

Submission to Law Reform Commission for Fifth Programme of Law Reform

Regulation of Detention in Garda Custody

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We submit to the Law Reform Commission a proposal to review the regulation of detention in garda custody. This area is predominantly regulated by the Criminal Justice Act 1984 and the related Treatment in Custody Regulations of 1987, as amended. The seriousness of this area of law is one which requires clear, effective, human rights compliant regulation. Most obviously, detention involves an immediate deprivation of liberty but what happens during detention can have determinative consequences for future criminal justice processes and future liberty. It affects victims who are entitled to effective investigations. And as a plethora of cases demonstrate, poorly conducted detentions have also had consequences for bodily integrity and right to life. The Irish legislation at present is both under-developed and out of step with human rights jurisprudence. This is harmful for detainees and victims, but also hinders the work of all in the criminal justice system.

Our submission highlights the numerous deficiencies we perceive in the current framework, clearly establishing the necessity of a wholesale review. Developments in other spaces also make such a review particularly timely:

- Both the United Nations Convention on the Rights of Persons with Disabilities and the General Data Protection Regulation take effect in Ireland in the coming months;
- The Commission on the Future of Policing will report in September;
- There is an intention to ratify OPCAT;
- EU Directives in recent years have regulated a range of suspects' rights including access to a lawyer, legal aid, translation, interpretation and information;
- Jurisprudence from domestic, European and Council of Europe courts grows apace;
- An Garda Síochána has adopted a new model for conducting interviews which is currently being rolled out; and
- Solicitors have in recent years been permitted to attend interviews but only a small number have received any training on doing so.

The impact of the above exposes the deficiencies in Irish law even further. It is a substantive area of law which now requires a comprehensive review to ensure human rights are being protected at this pivotal moment in the criminal justice system and that the system itself operates effectively. Some 20,000 persons are detained in Garda stations every year.¹ Prof John Jackson has pointed out that the increasing trend towards diversion from court based resolution has in fact placed greater

¹ <http://www.justice.ie/en/JELR/Pages/Report-Final-15-July>

emphasis on what happens in the police station and thus we need to be ever more protective of rights at that point.²

A review of this area of law should adopt a step by step approach, considering each stage of the process involved in garda detention and custody. It needs to synthesise this diverse body of law, engage in comparative analysis, balance potential reform with constitutional and human rights, undertake a consultation process which actively listens to the key stakeholders and produce draft legislation which is practicable and effective. Despite the number of bodies engaged in police reform and oversight at present, none have the function or skill to do this. It also extends beyond the capacity of individual academics. The Law Reform Commission has proven itself to have the skills, resources and independence to conduct such work.

² Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence, *Modern Law Review* (2016) 79(6) 987-1018

Issues to be addressed

Herein we outline a range of discrete issues which we have encountered both through our research, and our work with solicitors in delivering training on attending garda stations (see further details [here](#)). We have not attempted to conduct an all-inclusive study of such issues but what we have documented highlights the urgent need for this to be done.

Member in Charge

The member in charge of a Garda Síochána station authorises the initial detention of an arrested individual (for example under the Criminal Justice Act 1984 s 4(2)), can determine if questioning should be suspended in order to allow the detainee to rest overnight (Criminal Justice Act 1984 s 4(6a)), informs the detainee of his/her rights, and is responsible for overseeing the application of the Custody Regulations 1987 (Criminal Justice Act 1984 s7), amongst other things. Solicitors attending at Garda stations often seek recourse to the member in charge to either address issues they are encountering (e.g. difficulties with investigating members, concerns about the wellbeing of detainees) or to note certain matters on the custody record. Thus, this is a pivotal role in terms of ensuring that the rights of the detainee are protected during detention. Numerous reports, such as the Morris Tribunal, have criticised the respect and status conveyed upon the role.

While Reg 4 of the Custody Regulations 1987 specifies that “as far as practicable” the member in charge should not be a member who was involved in the arrest of the suspect or in the investigation of the relevant offence, there is no legislative guidance on any minimum rank which should be held by the member in charge, any specific duration for which an individual garda might fulfill this role, or what level of training is required in order to perform the role. In practice it seems that this role is often designated to quite junior gardaí. By contrast, in England and Wales, for example, since 2009 Custody Officers must be at least at the rank of sergeant.

We consider that the role of the member in charge is in need of deep review and that updated legislative clarity on the designation of such members, their role, their powers, and their accountability is necessary. Consideration should also be given to ways in which technology can enhance the performance of this role, such as through the use of electronic custody records.

Disclosure

Despite the adoption of the EU Directive on Right to Information, we consistently encounter very conflicting views from solicitors and gardai as to what should be disclosed at this point in the process. Solicitors consistently complain about the lack of disclosure gardaí are willing to make as this hinders their ability to build an effective defence for their client, including properly advising their clients in respect of pre-trial interviews. Gardaí feel they are adequately fulfilling their obligations under the law and are not well disposed towards providing further disclosure. Recent cases in England have evidenced the centrality of disclosure to fair trials and the integrity of the system. Given that this is already proving to be an area of conflict in Ireland it demands review.

Medical Assistance

Vast numbers of detainees require medical assistance, whether because they are injured, are intoxicated in some way or suffer from mental disorders.³ We have heard, in numerous settings, of the difficulties which are experienced in finding doctors to attend stations. Delays on this can have consequences not only for the health of the detainee but also on their liberty. As is evidenced in the GSOC annual reports, every year people die during or following detention in garda custody. It is essential that the state ensures that medical assistance is provided effectively and if dimensions of the current system are inhibiting that, then this needs to be explored, understood and rectified. An examination would need to be conducted as to how best to fulfill those obligations: should there be access to psychiatrists, for instance, as well as GPs? Would centralised custody suites where nurses are employed be a viable alternative? How is this serious demand managed in other jurisdictions?

Access to a lawyer

Solicitors in Ireland have been attending consultations with detained clients for a number of decades but it is only since May 2014 that they have been permitted³ to attend Garda interviews. This continues to be on an ad hoc basis at the permission of the DPP and has not, as yet, been recognised as part of the right of access to a lawyer in Irish law.⁴ Both an Garda Síochána and the Law Society produced guidelines⁵ on how attendance at interview should operate but they occasionally conflict and do not have legal status. Figures from the Legal Aid Board on how many solicitors claim for attendance at interview would suggest that the numbers attending interviews are alarmingly low, potentially less than 10%. There are numerous reasons, we suspect, as to why the numbers are so low, much of which relates to the lack of regulation on this attendance.

A number of dimensions require clear regulation in order to ensure that detainees' right of access to a lawyer is being fully protected: how solicitors are selected to attend stations, whether the right of access extends to a right to have a solicitor present in interview, how rights are explained to detainees and the lack of mandatory training for both solicitors and gardai. Practices from other countries give some sense of the scope for development: in Scotland, recently commenced legislation provides that juvenile and vulnerable suspects cannot consent to being interviewed without having a solicitor present (Criminal Justice (Scotland) Act 2016 s 33 (2)). England and Wales require accreditation before a solicitor may attend an interview.

Consultation

The current Garda code states that solicitors' consultations with clients can take place 'in the sight but out of the hearing of a member.'⁶ This is not in line with European jurisprudence which requires privacy more broadly. While there may be valid concerns, such as the safety of the solicitor, which

³ An Garda Síochána do not publish data on numbers of persons detained, statistical information, including gender, age, ethnicity, health requirements and vulnerabilities. Indeed, it may be necessary to consider placing an obligation to publish such data on the organisation.

⁴ See a discussion of the Supreme Court decision in the case of DPP v Doyle [2017]

<http://humanrights.ie/constitution-of-ireland/the-right-to-legal-advice-in-the-garda-station-dpp-v-doyle/>

⁵ [Garda Code](#) (2014) [Law Society Guidance](#) (2015)

⁶ part 8

<http://www.garda.ie/Documents/User/Code%20of%20Practice%20on%20Access%20to%20a%20Solicitor%20by%20Persons%20in%20Garda%20Custody.pdf>

explain having consultations in the sight of the gardai, this could potentially inhibit the ability of clients and solicitors to interact in the free-flowing manner which should be at the core of this important relationship. Practical means of alleviating all concerns need to be identified.

Vulnerabilities

While all detained by an Garda Síochána are inherently vulnerable, some persons have pre-existing circumstances or conditions which make them more vulnerable in that moment. Currently we are reliant on gardaí or a solicitor to spot and identify these vulnerabilities in order that they may be adequately responded to and accounted for. There are issues in the quality of training for both professions, but it raises a broader question of whether we should be reliant on such people to identify vulnerabilities. Deep consideration, in consultation with all the key stakeholders, needs to be given to how to develop best practice in this area, particularly in light of the implementation of CRPD.

Translators

The EU Directive on the right to interpretation and translation in criminal proceedings (2010/64/EU) has been adopted by Ireland and all suspects have a right to have an interpreter while in garda custody. However, there is no regulation of those who provide the translation service, nor is there an accreditation system as might be seen in other countries. This raises questions as to the standard of translation currently occurring in garda stations.

Privacy

Audio visual recordings are made of garda interviews and increasingly recordings are made of other spaces in detention areas, including hallways, search rooms and so on. There have previously been debates that for the best interests of some detainees (such as those who have mental health concerns, are intoxicated, or particularly violent) there should be recording of cells. Data protection issues emerge with such concerns. We would look to see a proper analysis and consideration of this issue so that recordings in garda stations are well regulated, data protection compliant, and enhance the safety of all those in detention areas.

Samples and photographs: rights and retention

The circumstances under which photographs, fingerprints and bodily samples can be taken and retained has been significantly reviewed in many countries and by the ECtHR in recent years. This issue may need review in Ireland.

Appropriate Adults

Juvenile and vulnerable suspects in this jurisdiction are entitled to have a parent or guardian, or another adult relative, present during garda interviews, or, if that is not possible, to have “some other responsible adult” who is not a garda present (Custody Regulations 1987, reg 13 (2)(c)). Under PACE Code of Practice C the role of the “appropriate adult” in England and Wales is far more developed than in the Irish experience, with local authorities obliged to provide appropriate adults and with clear guidelines on the role and functions published by the Home Office. There is also, in England and Wales, a National Appropriate Adult Network of individuals who are specifically trained

to act as appropriate adults within police custody. Consideration of creating a formalised Appropriate Adult Scheme in Ireland is especially timely given the ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD), which, amongst other things, seeks to ensure access to justice for people with disabilities on an equal basis with others (Art 13). It also reflects recent amendments to the Constitution and commitments under Children First.

Garda caution and requirement for contemporaneous notes

There is a pressing need to review the process of garda interviews. Not least among the issues which are currently unsatisfactory is the caution: “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” (emphasis added). For a long time now there has been a suggestion that this caution would be removed and updated, but nothing has happened. The requirement that all statements will be taken down in writing has the effect that, despite the existence of audio-visual recording equipment in most garda interview rooms nowadays, interviews with suspects are stilted by the fact that a contemporaneous note must be taken. It is very difficult for gardaí to get into any flow of questions and answers within the interview because of this, and interviews are likely to be much more effective if the requirement for a contemporaneous note was removed. This also has the effect of substantially lengthening the time an interview takes which means both that the suspect is detained for longer, and that garda time is unnecessarily consumed.

Inferences

The Law Reform Commission could also helpfully examine the drawing of inferences at trial from the pre-trial silence of the accused. Are the relevant legislative provisions useful and workable, or is their value outweighed by the complexity of their administration? The provisions are difficult to explain for gardaí and solicitors in the pre-trial process and for judges at trial, and they are difficult to understand for suspects detained in the Garda station, and for jury members at trial.

Inferences in this jurisdiction have also suffered from what might be called “function creep”. There is a relatively strong threshold requirement for the use of an inference at trial under s 19A of the Criminal Justice Act 1984, such that (1) there must be an effort to rely upon a certain fact at trial which was not mentioned in the pre-trial process, and (2) that fact must be one which “clearly called” for an explanation during the earlier process. However, a far lower threshold exists in relation to s 72A of the Criminal Justice Act 2006, as inserted by the Criminal Justice (Amendment) Act 2009. Section 72A applies to participation in or contribution to any activity of a ‘criminal organisation’. In such cases, an inference may be drawn at trial from the pre-trial failure of a suspect to ‘answer a question material to the investigation of the offence’. Unlike the double threshold requirement of s 19A, under s 72A it seems that an inference may be drawn whether or not an answer to the particular question was ‘clearly called for’ or the failure to provide such an answer is a specifically relevant matter in the context of the later trial. Failure alone gives rise to the inference.

While our neighbours in Northern Ireland, and in England and Wales, also operate inference-drawing provisions, it is notable that no such provisions exist in Scotland, Canada, or in many other jurisdictions. An examination of the value of their ongoing existence in this jurisdiction, and the

practicalities of their operation if retained, using comparative and consultation-based analysis, as per usual Law Reform Commission practice, would be very welcome.

Authorising Continued Detention

Consideration should be given to the legislative rules around the extension of detention periods. One notable matter which is in need of urgent legislative provision is the requirement for any decision on extended detention to be made by a garda who is independent of the relevant investigation. This is most important in the light of the decision in *Damache v DPP* [2012] IESC 11 whereby the issuing of search warrants must be carried out only by gardaí of a certain rank who are independent of the relevant investigation. Under various Acts (Offences Against the State Act 1939; Criminal Justice Act 1984; Criminal Justice (Drug Trafficking) Act 1996; Criminal Justice Act 2007) a period(s) of extended detention may be granted by a member of the Garda Síochána not below a certain rank (e.g. chief superintendent). There is nothing in any of the relevant provisions to require that the authorising garda should be independent of the relevant investigation, and relatively recent jurisprudence (though it does pre-date *Damache*) seems to suggest that gardaí issuing extension authorisations are not always independent of the investigation (*Doody v Governor of Whitehall Garda Station* [2010] IEHC 469).

Victim and Witness statements

The new Garda Síochána Interview Model recognises the centrality of victim and witness statements to the criminal process. To date attention has largely focused on the detainee's statement but we suggest that for the integrity of the process and to ensure the protection of the rights of all there should be clear regulation on the taking of these central statements.

Oversight

There needs to be greater inspection and oversight of detention in custody. Some of this is already conducted by the CPT, some will be provided for by OPCAT, but a review needs to assess the extent to which these mechanisms satisfy all requirements. There also needs to be clarity as to the roles of bodies such as the Policing Authority, the Inspectorate and GSOC and what access each is provided in this space. Given the centrality of this issue to the criminal justice process, and the potential impact on human rights, it is essential that this would be included in any review of the detention process.

A number of other matters in need of consideration include:

- a review of safeguards for persons detained under terrorism legislation, given the more extensive powers and provisions which apply;
- the adequacy and implementation of policies relating to cells, facilities and equipment;
- the regulation of Identification Parades;
- and, in line with all of the above, the Treatment of Persons in Custody Regulations 1987 will need review.

Conclusion

The above is an indication of the issues which, in our own work, we have encountered in relation to the regulation of detention in Garda custody. A fuller review will undoubtedly uncover other matters. It is clear that this is a large scale endeavour which the Law Reform Commission would be best placed to conduct.