them to speak at the conference, through to the final checks on draft chapters and citations, each contributor has been dedicated to the task and supportive in every way. This group of researchers believes strongly in the importance of a properly

functioning police organisation, and a criminal justice system that operates fairly and appropriately across each stage of its life cycle. The early, investigative, custodial stage is one of the most significant stages in the process, and the existence of (i) appropriate supports to safeguard those subjected to arrest and detention and (ii) professional and effective protocols and procedures for those who work within this space is essential. The chapters herein give both a snapshot of police custody in Ireland as it is now and make important recommendations for necessary future improvements.

Thanks to my colleagues in the School of Law and Government and the Faculty of Humanities and Social Sciences at Dublin City University for all of their ongoing support and encouragement, and to academic friends and colleagues at other institutions too. Many thanks are due to the team at Routledge for their guidance and support throughout the project. And special thanks to Yazmeen MacDonnell for excellent research assistance and copyediting support on this manuscript. Yazmeen has provided research assistance to me on a number of occasions, always approaching such endeavours with enthusiasm and great interest, and providing an abundance of support above and beyond the specificity of the required tasks.

I want to also thank Vicky's family, who, even in their own grief and loss, have been extremely supportive and kind to me, making sure to mark each milestone as I completed our joint projects and to stay in touch at significant times.

Finally, to my own family, as ever, thanks for your love and support. To Peter, Eva Zoe, and Rachel, in particular – all my love.

Professor Yvonne Daly
Dublin, July 2023

ABBREVIATIONS

AA	Appropriate Adult
ACEs	Adverse Childhood Experiences
ADHD	Attention-Deficit Hyperactivity Disorder
AGS	An Garda Síochána (the Irish police)
APP	Authorised Professional Practice
ASD	Autism Spectrum Disorder
BME	Black and Minority Ethnic
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDC	US Centers for Disease Control and Prevention
CEPOL	European Union Agency for Law Enforcement Training
CI	Cognitive Interview
CPD	Continuous Professional Development
CPT	Committee on the Prevention of Torture
CRC	United Nations Convention on the Rights of the Child
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDI	Equality, Diversity and Inclusion
ELO	Ethnic Liaison Officer
ECRI	European Commission Against Racism and Intolerance
FRA	EU Fundamental Rights Agency
GPCS	“Good” Police Custody Study
GRIDO	Garda Racial, Intercultural & Diversity Office
GSA	Garda Síochána Act
GSIM	Garda Síochána Interview Model

xx Abbreviations

GSOC	Garda Síochána Ombudsman Commission
ICCL	Irish Council for Civil Liberties
ICCPR	International Covenant on Civil and Political Rights
ID	Intellectual Disability
IHREC	Irish Human Rights and Equality Commission
INAR	Irish Network Against Racism
iNLE	Intensely Negative Life Events
IoPD	Inspectorate of Places of Detention
IP	Interrogative Pressure
IPRT	Irish Penal Reform Trust
ISL	Irish Sign Language
ITAJ	Irish Travellers' Access to Justice
ITIA	Irish Translators and Interpreters Association
LSI-R	Level of Service Inventory Revised (LSI-R)
MIC	Member in Charge
NCCRI	National Consultative Committee on Racism and Interculturalism
NISRA	Northern Ireland Statistics and Research Agency
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OSCE	Organisation for Security and Co-operation in Europe
PACE	Police and Criminal Evidence Act 1984
PEACE	Preparation and Planning; Engage and Explain; Account, Clarification, Challenge; Closure; Evaluation
PSNI	Police Service of Northern Ireland
PwASD	Person(s) with Autism Spectrum Disorder
PTSD	Post-Traumatic Stress Disorder
PWID	Person(s) with Intellectual Disability
RCCP	Royal Commission on Criminal Procedure
RISLI	Register of Irish Sign Language Interpreters
SPT	Sub-Committee on the Prevention of Torture
SwASD	Suspect with Autism Spectrum Disorder
WHO	World Health Organization

1

INTRODUCTION

Contextualising Police Custody in Ireland

Yvonne Daly

Introduction

The past 100 years have seen many changes in Irish society, across its criminal justice system, and, of course, in policing. An Garda Síochána (AGS), Ireland's national police service, celebrated its centenary year in 2022. The turn of a century presents an opportunity for renewed focus on offering the very best that a police service can provide to the communities that it serves.

This book does not set out to recount a history of AGS or to assess its culture, its success in resolving crime, or its public satisfaction ratings. All of these are interesting, of course, but the focus of this book is on one particular aspect of policing which has been under-researched in Ireland to date: the detention in custody of persons suspected of committing criminal offences. With an overarching human rights lens and a concern for procedural fairness for all, this book draws on the expertise of 19 leading experts across policing studies, law, criminology, and psychology, to critically examine police custody in Ireland, what we know about it, how it operates, how it is experienced, and how it might be improved.

This introductory chapter sets out the background, aim, and structure of the book, before outlining the history of investigative detention and police custody in Ireland. It highlights significant developments, particularly from the 1970s to the present day, which will give the reader foundational context for the substantive chapters that follow.

Background, Aim, and Structure of This Book

In 2021, the Garda Síochána Inspectorate published a report titled *Delivering Custody Services: A rights-based review of the treatment, safety and wellbeing*

*of persons in custody in Garda Síochána Stations.*¹ This was the first time that the material conditions of police custody had been reviewed by a national policing oversight body in any significant way.² In his Foreword, Chief Inspector Mark Toland noted that despite the fact that police custody is a “challenging and high-risk environment” AGS lacked any “organisational vision or strategy beyond adherence to the legal requirements” in relation to same.³ He said that “there was a lack of strategic leadership, and formal oversight of custody was weak.”⁴ While examples of good practice were highlighted within the report, concerns were also raised about poor record-keeping, inadequate management of risks, failure to meet the needs of detainees with particular vulnerabilities, the physical conditions of custody, and a lack of structured processes to engage with external support agencies which might assist individuals who come into contact with gardaí.⁵ With the agreement of AGS senior management, the Inspectorate’s self-initiated inspection involved, for the first time, unannounced visits to custody areas in garda stations, along with engagement with people in custody, examination of custody records, and discussions with working gardaí. The report shone a light on this aspect of police work in Ireland, and the significant need for improvements.

This book aims to further fill the knowledge gap on contemporary police custody in Ireland, providing, across a wide range of chapters, a critical appraisal of current issues in police custody and recommending necessary improvements and potential advancements. The book goes beyond the Garda Inspectorate report, examining some of the key features of custody and the experiences of those who are detained. It highlights the importance of police custody within the criminal justice system and within society more broadly; the impact of experiences in custody on individuals, particularly those with additional vulnerabilities, and on communities; and the contemporary challenges and opportunities for change.

The book begins with an “appreciative” and comparative enquiry into police custody in Ireland and a consideration of what “good” police custody looks like (Chapter 2). It then sets out, in broad terms, the concepts of

1 Garda Síochána Inspectorate, ‘Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations’ (2021) <www.gsinsp.ie/wp-content/uploads/2022/06/Garda-Inspectorate-Delivering-Custody-Services.pdf> accessed 27 July 2023.

2 The European Committee on the Prevention of Torture has examined garda station detention during its periodic visits to Ireland and often highlighted concerns around the protection of suspect rights, such as the right to legal assistance and the right to medical treatment, and ill-treatment therein. See the reports of the CPT on its visits to Ireland from 1993 to 2019 <www.coe.int/en/web/cpt/ireland> accessed 27 July 2023.

3 Garda Síochána Inspectorate (n 1) I.

4 Ibid.

5 Ibid.

vulnerability (Chapter 3) and trauma (Chapter 4) as they apply to those in custody. It examines modern advancements in police interviewing techniques (Chapter 5), and certain safeguards for suspects within the Irish detention process, including the right of access to legal advice/assistance (Chapter 6) and the right to an interpreter (Chapter 7). Next, the perennial issue of police oversight and future plans in this context in Ireland are critically explored (Chapter 8). The book then turns to examine specifically the needs and experiences of certain groups in Irish society in the custody context, including Mincéirs/Travellers (Chapter 9), racialised minorities (Chapter 10), children (Chapter 11), people with intellectual disabilities (Chapter 12), and people with autism spectrum disorders (Chapter 13). The concluding chapter (Chapter 14) draws themes from across the book and looks at what might be achievable in the future.

Garda Detention and Custody

Under Article 40.4.1 of *Bunreacht na hÉireann*, the Irish Constitution, no citizen shall be deprived of their personal liberty save in accordance with law. In the early years of policing by AGS in Ireland, right up until the late 1980s, the law provided no general power of arrest for the purposes of detention and questioning. If an individual was arrested on suspicion of involvement in the commission of a criminal offence, they could only be held in custody in order to be brought before the next sitting of the relevant court “as soon as practicable,” to be arraigned and/or formally charged.⁶ Arrest for detention and questioning was not a recognised concept.

In the absence of a power to arrest suspects to detain and question them, gardaí sometimes invited persons to attend at garda stations to “help with enquiries.” There is no legal difficulty with this unless and until “helping with enquiries” amounts to a *de facto* detention of a suspect without a formal arrest.⁷ This practice was questioned by the courts in the 1930s;⁸ however, it continued until it was expressly disapproved of by the courts in the late 1970s.⁹

Statutory provision for arrest for the purpose of detention and questioning was first introduced into Irish law under the Offences against the State Act

6 This common law conception of the powers of arrest was placed on a statutory footing by the Criminal Justice Act 1951, s 15, as substituted by the Criminal Justice (Miscellaneous Provisions) Act 1997, s 18, which provides that both a person arrested on foot of a warrant and a person arrested without warrant must be brought as soon as practicable before a District Court judge.

7 See M Zander, ‘When Is an Arrest Not an Arrest?’ (1977) 127 NLJ 352.

8 See *Dunne v Clinton* [1930] IR 366.

9 *People (DPP) v O’Loughlin* [1979] IR 85.

1939, which was enacted as a response to growing subversive activity within the State relating to the Conflict in Northern Ireland.¹⁰ A significant part of the armoury of the 1939 Act was the provision of certain investigatory powers to gardaí which had never before been recognised under Irish law. Notably s 30 allowed for persons arrested thereunder to be detained for a specified period of time, and s 52 expressly allowed for the questioning of an arrested suspect while in custody under the Act.

The Oireachtas (the Irish legislature) confined this power of arrest for the purpose of detention and questioning to the offences covered by the 1939 Act and scheduled offences.¹¹ In 1976, with ongoing concerns around the Conflict in Northern Ireland and the operation of the IRA, the Emergency Powers Act 1976 was introduced and it allowed for extended detention of up to seven days for an individual arrested in relation to offences under the 1939 Act.¹² No general power of arrest for detention in relation to offences other than those covered by the 1939 Act was established. However, certain practices which circumvented this difficulty sprung up.¹³ First, gardaí employed the anti-subversive legislation in cases which lacked any element of a subversive nature. Persons were arrested and detained for questioning under the auspices of the 1939 Act where the offence for which they were being questioned had no link to any dissident behaviour. Second, “holding charges” were used; that is, persons were arrested and detained in relation to offences covered by the detention provisions where the real investigative interest in the individual related to a wholly different offence which was not so covered. A number of conflicting judgments were issued by the courts in relation to the legality of these garda practices,¹⁴ though legal imprimatur was ultimately given to their use by the Supreme Court in *People (DPP) v Quilligan* in 1986.¹⁵ By that time, however, the Oireachtas was already in the process of providing a more general power of arrest for the purposes of detention, for a specified period, under s 4 of the Criminal Justice Act 1984.

10 See M Coen, *The Offences Against the State Act, 1939 at 80: A Model Counter-Terrorism Act* (Hart 2021); A Harrison, *The Special Criminal Court: Practice and Procedure* (Bloomsbury Professional 2019).

11 In regard to the scheduling of offences, see ss 35 and 36 of the Offences Against the State Act 1939.

12 Emergency Powers Act 1976, s 2.

13 See D Walsh, ‘The Impact of Anti-Subversive Laws on Police Powers and Practice in Ireland: The Silent Erosion of Individual Freedom’ (1989) 62 Temple Law Review 1099.

14 See, for example, *People (DPP) v Towson* [1978] ILRM 122 and *State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550; [1985] ILRM 465.

15 [1986] IR 495; [1987] ILRM 606.

This applies to all arrestable offences, which are those with a possible prison sentence of five or more years.

Considering the enactment of the 1984 Act, Keane J. in *People (DPP) v Finnerty*¹⁶ suggested that the legislative policy behind its enactment was:

to end the dubious practice of bringing people to the station for the purpose of “assisting the gardaí with their inquiries,” or in purported reliance on the legislation directed primarily at subversive crime, and to substitute therefore an express statutory regime under which the Gardaí would have the right to detain a person in custody for a specified period . . . for the purpose of investigating specified crimes.¹⁷

While 2024 sees the 40th anniversary of the introduction of the legislation which provided this general power of arrest for the purposes of detention, its provisions were not in fact commenced until 1987, following the introduction of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987. These “Custody Regulations” set out some specifics around the treatment of persons in custody, and are referenced throughout this book. While it took three years to promulgate those regulations, provision for the audio recording of garda interviews with suspects was not made for a further ten years, under the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997, and it took until the mid-2000s for the recording of garda interviews to become routine.¹⁸ Nowadays, garda interviews in relation to serious offences are almost invariably audio-visually recorded.

Over the past 35–40 years, the relative weight and impact of the investigative stage of the criminal process have been increasing, following the increase in garda powers of arrest for the purposes of detention. Since the introduction of s 4 of the 1984 Act, additional legislative provision for detention post-arrest has also been made in relation to specific offences, and existing detention periods have been lengthened by legislative amendment. Maximum detention periods range from 24 hours for most serious offences up to seven days for offences relating to drug trafficking, organised crime, or murder involving the use of a firearm. Table 1.1 sets out the current detention periods:

16 (1999) 4 IR 364.

17 *Ibid.*, 378. On arrest and detention, see further D Walsh, *Human Rights in Policing in Ireland* (Clarus Press 2009) chapters 22–23.

18 See *People (DPP) v Holland* (15 June 1998) CCA; *People (DPP) v Connolly* (2003) 2 IR 1; *People (DPP) v Kelly* (26 November 2004) SCC.

TABLE 1.1 Detention Periods¹⁹

<i>Legislation - and Relevant Offences</i>	<i>Initial Detention Period</i>	<i>Garda-authorized Extensions - and Minimum Rank of Authorising Member</i>		<i>Court-authorized Extensions</i>		<i>Total Detention Period</i>
Criminal Justice Act 1984 s 4 - all arrestable offences (potential sentence of 5yrs+). ²⁰	6 hours	6 hours -Superintendent	12 hours - Chief Superintendent	N/A		24 hours
Offences Against the State Act 1939 s 30 - specific offences listed in the Act and schedule to the Act.	24 hours	24 hours - Chief Superintendent		24 hours - District Court (application by Superintendent)		72 hours
Criminal Justice (Drug Trafficking) Act 1996 s 2 - certain drug trafficking offences.	6 hours	18 hours - Superintendent	24 hours - Chief Superintendent	72 hours - District or Circuit Court (application by Chief Superintendent)	48 hours - District or Circuit Court (application by Chief Superintendent)	168 hours (7 days)
Criminal Justice Act 2007 s 50 - murder involving the use of a firearm/explosive; capital murder; false imprisonment with use of firearm; possession of firearm with intent to endanger life.	6 hours	18 hours - Chief Superintendent	24 hours - Chief Superintendent	72 hours - District or Circuit Court (application by Chief Superintendent)	48 hours - District or Circuit Court (application by Chief Superintendent)	168 hours (7 days)

19 Drawn from Y Daly, A Muirhead and C Dowd, 'EmpRiSe Ireland Final Report' <<https://empriseproject.files.wordpress.com/2022/06/ab912-emprise-ireland.pdf>> accessed 27 July 2023. Note that persons arrested under s 42 of the Criminal Justice Act 1999, s 16 of the Criminal Procedure Act 2010, or s 17 of the Criminal Procedure Act 2010 may also be detained for the same period as is authorised under s 4 of the Criminal Justice Act 1984.

20 Persons arrested under s 42 of the Criminal Justice Act 1999, s 16 of the Criminal Procedure Act 2010, or s 17 of the Criminal Procedure Act 2010 may also be detained for the same period as is authorised under s 4 of the Criminal Justice Act 1984.

The General Scheme of the Garda Síochána (Powers) Bill 2021 seeks to standardise these detention periods,²¹ alter the rank of garda who can apply to the courts in certain contexts,²² and provide for the exclusion of certain time periods from the overall reckoning of the detention period, amongst other things.²³

The contemporary “front-loading” of the criminal process, whereby the centre of gravity is now in the garda station as opposed to the courts,²⁴ is evidenced by the fact that, on average, 90% of prosecutions on indictment in Ireland result in a guilty plea. This means that there is no trial on the evidence, and no judicial assessment or query into the methods of interrogation employed by gardaí or the treatment of the individual while in garda custody.²⁵ For most people suspected of criminal offending, the garda station is the main site of contestation, and the main formal interaction with the criminal structures of the State. The custody stage of the criminal process is thus of extreme importance, not only in the sense of ensuring procedural fairness and the accuracy of criminal justice outcomes but also in terms of the impact on individuals of how they are treated by the agents of the state at this point. Indeed, it is also important for gardaí working in custody that the system is operating well, that they can stand over the procedures in place, and engage as professionals in the work they need to do.

In terms of the physical custody environment, there are currently 564 operational garda stations in Ireland. 120 of those have custody facilities providing a total of 492 cells.²⁶ Many garda stations are housed within old buildings, and while recent upgrade projects and new builds have brought a more modern feel and additional facilities to certain custody suites, many have not had their physical structures upgraded in some time. The Inspectorate’s report noted that “with the exception of the purpose-built custody suites, very few stations had all the components required in a modern, safe and secure custody facility such as those seen in other jurisdictions.”²⁷

Context

Some further historic and indeed contemporary context is important for readers of this book. Interrogation techniques and practices in AGS were

21 General Scheme of the Garda Síochána (Powers) Bill 2021, Heads 45 and 47.

22 Ibid.

23 Some such periods are already excluded under existing law, others are new: Heads 39, Head 40, Head 42 or Head 53 and Head 54.

24 See Y Daly and J Jackson, ‘The Criminal Justice Process: From Questioning to Trial’ in D Healy and others (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016) 280, at 287, 292.

25 See V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury 2023) Chapter 4.

26 Garda Síochána Inspectorate (n 1) 16.

27 Ibid 76.

deeply questionable in the 1970s and early 1980s. Conway has argued that “violence was institutionalised in the force” at this time,²⁸ tolerated by Irish society, and facilitated by the law and a lack of both internal and democratic accountability.²⁹ A particular group of gardaí who were drawn together and said to specialise in “extracting information under interrogation”³⁰ came to be known as the “Heavy Gang.” While its existence has never been officially accepted, 13 of 42 retired gardaí interviewed by Conway expressly confirmed that it did exist and many were very uncomfortable with this fact.³¹ The Heavy Gang was said to employ serious violence in interrogating suspects, in particular those thought to be members of the IRA. They breached suspects’ rights of access to lawyers and doctors; they arrested family members and girlfriends of suspects; and confessions were made by those who simply could not take all of this anymore.³²

Miscarriages of justice occurred at this time, and beyond, with false confessions at the heart of many such cases. High-profile examples include the confessions and ultimate convictions of Martin Conmey for the manslaughter of Una Lynskey in 1971³³ and Nicky Kelly for the Sallins mail train robbery in 1978.³⁴ In 1984, a young woman called Joanne Hayes and her family members falsely confessed to the killing of a baby who had been found, stabbed, on the beach at Cahirciveen in County Kerry. This led to a Tribunal of Inquiry, which while critical of the garda investigation, ultimately exonerated the gardaí involved.³⁵ In 2020, some 36 years later, Joanne Hayes received a state apology.³⁶

Miscarriages of justice followed by public enquiries and tribunals carried on into the 1990s and 2000s. Discussing several high-profile cases and reports

28 V Conway, *Policing Twentieth Century Ireland: A History of An Garda Síochána* (Routledge 2014) 139.

29 *Supra* n 28, 151.

30 S Kilcommins and others, *Crime, Punishment and the Search for Order in Ireland* (Irish Academic Press 2004) 209.

31 *Supra* n 28, 146.

32 *Ibid* 141 in relation to the cases of Nicky Kelly and the Sallins mail train robbery. See also Walsh (n 17) Chapter 24.

33 *Conmey v DPP* [2014] IECCA 31; (2014) 2 ILRM 493.

34 See J Joyce and P Murtagh, *Blind Justice* (Poolbeg Press 1984).

35 Report of the Tribunal of Inquiry into “The Kerry Babies Case,” chaired by Mr Justice Kevin Lynch.

36 On the so-called Kerry Babies case, see J Hayes, *My Story* (Brandon/Mount Eagle Publications 1985); N McCafferty, *A Woman to Blame: The Kerry Babies Case* (Attic Press 1985); T Inglis, *Truth, Power and Lies: Irish Society and the Case of the Kerry Babies* (UCD Press 2003); YM Daly, ‘Commentary on the Report of the Tribunal of Inquiry into “The Kerry Babies Case”’ and V Conway, ‘Report of the independent Examination by Ms Justice Vicky Conway of the Case for a Re-Opened Inquiry into the “Kerry Babies Case”’ in M Enright, J McCandless and A O’Donoghue (eds), *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Hart 2017) 195–203, 204–18.

from the 1990s, Conway stated that there was “evidence of serious misconduct within an Garda Síochána; use of oppressive questioning techniques, perjury, failure to disclose evidence, mistreatment of vulnerable witnesses, assault, excessive use of force, failure to care for detainees and harassment.”³⁷ In 1997, Dean Lyons, a homeless heroin addict with learning difficulties, who was later identified as being extremely suggestible, was arrested and confessed to the double murder of two women in Grangegorman in Dublin. This was a false confession as the true murderer later confessed while under arrest on a different charge. The Commission of Investigation which followed this case highlighted the need for interviews to be audio-visually recorded,³⁸ and the risks attached to unskilled police interviews, particularly with vulnerable persons.

Allegations of corrupt and dishonest conduct by some gardaí in the Donegal Division led to the establishment of the Morris Tribunal in 2002.³⁹ This was a significant development in the context of garda investigations and approach to interviews. Across eight reports, the last of which was published in October 2008, the tribunal made shocking findings in relation to garda conduct in the region. It found that gardaí had “tunnel vision” in the investigation of alleged offences such that no alternative theories or possibilities were countenanced. Furthermore, false arrests and mistreatment in custody occurred, including verbal and physical abuse; detainees being shown disturbing autopsy photographs; sensory deprivation through the switching on and off of lights in interview rooms; denial of access to legal advice; threats; and many other breaches of regulations, disciplinary codes, and constitutional rights.⁴⁰

An important part of the context is that, until relatively recently, there was no structured approach to garda interviews, and gardaí were given very little training on effective investigative interview techniques. In its 2014 *Report on Crime Investigation*, the Garda Inspectorate noted that 5,000 gardaí had joined AGS since 2005 “and a large majority of those gardaí have not received any or appropriate interview techniques training.”⁴¹

37 *Supra* n 28, 180.

38 G Birmingham, ‘Report of the Commission of Investigation (Dean Lyons Case)’ (2006) <www.justice.ie/en/JELR/DeanLyonsRpt.pdf/Files/DeanLyonsRpt.pdf> accessed 27 July 2023. The Ó Briain Committee had made similar recommendations back in 1978, see Report of the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of An Garda Síochána (Chaired by Ó Briain J) para 67 <<http://opac.oireachtas.ie/AWDData/Library3/Library2/DL015115.pdf>> accessed 27 July 2023.

39 See Morris Tribunal <www.morristribunal.ie/> accessed 25 July 2023. On other cases at this time, see also Garda Síochána Inspectorate (n 1) 178–82.

40 *Ibid*; V Conway, *The Blue Wall of Silence: The Morris Tribunal and Police Accountability in Ireland* (Irish Academic Press 2010).

41 Garda Síochána Inspectorate, ‘Report on Crime Investigation’ (2014) 28 <www.gsinsp.ie/wp-content/uploads/2019/07/Crime-Investigation-Full-Report.pdf> accessed 25 July 2023.

A model of garda interviewing was developed in 2008 – the Garda Síochána Interview Model (GSIM)⁴² – as a response to the call from Judge Morris in his Tribunal reports for AGS to adopt the PEACE model of police interviewing or an equivalent.⁴³ Following a delayed roll-out, due to the financial recession, training under this model began in 2014/2015 and where a serious offence is being investigated now it is most likely that interviews will be conducted by gardaí who have been trained at least in the first two levels of the model, if not the more advanced third level.⁴⁴ While the model has been criticised in some aspects,⁴⁵ it is generally aligned with the recently devised Principles on Effective Interviewing for Investigations and Information Gathering, the so-called Mendez principles.⁴⁶ These principles, which were developed by an international team of experts and practitioners are formally supported by 54 countries, including Ireland, and have been recommended to all states by the UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment.⁴⁷ The principles aim to move away from confession-focused interviews and coercive techniques, to interviews which are based on rapport and focused on the gathering of an account from the interview subject.

Irish investigative interviewing techniques have now moved very far from their beginnings, where little to no training was provided to gardaí, who were expected to get confessions no matter what, and where oppressive, and indeed aggressive, tactics were tolerated. While improvements are certainly still needed, including ongoing supervision of the application of GSIM techniques, and greater continuing development opportunities for gardaí in this space, significant progress has been made. Much of this improvement has stemmed from the crises created by miscarriages of justice and inappropriate policing, and the responses thereto, including an enhanced focus on accountability and on human rights.

Accountability structures were reconstituted in the mid-2000s, with the establishment of the Garda Síochána Ombudsman Commission and the Garda Inspectorate under the Garda Síochána Act 2005. The Policing Authority was added to these structures under the Garda Síochána (Policing Authority and

42 See further Chapter 5 in this volume.

43 Report on the Detention of ‘Suspects’ Following the Death of the Late Richard Barron on the 14 October 1996 and Related Detentions and Issues (Government Publications Office 2008) para 15.104 <www.morristribunal.ie/> accessed 25 July 2023.

44 There is also a fourth level of training, for those acting in a supervisory capacity. See further Chapter 5 in this volume.

45 See supra n 25, Chapter 11.

46 ‘Principles on Effective Interviewing for Investigations and Information Gathering’ (May 2021) <<https://interviewingprinciples.com/>> accessed 29 June 2023.

47 AJ Edwards, ‘Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ A/77/2972 (4 October 2022) <www.ohchr.org/en/documents/thematic-reports/a77502-interim-report-special-rapporteur-torture-and-other-cruel-inhuman> accessed 26 July 2023.

Miscellaneous Provisions) Act 2015. There are plans to reconstitute these bodies again under the Policing, Security and Community Safety Bill 2023.

The centrality of human rights to policing has been increasingly recognised since the mid-1990s, including in Irish policing.⁴⁸ Under the Garda Síochána Act 2005, one of the specified functions of AGS is listed as “vindicating the human rights of each individual.”⁴⁹ Prior to this legislative recognition of human rights protection as a core function, in 1999, AGS established a Human Rights Office and working group to explore human rights implementation. The working group commissioned an audit of human rights in the organisation, which was conducted by Ionann Management Consultants and published in 2004. It found that the “structures for and resources devoted to human rights work are weak.”⁵⁰ A focus on human rights has continued to be enunciated across various Garda initiatives in the intervening years, though an updated analysis of the depth of cultural acceptance of this as a guiding principle within the organisation, and the proper resourcing of AGS to provide for a truly human rights-compliant service, would be useful.

The Commission on the Future of Policing, which issued its report in September 2018, put human rights front and centre, declaring as its first principle that “human rights are the foundation and purpose of policing.”⁵¹ Amongst many other things, it recommended that legislation defining police powers of arrest, search, and detention should be codified, with statutory codes of practice,⁵² and that inquests should be mandatory following a death in garda custody.⁵³ More generally it advocated for greater human rights monitoring and training across AGS and its operations.

Many of these recommendations are being implemented, and a swathe of legislation relating to AGS is currently before the Oireachtas, including the Garda Síochána (Powers) Bill 2021, the Inspection of Places of Detention Bill 2022, and the Policing, Security and Community Safety Bill 2023. These are discussed, as appropriate, throughout the chapters of this book.

48 Supra n 28, 194, citing P Neyroud and A Beckley, *Policing, Ethics and Human Rights* (Wil-lan 2001); R Crawshaw and L Holstrom, *Essential Cases on Human Rights for the Police* (Martinus Nijhoff 2006).

49 Garda Síochána Act 2005, s 7.

50 Ionann Management Group, *An Garda Síochána Human Rights Audit* (Ionann Management Group, June 2004) 26.

51 See the Key Recommendations and Principles of the Commission on the Future of Policing (September 2018) <<https://policereform.ie/en/POLREF/Key%20Recommendations%20and%20Principles.pdf/Files/Key%20Recommendations%20and%20Principles.pdf>> accessed 27 July 2023.

52 Supra n 51, Recommendation 1.

53 Ibid Recommendation 15.

Conclusion

The foregoing gives a relatively brief introduction to the context of police custody in Ireland. The chapters that follow give much more detailed, nuanced, and critical appraisals of where we are now, how we got here, and where we might be going. What is clear from start to finish is that a sustained and forward-looking focus on police custody, from a human rights and best practice perspective, is categorically needed in this jurisdiction. It is hoped that this book, and the work of its many expert contributors, will provide foundational evidence which can be used to motivate and bring about necessary changes and improvements within police custody in Ireland.

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2

SETTING A NEW AGENDA

“Appreciating” and Improving Garda Custody in Ireland

Layla Skinns

Introduction

This chapter takes as its starting point the idea of “good” police custody, which has been a focus of recent research on police custody in England and Wales. This is used to explore how to “appreciate” and improve garda custody in Ireland. “Good” custody may seem like an oxymoron given that police detention concerns the exercise of police authority over vulnerable and often disempowered detainees, who are likely to experience police custody as a painful, if not, punishing experience.¹ In addition, the notion of “good” raises questions, for example, about good for whom and about whether “good enough” might be a more reasonable ambition.² Yet, the notion of “good” police custody also offers the possibility of change, which is more likely to be realised by police stakeholders, as a result of the emphasis on the glass being half full rather than half empty.³

Indeed, this was the intention of the “good” police custody study (GPCS), from which this chapter draws. The research team worked with police and

1 L Skinns and A Wooff, ‘Pain in Police Detention: A Critical Point in the “Penal Painscape”?’ (2020) 31(3) *Policing and Society* 245; L Skinns, *Police Powers and Citizens’ Rights* (Routledge 2019) 146–50.

2 L Skinns, A Wooff and A Sprawson, ‘Preliminary Findings on Police Custody Delivery in the 21st Century: Is It “Good” Enough?’ (2015) 27(4) *Policing and Society* 358–71; B Bowling, ‘Fair and Effective Policing Methods: Towards “Good Enough” Policing’ (2007) 8(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 17–32.

3 L Skinns, A Wooff and A Sprawson, ‘“My Best Day Will Be My Last Day!” Appreciating Appreciative Inquiry in Police Research’ (2021) 32(6) *Policing and Society* 731–47; SAW Drew and J Wallis, ‘The Use of Appreciative Inquiry in the Practices of Large-Scale Organisational Change: A Review and Critique’ (2014) 39(4) *Journal of General Management* 3–26.

other external stakeholders to identify police custody at its best both for staff and, importantly, for detainees, and as a means of encouraging change to police custody policies, practices, and detainee experiences.⁴ By using the methodological framework of appreciative inquiry, this research identified two main features of “good” police custody.⁵

First, the research identified the critical importance of detainee dignity – rooted in decency, equal worth, and autonomy – as an end in itself, rather than as merely a route to legitimacy and detainee cooperation with the police.⁶ Dignified means decent, where detainees are not derided or laughed at nor presumed to be liars or guilty of the allegations made against them. Dignified also means staff treating detainees with kindness and recognising them as fellow human beings and of equal worth, that is, as no different from them, as innocent until proven otherwise and, therefore, worthy of their help and respect. Treating detainees with dignity also involves recognising and facilitating their capacity for autonomous decision-making, wherever possible, including about due process rights and entitlements. It was found that feelings of equal worth, for example, were more likely where detainees trusted in police accountability mechanisms; sensed a culture of camaraderie between detainees and staff; had access to material goods that met their basic needs; sensed a culture of decency not derision/suspicion; perceived the material conditions more favourably; and saw custody as being mainly about their welfare.⁷ It was concluded therefore that dignity linked to equal worth should be embedded in all encounters between staff and detainees, as well as in the language and cultures of police custody work, starting with police strategies, policies, and codes of practice.

Second, a connection was also found between detainee dignity and the material conditions of custody.⁸ These conditions include the lightness and brightness of the physical environment, and its design and layout (e.g. whether there are privacy screens); technology and equipment such as CCTV and in-cell buzzers/intercoms and tools of coercion; smells and soundscapes; and, lastly, but importantly, objects, such as personal effects, food, drink, reading and writing materials, toilet paper, clocks/watches, etc. It was found,

4 Skinns, Wooff and Sprawson (n 3).

5 L Skinns and A Sorsby, ‘Good Police Custody: Recommendations for Practice’ (2019) <www.sheffield.ac.uk/law/research/directory/police> accessed 21 December 2022.

6 L Skinns, A Sorsby and L Rice, ‘“Treat Them as a Human Being”: Dignity in Police Detention and Its Implications for “Good” Police Custody’ (2020) 60(6) *The British Journal of Criminology* 1667–88.

7 *Ibid.*

8 L Skinns, A Wooff and L Rice, ‘“Come on Mate, Let’s Make You a Cup of Tea”: An Examination of Sociomateriality and Its Impacts on Detainee Dignity Inside Police Detention’ (2023) 0(0) *Theoretical Criminology* <<https://doi.org/10.1177/13624806231184827>>; Skinns, Sorsby and Rice (n 6).

for example, that feelings of dignity rooted in equal worth were more likely if detainees perceived the material conditions more favourably (e.g. that they felt they were not being held underground and that the suite was well maintained) and if they felt they “had something” in terms of access to material goods that met their basic needs (e.g. reading and writing materials or limited personal possessions).⁹ Moreover, *staff* experiences of the material conditions of custody also affect detainee experiences of dignity.¹⁰ In particular, where staff thought the custody facility was bright and light, detainees were more likely to regard their treatment as dignified. In essence, where staff felt good about the material conditions in which they worked, this mapped on to detainees experiencing more dignified treatment. Preliminary analysis suggests that this was because more favourable conditions were associated with staff who were less stressed, more effective at using their authority (e.g. they felt they had some capacity for discretion) and who were more inclined to create a climate of decency (e.g. not laughing at detainees and treating them with suspicion).

Altogether this suggests that “good” custody means not only supporting and encouraging detainee dignity but also offering material conditions which meet detainees’ basic needs for sustenance, warmth, and to alleviate feelings of boredom. This includes reading/writing materials, regular access to food/drink, blankets, mattresses, appropriate clothing, etc. It also means designing dignity into the fabric of police custody buildings, prospectively and retrospectively, such as through the maximisation of natural light, regular cleaning and refurbishment, the creation of private spaces for staff-detainee interactions about personal matters relevant to the assessment of risk, and the inclusion of clocks, adequate pixelation around in-cell toilets on CCTV monitors, and art in communal areas.

Approach and Methods

In this chapter and drawing on findings from the GPCS, I take an appreciative and comparative approach to assessing garda custody in Ireland. The potential strengths of An Garda Síochána in the delivery of garda custody are assessed, with a view to building on these strengths in the future, rather than An Garda Síochána being solely evaluated by identifying inadequacies. In uncovering these strengths, this also enables the setting of an agenda for positive changes to garda custody policies and practices in the

9 Skynns, Sorsby and Rice (n 6).

10 L Skynns, “‘Seeing the Light’: Material Conditions and Detainee Dignity Inside Police Detention’ (All Souls Seminar Series, Centre for Criminology, University of Oxford, 23 January 2020).

future. This is not to say, however, that negative aspects of garda custody are overlooked and that there is a naive focus only on the positive. This is especially important given that the Garda Inspectorate report, *Delivering Custody Services*, published in 2022, revealed a number of challenges with garda custody.¹¹ These included the continued existence of paper-based custody records, limited risk assessment processes and, allied to this, limited provisions for identifying and supporting vulnerable detainees, as well as the inadequacies of the material conditions in some garda custody suites. Overall, the intention is to yield a more nuanced understanding of both the positive and the negative, with a view to setting an agenda for the future of garda custody in Ireland.

This chapter is comparative in that similarities and differences in police custody policies and practices between Ireland and England are documented and assessed, while also paying attention to the landscape of historical, legal, social and political factors that may shape them. In identifying differences between the two jurisdictions, the intention is also to examine the “distinctively local flavour” of garda custody in Ireland.¹² In so doing, I tread carefully through “the politics of comparison,” including the related pitfalls of ethnocentrism and relativism,¹³ in order to reach reasonable conclusions about strengths, weaknesses, and areas for improvement.

The purpose of this chapter is therefore twofold. First, I critically assess key features of garda custody in Ireland, examining their strengths and weaknesses. While the Garda Inspectorate report, *Delivering Custody Services*, provides a robust assessment of these strengths and weaknesses, compared to England and Wales, New Zealand, Northern Ireland, Norway, and Scotland, it does so largely with reference to police perspectives, rather than empirical evidence, and with reference to policy rather than practice. In other words, the emphasis in the report is more on how things should function, rather than on the lived realities of garda custody, from the perspective of staff and detainees, as documented in the research literature. This chapter therefore builds on the Garda Inspectorate report, using the empirical scholarship of police custody in England and Wales, and in Ireland, where it is available. Second, I set an agenda for the future of garda custody in Ireland, considering how the strengths that have been identified in this chapter could be built on

11 Garda Inspectorate, ‘Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations’ (2022) <www.gsinsp.ie/delivering-custody-services/> accessed 20 December 2022.

12 C Hamilton, ‘Crime, Justice and Criminology in the Republic of Ireland’ (2022) 20(5) *European Journal of Criminology* 2 <<https://doi.org/10.1177/14773708211070215>>.

13 D Nelken, ‘Whose Best Practices? The Significance of Context in and for Transnational Criminal Justice Indicators’ (2019) 46 *Journal of Law and Society* S31–50; D Nelken, *Comparative Criminal Justice* (Sage 2010); L Zedner, ‘Comparative Research in Criminal Justice’ in L Noaks, M Levi and M Maguire (eds), *Contemporary Issues in Criminology* (Cardiff UP 1995).

to instigate change. Here, I draw on evidence and recommendations from the “good” police custody to make these suggestions for future practice.

To address these aims, first, I examine, in turn, the strengths and weaknesses of: risk assessments, legal advice, identification and support for vulnerable detainees, dignified treatment of detainees, and the material conditions of garda custody. These custody features have been selected because of their “distinctively local flavour,”¹⁴ as revealed in the Garda Inspectorate report, which therefore warrant further examination. Given the breadth of these features, though, they are necessarily skimmed over, with some of them being picked up and considered in more detail elsewhere in this book. In the discussion that follows, second, I reflect on what this assessment of the strengths and weaknesses of the key features of custody reveals for future policies and practices in Ireland, framing this discussion through the lens of “good” police custody.

Throughout this chapter there will be a particular focus on findings from the “good” police custody study, on which I was the principal investigator from 2013 to 2018, meaning it is important to set out its methodology here. This was a five-year national mixed-methods study, the overarching aim of which was to examine rigorously what “good” police custody means. In Phase 1, in 2014, survey data were collected from custody managers in 40 of the 43 police forces in England and Wales about the delivery of police custody. In Phase 2 in 2014/15, the research team spent hours observing and interviewing 47 staff and 50 detainees in four custody blocks in four forces. The Phase 2 data were used to develop a questionnaire which was administered in 2016–2017 to nearly 800 staff and detainees in 27 custody facilities in 13 police forces in England and Wales. Analysis of the Phase 3 data resulted in a set of good practice recommendations launched in Phase 4 in 2019 and a series of publications.

I also draw on the Irish parts of a British-Academy-funded study conducted in 2009, which aimed to examine due process rights in theory and practice, in a comparative perspective. In the Irish part of the research, I observed six custody blocks in one large Irish city, amounting to 41 hours of observation, and interviewed eight members of An Garda Síochána, as well as looking at relevant documents and reports. These data have been published in Skinns (2019) and Skinns (2022).

Risk Assessment, Equal Worth, and Decency

That garda members ask questions to identify risk in detainees in their custody is a positive feature of their working practices, given the highly vulnerable nature of the detainee population¹⁵ and the demands on An Garda

14 Hamilton (n 12) 1.

15 T Rekrut-Lapa and A Lapa, ‘Health Needs of Detainees in Police Custody in England and Wales’ (2014) 27 *Journal of Forensic and Legal Medicine* 69–75.

Síochána to keep people safe, to prevent deaths in custody, and to comply with ECHR Article 2 right to life obligations. From an appreciative inquiry perspective, it is also of note that improvements were made to these risk assessment processes in 2018, in which the risk assessment questions that were once included as part of the paper custody record and which I observed in use in 2009, had been replaced by a separate paper risk assessment form, which enabled more detailed questions to be asked about mental and physical health, use of alcohol/drugs, learning disabilities, dietary requirements, etc. In 2009, this risk assessment process, as I noted in Skinns,¹⁶ was a relatively informal affair, which therefore compromised its potential for consistently and routinely identifying and responding to risk. Questions at this time focused on detainees' physical and mental health, medication, and intoxication, but this was not a rigid checklist and, instead, staff acted based on their intuition. For example, this garda member explained that:

[T]he new custody record now has a series of questions you ask them in relation to, have you taken medication, have you been to a hospital . . . So there's kind of a risk assessment built into that, but there's no separate form . . . they're [staff] go through this risk assessment in their head, they just don't realise they're doing this risk assessment, and it's like the instinct . . . they don't do it in that structured checklist type approach, which is why we don't have very many serious incidents. IREI1.¹⁷

Other interviewees were more critical of this informal approach and the reliance on intuition which, in one interviewee's opinion, had resulted in vulnerable people being put in cells on their own when other courses of action would have better supported their needs.

More recently, the Garda Inspectorate has noted that “although initial risk assessments are carried out for almost every person in custody, there are significant weaknesses in the identification, assessment and management of risk, as well as in the recording of relevant information and decisions.”¹⁸ In this respect, Ireland was distinctive as result of these weaknesses in the risk assessment process, when compared to the other jurisdictions in the report. Indeed, with the exception of the “significant weaknesses” identified in the formal oversight of custody at local, regional, and organisational levels,¹⁹ there were no other parts of the report where the same level of concern was expressed. By contrast, England and Wales were noted in the report for the

16 Skinns (n 1) 98–100.

17 Skinns (n 1) 99.

18 Garda Inspectorate (n 11) 61.

19 *Ibid.*, 31.

comprehensive and dynamic approach taken to the identification and management of risk on arrival and prior to release, founded on information gathering from police records and information sharing between the police, health and prisons and supported by national-level guidance, such as Authorised Professional Practice (APP).²⁰ It was therefore recommended that Members in Charge be made responsible for overseeing the assessment of risk both on arrival and release, and the devising and implementation of risk management plans which are formally recorded, updated, shared with relevant partner organisations and that information about risk be added to custody records and electronic records held on PULSE.²¹ If followed, these recommendations will mirror risk assessment processes in England and Wales.

It is therefore worth sounding some words of caution about the way risk assessments function in practice in England and Wales and examining the implications of this for changes to risk assessment processes in Ireland. Though national guidance exists about the implementation of risk assessments, practice varies considerably between police forces and between individual officers as to how they are put into practice, underpinned by the discretionary nature of police work.²² For example, the format risk assessments take, the themes covered and questions asked can vary significantly between *police forces* and also from national guidance. Stoneman et al. found that only one force of the 43 in their research covered all of the parts of the risk assessment suggested by APP guidance.²³ They also found that the content and delivery of the risk assessment also differed considerably between police forces. The findings highlight a practical problem for police forces in ensuring that risk assessment processes are conducted consistently and to the same national standard, which no doubt will be an issue for An Garda Síochána to consider were they to adopt the recommendations of the Garda Inspectorate (2022).

Varied approaches to risk assessment by *individual officers* are also of ongoing concern in England and Wales,²⁴ particularly where these risk assess-

20 College of Policing, 'Detention and Custody Risk Assessment' (2021) <www.college.police.uk/app/detention-and-custody/detention-and-custody-risk-assessment> accessed 9 January 2023.

21 PULSE stands for Police Using Leading Systems Effectively, which is An Garda Síochána's electronic incident recording system.

22 Skins (n 1) 190–92.

23 M Stoneman and others, 'Variation in Detainee Risk Assessment Within Police Custody Across England and Wales' (2019) 29(8) Policing and Society 951–67.

24 G Rees, 'Getting the Sergeants on Your Side: The Importance of Interpersonal Relationships and Cultural Interoperability for Generating Interagency Collaboration Between Nurses and the Police in Custody Suites' (2020) 42(1) Sociology of Health and Illness 111–25; Stoneman and others (n 23).

ments are improperly conducted and contribute to deaths in police custody.²⁵ This was recently highlighted in the inquest into the death of Kelly Hartigan-Burns in 2016. After being found by the police on a road in the midst of a mental health crisis, saying she wanted to kill herself, she was later arrested and detained at Blackburn police station for assaulting her partner. She took her own life in a cell there, only hours after arriving. The inquest into her death in February–April 2022 recorded an open conclusion, but nonetheless pointed to a number of failures by the police, including with the relaying of important information about the circumstances leading up to her arrest and her suicide risk, an inadequate risk assessment and a lack of concern for warning markers on police records, resulting in improper checks being made and her not being placed in a CCTV cell, even though there was one free. The custody officer who booked her in had also left his shift two hours early on the night that Kelly died, for which he was found guilty of gross misconduct in October 2021. Therefore, national guidance on risk assessments cannot guarantee detainee safety and prevent all deaths *in* police custody, as much also depends on the culture of custody and its staff, the training they receive, and how they implement this. Though there is no space to consider this fully here, identifying and responding to risk also depends on whether custody staff seek advice and support from trained professionals, such as healthcare or liaison and diversion practitioners, the quality of this advice, and whether it is followed.²⁶

Nor can custody staff necessarily keep detainees safe *on release* either. In spite of national guidance, at the time of writing, the management of risk on release is of greater concern in England and Wales than deaths in custody.²⁷ While there has been a downward trend in deaths *in* police custody since the late 1990s, particularly since 2009,²⁸ there has been an overall increase in the deaths following release, particularly of “Apparent suicides following release from police custody,” albeit these figures have stabilised in recent years. These

25 Independent Police Complaints Commission, ‘Deaths in or Following Police Custody: An Examination of the Cases 1998/9–2008/9’ (IPCC 2011) <www.ipcc.gov.uk/page/deaths-custody-study>.

26 A Lyall and others, ‘Pre-Release Risk Assessments: Pilot Study of a Novel Tool in One Police Station in the North East of England’ (2022) 17 *Policing: A Journal of Policy and Practice* <<https://doi.org/10.1093/police/paac016>>; R Dehaghani, *Vulnerability in Police Custody: Police Decision-Making and the Appropriate Adult Safeguard* (Routledge 2019) 103–13; Stoneman and others (n 23); Skinns (n 1) 98–100.

27 Lyall and others (n 26); Dehaghani (n 26) 35.

28 Independent Office of Police Conduct, ‘Annual Deaths During or Following Police Contact Statistics: Statistics for England and Wales 2021/22’ (2022) <www.policeconduct.gov.uk/research-and-learning/statistics/annual-deaths-during-or-following-police-contact-statistics> accessed 21 December 2022; Inquest, ‘Deaths in Police Custody’ (2013–2022) <www.inquest.org.uk/deaths-in-police-custody> accessed 21 December 2022.

apparent suicides on release from police custody are also greater in number than the deaths in police custody. In 2021/22, there were 11 deaths in police custody, compared to 56 apparent suicides in the 48 hours following release from police custody.²⁹ A large proportion of those who take their own life on release have been arrested for sexual offences (54% in 2021/22), including the possession of indecent images involving children (48% in 2021/22). Concerns about apparent suicides on release from police custody prompted the 2017 Angiolini Review into deaths in or following police custody to recommend that national APP police custody guidance

should include guidelines for pre-release risk assessment setting out specific practical steps that should be taken to provide support and protection for those at risk of self-harm on release (for example contacting family/carers before release with the detainee's consent, or referrals to community support groups).³⁰

It remains to be seen whether these recommendations and guidelines are enough to reduce apparent suicides on release from police custody. Though stable, at 56 they remain persistently high and higher than deaths in police custody.

While clearly an important, albeit imperfect, preventative mechanism which can improve detainee safety in custody and on release, enlarging the focus on risk in Ireland by elevating the importance of the risk assessment process may also have unintended consequences for detainees. In the “good” police custody study, custody was seen as being “all about risk.”³¹ Across all four sites in Phase 2 of the research, staff and to a lesser extent detainees exhibited a set of narratives and associated beliefs about the pervasiveness of risk in police custody suites, primarily connected to fears about detainees

29 IOPC (n 28). The equivalent figures for Ireland in 2021 were 6 deaths in garda custody and 5 following release from garda custody. However, these figures may be inaccurate, for example, because not all cases of suicide following garda custody are being referred to GSOC for investigation as required by s102 of the Garda Síochána Act 2005. See GSOC, *Annual Report* (GSOC 2021); S Bowers, ‘At Least 228 Fatalities in or Following Garda Custody Over Past 15 Years, Figures Show’ *Irish Times* (15 July 2022). Given the population differences between the England and Wales, and Ireland (approximately 59 v’s. 5 million), the number of deaths *in* garda custody seems particularly high relative to those in England and Wales, while the deaths following garda custody appear to be broadly equivalent, but objectively high.

30 E Angiolini, ‘Report of the Independent Review of Deaths and Serious Incidents in Police Custody’ (2017) 102 <www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody> accessed 21 December 2022.

31 L Skinnis and A Wooff, ‘Policing Risk Inside Police Detention in England and Wales’ (Presentation at the American Society of Criminology Conference, Philadelphia, 15–18 November 2017).

dying and the consequences of this. While concerns about a detainee dying was a key part of this culture of risk, motivating staff decision-making and behaviour, staff also recognised the significant threats posed to staff too, including to their safety, reputation, as well as their jobs, their financial security, and their family life, if something were to go wrong.

This culture of risk therefore significantly framed all of what staff did. However, this was sometimes to the detriment of other considerations, such as detainee dignity. This was most apparent in relation to material goods, including personal effects (e.g. wedding bands), food, drink, toilet paper, etc., all of which might be denied and justified on the basis of risk. The Garda Inspectorate also made similar observations in Ireland. They note, for example, that the routine removal of certain items of clothing was not in proportion to risk, and the lack of provision of alternative clothing was “unacceptable.”³² It was also noted that having to ask for toilet paper or menstrual products negatively impacts dignity. In the “good” police custody study, in some cases, detainees felt decisions to remove or not provide these material goods were unjustified, for example, if based on warning markers on the Police National Computer which were out of date.³³ These decisions also aggravated detainees because they conveyed to them a lack of trust in them by staff, while, for others, it was downright upsetting and dehumanising to have their wedding band removed, on the basis of presumed risk. Some detainees also did not understand or it had not been explained to them that their relatively low-risk wedding band would be returned and, for others, it was symbolic of a loss of identity. The removal of these items can be seen therefore as a form of “degradation,”³⁴ for example, as a result of the public, humiliating and routinised way in which it happened and a part of “mortifications of the self,”³⁵ through which detainees are forced to defer to those in charge and are socialised into the ways of the establishment.

In other words, an overemphasis on risk and an over-reliance on out-of-date warning markers on police records can undermine detainee dignity and their sense of being of equal worth and a decent trusted person, and, furthermore, might enflame and escalate detainees’ sense of injustice and the likelihood of them reacting negatively to this, which paradoxically increases not decreases the risk they pose. In order to deliver “good” police custody and given the risky and vulnerable nature of the suspect population, custody staff must continually balance risk against detainee dignity. In Ireland,

32 Garda Inspectorate (n 11) 71.

33 Skinns (n 1).

34 GM Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton UP 1958) 66.

35 E Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Penguin 1961) 24.

this decision-making process is made all the more difficult without the input, for example, of mental health professionals or liaison and pre-charge diversion teams. As the Garda Inspectorate notes, the recommended expansion of pre-charge diversion schemes in 2006 “were not evident, nor was there a consistent approach to signposting people with poor mental health to other organisations upon their release from custody.”³⁶ In the interests of more effectively managing risk, while also supporting detainees’ sense of equal worth and the decency of police custody, the recommendation made by the Garda Inspectorate to develop “a range of diversion and intervention services for persons in custody” is of critical importance.³⁷ This should be alongside more effective risk assessment processes and procedures (e.g. standardised, meaningful questions and opportunities to discuss them privately) but also training for staff to empower them to use their judgement to make appropriate decisions for detainees, on a case-by-case basis, which recognise and respect their need for dignity, alongside keeping detainees and staff safe.

Accessing Legal Advice and Autonomy

Custodial legal advice is a crucial due process feature of police detention. It protects a suspect’s right to a fair trial from the outset and ensures that a legal representative can offer meaningful support and advice to a suspect during, what will be, for most, a moment of extreme vulnerability when arrested and detained by the police, in some cases for the first time.³⁸ In circumstances where adverse inferences may be drawn from silence – for example, when a suspect fails or refuses to mention certain facts, provide certain information, or answer certain questions – as is the case for a growing range of offences in Ireland, England, and Wales,³⁹ and where the focus of the criminal trial has shifted from the courtroom to police custody,⁴⁰ the

36 Garda Inspectorate (n 11) 23.

37 *Ibid.*, 26.

38 For a fuller discussion of why custodial legal advice is so crucial, see V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury 2023) Chapter 1.

39 Y Daly, C Dowd and A Muirhead, ‘When You Say Nothing at All: Invoking Inferences from Suspect Silence in the Police Station’ (2022) 26(3) *The International Journal of Evidence & Proof* 249–70; Y Daly and V Conway, ‘Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance’ (2021) 48 *Journal of Law and Society* 618–44; Y Daly, ‘Ireland: Curtailment of the Right to Silence Through Statutory Adverse Inferences’ (2021) 12(3) *New Journal of European Criminal Law* 347–64; Y Daly, ‘The Right to Silence: Inferences and Interference’ (2014) 47(1) *Australian and New Zealand Journal of Criminology* 59–80.

40 A Pivaty and others, ‘Contemporary Criminal Defence Practice: Importance of Active Involvement at the Investigative Stage and Related Training Requirements’ (2020) 27(1) *International Journal of the Legal Profession* 25–44; H Quirk, *The Rise and Fall of the Right to Silence* (Routledge 2017) 121.

need for custodial legal advice is even more crucial. A solicitor is needed to help a suspect understand, for example, when adverse inferences apply and what the effect of remaining silent might be on their case at court. This is particularly so, because in Ireland, unlike in England and Wales, the traditional police caution,⁴¹ only gives way to more detailed information about adverse inferences, during late-stage “inference interviews,” at which point gardaí need only explain this caution and its consequences in ordinary language, rather than ensuring that the suspect understands it.⁴² Indeed, as has been found in other studies, suspects do not understand the caution because gardaí also fail to fully understand or explain it effectively, drawing on legally inaccurate examples to do so.⁴³

From an appreciative stance, Ireland has some of the necessary machinery of criminal justice to facilitate access to custodial legal advice. For example, the right to consult a solicitor is provided for under: administrative arrangements via the Garda Station Revised Legal Advice Scheme, for those receiving benefits or earning less than €20,316 p.a. and depending on the law under which suspects have been arrested; case law, such as *DPP v Gormley*,⁴⁴ which requires that a detained suspect who has requested legal advice should not be questioned until such advice has been provided; Garda custody regulations, which provide the right to consult a solicitor privately; HQ Directive 58/08 and Codes of Practices developed by An Garda Síochána and the Law Society; and ECtHR rulings, particularly the seismic, *Salduz v Turkey*, which emphasises the importance of legal advice as a pre-condition to police interrogation,⁴⁵ particularly in situations where adverse inferences may be drawn.⁴⁶ Indeed, breaches of Art 6(3) of the ECHR may arise where legal advice is not provided in a timely fashion for those against whom adverse inferences are later drawn at court.⁴⁷

Yet these legal and administrative provisions are insufficient to support access to custodial legal advice, in practice, with evidence also of difficulties with the quality of legal assistance provided, though these will not be

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

42 Daly, Dowd and Muirhead (n 39); Daly (n 39).

43 Daly, Dowd and Muirhead (n 39).

44 *DPP v Gormley* [2014] 2 IR 591; for a discussion of the significance of this ruling, see Conway and Daly (n 38) Chapter 3, 11.

45 *Salduz v Turkey* [2008] ECHR 36391/02 [Grand Chamber] (27 November 2008).

46 Garda Inspectorate (n 11); Daly (n 39); Pivaty (n 40); Daly, Dowd and Muirhead (n 39); D Giannouloupoulos, ‘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 103–29; D Walsh, *Human Rights and Policing in Ireland: Law, Policy and Practice* (Clarus Press 2009) 143.

47 Daly (n 39).

considered here.⁴⁸ It is estimated that around 20% of detainees in garda custody consulted in-person with a legal adviser and 11% had a legal adviser present during their interview.⁴⁹ Based on a random sample of custody records, in 2019, Garda Inspectorate figures suggest that this figure is lower with approximately 50 of their sample of 318 requesting and receiving legal advice, resulting in a consultation rate of around 15.7%.⁵⁰ Figures from the Legal Aid Board show consultation rates to be around 21% (though lawyers are only present in police interviews in 10% of cases).⁵¹ This compares to a higher consultation rate in England and Wales, where it is approximately 25%, based on the average from studies conducted between 1978 and 2009, and may even be as high as 48%.⁵²

Some of the reasons that suspects decline legal advice in Ireland are likely to be similar to those in England and Wales. Research in England and Wales has shown that they revolve primarily around the actions and decisions of suspects, the police, and legal representatives.⁵³ For suspects, being from a minority ethnic background, haste to leave police custody offence seriousness, self-defined guilt/innocence, and prior experience of custody all have an effect. For the police, ploys and informal conversations can be used to suggest to suspects, for example, that a legal advisor will prolong detention. For legal advisers, their availability, including through having sufficient remuneration to ensure attendance at the police station, experience, understanding of their role and competence is crucial, as well as their morale when performing a role, which is often undervalued.

Similarly, in Ireland, Skinns found suspects' prior experience of custody and police ploys dissuaded them to consult with a solicitor. Garda member,

48 Some of these difficulties include delays in accessing a lawyer, with no clear regulations or guidance on when such delays are permitted; limited privacy either during in-person or telephone legal consultations, due to staff standing in sight or earshot of consultation rooms or telephones (Garda Inspectorate (n 11)).

49 Daly (n 39).

50 Garda Inspectorate (n 11).

51 These figures are cited from Conway and Daly (n 38) Chapter 1.

52 L Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2011) 112.

53 J Blackstock and others, *Inside Police Custody: An Empirical Account of Suspects' Rights in four Jurisdictions* (Intersentia Ltd 2014) 247; Conway and Daly (n 38); D Newman and L Welsh, 'The Practices of Modern Criminal Defence Lawyers: Alienation and Its Implications for Access to Justice' (2019) 48(1–2) *Common Law World Review* 64–89; P Pleasence, V Kemp and N Balmer, 'The Justice Lottery? Police Station Advice 25 Years on from PACE' (2011) 1 *Criminal Law Review* 3–18; L Skinns, '“I'm a Detainee Get Me Out of Here”: Predictors of Access to Custodial Legal Advice in Public and Privatized Police Custody Areas' (2009) 49(2) *British Journal of Criminology* 399–417; L Skinns, '“Lets' Get It Over with”: Early Findings on the Factors Affecting Detainees' Access to Custodial Legal Advice' (2009) 19(1) *Policing and Society* 58–78.

IREI4, for example, said that suspects “get very complacent. They’ve been in a Garda station so often they know the way things go.”⁵⁴ IRE6, who had a legal background, said, however, that suspects declined legal advice because gardaí told them that they did not need a legal adviser “because all they [the gardaí] wanted to do was ask them a few questions,” which he felt was a “distortion of the interview process” and is suggestive of ploys being used by some of the gardaí, much in the same way that they have been found to be used in England and Wales. As is the case in England, there is also the possibility of solicitor competence undermining custodial legal advice. Conway and Daly highlight some of the challenges in this regard,⁵⁵ especially when attending police interviews, which they were not permitted to do until 2014 (30 years after this was the case in England and Wales). The increasingly broad but significant role of defence solicitors in Ireland in providing legal assistance⁵⁶ – which encompasses legal advice, but also protecting rights, especially to silence, preventing miscarriages of justice, providing support (e.g. with suspect welfare) and active support, and ensuring equality of arms⁵⁷ – also enhances opportunities for their competence to be impugned. Where solicitors do not conceive of their role in these broad terms and/or where there are failings in delivering any one of them, this may deter detainees from requesting custodial legal advice again in the future. As Pivaty et al. say,

[i]n order to provide effective and practical assistance to a detained suspect [which is line with the requirements of the *Salduz* ruling], lawyers need to fully appreciate the nature of their role in the police station, and have the skills to communicate effectively.⁵⁸

However, the reasons for declining legal advice in Ireland also differ from those in England and Wales in three key but interconnected ways. First, there is no statutory basis for custodial legal advice in Ireland of the kind that exists in England and Wales through the Police and Criminal Evidence Act 1984, and second, there is no formalised system for facilitating access. Unlike in England and Wales, there is no duty solicitor scheme, even though this inhibits Ireland from meaningfully operationalising the 2008 *Salduz v*

54 Skinns (n 1) 124–29.

55 V Conway and Y Daly, ‘From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station’ (2019) 1 *Irish Judicial Studies Journal* 103–23.

56 As Pivaty and others (n 40) note, the work that lawyers do in the police station is no longer merely preparatory work for their day in court with their client, it has a significant bearing on the trial and its outcome. For example, statements taken in the police station are unlikely to be modified in court or evidence elicited from a suspect is unlikely to be excluded if their solicitor did not object at the time.

57 Pivaty and others (n 40); Conway and Daly (n 55).

58 Pivaty and others (n 40) 39.

Turkey ruling.⁵⁹ Indeed, Giannopoulos notes that Ireland responded more slowly than jurisdictions, such as France, Scotland, and the Netherlands, in formalising access to a lawyer prior to interview.⁶⁰ It is therefore unsurprising that, in 2009, the status of publicly funded legal advice in garda custody provoked confusion amongst the staff interviewed by Skinns.⁶¹ No doubt it also provoked and continues to provoke confusion for suspects too, who are left to select a lawyer for themselves from amongst any business cards left in garda custody or lists that the police may hold.⁶² The Garda Inspectorate notes that sometimes these lists were compiled in conjunction with solicitors, but other times their origins were unknown.⁶³ While the Law Society has also produced a list of solicitors, which is on their website, it is not routinely used by An Garda Síochána and few staff were aware of its existence.⁶⁴

Third, suspects may also be deterred from seeking legal advice because of concerns about potential costs. As found by Skinns,⁶⁵ written information about custodial legal advice indicated to suspects that they may consult with a solicitor, but in a separate paragraph on a different page, suspects were informed that eligibility for legal aid was determined at court.⁶⁶ Therefore, suspects were required to connect these two paragraphs together, appearing as they did on different pages of the information sheet provided to them. If/when they did connect the paragraphs, they may have been further deterred from requesting legal advice by ambiguities about whether they would receive legal aid at all, since means-testing to establish their eligibility was done prior to going to court not in the police station. As custodial legal advice is publicly funded and thus free at the point of contact in the police station, in England and Wales, and given that detainees should be informed of this when given their notice of rights and entitlements, ambiguities about the potential cost of custodial legal advice is less likely to deter detainees from making use of it in England and Wales, compared to Ireland.

These uncertainties about eligibility for legal aid and which lawyer to choose rooted, in turn, in the lack of statutory or formalised basis for legal advice, are collectively likely to deter take up in Ireland, in ways that are not the case in England and Wales. The fact that the Garda Inspectorate has recommended that detainees be provided with more information about the Garda Station Revised Legal Advice Scheme (e.g. through

59 *Salduz v Turkey* (n 45).

60 Giannoulopoulos (n 46).

61 Skinns (n 1).

62 Garda Inspectorate (n 11); Conway and Daly (n 55); Daly (2014) (n 39).

63 Garda Inspectorate (n 11).

64 *Ibid.*

65 Skinns (n 1) 124–29.

66 See also Garda Inspectorate (n 11).

posters and explanations from Members in Charge)⁶⁷ further underscore these difficulties. Yet, this right is critically important, particularly where adverse inferences may be drawn and given the growing importance of the police station not courts in the criminal process. Beyond this procedural value of the right, deciding about custodial legal advice is also important to detainee dignity rooted in autonomy and therefore to “good” police custody. In order to make autonomous decisions, such as about whether to consult a solicitor, detainees need to have sufficient information to do so. This also needs to be provided in accessible formats and/or explained to them in ways that they are likely to understand, especially if they are vulnerable and if they are to be afforded the same level of autonomous decision-making as others, all of which are central to notions of “good” police custody.

Material Conditions as a Precursor to Detainee Dignity

In terms of the material conditions of garda custody in Ireland, from an appreciative stance, the newest, purpose-built custody blocks delivered, for example, by the Capital Works Plan in Wexford, Galway and Kevin Street, Dublin, and the plans for further new suites in 2022–2026, as well as the cell refurbishment plan which began in 2011 to address problems with ligature points, windows, vents, heating, lighting, sanitation, call bells, and fire detection, provide the basis for creating garda custody suites which are well maintained, have natural light in the main charge rooms and the cells, exercise yards, and other features which are likely to support dignity and safety.⁶⁸ This chimes with my observation of new purpose-built facilities in 2009 (e.g. IREPO6), which had a clean, bright, and airy feel and had modern technology, such as automated fingerprint identification machines.

Yet, these favourable material conditions were inconsistent. The Garda Inspectorate notes, for example, that the building of new suites was not co-ordinated with the refurbishment of cells and that guidelines are needed about minimum standards for custody facilities and optimum numbers of custody suites, taking into account capacity versus demand.⁶⁹

In the research I conducted in 2009, there were a different set of inconsistencies. Garda custody blocks were remarkable for the contrast between how favourable (e.g. IREPO6) and unfavourable the material conditions were. At the time of the research, the custody block in IREPO4, was amongst the

67 Ibid.

68 Ibid.

69 Ibid.

worst police detention facilities I had visited in ten years of conducting police custody research:

There were six cells, although only five were fully functioning. One was used as a property store. There were two interview rooms and one medical room/print room with a toilet and sink in it. There were no shower facilities. The print room enabled wet prints to be taken, rather than having livescan technology. The first thing that I noticed about going down to the cell block was how smoky it was. This was because suspects were allowed to smoke in the cells. . . . There were cell buzzers, but . . . they did not work [according to Sarah]. . . . Patrick, said that there were plans to knock the police station down and re-build it, but these had been put on hold due to the financial difficulties . . . I wondered how the custody area affected the morale of staff. Some, such as Sarah, seemed able to just get on with it and accepted that this was how it was. Others, such as Patrick, seemed negative and depressed about working in this kind of environment.

(IREPO4)

Three other facilities, where I conducted research in Ireland in 2009, were also poor in quality. The Garda Inspectorate report confirms that this is still likely to be the case some ten years later, based on their unannounced visits to 12 garda custody facilities in 2019. In 2009, these three facilities were dirty and had crumbling paint and/or plaster, which made them feel somewhat dilapidated and uncared for. Staff were also concerned about potential ligature points in the cells and possible escape routes, which meant that they chose to book-in detainees in the medical room because they felt it was safer (IREPO3). Others, such as Justice Hardiman in the *DPP v Gormley* ruling,⁷⁰ have also commented on how these material conditions impact detainees:

Many cells in Garda stations are frankly unsanitary and in a condition such that no normal person would wish to spend time there. Foul smells are not uncommon. They may be in a permanent state of semi-darkness, lighting, or the extinguishment of lights, being controlled from outside only. The seating or bedding may be such that no reasonable person would wish to use it. 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

70 Conway and Daly (n 44).

ideal preparation for what may well be the most important confrontation of one's life.⁷¹

These material conditions of garda custody in Ireland matter, both for staff and for detainees. The Garda Inspectorate notes, for example, concerns about safety and security, as a result of ligature points and a lack of secure entrances or routes into the custody block, for example, via multiple corridors without CCTV.⁷² Safety alarms did not always work and escape routes existed, for example, where doors were left open into other parts of the police station. These material conditions also matter to detainee dignity, particularly feelings of equal worth. It is not the case that "good" material conditions amount to dignity, as European jurisprudence implies when it describes poor material conditions as undignified.⁷³ Rather, "good" material conditions are a precursor to dignity.⁷⁴ Moreover, staff are also moulded by these material conditions, who in turn pass on these experiences in their interactions with detainees. Improving material conditions is therefore likely to be advantageous not only to detainee dignity but to staff too, particularly to their levels of stress, their capacity for using their authority effectively, and their inclination to create a climate of decency.⁷⁵

Taken together this suggests that to make garda custody "good" will entail improving material conditions in Ireland in the future. "Good" material conditions might include, for example, access to good quality food and drink, toilet paper, menstrual products, books and other distraction items, etc., notwithstanding any considerations of risk, as discussed earlier. More fundamentally, it is about ensuring that custody blocks are light, bright, and with natural light; are clean, regularly repainted, refurbished, and generally well maintained; and have means of telling the time. Were there a set of guidelines for An Garda Síochána about how garda custody facilities should be built and refurbished, taking account of not only detainee dignity but also safety and security and the needs of staff, this would further drive the custody estate in Ireland away from being the punishing and coercive custody blocks of the kind described earlier and towards a more consistently provided "good" set of material conditions, which would be of benefit to staff and to detainee dignity.

Conclusion: Setting a New Agenda for the Future?

In summary, an "appreciative" and comparative approach has been used to examine garda custody in Ireland. Focusing on the assessment of risk, access

71 *Ibid.*, per Justice Hardiman, para 10.

72 Garda Inspectorate (n 11).

73 Skinns, Sorsby and Rice (n 6).

74 Skinns, Wooff and Rice (n 8).

75 Skinns, Sorsby and Rice (n 6).

to custodial legal advice and material conditions, this has highlighted the strengths of custody services in Ireland, but also where improvements can be made. To do this, the Garda Inspectorate's *Delivering Custody Services* report has been not only drawn on but also supplemented by empirical evidence from Ireland and England and Wales, which provides an account of the lived experiences of those who work in, and are, detained in police custody.

This analysis shows that while there are many similarities between Ireland, England, and Wales with respect to the policies, procedures, and practices of police custody, there are also some distinctive elements. While police custody has long been the “Cinderella” of police work in England and Wales, this relegated status seems even more pronounced in Ireland. The Garda Inspectorate, for example, noted “significant weaknesses” in the formal oversight of custody at local, regional, and organisational levels,⁷⁶ in spite of the large volumes of citizens that cross through the doors of garda custody settings in Ireland. This likely sets the tone and helps explain some of the other distinctive features of garda custody that have emerged from the analysis presented here, including the “significant weaknesses” with risk assessment processes and procedures;⁷⁷ the existence of an entitlement to custodial legal advice in theory, but too limited support for this in practice, for example, in the form of a duty solicitor scheme; and inconsistencies in the material conditions of garda custody, which may compromise detainee safety, security, and dignity and staff morale.

At the same time, there are also other distinctive elements of Irish criminal justice that could be used to further support the goals of “good” police custody, particularly of detainee dignity rooted in equal worth, which emphasises that detainees are human beings, just like everyone else. Drawing on Brangan, Hamilton, for example, notes a “distinctively Irish approach whose aims are driven by ‘humanitarian values, a deep scepticism of the prison and a belief that the community, and not the prison, was a superior form of social control and reintegration’.”⁷⁸ This sense of the humanitarian nature of penalty could be readily transferred to garda custody in Ireland not only to humanise it but also to ensure that it provides a rehabilitative function, such as by diverting people from garda custody. Indeed, this form of “coercive caring,”⁷⁹ in which the police facilitate access to relevant helping agencies, should be seen as one of its many functions. In so doing, police organisations should also recognise their limitations in this regard. The expectation should not be that the police provide this support themselves, but rather that

76 Garda Inspectorate (n 11) 32.

77 Ibid.

78 Hamilton (n 12) 16.

79 AE Bottoms, ‘An Introduction to “The Coming Crisis”’ in AE Bottoms and RH Preston (eds), *The Coming Penal Crisis* (Scottish Academic Press 1980) 20.

they play a role in identifying those who need it and know when and how to refer people to appropriate external agencies. By diverting people from the criminal justice system and also significantly impacting some of the drivers of offending behaviour, in this way, An Garda Síochána has the opportunity to add to the already distinctive path in criminal justice policy and practice, which has been set in motion in other parts of the criminal justice system.⁸⁰

Framing the analysis presented here through the lens of “good” police custody and notions of dignity rooted in equal worth and autonomy enables the setting of a new agenda for the future of garda custody in Ireland. It has been shown how risk assessments and custodial legal advice could be used to uphold the goals of detainee dignity linked to equal worth and to autonomous decision-making. Moreover, the material conditions of police custody are likely to be a precursor to detainee dignity, as well as being important to staff and their ability to support such experiences. Though steps have already been taken in Ireland for delivering custodial legal advice in a meaningful way, improving risk assessments, and providing favourable material conditions for staff and detainees, the “good” custody framework has implications for further improvements in the future:

- Detainees should be fully informed about their rights and entitlements in garda custody, including custodial legal advice provided through the Garda Station Revised Legal Advice Scheme and any likely costs, so that they can be better supported in making autonomous decisions about matters that deeply affect them and their future.
- While posters and leaflets offer one way of informing detainees of these rights, digital technology, such as Apps or infomercials shown on screens in the cells, might offer a more effective way of doing this, which is something which academics and police forces are beginning to explore in England and Wales, for example, in relation to young suspects.⁸¹
- An Garda Síochána should make the identification and management of risk through appropriate initial and pre-release risk assessment processes a key priority, but do so in ways that support the dignity of detainees. This is likely to require thoughtful and empowered use of discretion based on the availability of a full range of up-to-date information about detainees, and encouragement and careful line management to support case-by-case decisions.
- As part of this risk management process, careful consideration should also be given to whether the person who is brought to the custody block needs

80 Hamilton (n 12).

81 V Kemp, N Carr, H Kent and S Farrall, ‘Examining the Impact of PACE on the Detention and Questioning of Young Suspects’ (unpublished, Final Report for the Nuffield Foundation 2022).

to be there at all and, in fact, whether they can be diverted through judicious use of voluntary interviews by appointment at the police station and, if in custody, whether pre-charge diversion processes could be used to support referral to appropriate helping agencies and to support the “coercive caring” and rehabilitative functions of garda custody.

- Consistently improving material conditions in garda custody across the Irish custody estate should be a critical priority, given the role it plays in supporting detainee dignity. As noted by the Garda Inspectorate, these improvements should include the routine provisions of material goods, such as high-quality food and drink, books, menstrual products, wash packs, religious text(s) and artefacts, and clothing;⁸² appropriate facilities, such as legal consultation rooms for private consultations, appropriately equipped and located medical rooms and places for private conversations during the initial risk assessment; appropriate equipment, such as electronic custody records, breath analysis, electronic fingerprint technology, and computer terminals for accessing electronic police records.
- In addition, thought should be given to building dignity and other humanitarian values into the fabric of the custody environment through facilities which are light, bright, and with natural light, are clean, regularly repainted and refurbished and generally well maintained, and have some means of telling the time. National guidance should also be developed, which sets out these intentions and how they should be realised, in practice.

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82 Garda Inspectorate (n 11).

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3

VULNERABILITY IN POLICE CUSTODY

Roxanna Dehaghani

Introduction

When a suspect enters the realm of the criminal process – whether detained in police custody or subject to a voluntary interview – they may be considered vulnerable. The vulnerability of suspects with certain characteristics or conditions – such as young age, and intellectual and psychosocial disability – has been recognised in domestic legislation (e.g. in England and Wales)¹ and by the Council of Europe and the European Union.² Yet, the mere engagement with the criminal process and all it involves, particularly at the police custody stage, has also been recognised as something which can render someone vulnerable.³ While this certainly acknowledges the vulnerability of suspects generally, it does little to ensure that the vulnerability of suspects is recognised in law and in practice. An adequate and appropriate response to a suspect’s vulnerability is a human rights concern whereby failure could result in an interference with the suspect’s right to a fair trial under Article 6 of the ECHR.⁴ The recognition and appropriate definition of “vulnerability” is

1 See R Dehaghani, *Vulnerability in Police Custody: Police Decision-Making and the Appropriate Adult Safeguard* (Routledge 2019).

2 See L Mergaerts and R Dehaghani, ‘Protecting Vulnerable Suspects in Police Investigations in Europe: Lessons Learned from England and Wales and Belgium’ (2020) 11(3) *New Journal of European Criminal Law* 313–34.

3 See, e.g. *Salduz v Turkey* App no 36391/02 (ECtHR 27 November 2008).

4 Although there are challenges even here. See *Hasáliková v Slovakia* App no 39654/15 (ECtHR 22 November 2021). See also R Dehaghani, ‘Not Vulnerable Enough? A Missed Opportunity to Bolster the Vulnerable Accused’s Position in *Hasáliková v Slovakia*’ *Strasbourg Observer* (23 November 2021).

important to minimise the risks to justice, to the investigation and wider case, and to the suspect. One particular obstacle is how vulnerability is defined. There remains a lack of clarity with regard to how vulnerability is framed in law and understood – and operationalised – in practice. This chapter will address the question of how vulnerability is and could – or should – be defined.

How vulnerability is defined has been subject to some debate. The term has been criticised for its over- and under-inclusivity.⁵ Brown⁶ has identified five principal manifestations of vulnerability – two of which are relevant here. First, vulnerability is seen to be determined by physical and/or personal factors (childhood, old age, disability, sensory impairment, and mental health problems, and/or “temporary biological states associated with elevated fragility, and which inspire protective responses, such as acute illness or pregnancy”).⁷ Second, vulnerability can be situational and includes those who are experiencing “elevated fragility or ‘risk of harm’ due to biological circumstances, situational difficulties or transgression.”⁸ Situational vulnerability is, however, linked with notions of deservingness and tends “to be associated with the active input of a human third party or a structural force but also imagined to contain elements of individual choice or agency.”⁹

This chapter examines how vulnerability is, and could, or should be defined in the context of suspects in police custody. While the focus is on the potential for improvements in Ireland, experience in England and Wales, where the law, practice, and research on this issue are at a more advanced stage, is referred to throughout. First, this chapter briefly examines how the vulnerability of suspects has been framed within European Union (EU) developments and within judgments of the European Court of Human Rights (ECtHR), based on the European Convention on Human Rights (ECHR), including the limitations of this framing. Then, this chapter adopts a psychology and law perspective to defining vulnerability in respect of suspects and explores why (some) suspects are vulnerable, and in what way(s). Thereafter, this chapter considers a more comprehensive approach to defining the vulnerability of suspects, considering the ways in which processes and procedures of police custody – as the beginning and often the end of the criminal process – may create or exacerbate vulnerability, and argues that a more encompassing approach is necessary. This chapter urges that more work is necessitated to – accurately and adequately – define vulnerability and provide

5 Dehaghani (n 1).

6 K Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (Policy Press 2015).

7 *Ibid.*, 29.

8 *Ibid.*, 28.

9 *Ibid.*, 31.

support to vulnerable suspects and argues that law and regulation in Ireland should acknowledge a holistic approach to the vulnerability of suspects.

Defining Vulnerability: The EU and ECHR Approach

Young age is widely recognised as constituting a vulnerability (at least in law, if not necessarily in practice).¹⁰ The ECtHR lists several considerations that could render a suspect acutely vulnerable. In addition to young age, factors include chronic alcoholism and/or acute alcohol intoxication; a physical disability or medical condition; belonging to a socially disadvantaged group; and mental disorder (e.g. ADHD).¹¹ The vulnerability of a suspect or defendant may be relevant to the right to a fair trial under Article 6 of the ECHR if there has been an alleged or actual failure to make adjustments for a suspect's or defendant's vulnerability. In a recent case, *Hasáliková v Slovakia*,¹² the ECtHR considered whether the applicant (A) – who had been convicted of murder – was a vulnerable person and whether she therefore, required reasonable adjustments to understand and participate meaningfully in the criminal process. A had attended “special school,” was entitled to disability benefits, attended a psychiatrist, had an “obvious” physical disability, and an evident intellectual disability. Further, in addition to noting A's intellectual disability, an expert psychiatric assessment¹³ explained that A displayed infantile and simplistic thinking, and was “very naïve, emotionally immature, and easily influenced.”¹⁴ However, the majority considered A not to be vulnerable because she was not suffering from mental illness or disorder, could recognise the dangerousness of her actions, and had foresight of the consequences.¹⁵ They also considered that A was an adult, was literate, had been assisted by a lawyer, and had not indicated that she experienced difficulty understanding or expressing herself until a year into the process. In doing so, the Court adopted a very narrow – and problematic – interpretation of vulnerability or, more accurately, non-vulnerability. The dissenting judges, Judges

10 Ibid. See R Dehaghani, “Vulnerable by Law but Not by Nature”: Examining Child and Youth Vulnerability in the Context of Police Custody’ (2017) 39(4) *Journal of Social Welfare and Family Law* 454–72; See also Chapter 11 in this volume.

11 *Blobkin v Russia* App no 47152/06 (ECtHR 23 March 2016); *Borotyuk v Ukraine* App no 33579/04 (ECtHR 16 December 2010); *Bortnik v Ukraine* App no 39582/04 (ECtHR 27 January 2011); *Plonka v Poland* App no 20310/02 (ECtHR 31 March 2009); *Orsus and others v Croatia* App no 15766/03 (ECtHR 16 March 2010).

12 *Hasáliková* (n 4).

13 This problematically focused on A's responsibility for the offence rather than her ability to understand process and procedure within the context of the criminal process. The dissenting judges highlighted this issue in their dissenting judgment.

14 *Hasáliková* (n 4) para 2.

15 Ibid.

Turković and Schembri Orland, finding that there had been a violation of A's fair trial rights, argued that A's intellectual disability and the consequences thereof would have made her vulnerable – and in doing so drew upon existing research on wrongful convictions and false confessions, in addition to the special consideration for vulnerable suspects by the Council of Europe and European Union, such as the Roadmap discussed later.¹⁶

The definition of vulnerability has also been addressed by the European Union. The European Commission, in its development of minimum procedural safeguards for suspects and defendants, defines vulnerability to include foreign nationals, children, those with a psychosocial disability (“mental or emotional handicap”) or physical illness or disability, carers for young children, those with trouble reading and writing, refugees and asylum seekers, and those with alcohol and/or drug issues.¹⁷ The Resolution for a Roadmap on the Strengthening of Procedural Rights of Suspected or Accused Persons in Criminal Proceedings¹⁸ Measure E urges that special attention be given to suspects and defendants “who cannot understand or follow the content or the meaning of the proceedings, for example because of their age, mental or physical condition.”¹⁹ This can be said to constitute a definition of vulnerability, particularly as this element of the Roadmap has been reflected in a Recommendation encouraging EU member states to introduce measures to bolster the procedural rights of vulnerable suspects and defendants.²⁰ Several Directives, while focusing on strengthening procedural rights for all suspects and defendants, include provisions on the consideration of the particular needs of vulnerable suspects and defendants;²¹ Ireland has opted into some, but not all, of these Directives.

16 Ibid.

17 European Commission, *Green Paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union* (European Commission 2003) 32–34.

18 Resolution of November 30, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings [2009] OJ C295/1.

19 Resolution of November 30, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings [2009] OJ C295/1, Measure E.

20 European Commission, Recommendation of November 27, 2013, on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C378/02.

21 Directive 2010/64/EU of October 20, 2010, on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of October 22, 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive 2016/343 of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

The Recommendation, unlike the Directives, contains a definition of vulnerability: “all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities.”²² This definition has not, however, been accepted amongst member states.²³

Defining Vulnerability: The Legal Psychology Approach

The legal psychology (or psychology and law) perspective offers useful insights into what may make a suspect vulnerable. This approach has significantly influenced the legal framework on vulnerable suspects in England and Wales, and Northern Ireland, under the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (NI) Order 1989, specifically Code C of the Codes of Practice, which detail how vulnerability is defined for the purposes of the “appropriate adult” safeguard – a safeguard for vulnerable suspects.²⁴ Indeed, by adopting such an approach, England and Wales have been commended for “taking the lead”²⁵ in respect of police investigations. It also seems to have significantly influenced – or dictated – definitions of vulnerability at a European level, and was explicitly discussed by the dissenting judges in *Hasáliková*.

22 Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings [2009] OJ C295/1.

23 This is arguably why implementation was through a non-binding Recommendation (rather than a Directive). See Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C378/02.

24 In England and Wales, an appropriate adult is available for all children under 18 years of age and for adults with a mental disorder or mental health condition who may struggle to communicate, understand their rights and entitlements or what they are told, may be confused or unclear about their position, may provide unreliable, misleading or incriminating information without knowing or wishing to do so, or may be suggestible or acquiescent. Home Office, *Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Home Office 2019). Similar provisions exist Northern Ireland – Department of Justice, *Police and Criminal Evidence (NI) Order 1989 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Department of Justice 2015). In Ireland, suspects under 18 years of age or with a “mental handicap” are entitled to have an appropriate – or responsible – adult present during questioning per the Criminal Justice Act 1984 and the Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987, Regulations 13(2), 22(1) and 22(2). In England and Wales, and Ireland, there are problems with how the safeguard is implemented for adults and a general lack of understanding of the provisions, particularly the role of the appropriate/responsible adult and the definition of vulnerability. See *Salduz* (n 3) (England and Wales); Garda Síochána Inspectorate, *Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations* (Garda Síochána Inspectorate 2021) (Ireland).

25 G Gudjonsson, ‘Psychological Vulnerabilities During Police Interviews: Why Are They Important?’ (2010) 15 *Legal and Criminological Psychology* 161–75, at 161.

The first significant point of note is that there is no “generally agreed definition” of psychological vulnerability.²⁶ In the context of police custody, however, vulnerability has been defined as “psychological characteristics or mental states which render a [person] prone, in certain circumstances, to providing information which is inaccurate, unreliable, or misleading.”²⁷ Yet, rather than providing definitive markers, vulnerability is viewed as a range or continuum of potential risk factors.²⁸ Generally, vulnerable suspects are recognised as “not fully understand[ing] the significance of the questions put to them or the implications of their answers [or being] unduly influenced by short-term gains (e.g., being released from custody) and by the interviewer’s suggestions.”²⁹ It is generally accepted that children are vulnerable,³⁰ although the situation is a little more complicated for adults who are not generally seen as vulnerable unless additional factors are present.³¹

Gudjonsson – whose research has been particularly influential in this area – identified four “types” of vulnerability relevant to suspects: (i) “mental disorder,” (ii) abnormal mental states, (iii) intellectual functioning, and (iv) personality.³² “Mental disorder” includes mental illness, personality disorder, and learning disability (although the terms “psychosocial disability” in relation to the first two terms and “intellectual disability” in relation to the last term may be preferred). The second category – abnormal mental states – is said to include anxiety (which is high amongst suspects³³ and correlates closely with suggestibility),³⁴ phobias, bereavement, intoxication, withdrawal, and mood disturbance (some of these may be considered a “psychosocial disability”). The fourth category includes traits such as suggestibility, compliance, and acquiescence, although some suspects falling into the other three categories may exhibit such traits because of their “mental disorder.” While authentication regarding these traits is “regularly

26 Ibid citing R Bull, ‘The Investigative Interviewing of Children and Other Vulnerable Witnesses: Psychological Research and Working/Professional Practice’ (2015) 15 *Legal and Criminological Psychology* 5–23.

27 G Gudjonsson, ‘The Psychological Vulnerabilities of Witnesses and the Risk of False Accusations and False Confessions’ in A Heaton-Armstrong and others (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006) at 68.

28 Gudjonsson (n 25); G Gudjonsson and T Joyce, ‘Interviewing Adults with Intellectual Disabilities’ (2011) 5(2) *Advances in Mental Health and Intellectual Disabilities* 16–21, at 18.

29 G Gudjonsson, ‘Confession Evidence, Psychological Vulnerability and Expert Testimony’ (1993) 3 *Journal of Community and Applied Social Psychology* 117–29, at 121.

30 See also Chapter 11 in this volume.

31 See Dehaghani (n 1).

32 G Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley 2003) at 61–75.

33 Gudjonsson (n 25).

34 G Gudjonsson, S Rutter and I Clare, ‘The Relationship Between Suggestibility and Anxiety Among Suspects Detained at Police Stations’ (1995) 25 *Psychological Medicine* 875–78.

admitted as evidence to challenge admissibility and the weight of the confession evidence,³⁵ some conditions – such as personality disorder – may prove difficult to evidence owing to the little scientific information regarding the impact on reliability,³⁶ in police interviews.³⁷

An intellectual disability³⁸ can result in feelings of intimidation when interviewed by those in positions of authority³⁹ and can increase the likelihood of suggestibility, compliance, and acquiescence.⁴⁰ O’Mahony et al. have found that those with an intellectual disability may be more likely to change their behavioural responses on the basis of communication; may respond in the affirmative when asked questions regardless of what that question is asking; and may go along with statements that they disagree with,⁴¹ doing so to maintain self-esteem or avoid conflict.⁴² Even those with a mild learning disability can struggle with communication or may have to make a concerted effort to be sufficiently understood, particularly in unfamiliar circumstances. That said, they may struggle to differentiate statements from others, handle or recall information, or pay attention, plan, and control inhibitions.⁴³

While Gudjonsson’s more recent research has identified four traits that may render a suspect vulnerable, his earlier work – with MacKeith – acknowledged that a suspect’s capacity to cope with police interview (and arguably also the broader processes and procedures in police custody) depends upon “circumstances (the nature and seriousness of the crime, pressure on the police to solve the crime) . . . interactions . . . personality . . . and health (physical and mental health, mental state).”⁴⁴ Physical illness – such as epilepsy, diabetes, and heart problems – has also been noted to lead to heightened agitation and distress, and thus, impair the accuracy and reliability of confession

35 Gudjonsson (n 32) 3.

36 It is worth noting that reliability is a key factor when the courts consider the admissibility of evidence in England and Wales (where much of Gudjonsson’s research and expert witness activities have been based).

37 Gudjonsson (n 25) 167.

38 See also Chapter 12 in this volume.

39 M St-Yves, ‘The Psychology of Rapport: Five Basic Rules’ in T Williamson (ed), *Investigative Interviewing: Rights, Research and Regulation* (Willan 2006).

40 *Ibid.* at 98.

41 B O’Mahony, B Milne and T Grant, ‘To Challenge, or Not to Challenge? Best Practice When Interviewing Vulnerable Suspects’ (2012) 6 *Policing* 301–13.

42 Gudjonsson (n 32).

43 X Moonen, M de Wit and M Hoogeveen, ‘Mensen met een licht verstandelijke beperking in aanraking met politie en justitie’ (2011) 90(5) *Proces*, tijdschrift voor strafrechtspleging 235–50, at 235–39.

44 Gudjonsson (n 25) citing G Gudjonsson and J MacKeith, *Disputed Confessions and the Criminal Justice System* (Institute of Psychiatry 1997). See also Gudjonsson and Joyce (n 28).

evidence.⁴⁵ Neurological conditions – which may or may not impair intellectual functioning – such as Parkinson’s disease, stroke, and dementia, can impair an individual’s cognitive abilities; those with neurological conditions may therefore also be considered vulnerable.⁴⁶

Although false confessions are not the only risk to justice for failing to safeguard a vulnerable suspect, and not all vulnerable suspects falsely confess, being “vulnerable” can increase the risk of false confession evidence. There are several reasons why a suspect may falsely confess. First, they voluntarily falsely confess in the absence of police pressure because they desire notoriety, feel a need to redress guilt (e.g. from a previous transgression), are unable to differentiate between fantasy and reality, expect leniency, wish to protect or assist the actual offender, or are seeking revenge on another person.⁴⁷ Such false confessions are not confined to those with mental health problems and may occur when a suspect is above average intelligence.⁴⁸ Second, a suspect may falsely confess because they wish to gain something such as being able to leave custody earlier, bringing the interview to an end, or avoiding detention altogether – known as coerced-compliant confessions. With coerced-compliant confessions, the “perceived immediate gains outweigh the perceived and uncertain long-term consequences” and “suspects may naively think that somehow the truth will come out later, or that their solicitor will be able to sort out their false confession.”⁴⁹ Suspects who are prone to anxiety, succumb easily to pressure, or have an intellectual disability may be more prone to coerced-compliant confessions.⁵⁰ Finally, false confessions may occur when a suspect believes that they have committed the crime without any memory of having done so.⁵¹ The suspect may either have no memory of what they were doing at the time of the alleged offence from the outset of the police interview or develop a distrust of their memory owing to “subtle manipulative influences by the interrogator.”⁵² These coerced-internalised false confessions can occur if the suspect, for example, experiences blackouts due to excessive alcohol or drug consumption, or where the suspect has poor self-esteem and succumbs to pressure.⁵³ The psychology and law literature thus recognises a myriad of factors that can render a suspect vulnerable,

45 G Gudjonsson and others, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Procedure Research Study no 12, HMSO 1993) at 16.

46 Justice, *Mental Health and Fair Trial* (Justice 2017) at 15.

47 Gudjonsson (n 32) 194–95.

48 *Ibid.* at 218–24.

49 *Ibid.* at 196.

50 *Ibid.* at 224–33.

51 *Ibid.* at 196.

52 *Ibid.* at 197.

53 *Ibid.* at 233–42.

although tends to focus more on the individual and less on the broader systemic structures and processes. Moreover, the focus within this literature is largely, although not exclusively related to how to identify risks of and thus, avoid false confessions. However, false confessions should not be considered the only risks posed to justice – it is necessary to view vulnerability in a much broader frame with consideration to the right to a fair trial and the right to humane treatment.⁵⁴

A More Inclusive Approach to Defining “Vulnerability”

As noted in the introduction, vulnerability can be viewed as, *inter alia*, innate and/or situational.⁵⁵ In the context of police custody, individuals can be innately vulnerable owing to, for example, young age or psychosocial disability. This “type” of vulnerability, while at times connected with notions of deservingness, is broadly recognised in domestic and European documents and frameworks.⁵⁶ There are, however, some limits placed on this approach – often physical disability and the effects thereof (as earlier) are given limited, to no recognition, in the law as it relates to vulnerability in police custody.⁵⁷ The psychology and law approach, explored earlier, defines vulnerability as a set of “psychological characteristics or mental states which render a [person] prone, in certain circumstances, to providing information which is inaccurate, unreliable or misleading.”⁵⁸ This approach also considers the factors that may impact the mental state of an individual. In doing so, it largely focuses on innate vulnerability, although certainly situational vulnerability can be “read into” this approach.⁵⁹ Thus, the psychology and law approach, while incredibly helpful in highlighting the ways in which a suspect’s mental state(s) or characteristic(s) can render them vulnerable (in the manner noted earlier), does not fully examine the ways in which someone’s situation may

54 On humane treatment and special measures for defendants in England and Wales, see S Fairclough, ‘The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment’ (2021) 41(4) *Oxford Journal of Legal Studies* 1066–95.

55 Gender, sexuality, and race/ethnicity may also be considered, but will not be explored within this chapter. On race and police custody see Chapter 10 in this volume; on gender, sexuality, and ethnicity, see V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury Professional 2023).

56 R Dehaghani, S Fairclough and L Mergaerts, *Vulnerability, the Accused, and the Criminal Justice System: Multi-Jurisdictional Perspectives* (Routledge 2023).

57 The only exception here is arguably the assessment for fitness for interview, which acknowledges the impact of physical illness on the suspect. This approach does not, however, lead to the provision of additional support. In short, it results in a delayed interview or possibly no interview at all; the process is not adjusted; it is simply delayed and/or avoided.

58 Gudjonsson (n 27) 68.

59 See, e.g. R Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) 30(2) *Social and Legal Studies* 251–71.

render them vulnerable. In the context of police custody, an individual is situationally vulnerable in a myriad of ways, as discussed later.

First, suspects can be situationally vulnerable because, through the act of being detained, their liberty has been restricted, which results from the authorisation, and continuation of, their detention. Provisions invoked in non-terrorist⁶⁰ cases in England and Wales, allow an initial period of 24 hours detention without charge upon authorisation of a custody officer,⁶¹ 36 hours without charge upon authorisation of a senior officer (of rank Superintendent or earlier) if the offence is indictable,⁶² and thereafter, up to a maximum total of 72 hours by application to the magistrates' court.⁶³ In Ireland,⁶⁴ the situation is a little more complex; depending on the offence in question, provisions variously allow for detention up to an initial period of six⁶⁵ or 24 hours;⁶⁶ initial extensions can be authorised by a Superintendent after six hours⁶⁷ and 18 hours⁶⁸ and by a chief superintendent after 18⁶⁹ and 24 hours.⁷⁰ Further extensions, by Chief Superintendent, are permitted for 12 hours⁷¹ and 24 hours;⁷² and any further extensions can be authorised by the courts,⁷³ with a total maximum of detention time of between 24 hours and seven days. Average detention lengths in Ireland are not (yet) known;⁷⁴ in England

60 The maximum length of detention without charge is longer in terrorism cases – a maximum of 28 days under the Terrorism Act 2006 per s 23.

61 Police and Criminal Evidence Act 1984 s 41. Within the initial 24-hour period, detention must be reviewed no later than after six hours from the authorisation of detention (first review) and then, no later than nine hours after the first review (second review), with subsequent reviews occurring at intervals of not more than nine hours – PACE s 40(3) – and can only be postponed under certain circumstances as per PACE 1984 s 40(4).

62 PACE 1984 s 42. Indictable offences in England and Wales are those to be tried at the Crown Court.

63 PACE 1984 s 43.

64 For more information, see Y Daly, A Muirhead and C Dowd, 'EmpRiSe Ireland Final Report' <<https://empriseproject.files.wordpress.com/2022/06/ab912-emprise-ireland.pdf>> accessed 6 March 2023. Offences Against the State Act 1939 s 30.

65 Criminal Justice Act 1984 s 4; Criminal Justice (Drug Trafficking) Act 1996 s 2; Criminal Justice Act 2007 s 50. Those arrested under Criminal Justice Act 1999 s 42, Criminal Procedure Act 2010 s 16, or Criminal Procedure Act 2010 s 17 may be detained for the same periods as is authorised under Criminal Justice Act 1984 s 4.

66 Offences Against the State Act 1939 s 30.

67 Criminal Justice Act 1984 s 4.

68 Criminal Justice (Drug Trafficking) Act 1996 s 2.

69 Criminal Justice Act 2007 s 50.

70 Offences Against the State Act 1939 s 30.

71 Criminal Justice Act 1984 s 4. See also Criminal Justice Act 1984.

72 Criminal Justice (Drug Trafficking) Act 1996 s 2; Criminal Justice Act 2007 s 50.

73 24-hours is the maximum time under the Criminal Justice Act 1984 s 4, with no further authorisation by the courts; see also n.72. 72 hours is the maximum under the Offences Against the State Act 1939 s 30; 7 days is the maximum under Criminal Justice (Drug Trafficking) Act 1996 s 2 and Criminal Justice Act 2007 s 50.

74 The Garda Inspectorate report on police custody (n 24) published in July 2021 was the first of its kind but regrettably did not examine detention lengths.

and Wales detention has been found to last an average of ten hours.⁷⁵ This restriction of liberty may be justified on various grounds (see Article 5 of the ECHR), but it may render a suspect vulnerable or enhance an already existing “innate” vulnerability. Detention also occurs within an environment that is designed to manage and mitigate risks (e.g. of suicide, self-harm, or harm to others),⁷⁶ is generally unpleasant,⁷⁷ and often sensorily overwhelming – with bright strip-lighting in reception areas and dimly lit cells, noisiness or eery silence, and smells of urine, vomit, faeces, stale blood, (stale) alcohol, body odour, and disinfectant.⁷⁸ Such conditions can be destabilising, overwhelming, and bewildering.⁷⁹

Within police custody, a suspect may be isolated in a multitude of ways. First, a suspect has restricted – if not entirely absent – interaction with relatives and friends. Although a suspect cannot be held incommunicado, they are not permitted to interact with loved ones as, and when, they wish during their period of detention. In England and Wales, a suspect is permitted to have someone – a friend, relative, or other person with an interest in their welfare – informed of their arrest and detention as soon as is practicable (although delays are permitted in some circumstances).⁸⁰ This may be in the form of a phone call from the custody officer⁸¹ or detention officer to the selected person or, at the officer’s discretion, a phone call from the suspect to the selected person. For those entitled to an appropriate adult,⁸² they may have longer interactions with someone known to them, although these interactions are arranged for particular legal purposes such as facilitating participation in police interview, often to the benefit of the police.⁸³ In Ireland, an arrested person is permitted a visit from a relative, friend, or other person with an interest in their welfare, although this visit can be supervised and must not hinder or delay the investigation.⁸⁴ Supervised phone calls and

75 L Skinnis, ‘“Let’s Get It Over with”: Early Findings on the Factors Affecting Detainees’ Access to Custodial Legal Advice’ (2009) 19(1) *Policing and Society* 58–78.

76 Although Skinnis found that some facilities in Ireland had escape routes and ligature points – see L Skinnis, *Police Powers and Citizens’ Rights: Discretionary Decision-Making in Police Detention* (Routledge 2019). See also An Garda Síochána Inspectorate (n 24).

77 See L Skinnis, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2011) 26(3).

78 R Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) 30(2) *Social and Legal Studies* 251–71.

79 *ibid.*

80 PACE 1984, s 56.

81 An officer of at least rank sergeant. In Ireland, this would be the “member in charge” (at garda or sergeant rank).

82 See Home Office (n 24).

83 See Dehaghani (n 1).

84 Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987 s 11.

letters to a nominated person are also permitted in the same circumstances.⁸⁵ These communications are not, importantly, privileged⁸⁶ and may therefore be stifled. A responsible adult may be called for those entitled to one;⁸⁷ although provisions are scant, entitlement is limited to interview, and, for adults, entitlement is only for those with a “mental handicap.”⁸⁸ In both jurisdictions, therefore, interaction with relatives and friends is limited in terms of form and/or function.

Of course, suspects may have several interactions with the police during their stay in police custody. These interactions are typically centred on particular stages of the process – the authorisation of detention;⁸⁹ the communication of rights and entitlements; welfare checks and/or gathering evidence (such as, but not limited to, police interview) – and/or the safeguarding obligations placed on the police and related individuals such as healthcare and medical practitioners. For example, in England and Wales, there are a range of safeguarding measures to prevent harm to, and by, a suspect in police custody. At booking-in, a suspect will typically be asked a range of questions relating to their health and well-being, with the purpose of ascertaining and appropriately managing risk. Significant attention is paid to the risk assessment, at least in terms of safeguarding the police from accusations of a breach of duty of care.⁹⁰ These interactions, in addition to being purely (or at least mostly) motivated by concerns regarding risk management,⁹¹ can themselves be destabilising, frustrating, and/or upsetting.⁹² Thus, not only are these interactions limited, if not entirely ineffective, in ameliorating the sense of isolation that a suspect may be experiencing, but they may also serve to further exacerbate any sense of vulnerability, such as through discussion of, the nature and gravity of, previous self-harm and/or suicide attempts. Conversations with any healthcare practitioners – who are usually present in large custody facilities in England and Wales – may also be driven by risk management procedures and arguably arise solely because the individual has been detained in police custody. As these interactions are not wholly voluntary, they may do little to dispel any feelings

85 Ibid.

86 Ibid.

87 See Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987, Regulation 13(1), Regulation 13(2), Regulation 22(1).

88 Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987, Regulation 22(1). The term “mental handicap” is archaic. Moreover, this category is particularly restrictive as it requires a significant impairment. See Dehaghani (n 1).

89 Although, only by a member in charge in Ireland, for serious offences. See An Garda Síochána Inspectorate (n 24).

90 See Dehaghani (n 1).

91 In the England and Wales context, see, e.g. Dehaghani (n 1).

92 Ibid.

of isolation. In Ireland, there are similar questions asked as part of a risk assessment, as per garda policy.⁹³ Information regarding mental health, learning difficulties, and self-harm, in addition to information regarding the condition of the person (to include any visible injuries, illness, medical condition, and consumption of drugs or alcohol), is gathered through questions posed to the detainee, garnered from general observations, and information from the arresting officer.⁹⁴ Contrastingly, in England and Wales, questions regarding an individual's previous self-harm attempts and other confidential information about their mental (ill) health are asked as part of the risk assessment process. While the purpose of the risk assessment is also, in Ireland, about keeping detainees safe through the prevention and minimisation of harm, similar issues regarding the voluntariness (or otherwise) of these interactions and the effects of the questions asked must be acknowledged.⁹⁵

While isolation may adversely impact any suspect, it also has practical implications in relation to understanding rights and entitlements in custody for those who experience barriers when reading and writing. As Rock notes, detention can interfere with a suspect's ability to understand rights and entitlements because "reading in detention . . . necessitates reading alone";⁹⁶ police custody "dismantles" the support networks upon which individuals may rely in their day-to-day lives.⁹⁷ Therefore, those who can read (somewhat) independently outside of police custody may be unable to do so when detained. This has serious implications for a suspect's understanding of their rights and entitlements and therefore, upon their ability to understand the process and meaningfully engage therein. Attempts may be made to ameliorate this through the provision of an appropriate (in England and Wales) or responsible (in Ireland) adult, although the remit of this safeguard is restrictive in law and restricted practically – it only applies to a narrow category of suspects.⁹⁸

93 See Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987. The Garda Inspectorate also raises concerns regarding the lack of statutory footing for the rights, entitlements, and processes designed to protect suspects' rights and well-being. See An Garda Síochána Inspectorate (n 24). See Conway and Daly for further information on the Garda risk assessment (n 55) at 115–19.

94 Conway and Daly (n 55) at 115–19.

95 In Ireland, there are also concerns about the recording of risk assessment information – paper-based (Ireland), which reduces accessibility of information, particularly information from previous records, as compared with electronic (England and Wales) – and availability and quality of medical attention-on-call and low quality (Ireland) compared with in situ and reliable quality (England and Wales). See Conway and Daly (n 55) at 115–21.

96 F Rock, *Communicating Rights: The Language of Arrest and Detention* (Palgrave Macmillan 2007) at 109.

97 *ibid* at 109.

98 See, e.g. Chapter 12 in this volume; see also Dehaghani (n 1) in the context of England and Wales.

There are also restrictions on matters of daily routine such as eating, drinking, exercise, personal hygiene, and taking medication, which can reduce freedom and autonomy and further contribute to feelings of isolation and vulnerability. Suspects are restricted by the practicalities of detention – they are locked in a cell for most of their stay, with movements controlled and supervised by custody staff. A suspect, while permitted rest time and meals, has limited to no control over when to rest and eat. Showering and toileting may also be limited or restricted. Showers in custody suites may lack functionality and/or privacy⁹⁹ or may depend upon staff availability to provide access. Toilets, typically within the cell, afford some level of privacy, although unannounced welfare checks and lack of access to toilet paper¹⁰⁰ may impede such privacy, and may, therefore, be destabilising, interfere with autonomy, and exacerbate feelings of dependence.¹⁰¹ Consumptions of alcohol, cigarettes, and illicit substances are also prohibited, and access to medication is restricted: in England and Wales, medication must be provided by a healthcare professional subject to restrictive controls¹⁰² and, in Ireland, is subject to medical advice and provided only where the health condition is deemed serious.¹⁰³ The suspect is, therefore, physically and territorially controlled by police,¹⁰⁴ where freedom and autonomy are almost entirely absent.

Suspects may also be subject to behavioural or social control; they may be limited in terms of permitted or accepted behaviour and may be reprimanded or treated punitively for a failure to comply with expected behavioural and/or social norms. Compliance and deference are expected within the context of police custody – suspects are expected to comply with officers' requests¹⁰⁵ and can be punished – or at least treated somewhat punitively – for failing to comply. During observations in police custody in England in 2014 and 2015,¹⁰⁶ suspects who were deferent and compliant were typically treated with courtesy, kindness, and (often) afforded special treatment such as being allowed to take reading materials into their cell or being given extra food and

99 See, e.g. An Garda Síochána Inspectorate (n 24) 68.

100 *ibid* 67. Skinns' research found cell sharing in Ireland to be a not uncommon practice, which can be particularly degrading where a detainee must use the toilet in front of another detainee. Skinns (n 76).

101 Dehaghani (n 1); Dehaghani (n 59).

102 College of Policing, 'Authorised Professional Practice: Detainee Care' <www.college.police.uk/app/detention-and-custody/detainee-care/detainee-care> accessed 18 November 2022.

103 Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987 s 21.

104 J Hodgson, 'Adding Injury to Injustice: The Suspect at the Police Station' (1994) 21 *Journal of Law and Society* 85–101.

105 S Holdaway, *Inside the British Police: A Force at Work* (Basil Blackwell 1983).

106 See Dehaghani (n 1).

drink (although there were certainly classed, gendered, and racialised elements to this treatment and to perceptions of deference and compliance). However, those suspects who were unwilling to answer questions during “booking-in” (such as when questions are asked as part of a risk assessment)¹⁰⁷ or who were seen to be disrespectful, demanding, or difficult, were treated with disdain, and were often threatened with being taken “straight to cell” as a form of punishment. These suspects, while not necessarily treated in breach of law and guidance, were not given the same “luxuries” as those who had been – or were perceived to be – deferent and compliant. Indeed, as Choongh highlights, the “booking-in” procedure, such as risk assessment and searches, can serve as a status degradation ceremony.¹⁰⁸ Less is known about risk assessment procedures in Ireland, although it is likely, given what we know about police culture generally,¹⁰⁹ that booking-in procedures – and other related procedures in police detention – are here too experienced as a form of social discipline.¹¹⁰

The suspect is also subject to informational control¹¹¹ as the police maintain power over the timing, format, and amount of information provided to the suspect. In England and Wales, where a suspect has access to a lawyer, a request for disclosure can be made but may not always be forthcoming.¹¹² In Ireland, where access to a lawyer during police detention has been a relatively recent development, there is no legal obligation on An Garda Síochána to provide information prior to interview (although, practically, not providing information may hamper the police interview and may increase the likelihood of a “no comment” interview).¹¹³ Thus, in both jurisdictions, the police have the upper hand through informational control. The maintenance of informational control can bring with it some degree of uncertainty for

107 Risk assessments are conducted in England and Wales, and in Ireland, although in Ireland, the risk assessment is limited to booking-in only. In comparison, in England and Wales there is an ongoing assessment of risk (at least in theory) and an assessment of risk pre-release. See An Garda Síochána Inspectorate (n 24) and Conway and Daly (n 55) for more information on the risk assessment in Ireland, and College of Policing (n 102) and Dehaghani (n 1) for more information on the risk assessment in England and Wales.

108 S Choongh, *Policing as Social Discipline* (Clarendon Press 1997); see also Dehaghani (n 1).

109 R Reiner, *The Politics of the Police* (4th edn, OUP 2010).

110 Skinnis found that “staff across all . . . detention facilities . . . displayed a . . . coercive style of authority in their relationships with detainees” which included “using a variety of sanctions and rewards to encourage but also reward compliance.” In Ireland, this included the use of cigarettes to get a drunk detainee to sign a consent form. Skinnis (n 76) 146–47.

111 Hodgson (n 104).

112 See, e.g. T Smith, ‘The “Near Miss” of Liam Allan: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice’ (2018) 9 *Criminal Law Review* 711–31.

113 An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Custody* (An Garda Síochána 2016) at 5.

the suspect regarding the evidence available and the progress of the case, including, but not limited to, the length of their detention.¹¹⁴ The suspect also lacks information regarding the outside world, at least for the period of their detention – for those with caring responsibilities, for example, they may worry about how – or whether – their loved one is being looked-after during their detention. Uncertainty can destabilise a suspect to the point that they confess,¹¹⁵ and it is not unusual for suspects to falsely confess when faced with uncertainty.¹¹⁶

Detention in custody also often marks the commencement of the criminal process.¹¹⁷ Within this process, suspects are expected to engage with the legal sphere which brings with it alien, impenetrable, and archaic convention, language, and procedure. Those without legal training (i.e. most suspects) may struggle to comprehend the terms used, and their impacts. One such example is offered by McConville, Sanders, and Leng.¹¹⁸ In this case, the suspect, during an altercation with his girlfriend, had swung his arm out and had hit the windscreen of a parked car leading to his arrest for suspected criminal damage. When asked whether he had swung his arm out “recklessly,” the suspect replied that he had, although it was evident to the researchers that he interpreted “recklessly” to mean “accidentally.” The officer knew that by using the term “recklessly” the *mens rea* of the offence would have been made out (as criminal damage can be committed intentionally or recklessly); the suspect did not understand this to be the case and, by agreeing to have swung his arm out in a reckless manner, had *de facto* admitted to committing the offence.

Access to effective legal advice and representation may ameliorate this legal vulnerability. In Ireland, suspects are permitted to consult a lawyer, but the threshold for access to the state-funded Garda Station Legal Advice Scheme is relatively high, meaning that some suspects may not be in a financial position to pay for legal assistance.¹¹⁹ The position in England and Wales

114 See, e.g. Dehaghani (n 1); Skins (n 75).

115 See Holdaway (n 105) at 102.

116 See generally, Gudjonsson (n 32). Uncertainty generally can cause a suspect or defendant to act against their own best interests. See, e.g. on guilty plea decision-making. RK Helm, R Dehaghani and D Newman, ‘Guilty Plea Decisions: Moving Beyond the Autonomy Myth’ (2022) 85(1) *Modern Law Review* 133–63.

117 It can also be the end point of the criminal process. See J Jackson, ‘Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence’ [2016] *Modern Law Review* 987–1018 – when cases are effectively tried at the police station, or by a police officer rather than a criminal case where detention is used as a form of social discipline and cases were never destined for the criminal justice system. See Choongh (n 108).

118 M McConville, A Sanders and R Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991).

119 A person earning more than €20,316 per annum will not be able to avail of legal assistance under the scheme and will need to pay privately. According to the Central Statistics Office, the average salary per annum in quarter two of 2022, in Ireland, was over €45,000. Central

is considerably more generous – suspects are entitled to free and independent legal advice and representation at police stations, regardless of their income, and may consult their lawyer at any time.¹²⁰ However, the right to legal advice and representation at police stations is found to be restricted in practice. Research in England and Wales has highlighted problems with how suspects understand their right to legal advice and its importance. They may be keen for release as soon as possible and may therefore, view the accessing of legal advice as something that could delay their release (despite the fact that delays are often unconnected with legal advice).¹²¹ They may believe that the offence is less serious, and therefore, no legal advice is required; and/or they may feel that requesting legal advice could undermine the perception of innocence in that the police would infer guilt from the request.¹²² Police ploys may also influence a suspect’s decision to obtain legal advice: important information may be omitted; rights may be read quickly or only once, even where the suspect has not understood what is being said; and rights may be provided verbally.¹²³ This is exacerbated by how the right to legal advice is triggered in England and Wales – as McConville, Sanders, and Leng highlight, it is provided only after a “*positive* request.”¹²⁴

The right to legal advice is also subject to further practical limitations. Legal advice and assistance may be undermined in terms of quantity and quality of provision owing to the paucity of fees for attendance at the police station. In England and Wales, lawyers are paid a fixed fee per police station visit. This fee includes travel costs and time spent waiting at the police station. Research in England and Wales has found that lawyers are reluctant to attend the police station and may offer merely routinised advice.¹²⁵ In Ireland, the right to legal advice and representation throughout police interviews is a more recent development than that in England and Wales – lawyers are accessing a space from which they have previously been largely excluded.¹²⁶ Indeed, as Daly and Conway highlight, it is only a minority of suspects who access legal assistance at garda stations.¹²⁷ Thus, in both jurisdictions,

Statistics Office, *Earnings and Labour Costs Q1 2022 (Final) Q2 2022 (Preliminary Estimates)* (2022).

120 Delay may be permitted in some circumstances. See, e.g. PACE 1984 s 58.

121 See *Skinns* (n 75).

122 *Ibid.*

123 *Ibid.*

124 McConville, Sanders and Leng (n 118) at 50.

125 See D Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart 2013).

126 Lawyers in Ireland “were only permitted to consult with clients in garda stations, not attend the interview” until May 2014. See V Conway and Y Daly, ‘From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station’ (2019) 3 *Irish Judicial Studies Journal* 103–23.

127 Conway and Daly (n 55).

suspects may experience legal vulnerability¹²⁸ caused by paltry provisions on the books or in action. For those with additional needs, a lawyer may be a necessary but insufficient support.

Relatedly, legal advice and assistance have been significantly undermined by adverse inferences on the right to silence.¹²⁹ Not only do adverse inferences interfere with the lawyer–client relationship – as Quirk points out, lawyers are damned if they advise silence and damned if they do not – they also remove the last remaining source of control for the suspect.¹³⁰ A suspect lacking in knowledge of legal language and process may face significant detriment because of adverse inferences, thus further creating or exacerbating vulnerability.¹³¹ Even where legal provisions – and arguably legal processes – are markedly improved, any type of custodial interrogation is coercive when viewed in terms of police power and control.¹³²

Conclusion

This chapter has examined how vulnerability is and could – or should – be defined in respect of suspects detained in police custody. It is worth noting that young age is not often contested as a category of vulnerability, at least in law.¹³³ For adults, the situation is more complicated: there is no widely agreed-upon definition in law and a suspect’s vulnerability may be contested.¹³⁴ Definitions that rely on innate vulnerability may also be somewhat lacking

128 That is vulnerability due to a lack of understanding of legal provisions and process and/or an ability to enforce one’s rights and entitlements. Those who are recognised as particularly vulnerable may have a legal vulnerability, although arguably, suspects’ understanding of their rights is poor. See, e.g. G Gudjonsson, I Clare and P Cross, ‘The Revised PACE “Notice to Detained Persons”’: How Easy Is It to Understand?’ (1992) 32(4) *Journal of the Forensic Science Society* 289–99.

129 In England and Wales, the Criminal Justice and Public Order Act 1994 allows adverse inferences to be drawn from a suspect’s failure to account for certain facts (s 34); refusal or failure to account for objects, substances or marks (s 36); and/or refusal or failure to account for his or her presence at a particular place (s 37). S 35 allows inferences to be drawn from silence at trial. Similarly, in Ireland, adverse inferences can be drawn from an accused’s silence in similar ways. See ss 18, 19 and 19A of the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007. For fuller discussion of the operation of adverse inferences provisions in Ireland, see Y Daly, C Dowd and A Muirhead, ‘When You Say Nothing at All: Invoking Inferences from Suspect Silence in the Police Station’ (2022) 26(3) *The International Journal of Evidence & Proof* 249–70.

130 H Quirk, *The Rise and Fall of the Right of Silence* (Routledge 2017).

131 See, e.g. Skinnis (n 76).

132 Gudjonsson (n 32) at 25. Coercion in police interviews could potentially result in Post-Traumatic Stress Disorder, although a link is yet to be established. See Gudjonsson (n 32) at 35.

133 See Dehaghani (n 10); Mergaerts and Dehaghani (n 2).

134 See, e.g. Mergaerts and Dehaghani (n 2); An Garda Síochána Inspectorate (Ireland) (n 24).

and may fail to consider the broader impacts of police custody and the wider criminal process on a suspect. The psychology and law literature sheds some light on what it means to be a vulnerable suspect and demonstrates why some suspects may potentially be “more vulnerable” than others. Yet, it arguably does not adequately acknowledge the myriad factors which result in the situational vulnerability of a suspect in police custody.

There is a clear need to define vulnerability – and to do so holistically. Without a clear definition of who is included – and excluded – from this category, decision-making on vulnerability could be contested.¹³⁵ The judgment in *Hasáliková* has demonstrated that how vulnerability is defined (or not defined) can impact whether a suspect is protected, which may subsequently impact their fair trial rights. This case also demonstrated the need for clear(er) definitions and greater awareness amongst criminal justice practitioners of the ways in which suspects may be innately or situationally vulnerable.

The issue of situational vulnerability also requires greater attention. Although recognised in *Salduz* and acknowledged in other legal frameworks and cases, there has been insufficient attention paid to the general vulnerability of all suspects. While the argument here has been for a more holistic definition of vulnerability, it is acknowledged that domestic, ECtHR/ECHR, and EU definitions have been so narrow that the starting point would at least be to update the law in line with the evidence base so that innately vulnerable suspects are afforded adequate protection. Importantly, this should include physical, in addition to psychosocial disability. It could also be broader to consider matters such as caring responsibilities (as acknowledged by the ECtHR) which could render a suspect psychologically vulnerable (as it may make a carer feel under pressure to leave the situation to return to those they care for). If there is the will, however, in Ireland, there is significant potential to make strides in this area, and to think more holistically about who is vulnerable in police custody and why – and subsequently, to consider what type(s) of support can be offered to (vulnerable) suspects. Addressing a suspect’s vulnerability – whether specific needs or the general impacts of police custody and the criminal process – should be viewed as a human rights commitment, particularly in securing the suspect’s right to a fair trial. As it stands, a narrow or ill-defined concept of vulnerability may undermine fair trial rights and limit or exclude legal remedies.

135 It is worth acknowledging that England and Wales have had legal provisions aimed at protecting vulnerable suspects since 1986 (and Northern Ireland since 1989). Despite these longstanding provisions, obstacles remain for vulnerable suspects – vulnerability is defined narrowly in law and even more narrowly in practice, vulnerability can be difficult to identify owing to insufficient tools and resources, and police officers may, for myriad reasons, feel safeguards for vulnerable suspects are unnecessary. See Dehaghani (n 1).

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4

TRAUMA AND POLICE CUSTODY

*Jane Mulcahy**

Introduction

Despite increasing recognition of the importance of human rights in recent years, most legal systems are currently “trauma-blind.”¹ This has grave implications for “unrecovered trauma survivors”² who are arrested, detained, charged, prosecuted, and punished for offending behaviour, often in the context of mental illness,³ addiction, and homelessness.

There are many kind, compassionate, heart-centred frontline criminal justice professionals, including police officers, in Ireland and beyond. However, in discharging their duties professionals can also be their own worst enemy.⁴ They can (un)intentionally inflame tense situations with individuals who have a nervous system “in a chronic state of defence”⁵ because they lack training on the prevalence and impact of trauma on human functioning and behaviour.

* The views expressed in this chapter are those of the author and do not represent the position of the Policing Authority.

- 1 J Mulcahy, ‘Connected Corrections and Corrected Connections: Post-Release Supervision of Long Sentence Male Prisoners’ (PhD, UCC 2019) 268. My PhD in Law from University College Cork was co-funded by the Irish Research Council (IRC) and the Probation Service under the employment-based PhD scheme.
- 2 C Whitfield, ‘Adverse Childhood Experiences and Trauma’ (1998) 14(4) *American Journal of Preventive Medicine* 361–64, at 362.
- 3 H Thordarson and T Rector, ‘From Trauma-Blind to Trauma-Informed: Re-Thinking Criminalization and the Role of Trauma in Persons with Serious Mental illness’ (2020) 25(5) *CNS Spectrums* 577–83.
- 4 J Mulcahy, *Submission to Future of Policing Commission* (Commission on the Future of Policing 2018).
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The police wield enormous power. Trauma-blindness puts police officers in a position where they may unknowingly become embroiled in destructive traumatic re-enactment situations with individuals suspected of criminal activity.

The absence of a truly holistic, biopsychosocial framework to explain human behaviour, including so-called deviance is due to a lack of consilience in discrete disciplines including law, criminology, sociology, and psychiatry, that is, an inadequate “linking of facts and fact-based theory across disciplines to create a common groundwork of explanation.”⁶ This has resulted in partial, fragmented accounts of complex issues⁷ such as the causes of addiction, mental health problems, and offending behaviour.

Trauma is best understood as an embodied experience following an event (or a series of events) that overwhelms the person’s capacity to cope, wreaking havoc on their “felt sense”⁸ of safety, health, relationships, and social behaviour. According to Maté, trauma “is not what happens to us, but what we hold inside in the absence of an empathetic witness.”⁹

Problematic drug and alcohol consumption and other self-destructive, risk-taking behaviours including periodic violence can be recast as normal, predictable responses¹⁰ to being perpetually in a state of physiological defensiveness, due to a deadly combination of “structural violence,”¹¹ “relational poverty,”¹² and multiple childhood adversities.¹³ We should re-frame addiction as an attempt to suppress “authentic feelings”¹⁴ that are too painful and

6 E Wilson Consilience, *The Unity of Knowledge* (Alfred A Knopf 1998) 8.

7 I McGilchrist, ‘The Divided Brain: RSA Animate’ (2011) <www.ted.com/talks/iain_mcgilchrist_the_divided_brain> accessed 10 May 2023.

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13 J Mulcahy, ‘How Can the Citizens’ Assembly on Drugs Use Make a Difference?’ *RTE Brainstorm* (9 May 2023).

14 A Miller, *From Rage to Courage: Answers to Readers’ Letters* (Norton 2009) at 53.

overwhelming to face, rather than as “a brain disease” or “caused by chemical imbalance or genetics.”¹⁵

This chapter draws on my PhD findings and upon extensive trauma training that I have undertaken since 2017. It is also informed by interviews I have recorded with a diverse range of experts for the *How to Talk Policy and Influence People* and *Relationships Matter* podcast series on law and justice on YouTube.¹⁶

In this chapter, with a view to informing practice, I provide an overview of brain development and the role of the autonomic nervous system (also referred to as the stress response system) in human development; functioning and behaviour; and a summary of studies on the impact of childhood adversity. Police officers, and others, interacting with suspects in custody need to realise that offending behaviour is often rooted in “relational rupture”¹⁷ and an overdose of trauma originating in the family home and compounded by growing up in marginalised, highly stressed communities where unemployment, food insecurity,¹⁸ substandard housing, low social mobility, and community violence are commonplace.¹⁹ Perry et al. estimate that 90% of the prison population have histories of interpersonal violence.²⁰

I argue that comprehensive trauma training would assist police to recognise the drivers of addiction and mental health symptoms, that is,

15 V Felitti, ‘The Origins of Addiction: Evidence from the Adverse Childhood Experiences Study’ (2004) <www.nijc.org/pdfs/Subject%20Matter%20Articles/Drugs%20and%20Alc/ACE%20Study%20-%20OriginsofAddiction.pdf> accessed 10 May 2023.

16 For the full range of interviews in the two series, see <www.youtube.com/c/JaneMulcahy> accessed 10 May 2023.

17 See K Treisman, ‘Good Relationships Are the Key to Healing Trauma’ <www.youtube.com/watch?v=PTsPdMqVwBg&app=desktop> accessed 10 May 2023.

18 Mulcahy (n 5).

19 W Ellis and W Dietz, ‘A New Framework for Addressing Adverse Childhood and Community Experiences: The Building Community Resilience Model’ (2017) 7(7S) *Academic Pediatrics* S86–93. See also D Jones, ‘Pandemic Policing: Highlighting the Need for Trauma-Informed Services During and Beyond the COVID-19 Crisis’ (2020) 5(2) *Journal of Community Safety and Well-Being* 69–72; K Gillespie-Smith and others, *Moving Towards Trauma-Informed Policing: An Exploration of Police Officer’s Attitudes and Perceptions Towards Adverse Childhood Experiences (ACEs)* (The Scottish Institute for Policing Research 2020); J Connolly and J Mulcahy, *Building Community Resilience: Responding to Criminal and Anti-Social Behaviour Networks Across Dublin South Central – a Research Study* (Four Forum Network and Dublin City Council 2019); J Mulcahy, *Safety in Numbers: An Evaluation of Community Crime Impact Assessment (CCIA) Pilot Projects* (Citywide 2020); J Mulcahy, *Relentless Caring, Trying Something New: An Evaluation of the Targeted Response to Youth (TRY) Project* (Slaintecare, Pobal and Government of Ireland 2021); A Montague, *Building Community Resilience – Sustaining the Momentum* (Dublin City Council 2021).

20 B Perry and others, ‘The Impact of Neglect, Trauma, and Maltreatment on Neurodevelopment’ in *The Wiley Blackwell Handbook of Forensic Neuroscience* (Wiley-Blackwell 2018) 815–35, 826–27.

intergenerational harms such as domestic violence,²¹ incest,²² and emotional neglect.²³ They would become less prone to damaging traumatic re-enactment interactions at the point of arrest. They would be more understanding of suspects' reactions to detention, to requests for cooperation, to questioning at interview, and motivated to find productive ways of engaging with such suspects. Trauma training would emphasise the merits of compassion and clarify the value of elevating "relational repair"²⁴ by treating people with dignity and respect²⁵ regardless of whether they may have committed a criminal offence or are having a mental health crisis.²⁶ It may also encourage more careful use of language and the inclusion of restorative practices²⁷ in policing.

The next section sets out the impact of early trauma or neglect on infant brain development, and its long-lasting impacts on emotional well-being and self-regulation.

State-Dependent Functioning: The Limits of Reason

Contrary to popular opinion, resilient children "are made, not born."²⁸ A baby's development is "experience dependent."²⁹ Perry, a neuroscientist and

21 J Stevens, 'If You Integrate ACEs Science into Batterer Intervention Programs, Recidivism Plummet, and Men (and Women) Heal' (2017) <<https://www.pacesconnection.com/blog/if-you-integrate-aces-science-into-batterer-intervention-programs-recidivism-plummet-and-men-and-women-heal>>.

22 C Courtois, *Healing the Incest Wound* (2nd edn, Norton 2010). See also K Rich, 'Trauma-Informed Police Responses to Rape Victims' (2019) 28(4) *Journal of Aggression, Maltreatment & Trauma* 463–80.

23 B Perry, *Bonding and Attachment in Maltreated Children Consequences of Emotional Neglect in Childhood* (Child Trauma Academy 2013) 3.

24 Treisman (n 17).

25 See V Pratt, 'How Judges Can Show Respect' <www.ted.com/talks/victoria_pratt_how_judges_can_show_respect?language=en> accessed 10 May 2023.

26 See Department of Justice, *Final Report of the High Level Task Force to Consider the Mental Health and Addiction Challenges of Those Who Come into Contact with the Criminal Justice Sector* (Department of Justice 2022); A Lacey, A Cusack and B O'Shea, *Report on a Roundtable Symposium with International Collaborators to Explore the Feasibility of Implementing a Community Safety Co-Response Model in Ireland* (Policing Authority and Irish Research Council 2022).

27 M Finnis, *Restorative Practice* (Independent Thinking Press 2021). See also J Mulcahy, 'Relationships Matter' (Law and Justice Interview with J Brummer) <www.youtube.com/watch?v=pMTMpIuz65Q> accessed 10 May 2023.

28 B Perry and M Szalavitz, *The Boy Who Was Raised as a Dog* (3rd edn, Basic Books 2017) at 38.

29 E Hambrick and others, 'Beyond the ACE Score: Examining Relationships Between Timing of Developmental Adversity, Relational Health and Developmental Outcomes in Children' (2019) 33(3) *Archives of Psychiatric Nursing* 238–47.

child psychiatrist who founded the Child Trauma Academy in Houston and developed the Neurosequential Model of Therapeutics,³⁰ states that children are “malleable.”³¹ They are adaptable, moulded by their environment. This is because the human brain is a social organ.

Siegel, a neuroscientist and clinical professor of psychiatry, employs the term “interpersonal neurobiology” to describe how our relationships and environmental experiences shape our brains, minds, and behaviour.³² The brain develops from the bottom-up, whereby all incoming sensory information first enters the lower brain regions. The brainstem and diencephalon are our “core regulatory networks.”³³ This “reptilian,” survival part of the brain develops first and is fully operational at birth. It processes external sensory stimuli such as smells, sounds, and touch and regulates basic physiological functions like sleeping, breathing, appetite and excretion, the reproductive drive, and homeostasis.

The limbic system, which is the attachment or emotional midbrain, and the cortical “rational” part of the brain (responsible for cognitive information processing, self-awareness, conceptual thinking, speech, impulse control, and consequential decision-making) begin to develop after birth. Their functioning is, therefore, highly experience dependent. By the age of three, a child’s brain is only 10% smaller than an adult brain and has put in place “the majority of systems and structures that will be responsible for all future emotional, behavioural, social, and physiological functioning during the rest of life.”³⁴

Siegel states that the pattern of emotional communication between child and caregiver is the main ingredient of secure attachment.³⁵ Serve and return interactions between mother and baby,³⁶ such as playing peek-a-boo, cause

30 B Perry, *Applying Principles of Neurodevelopment to Clinical Work with Maltreated Children: The Neurosequential Model of Therapeutics* (Child Trauma Academy 2006).

31 B Perry, ‘Incubated in Terror: Neurodevelopmental Factors in the “Cycle of Violence”’ in J Osofsky (ed), *Children, Youth and Violence: The Search for Solutions* (Guilford Press 1997) 124–48.

32 D Siegel, *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are* (2nd edn, The Guilford Press 2015).

33 B Perry and O Winfrey, *What Happened to You? Conversations on Trauma, Resilience, and Healing* (Flatiron Books 2021) at 52.

34 Perry (n 23).

35 Siegel (n 32) at 12.

36 E Tronick and others, ‘The Infant’s Response to Entrapment Between Contradictory Messages in Face-to-Face Interaction’ (1978) 17(1) *Journal of the American Academy of Child Psychiatry* 1–13; C McCarthy, ‘What Happened to You? Understanding the Impact of Chronic Early Adversity and Neglect in Infancy and Early Childhood’ (Toward a Trauma-Responsive Criminal Justice System – Why, How and What Next? ICJA Conference, Dublin, 2018) 17–29, at 23.

neurons to fire and establish positive “memory templates”³⁷ for future relationships. Providing children with nurturant care³⁸ – that is, engaging in cuddles and kisses³⁹ – is crucial for building healthy relational attachments and normal child development.⁴⁰

According to Hebb, a Canadian neuropsychologist, neural pathways become stronger with repeated use.⁴¹ If we do not use certain neural or synaptic connections, we lose them through the process of “pruning,” which occurs to make neuronal transmissions more efficient.⁴² If an infant does not hear enough speech, the neural systems governing language acquisition will not develop properly. Hebb’s rule is usually summarised as “neurons that fire together wire together.”⁴³

Porges, who developed polyvagal theory, states that the human body is on a quest for safety.⁴⁴ Safety switches off the defensive responses of the autonomic nervous system. Regrettably, there is very little understanding within the public, political, or criminal justice system about what humans need to feel physiologically safe.⁴⁵ The human body unconsciously detects danger in the environment. Unlike perception, which connotes conscious awareness of a phenomenon, “neuroception”⁴⁶ is the process by which our nervous system evaluates the presence or absence of risk without our awareness.

Exposure to overwhelming stress in infancy means that the neurons a baby will use most are those linked to the brain’s survival apparatus. The prefrontal cortex will not develop as it would have done if the infant had felt safe,

37 M Szalavitz and B Perry, *Born for Love: Why Empathy Is Essential-and Endangered* (Harper Collins 2010) at 21.

38 N Burke Harris, *The Deepest Well: Healing the Long-Term Effects of Childhood Adversity* (Houghton Mifflin Harcourt 2018) 132–33, Chapter 6.

39 F van Horst and R van der Veer, ‘Loneliness in Infancy: Harry Harlow, John Bowlby and Issues of Separation’ (2008) 42(4) *Integrative Psychological and Behavioral Science* 325–33.

40 Center for the Developing Child, *The Impact of Early Adversity on Children’s Development* (Harvard Center on the Developing Child 2007); N Burke Harris, ‘How Childhood Trauma Affects Health Across a Lifetime’ <www.ted.com/talks/nadine_burke_harris_how_childhood_trauma_affects_health_across_a_lifetime> accessed 10 May 2023.

41 D Hebb, *The Organization Of Behavior: A Neuropsychological Theory* (Wiley 1949).

42 See K Gill and J Cafasso, ‘What Is Synaptic Pruning?’ *Healthline* (2018).

43 See J Calbet, ‘Hebb’s Rule with an Analogy: Psychology and Neuroscience’ (2018) <<https://neuroquotient.com/en/psychology-and-neuroscience-hebb-principle-rule/>> accessed 10 May 2023.

44 S Porges, *The Polyvagal Theory: Neurophysiological Foundations of Emotions, Attachment, Communication, and Self-Regulation* (Norton 2011). S Porges, ‘The Polyvagal Theory: New Insights into Adaptive Reactions of the Autonomic Nervous System’ (2009) 76 *Cleveland Clinic Journal of Medicine* S86–90.

45 S Porges cited in J Mulcahy, ‘The Human Condition: We Are All on a Quest for Safety’ (2020) 1 <www.researchgate.net/publication/340309690_The_human_condition_we_are_all_on_a_quest_for_safety> accessed 10 May 2023.

46 Ibid.

seen, heard, and loved. Fear promotes the production of cortisol in children and activates the autonomic nervous system. The “defence cascade”⁴⁷ activates a fight/flight/freeze, fawn,⁴⁸ or collapse/shutdown⁴⁹ response (dissociation) will follow.

Fear causes humans to “flip their lids”⁵⁰ and become ruled by their reptilian, survival brains and emotional limbic system, inhibiting higher cortical functioning including impulse control. If we become chronically stressed as babies because our caregivers are frightening, or because they ignore us due to severe depression, drug addiction, or alcoholism, we will be less playful and curious, unmotivated to explore our environment. Our capacity to learn, to behave in compliance with social norms, and to form warm, reciprocal relationships with other people may be gravely impaired.

For individuals who meet the descriptor of “life-course-persistent-offenders”⁵¹ with chronic addictions and mental health struggles, their debilitating “dis/ease”⁵² may often be born of disorganised attachment, due to unpredictable, frightened, or frightening caregiving⁵³ and complex trauma.⁵⁴

Levine⁵⁵ states that trauma initiates “a biological response that needs to remain fluid and adaptive, not stuck and maladaptive. A maladaptive

47 K Kozłowska and others, ‘Fear and the Defense Cascade: Clinical Implications and Management’ (2015) 23(4) *Harvard Review of Psychiatry* 263–87.

48 P Walter, ‘Codependency, Trauma and the Fawn Response’ (2003) <www.pete-walker.com/codependencyFawnResponse.htm> accessed 10 May 2023.

49 A Anthony, ‘Stephen Porges: “Survivors Are Blamed Because They Don’t Fight”’ *The Guardian* (London, 2 June 2019).

50 See D Siegel, ‘Flipping Your Lid: A Scientific Explanation’ (2012) <www.youtube.com/watch?v=G0T_2NN0C68> accessed 10 May 2023.

51 J Laub and R Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (Harvard UP 2003) at 6. See also L McAra and S McVie, *Causes and Impacts of Offending and Criminal Justice Pathways: Follow-Up of the Edinburgh Study Cohort at Age 35* (Edinburgh UP 2023).

52 A Antonovsky, ‘The Sense of Coherence: An Historical and Future Perspective’ (1996) 32 *Israeli Journal of Medical Science* 170–78.

53 M Main and E Hesse, ‘Parents’ Unresolved Traumatic Experiences Are Related to Infant Disorganized Attachment Status: Is Frightened and/or Frightening Parental Behavior the Linking Mechanism?’ in M Greenberg and others (eds), *Attachment in the Preschool Years* (Chicago UP 1990) 161–82; G Boyle, *Tattoos on the Heart; the Power of Boundless Compassion* (Free Press 2010). See also G Boyle discuss how gang members accessing his training programme at Homeboy Industries typically have disorganised attachment and never learned how to self-soothe <<https://twitter.com/nanettemutrie/status/1163554627746508800>> accessed 10 May 2023; E Hart in ‘Dublin Narcos’ (2023) Episode 2 – The Entrepreneurs.

54 J Herman, *Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror* (2nd edn, Basic Books 2015) at 260.

55 See Somatic Experiencing International, ‘Transforming Lives Through Healing Trauma’ <<https://traumahealing.org/>> accessed 10 May 2023.

response is not necessarily a disease, but a dis-ease – a discomfort that can range from mild uneasiness to downright debilitation.”⁵⁶

The next section discusses Adverse Childhood Experiences.

Adverse Childhood Experiences

The original Adverse Childhood Experiences (ACEs) study published in 1998 was a partnership between Kaiser Permanente, a health insurance company, and the US Centers for Disease Control and Prevention (CDC).⁵⁷ The study involved over 17,000 mainly White, middle-class, college-educated Americans with health insurance. Respondents answered questions about their childhood exposure to emotional, physical, and sexual abuse, emotional and physical neglect, and household dysfunction including separation from a parent, living with a mentally ill person or someone with an addiction, or having a family member in prison.

The more ACEs a person accumulated before turning 18 years old, the greater their risk of common diseases such as ischemic heart disease, obesity, cancer, diabetes, and high blood pressure, as well as mental illness, addiction, and relational stress. According to the authors, 64% of respondents had at least one ACE and 12% of the population had an ACE score of four or more. Accumulating four or more ACEs almost doubled the risk of heart disease and cancer, increased the likelihood of becoming an alcoholic by 700% and the risk of attempted suicide by 1,200%.⁵⁸

In a 2015 report, on the links between the social determinants of health and ACEs, Allen et al. wrote that:

[t]here is a clear inequalities dimension to ACEs. While all ACEs are present across society, inequalities in wealth, disadvantage and the existence of poverty impact on the chances of experiencing ACE. Children growing up in disadvantaged areas, in poverty, and those of a lower socioeconomic status are more likely to be exposed to ACEs compared to their more advantaged peers – and more likely to experience “clustering” (co-occurring) of ACEs . . . Aside from these socioeconomic factors, there is a range of other risk factors for ACE, including poor and harmful parenting approaches and the relative stress under which families live.⁵⁹

56 P Levine and A Frederick, *Waking the Tiger: Healing Trauma* (North Atlantic Books 1997) at 37.

57 VJ Felitti and others, ‘The Relationship of Adult Health Status to Childhood Abuse and Household Dysfunction’ (1998) 14 *American Journal of Preventive Medicine* 245–58.

58 *ibid* at 252.

59 M Allen and A Donkin, *The Impact of Adverse Experiences in the Home on the Health of Children and Young People, and Inequalities in Prevalence and Effects* (Institute of Health Equity 2015).

In 2018, Ellis et al. called for greater focus on structural and systemic adversity, which cause toxic stress across entire communities. Adverse community environments are usually deprived, urban places where high levels of ACEs proliferate from household to household. Individual and family adversities often accumulate alongside poverty, unemployment, discrimination, community violence, poor housing, and low social and economic mobility. The authors state that:

[w]hen families live in communities in which food insecurity, domestic violence, challenges to parenting, unemployment, inadequate educational systems, crime, and social justice issues are common, the result is an environment in which ACEs abound, needed social supports are scarce, and toxic stress results.⁶⁰

Harris, former Surgeon-General of California, observes that in extremely deprived communities with low levels of individual and collective resources, trauma is “endemic.”⁶¹ This means that “it isn’t just handed down from parent to child and encoded in the epigenome; it is passed from person to person, becoming embedded in the DNA of society.”⁶²

The CDC published findings in 2019 on 144,000 adults from 25 States in America. According to the report, 61% of adults had at least one ACE and 16% had four or more ACEs.⁶³ Women, Native Americans and African Americans were more likely to experience four or more ACEs.⁶⁴ In the same year, the CDC published a document on preventing ACEs and violence, by adopting a multi-generational approach. The report called for greater economic supports for families and the promotion of social norms that protect against violence and adversity. It also recommended that active steps be taken to ensure a healthy early years’ experience for children and the development of schemes connecting youth to caring adults, for example, via mentoring programmes.⁶⁵

The Adverse Childhood Experiences International Questionnaire (ACE-IQ), developed by the World Health Organization (WHO) and the CDC for global use, contains a wider range of adversities than the original study. It poses questions on family dysfunction; parental death; hunger; physical, sexual, and emotional abuse and neglect by parents or caregivers; bullying

60 Ellis and Dietz (n 19).

61 Burke Harris (n 38).

62 *ibid* at 132–33.

63 Centers for Disease Control and Prevention, *Preventing Adverse Childhood Experiences (ACEs) to Improve U.S. Health* (CDC 2019).

64 *ibid*.

65 Center for Disease Control and Prevention, *Preventing Adverse Childhood Experiences: Leveraging the Best Available Evidence* (CDC 2019) at 9.

(e.g. due to race, skin colour, LGBTQIA+ identity); peer violence; witnessing community violence; and exposure to collective violence, such as warfare, terrorism, and genocide.⁶⁶ The WHO states that:

[i]t has been shown that considerable and prolonged stress in childhood has life-long consequences for a person's health and well-being. It can disrupt early brain development and compromise functioning of the nervous and immune systems. In addition because of the behaviours adopted by some people who have faced ACEs, such stress can lead to serious problems such as alcoholism, depression, eating disorders, unsafe sex, HIV/AIDS, heart disease, cancer, and other chronic diseases.⁶⁷

Various studies on ACEs prevalence amongst people with offending behaviour have been published. Higher ACE scores have been associated with substance abuse,⁶⁸ intimate partner violence, victimisation or perpetration as an adult,⁶⁹ recidivism⁷⁰ and greater risk of future incarceration.⁷¹ Reavis et al. reported high levels of ACEs amongst their sample of 151 San Diego-based offenders who were court-ordered to submit to psychological treatment.⁷² Four times as many offenders surveyed had four or more ACEs in comparison to non-offending males.

In Norway, Friestad et al. researched the relationship between ACEs, suicide attempts, and drug use, amongst imprisoned females. They found that 34% of the 141 women surveyed reported experiencing more than five ACEs. After controlling for age, immigrant background, and marital status, the ACE score was linked to an increased risk of attempted suicide and active drug use.⁷³

66 WHO, *Adverse Childhood Experiences International Questionnaire (ACE-IQ)* (WHO 2018).

67 Ibid.

68 M Bowles and others, 'Family Influences on Female Offenders' Substance Use: The Role of Adverse Childhood Events Among Incarcerated Women' (2012) 27(7) *Journal of Family Violence* 681–86.

69 C Whitfield and others, 'Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults: Assessments in a Large Health Maintenance Organization' (2003) 18(2) *Journal of Interpersonal Violence* 166–85.

70 S Manchak, J Skeem and K Douglas, 'Utility of the Revised Level of Service Inventory (LSI-R) in Predicting Recidivism After Long-Term Incarceration' (2008) 32(6) *Law and Human Behavior* 477–88.

71 L De Ravello, J Abeita and P Brown, 'Breaking the Cycle/Mending the Hoop: Adverse Childhood Experiences Among Incarcerated American Indian/Alaska Native Women in New Mexico' (2008) 29(3) *Health Care for Women International* 300–15.

72 J Reavis and others, 'Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?' (2013) 17(2) *The Permanent Journal* 44–48.

73 C Friestad, R Åse-Bente and E Kjelsberg, 'Adverse Childhood Experiences Among Women Prisoners: Relationships to Suicide Attempts and Drug Abuse' (2014) 60(1) *International Journal of Social Psychiatry* 40–46, at 40.

Moore et al. investigated whether the number of ACEs in an offender's life increased their risk of reoffending, according to the Level of Service Inventory – Revised (LSI-R) risk assessment tool. In a survey of 141 offenders on probation and parole in a community project, the authors controlled for race, age, and gender, discovering that “early negative experience can predict future risk.”⁷⁴ The more ACEs that an offender had accumulated, the higher their LSI-R risk level.

A 2015 Welsh report by Public Health Wales asked 2,028 Welsh adults about their ACE exposures, current health status, and social behaviours. According to the study, 47% of respondents self-reported experiencing one ACE, while 14% experienced four or more. By contrast with respondents who experienced no ACEs, people who accumulated in excess of four were:

- 14 times more likely to have been a victim of violence over the last year;
- 15 times more likely to have committed violence against another person in the last year;
- 16 times more likely to have used crack cocaine or heroin; and
- 20 times more likely to have been imprisoned.

Public Health Wales published a report on ACEs prevalence amongst prisoners in Parc prison in 2019,⁷⁵ finding that 80% of respondents had one ACE and 46% experienced four or more. The percentage of people with four or more ACEs increased from 25.4% amongst first-time prisoners to 58.9%, of individuals who reported being imprisoned more than seven times.

Turning to research in Ireland, in 2017, Lambert et al. reported on the trauma histories of homeless service users at the Cork Simon Community. Of the 50 service users surveyed, 77% had more than four ACEs, while 8% had 10 ACEs.⁷⁶ Dermody et al. conducted an ACEs study amongst women presenting to homeless services, probation, and drug treatment in Limerick.⁷⁷ A total of 24 Irish women participated in semi-structured interviews, answering questions on ACEs. Over 55% (n = 13) of the women experienced more than five ACEs. Five women had an ACE score of eight. The authors observe that normal trauma responses like fear, anger, and elation sit at one end of the arousal continuum, with dissociation (i.e. where the conscious brain disconnects from

74 M Moore and A Tatman, ‘Adverse Childhood Experiences and Offender Risk to Re-offend in the United States: A Quantitative Examination’ (2016) 11 *International Journal of Criminal Justice Sciences* 148–58.

75 K Ford and others, *Understanding the Prevalence of Adverse Childhood Experiences (ACEs) in a Male Offender Population in Wales: The Prisoner ACE Survey* (Public Health Wales 2019).

76 S Lambert and G Gill-Emerson, *Cork Simon Community: Moving Towards Trauma Informed Care. A Model of Research and Practice* (Simon Community 2017).

77 A Dermody and others, ‘Resilience in the Face of Trauma: Implications for Service Delivery’ (2018) 15 *Irish Probation Journal* 161–78.

the body to survive)⁷⁸ and disengagement at the other end, which “can make it difficult for trauma survivors to engage with mainstream services, and, indeed, for mainstream services to engage meaningfully with trauma survivors.”⁷⁹

Childhood adversities/stressors disclosed by the 12 prisoner interviewees in Ireland in my PhD study included attachment disruption, poverty, food insecurity, low social mobility, domestic violence, physical abuse, bullying and peer violence, high levels of community drug taking, multiple tragic bereavements,⁸⁰ care experience, being in the child detention system and institutional violence.⁸¹

ACEs exposures amongst participants in Garda Youth Diversion Projects published in 2020 found that while 96% of the 125 children had experienced at least one ACE, 63% had four or more childhood adversities and 36% experienced more than six ACEs. The authors claim that the ACEs profile of the teenage participants has more in common with “populations accessing homeless, probation and substance use support services” than the general population.⁸²

Research suggests that the more adversities/stressors that a person has experienced before the age of 18 years, the higher their risk of dis/ease and offending behaviour. Having discussed early child development with reference to interpersonal neurobiology, state-dependent functioning, and polyvagal theory, and then summarised the ACEs research, I will now proceed to explain that addiction-related offending behaviour is a normal, predictable consequence of trauma.

Trauma, Addiction, and Offending

The following interview extract with Cathal (a pseudonym meaning “strong in battle”) describes how disorganised attachment and non-existent nurturant care led to imprisonment for 21 years, in relation to mostly short sentences for drug-related thefts.⁸³ He also reported being on medication for depression and anxiety for years.⁸⁴

Cathal: I was in an’ out of care homes. I come from a dysfunctional family. I weren’t given a fair life, to be honest wit’ ya. DJunno?

JM: Yeah. And did you leave school early?

78 J Mulcahy, ‘Relationships Matter’ (Law and Justice Interview with R Lanius 2023) <<https://youtu.be/IsJHIFj9IGU>> accessed 16 May 2023.

79 Ibid at 164.

80 N Vaswani, ‘Loss and Adversity in Childhood: How Adversity, Gender and the System Can Interact’ in *NSH Adverse Childhood Experiences: Learning from Research for Better Policy and Practice in Scotland – Event report* (NHS 2019).

81 Mulcahy (n 1).

82 A Dermody and others, *An Exploration of Early Life Trauma and Its Implications for Garda Youth Diversion Services* (YouthRISE 2020) at 5.

83 Mulcahy (n 1). All interview transcripts were transcribed verbatim without being sanitised to reflect accent/social positioning and include pauses, changes in tone/pitch due to emotional arousal, etc.

84 Department of Justice (n 26) at 1.21 on the roll-out of dual diagnosis services.

Cathal: (high pitched) Yeah. I did leave school early. Djunno? Weren't given a fair life, like. Djunno what I mean?

JM: And so would you think – like when you've done the addiction counselling and stuff, why do you think you've taken drugs?

Cathal: (high pitched) For wha' I was watchin' at five years of age a' home. Dat's where it all started. (high pitched, soft) Watchin' me mudder ge' bate by me fa-der. Dat's where. It all kicked off when I was a small little child wit' nobody to hug me. (high pitched) I'm gone into all dis in treatment. (high pitched) I know who I am. I know *why* I am. . . . I went back t'rough all dese years. I put it out in groups. I don't hold in naught'n no more. (pre-release interview)

A 2005 study on mental illness in Irish prisons reported that between 61% and 79% of prisoners had addiction problems and many used “multiple intoxicants, including alcohol, benzodiazepines, opiates, cannabis and stimulants.”⁸⁵ Alexander, the addiction scholar behind the Rat Park experiments which aimed to demolish the “Myth of the Demon Drug,”⁸⁶ conceptualises addiction as an adaptive response to the dislocation (alienation and disconnection) caused by unrelenting social and environmental fragmentation, and the crushing of cultures.⁸⁷ Alexander defines dislocation as:

the experience of a void that can be described on many levels. On a social level it is the absence of enduring and sustaining connections between individuals and their families and/or local societies, nations, traditions, and natural environments. In existential terms, it is the absence of vital feelings of belonging, identity, meaning, and purpose. In spiritual terms it can be called poverty of the spirit, lack of spiritual strength, homelessness of the soul, or feeling forgotten by God.⁸⁸

The attachment/rewards and incentives/motivation brain circuits are altered by childhood trauma and the denial of “emotional nourishment,” and then ravaged further by the addictive process.⁸⁹ Addicted humans are trapped in a

85 HG Kennedy and others, *Mental Illness in Irish Prisoners Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners* (National Forensic Mental Health Service 2005) at 1.

86 BK Alexander, ‘Rat Park Versus The New York Times’ <www.brucealexander.com/articles-speeches/281-rat-park-versus-the-new-york-times> accessed 10 May 2023.

87 BK Alexander, *The Globalization of Addiction: A Study in Poverty of the Spirit* (OUP 2008).

88 BK Alexander, *Healing Addiction Through Community: A Much Longer Road Than it Seems?* (Revised Version of Keynote Address at the ‘Creating Caring Communities’ Conference, Selkirk College, 14 May 2014).

89 G Maté, *In the Realm of Hungry Ghosts: Close Encounters with Addiction* (Vermillion 2018) at 292.

prison of sensory, emotional, and psychological dysregulation, in which they place undue value on non-traditional rewards, for example, street drugs or gambling. Their habit structures are built around acquisition of said rewards. Maté states that the cortex, “whose job it is to censor inappropriate actions – to exercise the ‘free won’t’ – is hobbled. Brain lock sets in: the milliseconds that afford the possibility of ‘just saying no’ flash by.”⁹⁰

Alexander et al.’s theories on the nature of addiction stand in stark contrast to the traditional pharmacological theory of addiction (focusing on the inherent addictive quality of the substance and how it chemically commandeers the brain),⁹¹ rational choice theory, and the disease model of addiction, by explaining it as a combination of attachment disruption, searing emotional pain caused by childhood trauma and social alienation.

According to Miller, a Swiss psychologist who broke away from Freudian psychoanalysis due to its preoccupation with fantasies rather than real-life events notes that “all psychic disturbances and addictions have their causes in the denial of one’s own childhood’s suffering.”⁹² Felitti, one of the principal investigators in the 1998 ACEs study, states that “[a]ddiction is best viewed as an understandable, unconscious, compulsive use of psychoactive materials in response to abnormal prior life experiences, most of which are concealed by shame, secrecy, and social taboo.”⁹³

Every one of the 12 imprisoned men I interviewed for my PhD informed me that addictions underpinned their offending behaviour. Generally, the addictive behaviours revolved around unsafe consumption of drugs and alcohol. Four interviewees spoke of the sad, isolating consequences of heroin addiction and resultant criminality. One interviewee who had hundreds of driving convictions told me he frequently drove at high speeds in stolen cars when intoxicated. This posed a serious life threat to himself and others.

Sumrok, an addiction specialist, asserts that resorting to alcohol and drug consumption to self-soothe is a normal response to ACEs, “just like bleeding is a normal response to being stabbed.”⁹⁴ Several interviewees spoke of possessing an unpredictable, explosive part of themselves. A “feared self”⁹⁵ burst forth when they combined benzodiazepines with alcohol.

90 Ibid., 292–93.

91 J Hari, *Chasing the Scream: The First and Last Days of the War on Drugs* (Bloomsbury 2016) part IV, especially Chapter 13.

92 A Miller, *The Truth Will Set You Free: Overcoming Emotional Blindness and Finding Your True Adult Self* (Basic Books 2001) at 42.

93 Felitti (n 15).

94 J Stevens, ‘Addiction Doc Says: It’s Not the Drugs. It’s the ACEs . . . Adverse Childhood Experiences’ (2 May 2017) <<https://acestoohigh.com/2017/05/02/addiction-doc-says-stop-chasing-the-drug-focus-on-aces-people-can-recover/>>.

95 R Paternoster and S Bushway, ‘Desistance and the Feared Self: Toward an Identity Theory of Criminal’ (2009) 99(4) *Journal of Criminal Law and Criminology* 1103–56.

Subcortical survival-oriented affects which Panksepp, a neuroscientist, refers to as “mammalian/human birthrights” include fear, grief/panic, and rage.⁹⁶ For many interviewees, violence⁹⁷ and other dangerous risk-taking behaviours gave them a means of ventilating suppressed emotions. Corrigan, a psychiatrist and developer of Deep Brain Reorienting,⁹⁸ states that benzodiazepines eliminate fear, including fear of consequences.⁹⁹ When combined with alcohol their consumption can lead to catastrophic outcomes.¹⁰⁰ Some of my interviewees described violent behaviour that they claimed was uncharacteristic of them when sober. It was as if the men unconsciously engaged in excessive drinking and drug abuse to permit their buried rage to come to the surface, albeit treacherously.

Trauma survivors are frequently unsettled by bottom-up *hijacking*, which cuts off access to the cortex responsible for rational choice, impulse control, future planning, and empathetic connection with others. Nervous system dysregulation caused by chronic traumatic re-experiencing and avoidance renders the thinking brain inaccessible.¹⁰¹ The more childhood trauma a person has endured, the more likely they will be perceived as difficult, disengaged, and “hard to reach.” This is because they have high levels of interpersonal mistrust, a tiny “window of tolerance”¹⁰² (to deal with the inevitable ups and downs of life), and poor executive functioning.

Reared in chaos and deprivation, surrounded by violence, many offenders have all too frequently been hurt and, in turn, hurt others. In the case of drug users who commit crimes, their impaired attachment/rewards and incentives/motivation brain circuits, which were impacted by growing up in an adverse community environment, are ravaged further by the addictive process.

In the next section, I explore the possibility that every interaction can be “an intervention”¹⁰³ and contrast this trauma-responsive ideal with the reality that police encounters can easily descend into traumatic re-enactment scenarios,

96 J Panksepp, ‘Affective Neuroscience of the Emotional BrainMind: Evolutionary Perspectives and Implications for Understanding Depression’ (2010) 12(4) *Dialogues in Clinical Neuroscience* 533–45.

97 G Hassan, *Violence Is Preventable, Not Inevitable: The Story and Impact of the Scottish Violence Reduction Unit* (Violence Reduction Unit 2019). See also Mulcahy (n 5).

98 See Deep Brain Reorienting, ‘Deep Brain Reorienting (DBR) Is a Trauma Psychotherapy’ <<https://deepbrainreorienting.com/>> accessed 16 May 2023.

99 F Corrigan, *Deep Brain Reorienting: Healing Trauma and Attachment Shock* (PCPSI Training, Bessborough Centre Cork, 19 October 2019). See also K Murphy and others, ‘You Don’t Feel: The Experience of Youth Benzodiazepine Misuse in Ireland’ (2018) 50(2) *Journal of Psychoactive Drugs* 121–28.

100 Mulcahy (n 10).

101 P Ogden, C Pain and J Fisher, ‘A Sensorimotor Approach to the Treatment of Trauma and Dissociation’ (2006) 29 *Psychiatric Clinics of North America* 263–79, at 265.

102 Siegel (n 32) at 281–86.

103 K Treisman, *Assumptions, Principles, & Values of a Trauma-Informed Organisational Culture: A Paradigm Transformation – a Different Lens* (Safe Hands Thinking Minds 2018) at 10.

due to the inherent power dynamics and a lack of police awareness about neurodevelopment or the relational and behavioural consequences of trauma.

Community Commitment – “Every Contact Leaves a Trace”

Regarding the incriminating nature of DNA evidence, Locard stated that “every contact leaves a trace.”¹⁰⁴ According to Garda management, Locard’s assertion:

applies to more than the inanimate. Every contact between every member of An Garda Síochána and a member of the public leaves a trace on both sides. It’s up to us to make sure it’s a good impression.¹⁰⁵

Every interaction between a member of An Garda Síochána and a person in custody being questioned about an alleged offence undoubtedly leaves a trace, whether positive or negative on the suspect.

Police behaviour also leaves an imprint on malleable young children who witness their parent being arrested in harsh circumstances. Name-calling or other abusive behaviours by gardaí when interacting with members of the Traveller community contribute to a neuroception of danger and mistrust,¹⁰⁶ where innocent children develop a felt sense of persecution from an early age, that is, that they will be over-policed and under-protected because of their heritage.¹⁰⁷

In his Foreword to An Garda Síochána’s Strategy Statement 2022–2024, Garda Commissioner Harris wrote that:

[k]eeping people safe and protecting the vulnerable and victims of crime remains our central mission. Our role brings us in contact with people who have experienced injury, trauma and people who are suspected of wrongdoing. In every case, it is incumbent on us to protect their dignity and human rights and ensure a just outcome for all. It is through a clear focus on visibility, the vulnerable, victims and human rights that our values will be given practical effect.¹⁰⁸

104 An Garda Síochána, *Modernisation and Renewal Programme 2016–2021* (An Garda Síochána 2016) at 12.

105 Ibid.

106 See J Mulcahy, ‘Relationships Matter’ (Law and Justice Interview with E Flynn, Traveller Activist 2022) <<https://soundcloud.com/jane-mulcahy/law-and-justice-interview-with-eileen-flynn-traveller-activist>> accessed 16 May 2023.

107 S Joyce and others, *Irish Travellers’ Access to Justice* (European Centre for the Study of Hate 2022). See also A Barry, ‘Garda Síochána Does Not Engage in Ethnic Profiling’ *The Journal* (26 March 2014).

108 See An Garda Síochána, *Strategic Statement 2022–2024* (An Garda Síochána 2022) at 2. See further Chapter 9 in this volume.

It is crucial that police acknowledge that people who are suspected of wrongdoing are very likely to also have experienced injury and trauma.

In the strategic pillar on community, the service commits to “continue to strengthen connections with communities, working in partnership to keep people safe,” listing as a strategic objective that “[p]eople across all communities know and trust An Garda Síochána and are confident in reporting crime.”¹⁰⁹

The intergenerational nature of trauma across certain communities is important to consider in this context. An Garda Síochána must ensure that through the actions of its members it does not contribute to the injury of already underserved, oppressed groups such as the Traveller community,¹¹⁰ or other minority ethnic groups such as Black Irish people,¹¹¹ or people living in certain socio-economically deprived areas with high levels of adverse community experiences.¹¹²

In the strategic pillar on victims and vulnerable persons, An Garda Síochána commits to reduce harm “by promoting and protecting the dignity and Human Rights of victims and all vulnerable persons interacting with An Garda Síochána.”¹¹³

I have previously recommended that the entire service should be trained in the prevalence and impact of childhood trauma on individuals and marginalised communities. This would lead to An Garda Síochána adapting its approach to dealing with suspected offenders, their families and communities, towards trauma-responsive practice based on an understanding of the human cost of high levels of ACEs amongst the so-called criminal classes.

An Garda Síochána might well find that people who are, or are at risk of becoming “prolific” offenders are, in fact, better understood as unrecovered trauma survivors whose offending behaviour is just one “minor” affliction caused by massive exposure to trauma in their early years.¹¹⁴

109 Ibid. at 9.

110 See Mulcahy (n 106). See also J Mulcahy, *Excluded from the World: The Impact of Trauma, Racism and Social Inequity* (Submission to the Seanad Public Consultation on Travellers: Towards a More Equitable Ireland 2020).

111 See iReport, *Reports of Racism in Ireland* (INAR 2021); Ionann, ‘Audit of Human Rights’ (2004) <www.garda.ie/en/about-us/publications/general-reports/garda-human-rights-audit.pdf> accessed 16 May 2023. At 11, the authors write that “[s]ome statements by senior officers and the organisational responses to some groups, such as Travellers and the Nigerian Community, could be said to amount to institutional racism.” See also Jones 19. See further Chapter 10 in this volume.

112 Ellis and Dietz (n 19).

113 An Garda Síochána (n 108) at 11.

114 Mulcahy (n 4).

Offending behaviour is only one of many debilitating problems of “unrecovered trauma survivors.”¹¹⁵ For those who spent their formative years in abusive, volatile environments where other people came to be perceived as a source of danger, interpersonal interactions are fraught with difficulty in any social setting.

To return to the neurobiological importance of safety and the ability to respond appropriately to social cues, Treisman describes hostile attribution bias as “face and mind-reading difficulties.”¹¹⁶ Traumatised people have a neuroception which is highly attuned to danger signals, rendering them prone to reading neutral cues as threatening. They are also more emotionally reactive to negative facial expression and often respond aggressively to “personal space violations.”¹¹⁷

The police wield power and have important functions to perform, involving public protection, community safety, and the investigation of criminal offences. However, individual officers undermine their contribution to the common good, if they are (un)consciously traumatising individuals in the discharge of their duties. Providing trauma training to gardaí could be transformative for their interactions with suspects at the point of arrest and throughout the custody period.

An example of traumatic re-enactment from my PhD is a physical altercation between a young man, Daithi, and a Garda on the street, which appears to be directly linked to prison “shock” trauma.¹¹⁸ When I first interviewed Daithi, he felt unable to mix safely with other prisoners and had been living on the protection landing at his own request for months, having survived a vicious knife attack while imprisoned. Although he worked in the laundry, he was unable and unwilling to attend the school because he was fearful of large groups of people since the attack.

Daithi reported suffering flashbacks, racing thoughts and sensory flooding.¹¹⁹ He was unable to be fully alive in the present.¹²⁰ He recounted lurid memories of the blood pumping down his neck and face, almost appearing to take a perverse delight in reliving the horror of the moment: “Dey really cu’ me to de *skull* like. It wasn’t just dey cu’ me bad, like dey *tortured* me. And people don’t really can *understand* da’ like.”

115 Whitfield (n 2).

116 K Treisman, *Working with Relational and Developmental Trauma in Children and Adolescents* (Routledge 2017) at 212.

117 Perry and others (n 20) at 826–27.

118 Levine and Frederick (n 56).

119 Mulcahy (n 78).

120 B van der Kolk, J Hopper and J Osterman, ‘Exploring the Nature of Traumatic Memory: Combining Clinical Knowledge with Laboratory Methods’ in J Freyd and A DePrince (eds), *Trauma and Cognitive Science: A Meeting of Minds, Science, and Human Experience* (Haworth Press 2001) 9–31.

My second interview with Daithi occurred almost a year after release. Several attempts to connect in the community had proven fruitless due, in part, to escalating drug use. He told me he had been sleeping with knives under his pillow since his release from prison. Daithi had allegedly assaulted a garda on the street, in the early afternoon, close to a garda station. He was walking with his ex-girlfriend and a male friend. Daithi claimed that the garda stopped and searched him and his friend “for naugh’n.” The garda found heroin-related paraphernalia on his friend, which prompted Daithi’s ex-girlfriend to express disgust. This provoked a belligerent response from Daithi’s friend. The whole situation quickly spiralled, leading Daithi to become involved in a physical altercation with the garda.

I noted in my PhD that the garda’s attempt to touch Daithi:

was read by his primitive reptilian brain as an existential threat. During the knife attack in prison he had been immobilised in fear, unable to fight off, or escape the gang. All that mattered in this traumatic re-enactment scenario was that he could successfully defend himself, so his autonomic nervous system prompted his mobilisation responses to kick in and he fought for his life.¹²¹

Trauma optimises the person’s visceral responses of defence, that is, fight and flight. Where the body senses that defence is impossible due to life threat, it shuts down. According to Porges, trauma impacts the brain and gets into your body and muscle tone. “You become a different person.”¹²² As a young male mixing in circles rife with drug use and offending behaviour, including acts of violence, there was little safety or comfort in Daithi’s world. He was plagued by intrusive memories. Terrifying nightmares of being set upon by a group and utterly powerless to protect himself (as he had been during the real-life attack) haunted him unabated.

As things stand, most police officers across the world, in addition to defence lawyers, prosecutors, judges, risk management enthusiasts, reentry scholars, desistance theorists, and frontline criminal justice service providers, are uninformed about the subcortical, unconscious (and therefore *irrational*) marvel of neuroception. There is a lack of understanding that nervous system dysregulation can lead to impulsive acts of violence.

Inadequate awareness of “state-dependent functioning”¹²³ amongst front-line police makes them more likely to communicate antagonistically and

121 Mulcahy (n 1) at 282.

122 Porges cited in Mulcahy (n 45) at 6.

123 Child Trauma Academy Channel, ‘SevenSlideSeries: State-Dependent Functioning’ (2014) <www.youtube.com/watch?v=1uCn7VX6BPQ> accessed 10 May 2023.

become drawn into physical confrontation with chronically dysregulated males, like Daithi, who may be suffering from trauma.

Due to the current trauma-blindness of the criminal justice system, its faulty assumption that man's natural state is that of a "rational being"¹²⁴ and its denigration of emotion, including the fact that fear is often a subcortical driver of behaviour, it is highly unlikely that gardaí questioning Daithi about the alleged assault on their colleague would do so in a neurodevelopmentally aware, trauma-responsive manner.

Police investigators might never inquire about the quality of his early childhood, or prompt him to disclose the life-threatening violence he survived in prison. If they did elicit such disclosures, it is doubtful that they would appreciate the magnitude of his suffering, or how deeply the prison assault altered his nervous system, wreaking havoc on his health, relationships, and behaviour.

The memory of a personally traumatic event is such that it is typically fragmented and pixelated, yet felt intensely as if the person was re-experiencing the "sensory, cognitive, emotional and psychological"¹²⁵ responses to the original event in the here and now, activated by sounds, smells, or images. The reality is that for trauma survivors the world is full of stimuli that can cause nervous system dysregulation without their conscious awareness.

When dysregulated, the capacity of the individual to hear and process speech is impaired. A traumatised, highly stressed suspect may respond to robust police questioning by getting verbally or physically confrontational (a fight response), or by dissociating and becoming non-verbal (shutting down). As Porges states, "language is a gift we have when we are not in a state of defence."¹²⁶

In the context of police custody, routine aspects of investigating criminal offences may prompt survivors to quickly become sensitised and angry, such as requests to cooperate with fingerprinting, identification parades, drug searches, etc. As noted by Conway and Daly:

[c]ells in garda stations contain just a waterproof mattress and they do not have normal sanitation: instead of standard toilets there are floor level toilet pans with the flush mechanism located outside of the cell. The Garda Inspectorate's 2021 report *Delivering Custody Services* noted that toilet paper was not routinely provided in cells in order to avoid occupants misusing it, for example, to block the toilet or to harm themselves. While gardaí told the Inspectorate that they would provide toilet paper if it was

124 See Article 43.1.1 of Bunreacht na hÉireann.

125 See van der Kolk, Hopper and Osterman (n 120) at 11.

126 Mulcahy (n 45) at 4.

asked for, it is not routinely offered to cell occupants nor are they generally told that they can request it. Cells rarely have integral sinks with running water, and access to hand-washing and showering facilities may be extremely limited.

Lighting is externally controlled and the sounds may continue all night. Detention in such facilities, on suspicion of committing a criminal offence, would be distressing for anyone and could lead to particular situational vulnerability. As Dehaghani explains, custody creates senses of isolation, a loss of control, uncertainty, lack of knowledge, depletion of resilience, as well as dependence on the police for basic needs. All of this may impact on the detained person's ability to cope with the circumstances, to understand and engage with the process, and may affect their responses to garda questioning at interview. For persons who come to the garda station with certain existing characteristics, their vulnerability may be increasingly acute.¹²⁷

Austere environmental conditions of the kind described, coupled with the realities of being stripped of agency and control may be activating for trauma survivors, especially those detained in a garda station for the first time (who may be fearful of the experience) or offenders with “the window of tolerance the size of a toothpick”¹²⁸ who may have previously experienced abusive authority¹²⁹ in institutional settings at the hands of agents of the State (e.g. aggressive strip searches, experience of “padded cells”¹³⁰ or prolonged solitary confinement in violation of the Nelson Mandela rules).¹³¹

Trauma and Police Officers

Trauma training may help individual police officers to recognise the enduring impacts of their own childhoods, promoting self-compassion for any

127 V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloombury Professional 2023) at 113, referencing the Garda Inspectorate, *Delivering Custody Services* (Garda Inspectorate 2021) 67–68; R Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) 30(2) *Social & Legal Studies* 251–71.

128 J Fisher, a well-regarded trauma therapist, used this phrase during a talk she gave at the Trauma Summit in Belfast, June 2018.

129 S Anderson, ‘Rethinking Adverse Childhood Experiences’ (2019) 49 *Howard League of Penal Reform ECAN Bulletin* 5–10.

130 See Office of the Inspector of Prisons, *Report of an Investigation on the Use of ‘Special Cells’ in Irish Prisons* (Office of the Inspector of Prisons 2010) para 1.5.

131 See S Shalev <<https://www.solitaryconfinement.org/>>; and United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement>>.

personal difficulties relating to unprocessed trauma stemming from early life experiences.¹³² Hesketh et al. state that “early life exposures (ACE) to trauma can create additional vulnerability”¹³³ to traumatic overwhelm experienced in the course of their duties. Frontline professionals with high levels of personal trauma (i.e. four or more ACEs) have been found to be more likely to experience burnout, secondary traumatic stress and “significantly lower compassion satisfaction scores.”¹³⁴ They are also likely to be more susceptible to traumatic re-enactment and abusive behaviour due to bottom-up hijacking, since hurt people hurt others.¹³⁵

Trauma training would also raise awareness of the fact that frequent encounters with trauma survivors, including those who are extremely emotionally distressed and suicidal,¹³⁶ can lead to secondary trauma.¹³⁷ Many frontline police may experience secondary trauma without even being aware of it. Secondary trauma can impact police officers’ health, well-being, worldview and coping strategies, emphasising the importance of self-care and mutual support.¹³⁸

Daily contact with unrecovered trauma survivors can lead to burnout, absenteeism, and the adoption of negative coping strategies such as addictive behaviours or a propensity to dehumanise/brutalise offenders and their families. Hesketh et al. identify three groups of police staff requiring specific protection and support to ensure their physical, psychological, and social well-being:

- generalist officers and staff who are first responders to incidents including murders, suicides, and road traffic collisions;

132 A Topping, ‘Jon Needham: The Man Who Went to Hell and Back as a Child – and Now Fights for All Rape Victims’ *The Guardian* (London, 5 January 2022).

133 I Hesketh and N Tehrani, *Responding to Trauma in Policing: A Practical Guide* (College of Policing Limited 2018).

134 R Murphy and S Lambert, ‘Research Blog: Traumatic Childhoods and Later Life Outcomes’ (2019) <www.ucc.ie/en/apsych/research/researchnews/research-blog-traumatic-childhoods-and-later-life-outcomes.html> accessed 10 May 2023.

135 B van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (Penguin 2014) at 350. See also J Raver and M McElheran, ‘A Trauma-Informed Approach Is Needed to Reduce Police Misconduct’ (2022) 15 *Industrial and Organizational Psychology* 583–87.

136 See S Farrell, ‘“Rugby Saved My Life”: The Irishman Who Climbed Off a London Bridge and Wound Up in Brazil’ *The 42* (27 December 2013).

137 S Lambert, *Vicarious Trauma: The Impact of Working with Survivors of Trauma Toward a Trauma-Responsive Criminal Justice System: Why, How and What Next?* (ACJRD 2019) 30–36; M Harmon, ‘Secondary Trauma: What It Is, Who It Affects and How to Cope, According to Experts’ *Forbes* (8 May 2023).

138 T Gilbert-Eliot, *Healing Secondary Trauma: Proven Strategies for Caregivers and Professionals to Manage Stress, Anxiety, and Compassion Fatigue* (Rockridge Press 2020).

- specialist police officers and staff who focus on discrete areas such as domestic violence, child abuse, counter-terrorism, firearms, undercover work, and road death investigations; and
- police officers and staff who are involved in handling disasters including natural disasters, transport disasters, fires, and terrorist attacks.

The authors note that sick leave amongst the first group in the United Kingdom accounted for the bulk of sickness absence in 2017, observing further that in recent years sick leave is often due to mental health issues.¹³⁹ Some police staff experience anxiety, depression, burnout, compassion fatigue, primary trauma, or secondary trauma directly due to the hazards of police work.

Hesketh et al. recommend that line managers employ a “situational trauma risk assessment tool” in the aftermath of an officer dealing with “traumatic deaths, injuries and other life-threatening and hazardous events during their work.”¹⁴⁰ A high trauma score should prompt appropriate action, such as referral for trauma-focused therapy.¹⁴¹ A broad understanding of trauma across An Garda Síochána would help to embed a culture, supporting staff to respond with greater understanding and compassion for trauma in themselves, and when it surfaces in interactions with suspects.

Conclusion: Becoming Neurodevelopmentally Aware and Polyvagal-Informed

As noted earlier, the policing role brings officers into contact with people “who have experienced injury, trauma and people who are suspected of wrongdoing.”¹⁴² This chapter has sought to shine light on the fact that many individuals who are suspected of wrongdoing, have themselves experienced serious injury and trauma. They are often victims of crime(s), as well as perpetrators.

In police custody, trauma survivors may hurl vulgar abuse or become physically threatening following a drug and alcohol binge. Alternatively, nervous system dysregulation may prompt them to self-harm, or they may shut down/dissociate, appearing vacant and unresponsive to questions posed.

According to Hari, the opposite of addiction is not sobriety, but connection.¹⁴³ The same can be said of criminality. The opposite of offending behaviour is not desistance, but connection – an awakened, vital social engagement system. Police officers would do well to remember that “every

139 Hesketh and Tehrani (n 133) at 7.

140 Ibid. at 9.

141 Ibid. at 17.

142 An Garda Síochána (n 108) at 2.

143 See Hari (n 91) at 293.

contact leaves a trace.” They should strive to behave with respect, kindness, and compassion whenever they engage with suspected offenders including prolific, life-course persistent individuals, like some of the men in my PhD study. The public interest is not served if our “Guardians of the Peace” re-traumatise people accused of offences whose brains and bodies may have been flooded with overwhelming stress since birth, leading to addictions, mental health problems, relational poverty, and crime. However, compassionate, trauma-responsive interactions may have a lasting positive impact on individuals.

According to Perry et al., “[t]otal systemic exposure to – and adoption of – neurodevelopmentally aware and trauma-informed practices will be essential for juvenile justice models to optimize outcomes for individuals and for society.”¹⁴⁴ The often perplexing, self-destructive conduct of adult offenders should be viewed through a similar holistic, biopsychosocial prism.

All criminal justice personnel, including police officers, should urgently receive in-depth training about attachment, interpersonal neurobiology, ACEs, trauma, polyvagal theory, survival responses, and traumatic re-enactment.

Police management should ensure that any trauma training includes a staff self-care component to improve police resilience and reduce secondary traumatic stress. It may also assist them to identify tools to manage emotional dysregulation that can hamper communication with individuals at the point of arrest or questioning in police custody, or indeed when they interact with distressed members of the public calling on them for help. Training should also aim to empower police officers to recognise and minimise bias in themselves when they encounter people from marginalised, minoritised communities to reduce the risk that their words or behaviour exacerbate racial or cultural trauma.

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144 See Perry and others (n 20) at 818.

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5

FROM INTERROGATION TO INVESTIGATIVE INTERVIEWING OF SUSPECTS IN GARDA CUSTODY

Dave Walsh and Ray Bull

Introduction

Interviews with suspects of crime are an important element in both progressing and resolving police investigations.¹ In the last 20 years or so, developments have occurred in several countries (e.g. England and Wales, Ireland, Norway, and Australia) that have seen the police service in those countries move away from a confession-seeking approach that had so dominated their previous interviews with suspects of crime. In England and Wales, over 30 years ago a number of successful appeals against convictions overturned prison sentences handed down to those found guilty of crime at their original trials who had made confessions in police interviews, including several people from the island of Ireland who had been convicted of terrorist offences. Such confessions were later found to have been very often coerced or otherwise unfairly extracted from suspects by the police, who presumably were convinced of their guilt.

Events such as these prompted a major re-consideration regarding the purpose of police questioning of suspects,² including whether the pursuit of confessions in such interviews is appropriate. In 1992, this led in England and Wales to a new investigative paradigm that stipulates the role of police is to: search for the truth, not confessions; undertake investigative enquiries and follow leads including those where the outcome may suggest that a

1 D McNamara, 'Interviewing Vulnerable Suspects in Ireland' (2020) <<https://defendingvulnerability.wordpress.com/2020/09/28/interviewing-vulnerable-suspects-in-ireland/>; D Walsh and R Milne, 'Giving PEACE a Chance'(2007) 8 Public Administration 525–40.

2 R Milne and R Bull, *Investigative Interviewing: Psychology and Practice* (Wiley 1999).

suspected person is innocent. Similar developments occurred in Ireland some 15–20 years later. In this chapter, we detail this revised approach, termed *investigative interviewing*, which has led to confessions being considered less important to the resolution of criminal investigations. Since the introduction of investigative interviewing in England and Wales in 1992, instances of miscarriages of justice caused by unethical and coercive interviewing techniques have reduced dramatically.³ This chapter includes examination of three particular techniques integral to the investigative interviewing model (i.e. rapport building, disclosing evidence, and asking questions). While this chapter examines developments in Ireland, research there has been sparse, certainly in comparison to that conducted on practice in England and Wales. As such, many of the cited examples are from that latter jurisdiction, though we contend that there is no reason to suppose that these examples are not transferable to the Irish context. Since investigative interviewing is universally agreed to have commenced in England and Wales, this chapter begins with a brief retrospective examination of the matters that led to its introduction.

The Introduction of an Investigative Interviewing Model in England and Wales

The transformation from interrogation to investigative interviewing in the 1990s in England and Wales was prompted by increasing concerns from policymakers as to the way criminal suspects were being questioned. These concerns had culminated in the ultimate acquittal of an accused in a criminal case during the 1970s involving three young men who had originally been convicted and sentenced to imprisonment for the murder of Maxwell Confait.⁴ In this case, these men made confessions, even though evidence existed which proved that one of them had an alibi as to their whereabouts at the time of Confait's murder. Those original convictions were overturned on appeal. Of particular concern to the judges was the way confessions had been obtained under undue police pressure.⁵ After their release, a public inquiry⁶ into the case found that (i) the interrogation methods used and (ii) the fact that each of those convicted possessed psychological vulnerabilities were major contributors in their making of the original (and false) confessions.⁷

3 S Poyser, A Nurse and R Milne, *Miscarriages of Justice: Causes, Consequences and Remedies* (Policy Press 2018).

4 Confait Case <www.thejusticegap.com/cases-the-changed-us-maxwell-confait/> accessed 27 June 2023.

5 R Webster, 'The New Injustices' *New Statesman* (28 January 2002).

6 The Fisher Report <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228759/0090.pdf> accessed 27 June 2023.

7 Poyser, Nurse and Milne (n 3).

Following this inquiry, a Royal Commission was instigated to examine police conduct during their investigations.⁸ Work conducted for the RCCP regarding interrogations involved direct observation of police techniques as they questioned suspects.⁹ Along with clear demonstrations of presuming suspects' guilt, it has commonly been found that police either exaggerate the strength of evidence held or advised that they possessed evidence which was not actually to hand.¹⁰ Police officers were also found to be aggressive and accusatory towards suspects, often undermining the suspect's self-esteem. In short, the RCCP found that the police's aim when questioning suspects was to gain confirmation of the police's pre-existing beliefs of their guilt.¹¹ These are techniques that have subsequently been found by psychologists as those more likely to prompt suspects (particularly those with heightened vulnerabilities) to give false confessions.¹² The RCCP findings led to the introduction of major legislation in England and Wales; the Police and Criminal Evidence Act 1984.¹³ PACE (and its associated Codes of Practice) gave procedural guidance concerning the rights of those detained by the police for questioning as suspects of crime, including the rights to silence, legal representation before and during interviews, breaks and refreshments during a suspect's detention and a maximum period of detention (i.e. 24 hours in most cases) before either being charged with an offence(s) or being released.

The implementation of PACE in 1986 also meant that those practices found during the course of the RCCP, as mentioned earlier, were outlawed (much to the consternation of the police at that time who felt that the legislation would benefit those suspects who were clearly guilty of offending, allowing them to evade justice). Later in the 1980s, again first received with disquiet by the police, was the introduction to common practice of audio-recording interviews with suspects, providing an evidential record of police conduct in interviews with suspects. Such developments provided safeguards to suspects from those malpractices found prior to the introduction of PACE. In time, they became viewed as also providing safeguards to police officers from any accusations of malpractice. Of course, this does not necessarily mean that these malpractices were not continuing to occur, however occasional that may have been the case. Indeed, in one murder

8 The Royal Commission on Criminal Procedure – RCCP.

9 B Irving, *Police Interrogation: A Case Study of Current Practice* (Research Study no 2, HMSO 1980); P Softley and others, *Police Interrogation: An Observational Study in Four Police Stations* (HMSO 1980).

10 Ibid.

11 Ibid.

12 G Gudjonsson, *The Psychology of Interrogation and Confessions: A Handbook* (Wiley 2003); GH Gudjonsson, *The Psychology of False Confessions: Forty Years of Science and Practice* (Wiley 2018).

13 Henceforth PACE.

investigation in the early 1990s, the suspect (George Heron) was found to have been constantly harangued by police officers during questioning.¹⁴ The judge at the trial of Heron dismissed the case upon his examination of the recorded police interviews, declaring such approaches to the questioning of Heron to be unlawful.¹⁵

The Heron case had been preceded by pioneering research which, while finding that police officers generally complied with PACE, also revealed that they still continued to view confessions as the prime purpose when carrying out interviews with criminal suspects, being largely accusatory and spending little time attempting to gather an account.¹⁶ Where confessions occurred, they tended to be those cases where the evidence was strong. Seldom was it found that suspects moved to confessions from their initial denials (and even more rare was such a shift in position found to be due to police officers' interviewing skills). Additionally, other cases involving prior convictions were being overturned in light of expert evidence in the Court of Appeal in England and Wales that the suspects had particular vulnerabilities that rendered them unduly influenced by coercive tactics.¹⁷ These cases also revealed a police inability to recognise or consider suspects' vulnerabilities, such as a learning disability. Together, these events led to senior police officers in England and Wales recognising the need for systematic training (for the first time) of effective and ethical skills required to interview suspects.

A new interviewing approach was thus introduced across England and Wales during the 1990s under a framework called "PEACE" – an acronym for the five phases of the framework:

- Preparation and Planning before interviewing;
- Engaging with the interviewee at the interview's outset and Explaining what the respective roles were to be expected of all those present during the interview;
- Gathering an Account, and if needed, clarifying and challenging that account;
- Then, finally, bringing the interview to a Close;
- Once the interview had ceased, there would be an Evaluation both of the case and of the officer's own interview performance.

14 Gudjonsson (2003) (n 12) 96–105.

15 Ibid.

16 For example, J Baldwin, 'Police Interview Techniques: Establishing Truth or Proof?' (1993) 33 *British Journal of Criminology* 325–51; S Moston, GM Stephenson and T Williamson, 'The Effects of Case Characteristics on Suspect Behaviour During Police Questioning' (1992) 32 *British Journal of Criminology* 23–40.

17 Gudjonsson (2018) (n 12).

The PEACE framework has since been adopted in similar forms in other countries such as Ireland, Scotland, Singapore, Australia, New Zealand, and Norway.¹⁸

Examination of Interviews Conducted by PEACE-Trained Officers

In England and Wales, the mandatory recording of police interviews with suspects (introduced over 30 years ago) has provided opportunities for researchers to examine the use of the framework in actual interviews conducted with suspects.¹⁹ Consistent across these studies has been the finding that the malpractices that were often seen before the introduction of PACE (that were noted earlier) occurred rarely after the introduction of the PEACE model. As such, the ethos of PEACE as an interview technique that respects interviewees is non-oppressive, not confession-oriented, and non-coercive has become an essential part of the investigative interviewing paradigm and practice in England and Wales. Moreover, in contrast to those studies²⁰ which were conducted after the introduction of both the PACE legislation and measures such as tape recording of interviews, but before the implementation of the PEACE model, these post-PEACE studies found that interviewers now tended to adopt information-gathering strategies.²¹

18 See D Walsh and others, *International Developments and Practices in Investigative Interviewing and Interrogation* (Routledge 2016).

19 See C Clarke and R Milne, *National Evaluation of the PEACE Investigative Interviewing Course* (Police Research Award Scheme Report no PRAS/149, Home Office 2001); A Griffiths and R Milne, 'Will It All End in Tiers? Police Interviews with Suspects in Britain' in T Williamson (ed), *Investigative Interviewing: Rights, Research and Regulation* (Willan 2006) 167–89; A Griffiths, B Milne and J Cherryman, 'A Question of Control? The Formulation of Suspect and Witness Interview Question Strategies by Advanced Interviewers' (2011) 13(3) *International Journal of Police Science & Management* 255–67; S Leahy-Harland and R Bull, 'Police Strategies and Suspect Responses in Real-Life Serious Crime Interviews' (2017) 32(2) *Journal of Police and Criminal Psychology* 138–51; GE Oxburgh, T Williamson and J Ost, 'Police Officers' Use of Emotional Language During Child Sexual Abuse Investigations' (2006) 3 *Journal of Investigative Psychology and Offender Profiling* 35–45; S Soukara and others, 'What Really Happens in Police Interviews with Suspects? Tactics and Confessions' (2009) 15 *Psychology, Crime and Law* 493–506; D Walsh and R Bull, 'The Interviewing of Suspects by Non-Police Agencies: What's Effective? What Is Effective?' (2010) 15 *Legal and Criminological Psychology* 305–21; D Walsh and R Bull, 'The Association Between Evidence Disclosure, Questioning Strategies, Interview Skills, and Interview Outcomes' (2015) 21 *Psychology, Crime and Law* 661–80; D Walsh and R Bull, 'How Do Interviewers Attempt to Overcome Suspects' Denials?' (2012a) 19 *Psychiatry, Psychology, and Law* 151–68; D Walsh and R Bull, 'Examining Rapport in Investigative Interviews with Suspects: Does Its Building and Maintenance Work?' (2012b) 27 *Journal of Police and Criminal Psychology* 73–84; D Walsh and R Milne, 'Keeping the PEACE? A Study of Investigative Interviewing Practices in the Public Sector' (2008) 13 *Legal and Criminological Psychology* 39–57.

20 Baldwin (n 16).

21 See generally (n 19).

The PEACE model also appears to have achieved one of its aims of avoiding false confessions (compared to before its introduction), with that matter now almost never seen as the basis for any appeal against conviction. What has often been found by most of those observational studies is an emphasis by interviewers on their asking open questions, such as those pre-fixed by the instructions, Tell, Explain, or Describe.²² However, even though open questions are favoured in the PEACE model (while asking leading questions is discouraged), it was not always clear what constituted open and other types of questions.²³ Further, there was for some years no clarity as to what comprised good practice as to the strategies to be undertaken when using various question types.²⁴ Nor was it clear how all the recommended techniques of the PEACE framework worked together.²⁵ Indeed, many studies commonly found limitations regarding its use in practice, such as those relating to investigators (i) developing a logical structure to the interview, (ii) challenging suspects in an effective manner, (iii) failing to provide either intermittent or final summaries (or effectively providing them when they did undertake these tasks), and (iv) closing the interview effectively.²⁶ Furthermore, rapport building was often found to be demonstrated ineffectively. Again, while the PEACE framework advocates rapport as a key component of interviews, there was initially little guidance as to what interviewers should do to both build and maintain rapport. Rapport will be examined in greater depth later in this chapter.

The Introduction of the Investigative Interviewing Model in Ireland

As in England and Wales, Ireland too experienced a number of miscarriages of justice. In the latter part of the 20th century, cases involving false confessions included those of Martin Conmey for the murder of Una Lynskey in 1971,²⁷ Joanne Hayes and her family in the “Kerry Babies” case in the mid-1980s,²⁸ and both the Dean Lyons and Frank McBrearty Junior in the

22 GE Oxburgh, T Myklebust and T Grant, ‘The Question of Question Types in Police Interviews: A Review of the Literature from a Psychological and Linguistic Perspective’ (2010) 17 *International Journal of Speech, Language and the Law* 45–66.

23 Ibid.

24 Griffiths and Milne (n 19).

25 CE Kelly and others, ‘A Taxonomy of Interrogation Methods’ (2013) 19(2) *Psychology, Public Policy, and Law* 165–78.

26 For example, See Clarke and Milne (n 19); Walsh and Bull (2010) (n 19) 305–21.

27 *DPP v Conmey* [2014] IECCA 31.

28 See T Inglis, *Truth, Power and Lies: Irish Society and the Case of the Kerry Babies* (UCD Press 2003); YM Daly, ‘Commentary on the Report of the Tribunal of Inquiry into “The Kerry Babies Case”’ in M Enright, J McCandless and A O’Donoghue (eds), *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Bloomsbury 2017).

1990s.²⁹ In the Dean Lyons case, for example, the suspect provided a statement to gardaí as to his involvement in the murder of two women, though the electronic recording showed that this verbal account was lacking in detail – and that many of the questions asked of him were leading in nature.³⁰ In the later interviews conducted by gardaí, manual recording only took place and these purported to show Lyons making a full and frank confession to murder (though there was evidence that he was coached to provide such detail). This transpired to be a false confession.

Now, interviews are routinely electronically recorded in Ireland, although gardaí are still required to keep manual records (as taken by the second officer present), despite the preference by the Irish judiciary for video records due to their accuracy, which manual recording cannot guarantee. In contrast, gardaí still tend to use the written account to support the continuing investigation, even though the electronic record exists. The Morris Tribunal, set up to examine garda practices, found that such manual recording was disruptive to the flow of conversation during interviews with suspects and that these contemporaneously written records were inaccurate.³¹ Other studies have also found similar problems with manual statements.³²

Ireland in 2009 adopted a version of the investigative interviewing model, called the Garda Síochána Interviewing Model (GSIM). In common with the PEACE model, under the GSIM, the questioning of suspects is underpinned by the goal of gaining a detailed and reliable account from interviewees, who are first given the opportunity to provide their side of the story. The framework is applicable to interviews with suspects, victims, and witnesses.

Noone advises that there was favourable reception from Ireland's Department of Justice and Equality to the introduction in 2009 of the GSIM.³³ Its introduction, not unlike developments elsewhere, had been in no small part prompted by miscarriages of justice.³⁴ Consistent with the PEACE

29 See, in relation to Dean Lyons, G Birmingham, 'Report of the Commission of Investigation (Dean Lyons Case) Set Up Pursuant to the Commissions of Investigation Act 2004' (2006) <<https://assets.gov.ie/121723/24474606-fb81-4985-b72c-eab798c7e162.pdf>>; see, in relation to Frank McBrearty, Tribunal of Inquiry, *Report on the Detention of 'Suspects' Following the Death of the Late Richard Barron on the 14th of October 1996 and Related Detentions and Issues* (Tribunal of Inquiry 2008).

30 Birmingham (n 29).

31 Tribunal of Inquiry (n 29).

32 R Milne and others, 'From Verbal Account to Written Evidence: Do Written Statements Generated by Officers Accurately Represent What Witnesses Say?' (2022) *Frontiers in Psychology: Language Sciences*; D Walsh and others, 'When Law Enforcement Interview Witnesses and Write Their Statements' (2023) 3 *Police Practice and Research* 346–67.

33 G Noone, 'An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects' in J Pearse (ed), *Investigating Terrorism* (Wiley Blackwell 2015) 100–22.

34 DM McNamara, 'The Criminal Investigation of Suspects with Disabilities: The Impact of the UN Convention on the Rights of Persons with Disabilities' (Unpublished PhD thesis, Dublin City University 2018).

investigative interviewing approach, the GSIM also promotes the importance of gathering narratives from suspects, and veers away from confession-seeking, which was formerly the primary goal when questioning suspects in Ireland.³⁵ The GSIM consists of three elements:

- the generic phase;
- interview subject-specific considerations that categorise interviewees based on their perceived or known vulnerability as well as on their level of cooperation; and
- an interviewer competency framework.

The generic phase consists of preparation and planning, first contact, rapport building, account gathering, assess, corroborate and challenge and, finally, closure. Further similarity exists in the ethos of rapport-based information gathering, rather than a focus solely on gaining confessions. Both PEACE and GSIM possess a competency framework to enable interviewers to advance their skills. However, Gudjonsson notes that the GSIM has the potential to be more flexible than the PEACE model through the subject-specific considerations.³⁶ This, he claims, is particularly so when dealing with uncooperative interviewees, whose motivations may be borne, say, of fear of their not being believed (or even understood) by the police or found guilty of a crime that they did not commit. Such flexibility was reported as being understood by gardaí.³⁷ It has also been argued that GSIM thus presents greater opportunities to avoid false confessions while obtaining true confessions that have not been obtained coercively.³⁸ However, whether such hopes have manifested in practice remains largely unknown, given the dearth of empirical research of the GSIM.

As with officers in the United Kingdom, trained in the PEACE model, gardaí in Ireland receive further training to undertake interviews either in the most serious cases³⁹ or of those involving particularly vulnerable people who would include those with either mental health issues or developmental disorders, children and interviewees experiencing trauma, such as those reporting their being victims of sexual offences.⁴⁰ How effective this

35 Noone (n 33); K Sweeney, 'The Changing Nature of Police Interviewing in Ireland' (Unpublished PhD thesis, University of Limerick 2016).

36 GH Gudjonsson, 'False Confessions and Correcting Injustices' (2012) 46 *New England Law Review* 689–709.

37 Garda Professional Standards Unit, *Annual Report 2018* (Garda Professional Standards Unit 2018).

38 GH Gudjonsson and J Pearse, 'Suspect Interviews and False Confessions' (2011) 20(1) *Current Directions in Psychological Science* 33–37.

39 Such as murder.

40 McNamara (n 1).

training is, or whether sufficient officers are trained, remains open to question.⁴¹ Indeed, there has been only a very limited review of GSIM. Hence, much of this chapter explaining what happens in interviews and what is regarded as effective practice is based on the more frequently conducted research of investigative interviewing undertaken in England and Wales, though the amount of study is still far from enough in that country. In Ireland, while observational studies of investigative interviews remain rare, what little evidence we have of their undertaking suggests that there are skills deficits. Kilkelly and Forde, for example, cite children's experiences of being questioned by gardaí that contain both unethical and oppressive practices.⁴² Another recent study conducted by Daly et al. found that some gardaí engaged in various tactics

some of which are inappropriate and oppressive, including building rapport; adopting an approach of allyship; letting silence hang in the air; engaging in emotive questioning; threatening to arrest family members or stop social welfare payments; selectively presenting evidence; and undermining the suspect's legal advice.⁴³

They concluded that gardaí needed further training to embed the principles into their practice.

Field Studies of Investigative Interviewing

Studies of actual practice conducted by PEACE-trained officers in England and Wales have commonly found that interviewers demonstrated inadequate skill in three important areas: (i) building rapport with suspects, (ii) developing logical interview structures (evident in the organisation of the interview and the way evidence was disclosed), and (iii) conducting suitable questioning strategies.⁴⁴ This chapter will thus proceed to cover each of these in greater depth.

41 *ibid*; McNamara (n 34).

42 U Kilkelly and L Forde, *Children's Rights and Police Questioning: A Qualitative Study of Children's Experiences of Being Interviewed by the Garda Síochána* (Policing Authority/University College Cork 2020).

43 Y Daly, A Muirhead and C Dowd, *The Right to Silence and Related Rights in Pre-Trial Suspects' Interrogations in the EU: Legal and Empirical Study and Promoting Best Practice – Ireland* (Report for the EU Emprise Project, Dublin City University 2021).

44 For example, Clarke and Milne (n 19); Griffiths and Milne (n 19); Griffiths, Milne and Cherryman (n 19) 255–67; Leahy-Harland and Bull (n 19); Oxburgh, Williamson and Ost (n 19) 35–45; Soukara and others (n 19) 493–506; Walsh and Bull (2010) (n 19) 305–21; D Walsh and R Bull, 'The Association Between Evidence Disclosure, Questioning Strategies, Interview Skills, and Interview Outcomes' (2015) 21 *Psychology, Crime and Law* 661–80; Walsh and Bull (2012a) (n 19) 151–68; Walsh and Bull (2012b) (n 19) 73–84; Walsh and Milne (n 19) 39–57.

Rapport Building

One of the interviewing skills that the PEACE framework innovatively emphasised over 30 years ago, rapport building, is nowadays commonly understood to be a key feature of investigative interviewing.⁴⁵ Rapport, however, is a discrete step in the GSIM, suggesting that officers need to separately grapple with building it before progressing with the interview. However, Alison et al. argue that rapport possesses organic characteristics that flow from conversational behaviours and thus does not require such deliberate effort.⁴⁶ In this vein, rapport has been defined as a “working alliance,”⁴⁷ characterised by mutual trust and respect between interviewer and interviewee.⁴⁸ Indeed, rapport has also been found to overcome the resistance of terrorist suspects.⁴⁹ However, as has been noted, rapport has often been found to be undertaken less skilfully by PEACE-trained interviewers. In one study, for example, interviewers were found to miss opportunities to build rapport when conducting the opening “Engage and Explain” phase of the interview.⁵⁰ A fundamental task to be carried out at this stage (i.e. advising suspects of their legal rights) has been often undertaken by British police officers in a monotone manner and, once provided, expecting suspects to agree that they understood these rights.⁵¹ Walsh and Bull noted that rapport was beginning to be built where interviewers were more conversational when explaining their rights to suspects. Such explanations included expressing (cognitive) empathy with suspects as to the complexity of these rights that might act as an obstacle to their understanding. Skilled demonstrations of rapport building were typified by both interviewer and interviewee working together to ensure that these rights were understood.

Nevertheless, Walsh and Bull found that rapport, once built, was not always maintained in the “Account” phase. Certain tasks to be employed in this information-gathering part of the interview (such as encouraging

45 A Abbe and SE Brandon, ‘Building and Maintaining Rapport in Investigative Interviews’ (2014) 15 *Police Practice & Research: An International Journal* 207–20; F Gabbert and others, ‘Exploring the Use of Rapport in Professional Information-Gathering Contexts by Systematically Mapping the Evidence Base’ (2021) 35 *Applied Cognitive Psychology* 329–41.

46 L Alison and others, ‘Why Tough Tactics Fail and Rapport Gets Results: Observing Rapport-Based Interpersonal Techniques (ORBIT) to Generate Useful Information from Terrorists’ (2013) 19 *Psychology Public Policy and Law* 411–31.

47 M Vanderhallen, G Vervaeke and U Holmberg, ‘Witness and Suspect Perceptions of Working Alliance and Interviewing Style’ (2011) 8(2) *Journal of Investigative Psychology and Offender Profiling* 110–30.

48 M Russano and others, ‘Structured Interviews of Experienced HUMINT Interrogators’ (2014) 28 *Applied Cognitive Psychology* 847–59 <<https://doi.org/10.1002/acp.3069>>.

49 Alison (n 46).

50 Walsh and Bull (2012a) (n 44).

51 Ibid.

the suspect to provide more information, summarising, active listening, and resolving contradictions in the suspects' account), when conducted less skilfully, or not at all, were associated with a breakdown in rapport. Furthermore, the quality of interviewer rapport was found to be positively associated with increased amounts of (relevant) information being provided by the suspects.⁵² Rapport should not be employed in such a manner that coerces suspects into compliance but fosters the conditions where cooperation is provided freely, if the suspect so wishes to cooperate. In Daly et al., it was also reported that garda efforts to build rapport with detained suspects were less effective.⁵³ Gardaí wanted to talk about neutral topics in order to build an initial rapport (but not those necessarily of shared interests). Such efforts were not always successful. Daly et al. reported that officers engaged in techniques to build rapport that tended to be seen as false and forced, irritating suspects' legal representatives, who intervened to remind officers of the real purpose of the interview.⁵⁴ They perceived such initial rapport building as efforts constructed to gain their cooperation. Gardaí were then frustrated in undertaking a task that the GSIM explicitly requires.

However, the fact that rapport building is viewed as a discrete task in the GSIM to be undertaken before gathering an account from suspects might be the cause of the problem. In the study conducted by Walsh and Bull, PEACE-trained officers developed and maintained rapport as part of undertaking tasks that were essential elements of the investigative interview but not that adjunct to it.⁵⁵ That is, interviewers worked together with the suspect to ensure the suspect understood their rights, for example, expressing empathy at its complexity and self-deprecation about their own initial understanding at the start of the interview. As suspects gave their accounts, they actively listened to what suspects had to say and accurately and intermittently summarised what they said. Further, they used questions and language, adapted to meet the understanding of each suspect, kept them involved *in the conversation*, and avoided questions (see later in this chapter) and language that would alienate the suspect (even when they were challenging them about unresolved conflicts between the given account and the evidence). Additionally, they expressed open-mindedness, empathy, and compassion, where and when appropriate, and likewise used humour, allowing suspects the opportunity to tell their side of the story. In short, officers engaged in a wide range of conversation management techniques, being the bedrock of the PEACE

52 Ibid.

53 Daly, Muirhead and Dowd (n 43).

54 Ibid.

55 Walsh and Bull (2012b) (n 44).

investigative interviewing framework.⁵⁶ Walsh and Bull found that those who undertook investigative interviews most skilfully tended to obtain detailed accounts from suspects much more frequently than those who performed less satisfactorily. In their later research, they also found this to be the case when interviewers skilfully disclosed evidence and undertook skilful questioning.⁵⁷ We now cover, in turn, each of these techniques.

Disclosing Evidence in Interviews

A task deemed crucial to effective interviews which aims to gather information concerns evidence disclosure.⁵⁸ Bull and Soukara found that either shortly before, or at the time that, suspects made admissions that PEACE-trained interviewers were disclosing gradually the information/evidence held. These findings contrast with those historical studies conducted before officers were trained in the PEACE framework where all of the available evidence/information was often fully disclosed at the interview's beginning, and it was rare that suspects changed their story from denying involvement in the offence to that of admitting such participation or association.⁵⁹ Walsh and Bull found that once all the evidence had been disclosed early, interviewers offered few other areas for discussion and the interview ceased once the suspect denied any wrongdoing.⁶⁰ As such, these "early disclosure" interviews were of significantly shorter duration (and were conducted less skilfully) than those where it was found that other disclosure strategies were being undertaken.

In other interviews, Walsh and Bull found that evidence was being disclosed gradually, where a phased strategy of "drip-feeding" evidence throughout the interview was undertaken, while the suspects provided an account (or at least as they were being questioned).⁶¹ Bull and Soukara found that where interviewees first denied any wrongdoing but later confessed in the interview, officers trained in the PEACE model, had disclosed evidence either *shortly* before the suspect confessed or were disclosing evidence when the suspect admitted wrongdoing.⁶² These authors contended that gradual

56 E Shepherd and A Griffiths, *Investigative Interviewing: The Conversation Management Approach* (OUP 2021).

57 Walsh and Bull (2015) (n 44).

58 Leahy-Harland and Bull (n 19); Walsh and Bull (2012b) (n 44); Walsh and Bull (2015) (n 44).

59 Baldwin (n 16).

60 Walsh and Bull (2015) (n 44).

61 P-A Granhag and others, 'Eliciting Cues to Deception by Tactical Disclosure of Evidence: The First Test of the Evidence Framing Matrix' (2012) 18 *Legal and Criminological Psychology* 341–55.

62 R Bull and S Soukara, 'A Set of Studies of What Really Happens in Police Interviews with Suspects' in GD Lassiter and C Meissner (eds), *Interrogations and Confessions* (American Psychological Association 2010) 81–96.

evidence disclosure may well be effective in persuading otherwise reluctant suspects, who were very likely guilty, to confess.

Walsh and Bull also found that other interviewers disclosed evidence “late” in the interview. Gardaí are trained in this approach.⁶³ Laboratory-based studies have also found that “late” evidence disclosure strategies can rigorously test the veracity of accounts provided by suspects.⁶⁴ Hartwig et al. advise that the “late disclosure” strategy, coined the Strategic Use of Evidence (or SUE), involves eliciting the whole story from the suspect, dealing with all potential alibis and possible excuses they may (or do) employ, before finally disclosing the evidence held.⁶⁵ If there are discrepancies between the evidence held and the account provided by the suspect that have not been resolved by any further explanation, interviewers should challenge by revealing what evidence they hold and pointing out to the suspect how that evidence is inconsistent with the given verbal account. GSIM-trained investigators are also, as part of their interview planning, required to construct a “challenge document.” Gudjonsson thus declares that the GSIM is “more dynamic than PEACE in terms of challenging uncooperative interviewees.”⁶⁶

In both the United Kingdom and Ireland, the “late” disclosure approach can provide a dilemma for interviewers. That is, as opposed to many other parts of the world, in these two countries suspects are often legally represented in interviews (particularly in cases involving more serious offences). In turn, suspects’ legal representatives reasonably wish to know the evidence held against their client in order to provide them with appropriate advice. In such circumstances, the interviewers either have to opt to provide or refuse to supply details of the evidence held before the interview commences. If they provide details, then their “late” disclosure strategy is voided. However, if they choose not to disclose details of the evidence before the interview, they may increase the risk of suspects refusing to answer questions that would clearly inhibit the interviewer from knowing the suspect’s version of events. Thus, in such circumstances, the “late” disclosure strategy might be regarded as less effective.

63 Daly, Muirhead and Dowd (n 43).

64 C Dando and others, ‘Helping to Sort the Liars from the Truth-Tellers: The Gradual Revelation of Information During Investigative Interviews’ (2015) 20 *Legal and Criminological Psychology* 114–28; Granhag and others (n 61); M Hartwig and others, ‘Detecting Deception via Strategic Disclosure of Evidence’ (2005) 29 *Law and Human Behavior* 469–84; M Hartwig and others, ‘Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works’ (2006) 30 *Law and Human Behavior* 603–19; M Sorochinski and others, ‘Interviewing to Detect Deception: When to Disclose the Evidence?’ (2014) 29 *Journal of Police and Criminal Psychology* 87–94.

65 Hartwig and others (2005) (n 64).

66 Gudjonsson (n 36) 117.

Questioning Strategies

Regardless of whether interviewers disclose evidence using the SUE approach or disclose evidence gradually, in order to establish what happened, they need to ask questions. Moreover, in order to achieve the goals of gaining as much reliable and detailed information as possible, they need to ask “good” question types, while avoiding asking “bad” question types that might contaminate the given account or at least risk investigators not achieving those interview goals. Underpinning “good” question types are certain questioning strategies that again serve the purpose of gaining maximum information yield. As such, “good” questions are those that are productive in prompting more amounts of information, offering increased opportunity to examine these accounts for their clarity, accuracy, and veracity, whereas “bad” ones gain only limited details and limit such opportunities. “Good” strategies have a pattern that optimise these opportunities, while “bad” strategies often involve asking questions in a haphazard order, and thus, inhibit these opportunities.

Questions therefore need to be productive. Such productive questions, according to Griffiths and Milne,⁶⁷ are open ones classified in the literature as those likely to obtain more detailed responses.⁶⁸ The TED acronym (Tell, Explain, and Describe) is a typical example of the manner with which these types of questions may be prefaced (e.g. Tell me in your own words what happened yesterday afternoon. Or describe to me the events of yesterday evening. Or please explain to me what happened afterwards). The idea here is to gain a first account from interviewees. However, given that it should be expected that any first account (that should be provided uninterrupted) is unlikely to be one that contains complete details, there will likely be a need to ask further questions. In this regard, the second “productive” question type, that Griffiths and Milne classify as the “probing question,” usually involving one of the precursory ‘5W’s and H’ modalities (i.e. who, what, where, when, which, or how) is designed to tease out the finer details of suspects’ accounts (e.g. Who did you go to visit afterwards? Where precisely do they live? How long have they lived there?). The final “productive” question is the “appropriate closed” question, which, as Clarke and Milne contend, seeks only clarification and confirmation of points that have already been discussed (e.g. Did you say that you last saw your wife last Tuesday?).⁶⁹

In terms of the order of delivery of these productive questions, Griffiths and Milne identified as skilled practice a questioning strategy that would commence with an open question designed to elicit an initial account, which

67 Griffiths and Milne (n 19).

68 Milne and Bull (n 2).

69 Clarke and Milne (n 19).

is subsequently followed by a series of probing questions that derive the necessary micro-detail, with appropriate closed questions used only where necessary, as described earlier. Good interviews involve a series of topics logically presented that require such an arrangement of questioning. For example, they may be chronological in order (e.g. yesterday morning, yesterday afternoon, yesterday evening, this morning, etc.). Another option might be to present topics by way of subjects relevant to the alleged offending (e.g. the suspect's relationship with his wife, then his children, then his parents, and so on). As such, when questioning on a particular topic is thought complete, investigative interviewers are trained to proceed to summarise what has been said to ensure (and indicate) understanding. There may also be at the end of a series of open and then probing questions a requirement to challenge the suspect about any inconsistencies in the interviewee's account that remain, even after clarification that the summaries can trigger. This challenge might be phrased through an appropriate closed question (e.g. Did you commit the offence?) or even an open one (e.g. Please explain the contradictions between your story and the evidence – or between what you said now and what you said earlier).

On the other hand, there are five question types that Griffiths and Milne describe as “unproductive.”⁷⁰ First, these are “inappropriate closed” ones, where a question is asked, that more often than not demands either just a binary “yes” or “no” answer (e.g. “Do you live with your parents?” – rather than “Please tell me where you live” – a productive and open question). As such, the inappropriate closed questions may well prompt only limited information. Similarly, “forced choice” questions are also characterised as “unproductive,” as they too typically invite a limited answer (Do you now live with your husband or with your parents?). Unproductive questions also include those termed as “leading” ones (e.g. You were actually with your wife when she died, weren't you?), which have repeatedly in the literature been associated with suggestibility in prompting the interviewer's expected answer, particularly amongst more vulnerable suspects.⁷¹ As such, leading questions can be viewed as information giving, but not information gathering.

“Unproductive” questions also identified in Griffiths and Milne's study include “multiple” or “overlong” questions (e.g. Did you live with your husband at the time of his death, your friends, your parents, other relatives and when did you start living there and have you any proof of where you were living?). These question types (as in this example) make it unclear which question needed answering as either more than one was asked together or (due to its convoluted and rambling nature) it might have been difficult to

70 Griffiths and Milne (n 19).

71 Oxburgh, Myklebust and Grant (n 22).

identify what the question actually was, or as to what any answer given actually relates.⁷² The final “unproductive” classification that Griffiths and Milne categorise is that of “opinions” or “statements” provided by the interviewer (e.g. I put it to you that you have not told the truth and that you killed your wife). While these statements are not actually questions, they still may well generate a response from suspects, while indicating the biased opinion of the interviewer.⁷³

While field research of the GSIM is sparse, Gates, Daly, and Milne report that officers, despite their training, too often ask poor questions (such as leading ones) and frequently interrupt answers from either suspects or witnesses.⁷⁴ This finding suggests that interviewer’s attempt to gather information or execute the SUE approach effectively is being hampered by lapses into unhelpful interventions.

Rapport Building, Disclosing Evidence, and Questioning

While studies examining aspects of the PEACE model are important to our understanding of the effectiveness of investigative interviewing in ascertaining reliable and detailed accounts from suspects, such techniques do not operate in isolation from each other. Recently, studies have begun to examine a coalition of techniques. For example, Walsh and Bull⁷⁵ examined three forms of evidence disclosure by interviewers (i.e. early, gradual, and late presentation) alongside questioning strategies, following Griffiths and Milne.⁷⁶ They found that both gradual and late disclosure, when accompanied by open and probing questions yielded more information from suspects than did the “early” method of evidence presentation. Izotovas et al.⁷⁷ took this type of interview analysis yet one stage further by using a taxonomy that had been first utilised by Kelly et al.⁷⁸ These latter authors identified a maximum of six domains in any one interview (i.e. *rapport and relationship building, context manipulation, emotion provocation, confrontation/competition, collaboration, and presentation of evidence*). Kelly et al. postulated that these domains would be helpful to the gaining of better oversight when studying interview practices,

72 Clarke and Milne (n 19); Griffiths and Milne (n 19).

73 Griffiths and Milne (n 19); Oxburgh, Myklebust and Grant (n 22).

74 A Gates, Y Daly and R Milne, ‘Interviewing Suspects in the Republic of Ireland: Establishing Some Sort of PEACE in a Search for the Truth’ in D Walsh, R Bull and I Areh (eds), *The International Handbook of Investigative Interviewing and Interrogation* (Routledge forthcoming).

75 Walsh and Bull (2015) (n 44).

76 Griffiths and Milne (n 19).

77 A Izotovas, CE Kelly and D Walsh, ‘The Domains of PEACE: Examining Interviews with Suspected Sex Offenders’ (2021) 36 *Journal of Police and Criminal Psychology* 743–57.

78 Kelly and others (n 25).

due to the more holistic view undertaken when conducting this type of research of police interviews.

In the study undertaken by Izotovas et al.,⁷⁹ it was found that PEACE-trained officers, who had begun to develop initial rapport with suspects, appeared to become increasingly frustrated and confrontational in light of suspects' non-cooperation. It was also found that while evidence continued to be gradually disclosed, questioning strategies increasingly involved non-productive questions and levels of rapport declined. The gradual evidence disclosure did not have the same effect of gaining cooperation as was revealed to be the case in other studies suggest that evidence disclosure alone is insufficient.⁸⁰ These other techniques are also important.

The Perspectives of Suspects on Investigative Interviewing

Research undertaken around the world has examined what prompts interviewees to disclose their wrongdoing to interviewers, or at least become more cooperative with them.⁸¹ In these studies, the researchers asked convicted offenders what prompted them to cooperate. In the Kebbell et al. study, half of their participants reported approaching interviews with the firm intent to either provide full admissions or denials, while the other half waited to see how they were treated before deciding which of these two strategies to undertake.⁸² Consistently across the cited studies, it was found that cooperation was positively associated with the interviewers' willingness to (i) allow them to talk and provide explanation and their version of events; (ii) listen to them; (iii) be open minded and non-judgemental; and (iv) be compassionate and empathetic. It has also been consistently found in these studies that those who said that they did not cooperate attributed such denials to their treatment by those interviewers whom they viewed as dominant and aggressive. As such, it does appear that strategies recommended in those investigative interviewing models do encourage suspects to talk and even confess to crimes (such as sexual ones that have been shown, for various reasons, to be difficult to prove without such cooperation from suspects).

79 Izotovas, Kelly and Walsh (n 77).

80 Bull and Soukara (n 62); Walsh and Bull (2015) (n 44).

81 For example, HMD Cleary and R Bull, 'Jail Inmates' Perspectives on Police Interrogation' (2019) 25 *Psychology, Crime & Law* 157–70; U Holmberg and S-A Christianson, 'Murderers and Sexual Offenders' Experiences of Police Interviews and Inclination to Admit or Deny Crimes' (2002) 20 *Behavioral Sciences and the Law* 31–45; M Kebbell, L Alison and E Hurren, 'Sex Offenders' Perceptions of the Effectiveness and Fairness of Humanity, Dominance, and Displaying an Understanding of Cognitive Distortions in Police Interviews: A Vignette Study' (2006) 14 *Psychology, Crime and Law* 435–49.

82 Kebbell, Alison and Hurren (n 81).

An Overall Evaluation of Investigative Interviewing

The investigative interviewing approach has been generally viewed favourably, not least because of its promotion of a structured and ethical framework that has at its core the notion of acquiring reliable information, rather than one that is oriented towards seeking confessions. The transformation in England and Wales to investigative interviewing (and away from coercive approaches) has been largely underpinned by the introduction of key legislation which safeguards the legal rights of suspects when being questioned, including the right to be legally represented in interviews. While Irish legislation and the regulation of garda custody and garda interviews is vastly underdeveloped in comparison with PACE and its Codes of Practice, the judicial recognition of important constitutional rights of suspects, along with the now regular admission of lawyers into the interview room (though in the absence of legislative underpinning, to date), has been important in the development of appropriate practice in this area in Ireland. A further positive measure is the introduction of mandatory audio/video recording of interviews with suspected offenders to act as a faithful evidential record, which protects all participants against accusations of malpractice (notwithstanding, in Ireland, the continued practice of also making a written record). Finally, the introduction of the PEACE and GSIM models has seen police officers being trained for the first time in each of these countries systematically in an interview technique that respects human rights and encourages the need for better investigation techniques. All these factors were integral to the shift towards investigative interviews. None of them alone enabled this transformation.⁸³ The move to investigative interviewing is significant in and of itself, but there is an ongoing need for evaluation, reflection, and research on ongoing compliance with training, emerging knowledge, and best practice. Indeed, we go further and advocate that the police in Ireland should more willingly entertain the benefits of external scrutiny of their investigative interviewing practice, no matter whether criticism might be painful. As such, there are opportunities to reflect and learn from critical insights from journalists, independent inspections, or through academic critique. In the case of this latter cohort, the police in England and Wales have seen much value in such joint working to the extent where structures are in place to ensure that it occurs through the Evidence-Based Policing Model, which advocates that a more scientific approach should be taken to underpin developments in professional practices.⁸⁴

83 I Bacik, 'Recording Will Not End All Conflicts on Interviews' *The Irish Times* (Dublin, 5 August 1999) <www.irishtimes.com/news/recording-will-not-end-all-conflicts-on-interviews-1.213496>.

84 LW Sherman, 'The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking' (2013) 42(1) *Crime and Justice* 377–451; R Bull, 'Roar or PEACE: Is It a Tall Story?' in R Bull and I Blandon-Gitlin (eds), *Routledge International Handbook of Legal and Investigative*

Investigative Interviewing: Next Steps

Ireland and the United Kingdom, along with a growing number of other countries/organisations, have adopted a model/approach of “investigative interviewing” of suspects that does not rely on a coercive or oppressive approach.⁸⁵ Indeed, in 2016, the United Nations’ Special Rapporteur on torture and other cruel, inhumane, or degrading treatments, Professor Juan Mendez, submitted a report that was then transmitted by the UN Secretary-General to the UN General Assembly. In this report, its summary stated that:

The Special Rapporteur . . . advocates the development of a universal protocol identifying a set of standards for non-coercive interviewing methods and procedural safeguards that ought, as a matter of law and policy, to be applied at a minimum to all interviews by law enforcement officials, military and intelligence personnel and other bodies with investigative mandates.⁸⁶

When mentioning this “universal protocol” in 2016, the UN Special Rapporteur noted that:

Encouragingly, some States have moved away from accusatorial, manipulative and confession-driven interviewing models with a view to increasing accurate and reliable information and minimizing the risks of unreliable information and miscarriages of justice” and that “[t]he essence of an alternative information-gathering model was first captured by the PEACE model of interviewing adopted in 1992 in England and Wales . . . [I]nvestigative interviewing can provide positive guidance for the protocol.⁸⁷

Following on from the UN’s acceptance of Professor Mendez’ proposal that a “universal protocol” be written, a small international, multidisciplinary Steering Committee was set up in 2017 to draft such a document. This Steering Committee spent three years combining information into one document not only (a) on interviewing/interrogating but also (b) on laws/safeguards. The agreed, finalised version was published in June 2021, being called the

Psychology (Routledge 2019); R Bull (ed), *Investigative Interviewing* (Springer 2014); R Bull and A Rachlew, ‘Investigative Interviewing: From England to Norway and Beyond’ in S Barela and others (eds), *Interrogation and Torture: Research on Efficacy, and Its Integration with Morality and Legality* (OUP 2019); Noone (n 33).

85 D Walsh, R Bull and I Areh (eds), *The International Handbook of Investigative Interviewing and Interrogation* (Routledge forthcoming).

86 J Mendez, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations 2016) 2.

87 *Ibid.*, 13.

“Principles of Effective Interviewing,” though more informally referred to as the “Mendez Principles.”⁸⁸

The 2021 document states that:

Robust research supports the efficacy of an information-gathering approach to interviewing. Rapport-based, non-coercive methods offer effective techniques that can be successfully applied by trained professionals to gather criminal and intelligence information from interviewees. Establishing and maintaining rapport is an adaptive skill that helps create a working relationship between persons and enables better communication.⁸⁹

The “Principles” document notes that an effective interview process will typically involve the following:

- undertaking thorough preparation and planning, ensuring relevant safeguards are applied throughout;
- keeping an open mind and creating a non-coercive environment;
- establishing and maintaining rapport;
- using scientifically supported questioning techniques;
- actively listening to interviewees and enabling them to speak freely and completely;
- skilfully/calmly contrasting what the interviewee says with what the interviewer already knows (or has already been said by the interviewee – where contradictions appear to have arisen within or between various accounts); and
- assessing and analysing both the information gathered from interviewees and the interviewing itself.

In short, it can be seen that the above summary mirrors the investigative interviewing approach. Yet, while we know that countries such as Ireland and the United Kingdom have introduced adaptations of the investigative interviewing ethos, many more are either unaware or, for various reasons, still have yet to incorporate investigative interviewing into policies, law, or practice. This then remains a challenge for researchers, policy/lawmakers, and practitioners. Furthermore, the “Principles” document makes the important point that what happens during interviews (still called interrogations in some countries) is very likely to be influenced by what happens during arrest

88 United Nations Steering Committee on Effective Interviewing, ‘Principles of Effective Interviewing for Investigation and Information Gathering’ (2021) <www.wcl.american.edu/impact/initiatives-programs/center/publications/documents/principles-on-effective-interviewing/>.

89 *Ibid.*, 7.

and custody. These particular matters have yet to be researched sufficiently, and thus our understanding of this is far from complete. Nevertheless, what can be seen from the “Principles” of the UN Declaration is that they are very much consistent with those of investigative interviewing. As such, this approach (regardless of whether its nomenclature is investigative interviewing or interrogation) should be the basis for the future of law enforcement interviews worldwide.

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6

LEGAL ASSISTANCE IN POLICE CUSTODY

An Irish Solution to Safeguarding Suspects

Yvonne Daly

Introduction

Access to legal assistance in the pre-trial, investigative stage of the criminal process is recognised as a fundamental protection for those who are suspected of criminal offending and detained in police custody.¹ Anyone who is arrested and detained for questioning is vulnerable, and many suspects in the Irish criminal process have additional vulnerabilities in terms of low levels of educational attainment, mental ill-health, learning disabilities, addiction issues, and so on.² The investigative stage of the criminal process, and in particular, the garda interviewing of suspects, can be a crucial aspect of building a case against a suspect. As the centre of gravity of the criminal justice system has moved backwards into the privacy of the police station and away from the public courtroom, the need for additional safeguards to ensure fairness for suspects has been heightened.³

1 On an international level, see the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (approved by UN General Assembly in 2012) <<https://digital-library.un.org/record/735513?ln=en>> accessed 27 July 2023. Note also, that in the Principles on Effective Interviewing for Investigations and Information Gathering, the so-called Mendez principles, the right of access to a lawyer is specifically listed as one of 13 legal and procedural safeguards which are necessary to ensure respect for human rights and enhance the reliability and evidentiary value of the information obtained. 'Principles on Effective Interviewing for Investigations and Information Gathering' (May 2021) <<https://interviewingprinciples.com/>> accessed 29 June 2023.

2 V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury 2023) Chapter 6.

3 See Y Daly and J Jackson, 'The Criminal Justice Process: From Questioning to Trial' in D Healy and others (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016) 280

In the Irish context, as discussed in other chapters in this volume, many safeguards for particularly vulnerable suspects are underdeveloped. We do not have a clear system for the use of appropriate adults for adult suspects with learning disabilities, for example.⁴ Interpreters, outside of Irish Sign Language interpreters, are not required to have any particular qualification in interpreting and there are no formal registration requirements for them.⁵ There are, as yet, no unannounced oversight visits to garda stations to ensure that custody records are being properly kept, detainees are being properly treated, and that the facilities are appropriate.⁶ Access to medical review while in custody is in need of significant improvement also.⁷ Given the underdevelopment of those safeguards, and the overwhelming power of the police to hold someone in custody for periods of time ranging from six hours to seven days, the need for a properly functioning system of access to legal assistance for those detained in police custody is even more important than might be the case if those other safeguards were more fully functional.

This chapter begins by outlining the current status of the right to legal assistance in Ireland, and the winding road which has brought us to this point, including European influences on domestic developments. Then, it sets out the important role that a garda station lawyer plays. Following this, this chapter delves into issues which impact the practical and effective functioning of the right to legal assistance, including access to the Garda Station Legal Advice Scheme to cover the costs of legal assistance; the process of selecting a lawyer where a detainee does not know who to contact; time management issues for practitioners; and more. One aspect of the proposed Garda Síochána (Powers) Bill is then examined, before the chapter concludes with a recognition of where we are now and the need for enhancements to ensure effective protection of the right to legal assistance in Ireland.

Legal Assistance in Garda Custody: Current Status of the Right/Entitlement

At the time of writing, a free-standing right to legal advice/assistance⁸ during a period of garda detention is not directly set out in legislation in Ireland, though it is referred to in legislation providing for inferences to potentially be

at 287, 292. See also J Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) *Modern Law Review* 987.

4 See further Chapter 12 in this volume.

5 See further Chapter 7 in this volume.

6 See further Chapter 8 in this volume.

7 See further Chapter 12 in this volume.

8 While the constitutionally recognised right is one of reasonable access to legal advice, the European Court of Human Rights tends to refer instead to "legal assistance." Conway and others have previously argued that the role is broader than advising alone: see V Conway

drawn at trial from the failure or refusal of a suspect to answer certain questions or to provide certain information during garda interview.⁹ There are plans to recognise the right in legislation, within the Garda Síochána (Powers) Bill 2021, well over 30 years since the power of detention for questioning in garda stations became generally available for arrestable offences.¹⁰ The courts have recognised that a right of reasonable access to legal advice stems from the Irish Constitution, but this iteration of the right is more limited than that recognised at a European level, both in the EU Directive on the Right of Access to a Lawyer in Criminal Proceedings¹¹ and in the jurisprudence of the European Court of Human Rights.¹²

One of the main features of the broader iteration of the right to legal assistance which has not (yet) been recognised as part of the constitutionally protected right is the right to have one's lawyer present throughout police interview. Since 2014, however, this has been allowed in Ireland more by way of concession than through its recognition as a substantive right.

The story of how we, in Ireland, arrived at this juncture is a winding, but interesting one. In the 1970s and 1980s, the Irish courts referenced the existence of a right of access to legal advice in the pre-trial investigative stage of the criminal process in a number of cases,¹³ and its status as a constitutional right was eventually declared by the Supreme Court in the 1990 case of *People (DPP) v Healy*.¹⁴ It was expressed as a right of "reasonable access" to legal advice only. This was said to encompass a right to have immediate access to a requested lawyer once a suspect arrived at a garda station, but the

and Y Daly, 'From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station' (2019) 1 *Irish Judicial Studies Journal* 103–23.

- ⁹ See ss 18, 19, and 19A of the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007; s 2 of the Offences Against the State (Amendment) Act 1998; and, s 72A of the Criminal Justice Act 2006 as inserted by s 9 of the Criminal Justice (Amendment) Act 2009.
- ¹⁰ Offences with a potential sentence of imprisonment of five years or more. The general power of detention post-arrest in such cases was introduced under s 4 of the Criminal Justice Act 1984, though it was not commenced until 1987, following the introduction of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.
- ¹¹ Directive 2013/48/EU of the European Parliament and of the Council of October 22, 2013, on the right of access to a lawyer in criminal proceedings and in the European Arrest Warrant proceedings.
- ¹² See, for example, *Pishchalnikov v Russia* [2009] ECtHR 1357; *Brusco v France* [2010] ECtHR 1621; *Šebalj v Croatia* [2011] ECtHR 4429/09; *Borg v Malta* [2016] ECtHR 53; *Aras v Turkey (no 2)* [2014] ECtHR 15065/07.
- ¹³ In *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159; *People (DPP) v Madden* [1977] IR 336; *People (DPP) v Farrell* [1978] IR 13; and *People (DPP) v Conroy* [1986] IR 460.
- ¹⁴ *People (DPP) v Healy* (1990) 2 IR 73; [1990] ILRM 313.

notion of having a lawyer present during interview was summarily dismissed in a number of cases.¹⁵

Despite pronouncing the constitutional importance of the right, the courts did not prohibit the practice of gardaí questioning a detained suspect who had requested access to legal advice before they had in fact obtained such advice, so long as *bona fide* efforts were being made to contact a lawyer on their behalf.¹⁶ This changed with the hugely important case of *People (DPP) v Gormley and White*,¹⁷ in 2014. There, the Supreme Court departed from previous case law and ruled that the interrogation of detained suspects should not commence until after legal advice, where sought, has been obtained. Clarke J found that the arrest of an individual, by “the coercive power of the state”:

represents an important juncture in any potential criminal process. . . . Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods . . . It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage.¹⁸

Accordingly, the Court clarified that a breach of the right of access to legal advice in the garda station would amount to a breach of the right to a fair trial under Article 38.1 of the Constitution. Referencing the highly influential European Court of Human Rights (ECtHR) case of *Salduz v Turkey*¹⁹ (see later), Clarke J recognised the need at this early stage of the criminal process for a lawyer to engage in building the defence,²⁰ to advise on the lawfulness of the arrest and detention, and to advise on questioning. Hardiman J, concurring, highlighted the increasing complexity of the law for which the specialist

15 *ibid* 317. Prior to the decision in *Healy*, it had been suggested in a number of cases that the right of access to pre-trial legal advice, whether constitutional or otherwise, was a right of reasonable access only, and there was no entitlement for a suspect to have their solicitor present throughout interrogation: for example, *People (DPP) v Pringle* (1981) 2 Frewen 57. See also post-*Healy*, *Barry v Waldron* (23 May 1996) HC; and *Lavery v Member-in-Charge, Carrickmacross Garda Station* (1999) 2 IR 390.

16 See *People (DPP) v Buck* (2002) 2 IR 260; (2002) 2 ILRM 454 and *People (DPP) v O'Brien* (17 June 2002) CCA; (2005) 2 IR 206 SC.

17 *People (DPP) v Gormley and White* (2014) 2 IR 591; [2014] IESC 17.

18 *People (DPP) v Gormley and White* (2014) 2 IR 591, 629. A distinction was drawn in this case between the right of access to a lawyer prior to interview and prior to the taking of forensic samples.

19 *Salduz v Turkey* [2008] ECtHR 36391/02.

20 *People (DPP) v Gormley and White* (2014) 2 IR 591, 630.

expertise of a solicitor is required and indicated that the Court might find a right to have a solicitor present during garda interview if asked in an appropriate case.²¹

This *obiter* indication of an inclination to possibly recognise a right to the presence of a lawyer throughout interviews prompted an unexpected response. Two months later, in May 2014, the DPP issued a letter to An Garda Síochána instructing that where requested, the attendance of a solicitor at interview should be facilitated and that all suspects should be advised that they may request a solicitor to attend interviews. Solicitors were permitted to attend the very next day, though by way of concession rather than a legal or constitutional right, and with no legal clarity on how attendance should operate.²² A year later, in 2015, the Garda Síochána issued a Code of Practice on Access to a Solicitor by Persons in Garda Custody²³ and the Law Society issued Guidance for Solicitors Providing Legal Services in Garda Stations.²⁴ While these documents brought some clarity to the context of solicitor attendance at interviews, they are not entirely *ad idem* on all issues, and they do not have the force of law behind them. They are essentially internal protocols for each profession to follow.²⁵

There continues to be no detailed regulation of this stage of the criminal process, and while the Garda Síochána (Powers) Bill purports to engage with certain aspects of it, legitimate concerns remain about the Bill as it stands at the time of writing (discussed later).

The route which brought us to the current, somewhat equivocal, status of the right to legal assistance in Ireland, was paved not only by domestic case law and executive decisions but by developments at a European level also. Article 6 of the European Convention on Human Rights (ECHR) protects the right to a fair trial. Article 6(3)(c) specifically states that a person charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” The ECtHR has sought to ensure effective and practical implementation of these provisions by not only recognising the right to have a lawyer

21 *Ibid.*, 599.

22 See further Conway and Daly (n 8); Conway and Daly (n 2) 53.

23 An Garda Síochána, ‘Code of Practice on Access to a Solicitor by Persons in Garda Custody’ <www.garda.ie/en/about-us/publications/policy-documents/code-of-practice-on-access-to-a-solicitor-by-persons-in-garda-custody.pdf> accessed 29 June 2023.

24 The Law Society, ‘Guidance for Solicitors Providing Legal Services in Garda Stations’ <www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf> accessed 29 June 2023.

25 Conway and Daly (n 2) 57–63.

present during police interview but also clarifying that this right is one of legal assistance, which goes beyond legal advice alone.²⁶

In *Salduz v Turkey*,²⁷ which, as noted earlier, was later cited in *Gormley and White*,²⁸ the Grand Chamber declared clearly that, unless there are compelling reasons in an individual case, access to a lawyer should be provided from the first interrogation of a suspect by the police.²⁹ Prior to *Salduz*, the ECtHR had assessed whether a breach of the right of access to a lawyer amounted to a breach of the right to a fair trial by considering the fairness of the proceedings as a whole.³⁰ However, the Court departed from this approach in *Salduz*, basing its decision on the belief that “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”³¹ The Court was clear on the centrality of the police interview to the fairness of the criminal process as a whole, and the requirement for access to legal assistance, where requested, throughout the interview to ensure fairness.

There has been some regression since the heights of protection afforded to the right to legal assistance in *Salduz*. In *Ibrahim and Ors v UK*,³² the ECtHR held that a two-stage test should be applied to consider any claimed breach of Article 6 based on lack of access to a lawyer:

- (i) determine if compelling reasons exist for the non-provision of access; and if not,
- (ii) conduct “a holistic assessment of the entirety of the proceedings to determine whether they were ‘fair’ for the purposes of Article 6.”³³

Despite this regression in terms of the approach to assessing any possible breach, the ECtHR has reiterated the principles which apply under Articles 6(1) and 6(3), in relation to the right of access to legal assistance in police custody. In *Atristain Gorosabel v Spain*,³⁴ for example, the Court reiterated that, as a rule, access to a lawyer should be provided as soon as there is a criminal charge and, in particular, from the time of the suspect’s arrest. Access

26 See, for example, *Pishchalnikov v Russia* [2009] ECtHR 1357; *Brusco v France* [2010] ECtHR 1621; *Šebalj v Croatia* [2011] ECtHR 4429/09; *Borg v Malta* [2016] ECtHR 53; *Aras v Turkey (no 2)* [2014] ECtHR 15065/07.

27 *Salduz v Turkey* (2008) ECtHR 36391/02 (n 19).

28 *People (DPP) v Gormley and White* (2014) 2 IR 591 (n 17).

29 *Salduz v Turkey* [2008] ECtHR 36391/02 (n 19) at 55.

30 *Imbrioscia v Switzerland* [1993] ECtHR 13972/88; *Murray v UK* [1996] ECtHR 18731/91; *Averill v UK* [2001] ECtHR 36408/97.

31 *Salduz v Turkey* [2008] ECtHR 36391/02 (n 19) at 55.

32 *Ibrahim and Ors v UK* [2016] ECtHR 50541/08; 50571/08; 50573/08 and 40351/09.

33 *Ibid.*, para 264.

34 *Atristain Gorosabel v Spain* [2022] ECtHR 15508/15.

to a lawyer should be provided from the first interrogation of a suspect by police, unless it is demonstrated in the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction must not unduly prejudice the rights of the accused under Article 6. Furthermore, a person charged with a criminal offence who does not wish to defend themselves in person must be able to have recourse to legal assistance of their own choosing, from the initial stages of the proceedings.

The Court listed the value of “prompt access to a lawyer” for arrested suspects, stating that it:

constitutes an important counterweight to the vulnerability of suspects in police custody . . . Provides a fundamental safeguard against coercion and ill-treatment of suspects by the police . . . [and] one of the lawyer’s main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself . . . and for his right to remain silent.³⁵

The Court observed that assigning a lawyer does not in itself ensure the effectiveness of the assistance of that lawyer, and minimum requirements must be met. Suspects must be able to engage with a lawyer from the time at which they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview. The lawyer must be able to confer with his or her client in private and receive confidential instructions. Suspects are entitled to have their lawyer physically present during their initial police interviews and whenever they are questioned in subsequent pre-trial proceedings. Furthermore, such physical presence must be of a nature that enables the lawyer to provide assistance that is effective and practical rather than merely abstract, and in particular, to ensure that the defence rights of the interviewed suspect are not prejudiced.³⁶

Ireland found itself before the ECtHR in relation to an alleged breach of Article 6 in the case of *Doyle v Ireland*.³⁷ The applicant had been convicted of murder, in part based on a confession he made while in garda custody. He claimed a breach of his right to legal assistance as his lawyer was not present during this, or any other, garda interview. The relevant arrest was in 2009 when the attendance of a lawyer during interview was not yet permitted in Ireland, and the applicant had not been denied access to his lawyer at any point *outside* of the interviews. He was detained for over 60 hours and had 40 minutes of consultation with his solicitor across that time; no

35 Ibid., para 46.

36 *Atristain Gorosabel v Spain* [2022] ECtHR 15508/15 (n 34) para 49.

37 *Doyle v Ireland* App no 51979/17 (23 May 2019).

one consultation period lasted longer than 10 minutes. Gardaí had stopped interviews and facilitated consultations on request. The admission was made in the course of the fifteenth interview.

The ECtHR, applying its post-*Salduz* assessment of the overall fairness of proceedings, found no breach of Article 6. It did, however, emphasise the importance of the right to legal assistance and clearly stated that Article 6(3) (c) encompasses a suspect's right to have their lawyer physically present during police interviews.³⁸

Before the *Doyle* case got as far as the ECtHR, there was some speculation that the Supreme Court would make good on its previous *obiter* suggestion that in an appropriate case it might recognise the presence of a requested lawyer during interview as part of the constitutional right of access to legal advice. This did not happen. A majority of the Supreme Court in *Doyle* refrained from recognising that as an aspect of the constitutional right, though there were again indications from a number of members of the Court that this might be recognised at some point in the future.³⁹ O'Malley J mentioned, in particular, that a case involving inferences from silence might give rise to such a future finding. In dissent, McKechnie J was deeply concerned by the issue of equality of arms, given the "armoury and array of resources" at the State's disposal: "I do not believe that the present safeguards sufficiently address the inequality which now exists in the interview room and which can so threaten the rights being presently discussed."⁴⁰

Interestingly, in the 2022 case of *DPP v JD*,⁴¹ MacMenamin J made passing, *obiter*, reference to "the right to the presence of a lawyer" while being interviewed by An Garda Síochána.⁴² He also referred more directly to the decision in *Gormley & White* to the effect that the process of taking a statement in garda custody was so clearly connected to the trial process that Article 38 of the Constitution (the right to a fair trial) must be held to apply outside the temporal confines of the trial itself, and to require that a person in custody have access to, and the assistance of, a lawyer before being questioned. He noted that that decision "has led to a salutary change in official practice in respect of questioning in custody."⁴³ The concession to having a requested lawyer present during garda interview appears to now be well settled, despite not being officially recognised as part of the constitutional right to legal advice.

38 *Ibid.*, para 74.

39 See the judgments of MacMenamin, O'Malley and O'Donnell JJ: *People (DPP) v Doyle* (2018) 1 IR 1; [2017] IESC 1.

40 *Ibid.*, para 176–78.

41 *People (DPP) v JD* [2022] IESC 39.

42 *Ibid.*, paras 4, 106, 109.

43 *People (DPP) v JD* [2022] IESC 39 (n 41) para 118.

The increasing interest of the EU in the harmonisation of suspect rights across member states has also impacted the development of the current Irish position on the right of access to legal assistance. In 2016, an EU Directive on the Right of Access to a Lawyer in Criminal Proceedings entered into force. This is one of the so-called Procedural Rights Roadmap Directives, which emerged from the 2009 EU Stockholm Programme. Ireland does not participate fully in Justice and Home Affairs matters and maintains an “opt in” approach to directives in this area. While it has opted in to the Directive on the Right to Interpretation and Translation in Criminal Proceedings,⁴⁴ and the Directive on the Right to Information in Criminal Proceedings,⁴⁵ it has not opted in to other criminal justice directives, including this one. Its provisions confirm, and arguably expand, the position adopted by the ECtHR in *Salduz*. Article 3, for example, establishes that suspects have a right to access a lawyer, without undue delay, before they are questioned by police. Suspects must be enabled to “exercise their rights of defence practically and effectively.”⁴⁶ They are entitled to meet their lawyer in private and for “their lawyer to be present and participate effectively when questioned.”⁴⁷ The lawyer should also be permitted to attend ID parades, confrontations, and reconstructions of crime scenes. While Ireland has not (yet) opted in, the very existence of the directive has been influential on our domestic approach to the issue⁴⁸ and the European-wide consensus on the importance of legal advice and assistance in the early, investigative stages of the criminal process is clear.

We turn now to examine the specific role played by lawyers in fulfilling their clients’ right to legal assistance, noting that this goes beyond the mere provision of legal advice to include other important functions also.

Role of the Lawyer

The lawyer’s role at the police station is not simply to give legal advice, it has evolved into a more expansive role, as what happens in the police station has become more important to the overall trajectory and disposal of the

44 Directive 2010/64/EU of the European Parliament and of the Council of October 20, 2010, on the right to interpretation and translation in criminal proceedings.

45 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

46 Directive 2010/64/EU (n 45) Article 3(1).

47 *Ibid.*, Article 3(3).

48 In January 2013, the Government established a working group to advise on a system providing for the presence of a legal representative during Garda interviews: Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews, *Report – July 2013* (Department of Justice and Equality 2013). The group outlined the manner in which the Directive on the Right of Access to a Lawyer in Criminal Proceedings could practically be implemented in Ireland, if the state were to opt into it.

case. In 90% of cases, there will be no trial, and therefore, no later testing of the evidence against the accused.⁴⁹ What happens in the police station then can, in the vast majority of cases, be determinative of next steps, and ultimately of the outcome of the case. Accordingly, it is necessary for the lawyer not to simply tell the detainee what their legal rights are, or to recite the law to them: there is a more involved engagement necessary, which the SUPRALAT project has termed active, client-centred lawyering.⁵⁰ The term active here does not connote that the lawyer should be intervening unnecessarily throughout interviews, for example, but they should be fully engaged while present at the police station: listening actively to their client and to gardaí; seeking disclosure in advance of interview; assessing the well-being of their client and discussing any medical needs with gardaí; taking good notes in both the consultation and interview; supporting their client through the process; intervening when necessary during the interview; and casting their minds forward to the likely next steps of gardaí or the likely way the case might be perceived at trial, so as to continually give the best advice possible to the client. Being client-centred means that this is not a “one size fits all” exercise: the advice which might be appropriate for one detainee in certain circumstances might not be for another in a similar situation. A good garda station lawyer should be very aware of their client’s concerns and any specific vulnerabilities, should be focused on the specific needs of the individual client, and should assist that client to make the decisions in the garda station that will lead to the best outcomes for them in their individual circumstances. Performing all of the necessary tasks which are required of a garda station lawyer is not easy, and it requires, in particular, strong communication skills which will need to be employed with both clients and gardaí so as to give the best representation possible to the detainee.

Writing with my late colleague Dr Vicky Conway, and drawing on empirical research conducted with criminal defence solicitors around Ireland, we identified seven specific functions of a garda station lawyer.⁵¹ We used the mnemonic ADJRESS to assist lawyers to remember these:

A – Advise.

D – Actively Defend.

J – Prevent miscarriages of Justice.

49 Conway and Daly (n 2) 68–69.

50 The SUPRALAT project was an EU-funded project titled “Strengthening suspects’ rights in the pre-trial proceedings through practices orientated training for lawyers” which brought together researchers from Ireland, the Netherlands, Belgium and Hungary to develop and deliver training for police station lawyers. See Conway and Daly (n 2) 2–4.

51 Conway and Daly (n 2) Chapter 4.

- R – Protect Rights.
- E – Ensure Equality of Arms.
- S – Provide Support.
- S – Protect the right to Silence.

Each of these is now briefly examined in turn, to give a flavour of the important and multifaceted role played by garda station lawyers.

1) Advise

In order to give useful legal advice to a detained client, the lawyer must get a good understanding of the charges of which their client is suspected and the justification on which that suspicion is based. They will need to explain the relevant law and legal principles to their client, in a comprehensible manner, and advise the client on what, in their particular circumstances, might be the best approach to take and what the consequences of any decision made at that point might be. Doing this effectively requires building trust with the client. It also requires the use of adaptive language, to ensure that the particular client understands what the lawyer is explaining to them, and, of course, a clear understanding of substantive law and procedure.

As lawyers are now entitled to be present throughout the garda interview, there is an opportunity to provide ongoing legal advice, or to respond immediately to unexpected turns in interview or the revelation of evidence which had not previously been disclosed. The lawyer can also clarify any inaccuracies or misunderstandings about the law should they occur during interview.

2) Actively Defend

The defence of a client in a criminal case does not begin at the doors of the courtroom; rather, for clients who have engaged a lawyer at the early stages of an investigation, it begins in the garda station. Bearing in mind that the vast majority of detentions will not lead to a trial at which interactions in the garda station will be scrutinised, it is very important for suspects in garda detention to have not just legal advice but legal defence. Again, this is not about objecting to every garda statement, question or action, or creating unnecessary disturbances but rather insisting on the upholding of all protections for one's client, and fully engaging in the process on their behalf. This would include seeking all necessary and available information from gardaí; considering, on the basis of knowledge and experience, what would be the approach most favourable to one's client; taking the time to clearly outline options and consequences to the client; and supporting them in giving effect to whichever option they select, be that remaining silent throughout interview, engaging with gardaí to a certain extent, or preparing a statement.

3) *Prevent Miscarriages of Justice*

We are not at a point where we could suggest that there is no risk of miscarriages of justice occurring in our criminal justice system. There is always likely to be such a risk as even where the conditions of custody are relatively good and no oppressive behaviour, threats, or inducements are present, individual vulnerabilities of suspects might still lead to false confessions or acquiescence. The presence of a lawyer throughout the period of custody and questioning can operate as a safeguard against such outcomes, particularly where they are aware of their client's specific vulnerabilities and are alert to the risks of miscarriages of justice occurring, whether that be through improper police conduct or otherwise. Part of the role of the lawyer in this context may be to advocate on their client's behalf that a planned garda interview should not go ahead, where they are concerned that their client is unfit for interview. Gardaí should, of course, also be alert to concerns around fitness for interview and the well-being of the suspect throughout the detention period. The presence of the lawyer can be very important, nonetheless, in articulating specific concerns around the detainee's well-being and its impact on the fairness of any interview.

4) *Protect Rights*

It is clearly an important function of the lawyer in the garda station to protect the rights of their client, from requesting medical attention, to not being questioned about an offence other than the one for which they are arrested, to not being ill-treated or asked oppressive questions. Protecting rights is not just a matter of insisting that gardaí do things in an appropriate manner but also ensuring that the client appreciates the significance of what is at play during detention, understands the legal advice given, and is in a position to decide on which advice to take. As noted by Conway and Daly, "[t]he lawyer, by their presence [at interview] alone can impact on the tone of the interview, the pressure felt by detainees, and through their interventions can ensure that rights are protected during the interview."⁵² Findings in other European jurisdictions support this and suggest that where lawyers were present police were less likely to act oppressively or unfairly towards suspects, and more likely to follow procedural rules.⁵³

There are concerns that gardaí sometimes interact with suspects outside of the interview room in an improper manner which might put the suspect under pressure to respond in a particular way during interview. Conway and Daly's study suggested that the presence of a lawyer at interview can

52 *ibid.*, 188.

53 J Blackstock and others, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Vol 113, Intersentia 2014) at p 409.

counteract any such interaction which may have previously occurred, or the fact that the lawyer is soon to arrive at the station might ensure that such interactions do not occur in the first place.⁵⁴

5) *Ensure Equality of Arms*

Equality of arms is at the core of the right to a fair trial under Article 6 ECHR and was central to the decision in *Salduz*.⁵⁵ It was also referenced in *Healy* as one of the grounding rationales for the recognition of the right of reasonable access to legal advice under the Constitution.⁵⁶ Suspects in the garda station are not on an equal footing with others. They are deprived of their liberty, held in cells which are generally unpleasant, unsure of their future time of release or the potential outcome of the ongoing investigation, and almost always unsure of the law and legal procedures. Even those who have previous custody experience, and who may indicate externally that they are unperturbed by their detention, are in a very disadvantaged position in garda custody.⁵⁷ It is one of the ultimate displays, really, of the power of the State interfering in the private life of the citizen. Furthermore, the (increasing) complexity of criminal law, the law of evidence, and the regulation of criminal procedure places the detainee at a disadvantage, further exacerbated by the need to try to understand and apply the law to one's own circumstance, while being detained in a garda station.⁵⁸ Decisions with significant and potentially long-term consequences have to be made quickly. All of this requires that some protections are provided on the side of the individual detainee, and access to legal assistance is one of the more important amongst those. The lawyer brings with them not just substantive knowledge of the legal rules but their knowledge from previous experiences in the garda station and from the operation of the criminal justice system as a whole.

Lawyers in Conway and Daly's study considered that the presence of a lawyer throughout interview, in particular, can give detainees a sense of confidence and can

provide the client with the reassurance that all necessary legal advice will be given to them and they are not disadvantaged by their own lack of full

54 Conway and Daly (n 2) 188.

55 *Salduz v Turkey* [2008] ECtHR 36391/02 (n 19) at 53.

56 *People (DPP) v Healy* (1990) 2 IR 73, 81.

57 In the context of accused persons at the crown court in England and Wales, research has shown that even those who had repeat experience of the criminal process may fail to understand or be unable to meaningfully engage with its complex processes and procedures: J Jacobson, G Hunter and A Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press 2016).

58 See further, Conway and Daly (n 2) 75.

understanding of the procedures, the charges or the likely consequences of their responses to garda questions.⁵⁹

6) Provide Support

The process of arrest and detention can clearly be extremely stressful for a suspect, and the conditions are unpleasant and unfamiliar. The presence of a lawyer, whose primary concern is the protection of their client's rights, can offer some support to the detainee in this position. While the lawyer's primary role might be to advocate for their client's rights and to advise them on the law, doing so offers support in and of itself, and it is argued that performing those tasks is difficult unless the lawyer offers support in a broader manner also. For example, detained suspects can find it difficult to concentrate on the important matters occurring in the station if they have external concerns, such as missing work, needing to collect children from school, worries about family members, and so on. A lawyer may be able to address these matters, thereby allowing the detainee to focus on the significant issues which are ongoing in the station. While there are, of course, limits to the role of the lawyer in this context, and lawyers should be sure to operate only within ethical and appropriate boundaries in offering support to clients, simple words of comfort to acknowledge the stressful position the client is in or to give a listening ear to their concerns can be a good way to establish trust in the lawyer–client relationship, and to help the client to focus on the importance of the detention in the short term and the legal advice they are being given.

In the course of a garda interview, even where a lawyer is not making many interjections, their very presence can offer support to the detainee. This may assist the detainee to maintain silence, if this is the decision they have taken pursuant to legal advice, or indeed, as noted by lawyers in the Conway and Daly study, it may be important where a detainee is admitting their involvement in the criminal offence also. Presence at interview allows the lawyer to give the client some reassurance that they are doing ok and provides an opportunity for discussions between interviews of the shared experience, again building trust and supporting the client through a difficult experience.

7) Protect the Right to Silence

The right to remain silent is an important protection for suspects in the criminal process, and the presence of a lawyer prior to and during interview can assist in the upholding of this right. While remaining silent is not necessarily the best legal advice in all circumstances, if the client decides that this is the

⁵⁹ Ibid., 189.

approach they wish to take, the presence of the lawyer can support them in maintaining that stance and can ensure that police do not attempt to dissuade them from standing upon this right.

Conway and Daly recount that:

Lawyers felt that, to some extent, their mere presence at interview lent support to the client in holding their “no comment” position. While the lawyer could explain to their client about the right to remain silent at the consultation stage, and role play them saying “no comment,” the reality of saying that in response to garda questions may only fully crystallise in the interview itself.⁶⁰

Having the lawyer present in the interview could assist the client in maintaining the “no comment” approach on which they had decided, on the basis of legal advice. Lawyers can also remind the client of their right to silence during interview, if newly presented evidence arises, for example, which they have not previously discussed, or if the client seems to be wavering from their planned position in the face of ongoing police questioning.

Pivaty notes that:

[i]n many European countries, police are likely to use at least some degree of persuasion to obtain self-incriminating accounts from suspects, and in a minority of cases they may resort to improper compulsion. As a result of such persuasion or pressure, suspects may fail to adhere to their initial decision concerning whether to remain silent or to respond to questioning, and whether or not to confess. The lawyer’s role in this respect would be to counteract the coercion exercised by the authorities.⁶¹

There is an additional role for the lawyer in terms of the right to silence in Ireland also, because several legislative provisions allow for inferences to be drawn from the silence of the suspect at garda interview, in certain circumstances.⁶² These provisions specifically require that the suspect ought to have had a reasonable opportunity to consult a lawyer in relation to the operation of inference provisions, and the courts have clarified that there must be an opportunity (if the detainee wants it) to specifically discuss the inference

60 Ibid., 192.

61 A Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study* (Routledge 2020) 23–24.

62 On the operation of the inference provisions in Ireland, see Y Daly, A Muirhead and C Dowd, ‘When You Say Nothing at All: Invoking Inferences from Suspect Silence in the Police Station’ (2022) 26(3) *The International Journal of Evidence & Proof* 249–70.

provisions, and their implications in their individual case, with their lawyer.⁶³ This reflects ECtHR jurisprudence which, for a long time, has linked the right to silence with the right to legal assistance.⁶⁴ The lawyer will also need to engage with gardaí in advance of an inference interview to gain relevant disclosure which will assist in advising the client. It can be difficult to explain the inferences and to assist the client in determining whether the better approach is to engage with the questions or to remain silent and run the risk of adverse inferences being drawn at trial. This is another example of where a suspect alone would be disadvantaged in their lack of understanding of complex legal and procedural concepts, and the assistance of a lawyer can be extremely important.

Practical and Effective Operation of the Right to Legal Assistance

The ECtHR has emphasised continually the need for rights to be practical and effective, not theoretical and illusory. While a suspect in garda custody is entitled to have access to a lawyer, and to have that lawyer present throughout interview, there are a number of limitations or challenges which restrict the practical and effective operation of the right in the Irish context including cost, the selection process, practitioner availability, and other practicalities which are now considered.

Cost

Currently, if a person detained in garda custody is on social welfare benefits or earning less than €20,316 per annum, they will be entitled to access legal advice free of charge while in garda custody, through the non-statutory Garda Station Legal Advice Scheme. According to the Central Statistics Office, the average salary per annum in Ireland is over €45,000.⁶⁵ The threshold for access to the Garda Síochána Legal Advice Scheme seems very low and exclusionary in that context. For anyone earning €30,000, €40,000, €50,000, or even more per annum it would likely be very difficult to find the money from everyday finances to pay for the cost of having a lawyer attend at the station, and stay throughout garda interviews. The take-up rate for accessing a lawyer in the garda station is low. Drawing on legal aid figures, Conway and Daly contend that approximately 21% of detainees access a lawyer during

63 *People (DPP) v Fitzpatrick* [2012] IECCA 74.

64 *Murray v United Kingdom* (1996) 22 EHRR29; *Averill v United Kingdom* (2001) 31 EHRR 839; *Condon v United Kingdom* (2001) 31 EHRR 1.

65 Central Statistics Office, *Earnings and Labour Costs Q3 2022 (Final) and Q4 2022 (Preliminary Estimates)* (Central Statistics Office 2022).

detention.⁶⁶ A similar figure is discernible from the 2021 Garda Síochána Inspectorate Report *Delivering Custody Services*.⁶⁷ Conway and Daly suggest that an average of just over 10% of those interviewed in garda stations, who were not paying privately for a lawyer, had one in attendance at interview.⁶⁸

The reasons for this are not clear, but it is at least possible that the cost of accessing a lawyer, or even the perceived cost, may be off-putting for detainees. While the right of reasonable access exists, then it is not being adequately funded or resourced, which perhaps reflects a lack of acceptance of the fundamental nature of the right to legal representation in garda custody. By contrast, in England and Wales, access to the duty solicitor is free of charge, no matter the earnings or financial status of the detainee.

Access to the Garda Station Legal Advice Scheme is only for those who have been arrested and detained in relation to arrestable offences, under certain provisions. Persons who attend voluntarily at a garda station for a cautioned interview are not entitled to benefit under the scheme. This needs to be reviewed to ensure an adequate level of protection for such persons. There are many reasons why someone might prefer to attend at the station in a voluntary manner rather than being subject to arrest, and while their liberty might not be at stake (save for the fact that they could at any point be arrested) they ought to have the same protections as those arrested and subject to interview.

Remuneration for garda station lawyers also needs to be reviewed and enhanced.⁶⁹ The rates of payment are low, and restrictions apply to the number of consultations which will be funded.⁷⁰ Such restrictions are based on the specific statute under which a suspect is being detained rather than any examination of the particular circumstances of the individual detainee or their possible additional needs or requirements.⁷¹

Lawyering at the garda station is challenging, taxing, and hugely important work. It takes a very unique set of knowledge, experience, and communication skills to do this work well. In order to ensure fairness in our criminal process, the existence of an expert cohort of lawyers who are willing to represent clients detained in garda stations at any hour of the day or night

66 Conway and Daly (n 2) 5.

67 Garda Síochána Inspectorate, *Delivering Custody Services* (Garda Síochána Inspectorate 2021).

68 Conway and Daly (n 2) 5.

69 *Ibid.*, 205–9.

70 See Legal Aid Board, ‘Garda Station Legal Advice Revised Scheme Guidance Document’ <www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-criminal-legal-aid-ad-hoc-cases/garda-station-legal-advice-revised-scheme/> accessed 29 June 2023.

71 There is a proviso allowing for additional payments where a solicitor is “specifically required” to attend at the station or at an interview, but the meaning of this phrase is not clear. See further, Conway and Daly (n 2) 206–7.

is necessary. Without improved remuneration we are likely to see further departures from the specialism, and a dearth of experienced individuals who are willing to continue doing garda station work. Practitioners are concerned that their numbers are dwindling and the number of new entrants is low.⁷²

Selection of a Garda Station Lawyer

Article 6(3)(c) of the ECHR declares that a person is entitled to legal assistance “of his own choosing” and this has been reiterated in the decisions of the ECtHR.⁷³ Where a detainee indicates a preference for a particular lawyer, that lawyer ought to be contacted. However, detainees sometimes do not know who to contact, and the system which has developed in Ireland where this arises is ad hoc and inconsistent. In fact, it is not really a system at all. While the Law Society has provided a process for use in this situation, it is not consistently used by gardaí. The Law Society provides a webpage which lists lawyers who have registered as willing to attend at particular garda stations – the “Find a Garda Station Solicitor” tool.⁷⁴ This list displays in a random order each time the webpage is renewed, in an effort to ensure transparency, fairness, and equitable distribution of work. This tool was referred to by the State in evidence to the European Committee on the Prevention of Torture during its 2019 visit to Ireland.⁷⁵ However, lawyers in Conway and Daly’s study reported their views that:

the list is not used, or is not consistently used; alternative methods have been developed by gardaí; gardaí sometimes influence the choice of lawyer; and gardaí had the opportunity to sway selection towards their “favourite” lawyers, with serious consequences for due process.⁷⁶

Many solicitors interviewed in the Conway and Daly study expressed concerns around the lack of transparency in the process of selecting a garda station lawyer. The Garda Inspectorate noted that different stations employ

72 Conway and Daly (n 2) 35–37.

73 For example, *Dvorski v Croatia* [2013] ECtHR 25703/11; *Martin v Estonia* [2013] ECtHR 35985/09.

74 Law Society, ‘Find a Garda Station Solicitor’ <www.lawsociety.ie/find-a-solicitor/Find-a-Garda-Station-Solicitor> accessed 29 June 2023.

75 European Committee on the Prevention of Torture, ‘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 23 September to 4 October 2019’ (2019) para 17 <<https://tm.coe.int/1680a078cf>> accessed 29 June 2023.

76 Conway and Daly (n 2) 196. See also Y Daly and V Conway, ‘Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance’ (2021) 48(4) *Journal of Law and Society* 618.

different methods, and that very few gardaí were even aware of the Law Society's tool.⁷⁷ Conway and Daly listed the alternative practices which have developed in some stations, including gathering business cards which might be stuck to the wall and inviting suspects to choose from amongst those, or to choose between two or three of those as offered by a garda; maintaining a laminated list, which solicitors could request to be added to; providing a list that was completed by a local Law Association. Many of the lawyers in that study reported that they rarely received calls relating to clients with whom they had no pre-existing relationship, either through direct prior contact, or from representing family members, or through having a specific reputation in relation to certain types of offences. A sense of unease around the lack of transparency or consistency in the selection of garda station lawyers was clear in that study, and there was a perception amongst some lawyers that gardaí were able to influence the selection process.

This is corroborated, to some extent, by the finding in the Garda Inspectorate report that "certain solicitors were seen [by gardaí] as the 'go to' option, potentially creating an advantage to those concerned."⁷⁸

Conway and Daly examined lawyers' views on how a particular solicitor might come to be seen as the "go to" option, or become a garda "favourite."⁷⁹ A range of factors were cited ranging from simply the fact of a garda knowing a particular solicitor from school or from playing on the same sports team, to the far more concerning suggestion that lawyers might be favoured due to the likely impact on the investigation. In that context, the contention was that lawyers who prioritise the protection of their clients' rights, who are likely to attend in person at the station, who might advise their clients to maintain their right to silence, or who might make specific requests during detention or interventions during interview would not be favoured. Even the perception that this might be happening is damaging to the reputation of An Garda Síochána and to the notion of fair procedures. There is an urgent need to regularise the process of selecting lawyers for garda station work in Ireland, where the detainee does not know who to call. Consideration could be given to systems which remove this role entirely from police. In Scotland, for example, a protocol requires the police to pass all requests for police station legal advice to the Solicitor Contact Line (SCL), which is provided by the Scottish Legal Aid Board. Where no specific solicitor is requested, an SCL employee provides preliminary advice to suspects by telephone. If the suspect asks for a solicitor to

77 Garda Síochána Inspectorate (n 67) 43.

78 *Ibid.*, 43.

79 Conway and Daly (n 2) 195–200.

attend the police interview, the referral is passed to a duty solicitor, often provided through the Public Defence Solicitors' Office.⁸⁰ But we do not even need to go so far. The Garda Inspectorate has indicated its support for the consistent use of the Law Society "Find a Garda Station Solicitor" tool, to ensure transparency and independence in the delivery of legal assistance in garda custody. If this was employed consistently and effectively, and the list was rigorously managed and updated by the Law Society, it would allay much of the concern on this issue.

More innovative solutions could also be considered. In Belgium, for example, an adaptable web-based list is in operation, on which lawyers can update their availability up to two days in advance, allowing flexibility from the lawyers' perspective and providing reliable availability information.⁸¹ In England and Wales, Kemp has piloted a Police Station App to provide detained suspects with information on their legal rights, including the right to legal assistance.⁸² This could be further developed to enhance a rights-based approach to the selection of solicitors, ensuring that suspects are making the choice themselves, improving the quality of the information on which they make that choice, and recording any waivers of the right. Lawyers could potentially upload a brief video or audio clip in which they introduce themselves, which could be provided to suspects on a tablet or played on a screen in the garda station. Given the importance of what is at stake, and the importance of lawyers building rapport with a client, something more than a name or a business card would enhance the decision-making process. As with the "Find a Garda Station Solicitor" list, such a programme could be designed to play in a random, different order each time it is commenced. Of course, some suspects might still struggle to choose, but gardaí could be strictly informed that they should not engage with any request to counsel suspects on this matter and should advise suspects that they must make their own selection. Furthermore, the physical environment in which suspects are informed of their legal rights and are given access to this technology ought to be video-recorded, so that the free choice of the suspect can be verified. As with the Belgian list, solicitors should be able to access this programme from their side to update availability from time to time. If such a system was jointly developed by An

80 V Kemp, 'Effective Police Station Legal Advice – Country Report 6: Scotland' (2018) <<http://eprints.nottingham.ac.uk/51251/1/Country%20Report%20Scotland%20Final.pdf>> accessed 29 June 2023.

81 E Maegherman and M Vanderhallen, 'Effective Police Station Legal Advice – Country Report 1: Belgium' (2018) <<https://nottingham-repository.worktribe.com/output/927183/effective-police-station-legal-advice-country-report-1-belgium>> accessed 29 June 2023.

82 V Kemp, 'Digital Legal Rights for Suspects: Users' Perspectives and PACE Safeguards' (2018) <<https://nottingham-repository.worktribe.com/output/946048/digital-legal-rights-for-suspects-users-perspectives-and-pace-safeguards>> accessed 29 June 2023.

Garda Síochána and the Law Society of Ireland, it might be more likely to be adopted and applied. In the interim, the existing Law Society tool should be formally adopted at the highest levels of AGS as the correct procedure to employ where a suspect wants assistance from a lawyer in garda custody but does not know who to call.

Practitioner Availability

As the system currently operates, there is a very practical difficulty for solicitors in organising their time, and being available to drop everything and attend at a garda station to represent a client at any time of the day or night. This is a particularly difficult situation for sole practitioners or small firms. If a lawyer is in court in the morning, and has meetings planned with clients in the afternoon, but suddenly receives a call from a garda station to say that a client has been arrested, what are they supposed to do? It is very difficult to hand over court work or to reschedule all planned meetings, in order to attend at a station for an unknown period of time. Similarly, a lawyer might be at their child's football match on a Saturday morning, or asleep in bed in the early hours, when they get a call to say there is a client in a certain garda station in need of their representation. Nighttime calls can be particularly demanding, as while gardaí may be operating within their rostered hours, a lawyer will have a full day of work to complete the next day. The difficulty of continuously being subject to this work/life, and indeed work/other work imbalance is a challenge which lawyers in the Conway and Daly study mentioned often.⁸³

In larger firms, it can be easier to deal with this, and some smaller firms have developed rota systems to cover for one another on an on-call basis. There may be a need to operationalise this on a broader scale in time – either through a formal duty solicitor scheme or through a more regularised on-call rotation.

There would also be a benefit to increased use of pre-arranged interviews, whether voluntary or pursuant to an arrest, where possible. This would allow lawyers to plan their time better, and to consult with clients in their own offices rather than within the less accommodating facilities of the garda station.⁸⁴ Having said that, legislative confirmation that the rights and protections afforded to arrested detainees should also be afforded to those who attend for a voluntary, cautioned interview is necessary. Similarly, the Garda Station Legal Advice Scheme should be extended to include voluntary questioning and the necessary preparatory legal consultations.

⁸³ Conway and Daly (n 2), see Chapter 2.

⁸⁴ *Ibid.*, 263–65.

Other Practical Issues

Conway and Daly's study pointed to the differing challenges and experiences which present for access to legal assistance in garda custody in rural Irish settings, as compared with urban centres.⁸⁵ Small-town familiarity between lawyers, gardaí, and clients, as compared to the relative anonymity of city work, could have both disadvantages and advantages in terms of engagement and communication. The distance a lawyer might need to travel to attend at a station, and therefore the time involved in attending in person was noted as a particular difference. A further important concern in rural areas is that there might not be a specialist criminal defence lawyer available, and because garda station representation requires a very unique set of skills and expertise to be done well, it is not the type of work that a non-specialist can easily perform. If the local conveyancing and probate solicitor were to attend at the station to advise a detainee, they would simply not have the depth and breadth of experience in the criminal justice system to provide the same level of service as a criminal defence lawyer working within the system on a daily basis.

Lawyers in that study also referenced the lack of facilities provided to them at garda stations. There are 564 operational garda stations in the country, and 120 of those have custody facilities totalling 492 cells.⁸⁶ Many of these are in old buildings, which were not designed with the attendance of lawyers in mind. Lawyers spoke to Conway and Daly about having to sometimes wait in the public reception area before and between interviews. This can sometimes be uncomfortable, particularly at night when other residents of the public reception area may be drunk or otherwise intoxicated. Safety concerns can also arise, particularly where the identity of the lawyer representing a high-profile detainee might be exposed.⁸⁷ A lack of access to parking for lawyers at garda stations was also cited, which can not only add to the stress of attending but also, again, pose safety concerns for those advising detainees. One lawyer in the study recounted leaving a very serious detention late at night and being watched for a protracted time by someone across the road when leaving.⁸⁸ Walking to their car down the street felt unsafe.

Lawyers noted the lack of consultation rooms, meaning that consultations are sometimes held in the interview room, a medical office, or even in a cell.⁸⁹ None of these options is ideal.

As noted, garda station representation is a very particular aspect of lawyering, and there is very little formal training provided. Criminal law and

85 *Ibid.*, 27–28.

86 Garda Síochána Inspectorate (n 67) 16.

87 Conway and Daly (n 2) 29–30.

88 *Ibid.*, 30.

89 *Ibid.*, 29.

practice is not afforded significant space in the Law Society of Ireland initial solicitor education programme. While the Law Society supported Conway and Daly in providing the SUPRALAT training programme to practising criminal defence lawyers, so as to assist them in their garda station work, there is no regular, ongoing training on this issue. Neither is there any specific accreditation necessary to conduct garda station work, other than being a solicitor. In England and Wales, by contrast, lawyers are not permitted to attend at stations without full training and accreditation for that role.⁹⁰ Lawyers in Ireland told Conway and Daly that they would like training, in particular, on recognising client vulnerabilities, the procedural aspects of attendance, giving the best possible advice, intervening in interviews, challenging gardaí, and dealing with the heightened emotions of detention.⁹¹

One final point is worth making here, while having a lawyer in attendance throughout detention and interview is extremely important, at the end of the day their power is limited. There is no referee, or independent judge, to adjudicate on disputes between a lawyer and a member-in-charge who does not want to note something on the custody record, for example, or an interviewing garda who does not agree that the question they have put to the detainee is oppressive. While lawyers can intervene, there is no guarantee that their intervention will be successful. This can be difficult for lawyers to experience, particularly when they are used to the resolution of dispute by a judge at trial, for example, where an objection is raised to a question asked in cross-examination. Lawyers, while striving at all times to represent their clients to the very best of their abilities, have to accept the limitations of their role. Sometimes all they can do is take a comprehensive note of what they have requested and why, mention their objections and justifications clearly on camera during interview, or perhaps email concerns to the relevant superintendent, to ensure they have been placed on record. The absence of strong regulation in this area confounds the difficulty as the rules of engagement, so to speak, are not entirely clear.

The Garda Síochána (Powers) Bill 2021

As noted earlier, there are several concerns around the General Scheme of the Garda Síochána (Powers) Bill 2021. One of these is the provision for a Code of Practice on custody and detention to be drawn up by the Garda Commissioner (following consultation with the Policing Authority, the Garda Síochána Inspectorate, and the Irish Human Rights and Equality Commission), for subsequent approval by the Minister for Justice.⁹² This Code is to

90 Ibid., 32–33.

91 Ibid., 33.

92 General Scheme of the Garda Síochána (Powers) Bill 2021, Head 64.

address the treatment of persons detained in Garda custody on suspicion of the commission of an offence and other matters related to detention which might be deemed appropriate by the Minister. In relation to legal assistance specifically, the General Scheme of the Bill suggests that the Code of Practice on custody and detention “shall provide for procedures in relation to access to a legal representative by persons detained in Garda custody facilities.”⁹³ Furthermore, the General Scheme suggests that the time between a request for legal assistance up to and including the first consultation between a detainee and their lawyer can be excluded in reckoning the overall period of detention permitted.⁹⁴ So, for example, if a detainee requests legal assistance and his lawyer is in court and cannot attend for an hour, and then spends half an hour in consultation with the detainee, the detention clock is essentially stopped for that hour and a half, and only starts to run again after the consultation has ended. It is proposed that the Code of Practice would determine the maximum period of time which might be excluded in reckoning a period of detention in such circumstances.⁹⁵ This seems like a very strange way to establish an important boundary in relation to the right of access to legal assistance. As discussed later, there are legitimate reasons why it might take a lawyer some time to attend a station, and while one can understand the policing desire not to lose time from the investigative detention period, it is suggested that the determination of the maximum period of exclusion in these circumstances ought to be objectively and firmly established in law rather than in a Code of Practice which is drawn up by the Garda Commissioner. The devolution of responsibility from the Minister to the Garda Commissioner for the creation of this Code of Practice (following consultation with the designated bodies), though subject to ministerial approval, seems extraordinary. Looking at England and Wales by comparison, the highly detailed and comprehensive Codes of Practice which accompany the Police and Criminal Evidence Act 1984 are statutory codes, prepared and published by the Secretary of State, laid before both Houses of Parliament for approval by way of resolution, and brought into operation as a statutory instrument. They therefore have the appropriate force of law behind them. The plans for Codes of Practice within the General Scheme of the Garda Síochána (Powers) Bill 2021 are confusing in terms of their legal value and seem to pass the planning and drafting power to the police rather than having the Department of Justice engage in an objective consultation process, as an independent arbiter.

93 Ibid. Head 64(3).

94 Ibid. Head 42(2).

95 Ibid. Heads 42(2) and 64(3).

Conclusion

It is beyond time for the right of access to legal assistance in garda custody in Ireland, including the presence of one's chosen lawyer during any garda interviews, to be put on a clear statutory footing with relevant, comprehensive regulations provided. The current situation gives a sense of the sort of double-think that usually underlies the phrase "an Irish solution to an Irish problem": the rationale and importance of the right to legal assistance are accepted, but the legal clarity, agreed practical protocols and financial resources necessary to give full effect to the right for those who need to avail of it are not in place. If people are to be adequately and appropriately protected in the Irish criminal process, particularly while in garda custody, then their rights need to be properly recognised and resourced. The acceptance of rights or entitlements in theory, without robust systems to ensure practical and effective operation of those rights in reality, falls far short of what is truly necessary to assist those who find themselves in police custody in Ireland.

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7

INTERPRETERS IN GARDA STATION INTERVIEWS – IMPACTS AND REALITIES

Gearóidín McEvoy

Introduction

Interpreters in police stations are a vital conduit in ensuring that communication can occur between police and suspects, witnesses, victims, or other people. Where an individual does not share language with the police, an interpreter bridges the gap and makes communication possible, allowing police to collect evidence, to take statements, or to interview suspects. Without an interpreter where one is needed, communication is simply not possible. And yet, despite the vital role that interpreters can play, theirs is a field which is unregulated and vastly under-resourced.

In this chapter, I discuss the realities of police custody for people who need an interpreter in Ireland. I explore access to interpreters, the police role in facilitating that access and the realities of the system of interpreters in Ireland. The conflict between availability and provision of interpreters and garda custody regulations will be the central focus of this chapter.

Context and Concerns

I begin this chapter with an extract from a research interview with Síle, a Deaf Irish Sign Language (ISL) user who recalled giving a statement to An Garda Síochána regarding a road traffic incident. At the scene of the incident, there was no one to communicate with her and so it was arranged that she would attend a garda station at a later time to provide her statement recounting the incident.

Síle: I was called in just to make a statement . . . And there was an interpreter for that and I was surprised. I had never seen the interpreter

before. . . . There was some signs that were wrong, some confused numbers like 17 and 12. For me, that put extra pressure on me to be alert to the communication. Because this is a statement in relation to the [incident]. And then this was obviously through the interpreter, the garda asked me “do you want to read back through the statement through the interpreter or do you want to read it yourself?” And I said I’d read it myself. And luckily enough I can read. But what about other Deaf people who don’t have good literacy skills? I was lucky. I was able to read it over myself.¹

This illustrates how the accuracy, or otherwise, of interpreting can affect proceedings. When Síle attended the garda station interview, an ISL interpreter was provided. However, the quality of their interpretation was poor. Note that in ISL, the numbers 12 and 17 are formed using similar hand-shapes. However, numbers and letters are commonly the first thing a person learns when learning ISL, so the mistake is on a very basic level. As it turned out, the interpreter who had been provided for Síle was not qualified and had not finished their training.² Nevertheless, they were being used by An Garda Síochána to interpret Síle’s statement. Síle was on high alert during their interview and had to act as quality control for the interpreter in addition to recounting her own evidence. Síle was aware of her own privilege as a Deaf person with good literacy who was capable of correcting the written mistakes in her statement, acknowledging that this is not a reality for many Deaf people who lack literacy skills. Had she not had these literacy skills and proficiency in spoken English, she would not have been alert to the mistakes in interpretation and would not have been able to correct them. To paraphrase Shulman, what is notable here is not just that there were inaccuracies in the interpretation, but rather that the inaccuracies were caught.³

It is important that I state that this is not a criticism of this specific interpreter, or of interpreters generally. Rather, in this chapter I argue that the blame for poor interpretation in police station interviews lies with a system

1 This extract is from an interview conducted for research elsewhere. See G McEvoy, ‘The Créatúr and the Slíbhín: An Examination of the Lived Experiences of Regional or Minority Language Users within the Criminal Justice System’ (PhD, Dublin City University 2022) at 200. ‘Síle’ is a pseudonym.

2 It should be noted that since this incident, the Irish Sign Language Act 2017 has passed into law wherein interpreters used in garda station interviews must be qualified and registered on an official register. It should also be noted, however, that no such requirement for training or professionalism is required for any other language interpretation in Ireland.

3 MB Shulman, ‘No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants’ (1993) 46 Vanderbilt Law Review 176.

which allows for such interpreters, or which breeds an environment where it is not possible or profitable for trained, quality interpreters to thrive. The interpreter controls the flow of information between police and a suspect, victim, or witness giving evidence. In a situation such as a police station interview, where an individual's words have a major impact on their journey through the criminal justice system, an interpreter holds great power to influence that journey. Accuracy in such a setting is vital for an accused or suspected person. Mulayim et al. provide the following example of an exchange between an interpreter, a police officer, and suspect during an interview, which demonstrates the gravity of an interpreter's role:

[Police Officer]: Have you had any contact with your ex-wife recently?
 [Interpreter, in xxxx xxx xxxx xx xxx xxx xxx x xxx xx xx xxx? *(Have target language): you talked to your ex-wife recently?)
 [Suspect]: No.
 (Note: But he, in fact, sent his ex-wife text messages)⁴

In this instance, were police aware of text messages the suspect had sent to his ex-wife, it would indicate that he was lying, which could be used as evidence if a prosecution was brought. However, the suspect was in fact correctly answering the question put to him in his own language, as he had not spoken to his wife recently. The interpreter's input here, while small in an everyday context, has the potential for grave consequences for the suspect going forward within the context of the criminal process.

The interpreter's role in police station interviews must be understood as crucial, with the potential to entirely colour the outcome of the interview, and the subsequent experiences within the criminal justice system which follow. It is vital that their role is understood by all parties to ensure that fairness of trial is maintained for an accused person.

The Right to an Interpreter

The right to an interpreter for an accused person constitutes a minimum standard under the right to a fair trial provided for by a multitude of international human rights documents including the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which Ireland is party to. Both instruments guarantee an accused a right to an interpreter where they do not understand the language used within the criminal justice system. This right constitutes part

⁴ S Mulayim, M Lai and C Norma, *Police Investigative Interviews and Interpreting: Context, Challenges, and Strategies* (CRC Press 2014) at 63. Emphasis in original text.

of the right to a fair trial under both instruments, wherein the right to a fair trial applies to accused persons not only during the trial itself but also before the trial, including during police custody and interviews.⁵

Domestically in Ireland, there are some specific instruments which direct the right of an accused person to an interpreter within garda custody. The European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013⁶ state that:

An arrested person, other than a person who is being dealt with through the medium of the Irish language, who does not speak or who does not understand the English language shall have the right while in custody to the assistance, at no cost, of an interpreter and to the translation, at no cost, of the documents specified in these Regulations.⁷

In respect of Deaf persons specifically, the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987⁸ state that:

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 eighteen years, the written consent of an appropriate adult).⁹

It might be tempting to conclude from these laws that a person who needs an interpreter in garda custody will be provided with one. However, there are a number of issues to consider here which can impact an individual's access to an interpreter. First, we must ask what it means to "need" an interpreter – if having an interpreter is contingent on being able to understand the language of court, it is important to ask what that means. Second, we must ask who is

5 See Article 6.3 of the ECHR and Article 14.3 of the ICCPR.

6 Hereinafter "the 2013 Regulations."

7 The European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Síochána Stations) Regulations, 2013 s 3. Note additionally that Irish holds a constitutional hierarchy in Ireland as per Article 8 of the Constitution of Ireland. Therefore, specific rules exist for the provision of services in Irish in the criminal justice system, wherein gardaí and lawyers are mandated to undergo training in Irish. A person has, *de jure*, the right to use Irish when they engage with the criminal justice system. However, this situation is not without its own complexities. Actually acquiring that service can be fraught with difficulty for a multitude of reasons. See McEvoy (n 1).

8 Hereafter "the Custody Regulations."

9 Regulation 12.8(a), as amended by SI no 641/2006 – Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) (Amendment) Regulations 2006.

tasked with assessing that need and assessing linguistic competency. We must also ask about the availability of an interpreter, and we must ask about their standards of training, about their knowledge of appropriate legal terminology and experience with garda interviews. We must ask about the needs of the individual accused person, their socio-economic background and their historic access to language. We must ask about the impact that custody time limits have on access to an interpreter and decisions to forego interpretation in order to adhere to those time limits. We must ask about quality control and best practice for interpretation. We must ask about the recording and checking of interpretation for accuracy in such a high-stakes setting. All of these questions are vital in assuring that the right to an interpreter for an accused person is vindicated effectively.

Needing an Interpreter

An accused person is entitled to an interpreter where they need one, pursuant to the right to a fair trial, as found not only under the ICCPR and the ECHR but also under the garda custody regulations as cited earlier. This includes at a garda station, when they are being interviewed. However, it is worth considering what it means to need an interpreter and who is tasked with assessing that need.

Language competency is highly situational. A person may well be competent to navigate everyday conversations in one language but may struggle to use that same language in a complex situation.¹⁰ The same person who can order a coffee in English, chat with friends in English, or consume English-language entertainment media can struggle when they are being interviewed by police in English. As Waterhouse states:

[w]hile [it] is obvious where a person cannot understand or speak a single word of the language of court, it can be less clear when the defendant has some knowledge and use of the language, but is not fluent.¹¹

In a high-stress environment, such as in police interviews, the words chosen have the potential to greatly impact the course of events which follow. Language competency in one domain does not guarantee language competency in all domains.¹² In the context of this work, gardaí may see an individual

10 S Berk-Seligson, 'The Importance of Linguistics in Court Interpreting' (1988) 2 *La Raza Law Journal* 14 at 17.

11 K Waterhouse, *Ireland's District Court: Language, Immigration and Consequences for Justice* (Manchester UP 2014) at 82.

12 A McCaffrey, 'Don't Get Lost in Translation/Teaching Law Students to Work with Language Interpreters' (2000) 6 *Clinical Law Review* 347 at 354.

communicating in English in the hallway of a garda station, prior to their arrest and detention, or they may be previously known to gardaí as someone who can speak English. However, this knowledge outside of custody in no way indicates that an accused person will not need an interpreter in a garda station interview. Del Valle states that when a person is faced with the grave consequences of criminal charges, they should be given the opportunity to express themselves with the maximum of ease.¹³

Nevertheless, access to an interpreter is at the behest of the member in charge at the garda station. Regulation 4 of the 2013 Regulations states that where it appears to the member in charge that an arrested person requires an interpreter, the member in charge shall “take such steps as are reasonable in all the circumstances to verify if the person requires the assistance of an interpreter.” This is concerning as there is no indication as to what is meant by taking reasonable steps, nor is there an indication as to how the member in charge would assess language competency. The Regulations go on to state that:

[i]n deciding whether the assistance of an interpreter is required, the member in charge shall consider whether interpretation is necessary to ensure that the arrested person knows the offence or other matter in respect of which he or she has been arrested, will be able to communicate effectively with his or her solicitor and will be able to appreciate the significance of questions put to him or her or of his or her answers during interview. In case of doubt it shall be presumed that interpretation is required.

Language assessment is a complex task.¹⁴ There is no indication that the member in charge who will be assessing language competency will be trained to do so or appreciate that language competency is varied and situational. While it is positive that when there is doubt, an interpreter will be provided, there is no indication of how an accused person might appeal the decision not to have an interpreter provided.

The consequence of this is that An Garda Síochána are given the license to assess language competency, with no indication of how that should be done, and with no requirement for expertise in that area. They may act as gatekeepers for access to interpreters, and ultimately, for access to the interview itself because where an individual cannot fully understand the interview, they cannot be said to have had access to it.

13 S Del Valle, *Language Rights and the Law in the United States: Finding Our Voices* (Multilingual Matters Ltd 2003) at 172.

14 RC Williams, ‘Assessing Linguistic Incompetence in the Criminal Justice and Mental Health Systems’ in D Guthmann, GI Lomas and D Goff Paris (eds), *Deaf People in the Criminal Justice System* (Gallaudet UP 2021) at 22.

In respect of Deaf people, the Custody Regulations state that where an interpreter has been requested for a Deaf person in garda custody but “one is not reasonably available, any questions shall be put to [the accused person] in writing.” However, this solution is not always workable. Not only are there a limited number of ISL interpreters working in Ireland, a fraction of whom are experienced in interpreting in garda station interviews¹⁵ but also literacy in English cannot be guaranteed in respect of Deaf suspects. Due to systemic language deprivation,¹⁶ many Deaf people in Ireland have poor English literacy, or struggle to communicate in this way. Writing in no way guarantees that an accused Deaf person has access to the interview.¹⁷ This shows that the structures in place for interviewing a Deaf person have not been constructed with an understanding of the realities of Deaf peoples’ lives and experiences. As an example, a Deaf man was detained in Donegal, in the northwest of Ireland, in 2012, for driving while drunk. The man was an ISL user but was not provided with an interpreter during his detention by gardaí, and gardaí used written notes to communicate with him. This was in spite of a note written by the man to gardaí which stated “I not understand what you think.”¹⁸ An Garda Síochána were evidently satisfied that communication via written notes was satisfactory in the absence of an interpreter. On appeal, the man’s conviction was overturned because he was not given access to an interpreter.

For Deaf people, the requirement upon An Garda Síochána is to provide an interpreter only where one is “reasonably available” and to otherwise resort to written communication. Again, this does not ensure access for an individual, nor does it necessarily reflect the needs of the specific Deaf person in question.

Accessing an Interpreter

If we consider an accused who finds themselves in garda custody, and who needs an interpreter, they must first pass the hurdle of being deemed to need one by the member in charge, as discussed. If they have managed to overcome that hurdle, the next obstacle relates to sourcing an interpreter.

Depending on the language, there may be only a handful of interpreters available. For example, there are approximately 110 registered ISL

15 McEvoy (n 1) at 194. In McEvoy’s study, Prof Lorraine Leeson (Professor of Deaf Studies at the Centre for Deaf Studies, Trinity College Dublin) estimated that there are approximately ten such interpreters.

16 H Rose and JB Conama, ‘Linguistic Imperialism: Still a Valid Construct in Relation to Language Policy for Irish Sign Language’ (2018) 17 Language Policy 385.

17 See G Harkin, ‘Drink-Drive Deaf Man Wins Appeal Over Lack of Interpreter’ *Irish Independent* (7 May 2017).

18 Ibid.

interpreters as of the time of writing.¹⁹ Some of those interpreters are themselves Deaf and must work in conjunction with a hearing interpreter in order to facilitate communication in spoken English. Some of those interpreters are not actively working or taking on new jobs. And only a handful of those registered interpreters will be experienced working in legal settings. Leeson estimated in research elsewhere that approximately ten people are so experienced.²⁰ This means that the pool of available interpreters is very small. Additionally, they are spread out across the jurisdiction, meaning that in some areas the nearest interpreter could be hours away. As noted earlier, the Custody Regulations specifically allow for gardaí to proceed in the absence of an ISL interpreter where none is “reasonably available,” using written notes.

For other languages, there is no mandated register of interpreters as there is for ISL interpreters, so it is not possible to ascertain exactly how many Polish, Latvian, Mandarin, Urdu, etc., interpreters there are working in Ireland at present, or how easy it might be to find one to facilitate garda interviews. The concern about accessing interpreters for specific languages arose in research from Conway et al. where criminal defence solicitors acknowledged “difficulties when the system failed to produce an appropriate interpreter.”

YD18: **And have you had any difficulties or any interesting experiences with them?** Well you can’t get a Georgian, interpreter has to come from Dublin for [X other city].

YD22: I can imagine if you are dealing with an extreme minority language that it could be very difficult maybe to source an interpreter.²¹

Depending on the circumstances, an interpreter may not be available for a particular language, leaving uncertainty about how gardaí ought to proceed.

Specific to the process of garda station detention and interviews and the availability of interpreters is the issue of time limits. When a person is held for interview at a garda station, there is a time limit on how long they may be detained. If an interpreter is needed, there will likely be a delay in awaiting their arrival at the garda station. This may mean a delay of minutes, up to hours. Depending on the location of the garda station, the time of day, the day of the week or the time of the year, and the language needed, an appropriate interpreter may be hours away. This does not stop the clock from ticking on the custody time limit, however. That means that if a Swahili

19 See Register of Irish Sign Language Interpreters, ‘Directory of Interpreters June 2022’ <<https://risli.ie/wp-content/uploads/2022/06/Directory-of-Registered-Interpreters-June.2022-2.pdf>> accessed 11 July 2022.

20 McEvoy (n 1).

21 V Conway, Y Daly and G McEvoy, ‘Interpretation in Police Stations: Lawyers’ Perspectives on Rights and Realities’ (2022) 13 *Journal of Human Rights Practice* 606 at 617.

speaker is arrested at 4 am in a rural part of Galway, with a six-hour detention time limit, there may not be an appropriate interpreter available within that timeframe. In other research conducted by this author, a member of An Garda Síochána acknowledged the difficulty that gardaí face when trying to navigate time limits and acquiring an interpreter:

Garda: Geographically, it's impossible sometimes to get [an interpreter] to arrive in the station within the timeframe. And you are looking at the clock. . . . It doesn't say anything in Section 4 of the Criminal Justice Act [about interpreters arriving in the detention timeframe]. If you couldn't, that's your fault. The solicitor is going to make mincemeat of you if you took six hours for the interpreter to come and your first six hours has gone, you are detaining this person – that's your fault. That's the criminal justice system's fault. That's not the suspect's fault, if you couldn't get the person in.²²

This garda showed how interpreter availability impacts the carrying out of an interview and its possible impact on a detainee's right to liberty, through the potential need for an extension of the detention period, within the limits of relevant legislation.

As an additional example, two cases appeared before courts in Donegal regarding Deaf ISL users recently, including the case discussed earlier.²³ In both cases, the Deaf men were not provided with an interpreter for their interactions with gardaí, despite indications that interpretation was needed. There is no clear evidence as to why interpreters were not provided. It may have been, as discussed earlier, that gardaí considered that no interpreters were necessary. However, it may also have been connected to the availability of interpreters in very remote parts of Ireland.²⁴ The lack of a necessity for interpreters as described earlier, coupled with problems with interpreter numbers and availability, means that there is a potential for gardaí, worried about exceeding custody time limits, to decide to proceed in the absence of interpreters.

Training

The next hurdle in addressing interpreter provision is in respect of training and quality. If an individual in custody has been deemed to need an

22 McEvoy (n 1) at 180.

23 Harkin (n 17). See also J Cradden, 'Deaf Have Human Interpreter in Court' *Village Magazine* (9 June 2017).

24 McEvoy (n 1) at 179.

interpreter by gardaí, and an interpreter has been located to facilitate the interview, questions arise about who that interpreter is, and what their level of training might be. As shown with Síle’s testimony and in the example from Mulayim et al.,²⁵ accuracy and skill in interpreting police station interviews is crucial. Misinterpretations can cost the suspected person greatly, and impact their journey through the criminal justice system as a result.

Currently, in Ireland, only ISL interpreters are legislatively required to be trained and to appear on an official register of interpreters. Under the Irish Sign Language Act 2017 (ISL Act), ISL interpreters used in courts or within public bodies must be accredited and verified.²⁶ A Register of Irish Sign Language Interpreters (RISLI) was set up to accompany the ISL Act, which mandates the level of qualification necessary to appear on the register.²⁷ ISL interpreters are required to have *specific* interpreter training to a high level in order to be eligible to join the register. I mention the need for specific interpreter training, because as I will now discuss, there is no such requirement for interpreters in other languages.

Aside from ISL interpreters, there are no statutory requirements for any other interpreters to be professionally trained, qualified, regulated, or experienced in any setting. A 2012 call for tenders for interpreters in the Irish Courts Service did not require that interpreters had any formal training in interpreting.²⁸ The Irish Translators and Interpreters Association (ITIA) has reported on an interpreting company which had “advertised for interpreters for courts, garda and hospitals and said that ‘3rd level qualifications and interpreting experience an advantage but not a must.’”²⁹ In a recent Bulletin the ITIA have stated that:

in Ireland anyone who speaks English and another language can act as an interpreter in garda stations, for solicitors and the courts. This is because

25 Mulayim, Lai and Norma (n 4) at 63.

26 See the Irish Sign Language Act 2017, s 7.

27 Bachelor’s Degree in Deaf Studies (Interpreting) from Trinity College Dublin (NFQ Level 8) Signature Level 6 NVQ Diploma in Sign Language Interpreting with Level 6 NVQ Certificate in Irish Sign Language (equivalent to NFQ Level 8) or Continuous Professional Development Certificate in Deaf Interpreting, Trinity College Dublin. Register of Irish Sign Language Interpreters, ‘Qualifications’ <<https://risli.ie/registration/qualifications/>> accessed 22 August 2022.

28 Irish Translators and Interpreters Association, ‘ITIA Bulletin: April 2013’ <www.translatorsassociation.ie/wp-content/uploads/2017/10/ITIA-Bulletin-APR2013.pdf> accessed 6 July 2022, at 3. See also Irish Translators and Interpreters Association, ‘ITIA Bulletin: 2020/04’ at 15 <www.translatorsassociation.ie/wp-content/uploads/2020/12/ITIA-bulletin-2020-04.pdf> accessed 8 July 2022.

29 Ibid ITIA Bulletin: April 2013, at 2.

there is no training courses for legal interpreters and no examination to establish if [an] interpreter can provide competent interpreting.³⁰

While this applies to interpreters aside from ISL interpreters, it is also notable that no specific legal interpreter training is mandated for ISL interpreters either. Therefore, we can extrapolate that there is no guarantee that an interpreter who attends a garda station interview will be trained at all (aside from ISL interpreters), and no guarantee that any interpreter will have the necessary skills or experience to interpret in legal settings. In addition to this, there is little opportunity for interpreters to *acquire* training. Individual interpreter agencies may offer training to their interpreters, but this is not mandated, and on an *ad hoc* basis. There is only one dedicated training course, a Master's Degree in Conference Interpreting at NUI Galway. This course supports only Irish, French, German, and Spanish.³¹ In addition, as non-ISL interpreters are not required to have training in order to work in the field, the cost of training may not be offset by any competitive advantage.³²

In the recent case of *DPP v HM and BO*,³³ in the Irish Court of Appeal, the quality of interpretation at trial was deemed to have been so poor that a conviction of two individuals was overturned on appeal and a retrial ordered.³⁴ In that case, inadequate interpretation was such as to “distort” the questions put to the appellant which could have “impacted on [his] credibility before the jury.”³⁵ The interpreter used in that case had worked as a court interpreter for many years and had been deemed “by his employer as being qualified to interpret for Circuit Court and High Court cases.”³⁶ Nevertheless, the threshold that the interpreter met for such “qualifications” was that he was a native speaker of French and had obtained a PhD in English.³⁷ There is no indication that he had any specialised training to act as an interpreter in legal settings.

30 Irish Translators and Interpreters Association, ‘ITIA Bulletin: 2021/01’ at 10 <www.translatorsassociation.ie/wp-content/uploads/2021/03/ITIA-bulletin-2021-01.pdf> accessed 8 July 2022.

31 See Translator Association, ‘Interpreter Training’ <www.translatorsassociation.ie/interpreter-training/> accessed 11 July 2022.

32 See Irish Translators and Interpreters Association, ‘ITIA Bulletin: 2021/03’ at 7 <www.translatorsassociation.ie/wp-content/uploads/2021/09/ITIA-bulletin-2021-03.pdf> accessed 11 July 2022. See also M Brennan and RK Brown, *Equality Before the Law: Deaf People's Access to Justice* (D McLean 2004) at 48.

33 *DPP v HM and BO* [2021] IECA 315.

34 See P Doyle, ‘First People in Ireland Convicted of FGM Face Retrial After Convictions Quashed’ *The Irish Times* (18 November 2021).

35 *DPP v HM and BO* [2021] IECA para 37.

36 *Ibid.*, para 26.

37 *Ibid.*, para 26.

At the start of this chapter, I cited Síle’s experience with an untrained interpreter who made mistakes when interpreting her statement to gardaí. She had to be vigilant to the interpreter’s mistakes and correct them after the fact, to ensure the accuracy of her testimony, something which Síle felt lucky to be able to do. The interpreter’s lack of training impacted her experience in the garda interview and had the potential to alter her testimony. Síle’s experience occurred before the coming into force of the ISL Act. As such, no law or policy was broken at the time in procuring an unqualified interpreter. For all other languages, having an untrained interpreter in a garda station interview to this day remains lawful, in spite of how their skill level may impact the accuracy of testimony and evidence given during an interview.

Working Conditions for Interpreters

When we consider procuring an interpreter, it is necessary to discuss working conditions for interpreters. This has a direct link to the number of interpreters currently working, to the availability of interpreters and undoubtedly to the quality of the work which is available. I reiterate here that criticisms of the state of interpreter provision, interpreter training and interpreter access in Ireland ought not to be levelled at individual interpreters, but rather at a system which inadequately provides for accused persons who need interpreters, gardaí, and interpreters themselves alike. In discussing working conditions, I focus on six distinct issues: interpreter pay, the freelance nature of the work, the lack of regulation for interpreters, confidentiality, conflict of interest, and vicarious trauma. These issues are interconnected, and all contribute to how an accused person who needs an interpreter can experience accessing one.

Pay

First, it is crucial to understand that pay rates for interpreters in Ireland are poor. Interpreters are not adequately paid and, in some instances, may be even underpaid. According to the ITIA, the hourly rates for interpretation services are so low; they work as a disincentive to potential interpreters,³⁸ thereby lowering the pool of potential interpreters. Additionally, where the rate of pay is low, this lessens the incentive and opportunity to acquire training or improve skills through training, where such training is available.³⁹ With low pay, the job of an interpreter is less attractive to potential

38 See Irish Translators and Interpreters Association, ‘ITIA Bulletin: 2020/03’ at 10 <www.translatorsassociation.ie/wp-content/uploads/2020/10/ITIA-Bulletin-2020-03V2.pdf> accessed 11 July 2022.

39 Brennan and Brown (n 32) at 48.

interpreters; it is difficult to keep underpaid interpreters from finding other jobs with better pay, and there is no incentive to pay for upskilling for interpreters who remain in the field.

There is particular concern regarding pay for interpreters working in legal contexts. In 2013, the ITIA assessed that interpreters were being paid as little as €5.50 per hour for work in the Criminal Courts of Justice, when factoring in a minimum cost of transportation to the Court.⁴⁰ The ITIA, in fact, have repeatedly highlighted the poor pay rates, specifically for interpreters in the criminal justice context throughout their Bulletins, including both of the Bulletins published in 2022.⁴¹ Consider also the unsociable hours that are connected to the criminal justice system, the potential need to travel great distances, and the precise nature of interpreting required for garda station interviews. Interpreters are expected to perform a highly skilled and professional service, with extremely high stakes and in high-stress environments, for unsatisfactory wages. This can result in high rates of burnout⁴² or cause interpreters to leave the field or decline to take on police station work, given the stressful nature of the job. Again, this limits the number of capable and competent interpreters available in the field and has an impact on an individual who needs an interpreter in a garda station.

Freelance Nature

Interpreters are often freelance, or at least they work for agencies who cannot guarantee regular work. Some interpreters may find themselves working every day, whereas some interpreters, perhaps those working with a lesser used language, may work infrequently. This is particularly the case when it comes to police station interpreting. An interpreter is only required when a person needs one. Therefore, an interpreter is unlikely to be able to rely on police station interpreting as their main source of income.

One must also consider the unsociable hours that must be kept as an interpreter for the police. While some interviews at garda stations may be by arrangement, many are not.⁴³ Interpreters could be called upon late at

40 See Irish Translators and Interpreters Association, 'ITIA Bulletin: April 2013' at 3 <www.translatorsassociation.ie/wp-content/uploads/2017/10/ITIA-Bulletin-APR2013.pdf> accessed 11 July 2022.

41 Irish Translators and Interpreters Association, 'ITIA Bulletin: 2022/01' and Irish Translators and Interpreters Association, 'ITIA Bulletin: 2022/02' <www.translatorsassociation.ie/itia-bulletin/> accessed 11 July 2022.

42 RK Knodel, 'Coping with Vicarious Trauma in Mental Health Interpreting' (2018) 26(1) *Journal of Interpretation* 1 at 2.

43 For example, Síle's interview (see McEvoy (n 1)) was by arrangement so that gardaí could arrange an interpreter. Regardless of the time given to this, the interpreter sourced was untrained.

night, on weekends or during holidays to interpret an interview. As mentioned earlier, the time limits on custody regulations mandate urgency.⁴⁴ If an interpreter is to attend an interview in such a circumstance, they will likely be given very short notice and little time to prepare. Further, there may be only a handful of interpreters working in the language in question. If a Hungarian language interpreter is located in Dublin, for example, but called to interpret a garda station interview in Cork city at 9 am on a Sunday morning, they may well be the only available interpreter. It may be that if a specific interpreter does not attend the garda station, then no interpreter attends at all. This can be a complex situation for interpreters. Brennan et al., in their research, show that interpreters who felt out of their depth to interpret in a legal setting felt a duty to interpret regardless because of the fear that without their assistance, the accused person would have no interpreter.⁴⁵

It is not possible to have all interpreters for all languages on-call, all of the time, in all areas. Interpreters are specialised in their particular languages, and even the particular dialect of that language. The required interpreter for a garda station in one part of Ireland may live hours away. An interpreter could, in theory, be called upon to attend a garda station at a location hour away, on a Saturday night, after they have been out socialising with friends, consuming alcohol. There are no formal standards of practice to prevent this, and possibly no other interpreter available. For the accused person undergoing interview, they are therefore reliant on the arrival of an interpreter, possibly hours away, who may not be able to perform to the best of their abilities because of the lack of planning, and the suddenness of the interview.

Lack of Regulation

This leads me to my next point of concern, the lack of regulation in the field of interpreting. I wish to reiterate in the strongest possible terms that laying out the concerns regarding interpreters in garda stations is not meant to be a criticism of individual interpreters or of the field of interpreting generally. Rather, it is a criticism of the lack of regulatory mechanisms for the provision of services.

The right to an interpreter is part of the minimum standards of the right to a fair trial, along with the right to legal representation. However, when we consider the disparity in oversight which exists for the provision of legal representation and interpreters, there is a stark contrast.

44 McEvoy (n 1).

45 Brennan and Brown (n 32) at 51–52.

Solicitors must be professionally trained and qualified in Ireland.⁴⁶ There is a requirement that they undergo continuous professional development (CPD) annually, in order to maintain their skill set.⁴⁷ There is a regulatory body with the power to investigate misconduct and prevent those who have been found to have engaged in misconduct from practicing.⁴⁸

When compared to interpreters, no such mechanisms are in place. Again, ISL interpreters are required to be trained and must be registered on RISLI.⁴⁹ Complaints can be made through RISLI about interpreter performance, and interpreters can be removed from the register as a result. Some CPD training is offered to interpreters through RISLI; however, it appears to be on a relatively *ad hoc* basis.⁵⁰ For all other languages, there is no oversight mechanism at all. There is no regulatory body, CPD, or mandated training. If there has been an issue with interpreting, there is no complaint mechanism, nor review body, and no opportunity to have interpreter quality investigated or standardised.

Certainly, as seen in *DPP v HM and BO*, the quality of interpretation can be assessed later on at appeal, but this process is arduous and also mandates that the situation reach appeal stages. If the problems in interpretation existed only during garda custody, or if the interaction with gardaí did not progress past this stage, it can be difficult to source redress.

This has an impact on the working conditions for interpreters. There are best-practice standards for interpretation. These include working in pairs or teams,⁵¹ note-taking,⁵² and oversight.⁵³ However, with no regulatory body to advise on, or enforce, such working conditions, interpreters can be forced to work long hours, without breaks. This is worrisome in an environment where statements made by a suspect can have a huge impact on their experiences in the criminal justice system. Brennan et al. reported on interpreters feeling out of their depth in the job but being unable to highlight this to those in charge and feeling forced to carry out the interpretation regardless.⁵⁴ This again impacts the suspect's ability to accurately convey their statements and ultimately may impact how they access justice overall.

46 See Solicitors Act 1954.

47 Solicitors must complete at least 20 hours of CPD training annually in Ireland. See Law Society, 'CPD Scheme' <www.lawsociety.ie/Solicitors/Practising/CPD-Scheme> accessed 11 July 2022.

48 See Legal Service Regulation Act 2015.

49 See Irish Sign Language Act 2017, s 7.

50 See <<https://risli.ie/>> accessed 15 July 2022.

51 Brennan and Brown (n 32) at 75–76.

52 A Gillies, *Note-Taking for Consecutive Interpreting: A Short Course* (2nd edn, Routledge/Taylor & Francis Group 2017).

53 Brennan and Brown (n 32) at 62.

54 *Ibid.* at 52.

Confidentiality

Building upon the lack of regulation and oversight in the field of interpreting, there is also a concern about the information which an interpreter is privy to in a legal context.⁵⁵ When an accused person is detained at a garda station and awaiting an interview, they will be given an opportunity to consult with their solicitor. This consultation is privileged communication, and that privilege is protected by law.⁵⁶ However, where an accused and their counsel do not share a language, they will need an interpreter in order to communicate. There is nothing in law which mandates the extension of privilege between counsel and their client to the interpreter. In theory, then, anything the interpreter hears in the client consultation could be subject to subpoena. This is a serious grey area and, without proper legal protections, has the potential to impact the fairness of trial.

Even where there is no concern that the interpreter will breach privilege, there is also an ethical concern about having the same interpreter working in a lawyer–client consultation that then works in the subsequent garda interviews. The information which the interpreter hears in the consultation can inadvertently make its way into the garda interview, particularly depending on the target language and the prior information. For example, in ISL, movement, position, and direction are important. A simple question like “did you open the window?” when translated to ISL, will depend on how difficult it is to open the window, where the window was located, the type of window, etc. A hand shape to indicate opening the window like a door, using a handle might be chosen by the interpreter. The interviewee might respond in the negative, not because they did not open the window but because the window in question was a sash window which is opened by pushing upwards. If the interpreter has prior knowledge of the type of window, they will be able to use the appropriate sign. This confers upon the police, information obtained in the client consultation, which they otherwise would not have had.⁵⁷ For the accused person, this means a potential denial of the privilege which they have been assured and an infringement on the fairness of trial.

Conflict of Interest

It should also be understood that many of the linguistic and cultural communities in Ireland are small and close-knit. This can potentially result in an interpreter having a prior relationship with the interviewee. This is not

55 Ibid. at 69–70.

56 See Law Society of Ireland, *A Guide to Good Professional Conduct for Solicitors* (Law Society of Ireland 2013) at 27.

57 See Mulayim, Lai, and Norma (n 4) at 63.

necessarily a problem in all instances. The interviewee may indeed be relieved to see a familiar face in the interview room. However, there is also the potential that an interpreter who is known to the interviewee may make their experience more uncomfortable. Particularly considering there are no formal rules that ensure confidentiality with interpreters in garda station interviews.⁵⁸ The interviewee may be reluctant to engage with the interview process where they know the interpreter as part of their community and fear the reputational damage that could result if the interpreter does not maintain secrecy. Once again, because of the small pool of interpreters, it may not be even possible to acquire another interpreter in such a scenario.

In terms of conflict of interest, where an accused person has a prior relationship, or even an intimate relationship with an interpreter, there is the potential that it interferes with the garda investigation. In 2003, it was reported that a Chinese language interpreter had gone on a date with a murder suspect after she had interpreted his garda station interview. Gardaí had even facilitated giving the suspect the interpreter's phone number so they could communicate. Gardaí then went on to state that although this interpreter was not used with the suspect again, she had been used to interpret for other witnesses and there was no apparent concern for conflict of interest.⁵⁹ Questions necessarily arise about the ethics of such behaviours. If an interpreter has an intimate relationship with an individual who is suspected of a crime, there must be concern about their abilities, even subconsciously, to objectively interpret. Again, this affects the accused, who has the right to have their words accurately interpreted during interview and to be heard as they are intended to be.

Vicarious Trauma

A final issue of concern relating to the working conditions of interpreters in the legal context is the issue of vicarious trauma. Vicarious trauma is the "transformation in . . . inner experience resulting from empathic engagement with clients' trauma material."⁶⁰ Interpreters recount testimony in the first person, thereby embodying the experiences of trauma that a person recalls.⁶¹ In Brennan et al.'s study, they cite an interpreter who referred to their work

58 'Gardaí Used Chinese Policeman as Translator' *The Irish Examiner* (4 March 2003).

59 Ibid.

60 M Lai and G Heydon, 'Vicarious Trauma Among Interpreters' (2015) 7(1) *International Journal of Interpreter Education* 3 at 4 citing LA Pearlman and KW Saakvitne, 'Treating Therapists with Vicarious Traumatization and Secondary Traumatic Stress Disorders' in CR Figley (ed), *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized* (Brunner/Mazel 1995) at 151.

61 Ibid.

as like acting, whereby “you take on these characters and their characteristics in the best way you can.”⁶² Dean et al. found that sign language interpreters reported “significantly more psychological distress, depression and physical exertion than either the practice profession or the technical profession norms.”⁶³ In a large study of interpreters in Australia, Lai et al. found that 68% of interpreters surveyed had confronted traumatic experiences in their line of work.⁶⁴ One research participant reported the following:

I stepped out of the police station after a long session of interpreting for a murder suspect who was still covered in the victim’s blood. The police officers may well go for a counselling session. Where do I go? I still have to go home and join the family dinner as if nothing has happened.⁶⁵

This encounter is indicative not only of the traumatic experiences which interpreters are exposed to but also of the lack of aftercare and support which is available to interpreters as part of the profession.⁶⁶

In that same study, respondents also indicated that traumatic experiences impacted their ability to do their job, and that they would try to avoid being exposed to traumatic events. In applying this to Ireland, an already small pool of interpreters as explained, is made smaller when potential interpreters are not adequately supported when they are exposed to trauma in the workplace. There is no formal board or authority with responsibility for interpreter working conditions in Ireland. It may be that interpreters have individual coping mechanisms or finance their own supports. However, with the low pay and demanding work which has been described throughout this chapter, it must be understood that it may not be possible for interpreters who are overworked and underpaid to treat their vicarious trauma. Once again, this will necessarily impact the quality of interpretation, the number of interpreters overall and the number of interpreters willing to operate in police station interviews, thereby impacting the accused person’s access to interpretation.

Conclusion

Throughout this chapter, I have explored the provision of an interpreter in police stations. It is important for gardaí, practitioners, and commentators

62 Brennan and Brown (n 32) at 65.

63 RJ Pollard and others, ‘RID Research Grant Underscores Occupational Health Risks: VRS and K-12 Settings Most Concerning’ (2010) 27 Winter Views 41.

64 Lai and Heydon (n 60).

65 Ibid., 10.

66 See E Granger and M Baker, ‘The Role and Experience of Interpreters’ in H Ravel and R Tribe (eds), *Working with Interpreters in Mental Health* (Routledge 2003) at 113.

alike to know that the right to an interpreter is nuanced and multifaceted, and that there are many issues for consideration.

I began this chapter by citing Síle's experience with an interpreter during a garda interview. Síle was indeed provided with a person to interpret her testimony. However, because of the circumstances, Síle risked a denial of access to justice. The interpreter was unable to appropriately carry out the task and had the potential to greatly affect Síle's statement and her experience in the criminal justice system going forward. Síle's story shows us that there are many issues to consider when investigating interpreter usage in garda stations for people undergoing interviews.

An accused person must first be deemed to need an interpreter by gardaí when they are detained at a station. This assessment of need can be based on an arbitrary understanding of language competency, and in some cases, it is mandated to proceed in the absence of an interpreter, irrespective of the accused person's literacy skills.

Once the accused has been deemed to actually need an interpreter, one must be sourced. Depending on the language, the time of day, the time of year, the geographical location, etc., there is no guarantee that an interpreter will be available for the accused in the custody timeframe.

Where an interpreter is sourced, there is absolutely no guarantee, with the exception of ISL interpreters, that the interpreter who shows up will be trained. There is no guarantee that they will have any experience in garda station interpreting.

The interpreters themselves may well be underpaid, overworked, under extreme stress, or suffering from vicarious trauma. It may be that the interpreter knows or has a prior, conflicting relationship with the accused and is therefore ill-equipped to perform their duty with objectivity. There is no oversight mechanism to ensure that working conditions are conducive to ensuring best practice for interpreters and to prevent interpreters from burning out and leaving the profession. Nor is there a mechanism for complaints over unsatisfactory performance, review of performance, or continuous professional development for interpreters.

The biggest concern in my opinion remains that the issues described in this chapter are largely unknown and underappreciated, leaving accused persons who need interpreters in garda stations in deeply precarious positions. Without proper regulation, professionalisation, and oversight in the field, interpreter provision continues to pose a threat to the fairness of trial for those who need an interpreter during garda custody.

I am reluctant to offer immediate solutions or quick fixes to the problems explored in this chapter, primarily because these problems necessitate long-term, costly solutions. Certainly, awareness amongst gardaí, solicitors, and other professionals who work in the criminal justice system about the realities faced by interpreters is positive. Technology was used in the criminal justice

system and in garda stations during the COVID-19 pandemic, and it could be harnessed again to allow for more immediate access to interpreters.⁶⁷ However, codes of conduct around this issue would need to be solidified, and without oversight bodies and regulatory agencies for interpreters, legitimate concerns exist about confidentiality of garda station interviews where the interpreter might be operating remotely. Ultimately, I am strongly in favour of more long-term solutions, with investment into the professionalisation of legal interpreters, legislation to regulate the profession and standardise the pay, and investment into appropriate and relevant training and continuous professional development. Until we can be confident in the training and professionalism of interpreters, and indeed until interpreters can themselves be confident in providing high-quality service, we cannot be confident in the fairness of procedure for suspects who need interpreters in garda stations and beyond.

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⁶⁷ See Fair Trials, *Justice Under Lockdown in Europe: A Survey on the Impact of COVID-19 on Defence Rights in Europe* (Fair Trials 2020).

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8

BEHIND LOCKED DOORS

Is Oversight of Police Custody in Ireland Sufficient to Protect People From Ill-Treatment?

Doireann Ansbro

Introduction

Everyone in custody is vulnerable to abuse because they are entirely reliant on others for their care. There is a heightened duty of care on the State to prevent torture or ill-treatment in custody. This duty is deeply rooted in human rights law.¹

The prohibition of torture and ill-treatment is a *jus cogens* norm of international law. It is enshrined in international and national instruments such as the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the European Convention on Human Rights (ECHR), the European Convention against Torture and other Inhuman or Degrading Treatment or Punishment and implementing domestic legislation.

Torture is defined clearly in Article 1 of CAT, as follows:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or

¹ The European Court of Human Rights, for example, stated clearly in *Salman v Turkey*: “Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.” *Salman v Turkey* App no 21986/93 (ECHR, 27 June 2000).

at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Ill-treatment is generally used to refer to what Article 16 of CAT describes as:

acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Council of Europe (CoE), drawing on case law from the European Court of Human Rights, in its toolkit on definitions has stated that inhuman treatment:

must reach a minimum level of severity, and cause either actual bodily harm or intense mental suffering. It need not be deliberate nor inflicted for a purpose. In the typical case of injuries in custody, where a person is in good health before arrest or detention and is proved to be injured after it, the burden of proof is on the authorities to show force was not used, or was not excessive, or was justified by the victim's own conduct. Undue restraint during arrest or of a psychiatric patient can also amount to inhuman treatment.²

The CoE toolkit further states that degrading treatment “involves humiliation and debasement as opposed to physical and mental suffering. As with inhuman treatment, it does not have to be deliberate.”³

CAT requires State parties to put in place domestic laws that both prohibit and punish torture and ill-treatment, including in custody.⁴ Ireland implemented CAT into domestic law through the Criminal Justice (United Nations Convention against Torture) Act 2000.

Beyond ensuring the correct law is in place, CAT also requires the State to take practical and effective steps to prevent torture or ill-treatment, including education and training; systematic reviews of arrangements for custody and treatment of persons subjected to “any form of arrest, detention or

2 See Council of Europe, ‘Toolkit, Some Definitions’ <www.coe.int/en/web/echr-toolkit/definitions> accessed 17 July 2023. See further, UN Special Rapporteur on Torture and Ill Treatment, ‘Psychological Torture and Ill-Treatment’ (A/HRC/43/49, 2020) <www.ohchr.org/en/documents/thematic-reports/ahrc4349-report-psychological-torture-and-ill-treatment> accessed 17 July 2023.

3 Ibid.

4 See CAT Articles 2 and 4.

imprisonment”; prompt and impartial investigations where there is “reasonable ground” to believe an act of torture has been committed; and ensuring there are prompt and impartial complaints mechanisms.⁵

Robust oversight of custody arrangements is necessary to fulfil this obligation. However, at a national level, oversight of garda custody in Ireland is currently limited to internal garda oversight and a recent own-volition inspection by the Garda Inspectorate. There is no national body with a statutory mandate to conduct independent, human rights-based inspections of places of garda custody or any other place of detention in Ireland.

Ireland is an outlier in Europe on this issue. Most other European States have ratified an international treaty called the Optional Protocol to the Convention against Torture (OPCAT). Ireland signed the Treaty in 2007 but has not yet ratified it. OPCAT requires States to create independent inspection bodies, called National Preventive Mechanisms (NPMs). It also creates an international body called the Sub-Committee on the Prevention of Torture (SPT) which has a mandate to visit ratifying States and inspect places of detention.

National and international organisations have been calling for the ratification of OPCAT for almost 15 years.⁶ Amongst other reasons, they have cited the need for an independent and effective inspection body for places of garda custody.⁷

This chapter sets out the existing oversight and inspection arrangements for police stations in Ireland and looks ahead to future possibilities in light of the planned ratification of OPCAT.

Oversight

There are currently three independent bodies tasked with overseeing An Garda Síochána (AGS). They are the Garda Síochána Ombudsman

5 See CAT Articles 10–13. Article 16 of CAT states: “the obligations contained in articles 10–13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.”

6 The Irish Penal Reform Trust has a particular campaign website for Ireland’s ratification of OPCAT with supporters listed as Centre for Disability Law & Policy; Disabled People of Ireland; Empowering People in Care (EPIC); Irish Council for Civil Liberties (ICCL); Irish Penal Reform Trust (IPRT); Jesuit Centre for Faith and Justice; Midwives for Choice; Nasc: the Irish Refugee and Migrants Rights Centre; and Reclaiming Self and Sage. For an updated list, see the Irish Penal Reform Trust, ‘Campaign Supporters’ (OPCAT Ireland 2023) <<https://opcat-ireland.com/campaign-supporters/>> accessed 17 July 2023.

7 Committee Against Torture, *Concluding Observations on the Second Periodic Report of Ireland*, UN Doc CAT/C/IRL/CO/2 (31 August 2017) para 7–8; see also Garda Inspectorate, *Delivering Custody Services: A Rights Based Review of the Treatment, Safety and Well Being of Persons in Custody in Garda Síochána Stations* (Garda Inspectorate, July 2021); European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment *Report from 23 September to 4 October 2019* (CPT/Inf 2020) 37. See also M O’Rourke, *Rights Based Policing: How Do We Get There?* (ICCL 2018).

Commission (GSOC), the Policing Authority, and the Garda Inspectorate. These bodies provide some oversight over places of garda custody in terms of their mandate to receive complaints from individuals and to analyse policies and practices of AGS. However, no oversight body has a specific statutory mandate to inspect places of garda custody. The Garda Inspectorate has the power to conduct its own-volition inspections, and this body conducted inspections of some garda stations between 2018 and 2019. A report it published in February 2022, following these inspections, is explored in detail later.

As part of a wide-ranging police reform process underway in Ireland, these three oversight bodies are set to change under draft legislation, namely the Policing, Security, and Community Safety Bill 2023.⁸ This Bill seeks to implement recommendations from the Commission on the Future of Policing, which reported in December 2018.⁹ GSOC will be renamed the Office of the Police Ombudsman. The Policing Authority and Garda Inspectorate will be joined together into one entity, called the Policing and Community Safety Authority. Many of the functions of the existing oversight bodies as explored later will remain the same under the 2023 Bill. Some aspects of their mandates will change but those changes are beyond the remit of this chapter.¹⁰

Neither new body is proposed to have an expanded inspection function over places of Garda custody. Rather, the General Scheme of a separate Bill called the Inspection of Places of Detention Bill, published in 2022, proposes to expand the remit of the Inspector of Prisons to include places of garda custody and rename the body the Inspectorate of Places of Detention.¹¹ That Bill is intended to pave the way for the ratification of OPCAT, and the necessary components for its compliance with OPCAT are explored in detail later.

8 For updates on the passage of this Bill, see Oireachtas, *Policing, Security and Community Safety Bill 2023* (Oireachtas 2023) <www.oireachtas.ie/en/bills/bill/2023/3/> accessed 17 July 2023.

9 Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (Commission on the Future of Policing in Ireland, September 2018).

10 See Irish Council for Civil Liberties, *ICCL Submission for 3rd Stage Debate on the Policing, Security and Community Safety Bill 2023* (ICCL 2023). For an exploration of some of these changes, see <www.iccl.ie/wp-content/uploads/2023/04/230417-PSCS-Bill-ICCL-Submission-April-2023.pdf> accessed 17 July 2023.

11 See Government of Ireland Press Release, 'Draft General Scheme of Inspection of Places of Detention Bill' (June 2022) <www.gov.ie/en/publication/18539-draft-general-scheme-inspection-of-places-of-detention-bill-june-2022/?referrer=www.justice.ie/en/JELR/Draft-General-Scheme-of-Inspection-of-Places-of-Detention-Bill-June-2022.pdf/Files/Draft-General-Scheme-of-Inspection-of-Places-of-Detention-Bill-June-2022.pdf> accessed 17 July 2023.

Garda Síochána Ombudsman Commission (GSOC)

GSOC, as currently constituted, has three main functions, outlined in the Garda Síochána Act 2005. The first is to receive and investigate complaints against gardaí for “misbehaviour.”¹² The second is to carry out public interest investigations.¹³ The third is to conduct investigations into the practice, policies, and procedures of AGS.¹⁴

GSOC opens around 2,000 formal complaints of “misbehaviour” a year.¹⁵ Misbehaviour is defined in the Garda Síochána Act (GSA) 2005 to mean “conduct that constitutes an offence or a breach of discipline.”¹⁶ Once a complaint has been assessed by GSOC, it may decide whether to investigate the complaint itself or “lease back” the complaint to AGS for investigation. The referral of less serious complaints back to AGS for investigation has been widely criticised, given the loss of independence in such an investigation.¹⁷

The Garda Commissioner is under a statutory duty to refer complaints concerning the death of, or serious harm to, a person in the custody or care of the Garda Síochána, to GSOC for investigation.¹⁸ “Serious harm” is defined in the GSA 2005 to mean injury that:

- (a) creates a substantial risk of death;
- (b) causes serious disfigurement; or
- (c) causes substantial loss or impairment of mobility of the body as a whole or of the function of any particular bodily member or organ.¹⁹

If a complaint concerns the death of, or serious harm to, a person as a result of garda operations or while in the custody or care of the Garda Síochána, the Ombudsman Commission must appoint a designated officer to consider the complaint and make a recommendation as to whether GSOC should investigate the complaint.²⁰

Both the definition of serious harm in the Act and the practice of “leasing back” have been criticised as failing to meet key procedural requirements

12 Garda Síochána Act 2005, s 83.

13 *Ibid.*, s 102(4) and s 102(5).

14 *Ibid.*, s 106.

15 See, for example, Garda Síochána Ombudsman Commission, *Annual Report 2021 – GSOC in Transition* (Garda Síochána Ombudsman Commission 2022). For further report, see <www.gardaombudsman.ie/publications/statutory-reports/> accessed 17 July 2023.

16 Garda Síochána Act 2005, s 82.

17 See, for example, A Kilpatrick, *A Human Rights Based Approach to Policing in Ireland* (ICCL 2018).

18 Garda Síochána Act 2005, s 102.

19 *Ibid.*, s 82 (1).

20 *Ibid.*, s 91.

of Articles 2 and 3 of the ECHR.²¹ These articles require a State to conduct independent, impartial, effective, transparent, victim centred, and timely investigations into all deaths or serious injuries that occur when someone is in the care of the State. Sending investigations back to AGS undermines the requirement of an “independent” investigation and the narrow definition of “serious harm” potentially precludes independent investigations into some serious injuries inflicted by a garda member on a person in custody.

Another criticism of the remit of GSOC is that there is no obligation to investigate deaths or serious harm to people who have recently left garda custody. This denies the opportunity to identify particular risks, behaviours, or omissions that may have occurred in custody that may have left people in a particularly vulnerable state when leaving custody, potentially constituting a causative factor in subsequent injury or death.

GSOC is mandated to carry out “public interest investigations,” without receiving a complaint, into any matter where it appears a garda member has committed a criminal offence or disciplinary breach.²² In such circumstances, it can open an investigation itself, or if requested to do so by the Policing Authority or the Minister for Justice and Equality.

Broader issues that may have come to the attention of GSOC, as a result of individual complaints can be investigated by GSOC where they relate to the “practice, policy or procedure” of AGS.²³ However, GSOC cannot open a complaint in so far as it relates to the “general direction and control of the Garda Síochána by the Garda Commissioner.” GSOC has opened a number of practice, policy, and procedure investigations such as into detention of people under the Public Order Act 1994 where no power of arrest exists, and into seizure of vehicles that have left people stranded on the side of the road.²⁴

The requirement for the Minister to approve own-volition investigations narrowed GSOC’s powers in this regard. A high-profile example is where the Minister refused to approve an investigation into controversial policing during the Shell to Sea protests.²⁵ However, legislative amendments from 2015 now allow for GSOC to carry out own-volition investigations, without the need for ministerial approval.²⁶

21 Kilpatrick (n 17) 16.

22 Garda Síochána Act 2005, ss 102(4) and 102(5).

23 *Ibid.*, s 106.

24 See Garda Ombudsman, ‘Examinations of Garda Practice, Policy and Procedure’ (Garda Ombudsman) <www.gardaombudsman.ie/about-gsoc/gsoc-functions/examinations/> accessed 17 July 2023; Garda Ombudsman, ‘Examination Reports’ (Garda Ombudsman) <www.gardaombudsman.ie/publications/examination-reports/> accessed 17 July 2023.

25 See M Sekaggya, *Report of the Special Rapporteur on the Situation of Human Rights Defenders* (OHCHR 2013) para 75.

26 Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s 52.

GSOC cannot insist on carrying out a statutory review of systemic issues arising out of investigations, but it does issue non-statutory reports into systemic issues, making recommendations to the Garda Commissioner. Since 2022, GSOC forwards these reports to the Department of Justice, the Policing Authority, the Garda Inspectorate, and the Irish Human Rights and Equality Commission (IHREC).²⁷ A major gap currently, in regard to oversight, is that GSOC is not mandated to carry out investigations regarding matters of national security.²⁸

Of particular concern is the lack of a mechanism to ensure that where recommendations by GSOC are made, they are responded to by AGS. Rather, GSOC must report the results of its investigations to the Garda Commissioner, who may decide on a disciplinary procedure for an individual, and, where it considers that it is appropriate, GSOC will report to the Director of Public Prosecutions, who may proceed with a criminal prosecution.

Garda Inspectorate

The Garda Inspectorate was established in 2006 under the GSA 2005 and is tasked with carrying out inspections or inquiries into the operation and administration of AGS. These can be conducted at the request of the Minister for Justice, the Policing Authority, or on its own initiative. It provides advice on best policing practice to the Policing Authority and to the Minister. The Policing Authority is tasked with monitoring and implementing recommendations of the Garda Inspectorate.

The Garda Inspectorate does not carry out routine oversight of policing and does not have a mandate to carry out regular and systematic inspections of places of detention. However, on its own initiative, the Garda Inspectorate can decide to carry out inspections and between 2018 and 2019, the Inspectorate undertook an inspection focused on custody, publishing a report with wide-ranging recommendations in 2022, as examined in detail later.²⁹

Policing Authority

The Policing Authority was established in 2016 under the Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, which amended

27 GardaOmbudsman, 'Systemic-Recommendations' (GardaOmbudsman) <www.gardaombudsman.ie/publications/systemic-recommendations/> accessed 17 July 2023.

28 The Policing, Security and Community Safety Bill 2023 seeks to create an "Independent Examiner of Security Legislation," which may go some way in filling this gap, though it has been criticised by the Irish Council for Civil Liberties and academics as not going far enough to provide robust oversight.

29 Garda Inspectorate (n 7).

the GSA 2005. Its main functions are to oversee the performance of the Garda Síochána and ensure its resources are used efficiently and effectively. It approves Strategy Statements and Policing Plans, and sets policing priorities and performance targets.

The Policing Authority has significantly increased standards of transparency and accountability for AGS. It assisted with putting a Code of Conduct in place for AGS members and continues to monitor its implementation. A particularly welcome step from the perspective of transparency is the requirement that the Garda Commissioner submit a monthly report on the activities of AGS to the Policing Authority and attend monthly meetings with the Authority to discuss the report and issues arising. These reports are published on the Policing Authority's website,³⁰ and four of these meetings a year, at least, are held in public.

The Policing Authority also commissions research and engages with a wide variety of stakeholders with the aim of building independent sources of evidence to assess garda performance. The Authority has a separate budget line for its activities outside of the Department of Justice but it reports to, and provides advice to, the Minister for Justice on request.

The Garda Inspectorate Report Into Places of Garda Custody

Before its most recent report into places of Garda custody, the Garda Inspectorate had examined a wide range of different issues. Until 2016, it conducted examinations and made recommendations on issues at the request of the Minister for Justice on issues such as policing roads, two reports into examinations of how AGS responded to allegations of child sexual abuse, and how AGS handles complaints of missing persons. Following the establishment of the Policing Authority, the Inspectorate received requests to examine community policing and public order policing from that body. It published its first own-volition report into combating internal corruption at the end of 2020, and its second own-volition report was the report into garda custody, published in 2022.³¹ These topics were prioritised by the Inspectorate based on an assessment of the “level of risk to human rights, public safety, public confidence, reputation and garda financial management.”³²

Its report on Garda custody is titled “Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in

30 Policing Authority, ‘Publications’ (Policing Authority) <www.policingauthority.ie/en/all-media/publications/> accessed 17 July 2023.

31 All of these reports have been published on the Inspectorates website. See Garda Inspectorate, ‘Inspection Reports’ (Garda Inspectorate) <www.gsinsp.ie/inspection-reports/>. See, in particular, Garda Inspectorate (n 7).

32 Garda Inspectorate (n 7) 1.

Custody in Garda Síochána Stations.” The report was both ambitious and unique in that it aimed to examine the treatment of people in garda custody using a rights-based approach, with the cooperation of AGS. The Inspectorate recognised that holding a person in custody constitutes a significant interference with their right to liberty and that it is vital that rights are upheld and people are kept safe when they are in custody. The Inspectorate agreed a protocol with AGS that allowed it, for the first time, to conduct unannounced visits of garda stations. It engaged directly with people in custody, examined custody records in detail, and made unannounced visits to 12 garda stations.

The report analysed garda policies around custody, identified issues of concern, and made wide-ranging recommendations for reform. Its findings regarding oversight are damning. The Chief Inspector states in his foreword that:

Despite custody being a challenging and high-risk environment, there was no organisational vision or strategy beyond adherence to the legal requirements, there was a lack of strategic leadership, and formal oversight of custody was weak.³³

The Inspectorate highlighted the opaqueness of garda policies, the lack of data gathering, a lack of coherent, and consistent oversight and uneven access to legal and medical support. In terms of treatment of people in custody, the oversight body found significant shortfalls regarding policies and procedures. It criticised the fact that AGS did not have a single coherent policy document with information about rights, care, and treatment of persons in custody, and it highlighted that the policies that were in place were not publicly available.

The concerns of the Inspectorate were so wide-ranging that the authors recommended that government establish a multi-agency working group on custody to implement reforms.³⁴

Crucially, the Inspectorate found that formal oversight over custody within AGS was lacking at local, regional, and organisational levels, stating that the current model dissipated responsibility and resulted in “inconsistent practices.” They highlighted that many previous internal recommendations from the Garda Professional Standards Unit had not been addressed.³⁵

The Garda Inspectorate used the prisoner logs on the garda record-keeping database, PULSE, to estimate that during the 12-month period from July 2018 to June 30, 2019, there were 82,013 people in police custody. Under Irish law, only arrests for serious offences (those that attract a prison sentence of

33 Ibid., 1.

34 Ibid., 4.

35 Ibid., IX.

five years or more) require authorisation by a custody officer (member in charge).³⁶ This means that for non-serious offences there is no independent assessment of the necessity of custody.

Strikingly, the inspectorate found that in 80% of arrests, there was no independent, objective assessment of the need for the person to be kept in custody.³⁷ This is incredible from the perspective of the right to liberty. People should only be detained when detention constitutes a necessary and proportionate interference with their right to liberty. This gap in the Irish approach is out of step with Northern Ireland and the United Kingdom, where the custody sergeant must make a decision as to whether each person's detention is necessary.

The Inspectorate recommended that the Department of Justice consider enacting legislation that requires the member in charge to consider the necessity to detain every person who is arrested at a garda station or is brought there following arrest elsewhere.³⁸

Access to legal and medical services is a vital safeguard against ill-treatment. The Inspectorate found that the provision of medical services needed to be improved³⁹ and that the right to legal advice needed a legislative basis. It noted that circumstances where access to legal advice and the right to notify a third party can be delayed should be defined in law, and such delay should only happen where authorised by an inspector or superior.⁴⁰

Access to private legal consultations, better record-keeping, follow-up risk assessments, and risk management plans were also key recommendations. The impact of searches on people in custody was also addressed. The Inspectorate recognised that any search of a person that takes place is an interference with the right to privacy, and therefore must be necessary and proportionate. Significantly, the Inspectorate found that necessity and proportionality were “not to the forefront of members’ minds when deciding if a search should be carried out and, if so, in what manner.”⁴¹

It also noted the lack of clarity relating to garda search powers, in particular, the “powers to search people in custody, including searches that involve the removal of all items of clothing or examination of body orifices,” and the absence of safeguards for searching children and vulnerable adults.⁴² In particular, the Inspectorate noted that the technique for carrying out a search that necessitates the removal of all items of clothing was not in line with the

36 See, for example, the Criminal Justice Act 1984, s 4.

37 Garda Inspectorate (n 7) X.

38 *Ibid.*

39 *Ibid.*, 42.

40 *Ibid.*, 46–47.

41 *Ibid.*, XVII.

42 *Ibid.*

position of the Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁴³ A new Bill codifying police powers is going through the Oireachtas at the time of writing, the Garda (Powers) Bill 2021. Publication of this Bill following pre-legislative scrutiny is due in 2023.⁴⁴ This Bill offers the opportunity for Government to ensure that garda powers, including powers of arrest, search, and detention, comply fully with international human rights standards, and respond to the Garda Inspectorate's recommendations.

The insights and recommendations provided by this single report from the Garda Inspectorate indicate what could be achieved with regular inspections, recommendations, and responses, as would be required under a National Preventive Mechanism. Such an approach is vital to ensure rights are upheld in all custody settings.

Other Inspections

Independent Custody Visiting Scheme

There is no independent custody visiting scheme for places of garda detention. Such a scheme is in place in Northern Ireland and calls have been made for such a scheme to be introduced in the Republic.⁴⁵ In Northern Ireland, the scheme is run by the Policing Board which is required by statute to make, and keep under review, arrangements for places of detention to be visited by independent lay visitors. Concerns are brought to the immediate attention of both the Policing Board and the PSNI. The visit reports are also made available to the Board's Independent Human Rights Advisor who reviews them for any issues relating to human rights.⁴⁶

Such a scheme is not a valid replacement for an independent inspection body but can complement it in a valuable manner. It is a particularly effective way of ensuring members of the public have access to information about the treatment of detainees. New regulations for the operation of Visiting Committees are envisaged for prisons in the General Scheme of the Inspection of Places of Detention Bill 2022 (addressed in detail later), but, as currently drafted, visiting committees are not envisaged for garda stations.

43 Ibid., 13.

44 The General Scheme of the Bill can be accessed at <www.gov.ie/en/press-release/6ed9f-garda-powers-to-be-modernised-and-updated-under-new-bill-from-minister-humphreys/> accessed 17 July 2023.

45 Kilpatrick (n 17) 16.

46 Ibid.

Committee on the Prevention of Torture

Ireland ratified the Council of Europe Convention against Torture and other Inhuman or Degrading Treatment or Punishment in 1988. The Committee on the Prevention of Torture (CPT) is mandated by the Convention to carry out inspections of places of detention. This is the only independent body with a specific mandate to inspect places of garda custody in Ireland. However, its mandate is limited. It conducts visits every five years, and such visits cover only a small sample of places of detention. To date, Ireland has had seven visits from the CPT. On its last visit to Ireland in 2019, the CPT visited five garda stations.

CPT reports can provide a useful snapshot of issues regarding treatment of people in detention but the small number of places visited means the findings cannot be considered comprehensive, nor can the inspection regime be considered a sufficient deterrent to ill-treatment. Nevertheless, some of the findings in the CPT's last report on Ireland are instructive.⁴⁷

Crucially, the CPT has repeatedly recommended that Ireland ratify OPCAT and set up an NPM.⁴⁸ The CPT stressed that while the Garda Inspectorate report was welcome and could serve as a “baseline for the current situation” there was a need for continuous monitoring. The CPT emphasised the link between the importance of inspections and the need to prevent ill-treatment and ensure “satisfactory conditions” of detention. The CPT stated that “there remains an urgent need to mandate an independent body now to conduct regular inspections of Garda stations, with a view that such a body will be brought into the NPM structure once it is established.”⁴⁹

In its 2020 report, the CPT stated that “the great majority of detained persons interviewed by the delegation stated that they had been treated correctly by the Gardaí.”⁵⁰ However, the delegation did receive several allegations of physical ill-treatment and verbal disrespect by gardaí from remand prisoners who had recently been apprehended by gardaí. The allegations of ill-treatment mostly involved slaps, kicks, and punches to various parts of the body. Nearly, all the allegations concerned the time of arrest or during transport to a garda station, but a few related to the time when the persons were being held in the station.⁵¹

47 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (n 7).

48 Ibid.

49 Ibid., 16, 25.

50 Ibid., 4.

51 Ibid., 5.

The CPT outlined several cases where they were able to observe and record injuries allegedly inflicted by gardaí. They cite a case of a man who they met at Cloverhill Prison on September 30, 2019, who:

stated that after he had been caught by some civilians while stealing a handbag, he had been handed over to two Gardaí who transported him to the police station. He was allegedly slapped a few times about the head while in the car. However, when he got out of the car, hands cuffed behind his back, his arms were lifted into the air forcing him to bend forward whereupon he alleges that he was punched and kicked by several other Gardaí from the station.⁵²

When met by the delegation, some four days later, he displayed a number of injuries, recorded in detail by the CPT.

A second example of alleged abuse is recorded as follows:

A man apprehended on 24 September 2019 claimed that he had been treated roughly by the Gardaí upon arrest and in the station, where he had been pushed to the floor and had all his clothes removed and left naked in the cell, reportedly because he was a suicide risk. In the course of this procedure he had been hit in the head and, when met by the delegation in Cloverhill Prison six days later, displayed a blueish-black bruise below his right eyebrow. He had subsequently been seen by a doctor in the police station and provided with a blanket, and later a jumpsuit.⁵³

The CPT were particularly concerned about this, stating that “there can be no justification for leaving a detained person naked in a cell.”⁵⁴

The CPT reported several other consistent allegations involving physical abuse⁵⁵ and stated that the cases they report are “illustrative of the information gathered by the delegation” and demonstrate that “there can be no room for complacency in the Irish authorities’ commitment to prevent ill-treatment.”⁵⁶

Access to a doctor and the treatment of people detained under the Mental Health Act 2001 was also of concern to the CPT. They reported a number of allegations of excessively tight handcuffing and stated that they consider that the police are “not appropriately trained to manage mentally ill persons who are agitated and that they should only be required to transfer such

52 Ibid., 13, para 12.

53 Ibid., 13, para 12.

54 *ibid.*

55 *Ibid.*

56 *Ibid.*, 14.

persons when absolutely necessary.”⁵⁷ They said they “could not be assured that detained persons were appropriately assessed and examined” by medical professionals. No medical records are kept for persons seen by doctors and “little follow-up care was apparent.”⁵⁸

Of real significance for the effectiveness for any future inspection regime, the CPT stated that custody registers were not always maintained in a comprehensive and accurate manner. They cite the example of Store Street Garda station in Dublin, where registers lacked dates and times of arrest, or details regarding whether a doctor was needed or not.⁵⁹

The findings of both the Garda Inspectorate and the CPT underline the urgent need for a regular, statutory-based, and independent inspection regime for garda stations.

Looking to the Future

Once Ireland has ratified OPCAT, it will be required to create a National Preventative Mechanism which will be tasked with conducting independent human rights-based inspections of all places of detention in Ireland, including places of garda custody.

This body will need to meet the requirements set by OPCAT and expanded on by its implementing body, the Sub-Committee on the Prevention of Torture (SPT). Underpinning these requirements is the overarching aim of ensuring that NPMs can exercise their mandates in a way that effectively contributes to the prevention of torture and ill-treatment. The SPT has underlined the unique contribution that NPMs can make, stating that “[t]he National Preventive Mechanisms represent the most significant single measure which States can take to prevent torture and ill-treatment occurring over time.”⁶⁰ The Office of the UN High Commissioner for Human Rights (OHCHR) has written a guide for NPMs which helpfully summarises these requirements.⁶¹

Requirements of OPCAT

The OHCHR Guide stresses that the mandate’s character is preventive and must focus on identifying patterns and detecting systemic risks of torture or ill-treatment. NPMs should not be tasked with undertaking investigations

57 Ibid.

58 Ibid., 15.

59 Ibid., 16.

60 A Shujune Muhammad, Vice-Chair, United Nations Subcommittee on Prevention of Torture, quoted in *Preventing Torture: A Practical Guide* (Professional Training Series no 21, UN OHCHR 2018).

61 Ibid.

or adjudicating complaints concerning torture or ill-treatment, even if they encounter such cases while carrying out inspections.⁶²

NPMs must have the power to:

- i. freely select the places of deprivation of liberty they will visit;
- ii. regularly examine the treatment of persons deprived of their liberty in those places;
- iii. select the timing of such visits and determine whether they are to be announced or unannounced;
- iv. choose the persons to be interviewed;
- v. have access to all information, including personal and sensitive information;
- vi. have the premises and persons necessary for pursuing its mandate;
- vii. make recommendations to the relevant authorities and other addressees;
- viii. submit proposals and observations concerning existing or draft legislation; and
- ix. have contact with the sub-committee.

Crucially, the NPM must be properly resourced, with specific financial and staffing resources allocated to its NPM duty where it has other duties. The SPT has emphasised that the NPM must have personnel that has sufficient expertise in a range of areas, including mental health and general health.⁶³

Beyond their inspections, NPMs have an advisory function.⁶⁴ This should include providing recommendations to State authorities, such as opinions, reports, and legislative proposals.

NPMs should have the right to engage with regional and international human rights treaty or other monitoring bodies, which would include, for example, the CAT Committee and the SPT. They should contribute to State's parties reports or present their own reports to human rights mechanisms. In addition to submitting reports, they should play a role in ensuring that recommendations from treaty monitoring bodies are implemented.

NPMs also have an educational function.⁶⁵ OHCHR states that this can include participation in training and development of programmes in schools, universities, and professional circles. It can include ensuring that education and information on the prohibition of torture is included in the training of any state actor who engages with people in detention, such as law

⁶² *Ibid.*, 5.

⁶³ Sub-Committee on the Prevention of Torture and Ill Treatment, *Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party* (CAT/OP/NZL/1, UN 2017).

⁶⁴ *Preventing Torture* (n 60) 27.

⁶⁵ *Ibid.*, 30.

enforcement personnel, civil or military personnel, medical personnel, or other public officials.

In terms of external relationships, NPMs should both establish and maintain contact with NPMs in other countries, with a view to sharing experiences and reinforcing effectiveness. They should also be in regular contact with the SPT, through regular meetings and information exchange.⁶⁶

What Is the Relationship Between the NPM and the SPT?

OPCAT envisages an ongoing relationship of information exchange and collaboration between the SPT and the NPM. The SPT has developed guidelines and assessment tools for NPMs⁶⁷ and an NPM assessment matrix for use by NPMs. OPCAT creates an obligation on States parties to grant NPMs the right to have contact with the SPT.

The SPT commenced its work in 2007 and has two primary operational functions. First, it may undertake visits to States Parties, during the course of which it may visit any place where persons may be deprived of their liberty. Second, it has an advisory function which involves providing assistance and advice to States Parties on the establishment of National Preventive Mechanisms (“NPM”) and providing advice and assistance to both the NPM and the State Party regarding the functioning of the NPM.

Under OPCAT, the SPT is permitted to have unrestricted access to all places where persons may be deprived of their liberty, including police stations. According to the OHCHR guidance document, the SPT should be able to interview, in private, persons deprived of their liberty and any other person who in the SPT’s view may be able to assist it with relevant information, including Government officials, NPMs, representatives of national human rights institutions, non-governmental organisations, custodial staff, lawyers, doctors, and family members.

During its visits, the SPT examines the conditions of detention and the daily life of detained persons, including the manner in which they are treated. They also examine relevant legislative and institutional frameworks, including, in particular, the extent to which States adopt the definition of torture as set out in Article 1 of the Convention against Torture in their national legislation. At the end of a State visit, the SPT prepares a report containing both observations and recommendations and requests a written response from the government within six months. The visit reports are confidential (although

66 Ibid., 6.

67 See, for example, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms* (12th Session, CAT/OP/1/Rev.1, November 2010).

the State may decide to make them public) and are intended to trigger a dialogue between the State and the SPT.⁶⁸

Once Ireland has ratified OPCAT, the SPT will be mandated to conduct visits of places of detention, including garda stations.

Inspection of Places of Detention Bill 2022

As noted earlier, at time of writing, Ireland has still not ratified OPCAT, despite ongoing calls from civil society groups such as the Irish Council for Civil Liberties and the Irish Penal Reform Trust (IPRT), as well as the CAT Committee,⁶⁹ the CPT and the Garda Inspectorate.

However, there is some momentum towards ratification with the publication of the Draft General Scheme of the Inspection of Places of Detention Bill (“the IoPD Bill”) in June 2022. This Bill proposes to implement OPCAT requirements into law, create or designate NPMs, and allow visits from the SPT to Ireland. The Government’s press release makes clear that the intention of the Bill is to pave the way for ratification of OPCAT, and heightened standards of inspections:

Ratification of OPCAT and the enactment of this legislation will allow for more rigorous standards in inspecting places of detention in this State. Both international and national inspection bodies (the NPMs) will be facilitated with unfettered access to facilities, information and engagement with those deprived of their liberty and people working in places of detention.⁷⁰

The proposal under the IoPD Bill is to designate the Irish Human Rights and Equality Commission (IHREC) as the coordinating body of a number of existing inspection bodies, which will be designated as NPMs. Of primary relevance for our purposes, is the proposal that the NPM for the justice sector will be the Inspector of Prisons, which will be renamed and expanded to be an Inspectorate of Places of Detention (IoPD),⁷¹ to be led by a Chief Inspector.

The Bill outlines the new appointment procedures, functions, and powers of the Chief Inspector and the IoPD in Part 1. The Inspectorate is explicitly designated as the NPM for garda stations and other places where people are

68 *Preventing Torture* (n 60).

69 Committee Against Torture (n 7) para 10(b).

70 Department of Justice Press Release, ‘Minister Publishes General Scheme of the Inspection of Places of Detention Bill’ (June 2022) <www.gov.ie/en/press-release/470b9-minister-for-justice-publishes-general-scheme-of-the-inspection-of-places-of-detention-bill/> accessed 17 July 2023.

71 Heads 8(1) and 19(1) of the Bill provide that the Inspectorate will be the NPM for justice sector.

in garda custody.⁷² Part 2 creates Prison Visiting Committees, and Part 3 deals with NPMs beyond the justice sector.

Civil society groups, as well as IHREC and the Inspector for Prisons, have expressed significant concerns that the Bill, as currently drafted, will not meet OPCAT requirements.⁷³ Stakeholders have expressed concern that the NPM for the justice sector will not be sufficiently independent in function, mandate, or operation, as required by OPCAT. In addition, it may not have the relevant expertise or powers to carry out OPCAT-compliant inspections.

A new version of the Bill is expected during 2023 and may address some of these concerns. In fact, the Joint Oireachtas Committee on Justice made numerous recommendations reflecting the broad stakeholder concerns in their report on its pre-legislative scrutiny, published in March 2023.⁷⁴ In order to comply with OPCAT, Ireland's NPM will need to fulfil the requirements in the treaty in the manner outlined by the SPT and summarised by OHCHR, as detailed earlier.

The NPM will need operational, functional, and financial independence; relevant expertise; sufficient financial and human resources; unrestricted access to all places where persons are, or may be, deprived of liberty; mechanisms to ensure recommendations to government are acted on; statutory advisory and educational functions; the right to work alongside particular external actors; and a guarantee of the ability to work without threats or sanctions being made against them or against those who work with them.

These thematic requirements are examined in more detail later, applying the international framework to the Irish context.

a) True operational, functional, and financial independence

In terms of financing, it will be important that the NPM has its own budget, rather than remaining within the budgetary allocation of the Department of Justice. There is precedence for this with other independent bodies in Ireland. Currently, both IHREC and the Policing Authority have their own budget line and do not have to rely on allocations from the Department of Justice.

The SPT is clear that NPMs should be accountable directly to Parliament. All of the inspection bodies that will form part of the NPM should be accountable directly to the Oireachtas and not to the Department of Justice. This should include a statutory requirement to lay annual reports before the Oireachtas. In addition, provision should be made for the preparation

72 The IoPD Bill, Head 19 and Head 14(g).

73 Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022* (Joint Committee on Justice, March 2023). The report includes all submissions made to the Committee.

74 Ibid. See the recommendations section.

and publication of thematic reports, as well as reports after each inspection.⁷⁵ IHREC, in its submission to the Justice Committee, stated that NPM reports should be submitted to IHREC as the coordinating body at the same time as their submission to the Houses of the Oireachtas and relevant Minister,⁷⁶ which seems sensible if IHREC's role as coordinating body is to be meaningful.

Appointments to the NPM, including to pre-existing inspection bodies, must be through an independent and transparent process in order to fulfil the requirements of OPCAT.⁷⁷ The Department of Justice should not be directly involved in appointments to the NPM. Appointment procedures that exist for other independent bodies in the State should be used for NPM appointments, such as the procedures for Commissioners of IHREC, the Ombudsman, and the Ombudsman for Children.⁷⁸ This would involve appointment by the President following an independent appointment process and the agreement of both Houses of the Oireachtas. The Chief Inspectors of each NPM, if appointed in that way, could only be removed by the President or Government and upon the agreement of both Houses.

b) Relevant expertise

Article 18(2) of OPCAT requires relevant expertise, gender balance, and the “adequate representation of ethnic and minority groups” in the NPM. This is expanded upon by the SPT to include relevant legal and healthcare expertise.⁷⁹ It will be important that there is a statutory requirement for such expertise in the Irish implementing legislation. Certain stakeholders in Ireland have highlighted that if the current proposal for the Justice sector NPM remains the Inspectorate of Prisons, which will include inspections of garda custody services, there must be a statutory basis for cooperation between the NPM and existing policing oversight bodies. This would ensure that expertise

75 See, for example, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 67) 36.

76 Irish Human Rights and Equality Commission, *Submission to the Justice Committee* (Irish Human Rights and Equality Commission 2022) 7.

77 OPCAT Article 2 and 18(1). See also UN SPT, *Analytical Assessment Tool for National Preventive Mechanisms*, UN Doc CAT/OP/1/Rev.1 (January 2016) para 13 accessed 17 July 2023.

78 Both IPRT and IHREC suggest this in their submissions on the Inspection of Places of Detention Bill: IPRT, *Submission to the Justice Committee* (IPRT 2022) 11; IHREC, *Submission to the Justice Committee* (IHREC 2022) 19.

79 UN SPT, *Guidelines on National Preventive Mechanisms*, UN Doc CAT/OP/12/5 (November 2010) para 20 accessed 17 July 2023.

built up, for example, during the Inspectorate's last own-volition inspection of garda custody services, is not lost.⁸⁰

c) Sufficient financial and human resources

Regarding NPMs that have existing roles beyond their NPM role, the SPT has made clear that they should have a designated budget for their NPM work. This is a point that has been made repeatedly by the SPT in its country reports. For example, in its report on New Zealand, the SPT noted that many of the component bodies of NPM had not received extra resources to carry out their OPCAT mandate and this, alongside staff shortages, had "severely impeded their ability to do so."⁸¹ As the Irish Penal Reform Trust points out forcefully in its submission to the Joint Oireachtas Committee on Justice, it will be vital that the Inspectorate of Prisons, if it remains the Justice NPM, will have the resources and necessary staffing expertise to effectively carry out its OPCAT functions in respect of "all prisons; Garda Síochána Stations; vehicles used by An Garda Síochána and the [Irish Prison Service]; and court cells (or other places where a person is detained immediately before and after being escorted to court)."⁸² The issue of a dedicated and sufficient budget will need to be addressed within the legislation.

d) Unrestricted access to all places where persons are, or may be, deprived of liberty

Two key concerns expressed by stakeholders regarding access to places of detention are first that the current proposals for Ireland's NPM do not explicitly include places of *de facto* detention such as social and care settings like Direct Provision Centres and Nursing Homes. That issue lies outside the remit of this chapter but is worth noting given the lost opportunity the Bill represents if such institutions are omitted.

The second issue relates to the definition of "unrestricted access." As noted in CAT's Concluding Observations on Ireland in 2017, the State should:

Ensure that existing bodies which currently monitor places of detention as well as civil society organizations are allowed to make *repeated and unannounced visits* to all places of deprivation of liberty, publish reports and have the State party act on their recommendations.⁸³ (Emphasis added).

80 Irish Council for Civil Liberties, *Submission to the Justice Committee* (Irish Council for Civil Liberties 2022) 12.

81 Sub-Committee on the Prevention of Torture and Ill Treatment (n 63) 4, para 12.

82 IPRT (n 78) 33.

83 Committee Against Torture (n 7) para 8(b).

It will be important that the legislation reflect these requirements, in particular, by specifying that visits to places of detention can be unannounced.

e) Mechanisms to ensure recommendations to government will be acted on

OPCAT Article 19(b) provides that NPMs must be able to make recommendations to address issues identified during inspections. It will be important that the Irish legislation includes not just government as the designated body that can receive recommendations but that other relevant bodies, such as the Irish Prison Service, are mandated to consider and implement the recommendations made by NPMs. Further, a mechanism to ensure that government must respond to recommendations by NPMs is vital if inspections are to be effective in preventing ill-treatment.

f) Advisory and educational function

According to OPCAT's Article 19, submitting proposals and observations concerning existing or draft legislation is a key function of an NPM. The SPT National Preventive Mechanism Guideline 35 echoes this requirement and extends it to observations on both law and policy. The Irish legislation will need to ensure that NPMs are granted, at a minimum, the power to submit proposals and observations concerning existing or draft legislation. In line with Guideline 35, Inspectors should be empowered to comment on both law and policy.⁸⁴

g) The right to work alongside particular external actors

The right to engage with external actors such as the SPT, other NPMs, and civil society should be enshrined in the national legislation.⁸⁵ The SPT has stated that the NPM should:

benefit from cooperation with civil society, universities and qualified experts, Parliament, and Government departments, among others. Special attention should be paid to developing relations with civil society members dedicated to working with vulnerable groups.⁸⁶

84 The 2022 Inspection of Places of Detention Bill sought to exclude the Chief Inspector of Prisons from commenting on government policy, which ICCL, IPRT, and the IoP expressed considerable concern about. See their submissions annexed to the Joint Committee on Justice (n 73).

85 UN SPT (n 77) para 24.

86 Ibid.

The CAT Committee has recommended that civil society organisations should be given access to all institutions in Ireland where people are detained.⁸⁷ The OPCAT legislation will be an important opportunity for government to implement the recommendations of the 2018 independent review into the Inspector of Prisons, which stated that the new Inspectorate’s internal staff should be “augmented by an external Expert Panel of suitably qualified individuals who can support inspections and investigations in specific specialist subject matter areas.”⁸⁸ In particular, the legislation should state that Inspectors have the power to engage external experts as needed and should clearly state that external experts can accompany Inspectors and their staff on their visits.

Each NPM in Ireland should be empowered to undertake joint inspections,⁸⁹ in order to maximise the benefits of sharing expertise. In addition, provision should be made in the legislation for information sharing between NPMs.

The Bill should also provide a legislative basis for an ongoing consultative role for civil society in the operation of NPMs. This could involve regular information exchange through “sustainable lines of communication” with Civil Society Organisations.⁹⁰

h) The ability to work without threats or sanctions being made against inspectors or against those who work with them or provide them with relevant information.

OPCAT Article 35 requires that members of National Preventive Mechanisms be accorded such privileges and immunities as are necessary for the independent exercise of their functions. This should be enshrined in the implementing legislation in order to ensure that there are no reprisals or fear of reprisals against any one in custody who speaks out about his or her treatment. It may take on particular importance in the context of anyone with irregular status, or those seeking asylum, for example. People in heightened situations of vulnerability will need reassurances that there will be no reprisals for their participation in an inspection.

87 Committee Against Torture (n 7) para 8(b).

88 IPRT (n 78) 15, quoting PA Consulting, *Office of the Inspector of Prisons Review of Operational Structure and Resources* (PA Consulting 2018) 8.

89 The Inspector of Prisons supports this proposal; see Office of the Inspector of Prisons, *Submission to the Houses of the Oireachtas Joint Committee on Justice on the Draft General Scheme of the Inspection of Places of Detention Bill* (Office of the Inspector of Prisons, August 2022).

90 UN SPT (n 77) para 30.

Conclusion

Ireland currently has a significant gap in its inspection regime for garda stations. This gap leaves people in custody at risk of ill-treatment, and Ireland is potentially in breach of its obligations under the UN Convention against Torture. The risks to people in custody, as a result of a longstanding failure to inspect garda stations, were exposed by the Garda Inspectorate's 2021 report, including failures regarding proper policies, oversight, and a rights-based approach to detention and treatment. The CPT reports have also revealed significant areas for improvement in the delivery of custody services and respect for rights.

At the same time, the detail and depth of analysis contained in the Garda Inspectorate's report demonstrate the opportunity that inspections afford to identify areas in need of improvement and to recommend solutions that would ensure everyone's rights are respected, protected, and fulfilled while in the custody of An Garda Síochána.

The Irish State should ratify OPCAT as a matter of urgency to ensure that regular, independent, and OPCAT-compliant inspections are conducted for all places of detention in Ireland. The Draft Scheme of the Inspection of Places of Detention Bill, published in 2022, is a step in the right direction and indicates a positive intent from the Irish government to close this ongoing gap in Ireland's human rights protection framework, but sustained commitment to passing an OPCAT-compliant Bill is required.

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- Joint Committee on Justice, *Report on Pre-Legislative Scrutiny of the General Scheme of the Inspection of Places of Detention Bill 2022* (Joint Committee on Justice, March 2023).
- Kilpatrick A, *A Human Rights Based Approach to Policing in Ireland* (ICCL 2018).
- Office of the Inspector of Prisons, *Submission to the Houses of the Oireachtas Joint Committee on Justice on the Draft General Scheme of the Inspection of Places of Detention Bill* (Office of the Inspector of Prisons, August 2022).
- O'Rourke M, *Rights Based Policing: How Do We Get There?* (ICCL 2018).
- Preventing Torture: A Practical Guide (Professional Training Series no 21, UN OHCHR 2018).
- Sekaggya M, *Report of the Special Rapporteur on the Situation of Human Rights Defenders* (A/HRC/22/47/Add.3, OHCHR 2013).
- Subcommittee on the Prevention of Torture and Ill Treatment, *Guidelines on National Preventative Mechanisms* (12th Session, Subcommittee on the Prevention, November 2010).
- *Visit to New Zealand Undertaken from 29 April to 8 May 2013: Observations and Recommendations Addressed to the State Party* (CAT/OP/NZL/1, UN 2017).
- UN Committee Against Torture, *Concluding Observations on the Second Periodic Report of Ireland* (UN Committee Against Torture 2017).
- UN SPT, *Analytical Assessment Tool for National Preventive Mechanisms*, UN Doc CAT/OP/1/Rev.1 (25 January 2016).

9

MINCÉIRS/TRAVELLERS IN GARDA CUSTODY

*Jennifer Schweppe, Amanda Haynes, and Sindy Joyce*¹

Introduction

The Morris Tribunal, investigating particular incidents of garda misconduct, found that Mincéirs/Travellers in garda custody had been subjected to racist abuse.² This chapter argues that the treatment of ethnic minorities in police custody merits our attention, not only as a stage along the pathway to release or conviction but also as an experience within criminal justice in its own right. Being detained as a suspect in police custody, usually in a garda station, is a position of significant vulnerability. The status of being a detained suspect is peculiar in its precarity – a waypoint balanced between the statuses of suspect and accused, and the life-altering changes that moving from one to other implies. As a detained person, some rights are already suspended pending others' determination of our likely innocence or guilt. In this moment of vulnerability, people also find themselves isolated from their support networks – from those upon whom they normally depend to support their decision-making. For these reasons, the protection of what has been

1 This chapter uses data collected as part of the Irish Research Council/Irish Human Rights and Equality Commission funded project, *Irish Travellers' Access to Justice Project*. We would like to acknowledge the remaining members of the original research team, Margaret O'Brien, Olive O'Reilly, and David Joyce, who were peer researchers on the project. We would also like to thank the student interns working at the European Centre for the Study of Hate who assisted in the editing of this chapter: Chloe Hick, Niall Gannon, Wiktoria Kluczak, Róise McHugh, Bríd McSharry, and Isabelle Murphy.

2 The Morris Tribunal, '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' (2006) <<http://policereform.ie/en/JELR/Pages/Fifth-Morris-tribunal-report>> accessed 30 June 2023.

described by the Committee for the Prevention of Torture as the “trinity of custodial rights” is crucial, that is, the right of access to a solicitor; the right to receive medical attention where required; and the right to have the fact of one’s detention notified to a third party.³

Together, the trinity of rights ensure that the suspect, finding themselves in a precarious legal position, will have access to legal advice from an expert; is in a fit state to be detained in police custody, to make decisions in their own best interests and to participate in the process of interrogation; and that support networks are made aware of their situation. The significance of these rights is their centrality to ensuring not only that police custody is humane but also that the processes that occur during the period of custody comply with the requirements of due process and in accordance with the principle of access to justice. It is therefore important that we know, within the relatively privatised context of police custody, how suspects are treated and whether their rights are upheld. Given evidence of global disparities in the treatment of ethnic minorities in the criminal justice system,⁴ it behoves us to consider the particular experiences of those ethnic minorities in the process. Where one particular ethnic group is disproportionately over-represented in the prison system, there is a particular onus on the institutions of the criminal justice system and on those who seek to critically understand and inform their work to attend to their treatment at this decisive point in the criminal justice process. This chapter particularly examines the manner in which Mincéirs/Travellers are treated by An Garda Síochána when held in police custody.

A Short Introduction to Mincéirs/Travellers

Mincéirs/Irish Travellers are an Indigenous ethnic minority originating in Ireland who are a traditionally nomadic people with a rich oral culture, a unique history and language, and their own customs and traditions. A unique feature of the evolving relationship between the Irish State and Travellers in Ireland is the contradictory and simultaneous process of racialisation and denial of ethnicity. For example, the Report of the Commission on Itinerancy 1963 proposed discriminatory policies justified by statements which speak to a

3 See, for example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment *CPT Standards* (Council of Europe 2002, Rev 2010) <www.refworld.org/pdfid/4d7882092.pdf>.

4 See, for example, L Fekete, ‘Lammy Review: Without Racial Justice, Can There Be Trust?’ (2018) 59(3) *Race & Class* 75–79; MB Kovera, ‘Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions’ (2019) 75(11) *Journal of Social Issues*; JL Jeffers, ‘Justice Is Not Blind: Disproportionate Incarceration Rate of People of Color’ (2019) 34(1) *Social Work in Public Health*; C Cunneen and J Tauri, ‘Indigenous Peoples, Criminology, and Criminal Justice’ (2019) 2(1) *Annual Review of Criminology* 359–81.

deeply rooted ideology of sedentarist superiority.⁵ Despite sedentary society's ascription to the category of Mincéirs/Travellers of a range of negative characteristics based on their belonging to a clearly identifiable, self-identifying, and longstanding group, the State persisted in denying Traveller ethnicity. Although recognised as a race/ethnic group in legislation in the United Kingdom, the Irish state declined to recognise them as an ethnic group until 2017 and has yet to enshrine this status in legislation.⁶

Like nomadic peoples across the globe, Mincéirs/Travellers have been subjected to institutional and individual discrimination throughout their history. As far back as the Middle Ages, anti-nomadic legislation penalised and criminalised nomadism.⁷ For example, the 1551 Act of Peddlars and Tynkers prohibited nomadism as well as nomadic trading. The Irish State, formed in 1922, sustained this sedentarist ideology. Mincéirs/Travellers were seen as contrary to the "Irish" settled way of life, and State policy sought to remove, assimilate, and eradicate Mincéir/Traveller culture. For example, just six months after the official formation of the Irish State in June 1922, local authorities in Galway put out an order to "remove Gypsies and Tinkers" from their areas. Since that time the actions and inaction of the State have consistently failed to protect Mincéirs/Travellers' social and cultural life resulting in what McVeigh has referred to as cultural genocide.⁸

Today Mincéirs/Travellers living conditions, health status, educational attainment, and employment levels are all substantially below those of the general population.⁹ Socially, they are the most stigmatised ethnic group in Irish society. The Traveller Community National Survey 2017 found that 55% of the general population would not have Travellers as community members; 35% avoid Travellers; 75% would not have a Traveller as a co-worker; 78% would not have a Traveller as a neighbour; 83% would not employ a Traveller; 91% would not have a Traveller as a family member, and 85% would not have a Traveller as a friend.¹⁰ The racist stereotypes which fuel this preju-

5 R McVeigh, 'The "Final Solution": Reformism, Ethnicity Denial and the Politics of Anti-Travellerism in Ireland' (2008) 7(1) *Social Policy and Society* 91–102; R McVeigh, 'Irish Travellers and the Logic of Genocide' in M Peillon and T Fahy (eds), *Encounters with Modern Ireland* (IPA 1997).

6 A Haynes, S Joyce and J Schweppe, 'The Significance of the Declaration of Ethnic Minority Status for Irish Travellers' (2021) 49 *Nationalities Papers* 270–88.

7 J Helleiner, *Irish Travellers: Racism and the Politics of Culture* (U of Toronto P 2000).

8 McVeigh (2008) (n 5).

9 D Watson and others, *A Social Portrait of Travellers in Ireland* (Economic and Social Research Institute 2017).

10 J O'Mahony, 'The Community Foundation for Ireland: Traveller Community National Survey' (2017) <www.exchangehouse.ie/publications_nationaltravellerssurvey2017.php> accessed 20 June 2023.

dice will be familiar to nomadic peoples internationally – Mincéirs/Travellers are depicted in political, media, and public discourses as criminals and Mincéir/Traveller culture as criminogenic.¹¹ Those working in criminal justice institutions, being drawn from the general population cannot be expected to be impervious to prejudices and stereotypes embedded in our culture; as a Traveller participant to Drummond’s seminal work on Travellers’ experiences of criminal justice institutions across the island of Ireland stated, there is “nothing to suggest that their genetic make-up is such that they are immune or protected from prejudice or racism or assumptions and stereotypes.”¹²

Mincéirs/Travellers and the Criminal Justice Process

The evidence is clear: racial profiling, harassment, verbal abuse and abuse of power by law enforcement officials are widespread in many countries. So too are discriminatory stop-and-search measures, ill-treatment, arbitrary arrests, and excessive use of force, at times leading to death.¹³

We know that globally, criminal justice systems evidence differential treatment of, and outcomes for, ethnic and racialised minorities which cannot be explained other than by reference to individual or institutional racism.¹⁴ The practices and processes that produce these statistics and outcomes – and contribute to the maintenance of longstanding patterns of societal inequality – include the over-policing and under-policing of ethnic minority neighbourhoods, racial profiling, racialised use of force, and racial disparities in the probability of arrest, conviction, and custodial sentences.

In England and Wales in the year ending March 2022, for example, people from a Black or Black British background were stopped and searched at a

11 A Mulcahy, “‘Alright in Their Own Place’: Policing and the Spatial Regulation of Irish Travellers’ (2012) 12(3) *Criminology and Criminal Justice* 307–27.

12 A Drummond, ‘Irish Travellers and the Criminal Justice Systems Across the Island of Ireland’ (Unpublished Ph.D. thesis, University of Ulster 2007) 315.

13 M Bachelet, *Addressing and Responding to Racial Discrimination in the Criminal Justice System* (High Level Side Event – Commission on Crime Prevention and Criminal Justice, 18 May 2022).

14 See The Lammy Review, ‘An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System’ (2017) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf>; W Macpherson, ‘The Stephen Lawrence Inquiry Report’ (Command Paper, February 1999) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf>; C Cunneen, ‘Institutional Racism and (In)justice: Australia in the 21st Century’ (2019) 1(1) *Decolonization of Criminology and Justice* 29–51; A Souhami, ‘Institutional Racism and Police Reform: An Empirical Critique’ (2014) 24(1) *Policing and Society* 1–21.

rate 6.2 times higher than those from a White ethnic group.¹⁵ A 2015 Chief Inspector of Constabulary report documented that on arrest, people from African-Caribbean backgrounds felt they were discriminated against by the police, citing examples of “rudeness, disrespect or an over-use of force.”¹⁶ That report found that people from African-Caribbean backgrounds made up just 3% of the population in the police areas they inspected, they made up 9% of those in custody and 17% of those strip-searched.¹⁷ The Independent Police Complaints Commission in England and Wales also found that ethnic minorities are more likely to be restrained in police custody.¹⁸ A recent analysis of eight years of official data from 2012/3 to 2020/1 concluded that Black people held in custody after police restraint are seven times more likely to die than White people in the same circumstances.¹⁹

Internationally, interventions such as the Black Lives Matter movement, the 2017 Lammy Review,²⁰ and the 2021 report of the UN High Commissioner for Human Rights²¹ have reignited political and public attention to institutional racism in the criminal justice system. The 2015 Doha Declaration underscored signatories’ commitment to the:

[S]upport of effective, fair, humane and accountable criminal justice systems and the institutions comprising them . . . and recognizing the responsibility of Member States to uphold human dignity, all human rights and fundamental freedoms for all, in particular for those affected by crime and those who may be in contact with the criminal justice system, including vulnerable members of society, regardless of their status, who may be subject to multiple and aggravated forms of discrimination, and to prevent and counter crime motivated by intolerance or discrimination of any kind.

15 National Statistics, ‘Police Powers and Procedures: Stop and Search and Arrests, England and Wales, Year Ending 31 March 2022’ (2022) <www.gov.uk/government/statistics/police-powers-and-procedures-stop-and-search-and-arrests-england-and-wales-year-ending-31-march-2022/police-powers-and-procedures-stop-and-search-and-arrests-england-and-wales-year-ending-31-march-2022>.

16 The Welfare for Vulnerable People in Police Custody (Inspecting Policing in the Public Interest 2015) <www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf>.

17 Ibid.

18 Ibid.

19 INQUEST, ‘“I Can’t Breathe”: Race, Death and British Policing’ (2023) <www.inquest.org.uk/i-cant-breathe-race-death-british-policing>.

20 Lammy (n 14).

21 UN High Commissioner for Human Rights, ‘Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers’ (2021) A/HRC/47/53.

Nationally, however, discussion of ethnic disparities and institutional racism in the criminal justice system has been stymied by the failure on the part of all criminal justice institutions – bar the prison service – to collect equality data.

In Ireland, there is a dearth of information on ethnic disparities in stop and search, cautions, arrests, detention, prosecution, conviction, and sentencing. An Garda Síochána record hate crimes and incidents, including those involving an anti-Traveller discriminatory motivation. However, neither the police nor the courts record the ethnicity of suspects or offenders. Data collection and publication by criminal justice institutions are generally limited in Ireland – stops and searches are not recorded, for example – but there is a particular information deficit in respect of ethnic disparities in the criminal justice system.

It is worth noting that even in jurisdictions which do record and transparently publish official data on ethnic disparities across criminal justice institutions, Mincéirs/Travellers often remain invisible. In England and Wales, for example, the otherwise very comprehensive Lammy Review into disparities in the treatment of, and outcomes for, ethnic and racialised minorities notes that Traveller, Gypsy, and Roma identities “have not featured in the official monitoring systems across the CJS.”²² The report goes on to underscore the impact of this failure “it is impossible to analyse whether charging rates, sentencing decisions, or reoffending rates are proportionate for Gypsies, Roma and Travellers.”²³

In 2019, at the UNHCR hearings on Ireland and again in 2021 at a meeting of the Policing Authority, at which he was questioned about the findings of the research presented in this chapter, the Garda Commissioner has stated categorically that Ireland’s police do not engage in ethnic profiling. Such statements – while incorrect according to the research of the Irish Travellers Access to Justice (ITAJ) project and that of the EU Fundamental Rights Agency²⁴ – are possible because Ireland’s police and courts operate race/ethnicity-blind administrative systems which invisibilise racist incidents and practices. Thus, high-profile incidents such as the police killing of George Nkencho – a young Black man who in 2020 was shot by gardaí from the Armed Support Unit and later died of the injuries he sustained – are investigated and addressed in the absence of any wider official consideration of, or insight into, racial or ethnic disparities in access to justice.

In contrast, on the same shared island, the Police Service of Northern Ireland (PSNI) regularly disaggregate by ethnicity statistics on the number of

22 The Lammy Review (n 14).

23 Ibid.

24 European Agency for Fundamental Rights, ‘Travellers in Ireland: Key Results from the Roma and Traveller Survey 2019’ (2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-roma-and-travellers-survey-country-sheet-ireland_en.pdf>.

persons stopped and searched/questioned and subsequently arrested under all legislative powers. These include data relating to those identified as Travellers, although those statistics are presented with a warning that the data may not be comprehensive as “some Irish Travellers are likely to be categorised as White.”²⁵ The 2021 Northern Ireland Census data show that Irish Travellers make up just 0.14% of the population in Northern Ireland. During the period April 1, 2022, to March 31, 2023, PSNI/NISRA statistics show that Travellers represented 2% of all of those individuals stopped and searched/questioned, and 3% of those subsequently arrested. The PSNI statistics, along with our calculation of the percentage of stops that result in arrest for each ethnic group, are presented in Table 9.1.

On the basis of these data which the PSNI/NISRA admit likely undercount Travellers, Travellers still have the highest probability (14%) of any ethnic category of a stop and search resulting in an arrest, more than twice the likelihood of those identified as “White Irish” (6%).

In 2015, Anthony Drummond noted that until very recently, “little was known as to the situation of Travellers with criminal justice agencies.”²⁶ In the intervening years, the introduction of an ethnic identifier by the Irish Prison Service has helped to make the experiences of Mincéirs/Travellers in prison more visible. These data facilitated the confirmation of earlier work which asserted the over-representation of Mincéirs/Travellers in prison.²⁷ In 2022, Doyle et al. published an analysis of prison data which again found that Irish Travellers “compris[e] almost 8 per cent of committals relative to their 0.7 per cent of the total population in Ireland.”²⁸ The authors also document the over-representation of Mincéirs/Travellers in the probation service, noting that across a 12-month period, Travellers comprised 8.9% of those engaged with the Irish Probation Service although they comprise only 0.7% of the national population. Younger Travellers were also over-represented—8.6% of Travellers engaged with the Irish Probation Service were under 18 years of age, compared to just 3.7% of non-Traveller White Irish.²⁹

25 PSNI/NISRA, ‘Use of Stop and Search Powers by the Police in Northern Ireland’ <www.psnipolice.uk/sites/default/files/2023-05/PSNI%20Stop%20and%20Search%20Report%20Q4%202022_2023.pdf> accessed 30 June 2023.

26 A Drummond, ‘Becoming Visible: Gypsy Roma Travellers in Prison’ (2015) 219 *Prison Service Journal* 19–23.

27 Cf. L Costello, *Travellers in the Irish Prison System: A Qualitative Study* (Irish Penal Reform Trust 2014); H Kennedy and others, *Mental Illness in Irish Prisoners: Psychiatric Morbidity in Sentenced, Remanded and Newly Committed Prisoners* (National Forensic Mental Health Service 2005); S Linehan and others, ‘Irish Travellers and Forensic Mental Health’ (2002) 19(3) *Irish Journal of Psychological Medicine* 76–79.

28 D Doyle and others, “*Sometimes I am Missing the Words*”: *The Rights, Needs and Experiences of Foreign National and Minority Ethnic Groups in the Irish Penal System* (Irish Penal Reform Trust 2022) 28.

29 *Ibid.*, 29.

TABLE 9.1 PSNI Stop, Search, and Arrest Data Disaggregated by Ethnicity

	<i>Persons stopped and searched/questioned</i>	<i>Persons subsequently arrested</i>	<i>Percentage of stops resulting in an arrest</i>
White Irish	22,257	1,279	6%
Irish Traveller	355	48	14%
	(2% of all stop and searches)		
Other Ethnic Group	388	34	9%
Black	242	21	9%
Asian	194	17	9%
Mixed	112	6	5%
Not Specified	102	6	6%
Total	23,650	1,411	6%

(Adapted from PSNI/NISRA, *Use of Stop and Search Powers by the Police in Northern Ireland* April 1, 2022, to March 31, 2023.)

The introduction of an ethnic identifier by the Irish Prison Service is to be commended and was welcomed by both Pavee Point³⁰ and the Irish Penal Reform Trust.³¹ However, the absence of ethnic data collection in other parts of the criminal justice system means that the causes of Mincéir/Traveller over-representation in prison are contemplated without insight into any contributing factors relating to institutional racism or bias in other criminal justice institutions. It is notable that the last National Traveller and Roma Inclusion Strategy (2017–2021) addresses Mincéirs’/Travellers’ involuntary contact with criminal justice institutions only in the context of prison.³² No reference is made to equality or discrimination in treatment by police or the courts during involuntary encounters. Victim-centred commitments are made to address the under-policing of intra-community crime and to facilitate the reporting of racist crime. A commitment to “implement the CERD Committee’s General recommendation XXXI on the prevention of racial discrimination in the criminal justice system with a focus on data collection by an independent body for the purposes of identifying trends in racial discrimination” was not met within the period of the strategy.³³ In contrast, the Strategy includes three separate action items with respect to the treatment of Mincéirs/Travellers in prison. Arguably, the failure of the State to statistically connect

30 Pavee Point, *Submission to the Department of Justice and Equality: Towards the Development of a Strategy for the Criminal Justice System* (Pavee Point 2015).

31 Irish Penal Reform Trust, *IPRT Submission to the Joint Committee on Key Issues Affecting the Traveller Community* (Irish Penal Reform Trust 2019).

32 Department of Children, Equality, Disability, Integration and Youth, ‘National Traveller and Roma Inclusion Strategy 2017–2021’ (2017) <www.gov.ie/pdf/?file=https://assets.gov.ie/43310/d7d54fbff0f4418982856e7dddaf78c1.pdf#page=null>.

33 Ibid.

the over-representation of Mincéirs/Travellers in prison to the character of their encounters with police and courts contributes to sustaining racist stereotypes of Traveller culture as criminogenic.

Previous independent research has long established that relations between criminal justice institutions and people identified and identifying as Mincéirs/Travellers are problematic. The 2004 An Garda Síochána Human Rights Audit described the relationship between Mincéirs/Travellers and gardaí as difficult and characterised by mutual suspicion.³⁴ Of over 800 gardaí surveyed for the purpose of that audit, 35% responded that the relationship between An Garda Síochána and Travellers was poor, and 13% rated their personal relationships with Travellers as poor.³⁵ Both organisational and personal relationships with Travellers were characterised by garda respondents as the worst amongst all minority groups addressed by the survey.³⁶ Mulcahy and O'Mahony, based on interviews conducted with both gardaí and Travellers conducted between 2002 and 2004, described relations between Irish Travellers and An Garda Síochána to be “extremely difficult and contentious.”³⁷ Mulcahy again documented Mincéirs'/Travellers' distrust of gardaí³⁸ and Bracken's research extends this to distrust of the criminal justice system as a whole.³⁹ Mulcahy noted that as traditional nomads, Mincéirs'/Travellers' historical experience with the institutions of criminal justice “largely involved efforts to control their mobility, and ensure they remained in locations which would not cause concern for settled people.”⁴⁰ Dr Vicky Conway stated in her podcast that Mincéirs/Travellers are a

community that is both underpoliced when it needs the police, and overpoliced outside of that, and yet a community that wants a policing service, that has needs in this space, that has concerns about its safety, just as anyone else does, and wants that.⁴¹

With such a range of points in the criminal process at which disparities may manifest and a dearth of official data, it is perhaps unsurprising that

34 Ionann Management Consultants, *An Garda Síochána: Human Rights Audit* (Ionann Management Consultants Ltd 2004).

35 Ibid.

36 *ibid* 84.

37 A Mulcahy and E O'Mahony, *Policing and Social Marginalisation in Ireland* (Combat Poverty Agency 2005) 22.

38 Mulcahy (n 11).

39 DC Bracken, 'Probation Practice with Travellers in the Republic of Ireland' (2014) 11 *Irish Probation Journal* 44–62.

40 Mulcahy (n 11) 309.

41 V Conway, 'Policed the Beat – “Traveller Access to Justice”' *The Tortoise Shack* (20 July 2022).

the experiences of ethnic minorities in police custody have, to date, received relatively little attention as a specific point of focus. Mulcahy in his seminal analysis of the spatial regulation of Mincéirs/Travellers in Ireland noted that mistreatment in police custody arose as a concern amongst his sample:

Other concerns involve what can only be described as allegations of clear misconduct on the part of police officers, including allegations of being “beaten physically” while in police custody. . . . One case involved allegations of misconduct towards a young boy detained by the police.⁴²

Mulcahy and O’Mahony’s research found that “accounts of serious police misconduct circulate widely within marginalised communities . . . and many of them appear to be accepted as fact by members of those communities.”⁴³ In 2004, An Garda Síochána Human Rights Audit found that institutional racism against Mincéirs/Travellers was common within the organisation and the worst personal relationships were with Travellers. The audit also highlighted that the “procedure and operating practices of An Garda Síochána can lead to institutional racism particularly in relation to the Nigerian community, the [T]ravelling community and to a slightly lesser degree at present, the Muslim community.”⁴⁴

Methodology

Funded by the Irish Research Council and the Irish Human Rights and Equality Commission, the ITAJ project sought to document Mincéirs’/Travellers’ perceptions of, and experiences with, the criminal justice process, specifically policing and the courts’ system. This research sits within a body of work which addresses minority communities’ access to justice. Our approach of focusing on ethnic minorities’ and traditionally nomadic people’s lived experience of interacting with criminal justice agencies is informed by the work of scholars like Porter,⁴⁵ Tauri,⁴⁶ and Cunneen.⁴⁷ We fully endorse the argument of Skinnis, who notes that while research *with* the police is becoming the norm, research *on* the police is “still of value as part of a diverse police

42 Mulcahy (n 11) 318.

43 Mulcahy and O’Mahony (n 37) 33.

44 Ionann Management Consultants (n 34) 19.

45 A Porter, ‘Decolonizing Policing: Indigenous Patrols, Counter-Policing and Safety’ (2016) 20(4) *Theoretical Criminology* 548–65.

46 JM Tauri and A Deckert, ‘Walking While Brown: A Critical Commentary on the New Zealand Police Extra-Legal Photographing and Surveillance of Rangatahi Māori’ (2022) 4(2) *Decolonization of Criminology and Justice* 69–75.

47 C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Routledge 2020).

research agenda.”⁴⁸ Our research seeks to document the particular experiences of ethnic minority communities engaging with the police and the courts as victims, suspects, and rights-bearing citizens.

This research was guided from the outset by the principles of participatory research and co-design.⁴⁹ The project was overseen by an Advisory Committee consisting, in the majority, of national Mincéir/Traveller organisations: the Irish Traveller Movement, Pavee Point, the National Traveller Women’s Forum, Mincéir Whidden, and the Traveller Mediation Service. The Advisory Committee also included representatives of the Department of Justice and An Garda Síochána. A representative of the Irish Human Rights and Equality Commission sat on the advisory board in an *ex-officio* role. The Advisory Committee was established at the outset of the 18-month project and its oversight informed all stages of the research from the design of the research instruments, to sampling, data collection, and data interpretation.

The aims of the project were fulfilled through the collection of original qualitative and quantitative data with Mincéirs/Travellers in Ireland. Multiple modes of data collection were utilised, two of which will be drawn upon in this chapter. A total of 326 Travellers, equivalent to 1 in every 60 adult Mincéirs/Travellers in Ireland, responded to a survey documenting their perceptions of, and experiences with, the criminal justice system in Ireland. The survey instrument was disseminated remotely, and responses were recorded by interviewers via an electronic survey instrument, as well as via voice recording which facilitated the inclusion of open-ended questions. The latter were included to document critical positive and negative incidents⁵⁰ with members of criminal justice bodies and to respect the oral culture of the Mincéir/Traveller community.⁵¹ Participants in the survey were drawn from 25 of the 26 counties in Ireland. Additionally, the data were weighted using census data on Ireland’s Mincéir/Traveller community to ensure that the ITAJ dataset is representative of the jurisdiction’s Mincéir/Traveller population on the basis of age, gender, and county. Conway in her podcast, *Policed in Ireland*, noted that the response rate was “incredibly high,” and that the response rate gave the research “incredible authenticity and accuracy.”⁵²

In addition to the survey, 29 in-depth interviews were conducted with national and regional Mincéir/Traveller organisations and community

48 L Skins, ‘Researching Inside Police Custody in Four Jurisdictions: “Getting in”, “Getting on”, “Getting Your Hands Dirty” and “Getting Through It”’ (2023) 23(2) *Criminology & Criminal Justice* 273–89.

49 S Joyce and others, *Irish Travellers’ Access to Justice* (European Centre for the Study of Hate 2022).

50 *Ibid.*

51 *Ibid.*

52 Conway (n 41).

projects around Ireland. The interview participants have extensive experience in supporting members of the community impacted by involuntary contact with the criminal justice system and/or by crime victimisation. Their expertise and experiential knowledge provided insights into the relationships between community advocacy/support organisations and the police and courts, as well as the relationship of the wider ethnic community to these bodies. The geographic dispersal of the participants additionally contributed to understanding regional commonalities and differences in experiences of access to justice.

The data collection instruments were co-designed by the ITAJ research team, which intentionally consisted in the majority of Mincéirs/Travellers. While the Mincéir/Traveller members of the team led participant recruitment and the dissemination of the survey, all members of the research team participated in this process. Qualitative data were subjected to thematic analysis⁵³ with the aid of QSR NVivo computer-aided qualitative data analysis software.⁵⁴ All members of the research team contributed to the interpretation of the findings.

Rights in Police Custody

Other chapters in this book have detailed the range of rights which individuals detained in police custody are afforded (see Chapters 6, 7, and 12, in particular). While there are a range of such rights protected, we have chosen in this chapter to focus on what the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment describes as the “trinity of rights” crucial to safeguard against the ill-treatment of people in custody: the rights of access to a lawyer; to medical treatment; and to have the fact of detention notified to a third party.⁵⁵ At a domestic level, when in garda custody, accused persons are entitled to be treated in accordance with provisions of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987. In its most recent report, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stated that it was of the view that these main safeguards “operate in a satisfactory manner as from the very outset of custody.”⁵⁶

53 Joyce and others (n 49).

54 Ibid.

55 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ‘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 23 September to 4 October 2019’ (2019) para 17 <<https://rm.coe.int/1680a078cf>>.

56 Ibid., 14.

The remainder of this chapter will address what Mincéirs/Travellers, participating in the ITAJ research, reported regarding the respect of the “trinity of rights” while in police custody. We first detail the *perceptions* of Mincéirs/Travellers as to how they think they would be treated if they were detained in police custody and then describe Mincéir/Traveller *experiences* in custody. It should be noted that the experiences of supporting those in custody, and of being in custody relate to the five-year period prior to the survey taking place, that is, between 2016 and 2021.

Rights in Police Custody – Traveller Perceptions

The ITAJ project explored Mincéirs/Travellers’ perceptions and experiences of key criminal justice institutions, namely An Garda Síochána and the judiciary. In interviews with individuals working in Mincéir/Traveller organisations, we asked interviewees if they would have any concerns for the safety of a Mincéir/Traveller if they were held in police custody: the vast majority of participants said that they would.⁵⁷

A number of individuals were of the view that the treatment by the gardaí of Mincéirs/Travellers in police custody is gendered: that men get worse treatment than women. This individual, for example, was of the view that this extended across the trinity of rights:

the boys and the men would have had more negative experiences than what the women would have. I would have heard of many cases where men in particular or boys would have gotten beaten up either being transported to the [garda station]. They would have been thrown in a cell, they wouldn’t have got immediate medical attention if they needed it. They wouldn’t have gotten their phone call to the solicitor for many hours. The guards would be kind of goading them and taking the mick out of them and throwing comments in and out of the cell and stuff like that . . . But I would have supported a couple of women whereby they would have been on medication and they would have allowed them to contact a family member to bring that medication down.

(Interviewee from a Traveller organisation)

This individual who works in a Mincéir/Traveller organisation was also of the view that young Mincéir/Traveller men would not feel safe when in garda custody:

I certainly don’t think that most Travellers feel safe when they’re in garda custody. As I said, I think you know particularly, well not only I mean,

57 It should be noted that where interviewees or survey participants refer to “barracks” or “garda barracks” they are referring to garda stations. Joyce and others (n 49) 87.

but particularly young, younger men I think wouldn't feel safe in garda custody.

(Interviewee from a Traveller organisation)

Another individual was of the view that the treatment of Mincéirs/Travellers in garda custody depended on which garda station the individual was brought to – some stations had a reputation for being worse than others. In response to the question as to whether this interviewee was concerned about individuals brought into custody, her response was first that she would have no concerns in one station, but would in the other:

Interviewer: When you were supporting those people in police custody, were you concerned about their safety at all?

Participant: No, not in [Town A] garda station, no.

Interviewer: If you were supporting someone in another garda station, would you be concerned about their safety?

Participant: Yeah, I find the [Town B] garda station a very – very rough garda station.

Interviewer: What do you mean by that?

Participant: They would treat the – they would treat young boys and girls very roughly. They wouldn't – they wouldn't be – they wouldn't follow the book accordingly, if that make sense.
(Interviewee from a Traveller organisation)

While not every individual we spoke with in the qualitative interviews had supported someone who was in garda custody, the vast majority had the *perception* that Mincéirs/Travellers would not be treated well in custody, with particular concerns about the way that young men would be treated.

Further, while some interviewees were of the view that the treatment of Mincéirs/Travellers in custody was dependent on, for example, their gender, age, or location, others had more general concerns. Indeed, this interviewee referenced respect for the “trinity of rights” as their core concern:

I'd be worried that I wouldn't have the rights, that they wouldn't be able to make a call. I'd be worried [about] the way they'd be treated within the cell. If there was a person for instance maybe was on medication, would the guards . . . inform us that that person was locked up in order that we could get the medication to them? . . . Would the guards be willing then for family to come down and hand in that? Would that person that's locked up behind those bars get that medication? Would they actually give it to them?

(Interviewee from a Traveller organisation)

As we will see, these pessimistic perceptions as to how Mincéirs/Travellers would be treated in custody are frequently borne out through the testimony of Mincéirs/Travellers as to their experiences in reality. More generally, these perceptions should be understood in the context of the finding that Irish Travellers' trust in An Garda Síochána is far lower than that of the general population.

Rights in Police Custody – Traveller Experiences

As we have seen, the perception of those who work in Mincéir/Traveller organisations was that Mincéirs/Travellers would not be treated well in garda custody. The ITAJ survey included a module which asked about the experiences participants had in garda custody. Of the participants in the survey, 19% had been held in garda custody and all but one participant agreed to answer questions about their experience. Of those participants that had been held in police custody in the five years prior to the survey, 46% had been in police custody once, 40% had been in custody 2–5 times, and 15% had been in custody 6 or more times. Participants answered questions about their last experience in custody.

Generally speaking, there was a predominant sense of “unsafety”: 64% of the participants in the ITAJ survey that had been held in garda custody asserted that they did not feel safe while in garda custody. A range of testimonies including the use of racist language, degrading treatment, and physical violence were recalled as participants described their worst experience with the police in the five years prior to the survey.⁵⁸ Rather than focus on these particular experiences of ill-treatment, this chapter will address the extent to which the “trinity of rights” was respected from the perspective of those Mincéirs/Travellers who were detained in custody.

Notification of Rights

The “trinity of rights” are articulated in Regulation 8 of Custody Regulations which provides for the notification of rights to an individual in garda custody. An arrested person must be *notified* of the following:

- (a) the matter in respect of which the person is arrested;
- (b) the fact that the arrested person is entitled to consult a solicitor; and
- (c) the fact that they are entitled to have the fact of their being held in custody notified to another person.⁵⁹

58 Ibid., 76.

59 The rules regarding notification for those under the age of 18 are provided for in regulation 9 of the Custody Regulations.

In *DPP v O’Kelly*,⁶⁰ the Court was clear that, while there is a right under the Regulations for an accused person to be notified of their rights, there is no duty on the Member In Charge (hereinafter “MIC”) to ensure the accused *understands* their rights. The High Court stated:

The Regulations require that the accused be informed of his rights, whether he understands them or not . . . all that is required is that the relevant information is given to the accused.⁶¹

With respect to the operation of this right, and with respect to being notified of the reason for their arrest, 60% of participants who had been held in custody stated that they were given a reason, 34% stated that they were not given a reason for their arrest, and 6% could not recall. We additionally asked participants if they understood the reason for their arrest: 60% stated that they understood all of what was said; 32% stated that they understood some of it; and 8% stated that they understood none of what they were told as to the reason for their arrest.

Gulati et al. discuss the importance of developing an accessible notice of rights for those with intellectual disabilities in police custody.⁶² Given the low levels of literacy in the Mincéir/Traveller community, combined with the overrepresentation of those with intellectual disabilities highlighted by Gulati et al., it is argued here that information should be provided to all those in custody in an accessible manner, that is, that all such notices should be in simplified, plain English, and presented along with images to explain the scope of the rights.

In its assessment of custody records, the Garda Inspectorate found that almost a quarter of custody records had no recorded acknowledgement of notification of rights, and no reason was given for this in more than one-third of these cases. In the ITAJ research, just over a quarter of individuals stated that the Garda did not read over the notice of rights, and 8% could not recall whether the rights were read to them or not.

Notification of Right to Access a Solicitor

The Garda website lists, at the time of writing, only two policy documents relating to the treatment of people in custody.⁶³ One document relates to the process for taking the temperature of persons in garda custody under emergency

60 *DPP v O’Kelly* [1998] IEHC 22.

61 *Ibid.*

62 G Gulati and others, ‘The Collaborative Development Through Multidisciplinary and Advocate Consensus of an Accessible Notice of Rights for People with Intellectual Disabilities in Police Custody’ (2022) 83 *International Journal of Law and Psychiatry* 101815.

63 An Garda Síochána, ‘Policy Documents’ <www.garda.ie/en/about-us/publications/policy-documents/> accessed 1 June 2023.

legislation introduced during the COVID-19 pandemic.⁶⁴ The second document is the Code of Practice on Access to a Solicitor by Persons in Garda Custody.⁶⁵ This document was published in 2016 to “streamline the interaction between An Garda Síochána and solicitors in relation to arrested/detained persons.”⁶⁶ This policy communicates to members of An Garda Síochána the rights accruing in this regard to persons arrested or detained at a garda station. The policy synthesises the obligations that these rights confer on gardaí as follows:

[A] suspect in Garda custody, unless he/she expressly waives his/her right to be given legal advice, should not be interviewed prior to him/her obtaining legal advice except in wholly exceptional circumstances involving a pressing and compelling need to protect other major constitutional rights such as the right to life or where there is a clear waiver of the right by the suspect.⁶⁷

When asked if they were offered access to a solicitor when in garda custody, 42% of participants stated that they had been offered access to a solicitor, but the same number stated that they had not been offered access to a solicitor; 16% could not recall if they had been offered access to a solicitor. The Garda Inspectorate in its 2021 report noted that of the 318 records reviewed, a solicitor was requested in only 68 cases.⁶⁸ It observed that in 19% of those 68 cases, the Inspectorate was unable to determine if the individual was in fact able to avail of the right to legal assistance.⁶⁹ Crucially, there is no requirement that those in custody sign or mark the custody record to formally confirm their decision, and we believe that the need for such a requirement is clear. Waivers of the right to access a solicitor should also be documented as should any change of mind in this regard.

Third-Party Notification

Regulation 8(1)(c) of the Custody Regulations as amended by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána

64 An Garda Síochána, ‘Treatment of Persons in Custody Regulations – Temperature Screening and Related Risk Assessment’ (2020) <www.garda.ie/en/about-us/publications/policy-documents/treatment-of-persons-in-custody-regulations-temperature-screening-and-related-risk-assessment.pdf> accessed 1 June 2023.

65 An Garda Síochána, ‘Code of Practice on Access to a Solicitor by Persons in Garda Custody’ (2015) <www.garda.ie/en/about-us/publications/policy-documents/code-of-practice-on-access-to-a-solicitor-by-persons-in-garda-custody.pdf> accessed 1 June 2023.

66 Ibid.

67 Ibid., 3.

68 Garda Síochána Inspectorate, ‘Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations’ at 44 <www.gsinsp.ie/wp-content/uploads/2022/06/Garda-Inspectorate-Delivering-Custody-Services.pdf>.

69 Ibid., 46.

Stations) (Amendment) Regulations 2006 provides that, where an individual is not below the age of 18, they are entitled to have the fact of their custody communicated to another person. In its assessment of a sample of 318 custody records, the Garda Inspectorate found that no information as to third-party communication was recorded in 6% of the cases.⁷⁰ It found that 20% of persons in custody expressed a wish to have a third-party informed, which was provided in 94% of the cases.⁷¹ The report of the Committee on the Prevention of Torture found that only a few persons complained that they had not been allowed to contact their family while in police custody.⁷²

Due to the fact that our participants could not definitively confirm if the fact of their arrest had been communicated to a third party in a reasonable timeframe, we did not ask survey participants whether a third party had been informed of the fact of their arrest. Participants had experience of family members being in custody in circumstances where no communication as to the fact of their custody had been made:

[They] kept her above in a *barrack* [garda station] just a few days before Christmas until 3 o'clock in the morning and left her out in the freezing cold and her husband had gone out that night, he didn't even know, they came about 11 o'clock and arrested her and nobody knew, none of the family knew and left her walk home . . . a couple of miles in the frost.

(Survey participant)

I know certain times that there were young people that young adults and that would have been gone, people's out looking for them, and they were arrested, and nobody knew they were arrested.

(Interviewee from a Traveller organisation)

Medical Attention

In the Policed in Ireland podcast, Conway noted that while being in custody is stressful for everyone, it is particularly difficult for those with mental health conditions:

[F]or anyone who has any level of mental illness or any concerns around their mental health, custody is an enormously triggering and difficult

70 Ibid., 44.

71 Ibid., 68.

72 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (n 55) 15.

experience, and as we know from elsewhere, you know mental illness is a really serious issue in the Traveller community and that's been deeply neglected.⁷³

This issue of lack of supports for those with mental health conditions while in custody was raised by a participant in our study, who works in a Mincéir/Traveller organisation:

You would identify a few Travellers who have really chronic mental health issues, that you would be concerned about their safety when they go on to Garda Síochána.

(Interviewee from a Traveller organisation)

While there is no *right* to medical attention under the Regulations, there is a requirement under Regulation 21(1) for the Member in Charge to call upon a doctor to attend to the individual in custody in the following circumstances:

- where the person is injured;
- where the person is under the influence of intoxicating liquor or drugs and cannot be roused;
- where the person appears to the MIC to be suffering from a mental illness; or
- otherwise appears to the MIC to need medical attention.

Regulation 21(2) provides that where an individual “claims” to need medication relating to a serious or potentially serious condition, medical advice should be sought. Equally, medical advice should be sought if the MIC considers it necessary because the person in custody has such medication in their possession.

Of the records examined by the Garda Inspectorate, 29 out of 318 (9%) had no information regarding whether or not a doctor was required in the custody record.⁷⁴ A doctor was stated to be required for 74 (23%) individuals because of “physical illness or injury, poor mental health, drug or alcohol issues, or a combination of these factors.”⁷⁵ Many gardaí reported time delays to the Inspectorate with respect to doctors attending the station, and of those records that had sufficient information for the Inspectorate to calculate the time from when the doctor was requested until the examination took place, 63% of the examinations took place outside the target timeframe: in

73 Conway (n 41).

74 Garda Síochána Inspectorate (n 68) 39–40.

75 *Ibid.*, 80.

45% of cases, it exceeded an hour with the longest period exceeding three hours.⁷⁶

The Committee for the Prevention of Torture expressed concern about the provision of medical treatment to those in custody, stating that it continued to “have certain misgivings about the effectiveness of the right of access to a doctor.”⁷⁷ Particular concerns were expressed regarding the lack of medical facilities in garda stations, and there was no means by which the delegation could be sure “that detained persons were appropriately assessed and examined” as no medical records were kept, and little follow-up was apparent.⁷⁸

The ITAJ survey asked participants whether they needed medical attention while in custody. Of those individuals who were held in custody, 27% needed medical attention – a slightly higher number than those documented by gardaí as requiring attention according to the Garda Inspectorate report (23%). The majority of those that needed medical attention while in custody did not receive medical attention. The reasons given by respondents as to why they needed medical attention included because of an existing medical condition, to treat injuries, or something else. Descriptions of the cause of requirements for medical treatment included injuries caused by a garda or a number of gardaí.

Those participating in the ITAJ study gave mixed responses with respect to access to medical treatment. For some, professional medical attention was provided:

[I]n fairness the guards did take them to the hospital or whatever, in fairness. I have to be honest. But now they would be fair in that aspect that I’m aware of. Now I couldn’t lie they would be fair in that aspect.

(Survey participant)

For others, no medical treatment was provided for injuries:

[M]y mother said look he hit his head like, he fell off the wall and hit his head, he needed to see a doctor like and no doctor came to see him, nothing.

(Survey participant)

As to the operation of Regulation 21(2), of those participants in ITAJ that were held in custody, 39% were on regular medication at the time. We asked

⁷⁶ Ibid., 40.

⁷⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (n 55) 15.

⁷⁸ Ibid.

if they had been provided with their medication while in the garda station: 81% stated that they had not. The majority stated that the time without their medication made them feel unwell. One individual recounted their worst experience at a garda station as being in custody, when they began to feel unwell: they told the gardaí they needed help because they are asthmatic and suffer panic attacks. They asked for medical attention and did not get any, and after being released from custody, they said:

I had to go to my own doctor afterwards yeah, they kept my medication in there so I had to go back to my doctor and get more medication, they wouldn't give me out my medication.

(Survey participant)

Similarly, a request from this person's family member for access to medication was denied:

[H]e also suffers from bi-polar, schizophrenia, and he was trying to explain that he needed his medication and things, and they didn't take heed of him.

(Survey participant)

By contrast, another individual recalled instances where people in custody were supported in accessing medication:

I would have supported a couple of women whereby they would have been on medication and they would have allowed them to contact a family member to bring that medication down.

(Interviewee from a Traveller organization)

It is our view that practice in Northern Ireland, whereby a nurse is present in all police stations which have custodial detention facilities, should be introduced across the rest of the island, ensuring that those in custody have immediate access to medical supports where necessary.

Complaints

We assert, in the ITAJ report, that an effective and independent complaints procedure for policing is vital to the functioning of independent democracy. It might be suggested that those who have experienced a breach of the custody regulations should make a complaint to the Garda Síochána Ombudsman Commission (GSOC). In this regard, it is noteworthy that Mincéirs/Travellers account for 2% of those who responded to a survey having previously made a complaint to GSOC according to its 2021 Annual Report,

despite making up only 0.7% of the population.⁷⁹ High levels of literacy are required by GSOC to make a complaint as one is generally made through a written complaints system. Given that Mincéir/Traveller literacy levels are much lower than those of their settled peers, Mincéirs/Travellers can often find it difficult to make a formal complaint. The high level of engagement with GSOC is even more noteworthy in that context. Given that only 21% of the complainants to GSOC provided demographic details to the organisation, the likelihood is that the figure of 2% is incorrect. Further, the Garda Inspectorate in its report of 2021 states that of the 20 people in custody who engaged with the Inspectorate, only three of those individuals stated that they knew how to make a complaint.⁸⁰ We assert that low levels of complaints do not reflect good practices and high levels of compliance with a rights-based framework but rather is a signifier of a lack of access to justice. Equally, the Committee for the Prevention of Torture notes that the absence of complaints “is often indicative of an unsafe environment in the establishments concerned or a lack of trust in the complaints system.”⁸¹

The ITAJ survey included four subsections which we refer to as “critical incident testimonies.” The purpose of these questions was to give Mincéirs/Travellers, who are the experts in their own lived experience, the opportunity to tell us in their own words about their experiences with gardaí and judges. The four sub-subsections gave Mincéirs/Travellers an opportunity to describe their most positive experience with a garda and with a judge in the five years prior to the survey and their most negative experience with a garda and with a judge in the five years prior to the survey. Of the 55% of those individuals who shared negative experiences with the gardaí, 35% stated that a complaint was made about the experience, and 63% stated that no complaint was made. It is possible that these complaints were made to organisations or bodies other than GSOC: survey respondents and interview participants spoke about making complaints via their local station, or via approaches to individual gardaí with whom they had a pre-existing relationship.

From the ITAJ data, it was clear that absence of knowledge about the formal GSOC processes was not the only obstacle to making a complaint relating to poor treatment at the hands of gardaí, though 45% of respondents cited that as their reason for not making a complaint. While not limited to experiences in custody, respondents who did not make a complaint against gardaí provided amongst their reasons first, that nothing would come of the complaint (75%) and second, the fear that they would be

79 For further details as to the manner in which GSOC collects data regarding the demographic details of complainants, including their ethnicity, see Joyce and others (n 49) 123.

80 Garda Síochána Inspectorate (n 68) 123.

81 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ‘27th General Report of the CPT’ (2017) <<https://rm.coe.int/16807bc1cf>>.

targeted by a garda in particular or the gardaí generally as a result of making a complaint (57%). The emotional labour involved in making a complaint was cited as a further reason by a small number of participants. Again, these findings are reflected in the Commission on the Prevention of Torture report, which found that none of the people that they met “had *any* faith in the complaints system.”⁸²

A research participant working in a Mincéir/Traveller organisation spoke to the need to make the complaints process more accessible, both in terms of making information available about how to make a complaint and to simplify the complaints process and make it easier for members of the community to articulate their concerns:

I think we need to look at how we make it as easy as possible for people to make a complaint and as less laborious as possible because people don't hardly know that process for starters. I think it's made – I don't think it's designed that way purposely, but I think I think it's designed from an ethnocentric perspective. And sometimes from a class perspective, as well, as a middle-class ethnocentric perspective. . . . It's based on the norm. You know, based on certain norms of a certain class of settled person. . . . And I think that needs to be addressed in terms of access to justice. If you're talking about access to justice, I think the ethnocentrism and class issue needs to be addressed, you know.

(Interviewee from a Traveller organisation)

Given the low levels of literacy in the community, the need for an oral complaints process as well as a written one is clear.

Conclusion

This book, with a specific focus on police custody in Ireland, is of vital importance, shedding light on the rights of those in police custody, as well as exposing police practices in the operationalisation of rights. The groundbreaking work of Conway and Daly in exploring the protection of rights in police custody was instrumental in highlighting the importance of understanding this process.⁸³ This chapter delves further into these practices by articulating the experiences and perceptions of Mincéirs/Travellers in police

82 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (n 55) 14.

83 See, for example, V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury Professional 2023); V Conway, Y Daly and G McEvoy, 'Interpretation in Police Stations: Lawyers' Perspectives on Rights and Realities' (2021) 13(3) *Journal of Human Rights Practice* 606–28.

custody, with findings that map onto the work of both the Garda Inspectorate and the Committee for the Prevention of Torture in relation to the operationalisation of the “trinity of rights” in Irish police custody – at least for the Mincéir/Traveller community. This chapter contains recommendations as to how the protection of these rights can be better respected, with an emphasis on access to information and formal acknowledgement of rights recognition through the process. This chapter focuses on Mincéirs/Travellers and police custody, utilising data gathered through the Irish Travellers’ Access to Justice project which is positioned as the beginning of dedicated research on Mincéirs/Travellers experiences in the criminal justice system. ITAJ found that Mincéirs/Travellers do not trust the Irish criminal justice system to treat them fairly, and that their mistrust is grounded in direct and shared experiences of unsatisfactory responses from and encounters with the criminal justice system. Given the evidence of widespread discrimination and racism towards Mincéirs in Ireland as a whole, it is not unexpected that there would be widespread discrimination and racism within the criminal justice system too, where the practice of discriminatory behaviour towards Mincéirs/Travellers in Ireland is performed through racist stereotyping rooted in the Irish psyche. As a predominately homogeneous (“Irish,” “White,” “settled,” “Catholic”) system, it is evident that the lack of ethnic diversity within the criminal justice system has created an absence of knowledge of how to deal with other communities and little knowledge about racism within the system has impacted upon effective access to justice for Mincéirs and other minorities in Irish society.

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10

POLICING, CUSTODY, AND RACIALISED MINORITIES IN IRELAND

Lucy Michael

Introduction

Internationally, there has been much discussion of the relationship between “race” and policing, in particular highlighting the vulnerabilities and racialising interactions experienced by Black and minority ethnic people in police custody.¹ Disproportionate rates of death in custody are documented² even while many experiences of mistreatment in custody go unobserved. This chapter first explores the experience of Ireland in accommodating ethnic diversity, and then addresses factors affecting custody entry and experiences as they relate to minority ethnic and migrant groups internationally, and finally, identifies questions relating to the Irish case.

Context

Large-scale immigration in the Republic was triggered by economic prosperity during the “Celtic Tiger” years helped by immigration from the new

1 B Bowling and C Phillips, *Racism, Crime and Justice* (Pearson Education 2002); SL Gabbidon, *Race, Ethnicity, Crime, and Justice: An International Dilemma* (Sage 2010); M Rowe, *Policing, Race and Racism* (Routledge 2012); B Bowling, R Reiner and JW Sheptycki, *The Politics of the Police* (OUP 2019); L Fekete, ‘Racism, Radicalisation and Europe’s “Thin Blue Line”’ (2022) 64(1) *Race & Class* 3–45.

2 H Athwal, ‘“I Don’t Have a Life to Live”: Deaths and UK Detention’ (2015) 56(3) *Race & Class* 50–68; A Elliott-Cooper, ‘Into the Twenty-First Century: Resistance, Respectability and Black Deaths in Police Custody’ in *Black Resistance to British Policing* (Manchester UP 2021) 53–85.

EU states in 2004, albeit with a sharp drop from 2009 after the recession.³ In 2000, the Garda Síochána established a Racial, Intercultural & Diversity Office (GRIDO). A number of Garda Ethnic Liaison Officers (ELOs) were appointed to support racialised minorities. The National Consultative Committee on Racism and Interculturalism (NCCRI) initiated an informal racist incident monitoring system in 2001 in the absence of police recording of racist incidents. In 2005, Ireland published its first National Action Plan Against Racism. It was arguably Celtic Tiger immigration, rather than concern for ethnic minorities already in the country (amongst others, Irish Travellers and Mixed-Race Irish) that prompted a flurry of activity and investment in anti-racism.

After the recession, with sharply dropping immigration, much of the progress being made on anti-racism slowed or stopped. In 2008, the State effectively dismantled the key institutional mechanisms for addressing racism, such as the NCCRI,⁴ under the guise of “austerity,” and cut the budgets for others significantly, including the Equality Authority⁵, while the National Action Plan Against Racism expired. The Garda Diversity Office continued with minimal budget.

Immigration began to rise again in 2014, but it took a further five years before significant actions on institutional or other forms of racism began to be addressed again by the State. The Garda Síochána’s Equality, Diversity & Inclusion (EDI) Strategy Statement & Action Plan 2019–2021⁶ provided the basis for adopting and implementing a definition of hate crime (for all legislated equality grounds) ahead of promised hate crime legislation,⁷ establishing the first Garda online hate crime recording system and publishing national hate crime statistics for the first time.⁸ In 2022, the system recorded 187 racist hate crimes or incidents.⁹ However, the system is still in its infancy, and NGO data, such as that collected by the Irish Network Against Racism (INAR) iReport.ie recording system, continues to be widely cited by national

3 B Fanning and L Michael, ‘Racism and Anti-Racism in the Two Irelands’ (2018) 41(15) *Ethnic and Racial Studies* 2656–72.

4 B Fanning, *Immigration and Social Cohesion in the Republic of Ireland* (Manchester UP 2011).

5 N Crowley, *Empty Promises: Bringing the Equality Authority to Heel* (AA Farmer 2010).

6 An Garda Síochána, *Diversity and Integration Strategy 2019–2021* (An Garda Síochána 2019).

7 Hate crime and hate speech legislation passing through the Oireachtas in 2023 has not yet been finalised.

8 An Garda Síochána, ‘Ireland: New Online Tool for Reporting Hate Crime’ (2021) <https://ec.europa.eu/migrant-integration/news/ireland-new-online-tool-reporting-hate-crime_en> accessed 13 May 2023.

9 An Garda Síochána, *2022 Hate Crime Data and Related Discriminatory Motives* (An Garda Síochána 2022).

and international human rights bodies to address the impact of under-reporting and under-recording in official statistics. In 2022, INAR recorded 600 racist hate crimes or incidents.¹⁰

First figures from Census 2022 reveal that 20% of the population of Ireland were born elsewhere, equivalent to just over one million people. Twelve percentage of the population are non-Irish citizens.¹¹ The Census and a small number of large-scale quantitative surveys on the labour market and household data provide the main sources of data which can be used to understand the experiences of Ireland's migrant and minority ethnic populations.¹² Ethnic data collection in public services in Ireland has still not been adopted extensively or consistently, with a few notable exceptions including the Probation Service and Garda Ombudsman. The Public Sector Equality and Human Rights Duty introduced under Section 42 of the Irish Human Rights and Equality Act 2014 places an obligation on all public bodies to assess the human rights and equality issues relevant to their functions, including through the use of existing or new equality data and IHREC has provided legal advice to confirm that equality data collection is permissible.¹³ As a public body, the gardaí must have regard to the need to eliminate discrimination, promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and protect the human rights of its members, staff, and the persons to whom it provides services. However, there is no legal obligation to collect data or report on groups protected by equality legislation, and there is no national audit of the Duty across public bodies. The new National Action Plan Against Racism,¹⁴ launched in March 2023, acknowledges the official data gap on racism and identifies this as an area for work.¹⁵

The lack of equality data collection and publication in policing in Ireland sets the context for emerging questions around the pre-custody and custody experiences of Ireland's racialised minorities. In the next section, this lacuna in equality data collected in Ireland becomes more evident by way of contrast to that available in other jurisdictions. Later, the chapter identifies how

10 L Michael, D Reynolds and N Omid, *Reports of Racism in Ireland 2022* (iReport.ie, Irish Network Against Racism 2023).

11 Central Statistics Office, *Census of Population 2022 – Summary Results* (CNS, 30 May 2023).

12 Department of Children, Equality, Disability, Integration and Youth, *National Access Plan Against Racism* (Department of Children, Equality, Disability, Integration and Youth 2023) 41–45.

13 Irish Human Rights and Equality Commission, 'Public Sector Equality and Human Rights Duty FAQ' <www.ihrec.ie/our-work/public-sector-equality-and-human-rights-duty-faq> accessed 12 May 2023.

14 Department of Children, Equality, Disability, Integration and Youth (n 12).

15 L Michael, 'Data on Ethnicity Will Be Essential to Success of New Action Plan on Racism' *The Irish Examiner* (Dublin, 23 March 2023).

ethnic data would contribute to a stronger understanding of effective protections and vulnerabilities in Irish policing for racialised minorities. In the absence of official data, evidence from human rights and civil society organisations is reviewed.

Understanding Race in Police Encounters

International research on minorities in police custody suggests that they are at heightened and disproportionate risk of not knowing or being able to exercise their legal rights; being subjected to mistreatment in custody; having their rights disregarded; and even dying in police custody.¹⁶

Minority ethnic and migrant groups come into contact with police for a wide variety of reasons, as victims of hate crime and other crimes, as consumers of police functions related to identity verification or immigration paperwork, and as suspects. Structural discrimination resulting in poverty and exclusion heightens the likelihood of racialised persons being in contact with police as both victims and suspects.¹⁷ Disproportionate entry of racialised persons into police custody and risk of mistreatment in custody are related to an interconnected set of factors, including structural discrimination, racial bias in police forces, over-policing, and lack of accountability.¹⁸ Internationally, Black and other minority ethnic and migrant communities are often subjected to over-policing, which can lead to a higher likelihood of encounters with police and a greater chance of being arrested and detained.¹⁹ This over-policing can also result in increased surveillance and harassment, leading to an overall distrust of law enforcement.²⁰

Disparities in healthcare, housing, education, and employment can also contribute to the higher risk of death in police custody for racialised persons. These factors can lead to higher levels of stress and chronic health conditions, which can increase the risk of death during encounters with law

16 Inquest, *BAME Deaths in Police Custody* (Inquest 2023).

17 C Phillips and B Bowling, 'Ethnicities, Racism, Crime and Criminal Justice' in A Liebling, S Maruna and L McAra (eds), *The Oxford Handbook of Criminology* (OUP 2017) 190–212.

18 B Loftus, *Police Culture in a Changing World*, *Clarendon Studies in Criminology* (OUP 2009).

19 D Jones-Brown and JM Williams, 'Over-Policing Black Bodies: The Need for Multidimensional and Transformative Reforms' (2021) 19(3–4) *Journal of Ethnicity in Criminal Justice* 181–87; S Holdaway, 'Migration, Crime and the City: Contexts of Social Exclusion' in S Body-Gendrot and M Martiniello (eds), *Minorities in European Cities: The Dynamics of Social Integration and Social Exclusion at the Neighbourhood Level* (Palgrave Macmillan 2000).

20 M Hough, 'Researching Trust in the Police and Trust in Justice: A UK Perspective' (2012) 22(3) *Policing and Society* 332–45; L Fekete, 'Lammy Review: Without Racial Justice, Can There Be Trust?' (2018) 59(3) *Race & Class* 75–79.

enforcement.²¹ Racial bias can lead to increased use of force, including lethal force, in situations where it may not be necessary or justified.²²

The combination of these factors illuminates why certain racialised groups in any particular country may be more likely to enter into police custody, experience failures in respect of their custody rights, and experience abuse while in custody. There are entrenched patterns of common experience across Europe for Roma and people of African descent; particularly heightened risks for Muslims since 2001; and for asylum seekers and other migrants since 2015.²³ Historical patterns of racial discrimination can also vary even within Europe depending on the particular political narratives towards any group, and policing mirrors discrimination seen across wider social and political institutions. In Ireland, for example, anti-Traveller racism has long been documented in a wide range of public functions as well as in policing.²⁴ The effects of racism continue to have a profound impact on society even as race itself is recognised as a problematic category.²⁵ In this chapter, the term race is used to address these effects and includes in its analysis the experiences of all groups who experience racism as non-White, minority ethnic, or migrant people. Race is inscribed in police encounters through a complex interaction of structural, institutional, and interpersonal forms of

- 21 DR Williams, 'Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-Related Stressors' (2018) 59(4) *Journal of Health and Social Behaviour* 466–85; I Cummins, 'Discussing Race, Racism and Mental Health: Two Mental Health Inquiries Reconsidered' (2015) 8(3) *International Journal of Human Rights in Healthcare* 160–72; JJ Payne-James and others, 'Healthcare Issues of Detainees in Police Custody in London, UK' (2010) 17(1) *Journal of Forensic and Legal Medicine* 11–17.
- 22 S Francis, T Welsh and Z Adesina, 'Met Police "Four Times More Likely" to Use Force on Black People' *BBC* (London, 30 July 2020).
- 23 L Fekete, 'Europe Against the Roma' (2014) 55(3) *Race & Class* 60–70; L Schclarek Mulinari and S Keskinen, 'Racial Profiling in the Racial Welfare State: Examining the Order of Policing in the Nordic Region' (2022) 26(3) *Theoretical Criminology* 377–95; I Schwarz, 'Racializing Freedom of Movement in Europe: Experiences of Racial Profiling at European Borders and Beyond' (2016) 2(1) *Movements Journal, Journal for Critical Migration and Border Regime Studies*; E Bruce-Jones, 'German Policing at the Intersection: Race, Gender, Migrant Status and Mental Health' (2015) 56(3) *Race & Class* 36–49; O De Schutter and J Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law' (2008) 71(3) *The Modern Law Review* 358–84; JP Van der Leun and MA Van der Woude, 'Ethnic Profiling in the Netherlands? A Reflection on Expanding Preventive Powers, Ethnic Profiling and a Changing Social and Political Context' (2011) 21(4) *Policing and Society* 444–55; S Keskinen and others, *The Stopped: Ethnic Profiling in Finland* (Swedish School of Social Science, U of Helsinki P 2018).
- 24 A Mulcahy and E O'Mahony, *Policing and Social Marginalisation in Ireland* (Combat Poverty Agency 2005); F McCaughey, *Irish Travellers and Roma Shadow Report: A Response to Ireland's Third and Fourth Report on the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)* (Pavee Point Traveller's Centre 2011). See also Chapter 9 in this volume.
- 25 A Lentin, *Racism: A Beginner's Guide* (Oneworld 2008) 91.

discrimination which requires understanding beyond a simplistic analysis by ethnic or national group. Race is thus a useful analytic concept because it has explanatory power in how it functions, rather than who it describes.²⁶

Entry to Police Custody: Racial Profiling

Racial profiling is one of the key drivers of disproportionate representation of racialised groups in custody. As such, it is taken seriously by human rights and equality institutions and is illegal under EU law.²⁷ “Profiling” involves categorising people according to their (perceived) personal characteristics, which can include racial or ethnic origin, skin colour, religion, or nationality. Profiling that is based solely or mainly on one or more characteristics protected by equality law amounts to direct discrimination, and therefore violates the individual’s rights and freedoms and is unlawful. Significant investment has been made by EU agencies to address racial discrimination in policing, such as the EU Fundamental Rights Agency (FRA),²⁸ the Agency for Law Enforcement Training (CEPOL), the Council of Europe and OSCE Office for Democratic Institutions and Human Rights.²⁹

Across Europe, survey data show that racial considerations influence the likelihood of being stopped by the police. The EU Fundamental Rights Agency found that of the 14% surveyed who said they had been stopped by police in the last year, 40% perceived that the last stop was because of their ethnic origin or immigrant background.³⁰ One-quarter of all persons of African descent surveyed were stopped by police in the five years before the survey, and amongst these, 41% characterised the most recent stop as racial profiling.³¹ In the United Kingdom, Black people are nine times more likely to be stopped and searched by police than White people.³² In France, young men perceived as Black or Arab are 20 times more likely to be subject to repeated police stops than others.³³ During COVID-19, there were numerous

26 A Lentin, *Why Race Still Matters* (John Wiley & Sons 2020).

27 Article 11(3) of Law Enforcement Directive, Directive 2016/680.

28 EU Fundamental Rights Agency, *Fundamental Rights-Based Police Training – a Manual for Police Trainers* (EU Fundamental Rights Agency 2013).

29 European Commission, *A Union of Equality: EU Action Plan Against Racism* (European Commission 2020).

30 EU Fundamental Rights Agency, *Second European Union Minorities and Discrimination Survey – Main Results* (EU Fundamental Rights Agency 2017).

31 European Network Against Racism, *Policing Racialised Groups* (European Network Against Racism 2020).

32 UK Government, *Ethnicity Facts and Figures: Stop and Search* (UK Government, 27 May 2022).

33 Information Related to France, ‘Facial Checks: Young Blacks or Arabs Are 20 Times More Likely to Be Checked by the Police, According to the Defender of Rights’ in *Policing Racialised Groups* (European Network Against Racism 2020).

complaints about the unlawful use of racial profiling in Spain³⁴ and treatment of young Black men by the Garda Síochána in Ireland.³⁵ Disproportionate entry of certain groups into custody has also been determined by counterterror policing across Europe over the last decade.³⁶

Use of Excessive Force

Incidents that involve excessive force are important indicators of the extent to which police consider force to be necessary in order to manage a situation involving racialised minorities, and that this judgement overrides any balancing of use of force with what might be considered reasonable in other circumstances. Use of excessive force on racialised minorities has been one of the consistent themes of police debates in recent years, with the phrase “I can’t breathe” adopted worldwide in Black Lives Matter protests after the death of George Floyd in the United States.³⁷ Similarly, Black people in England and Wales were found to be more than five times as likely to have force used against them by police as White people and were subject to the use of tasers at almost eight times the rate of White people.³⁸

Police using excessive force, including lethal force, are often not held accountable for their actions. This can perpetuate a culture of impunity and a lack of trust between criminal justice agencies, particularly the police, and the communities they serve.³⁹

Issues of mental health, common amongst migrant populations worldwide and correlated strongly with the effects of cumulative discrimination,⁴⁰ pose

34 Y Ouled, ‘Racism, Xenophobia and Police Brutality on the Rise in Spain’ *Liberties* (9 June 2020).

35 C Casey and others, *Ireland’s Emergency Powers During the COVID-19 Pandemic* (The Irish Human Rights and Equality Commission by the COVID-19 Law and Human Rights Observatory 2021).

36 J Cesari, *The Securitisation of Islam in Europe* (CEPS 15, 2009); UK data pre-COVID, for example, showed a continuing disproportion of Muslims in custody at UK ports and airports. D Sabbagh, ‘Detention of Muslims at UK Ports and Airports “Structural Islamophobia”’ *The Guardian* (London, 20 August 2019).

37 B Okri, ‘“I Can’t Breathe”: Why George Floyd’s Words Reverberate Around the World’ (2021) 12(1) *Journal of Transnational American Studies*.

38 House of Commons, House of Lords Joint Committee on Human Rights Black People, *Racism and Human Rights Eleventh Report of Session 2019–21 Report* (House of Commons 2020).

39 BW Smith and MD Holmes, ‘Community Accountability, Minority Threat, and Police Brutality: An Examination of Civil Rights Criminal Complaints’ (2003) 41(4) *Criminology* 1035–64.

40 S Wallace, J Nazroo and L Bécares, ‘Cumulative Effect of Racial Discrimination on the Mental Health of Ethnic Minorities in the United Kingdom’ (2016) 106(7) *American Journal of Public Health* 1294–300; V Ceri and others, ‘Mental Health Problems of Second Generation Children and Adolescents with Migration Background’ (2017) 21(2) *International Journal of Psychiatry in Clinical Practice* 142–47.

particular issues in police custody. Cumulative exposure to racial discrimination has incremental negative long-term effects on the mental health of ethnic minority people. Police use of force in the United Kingdom has been found to be greater against members of the public with mental health problems. The UK government was urged to stop the roll-out of tasers amid concerns it has led to a “disturbing rise” in its “disproportionate” use against Black people and those with mental ill-health.⁴¹ The Angiolini review, which was the first official review of practices and processes relating to and following police-related deaths in the United Kingdom, highlighted the need to situate custodial deaths and deaths in policing within the frame of racism, as well as in the context of neglect and mistreatment of people experiencing mental ill-health.⁴²

In the United Kingdom, the police use of restraint against detainees was identified as a cause of death by post-mortem reports in 10% of deaths in police custody between 2004/05 and 2014/15, and use of restraint was more prevalent in cases of Black and Minority Ethnic (BME) individuals who have died in police custody than in deaths of White people.⁴³ Data disclosed by the London Metropolitan Police in 2017 found that people of African descent and of ethnic minority background, in particular, young African and Caribbean men, subject to deadly use of force by restraint and restraint equipment, were twice as likely to die after the use of force by police officers and the subsequent lack or insufficiency of access to appropriate healthcare.⁴⁴ A 2021 report by Inquest on deaths in custody found that Black people are seven times more likely to die than White people when restraint was involved.⁴⁵ The report further found that no death of a Black person following police custody or contact has led to officers being disciplined for racism, at a conduct or criminal level.

Despite the stark racial disproportionality evidenced in data, none of the accountability processes effectively or substantially considers the potential role of racism in deaths. The Institute of Race Relations in its report *Dying for Justice*, on Black and minority ethnic deaths in custody in the United Kingdom between 1991 and 2014, revealed that out of 509 cases, just ten had been considered unlawful killings at an inquest, only five prosecutions

41 G Lindon and S Roe, *Deaths in Police Custody: A Review of the International Evidence* (Report 95, Home Office Research 2017) 6.

42 E Bruce-Jones, ‘Mental Health and Death in Custody: The Angiolini Review’ (2021) 62(3) *Race & Class* 7–17.

43 Lindon and Roe (n 41).

44 UN Human Rights Office of the High Commissioner, *UN Human Rights Experts Says Deaths in Custody Reinforce Concerns About “Structural Racism” in UK* (ONHCHR, 27 April 2018).

45 R Carr, ‘I Can’t Breathe: Race, Death & British Policing’ *Inquest* (20 February 2023).

had been brought, and nobody had ever been convicted of an offence.⁴⁶ In a significant number of these cases, where police conduct is in question, potential crisis of legitimacy for the police is deflected by the press, because police are able to frame the death in terms of a media narrative that deploys the race of the deceased as the key narrative rather than the behaviour of police.⁴⁷

Young People in Custody

The experience of young people from racialised minorities in custody internationally is also cause for concern. Patterns from other countries suggest that this is an area which also requires review. In England and Wales, Black children are the only exception to a falling number of first-time entrants to the youth justice system and decrease in children on remand. Black children account for 4% of the 10–17-year-old population⁴⁸ but 18% of stop and searches (where ethnicity was known), 15% of arrests, 12% of children cautioned or sentenced, 34% of children in custody on remand, and 29% of the youth custody population.⁴⁹ These figures are significant cause for alarm in the neighbouring jurisdiction.

In England and Wales, there are noted phenomena behind the disproportionate arrest of children from racialised groups. Adultification of Black children refers to the phenomenon in which Black children are perceived and treated as if they are more mature, less innocent, and more culpable than their White peers of the same age.⁵⁰ This can lead to a number of negative consequences for Black children, including harsher disciplinary measures at school, higher rates of suspension and expulsion (along with Traveller and Roma children),⁵¹ and increased likelihood of involvement with the criminal justice system. The adultification of Black children is a complex issue that is influenced by a range of societal and cultural factors, including structural racism, stereotypes in the media, and implicit biases amongst educators and law enforcement officials. Black girls, in particular, are often adultified at

46 H Athwal and J Bourne, *Dying for Justice* (Institute of Race Relations 2015).

47 R Erfani-Ghettani, 'Racism, the Press and Black Deaths in Police Custody in the United Kingdom' [2018] *Media, Crime and Racism* 255–75.

48 Office for National Statistics, *Ethnicity by Sex and Ages in England and Wales, 2011 to 2015* (ONS 2018).

49 Youth Justice Board for England and Wales, *Youth Justice Statistics: 2020–2021* (Youth Justice Board for England and Wales 2022).

50 AA Gilmore and PJ Bettis, 'Antiblackness and the Adultification of Black Children in a US Prison Nation' in *Oxford Research Encyclopedia of Education* (OUP 2021); AN Cooke and AG Halberstadt, 'Adultification, Anger Bias, and Adults' Different Perceptions of Black and White Children' (2021) 35(7) *Cognition and Emotion* 1416–22; J Davis, *Adultification Bias Within Child Protection and Safeguarding* (HM Inspectorate of Probation 2022).

51 School Census Statistics Team, *Academic Year 2019/20 Permanent Exclusions and Suspensions in England* (Department for Education 2021).

a young age, with many experiencing gendered racial biases that result in them being viewed as more aggressive, less in need of protection, and more sexually promiscuous.⁵² This leads to them being more severely treated by criminal justice agencies and less protected. For example, almost half of all girls subjected to strip search in police custody in London between 2017 and 2022 were Black.⁵³ Overall, Black children were 11 times more likely than their White peers to be selected by officers to be strip-searched.⁵⁴

The Nexus of Migration and Policing

Migrants are often reflected disproportionately amongst those minority groups discussed earlier.⁵⁵ Migrant status has a particular intersection with race which interplays with contemporary discourses on who belongs in Europe, and especially affects those who are, or are perceived to be, asylum seekers or undocumented migrants. Thus, racialised groups are often questioned about their migration status and suspected of crimes associated with particular stereotypes of migrant groups⁵⁶ (those being country variant depending on the political discourse around migration, for example, Roma, East Europeans, Africans, etc., often have different criminal stereotypes associated with them in different countries). In the United Kingdom, people in immigration detention have been found to be particularly vulnerable to invasive custody procedures which are not applicable to their detention, and simultaneously not to have the same standards of care provided to them as other suspects because immigration detention was not considered “real police work” in the custody suites.⁵⁷ Thus, the current conceptualisation of vulnerability in reference to “risk management” and detainee care, at least in

52 C Carpan, ‘The Adultification of Black Girls as Identity-Prejudicial Credibility Excess’ [2022] *Ethical Theory and Moral Practice* 1–15.

53 M Gidda and T Thomas, ‘Black Girls Nearly Three Times More Likely to Be Subjected to Most Invasive Strip-Search’ *Liberty Investigates* (6 April 2023).

54 Children’s Commissioner, ‘Strip Search of Children in England and Wales’ (27 March 2023) <www.childrenscommissioner.gov.uk/resource/strip-search-of-children-in-england-and-wales/>.

55 Bruce-Jones (n 23); I Vrăbiescu, ‘Devised to Punish: Policing, Detaining and Deporting Romanians from France’ (2021) 18(4) *European Journal of Criminology* 585–602; B Kalir, ‘Qualifying Deportation: How Police Translation of “Dangerous Foreign Criminals” Led to Expansive Deportation Practices in Spain’ [2022] *Security Dialogue* <<https://journals.sagepub.com/doi/full/10.1177/09670106221118798>>; M Van Craen and WG Skogan, ‘Differences and Similarities in the Explanation of Ethnic Minority Groups’ Trust in the Police’ (2015) 12(3) *European Journal of Criminology* 300–23.

56 HO Gundhus and PT Jansen, ‘Pre-Crime and Policing of Migrants: Anticipatory Action Meets Management of Concerns’ (2020) 24(1) *Theoretical Criminology* 90–109.

57 R Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) 30(2) *Social & Legal Studies* 251–71.

England, does not give much consideration to the, perhaps added or layered, vulnerability of immigrant detainees in custody.

Migrant children across Europe are also often subject to stereotypes and prejudices that lead to their adultification. For example, they may be seen as more independent and self-sufficient due to their experiences of migration and displacement, or as more prone to criminal behaviour due to negative stereotypes about their home countries or ethnic backgrounds.⁵⁸ In the last decade, asylum-seeking children have also been subjected to an explosive political discourse on age determination which has unsettled childhood as a stable category which guarantees protection and led to increased scrutiny and suspicion.⁵⁹ This has led to their being over-policed and under-protected.⁶⁰

Trust in Police and Police Attitudes

Police attitudes towards racialised minorities are another way to understand the likelihood of racial bias impacting custody. The attitudes and behaviours of police officers can play a significant role in shaping interactions with individuals from minority ethnic backgrounds, which can ultimately contribute to disparities in arrest rates, charges, and convictions. In a police culture that tolerates (or even relies upon) racial biases, discriminatory speech or acts are tolerated, ignored, or dismissed as “banter.”⁶¹ It is inevitable that racist attitudes which thrive in wider society may be reflected in police organisations, but police organisations have a unique set of powers which rely in many cases on discretion.⁶² As a result, it is crucial that police officers receive

58 N Samota and D Ariyo, ‘Racialising and Criminalising Vulnerable Migrants: The Case of Human Trafficking and Modern Slavery’ in C Murphy and R Lazzarino (eds), *Modern Slavery and Human Trafficking* (Policy Press 2022) 130–45.

59 C McLaughlin, ‘“They Don’t Look Like Children”: Child Asylum-Seekers, the Dubs Amendment and the Politics of Childhood’ (2018) 44(11) *Journal of Ethnic and Migration Studies* 1757–73.

60 E Saarikkomäki, R Solhjell and D Wästerfors, ‘Dealing with Police Stops: How Young People with Ethnic Minority Backgrounds Narrate Their Ways of Managing Over-Policing in the Nordic Countries’ [2023] *Policing and Society* 1–16; L Fekete, ‘Accelerated Removals: The Human Cost of EU Deportation Policies’ (2011) 52(4) *Race & Class* 89–97; SJ Terrio, ‘The Production of Criminal Migrant Children: Surveillance, Detention, and Deportation in France’ in MO Ensor and EM Goździak (eds), *Children and Migration* (Palgrave Macmillan 2010).

61 B Casey, ‘Final Report: An Independent Review into the Standards of Behaviour and Internal Culture of the Metropolitan Police Service’ (2023) <<https://www.met.police.uk/SysSiteAssets/media/downloads/met/about-us/baroness-casey-review/update-march-2023/baroness-casey-review-march-2023a.pdf>>.

62 J Chan, ‘Changing Police Culture’ (1996) 36(1) *The British Journal of Criminology* 109–34; PAJ Waddington, ‘Discretion, “Respectability” and Institutional Police Racism’ (1999) 4(1) *Sociological Research Online* 175–83; D Ellis, ‘Stop and Search: Disproportionality, Discretion and Generalisations’ (2010) 83(3) *The Police Journal* 199–216; AC Crehan, ‘“Appropriate”

the necessary training and guidance in discharging their duties in a manner that does not employ racial biases in decision-making and that there are accountability structures in place to ensure this is the case. When the London Metropolitan Police was described as “institutionally racist” in 2002 by the MacPherson Inquiry, following the failed investigation into the death of Black teenager Stephen Lawrence, it was in reference to not only the attitudes or cultures that existed within the police force but also the failure of the organisation to address systemic factors creating disproportionately poor policing for Black communities.⁶³ Thus, the UN Committee on the Elimination of Racial Discrimination recommends the:

1. creation of an independent reporting mechanism for receiving complaints, with public reports;
2. establishment of oversight mechanisms to prevent discriminatory behaviour;
3. effective investigation of incidents of racial profiling with sanctions for perpetrators and compensation to victims; and
4. rigorous monitoring of staff conduct by senior officials in law enforcement through the analysis of data, with particular attention to “disproportionate impact on marginalized groups and communities.”⁶⁴

Examples of police hostility or mistreatment towards ethnic minorities, and explicit surveillance based on racial profiling, are sufficient to decrease trust in police and drive down reporting rates when these groups are targeted for racist violence. FRA survey data on people of African descent show, for example, that nearly two-thirds (64 %) of victims of racist violence did not report the most recent incident they experienced to the police or any other organisation or service.⁶⁵ Police disregard for rights, including provision of information about procedure and rights to those in pre-custody contact and in custody, and failure to uphold the rights of victims of crime, also raises suspicion about the impunity felt by police. Police legitimacy does not result just from trust and interactions between police and public, but specifically along four axes of police legitimacy: trust and policing styles, police-citizen interaction, use of force, and oversight/accountability.⁶⁶

Police Discretion and Indigenous Over-Representation in the Criminal Justice System’ (2010) 11(1–2) *Australian Journal of Professional and Applied Ethics* 68–80.

63 W Macpherson, *The Stephen Lawrence Inquiry – Report* (HMSO 1999).

64 United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation no 36 (2020) on Preventing and Combating Racial Profiling by Law Enforcement Officials*, CERD/C/GC/36 (17 December 2020).

65 EU Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey Being Black in the EU* (EU Agency for Fundamental Rights 2018).

66 J Noppe, A Verhage and A Van Damme, ‘Police Legitimacy: An Introduction’ (2017) 40(3) *Policing: An International Journal* 474–79.

There are wider factors at play, however, when we look at trust in police by minority ethnic groups. In Belgium, perceptions of discrimination were found to be a key explanatory factor for Turkish, Moroccan, and Polish minority group levels of trust in the police.⁶⁷ In Finland, Russian and Somali group trust in the police was differentiated by the entire social context in which they lived, that is, their trust in the police (or other public authorities) is influenced not only by personal experiences of insecurity or police contacts only but also from the wider perspective of what the police and other authorities represent for members of ethnic minorities. Trust in police decreased over time related to the experience of discrimination in the country, independent of any contact with police. Research found, however, that Somali trust in police could be improved by multiple positive contacts with police which did not involve active police control, even if they had occasional negative experiences of stops.⁶⁸ In the United Kingdom, a recent YouGov poll showed that views of unfair treatment were more common amongst Black respondents, with more than 70% of Black respondents thinking that the police and the criminal justice system treat them less fairly than White people, while 44% of ethnic minority participants and 37% of Black participants had trust in police.⁶⁹

Race and Policing in Ireland

The picture of race and policing in other jurisdictions, particularly not only in the United Kingdom but also across Europe, raises concerns that similar biases may form part of policing in Ireland. Given the ubiquity of these patterns globally, in fact, it would be surprising if were Ireland to be entirely free of them. The next section examines the limited evidence from Ireland on policing and racialised minorities (including migrants) in Ireland. Attention to the heightened risks for racialised persons in police custody and the need for data on this is called by the patterns of abuse captured by international data. No data, however, are gathered in Ireland on ethnicity in police stops, identity checks, vehicle stops, or searches of persons, homes, or vehicles. Thus, understanding what we cannot see is as important as knowing what to do with what we can see.

Although no ethnic data are routinely gathered and disaggregated for publication by the Garda Síochána, a recent Garda Inspectorate report found that people with a nationality other than Irish constituted 17% of those in a random

67 Van Craen and Skogan (n 55).

68 J Kääriäinen and J Niemi, 'Distrust of the Police in a Nordic Welfare State: Victimization, Discrimination, and Trust in the Police by Russian and Somali Minorities in Helsinki' (2014) 12(1) *Journal of Ethnicity in Criminal Justice* 4–24.

69 T Abraham, 'Trust in the Police Has Fallen Amongst Ethnic Minority Britons' *YouGov* (15 December 2021).

sample of custody records, compared to 12% of the general population.⁷⁰ The absence of equality data, in relation to custody reduces the capacity for external analysis of issues in custody for racialised minorities, and the intersections with language, disability, and other factors which may increase risk.

The best available official data in Ireland to give at least some indication of likely rates of police custody amongst racialised minorities are data on prison populations. Data regarding prisoner ethnicity are not yet publicly available, but the entrance of non-Irish nationals into the penal system is evident in official data collected in relation to nationality. In May 2023, foreign nationals comprised 14.7% of those in custody in Irish prisons, compared to 12% of the general population (as counted in Census 2022).⁷¹ Amongst these, EU citizens (of all ethnic backgrounds) represented the largest cohort (54%), of whom around two-thirds were Polish or Romanian (21.4% and 11% of all foreign nationals, respectively). A further 14.9% were of any African nationality, 12.5% were British, 5.5% were Asian, and 6.1% were South American. Both Polish and Romanian people are over-represented in the prison population compared to the general population, but the group that appears to be most over-represented is people of African nationality.⁷² These figures only include those without Irish citizenship and are therefore not a full reflection of ethnic representation in the prison population. For example, more than half of people born in Ireland who describe their ethnicity as Black-African are Irish citizens,⁷³ and thus they are not visible in statistics which only record nationality.

Research on the prison population and courts provides further insight into over-representation of certain ethnic groups. In a 2022 study of foreign nationals in prison, the research team found that foreign nationals were likely to receive longer sentences than Irish nationals for controlled drug offences and sexual offences.⁷⁴ Observational research in the District Courts has long suggested that certain minority ethnic groups – in particular, those from the

70 Garda Síochána Inspectorate, *Delivering Custody Services – a Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations* (Garda Síochána Inspectorate 2021).

71 Irish Prison Service, *Monthly Information Note* (Irish Prison Service, May 2023) <www.irishprisons.ie/wp-content/uploads/documents_pdf/MAY-2023.pdf> accessed 1 June 2023.

72 This is the author's calculation based on African nationalities as 0.32% of the population in Census 2016 and extrapolation from ethnicity statistics published in first release of Census 2022. Nationality figures have been released for Poland and Romania but not yet for all countries. Central Statistics Office (n 11).

73 Central Statistics Office, *Census of Population 2016 – Profile 8 Irish Travellers, Ethnicity and Religion* (CNS, 12 October 2017).

74 DM Doyle and others, *“Sometimes I’m Missing the Words”: The Rights, Needs and Experiences of Foreign National and Minority Ethnic Groups in the Irish Penal System* (Irish Penal Reform Trust 2023).

Nigerian community – may be over-represented within Irish prisons.⁷⁵ In 2021, Irish Travellers made up 7.3% of the prison population (and 22% of the female prison population), but just 0.7% of the general population.⁷⁶ Doyle et al., in their analysis of data provided by the Irish Probation Service regarding the ethnicity of those engaged with the Probation Service over a 12-month period, found that Travellers constituted 8.9% of those engaged with the service, despite making up just 0.7% of the total population in Ireland, and people “from the African or Black community” represented approximately 1.6% of those engaged with the Probation Service, a slight over-representation relative to their proportion of the overall population in Ireland (1.2%).⁷⁷ Over-representation from a youth justice perspective was clear in this study also. 8.6% of Travellers and 9% of those from the African or Black community (most likely Irish citizens) who were engaging with the Probation Service were aged under 18, compared to just 3.7% of the settled-Irish majority group.⁷⁸

Data published by the Garda Síochána Ombudsman Commission (GSOC) on the ethnicity of complainants about Garda performance or conduct are another valuable source of information about the policing of, and for, racialised minorities. While the subject of complaints is not disaggregated by ethnicity, the Ombudsman does publish a summary of ethnicity of complainants in its Annual Reports. In 2021, 10% of complaints were made by people who were Black, Asian, or Traveller, and 5% by others. Black, Asian, and Traveller numbers were all double the rate of their representation in the general population. Twenty-four percent of complaints were by nationalities other than Irish, also double their representation in the general population.⁷⁹ These are similar figures for all groups published by GSOC in the previous year,⁸⁰ suggesting a pattern concerning racialised minorities and migrants.

In order to understand problems emerging in custody related to racial discrimination, or in disproportionate relation to the size of Ireland’s minority ethnic and migrant populations, we may look to the available data on experiences of racialised minorities from non-official sources. The availability of an anonymous reporting system is a crucial check against the noted systemic issues in Garda complaint and oversight mechanisms⁸¹ and the

75 C O’Nolan, *The Irish District Court: A Social Portrait* (Cork UP 2013) cited in *ibid.*

76 S Joyce and others, *Irish Travellers’ Access to Justice* (European Centre for the Study of Hate, Limerick 2022).

77 Doyle and others (n 74) 29.

78 *Ibid.*

79 Garda Síochána Ombudsman Commission, *Annual Report 2021* (Garda Síochána Ombudsman Commission 2022).

80 Garda Síochána Ombudsman Commission, *Annual Report 2020* (Garda Síochána Ombudsman Commission 2021).

81 A Kilpatrick, *A Human Rights Based Approach to Policing in Ireland* (ICCL 2018); Commission on the Future of Policing in Ireland, *The Future of Policing in Ireland* (Commission on the Future of Policing in Ireland 2018).

lowering trust that results from incidents of mistreatment. Evidence from Ireland on discrimination against minority ethnic groups other than Irish Travellers in police custody mainly comes from reports submitted to the Irish Network Against Racism (INAR) *iReport.ie* racist incident reporting system. Incident reports recorded by INAR in their annual reports between 2016 and 2022 include discrimination by public authorities as well as by private organisations or individuals, and illegal discrimination as well as hate crimes. In 2022, five cases referred specifically to the discrimination in use of Garda powers (two of which resulted in injury).⁸² Between 2017 and 2021, there were 36 further cases reported as Garda discrimination.⁸³ These figures relate only to reports made by the complainant directly about Garda abuse of powers and do not include incidental information about discrimination in Garda responses to hate crimes in the wider database of reports (discussed later in this chapter). These variously relate to poor treatment by gardaí during stops, searches, seizures, arrests, and detention. The repeated reporting of police abuse and violence in INAR *iReport.ie* data necessitates significant concern. Most incidents of reported abuse in custody on the *iReport.ie* platform come from people of African descent.

INAR, in its 2017 submission to the Commission on the Future of Policing in Ireland, provided evidence from *iReport.ie* data between 2013 and 2017 of explicit garda surveillance of ethnic minority people, and direct threats to them, particularly in rural towns; harassment of ethnic minorities, including unwarranted car searches; intimidation of young women; house searches without warrants; racial profiling; and hostile treatment of victims at the scene of an alleged crime that resulted in their being treated as suspects. The INAR Submission also noted that public meetings with gardaí had been held in a particular north Dublin town regarding the hostile treatment of young Afro-Irish people, who were searched when leaving their homes, warned not to be on the street, accused of involvement in disorder and crimes on a regular basis and treated with contempt by local gardaí.⁸⁴

Racial Profiling

Recent political impetus towards the prohibition of racial profiling by police in debates about the Garda Síochána (Powers) Bill 2021 has been the result of more than a decade of commentary by international human rights organisations on Ireland's protection of fundamental rights, as well as the gathering of direct testimony by civil society organisations. In 2011, the Migrant

82 Ibid.

83 This is the author's calculation from INAR *iReport.ie* data published between 2017 and 2022.

84 L Michael and S O'Curry, *Submission to the Commission on the Future of Policing in Ireland* (ENAR Ireland 2018).

Rights Centre of Ireland published *Singled Out*, a report on racial profiling in immigration, which evidenced persistent discrimination in the treatment of Black and ethnic minority communities during police, immigration, or security checks.⁸⁵ In response to Dáil questions in 2014 about the recording of Traveller children on the Pulse system as a standard recording practice, the Minister for Justice told the Dáil that An Garda Síochána does not engage in racial profiling.⁸⁶

In its 2011 inspections of Ireland, the UN Committee on CERD recommended the introduction of an explicit prohibition on racial and ethnic profiling in Irish law on the basis of its observations of disproportionate policing of Black and Traveller persons in Ireland.⁸⁷ This recommendation was repeated in 2019 when it highlighted concerns about the “reportedly high incidence of racial profiling by the Irish police targeted at people of African descent, Travellers and Roma.”⁸⁸ In its 2019 report on a visit to Ireland, the European Commission Against Racism and Intolerance (ECRI) regretted that racial profiling has not been defined, prohibited in law and reminded the Irish authorities of the negative effects of such practices, “generating a feeling of humiliation and injustice among affected groups and resulting in stigmatisation and alienation.”⁸⁹ They also recognised that racial profiling is detrimental to overall security, as it erodes trust in police and contributes to under-reporting of crime.⁹⁰ In 2018, the Advisory Committee on the Framework Convention for the Protection of National Minorities called on the Irish authorities to amend Garda Síochána (Discipline) Regulations 2007 to explicitly specify that discrimination constitutes a breach of discipline.⁹¹ Kilpatrick’s report on policing for the Irish Council of Civil Liberties in 2018 recommended that An Garda Síochána, working with the Traveller and Roma communities, should commence a review of its policy, training, and practices

85 Migrant Rights Centre of Ireland, *Singled Out: Exploratory Study on Ethnic Profiling in Ireland and Its Impact on Migrant Workers and Their Families* (MRCI 2011).

86 Pavee Point Ireland, *Travellers Recorded on the PULSE Database* (Pavee Point Ireland 2014) <www.paveepoint.ie/travellers-recorded-on-the-pulse-database/> accessed 1 June 2023.

87 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Third to Fourth Reports of Ireland*, CERD/C/IRL/CO/3-4 (4 April 2011); Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Fifth to Ninth Reports of Ireland*, CERD/C/IRL/CO/5-9 (23 January 2020).

88 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Fifth to Ninth Reports of Ireland*, CERD/C/IRL/CO/5-9 (23 January 2020) para 15.

89 European Commission Against Racism and Intolerance, *ECRI Report on Ireland (Fifth Monitoring Cycle)* (ECRI, 4 June 2019) 18.

90 Ibid.

91 Advisory Committee on the Framework Convention for the Protection of National Minorities, *Fourth Opinion on Ireland*, ACFC/OP/IV(2018)005 (2019) para 61.

with a particular focus on their impact on Travellers and Roma, and publish an action plan with time-limited targets to deal with the issues identified.⁹²

In a series of reports in 2021, the Policing Authority and Irish Human Rights and Equality Commission (IHREC) raised concerns about the treatment of young Black men during COVID-19 by An Garda Síochána.⁹³ IHREC described gardaí as having “negative attitudes” towards ethnic minorities which has influenced the practice of racial profiling. They urged the Irish Government to act, including to introduce an independent complaints mechanism as well as prioritising the introduction of legislation to prohibit racial profiling.⁹⁴ An Garda Síochána denied the use of racial profiling and pointed to the absence of data on racial profiling, which it said means claims of discrimination cannot be substantiated.⁹⁵ However, An Garda Síochána also claimed that there was no legal basis to record information on the ethnicity of people arrested or searched, even if they wished to do so⁹⁶, despite IHREC advice to the contrary.

The 2022 Irish Travellers Access to Justice study by the University of Limerick found that 59% of Travellers believed they were stopped by gardaí because of their ethnicity, and Travellers across Ireland regularly experience garda harassment, threats to abuse power, provocation, gardaí deliberately escalating conflict, and degrading treatment during stop-and-search.⁹⁷ This reflects and extends significantly the findings of an existing literature on Irish Traveller experiences with the justice system.⁹⁸ In response to the report, the Garda Commissioner told the media that gardaí do not engage in racial profiling and described it as a “very serious allegation” to make against the force.⁹⁹ The Chief Executive of the Policing Authority later told the media that the Policing Authority were “not satisfied” with the Garda Commissioner’s comments on Traveller profiling, stating that “absence of data in Ireland to tell us about the distribution of policing activity, the use of force, intrusive powers and so on” is a big problem.¹⁰⁰

92 Commission on the Future of Policing in Ireland (n 81).

93 Casey and others (n 35).

94 C Gallagher, ‘Government Urged to “Tackle” Garda Views on Ethnic Groups’ *The Irish Examiner* (6 September 2021).

95 Ibid.

96 C O’Keeffe, ‘Garda HQ Rebuffs Charges of Racism in IHREC Report’ *The Irish Examiner* (7 September 2021).

97 Joyce and others (n 76). See also Chapter 9 in this volume.

98 Irish Penal Reform Trust, *Travellers in the Irish Prison System: A Qualitative Study* (Irish Penal Reform Trust 2014); A Mulcahy, ‘“Alright in Their Own Place”: Policing and the Spatial Regulation of Irish Travellers’ (2012) 12(3) *Criminology & Criminal Justice* 307–27.

99 R Schiller, ‘Garda Commissioner Denies Force Engages in Racial Profiling After Traveller Study Finds High Levels of Distrust’ *The Irish Independent* (30 June 2022).

100 M Hennessy, ‘Policing Authority “Not Satisfied” with Garda Commissioner’s Comments on Traveller Profiling’ *The Journal.ie* (30 October 2022).

The question of eliminating racial profiling, given its potential importance in reducing over-representation of racialised minorities in the criminal justice system, remains a live one. In December 2021, the Oireachtas Joint Committee on Justice expressed grave concern that the section of the new Garda Powers Bill on stop-and-search included a catch-all for warrantless searches, and Senator Barry Ward expressed his concerns that already “the power under section 23 of the Misuse of Drugs Act is used wholesale by the Garda to effect stop and search powers, and not always legitimately.”¹⁰¹ Bob Collins, Chair of the Policing Authority, told the Committee that failure to legislate for ethnic data collection would be “a critical opportunity lost.”¹⁰²

The new National Action Plan Against Racism includes only a single action on policing, identifying An Garda Síochána and “representative organisations of communities affected by these practices” as the appropriate persons to “identify and eliminate any policing practices that target specific groups experiencing racism, including through racial or ethnic profiling.”¹⁰³ It also recommended that:

Right of access to legal representation in a Garda station should be provided for, including the right to have a suitable interpreter present, with the role of the interpreter to be covered specifically within the terms of legal professional privilege. . . . Independent external review processes of the complaints mechanisms for those experiencing racism within the justice system (including in prison) should be put in place, with members of minority ethnic communities as part of the review processes.¹⁰⁴

It did not take up any of the further recommendations made by IHREC¹⁰⁵ or civil society organisations including the Irish Council of Civil Liberties, Free Legal Advice Centres Ireland, or the Irish Penal Reform Trust in respect of discrimination in policing.¹⁰⁶ These will in all likelihood continue to be raised as the plan is implemented and with the new Special Rapporteur on Racism

101 Joint Committee on Justice Debate, *General Scheme of the Garda Síochána (Powers) Bill 2021* (Joint Committee on Justice Debate, 8 December 2021).

102 Ibid.

103 Department of Children, Equality, Disability, Integration and Youth (n 12) 18.

104 Ibid., 30.

105 Irish Human Rights and Equality Commission, *Developing a National Action Plan Against Racism – IHREC Submission to the Anti-Racism Committee* (IHREC 2021).

106 Irish Council for Civil Liberties, *Towards a National Action Plan Against Racism for Ireland* (ICCL Submission to the National Anti-Racism Committee 2021); Free Legal Advice Centres Ireland (FLAC), *Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland* (FLAC 2021); Irish Penal Reform Trust, *Submission to the National Anti-Racism Committee: Towards a National Action Plan Against Racism for Ireland Public Consultation 2021* (Irish Penal Reform Trust, 14 July 2021).

to be appointed by Government. The vagueness of the action on discriminatory policing, as well as the delegation entirely to the Garda Síochána and minoritised communities, may inspire little confidence that significant new protections will be introduced.

Deaths in Custody

The death in December 2020 of George Nkencho, a 27-year-old man who was shot by the Garda Armed Support Unit outside his home in west Dublin, is reminiscent of many of the patterns described in the United Kingdom of fatal or near-fatal encounters with police by Black men or women in mental health crisis.¹⁰⁷ Nkencho had no previous criminal convictions and had reportedly been suffering from mental health issues in the preceding months. He had allegedly assaulted a shop worker in a nearby supermarket, with Gardaí called during that incident. He was followed by police as he walked towards his family home, apparently carrying a kitchen knife. Gardaí said that pepper spray and tasers were deployed before he was killed.¹⁰⁸

The shooting of Nkencho sparked anger and protests in Dublin, following so closely as it did the Black Lives Matter protests of earlier 2020. At that time, in that area, no Garda diversity liaison officers were in role, and there were tensions during COVID-19 lockdowns between police and young people, as there were in other parts of the wider Dublin region with significantly young populations.¹⁰⁹ Anecdotal data of negative experiences with police in public places and in custody began to emerge in community discussions of policing. The length of time which the investigation has taken, in particular, the delays in collecting evidence from the Nkencho family, have prompted distrust in the complaints process.¹¹⁰ In June 2023, the Garda Ombudsman finally confirmed it would send a file to the DPP.¹¹¹

The community was alarmed by the fact that gardaí failed to take Nkencho into custody safely. However, even in custody there are few safeguards to ensure that people experiencing mental health difficulties receive the extra support they may require. The Garda Síochána Inspectorate

107 Black Mental Health UK, 'Written Evidence Submitted by Black Mental Health UK' (IPCC 23, 2012) <<https://publications.parliament.uk/pa/cm201213/cmselect/cmhaff/494/494we06.htm>> accessed 20 May 2023; J Bourne, 'Mental Health and Black Deaths in Police Custody' *Institute of Race Relations* (28 January 2021).

108 A Bracken, 'Garda Watchdog Completes Its Inquiry into George Nkencho Shooting' *The Sunday Independent* (16 October 2022).

109 Casey and others (n 35).

110 C Pope, 'Mother of George Nkencho Takes Legal Action Over Son's Death' *The Irish Times* (7 January 2023).

111 C Lally, 'George Nkencho: File Sent to DPP Over Fatal Shooting by Gardaí' *The Irish Times* (19 June 2023).

found that, from a sample of 318 custody records, “24 per cent showed that the person was suffering from poor mental health or had engaged in self-harm.”¹¹² Despite this, the assessment of vulnerability by gardaí relied on personal judgement, and there was limited good practice observed in respect of assessment and recording of vulnerability, with resulting impacts on whether vulnerable individuals were adequately afforded their rights.

Deaths in custody in Ireland are recorded, but not disaggregated by ethnicity. In 2022, there were 34 fatal incidents in which people died either in or after garda custody, and this reflects a significant increase in recorded deaths of this nature. Garda annual reports provide figures on deaths in custody – only those that happen in a cell or station. In 2021, six people died while in garda custody (including people hospitalised while in custody).¹¹³ Cases where people die or suffer serious harm and where there was contact with gardaí are automatically referred to GSOC for independent investigation.

The absence of equality data collected in custody means that deaths of people from minority ethnic or migrant backgrounds in custody only come to light through community knowledge of an incident or through media coverage. The death of Mauricio Mota de Camargo, a Brazilian man, after being in garda custody in 2018, for example, first came to light through a tabloid news headline less than a week later which framed the death as resulting from drug use,¹¹⁴ despite a GSOC investigation being commenced into the incident. Mota de Camargo died after two cardiac arrests followed by irreversible brain damage. He was 28 years old and had been in Ireland for only 11 months.¹¹⁵ A GSOC report has yet to be published.

Particular Experiences of Migrants

There is good reason to examine the experiences of migrants separately from that of second-generation or other minority ethnic groups. Although most migrants in Ireland are more highly skilled and more likely to work in professional/managerial jobs than non-migrants,¹¹⁶ certain groups of migrants, for a wide range of economic and structural factors shaping lives in Ireland, may be disproportionately likely to experience police custody. Migrants

112 Garda Síochána Inspectorate (n 70).

113 Garda Síochána Ombudsman Commission (n 79).

114 J Hand, ‘Probe Launched After Man Who Took Cocaine Was Found Unconscious in Garda Custody and Died Last Week’ *The Sun* (15 March 2018).

115 S O’Curry, *Correspondence Between INAR Director Shane O’Curry and the Author* (INAR, 1 March 2023).

116 F McGinnity, J Laurence and E Cunniffe, *Comparing Migrant Integration in Ireland and Northern Ireland* (ESRI 2023).

are amongst those most exploited in the labour market particularly when undocumented.¹¹⁷ The homeless population, for example, disproportionately includes migrants from other countries.¹¹⁸ Many of Ireland's sex workers are migrants.¹¹⁹ Asylum seekers are routinely brought into contact with police by the staff of Direct Provision centres.¹²⁰ As well as these, migrants have a younger age profile than other groups, most commonly between 25 and 44 years old,¹²¹ and therefore, more likely to move regularly in the night economy and in public space more generally. Police stops may be more likely to involve racialised persons for all of these reasons and because of institutional and interpersonal biases emerging in police practice.

Irish law provides various grounds for the detention of both asylum seekers and unauthorised migrants, including for those refused entry to the country and those in removal proceedings. For many years, Ireland's use of prisons and police stations for immigration purposes was subject to widespread criticism, including from the Council of Europe and the United Nations.¹²² Recommendations to establish a specialised detention facility and the Recast EU Reception Conditions Directive (although not signed by Ireland) resulted in a dedicated immigration detention centre at Dublin Airport with capacity to hold four detainees for up to 24 hours.¹²³ In 2021, more than 3,200 people were refused leave to land, of which gardaí detained 238 people at the airport.¹²⁴ Detainees staying longer than a day were sent to Cloverhill Remand Prison, a medium-security prison for men in Dublin. There is no record, however, of people detained at garda stations on immigration charges in the absence of an immigration detention centre. Legal aid is not available for people detained on immigration charges, creating a vacuum in legal advice for people in custody. Language barriers cause further obstacles for detainees to

117 MP Murphy, 'Irish Flex-Insecurity: The Post-Crisis Reality for Vulnerable Workers in Ireland' (2017) 51(2) *Social Policy & Administration* 308–27.

118 F McGinnity and others, *Origin and Integration: Housing and Family Among Migrants in the 2016 Irish Census* (ESRI 2022).

119 Estimates suggest that more than 90% of sex workers in Ireland are migrants. See generally, A Conneely, '94% of Those Involved in Prostitution in Ireland Are Migrant Women' *RTE* (21 June 2021) and on experiences with Garda Síochána, see A Minescu and others, *I Must Be Some Person: Accounts from Street Sex Workers in Ireland* (U of Limerick P 2022).

120 D Hewson, '“All the Time Watched”: An Analysis of Disciplinary Power Within the Irish Direct Provision System' (2022) 48(3) *Journal of Ethnic and Migration Studies* 676–92.

121 Central Statistics Office (n 73).

122 Global Detention Project, *Immigration Detention in Ireland: Will Better Detention Mean More Detention?* (Global Detention Project 2018).

123 European Council of Refugees and Exiles, *Ireland: Planned Opt-In to Recast Reception Conditions Directive* (European Council of Refugees and Exiles 2017).

124 S Malekmiam, 'With Long-Planned Immigration Detention Centre Stalled, People Refused Entry at Borders Still Await Deportation in Prison, Dublin Inquirer' *The Dublin Inquirer* (2 February 2022).

understand their rights, and although there is a right to interpreters, there are well-recognised problems with interpretation in police stations in Ireland.¹²⁵

The collection of data on migrants in custody in Ireland raises a number of important questions. The investigation or required declaration of immigration status is not likely to be beneficial to the detainee and so should not be collected from any person not detained under immigration legislation. In 2018, INAR made the recommendation to the Commission on the Future of Policing that as per best international practice, there should be a firewall established between crime investigation and community policing, on the one hand, and the immigration and deportation functions of the Garda National Immigration Bureau on the other.¹²⁶ The consideration of immigration status and the insecurities it creates for migrants is a crucial part of the picture of race and police custody. There is no easy line drawn between the real risk of deportation and the threat of it. Even those who are foreign-born Irish citizens, as Otukoya has noted, are subject to a Good Character requirement which makes citizenship itself impermanent.¹²⁷

Racist Attitudes in the Garda Síochána

There have been a range of indications in policy reports, research, and testimonies from the public that gardaí are susceptible to pervasive racist myths, with very serious consequences. On October 21, 2013, the HSE and gardaí removed a seven-year-old blonde-haired Roma girl from her family in Tal-laght, the suspicion being that she had been abducted by the family, who protested their innocence and pleaded not to have their child taken away. Gardaí were acting on a “tip-off” from a television presenter contacted by a neighbour of the family. The next day, Gardaí in Athlone removed a second blond-haired Roma child from his family, again, against protestations. Both children were returned to their families, and subsequently a probe launched into HSE and garda actions. Although the report of the probe found that the families had been targeted as a result of ethnic profiling, it said it could find “no evidence of institutional racism” influencing the garda decision-making process.¹²⁸ This is contradicted by the MacPherson definition of institutional racism, and the fact that the removals had taken place in the

125 V Conway, Y Daly and G McEvoy, ‘Interpretation in Police Stations: Lawyers’ Perspectives on Rights and Realities’ (2021) 13(3) *Journal of Human Rights Practice* 606–28; Garda Síochána Inspectorate (n 70).

126 Michael and O’Curry (n 84).

127 B Otukoya, ‘Hyphenated Citizens as Outsiders’ in B Fanning and L Michael (eds), *Immigrants as Outsiders in the Two Irelands* (Manchester UP 2019) 213–28.

128 E Logan, *Garda Síochána Act 2005 (Section 42) (Special Inquiries Relating to Garda Síochána)* (Department of Justice and Equality 2014).

context of a Europe-wide media-fuelled moral panic about blonde children being taken by Roma, a moral panic strongly reminiscent of ancient racist myths about “gypsies” stealing White children.¹²⁹ The embeddedness of racism in policing activities is borne out also by the experiences of Irish Travellers who have had their children’s (as young as 16 days) details recorded on the PULSE system, and which have been the subject of legal action against An Garda Síochána in recent years.¹³⁰ The recording of children’s details speaks directly to a racist belief that Travellers are born and nurtured as criminals from an early age.¹³¹

The explosive revelation in 2020 that an internal survey found no positive attitudes amongst gardaí to Travellers and 75% negatively disposed to Roma was the first evidence collected by a serving Garda of racism in the police,¹³² but was far from the first indication of racism amongst members of the Garda Síochána. Fifteen years after the establishment of the Garda Racial, Intercultural and Diversity Office (GRIDO), and introduction of ethnic liaison officers (ELOs) across the country, O’Brien-Olinger, in their ethnographic study of policing in Ireland, observed a particular animosity that was common in relations between gardaí and Nigerian persons. Gardaí told him they were willing to make “reasonable” accommodations for minorities on various practical levels – “such as the state provision of translators, adapting meals for those in custody to respect religious food requirements, and even to strengthen whistle-blowing mechanisms with regard to weeding out racist Garda members.”¹³³

Garda behaviour towards minorities was also influenced by a shared understanding that people from some cultural or national backgrounds saw gardaí as “soft” compared to the powers or behaviour of the police in their home countries, particularly because of the rights of suspects, and frustrated Gardaí believed that they had to counter that impression with a more authoritative approach.¹³⁴ O’Brien-Olinger also recorded a significant distinction in the attitudes towards those who were seen as a “decent foreigner” and those who were not. There have been few publicly reported cases of disciplinary action against gardaí for racist behaviour, but one in 2018 was reported as involving offensive language towards a foreign national in custody.¹³⁵

129 Michael and O’Curry (n 84) 17.

130 Pavee Point Ireland (n 86).

131 Michael and O’Curry (n 84) 17.

132 C Gallagher, ‘Gardaí Have Negative View of Travellers, Survey Finds’ *The Irish Times* (20 August 2020).

133 *Ibid.*, 205–6.

134 *Ibid.*

135 A O’Loughlin, ‘Court Decides Garda, Who Allegedly Used Offensive Language Towards Foreign National, Can Face Disciplinary Investigation’ *The Irish Examiner* (12 May 2018).

Even where the person is a victim of crime, gardaí told O'Brien-Olinger there was a reluctance to treat Nigerians equally because of the nature of these interactions.¹³⁶ These attitudes towards racialised minorities provide a backdrop against which varying levels of racial discrimination and harassment are enacted by some members of An Garda Síochána, and a lens through which policing policy must be interrogated.

Trust in Police

Trust between gardaí and Travellers and Roma has been significantly eroded by the above instances of profiling and recording (of Traveller children on the PULSE system; the removal of Roma children from their parents based on racial stereotyping and without adequate investigation; as well as the recording of extensive stops by gardaí of Roma people). More than 77% of Roma surveyed have reported being stopped on the street for ID by gardaí, 56% being stopped four times or more.¹³⁷ Roma describe gardaí routinely confiscating IDs, without issuing receipts or informing the person of their rights, trying to retrieve ID cards in fear approaching police, and struggling with language barriers when they do.¹³⁸ There are fears amongst Travellers that even reporting racial profiling to civil society organisations may prompt retaliation by gardaí against their communities.¹³⁹

Between 2017 and 2020, there was an increase in reports to gardaí by people who also reported to iReport.ie – from 30% to 42%, coinciding with explicit new policies in An Garda Síochána on expanded diversity training, recording hate crimes and recruiting for diversity. However, in the last three years, reports to gardaí for crimes also reported to iReport.ie have dropped significantly. Garda reports fell from 43% in 2020 to 20% in 2022. The introduction of a centralised Garda Síochána dedicated hate crime reporting system in 2022 has had less impact on this pattern than declining trust in the gardaí. Reporting had fallen to 25% in 2021 before the launch of that system. Key events which appear to be correlated in this period include the fatal shooting of George Nkencho by the Garda Armed Support Unit; increased mistreatment of migrants and minority ethnic young people during the pandemic; community knowledge of increased racial profiling in person

136 Ibid., 94.

137 Pavee Point Traveller and Roma Centre and Department of Justice and Equality, *Roma in Ireland – a National Needs Assessment* (Pavee Point Traveller 2018).

138 Irish Network Against Racism, *Alternative Report on Racial Discrimination in Ireland: Submission to the Committee on the Elimination of Racial Discrimination (CERD) for Its Consideration of the Combined Fifth to Ninth Periodic Reports of Ireland CERD/C/IRL/5-9* (2019).

139 Ibid.

and vehicle stops; and continuing failures to address escalating neighbourhood harassment.¹⁴⁰ The 29-month failure of GSOC to publish its determinations on the death of George Nkencho offers a continuing backdrop for this decline in public trust. Shane O Curry, Director of INAR in 2021 wrote that:

[T]he fact that GSOC have been unable to deliver on their promise to the Nkencho family to conclude their investigation within a year of George's killing has . . . serious ramifications for minorities' faith in the authorities.¹⁴¹

INAR's 2022 report showed that 55% of victims of racist crimes and 83% of victims of other racist incidents (excluding hate speech and illegal discrimination) said that they did not report to An Garda Síochána, and the majority of victims who did report characterised their encounter with police as negative.¹⁴² Data from iReport.ie suggest that a lack of trust in gardaí is the single largest factor affecting low reporting rates, in relation to racist crimes and harassment. The iReport.ie survey asks victims of crime "If you didn't report this to the police, why was this?." The most common reason every year between 2016 and 2022 for not reporting to gardaí was "I did not think the Gardaí (police) would do anything." Half of people who experienced crime did not expect gardaí to act if they reported, and many of these cited previous incidents in which their rights had been disregarded by gardaí.

A family experiencing racial harassment for 5 years recently discovered that no reports they had made to An Garda Síochána had been recorded on the Pulse system for 4 of those years, despite their persistent reporting.¹⁴³

Ethnic Data Collection

In February 2021, the Policing Authority reported to the Minister for Justice that An Garda Síochána were to conduct an assessment of the legal basis for recording ethnic identifiers, and that the issue had been raised at the Garda Síochána's Strategic Human Rights Advisory Council.¹⁴⁴ The Policing Authority has made multiple recommendations for An Garda Síochána to progress ethnic data collection. An Garda Síochána, however, has taken the position that there is a need for legislative change in relation to gathering ethnic identifier data. An Garda Síochána have reported on several occasions

140 Michael, Reynolds and Omidí (n 10).

141 Ibid.

142 Irish Network Against Racism (n 138).

143 Michael, Reynolds and Omidí (n 10).

144 Policing Authority, *Report on Policing Performance by the Garda Síochána During the COVID-19 Health Crisis* (Policing Authority 2021).

that it has received “clear legal advice” that there is no legislative basis for it to collect ethnicity data from people they come into contact with.¹⁴⁵ In relation to a recent recruitment drive, the organisation repeated its position that “An Garda Síochána has no statutory authority for collecting data based on ethnicity.”¹⁴⁶ IHREC disputed this position in its commentary on the Garda Síochána (Powers) Bill 2021, when it said:

While a legal basis for An Garda Síochána to collect race and ethnicity data already exists, this legislation provides an opportunity to strengthen this, by creating a specific statutory basis and requirement for data collection. These legislative measures should ensure that members of An Garda Síochána have the necessary powers to collect and process this data, and to ensure that the processing is proportionate.¹⁴⁷

A new National Equality Data Strategy is being developed by the Central Statistics Office and the Department of Children, Equality, Disability, Integration and Youth which will put in place a strategic approach to improving the collection, use, and dissemination of equality data.¹⁴⁸ It is intended that the Strategy will be in place from 2023 and that it will provide a general approach for identifying current gaps in equality data and guidance on how to fill those gaps, as well as develop standard practices in classification. However, it will neither impose an obligation on An Garda Síochána to collect ethnic data nor provide new legislative basis for it to do so.

The National Action Plan Against Racism also made two recommendations on equality data in the criminal justice system. First, that legislative provision should be made for the collection of ethnically disaggregated data across the justice system, including with respect to the recording of racist incidents and racially motivated crimes; the composition of the prison population; policing activities short of arrest (including stop-and-search); and complaints made about any aspect of the justice system. Second, that there be regular surveys of minority ethnic communities’ experience of, and satisfaction levels with, policing services.¹⁴⁹ The Garda Síochána (Powers) Bill 2021

145 Hennessy (n 100).

146 C Gallagher, ‘Ethnicity and Garda Recruitment: The Challenges of Cultural Diversity’ *The Irish Times* (22 February 2022).

147 Irish Human Rights and Equality Commission, *Race and Ethnicity Should Be Recorded During Stop and Search* (IHREC 2022).

148 Department of Children, Equality, Disability, Integration and Youth, ‘Minister O’Gorman Announces the Development of a National Equality Data Strategy’ (2016) <www.gov.ie/en/press-release/5a7f4-minister-ogorman-announces-the-development-of-a-national-equality-data-strategy/> accessed 1 June 2023.

149 Department of Children, Equality, Disability, Integration and Youth, *Ireland’s National Action Plan Against Racism* (Department of Children, Equality, Disability, Integration and Youth 2023) 36.

purports to oblige An Garda Síochána to record the ethnicity and gender of people stopped and searched. However, there is no similar requirement included in respect of the gathering of data on the ethnicity of people arrested or held in Garda custody. In its commentary on the Bill, IHREC recommended that the custody record also should contain a record of the detainee's race or ethnicity for the purpose of equality data collection.¹⁵⁰

Conclusion

This chapter identified a range of ways in which criminal justice institutions and scholars of policing should be attuned to the particular risks for racialised minorities arising in police custody. In developing the new National Action Plan, “racism” was understood as “the power dynamics present in those structural and institutional arrangements, practices, policies and cultural norms, which have the effect of excluding or discriminating against individuals or groups.”¹⁵¹ The particular power dynamics of police custody, regardless of the issue of race, already makes it a site where the resilience of the suspect is reduced by what Choongh has called the “status degradation ceremony” of the procedures involved,¹⁵² and it is noted in the international literature that custody itself can be used for social disciplinary measures, and the resilience of the suspect depleted through a variety of behaviours by police.¹⁵³

Disproportionate detention in custody, of racialised individuals or groups, should be interrogated and measures taken to increase positive non-custodial contact over increased stints in police custody. Where police view racialised minorities as particularly problematic, there is reason to seek reassurance in the form of records and regulations that they are adequately protected in custody and given appropriate access to justice. In Ireland, the lack of ethnic data across policing functions makes it near impossible to monitor the impact of police activities, including discretionary powers, on racialised minorities. There has been little effort by the State or An Garda Síochána to date, through legislation or published practice, to address concerns about racial profiling raised by racialised minority communities and civil society organisations, as well as international human rights bodies. However, in the actions set out in the new National Action Plan Against Racism, and the inclusion of ethnic data collection in relation to stop-and-search in the Garda (Powers) Bill, as well as the new policing oversight body to be established,

150 Irish Human Rights and Equality Commission (n 147).

151 Anti-Racism Committee, *Interim Report to the Minister for Children, Equality, Disability, Integration and Youth* (Anti-Racism Committee, 30 November 2020) 5.

152 S Choongh, *Policing as Social Discipline* (Clarendon Press 1997).

153 Dehaghani (n 57).

there is some promise for a shift in the oversight and accountability of An Garda Síochána conduct and policy in respect of racialised minorities. There is, or ought to be, an urgency in bringing about this shift, so that we can see clearly whether or not racialised minorities are subject to over-policing or if decisions on arrest and detention are made on improper, biased, discriminatory grounds by An Garda Síochána.

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11

CHILDREN'S RIGHTS IN POLICE CUSTODY

Louise Forde and Ursula Kilkelly

Introduction

The UN Convention on the Rights of the Child recognises that children in conflict with the law are entitled to special protection. Acknowledging the particular vulnerability of such children, the Convention and related international standards highlight the importance of ensuring children's rights are protected during the criminal process. International standards build on the general principles of age-appropriate treatment and due process rights and require that the process of police questioning is specially adapted to children's circumstances and needs. However, despite important legal developments at regional and international levels (discussed further later), relatively little is known about how children experience their rights. There are similar gaps in the literature with regard to how children experience the specialised policies, procedures, and approaches that are put in place to accommodate their particular vulnerability as suspects. Finally, little attention has focused on how to strike an appropriate balance between children's due process rights and the police duty to investigate alleged crime.

The aim of this chapter is to explore these issues through the lens of a study of children's rights in police questioning, undertaken by the authors for the Irish Policing Authority. This chapter begins by setting out the rights of children during police questioning in international and national law. It then presents a summary, drawing on empirical research, of how children experience these rights before going on to consider the key factors influencing these experiences. This chapter concludes with recommendations as to how to improve the realisation of children's rights in this setting, taking account

of the need to appropriately balance the rights of the child suspect with the parameters of police investigation.

International Standards

The United Nations Convention on the Rights of the Child (CRC)¹ is a widely accepted legal blueprint for the rights of children, defined as every child below the age of 18 years (Art. 1). Embedded in the Convention is an understanding that although vulnerable due to their age and maturity, children are entitled to enjoy a wide range of rights across a variety of circumstances and settings including in education, health, and family care. Children in the justice system receive particular attention in the Convention and those in conflict with the law are entitled to special protection under Articles 37 and 40. Together, these provisions require that every child is entitled to treatment in a manner consistent with the child's age and needs highlighting the importance of age-appropriate treatment. Article 40 sets out a detailed list of due process rights that include procedural protections that apply during the investigation process, such as the right to be informed promptly and directly of the charges against them and to have legal or other appropriate assistance in the preparation of their defence.² In addition to these specific rights, the Convention recognises that in order to take account of the vulnerability of children in these situations, states must promote the "establishment of laws, procedures, authorities and institutions" specifically applicable to children alleged or accused of having infringed the penal law (Art. 40(3)). A consistent recommendation of the Committee on the Rights of the Child, whose role is to monitor implementation of the Convention, is that "continuous and systematic training of professionals" is vital to ensure that these rights are effective. The Committee emphasises that this training should be provided to all legal professionals working in the youth justice system,³ emphasising the additional requirement to provide training to police to avoid questioning techniques and practices that might result in unreliable testimony or confessions.⁴ In this respect, the Committee draws attention to the duty on police officers to uphold the standards associated with the child's right to a fair trial, while clearly reinforcing the broader need to ensure that children's rights and dignity are respected.

1 United Nations Convention on the Rights of the Child (Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 44/25 of 20 November 1989 Entry into Force 2 September 1990, in Accordance with Article 49).

2 UN Committee on the Rights of the Child, *General Comment no 24 on the Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019) paras 47–53.

3 *Ibid.*, paras 39, 112.

4 *Ibid.*, para 60.

The European Guidelines on Child-friendly Justice (2010)⁵ seek to build on these international standards by paying special attention to the ways in which the justice system should be adapted to take account of the vulnerability of child suspects.⁶ Although not exclusive to children in conflict with the law, the Guidelines emphasise the need to adjust the criminal justice process in order to ensure the child's right to participate is effective. In this regard, they highlight the importance of providing children with information and explanations in age-appropriate language and stress the need to ensure children receive access to legal advice and assistance, as well as assistance from parents or other "appropriate" adults in police custody. With particular regard to police questioning, the Guidelines stipulate that

[w]henver a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody.⁷

In addition, the Guidelines require that children should be provided with "access to a lawyer and be given the opportunity to contact their parents or a person whom they trust."⁸ Parents should normally be informed as to the reasons for the child being taken into police custody and should be invited to come to the police station. Questioning of the child should not take place except in the presence of a lawyer or the child's parent or alternatively another person whom the child trusts. According to Liefwaard, these safeguards are necessary "because of a child's particular vulnerability in the earliest stages of a criminal proceeding" and because a child being questioned by the police needs protection both from police ill-treatment and "treatment that trumps his right to a fair trial."⁹ The Child-Friendly Justice Guidelines recognise that questioning children is specialist police work that should involve "trained police officials that work for special police units."¹⁰ In light of the risks to children's rights in police custody, Liefwaard asserts that the Guidelines provide "concrete" safeguards in relation to children's access to a lawyer and the presence of a lawyer during police questioning.¹¹ He highlights how

5 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th Meeting of the Ministers' Deputies).

6 T Liefwaard, 'Child-Friendly Justice: Protection and Participation of Children in the Justice System' (2016) 88(4) *Temple Law Review* 905.

7 Guidelines of the Committee of Ministers (n 5) 26.

8 *Ibid.*

9 Liefwaard (n 6) 919.

10 Guidelines of the Committee of Ministers (n 5) 72.

11 Liefwaard (n 6) 919.

this reflects the importance of these rights in the case law of the European Court of Human Rights¹² and the monitoring work of the Committee for the Prevention of Torture. At the same time, Liefwaard laments the fact that the Guidelines appear to conflate the presence of a lawyer with that of a parent, in stating that “a child . . . should not be questioned . . . except in the presence of a lawyer or one of the child’s parents.”¹³ This suggests, he says, that a child could be denied the opportunity to have a lawyer present if a child is questioned while their parents are in attendance, when these parties play very distinct roles in support of the child. Similar softness is evident in the Convention on the Rights of the Child, which appears to use “legal” and “other appropriate assistance” interchangeably in Article 40. However, recently the Committee on the Rights of the Child has highlighted the distinctive importance of both the lawyer and the parent in ensuring that the child’s rights are adequately protected in police custody, emphasising that legal assistance should be guaranteed to all children facing charges, in addition to ensuring the maximum involvement of parents or legal guardians in the proceedings.¹⁴

The Guidelines can be criticised for remaining silent with respect to the recording of police interviews, despite the importance of such a safeguard in protecting the child from the infringement of their rights. Although this right is set out in Article 9 of EU Directive 2016/80,¹⁵ it is not mandatory if the child is represented by a lawyer during questioning. What is significant, however, is that the Directive includes the right to the presence of a lawyer during police questioning amongst the procedural safeguards that must apply to child suspects in criminal proceedings and stipulates that lawyers should be able to participate effectively during questioning. Although this right can be derogated from if it is not proportionate in light of the circumstances of the case and the child’s best interests, the Directive establishes an important presumption in favour of providing legal assistance to a child throughout the process of questioning. The instrument also provides that all children who are suspects or who are accused should have a right to an individual assessment and to a medical examination; again, while provision is made for derogation in the child’s best interests, these provisions provide important means of establishing any needs or vulnerabilities of the child which may require an adaptation to criminal justice processes. Even though Ireland has so far opted out of this Directive, it represents an important European standard in the area and provides guidance on the steps that should be taken to provide greater

12 *Salduz v Turkey* (2000) 49 EHRR 19.

13 Liefwaard (n 6) 920.

14 UN Committee on the Rights of the Child (n 2) paras 49–51, 57.

15 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings.

protection for children's rights when they are being questioned by police. Significantly, in the most recent Concluding Observations issued by the CRC Committee, it has been recommended that Ireland should either opt into the Directive or transpose its most important elements into national law.¹⁶

Requirements of Irish Law

The Children Act 2001, as amended ("the 2001 Act"),¹⁷ provides a statutory framework for youth justice in Ireland, with Part 6 focused on the treatment of children in Garda (police) custody. Most importantly, s 55 of the Act requires that in any investigation of an offence by a child, members of the Garda Síochána (the police)

shall act with due respect for the personal rights of the children and their dignity as human persons, for their vulnerability owing to their age and level of maturity and for the special needs of any of them who may be under a physical or mental disability.

This duty must be balanced with the duty to prevent escapes from custody and to act with "diligence and determination in the investigation of crime" as well as "the protection and vindication of the personal rights of other persons." While this is an important statement of principle, there is, interestingly, no guidance available as to how the competing interests highlighted here are to be appropriately balanced. The Act sets out the steps to be followed when the child is brought to a Garda station to be interviewed and makes provision for safeguards in this context. In particular, the Act provides for the child's right to be informed in appropriate language of the charge against them, their right to contact a lawyer (solicitor), and their right to have their parent or guardian contacted and asked to attend the Garda station.¹⁸ If a parent cannot be contacted or cannot attend within a reasonable period of time, the Act requires another adult relative or other adult named by the child to be contacted to this end. If the child is in need of care and protection, the Act requires contact to be made with Tusla, the Child and Family Agency, for the purposes of care and protection.¹⁹

In terms of legal representation, the Act makes provision for the child's solicitor to be contacted "as soon as practicable" and where this is not

16 UN Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ireland (Advance Unedited Version)*, UN Doc CRC/C/IRL/CO/5-6 (7 February 2023) para 45.

17 Children Act 2001.

18 *Ibid.*, s 57.

19 *Ibid.*, s 59.

possible within a reasonable period of time, or the solicitor is unwilling or unable to attend the Garda station, the child is to be given the opportunity to ask for another solicitor to attend.²⁰ The child is entitled to be supported in identifying an available solicitor, so that the child's legal right to representation can be given effect. At the same time, the Act stops short of expressly recognising the child's right to avail of legal advice prior to, or the presence of a solicitor during questioning. It also does not make such access mandatory in any way. Accordingly, if they choose to waive their entitlement to seek advice from a lawyer, a child may be questioned by Gardaí without accessing legal advice prior to interview. The possibility also remains that, as no clear legal entitlement exists in statute, children may face questioning without the support of legal representation during the interview itself, unless Gardaí allow the attendance of a solicitor on a discretionary basis. Admittedly, the Act provides that where the child or their parent or guardian asks for a solicitor, they will not be asked to make a statement in relation to an offence until "a reasonable time" for the attendance of the solicitor has elapsed. However, it is not clear from the Act who determines "reasonableness" for this purpose or indeed, what factors dictate what is reasonable in such circumstances. With regard to the presence of a parent or guardian, the Act provides that a child shall not be questioned unless in the presence of a parent or guardian or "another adult" where the parent is not available²¹ although questioning may go ahead where delay would risk death or injury or interfere with the investigative process.²²

The Treatment of Persons in Custody Regulations 1987 ("the Regulations")²³ provide further instructions on the treatment of persons in custody, including children. Importantly, they set out the role of the "member in charge" of the Garda station and provide for their duties to maintain the custody record and ensure the fair treatment of any person detained in Garda custody. Amongst other duties, the member in charge has responsibility for notifying the child's arrest to the child's parents or to another appropriate adult. However, the Regulations do not provide further detail on who should play the role of the "appropriate adult," beyond specifying that it should be a "responsible" adult who is not a member of An Garda Síochána. This arguably leaves the choice of such persons to the discretion of the member in charge.

It is evident from the above summary that Irish law makes reasonable provision for legal safeguards to protect the child's rights during police

20 *Ibid.*, s 60.

21 *Ibid.*, s 61.

22 *Ibid.*

23 SI no 119/1987 – Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.

questioning, in general alignment with international children's rights standards. There are some gaps, however. For example, there is no requirement to ensure that the child has understood the information provided, and there is no requirement for guidance to ensure that the child's age and maturity are taken into account in this process. Similarly, while the legislation mandates the presence of a parent, guardian, or other adult during police questioning, there are no requirements as to who undertakes these roles and, with respect to the "other adult," there are no requirements as to qualifications, suitability, or vetting. While there is provision for the child's right to contact a lawyer, the parameters for proceeding to question a child without legal assistance are unclear. Finally, while the Regulations require the member in charge to seek medical treatment for detainees, there is no routine requirement for a full assessment of the needs or vulnerabilities of the child at the point where they are taken into Garda custody. Interestingly, the Act allows for the making of regulations with respect to the treatment of children in police custody, with regard to the role of the parent, guardian, or other adult, and any other matters "necessary or expedient" for the purpose of enabling Part 6 to have full effect. To date, no such regulations have been developed.

Children's Experiences of Their Rights

Children who participated in the Policing Authority study reported a variety of experiences of their rights during police questioning.²⁴ Some children reported taking the experience in their stride and found the experience to be "straightforward" or "grand."²⁵ However, other children had much more negative experiences, as a result, mainly, of the demeanour or the behaviour of questioning Garda members. For instance, some children interviewed reported Gardaí "shouting" at them or appearing "very angry" during questioning.²⁶ In a number of instances, children experienced Gardaí being "rough" or verbally or physically ill-treating them on arrest or in custody.²⁷ Importantly, these issues were raised spontaneously by some children during interviews. With regard to their experience of the line of questioning followed by Gardaí at interview, some children routinely described feeling that they were being "tricked."²⁸ This arose, for instance, when the child was asked a question in different forms, multiple times, or where the Garda would return to questions already asked. Sometimes, the children considered

24 U Kilkelly and L Forde, *Children's Rights and Police Questioning: A Qualitative Study of Children's Experiences of Being Interviewed by the Garda Síochána* (Police Authority 2020).

25 *Ibid.*, 23.

26 *Ibid.*, 25.

27 *Ibid.*, 26.

28 *Ibid.*, 23.

that the Garda was not being truthful during the course of the interview and might, for instance, suggest that a friend who had also been arrested with the child was giving a different version of events.²⁹ Overall, the impression in many cases was that the child had little confidence that they were being treated fairly, resulting in them having little faith in the legitimacy of the questioning process.

It was evident from the interviews that children's experience of being in police custody was impacted by the inappropriateness of the custodial environment. This was especially the case where the child was held in custody overnight or, in one case, over a weekend.³⁰ In general, the children described rooms in which they were held as dirty and cold, and where they were provided with food, they described it as being of poor quality.³¹ The inappropriate nature of the environment in which children were detained was also highlighted by lawyers and Gardaí interviewed as part of the study, with some trying to take measures to ensure that the time children spent in these cells was limited.³²

Some children described being "nervous" or "scared" during the police interview and while children interviewed multiple times described getting "used to it," it was clear that in at least one case the experience of being interviewed had a profound impact on the child, who described being "shook for about 3 or 4 months" afterwards.³³

A particular issue clearly arose with respect to the inconsistency of the experience from the child's point of view and approaches of individual Garda members clearly varied depending on their behaviour, experience, and expertise. The reports of the children interviewed indicated a willingness on the part of Gardaí to adapt their approaches, modify language, and adjust the interview style to support the child's effective participation in the process.³⁴ At the same time, the variability of the children's experiences highlighted the absence of a consistent approach. For children, this sometimes came down to whether they considered they could trust the Garda in question and they were quick to identify that while some were "nicer," others were clearly "worse."³⁵ Whether they had been treated fairly or not was keenly felt by some children and could impact how children engaged with police during the course of the interview. One child stated clearly "if they're nice to me, I'm going to be nice

29 *Ibid.*, 24.

30 *Ibid.*, 12.

31 *Ibid.*, 13.

32 *Ibid.*

33 *Ibid.*, 35.

34 *Ibid.*, 30.

35 *Ibid.*, 25.

to them. Simple as, really.”³⁶ In general, the individual approach of the Garda interviewer evidently had a significant impact on how children felt about the overall experience, their understanding of their rights, and information given to them.

As a result, some children described having real difficulty understanding the interview process and reported that it was “confusing because they use hard words I don’t really understand.”³⁷ The interviews highlighted the critical need for age-appropriate information as even though some children said the information they received was “clear enough” and “straightforward,” others clearly struggled.³⁸ Those who were supported by an adult – a parent/guardian or a legal representative – identified the value of this support in enabling them to understand the process better. For instance, one child explained that having a lawyer in attendance at the interview was “handy like for something you don’t understand.”³⁹ In this respect, the need for an age-appropriate approach was clearly recognised by many of the children interviewed. As one explained the process “could be more child-friendly like” as he explained that in his experience “they treat you the same as they treat an adult.”⁴⁰ Assistance from a parent or supportive adult was also considered crucial for children, who reported wanting someone to offer “guidance . . . or assistance.”⁴¹ While some identified that the parent or solicitor offered concrete or practical support, such as help understanding questions posed to them, for others the support was less tangible but no less important, in that it “just felt better.”⁴² Some children were also able to discern the circumstances in which it was not comfortable having a parent in attendance.⁴³ For some, their difficult relationship with a parent or their awkwardness around the alleged offence made it less appealing to have their parent present. In other circumstances, such as where the parent was not available to attend the garda station, they did not have this support available to them.⁴⁴

One of the more important findings of the study was that children frequently waived their right of access to a solicitor, despite the fact that those who availed of this right found it “very, very helpful.”⁴⁵ For those children who had a solicitor to provide advice in advance of questioning and/or to attend the interview with them, they found them to be an important source of

36 *Ibid.*, 26.

37 *Ibid.*, 30.

38 *Ibid.*, 29–30.

39 *Ibid.*, 19.

40 *Ibid.*

41 *Ibid.* 41.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*, 41–42.

45 *Ibid.*, 18.

help, information, and support. Children liked that “they’re on your side.”⁴⁶ Those children who waived their right did not always provide a clear reason. In general, however, the children indicated wanting “to get out of there as fast as possible,” and “to get home as quick as I can” and so, waiting for a solicitor was “a whole lot of hassle.”⁴⁷ Some children seemed to decide that it was not always worth the wait and preferred instead to be questioned alone. This feeling that there was “no point” waiting for a solicitor also reflected the value to the child of having legal representation when the charge was not serious (according to them) or where they had decided to exercise their right to silence.⁴⁸ Interestingly, the value of having a solicitor present was borne out by children who made the alternative decision to wait for their lawyer to arrive.⁴⁹

Recommendations

This study demonstrates that while the Children Act 2001 envisions that a number of legal safeguards should exist for children during Garda questioning, in practice, it is often challenging to ensure that these provide effective protection for children in this situation. The diversity in the experiences of children being questioned by the Gardaí suggests that there is an urgent need to find methods of ensuring that legal safeguards and protections are applied in a manner that is both meaningful for children in practice and brings about consistency that generates confidence in the fairness of the system. The standards set out in the CRC, the Child-Friendly Justice Guidelines, and Directive (EU) 2016/800 provide very important guidance on the practical steps necessary to ensure respect for children’s rights during the investigation process, while balancing this with the duty on police to effectively investigate alleged offences.

One of the key issues identified with Part 6 of the Children Act 2001 is that although many of the key elements identified in the international standards are reflected in the legislation, they are broadly defined with no clear guidance as to how they are to be implemented.⁵⁰ This is especially the case with regard to the requirement to provide information to children and parents, to ensure that children have access to legal assistance, and the requirement that another adult must be present if it is not possible for a parent to attend. The absence of this detail means that in practice, individual Gardaí

46 Ibid.

47 Ibid., 15.

48 Ibid., 16.

49 *ibid.*

50 See further, *ibid.*; L Forde, ‘The Role of the Courts in Protecting Children’s Rights in the Context of Police Questioning in Ireland and New Zealand’ (2022) 61 *The Howard Journal of Crime and Justice* 240.

must exercise their own judgement as to how best to adapt their language and approach to account for the child's age and level of understanding, while the member in charge is left to identify a person to act as an appropriate adult if a child's parent or guardian is unable to attend a Garda interview for any reason. The Policing Authority study highlighted the fact that despite the efforts of some Gardaí to adapt their approach to ensure it was more suitable for children, children continue to have divergent experiences of the level of protection for their rights.⁵¹ In order to address this, it is recommended that robust regulations are developed to promote more consistent realisation of the rights of children in the questioning process in practice. The fact that s 70 of the Children Act 2001 allows for the making of regulations to support the operation of Part 6 may provide a useful means of achieving this. Regulations should also provide guidance as to how to support children's understanding of the information received, and the procedures to be followed in relation to their access to supports.

In addition to the adoption of regulations, the adoption of a range of practical tools would also facilitate more rights-compliant practices by Gardaí. These would not only support better communication with children, but would also enhance the process of police questioning in line with fairer and more robust standards of justice. Similarly, investing in the training of professionals who have roles supporting children during this process – including Gardaí, lawyers, and appropriate adults – would strengthen practice, bringing about stronger and more consistent realisation of children's rights in this area. Finally, the Policing Authority study demonstrates the need to ensure that an effective system of inspection and monitoring is in place and that transparent and responsive complaint mechanisms are available to children who have experienced breaches of their rights in police custody. Wider police reforms also create an opportunity here. The following section considers these recommendations in more detail, placing them in the context of the wider literature.

The Development of Regulations

An important issue which could be addressed through the development of regulations under s 70 of the Children Act 2001 relates to information and explanations. While the Act requires specific types of information to be given, it does not explicitly require that children should be given explanations of their rights or supported to understand them in practice. In order to realise children's rights to participate effectively and meaningfully from the first stages of their engagement with Gardaí, adequate information and explanations delivered in an age-appropriate manner are an important pre-requisite.⁵²

51 Kilkelly and Forde (n 24).

52 UN Committee on the Rights of the Child (n 2) paras 46, 48.

Access to reliable information has been described as an “essential starting point” for meaningful participation.⁵³ However, children can have difficulty understanding information which is provided to them, particularly if it is delivered in a rote or bureaucratic form or in written form.⁵⁴ In addition, interactions with the police can be further complicated when a child has an intellectual disability, communication difficulty, or other concern which impacts their ability to understand the process.⁵⁵ In this respect, it is particularly important to note that children with communication difficulties are over-represented in youth justice systems internationally.⁵⁶ The CRC Committee has been clear that while both parents and appropriate adults have an important role to play in supporting children’s understanding, authorities should not leave the task of explaining charges to the child, to them.⁵⁷ In light of this, and given that the duty falls on police to ensure the integrity of the questioning process, placing an explicit duty on Gardaí to support children’s understanding of this process would be a legitimate step to take, towards the realisation of children’s rights.

While it is clear from the study that many Gardaí make efforts to adapt their language to make it less difficult for children to understand, making this mandatory through the establishment of a specific regulation would help to make practice more consistent in this area. This is the experience in other jurisdictions. For example, in New Zealand, the statutory framework imposes a duty on police officers to provide detailed explanations of their entitlements to children before they are questioned,⁵⁸ allowing more robust oversight of the quality of the explanations given to children by the courts.⁵⁹ Imposing a similar duty in Ireland would thus ensure a greater focus on the

53 H Stalford, L Cairns and J Marshall, ‘Achieving Child Friendly Justice Through Child Friendly Methods: Let’s Start with the Right to Information’ (2017) 5(3) *Social Inclusion* 207, 210.

54 H Zelle, CL Riggs Romaine and NES Goldstein, ‘Juveniles’ Miranda Comprehension: Understanding, Appreciation and Totality of Circumstances Factors’ (2015) 39(3) *Law and Human Behaviour* 281; S Parsons and G Sherwood, ‘Vulnerability in Custody: Perceptions and Practices of Police Officers and Criminal Justice Professionals in Meeting the Communication Needs of Offenders with Learning Disabilities and Learning Difficulties’ (2016) 31(4) *Disability & Society* 553.

55 K Gooch and P von Berg, ‘What Happens in the Beginning, Matters in the End: Achieving Best Evidence with Child Suspects in the Police Station’ (2019) 19(2) *Youth Justice* 85; K McLachlan and others, ‘Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder’ (2014) 38(1) *Law and Human Behavior* 10.

56 SAS Anderson, DJ Hawes and P Snow, ‘Language Impairments Among Youth Offenders: A Systematic Review’ (2016) 65 *Children and Youth Services Review* 195.

57 UN Committee on the Rights of the Child (n 2) para 48.

58 Oranga Tamariki Act 1989, ss 215–20.

59 Forde (n 50).

suitability to the child's circumstances of the mode of communication used in each individual case.

The second area that might be developed through the establishment of appropriate regulations is the issue of assessment when a child is being brought into police custody. Directive (EU) 2016/800 is clear that children who are suspects or accused persons should have a right to an individual assessment to identify "specific needs in terms of protection, education, training and social integration, to determine if and to what extent they would need special measures," as well as the extent of their criminal responsibility and the appropriateness of proposed measures. This would also identify, at the earliest appropriate stage of the proceedings, if the child has any learning disabilities or communication difficulties. The value of an early assessment clearly lies in the potential to identify any circumstances that might impact the child's ability to participate effectively, especially in the vital process of police questioning. It would also provide a clear pathway for circumstances, such as where the child is found to be under the influence of an intoxicating substance, preventing the child from being questioned under these conditions.⁶⁰ Apart from protecting the integrity of the police investigation, the desirability of identifying the child's speech, language, or communication needs at an early stage is also linked to ensuring that the child receives appropriate supports.⁶¹ The study of children's experiences in Ireland also highlighted that information about a child's particular needs could prompt Gardaí to try to put measures in place to mitigate this vulnerability, further underscoring the potential benefits of ensuring that early assessments are in place.

The Treatment of Persons in Custody Regulations currently require the member in charge to note the physical and mental condition of the individual on the custody record, and requires that medical treatment be sought if it appears they are injured, where they are suffering from a mental illness or where it appears they may need medical attention, amongst other circumstances. However, this is clearly less than a comprehensive assessment of a child's needs, including whether they may require additional measures to assist them to participate in the interview, in a routine manner. Research has indicated that the process of assessing the needs of people in police custody in Ireland generally is relatively informal and unstructured in nature.⁶²

60 Kilkelly and Forde (n 24).

61 Anderson, Hawes and Snow (n 56); C Holland, P Hutchinson and D Peacock, 'The Importance of Screening For Speech, Language and Communication Needs (SLCN) in Police Custody' [2023] *The Howard Journal of Crime and Justice* 1; K Ellem and K Richards, 'Police Contact with Young People with Cognitive Disabilities: Perceptions of Procedural (In)justice' (2018) 18(3) *Youth Justice* 230.

62 L Skinnis, *Police Powers and Citizens' Rights: Discretionary Decision-Making in Police Detention* (Routledge 2019).

Developing regulations which provide for routine assessment of children's needs and any relevant vulnerabilities would help to bring Ireland closer to the minimum procedural safeguards set out in Directive (EU) 2016/800, and would enhance the ability of Gardaí to meet the requirement set out by s 55 of the Children Act to act with due regard for children's needs, including any physical or mental disability.

A third area for development identified in this study which could potentially be addressed through the establishment of regulations was the need for further development of the role of the parent, guardian, or "other adult." Research has highlighted that the role parents/guardians are expected to play often lacks clarity and can be particularly complex and difficult.⁶³ Practical considerations can also make it difficult for Gardaí to secure the attendance of parents at police interviews.⁶⁴ The international standards emphasise the need for children to be supported by an "appropriate adult" where a parent or guardian is not available.⁶⁵ The Children Act specifies that where a parent or guardian is unavailable, an adult relative or other adult named by the child should be notified in the case where a child has been brought into Garda custody,⁶⁶ and that if a parent or guardian cannot attend the interview, another adult nominated by the member in charge of the station should be present.⁶⁷ The Treatment of Persons in Custody Regulations refer to another adult relative or "some other responsible adult other than a member" [of an Garda Síochána] but do not provide any further details on the role expected to be played. While well-established "appropriate adult" systems operate in countries such as the United Kingdom, there are continuing debates about who should undertake this role, and what their duties should be.⁶⁸ Given the complexity of the role that a parent, guardian, or appropriate adult has when a child is being subjected to police questioning, greater certainty around this

63 M Peterson-Badali and J Broeking, 'Parents' Involvement in the Youth Justice System: Rhetoric and Reality' (2010) 52(1) *Canadian Journal of Criminology and Criminal Justice* 1; HMD Cleary, 'Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases' (2014) 38(3) *Law and Human Behaviour* 271; HMD Cleary and TC Warner, 'Parents' Knowledge and Attitudes About Youths' Interrogation Rights' (2017) 23(8) *Psychology, Crime & Law* 777; L Cohen, 'When Parents Are Not Enough: The Case for Counsel in Juvenile Interrogations' (2020) 34(4) *Criminal Justice* 55.

64 Kilkelly and Forde (n 24).

65 UN Committee on the Rights of the Child (n 2) para 60.

66 Children Act 2001, s 58.

67 *Ibid.*, s 61.

68 H Pierpoint, 'How Appropriate Are Volunteers as Appropriate Adults for Young Suspects? The Appropriate Adult System and Human Rights' (2000) 22(4) *Journal of Social Welfare and Family Law* 383; H Pierpoint, 'Reconstructing the Role of the Appropriate Adult in England and Wales' (2006) 6(2) *Criminology and Criminal Justice* 219; R Dehaghani and D Newman, 'Can – and Should – Lawyers Be Considered "Appropriate" Appropriate Adults' (2019) 58(1) *The Howard Journal of Crime and Justice* 3.

role should be established in Ireland; in the study discussed earlier, we suggested that it may be useful to establish a panel of appropriate adults who would be trained to undertake this role.⁶⁹ Setting out clearly who can undertake the role of an appropriate adult, what their duties and responsibilities are, and the expectations of appropriate adults in supporting children's effective participation and the realisation of their rights would bring much needed clarity to police practice in this area and would ensure greater protection of the child's rights during this process.

Additional specialist supports may also be necessary where a child being questioned experiences a learning disability or a communication difficulty. Intermediaries or communication assistants have been introduced in youth justice settings in other jurisdictions with positive impacts reported by both young people and professionals.⁷⁰ In light of the difficulties facing young people who experience these problems in their interactions with police, it has been suggested that speech and language specialists have an important role to play in ensuring children are not disadvantaged in their interactions with formal criminal justice processes.⁷¹ The CRC Committee has said that states should provide "adequate and effective assistance by well-trained professionals to children who experience communication barriers,"⁷² thus ensuring the specialist assistance of an intermediary is available to children is important to ensure the protection of their rights in this area.

A fourth important issue worthy of consideration is that of providing greater protection for a child's access to legal advice. Reflecting similar findings in the international research that a high proportion of children do not avail of their right to legal advice,⁷³ children who participated in the Irish

69 Kilkelly and Forde (n 24).

70 K Howard, C McCann and M Dudley, "It's Really Good . . . Why Hasn't It Happened Earlier?" Professionals' Perspectives on the Benefits of Communication Assistance in the New Zealand Youth Justice System' (2020) 53(2) *Australian & New Zealand Journal of Criminology* 265; K Howard, C McCann and M Dudley, "It Was Like More Easier": Rangatahi (Young People) and Their whānau (Family) Talk About Communication Assistance in the New Zealand Youth Justice System' (2021) 21(2) *Youth Justice* 210.

71 PC Snow, 'Speech-Language Pathology and the Youth Offender: Epidemiological Overview and Roadmap for Future Speech-Language Pathology Research and Scope of Practice' (2019) 50(2) *Language, Speech, and Hearing Services in Schools* 324.

72 UN Committee on the Rights of the Child (n 2) para 65.

73 B Feld, 'Police Interrogation of Juveniles: An Empirical Study of Policy and Practice' (2006) 97(1) *The Journal of Criminal Law and Criminology* 219; B Feld, 'Real Interrogation: What Actually Happens When Cops Question Kids' (2013) 47(1) *Law & Society Review* 1; JL Viljoen and R Roesch, 'Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms' (2005) 29(6) *Law and Human Behavior* 723; Cleary (n 63); V Kemp, P Pleasence and N J Balmer, 'Children, Young People and Requests for Police Station Legal Advice: 25 years on from PACE' (2011) 11(1) *Youth Justice* 28.

study of children's experiences of questioning revealed that children often did not request to speak to a lawyer prior to being questioned.⁷⁴ However, those who did reported that they had found it to be very beneficial, with some suggesting that with the benefit of hindsight, they would in future choose to exercise, rather than to waive their right to legal advice.⁷⁵ The CRC Committee has emphasised that legal assistance should be guaranteed to all children from the outset of proceedings,⁷⁶ and Article 6 of Directive (EU) 2016/800 similarly requires states to guarantee that children have the assistance of a lawyer during police questioning. At present, in Ireland, while a child has a statutory and constitutional right to access legal advice, this has been interpreted as access to a lawyer prior to questioning, and the statutory entitlement does not extend to allowing the presence of a lawyer during garda questioning. While the presence of a lawyer is now permitted by a Code of Practice,⁷⁷ and gardaí in the study discussed earlier were unanimous in their support for the presence of a lawyer during the interview process,⁷⁸ it remains problematic that this entitlement is not enshrined in statute. In light of this, codifying the child's right to assistance a lawyer throughout the police questioning process in a Regulation would help to protect children's access to legal safeguards in this context.

Finally, it is important that any regulations adopted under the Children Act would address the issue of children being held in police custody. Children interviewed as part of the Policing Authority study reported very negative experiences in this regard, including being held in cells for long periods while waiting to be questioned.⁷⁹ Issues relating to the physical condition of police cells, the length of time they were detained, the quality of food provided, and ill-treatment while in custody were raised by young people.⁸⁰ Article 37 of the CRC is clear that deprivation of liberty – including in police custody – should be a measure of last resort and for the shortest appropriate period of time. Further, it stipulates that where children are detained, it should be in circumstances which are appropriate to their age and needs. The Children Act provides that children should be separated from adults in a Garda station, as far as practicable,⁸¹ and further, that children may be released on bail.⁸² However, given the significant breaches of their rights

74 Kilkelly and Forde (n 24).

75 *Ibid.*, 16.

76 UN Committee on the Rights of the Child (n 2) para 49.

77 An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Custody* (An Garda Síochána 2015).

78 Kilkelly and Forde (n 24).

79 *Ibid.*, 12.

80 *Ibid.*

81 Children Act 2001, s 56.

82 *Ibid.*, s 68.

that children have experienced while in police custody, it is crucial that the measures in Irish law are strengthened with regard to the duties of Gardaí to protect the child's rights in this context. Making explicit provision for the child's rights to protection from harm, to assessment of need and vulnerability, and to accessing necessary supports and services where required would serve to underscore the exceptional vulnerability of children in police custody, placing the duty firmly on the justice authorities to respond to children in these circumstances. Crucial too is the need to make appropriate provision for an effective complaints process, one which delivers accountability and in which children themselves can have confidence.⁸³

Resources and Training

While enacting regulations relating to children's rights in police custody and questioning is important, it is equally important to develop complementary resources and training for members of An Garda Síochána, as well as for lawyers, appropriate adults, and other professionals who work with children in this setting. It was clear from the Policing Authority study that Gardaí often make significant efforts to adapt their approach in order to make it more suitable for children, but in the absence of concrete guidance and tools to support this progress, practice was dependent on the approach of individual Gardaí, leading to inconsistency in practice. Similarly, issues relating to the conditions in which children are held in Garda custody are significantly impacted by the conditions in custody, pointing to the need for investment so that the physical environment is fit for purpose.

One area in which it may be particularly useful to develop practical resources is in relation to information provision and communication. The CRC Committee and the Child-Friendly Justice Guidelines emphasise the need to adapt language and processes so that they are accessible to children, and tools and resources can help professionals to communicate more effectively with children. While the provision of written information that does not meet the needs of children can hamper their understanding,⁸⁴ practical resources developed in other jurisdictions, such as "Talking Mats" and "Communication Postcards," have been shown to enhance the ability of young people to understand and communicate better during the youth justice process.⁸⁵

83 See, e.g. U Kilkelly and E Logan, *National Independent Human Rights Institutions for Children. Protecting and Promoting Children's Rights* (Palgrave Macmillan 2021); Ombudsman for Children, *A Guide to Child-Centred Complaints Handling* (Ombudsman for Children) <www.oco.ie>.

84 Parsons and Sherwood (n 54).

85 See further Howard, McCann and Dudley (2021) (n 70).

In order to make these measures effective, however, it is also important to adequately resource the systems through which children can access such supports. A recommendation has been made to establish a panel of specially trained appropriate adults, from which Gardaí draw if a parent or guardian were unable or unwilling to attend a Garda interview with a child.⁸⁶ In jurisdictions such as England and Wales, where the appropriate adult safeguard is provided for under Code C of the Police and Criminal Evidence Act 1984,⁸⁷ each local authority area is required to have a system for providing appropriate adults. In order to ensure that such effective safeguards are available to children in Ireland, the establishment of an appropriate adult service across the country would be a welcome step.

The international children's rights standards in this area stress the importance of systematic training on children's rights and issues relevant to children's development and well-being for all professionals involved in the youth justice system.⁸⁸ In Ireland, while some training is available to Gardaí and lawyers, it is limited in scope and/or undertaken on an ad hoc or voluntary basis.⁸⁹ No training is available to those currently appointed to act as appropriate adults. If significant improvements are to be brought about to children's experiences of their rights in police questioning, the provision of mandatory, consistent, rights-based training to all those who engage with children during police questioning is very important. Given the specialist nature of this work, such training should be mandatory for members of An Garda Síochána, for lawyers who represent children in the justice system, and for appropriate adults who also play such a vital role in the protection of children's rights in this setting. The CRC Committee has provided guidance on the content of the training that should be provided to professionals working with children in the youth justice system. The Committee is clear that the training should be multidisciplinary in nature and should include information about children's rights under the CRC, as well as:

[E]stablished and emerging information [from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalized groups such as children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities, among other issues].⁹⁰

86 Kilkelly and Forde (n 24).

87 Police and Criminal Evidence Act 1984.

88 UN Committee on the Rights of the Child (n 2).

89 Kilkelly and Forde (n 24).

90 UN Committee on the Rights of the Child (n 2) para 112.

Other studies have also highlighted the importance of ensuring comprehensive training, taking account of the variety of issues which can impact young people in contact with the justice system, and recommending that issues such as trauma are also given consideration in this training.

Inspection and Monitoring

As research has consistently highlighted, effective systems of oversight and redress are essential to ensure that children's rights are respected in practice, and it is equally important that children have access to effective remedies where their rights are breached. The importance of this comes into sharp focus given the concerns raised by children about the inappropriate nature of the conditions of detention and their reports of ill-treatment by members of An Garda Síochána.⁹¹ There may be a number of ways of ensuring that effective systems of oversight are in place. In the first instance, there is a need for regular inspections of all places where children are deprived of their liberty, including in police custody. The CRC Committee highlights that independent and qualified inspectors should be empowered to visit and inspect all places where children are deprived of their liberty, on a regular basis, as well as to carry out unannounced visits.⁹² The General Scheme of an Inspection of Places of Detention Bill was published in 2022 and provides for the establishment of a Chief Inspector of Places of Detention, and for the designation of national preventative mechanisms (NPMs). Ensuring that these bodies have regular access to children in police custody, and are appropriately vetted and trained for such engagement, is important to ensure that these safeguards serve to enhance children's experiences of their rights in police custody in Ireland.

In addition, there is a need to ensure that children have access to effective mechanisms in the event that their rights are breached. The Ombudsman for Children is currently precluded under the Ombudsman for Children Act 2002 from considering such complaints, meaning that children can only complain to the general Garda Síochána Ombudsman Commission (GSOC).⁹³ However, little is known about children's experiences of this mechanism and no information is available explaining whether the mechanism has been adapted to meet children's particular needs and circumstances. It is notable that the CRC Committee has also recently recommended that any limits to the jurisdiction of the Ombudsman should be removed, so that they have clear authority to

91 Kilkelly and Forde (n 24).

92 UN Committee on the Rights of the Child (n 2) para 95.

93 Kilkelly and Logan (n 83).

investigate complaints on all matters affecting children.⁹⁴ No statistics have been published by GSOC on children's use of the complaints mechanism, meaning that research is needed in order to assess how well this mechanism is operating for children and to consider whether it is effective in providing access to justice for children who experience a breach of their rights.

Conclusion

The international standards set out in the CRC, the General Comments of the CRC Committee, the Council of Europe Child-Friendly Justice Guidelines and EU Directive 2016/800 require that special attention is required to ensure that the rights of children who are being questioned by police or who are in police custody are adequately protected. The volume and complexity of these requirements at international level reflect the particular vulnerability of children in this situation and highlight that particular efforts are required to adapt these procedures adequately for children. The Children Act 2001 sets out a number of requirements for the treatment of children in police custody and for the questioning of children. Yet as the diversity in the experiences of children who have been questioned by members of An Garda Síochána, as reported through the Policing Authority study, indicates, there is still significant room for improvement. Overall, then, while the current legislative framework provides a good foundation from which to build, further steps are required to bring Ireland in line with the requirements of international instruments. In particular, more detailed legislative requirements, the development of resources to provide appropriate supports to children during police questioning, increased training for professionals and robust systems of inspection and monitoring are needed so that children's rights in this context are fully respected.

S 70 of the Children Act 2001, in enabling the drafting of regulations related to Part 6 of the Children Act, provides an (as yet unexploited) avenue for the development of more robust provisions designed to ensure that the rights of children are protected in their interactions with Gardaí during the questioning process. This chapter argues that the development of regulations would be a welcome way to increase the protections available for children being questioned by police. Any such regulations could usefully provide for a right to explanation and information, a process for individual assessment of children in police custody, the development of the role of the "appropriate adult," more robust provisions in relation to legal advice, and stricter regulation in relation to the conditions in which children are held in police custody. Establishing regulations such as these would help to bring Ireland much

94 UN Committee on the Rights of the Child (n 16) para 11.

closer to the expectations set out at international level. However, in building on the regulations, a range of practical supports and resources should be introduced, including the provision of training to all professionals working with children, so that Gardaí and professionals working with children in this context are supported to better fulfil their roles in a rights-compliant manner. Finally, ensuring that relevant inspection bodies and complaint mechanisms have strong mandates would help to ensure that avenues for redress are available where children experience breaches of their rights.

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12

PEOPLE WITH INTELLECTUAL DISABILITIES AS ACCUSED PERSONS IN THE IRISH POLICING INTERFACE

*Alan Cusack, Gautam Gulati, Colum P. Dunne,
and Shane Kilcommins*

Introduction

The past three decades have witnessed a discernible growth in academic, political, and procedural interest in the field of intellectual disabilities and adversarial criminal procedure.¹ The ageis for this cultural emphasis has been manifold; comprising a heterogenous mix of both political and psychological imperatives as policymakers and stakeholders across much of the common-law world have demonstrated an increased willingness to depart from established forensic systems in contemplation of emerging advances in the field of psychology.² Most notably, in England and Wales, the mistreatment of two young suspects who confessed under duress to involvement in the death of Maxwell Confait in 1972³ drew widespread media and political attention

1 On this trend, see A Cusack, 'Victims of Crime with Intellectual Disabilities and Ireland's Adversarial Trial: Some Ontological, Procedural and Attitudinal Concerns' (2017) 68(4) Northern Ireland Legal Quarterly 433; L Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 21(3) Legal Studies 353–55; M Burton, R Evans and A Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies* (Home Office 2006) 63; A Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (University of Oxford Centre for Criminological Research 1997) 75.

2 GH Gudjonsson and others, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (HMSO 1993); G Murphy and ICH Clare, 'People with Learning Disabilities as Offenders or Alleged Offenders in the UK Criminal Justice System' (1998) 91(4) Journal of the Royal Society of Medicine 178–82.

3 C Price and J Caplan, *The Confait Confessions* (Marion Boyars 1977).

to the issue of vulnerability to interrogative questioning.⁴ This theme subsequently dominated the Royal Commission on Criminal Procedure Report in 1981 which, in turn, prompted the evolution for the first time of directed, pre-trial legal safeguards for vulnerable suspects in England and Wales.⁵

In Ireland, by contrast, the pace of recognition of the vulnerability of people with intellectual disabilities in the criminal justice pathway has been comparatively slow. Irish policymakers only recently, and in the wake of sustained EU pressure, have taken proactive steps on a legislative basis to reorientate the formalities of Ireland's pre-trial and trial processes in order to demonstrate an increased sensitivity to the needs of crime *victims* with intellectual disabilities.⁶ Meanwhile, the needs of members of this constituency who enter Ireland's criminal process as *suspects* of crime remain, at the time of writing, politically, and procedurally neglected.⁷ Indeed, over a decade after the Commission of Inquiry into the Dean Lyons case,⁸ very little remains known about the status and experience of suspects with intellectual disabilities within the formative stages of Ireland's pre-trial criminal process:

[D]espite the reverential juncture that the police station occupies in Ireland as the confluence site for a series of fundamental evidential, human rights and constitutional values, little is known at the time of writing about the unique challenges which suspects with intellectual disabilities face during their initial interactions with Irish law enforcement officers.⁹

- 4 G Gulati and others, 'Experiences of People with Intellectual Disabilities Encountering Law Enforcement Officials as the Suspects of Crime – a Narrative Systematic Review' (2020b) 71 *International Journal of Law and Psychiatry* 101609.
- 5 Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (HMSO 1981). See generally, R Dehaghani, 'He's Just Not That Vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody' (2016) 55(4) *The Howard Journal* 396–413; R Dehaghani and C Bath, 'Vulnerability and the Appropriate Adult Safeguard: Examining the Definitional and Threshold Changes Within PACE Code C' (2019) 3 *Criminal Law Review* 213–32.
- 6 Cusack (n 1); A Cusack, 'Addressing Vulnerability in Ireland's Criminal Justice System: A Survey of Recent Statutory Developments' (2020) 24(3) *International Journal of Evidence and Proof* 280; S Kilcommins, and M Donnelly, 'Victims of Crime with Disabilities in Ireland: Hidden Casualties in the "Vision of Victim as Everyman"' (2014) 20(3) *International Review of Victimology* 305–25.
- 7 A Cusack, 'An Overview of the Legal Position of Vulnerable Suspects and Defendants in Ireland' (Irish Criminal Justice Agencies Annual Conference, Dublin, 4 June 2021); G Gulati and others, 'Recognising and Responding to Vulnerability: Securing Access to Justice for Vulnerable Accused Persons in Ireland' (2022) 6(2) *Irish Judicial Studies Journal* 77–90.
- 8 G Birmingham, 'Department of Justice, Commission of Investigation into the Dean Lyons Case' at 149 <www.justice.ie/en/JELR/DeanLyonsRpt.pdf/Files/DeanLyonsRpt.pdf> accessed 27 January 2023.
- 9 A Cusack and others, 'Towards Inclusionary Policing: A Critical Inquiry into the Pre-Trial Treatment of Suspects with Intellectual Disabilities in Ireland' (2022) 45(3) *Policing: An International Journal* 421–33, at 422.

In an attempt to address this research lacuna, this chapter surveys Ireland's existing suite of pre-trial procedural safeguards with a view to excavating an overdue understanding of the unique custodial experience of members of this vulnerable constituency.¹⁰ Drawing upon the findings of a series of recent, landmark empirical studies in this field,¹¹ this chapter identifies a number of sites of concern with respect to Ireland's extant pre-trial protocols for recognising and responding to intellectual impairment during the investigative process.¹² In framing these concerns within the potential transformative impact of the forthcoming Garda Síochána (Powers) Bill, this chapter makes a case for an ambitious campaign for legislative and procedural reform that promises to align Irish criminal procedure with the human rights exigencies mandated under international conventions.

The Irish Context

The prevalence rate of intellectual disability within the Irish criminal justice system is currently unknown.¹³ This data deficit, coupled with the reported absence of a targeted support system,¹⁴ has been found to pose a very real risk of trans-institutionalisation for members of this vulnerable constituency.¹⁵ Indeed, this phenomenon has been acknowledged, not only at Governmental level¹⁶ but also by a recently published report by the Garda Síochána Inspectorate which found that 5% of a sample of 318 custody records revealed the presence of an intellectual disability. Moreover, the Inspectorate noted,

10 Cusack (n 7).

11 Gulati and others (n 7); G Gulati and others, 'The Collaborative Development Through Multidisciplinary and Advocate Consensus of an Accessible Notice of Rights for People with Intellectual Disabilities in Police Custody' (2022d) 83 *International Journal of Law and Psychiatry* 101815; G Gulati and others, 'The Evaluation of a Training Course to Enhance Intellectual Disabilities and Mental Health Awareness Amongst General Practitioners Attending Police Stations' [2022] *Irish Journal of Psychological Medicine* 1–2; G Gulati and others, 'Trans-Institutionalisation in Ireland: New and Emerging Congregated Settings for People with Disabilities' (2021a) *Health and Human Rights Journal* <www.hhrjournal.org/2021/08/trans-institutionalisation-in-ireland-new-and-emerging-congregated-settings-for-people-with-disabilities/> accessed 1 January 2022; G Gulati and others, 'Challenges for People with Intellectual Disabilities in Law Enforcement Interactions in Ireland; Thematic Analysis Informed by 1537 Person-Years' Experience' (2021b) 75 *International Journal of Law and Psychiatry* 101683.

12 Cusack and others (n 9).

13 *Ibid.*

14 Mental Health Commission, *Access to Mental Health Services for People in the Criminal Justice System* (Mental Health Commission 2021).

15 Gulati and others (2021a) (n 11); G Gulati and others, 'Intellectual Disabilities in Irish Prisons: Could Article 13 of the UNCRPD Hold the Key?' (2020a) 68 *International Journal of Law and Psychiatry* 101540.

16 Joint Committee on Disability Matters, *Ensuring Independent Living and the United Nations Convention on the Rights of Persons with Disabilities* (House of the Oireachtas 2022).

“20% of the people in custody . . . disclosed that they had poor mental health or a learning difficulty.”¹⁷ Further, the lack of service provision for people with intellectual disabilities in Ireland’s criminal justice system and a need to move discourse towards diversion earlier in the criminal justice pathway has been highlighted by a landmark report by Ireland’s inspector of mental health services.¹⁸

And yet, notwithstanding the emergent political emphasis on diversionary interventions and mechanisms of non-dispositive justice, existing research from Ireland’s penal sphere nevertheless suggests that persons with intellectual disabilities are over-represented at the terminus of Ireland’s criminal justice system.¹⁹ The leading study in this field, for instance, discovered a potential prevalence of 28% of “significant intellectual disability” in Irish prisons.²⁰ This high prevalence rate of intellectual impairment within Irish prisons raises questions, not merely with respect to the level of service provision that is available to support these individuals as they pass through the frontiers of Ireland’s criminal justice apparatus but also with regard to the capacity of Irish criminal justice agencies – including, in particular, serving members of An Garda Síochána – to, at once, recognise and respond appropriately to situations involving a suspect with an intellectual disability.²¹

Though research is sparse in the area, the failure of the Irish legal profession, for example, to understand the difficulties posed by the adversarial criminal justice system for people with disabilities has been noted in Irish victimological discourse.²² At the pre-trial stage of criminal proceedings meanwhile, the clear need to “mainstream” disability awareness training within the Irish police service was recommended as far back as 1996²³ and, once again, in 2018.²⁴ Indeed, the critical importance of recognising the presence of disabilities at the point of contact with police has emerged as a central unifying theme in international literature in this field.²⁵

17 Garda Síochána Inspectorate, *Delivering Custody Services* (Garda Síochána Inspectorate 2021) 47.

18 Mental Health Commission (n 14). See also G Gulati and others (2020a) (n 15).

19 Cusack and others (n 9); Cusack (n 7).

20 M 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).

21 Cusack and others (n 9).

22 Cusack (n 6).

23 Commission on the Status of People with Disabilities, *A Strategy for Equality: Report of the Commission on the Status of People with Disabilities* (Stationery Office 1996) 63.

24 Commission on the Future of Policing, *Report of the Commission on the Future of Policing* (Commission on the Future of Policing in Ireland 2018).

25 See, for instance, Gulati and others (2022) (n 11); Gulati and others (n 4); G Gulati and others, ‘The Experience of Law Enforcement Officers Interfacing with Suspects Who Have an Intellectual Disability – a Systematic Review’ (2020) 72 *International Journal of Law and Psychiatry* 101614.

Perhaps unsurprisingly, the police custody setting has been described as both “frightening and confusing” by people with intellectual disabilities.²⁶ Studies have shown that members of this constituency have reported a paucity of accessible information, procedural and emotional supports, and emphasise communication barriers in their preliminary encounters with law enforcement officials in custody settings.²⁷ These participatory barriers have been recognised by law enforcement officers who, in several studies, have stressed the need for specialised training to overcome the challenges associated with recognising intellectual disability and appropriately supporting and communicating with persons with this impairment.²⁸ Significantly, these experiences are reflected in the leading empirical inquiry into the treatment of suspects with intellectual disabilities in Ireland which found a need for institutional and systemic change to address these barriers:

Protocols need to be developed to support the provision of information and rights in an accessible format (such as easy read leaflets) as well as the provision of support to the PWID [person with intellectual disability] so that they understand critical information such as the reason for arrest, their rights (including the caution) and legal processes. Protocols in respect of the presence of a pre-trial safeguard for vulnerable suspects, similar to the “appropriate adult” facility in England and Wales, and establishment of a “registered intermediary” scheme for both vulnerable victims and suspects as proposed by the National Disability Authority in Ireland (National Disability Authority, 2020) need careful consideration with policies supporting consistent provision.²⁹

As systems are currently structured whereby a suspect’s vulnerability is primarily screened through a risk assessment checklist delivered by officers without tailored disability training,³⁰ there is a very real risk of non-recognition. Consequently – and, as revealed in several other European countries³¹ – there is a wider overarching risk that appropriate safeguards will not be offered to

26 Gulati and others (2021b) (n 11).

27 Gulati and others (n 4).

28 Gulati and others (n 25).

29 Gulati and others (n 11) citing National Disability Authority, *NDA Independent Advice Paper on the Use of Intermediaries in the Irish Justice System* (National Disability Authority 2020).

30 See A Cusack, *Review of An Garda Síochána Custody Record – Risk Assessment Form C.84(a)* (University of Limerick 2020) 1–23.

31 B Linder, N Katona and J Kolda, *Dignity at Trial: Enhancing Procedural Safeguards for Suspects with Intellectual and Psychosocial Disabilities* (Boltzmann Institute of Human Rights 2018).

individuals where necessary in order to protect the procedural fairness and forensic accuracy of the pre-trial process:

There are a range of procedural safeguards that are relevant and potentially available to an accused person with an intellectual disability in Ireland such as those of a responsible adult and the availability of cognitive interviews . . . However, without an emphasis on defining and recognising vulnerability, there is a real risk that the available safeguards may not be applied, thereby compromising the forensic accuracy of the pre-trial process.³²

Significantly, in this regard, it has been shown that the risk of non-recognition of disability can be mitigated primarily by disability awareness training for police.³³ However, there is also a need to update current Irish policy and procedure to enhance recognition of vulnerability as highlighted by the Garda Síochána Inspectorate report:

In the Inspectorate's view a broader and more contemporary definition of vulnerability is needed to ensure that adequate safeguards are put in place to protect the rights of all vulnerable people and to enable them to understand and fully participate in the custody process. However, a new definition alone will not ensure that vulnerabilities are identified. Those performing member in charge duties require a level of awareness of mental health conditions and intellectual disabilities. They must also adopt an inquisitive approach to their assessment of vulnerability of persons in their care, because if vulnerability is not recognised, there is a risk that appropriate safeguards will not be put in place to protect the rights and well-being of some people in custody. While some work has been done with relevant experts, it is important that this results in guidance and training being provided to all members in charge.³⁴

In an advanced effort to respond to this unmet training need, An Garda Síochána launched a disability awareness pilot study for police officers in April 2021.³⁵ Significantly, the design and content of this pilot training scheme were informed by the findings from the leading empirical inquiry into the perceived barriers that confront persons with intellectual disabilities

32 Gulati and others (n 7).

33 Gulati and others (2021b) (n 11); G Gulati and others, 'Human Rights, Public Health, and Disability Awareness Training of Police' [2021f] *Health and Human Rights Journal* <www.hhrjournal.org/2021/12/human-rights-public-health-and-disability-awareness-training-of-police/>.

34 Garda Síochána Inspectorate (n 17) 53.

35 For a detailed exposition of this training programme and its reception, see Gulati and others (2021c) (n 11).

in seeking to access justice in Ireland.³⁶ On the basis of the latter findings, a four-point training model was devised which was intended to equip participants with the knowledge to:

- (i) *Recognise* when a suspect might have an intellectual disability, (ii) Provide *information* to the vulnerable suspect, (iii) Improve *communication* skills including crisis situations, and (iv) *Support* the person with an intellectual disability in custody.³⁷

The training was delivered by a team of medical and legal experts who used an interactive, online seminar format (90-minute duration) with vignettes and video interviews of persons with an intellectual disability in reference to law enforcement interactions.

The success of this quadripartite training model was recently revealed in an empirical evaluation of the pilot programme which noted that

statistically significant improvements were found in participants' self-rated knowledge of intellectual disability, their understanding of the challenges faced by people with intellectual disabilities in law enforcement interactions, their communication skills and their knowledge of how to approach a person with a disability in crisis.³⁸

These findings, it is submitted, are highly apposite in light of the thematic findings from the recent empirical inquiry and provide “an empirically-sound blueprint for addressing the challenges that suspects with an intellectual disability are perceived to currently experience within Ireland’s criminal justice system.”³⁹

In addition, and in a proactive effort to address accessibility concerns raised by Ireland’s Government, An Garda Síochána launched a national review of risk assessment practices in April 2020.⁴⁰ Significantly, this review – which remains ongoing at the time of writing – represents the second major reappraisal of risk assessment practices in Ireland in recent years following the publication of the Smyth Committee’s findings in 2017.⁴¹ While the outcome of the ongoing review is, as of yet, unknown, there is every reason to be

36 Gulati and others (2021b) (n 11).

37 Cusack and others (n 9) 430.

38 Gulati and others (2021c) (n 11).

39 Cusack and others (n 9) 430.

40 Government of Ireland, *A Policing Service for Our Future* (Stationery Office 2018).

41 Smyth Committee, *Advisory Committee on the Garda interviewing of Suspects – Update Report* (Smyth Committee 2017).

optimistic that the review will result in the roll-out of a more ontologically sensitive vulnerability assessment:

Although the precise findings from the ongoing review remain to be seen, early evidence suggests that Irish police risk assessment practices will be re-tailored for the purpose, not singularly of managing risk (through a focus on issues of mental health), but also to facilitate the appropriate identification of suspects with intellectual disabilities at the point of first contact with the Irish criminal justice system. In proposing to elongate Ireland's existing risk assessment protocol so as to accommodate a vulnerability assessment (by including a new section relating specifically to intellectual disability), the review's findings promise to avoid the diagnostic shortcomings historically associated with the exclusive use of risk matrices to identify intellectual disability. . . . Moreover, by mandating a consideration of a suspect's intellectual condition at the time of arrest, the proposed new approach will ensure that members of An Garda Síochána give due consideration to a suspect's eligibility for support under the Custody Regulations at the point of arrest.⁴²

Patently, then, both the mainstreaming of tailored disability awareness training and the anticipated modernisation of custody vulnerability assessment practices by An Garda Síochána promise to significantly improve efforts aimed at securing the early recognition of intellectual impairment within Ireland's pre-trial process. However, it would be misleading to regard these developments as ends in and of themselves. It is submitted that securing a positive recognition of disability is meaningless unless adapted procedures are in place to accommodate identified individuals within the criminal justice system.

Safeguards for Accused Persons

For suspects with intellectual disabilities, the importance of adopting a tailored and calibrated police response which incorporates rigorous procedural safeguards is particularly acute. Studies suggest that any failure to adapt the forensic formalities and communication protocols followed by police at the pre-trial stage of the criminal process to account for the unique needs of these individuals can materially bias the accuracy of any elicited testimony.⁴³

42 Cusack and others (n 9) 428.

43 See, generally, S Parsons and G Sherwood, 'Vulnerability in Custody: Perceptions and Practices of Police Officers and Criminal Justice Professionals in Meeting the Communication Needs of Offenders with Learning Disabilities and Learning Difficulties' (2016) 4 *Disability & Society* 553–72; J Talbot, 'Prisoners' Voices: Experiences of the Criminal Justice System by Prisoners with Learning Disabilities' (2010) 15(3) *Tizard Learning Disability Review*;

In light, then, of the formative influence which pre-trial matters exert over the trajectory of criminal proceedings, the adequacy of Ireland's existing pre-trial procedural landscape merits particular scrutiny. In particular, five central safeguards, which have evolved within Irish criminal procedure over the past four decades for the purpose of vindicating the rights of members of this constituency, demand calibration.

These five safeguards include

1. the right of access to a solicitor;
2. the right to medical assistance;
3. access to specialist interviews;
4. the responsible adult safeguard; and
5. provision of accessible information.

1. Access to a Solicitor

Access to a solicitor while detained in Garda custody is seen as a means of equalising relations between the accused and the state in the detention process. The right to a solicitor was deemed to be constitutional in origin in 1990.⁴⁴ Solicitors play a key role in safeguarding rights, and this is particularly the case with vulnerable defendants. Conway and Daly note:

Whether by preventing false confessions or confessions obtained under oppressive circumstances, the presence of solicitors can contribute greatly to preventing miscarriages of justice. Not only can their presence encourage appropriate police behaviour but, if they have consulted well with a client and notice them deviating substantially from what was said then, they may spot when a client is suggestible or appearing oppressed.⁴⁵

Much progress has recently been made by Irish and European legal scholars in advancing the role and skillset for lawyers assisting accused persons in the police custody setting through training, and, notably with an emphasis on communication skills.⁴⁶ However, the right to the presence of a lawyer during

A Cusack, 'The Pre-Trial Position of Vulnerable Victims of Crime in Ireland' in P Cooper and L Hunting (eds), *Addressing Vulnerability in Justice Systems* (Wildy, Simmonds and Hill Publishing 2018) 185–218; B Tully and D Cahill, *Police Interviewing of People with Mental Disabilities: An Experimental Study* (Police Foundation 1984).

44 *People (DPP) v Healy* (1990) 2 IR 73 (SC).

45 V Conway and Y Daly, 'From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station' (2019) 1 *Irish Judicial Studies Journal* 103–23, 114–15.

46 See A Pivaty and others, 'Contemporary Criminal Defence Practice: Importance of Active Involvement at the Investigative Stage and Related Training Requirements' (2020) 27(1) *International Journal of the Legal Profession* 25–44.

the interrogation phase in Ireland is less clear legally and remains problematic having regard to Strasbourg jurisprudence.⁴⁷

2. Right to Medical Assistance

The right to medical assistance is a safeguard that requires strengthening given the criticisms levelled by the Council of Europe in 2014 which cited a need for adequate training and resourcing of medical practitioners attending Garda stations in Ireland.⁴⁸ There remains a paucity of specialist training programmes in Ireland for doctors attending garda stations and a dearth of service provision when compared to England and Wales.⁴⁹ An empirical pilot evaluation of a disability awareness programme for general practitioners in respect of the Garda interface found scope for increasing confidence around recognition of intellectual disabilities, communication skills, and knowledge of potential safeguards.⁵⁰ An approach using the quadripartite model proposed for training law enforcement officers appears, on the face of it, to have some potential for use with this professional group. The recommendation to strengthen the right to medical assistance with access to doctors who have “adequate expertise on intellectual and psychosocial disabilities” has been highlighted at a European level by an investigation that found a lack of resources and “solid expertise” across a number of jurisdictions.⁵¹

3. Access to Specialist Interviewers

One positive example of a progressive safeguard in Irish policing practice in meeting the needs of accused persons with intellectual disabilities is the modernisation of interview protocols. Following the Commission of Investigation into the Dean Lyons case, and the Morris Tribunal with respect to

47 On this point, see A Cusack and others, ‘Calibrating the Right to Reasonable Access to a Lawyer for Vulnerable Suspects in Ireland’ in R Dehaghani, S Fairclough and L Mergaerts (eds), *Vulnerability, the Accused, and the Criminal Justice System: Multi-Jurisdictional Perspectives* (Routledge, Taylor & Francis 2023).

48 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’ (2014) <<https://rm.coe.int/1680696c9a>> accessed 1 March 2022.

49 G Gulati and others, ‘What Is the Role of Doctors in Respect of Suspects with Mental Health and Intellectual Disabilities in Police Custody?’ [2021] *Irish Journal of Psychological Medicine* 1–6.

50 Gulati and others (2022) (n 11).

51 Linder, Katona and Kolda (n 31).

police investigative practices,⁵² a new interview model – the Garda Síochána Interview Model – was mainstreamed in Irish policing operations, and this includes accommodations for specialist “cognitive interviews” for individuals with intellectual disabilities.⁵³ This forensic model which – it is important to note – is distinct from the interview scheme which is followed for vulnerable victims and witnesses in Ireland,⁵⁴ has been described as “very effective in decreasing suggestibility in vulnerable persons.”⁵⁵ Drawing upon the PEACE method which is followed in England and Wales, the GSIM approach entails a number of reflexive phases which prioritise active listening, empathy, and rapport building:

Interviews, under the model change from confession-seeking to information-gathering spaces. They are conducted in a structured manner, going through the “Generic Phases”: planning and preparing; first contact; rapport building; account of knowledge; assess, corroborate and challenge; and closure. Interviews should be conducted in the same way whether the individual is a suspect, victim or witness with emphasis placed on the specific considerations of the individual being interviewed, including their level of cooperation, intellectual and psychological capacity. There is a competency framework for interviewers, with Gardaí trained to different levels dependent on their involvement in interviewing.⁵⁶

In promising to align Irish investigative interview procedures with international best practice, the roll-out of the GSIM framework has unquestionably represented a positive forensic development. However, at the time of writing, the level of operational implementation of this model – particularly, in the context of interviewing vulnerable suspects – remains unknown owing largely to the absence of accessible, public data on internal training numbers

52 FR Morris, ‘The Interrogation of Suspects in Garda Custody: Report VI, Delivered to the Minister for Justice on 24 April 2008’ <<https://morristribunal.ie/Narrative.asp-ObjectID=310&Mode=0&RecordID=113.htm>> accessed 1 March 2022.

53 G Noone, ‘An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects’ in J Pearse (ed), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (Wiley Blackwell 2015).

54 Vulnerable victims and suspects are, in the main, interviewed by specialist interviewers within An Garda Síochána. A recent study, however, revealed that in certain cases, advice from these specialist interviewers can be sought by members of An Garda Síochána when interviewing vulnerable suspects in accordance with the GSIM approach. See U Kilkelly and L Forde, *Children’s Rights and Police Questioning: A Qualitative Study of Children’s Experiences of Being Interviewed by the Garda Síochána* (Policing Authority 2020).

55 K Sweeney, ‘The Changing Nature of Police Interviewing in Ireland’ (PhD Thesis, University of Limerick 2016).

56 Conway and Daly (n 45) 108.

within An Garda Síochána and the absence of an evaluation of its operational deployment in custody suites across the country.⁵⁷

4. *The Responsible Adult Safeguard*

The presence of a responsible adult, as set out in the 1987 Custody Regulations is an important safeguard in providing practical and emotional support to the person with intellectual disability in custody, though we note a lack of codification around this role as it stands and a lack of implementation data.⁵⁸ Concerningly, through examining custody records, the Garda Inspectorate in 2022 found that:

[S]upport from an adult was rarely obtained for people over the age of 18 who the custody record showed to have a learning difficulty or poor mental health or to have engaged in self-harm. Although a number of those with identified vulnerabilities requested that a third party be notified of their being in custody, few records showed that an appropriate adult had been called.⁵⁹

This finding triangulates the need for enhancing awareness of supports (or safeguards) as embedded in the quadripartite model of disability awareness training as well as a recommendation to develop a code of practice for the responsible adult safeguard in the context of the Garda Síochána (Powers) Bill 2021. Further, it adds weight to a 2020 recommendation by the National Disability Authority in respect of the need for trained intermediaries to enable effective participation for people with disabilities in the Irish criminal justice system. Although intermediaries and appropriate adults have complementary roles, these do not necessarily overlap and both need consideration when addressing the support needs as highlighted by people with intellectual disabilities.⁶⁰

57 According to McNamara, “307 Garda Members Trained to Level 3 of the GSIM as of 2018, While Just 40 Were Trained to Level 4.” See D McNamara, ‘Interviewing Vulnerable Suspects in Ireland’ *Defending Vulnerability Blog* (28 September 2020) <<https://defendingvulnerability.wordpress.com/2020/09/28/interviewing-vulnerable-suspects-in-ireland/>> accessed 27 June 2023.

58 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987; Gulati and others (n 7); Cusack and others (n 9); Kilkelly and Forde (n 54).

59 Garda Síochána Inspectorate (n 17) 54.

60 See Á Kearns and others, ‘Intermediaries in the Justice System for People with Communication Disability: Enacting SDG16 in Ireland, Northern Ireland and New Zealand’ (2022) 24(4) *International Journal of Speech-Language Pathology*; C Holland, P Hutchinson and D Peacock, ‘The Importance of Screening for Speech, Language and Communication Needs (SLCN) in Police Custody’ (2022) 62 *The Howard Journal of Crime and Justice*; P Cooper and D Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ (2013) 1 *Criminal Law Review* 1–19.

5. Provision of Accessible Information

Historically, in Ireland, there persisted a paucity of accessible information for suspects (who were detained in garda custody). Not only was this procedural ableism at odds with practice in some other common-law jurisdictions such as England and Wales, but it was also contrary to Strasbourg jurisprudence.⁶¹ This has recently been addressed through the development of an easy-to-read notice of rights in conjunction with people with lived experience and a multidisciplinary team.⁶² Insights evident from this work included deficiencies in the existing notice of rights in respect of setting out the right to silence more clearly. People with lived experience are unambiguous that this is a document that cannot be simply given to them; it must be accompanied by an explanation. Therefore, there is further intersection with the need for specialised training for law enforcement officers. There are obligations resting on the State to adopt inclusionary communication practices under both national⁶³ and international laws.⁶⁴ This procedural development, once adopted, will seek to further Ireland's progress in respect of these.

Future Directions

Although the foregoing safeguards were long regarded as representing central procedural bulwarks against improper police practice in Ireland, their effectiveness has been shown to falter under scrutiny.⁶⁵ For instance, in *People (DPP) v Darcy*,⁶⁶ an inculpatory statement made by a child with “low intelligence” was deemed to be admissible as evidence in circumstances where it was elicited in contravention of the Custody Regulations. In the circumstances, the Court of Appeal ruled that, in the absence of unfair or oppressive questioning, trial judges in Ireland enjoy a measure of discretion in determining whether or not to admit statements elicited in breach of the Custody Regulations. More recently, Gulati and colleagues discovered an information deficit amongst suspects with intellectual disabilities with regard to the operational formalities of the Irish criminal justice system. Specifically, their analysis yielded “a portrait of a pre-trial landscape that can fail to

61 See, in particular, *ZH v Hungary* App no 28973/11 (ECtHR, 8 November 2012).

62 For a detailed discussion of this project, see Gulati and others (2022d) (n 11).

63 Section 28, Disability Act 2005; section 42, Irish Human Rights and Equality Commission Act 2014.

64 Article 9, UNCRPD; Directive 2012/13/EU on the Right to Information in Criminal Proceedings.

65 On the historical faith placed in the effectiveness of the safeguards enshrined in the Custody Regulations, see Seanad Eireann Debate 113(12) (1 July 1986) <www.oireachtas.ie/en/debates/debate/seanad/1986-07-01/4/> accessed 13 February 2022.

66 *People (DPP) v Darcy* (Unreported, CCA, 29 July 1997).

recognise and adapt to the unique communicational needs of suspects with an intellectual disability.”⁶⁷ This research also outlined

the need for a training programme for law enforcement officers that included skills in recognising people who may have a disability, specific communication strategies and an emphasis on a human rights based approach, informed by the lived experience of people with intellectual disabilities.⁶⁸

Given the foregoing concerns, and in an effort to elevate national custodial practice in light of Ireland’s human rights commitments under international law, a number of recommendations may be made regarding future work in this area. First, improved datasets are needed, both in respect of the prevalence of people with intellectual disabilities in sites of detention in Ireland (including, in particular, police custody suites and prisons), and the perspectives of these individuals as to barriers they may face within the criminal justice system. Second, it is necessary to roll out disability awareness training more widely across Ireland’s criminal justice system. This would be helpful not just for frontline law enforcement officers, but other actors such as the legal profession and doctors who attend Garda stations. Third, a statutory definition of vulnerability and codification of procedures in identifying vulnerability is necessary to ensure recognition. Fourth, safeguards that ensure equal access to justice for people with intellectual disabilities need operationalising and strengthening. In particular, it is submitted that Ireland needs to progress to a position where (i) the legal position in respect of access to a lawyer during interrogation is strengthened; (ii) members of An Garda Síochána and people with disabilities have access to timely, trained medical expertise at the point of arrest and throughout any period of custody; (iii) accused persons receive information in an accessible format in keeping with Ireland’s domestic and international human rights obligations; and (iv) critical sources of support such as the responsible adult are mandated by codes of practice, and any necessary training programmes or funding is provided to ensure access to such supports.

Conclusion

The failure to structure custodial practices to secure a meaningful recognition and procedural response to intellectual impairment not only risks prejudicing the quality of evidence that will be uncovered in an investigation but also risks

67 Cusack and others (n 9) 426.

68 Ibid.

reinforcing traditional constructions of incapacity.⁶⁹ Moreover, from a legal perspective, the adoption of such an approach cannot be reconciled with Ireland's international obligations under both the UN Convention on the Rights of Persons with Disabilities and EU law.⁷⁰ Nor, more significantly, can it be reconciled with the State's obligation to secure a fair trial for every citizen under Article 38.1 of Bunreacht na hÉireann. Against a backdrop of heightening political, media, and legal debate concerning the focus, content, and reach of the terms of the forthcoming Garda Síochána (Powers) Bill, the time is uniquely ripe for Irish policymakers to harness the insights emerging from Irish and international research in this field which can offer a valuable blueprint for procedural reform aimed at aligning Irish criminal procedure with the human rights exigencies mandated under national and international laws.

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69 Cusack (n 1); C Edwards, 'Pathologising the Victim: Law and the Construction of People with Disabilities as Victims of Crime in Ireland' (2014) 29(5) *Disability and Society* 685–98.

70 Directive 2012/13/EU; Recommendation C (2013) 8178/289.

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13

SUSPECTS WITH AUTISM SPECTRUM DISORDER AND THE PRE-TRIAL INVESTIGATIVE INTERVIEW

Lorraine Boran

Introduction

Neurodiversity is a term that refers to natural variation in how young brains develop in childhood.¹ It captures a range of neurodevelopmental conditions, such as the ability to pay attention (Attention-Deficit Hyperactivity Disorder or ADHD), or the ability to communicate, empathise, or display a theory of mind (Autism Spectrum Disorder or ASD). Both conditions can be diagnosed in childhood, or even later in adulthood, and the behaviours that manifest along a continuum and severity, especially for ASD, depend in part on whether intellectual disorder (ID) is also present. As such, ASD can present as a heterogeneous condition, depending on age, social setting, and other confounding factors, such as mental illness or another psychological condition.

Internationally, people with Autism Spectrum Disorder (PwASD) are reported to be disproportionately over-represented in all phases of the criminal justice process, in the pre-trial custody interview and in the prison system.² However, the reported prevalence of ASD in offending cohorts varies widely across age and criminal justice settings.³ Internationally, Railey

- 1 S Baron-Cohen, 'Editorial Perspective: Neurodiversity – a Revolutionary Concept for Autism and Psychiatry' (2017) 58(6) *Journal of Child Psychology and Psychiatry* 744–47.
- 2 C King and GH Murphy, 'A Systematic Review of People with Autism Spectrum Disorder and the Criminal Justice System' (2014) 44 *Journal of Autism and Developmental Disorders* 2717–33. For more, see discussion by King on small and biased samples, and large variability in reported prevalence ranges.
- 3 J Collins and others, 'A Systematic Review of Autistic People and the Criminal Justice System: An Update of King and Murphy' (2014) 53(8) *Journal of Autism and Developmental Disorders* 3151–79.

et al. reported⁴ that the prevalence of PwASD in custody ranged from 0 to 27%, concerningly higher than reported community prevalence of 1–4% of adults.⁵ In the United Kingdom, similarly high prevalence rates for PwASD in custody range from 2 to 6%, again comparatively higher than community prevalence.⁶ In a US study, young PwASD were more likely to be diverted into pre-trial interventions than their offending peers, and less likely to be prosecuted for these offences.⁷ PwASD are also disproportionately confined to maximum security psychiatric units⁸ and over-represented within juvenile offender groups based on retrospective diagnosis.⁹ Prevalence figures within an Irish context are unclear but thought to reflect international trends.¹⁰

PwASD usually receive a diagnosis if problematic symptoms associated with social thinking and communication are not better explained by delayed development or ID.¹¹ That is not to say that there is not a percentage of those PwASD with some level of ID,¹² which can complicate a diagnosis of

- 4 KS Railey, A Love and JM Campbell, 'A Scoping Review of Autism Spectrum Disorder and the Criminal Justice System' (2021) 8 *Review Journal of Autism and Developmental Disorders* 118–44. See AX Rutten, RRJM Vermeiren and C Van Nieuwenhuizen, 'Autism in Adult and Juvenile Delinquents: A Literature Review' (2017) 11(1) *Child and Adolescent Psychiatry and Mental Health* 1–12, for reported prevalence of 2 to 18% in forensic settings.
- 5 TS Brugha and others, 'Epidemiology of Autism Spectrum Disorders in Adults in the Community in England' (2011) 68(5) *Archives of General Psychiatry* 459–65. Note that global prevalence is estimated at just under 1%, see M Elsabbagh and others, 'Global Prevalence of Autism and Other Pervasive Developmental Disorders' (2012) 5(3) *Autism Research* 160–79.
- 6 L Robinson and others, 'Evaluation of a Screening Instrument for Autism Spectrum Disorders in Prisoners' (2012) 7(5) *PLoS One* e36078; P Scragg and A Shah, 'Prevalence of Asperger's Syndrome in a Secure Hospital' (1994) 165(5) *The British Journal of Psychiatry* 679–82.
- 7 CA Cheely and others, 'The Prevalence of Youth with Autism Spectrum Disorders in the Criminal Justice System' (2012) 42(9) *Journal of Autism and Developmental Disorders* 1856–62.
- 8 DJ Hare and others, *A Preliminary Study of Individuals with Autistic Spectrum Disorders in Three Special Hospitals in England* (National Autistic Society/Dept of Health, London 2000).
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- 10 N Moloney and G Gulati, 'Autism Spectrum Disorder and Irish Prisoners' (2022) 39(3) *Irish Journal of Psychological Medicine* 321–23. Also, see OP O'Sullivan, 'Autism Spectrum Disorder in Prison and Secure Care' (2022) 39(3) *Irish Journal of Psychological Medicine* 324–26.
- 11 JH Miles and others, 'Essential Versus Complex Autism: Definition of Fundamental Prognostic Subtypes' (2005) 135(2) *American Journal of Medical Genetics Part A* 171–80.
- 12 A Thurm and others, 'State of the Field: Differentiating Intellectual Disability from Autism Spectrum Disorder' (2019) 10 *Frontiers in Psychiatry* 526.

ASD and impact the range and severity of symptoms experienced. Mirroring the concerning over-representation of PwASD in the criminal justice system, people with Intellectual Disorder (PwID) are disproportionately over-represented in pre-trial custody interviews¹³ and the prison system.¹⁴ We also know that young PwID living independently with varying degrees of social support can experience more contact with the criminal justice system,¹⁵ but it would appear that those PwID also having a diagnosis of ASD are actually less likely to be involved with the law in this way.¹⁶

Much of the prevalence research has sought to establish the link between ASD and offending behaviour – does the presence of an ASD diagnosis or ASD features render one at risk for certain types of offending behaviour?¹⁷ Why do upward of 20% of individuals with ASD report being stopped and questioned by police (North America;¹⁸ Canada)¹⁹ Not all research has reported high prevalence or greater likelihood of offending if the individual scores high on ASD features,²⁰ due in part to variability in ASD and comorbidity with other issues including ID, and psychiatric conditions. In fact, a 2021 study by Yu et al. reported virtually no difference in offending rates for young people with

- 13 G Murphy, 'People with Intellectual and/or Developmental Disabilities in the Criminal Justice System' (2019) 63(7) *Journal of Intellectual Disability Research* 631. See also S Young and others, 'The Effectiveness of Police Custody Assessments in Identifying Suspects with Intellectual Disabilities and Attention Deficit Hyperactivity Disorder' (2013) 11(1) *BMC Medicine* 1–11.
- 14 G Gulati and others, 'Intellectual Disability in Irish Prisoners: Systematic Review of Prevalence' (2018) 14(3) *International Journal of Prisoner Health* 188–96; M Hellenbach, 'Learning Disabilities and Criminal Justice: Custody Sergeants' Perceptions of Alleged Offenders with Learning Disabilities' (2012) 40(1) *British Journal of Learning Disabilities* 15–22.
- 15 Y Lunsky, P Raina and J Jones, 'Relationship Between Prior Legal Involvement and Current Crisis for Adults with Intellectual Disability' (2012) 37(2) *Journal of Intellectual and Developmental Disability* 163–68.
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- 17 CE Robertson and JA McGillivray, 'Autism Behind Bars: A Review of the Research Literature and Discussion of Key Issues' (2015) 26(6) *The Journal of Forensic Psychiatry & Psychology* 719–36.
- 18 J Rava and others, 'The Prevalence and Correlates of Involvement in the Criminal Justice System Among Youth on the Autism Spectrum' (2017) 47(2) *Journal of Autism and Developmental Disorders* 340–46.
- 19 A Tint and others, 'Correlates of Police Involvement Among Adolescents and Adults with Autism Spectrum Disorder' (2017) 47(9) *Journal of Autism and Developmental Disorders* 2639–47.
- 20 Rutten, Vermeiren and Van Nieuwenhuizen (n 4).

ASD, compared to their peers with an ID or neurotypical peers.²¹ Older adults with ASD were less likely to have contact with the criminal justice system compared to their peers. For the minority that offend though, ASD features can be a causal factor precipitating contact with police in the first instance.²²

This chapter focuses on pre-trial, police interviews with suspects with ASD (SwASD). While interview techniques, such as rapport building, asking open-ended questions, and supportive questioning to aid recall, have been designed to reduce the risk of “interrogative pressure” that can result in false confessions, SwASD may be uniquely vulnerable during police interviews. ASD can negatively impact an individual’s ability to process and recall information about social contexts (including personally witnessed events), communicate with others in social contexts (literal interpretation, social naivety, and trusting behaviour), and for some, reason coherently and regulate emotions. This chapter first provides contextual information on interrogative pressure and ASD, before examining psychological and legal definitions of vulnerability. It then sets out some patterns emerging from international literature in relation to SwASD, before exploring the pre-trial interview, rights, and safeguards. In concluding the chapter looks to future justice issues in neurodiversity and neurolaw.

Context

Interrogative Pressure (IP) is “a psychological vulnerability”²³ and is measured by a psychometric tool that taps into psychological suggestibility – acceptance of misinformation during the interview as a result of questioning tactics, negative feedback, or a change in responding from original statements made, in response to perceived negative feedback. Prior work has demonstrated an association between interrogative suggestibility and psychological features such as “intensely negative life events (iNLEs),”²⁴ neuroticism (negative affect including anxiety/depression, hostility, self-consciousness, and vulnerability),²⁵ compliance (adaptive learned response to expected interpersonal conflict), and avoidant or anxious attachment (maladaptive

21 Y Yu and others, ‘Young Adults with Autism Spectrum Disorder and the Criminal Justice System’ [2021] *Journal of Autism and Developmental Disorders* 1–13.

22 Tint and others (n 19).

23 GH Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (John Wiley & Sons 2003).

24 KE Drake, ‘Interrogative Suggestibility: Life Adversity, Neuroticism, and Compliance’ (2010) 48(4) *Personality and Individual Differences* 493–98, at 493.

25 P T Costa and RR McCrae, ‘Normal Personality Assessment in Clinical Practice: The NEO Personality Inventory’ (1992) 4(1) *Psychological Assessment* 5.

interpersonal style).²⁶ These same psychological risk factors for interrogative suggestibility are observed in ASD and may, in part, explain why SwASD are at increased risk of IP. People with ASD tend to experience greater negative life events (such as “social victimisation”),²⁷ to the extent that it mirrors post-traumatic stress disorder (PTSD). Similarly, neuroticism is associated with clinically significant features of Autism and Attention-Deficit Disorder²⁸ – thought to share similar causal factors that drive neurodevelopmental disorder. This also includes trait anxiety, a psychological feature that is more likely to be high in ASD cohorts compared to their peers.²⁹ When considering compliance from an investigative interview perspective, and with adult ASD suspect cohorts, the picture is quite mixed, with some research pointing to a real risk of psychological compliance during the interview,³⁰ and other studies failing to replicate this risk.³¹

As a broad group of spectrum disorders, PwASD can experience vulnerability as:

suspects because they are likely to experience difficulty with time relationships, problems in differentiating their own action from those of others, to misinterpret what they see or hear, to function poorly in unfamiliar environments, and to misjudge relationships in formal interviews (resulting in incautious frankness, disclosure of private fantasies, etc.), show undue compliance and rigidly stick to an account once it has, in their view, become established, and use words without fully understanding their meaning.³²

26 KE Drake, ‘The Psychology of Interrogative Suggestibility: A Vulnerability During Interview’ (2010) 49(7) *Personality and Individual Differences* 683–88.

27 N Haruvi-Lamdan and others, ‘Autism Spectrum Disorder and Post-Traumatic Stress Disorder: An Unexplored Co-Occurrence of Conditions’ (2020) 24(4) *Autism* 884–98 at 884.

28 SH Park and others, ‘Neuroticism and the Overlap Between Autistic and ADHD Traits: Findings from a Population Sample of Young Adult Australian Twins’ (2017) 20(4) *Twin Research and Human Genetics* 319–29.

29 R Jolliffe, D Adams and K Simpson, ‘Trait Anxiety in Individuals on the Autism Spectrum: A Systematic Review’ (2023) 10 *Review Journal of Autism and Developmental Disorders* 523–45.

30 AS North, AJ Russell and GH Gudjonsson, ‘High Functioning Autism Spectrum Disorders: An Investigation of Psychological Vulnerabilities During Interrogative Interview’ (2008) 19(3) *The Journal of Forensic Psychiatry & Psychology* 323–34.

31 KL Maras and DM Bowler, ‘Brief Report: Suggestibility, Compliance and Psychological Traits in High-Functioning Adults with Autism Spectrum Disorder’ (2012) 6(3) *Research in Autism Spectrum Disorders* 1168–75.

32 D Allen and others, ‘Offending Behaviour in Adults with Asperger Syndrome’ (2008) 38(4) *Journal of Autism and Developmental Disorders* 748–58, 749.

Psychological issues to do with perception, recall, and reconstruction of events, and how to communicate, both in an unfamiliar environment and with unfamiliar people, can trigger vulnerabilities for SwASD with regard to interrogative pressure, and the risk of compromising the evidential process. These all have impacts on access to justice and effective participation in the pre-trial process.

Jaarsma and Welin³³ argue that high-functioning ASD “should neither be regarded as a disorder or a disability nor as an undesirable condition per se, but rather as a condition with a particular vulnerability.” Vulnerability is a heterogeneous term with no agreed definition³⁴ that can invoke negative connotations associated with the medical model of deficit, including dependence, helplessness, physical and decisional incapacity, risk of harm, manipulation or exposure, victimhood, and weakness.³⁵ In contrast, a focus on dignity and human rights can re-frame the discussion of vulnerability in terms of fundamental freedoms and liberty,³⁶ and so, the use of the term vulnerability can operate either as a disempowering factor or as an empowering factor, respectively.³⁷ Within the context of legal psychology, vulnerability is more narrowly defined as “psychological vulnerability” within the context of a pre-trial interview with police, where the suspect has a mental disorder, or either a mental state or intellectual impairment.³⁸ The main concern about suspect vulnerability in the interview situation is the increased likelihood of making a false confession due to a host of factors that may be related to the mental disorder or state in question, and/or the impact of interrogative pressure to comply and avoid detention, confrontation, and anxiety.³⁹ Clearly, where an individual is deemed vulnerable and at risk of manipulation (whether intended or not), false confession, misunderstanding the nature of the interview, being unable to give effect to the right to silence, and so on,

33 P Jaarsma and S Welin, ‘Autism as a Natural Human Variation: Reflections on the Claims of the Neurodiversity Movement’ (2012) 20 *Health Care Analysis* 20–30, 22.

34 R Bull, ‘The Investigative Interviewing of Children and Other Vulnerable Witnesses: Psychological Research and Working/Professional Practice’ (2010) 15(1) *Legal and Criminological Psychology* 5–23.

35 Examples taken from, B Misztal, *The Challenges of Vulnerability: In Search of Strategies for a Less Vulnerable Social Life* (Palgrave Macmillan 2011) 31. See Chapter 3 in this volume.

36 BA Misztal, ‘The Idea of Dignity: Its Modern Significance’ (2013) 16(1) *European Journal of Social Theory* 101–21.

37 VE Munro and J Scoular, ‘Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK’ (2012) 20 *Feminist Legal Studies* 189–206.

38 GH Gudjonsson, ‘Psychological Vulnerabilities During Police Interviews: Why Are They Important?’ (2010) 15(2) *Legal and Criminological Psychology* 161–75.

39 *Ibid.*

there is a real risk of unequal access to justice and miscarriage of justice for those individuals.

Capability is the flip side of vulnerability as it focuses on the capacity, reserve, and spared abilities of an individual to engage and perform, despite the presence of vulnerability. This concept is interrogated within the medical literature in terms of compensatory function and cognitive reserve in the face of mental disorder and pathology.⁴⁰ From the cognitive reserve literature in particular, the presence of progressive (developing) or acquired pathology, injury, or disorder does not necessarily manifest as a behavioural problem or symptom in the same way in any two individuals. An individual's lifetime experience of education, work, hobbies, friendships, and support – basically social “brain” capital – can protect against the expression of the disorder and maintain cognitive function. The social literature refers to individual difference in resilience or capacity factors (mental health) and the legal instruments that enable an individual to fully engage and be capable.⁴¹ For example, PwASD in custody or being interviewed by police using a method of supportive questioning can recall episodes from witnessed events as accurately as their peers.⁴² More recently, within the ASD and terrorism literature, resilience has been a focal point in potentially guiding targeted ASD-specific supports and diversion programmes.⁴³

Psychological and Legal Definitions of Vulnerability

Vulnerability can be more narrowly defined as “psychological vulnerability” within the context of a pre-trial interview with police, where the suspect has a mental disorder, or either a mental state or intellectual

40 For example, see D Barulli and Y Stern, ‘Efficiency, Capacity, Compensation, Maintenance, Plasticity: Emerging Concepts in Cognitive Reserve’ (2013) 17(10) *Trends in Cognitive Sciences* 502–9.

41 This conceptual relationship was outlined in J Simon and others, ‘Impacts of the Covid-19 Lockdown and Relevant Vulnerabilities on Capability Well-Being, Mental Health and Social Support: An Austrian Survey Study’ (2021) 21(1) *BMC Public Health* 1–12. Reference to the individual difference aspect of capability can be found in A Sen, ‘Capability and Well-Being’ in M Nussbaum and A Sen (eds), *The Quality of Life* (Clarendon Press 1993) 30–53. Reference to the legal processes that can support capabilities can be reviewed in P Anand and others, ‘COVID-19 as a Capability Crisis: Using the Capability Framework to Understand Policy Challenges’ (2020) 21(3) *Journal of Human Development and Capabilities* 293–99.

42 JE Norris and K Maras, ‘Supporting Autistic Adults’ Episodic Memory Recall in Interviews: The Role of Executive Functions, Theory of Mind, and Language Abilities’ (2022) 26(2) *Autism* 513–24.

43 Z Al-Attar, ‘Autism Spectrum Disorders and Terrorism: How Different Features of Autism Can Contextualise Vulnerability and Resilience’ (2020) 31(6) *The Journal of Forensic Psychiatry & Psychology* 926–49.

impairment⁴⁴ that renders them at risk of coercion, interrogative pressure, or falsely confessing.⁴⁵ Where an individual is deemed vulnerable, there is a real risk of unequal access to justice and miscarriage of justice for those individuals. The vulnerability literature and best practice models of Appropriate Adult safeguards (UK) bring together disability issues regarding access to justice and metrics on what works in the interest of the person and the justice system, and what does not work. Neurodiverse suspects are at increased risk of making a false confession during a suspect interview.⁴⁶ More research is needed to tease out the barriers, challenges, and supports required for neurodiverse suspects during a suspect interview, and guiding principles upon which to safeguard vulnerabilities where a disorder or disability has been established, and indeed, how to respect and protect the rights of an individual who identifies as different in this situation. Little work has been done to date in an Irish context to ascertain the barriers and challenges of SwASD, specifically when interfacing with the Irish police (An Garda Síochána).

Psychological vulnerabilities may manifest as part of a comorbid diagnosed mental disorder (e.g. learning disorder, psychiatric disorder) that may compound communication impairments in the interview setting; and this can overlap with or be separate from an intellectual function impairment, ranging from low to high impairment across the Autism spectrum, impacting on communication, language, and cognitive functioning. Personality factors can also be a source of vulnerability, and within the Gudjonsson model, map onto suggestibility, compliance, and acquiescence (see Table 13.1 for more details). Risk of suggestibility to mis- and dis-information is concerning in a police interview, but some work reports that it may not be manifest for SwASD.⁴⁷ More concerning, may be the risk of complying with questioning, orders, or requests, and this can in turn impact the individual's right to stay silent when questioned. An additional vulnerability is the risk of agreeing with an interviewer's statement, in an attempt to please, or avoid confrontation. The latter is also a vulnerability that may manifest itself in SwASD.⁴⁸

44 Gudjonsson (n 38).

45 Ibid.

46 GH Gudjonsson, RA Gonzalez and S Young, 'The Risk of Making False Confessions: The Role of Developmental Disorders, Conduct Disorder, Psychiatric Symptoms, and Compliance' (2021) 25(5) *Journal of Attention Disorders* 715–23.

47 Maras and Bowler (n 31).

48 M Woodbury-Smith and K Dein, 'Autism Spectrum Disorder (ASD) and Unlawful Behaviour: Where Do We Go from Here?' (2014) 44 *Journal of Autism and Developmental Disorders* 2734–41.

TABLE 13.1 Gudjonsson Model of Vulnerability, Interview Concerns, and Manifestation in the Suspect With ASD

<i>Vulnerability Dimension</i>	<i>Suspect Interview Concern</i>	<i>How It Can Manifest in ASD</i>
<i>Psychological Characteristics and Individual Difference⁴⁹</i>		
Mental Disorder (e.g. Psychiatric or Learning Disorder, Comorbidities, Anxiety, and Depression).	Communication ability (interview question and response) and Social Cognition.	Various, depending on disorder.
Intellectual Function (e.g. Low or impaired intellectual function).	Communication ability; Social Cognition.	Impaired thinking; language, and cognitive deficits.
Individual Difference and Personality. ⁵⁰	Suggestibility. Compliance (behavioural response/ personality approach).	Error in recall due in part to suggestive influence, ⁵¹ also related to mis- and dis-information – this may manifest in ASD to some extent. Comply ⁵² with demands or requests for information or to act in a particular way – this may manifest in ASD due in large part to low self-esteem, ⁵³ as well as anxiety and other factors.

(Continued)

49 Dual arm of Gudjonsson Model of Vulnerability based on a case study of ADHD, see GH Gudjonsson and S Young, ‘An Overlooked Vulnerability in a Defendant: Attention Deficit Hyperactivity Disorder and a Miscarriage of Justice’ (2006) 11(2) *Legal and Criminological Psychology* 211–18.
 50 For suggestibility and compliance, factors such as intellectual function and memory recall can differentially impact, see GH Gudjonsson, ‘The Effects of Intelligence and Memory on Group Differences in Suggestibility and Compliance’ (1991) 12(5) *Personality and Individual Differences* 503–5.
 51 GH Gudjonsson, *The Gudjonsson Suggestibility Scales* (Psychology Press 1997).
 52 Anxiety, Self-Esteem and other factors can predict greater compliance in many populations, see GH Gudjonsson and others, ‘The Relationship of Compliance with anxiety, Self-Esteem, Paranoid Thinking and Anger’ (2002) 8(2) *Psychology, Crime and Law* 145–53.
 53 RJ Chandler, A Russell and KL Maras, ‘Compliance in Autism: Self-Report in Action’ (2019) 23(4) *Autism* 1005–17.

TABLE 13.1 (Continued)

<i>Vulnerability Dimension</i>	<i>Suspect Interview Concern</i>	<i>How It Can Manifest in ASD</i>
	Acquiescence	Likely to agree with statements regardless of content ⁵⁴ due to a wish to please or motivation to terminate an interview – this may manifest in ASD to some extent. ⁵⁵
<i>Mental State</i>		
Mental State	Internal (Related to Psychiatric conditions such as Mood disorder Anxiety, Stress, or Distress) or External factors (intoxication; drug action; environment (negative life event)) that alter mental state.	Various, depending on mental state.

54 GH Gudjonsson, 'The Relationship Between Interrogative Suggestibility and Acquiescence: Empirical Findings and Theoretical Implications' (1986) 7(2) Personality and Individual Differences 195–99.

55 Woodbury-Smith and Dein (n 48).

The International Context Considered: Patterns Emerging From Systematic Literature

Effective participation and access to the pre-trial phase are protected by normative legal doctrine in the form of the fundamental right to a fair trial. However, the descriptive experiences of those PwASD during the pre-trial phase raise serious concerns for effective participation. Maras and Bowler profiled the likely cognitive vulnerabilities that PwASD may experience as an eyewitness with a particular emphasis on the factors that impact on the recall of personally experienced events.⁵⁶ In this spare-impair profile, memory of facts or semantic memory is typical, but the personally experienced conscious memory or “autonetic awareness” of witnessing, doing, or being involved in an event is compromised. The latter impairment can manifest as problems recalling personal events in an interview. Similarly, spared ability to recall fine level of detail, but inability to recall the overall gist or context, is another marker of PwASD cognitive impairment.

Does this mean that SwASD are more likely than others to succumb to interrogative pressures of a custody interview? Current understanding of the lived experience of SwASD would suggest that this is not a simple question. Consensus in the research suggests that compliance and poor personalised memory may be risk factors for SwASD during questioning, while other aspects of vulnerability, including suggestibility, are less apparent. Compliance for SwASD can take the form of avoidance of confrontation, eagerness to please, and susceptibility to be manipulated or pressured to respond.⁵⁷ In a non-forensic study, Chandler et al. reported evidence of increased compliance to an unreasonable request in a sample of adults with ASD.⁵⁸ The authors noted that their sample also experienced higher levels of anxiety and lower self-esteem scores, compared to an earlier Maras and Bowler study reporting no difference in compliance between ASD and controls. While factors such as impulsivity and low confidence in one’s memory are predictive of compliance and interrogative pressure in suspects with Attention-Deficit Hyperactivity Disorder (ADHD),⁵⁹ negative affect (paranoia, anxiety, and depression) is a key risk factor for compliance and susceptibility to interrogative pressure in SwASD.

56 KL Maras and DM Bowler, ‘Eyewitness Testimony in Autism Spectrum Disorder: A Review’ (2014) 44(11) *Journal of Autism and Developmental Disorders* 2682–97, 2683.

57 North, Russell and Gudjonsson (n 30).

58 Chandler, Russell and Maras (n 53).

59 GH Gudjonsson, ‘Interrogative Suggestibility and Compliance’ in AM Ridley, F Gabbert and DJ La Rooy (eds), *Suggestibility in Legal Contexts: Psychological Research and Forensic Implications* (Wiley 2013) 45–61.

Suggestibility is low risk for SwASD; however, compliance and recall of personalised experiences are vulnerability markers, in the broader literature.

The Pre-Trial Interview and Rights

Central to a free society that upholds legal norms is the fundamental right to access its criminal justice system that operates along a continuum from early pre-trial investigative and charge phases to later trial and post-trial sentencing (prison, hospital order), release, risk management, and monitoring phases, to re-admittance to the system phase triggered by violations of probation or parole conditions, for some. What an effective “right to access the system” actually means depends in part on the procedural stage at which the person is involved in the system (pre-trial, trial, post-trial), their role (victim, suspect, accused, or defendant, juror), and the setting (custody suite, courtroom, prison cell), as well as the actors (police officers, lawyers, judges, support persons), surrounding the phase of involvement. Access can be operationalised as:

- *physical* (entry access of the person and their assistive devices to a location, be it physical, or in less frequent cases, using remote technology for virtual hearings; also how a person may be physically controlled in the setting);
- *cognitive* (access to relevant visual and verbal information to assist the person in the legal decision-making context so that they can respond to questions or remain silent, direct legal representation, and make informed decisions); and
- *social* (access to people such as officers of the justice system that may be part of their representation, support with communication, or actors that may prosecute and sentence).⁶⁰

Facilitating access to the criminal justice system, and any barriers to access, impact upon an individual’s right to participate effectively in criminal proceedings involving themselves.

Participatory rights are recognised under the right to a fair trial as enshrined in Article 6 of the European Convention of Human Rights. They can broadly fall into passive participatory rights (present at trial and following it, for the purpose of understanding what is happening, for example) or more active participatory rights (directing legal counsel and challenging

60 A similar definition focusing on access to systems, procedures, information, and locations. See S Ortoleva, ‘Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System’ (2010) 17 ILSA Journal of International and Comparative Law 281.

what is put to them, for the purposes of contributing to the trial process and outputs). The passive model of participation stems from the adversarial procedural model⁶¹ where the defendant does not have to prove their innocence, but rather the burden of proof of guilt lies with the prosecution, and procedural safeguards are in place to promote evidentiary reliability, and fairness between both sides. Access to effective legal representation can mean that the defendant's positive defence or challenge to the prosecution can be done through legal representation without an "active" role on their part. However, active participation refers to the defendant's more effortful input into providing information (answers, evidence, directions) to legal representation, and an inability to do so may introduce unfairness into the trial process, and erode associated access rights, including the right not to speak (silence), the right not to self-incriminate, etc.

The distinction between passive and active participation has been noted elsewhere within the trial process⁶² but, to the knowledge of the author, has not yet been examined in detail in the pre-trial process, apart from the requirement to disclose one's case ahead of trial, and how that may negatively impact upon having access to a fair trial.⁶³ Barriers to accessing justice at any point along the continuum of pre-, per-, and post-trial phases pose a serious risk to the right to a fair criminal trial,⁶⁴ as outlined in international,⁶⁵ European,⁶⁶ and domestic legal instruments.⁶⁷ This right can be further specified in terms of access to a public, independent, and impartial court as established by law, grounded in moral, public order and national security reasons,

61 SJ Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Bloomsbury Publishing 2007).

62 A Owusu-Bempah, 'Understanding the Barriers to Defendant Participation in Criminal Proceedings in England and Wales' (2020) 40(4) *Legal Studies* 609–29, at 611 n13.

63 A Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2016).

64 D Harris, 'The Right to a Fair Trial in Criminal Proceedings as a Human Right' (1967) 16(2) *International & Comparative Law Quarterly* 352–78.

65 Universal Declaration of Human Rights 1948; and, the International Covenant on Civil and Political, or ICCPR 1966, Article 14. A Clooney and P Webb, *The Right to a Fair Trial in International Law* (OUP 2021). For more on disability, and access to justice, later sections will examine the 2006 Convention on the Rights of People with Disabilities, Article 13. D Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Brill 2021).

66 Applicability of Article 6 to the pre-trial phase depends in part on the remedies available domestically. For more, see D Vitkauskas and G Dikov, *Protecting the Right to a Fair Trial Under the European Convention on Human Rights* (Council of Europe 2012) 17 <www.csm.org.pt/wp-content/uploads/2017/11/Protecting-the-right-to-a-fair-trial-under-the-european-convention-on-human-rights.pdf> accessed 17 July 2023.

67 Irish Constitution, Article 40.

and in the broader interests of justice.⁶⁸ Where a person has been accused of a criminal offence, these rights further extend to being informed of the charge that has been brought against them, and this includes where it is communicated in a way that the person “understands” the “nature and cause” of the charge or accusation;⁶⁹ the right to legal assistance and to prepare a defence; the right of cross-examination and, to have admitted eyewitness and expert testimony that goes to the defence; and the right against self-incrimination.⁷⁰ The latter right is of particular importance, as it is central to fair procedure⁷¹ where one is not compelled to answer questions or where safeguards are in place to limit the extent to which an adverse inference can be drawn from an individual’s silence⁷² in the first place. Adverse inference can erode the presumption of innocence and shift the burden of proof onto the accused or defendant.⁷³

Recent work details concerning facts about the involvement of SwASD with the criminal justice system,⁷⁴ from serious communication barriers with the police, stemming, in part, from lack of trust in the interview process and distress at interview, to also cognitive issues to do with processing the information shared. Police perceptions of the Appropriate Adult (AA) safeguard in the United Kingdom have been mixed, with a significant minority indicating that they were unhelpful for the SwASD,⁷⁵ but pointing out that family members and others such as key workers familiar with the suspect were helpful. Table 13.2 maps aspects of ASD (from how an individual senses their environment, to how they interact with, and understand, actors in their social environment) to how it can manifest as a concern in the pre-trial interview, and how this in turn runs the risk of interrogative pressure due to psychological vulnerabilities, and potentially erodes important rights, such as the right to silence and protection against self-incrimination.

68 Vitkauskas and Dikov (n 66) 9.

69 Ibid.

70 JE Veas, ‘A Comparative Analysis of the Case Law of the European Court of Human Rights on the Right Against Self-Incrimination’ (2022) 8 *Revista Brasileira de Direito Processual Penal* 869–901.

71 *John Murray v. United Kingdom* [1996] ECtHR no 18731/91, 45.

72 A Beazley and A Pivaty, ‘The Right to Silence in Pre-Trial Investigations’ (2021) 12(3) *New Journal of European Criminal Law* 325–27.

73 A Pivaty and others, ‘Opening Pandora’s Box: The Right to Silence in Police Interrogations and the Directive 2016/343/EU’ (2021) 12(3) *New Journal of European Criminal Law* 328–46.

74 R Slavny-Cross and others, ‘Are Autistic People Disadvantaged by the Criminal Justice System? A Case Comparison’ 27(5) *Autism* 1438–1448 <https://doi.org/10.1177/13623613221140284>.

75 L Crane and others, ‘Experiences of Autism Spectrum Disorder and Policing in England and Wales: Surveying Police and the Autism Community’ (2016) 46(6) *Journal of Autism and Developmental Disorders* 2028–41.

TABLE 13.2 Mapping of ASD Features, Manifestations During a Pre-Trial Interview, and Possible Impacts on the Evidentiary Process

<i>Domain of Interest</i>	<i>Manifestation</i>	<i>Interview Concerns</i>	<i>Interrogative Pressure (IP)</i>	<i>Procedural/Rights-based Concerns</i>
Sensation and Perception	Hypo- or hyper-sensitivities to environmental stimuli; can have resultant stress responses and emotional dysregulation (“meltdown”); ⁷⁶ proximity issues with respect to sitting close to interviewers; unusual interest in sensory environment	Safety concerns for all parties; misreading of suspect responses by custody officers as guilt. Indicators (eye gaze avoidance), aggressive or anti-authoritarian behaviour (“meltdown” ⁷⁷ with violence, or “shutdown” without violence), disinterestedness (coping behaviours such as humming or rocking or “stimming”), ⁷⁸ sensory arrangement at the interview suite including seating, tables, interviewers and others present – “high-impact” environment	Managing sensory issues can reduce anxiety and risk of IP ⁷⁹	Risk of inadvertent confession, right to silence, and adverse inferences, due to probable link between sensory issues and aberrant cognitive processing ⁸⁰

(Continued)

76 For example, D Denenburg and others, *Been There. Done That. Try This!: An Aspie’s Guide to Life on Earth* (Jessica Kingsley Publishers 2014).
 77 Ibid.
 78 P Sims, *Autism, Sensory Differences and Criminal Justice* (National Autistic Society 2016) <www.autism.org.uk/advice-and-guidance/professional-practice/sensory-criminal-justice> accessed 17 July 2023.
 79 AC Salerno-Ferraro and RA Schuller, ‘Perspectives from the ASD Community on Police Interactions: Challenges & Recommendations’ (2020) 105 *Research in Developmental Disabilities* 103732.
 80 T Falck-Ytter, C Carlström and M Johansson, ‘Eye Contact Modulates Cognitive Processing Differently in Children with Autism’ (2015) 86(1) *Child Development* 37–47.

TABLE 13.2 (Continued)

<i>Domain of Interest</i>	<i>Manifestation</i>	<i>Interview Concerns</i>	<i>Interrogative Pressure (IP)</i>	<i>Procedural/Rights-based Concerns</i>
Memory	Spare-impair profile with typical semantic recall, but atypical and poor personally experienced recall; typical or above average recall of fine/local detail, but atypical and poor recall of gross/global gestalt or context	Poor recall of autobiographical or personally witnessed events during questioning with potential impacts on credibility as a witness	Risk of compliance; recall issues	Risk of procedural violations including right to silence – false statements, adverse inferences
Communication	Social naivety and vulnerability ⁸¹ (trusting behaviours); literal interpretation and poor metaphor interpretation; lack of emotional intonation; problems with turn-taking and reciprocity in conversation; default to unusual rituals or (repetitive) word usage; difficulties with language production and comprehension (spectrum)	Interview question framing, timing should be critically considered; avoid use of metaphors and reliance on emotive words; avoid questions that prime abstraction and inference; avoid priming negative stereotypes and greater scrutiny ⁸²	Risk of compliance; recall issues	Risk of procedural violations including right to silence – false statements, adverse inferences; risk of inadvertent confession; risk of biased judgements and increased scrutiny as a response to unusual behaviour; problem understanding the caution ⁸³

81 KL Payne, 'Introducing Social Vulnerability and Compliance as Factors for Understanding Offending in Autism Spectrum Disorder' (2017) 21 *PsyPag Quarterly* <<https://doi.org/10.53841/bpspag.2017.1.102.21>>.

82 K Logos, N Brewer and RL Young, 'Countering Biased Judgments of Individuals Who Display Autism-Characteristic Behavior in Forensic Settings' (2021) 47(3) *Human Communication Research* 215–47.

83 J Richards, 'Improving the Preliminary Stages of the Criminal Justice System to Accommodate People with Autism Spectrum Disorder (ASD)' (Doctoral Dissertation, University of Portsmouth, Institute of Criminal Justice Studies 2015).

<i>Domain of Interest</i>	<i>Manifestation</i>	<i>Interview Concerns</i>	<i>Interrogative Pressure (IP)</i>	<i>Procedural/Rights-based Concerns</i>
Affect and Emotion	Emotion dysregulation ⁸⁴ (can be separate from “meltdown” and relate more broadly to a general regulation issue); mental health concerns	Safety concerns for all parties; clarity around interview aims, timing, and duration; impact on frustration tolerance and aggression/violence; paranoia, anxiety and depression risk factors for compliance ⁸⁵	Risk of compliance	Risk of procedural violations including right to silence – false statements, adverse inferences; risk of inadvertent confession; risk of biased judgements and increased scrutiny as a response to unusual behaviour
Intellectual Function	Wide-ranging	Framing of questions (simple, complex; closed, open; fact-finding versus self-incriminatory)	Risk of suggestibility; recall issues	Risk of procedural violations including right to silence – false statements, adverse inferences; risk of inadvertent confession
Social Cognition	Impaired “Theory of Mind” ⁸⁶ or empathic understanding of another’s mental state and intentions	Appropriateness of social responding within the context, and ability to read verbal and non-verbal social cues	Risk of compliance; recall issues	Risk of procedural violations including right to silence – false statements, adverse inferences; risk of inadvertent confession; risk of biased judgements and increased scrutiny as a response to unusual behaviour; risk of biased judgements and increased scrutiny

84 CA Mazefsky and others, ‘The Role of Emotion Regulation in Autism Spectrum Disorder’ (2013) 52(7) *Journal of the American Academy of Child & Adolescent Psychiatry* 679–88.

85 North, Russell and Gudjonsson (n 30).

86 S Baron-Cohen, H Tager-Flusberg and M Lombardo (eds), *Understanding Other Minds: Perspectives from Developmental Social Neuroscience* (OUP 2013).

Sensory issues such as hypo- or hyper-sensitivities to sight, sound, or touch, within the interview context, can lead to distress and emotional dysregulation for the SwASD in such a “high-impact” environment, and can in turn be misinterpreted as escalation of suspect aggression, withdrawal or disinterestedness by police officers⁸⁷ – putting the suspect at risk of interrogative pressure. Cognitive or intellectual issues such as problems recalling personally relevant information and experiences can negatively affect the suspect’s credibility as a witness and also increase their risk of compliance during questioning, which can in turn potentially erode their right to remain silent when questioned. Separate from cognitive function, but also related, is problematic communication ability. SwASD can exhibit “social naivety” and have difficulties processing abstract information during the interview process,⁸⁸ which in turn can lead to a risk of compliance when questioned. Additionally, it can mean that the suspect does not fully understand the notice of rights or caution, and very often, that information is not accessible (understandable) for any vulnerable suspect.⁸⁹ Mental health conditions, including emotion dysregulation, depression, and anxiety, can be interpreted as a safety concern by police officers, for the suspect themselves, and are risk factors for compliance as well.⁹⁰ Taken together, it appears that SwASD can present a psychological vulnerability profile associated with risk of interrogative pressure, and related erosion of the right to silence.

Please note that manifestation is heterogeneous, ranging in severity and form. Based in part on categorisation of ASD features in a paper by Murphy.⁹¹

Table 13.2 discusses various domains of interest (sensation and perception; memory; communication; affect and emotion; intellectual function; social cognition) and their manifestations in ASD. It covers the potential concerns for these areas during interview, the risk of Interrogative Pressure (IP), and procedural/rights-based concerns that could arise due to these manifestations.

- *Sensation and Perception*: Sensitivities to environmental stimuli and unusual interest in the sensory environment can lead to stress responses and emotional dysregulation for SwASD. These might lead to misinterpretations of behaviour during police interviews, including viewing avoidance

87 D Debbaudt, *Autism, Advocates, and Law Enforcement Professionals: Recognizing and Reducing Risk Situations for People with Autism Spectrum Disorders* (Jessica Kingsley Publishers 2001).

88 Payne (n 81).

89 C Holland, P Hutchinson and D Peacock, ‘The Importance of Screening for Speech, Language and Communication Needs (SLCN) in Police Custody’ (2023) 62(3) *The Howard Journal of Crime and Justice* 295–312.

90 North, Russell and Gudjonsson (n 30).

91 D Murphy, ‘Interviewing Individuals with an Autism Spectrum Disorder in Forensic Settings’ (2018) 17(4) *International Journal of Forensic Mental Health* 310–20.

or coping behaviours as indicators of guilt. The sensory arrangement of the interview suite can cause anxiety, which may increase the risk of IP and risk of inadvertent confession due to aberrant cognitive processing.

- *Memory*: ASD individuals often show typical semantic recall but have poor recall of personally experienced events and context, which might affect their credibility as a witness. They are also at risk of compliance and procedural violations due to recall issues.
- *Communication*: Challenges include social naivety, literal interpretation, problems with turn-taking in conversation, and difficulties with language comprehension. The way interview questions are framed and timed can be crucial. There is also a risk of procedural violations, inadvertent confession, and biased judgements due to unusual behaviour.
- *Affect and Emotion*: Issues like emotion dysregulation and mental health concerns can pose safety risks. These could also lead to compliance issues, risk of procedural violations, and bias due to unusual behaviour.
- *Intellectual Function*: Depending on the intellectual function of the SwASD, question framing can significantly influence the outcome. There are also risks of suggestibility, recall issues, procedural violations, and inadvertent confession.
- *Social Cognition*: Impaired “Theory of Mind” or understanding of others’ mental states and intentions could affect social responding within the interview context, leading to compliance issues, recall issues, and risk of procedural violations.

The main conclusion indicates that compliance might be a concern more than suggestibility. Memory concerns may be a risk factor for interrogative pressure. All these issues raise concerns about the right to a fair trial, effective participation in the pre-trial process, and associated curtailment of the right to silence and the presumption of innocence.

Safeguards for Neurodiverse Suspects

The protection of vulnerable individuals who are detained for questioning (or who are voluntarily questioned) is enshrined in the Police and Criminal Evidence Act 1984 in England and Wales. A functional test operates for those who are classified as mentally disordered,⁹² and within this frame, this also includes the neurodiverse condition of ASD,⁹³ which may result in a situation where the person is deemed vulnerable and cannot be interviewed as a suspect in the absence of an appropriate adult (AA) – an individual independent

92 Mental Health Act 1983, section 1(2) defines mental disorder as “any disorder or disability of mind.”

93 R Dehaghani and C Bath, ‘Vulnerability and the Appropriate Adult Safeguard: Examining the Definitional and Threshold Changes Within PACE Code C’ (2019) 3 Criminal Law Review 213–32.

of the police who can safeguard the rights and entitlements of the neurodiverse interviewee; aid with communication (comprehension and production); and some studies have shown that the presence of an AA can increase active participation of the legal representative, and reduce interrogative pressure and the risk of false confessions.⁹⁴ Looking to the Irish context, a concerning observation in the Garda Inspectorate report⁹⁵ mirrors a more recent systematic review finding in the United Kingdom that suspects who identify as vulnerable (such as SwASD) and who felt that they required the presence of an appropriate adult in the pre-trial interview were not accommodated.⁹⁶

A phased investigative interview⁹⁷ is founded upon core principles of obtaining a fair and reliable account of events under investigation from the suspect; using consideration and fairness with vulnerable suspects at all times; sense-checking the suspect's account against known facts by adopting an "investigative mindset";⁹⁸ and asking free and open-ended questions to elicit information that may be material to the matters under investigation.⁹⁹ Other sources to consider when designing an investigative interview, and indeed, police training in administering it, include advice from the UK National Autistic Society,¹⁰⁰ focusing on what is permitted (and what environmental, social, and cognitive accommodations to make during arrest, detention, and questioning), and the various support persons (appropriate adults, intermediaries, etc.) that can assist the process. Similarly, a recent interview checklist developed by Mattison and Allely¹⁰¹ map onto key cognitive (thinking, language, memory), sensory, communication, and social (compliance) issues. An adapted Table 13.2 illustrates key remedies/accommodations for each anticipated challenge that can be experienced (but may not be, as ASD is a continuum condition).

94 S Medford, GH Gudjonsson and J Pearse, 'The Efficacy of the Appropriate Adult Safeguard During Police Interviewing' (2003) 8(2) *Legal and Criminological Psychology* 253–66.

95 Garda Siochana Inspectorate, *Delivering Custody Services* (Garda Siochana Inspectorate) 54. Observations that an adult (support person) was typically not called for a suspect with a suspected or confirmed learning difficulty or mental health issue while in custody.

96 Slavny-Cross and others (n 74).

97 R Shepherd (ed), *Investigative Interviewing: The Conversation Management Approach* (OUP 2013). See Chapter 1 for historical recounting of the theoretical framework that inspired the PEACE approach.

98 *Ibid.*, 28.

99 See the National Policing Improvement Agency Strategy (NPIA) <<https://zakon.co.uk/admin/resources/downloads/bp-nat-investigative-interviewing-strategy-2009.pdf>> accessed 17 July 2023.

100 National Autistic Society, 'Autism: A Guide for Police Officers and Staff' (2017) <www.safeguardingadultsinbexley.com/wp-content/uploads/Autism-Booklet-for-Police-Officers.pdf> accessed 17 July 2023.

101 M Mattison and C Allely, 'Questioning Autistic People: Police and Courts' in N Tyler and A Sheeran (eds), *Working with Autistic People in the Criminal Justice and Forensic Mental Health Systems* (Routledge 2022) 55–66.

TABLE 13.3 The ASD Investigative Interview – Balancing Vulnerability and Capability

<i>ASD Domain</i>	<i>Sub-Domain</i>	<i>Interview Approach (Accommodation – Challenge)</i>	<i>Interview Approach (Support Strength – Preserved or Compensatory Strategies)</i>
Cognitive	Theory of Mind (social-cognitive) Empathy	<ul style="list-style-type: none"> – Clearly outline own and others’ intentions, beliefs, and thinking – Build in rapport and trust engagement, and use concrete objects (pictures, drawings) to foster familiarity and rapport – Clearly outline the aim of interview and associated technical details (timing, breaks, location – but do not overwhelm) – For any instruction, actively check for suspect’s understanding by asking them to recount in plain language – Do not misconstrue lack or unusual affect/emotion response as lack of empathy or understanding 	<p>Theory of mind is preserved,¹⁰² or at least not universally comprised. Clearly outline and sense-check understanding of intentions, suspect self-reported understanding may be variable but do not assume absolute impairment; indirect requests for information may be understood, as a function of intelligence¹⁰³</p> <p>Cognitive empathy is preserved – clearly explain and sense-check suspect understanding of one’s own and others’ feelings using simple language – affective display is neither required (e.g. remorse) nor a proxy for having empathy (can understand it, even if not “feel” it)</p>

102 MA Gernsbacher and M Yergeau, ‘Empirical Failures of the Claim That Autistic People Lack a Theory of Mind’ (2019) 7(1) Archives of Scientific Psychology 102–18. In fact, 19 studies showing no Autism specific difference in theory of mind or challenge are outlined at p 109.

103 E Marocchini, ‘Impairment or Difference? The Case of Theory of Mind Abilities and Pragmatic Competence in the Autism Spectrum’ (2023) 44(3) Applied Psycholinguistics 365–83.

TABLE 13.3 (Continued)

<i>ASD Domain</i>	<i>Sub-Domain</i>	<i>Interview Approach (Accommodation Challenge)</i>	<i>Interview Approach (Support Strength – Preserved or Compensatory Strategies)</i>
	Recall	<ul style="list-style-type: none"> – Build in time for recall – Use careful questioning with open (non-directive/non-biased) prompts – Temporal or personalised recall may require prompts – Visual or other aids may act as more appropriate prompts for recall 	Specific recall of details can be preserved; narrative recall can also be preserved; bear in mind that some cognitive interview techniques (open questioning) can impair recall for SwASD – depending on comorbidities, intellectual function, and language ability
	Information processing speed	<ul style="list-style-type: none"> – Build in time for responding or the right not to respond – Where repetitive questions occur, build in time, and explain why the repetition is necessary – Also, consider sensory and emotion control (stress) issues and how it may impact processing speed 	With adequate spacing between questions and breaks, compensatory strategies can be deployed by the ASD individual so that they can respond, show theory of mind, and interface with others ¹⁰⁴
Sensory and Perception Processing	Custody room Light and sound Touch/haptics	<ul style="list-style-type: none"> – Use a suspect self-assessment or collateral history assessment (family/friends) about sensitivities and accommodate where reasonable 	Sensory issues are reduced where other comorbid risk factors are low (e.g. high-risk factors include sleep problems, psychiatric issues)
		<ul style="list-style-type: none"> – Do real-time assessment of room seating, sound, light arrangements on suspect focus – Permit appropriate sensory item that helps reduce anxiety 	Lower risk factors for ethnic cohorts (see Kirby et al.) ¹⁰⁵

104 Ibid.

105 AV Kirby and others, ‘Sensory Features in Autism: Findings from a Large Population-Based Surveillance System’ (2022) 15(4) Autism Research 751–60.

<i>ASD Domain</i>	<i>Sub-Domain</i>	<i>Interview Approach (Accommodation Challenge)</i>	<i>Interview Approach (Support Strength – Preserved or Compensatory Strategies)</i>
Communication	Verbal; Non-verbal; Paraverbal	<ul style="list-style-type: none"> – Use simple, tense-appropriate, concrete (not abstract) language, avoid negative, and double-negative phrasing – Build in processing and response (or no response) time between questions 	Narrative and indirect requests for information can be preserved; high-functioning ASD associated with greater language ability
Social	Compliance.	<ul style="list-style-type: none"> – Use questions and not direct statements for comment as the latter may not be interpreted as something to answer – Use non-leading biased questioning – Clearly, no use of force or coercion or promise permitted to elicit a response 	Factors that reduce interrogative pressure, such as compliance, may be low for some ASD individuals

Table 13.3 outlines approaches and strategies for interviewing individuals with ASD, balancing accommodations for anticipated suspect challenges, and supporting abilities that are preserved. More work is needed to validate and co-design with the ASD community, such investigative approaches.

In order to safeguard vulnerable suspects and other witnesses in terms of problematic recall, different models of police interview frameworks have been developed, such as the Cognitive (and Enhanced version) Interview (CI) for SwASD.¹⁰⁶ CI was developed based on two core principles of memory: recall is improved if the context experienced initially is reproduced at recall; and long-term memory recall is cued by multiple routes. However, it is concerning that research points to the use of CI in eyewitness recall as not only unhelpful in improving accuracy but also possibly detrimental to credibility. That is, accuracy for recall is lower for SwASD (high functioning) using CI compared to neurotypicals, and false recall of inaccurate details is higher.¹⁰⁷ More recent revisions to this protocol, the Witness-Aimed First Account (Wafa) technique for interviewing witnesses with ASD, appear to show early evidence of supporting greater accuracy in recall and details and may go some way towards developing a toolkit to support SwASD in the interview process.¹⁰⁸ This approach appears to support episodic memory recall (personalised memory) and impacts both objective measures of accuracy and the suspect's subjective sense of "comfort" during the interview process. The competency difference in overall accurate recollection between ASD individuals and controls was still evident despite Wafa-associated improvements in recall; and future comparative work between the Wafa and the CI needs to be done to determine whether the former outperforms the latter in supporting ASD interviewees. Within the Irish context, an equivalent cognitive-informed model of interviewing (the Garda Síochána Interview Model) is in operation and is adaptive in particular to intellectual functioning impairments.¹⁰⁹ While this may address particular vulnerabilities for those SwASD and intellectual functioning impairments,¹¹⁰ it remains unclear if it addresses the other sensory, emotional, and social-cognitive issues associated with ASD

106 KL Maras and DM Bowler, 'The Cognitive Interview for Eyewitnesses with Autism Spectrum Disorder' (2010) 40(11) *Journal of Autism and Developmental Disorders* 1350–60.

107 *Ibid.* at 1356.

108 K Maras and others, 'The Witness-Aimed First Account (Wafa): A New Technique for Interviewing Autistic Witnesses and Victims' (2020) 24(6) *Autism* 1449–67.

109 G Noone, 'An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects' in J Pearse (ed), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (Wiley Blackwell 2015) 100–22.

110 A Cusack and others, 'Towards Inclusionary Policing: A Critical Inquiry into the Pre-Trial Treatment of Suspects with Intellectual Disabilities in Ireland' (2022) 45(3) *Policing: An International Journal* 421–33.

that can raise the risk of interrogative pressure and negatively impact on the right to a fair trial.

Future Justice Issues in Neurodiversity and Neurolaw

Neuroscience can help inform an understanding of both the psychological vulnerabilities (communication, social-cognitive, sensitivities, repetitive behaviour) and capabilities (focused interest and memory) of an individual with ASD, and in so doing, can inform best practice for eliciting personally witnessed information, as well as reducing the risk of misleading or false recall when questioned.¹¹¹ The cognitive interview methodology of initial narrative recall (open ended, abstract), as well as a reliance on the individual's ability to freely recall information, can be extremely challenging for a SwASD, where, in contrast, it is supportive for other categories of vulnerable suspects. More work needs to be done to establish how question reframing can reduce the burden on the SwASD's memory, emotion control, and language processing, and reduce the risk of interrogative pressure during the pre-trial interview.

In Ireland, a number of progressive changes to interviewing vulnerable suspects include an interview model (Garda Síochána Interview Model) based on the PEACE-framed cognitive interview model.¹¹² However, advances have been made in interviewing that go beyond the focus on verbal questioning and responding. ASD Child witness interview research using drawing or sketching,¹¹³ instead of verbal responses, is beginning to set an agenda for other interview modes that might facilitate memory recall using mnemonics (or memory cues) for vulnerable groups, without any concerning increase in errors during free and probed questioning.¹¹⁴ This may also generalise to suspect interviews, and the degree to which “best practice” interview models can help children with ASD (witness, victim, or suspect) recall better accounts (similar to their typically developing peers), chimes with other work on the support role of intermediaries during the witness interview¹¹⁵ – which appears to be variable at best. The question of whether “human” or artificial

111 FR Volkmar and others (eds), *Handbook of Autism Spectrum Disorder and the Law* (Springer Nature). For more, see Chapter 7 ‘Obtaining Testimony from Autistic People’, at p 160.

112 Noone (n 109).

113 M Mattison, CJ Dando and TC Ormerod, ‘Drawing the Answers: Sketching to Support Free and Probed Recall by Child Witnesses and Victims with Autism Spectrum Disorder’ (2018) 22(2) *Autism* 181–94.

114 Ibid.

115 LA Henry and others, ‘Verbal, Visual, and Intermediary Support for Child Witnesses with Autism During Investigative Interviews’ (2017) 47 *Journal of Autism and Developmental Disorders* 2348–62.

intelligence (AI – generative AI based on machine learning) offers better support during decision-making, and the interview process is fast becoming a major focus¹¹⁶ to potential high-tech solutions that could model some positive aspects of interviewing, such as rapport building.¹¹⁷ This, of course, would have to be culturally sensitive, and trust in the technology would have to be established.

There is much that we do not yet understand, and much still to be considered in relation to interviewing suspects, particularly neurodiverse suspects, in police custody. As our understanding of neurodiversity grows, our knowledge on how to accommodate neurodiverse individuals within the criminal process needs to grow too.

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116 T Pereira and M Aldridge, ‘“Show Me What Happened”: Low Technology Communication Aids Used in Intermediary Mediated Police Investigative Interviews with Vulnerable Witnesses with an Intellectual Disability’ (2023) 27(1) *The International Journal of Evidence & Proof* 83–104.

117 F Gabbert and others, ‘Exploring the Use of Rapport in Professional Information-Gathering Contexts by Systematically Mapping the Evidence Base’ (2021) 35(2) *Applied Cognitive Psychology* 329–41.

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14

CONCLUSION

The Future of Police Custody in Ireland

Yvonne Daly

Introduction

One discrete aspect of policing in Ireland has been the central focus of this book – police custody. This is one of the most important components of operational policing. The consequences which flow from police custody can have significant and far-reaching impacts on the lives of those who have been detained. As noted previously, 90% or more of prosecutions relating to serious crime result in guilty pleas, meaning that what’s happened, been said, or experienced in the pre-trial investigative stage of the process is not reviewed in any detail or subject to significant individualised oversight.¹ On a broader level too, there are significant concerns around a lack of oversight of police custody in Ireland,² and, even in the context of a contested trial, the courts seem to be redrawing the line between what happens in the station and the consequences of that at trial.³

While there have been positive developments within the custody experience in Ireland, such as the refurbishment or building of some new garda custody suites, the introduction of specific garda training for the conduct of investigative interviews,⁴ and the recognition of at least an entitlement, if not a right, to

1 See Chapters 1 and 6.

2 See Chapter 8.

3 In *DPP v JD* [2022] IESC 39, the Supreme Court emphasised that while a person under garda investigation is entitled to fairness in the course of that investigation, the right to a trial in due course of law, under Article 38 of the Irish Constitution, is a right to be vindicated at the trial, and by the trial. Accordingly, any pre-trial, investigative unfairness might not necessarily have consequences or remedies within the trial.

4 See Chapter 5.

have one's lawyer present throughout garda interviews,⁵ the contents of this book have shown that there is much yet to do. A summation of all chapters would be misplaced here and would not do justice to the complexities of each individual contribution, or the depth of analysis provided in each chapter. What follows then is simply a pulling on certain threads which traverse the book as a whole, in order to provide an overarching perspective on where we are and where we might be going. The themes which are discussed include:

- the need for data-driven policies and interventions;
- the need to provide additional supports and safeguards for particularly vulnerable persons in garda custody;
- the need for financial and regulatory support to ensure the complete fulfilment of individual's rights;
- the need to see the garda station through fresh eyes as a place where different professionals come to work, not merely as the domain of An Garda Síochána (AGS); and
- the need for a new, more open approach to research on operational policing in Ireland.

Across all of this, there is an ongoing need for managerial and political commitment to the ideal of offering the very best that a police service can provide to the communities that it serves. This is particularly important in the context of the future of police custody in Ireland.

Data-Driven Policies and Interventions

There is a distinct lack of data available on operational policing in Ireland, and this needs to change. If we do not measure where we are, we cannot plan for where we want to be. As discussed in this book, we do not have a clear picture of those who find themselves in garda custody. For example, what is the average age of a detainee?; are Travellers, members of other ethnic groups, or racialised minorities any more or less likely to be arrested and detained than others?;⁶ are persons with mental ill-health, addiction, Adverse Childhood Experiences (ACEs), intellectual disabilities, or neurodiverse conditions more likely to be held in custody than others?⁷ None of this is clear. We also do not know exactly how many people are held in garda custody in the course of an average year, what the average detention period is, or, for example, what the average period of waiting for access to legal advice is and

⁵ See Chapter 6.

⁶ See Chapters 9 and 10.

⁷ See Chapters 4, 12 and 13.

the reasons for this. All of this information would be extremely beneficial in terms of understanding police custody in Ireland and planning for its future. While the absence of an electronic custody record is a factor, this is not insurmountable and immediate steps could be taken to collate information across divisions at the end of each month, for example.

Important data on the operation of garda custody should not be hidden from view. One example of a lack of clarity in data collection and dissemination was the failure of the Garda Síochána Ombudsman Commission (GSOC), until 2021, to disaggregate the circumstances giving rise to referrals from AGS under s 102 of the Garda Síochána Act 2005, as amended.⁸ This meant that it was not possible to show what number of individuals died while in garda custody or soon after release from garda custody, as opposed to those who suffered serious harm as a result of garda conduct (whether in custody or otherwise).⁹ Given the importance of this information it is concerning that it was not more clearly collated by GSOC, so that a clear picture of the level of deaths in, or subsequent to, detention was apparent and related lessons could be learned.

Another extremely important area where we simply do not have the necessary information is the arrest and detention of racialised and ethnic minorities.¹⁰ As noted in Chapter 9, the Garda Commissioner has on a number of occasions stated categorically that Ireland's police do not engage in ethnic profiling.¹¹ There is simply no data to prove this one way or the other. Such data are urgently needed, in our increasingly diverse society. We need to be sure that all persons are being treated equally, and fairly, and if this is not the case, then we need to design interventions to make it so. Without verifiable data, we are simply daydreaming about what might be the case.

Much of this comes back to the sense that garda custody – which lies at the heart of our criminal process – is happening every day, but nobody is over-seeing it. AGS have lacked managerial oversight of custody¹² and while the

8 Section 102 provides for independent investigation of any matter that appears to indicate that the conduct of a member of the Garda Síochána may have resulted in the death of, or serious harm to, a person. See Garda Síochána Ombudsman Commission Annual Reports <www.gardaombudsman.ie/publications/statutory-reports/> accessed 31 July 2023.

9 AGS Annual Reports had given a figure for deaths in custody for many years, but this did not include those who died soon after garda detention.

10 See Chapters 9 and 10.

11 See Chapter 9.

12 Garda Síochána Inspectorate, 'Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations' (2021) <www.gsinsp.ie/wp-content/uploads/2022/06/Garda-Inspectorate-Delivering-Custody-Services.pdf> accessed 27 July 2023, see p I where Chief Inspector Mark Toland noted that, in relation to police custody, AGS lacked any "organisational vision or strategy beyond adherence to the legal requirements."

Garda Inspectorate report on *Delivering Custody Services*¹³ has pushed the issue forward,¹⁴ it was largely focused on the material conditions of custody and the safety and well-being of detainees. While those are extremely important considerations,¹⁵ there is more to be considered, as discussed throughout this book.

It is hoped that unannounced inspections of garda stations will become part of the oversight mechanism once the Inspection of Places of Detention Bill 2022 is enacted, and the Optional Protocol to the UN Convention against Torture (OPCAT) is ratified.¹⁶ This would be a significant improvement of the oversight structures but should not usurp the duty of AGS itself to ensure robust monitoring, oversight, and spot-checking of garda custody, including garda interviewing techniques.

Additional Supports and Safeguards for Particularly Vulnerable Persons in Custody

Vulnerability has been a significant theme across the chapters of this book. While everyone is vulnerable in police custody to a certain extent, detainees with particular vulnerabilities are in need of additional supports and safeguards.¹⁷ Suspects with intellectual disabilities,¹⁸ autism spectrum disorder or other neurodiversities,¹⁹ those for whom English is not their first language,²⁰ D/deaf suspects,²¹ and children²² all need to be considered in the context of the physicality of being detained and in terms of the impact of investigative interviewing techniques. Chapters within this book looked at the right to legal assistance for all detainees²³ and the right to an interpreter for those with language needs.²⁴ While there are significant challenges yet to be met to ensure the practical and effective protection of those rights, other supports are also needed in the system for particularly vulnerable individuals. We have no systematic approach to the provision of appropriate adults to assist suspects with intellectual disabilities, neurodiverse conditions, or mental ill-health,

13 Ibid.

14 At the time of writing, July 2023, a draft implementation plan in response to the Inspectorate report is with the Garda Commissioner.

15 See further Chapter 2.

16 See Chapter 8.

17 See Chapter 3.

18 See Chapter 12.

19 See Chapter 13.

20 See Chapter 7.

21 Ibid.

22 See Chapter 11.

23 See Chapter 6.

24 See Chapter 7.

for example, and while intermediaries are currently being trained it is not clear if they will be allowed to assist suspects in police custody in Ireland.²⁵ Our system of access to medical assistance in police custody is also in need of improvement, as it is haphazard and cannot provide speedy access to specialist knowledge relating to complex conditions.²⁶

Action is needed to agree on a strategy for supporting particularly vulnerable detainees in garda custody. A regulatory framework is needed which makes space for appropriate adults and intermediaries, and financial support will be necessary to ensure equitable access to such supports. A review of garda interview training is also necessary, to ensure that it is fit for purpose in relation to specific cohorts of potential interviewees, and to make adjustments as necessary.

Financial and Regulatory Support

While there have certainly been improvements in recent years in terms of access to legal assistance throughout garda interviews, and the recognition of the right to an interpreter, the financial and regulatory support needed to move these, and other necessary safeguards, from being theoretical and illusory rights to being truly practical and effective has been absent. Running a criminal justice system which is procedurally fair and accepted as legitimate by the public costs money. The Irish government (and indeed the media and wider public) needs to accept the value of expenditure on supporting the criminal process through the provision of legal assistance to those who cannot afford to pay privately, through paying interpreters (and criminal defence solicitors) a decent wage so that they will be available for garda station work, through financing the transcription of garda interviews so that gardaí no longer have to take a contemporaneous note, and through investing in wider supports for particularly vulnerable detainees.

Proper regulation of the system is necessary too, which does not mean codes of practice outsourced for creation to the Garda Commissioner.²⁷ The Minister for Justice should establish a committee including representatives from AGS, criminal defence solicitors, interpreter representatives, medical experts including specialists in intellectual disabilities, neurodiversity, mental ill-health, and addiction, and academics to design an appropriate regulatory framework for garda custody which could include statutory codes of practice, internal disciplinary protocols, oversight structures, and a review mechanism.

²⁵ See Chapter 12.

²⁶ See Chapter 12. See also V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury 2023) 119–24.

²⁷ See discussion in Chapter 6 on the General Scheme of the Garda Síochána (Powers) Bill 2021.

A New Image of Garda Custody

What is needed at this point, 40 years from the introduction of legislation allowing for detention in custody for a wide range of serious offences is a new image of garda custody. The garda station can no longer be seen as the domain of AGS alone. Stations, and custody suites/areas in particular, need to be opened up to other professionals including lawyers, interpreters, doctors, psychiatrists, mental health specialists, intermediaries, youth workers, and so on. Each of these can support those who are detained in police custody, and thus support AGS in being the best it can be, serving its communities, and protecting the human rights of all.

Garda detention can no longer be seen as existing solely for the purpose of getting a confession from a suspect. It is simply a step in the criminal justice system, wherein gardaí can gather information, to be passed on to the next stage in the process. It can be more than that too though, it can be a site of intervention for the most vulnerable amongst us. We should be using it as a point in the system where we, as a society, can disrupt the chaotic trajectory of some individual's lives by providing supports across mental health, homelessness, addiction, trauma, and neglect. Each of us wants a society with less crime, and while recidivism is discussed at the end point of the criminal justice system – the prison system – why not intervene earlier, at the beginning, in the garda station?

A More Open Approach to Research

One final important point must also be made – a new culture around research on operational policing is needed in Ireland. AGS have been slow to allow academics to have access to garda stations to conduct observational research, or to conduct qualitative interviews with gardaí involved in investigative interviewing.²⁸ There is a need to nurture a more open culture of independent research on policing in Ireland, which could be of benefit to all, including AGS as an institution and its members operating on the ground. The more we know about the day-to-day issues that face gardaí, the more we can advocate for change that will both support their work and ensure appropriate safeguards for persons subject to policing.

28 On the access challenges relating to research on AGS, see V Conway, *Policing Twentieth Century Ireland: A History of An Garda Síochána* (Routledge 2014); P Williams, 'Cop Culture: The Impact of Confrontation on the Working Personality of Frontline Gardaí' (Unpublished Masters dissertation, Dublin Institute of Technology 2016); S O'Brien-Olinger, *Police, Race and Culture in the 'New Ireland': An Ethnography* (Palgrave Macmillan 2016); C Marsh, *Irish Policing: Culture, Challenges and Change in An Garda Síochána* (Palgrave Macmillan 2022).

Looking to other jurisdictions, there is much that could be done including, for example, exploring opportunities for the co-creation of research between police and academics, creating links between AGS and university researchers and departments, and supporting PhD research on operational policing issues.²⁹ Cooperation and research of this nature are hugely valuable as they lead to evidence-informed policy and practice. Governmental funding of research in this area would also be welcome. While the Policing Authority has, in recent years, supported important research of this kind,³⁰ more could be done across agencies to broaden the field of research and knowledge, and to support the further development of a cohort of academic experts in this area.

Conclusion

Any one of us could find ourselves suspected of criminal offending. It may seem a remote possibility, but unexpected events occur, allegations can be made, and misunderstandings can escalate. If you were detained in police custody in Ireland, what would you want that experience to be like? What physical conditions would you expect? How would you wish to be treated? Would you want assistance from a lawyer, and could you afford to pay for it? Would you need access to medications? What if you have an intellectual disability or are neurodiverse? Would you need additional supports? Would your likely response to being in custody, and to garda interviewing, be different to that of other detainees? What if your child was arrested and detained? How would you expect gardaí to treat them? What specific supports would you expect to be in place? What training would you expect gardaí to have?

It is easy to “other” garda station detainees, but it could be any one of us, our relatives or friends. In considering what is needed in terms of best practice, it is useful to explore how you would feel if you were detained in police custody. Even if you were guilty of the offence, you would want supports in place to assist you during an extremely stressful time, and the physical conditions of custody should not be punitive.

This book has provided a clear picture of contemporary police custody in Ireland. Applying a human rights lens and based on a concern for procedural fairness across the criminal process, it has critically examined specific issues within police custody ranging from garda interview methods to the experiences of minority ethnic groups and from rights and entitlements in custody to the additional needs of suspects with particular vulnerabilities. The Garda

29 See, for example, the Scottish Institute for Policing Research <www.sipr.ac.uk/> accessed 27 July 2023; and, the N8 Policing Research Partnership <www.n8prp.org.uk/> accessed 27 July 2023.

30 Including the research on children subject to garda questioning referenced across Chapter 11.

Inspectorate report has drawn attention to aspects of garda custody, but the overall picture is bigger and in need of informed and sustained review, both internally within AGS and externally. A proactive strategy to improve police custody in Ireland is needed. We must insist on the highest standards of police practice, the greatest level of support possible for detainees, and ongoing, effective oversight of what happens behind closed doors.

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