A HUMAN RIGHTS-BASED APPROACH TO POLICING IN IRELAND

Alyson Kilpatrick BL
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FOREWORD

Policing defines the relationship between the people and the State both with regard to the protective function of government and the expression of its power through law and the use of force. From the perspective of vindicating and protecting human rights, then, policing is the most important area of public service.

For over forty years, concerns about policing have been at the heart of ICCL’s work: from resisting the use of emergency powers, to highlighting cases of the mistreatment of suspects, to challenging restrictions on freedoms of association and assembly. We have always advocated a human rights-based approach to policing in Ireland because we understand the issues which have emerged in Irish policing as being essentially concerned with failures in the vindication of rights.

ICCL believes that what is needed is a reframing of Irish policing to ground it in principles of human rights. Irish law now provides for such an approach: under the Irish Human Rights and Equality Commission Act 2014, all public bodies are obliged to have regard to human rights standards in their policies and practice. We commissioned this report because this new statutory duty has the potential to reframe the issue of Garda reform as an issue of human rights protection.

The structures that are put in place at this critical moment will define the future of Irish policing for a generation. This report draws heavily on the experience of Northern Ireland because we believe the lessons from the North are applicable and translatable to our situation. As such, this report provides a blueprint for how the imminent reform processes can be firmly grounded in principles of human rights. We believe that if the blueprint is followed, the relationship between An Garda Síochána and the people it is charged with protecting can be radically transformed.

Liam Herrick
Executive Director,
Irish Council for Civil Liberties

We are grateful for the support of the Irish Human Rights and Equality Commission for the grant support for this project. We are also grateful to the Community Foundation Ireland and its Donor Assisted Programme for supporting our public education and awareness raising work in the broad area of Garda reform.
ACKNOWLEDGEMENTS

I was commissioned by the Irish Council for Civil Liberties to consider whether and, if so, how a human rights-based approach to policing should influence the reform of policing in Ireland. In particular, I was asked to draw on my experience as independent human rights legal advisor to the Northern Ireland Policing Board, which was responsible for monitoring the performance of the PSNI including its compliance with the Human Rights Act 1998.

This report was informed by a review of the legislative framework within which An Garda Síochána operates and by a review of relevant court judgments, inquiry and tribunal reports and inspections. Perhaps most importantly, however, it was informed by speaking with individuals and groups who influence policing and who are policed. Their assessment and insight into the issues runs through this report. It is they who know what policing feels like and what needs to change to bring about increased community confidence and cooperation with the police. I am very grateful to them. Many of my discussions were conducted in confidence so I have not acknowledged any individual or group but I hope they recognise their contribution in this report – I certainly do.

I am very grateful to Liam Herrick and Maeve O’Rourke of ICCL for their assistance in preparing this report. They were keen to ensure the independence of my analysis and were very respectful of that. Their own insightful and important observations in the ICCL’s submission to the Commission on the Future of Policing, January 2018, should be considered as a free-standing expert report which makes a hugely important contribution to the future of policing in Ireland. I strongly urge the consideration of that report by the relevant agencies involved in the reform of policing.¹

Alyson Kilpatrick BL

EXECUTIVE SUMMARY

Introduction

This report considers whether and, if so, how, a human rights-based approach to policing can influence the reform of policing in Ireland. In particular, this report draws on experience gained from the process of reform in Northern Ireland where the Police Service of Northern Ireland (PSNI) adopted a human rights-based approach to policing, overseen and monitored by the Northern Ireland Policing Board.

This report examines the legal framework (both international and domestic) which sets the standards for the Garda Síochána, the current practice of the Garda Síochána in meeting those standards and lessons which can be learned from Northern Ireland. I also offer recommendations aimed at achieving a human rights-compliant policing service. This report does not, and could not in the relatively limited time frame available, cover all areas of policing or address all issues of concern. Moreover, as noted at various places in this report, there is limited access to garda policy, training and practice so analysis without full access is necessarily restricted. That in itself must be addressed as the reform programme proceeds. This report does however offer an overview informed by analysis of a number of specific areas about which concern has been raised. I have chosen those areas for closer scrutiny because they provide a useful prism through which to view the Garda Síochána as a whole.

It is hoped that this report will contribute to the current debate and the important work of the Commission on the Future of Policing in Ireland. I recognise that the reform of policing in Ireland is at a very early stage, with much more work to be done. A wholesale process of reform will be required. That will be labour intensive and will require the dedication of resources and expertise. It will however be repaid when a rights-based policing service emerges which is professional, legitimate and fully supported by the public it is there to serve.

I include for convenience a free-standing Appendix containing all of the most relevant international and domestic law which applies to policing. I have deliberately chosen to include substantial amounts of legal information and analysis so that the legal basis for what is recommended is clear.

The remainder of this Executive Summary discusses the key messages and recommendations that I make in each chapter of the report. The executive summary is no more than that; to understand its observations and recommendations the report should be read in full.
EXECUTIVE SUMMARY

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CHAPTER 1: A human rights-based approach to reform: what is it and why adopt it?

A human rights-based approach is necessary because it is required by law. In Ireland, the European Convention on Human Rights Act 2003 requires An Garda Síochána to perform its functions in a manner compatible with the state’s obligations under the European Convention on Human Rights (ECHR). Moreover, a human rights-based approach is the best means of securing the reform of policing that is desired and needed. It is effective in securing a professional, lawful, democratic and accountable police service that respects and values the people it is there to serve while effectively combating crime and maintaining order. It will help secure police legitimacy and therefore enhance safety and security.

A human rights-based approach puts the rights of individuals and protected groups, enshrined at law by the ECHR, at the centre of every decision and action of the Garda Síochána and gardaí. Every policy, training exercise and operational application of powers and duties begins with a consideration of the rights at issue. The ensuing policy and practice respects, protects and fulfils human rights. Such an approach has been tried and tested and proved to be truly democratic, enabling people to know their rights, to claim and defend them. It has resulted in police becoming more professional, efficient, effective and ultimately respected by the public. Rights and responsibilities are balanced within a human rights framework that is foreseeable and which is mandatory rather than discretionary. Policing within a human rights-based approach is not subject to the whim of politics, to money or to power but beholden to and protective of the rule of law.

The garda play a pivotal role in defending human rights. When a human rights-based approach is adopted by police they can rightly claim to be human rights champions. They enable all of us to live free from violence and crime while helping to create and support an environment within which we can enjoy all of our rights. A human rights-based approach recognises and reflects the fact that policing is an honourable profession, which deserves the support of the public but also appreciates that support, if it is to be relied upon, must be earned. When a human rights-based approach is taken, gardaí understand that the protection of human rights is the foundation of, not an obstacle to, their work.

The reform of policing in Northern Ireland, grounded in the 1999 report of the Independent Commission on the Future of Policing in Northern Ireland (known as the Patten Report), is evidence of the success of such an approach but also instructive of the potential pitfalls that must be avoided in its implementation.

The reform of policing in Northern Ireland resulted in seismic change; from cultural transformation to the application of human rights policing on the ground. However, not all of the recommendations made in the Patten Report were implemented fully and some took significantly longer than anticipated. That in itself is a lesson that can be learned from Northern Ireland. If reform is to be undertaken, it must be wholesale and designed to sustain human rights as a core function of policing over the longer term. The momentum which drove the oversight and accountability arrangements in Northern Ireland waned significantly over recent years. That tells us that if reform is to be sustained and built upon, oversight must endure over the long term and must align with the letter and the spirit of reform. There must be a clear, long-term vision for reform with agreed outcomes. Unless and until the agreed outcomes have been delivered the process will not have been completed. Even when the agreed outcomes have been achieved the active monitoring of human rights compliance must continue. Anxious scrutiny is required to foster and protect a human rights-based approach. Both the garda and oversight bodies must share and commit to the process of reform, promote human rights, and be held to the same high standards of human rights compliance. The oversight and accountability bodies must support the integration of human rights standards with as much enthusiasm as they expect of the police. If there is a singular lesson to be learned from Northern Ireland, that is it.

An Garda Síochána undertook a significant amount of work some years ago with the stated intention of

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2 Section 3 of the 2003 Act.
3 As informed by amongst other things other international treaties.
embedding human rights standards within policing. However, despite significant efforts to embed human rights the process stalled before it really got started. A renewed reform process is now required which should be driven by a pressing desire to deliver a human rights-based approach, with adequate resources dedicated to it.

Before anything else is achieved, the ‘mind-set’ of the Garda Síochána and gardaí must change. They must accept the need for reform and embrace fully the adoption of a human rights-based approach. The Garda Síochána should believe that the oversight bodies will engage with it in a positive and supportive way while holding it to account, robustly and independently. Criticism without support is counterproductive – support without criticism is pointless. When a human rights-based approach is adopted a framework for monitoring compliance must be settled, informed by a number of guiding principles agreed between the Garda Síochána and the Policing Authority. If it cannot be agreed, the Policing Authority should be provided with the power to compel it. Within the monitoring framework, all performance should be monitored – the good and the bad. The framework should establish an environment that is dynamic and which encourages the garda to engage in meaningful dialogue to address issues as they arise but which also holds the garda to account for any failure to comply with human rights.

Reform will take time but it will be completed much more quickly and ultimately in a more sustainable way if it is a wholesale process in which government, the oversight bodies and external stakeholders are involved. A number of stakeholders are still to be convinced that the desire for wholesale reform is shared by all members of the Garda Síochána or even by those who will oversee the process but they remain willing to provide support and to offer assistance to achieve the shared objective – improved policing. There is considerable expertise within the community, which is not utilised. The garda and the oversight bodies can learn much from the communities they are all there to serve. The process of reform should be informed by them and responsive to their needs.

A human rights-based approach begins with cultural reform.

**Recommendation**

(1) It should be agreed by government, the police and the oversight bodies that a human rights-based approach will be adopted and that all will cooperate and share responsibility for its delivery. That should be accompanied by a public awareness campaign with a focus on the rationale for and expected benefits of reform.

**CHAPTER 2: An Garda Síochána: culture and ethos**

The culture and ethos of an organisation is the way the organisation sees itself and the way it sees and interacts with others. If a police service is to comply with its human rights obligations it must promote then establish and sustain a human rights culture and ethos within – from the Commissioner and his or her senior team through to all staff including new recruits. That culture and ethos must permeate the service and inform the way people treat colleagues and others. A successful human rights culture within policing depends upon a number of factors, most prominent of which is the promotion by police leaders of a human rights culture and a demonstrable commitment to human-rights-based policing in practice.

The Garda Síochána must embrace the protection and fulfilment of human rights as a core function, as opposed to a ‘value’, of policing and thereafter establish the measures it will take to ensure that its policy and operational focus will be on human rights. Policing culture can be exclusive and resistant to change, suspicious of ‘outsiders’ and slow to self-reflect. A human rights culture on the other hand is, by definition, inclusive, open to change, respectful of difference and considerate of the views and experiences of others.

Despite the many efforts to reform the culture and ethos, the Garda Síochána continues to be undermined
by allegations of misconduct, dysfunction and cultural malaise. Reported ‘scandals’ stretch back over many years but new ones are emerging and the findings of consecutive reviews have not recorded much cultural change. Unfortunately, history shows that the Garda cannot be left to its own devices to implement reform. It was observed by the eminent former Supreme Court Judge Adrian Hardiman that “a considerable number of deeply disturbing developments both in relation to the Garda Síochána itself and to the arrangements for its oversight...” had been uncovered (and are still being uncovered) which were not dealt with.

Mr. Conor Brady (former editor of The Garda Review and a founding Commissioner of GSOC) also recorded his “deep” disillusionment with the garda and “I just could not move the rock. You could not get into Fortress Garda.”

The Garda Inspectorate (in November 2015), recorded that that there had been “minimal and often ineffective internal changes made to the structure of the Garda Síochána in response to recommendations made in many previous reports and inquiries. The need for change is all the more acute given the pressures on front-line services, changing crime patterns and changing demographics.”

Some efforts have been made to address issues of culture. For example, there has been developed by the Policing Authority, in consultation with stakeholders, a Code of Ethics for the Garda Síochána. The Code “sets out guiding principles to inform and guide the actions of every member of staff of the Garda Síochána at every level of the organisation.” What the Code does not do, however, is incorporate expressly the rights and obligations enshrined in the ECHR or explain for the benefit of gardaí and the public the practical application of those rights and responsibilities. Furthermore, the Garda Síochána Code is not a discipline code in that it does not contain mandatory standards against which members will be monitored, measured and sanctioned. It is disappointing that the Code of Ethics is not a human rights tool or a discipline tool. It is recommended that it should be both. The factors in the success of the PSNI Code of Ethics are twofold: it contains clearly articulated human rights standards and their practical application; those standards are monitored and enforced by independent oversight bodies, that the police and public alike can be reassured that if the code is complied with human rights will be protected and respected. But, they can also be reassured that if human rights are abused those abuses can be uncovered and sanctioned.

In May 2018, the Garda Síochána published its Culture Audit. The audit marked, in the words of the Foreword, the beginning of the process of establishing cultural reform under the An Garda Síochána Modernisation and Renewal Programme. The culture audit provides an important insight into the existing culture within the Garda Síochána and potential barriers to cultural reform. It gathered the views of serving gardaí and records both positive and negative indications. In the context of an ongoing modernisation and reform programme a particularly revealing score is for gardaí perception of the organisation as “open to change/innovation” which scored only 4.9 out of 10. It is also notable that “speaking up and reporting wrongdoing” achieved a score of 5.5 out of 10. A number of other measures, grouped together under the heading “cultural reinforcers” received worryingly low scores ranging from 4 to 6.5. It was observed that senior leadership were not held in high regard; access to the right resources was limited; there is insufficient front-line supervision particularly to new recruits; it is not a meritocracy but depends upon who you know; and, there is a fear about speaking up. The findings in the audit should alert the Garda Siochana, the Policing Authority, the Garda Inspectorate and the Commission on the Future of Policing Ireland to the serious challenges that will present in their efforts to transform the culture of policing. Advance notice of cultural impediments, however, provides a real opportunity to get the right mechanisms in place from the outset.

Despite these efforts it would seem that attempts to reform culture and ethos have proved unsuccessful despite evidence of the need for reform and efforts made over many years. A new and more radical approach is now required. The garda’s apparent reluctance to change presents an enormous hurdle to reform and does not bode well for the paradigm shift in police thinking that is required for a human rights-based approach but with

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2 Irish Times on line 2 October 2014.
the correct structures in place, underpinned by robust oversight and accountability arrangements delivered by people of sufficient standing and expertise, there is a chance that change can finally be effected.

In Northern Ireland, the Patten Commission noted similar cultural issues within the Royal Ulster Constabulary. It observed (in 1999) that, “There needs to be a culture of openness and transparency in a police service as a whole, in which police officers as a matter of instinct disseminate information about their work. The prevailing instinct at present, however, is defensive, reactive and cautious in response to questions.” The ensuring recommendations and reform programme sought to address that. While not all issues have been resolved - with concerns continuing to be expressed about transparency over legacy issues – the implementation of Patten’s recommendations has transformed policing in Ireland despite early resistance by some to the need for change. That resistance was met by police leaders and the Policing Board in a proactive and supportive environment with officers and staff persuaded of the imperative for reform.

The Northern Ireland experience should inform those who will be charged with implementing reform. They need to bring gardaí with them through the process and devote resources to explaining the reforms and encouraging acceptance of them. Training should always be delivered in a positive environment; discussion should be encouraged, myths dispelled and questions answered. That can only be achieved when training is face to face. No amount of e-learning will suffice.

**Recommendations**

1. An Garda Síochána, working with the Policing Authority, should assess human rights awareness within and across policing. As part of that review garda culture and acceptance of a human rights-based approach should be measured.

2. Having measured garda culture and acceptance of a human rights-based approach, a strategy should be developed and implemented to address any issues or themes arising with a particular focus on eliminating obstacles to embedding a human rights-based approach and ensuring that cultural reform will be translated into the practical and effective protection of rights.

3. The Garda Síochána Code of Ethics should be revised so as to include expressly the human rights standards expected of garda and civilian staff and their practical application. Thereafter, the Code of Ethics should take effect as a discipline code with all alleged breaches of human rights investigated by the Garda Síochána Ombudsman Commission. The Code should be kept under review by the Policing Authority which should monitor and report upon any human rights themes and trends emerging from reported breaches of the Code.

**CHAPTER 3: Policing of public order and protest**

A number of areas of policing were scrutinised to inform my analysis of the Garda Síochána’s current practice and human rights compliance. The policing of public order and protest is the first of those.

If police are to build (or rebuild) trust they must behave so as to secure the confidence, approval and support of the public – willingly – by their professional, human rights compliant approach which respects democracy and the rule of law. Trust in the police can be easily undermined, particularly when public order operations end in violence. Scenes of police battling with protesters for example will be beamed across the country, drawing observers into a debate about the very legitimacy of the policing operation and the legitimacy of police themselves. The police will be compelled to justify their actions by reference to the law and human rights principles. Without a ready willingness to explain, provide justification and answer questions the police will be pitched against the community it is there to serve. Unanswered questions will invite speculation and
silence will result in conspiracy theories. Tactics will be discussed and criticised by those who urge a harder edged policing response and by those who condemn the police for their over-use and/or misuse of power.

An Garda Síochána does not make its policy directives, training, strategy, decision-making logs or de-briefs available for public scrutiny. In other words, the framework within which the garda operate is entirely hidden from the public. There has been published an overarching policy directive on public order incident command but it is general in nature. It does contain the statement that it is “the aim of An Garda Siochana to uphold and protect the human and constitutional rights of everyone” but there is little in terms of practical guidance on how that will be achieved. The garda’s policing of protest has given rise to concern among the public about tactics and potential political interference in policing operations but remains shrouded in secrecy.

A human rights-based approach however provides the framework within which police can plan for any protest or anticipated public order operation and guide the police so that discretion can be exercised consistently and reliably. This is particularly important given the public order powers available to the Garda Síochána are extremely broad and confer broad discretion on gardaí. A human rights-based approach within a clear human rights framework can provide the answers when domestic legislation (or indeed politics) does not. The Council of Europe has made it clear, but it should be self-evident, that effective accountability, of which transparency is a key element, should not depend upon requests for information. Information should be collected and published. Such information enables the public to consider and debate the service delivered by the police, to hold them to account and, critically, to ensure their own safe participation in protest and exercise their rights to expression, association and peaceful assembly.

In Northern Ireland, the PSNI have significant experience of responding to large scale public order incidents in which serious violence, including towards police officers, has been carried out and where community tensions run high. Adopting a human rights-based approach has served them well. They have demonstrated that within that framework they are capable of responding, and do respond, so as to protect and respect the rights of all involved while managing disorder in a lawful and proportionate manner. The success of the PSNI in managing public order incidents and protests is no fluke; it derives from years of attention to perfecting their policy, training, community engagement and practice taking a human rights approach.

Critically, the PSNI is prepared and willing to account for all of its decisions. For example, the Policing Board receives and considers, on a six-monthly basis, use of force reports prepared by PSNI. Those reports include details of any correlation between high incidents of use of force by the police and public disorder incidents. In addition, the relevant District Commander is required to submit to the Policing Board, as soon as reasonably possible after a major public disorder incident, a written record containing details of the nature of the disorder, any force used, any injuries sustained by police officers or members of the public and any damage caused to property.

Perhaps one of the most significant and unique ways in which PSNI demonstrates its willing acceptance of transparency is the access afforded to the independent Human Rights Advisor, engaged by the Policing Board, who reviews policy, observes training, attends planning meetings and briefings of officers and is present in the command room during many public order operations. The PSNI has recognised the benefits of this human rights approach – legitimacy, trust and the cooperation of the public. The PSNI’s approach to public order policing demonstrates the degree of commitment required to deliver a human rights-based approach. It cannot be achieved in a piecemeal or half-hearted fashion but it has been rewarded by improved policing and community confidence.

Referring to the thousands of parades and protests which his PSNI colleagues had policed, Sir Hugh Orde (former PSNI Chief Constable) said “a concern for human rights helps us in our policing. It is not an impediment to policing – it makes you think of other solutions.” Giving evidence to the Westminster Parliament’s Home

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9 In DB’s Application [2014] NICA 56 for example the Court of Appeal was assisted in reaching its decision through a consideration of PSNI’s Criminal Justice Strategy documents and revisions, the relevant operational strategy and the decisions recorded within the Events Policy Book. When the case reached the Supreme Court the PSNI’s handling of the events withstood scrutiny and criticism.
Affairs Select Committee he said:
“...disorder at one parade in Belfast was so violent my officers had to return fire but the following year it was policed by just two officers in shirtsleeves as a result of a radical re-examination of tactics with consideration of human rights at its core.”

The PSNI is now widely regarded as world leaders in human rights compliant public order and protest policing.

**Recommendations**

(5) An Garda Síochána should, with the assistance of human rights legal experts, revise and publish policy and guidance on public order and policing of protest incorporating expressly the relevant ECHR rights and their practical application. All gardai who might be involved in the policing of public order and protest including close protection officers and state security police should be trained in the revised policy.

(6) On an annual basis, Garda Síochána leaders should consider, with relevant community and response teams, the public order and protest operations conducted throughout the previous 12 months with a particular focus on any human rights issues that arose. As part of that consideration garda should consult with relevant non-governmental organisations and community groups. Lessons learned from that exercise should be disseminated amongst all gardai who have been or might be involved in such operations.

(7) When collating data on the use of police powers (see below) those incidents in which powers or force was used in the public order context should be identified and highlighted. That data should be reported to the Policing Authority and published in an easily accessible format.

**CHAPTER 4: Use of force**

The strategy adopted for and the planning and execution of any operation in which weapons are deployed is critical to the Garda Síochána’s ability to comply with the ECHR. Any use of force has the potential to cause injury and in some cases death. Whilst police are required to refrain from taking life, and must take steps to protect it, deprivation of life by the police will not be regarded as being unlawful when it results from the use of force which is no more than absolutely necessary for a specified aim which must, as properly interpreted, be to save life or prevent serious injury. If the use of lethal or potentially lethal force is unavoidable police must still exercise restraint in the use of that force, minimise damage and injury caused, render assistance and medical aid at the earliest opportunity and notify relatives or other persons if a person has been injured or killed. Any policy or approach to managing conflict (which should be applied to both spontaneous incidents and planned operations) should have a central statement of mission and values which recognises the need to protect and respect the human rights of all. Thereafter, it should contain the key elements which should be kept under constant review throughout an operation.

Gardaí are not routinely armed but are issued with incapacitant (pepper) spray and batons. Specialist units also carry conventional firearms and TASER. Because the garda does not publish statistics on their uses of force it is difficult to gauge the extent to which force is used or to draw any comparison with other police services. As a result of some information released by GSOC and media reports the seemingly high rate of use of incapacitant sprays has raised concern. The garda does appear to use incapacitant spray at a much higher rate than for example the Metropolitan police and the PSNI.

An accurate assessment of the propriety of use cannot be made merely from statistics but the rate of use by gardaí certainly appears to be high and should prompt further consideration. Concern about that use will be compounded by the fact that the garda does not appear to have a written human rights-compliant policy on
its use and does not release statistics on its use. Moreover, GSOC has articulated its concern that gardaí only rarely comply with a regulation requiring them to notify GSOC within 48 hours of the use of garda weapons. Another issue of concern is the nature of the investigation that follows an alleged inappropriate use of force. A complaint made to GSOC is likely to be carried out by a garda member, which might not inspire confidence in the quality of independent oversight.

There are many important lessons from Northern Ireland in this respect but the great utility of having the express, practical and operational application of human rights at the centre of every aspect of policing and the use of force is the most important. That is reflected in written policy, training and operational briefings. The PSNI’s Manual of Policy, Procedure and Guidance on Conflict Management is available to the public through the PSNI website, with only a limited amount of very sensitive operational information redacted. Moreover, mechanisms are in place, both internal and external, to ensure that PSNI is held to account for all uses of force by its officers. That includes the submission of an electronic use of force monitoring form, in some instances a Police Ombudsman investigation and scrutiny by the Policing Board. The PSNI collates the data captured on the electronic use of force monitoring forms and includes it within a six monthly statistical report that is provided to the Policing Board. Versions of the use of force statistical reports are published on the PSNI website. Six-monthly statistical reports contain very detailed information which correlates use of force according to district/area, date, incident, reason for use and the gender and age of the person on whom the force was used. Annual statistics are then published in full in the Policing Board’s Human Rights Annual Reports. This enables a truly forensic analysis to be undertaken of the use of force.

**Recommendations**

(8) The Garda Síochána should, with the assistance of human rights legal experts, develop and publish an overarching policy on the use of force to include expressly the relevant human rights standards and their practical application. That policy should include: the training required for gardaí prior to deployment; provision for the planning of any operation in which force might be used; preventative measures to avoid recourse to the use of force; the authorisation regime for the use of force; the legal tests for the various weapons deployed; the provision for medical assistance; the requirement for post-operative briefings in any case where force is used; and, the requirement to report the use to the relevant oversight bodies.

(9) All deployments of weapons and all uses of force should be recorded together with a brief explanation of the circumstances surrounding the use, the location of the use, the outcome and the identity of the gardaí who used force. That information should be collated and shared with the Policing Authority. Statistics should thereafter be produced and published on an annual basis on the use of force broken down according to the force used and the circumstances in which force was used.

(10) The Garda Síochána should produce and publish Standard Operating procedures for the deployment of armed units, including those on close protection duties.

(11) The Garda Síochána should keep under review the availability of less lethal and non-lethal technology.

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11 The Police Ombudsman will investigate all instances where death occurs following contact with police. The Ombudsman must also be notified of all incidents where a firearm, AEP or Taser has been discharged.

12 PSNI must notify the Policing Board every time an AEP is discharged and also of any force used where there are public order incidents which either involve 200 people or more or where the incident is of such an intensity there is likely to be wide scale media reporting or public interest in it. PSNI also provides the Policing Board with six monthly statistical reports on police use of force. The Policing Board is provided a copy of all Police Ombudsman Regulation 20 reports which are produced following an investigation into certain incidents where force has been used. If any issues or concerns arise through any of these reporting mechanisms, the Policing Board can raise these directly with the PSNI senior command team.

13 The identity of the officer who used force need not be revealed in the published statistics but the statistics should identify where and when force tends to be used. For example, it should identify whether force is used primarily during public disorder or as a result of arrest.
CHAPTER 5: Suspects and detainees

The protection of human rights within the custody environment and oversight of the treatment of police detainees have been ongoing concerns and subject to a number of recommendations over the years.

There is a positive obligation on the state (known as the procedural obligation) which requires that an inquiry must follow a suspicious death or allegation of breach of the right not to be tortured or subjected to inhuman or degrading treatment or punishment. The investigation must comply with certain minimum requirements. Those minimum requirements are: (i) The authorities must act of their own motion and not wait for the matter to be referred; (ii) the investigation must be independent; (iii) the investigation must be effective; (iv) the investigation must be reasonably prompt; (v) there must be sufficient public scrutiny of the investigation; and, (vi) the next of kin of the deceased must be involved in the investigation to the appropriate extent.15

Oversight of An Garda Síochána is undertaken principally by the Garda Síochána Inspectorate (GSI), the Garda Síochána Ombudsman Commission (GSOC) and the Policing Authority. There is not, however, a legal framework or practical mechanism within which independent oversight of police detention can be monitored or reported upon. Neither is there a practice of collecting and making available sufficient information on complaints and the outcome of complaints to enable the Irish Human Rights and Equality Commission, the Irish Council for Civil Liberties or any non-governmental organisation to effectively monitor the treatment of persons in police detention. That means there are significant gaps in police accountability and oversight of police detention.

As the domestic legislation stands, GSOC is required to investigate where there has been a complaint of death or serious harm16 and the Garda Commissioner must refer to GSOC any matter “that appears to the Garda Commissioner to indicate that the conduct of a member may have resulted in the death or serious harm to a person.”17 However, as GSOC says, “the power is delegated by the Garda Commissioner to Superintendents, whose responsibility it is to decide if it is appropriate to refer an incident, in order that it be investigated independently.”18 Compounding the issue, the practice (made necessary by under-staffing and under-funding) whereby GSOC ‘lease-back’ investigations to the Garda Síochána and use garda officers to carry out the investigations continues. While GSOC asserts that its Article 2 investigations (i.e. those into deaths) comply with the procedural obligation, there must be a serious doubt about its Article 2 independence. Moreover, there is no requirement to refer allegations of breach of Article 3 (which fall short of serious harm) to GSOC.

If there is garda involvement in an investigation (whether by deciding whether an investigation is needed or being involved in some way in the investigation itself) – the context being allegations of wrong-doing by gardaí – that will almost certainly undermine its independence. Essentially, those who are or might be implicated are connected to those investigating and cannot be said to be independent in the context of Articles 2 and 3 ECHR. Furthermore, while GSOC can and sometimes does report to the Garda Síochána on system-wide issues identified in investigations it cannot, despite calling for a statutory power to do so, insist on carrying out a statutory review of systemic issues arising out of investigations. GSOC does publish statistics but they are not broken down into sufficient detail to establish the number of complaints relating to treatment in or conditions of detention. Finally, it should be noted that GSOC is prevented from investigating matters relating to national security, which is bound to limit its effectiveness in investigating some complaints and demonstrates an additional gap in oversight.19

The Policing Authority monitors and implements recommendations of GSI, however GSI cannot and does not carry out routine oversight of policing and does not visit places of detention for the purpose of ensuring the welfare and protection of police detainees. Therefore, the Policing Authority is not currently equipped to monitor effectively the treatment of police detainees. GSI has raised a number of issues which gave cause for

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16 Section 91 of the 2005 Act
17 GSOC 2016 Annual Report, March 2017. During 2016, one death in Garda custody was referred to GSOC.
18 State security is considered further below.
Concern relating to police custody. Included among its concerns were incomplete custody records, failures to update PULSE, inadequate training and the lack of any mechanism for independent custody visiting to check on the welfare of detainees.

GSI has made a number of recommendations including that they should be able to conduct unannounced visits as of right. Such visits are essential. Legislation is proposed but it would restrict the right of GSI to make unannounced visits of their own volition. GS has contended that inspections should be unannounced and as of right. I agree and would add that there should also be a mechanism for routine inspection by lay visitors who are entirely independent of the state.

Concern was also raised by the Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) about the provision of health care services within garda custody suites with stations ill-equipped with medical facilities, no duty doctor rota in place and examinations perfunctory. The personal medical records maintained by doctors were not shared or available to other doctors who were called subsequently to review the same detainee. The CPT recommended that doctors should undergo appropriate training in the management of those healthcare problems associated with detention in police custody such as drug and alcohol withdrawal and that more formal arrangements should be put in place for a duty doctor rota and for annotated medical records to be made and kept in a secure place, accessible to medical staff only.

Human rights-compliant oversight of police detention is not unduly complicated or unacceptably onerous; it has been established across the UK and works particularly well in Northern Ireland which could be said to have overcome additional challenges in permitting unannounced access to all places of detention.

A significant development in Northern Ireland, which should be implemented in the Republic of Ireland, is the independent custody visiting scheme. In Northern Ireland the scheme is run by the Policing Board which is obliged by statute to make and keep under review arrangements for places of detention to be visited by independent lay visitors. The Custody Visitors are volunteers from across the community who are unconnected with the police or the criminal justice system. They make unannounced visits to all police custody suites where they inspect the facilities, check custody records and, with consent, speak to detainees. They can also view, with consent, live interviews with detainees held under terrorism legislation by remote video link. Custody visitors fill in records of their visits which contain tailored questions and information specifically designed to capture any potential human rights abuses. Concerns are brought to the immediate attention both of the Policing Board and the PSNI. The visit reports are made available to the Board’s Independent Human Rights Advisor who reviews them for any issues relating to human rights.

The Human Rights Advisor also visits custody suites and includes within the Human Rights Annual Report a summary of issues arising and makes recommendations for improvement, if necessary. The visitors report quarterly to the Policing Board under a number of headings, which are designed to reveal the general standards of welfare, treatment and facilities. The scheme has discharged a critical function in ensuring the protection of the human rights of detained suspects and detainees.

### Recommendations

1. **(12) The State should immediately ratify the Optional Protocol to the UN Convention against Torture (OPCAT) and establish a National Preventive Mechanism.**

2. **(13) Consideration should be given to providing appropriate statutory authority to the most appropriate independent oversight body to inspect all places of detention. Those inspections should not require permission or advance notice. Inspectors should also be entitled to speak with detainees and to consider detention both in police custody and in transit.**

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9. The electronic recording system.

(14) There should be established, with statutory authority, an independent custody visiting scheme where lay members might make unannounced visits to all places of detention. The custody visitors should be given access to all detainees and their custody records with the consent of the detainee. Thereafter custody visiting reports should be submitted to the oversight body responsible for inspecting places of detention, which should report on an annual basis on the operation of the scheme.

CHAPTER 6: Racist hate crime

An Garda Síochána’s relationship with minority communities and its treatment of and response to hate crime reveals a lot about its general approach to the protection of human rights.

Ireland has become an increasingly diverse society comprising individuals from wide ranging racial, religious, political, socio-economic and familial backgrounds. Such diversity has enriched society economically and culturally yet hostility and racist crime continues. This trend appears set to continue. It is therefore essential that An Garda Síochána equips its entire staff with the knowledge and competency to respond to the needs of all in society, whether they are victims, witnesses or perpetrators of crime. The ability to respond appropriately to a diverse community should no longer be considered a specialist pursuit but must be mainstreamed throughout all garda policy, procedure, and practice. The culture and ethos of the organisation must not only reflect its legal obligations to mainstream diversity but should embrace diversity in all its forms. Embracing diversity is about much more than combating racist hate crime but that is an essential prerequisite.

The differential impact of hate crime is now widely understood: crimes motivated by hostility or prejudice towards a person’s core human identity or difference can cause extreme hurt and distress beyond the hurt experienced from comparable crimes which are not so targeted. Furthermore, hate crimes are ‘signal crimes’ or ‘message crimes’ that are intended to signal that the community of which the victim is a member is different and not accepted.

There is no specific offence of ‘hate crime’ in Ireland. Neither is there recognised at law a type of crime in which identity-based hostility must be taken into account when a court is considering the appropriate sentence or other sanction. The only legislation under which hostility on grounds of race, colour, nationality, religion, ethnic or national origin, membership of the travelling community or sexual orientation is criminalised is the Prohibition of Incitement to Hatred Act 1989, which criminalises words and behaviour that are threatening, abusive or insulting and intended or, having regard to all the circumstances, are likely to stir up hatred. In other words, the 1989 Act covers hate speech. The 1989 Act is narrow in its scope and rarely relied upon; many police officers express confusion and discomfort at its use. It has been suggested that the requirement to prove that the defendant either intended to, or in the circumstances was likely to, stir up hatred is inhibiting the prosecution of offences. That might explain the startling low number of reported cases.

Because there is no statutory basis in Ireland for racism to be considered as an aggravating factor racist motivation is less likely to be recorded on PULSE. Even without specific hate crime legislation garda should ensure, to comply with current human rights obligations, that racist motivation is recorded for all incidents perceived by the victim to have such a motivation. The Garda Síochána Policing Plan (2017) has hate crime as a policing priority but anecdotal evidence suggests it is still not being recorded routinely and that gardaí are requiring independent evidence of corroboration of motivation. To require corroboration conflicts with human rights obligations to protect victims by putting them at the centre of an investigation.

The Garda Síochána Victims’ Charter makes a number of promises to victims of crime or other traumatic events.

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21 17% of the Irish population belongs to a minority or migrant community according to the 2016 Census.
incident, intended to implement the requirements of the EU Victims’ Directive. It promises victims of racist incidents that their report will be accurately recorded; their complaint will be investigated; and, they will be put in contact with their local Garda Ethnic Liaison Officer (ELO). Those commitments are positive but whether they are actually being adhered to in practice requires further examination. In important research commissioned by the Irish Council for Civil Liberties, published in 2018, it is noted that, “Gardai interviewed stated that they had not seen the impact of the Directive in the context of hate crime. They highlighted the lack of an explicit and formal link between the work of specialist ELO/LGBT officers and those working within the Garda Victim Service Offices. We found no evidence that those working within Garda Victim Service Offices had received training on the treatment of victims of hate crime specifically, or on any of the particular special measures that should be in place for them.”

That is a cause for concern and is illustrative of the piecemeal and partial nature of policy development and practical application of policy within the Garda Síochána.

Moreover, evidence contained within iReport.ie suggests that the service received by victims of racist crime is very mixed, with many victims not receiving the service to which they are entitled and some even suffering abuse by gardaí. This needs to be monitored closely and reported upon by the relevant oversight bodies.

The Garda Síochána has introduced risk assessments for domestic violence cases (which is welcomed) but there is nothing similar for racist crime. Therefore, there is no policy or strategy (certainly no written policy that has been made publicly available) to deal with repeat victimisation and harassment. Racist crime tends to escalate, so clear policy which includes case-sensitive risk assessments followed by an action plan to protect the victim is essential if human rights obligations are to be discharged. The publication of such policy so that the public, including victims of racist crime, can be reassured that there is a commitment and a plan to respond to it would go some way to improving reporting rates.

The relationship between the garda and Travellers and Roma is particularly worrying and requires close attention.

In 2015, the Irish Traveller Movement reported that despite some attempts at local initiatives, “trust has rapidly eroded based on a string of allegations raised by Garda ‘whistleblowers’ in relation to ethnic profiling of Travellers, including Traveller infants, on the Garda PULSE system... very few allegations have caused such widespread distress among the community, which has seriously impacted on relationships between An garda Síochána and Travellers in Ireland... not enough has been done to overcome potential institutional bias; indeed the allegations in relation to ethnically profiling Traveller infants has confirmed for many the existence of ant-Traveller racism with the force.” Based upon my own discussions with Travellers, the situation has not improved since 2015. In fact, it is possible that it has worsened further. Attempts to counteract prejudice within the garda and educate officers and members by including Traveller groups in training at Templemore have, it is said, “fizzled out over the last couple of years.” That is disappointing and counter-productive.

The situation is not much better with the Roma community. In a 2017 national needs assessment of Roma in Ireland it was revealed that 53.9% of respondents reported feeling discriminated against by the Garda Síochána. There is some basis for those feelings. In 2013 for example a Special Inquiry examined the removal of two Roma children from their families on the basis that the children did not resemble their parents as their appearance did not conform to racial stereotypes. The Inquiry found that in the case of one of the children his “ethnicity was so influential in determining the decision to remove him from the care of his parents, with no objective or reasonable justification” that it amounted to ethnic profiling. It was recommended that an independent audit should be carried out to consider, amongst other things, whether certain groups are over-represented in police

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23 See for example a detailed thematic review (and follow-up reports) of policing with and for members of the LGB&T communities which considered and made recommendations for the PSNI: Human Rights Thematic Review of Policing with and for Lesbian, Gay, Bisexual and Transgender Individuals, Alyson Kilpatrick BL, NIPB, February 2012.


25 Or other hate crimes.

26 Irish Traveller Movement Report In response to the European Commission against Racism and Intolerance (ECR) Ireland’s fourth monitoring round (April 2015). This issue was also raised in Dail debates. See for example written questions Clare Daly TD.
Audit on Section 12 by Dr Geoffrey Shannon. The subsequent audit, carried out by Professor Geoffrey Shannon, found that "crucial demographic data in relation to individuals who engage with members of the Garda Síochána is not routinely recorded on their PULSE file and that “cultural competence within An Garda Síochána with respect to the Roma community must be enhanced.”

Professor Geoffrey Shannon is an extremely experienced and highly regarded lawyer who dedicated an enormous amount of time and energy to his review. His observations must not be ignored but fully implemented as a matter of urgency.

There is a real problem across the service with the unavailability of data sufficient to analyse the nature and scale of issues. That is certainly the case with hate crime. Unless and until statistics capture the true nature and scale of racist incidents and crimes the Garda Síochána and other service providers will not be able to target their resources correctly. They will not know, for example, if there are hot-spots (geographically or temporally), whether there are victims left unprotected or whether the resources that are being dedicated to racist incidents and crimes are effective. A policing service not only needs to have that sort of information, it should want to have it so that it might prioritise resources and protect victims.

Recommendations

(15) To underpin the Garda Síochána’s efforts to improve its response to tackling hate crime there should be enacted specific hate crime legislation to include, at least, enhanced sentencing for crime motivated by or demonstrating hostility.

(16) An Garda Síochána should develop, with the assistance of human rights legal experts, a written policy on responding to hate crime to put the protection of victims at the centre of its service.

(17) An Garda Síochána should amend its guidance and working definition of hate crime as follows: “A hate incident is defined as any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by hostility or prejudice. A hate crime is defined as any incident, which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by hostility or prejudice.”

(18) An Garda Síochána should develop and integrate into its written policy a risk assessment for hate crime with particular attention paid to minimising the risk of further harm. That policy should thereafter be published.

(19) Minority liaison officers should be appointed on a full-time basis for each minority group such as: minority ethnic people; Travellers and Roma; lesbian, gay bisexual and transgender people; persons living with a disability; children; and, vulnerable adults. Those officers should be trained in hate crime investigation and perform an investigative role.

(20) An Garda Síochána should strengthen the formal and operational links between ELO/LGBT officers and Garda Victims Services Offices.

(21) An Garda Síochána should, working with the Traveller and Roma communities, forthwith commence a review of its policy, training and practices with a particular focus on their impact on Travellers and Roma. Thereafter, an action plan with time-limited targets should be published to deal with the issues identified.

(22) An Garda Síochána should establish specialist hate crime investigation units across the country, members of which should be selected by reference to aptitude and experience. Each should receive high quality intensive training in the investigation of hate crime. Thereafter, all hate crime investigations should be referred to a specialist unit. Bespoke training in identifying, recording and initiating an investigation of hate crime should also be developed for all response officers.

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27 Audit on Section 12 by Dr Geoffrey Shannon.
(23) An Garda Síochána should establish under a central lead a single command structure for all hate incidents and crimes.

(24) An Garda Síochána should collate disaggregated data on: the number of incidents and crimes reported to police; the number of incidents and crimes recorded as having a hate motivation; the number of arrests, charges and prosecutions that follow; and the number of complaints arising from the handling of reports of hate crime. The figures should be disaggregated according to the relevant hate motivation and the district within which the report was made. At the conclusion of 12 months and thereafter on an annual basis the statistics should be published.

(25) An Garda Síochána should carry out on an annual basis a dip-sampling exercise in which entries recorded on PULSE with a hate motivation are compared to reports of hate incidents and crimes. That dip-sampling exercise should then be analysed to identify any trends and patterns. Those trends and patterns should be published.

(26) An Garda Síochána should publish a revised and up-dated Diversity Strategy.

CHAPTER 7: State security

Because there is little oversight and no public accountability for state security my consideration of this aspect is severely limited. In many jurisdictions, responsibility for ‘normal’ policing and national security is split with national security handled by non-policing security services (such as MI5 in the United Kingdom) albeit there is considerable overlap with police remaining responsible for the executive policing functions involved in security operations. In Ireland, it is the Garda Síochána which has sole responsibility for all aspects of policing including state security. In theory that should make it easier to assess and monitor compliance with human rights obligations. That is not the case in practice. Serious concerns have been raised about the practices in security policing and the lack of oversight or accountability.

This is only going to increase. As technology advances the temptation grows to use every means available to combat crime and keep people safe; so does the potential for grave interference with rights. With intrusive powers there should be a commensurate level of regulation and oversight, not least for the sake of state security police. Increasingly, police will be required to explain to the courts their rationale for any interference and demonstrate how relevant human rights principles were applied. In the absence of robust policies and procedures which guide the practical application of human rights principles the garda are likely to fall foul of the courts. That will only undermine the purpose of the interference – to secure evidence to bring offenders to justice.

The domestic legal framework governing surveillance, interceptions and data retention is opaque, piecemeal and out of date. The governance arrangements are muddled and complex. A detailed analysis is beyond the scope of this report, but if it is to comply with human rights obligations a comprehensive review is required followed by, most probably, a radical reconfiguration.

Surprisingly, there is no legislation regulating the use of covert human intelligence sources (CHIS) commonly known as informers. Nor is there any law regulating the use or activities of undercover police. Given the extreme risk associated with undercover activities it is particularly concerning that there is not a clear and robust policy. Northern Ireland demonstrates the inherent risks associated with the use of CHIS and the importance of police having strict rules and oversight. 28 Ireland is now very much out of step with Great Britain and Northern Ireland. 29

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28 In Northern Ireland the use of CHIS, particularly those authorised to engage in criminality has been at the centre of a number of legacy cases currently going through the courts.

29 In Northern Ireland the use of CHIS, particularly those authorised to engage in criminality has been at the centre of a number of legacy cases currently going through the courts.
Recommendations

(27) The legal framework for the authorisation and regulation of all covert activity should be reviewed to provide a clear statutory framework in which rights might be interfered with lawfully. In particular the law should include authorisation and use of: Covert Human Intelligence Sources; interception; surveillance; collection, use and retention of personal data; an independent appeals and/or complaints mechanism; and, oversight of all covert activity by an independent person or body.

(28) An Garda Síochána should, with the assistance of human rights legal experts, devise an overarching written policy on all covert activity which incorporates expressly the relevant human rights standards and their practical application. Within the framework of the overarching policy there should be service directives dealing in detail with the various covert tactics and authorisations. Thereafter those documents which can be published without detrimental impact on state security should be published. Those documents which cannot be published should be accessible to the Policy Authority’s human rights legal expert.

(29) An Garda Síochána should employ a human rights legal expert to advise on the operational use of powers.

CHAPTER 8: Implementing a human rights-based approach: A step by step guide

Willingness to change

Firstly, there must be a willingness change and to transform culture. It is clear that a wholesale review of policing in Ireland is both desired and required. To achieve that there must be a paradigm shift to a human rights-based approach that will sustain over the longer term. The Garda Síochána must embrace human rights not only as a core value or objective but as a practical guide to decision-making and behaviour.

It is self-evident that reform is led from the top but it must be driven by and responsive to the needs of those the police are there to serve – the public. To be effective, cultural reform should result in the willing acceptance of a human rights-based approach and permeate every area of policing. It must be welcomed by every person who serves policing, which means every person within the Garda Síochána, the Garda Síochána Ombudsman Commission, the Garda Inspectorate, the Policing Authority, the legal profession and the judiciary. If a human rights-based approach is adopted by the garda it should be reflected in all of the oversight bodies. The single thread of human rights (of which equality is an integral part) should run throughout everything the garda do and every element of oversight.

If human rights are to be effectively protected, compliance must be monitored and the public informed of the success or failure of the Garda Siochana. To use a cliché – what is measured gets done – for human rights protections to become practical and effective they must be the standard by which the garda as a whole and individual gardaí are measured and reported upon.

If change is to be effected, the Garda Síochána culture must change. Cultural change enables meaningful reform – meaningful reform encourages and reinforces cultural change. Police must accept transparency and accountability not because they have to (although with a human rights-based approach they do) but because it improves policing; it will make them more effective (including cost-effective), efficient, legitimate and professional. Such an approach will build community support and cooperation and make their extremely challenging job much easier. Ultimately, police will not combat crime if they do not have the support and cooperation of the community. No amount of force will be sufficient to combat crime; without the public’s willing observance of the rule of law and respect for the honour of police and policing, crime will prosper.
Cultural reform will be achieved more quickly and more fully if gardaí are ‘on board’ from the outset.

**Recommendation**

(30) From the earliest possible stage but at least before any process of reform is implemented the Garda Síochána leadership together with the Policing Authority should engage with all garda members and reserves to explain the process and encourage support for it.

**Representativeness**

The Garda Síochána is not representative of Irish society. In August 2017, for example, only 63 gardaí and 37 reserves were from minority ethnic backgrounds.

Police serve the public as a whole and ‘the public’ comprises many diverse and sometimes hard to reach communities with their own vulnerabilities and needs. It is often said that a “them and us” environment exists with police occupying a closed and self-protective world that is not easily penetrated by others. That applies both to police/public generally but to police/minorities particularly. A number of contributors to this and previous reviews have questioned the fairness and impartiality of the Garda Síochána and its ability – desire even - to serve all communities and be accountable under the law to those communities. The Garda Síochána needs support from all communities but will struggle to attract and sustain that support if it bears no relationship to the composition of those communities.

The garda ran a recruitment campaign recently, which invited applications from people from diverse backgrounds but it was not sufficiently proactive in targeting people from minority groups. A recruitment campaign must reach under-represented communities and actively encourage them to join the garda. That means the garda must go to those communities and, working with advocacy groups, persuade them that their applications will be welcomed and that policing is a good career for them. If the garda is seen as an organisation in which ‘who you know’ counts for more than ‘what you know or can offer’ it will not be attractive to those who are currently under-represented within it. Unless and until the Garda Síochána is seen to have embraced cultural reform and embraced human rights and equality it is unlikely that members of minority groups will be persuaded in much greater number to join its ranks. All future recruitment drives need to focus specifically on minority groups and target proactively potential applicants in partnership with civil society and those representing minority groups.

**Recommendation**

(31) In future recruitment campaigns the Garda Síochána should first consult with minority groups and work with representative groups to target advertisements specifically those groups that are under-represented.

**Expert advice**

An Garda Síochána will almost certainly need the assistance of dedicated human rights experts to implement and sustain a human rights-based approach. The service should recruit people of sufficient standing and experience to exert authority and challenge officers. Police culture can be exclusive with police reluctant to accept that non-police can understand or add anything to their experience. Anyone coming in from the outside needs to be valued, supported and protected in the difficult work they will undertake.

There is a clear operational need for human rights advice: to implement a human rights-based approach; to review, devise and oversee training; to develop policy; for real-time advice in operational scenarios; to carry out
monitoring of human rights compliance. While there is some overlap in those functions there are three clear roles, requiring different expertise and experience. At the very least there should be one full-time dedicated role to offer advice and assistance operationally. Training would also benefit from having a full-time human rights training advisor who can review and advise upon training at Templemore and on continuing professional development.

In Northern Ireland, the PSNI employs a full-time human rights legal advisor who provides strategy and policy advice as well as operational advice. He attends public order planning sessions for example and is present in the command room during contentious operations. That advice is invaluable and welcomed by police officers. The PSNI also employs a full-time human rights training advisor who keeps training needs under review, develops training packages to ensure that human rights run through all training and trains the police trainers to deliver human rights training. The training advisor has both legal and teaching experience.

**Recommendation**

(32) An Garda Síochána should recruit human rights experts of sufficient standing and experience to influence real change. There should be at least one human rights legal expert to assist in the development of policy and operationally and one human rights training expert.

**Policy Development**

Police officers are bound by the law, not policy. However, policy is often the touchstone for frontline police officers in understanding what their obligations under the law are. Policy does not simply advise officers what they ought not to do, it is a positive statement of what officers can do within the confines of the law and sets out how they can uphold and vindicate the human rights of all persons, including their own human rights and those of their colleagues. As such, policy should instil confidence in officers when carrying out their duties and exercising their powers. Police policy sets the parameters for behaviour. It sets out the framework within which decisions may be made. It should contain guidance on relevant legislation, police powers and duties and relevant provisions in the Code of Ethics together with operational scenarios to explain their practical effect.

When policy is itself human rights compliant it is much more likely that training, decision-making and practice will be human rights compliant. Good policy is the first and most basic step in ensuring a human rights-based approach. Any member of the garda should be able to pick up a policy and know what is expected of him or her, regardless of experience, thereby promoting consistency across the service and in all parts of the country. Moreover training is dependent upon the quality of governing policy. A comprehensive policy which itself has human rights embedded within it will better equip trainers to deliver human rights-based training.

Written policy should cover all areas of policing from the routine to the unusual and should include internal policy protecting the human rights of gardaí and civilian staff. Human rights compliant policy should be developed to cover, at least: recruitment; culture and human rights awareness; training and professional development; public order; protests; use of force; stop and search/question and entering premises to search; arrest and detention; state security, surveillance and covert tactics; responding to hate crime; domestic and sexual violence; treatment of victims; safeguarding of vulnerable adults and children; community engagement; personal data collection retention and processing; investigations; the rights of children both as victims and perpetrators; and, roads policing. Human rights will be engaged in everything the police do; written policy should reflect that.

Importantly, policy should be published so that the public might know what to expect of its policing service and what is expected of the public. Publication of policy demonstrates transparency, which is a fundamental aspect of legitimacy, and treats the public with respect. For police action to be human rights compliant it must, amongst other things, have a lawful basis which includes a requirement that it is sufficiently accessible and
foreseeable by those against whom it may be imposed. An Garda Síochána permits very limited access to its operational policy.

It is accepted that publication of some policy documents might impact adversely upon state security or operational capability but even if such a policy cannot be published in full, a summary of the policy with the restricted information redacted from it can, and should, be published. Policy documents should be published in formats that enable persons with disabilities to have equal access to the information.

The PSNI publishes all of its policies and service instructions save those that contain such sensitive information that they cannot be put safely into the public domain. Any suggestion that to inform the public about police tactics is counter-productive and equips the potential criminal is ill-founded; that has not been the experience in Northern Ireland. It has not exposed the PSNI to criticism, left them vulnerable to counter-tactics or weakened them operationally. Quite the contrary; the public welcomes the transparency afforded and appreciates the respect with which they are treated.

Recommendations

(33) An Garda Síochána should, with the assistance of independent human rights experts, human rights proof all policy documents and instructions to ensure that they are clear, accessible and articulate relevant human rights obligations which are explained in their operational context. Where there is no policy on a particular area of police practice a policy should be developed which incorporates relevant human rights obligations. The Garda Síochána should engage with its oversight bodies in its development of policy.

(34) An Garda Síochána should publish all policy documents, instructions and directives save for those which cannot be put into the public domain for reasons of security. If sensitive security information can be redacted from a document the redacted document should be published with an explanation for the redaction. If a document cannot be published at all the existence and title of the document should be published with an explanation for not publishing the document.

Developing and delivering effective training

Effective training in human rights principles and practice is fundamental to any organisation committed to compliance with its human rights obligations.

While training is often recommended whenever something goes wrong, by then it might be too late and, in any event, reactive training does not achieve wholesale reform and certainly does not deliver a service that is human rights-based. Instead, training should be planned for and adequately resourced. Human rights should not be taught solely in a stand-alone lesson, although a dedicated introduction to human rights is important and effective. Human rights training should be mandatory and integrated into all training in a meaningful and practical way. The most effective training is interactive and reinforced in operational scenarios. Training should not cease once confirmed in rank but should continue throughout a garda’s career. Every profession requires continuing professional development and any policing organisation that aspires to delivering a professional service must value such development and its people.

If and when the Garda Síochána training programme is reviewed - with an emphasis on human rights - it should include consideration of the capacity of trainers who must themselves be sufficiently knowledgeable about their subject. Skilled in the delivery of training and given sufficient time to engage with students during lessons. It is highly likely that trainers will not be experts in every subject and even more unlikely that they will have lived experience of many of the issues that arise. For example, training on policing racist hate crime (considered above) would benefit greatly from including those who work with and advocate for minority ethnic people and Travellers. Including them in training is productive, cost-effective and symbolic. It must however
be meaningful and lasting. An occasional dipping in and out of training will not suffice.

Training must ‘hit home’ in that it must be welcomed by gardaí and it must better equip them to discharge their obligations. Human rights standards are legal standards and should be treated with due deference as such. In the PSNI human rights are taught as a legal subject but very much within their operational context. Skilled trainers combine technical knowledge of human rights legal obligations, proudly declared as such, with interactive problem-solving. When it done well, students (both new recruits and experienced officers) are enthusiastic, responsive and empowered by the training.

Human rights training should be interwoven in all training from firearms training through to community policing and engagement. There is no area of policing that does not engage human rights in some way and training should reflect that.

Recommendations

(35) An Garda Síochána should engage independent experts both in human rights law and training to review training needs and thereafter devise a training programme that has human rights obligations embedded within each element of training. In doing so, the garda should consult with representatives of minority groups to ensure that diversity and cultural awareness training is tailored to meeting human rights obligations for diverse and hard to reach groups. The training programme should include foundation training for new recruits and continuing professional development.

(36) An Garda Síochána should engage with its oversight bodies and the Irish Human Rights and Equality Commission on its revised human rights training programme.

Data collection and analysis

The collection of data on the police use of powers is both a human rights legal obligation and essential for the delivery of effective services. It is the cornerstone of transparency and enables accountability mechanisms to discharge their functions. It also enables the public – by whose consent and financial contribution the police operate – to judge but also understand their police and support them.

An Garda Síochána, if interested in whether the hard work it will undertake to implement human rights reform is successful, should want to monitor all areas of policing. If it is to apply the law, it must monitor all areas. That means collecting disaggregated data on at least the following: reported incidents of crime; recording rates for hate crime; recording rates for domestic and sexual violence; use of powers to stop, search, question and enter premises; use of security powers including surveillance and covert operations; use and deployment of CHIS; detentions; use of force; arrest, charge and outcome rates; complaints; training delivered; and, the representativeness of the service. All data should be collected and collated so that it might be presented in a meaningful way to the Policing Authority and other oversight bodies. Statistics should be produced in a form which can be shared with the public by routine publication.

Recommendations

(37) An Garda Síochána should, liaising with the Policing Authority, devise the means by which data, disaggregated according to its eleven categories and by district, can be recorded, collated and published. Thereafter, statistics should be produced and published on a quarterly basis. Data collected should include reported incidents of crime; recording rates for hate crime; recording rates for domestic and sexual violence; use of powers to stop, search, question and enter premises; use of security powers including surveillance and covert operations; use and
deployment of covert human intelligence sources; detentions; use of force; arrest, charge and outcome rates; complaints and internal discipline and outcomes; breaches of data protection; training delivered; and, the representativeness of the service.

(38) An Garda Síochána should establish and maintain its own internal human rights monitoring framework. That monitoring framework should cover the performance of the organisation as a whole and also that of individual members.

(39) Individual members’ performance in respect of human rights compliance should form part of their performance review and matter for their prospects of promotion. Supervisors and line-managers should be equipped to make those assessments and guide members on any improvement that is required.

(40) The professional standards unit should develop a process by which to keep members’ performance under review and identify training needs.

**External Monitoring / Oversight and accountability**

This is perhaps the most critical element of all. The oversight arrangements should of course be independent if they are to maintain the confidence of the public but they must be much more than that. Each organisation fulfilling an oversight role must be well resourced and have the power to hold the garda to account and effect change. Currently, each oversight body has restrictions placed upon it and is limited in its remit. None of the oversight bodies however have been established within a human rights framework, albeit they take account of human rights. The Garda Siochana Act 2005 (as amended) provides that the garda must “provide policing and security services with the objective of… vindicating the human rights of each individual”.

Moreover, the Garda Síochána’s policing principles provide that policing services will be provided “In a manner that respects human rights.” However, the legislation which establishes the oversight bodies does not make it an express function to monitor compliance with human rights obligations or to hold the garda to account for failures in compliance. The Policing Authority should have such a function including a duty to report on its findings.

In Northern Ireland, where the oversight arrangements are respected internationally, the Policing Board’s mandatory functions include monitoring the compliance of the police with the Human Rights Act 1998. The statutory underpinning of that mandatory function has enabled the Board to: require the provision of information; to monitor all aspects of policing from a human rights perspective; to require the Chief Constable to attend and present on the PSNI’s compliance with human rights; to report publicly on PSNI’s compliance with sufficient information that the Board’s assessment is reliable; and, prioritise resources to ensure a human rights compliant service.

An essential element of the Board’s work is the publication of an annual human rights report, which covers all aspects of policing. To assist it in fulfilling its human rights monitoring function and publish an annual report, the Board engages the services of an independent human rights advisor who is a practising human rights lawyer. The advisor is not an employee, to maintain independence. The advisor developed the monitoring framework, kept the Code of Ethics under review, undertook on behalf of the Board a continuing monitoring function, provided advice to the Board, carried out thematic reviews of areas of concern, produced an annual human rights report and undertook extensive engagement with the community to inform a practical assessment of policing on the ground. In particular the advisor: reviewed police training (including by proofing lesson plans and sitting in classes); observed and monitored the planning and execution of operations; reviewed strategy, procedure and planning for public events; analysed quantitative and qualitative data; attended public processions; attended training and planning sessions regarding use of force; visited detention facilities and

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30 Section 7.
31 See the Police (NI) Act 2000, as amended.
32 See Board chose, from the outset, to appoint a barrister in private practice to demonstrate its commitment to independence, to ensure the separation of interests and to apply a rigorous legal analysis to human rights compliance. An advisor was in place between 2003 and 2017.
kept under review legislative reforms, developments in case law and any other matters impacting upon police compliance with human rights. That role was critical to the Board’s discharge of its human rights function.

Another important aspect of the work of the independent human rights advisor is the monitoring and oversight of national security. Although the Board has no remit in respect of the Security Service, the Chief Constable remains responsible for, and accountable to the Board in respect of all PSNI officers and staff working alongside the Security Service. The human rights advisor (who was security cleared) had access to and monitored many aspects of intelligence and national security work from a human rights perspective. The advisor was able to advise the Policing Board about the PSNI’s compliance – albeit not always able to share the detail of what she had seen. Even in the area of national security, mechanisms can be found to monitor human rights compliance. The importance of that oversight was emphasised in the Patten Report in which it was recommended that no area of policing should be free from appropriate oversight. It said “Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.” Or, as Lord Bingham put it “Democracies die behind closed doors.”

In Ireland, there is no external or transparent oversight of state security policing. If, as suggested in this report, sufficiently senior human rights lawyers are engaged to assist the oversight bodies those lawyers can be security cleared to enable access to sensitive material thereby removing an obstacle to such oversight.

**Recommendations**

(41) The Department of Justice should consider the establishment of a criminal justice inspectorate with power to inspect, of its own volition, all criminal justice agencies and report publicly on its findings. Any inspectorate should have as a statutory function inspecting for compliance with human rights obligations.

(42) The Policing Authority’s statutory functions should include the duty to monitor the Garda Síochána’s compliance with the European Convention on Human Rights Act 2003 and to report annually on its assessment of the Garda Síochána’s performance according to an agreed human rights monitoring framework.

(43) State security should be subject to the statutory oversight arrangements. The statutory exceptions which apply to those bodies should be repealed. Oversight should proceed on the basis that all policing is subject to the accountability arrangements subject only to strictly limited exceptions on defined security grounds. Those excepted matters should be considered by the Policing Authority’s independent human rights legal expert.

(44) The Policing Authority should engage the services of an independent human rights legal advisor of standing and experience to advise the Authority on the discharge of its human rights function. The legal advisor should conduct a root and branch review of the Garda Síochána with the purpose of assisting in the development of a human rights monitoring framework, devise the standards by which to measure compliance and thereafter monitor and report upon the Garda Síochána’s compliance with the European Convention on Human Rights Act 2003.

(45) The Policing Authority should publish its human rights monitoring framework, which should be followed by the Garda Síochána’s human rights action plan setting out how, when and by whom the various elements of monitoring will be facilitated. Thereafter, annually, the Garda Síochána should publish a human rights action plan responding to all recommendations made in the previous 12 months in the human rights annual report.
A HUMAN RIGHTS-BASED APPROACH TO POLICING IN IRELAND:

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A HUMAN RIGHTS-BASED APPROACH TO POLICING
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A HUMAN RIGHTS-BASED APPROACH TO POLICING

What is a human rights-based approach? Lessons from Northern Ireland

Essentially, a human rights-based approach to policing is one which puts the rights enshrined by the European Convention on Human Rights and Fundamental Freedoms (ECHR)33 of individuals and protected groups at the centre of every decision and action of the police service and police officers. Every policy, training exercise and operational application of powers and duties begins with a consideration of the rights at issue. The ensuing policy and practice respects, protects and fulfils human rights. Such an approach has been tried and tested and proved to be truly democratic; enabling people to know their rights, to claim and defend them. It has resulted in police becoming more professional, efficient, effective and ultimately respected by the public they are there to serve. Rights and responsibilities are balanced within a human rights framework that is foreseeable and which is mandatory rather than discretionary. Policing is not subject to the whim of politics, to money or to power but beholden to and protective of the rule of law.

Police play a pivotal role in defending human rights. When a human rights-based approach is adopted they can rightly claim to be human rights champions. They enable all of us to live free from violence and crime while helping to create and support an environment within which we can enjoy all of our rights. A human rights-based approach recognises and reflects the fact that policing is an honourable profession, which deserves the support of the public but also appreciates that support, if it is to be relied upon, must be earned. When a human rights-based approach is taken, police officers understand that the protection of human rights is the foundation of, not an obstacle to, their work.

The European Union Agency for Fundamental Rights puts it this way:

“*The central elements of human rights-based policing in democratic societies are: the police’s special role given its monopoly on the use of force; professionalism; the requirement of strict legality; internal and external accountability; transparency; and a relationship of trust and confidence with the public.*”34

Those are all aspirations which the state and the Garda Síochána have committed to. If they are to be achieved, it will be by a genuine and comprehensive shift in thinking and practice which truly embraces a human rights-based approach. There is evidence of the success of this paradigm shift in many jurisdictions but perhaps nowhere more so than in Northern Ireland. One does not have to look too far (geographically or philosophically) to see how it can be realised.

The Belfast (Good Friday) Agreement of 1998, recognising the legacy of suffering and discord, agreed that Northern Ireland needed a new beginning, including for policing. That new beginning was to be based on reconciliation, tolerance, mutual trust and the protection and vindication of the human rights of all. Included within the agreement was the commitment to “give the policing of Northern Ireland to the people of Northern Ireland.” Thereafter, in 1999, the Independent Commission on the Future of Policing published its report: *A New Beginning for Policing in Northern Ireland* – known as the Patten Report. Throughout the Patten Report it was stressed that realisation of a desire for a new beginning would depend upon a comprehensive programme of action to focus policing on a human rights-based approach. That approach was to include: a new oath of office expressing a commitment to upholding human rights; a new Code of Ethics integrating the ECHR into police practice; new codes of practice on all aspects of policing including covert law enforcement techniques so that their use would be strictly in accordance with the ECHR; training of all police officers and police civilians in fundamental human rights principles and their practical implications; the requirement that awareness of human rights issues and respect for human rights in the performance of duty would be an important element in performance appraisal; and, that the performance of the police service as a whole in respect of human rights would be monitored closely by an independent Policing Board.

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33 As informed by amongst other things other international treaties.
34 Fundamental rights-based police training – A manual for police trainers
Ultimately the Patten Report envisaged, by this process of reform, a Northern Ireland in which the police service would enjoy widespread support from, and become an integral part of, the community as a whole. The hope was that the police would be a service provider rather than a force, which would be effective, efficient, impartial, accountable, representative and respectful of human rights. The transition from a force to a service was hugely significant, recognising police officers not as part of a militaristic regime but as public servants who police by consent, that consent being dependent upon the public accepting the legitimacy of the police. It required much more than a name change – it required a wholly different mind-set.

That seminal report began a process of root and branch reform to put human rights at the centre of everything the newly constituted Police Service of Northern Ireland (PSNI) was to do. As envisaged by Patten it was to be the epitome of a human rights-based approach. The subsequent reform of policing in Northern Ireland resulted in seismic change from cultural transformation through to practice on the ground. However, not all of the recommendations have been implemented fully and some took significantly longer than anticipated. That in itself is a lesson that can be learned from the process of reform in Northern Ireland. If it is to be undertaken, reform must be wholesale and designed to sustain human rights as a core function of policing over the longer term.

It should be acknowledged that the momentum which drove the oversight and accountability arrangements has waned significantly in recent times. That tells us that if reform is to be sustained and built upon, oversight must endure over the long term and must align with the letter and the spirit of reform. There must be a clear, long-term vision for reform with agreed outcomes. Unless and until the agreed outcomes have been delivered the process will not have been completed. Even when the agreed outcomes have been achieved the active monitoring of human rights compliance must continue. Anxious scrutiny is required to foster and protect a human rights-based approach. Both the police and oversight bodies must share and commit to the process of reform and agreed outcomes and be held to the same high standards of human rights compliance. The oversight and accountability bodies must support the integration of human rights standards with as much enthusiasm as expected of the police. If there is a singular lesson to be learned from Northern Ireland, that is it.

Is a human rights-based approach necessary?

The answer may be self-evident to many readers but there will be some who question the necessity and even the legitimacy of such an approach. That must be dealt with head on.

Firstly, and most directly, a human rights-based approach is necessary because it is required by law.

In Ireland, the European Convention on Human Rights Act 2003 (the 2003 Act) requires every organ of the state to perform its functions in a manner compatible with the state’s obligations under the ECHR. Organ of the State includes a tribunal or any other body which is established by law or through which any of the legislative, executive or judicial powers of the state are exercised, i.e. it includes the Garda Síochána. Furthermore, the 2003 Act requires a court to interpret and apply any statutory provision or rule of law (both those in force or coming into force) in so far as is possible subject to the rules of law in a manner compatible with the state’s obligations under the ECHR. In other words, the legality of police action and the use of powers will be judged according to the principles established by the ECHR as interpreted by the European Court of Human Rights (ECTHR). The state must require it and the Garda Síochána must comply with ECHR standards, which will themselves be interpreted taking into account other international standards. That means that international treaties which have not yet been incorporated into domestic law, while not enforceable directly in the domestic courts, should be taken into account in the course of interpreting and applying ECHR standards. A human rights-based approach should not set, as a minimum, compliance with the ECHR. Treaties to which Ireland is a signatory are relevant, even prior to ratification. Therefore, by way of example, the United Nations Optional Protocol to the Convention against Torture (OPCAT) cannot be ignored.

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Section 3 of the 2003 Act.
Section 1 of the 2003 Act.
Section 2(1) of the 2003 Act.
This is considered further below.
On the latter point the body of case-law emerging in the United Kingdom, which has a very similar express obligation to comply with the ECHR, is instructive.\textsuperscript{39} UK jurisprudence has demonstrated the increasing importance of unincorporated treaties on the development of the domestic law by supplementing or augmenting ECHR rights, albeit with some limitations.\textsuperscript{40} International law has long been used to resolve legislative ambiguity. If there is a provision in a domestic statute which may either conflict with or conform to a treaty right, the legislature will be presumed to have intended to conform rather than conflict and the domestic statute should be interpreted accordingly. There is a strong presumption in favour of interpreting domestic statutory law in a way which does not place a member state in breach of its international law obligations.\textsuperscript{41} Therefore, in cases of legislative ambiguity unincorporated international treaty obligations can have a very important and direct impact upon the outcome of a case.

Ireland already, as a matter of law, provides that the Garda Síochána must comply with the ECHR so any approach other than a human rights-based one risks the Garda Síochána and gardai breaching their legal obligations. As law enforcers gardai must respect and uphold the law. The legal obligation to comply with the ECHR is express; it should not be watered down in a debate which frames it in terms of aspiration, principle or objective. The Garda might wish to vindicate human rights, might aspire to take account of human rights and might seek to protect human rights in practice but if the Garda Síochána and its members do not achieve those objectives – let us be clear – they will be acting unlawfully. The correct question is not therefore whether a human rights-based approach is necessary – it is - but whether a human rights-based approach has been achieved and if it has not, what needs to be done to achieve it.

Secondly, and perhaps most importantly, a human rights-based approach should be adopted because it works; it is effective in securing a professional, lawful, democratic and accountable police service that respects and values the people it is there to serve while effectively combating crime and maintaining order. It is the best means of securing police legitimacy and therefore enhancing safety and security. To put it another way, police are better equipped to deal effectively with crime and disorder when they are engaged with, and have secured the willing cooperation of, the public. The notion of policing by consent, that the police owe their duty to the public not to the state, was developed in the early 19th Century and has grown in stature ever since. The police fight crime and maintain public order but do so in association with the public and for the benefit of the public. Without public support and willing co-operation the police will always be ‘catching up’. They will not have access to community leaders, to local intelligence or to the public’s help in managing crime and disorder. No amount of force will compensate for a lack of public support. If law enforcement is to be effective and violent encounters are to be avoided there must be a demonstrable commitment to moving from a negative relationship with the public to one where police protect the public and the public helps them to prevent and solve crime.

It is worth reflecting back on what the Patten Report said in 1999, when it recommended a human rights-based approach for Northern Ireland. It stressed:

“We cannot emphasize too strongly that human rights are not an impediment to effective policing but, on the contrary, vital to its achievement. Bad application or promiscuous use of powers to limit a person’s human rights – by such means as arrest, stop and search, house searches – can lead to bad police relations with entire neighbourhoods, thereby rendering effective policing of those neighbourhoods impossible. In extreme cases, human rights abuses by police can lead to wrongful convictions, which do immense damage to the standing of the police and therefore also to their effectiveness. Upholding human rights and upholding the law should be one and the same thing.”

That is pertinent to Northern Ireland and Ireland alike.

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\textsuperscript{39} By the Human Rights Act 2000, section 6. There has not yet been the same level of judicial attention paid to this aspect in Ireland.  
\textsuperscript{40} A v The Home Secretary [2005] AC 68 as to article 14 ECHR in which their Lordships considered the provisions of the unincorporated International Covenant on Civil and Political Rights (the ICCPR).  
\textsuperscript{41} R v Lyons [2002] UKHL 44 as per Lord Hoffman.
Since 1999, the experience in Northern Ireland has been positive for public and police. If evidence is required of that take the assessment, in 2016, of the PSNI Chief Constable who leads the service that went through a human rights-based reform process. He said:

“Accountability and human rights are the foundations for effective policing... The result has been a transformation in policing and a broad acceptance of the policing structures across the community that we serve... The critical success story, from a policing perspective, has been the full implementation of the human rights framework.”

That is vindication of the Patten approach and as solid an evidence base as you can find to endorse its approach and recommendations.

**A human rights approach by the Garda Síochána: progress or stasis?**

An Garda Síochána undertook a significant amount of work some years ago with the stated intention of embedding human rights standards within policing. For example in 1999, in response to the Council of Europe’s Policing and Human Rights 1997-2000 Programme, the Garda Síochána launched its human rights initiative which included the establishment of a Human Rights Office and a Human Rights Working Group. The working group, which included a number of human rights experts, recommended a human rights audit of policy and practice.

In 2002, a human rights audit of garda policies and practices was commissioned. The report which ensued, known as the Ionann Report, assessed the extent to which the Garda Síochána complied with the values enshrined in international human rights standards, with particular reference to the basic values set out by the Council of Europe. The Ionann Report recognised the early impetus for improved human rights compliance but observed “concerns were expressed during the audit about the pace at which these initiatives were being progressed, and this was also evident by looking at the history of events in the human rights programme and the extent to which human rights considerations had been taken into account in policy formulation.” The report noted that “resources for human rights work were extremely limited for such a large organisation, with a Human Rights Office with only two staff members who were required to deliver training at the Garda Training College at Templemore in addition to carrying out the actions in the programme on human rights”.

In other words, with the Human Rights Office understaffed and located away from Garda Headquarters there had been created a demonstrable ‘distancing’ of the core business of human rights compliance. The Human Rights Office remains understaffed and located at Templemore Training College. It seems to me there has been little progress achieved in moving human rights ‘in-house’ or embracing compliance as a core value, other than as a stated commitment.

It was observed in the Ionann Report that:

“...much more needs to be done to review existing policies and develop a new mechanism for new policies to ensure they are human rights compliant... The Garda Code should be reviewed to ensure that human rights are reflected throughout so that infringements of human rights, as with other infringements of the code, become a disciplinary offence.”

The report suggested that one of the most important reforms in terms of human rights at that time was the establishment of an independent police complaints system. That body was to have the capability to investigate...
any serious breach of human rights whether or not a complaint was made to it, in accordance with the ECHR. While an independent complaints body has been established its capacity to be truly independent has been questioned and the Garda Code is not a discipline code.\textsuperscript{46}

The audit also revealed “structural weaknesses in ensuring stated commitments to human rights were properly supported so that they could become reality.” It was clear in the report that insufficient resources had been dedicated to mainstreaming core human rights values. Accordingly little, if anything, had been done to set up the necessary structures and processes to human rights-proof policies, to educate the service about human rights or to monitor compliance with human rights standards. The importance of a corporate commitment to human rights was emphasised. It can be restated without controversy that unless the garda commitment to human rights is fully embedded in policy, training and practice there will never be a culture and ethos which properly and comprehensively embraces human rights as a core value of policing.

Furthermore, the Ionann Report noted a clear disparity between what senior garda managers believed had been achieved and what more junior officers and members either understood or applied in practice. That suggests a serious failure in leadership and reflects an under-investment in embedding human rights into policing at every level. Gardai, who were expected to translate the organisation’s commitment into day to day encounters and policing operations, were not properly equipped to do so. Unless and until that is addressed, little more is likely to be achieved. As the Ionann Report observed “it is essential that the application of policy and procedure is monitored and reviewed so that continuous development and improvement can be made.” That is as important (arguably more so) today as it was in 2004.

The Ionann Report recorded particular concerns in respect of custody and questioning, excessive use of force, public order policing, the Garda Síochána’s immigration role, its perceived lack of accountability and discrimination against minority groups and Travellers. Whether and to what extent those specific concerns have since been addressed is important in gauging both the garda intent and capacity to implement reforms in the future. I will return to some of those specific issues below.

There followed, in 2005, publication of the Garda Human Rights Action Plan containing targets and timeframes for implementation of the Ionann Report’s recommendations. Also in 2005, a Strategic Human Rights Advisory Committee was established, which provided advice on: human rights monitoring framework; policy; and, training.\textsuperscript{47} In respect of a human rights monitoring framework it was recommended that a human rights lawyer should be appointed to develop a framework. In respect of policy, a specific integrated policy package was recommended. It was further recommended that a lawyer should be appointed to human rights proof all garda policies, practices and procedures. A training proposal was suggested for incorporation into all strands of policing practice. A lot of expertise, time and effort went into producing the report of the Advisory Committee. Its recommendations were thoughtful, evidenced and practical. Ultimately, however, austerity measures amongst other things stood in the way of its delivery. Today, it is almost impossible to even get a copy of the Advisory Committee’s report. That being the case, it has to be a source of great frustration and regret that the work has not been progressed and the impetus has waned. The report provided a useful starting point but did not, because the Committee was not so tasked, provide the overall model for a human rights-based approach to policing. That still needs to be developed. If a new reform process is to be undertaken it must be the result of a renewed and pressing desire to deliver a human rights-based approach, with resources dedicated to all aspects of policing.

Before anything else is achieved, the mind-set of the organisation must change. It must accept the need for reform and embrace fully the adoption of a human rights-based approach. The Garda Síochána should believe that the oversight bodies will engage with it in a positive and supportive way while holding it to account robustly and independently. Criticism without support is counterproductive – support without criticism is pointless. When a human rights-based approach is adopted and a framework for monitoring compliance settled a number

\textsuperscript{46} This is considered further below.

\textsuperscript{47} Submission by the Human Rights Strategic Advisory Committee for the Development and Implementation of the following Instruments: Monitoring Framework; Policy; Training, April 2008.
of guiding principles should be agreed between the Garda Síochána and the Policing Authority within which all performance can be monitored – the good and the bad – and which creates an environment that is dynamic, allowing the garda to engage in meaningful dialogue and shared enterprise to address issues as they arise.

Reform will take time but it will be completed much more quickly and ultimately in a more sustainable way if it is a wholesale process in which the oversight bodies and external stakeholders are involved. A number of stakeholders are still to be convinced that the desire for wholesale reform is shared by all members of the Garda Síochána or even by those who will oversee the process but they remain willing to provide support and to offer assistance to achieve the shared objective – improved policing. There is considerable expertise within the community, which is not utilised. The garda and the oversight bodies can learn much from the communities they are all there to serve. A number of stakeholders are still to be convinced that the desire for wholesale reform is shared by all members of the Garda Síochána or even by those who will oversee the process but they remain willing to provide support and to offer assistance to achieve the shared objective – improved policing. There is considerable expertise within the community, which is not utilised. The garda and the oversight bodies can learn much from the communities they are all there to serve.

Reform will take time but it will be completed much more quickly and ultimately in a more sustainable way if it is a wholesale process in which the oversight bodies and external stakeholders are involved. What is required is a firm commitment made good by resources allocated as necessary across all relevant bodies. In this context, the important work to embed human rights in policing, undertaken previously, should be recalled and built upon. That work was not completed however. If this new attempt to embed human rights is to have any credibility or prospect of success it must have a singular and sustained focus with the backing of government, the Garda Síochána, the relevant oversight bodies, non-governmental groups and the public.

**Recommendations**

**RECOMMENDATION 1**

An Garda Síochána should recruit human rights experts of sufficient standing and experience to influence real change. There should be at least one human rights legal expert to assist in the development of policy and operationally and one human rights training expert.
CHAPTER 2
CULTURE, ETHOS AND HUMAN RIGHTS AWARENESS
CHAPTER 2
CULTURE, ETHOS AND HUMAN RIGHTS AWARENESS

The culture and ethos of an organisation is the way the organisation sees itself and the way it sees and interacts with others. If a police service is to comply with its human rights obligations it must promote then establish and sustain a human rights culture and ethos within − from the Commissioner and his or her senior team through to all staff including its new recruits. That culture and ethos must permeate the service and inform the way people treat colleagues and others. A successful human rights culture within policing depends upon a number of factors, most prominent of which is the promotion by police leaders of a human rights culture and a demonstrable commitment to human-rights-based policing in practice.

A number of surveys conducted across Europe have demonstrated the strong link between trust in the police and the enjoyment of human rights. What is undisputed is that a commitment to safeguarding human rights, the substantive and visible protection of those rights, and the exposure of violations of rights if they do occur, are the best means of building public confidence in policing and ensuring an effective and efficient police service. After all, a police service that cannot secure public confidence and maintain its legitimacy cannot function effectively. The Garda Síochána must embrace the protection and fulfilment of human rights as a core function, as opposed to value, of policing and thereafter establish the measures it will take to ensure that its policy and operational focus will be on human rights. Policing culture can be exclusive and resistant to change, suspicious of ‘outsiders’ and slow to self-reflect. A human rights culture on the other hand is, by definition, inclusive, open to change, respectful of difference and considerate of the views and experiences of others.

Is Garda Culture a Human Rights Culture?

The Garda Síochána Act of 2005 established a number of policing principles. It requires that policing services are provided: independently and impartially; in a manner that respects human rights; and, in a manner that supports the proper and effective administration of justice. Those are important principles but unless translated into practice on the ground, which is enjoyed by the public as better service, they will remain little more than lip-service.

During the course of my review, when I discussed the reforms in Northern Ireland and their potential to inform the process of reform in Ireland, I was met with the response “but Northern Ireland is different – policing was in crisis.” Whether or not one accepts that as the motivating impetus to policing reform in Northern Ireland, it cannot be said that Ireland is so very different. Despite the many efforts to reform the culture and ethos within the Garda Síochána it continues to be undermined by allegations of misconduct, dysfunction and cultural malaise. Reported ‘scandals’ stretch back over many years but new ones are emerging and the findings of consecutive reviews have not recorded much cultural change. That does not bode well for the paradigm shift in police thinking that will be required by a human rights-based approach.

In this context some reflection on some of the more significant cases, reviews and emerging issues is merited. One can discern a lot about the Garda Síochána’s culture from the observations of those charged with investigating and reviewing them over the years.

Take, for example, the eminent former Supreme Court Judge Mr. Justice Adrian Hardiman. He took the opportunity, during a detailed dissenting judgment in the 2015 case of DPP v JC, to make a number of observations on the garda. He noted the case of Frank Shortt, which he said was:

“...an appalling example of a deliberate garda conspiracy to perjure an innocent man into prison for no better reason than to enhance the careers of certain gardaí... Unfortunately, as experience in this country and other countries demonstrate, departures, sometimes the gravest of deviations, from normal standards of conduct and professionalism occur in police forces. Left unchecked there is always a risk that low standards will infect elements of such a force.”

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48 In DPP v JC Neutral Citation [2015] IESC 31.
49 He gave a dissenting judgment in the case of DPP v JC in which the issue of admissibility of illegally obtained evidence was considered.
Mr. Justice Hardiman also noted the Morris Tribunal report (of 2004) and its finding that garda culture generally “militates against open and transparent cooperation with investigations both internal and external and manifests itself in a policy of ‘don’t hang your own.’” This was said in the context of garda ‘planting’ explosives and then ‘finding’ them. He then noted the Smithwick Tribunal report (of December 2013) which found, “there prevails in An Garda Síochána today a prioritisation of the protection of the good name of the force over the protection of those who seek to tell the truth. Loyalty is prized above honesty.” He commented that this “clearly demonstrates that there was little or no change in what the Morris Tribunal called “garda culture” in the intervening period between the two reports.”

Mr Justice Hardiman made this prescient observation:

“When the State appoint a person to any position which gives him or her coercive, compulsory powers over other citizens, whether those powers are to arrest, to search, to imprison, to confiscate property or documents, levy fines or other charges or whatever, in my view there is an obligation upon the State to ensure that the people whom it chooses to appoint with such powers are fully instructed in the precise legal extent of those powers and in the proper legal manner of applying them. Few would dispute that the State has an obligation, directly or through other bodies, to ensure that people who practise medicine or accountancy (to take the professions involved in the cases cited above) are competent to do so and actually do so in a proper and careful manner.”

He observed that over a number of years there have been “a considerable number of deeply disturbing developments both in relation to the Garda Síochána itself and to the arrangements for its oversight...”

Can anyone really dispute that? The more difficult question is whether, since then, much has changed. Sadly, it would seem not. I am also reminded of the interview, published on 2 October 2014, with Mr. Conor Brady (former editor of The Garda Review and a founding Commissioner of GSOC) which recorded his “deep” disillusionment with the garda. He said “I just could not move the rock. You could not get into Fortress Garda.”

We have also seen the report of the O’Higgins Commission, which looked into allegations made by Maurice McCabe of misconduct in Cavan-Monaghan. The report found failures to investigate with victims being poorly served. That has been followed by the ongoing Disclosures Tribunal looking into amongst other things the alleged ‘smearing’ of Maurice McCabe following his disclosure of wrong-doing. We have had the Fennelly Commission report, in April 2017, which looked into the taping of phone calls at garda stations. It reported that while it was “reasonable to conclude, based on the evidence before it, that no widespread or systematic, indeed probably no significant, misuse of information derived from non-999 recordings took place” the recordings were unlawful, there was no procedure to deal with the situation and there was no effective oversight. The shocking content of telephone recordings relating to the investigation of the death of Sophie Toscan du Plantier was also noted.

There is the recent breath test issue where gardaí recorded breath tests that had not been carried out. For some years the issue was known to the garda but the Policing Authority was not informed that a review was taking place or even that discrepancies of any kind had been discovered. The Policing Authority noted its “disappointment” at not being advised at the time that an audit was underway and said that the situation raised widespread concern about the way gardaí go about their daily work and about management and supervision. The scale of the discrepancy, it said, is “further evidence of deep cultural problems” within the service. To that can be added the recent issue whereby 14,700 people have allegedly been convicted wrongly of motoring offences when they should have been given the opportunity to pay a Fixed Charge Notice.

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51 Irish Times on line.
With all of this in the public domain, the need for urgent wholesale reform to re-establish legitimacy and public confidence in policing should be obvious. The Garda Síochána must recognise the need for cultural reform but history suggests that it is slow to embrace and implement change. It is worth recalling this observation of the Garda Inspectorate (of November 2015), that there had been “minimal and often ineffective internal changes made to the structure of the Garda Síochána in response to recommendations made in many previous reports and inquiries. The need for change is all the more acute given the pressures on front-line services, changing crime patterns and changing demographics.”

In Northern Ireland, the Patten Report emphasised (in 1999) that, “There needs to be a culture of openness and transparency in a police service as a whole, in which police officers as a matter of instinct disseminate information about their work. The prevailing instinct at present, however, is defensive, reactive and cautious in response to questions.”

An Garda Síochána Culture Audit

In May 2018, the Garda Síochána published its Culture Audit. The audit marked, in the words of the Foreword, the beginning of the process of establishing cultural reform under the An Garda Síochána Modernisation and Renewal Programme. The culture audit provides an important insight into the existing culture within the Garda Síochána and potential barriers to cultural reform. It gathered the views of serving gardai and records both positive and negative indications. In the context of an ongoing modernisation and reform programme a particularly revealing score is for gardai perception of the organisation as “open to change/innovation” which scored only 4.9 out of 10. It is also notable that “speaking up and reporting wrongdoing” achieved a score of 5.5 out of 10. A number of other measures, grouped together under the heading “cultural reinforcers” received worryingly low scores ranging from 4 to 6.5. It was observed that senior leadership were not held in high regard; access to the right resources was limited; there is insufficient front-line supervision particularly to new recruits; it is not a meritocracy but depends upon who you know; and, there is a fear about speaking up. The findings in the audit should alert the Garda Síochána, the Policing Authority, the Garda Inspectorate and the Commission on the Future of Policing Ireland to the serious challenges that will present in their efforts to transform the culture of policing. Advance notice of cultural impediments, however, provides a real opportunity to get the right mechanisms in place from the outset.

The audit contains a number of helpful recommendations, which should be considered before any reform programme is developed or implemented. The audit does not include, however (and therefore does not provide a baseline for measuring), human rights awareness within the Garda Síochána or the extent to which gardai accept the legitimacy of a human rights-based approach. That is disappointing but can be addressed as part of the modernisation and reform programme. Unless and until a fulsome needs analysis is carried out it will be impossible to deliver an effective human rights strategy.

Public Attitudes

However the Garda Síochána views itself, it must be considerate of the public’s attitude to the service it provides. In 2014, the Garda Síochána began a series of surveys (published quarterly) to determine public attitudes. The quarterly surveys are conducted with 1,500 persons aged over 18 years. The respondents comprise men and women and include non-Irish nationals (13% of respondents). Respondents were asked about: their perception and fear of crime; whether they had experienced victimisation; the visibility of garda; satisfaction with An Garda Síochána; trust in An Garda Síochána; equality of treatment by An Garda; and, perceptions of An Garda Síochána as an organisation.

In the final quarter of 2017, of respondents who had experienced victimisation (6%), 88% had reported the

14 Changing Policing in Ireland, November 2015.
crime to the garda. While the reporting rate appears positive it means 12% of respondents who were victims of crime did not report it. Of those respondents who reported a crime, only 55% were satisfied with the service they received. In other words, 45% (nearly half of all respondents who reported a crime) were not satisfied with the service they received. That represents a significant decrease from the final quarter in 2016 (62%). That is unacceptably low. Furthermore, when asked whether they were satisfied with the information provided to them by the garda, the number of respondents who were satisfied (48%) had decreased significantly from the previous 12 months (when it stood at 54%). Trust in the Garda Síochána was recorded, in the final quarter of 2017, at 88%. However within that, a high level of trust was recorded by only 44% of respondents. The remainder had either medium or low trust (12%). That rate has not fluctuated beyond a few percentage points over the course of 12 months. Respondents were also asked whether they believed the Garda Síochána would, if in contact for any reason, treat them with respect. Over the course of 12 months the rate of respondents who said they strongly agreed decreased from the already low rate of 29% to 25%. 8% of respondents disagreed or strongly disagreed. Respondents were also asked whether they believed the Garda Síochána would treat them fairly regardless of who they were. Only 17% of respondents strongly agreed and 18% of respondents strongly disagreed. The survey is not, under these latter two headings, disaggregated according to whether the respondent had contact with the Garda Síochána or was a victim of crime.

General satisfaction with the Garda Síochána among respondents has varied over the course of the surveys between 69% and 77%. In the final quarter of 2017, 70% were satisfied but of those only 10% were very satisfied. 65% of respondents believed that the Garda Síochána was community focused; 57% believed it was modern or progressive; and 55% believed that it was effective in tackling crime. When asked whether the Garda Síochána was well managed, only 38% believed that it was and only 35% believed that it provided a world class police service.

An Garda Síochána Code of Ethics: meeting the challenge?

All of the above suggests the same or similar issues within policing in Ireland as those which motivated reform in Northern Ireland. Rather than Northern Ireland being viewed as a unique case where reform was essential, it can be seen as a similar case which can teach us a lot about what is needed for policing in Ireland. The Garda Síochána has not however embraced the wholesale reform that is necessary to resolve those issues.

Some efforts have been made to address issues of culture. There has been developed by the Policing Authority, in consultation with stakeholders, a Code of Ethics for the Garda Síochána. The Code “sets out guiding principles to inform and guide the actions of every member of staff of the Garda Síochána at every level of the organisation.” What the Code does not do, however, is incorporate expressly the rights and obligations enshrined in the ECHR or explain for the benefit of gardai and the public the practical application of those rights and responsibilities. In my view the Code should have incorporated expressly human rights obligations and their application in much the same way as the PSNI Code of Ethics. The PSNI Code of Ethics draws directly from the ECHR and other relevant human rights instruments including the United Nations Code of Conduct for Law Enforcement Officials, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the European Police Code of Ethics.

Furthermore, the Garda Síochána Code is not a discipline code in that it does not contain mandatory standards against which members will be monitored, measured and sanctioned. While it may be taken into account in any disciplinary proceedings and in any investigation by the Garda Síochána Ombudsman Commission (GSOC), it is not enforceable directly. The Garda Síochána Act 2005 no longer provides that a breach of the Code may be a breach of the Garda Discipline Regulations or the Civil Service Code of Standards, the latter of which applies to civilian staff.

In my view, that is a missed opportunity. In Northern Ireland, the PSNI Code of Ethics is a comprehensive

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54 Introduction, Code of Ethics for the Garda Síochána.
57 First published in 2003, and most recently revised and reissued in 2008, the PSNI Code of Ethics lays down standards of conduct and practice for police officers and is intended to make police officers aware of their rights and obligations under the Human Rights Act 1998.
human rights document which sets the standards expected of officers and is a discipline code against which police conduct or misconduct is judged. If an allegation of misconduct against a PSNI officer is made, the standards by which he or she is judged are those contained within the Code of Ethics, which means human rights compliance is enforced directly by the PSNI internal discipline branch and the Police Ombudsman investigating a complaint. It ensures that the common thread of human rights and ethical practice runs through all police action and oversight of police action. The extent to which individual officers pay due regard to human rights principles and the action that PSNI as an organisation takes in response to those breaches can be monitored and reported upon. Moreover, the Northern Ireland Policing Board monitors the effectiveness of the Code by considering how officers are trained on the implications of it; by reviewing quantitative information on breaches of the Code of Ethics; and by evaluating qualitative information on how the PSNI both investigates and addresses such breaches, including disciplinary action taken or procedural or policy changes made.

It is precisely because the human rights standards expected of police officers are set out in a published document, which can be monitored and enforced by independent oversight bodies, that the police and public alike can be reassured that if the code is complied with human rights will be protected and respected. But, they can also be reassured that if human rights are abused those abuses can be uncovered and sanctioned. The application of the PSNI Code of Ethics is one of the great achievements for policing in Northern Ireland and has played a significant part in embedding human rights within and across policing.

A weakness of the PSNI Code of Ethics however is the fact that it does not apply to civilian staff; therefore the fact that the Garda Síochána Code of Ethics applies to all staff including civilian staff should be welcomed.

The Garda Síochána Code sets out nine ethical standards and the ethical commitments required to meet those standards. In its foreword, former Commissioner O’Sullivan observed, “At the heart of the commitments in this code is the principle that every Garda member, Civilian, Reserve member, of all ranks and grades, treats others the way they would expect to be treated themselves, in consideration of the ‘common good’.”

While that observation is encouraging, and with which it is hard to disagree, it could be said to be a little trite. It does not guide gardai or others on how to ensure the operational delivery of services which respect, protect and fulfill human rights. Neither does it ensure a consistent standard against which individuals’ actions might be measured: it presupposes that everyone understands what is in the common good and agrees how people should be treated. It does not recognise the complex operational challenges presented to gardai on a daily business or the legal context within which decisions must be taken. It does not recognise that some policing decisions and actions impact upon individuals differently and that individuals’ rights must be protected and cannot be sacrificed because of a subjective view that it might be for the common good.

Moreover, one person’s desire to be treated in a certain way might not match another’s. Take for example the right to privacy and data protection. Views vary significantly. Some people believe if you have done nothing wrong you have nothing to hide while others believe that privacy really matters to them and should not be invaded unless and until it can be shown that that they have done something wrong. No general commitment to treating people fairly or decently will assist gardai on the legal limits of surveillance. It is essential therefore that a framework of standards is set which is lawful and sufficiently precise while allowing the reasonable exercise discretion.

The Chair of the Policing Authority observed in her Foreword to the Code, “Now that the Code has been established, it is vitally important that active steps are taken to ensure that it is embedded into the day to day work of the Garda Síochána.” I agree that the Code must be embedded into the day to day work of gardai. However I offer the observation that while the Code sets out an ethical framework by which garda decisions and actions will be measured it does not, of itself, provide sufficiently clear or enforceable standards to ensure compliance in operational settings. Before ethical standards can be embedded into operational policing they

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58 Code of Ethics for the Garda Síochána, Policing Authority.
59 Josephine Feehily, Chairperson, Policing Authority.
must first be made explicit in their operational context. Furthermore, failure to follow ethical standards must, if they are to be effective both in changing culture but also in enhancing public confidence, have consequences; the public must believe that they will be upheld and see that they are enforced, if breached.

Cultural Reform in Northern Ireland
The PSNI experience

Chief Constable George Hamilton (when he was Assistant Chief Constable), made a comprehensive and unambiguous statement which reveals a lot about the culture and ethos within a reformed PSNI. It merits setting out in some detail:

“Human rights and accountability are essential for policing. The fundamental building blocks for community confidence and the delivery of effective policing are human rights and accountability. For PSNI, which came into being almost exactly one year after the Human Rights Act entered into force, human rights have been a central pillar to development and growth of the new Service. We haven’t always got it right and at times it’s been a steep learning curve. However, as has been recognised, since 2005 we have implemented almost 200 recommendations contained within previous Human Rights Annual Reports...Human rights underpin all our policies, practices procedures and decision making at every level and in every department of the organisation. We don’t have to look too far for an example of how this works in practice. The past year has presented a significant challenge for policing. Human rights are always at the core of our operational response to policing protests and public order. The recent flag protests and the associated disorder have thrown some of the difficult decisions we face into sharp focus. It has opened up the debate on how we balance what are sometimes competing human rights...”

“The European Convention on Human Rights has been the framework through which all decisions have been made, from the senior commanders’ level right through all ranks to the officers on the ground, who at times have had to make split second decisions in the face of serious and sustained disorder. The decision to accommodate peaceful protest; the decision to engage with and talk to those involved; the decision to forcibly remove protestors; the decisions to use water cannon and impact rounds when disorder broke out; the decision to evidence gather for follow-up investigation; the decision of how we appoint finite resources across a range of demands – all of these decisions have sought to balance individual and collective human rights... The principles of human rights, of proportionality, accountability, legality and necessity have become the language used in our planning meetings and command rooms. It is a balance. It is a challenge and different communities will have their own view. However the role of the police is clear, to uphold and balance human rights...There has been much debate. Our decisions and tactics have been challenged. And it is right and proper that they are challenged. The Board has, and will, continue to hold us robustly to account on the issue. Whilst we continually review our operational tactics on a regular basis there will be one constant factor in all our decision making, and that is a core focus on human rights...During the past year we have also seen murderous and attempted murderous attacks by terrorists on a prison officer, police officers and other members of the community. When the discontent of a minority is expressed through violence the safety of the community is threatened. The Police Service must act accordingly, protecting the community and protecting its officers. The greater the challenges faced by the police service, the more important human rights policing and accountability becomes...The Board’s annual report recognises the success and progress we have made. It also, rightly, challenges us to do more. And we will respond to that challenge.”

PSNI leadership demonstrated their commitment to a human rights-based approach and the cultural reform necessary to make that a reality. However, ensuring that a human rights culture persists and grows throughout the organisation has been a challenge. In 2011, PSNI carried out its own cultural audit (of officers and civilian staff) in order to assess the extent to which the culture of PSNI was ‘fit for purpose’ to deliver a policing service as envisaged by the Patten Report and to assess cultural reform since the previous cultural audit of 2008.

60 ACC George Hamilton’s introduction to the PSNI Human Rights Programme of Action 2012-2013. PSNI. May 2013.
Of the respondents to a survey which formed part of the audit, only 65% agreed with the statement “I see the protection of human rights as a fundamental part of my job.” 10% disagreed with that statement and the remainder were either neutral, didn’t know or didn’t answer. That was a negative and worrying development when compared to the 2008 Cultural Audit where 69% of respondents agreed with the statement – albeit that was also a disappointingly low figure.

What it tells us is that culture and ethos do not change overnight but must be fostered. It is notable that the PSNI cultural audits spanned a period when austerity measures were in place, training had begun to suffer and morale was low. It also reflects an increasingly toxic political environment in which a number of political representatives demonstrated open hostility to human rights. Police are not immune to such rhetoric so it is incumbent upon police leaders to ensure that misconceptions regarding human rights are addressed and ensure that messages such as those enunciated by ACC Hamilton are understood and accepted by all officers and civilian staff of all ranks and grades. Chief Constable George Hamilton has continued his efforts and takes every opportunity to restate the importance and benefit of a human rights-based approach.

The Northern Ireland experience should inform those who will be charged with implementing reform. They need to bring gardaí with them through the process and devote resources to explaining the reforms and encouraging acceptance of them. Training should always be delivered in a positive environment; discussion should be encouraged, myths dispelled and questions answered. That can only be achieved when training is face to face. No amount of e-learning will suffice.

**Recommendations**

**RECOMMENDATION 2**
An Garda Síochána, working with the Policing Authority, should assess human rights awareness within and across policing. As part of that review garda culture and acceptance of a human rights-based approach should be measured.

**RECOMMENDATION 3**
Having measured garda culture and acceptance of a human rights-based approach, a strategy should be developed and implemented to address any issues or themes arising with a particular focus on eliminating obstacles to embedding a human rights-based approach and ensuring that cultural reform will be translated into the practical and effective protection of rights.

**RECOMMENDATION 4**
The Garda Síochána Code of Ethics should be revised so as to include expressly the human rights standards expected of garda and civilian staff and their practical application. Thereafter, the Code of Ethics should take effect as a discipline code with all alleged breaches of human rights investigated by the Garda Síochána Ombudsman Commission. The Code should be kept under review by the Policing Authority which should monitor and report upon any human rights themes and trends emerging from reported breaches of the Code.
CHAPTER 3

POLICING OF PUBLIC ORDER AND PROTEST
CHAPTER 3
POLICING OF PUBLIC ORDER AND PROTEST

Introduction

If police are to build (or rebuild) trust they must behave so as to secure the confidence, approval and support of the public – willingly – by their professional, human rights compliant approach which respects democracy and the rule of law. Trust in the police can be easily undermined, particularly when public order operations end in violence. Scenes of police battling with protesters for example will be beamed across the country, drawing observers into a debate about the very legitimacy of the policing operation and the legitimacy of police themselves. The police will be compelled to justify their actions by reference to the law and human rights principles. Without a ready willingness to explain, provide justification and answer questions the police will be pitched against the community it is there to serve. Unanswered questions will invite speculation and silence will result in conspiracy theories. Tactics will be discussed and criticised by those who urge a harder edged policing response and by those who condemn the police for their over-use and/or misuse of power. Recent history proves the point. Take for example the protests around Shell 2 Sea, Reclaim the Streets, Student Fees, the British Embassy, the HBlocks, the Curragh and Jobstown. Allegations of brutality, improper use of police powers and improper political interference into policing abound.

Protest might be described as the right to air grievances without fear of retribution or censorship, which is fundamental to a democratic society. That right however must be balanced against the rights of those living and working in the area in which the right to protest is exercised. Police must balance those rights, which can be challenging. To conduct that balancing exercise the garda must understand the rights at play and the parameters within which they are operating. That understanding – of how to make lawful decisions when policing protest – is only strengthened by a proper understanding of human rights obligations and principles. Sir Hugh Orde, former Chief Constable of the Police Service of Northern Ireland and President of the Association of Chief Police Officers, is very clear about that. He said “Our understanding of how to make those choices is strengthened by a growing understanding of human rights obligations.”

Sir Hugh Orde went on to call for a radical shakeup in policing in Great Britain, particularly in public order tactics and training, to put more emphasis on the consideration of human rights. In particular, he was keen to challenge the view that the consideration of human rights was an obstacle to tackling crime. He said “It’s a myth that human rights prevent good policing.” Referring to the thousands of parades and protests which his PSNI colleagues had policed he said “a concern for human rights helps us in our policing. It is not an impediment to policing – it makes you think of other solutions.” Giving evidence to the Westminster Parliament’s Home Affairs Select Committee he said “disorder at one parade in Belfast was so violent my officers had to return fire but the following year it was policed by just two officers in shirtsleeves as a result of a radical re-examination of tactics with consideration of human rights at its core.” He added “Accountability is critical to policing – if a police service anywhere is to retain its privileged position as an operationally independent service with the right to take the liberty of a fellow citizen away, then it must be subject to robust and effective challenge.” He was speaking about his experience in Northern Ireland. While his comments attracted some criticism in Great Britain, from those who advocated for a zero tolerance approach to protest, Sir Hugh Orde’s was not a lone voice. For example, another senior British officer said, “A human rights emphasis will make us shape our services around what people have a right to expect in terms of protection, reassurance and the defence of civil liberties.”

The current PSNI Chief Constable, George Hamilton, while an Assistant Chief Constable continued the theme and said, “Human rights & accountability are essential for policing. The fundamental building blocks for community confidence and the delivery of effective policing are human rights and accountability.” He described the PSNI’s policing of the notorious ‘flag protests’ and related public disorder as an example of how human rights worked in practice to the benefit of the police and the public alike. The ECHR was, he said, the framework within which all decisions were made from senior commanders to officers on the ground. Despite the challenge to balance sometimes competing rights he remained steadfast and concluded that there would

61 The British Approach to Policing, the Guardian, 11 May 2011
62 The British Approach to Policing, the Guardian, 11 May 2011
be "one constant factor in all our decision making and that will continue to be a core focus on human rights."63

In other words, human rights provide the framework within which police can plan for any protest or anticipated public order operation and guide the police so that discretion can be exercised consistently and reliably. This is particularly important given the public order powers available to the Garda Síochána are extremely broad and confer broad discretion on gardaí. A human rights-based approach within a clear human rights framework can provide the answers when domestic legislation (or indeed politics) does not.

**Legal Framework**

Ireland is a common law jurisdiction but with a written constitution.

A brief overview of both common law and written legislation (including constitutional and ECHR provisions) concerning protest is merited to better contextualise the application of rights in practice.

**Human Rights Instruments**

The Constitution provides every citizen with the rights to free expression, assembly and association. The rights are however limited. The right to freedom of assembly is protected by the Constitution only if it is peaceful.64 This does encompass the right to protest, but with qualification.

This has been developed further by the courts.

At common law, an early reference to a *right* (as opposed to a liberty) to assemble and to protest was in a judgment of Lord Denning (in 1976) in which he said

‘the right to demonstrate and the right to protest on matters of public concern... are rights which it is in the public interest that individuals should possess; and, indeed that they should exercise without impediment so long that no wrongful act is done... As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited.’65 That case considered the application of common law principles. That statement was reaffirmed, in 1987, as follows; "law upholds to the full the right of people to demonstrate and to make their views known so long as all is done peaceably and in good order."66

By 1999, further clarity was provided to the extent that “the common law recognises the right of public assembly... the common law should also recognise that in some circumstances this right can be exercised on the highway, provided that it does not obstruct the passage of other citizens.”67 However, that case was fact sensitive and considered primarily the ancient right of access to and use of land. Another case, in 1999, which considered the related ‘right’ of free speech held that free speech includes “not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.”68 Since then (but before the enactment of the Human Rights Act in the UK), there has been debate at a judicial and political level as to whether there is a ‘right’ or ‘liberty’ which can be overridden by considerations of the convenience of others. In a UK Supreme Court decision, Lord Bingham observed that the ‘approach of the English common law to freedom of expression and assembly was hesitant and negative, permitting that which was not prohibited.’69 That can no longer be said to be a full representation of the law post the enactment of the Human Rights Act in the UK or the European Convention on Human Rights Act 2003 in Ireland.

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64 Article 40.
65 Hubbard v Pitt [1976] QB 142, CA.
66 R v Chief Constable of Devon & Cornwall ex parte Central Electricity Generating Board [1987] QB 458 (known as the CEGB case).
67 DPP v Jones & Lloyd [1999] 2 AC 240. HL as per Lord Hutton. This concerned a banned protest at Stonehenge.
68 As per Sedley J in Redmond-Bate v DPP [1999] 7 BHRC 375.
Before the enactment of the 2003 Act in Ireland, individuals wishing to raise an alleged breach of the ECHR had to take that alleged infringement to the ECtHR. The coming into force of the 2003 Act signaled an important milestone. For the first time rights (such as to freedom of assembly and association and the right to express political and other opinions) were enshrined as directly enforceable legal rights, as opposed to common law liberties, capable of being relied upon to bring a claim for infringement of the right or in defence of a prosecution in local courts.

The ECHR is described often as a ‘living instrument’ which means its interpretation develops over time in light of changing conditions. For example, the ECtHR has held that to avoid a chilling effect on the right to free speech the right should be read so as to include an almost universal prohibition against requiring journalists to reveal their sources. An analysis of the case law of the ECtHR is therefore instructive but older cases must be approached with a degree of caution. The ECHR rights, which are most obviously and directly engaged in any assembly, protest or other public meeting are: Article 5 (the right to liberty and security); Article 8 (the right to respect for private and family life, the home and correspondence), which includes the right of peaceful enjoyment of the home; Article 9 (the right to freedom of thought, conscience and religion); Article 10 (the right to freedom of expression); and, Article 11 (the right to associate with others and to peacefully assemble). The rights to assemble and to protest peacefully derive from the combination of Articles 9, 10 and 11. It must be borne in mind that there is no expressed right to protest within the ECHR: it is the combination of Articles 9, 10 and 11 which protects the right to protest. The right of protest includes a right to march or process if the purpose is peaceful. Article 11 ECHR (the right to peaceful assembly) does not require the police to facilitate the assembly if doing so would expose the community to a real risk of serious violence. The rights are qualified, save for that part of Article 9 which protects the right to freedom of thought, conscience and religion and Article 14. That means the rights may be restricted so long as any restriction is lawful, serves a legitimate purpose (which must be necessary in a democratic society) and is proportionate. When considering restrictions imposed upon protests, the three legality tests will be applied strictly.

The right to freedom of expression and assembly is considered to be of fundamental importance. Freedom of expression has been said to constitute “an essential foundation of democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.” In another case it was restated that the right to freedom of assembly is “one of the foundations of such a society.” Indeed, the ECtHR has gone on to say that member states must take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully and that “Genuine, effective freedom of peaceful assembly cannot ... be reduced to a mere duty on the part of the state not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11... Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.”

Article 14 (the right not to be discriminated against on designated grounds in the exercise of another ECHR right) will be engaged as the rights are exercised. Article 14 does not require that every person or group of persons is treated in exactly the same way. Rather, it prohibits differential treatment of one group when compared to another group unless that differential treatment is justified objectively. The grounds upon which discrimination is expressly prohibited are wide-ranging and include but are not limited to: political or other opinion, national or social origin, sex, race, colour, language, birth, association with a national minority and any other status. Discrimination includes treating a person less favourably than others in similar situations on the basis of a particular characteristic, failing to treat persons differently when they are in significantly different

20 Goodwin v the UK (1996) 22 EHRR 123. Note, there is no such express right.
21 Which includes the right not to be detained save in accordance with one or more of an exhaustive list of scenarios contained at article 5(1).
22 Rassemblement Jarussien and Unite Jurassienne v Switzerland (1979) 17 DR 138; Christians Against racism and Fascism v UK (1980) 21 DR 138.
24 That part of the Article 9 right - to manifest one's religion or beliefs - may be limited on certain grounds. Article 14 is the right not to be discriminated against in the exercise of an ECHR right.
25 See for example The Sunday Times v United Kingdom (No 2) [1991] 14 EHRR 229
26 Steel & Others v United Kingdom (1998) 28 EHRR 603
27 Ziliberberg v Moldova (App no 61821/00, 4 May 2004, unreported.
28 Plattform Ärzte für das Leben v Austria (1988) 13 EHRR 204
situations and applying a neutral policy in a way that has a disproportionate impact on individuals or groups.

The rights protected by the ECHR must be practical and effective.\textsuperscript{79} The application of the ECHR must ensure the values of pluralism, tolerance and broadmindedness.\textsuperscript{80} To ensure the practical and effective application of the rights there has developed a system of positive obligations on states rather than mere forbearance from the violation of rights. In respect of the former, this can be demonstrated by the development of a positive, albeit limited, duty under Article 11 to facilitate peaceful protest by, for example, requiring the state to require police to intervene in the face of violent opposition to the exercise of the right to assemble.\textsuperscript{81}

It has been restated that

“any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it.”\textsuperscript{82}

Importantly, ‘peaceful’ within this context does not equate, without more, to an assembly that is not unlawful within the domestic law. The legality or otherwise of an assembly under domestic law is no criterion for determining whether the assembly or protest is peaceful.\textsuperscript{83} For example, in one case a non-violent unlawful sit-in which blocked the entrance to an army barracks in Germany was considered to be a peaceful assembly attracting the protection of Article 11 ECHR.\textsuperscript{84} In another case, however, because the demonstration extended over a prolonged period and caused serious disruption to others the dispersal of the demonstration by the police was considered to be justified within Article 11(2) ECHR.\textsuperscript{84}

To ensure the full realisation of rights the ECtHR has imposed upon states a duty to regulate or prevent a third party from violating another’s rights.\textsuperscript{85} That means, in the current context, the police may be required to protect peaceful protestors from the disruption of their protest by others. A further general principle which runs through ECtHR judgments is that of proportionality. In other words, there must be a fair balance struck between the protection of the rights of individuals and the general interests of the community. Proportionality is of particular importance in the analysis of Articles 9, 10 and 11.

In assessing whether any particular state restriction or other act is permitted or prohibited by the ECHR a number of questions must be answered. Firstly, does the assembly, protest or public meeting engage the ECHR rights? Almost any assembly or association.

\textsuperscript{79} Airey v the UK (1980) EHRR 305.
\textsuperscript{80} Handyside v the UK (1976) 1 EHRR 737.
\textsuperscript{81} Plattform Arzte fur das Leben v Austria (1988) 13 EHRR 204.
\textsuperscript{82} Faber v Hungary (App No. 4072/08) 24 October 2012.
\textsuperscript{83} Cisse v France (App 25/02 29 November 2007).
\textsuperscript{84} G v Federal Republic of Germany (1989) 60 DR, a decision of the European Commission.
\textsuperscript{85} Friedl v Austria (App. No. 15225/89) in which the dispersal by the police of a sit-in in a busy underpass in Vienna which obstructed passers-by over the period of one week was considered to be squarely within the State’s margin of appreciation and was justified.
\textsuperscript{86} A v the UK (1999) 27 EHRR 61; Steel & Morris v the UK (2005) 41 EHRR 22, known as the McLibel Two case in which the State failure to provide legal aid in a defamation action brought against a private individual was capable of infringing the article 10 right to freedom of expression.
\textsuperscript{87} Christians Against Racism & Fascism (CARAF) v the UK (App. No. 8440/78) (1980); Plattform Arzte fur das Leben v Austria (1988) 15 EHRR 204.
\textsuperscript{88} Anderson v the UK (App No. 33489/96) (1997), which concerned a number of individuals banned from entering a shopping centre. The ECtHR held that Art 11 did not apply because there was no history of the applicants using the shopping centre for any form of organised assembly or association.
11. To be prescribed by law, a restriction must be sufficiently accessible (i.e. it must provide the citizen with an explanation of it) and certain (i.e. it must be precise so the citizen can regulate his or her conduct in line with the restriction). To put it another way, the law relied upon must itself be clear and capable of objective measurement so that a person proposing to participate in a procession or protest must be able to discern whether he or she may be liable to arrest or sanction. If not, the law is unlikely to be sufficiently accessible and certain. In one case, the law relating to ‘binding over to keep the peace’ was considered too vague and subjective to be predictable to a potential protestor and therefore violated Article 11. That does not mean however that a law which is open to interpretation or more than one construction will necessarily fall foul of Article 11. A margin of doubt is permitted.

The state must establish that the restriction seeks to achieve one of the legitimate aims of Article 11(2) which are national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights of others. These are wide-ranging and relatively easy to establish. In respect of the protection of the rights of others, the relevant rights do not themselves have to be ECHR rights. The ECtHR has recently restated that

“...although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance.” Furthermore, the mere existence of a risk of disorder is likely to be insufficient justification for banning an event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes. The state authority cannot place restrictions on an assembly because it disapproves of the purpose for it or the cause espoused by it.

Finally, the state must also establish that the restriction is necessary in a democratic society. Therefore, there must not only be a legitimate aim but the restriction must be proportionate to meeting a pressing social need. It is in this context that striking the balance between the rights of individuals and the wider community is most elusive. By way of example, the state should be able to demonstrate that the aim sought to be achieved by a restriction could not have been achieved by a less intrusive measure. The state will always have a degree of scope (referred to as the margin of appreciation) to choose the most appropriate measure. The ECtHR recognises that state authorities are often in a better position to assess the necessity of any restriction subject ultimately to the court’s supervisory role. It will, within recognised principles, be for the state authorities to decide what is an acceptable level of disruption and when it becomes necessary in a democratic society to disperse a protest and, if necessary, to arrest the participants. For example, in 1995, the European Commission upheld a ban on demonstrations relating to Northern Ireland in Trafalgar Square. Any demonstration to be held in Trafalgar Square required permission, which was refused in relation to all such demonstrations relating to Northern Ireland. The ban was considered, by the European Commission, to pursue a legitimate aim, namely the prevention of disorder and the protection of the rights and freedoms of others, to be necessary in a democratic society and to be proportionate. The Commission considered that the state authorities were better placed to determine policy in respect of civil unrest.

In another case, the ECtHR considering the extent to which the state may impose restrictions on a proposed protest meeting the ECtHR observed that “In order to enable the domestic authorities to take the necessary preventive security measures, associations and others organising demonstrations, as actors in the democratic

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89 The Sunday Times v the UK (1979) 2 EHRR 245.
90 Hashman v Harrup v the UK (2000) 30 EHRR 241 in which fox-hunting protestors were bound over to keep the peace and to be of good behaviour in the judgment of fellow citizens was considered too vague and too subjective.
91 Gorzelik v Poland (2005) 40 EHRR.
93 Berladir v Russia (App No. 34202/06) 19 November 2012.
94 Faber v Hungary (App No. 40721/08) 24 October 2012.
95 Genderdoc-M v Moldova (App No 9106/06) 12 September 2012.
96 G v Federal Republic of Germany (1989); F v Austria (1989); H v Austria (1989) all Commission decisions.
97 Rai, Allmond and Negotiate Now v the UK 81-A DR 146, decision of the European Commission of 6 April 1995.
process, should respect the rules governing that process by complying with the regulations in force. Notification, and even authorisation, procedures for a public event do not normally encroach upon the essence of the right under Article 11 of the ECHR as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering, be it political, cultural or of another nature. An authorisation procedure is in keeping with the requirements of Article 11(1), if for the purpose of enabling the authorities to ensure the peaceful nature of a meeting. Thus, the requirement to obtain authorisation for a demonstration is not incompatible with Article 11 of the Convention. Since states have the right to require authorisation, they must be able to apply sanctions to those who participate in demonstrations that do not comply with the requirement. At the same time, in special circumstances when an immediate response might be justified, for example in relation to a political event in the form of a spontaneous demonstration, to disperse the ensuing demonstration solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, may amount to a disproportionate restriction on freedom of peaceful assembly.98

Other factors which will be taken into account in any assessment will include the extent to which protesters are prepared to cooperate with the police, the location and duration99 of the protest, the nature of the protest and the police response to the protest. For example, if the very purpose of the protest is to cause an obstruction rather than a minimal obstruction being an undesired side effect of the protest the ECHR has been very slow to find a violation of ECHR rights.100 But, if there is no reason to believe that a protest or demonstration will turn violent the court has found a violation (by reason of it being disproportionate) where police have been too quick to intervene to break it up. In one case, the ECtHR held that where there was no evidence of a danger to the public other than the blocking of a tram line, the number of protestors was small and the protest was broken up by the police within half an hour, the state authorities had not shown the requisite degree of tolerance.101 In another, in which protestors physically impeded the activities of others, the police were held to be justified in intervening as they reasonably believed the obstruction might provoke others to violence.102

It is clear that a restriction on the right to assemble and/or to protest may be justified if its purpose is to prevent disorder at or in the vicinity of the assembly or protest and the measure is both necessary and proportionate to achieve that. However, it is less clear that a restriction imposed due to a threat of general disorder other than at or in the vicinity of the assembly or protest is capable of being justified within Article 11(2) ECHR. That is because Article 17 ECHR provides that nothing in the ECHR should be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set out in the ECHR or at their limitation to a greater extent than is provided for in the ECHR.103 To put it another way, the state must not permit or encourage those who threaten violence for the very purpose of preventing others from exercising their right to assemble and/or to protest under Article 11 ECHR.

In a case involving a round the clock protest in Parliament Square, in which a protestor erected and lived in a tent for a period of time until directed to leave, the English Court of Appeal considered the extent of Articles 10 and 11. The court held that the statutory power to direct protestors to remove tents from Parliament Square was capable of interfering with Articles 10 and 11 ECHR even though the general right to protest in Parliament Square would remain substantially unimpaired by a direction to remove a tent. This was because the manner of the protest (the use of a tent) was part and parcel of the protest. Depending on the facts, the manner of a protest might constitute its actual nature and message. For some protesters, the ability to maintain a round-the-clock presence in Parliament Square was essential to the nature of the protest. In considering compatibility the limited nature of the interference was relevant. While the erection of a tent in Parliament Square was not unlawful, a refusal to comply with a removal direction without reasonable excuse was. The court held that the limited nature of the interference was relevant. While the erection of a tent in Parliament Square was not unlawful, a refusal to comply with a removal direction without reasonable excuse was. The statutory power to direct removal conferred powers on the police for the protection of the rights and freedoms

98 Berladir v Russia (App No. 34202/06), 19 November 2012.
99 There is not a right to assemble for an indefinite length of time: S v Austria (App No. 13812/88) 1990.
100 See for example Steel & others v the UK (1998) 28 EHRR 603; GS v Austria (App No. 14923/89) 6 March 1989.
101 Boczkowski v Poland (App No. 1543/06).
102 Steel v the UK (1998) 28 EHRR 603.
103 See for example Norwood v the UK (2004) 40 EHRR SE111.
of others, to preserve the amenity and availability of the square, to prevent crime and to prevent risks to health and safety arising from encampments, which were legitimate aims. The direction to remove the tent was proportionate to those legitimate aims. The court emphasised that each case must be considered on its own facts and a careful balancing exercise must be conducted in each case before rights were interfered with.  

Article 8 ECHR has been considered very recently by the English Court of Appeal in the context of police power to collect and retain the personal data (including written and photographic records) of a non-violent protestor’s attendance at demonstrations. The court held that the inclusion of personal information on the national database involved an interference with the subject’s right to respect for his private life, which required justification. It accepted the importance to modern policing of detailed intelligence gathering and the need for caution before overriding the judgment of the police about what information was likely to assist them however the court was not persuaded that the information could provide any assistance in relation to any legitimate aim. It held that the systematic collection, processing and retention on a searchable database of personal information, even of a relatively routine kind, involved a significant interference with the right to respect for private life which could be justified by showing that it served the public interest in a sufficiently important way, but the police had not shown that the value of the information was sufficient to justify its continued retention. The interference with the applicant’s Article 8 right was held to be disproportionate and unjustified.

It is the duty of police officers to protect life and property, to preserve order, to prevent the commission of offences and where an offence has been committed to take measures to bring the offender to justice. In carrying out their functions they will be guided by the Code of Ethics and should so far as practicable carry out their functions in co-operation with, and with the aim of securing the support of, the local community. The garda have a positive obligation under Article 2 ECHR to protect life (of all involved including gardaí) and to ensure that all operations are planned so as to avoid recourse to lethal force. When considering whether an operation has been planned effectively, with Article 2 in mind, relevant factors will include the training of officers and the issue of equipment including weapons. During the course of an assembly, protest or other public meeting the role of garda on the ground is pivotal. It is the garda officer who responds by, for example, making arrests, issuing warnings, keeping protesters and marchers apart, protecting life and property, using force and implementing the criminal justice strategy. In the exercise of all relevant powers and duties the police must act compatibly with the ECHR.

Domestic legislation: public order and protest

The specific legislative powers often resorted to by the garda to restrict assemblies include those provided by the Criminal Justice (Public Order) Act 1994. Gardai have a broad power to ‘move on’ individuals including when they “without lawful authority or reasonable excuse [are] acting in a manner which consists of loitering in a public place in circumstances, which may include the company of other persons, that give rise to a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of the public peace.” Failure to comply with such a direction is an offence. Furthermore, a person commits an offence if he or she without lawful authority or reasonable excuse, “willfully prevents or interrupts the free passage of any person or vehicle in any public place.” A large number of arrests were effected during the Corrib Gas protests under those legislative provisions.

The Criminal Justice Act 2006, which provides the garda with power to deal with anti-social behaviour, has been used in relation to protests. For example, gardai may issue a behaviour warning, which lasts for 3 months, in response to anti-social behaviour. Anti-social behaviour is behaviour which causes or is likely to cause to another person or persons who are not of the same household as the person: harassment, significant or persistent alarm, distress, fear or intimidation; or significant or persistent impairment of their use or enjoyment.

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104 R (Gallastegui) v Westminster CC & others [2013] EWCA Civ 28.
105 R (John Catt) v ACPO, Commissioner of Police of the Metropolis [2013] EWCA Civ 92.
106 Sections 8 and 9.
107 Section 8.
108 Section 9.
of their property. This applies both to criminal and non-criminal behaviour. The fact that the Act applies to behaviour “likely to” cause alarm etc. means there need not be an actual victim. If a person fails to comply with a warning or receives three or more warnings in six months, the garda can apply to the District Court for an Anti-Social Behaviour Order prohibiting a wide range of behaviour. ASBOs are civil orders made without criminal law procedural safeguards but the consequence of breaching such an order is criminal.109

Gardai also have power to arrest for a “breach of the peace.” Breach of the peace is not defined in statute and there has been little judicial guidance in Ireland on interpreting the common law power. Some general principles however can be stated. Breach of the peace is a common law concept which is meant to be used to prevent unlawful violence against people or property. It is not a criminal offence in its own right however gardai have power which may be exercised for the purpose of stopping or preventing anyone from breaching or threatening to breach the peace. A breach of the peace may occur on either public or private property.110 If gardai reasonably believe that a breach of the peace is being committed, or is about to be committed, on private property, they may use their common law power to enter the property without a warrant in order to stop or prevent the breach. An arrest for an anticipated breach of the peace will only be lawful if the threat of breach is imminent. Furthermore the arresting garda’s apprehension of the breach must be reasonable in the circumstances. This means that there must be an objectively reasonable cause which led him or her to believe that a breach was about to occur.

In respect of the exercise of the common law power to arrest to prevent a breach of the peace, gardai must be aware of the potential to violate Articles 5, 9, 10 and 11 ECHR. Any decision to arrest must also therefore be lawful, necessary and proportionate. There is nothing in domestic statute to guide gardai in the application of those principles. Additional guidance is therefore required.

**An Garda Síochána’s Policing of Protest**

An Garda Síochána does not make its policy directives, training, strategy, decision-making logs or de-briefs available for public scrutiny. In other words, the framework within which the garda operate is entirely hidden from the public. There has been published an overarching policy directive on public order incident command but it is general in nature. It does contain the statement that it is “the aim of An Garda Síochána to uphold and protect the human and constitutional rights of everyone” but there is little in terms of practical guidance on how that will be achieved.

Without access to the accompanying policies it is impossible to comment any further. I do not suggest necessarily that the garda have anything to conceal (it’s impossible at this remove to assess) but there is certainly nothing to debate or to hold them to account for. Many protests have given rise to concern among the public about tactics and potential political interference in policing operations but it remains shrouded in secrecy despite calls for public inquiry of certain operations.

There is a well-documented history of unsuccessful attempts to obtain information which encourages distrust, skepticism and even fear.

The policing of the Corrib Gas protests in County Mayo between 2005 and 2011 has resulted in a large number of complaints to GSOC. GSOC sought but was refused permission from the Minister for Justice to institute a practice, policy and procedure investigation into certain aspects of the policing of the dispute. Human rights organisations, civil society groups, academics and TDs have called for an independent inquiry, which has also been refused. The UN Special Rapporteur on the situation of human rights defenders111 addressed the issue, in a 2013 report, on her mission to Ireland. She called for an investigation by GSOC noting (among other things) that “During her visit, the Special Rapporteur received credible reports and evidence, including video footage, indicating the existence of a pattern of intimidation, harassment, surveillance and criminalization of those

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109 Breach of an ASBO carries a penalty of a fine and/or up to 6 months’ imprisonment.
111 Margaret Sekagya
peacefully opposing the Corrib Gas project. Protests have ranged from lawful demonstrations to non-violent non-compliance and passive resistance on both public and private grounds. The information received seemed to indicate that the policing of the protests had been, in some instances, disproportionate. Moreover, there have also been serious concerns about the lawfulness of certain actions by the private security firm employed by Shell.\textsuperscript{112}

Concern has also been expressed about post-protest actions of the Garda Síochána. Following the Jobstown anti-water charges protests, in 2014, the Garda Síochána carried out pre-dawn raids on the homes of numerous protesters in order to effect arrests. Accounts have been given of up to ten gardaí raiding the homes of protesters, some of whom were school children as young as 16. This has been described as an example of “political policing” involving the stereotyping of those involved in the water charges protest as requiring a draconian approach to arrest.\textsuperscript{113} That is a serious concern and one that merits further consideration. If state security is claimed as a reason to refuse access to the policing strategy for the arrest operation, it should be recalled that the Garda Síochána Act 2005 expressly provides that “protecting the security of the State does not include lawful advocacy, protest or dissent by any person.”\textsuperscript{114} Moreover, the interests of national security cannot be used for the purpose of concealing illegality.\textsuperscript{115} As Lord Bingham so deftly put it in one case, “Those concerned may very strongly wish that the facts relating to such matters are not made public… Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied… The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.”\textsuperscript{116}

Another example of concern raised about the garda approach to policing protests relates to the extent to which the Garda Síochána National Surveillance Unit (NSU) gathers intelligence in relation to those organising or attending a protest. The refusal to provide information has caused great disquiet. There is no mechanism for accessing that information (the Freedom of Information Act does not apply) and no oversight body with a remit which extends to state security. An example of the opaqueness of operations can be demonstrated by an unsuccessful attempt by the Irish Council for Civil Liberty’s (ICCL) request for information relating to an operation in which an undercover member of the Metropolitan Police Service was present during protests in Ireland. It is public knowledge that the officer was present and that his presence was made known to the garda. ICCL sought access to the intelligence sharing protocol which applied to such an operation. Access was refused. While there might be reasons of national security for denying access to intelligence or sensitive operational matters, access to the information sharing protocol, or at least a redacted version of it, should be available if the garda are to be transparent and accountable. Even if those documents cannot be shared publicly they should be shared with the relevant oversight bodies - but are not - demonstrating an obvious gap in transparency and oversight.

This lack of transparency is evident across the Garda Síochána and across all policing areas, including those not involving state security. The absence of transparency has been commented upon frequently. Access Info Europe noted the “administrative silence” from Ireland to a request for information on the legal framework for and actual use of different types of equipment including batons, shields, tear gas etc. during protests.\textsuperscript{117} Ireland also refused or was unable to provide information on the number of times such equipment was used over a five year period. It was also noted that more comprehensive responses were received from Northern Ireland, including the number of times equipment was used, the legal framework within which it was used, the guidance given to police officers and information on post-protest evaluation.\textsuperscript{118}

The Council of Europe has emphasised the importance of applying human rights to the policing of protest, underpinned by transparency. In 2011 it said, “Police officers in charge of policing public order operations

\textsuperscript{112} UNHRC, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya on her mission to Ireland from 19 to 23 November 2012 (26 February 2013) UN Doc A/HRC/22/47/Add.3.

\textsuperscript{113} Dr. Vicky Conway, Human Rights in Ireland, 20 February 2015.

\textsuperscript{114} Section 3A(2).

\textsuperscript{115} Section 8.

\textsuperscript{116} R v Shayler [2002] UKHL 11

\textsuperscript{117} The Transparency of the Policing of Protests: Using the right of access to information to assess the transparency of police activities during protests, Access Info Europe, April 2015.

\textsuperscript{118} See further below.
should be able to show that they have considered and applied relevant human rights principles. The keeping of adequate records is very important in this regard.”

To that I would add, record-keeping is only part of the process; information should be collated and made available both to oversight bodies and also for the benefit of the public. It is recognised, in the Convention on Access to Official Documents that transparency of public authorities is of paramount importance in a pluralistic, democratic society. Ireland has neither signed nor ratified the Convention but its principles are important and should be taken into account in a human rights-based approach.

The Convention on Access to Official Documents explains that the exercise of a right to access official documents: provides a source of information for the public; helps the public to form an opinion on the state of society and on public authorities; and, fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy. It also reminds us that all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests. The police are expressly included as a public body for these purposes. “Official documents” is defined as all information recorded in any form, drawn up or received and held by public authorities. Limitations to access may be imposed but are strictly limited to those that are proportionate to the aim of protecting for example national security, public safety, the prevention, investigation and prosecution of criminal activities; disciplinary investigations; privacy and other legitimate private interests. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of those interests... [specified] unless there is an overriding public interest in disclosure. Furthermore, importantly, at its own initiative and where appropriate, a public authority must “take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.”

The Council of Europe has made it clear, but it should be self-evident, that effective accountability, of which transparency is a key element, should not depend upon requests for information. Information should be collected and published. Such information enables the public to consider and debate the service delivered by the police, to hold them to account and, critically, to ensure their own safe participation in protest and exercise their rights to expression, association and peaceful assembly.

On a final note, given the rise of citizen journalism, necessitated often by a lack of official transparency, garda actions will be subjected to increasing scrutiny in the media. That is only to be expected and is perfectly legitimate: It is not illegal to photograph or video a garda officer on duty. Such recording has already played a part in events following the Jobstown protests of 2014. 14 protesters were charged with false imprisonment but in 2017, six were acquitted by a jury (the DPP dropped charges against a further seven protesters) based partly on video footage relied on to contradict the sworn testimony of members of An Garda Síochána. Since then, there have been calls from gardai to legislate for a ban on photography or video used to record the activities of gardai, including during the policing of protest. In my view, that would be a retrograde step and would bring garda into conflict with human rights standards.

**Northern Ireland: A Model for An Garda Síochána?**

The PSNI have significant experience of responding to large scale public order incidents (static assemblies, parades and protests) in which serious violence, including towards police officers, has been carried out and where community tensions run high. For example, in 2012/13 PSNI managed the ‘flag protests’, the G8 summit, the City of Culture events in Derry/Londonderry and the World Police and Fire Games on top of thousands of parades and protests. Adopting a human rights-based approach served them well. They have demonstrated that within that framework they are capable of responding, and do respond, so as to protect and respect the
rights of all involved while managing disorder in a lawful and proportionate manner. The success of the PSNI in managing public order incidents and protests is no fluke; it derives from years of attention to perfecting their policy, training, community engagement and practice taking a human rights approach. PSNI are widely regarded as world leaders in human rights compliant public order and protest policing.

The PSNI journey started with an organisational commitment to adopting a comprehensive human rights approach. In many respects, that was and remains the single most significant factor contributing to their success. Thereafter, PSNI developed written public order policy which has human rights both expressly referenced but also more importantly made operational with scenarios offered and explained from a human rights perspective. That policy is human rights proofed, kept under review and amended as necessary. Importantly, PSNI publishes its policy on its public access website so that the public can read and understand what to expect of the police and what the police expect of the public. Training is an essential component to ensure the successful application of the human rights compliant policy. Training is reviewed and delivered from a human rights perspective both at Police Training College and in Districts to all involved in public order and protest policing. Training is reviewed and offered to officers throughout their careers. Human rights are explained in their operational context with all involved reminded of their personal obligations to comply. PSNI plan for public order events meticulously, always drawing on their human rights policy and lessons learned from previous operations. Multi-agency meetings are held at which the operation is discussed and planned from a human rights perspective. Those meetings are followed by various meetings with officers involved in the operation(s). Again, the human rights framework is the template within which officers prepare. On the occasion of an operation, officers are briefed fully on the tactical strategy for the operation which always includes the human rights implications of any pre-planned decisions and any spontaneous decisions which may have to be taken. Officers are reminded that each and every one is a human rights protector while on duty.

Any potential use of force is carefully planned with all measures taken in advance to avoid recourse to force, specifically in the context of Article 2 ECHR. A critical factor is and must always be the protection of the human rights of officers. That means taking necessary steps to ensure their safety from considering the equipment deployed to working conditions. Human rights protect officers just as much as they protect the public with whom the police will be engaging.

Throughout an operation, PSNI keeps copious and detailed records of all decisions taken and the rationale for those decisions, noting the human rights obligations at play. Each and every use of force is recorded and reported to the Policing Board. Annual figures are then published. After every operation, PSNI undertake de-briefs which consider the success or otherwise of the operation and any human rights issues that arose. Lessons learned from those de-briefs are then circulated amongst officers. Critically, the PSNI is prepared and willing to account for all of its decisions. For example, the Policing Board receives and considers, on a six-monthly basis, use of force reports prepared by PSNI. Those reports include details of any correlation between high incidents of use of force by the police and public disorder incidents. In addition, the relevant District Commander is required to submit to the Policing Board, as soon as reasonably possible after a major public disorder incident, a written record containing details of the nature of the disorder, any force used, any injuries sustained by police officers or members of the public and any damage caused to property.

Perhaps one of the most significant and unique ways in which PSNI demonstrates its willing acceptance of transparency is the access afforded to the independent Human Rights Advisor, engaged by the Policing Board, who reviews policy, observes training, attends planning meetings and briefings of officers and is present in the command room during many public order operations. I occupied that role between 2009 and 2017. I was afforded unrestricted access to documents, intelligence, briefings and to officers both on the ground and in the command room. I was able to report to the Policing Board my findings in respect of the policing operations.

123 For example, on 12 July, over 9,000 people participated in 24 parades in Belfast alone.
124 In DB’s Application [2014] NICA 56 for example the Court of Appeal was assisted in reaching its decision through a consideration of PSNI’s Criminal Justice Strategy documents and revisions, the relevant operational strategy and the decisions recorded within the Events Policy Book. When the case reached the Supreme Court the PSNI’s handling of the events withstood scrutiny and criticism.
and thereafter produce in an annual report my observations on the human rights compliance of the PSNI. While there was some political dissent to such oversight, it was welcomed wholeheartedly by the police themselves because they recognised the benefit of strong accountability – legitimacy, trust and the cooperation of the public. Such close scrutiny can be uncomfortable – invasive even – but if conducted professionally is central to delivering a truly accountable police service.

The PSNI’s approach to public order policing demonstrates the degree of commitment required to deliver a human rights-based approach. It cannot be achieved in a piecemeal or half-hearted fashion. It requires resources to be dedicated to it (most obviously in the early stages) but once established is repaid tenfold, as acknowledged by former and serving Chief Constables.

### Recommendations

**RECOMMENDATION 5**

An Garda Síochána should, with the assistance of human rights legal experts, revise and publish policy and guidance on public order and the policing of protest, incorporating expressly the relevant ECHR rights and their practical application. All gardai who might be involved in the policing of public order and protest, including close protection officers and state security police, should be trained in the revised policy.

**RECOMMENDATION 6**

On an annual basis Garda Síochána leaders should consider, with relevant community and response teams, the public order and protest operations conducted throughout the previous 12 months with a particular focus on any human rights issues that arose. As part of that consideration garda should consult with relevant non-governmental organisations and community groups. Lessons learned from that exercise should be disseminated amongst all gardai who have been or might be involved in such operations.

**RECOMMENDATION 7**

When collating data on the use of police powers those incidents in which powers or force was used in the public order context should be identified and highlighted. That data should be reported to the Policing Authority and published in an easily accessible format.
CHAPTER 4
USE OF FORCE
CHAPTER 4
USE OF FORCE

Legal framework

The strategy adopted for and the planning and execution of any operation in which weapons are deployed is critical to the Garda Síochána’s ability to comply with the ECHR (and therefore the European Convention on Human Rights Act 2003). All police operations raise human rights issues but in public order operations or other incidents in which there might be recourse to the use of force a number of articles of ECHR rights are directly and immediately engaged. Article 2 (the right to life) and Article 3 (the right not to be subjected to torture or other ill-treatment) are engaged in any operation which might result in the use of force. Article 8 (the right to a private and family life) includes the right to physical, moral and psychological integrity of a person.

Any use of force has the potential to cause injury and in some cases death. Whilst police are required to refrain from taking life, and must take steps to prevent it, deprivation of life by the police will not be regarded as being unlawful when it results from the use of force which is no more than absolutely necessary for a specified aim which must, as properly interpreted, be to save life or prevent serious injury. That does not mean that gardai are permitted to take a life but that they are permitted to use force which might result in the deprivation of life. Article 2 ECHR applies to the use of lethal or potentially lethal force and requires that such force be no more than is absolutely necessary to defend any person from unlawful violence, to effect an arrest (or prevent escape) or to quell a riot or insurrection. The use of lethal or potentially lethal force to arrest someone or prevent escape however, although provided under Article 2, is very strictly limited. The ECtHR has indicated that it would not be absolutely necessary to use lethal or potentially lethal force to arrest an individual unless he or she was violent and posing a threat to life or limb. What that means, effectively, is that the use of lethal or potentially lethal force to effect an arrest (or prevent escape) is aligned with the use of force to defend any person from unlawful violence.

The test of absolute necessity is a stricter and more compelling test of necessity than that normally applicable when determining whether state action is necessary in a democratic society. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that:

“Law enforcement officers shall not use firearms against persons except in self-defence or the defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve those objectives. In any event, the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

If the use of lethal or potentially lethal force is unavoidable police must still exercise restraint in the use of that force, minimise damage and injury caused, render assistance and medical aid at the earliest opportunity and notify relatives or other persons if a person has been injured or killed.

Consideration must always be given to whether there is a viable alternative to the use of force. The United Nations Basic Principles provide that police, in carrying out their duties, shall as far as possible apply non-violent methods before resorting to any use of force. Any use of force must be the minimum appropriate in the circumstances and must reflect a graduated and flexible response to the threat. In other words, police officers should use force only if other means remain ineffective or have no realistic chance of achieving the intended result. Furthermore, the use of conventional firearms is unlikely to be absolutely necessary where less life-threatening equipment is available and could have been used. In a previous case the ECtHR found

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125 Botta v Italy 26 EHRR 241.
127 The European Court of Human Rights has extended the ambit of Article 2 ECHR to circumstances where potentially lethal force is used on a number of occasions: e.g. Makaratzis v Greece 50385/99, 20 December 2004.
128 Article 2(2) ECHR.
129 Nachova v Bulgaria 43577/98, 6 July 2005.
130 See for example Nachova ibid.
131 Which the European Court has used in interpreting Article 2 in for example Simsek v Turkey, [2005] ECHR 35072/97; Makaratzis v Greece 50385/99, 20 December 2004.
a breach of Article 2 when police officers discharged conventional firearms at demonstrators “without first having recourse to less life-threatening methods, such as tear gas, water cannons or rubber bullets.”\(^{132}\) The ECtHR, importantly, went on to hold that it is the duty of the relevant authorities to “provide the necessary equipment, such as tear gas, plastic bullets, water cannons etc.” and that it was “unacceptable” to fail to provide such equipment to the police for use when dispersing demonstrators.\(^{133}\) Gardai are not routinely armed but are issued with pepper spray. Specialist units carry conventional firearms and TASER.\(^{134}\)

Any policy or approach to managing conflict (which should be applied to both spontaneous incidents and planned operations) should have a central statement of mission and values which recognises the need to protect and respect the human rights of all. Thereafter, it should contain the key elements which should be kept under constant review throughout an operation. To comply with Articles 2, 3 and 8 ECHR the planning and strategy for the operation and the spontaneous response to a developing incident should: be based upon an assessment of information and intelligence; involve an assessment of the real threat; consider the powers and duties arising; identify the options available and any contingencies; and, decide on the most appropriate course of action, which should be followed by a review of what actually happened. Any tactical option to use force must be proportionate to the actual threat posed, whether it is the decision to resort to a weapon or a hands-on restraint technique.

Because of the fundamental nature of the Article 2 right to life there are significant implications for training and for the planning and control of operations where there is potential for the use of force. The ECtHR has made it clear that police officers must be provided with effective training “with the objective of complying with international standards for human rights and policing.”\(^{135}\) It has also indicated, drawing on the Parliamentary Assembly of the Council of Europe Declaration on the Police,\(^{136}\) that police should receive “clear and precise instructions as to the manner and circumstances in which they should make use of firearms.”\(^{137}\) It goes on to mandate that operations should be planned “so as to minimise, to the greatest extent possible, recourse to lethal force.”\(^{138}\) Police should not be left in a vacuum. There must be a legal and administrative framework which defines the limited circumstances in which law enforcement officials may use force and firearms, in light of international standards\(^{139}\) which have been developed.\(^{140}\)

Article 2 ECHR also has implications for the investigation of cases where lethal or potentially lethal force is used. The ECtHR has consistently held that there must be an effective and independent investigation whenever anyone is killed as a result of the use of force by police, the purpose of which is to secure the effective implementation of domestic laws safeguarding life and to hold those responsible to account. That investigation must provide for the involvement of the family of the deceased and be capable of ascertaining the circumstances in which the incident took place.\(^{141}\)

### An Garda Síochána and the use of force

Gardai are not routinely armed but are issued with incapacitant (pepper) spray and batons. Specialist units also carry conventional firearms and TASER.

The Garda Síochána does not publish statistics on their uses of force. The Garda Síochána Ombudsman Commission, however, did put some figures into the public domain. It reported that between the beginning

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\(^{132}\) Simsek v Turkey ibid.
\(^{133}\) Ibid.
\(^{134}\) See below at X for further discussion about equipment to gardai
\(^{135}\) Simsek v Turkey.
\(^{136}\) Resolution 690 (1979).
\(^{137}\) Simsek v Turkey.
\(^{139}\) The international standards that the European Court was referring to include those derived from the International Covenant on Civil and Political Rights and the General Comments of the UN Human Rights Committee on that instrument ,the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials.
\(^{140}\) Simsek v Turkey, para. ’105.
\(^{141}\) This is considered further at X.
of 2017 and the first week of November 2017, i.e. over a ten month period, gardaí deployed incapacitant spray on at least 502 occasions. A recent article published in the Irish Times compared that rate of use to the Metropolitan Police Service (London). The MET used incapacitant spray 68 times between April and June 2017. As noted that “extrapolates to 272 uses a year, roughly half of the rate of Garda discharges. The Met polices an area with about eight million inhabitants, while the Republic of Ireland has about 4.8 million inhabitants. It employs 32,000 officers, about 19,000 more than the Garda, which has about 13,000 sworn members.” MET officers are routinely issued with TASER, which it was suggested could be used instead of incapacitant spray and account for the disparity in use between the Met and the Garda Síochána. It was said “Met officers are less likely to deploy pepper spray, which could explain the discrepancy in the statistics.” Even if that is right, if one adds together uses of both incapacitant spray and TASER (238 uses in 2016) that is still significantly fewer uses by the MET than the Garda Síochána.

One can compare the rate of use of incapacitant spray in Northern Ireland, which is perhaps a more reliable comparison as PSNI officers do not routinely carry TASER. In Northern Ireland, PSNI used incapacitant spray a total of 187 times between 1 April 2016 and 31 March 2017, i.e. over a 12 month period. PSNI officers discharged TASER on 13 occasions during 2016/17.

While an accurate assessment of the propriety of use cannot be made merely from statistics on the rate of use, the rate of use by gardai certainly appears to be high and should prompt further consideration. Concern about the use of incapacitant spray will only be compounded by the fact that the garda do not appear to have a written human rights policy and do not release statistics for its use. Moreover, GSOC has articulated its concern that gardai only rarely comply with a regulation requiring them to notify GSOC within 48 hours of the use of garda weapons. GSOC has said:

“Our numbers showed as of the 7th of November, 2017, of the 502 notifications of use of incapacitant spray alone in 2017, only 33 had come within the required 48-hour period.”

Another issue of concern is the nature of the investigation that follows an alleged inappropriate use of force. A complaint made to GSOC is likely to be carried out by a garda. That might not inspire confidence in the quality of independent oversight but it also means that the use will be judged according to that garda’s own subjective knowledge and experience.

In 2012, a set of Directives was introduced on the Garda’s Use of Force. The set of Directives includes separate policies for the use of baton, TASER and incapacitant spray. The overarching policy has been published, but not the guidance notes or separate policies. The overarching policy contains commitments to protecting human rights but does not articulate with any particularity what those obligations are or what they mean in practice. It might be that the requisite details are contained in the separate policies but I was unable to view them and therefore cannot comment on their human rights compliance. If a human rights-based approach is to be adopted, policies will have to be reviewed. Ideally, that will be by an independent human rights expert who, if necessary, can be vetted to look at sensitive material.

In August 2017, the Garda Síochána established the Special Tactics & Operations Command (STOC) in response to a number of recommendations contained in a report of the Garda Síochána Inspectorate (GSI). The stated objective of STOC is “to make policing safer by providing specialist firearms and Less Lethal services.” STOC has a number of specialist teams including the Emergency Response Unit (ERU), the National Negotiator and the Dublin-based Armed Support Unit (ASU). Outside of Dublin STOC has only a governance role for ASUs, which are managed locally as regional resources. The GSI recommendation however was to “create a single firearms command unit with responsibility for the tasking and deployment of armed resources to spontaneous and pre-planned operations.”
STOC should therefore assume a command role for all ASUs, whether in Dublin or elsewhere.

STOC now includes a Close Protection Unit (CSU) which takes responsibility for designated VIPs including the President and Taoiseach. The CSU might also be involved therefore in protest policing during a state visit. STOC is currently in the process of setting up a Critical & Firearms Incident Command (CFIC) for the Dublin Region in which Dispatchers trained in a firearms decision model will manage STOC and other garda resources “to ensure that the most appropriate responders are tasked to deal with serious incidents.” STOC is “creating new ways of managing pre-planned operations by providing expert advice to ensure the right STOC teams are used where required...A back office will record and audit details of pre-planned firearms operations to ensure STOC supports the community and fellow Gardaí.” STOC is led by a Detective Chief Superintendent who reports to Assistant Commissioner, Security & Intelligence (S&I).

The Garda Síochána explains, “placement of STOC under S&I recognises our dual responsibilities to both security and policing and prioritises our role in safeguarding the security of the State.” While there may be merit in such a command structure it does, potentially, put the use of force (at least by firearms units) outside the remit of the oversight bodies given the restriction on oversight of state security. That should be considered further, particularly in light of the GSI recommendation that the Firearms Command Unit should be under Assistant Commissioner Operational Support Services. The GSI also recommended that the garda should “Develop Standard Operating procedures for the deployment of armed units, including those on close protection duties.” It is unclear whether those operating procedures are being developed or whether they will incorporate human rights obligations. According to GSO the garda do “usually create” Operation Orders for major policing events, “containing full details of the type of operation, the strategic plan and the various resources that will be deployed.” The use of the word ‘usually’ is important; all major events should be subject to Operation Orders, which themselves should sit under the standing operating procedures and incorporate human rights standards expressly.

The Northern Ireland experience

There are many important lessons from Northern Ireland in this respect but the great utility of having the express, practical and operational application of human rights at the centre of every aspect of policing and the use of force is the most important. For example, the PSNI Code of Ethics which draws upon the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states:

“Police officers, in carrying out their duties, shall as far as possible apply non-violent methods before resorting to any use of force. Any use of force shall be the minimum appropriate in the circumstances and shall reflect a graduated and flexible response to the threat. Police officers may use force only if other means remain ineffective or have no realistic chance of achieving the intended result.”

That is reflected in written policy, training and operational briefings. The PSNI’s Manual of Policy, Procedure and Guidance on Conflict Management is available to the public through the PSNI website, with only a limited amount of very sensitive operational information redacted.

Mechanisms are in place, both internal and external, to ensure that PSNI is held to account for all uses of force by its officers. That includes the submission of an electronic use of force monitoring form, in some instances a Police Ombudsman investigation, and scrutiny by the Policing Board. Officers using the following types

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148 Statement Garda Síochána website.
149 Statement Garda Síochána website.
150 Changing Policing in Ireland, November 2015.
151 Changing Policing in Ireland, November 2015.
152 The Police Ombudsman will investigate all instances where death occurs following contact with police. The Ombudsman must also be notified of all incidents where a firearm, AEP or Taser has been discharged.
153 PSNI must notify the Policing Board every time an AEP is discharged and also of any force used where there are public order incidents which either involve 200 people or more or where the incident is of such an intensity there is likely to be wide scale media reporting or public interest in it. PSNI also provides the Policing Board with six monthly statistical reports on police use of force. The Policing Board is provided a copy of all Police Ombudsman Regulation 20 reports which are produced following an investigation into certain incidents where force has been used. If any issues or concerns arise through any of these reporting mechanisms, the Policing Board can raise these directly with the PSNI senior command team.
of force must record the use on an electronic use of force monitoring form: Attenuating Energy Projectile (AEP); Baton; CS Spray; PAVA Spray; Firearms; Police Dog; Taser and Water Cannon. The PSNI collates the data captured on the electronic use of force monitoring forms and includes it within a six monthly statistical report that is provided to the Policing Board. Versions of the use of force statistical reports are published on the PSNI website.

Any issues identified from the use of force monitoring forms are raised directly with PSNI’s senior command team. The six-monthly statistical reports contain very detailed information which correlates use of force according to district/area, date, incident, reason for use and the gender and age of the person on whom the force was used. The uses of force monitoring forms include all incidents when a firearm, Taser or AEP is pointed or discharged. They record each incident when a baton or CS spray is drawn or discharged. The number of times police dogs or water cannon are deployed and used are also recorded. Annual statistics are published in full in the Policing Board’s Human Rights Annual Reports. Because of the concern over the use of AEP, sometimes referred to as rubber bullets, special consideration is given to their use. The Human Rights Annual Report provides a detailed breakdown of deployment and use according to month and area. Detail is provided on the nature of incidents in which AEP were deployed or discharged, including whether it was during a public order incident. This enables a truly forensic analysis to be undertaken of the use of force.

**Recommendations**

**RECOMMENDATION 8**

An Garda Síochána should, with the assistance of human rights legal experts, develop and publish an overarching policy on the use of force to include expressly the relevant human rights standards and their practical application. That policy should include: the training required for gardai prior to deployment; provision for the planning of any operation in which force might be used; preventative measures to avoid recourse to the use of force; the authorisation regime for the use of force; the legal tests for the various weapons deployed; the provision for medical assistance; the requirement for post-operative briefings in any case where force is used; and, the requirement to report the use to the relevant oversight bodies.

**RECOMMENDATION 9**

All deployments of weapons and all uses of force should be recorded together with a brief explanation of the circumstances surrounding the use, the location of the use, the outcome and the identity of the gardai who used force. That information should be collated and shared with the Policing Authority. Statistics should thereafter be produced and published on an annual basis on the use of force broken down according to the force used and the circumstances in which force was used.

**RECOMMENDATION 10**

An Garda Síochána should produce and publish Standard Operating procedures for the deployment of armed units, including those on close protection duties.

**RECOMMENDATION 11**

An Garda Síochána should keep under review the availability of less lethal and non-lethal technology.

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154 PAVA was not authorised for use in Northern Ireland until the end of 2015. In future use of force monitoring forms its use will be recorded.

155 Although this is technically inaccurate as AEP are different devices.
CHAPTER 5
SUSPECTS AND DETAINEES
CHAPTER 5
SUSPECTS AND DETAINEES

The protection of human rights within the custody environment and oversight of the treatment of police detainees have been ongoing concerns and subject to a number of recommendations over the years. It has been said that “you can judge a society by the way it treats its prisoners” and that should be echoed here. The treatment of police suspects and detainees reveals a lot about the Garda Síochána’s approach to its human rights obligations more generally.

Therefore, this area is another to which I have devoted some time.

International legal framework

Council of Europe: the European Convention on Human Rights and Fundamental Freedoms

The treatment of suspects and detainees by police inevitably engages a number of rights protected by the ECHR. For example, most criminal investigations engage a suspect’s Article 8 ECHR right to privacy. The conduct of the investigation will always engage his or her Article 6 ECHR right to a fair trial, which includes the requirement that a person under investigation is entitled to the presumption of innocence (until guilt is proved) and, if charged, to consult with a lawyer and be told, in a language he or she understands, the charges. Article 3 ECHR (the right not to be subjected to torture, inhuman or degrading treatment) will apply to the conditions of detention. Any conditions attached to the grant of bail will engage Article 11 ECHR (the right to freedom of assembly and association). Article 2 ECHR (the right to life) imposes a number of inter-related obligations on the state (including the police) to protect life and to refrain from the unlawful taking of life. Deprivation of liberty creates particular vulnerabilities so the obligations on the state are enhanced when a person is deprived of his or her liberty whether that is during an arrest, in the course of police transit or in police custody. When the police deprive a person of his or her liberty they assume responsibility for the protection of that person’s ECHR rights. Detention will always engage Article 5 ECHR (the right to liberty and security) and can only be justified if at least one of the Article 5 criteria has been met.

As the ECtHR has made clear:

“Persons in custody are in a vulnerable position and the authorities are under a duty to protect them... The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Where the events in issue are wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”

One can see from case law the many ways in which states have breached Article 2 arising from, for example: the use of restraint; insufficient care and supervision; suicide; lack of or inadequate medical treatment; failure to prevent violence by others. In the case of suicide or violence the relevant test is whether the police knew, or ought to have known, that there was a real and immediate risk of suicide or violence, and, if so, whether they did all that could reasonably have been expected of them to prevent that risk being realised. Furthermore, if a person is under a disability the police have to demonstrate that particular regard has been paid to their needs.

Article 3 of the ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment.

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156 Fyodor Dostoevsky
157 For example, the detention must be in accordance with a procedure prescribed by law and for the purpose of bringing the detainee before a court on reasonable suspicion of having committed an offence.
158 Salman v Turkey No. 29982/95, 27.6.00, paras. 99–100.
159 Mojsiejew v Poland No. 11818/02, 24.3.09.
160 Taïs v France No. 39922/93, 16.06.
161 Tararíyeva v Russia No. 4353/03, 14.12.06.
162 Paul and Audrey Edwards v UK No. 46477/99, 14.3.02.
163 For example Keenan v UK No. 27229/95, 3.4.01.
irrespective of the victim’s conduct. There can be no derogation even in the event of a public emergency threatening the life of the nation. While a special stigma is attached to torture which is deliberate inhuman treatment causing very serious and cruel suffering, all other forms of ill-treatment are also prohibited. The practice of depriving a detainee of sleep, food, privacy and physical integrity have all been held to constitute inhuman and degrading treatment as has the use of solitary confinement, noise and being denied access to lawyers and family members. The distinction between torture and other forms of ill-treatment has been considered recently by the ECtHR (the distinction being the degree of suffering inflicted) but that judgment is subject to a reference to the Grand Chamber. Despite the distinction made by the ECtHR in practice garda must desist from engaging in any form of ill-treatment which fails to recognise the inherent dignity of human life. There should be no place for technical arguments as to the category the abuse falls within.

**Investigating abuse**

A critical, but sometimes overlooked, element of human rights compliance in the custody setting is the positive obligation on the state to initiate an independent investigation into alleged breaches of Articles 2 and 3 ECHR. This is such an important requirement under the ECHR that it merits close scrutiny. The legal obligation is set out specifically below in relation to Article 2 (where the case law has been focused) but there is also a positive obligation to investigate breaches of Article 3. It can be summarised as follows.

The positive obligation on the state (known as the procedural obligation) means that an inquiry must follow a suspicious death or allegation of torture or other inhuman or degrading treatment or punishment. That inquiry must be designed to lead to criminal proceedings, where appropriate. Article 2 requires a full inquiry into a death where that death occurred in a situation which raises issues of public concern whether or not there was direct or indirect state involvement. There has been some attempt in the courts to distinguish, in the context of the standards of investigation to be applied, between cases in which there is alleged direct or indirect state involvement in the death and those cases which involve for example a failure of care which results in death. The ECtHR has not, however, distinguished cases in the same way. Despite that debate the ECtHR (and the UK Supreme Court) is clear that if state forces bear some responsibility for a death, directly or indirectly, there must be a full Article 2 compliant investigation.

The ECtHR has interpreted the procedural obligation as imposing on states an obligation to “initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the substantive obligations (i.e. to take life or to fail to protect life) has been or may have been violated and it appears that agents of the state are or may be in some way implicated.”

The purpose of such an investigation is to ensure that the “full facts are brought to life; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”

There is no single prescribed model of investigation. The ECtHR recognises that some flexibility is required as to the form and procedure to be adopted. However, the investigation must comply with certain minimum requirements.

Those minimum requirements are: (i) The authorities must act of their own motion and not wait for the matter to be referred; (ii) the investigation must be independent; (iii) the investigation must be effective; (iv) the investigation must be reasonably prompt; (v) there must be sufficient public scrutiny of the investigation; (vi) the next of kin of the deceased must be involved in the investigation to the appropriate extent.

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164 For example, in Menson and others v. UK (2003) 37 EHRR CD 220 the ECtHR held that article 2 applied to the killing of a black man during a racist attack in the absence of any direct State responsibility for the death. That was followed, in 2007, in Angelova and Iliev v. Bulgaria (2008) 47 EHRR 7. See also Šilih v. Slovenia (2009) 49 EHRR 37, a decision of the Grand Chamber, in April 2009.

165 R (Middleton) v West Somerset Coroner [2004] 2 AC 182.

166 R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653.

167 See for example Al-Skeini and others v the United Kingdom (2011) ECHR 19.

(i) Investigation to be of the State’s own motion

Article 2 requires the state (by its authorities) to conduct an investigation of its own motion once the matter has come to its attention. The state may not wait until a case has been referred or a formal complaint has been made.169 Any civil or other remedy that may be available to the next of kin must therefore be left out of account when assessing the extent of the state’s obligations because a civil action may provide a judicial fact finding forum and the opportunity to get a finding of unlawfulness but it does not involve punishment of the alleged perpetrator.170 In other words, a fact-finding mechanism which is incapable of holding the perpetrator to account will not in itself satisfy Article 2. It is also clear that the obligation cannot be waived by the next of kin, or indeed anyone else. Once the matter has come to the attention of the state it must comply with its obligations. Moreover, importantly, if a number of allegations are made of state involvement in deaths where there may be systemic issues there is a further obligation to investigate those systemic issues.171

(ii) Independence

The ECtHR has held that “it is generally regarded as necessary that the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of institutional connection but also a practical independence.”172 Therefore, independence must be demonstrated as a matter of institutional, hierarchical and practical independence. If the investigation appears to be institutionally and hierarchically independent but is not in fact independent, there is likely to be a violation of Article 2. The requirement of independence applies whether the inquiry subject to scrutiny is investigative only or has additional functions such as deciding on prosecution or making recommendations.173 In other words, because another independent body is ultimately responsible for deciding on whether to prosecute in an individual case does not absolve the investigation of its obligation to demonstrate the requisite independence. To put it another way, there must be no part of the structure and no participant in the investigation that might undermine the independence of the investigation. If it is not independent from the outset no subsequent process is likely to save the investigation from an alleged breach of Article 2.

(iii) Effectiveness

The requirement that an investigation is effective means that the procedure in question must be able to reach a determination of state responsibility. It must be, for example, capable of reaching a determination of whether the force used was or was not justified and to lead to the identification and punishment of those responsible. Therefore, “Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.”174 The requirement of effectiveness includes a requirement that the authorities take reasonable steps to secure relevant evidence such as eye-witness and forensic evidence. Otherwise, the investigation is unlikely to be capable of identifying and punishing those responsible. Failure to follow an obvious line of enquiry (and the failure to keep an open mind about lines of enquiry) may result in a violation of Article 2.175 If an investigator pre-determines the outcome of an investigation without first undertaking preliminary investigative steps and, for that reason, does not follow a procedure which is capable of resulting in a prosecution, the investigation is likely to be incapable of identifying the perpetrator and holding him responsible. For example if an investigation is commenced by interviewing a suspect without caution, and therefore in circumstances in which the answers cannot be used against the interviewee at trial,176 that investigation will likely fall foul of Article 2 unless it is abundantly clear, on an objective analysis, that there is no realistic prospect of a prosecution.

171 In Ali Zaka Mousa v the Secretary of State for Defence [2011] EWCA Civ 133 the Court of Appeal proceeded on the basis that the tribunal must be capable of investigating independently the systemic issues that arose.
173 Ali Zaki Mousa and others v The Secretary of State (No.2) [2013] EWHC 1412 Admin, Divisional Court.
174 Jordan ibid.
175 See e.g. Kolevi v Bulgaria Application no 1108/02; Jordan v The United Kingdom (2003) Application no. 28883/95.
176 In such a case, the information obtained from the interview could not be used against the interviewee at trial.
While there must be a system which is designed to ensure that persons against whom there is sufficient evidence are prosecuted, Article 2 probably does not extend to require that a prosecution must follow.\textsuperscript{177} The Prosecution Service can decide that despite the evidential test being satisfied a prosecution would not be in the public interest. However, if there is sufficient evidence to mount a prosecution any decision not to prosecute must be supported by reasons which meet the reasonable expectations of interested parties that a prosecution would follow or a reasonable explanation for not prosecuting.\textsuperscript{178}

Where the death occurred as a result of the use of lethal force by police, the investigation must additionally be able to scrutinise the legal framework within which the operation was conducted including the planning and control of the operation. There must be an adequate and effective framework (of law, policy, training and practice) to safeguard against arbitrariness. Police policy should always be considered. In particular, the investigation should consider whether relevant policy contained clear and robust guidelines on the use of force and the planning and control of any pre-planned operation which must have as an objective the minimising of the risk of loss of life.\textsuperscript{179} The ECtHR will not construe the positive obligation to protect life or to investigate a death so as to impose an impossible or disproportionate burden on the state but will have regard to policy and resource considerations, among other things.\textsuperscript{180} Not, however, so as to absolve the state from conducting an Article 2 investigation. Rather, the means of conducting the investigation may differ.

It can also be noted in passing that the ECtHR held, in 2004, that strict obligations arise in investigating hate crimes involving violence.\textsuperscript{181} That is relevant to any investigation of racist, homophobic, transphobic or sectarian violence whether that is perpetrated by a member of the public or a member of the garda. The ECtHR held that “where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence... The domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim’s racial or ethnic origin.”

Excessive investigative delay has itself been held to be incompatible with the requirement for an effective investigation under Article 2.\textsuperscript{182}

(iv) Promptness

The investigation must be prompt. The requirement of promptness and reasonable expedition is an important element of the Article 2 obligation. It is also considered to be essential to maintaining public confidence in the state’s “adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”\textsuperscript{183} In July 2013, the ECtHR considered the investigation into the killing of Mr McCaughey and Mr Grew by the British security forces in Northern Ireland in 1990. That decision was concerned only with delay.\textsuperscript{184} The ECtHR restated the importance of investigations being instigated promptly and proceeding with reasonable expedition. The ECtHR criticised the inquest process and said that delay in carrying out inquests, in cases of killings by security forces in Northern Ireland, was an endemic problem and emphasised the urgency of reforms to “involve the state taking, as a matter of some priority, all necessary and appropriate measures to ensure...that the procedural requirements of Article 2 are complied with expeditiously.” The ECtHR held that the excessive investigative delay of itself meant the investigation was ineffective for the purposes of Article 2.

\textsuperscript{177} This is also the position in England and Wales.
\textsuperscript{178} R v DPP ex parte Manning & Melbourne [2001] QB 330 DC; R (Denis) v DPP [2006] EWHC 3211; R (Armani de Silva) v DPPEWCA 3204.
\textsuperscript{179} Nachova ibid.
\textsuperscript{180} See e.g. Osman v United Kingdom [1998] ECHR 101.
\textsuperscript{181} Nachova & others v Bulgaria Nos. 43577/98 and 43579/98 (confirmed by Grand Chamber).
\textsuperscript{182} McCaughey v United Kingdom Application n. 43098/09, 16 July 2013.
\textsuperscript{183} Jordan v United Kingdom (2003) 37 EHRR 2
\textsuperscript{184} There being domestic remedies still to be exhausted. The matter may therefore return to the ECtHR on the substantive allegations of breach.
(v) Public scrutiny

The investigation must be transparent in the sense that it must permit public scrutiny of the investigation and its results to secure accountability in practice as well as in theory. The requirement of public scrutiny is additional to and separate from the requirement to involve the relatives of the deceased in the procedure to the extent necessary to safeguard his or her legitimate interests. That means that both the process and the result must be open and subject to effective scrutiny. As set out above, public confidence in investigations is a fundamental aspect of Article 2.

The ECtHR (Grand Chamber) emphasised that an investigation must be accessible to the victim's family and to the public, including in respect of the broader issues of state responsibility including the instructions, training and supervision given to police. The investigation should be “broad enough to permit the investigating authorities to take into consideration not only the actions of state agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the state complied with its obligation under Article 2 to protect life.”

In a recent English case, the court drew attention to the absence of any mechanism to consider in sufficient detail the instructions, training etc. of actions taken in Iraq, which the court observed should entail obtaining evidence from soldiers and those responsible for devising and organising training together with the effective checking of its reliability. The absence of that capability was deemed to be particularly significant where there is "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but a pattern or system.” The court was not formulating a new test but referring to an early decision of the ECtHR. The court was not satisfied that the examination of the wider or systemic issues was sufficiently public or subject to independent scrutiny. Such an investigation must also consider lessons to be learned if wider systemic issues are identified.

(vi) Involvement of the next of kin

Article 2 requires that the next of kin must be involved in the procedure to “the extent necessary to safeguard his or her legitimate interests.” Whether that requires disclosure of witness statements and other materials is fact-specific. For example, in an Article 2 compliant inquest the next of kin is entitled to discovery of all relevant material unless a decision is made by the Coroner on grounds of public interest immunity to restrict discovery. In an investigation by the Independent Police Complaints Commission however it has been held that discovery of witness statements is not necessarily required.

The United Nations: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), adopted and ratified on 11 April 2002, prohibits torture and other forms of ill-treatment in all circumstances and requires states to prevent and investigate torture and other forms of inhuman and degrading treatment and punish anyone who carries it out. “Torture” means 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 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.

UNCAT is relevant to, for example, arrest, detention, interrogation and imprisonment and should be taken into account in the training of police, medical staff, public officials and anyone else who may be involved in the arrest, detention and questioning of a person. In particular, each state party must keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment with a view to preventing any cases of torture.\textsuperscript{193} States must also ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed,\textsuperscript{194} ensure that any individual who alleges he or she has been subjected to torture has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.\textsuperscript{195} The regular inspection of all places of detention by independent persons is an important measure to prevent the occurrence of torture or other forms of ill-treatment: there should be systematic inspections which permit unhindered and confidential access to all detainees.

The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)\textsuperscript{196} provides additional comprehensive guidance which should be incorporated into all garda policy, practice and training.

**Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)**\textsuperscript{197}

The OPCAT Preamble emphasises that “the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment can be strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention.” A number of principles were agreed to include the establishment of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other ill-treatment.\textsuperscript{198} In particular, OPCAT requires each state party to set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, referred to as the national preventive mechanism. The national preventive mechanism must be granted, at a minimum, the power: to regularly examine the treatment of persons deprived of their liberty in places of detention, with a view to strengthening, if necessary, their protection; to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of those persons; and to submit proposals and observations concerning existing or draft legislation.\textsuperscript{199}

For the purposes of OPCAT, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.\textsuperscript{200} That includes police detention.

\textsuperscript{192} Article 11.
\textsuperscript{193} Article 12.
\textsuperscript{194} Article 13.
\textsuperscript{197} Article 1.
\textsuperscript{198} Article 19.
\textsuperscript{199} Article 4.
To enable the national preventive mechanisms to fulfil their mandate, states parties must grant them: access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4 OPCAT, as well as the number of places and their location; access to all information referring to the treatment of those persons as well as their conditions of detention; access to all places of detention and their installations and facilities; the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information; the liberty to choose the places they want to visit and the persons they want to interview; and the right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.\(^{201}\) States parties are also required to publish and disseminate the annual reports of the national preventive mechanisms.\(^{202}\)

A sub-committee was established to, amongst other things, oversee and implement OPCAT’s provisions, including by visiting places of detention and making recommendations.

Ireland has signed but not yet ratified OPCAT despite a number of declarations that it will do so. That is disappointing. OPCAT and in particular the provisions regarding the National Preventive Mechanism would establish the critical framework for independent visits to police places of detention.

In the meantime, however, it should not be forgotten that Ireland has ratified the UNCAT, which itself requires the state to ensure it has systems and mechanisms in place to prevent and investigate torture or other ill-treatment. Therefore even without ratification of OPCAT the state is obliged to have effective mechanisms in place. It is doubtful that the systems in place comply with UNCAT.

**Irish legal framework**

**Domestic legislation**

In Ireland, detention is governed by the Criminal Justice Act 1984, as amended, together with the Garda Custody Regulations 1987 and 2006 which provides a number of technical safeguards. The Act and Regulations do not however assist gardai in determining the practical and effective protection of ECHR rights of a detained person. Unlike in Northern Ireland and Great Britain there is not an accompanying statutory code of practice which sets out expressly and in clear terms the application of all relevant ECHR standards in police custody. There should be; that code of practice should be readily accessible to the public and copied to all detainees upon detention. While the Garda Síochána Code of Ethics is intended to cover all police actions including arrest and detention, it fails to stipulate the operational application of ECHR rights to the custody environment. The code is more abstract than practical so it represents a welcome commitment to ethical standards but it does not make clear how those ethical standards will apply operationally or how they interface with human rights obligations. The code does not therefore assist in the state’s compliance with UNCAT.

If gardai are to comply with their human rights obligations they must know what they are and how to apply them. That requires training. I am not convinced that training is adequate, up to date, delivered to all ranks and grades or effective. While the training of recruits at Templemore does include a human rights element it does not appear to ‘operationalise’ human rights and it is not provided to gardai by way of refresher training throughout their careers. There has not been a human rights training needs analysis conducted of the organisation so it would be impossible for senior officers to know who needs further training and in what aspects of human rights compliance. Neither has there been a review of the practical impact and effect of the training that has been delivered. Unless and until such a review is complete it will be impossible to know whether the training that is delivered, at great cost, is achieving its desired outcome. During the course of my work I was unable to access training materials but I did speak with some who had delivered and some who had received training. The snapshot I got of training was piecemeal, concentrated on new recruits, overly focused on technical capability and not centralised within the organisation.

\(^{201}\) Article 20.  
\(^{202}\) Article 23.
Inspection of Garda stations

Oversight of An Garda Síochána is undertaken principally by the Garda Síochána Inspectorate, the Garda Síochána Ombudsman Commission and the Policing Authority. There is not, however, a legal framework or practical mechanism within which independent oversight of police detention can be monitored or reported upon. Neither is there a practice of collecting and making available sufficient information on complaints and the outcome of complaints to enable the Irish Human Rights and Equality Commission, the Irish Council for Civil Liberties or any non-governmental organisation to effectively monitor the treatment of persons in police detention.

Despite legislative reform in 2014, which stated aims were to include the expansion of GSOC’s remit and the strengthening of its powers, there remain significant gaps in police accountability and oversight of police detention.

By way of example, the legislative reforms do not require mandatory formal investigation by GSOC of all incidents of death and serious injury arising from or related to contact with the police. As the legislation stands, GSOC is required to investigate where there has been a complaint of death or serious harm and the Garda Commissioner must refer to GSOC any matter “that appears to the Garda Commissioner to indicate that the conduct of a member may have resulted in the death or serious harm to a person.” However, as GSOC says, “the power is delegated by the Garda Commissioner to Superintendents, whose responsibility it is to decide if it is appropriate to refer an incident, in order that it be investigated independently.” Compounding the issue, the practice (made necessary by under-staffing and under-funding) whereby GSOC ‘lease-back’ investigations to the Garda Síochána and use garda officers to carry out the investigations continues. While GSOC asserts that its Article 2 investigations (i.e. those into deaths) comply with the procedural obligation, there must be a serious doubt about its Article 2 independence. Moreover, there is no requirement to refer allegations of breach of Article 3 (which fall short of serious harm) to GSOC.

In Northern Ireland, the courts have considered this issue on numerous occasions in a string of ‘legacy’ cases. In one recent case, the court emphasised that public perception of independence is of paramount importance. The issue is not whether a particular person lacks impartiality or would bring a conscious bias to the investigation. Rather, the court observed, “the issue is about how the matter is reasonably perceived and, in particular, whether a fair minded and informed observer would conclude that there is a real possibility of institutional or practical lack of independence.” In assessing that the court considered the independence of the Historical Enquiry Team (HET), which was set up specifically to investigate deaths where there had been state involvement. The HET had independent teams of investigators. Despite that, the court found that a fair minded observer might conclude that the HET showed preferential treatment to soldiers based upon unconscious bias. Furthermore, the court found that the PSNI Legacy Investigation Branch (LIB), which comprised only officers of the PSNI, could not investigate independently cases of British Army involvement in deaths; both being parts of the state security forces.

It is of particular significance that the LIB, in the instant case, was concerned with allegations of British military involvement in the death. There was no suggestion that the RUC or anyone now serving in the PSNI was involved in the death. It was argued that there could be no suggestion that the PSNI was not independent of the military. Furthermore, that the PSNI was institutionally distinct and therefore independent from the RUC and in any event did not investigate police misconduct which was referred to the Police Ombudsman. The PSNI argued that:

“...a fair-minded and informed observer would not regard there as being in operation any real possibility of bias on the part of the PSNI and likewise there would be no basis for a public perception of prejudice in the conduct by the LIB of its review function in respect of historic cases.”

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203 Reform was to be effected by the Garda Síochána (Amendment) Act 2015.
204 Section 91 of the 2005 Act
205 Section 102(1) of the Garda Síochána Act 2005.
206 GSOC 2016 Annual Report, March 2017. During 2016, one death in Garda custody was referred to GSOC.
207 McQuillan’s Application [2017] NIQB 28.
Maguire J. however drew attention to the fact that the case was “back with” the police notwithstanding the context of the death and:

“...the current level of suspicion that, after all, it may have been the security forces, of which the RUC formed part, which might be responsible for it... For the investigation to go forward under the auspices of the LIB would be wrong as in the circumstances the PSNI would not be perceived as passing the test for independence...”

Similar principles, I suggest, will apply to GSOC investigations. If there is garda involvement in those investigations (whether by deciding whether an investigation is needed or being involved in some way in the investigation) – the context being allegations of wrong-doing by gardai – that will undermine its Article 2 independence. Essentially, those who are or might be implicated are connected to those investigating and cannot be said to be independent. Furthermore, while GSOC can and sometimes does report to the Garda Síochána on system-wide issues identified in investigations it cannot, despite calling for a statutory power to do so, insist on carrying out a statutory review of systemic issues arising out of investigations. GSOC does publish statistics but they are not broken down into sufficient detail to establish the number of complaints relating to treatment in or conditions of detention. Finally, it should be noted that GSOC is prevented from investigating matters relating to national security, which is bound to limit its effectiveness in investigating some complaints and demonstrates an additional gap in oversight.

The Policing Authority now monitors and implements recommendations of Garda Síochána Inspectorate (GSI). GSI, however, cannot and does not carry out routine oversight of policing and does not visit places of detention for the purpose of ensuring the welfare and protection of police detainees. Therefore, the Policing Authority is not currently equipped to monitor effectively the treatment of police detainees.

In 2014, the GSI published a report on the investigation of crime. The objective of GSI is to “ensure that the resources available to the Garda Síochána are used so as to achieve and maintain the highest levels of efficiency and effectiveness in its operation and administration, as measured by reference to the best standards of comparable police services.” During its inspection GSI raised a number of issues which gave cause for concern relating to police custody. Included among its concerns were incomplete custody records, failures to update PULSE, inadequate training and the lack of any mechanism for independent custody visiting to check on the welfare of detainees. GSI made a number of recommendations. There is currently proposed legislation to enable GSI to inspect garda stations but the current proposal requires GSI to first obtain the consent of the Minister. That would not satisfy the state’s obligations under UNCAT or OPCAT (whenever the latter might be ratified). Neither would it be effective in preventing or uncovering human rights abuses in custody. Unannounced visits by independent visitors are essential. GSI, the proposed inspector of stations, has contended that inspections should be unannounced and as of right. I agree and would add that there should also be a mechanism for routine inspection by lay visitors who are entirely independent of the state. Experience in Northern Ireland suggests that those charged with inspecting who have a close association with the state are less likely to engender trust and confidence.

The Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) organises visits to places of detention, in order to assess how persons deprived of their liberty are treated. The delegation has unlimited access to places of detention, and the right to move inside such places without restriction. They interview persons deprived of their liberty in private, and communicate freely with anyone who can provide information. In September 2014, the CPT visited Ireland and issued its subsequent report to the Government of Ireland in November 2015.

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208 State security is considered further below.
209 Crime Investigation, October 2014, Garda Síochána Inspectorate.
210 By s. 117 of the Garda Síochána Act 2005.
211 Human Rights Annual Report 2015, NI Policing Board.
212 Set up under the Council of Europe’s European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in 1989.
213 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, CPT/Inf (2015) 38, Council of Europe, Strasbourg. 17 November 2015. This report followed the CPT’s sixth periodic, its previous visit having been conducted in 2010.
The delegation's visit included a number of garda stations.\(^{214}\) It looked into the conditions of detention and the safeguards in place. The CPT's delegation spoke with persons who had experienced police detention in the past who noted that the treatment by gardai has progressively improved. However, in the course of the visit, the delegation received “several allegations of physical ill-treatment and verbal disrespect by Gardaí.” It was recorded that the majority of the allegations concerned incidents occurring at the time of arrest or during transport to a garda station and some related to time spent in a police cell. The allegations of ill-treatment were primarily of blows with batons, slaps, kicks and punches to various parts of the body. Some of the allegations concerned juveniles. One person spoke, relating an incident in May 2014, of being left completely naked for some time after being strip-searched and being subjected to a baton blow for ‘bad-mouthing’ a garda. Another person alleged that (in mid-September 2014) he was handcuffed behind his back while a gardai punched him in the ribs. Further examples included a person who was violently wrenched from a police vehicle, thrown on the ground and hit about the head. That person reported having lost consciousness and suffering a fractured arm. A number of other allegations involved verbal abuse or threats post-arrest with the intention of inciting a confession.

The CPT issued a warning, which I echo, that “there can be no room for complacency in the Irish authorities’ commitment to prevent ill-treatment.” Despite the commitment given previously to human rights compliance and preventing ill-treatment, the number of complaints made to GSOC of such ill-treatment on arrest or in police custody had remained stable.

Furthermore, the provision of health care services within police custody suites was considered “somewhat problematic” with stations ill-equipped with medical facilities, no duty doctor rota in place and examinations only perfunctory. The personal medical records maintained by doctors were not shared or available to other doctors who were called subsequently to review the same detainee. The CPT recommended that doctors should undergo appropriate training in the management of those healthcare problems associated with detention in police custody such as drug and alcohol withdrawal and that more formal arrangements should be put in place for a duty doctor rota and for annotated medical records to be made and kept in a secure place, accessible to medical staff only. The CPT remained concerned about the provision of health-care services within police custody and reported that the “system is not serving as an effective safeguard against ill-treatment and should be thoroughly reviewed.” Importantly, the absence of any independent inspection regime was commented upon unfavourably. To date, this has still not been implemented.

In response, the Garda Síochána advised that a working group had prepared a specification on medical services required for persons whilst detained in garda stations and that, following the identification of a service provider, the service would be commenced in the Dublin Metropolitan Region. It was also stated that the Deaths in Custody in Garda Stations Working Group would look at this service.

On 27 April 2015, GSOC published a report on an examination into the practice, policy and procedure of the Garda Síochána in the narrow circumstances of the garda dealing with persons committed to custody on remand, i.e. following a court order.\(^{215}\) The examination was prompted by a particular event during which a person, remanded in custody by warrant of the court, was not detained and went on to kill his mother. The warrant which would have secured his detention had not been executed by the Garda Síochána. The examination looked at that specific issue. A number of technical and other procedural difficulties, oversights and mistakes were noted but ultimately GSOC observed that practice, policy and procedure needed to be put in place to prevent the same thing happening again. It went on “the issues identified by this examination arise out of deficiencies in communication, procedure and supervision... [but they] cannot be viewed in isolation.” GSOC recommended a multi-agency group tasked to update and codify the criminal justice system as a whole so that arrangements for the escort of remand prisoners could be formalised. As for the Garda Síochána specifically, it was recommended that they review their policies, procedures and practices and train garda members who perform escort duties. Furthermore, it was recommended that the Garda Síochána liaise with

\(^{214}\) The delegation visited one station in Castlerea Roscommon, one in Henry Street, Limerick and nine in Dublin: Bridewell, Coolock, Kevin Street, Mountjoy, Pearse Street, Santry, Store Street, Ballymun, Dublin Airport.

\(^{215}\) Such examination is provided for by s.106 of the Garda Síochána Act 2015.
the court service to ensure that all warrants, bail decisions and bail conditions are entered onto PULSE without delay.  

The fact that a person unlawfully at large goes on to commit a serious offence undoubtedly has a profound impact on public confidence in the policing service. The fact that the offence committed is the unlawful taking of life raises even more profound concerns about garda ability to protect the public from dangerous offenders. A human rights-based approach, which has the protection of the public at its core while maintaining a strict, professional and reliable mechanism for oversight of suspects and detainees, will contribute to an environment in which such mistakes are less likely to occur.

In August 2017, the UN Committee Against Torture issued its concluding observations following Ireland’s appearances before the Committee in July and August 2017. The Committee noted that the Inspector of Prisons, the Prison Visiting Committees, the Health Information and Quality Authority (HIQA) and the Inspector of Mental Health all have some access to places of detention but the Committee remained concerned that they do not systematically carry out visits to Garda stations. It was recommended, again, that Ireland ratify OPCAT but also that it ensure that “existing bodies which currently monitor places of detention as well as civil society organisations 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.” The inclusion of civil society organisations in the oversight of garda detention is critical as is their ability to make repeated unannounced visits to all places of detention. It is disappointing that the Inspection of Places of Detention bill, which should be an opportunity to establish independent oversight of all places of detention, has still not been enacted.

Furthermore, while appreciating the establishment of GSOC, the Committee noted its concern about: (a) the capacity of GSOC to function independently and effectively and to investigate allegations of torture and ill-treatment, including with regard to financial and staffing limitations; (b) the “leaseback” practice whereby complaints referred to GSOC are referred back to the garda for investigation, which amounts to the police investigating itself; (c) the absence of information on the number of complaints which may relate to torture and ill-treatment and the low number of prosecutions initiated against members of An Garda Síochána; and (d) limited public awareness about its activities and responsibilities. I share those concerns as do many governmental and non-governmental organisations, members of the public and GSOC itself. The Committee also recommended that information on the number of complaints to GSOC should be provided to the public to include the final outcome of complaints processed by GSOC. GSOC welcomed the findings and in particular any measures that would enhance its independence and effectiveness in investigating any allegations of torture and ill-treatment, including the provision of additional financial and staffing resources. To date, however, there has been little progress and the requisite information to enable analysis of complaints and outcomes has not been published in a readily accessible format.

Such oversight is not unduly complicated or unacceptably onerous; it has been established across the UK and works particularly well in Northern Ireland which could be said to have overcome additional challenges in permitting unannounced access of lay visitors to all places of detention.

**The Northern Ireland experience**

In Northern Ireland, the PSNI Code of Ethics (which operates as a guide and a discipline code) requires police officers to ensure that all detained persons for whom they have responsibility are treated in a humane and dignified manner. It stipulates that arrest and detention must be carried out in accordance with relevant Codes of Practice and, expressly, in compliance with the ECHR. The Code of Ethics also stipulates that police officers, in their dealings with detainees, must apply non-violent methods insofar as possible before resorting to any use of force, with any use of force being the minimum required in the circumstances. Police are required to take

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216 Concerns about PULSE are addressed elsewhere at X.
217 Concluding observations on the second periodic report of Ireland, 11 August 2017, adopted by the Committee at its sixty first session (24 July to 11 August 2017).
every reasonable step to protect the health and safety of detained persons and take immediate action to secure medical assistance where required. That comprehensive statement of protections is invaluable in protecting those in police detention. Not only does it assist officers dealing with detained persons in understanding the legal framework within which they are working but it reminds officers of the consequences of not protecting the rights of detainees - investigation by the independent Police Ombudsman. The incorporation of such standards into a disciplinary code of ethics has been instrumental in securing a safer custody environment within Northern Ireland. If, as recommended elsewhere in this report, the Garda Síochána Code of Ethics is amended, it should include express guidance on the human rights standards to be applied in police custody.

Detainees within police custody are increasingly diverse and many have complex needs such as addictions, mental health issues and suicidal ideation. Gardai, who have to make decisions about the level of observation a detainee should be placed under during their time in custody, must assess the risk factors that are presented. It is essential that they have adequate training and the support of medical professionals. There is an obvious concern about the provision of medical services within garda custody, which should be addressed as a matter of priority.

Within Northern Ireland, there is a number of additional safeguards, which are not present within Ireland. Firstly, there is a statutory right to have a solicitor present during interview. While in Ireland there is now a protocol for access to a solicitor, it is not enshrined in statute. An Garda Síochána has produced its own Code of Practice (2015) for members, for which they should be commended, but that code makes only passing reference to the rights protected by the ECHR and other international treaties. While the production of such a code of practice is positive it does highlight the absence of any coordinated or centralised approach to embedding human rights within policy and practice. It was a missed opportunity. I am advised that, for the most part, gardai do take steps to ensure that a detainee is advised of the opportunity to have a solicitor present during interview but that the rigour with which that is pursued can vary greatly.

Another significant development in Northern Ireland, which should be implemented in Ireland, is the establishment of an independent custody visiting scheme. Such schemes are routine across the United Kingdom and have contributed to improving the safety of detainees and reducing the number of deaths in custody. In Northern Ireland the scheme is run by the Policing Board which is obliged by statute to make and keep under review arrangements for places of detention to be visited by independent lay visitors. The Custody Visitors are volunteers from across the community who are unconnected with the police or the criminal justice system. They make unannounced visits to all police custody suites where they inspect the facilities, check custody records and, with consent, speak to detainees. They can also view, with consent, live interviews with detainees held under terrorism legislation by remote video link. Custody visitors fill in records of their visits which contain tailored questions and information specifically designed to capture any potential human rights abuses. Concerns are brought to the immediate attention both of the Policing Board and the PSNI. The visit reports are made available to the Board’s Independent Human Rights Advisor who reviews them for any issues relating to human rights. The Human Rights Advisor also visited custody suites on occasion. Included within the Human Rights Annual Reports is a summary of issues arising and recommendations for improvement, if necessary. The independent visitors report quarterly to the Policing Board under a number of headings, which are designed to reveal the general standards of welfare, treatment and facilities. Reports on visits to terrorism detainees are also provided to the UK’s Independent Reviewer of Terrorism Legislation.

Custody visitors are trained to inspect the custody record of any detainee who has consented to the inspection. That training includes human rights standards. Custody visitors are required to check: that detainees have been afforded their rights and entitlements to have someone informed of their arrest, to consult with a solicitor, and to consult the codes of practice; that medication, injuries, medical examinations, meals and diet are recorded and if treatment was required whether it was given; that the procedures to assess special risks or

219 Custody visiting in the UK came about as a result of Lord Scarman’s inquiry into the Brixton disorder in 1981. The Northern Ireland Independent Custody Visiting Scheme was first established in 1991 and was made statutory in 2001 under Section 73 of the Police (NI) Act 2000.

220 Section 73 of the Police (Northern Ireland) Act 2000.

221 As to which see further at X.
Detainees at risk should be checked every 15 minutes. The National Preventative Mechanism (NPM) is responsible for the implementation of the Optional Protocol to the UN’s Convention against Torture (OPCAT) in the United Kingdom, with the bodies that form it carrying out a system of regular visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

The scheme has discharged a critical function in ensuring the protection of the human rights of detained suspects and detainees. It forms part of the United Kingdom’s National Preventive Mechanism (NPM) and has been a great success.

### Recommendations

**RECOMMENDATION 12**

The State should immediately ratify OPCAT and establish a National Preventive Mechanism.

**RECOMMENDATION 13**

Consideration should be given to providing appropriate statutory authority to the most appropriate independent oversight body to inspect all places of detention. Those inspections should not require permission or advance notice. Inspectors should also be entitled to speak with detainees and to consider detention both in police custody and in transit.

**RECOMMENDATION 14**

There should be established, with statutory authority, an independent custody visiting scheme where lay members might make unannounced visits to all places of detention. The custody visitors should be given access to all detainees and their custody records with the consent of the detainee. Thereafter custody visiting reports should be submitted to the oversight body with responsible for inspecting places of detention, which should report on an annual basis on the operation of the scheme.

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<sup>222</sup> Detainees at risk should be checked every 15 minutes.

<sup>223</sup> The National Preventative Mechanism (NPM) is responsible for the implementation of the Optional Protocol to the UN’s Convention against Torture (OPCAT) in the United Kingdom, with the bodies that form it carrying out a system of regular visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
CHAPTER 6
RACIST HATE CRIMES
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Understanding human rights-based policing through the prism of hate crime

An Garda Síochána’s treatment of and response to hate crime reveals a lot about its general approach to the protection of human rights. It is therefore a helpful prism through which to view the service as a whole. Elsewhere in this report I have highlighted the need for a root and branch review of policing across all areas but for the purposes of this report have singled out some areas for closer scrutiny. Racist crime is only one area requiring attention. Much of what is said below applies (in principle) to policing more generally and specifically in areas such as domestic and sexual violence, children and vulnerable adults, homophobic and transgender hate crime, community engagement, public order policing, stop and search, state security.

Ireland has become an increasingly diverse society comprising individuals from wide ranging racial, religious, political, socio-economic and familial backgrounds. Such diversity has enriched society economically and culturally yet hostility and racist crime continues. This trend appears set to continue. It is therefore essential that An Garda Síochána equips its entire staff with the knowledge and competency to respond to the needs of all in society, whether they are victims, witnesses or perpetrators of crime. The ability to respond appropriately to a diverse community should no longer be considered a specialist pursuit but must be mainstreamed throughout all garda policy, procedure, and practice. The culture and ethos of the organisation must not only reflect its legal obligations to mainstream diversity but should embrace diversity in all its forms. Embracing diversity is about much more than combating racist hate crime but that is an essential prerequisite.

When considering the policing response to racist crime one should recall the words of the ECtHR, which has said:

“Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”

The EU Agency for Fundamental Rights has said that “if racist crime is allowed to go unchecked – that is, if criminal justice agencies do not appear to tackle the problem effectively – then the message this promotes is that vulnerable communities are not protected by the state and that offenders go unpunished.” International human rights standards require the state to refrain from violating individuals’ rights but also require the state to take positive action to ensure that the rights of individuals are not violated by others. In other words, An Garda Síochána has an obligation to both ensure that gardaí and staff do not breach the rights of minority ethnic people and ensure they have systems in place to combat racist crime perpetrated by others.

The characteristics of racist hate crime commonly (but not exclusively) include the victim’s membership of a distinct racial or minority ethnic group, an imbalance in power between the victim and perpetrator, and a perception that the distinct minority group presents a threat to the perpetrator’s quality of life. Hate crime has been described to include:

“...acts of violence and intimidation, usually directed towards already stigmatised and marginalised groups. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterise a given social order. It attempts to recreate simultaneously the threatened (real or imagined) hegemony of the perpetrator’s group and the ‘appropriate’ subordinate identity of the victim’s group. It is a means of marking both the Self and the Other in such a way as to re-establish their ‘proper’ relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality.”

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224 17% of the Irish population belongs to a minority or migrant community according to the 2016 Census.
228 In the Name of Hate: Understanding Hate Crimes, Barbara Perry, March 2001.
Or, put another way, hate crime involves acts of violence and intimidation directed towards people because of their identity or perceived difference. Hate incidents and crimes deny the human dignity and individuality of the victim and attack the principle that each individual is entitled to the equal protection of the law. As guardians of the rule of law and defenders of constitutional and human rights, gardai play an essential role in ensuring that fundamental rights are given meaning.

The differential impact of hate crime is now widely understood: crimes motivated by hostility or prejudice towards a person’s core human identity or difference can cause extreme hurt and distress beyond the hurt experienced from comparable crimes which are not so targeted. Furthermore, hate crimes are ‘signal crimes’ or ‘message crimes’ that are intended to signal that the community of which the victim is a member is different and not accepted. Where hate crime occurs, there usually follows a sense of vulnerability and fear which resonates throughout that entire community. Viewed from that perspective it can be seen that hate crime derives from and is fed by prejudice, marginalisation and oppression experienced by minority groups. In turn, the perpetration of hate crime on a minority group fuels further marginalisation and oppression of that minority group. Hate crime does not begin and end with an isolated offence; it occurs within a social and political context which is ever changing. Nor is hate crime perpetrated on the victim alone. Rather, it is directed towards the wider community to which the victim belongs. Hate crime impacts upon the wider community by engendering fear, hostility and suspicion.

Before considering the policing response to racism and racist crime there is a fundamental principle that must be restated: All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. That principle runs through the ECHR, the EU Charter and case-law emanating from the ECtHR and the European Union Court of Justice. The European Convention on Human Rights Act 2003 requires An Garda Síochána to uphold and protect equally ECHR rights and freedoms. That means all persons present in Ireland whether citizens or not. The ECtHR has repeatedly stated, when outlining the hallmarks of a democratic society, that it attaches “particular importance to pluralism, tolerance and broadmindedness... democracy does not simply mean that the views of the majority must always prevail” which means that if conflict exists between a minority and majority group, the role of public authorities is … not to remove the cause of tension by eliminating pluralism, but to ensure the competing groups tolerate each other…”228 So must the Garda Síochána.

The remainder of this chapter proceeds as follows:

Having set out the State and the Garda Síochána’s primary obligations I then deal with the Garda Síochána’s current approach and offer a suggested framework within which to achieve a human rights-based approach to racist crime. In the confines of a report such as this my observations should not be taken to cover everything but they do, it is hoped, offer some constructive suggestions to begin the process. Ultimately, the State and the Garda Síochána should now work with specialists such as Non-Governmental Organisations and those working with and advocating for victims, who have a wealth of professional and lived experience to inform improvements to the service.

**International Legal Framework: Overview**

**Council of Europe: European Convention on Human Rights**

The ECtHR has considered specifically the extent of states’ obligations in relation to hate crimes. From those judgments a number of principles emerge, which can be summarised as follows. States are obliged to conduct prompt and effective investigations into violent crime involving violations of Article 2 (the right to life) and Article 3 (the right to be free from torture, inhuman or degrading treatment) in order to give practical effect to those rights.229 Furthermore, state agencies investigating crime must be impartial in their assessment of the
evidence. In one case involving Romanian authorities, in which the alleged ill-treatment by police of a Roma child left him with permanent disabilities, it was held that the military prosecutors had premised their findings on the statements of the police who had reason to wish to exonerate themselves and their colleagues from any liability. The prosecutors had also dismissed all statements by other witnesses, all of whom were Roma, on the ground that they were biased towards the child. The prosecution had not taken seriously statements by police that the witnesses’ behaviour was “purely Gypsy.” The court believed that that statement demonstrated the “stereotypical views” of the police and should have informed the investigation.

While there is no legal requirement on states to introduce specific hate crime legislation, the criminal justice system must be able to identify, recognise and punish appropriately racist motivated crime.

In one case before the ECtHR, the applicants alleged that the state (Bulgaria) had failed in its obligation to conduct an effective and prompt investigation into the death of a Roma man and that the lack of legislation for racially motivated murder failed to provide adequate legal protection against such crimes. The ECtHR held that the absence of hate crime laws did not in itself hinder the ability of state agencies as the general legal framework did allow for an appropriate and enhanced punishment for hate crimes. Crimes that are particularly egregious, including those causing increased harm to individuals and society, such as hate crimes, must according to the ECtHR receive proportionate punishment under the law. In considering what happened in this particular case however the police identified the alleged perpetrators, one of whom admitted the racial motivation for the crime, but thereafter failed to conduct the necessary investigation. The ECtHR concluded therefore that the authorities had failed to conduct a prompt and effective investigation into the incident, especially “considering the racial motives of the attack and the need to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racial violence.” The ECtHR also found a breach of the procedural aspect of the right to life in connection with the principle of non-discrimination because the authorities failed to make the “required distinction from other, non-racially motivated offences, which constitutes unjustified treatment irreconcilable with Article 14.”

In another case brought against Croatia, concerning a Roma man who was severely beaten by two individuals with wooden bats while they shouted racial abuse, the ECtHR extended the same reasoning to violations of the procedural aspect of the Article 3 right (to be free from ill-treatment) in connection with Article 14 (the right not to be discriminated against). Despite several leads, the police had failed to take reasonable investigative measures to find the perpetrators and bring them to justice. The ECtHR held that state authorities have a duty, when investigating violent incidents, “to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have non-racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”

The ECtHR has made clear that in crimes involving bias on the grounds of race, the state is held to a very high standard. Investigators must recognise and give additional weight to the bias element of crimes and take all reasonable steps to collect evidence of motive and bring offenders to justice. The evidence must be assessed in a fair and unbiased manner to ensure that evidence is not dismissed on the basis of stereotypes. Where investigators appear to have applied stereotypes, police must be aware of the responsibility to challenge and to question whether the investigation is thorough and effective.

The Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM) was adopted on 10 November 1994 by the Committee of Ministers and entered into force on 1 February 1998. It has 39 member states to date and was ratified by Ireland in 1999. The FCNM is founded on the principle that the protection of minorities forms an integral part of the universal protection of human rights. It sets standards, requires intergovernmental co-operation and provides for the development and consolidation of democratic stability.
and confidence building measures in civil society. The FCNM is the Council of Europe’s most comprehensive text for protecting the rights of persons belonging to national minorities and is the first legally binding multilateral instrument devoted to the protection of national minorities worldwide. While it is a legally binding instrument under international law, the fact that it is a framework document highlights the scope for member states to translate its provisions through national legislation and appropriate governmental policies. Parties to the FCNM undertake to promote full and effective equality for persons belonging to minorities in all areas of economic, social, political, public and cultural life together with conditions that will allow them to express, preserve and develop their culture, religion, language and traditions. States have to ensure the freedom of assembly, association, expression, thought, conscience, religion and access to and use of media for national minorities.

**European Union**

The European Union Framework Decision on Combating Racism and Xenophobia, an official response to hate crime, requires all EU member states to review their legislation and ensure compliance. It is intended to harmonise criminal law across the European Union and to ensure that states respond with effective, proportionate and dissuasive penalties for racist and xenophobic crimes. Article 4 provides that all states must “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.” Article 8 requires that the initiation of investigations must not be dependent on a victim’s report or accusation. Therefore, while the decision does not require the enactment of any specific legislation, it does require criminal justice systems to recognise and sentence appropriately bias-motivated crimes. The EU Victims Directive establishes minimum standards on the rights, support and protection of victims of crime. The Directive recognises that criminality leaves victims vulnerable and often in need of assistance. It stresses that victims are, often for the very first time, involved in the criminal justice system and may have to speak to police officers, lawyers and judges and ultimately go to court. It therefore ensures that victims are recognised and treated with respect and dignity; are protected from further victimisation and intimidation from the offender and further distress when they take part in the criminal justice process; receive appropriate support throughout proceedings and have access to justice; and, have appropriate access to compensation. Victims must be guaranteed a minimum level of rights without discrimination across the EU, irrespective of their nationality or country of residence. These rights apply whether a minor or serious crime is involved. Victims, and their family members, should also have access to support services - whether or not they have reported the crime – and be protected from further harm. The Directive identifies hate crime victims as particularly at risk of secondary or repeat victimisation. That risk must be assessed at the earliest possible stage of criminal proceedings as part of the individual assessment of the victim. Special protection measures provided for in the Victims Directive must be applied where necessary. European Union member states were required to bring their laws and policies into compliance with the Directive by 16 November 2015. Guidance was issued in which member states were asked to consider “nation-wide codes of conduct/guidelines for professionals in regular contact with victims of crime... and probably will require setting clear responsibilities... Paying particular attention to inter-agency co-operation.” The Directive states:

“It is of utmost importance to ensure horizontal collaboration and coherence between police, judicial authorities and victim support organisations, when they are dealing with a victim’s case in order to minimize the burden upon the victim. Ensuring that rights set out in this Directive are not made conditional on the victim having legal residence status in their territory or on the victim’s citizenship or nationality.”

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The United Nations

The United Nations human rights framework requires states to guarantee equal rights and the equal protection of laws and to prevent discrimination. The Universal Declaration of Human Rights provides the framework for the principles of equal rights and non-discrimination and was the first international instrument to affirm that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as “race”, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly in 1966, expands on those principles. For example, Articles 6 and 7 ICCPR protect an individual’s right to life and freedom from inhuman and degrading treatment, respectively. Article 2 requires that states have sufficient legislative, judicial and other measures to ensure that a remedy is available in the event of treaty violations.

The United Nations human rights framework requires states to implement legislation prohibiting acts of violence and incitement to violence based on racism. The CERD Committee, which oversees the treaty’s implementation, has stressed the importance of prosecuting racist acts, including minor offences committed with racist motives, “since any racially motivated offence undermines social cohesion and society as a whole.” The Committee has also recommended that in order to assist victims of racism in bringing cases to court states should ensure that victims are allowed to participate in criminal proceedings, are kept informed about progress, are protected against reprisals or intimidation and that they have access to compensation and assistance, where available.

It is the duty of state agencies (including An Garda Síochána) to ensure that a racist motivation is investigated fully. Failure to do so when there is prima facie evidence of motivation in connection with a serious crime is considered to be a violation of Article 6 CERD (on effective remedies) and Article 2 CERD (on bringing an end to racial discrimination by all appropriate means).

The CERD Committee has considered the duty to take effective action against acts of discrimination under Article 2 and to provide effective remedies under Article 6 in relation to the adequate investigation and prosecution of hate crimes. In one case, the petitioners were a family of Iraqi immigrants living in Denmark, who were repeatedly subjected to racist taunts and verbal abuse. On one occasion neighbours broke into the family’s home causing damage and physically assaulting two male occupiers. The police investigated the incident, however when the prosecution service secured admissions of guilt on assault and property damage charges it amended the charges to refer only to the violent offences not to the aggravating racist motivation. The prosecutor thereby failed to inquire into the potential bias motivation of the crime. The Committee stressed that the potential gravity of the incident required a full investigation of the potential bias motivation. In that case, the offensive comments made during the attack and the xenophobic statements leading up to the incident imposed a duty to consider fully the racist motivation of the crime.

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238 General Comment 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, Committee on the Elimination of Racial Discrimination, Sixtieth Session, Supplement No. 18 (2005) UN Doc A/60/18, page 103, para. 15.
239 Ibid. At pages 104–05, para. 17.
Organisation for Security and Cooperation in Europe (OSCE)

The OSCE comprises 57 participating states, including Ireland, and is the world’s largest regional security organisation. The OSCE is a forum for political dialogue on a wide range of security issues and a platform for joint action to improve the lives of individuals and communities. The OSCE’s police-related activities are an integral part of its efforts in conflict prevention, crisis management and post-conflict rehabilitation. Within the OSCE Secretariat, the Transnational Threats Department’s Strategic Police Matters Unit (SPMU) is the focal point for the OSCE’s policing work. One of its main categories is police development and reform within the principles of democratic policing, a special focus on community policing and police-public partnership, training initiatives, and promoting the protection of victims and vulnerable persons.

The 2009 OSCE Ministerial Council Decision on Combating Hate Crimes\(^\text{242}\) remains one of the most comprehensive commitments by the international community concerning state obligations to address hate crimes. In this decision, participating states committed themselves to, amongst other things: collect, and make public, data on hate crimes; enact, where appropriate, specific, tailored legislation to combat hate crimes; take appropriate measures to encourage victims to report hate crimes; develop professional training and capacity-building activities for law enforcement, prosecution and judicial officials dealing with hate crimes; and, promptly investigate hate crimes, and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and the political leadership.

The OSCE has restated many times that:

What police officers do and say in the first several minutes at a crime scene can affect the recovery by victims, the public’s perception of governmental commitment to addressing hate crimes, and the outcome of the investigation. Officers who recognize a probable hate crime, interact with the victims with empathy, and take action to initiate a hate crime investigation send a strong message that hate crimes are a serious issue.\(^\text{243}\)

Irish legal framework

Domestic legislation

There is no agreed definition of ‘hate crime’ but it is generally accepted to encompass crime (recognised in the criminal law) which is committed in a context that includes hostility based on identity. It is a type of crime rather than a specific offence. There is no specific offence of ‘hate crime’ in Ireland neither is there recognised at law a type of crime in which identity-based hostility must be taken into account when a court is considering the appropriate sentence or other sanction.

The only legislation under which hostility on grounds of race, colour, nationality, religion, ethnic or national origin, membership of the travelling community or sexual orientation is criminalised is the Prohibition of Incitement to Hatred Act 1989, which criminalises words and behaviour that are threatening, abusive or insulting and intended or, having regard to all the circumstances, are likely to stir up hatred. In other words, the 1989 Act covers hate speech. The 1989 Act is narrow in its scope and rarely relied upon; many police officers express confusion and discomfort at its use. It has been suggested that the requirement to prove that the defendant either intended to, or in the circumstances was likely to, stir up hatred is inhibiting the prosecution of offences.\(^\text{244}\)

That might explain the startling low number of reported cases. The Criminal Justice (Victims of Crime) Act 2017

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\(^{242}\) Decision No. 9/09 on combating hate crimes, OSCE Ministerial Council, December 2009.


\(^{244}\) Lifecycle of a Hate Crime – Country Report for Ireland, Amanda Haynes and Jennifer Schweppe, ICCL 2017, which analyses the use of the 1989 Act in Ireland.
does refer to hate crime, which is positive, but it applies only to the treatment of victims not the offender. There is also, potentially, the Criminal Justice (Public Order) Act 1994, the Non-Fatal Offences against the Person Act 1997 and the Criminal Damage Act 1991, which are used to protect individuals and their property including from racial attack but racist behaviour is not explicitly addressed. Unlike in Great Britain and Northern Ireland, there has not yet been enacted specific legislation providing for enhanced sentences for any offence that is aggravated by hostility towards members of one or more of a number of defined groups.

The message given by express legislative provision is important: it demonstrates an alliance between law and policy to ensure that hate crime, bearing in mind the particular harm it does to vulnerable individuals and to society, is repugnant to a diverse civilised society. In enacting such legislation, the legislature recognises society’s condemnation of hate crime and sends out a message that victims will be protected and supported. The police, by recording hate incidents and crimes and applying the legislation, can have a profound impact upon the views and attitudes of both state and the general public. Furthermore, the police are often (or at least should be) the first point of contact for a victim of crime and therefore the police response must be sufficiently targeted and informed to meet the individual needs of victims; equality does not mean treating all people in the same way. Article 14 ECHR prohibits discrimination, which includes treating a person less favourably than others in similar situations on the basis of a particular characteristic, failing to treat persons differently when they are in significantly different situations and applying a seemingly neutral policy in a way that has a disproportionate impact on individuals or groups.

**An Garda Síochána’s current practice**

**Defining hate incidents and crimes**

An Garda Síochána defines hate crime as “Any incident which is perceived by the victim or any other person as being motivated by hate, based on a person’s age, race, ethnicity, religious belief, gender identity, disability, or sexual orientation.” That is drawn from but does not mirror exactly the definition recommended by Lord Macpherson following his inquiry into the death of Stephen Lawrence, a seminal case in the UK which marked a turning point in police understanding and appreciation of hate crime and the many factors that foster it and arise when dealing with it. The Macpherson report recommended the following definition, “any incident which is perceived to be racist by the victim or any other person,” to emphasise the need “to ensure that nobody obscures the approach to incidents involving racism because of lack of appreciation or willingness to accept that racism is involved. A clear and uncompromising definition of such incidents is needed to ensure that there is no shelter for such views.” The new definition, which became known as ‘the perception test’, was a key recommendation. It was meant to give primacy to the perception of the victim rather than the judgement of the police officer attending. It was also stressed that the term “racist incident” should be understood to include crimes and non-crimes in policing terms. The importance of reporting, recording and investigating with equal commitment was stressed. The Macpherson report resulted in a number of developments to policing across the United Kingdom, including Northern Ireland, relating to critical incident management, family liaison, community engagement and independent advice, third-party reporting, and changes in the way hate crime investigations are conducted. It has proved enormously powerful and effective.

Since the Macpherson reforms, all UK police services have worked on improving their response to hate crime. As noted by the College of Policing, “In a modern democratic and diverse society, protecting all the composite

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246 An Garda Síochána website.
247 Ibid., para 46.36
248 Before the Macpherson recommendation was accepted the definition used by police was as follows. “A racist incident is any incident in which it appears to the reporting or investigating officer that the complaint involves an element of racial motivation made by any person.”
groups of that society in accordance with their needs is vital if the service is to continue to police by consent.”

An essential component of the reform was a new approach to recording hate incidents. A hate incident is defined as “any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by hostility or prejudice.” A hate crime is defined as “any incident, which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by hostility or prejudice.” It means that at the recording stage any hate incident whether displaying the elements of a crime or not have to be recorded as such. Hostility replaced hate because it is a wider concept and more accurately reflects the nature and scale of such incidents. Police officers had difficulty understanding what was necessary to prove hate which was seen as a very high threshold, difficult to apply in practice or prove.

An Garda Síochána’s definition is significantly weaker than the Macpherson definition. It should be amended to that which is used and which has proved successful in the UK.

Because there is no statutory basis in Ireland for racism to be considered as an aggravating factor racist motivation is less likely to be recorded on PULSE. Even without specific hate crime legislation garda should ensure, to comply with current human rights obligations, that racist motivation is recorded for all incidents perceived by the victim to have such a motivation.

Garda record “discriminatory motives” in relation to standard offences if it is perceived by the victim or another person to have a racist motivation. In 2018, it was reported that:

“Significant improvements have been made to the mechanisms for the police recording of hate crime data specifically since 2015 via an update termed PULSE 6.8, including the expansion of the range of categories of discriminatory motive from five to eleven and the establishment of the question as mandatory, indicating a commitment to fulfilling the State’s obligations under the Victims’ Directive to identify victims of hate crimes in order to provide them with access to appropriate supports. However, in this context, we note that the question has been relocated from the Incident Details screen to the Victim Needs Assessment screen which supports the view that the information is sought for the purposes of victim support rather than investigation.”

The Garda Síochána Policing Plan (2017) has hate crime as a policing priority but anecdotal evidence suggests it is still not being recorded routinely and that gardai are requiring independent evidence of corroboration of motivation. To require corroboration conflicts with human rights obligations to protect victims by putting them at the centre of an investigation and does not give effect to the objective of the Macpherson (perception test) approach. It has been reported that in respect of the ‘perception test’ as the criterion for recording a racist discriminatory motive, "only those police officers who worked exclusively with victims and who had additional training on hate crime had any knowledge of the perception test. Police interviewees differed in their belief as to whether it is the victim, or the police officers’ perception, which determines recording, and more specifically, whether evidence of a hate element is required to legitimate the recording of a discriminatory motive." Until there is confidence in the ability of gardai to identify bias or hostility motivations and record it accurately those statistics that are collated will not provide a reliable indication of the nature and scale of racist crime.

Victim protective services

An Garda Síochána’s National Protective Services Bureau (GNPSB), was established to provide advice, guidance and assistance to Gardai investigating sexual crime; online child exploitation; child protection; domestic abuse; human trafficking; organised prostitution; ViCLAS; sex offender management; missing persons; and support for victims of crime. The bureau leads the investigation in more complex cases. The bureau also

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251 The Garda electronic recording system.
255 Violent Crime Linkage Analysis System
liaises with relevant Government Departments, State Bodies and voluntary groups, embracing the essential multi agency approach to tackling these crimes and their causes. Primary considerations in these cases are the protection and welfare of the victims, while ensuring the proper investigation of the alleged activities. Investigation of hate crime is not included as a priority for GNPSB, which means its expertise is not directed towards this pervasive category of offending. It might be that GNPSB could usefully extend its remit to include the protection of repeat victims of hate crime. Given the obligations under, for example, Articles 2 and 3 ECHR, attention needs to be paid to the protection of victims of hate crime from further victimisation and harm. The Garda Síochána Policing Plan 2017 does have hate crime as a priority but more consideration needs to be given to what means in practice.

There is also a Garda Victim Liaison Office (GVLO) which is responsible for formulating strategy, developing policy and supporting the implementation of An Garda Síochána’s Victims’ Charter. The GVLO liaises with the Commission for the Support of Victims of Crime, the Victims of Crime Office, Department of Justice and Equality and Government funded victim support organisations. GVLO staff attend conferences and seminars nationally and internationally to bring back expertise to the organisation. The GVLO provides support to Family Liaison Officers (FLOs) who are appointed to victims of crime and their families in serious cases such as murder or false imprisonment. The principal role of the FLO is to keep victims informed during the investigation and to provide victim support information. Additionally, there are 28 Victim Service Offices which are responsible for communicating with victims of crime, and prioritising their needs. It is intended that victims of crime will, through this central point of contact, be kept better informed about the progress of their case and the support available to them. Victims of domestic violence, sexual crime “or other crimes where there is trauma” are meant to be given advice and support in person from investigating or specialist gardaí. Divisional Protective Services Units have been established to target particular types of offending but they do not extend specifically to hate crime.256

The Garda Síochána Victims’ Charter makes a number of promises to victims of crime or other traumatic incident, intended to implement the requirements of the EU Victims’ Directive. It promises victims of racist incidents that their report will be accurately recorded; their complaint will be investigated; and, they will be put in contact with their local Garda Ethnic Liaison Officer (ELO). Those commitments are positive but whether they are actually being adhered to in practice requires further examination. In important research commissioned by the Irish Council for Civil Liberties, published in 2018, it is noted that:

“Gardaí interviewed stated that they had not seen the impact of the Directive in the context of hate crime. They highlighted the lack of an explicit and formal link between the work of specialist ELO/LGBT officers and those working within the Garda Victim Service Offices. We found no evidence that those working within Garda Victim Service Offices had received training on the treatment of victims of hate crime specifically, or on any of the particular special measures that should be in place for them.”257

That is a cause for concern and is illustrative of the piecemeal and partial nature of policy development and practical application of policy within the Garda Síochána.

The evidence contained within iReport.ie suggests that the service received by victims of racist crime is very mixed, with many victims not receiving the service to which they are entitled. This needs to be monitored and reported upon by the relevant oversight bodies.

Garda response to race hate crime

As noted by iReport.ie, “The response of the gardaí to reported racist incidents appears to play a role in the impact on victims.”258 In its first quarterly report, in 2013, it was recorded that of 97 incidents recorded by

256 Unless it also falls within the other designations.
258 iReport.ie was established as the national independent system for recording racism in Ireland.
iReport.ie, only 16 were reported to An Garda Síochána. Of the 16 reports, only one victim could verify receipt of an incident number. That is not to say that in all other cases an incident number was not issued but it certainly should alert the garda and the oversight bodies to the possibility that racist incidents are not being pursued with vigour. It also suggests significant under-reporting of incidents. Details were provided to iReport.ie on a number of incidents, which revealed failures to take the reports seriously or act on them, failures to keep victims informed of police action, poor communication, asking irrelevant questions about status rather than about the alleged offence, lethargy and in some cases racial abuse by gardai themselves.\textsuperscript{259}

It should be noted that it is unlawful to discriminate against any person on the ground of their status and that includes irregular migrants who are particularly vulnerable but particularly reluctant to report in case they are targeted by police because of their status. If gardai are interested in checking the immigration status of a victim of crime that victim will not receive a proper service and other victims will be deterred from reporting. The Victims’ Directive requires that irregular migrants are supported as victims of crime in the same way as others. There is no space within the confines of this report to develop this further but work could usefully be undertaken in relation to irregular migrants in line with ECRI General Policy Recommendation No. 16.\textsuperscript{260}

In 2016, reports of racist incidents made to iReport.ie showed significant increases in both the rate and severity of incidents. In the period July to December 2016 there were 245 reports, of which 155 included allegations of criminal offences.\textsuperscript{261} Of the 245 reports, 20 involved allegations of assault.\textsuperscript{262} Approximately 22% of those who reported to iReport.ie also reported to An Garda Síochána. In addressing the under-reporting of incidents victims were asked to comment on what could be done to encourage them to report. Their answers are revealing. A significant number said they would be more inclined to report if: the report could be made anonymously; they could self-report by filling in a form; a third party could report on their behalf; and, there was an officer of the same ethnic/racial group to whom the report could be made.\textsuperscript{263} Another group questioned whether they could be convinced to report at all because they still needed to be reassured that the report would be taken seriously. This certainly indicates a breakdown of trust in policing and the criminal justice system and a fear that reporting will not resolve the issue, but might escalate it. iReport.ie also notes as a general theme, “slow and inadequate response from An Garda Síochána to violence... Getting information from gardai about whether they are following up on a complaint at all requires persistence, and the lack of availability of information is a consistent theme... Victims left feeling unsafe after an attack have no way of communicating with the gardai who took the report.”

That is simply not acceptable in a modern policing service which aspires to service the whole community. This is particularly important where the impact of the crime is felt more greatly by the victim and the wider community. The devastating impact of racist abuse upon a victim is well described in iReport.ie as follows:

“...the majority of incidents had significant impact in terms of health, feelings of inclusion, and ability to work and form relationships... The psychological effects of reported incidents are significant. One victim reported having suicidal thoughts afterwards, nine described ongoing serious anxiety and seven described significant experiences of depression... 31 people reported fear as a direct result of the experience which were so significant that it impacted on their ability to engage in normal everyday activities... The level of fear prompted moving house, avoiding local amenities... not leaving the house... and not socialising with anyone.”\textsuperscript{264}

In 2017, the rate and severity of incidents continued to rise.\textsuperscript{265} The rate of reporting to An Garda Síochána increased slightly but victims continued to record that lack of trust in gardai, based on previous experience, was the main reason for not reporting. The second most common reason for not reporting was the time required to make the report. It is known that racist crime is under-reported generally and that the rate of

\textsuperscript{259} Reports of racism in Ireland, 1st Quarterly Report of, Michael L, July–August–September 2013.
\textsuperscript{260} Regarding safeguarding irregular migrants and countering discrimination.
\textsuperscript{261} This compares to 97 reports in the period July to September 2013.
\textsuperscript{262} Reports of racism in Ireland, 13th & 14th Quarterly Reports of Michael L. (2013–2018).
\textsuperscript{263} Representativeness is considered further below.
reporting to police is lower still. Any additional barriers to reporting must therefore be addressed as a matter of urgency. iReport.ie records, in 2017, that:

“...experiences of reporting to Gardaí are mixed. There were cases of good practice as well as cases reflecting continued failure to address this area adequately. One Dublin Division demonstrated repeated good practice in responding to calls for immediate assistance, although there are still areas for improvement in preventing the escalation of incidents.... Barriers to reporting are still not taken sufficiently seriously... It is not clear to the public how to report racist incidents and insufficient information about the process, including diversion during reporting for unexplained reasons... deters even those who are initially motivated to report.”

There were reports of hostile treatment by some gardaí to victims and witnesses of racist crime including refusing to take an account from the victim, failing to record the facts and aggression by gardaí. As noted, “hostile responses like this are unpredictable, and further terrorise the victim at the point where they most need help and support.” Some of those who reported racist crime to iReport.ie also reported their experience of bias (by targeted surveillance of ethnic minorities) and even racial abuse and direct threats made to them by gardaí. This cannot be ignored but must be confronted and eliminated. While a human rights-based approach does not in itself prevent an individual behaving badly it does create an environment and provide the framework within which such behaviour is less likely to occur and more likely to be punished. Not all incidents of bad behaviour by gardaí are due to prejudice; some are explained by lack of awareness, failures in training and lack of exposure to members of minority groups. Within a human rights-based approach those issues can be addressed.

It is further recorded by iReport.ie that while the Garda Síochána have introduced risk assessments for domestic violence cases (which is welcomed) there is nothing similar for racist crime. Therefore, there is no policy or strategy (certainly no written policy that has been made publicly available) to deal with repeat victimisation and harassment. Racist crime tends to escalate, so clear policy which includes case-sensitive risk assessments followed by an action plan to protect the victim is essential if human rights obligations are to be discharged. The publication of such a policy, so that the public including victims of racist crime can be reassured that there is a commitment and a plan to respond to it, would go some way to improving reporting rates.

Travellers’ experience of policing

Travellers’ experiences of policing in Ireland merit some separate attention. There is no legal recognition of Travellers’ distinct culture as defined by ethnicity acknowledgement and therefore little protection at law. In Great Britain and Northern Ireland Travellers are recognised and therefore protected at law as a distinct ethnic group. Despite the national failure to provide legal protection to Travellers as a distinct ethnic group, the Garda Síochána is obliged to act compatibly with the ECHR, which includes the Article 14 right not to be discriminated against. Article 14 does recognise and protect Travellers from discrimination on grounds of race.

It should also be recognised that legislation in Ireland – to deal with trespass, for example – has contributed to an environment in which Travellers feel increasingly disenfranchised and discriminated against. Garda are increasingly seen to be in conflict with Travellers. The Criminal Justice (Public Order) Act 1994, which facilitates the eviction of persons entering and occupying land without consent, permits gardai to direct individuals to leave land immediately and remove all objects on the land. Previous legislation placed restrictions on such evictions if there was no alternative accommodation available. The 1994 Act also provides that a person who refuses to give their name or address to or comply with the direction of a garda is guilty of an offence. Gardai may arrest such a person without a warrant and may also remove, store and dispose of a person’s property. Gardai now are used to remove travellers forcibly from land when they have nowhere else to

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264 Too often allegations of hostility or racism by Gardaí are dismissed as uncorroborated or in any event exaggerated. Over time, there is a collection of credible allegations that must alert Garda management to a persistent and serious problem. This can have a devastating impact upon legitimacy and public confidence. Some allegations could not be dismissed. For example, a 2011 recording of a conversation between Gardai, which was published by the Irish Times, revealed shocking misogyny and racism including jokes about raping an immigration detainee.

267 Interview with author.
go. That necessarily raises tensions and distrust of the garda.

The Irish Traveller Movement\textsuperscript{268} carried out a survey, in 2015, of its members to establish a baseline for local relationships between Travellers and An Garda Síochána. They noted some progress such as the Local Traveller Inter-Agency Committees, in which Travellers and the garda participate, but highlighted significant issues that remained. For example, trust had yet to be established, with Travellers feeling gardai did not do enough to protect them. A particular complaint was that gardai were slow to respond to reports of crime committed against Travellers at halting sites.\textsuperscript{269} It is also recorded that Travellers believe they are seen as perpetrators rather than victims of crime and cited the overuse of stop and search and stop and question powers against them, particularly their young men. They reported frequent patrols on sites and group housing schemes “to keep them under surveillance [as] there is no interaction.” CCTV cameras sited next to existing or planned sites exacerbate the feeling of being under constant surveillance. Whenever gardai attend sites or group schemes, Travellers report that they often send Armed Response Units, which adds to the sense of isolation and conflict. Travellers report that they are made to feel uneasy and unwelcome when attending garda stations, sometimes with inappropriate remarks being made and intrusive questions asked.

The Human Rights Audit (the Ionann Report) carried out by independent researchers recorded that only 15% of garda members who responded considered their relationship with Travellers to be “good”. That was the lowest score over eight categories. Refugees and asylum seekers fared marginally better, with 21% of gardai believing the relationship to be good. The Ionann report then went on to make the unsettling finding “on the basis of this audit it seems clear that there is institutional racism within An Garda Síochána in its dealing with certain groups in the community and in the absence of organisational structures which would identify and deal with what is a very fundamental abuse of human rights.”\textsuperscript{270}

An Garda Síochána made a commitment to deal with the issues in the Ionann Report but if one looks at a public attitudes’ survey carried out by the Garda Síochána it is clear that levels of satisfaction with the policing service remain markedly lower amongst Travellers than the general population. In a survey undertaken in 2007 only 5% of Travellers were very satisfied with the policing service compared to 14% of the general population. 22% of Travellers were very dissatisfied with the service compared to 3% of the general population.\textsuperscript{271} There has not been a similar survey carried out since; the survey published in 2018 did not consider specifically Travellers or persons from other ethnic minorities.

The reforms and action plan in response to the Ionann Report clearly did not have a great impact on the service received by Travellers. By 2015, the Irish Traveller Movement was reporting that despite some attempts at local initiatives:

“...trust has rapidly eroded based on a string of allegations raised by Garda ‘whistleblowers’ in relation to ethnic profiling of Travellers, including Traveller infants, on the Garda PULSE system... very few allegations have caused such widespread distress among the community, which has seriously impacted on relationships between An garda Síochána and Travellers in Ireland... not enough has been done to overcome potential institutional bias; indeed the allegations in relation to ethnically profiling Traveller infants has confirmed for many the existence of anti-Traveller racism with the force.”\textsuperscript{272}

Based upon my own discussions with Travellers, the situation has not improved since 2015. In fact, it is possible that it has worsened further. Attempts to counteract prejudice within the garda and educate officers and members by including Traveller groups in training at Templemore have, it is said, “fizzled out over the last couple of years.” That is disappointing and counter-productive.

\textsuperscript{268} The Irish Traveller Movement is a national network of organisations (including 40 Traveller organisations) and individuals.
\textsuperscript{269} Irish Traveller Movement Report In response to the European Commission against Racism and Intolerance (ECR) Ireland’s fourth monitoring round (April 2015).
\textsuperscript{270} An Garda Síochána Human Rights Audit Report from Ionann Management Consultants, June 2004.
\textsuperscript{271} Public Attitudes Survey and Traveller/Minority Ethnic Communities Attitudes to An Garda Síochána, 2007.
\textsuperscript{272} Irish Traveller Movement Report In response to the European Commission against Racism and Intolerance (ECR) Ireland’s fourth monitoring round (April 2015). This issue was also raised in Dáil debates. See for example written questions from Clare Daly TD.
The Roma community’s experience

The situation is not much better with the Roma community. In a 2017 national needs assessment of Roma in Ireland it was revealed that 53.9% of respondents reported feeling discriminated against by the Garda Síochána. There is some basis for those feelings. In 2013 for example a Special Inquiry examined the removal of two Roma children from their families on the basis that the children did not resemble their parents as their appearance did not conform to racial stereotypes. The Inquiry found that in the case of one of the children his “ethnicity was so influential in determining the decision to remove him from the care of his parents, with no objective or reasonable justification” that it amounted to ethnic profiling. It was recommended that an independent audit should be carried out to consider, amongst other things, whether certain groups are over-represented in police figures. The subsequent audit, carried out by Professor Geoffrey Shannon, found that “crucial demographic data in relation to individuals who engage with members of the Garda Síochána is not routinely recorded on their PULSE file and that “cultural competence within An Garda Síochána with respect to the Roma community must be enhanced.”

Professor Geoffrey Shannon is an extremely experienced and highly regarded lawyer who dedicated an enormous amount of time and energy to his review. His observations must not be ignored but fully implemented as a matter of urgency.

Has the garda service improved?

Data

I am conscious that some reading this report will query the veracity or reliability of some of the statements made above without corroborating statistics to back them up, but in the absence of the garda collecting and others analysing and publishing source data it is impossible to provide reliable statistics; that in itself is a significant human rights issue. Without reliable statistics no-one (including presumably the Garda Síochána) can be confident about the quality of the policing service or its compliance with human rights obligations. What can be said however is that over the years a number of reviews and independent reporting mechanisms have provided evidence which should not be dismissed of a serious breakdown in trust between the garda and minority communities.

The Central Statistics Office has resumed, with qualification, the publication of crime statistics but they do not include crimes motivated by or demonstrating hostility on racial or other grounds. That is despite the fact that all Member States participating in the OSCE have agreed to collect data on hate crimes and to make the information publicly available, including for the annual reports of the Office for Democratic Institutions and Human Rights (ODIHR).

In 2012, Ireland did provide some disaggregated figures for hate crime broken down according to cases recorded by police and cases prosecuted. Clearly, therefore, the Garda Síochána is at least recording some information on hate crimes. In 2012, 98 cases were reported but no figures were provided for cases prosecuted or sentenced. If one compares that figure to those provided by the United Kingdom in the same period (approx 48,000 recorded cases), it does suggest significant under-reporting and under-recording in Ireland. The UK actively worked to increase the reporting and recording of hate crime. Even the UK’s 48,000 figure is considered to be an under-estimate. Scotland reported 6,472 cases.

Comprehensive data enables police (and others) to understand the nature and scale of hate crime and to monitor the effectiveness of any strategy to combat it. A comprehensive approach includes collecting data and statistics on the number of cases reported to police, the number of cases recorded by police as having a hate motivation, the number of cases prosecuted and the number of cases sentenced. Disaggregation of that data by types of crime and hate motivation is essential for analysing trends in hate crimes.

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273 Audit on Section 12 by Dr Geoffrey Shannon.
274 Hate Crimes in the OSCE Region – Incidents and Responses.
The European Commission against Racism and Intolerance (ECRI) issued a number of reports in its fourth country monitoring cycle. In 2012, ECRI recommended that “Ireland improve and supplement the existing arrangements for collecting data on racist incidents, and assess the application of criminal law provisions against racism in order to identify any gaps that need closing, including making racist motivation an aggravating circumstance.” To date that has not been actioned but should be. In addressing this gap, the Garda Síochána must however be mindful of the warning given by the ECRI that “police must ensure that they do not communicate with the media and the public in a manner that risks perpetuating hostility or prejudice towards members of minority groups.” For example, the ECRI recommends that “police should not reveal to the media or to the public information on the race, colour, language, religion, nationality or national or ethnic origin of the alleged perpetrator of an offence. The police should only be allowed to disclose this type of information when such disclosure is strictly necessary and serves a legitimate purpose, such as in case of a wanted notice. Especially when making public statistical information, the police should be careful not to contribute to spreading and perpetuating myths linking crime and ethnic origin or linking the increase in immigration with an increase in crime. The police should ensure that they release objective information, in a way that is respectful of a diverse society and conducive to promoting equality.”

The UK’s College of Policing Operational Guidance states:

“...hate crimes are far more prevalent than official statistics suggest. Proportionately, they are more likely to be directed against the person than non-hate crimes, and they tend to be experienced repeatedly. Victims often expect their victimisation to continue, or are otherwise fearful of attacks in the future. Hate crimes can have a greater emotional impact on the victim than comparable non-hate crimes, and can cause increased levels of fear and anxiety that can also permeate through wider communities. This is precisely why all victims should not be treated the same. Rather, they should receive a service from the police that is appropriate to their needs.”

That cannot be overestimated. Furthermore, unless and until statistics capture the true nature and scale of racist incidents and crimes An Garda Síochána and other service providers will not be able to target their resources correctly. They will not know, for example, if there are hot-spots (geographically or temporally), whether there are victims left unprotected or whether the resources that are being dedicated to racist incidents and crimes are effective. A policing service not only needs to have it so that it might prioritise resources and protect victims.

Specialist officers

In April 2000, the Garda Síochána established a Racial, Intercultural & Diversity Office (GRIDO). Within GRIDO, staff “co-ordinate, monitor and advise on all aspects of policing in the area of diversity.” Those staff members are supposed to be available to the public and to the garda organisation to provide advice and support. A number of Garda Ethnic Liaison Officers (ELOs) have been appointed to: liaise with representatives of ethnic minority communities and ‘hard to reach groups’; inform ethnic minorities of garda services; monitor racist incidents; liaise with victims of racist incidents and ensure that they are afforded adequate protection; liaise with local organisations providing support for victims of crime; and ensure that members of ethnic minority communities are aware of local and national victim support services; support integration at community social events and community policing initiatives; develop initiatives at local community level to facilitate and encourage integration; assist in the investigation of racist incidents and ensure that appropriate support mechanisms are available; monitor the delivery of appropriate policing services; and visit Reception Centres for Asylum Seekers and Refugees to make residents aware of Garda services and the role of ELOs.

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275 ECRI is a human rights body of the Council of Europe, composed of independent experts, which monitors problems of racism, xenophobia, anti-semitism, intolerance and discrimination on grounds such as “race”, national/ethnic origin, colour, citizenship, religion and language (racial discrimination); it prepares reports and issues recommendations to member States.


277 General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, European Commission against Racism and Intolerance (ECRI), June 2007.

278 Hate Crime Operational Guidance, College of Policing, May 2014.
An information sheet is available on the garda website identifying the names and contact details of officers fulfilling ELO and LGBT roles. It is not made clear however whether officers are ELOs and/or LGBT officers. Clearly, different issues arise for ethnic minority groups and those from the LGBT community; one minority is not the same as any other. It would be helpful if officers were, and became known as, specialist officers who both wanted to and were trained to, deliver specialist services to minority victims. It is important that such officers are chosen because of their particular interest in and commitment to working with minority victims. Too often, I am told, officers ‘draw the short straw’ for selection when they have expressed no previous interest or aptitude. There is particular skill to being a minority liaison officer, which should be valued by the organisation. It would appear that the ELOs who have contact with groups representing minorities have been well received, however too few members of the public (including victims of racist crime) are aware of ELOs. An Garda Síochána should make sure that the public are aware of the services available and ensure that there are sufficient resources to deal with any increase in requests for those services. There is a relatively small number of ELOs and the role is part-time. In other words it has to be fulfilled on top of other duties. While there was early appreciation for the commitment signalled by the appointment of ELOs and recognition of the positive impact they had on, for example, the investigation into a racist murder in 2010, that has been followed by disappointment at the under-resourcing of GRIDO and its perceived cultural dissonance and ‘out-datedness’.

Since then however it appears that ELOs perform only victim support functions and are not involved in investigations. Furthermore, ELOs are not available beyond office hours. Many hate crimes however occur in the evenings and at weekends and are often linked to the night time economy. There should be access to a rota of specialist officers 24 hours of each day. The Garda Síochána would benefit from the creation of specialist hate crime investigation units across the country member of which should receive high quality intensive training. That should run alongside bespoke training for all response officers in identifying, recording and initiating an investigation of hate crime.

**Competence of all Gardaí**

While there is a place for experts and champions within organisations to take the lead in specialist investigations and highlight international best practice, human rights (which must always include equality) should be within the competence of every officer and member. It is the response officer or team that will set the tone for everything that follows. If he or she is not sufficiently trained in and competent to discharge the organisation’s human rights obligations, they will fail at the first hurdle. That appears to be the experience from iReport.ie - once a case gets to a specialist because it is high profile or viewed as particularly serious, the service improves but many cases with a racist motivation are overlooked or ignored at an early stage and protective measures not instigated. Specialist officers must be sufficient in number to assist in the investigation of racist crime, as opposed to only victim support, and must be deployed appropriately but response officers must also receive training specific to their role. I was told that many officers believe that these ‘community type’ skills are viewed as soft skills, or ‘not real policing,’ which does not assist in applications for promotion. That is short-sighted and misguided and should be addressed immediately. Building positive relationships with communities, particularly minority or hard to reach communities, and investigating hate crime require a plethora of skills and goes to the very heart of effective policing. It should be seen as such.

A Garda Diversity Strategy, launched in 2009, sought to promote diversity from an organisational perspective. The strategy was informed by the Irish Government’s ‘National Action Plan against Racism 2005-2008’ and ‘Migration Nation.’ It states, “the intercultural framework suggests the acceptance not only of the principles of equality of rights, values and abilities but also the development of policies to promote interaction,

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279 Many with whom I spoke were unaware of the availability of ELOs or were not offered their assistance. See also Submission to the Commission on the Future of Policing in Ireland, Immigrant Council of Ireland, 2018 and Submission to the Commission on the Future of Policing in Ireland, European Network Against Racism Ireland, 2018.

280 See for example, the ENAR Submission to the Commission on the Future of Policing.

281 Gardaí interviewed for the Lifecycle of a Hate Crime – Country Report for Ireland, interviewed a number of gardai who fulfilled the role of ELO/LGBT officers who were clear that, in practice, their remit was limited to victim support, and that they had no investigative function.
The strategy is accompanied by an Action Plan, which included the appointment of a Diversity Champion and a Diversity Strategy Board consisting of a combination of civilian experts and high ranking members of An Garda Síochána. Another stated objective is to “widely consult with Diverse and Minority groups to inform future Diversity Awareness Raising, Training & Policy initiatives.” It provides further that “Chief Superintendents, Superintendents and departmental heads will have responsibility for drafting and implementing plans at local level to deliver this Strategy. Managers, first line Supervisors and all members of Garda Síochána staff are responsible for working towards delivering this strategy.” There is little evidence however that those objectives have been achieved.

**Accountability**

A positive development is the renewed focus on capturing hate crime on PULSE by including fields in which racist motivation is recorded. But whether all racist motivation is actually being recorded is less clear. There does not appear to be any monitoring of PULSE to compare entries to reports taken from victims. In Northern Ireland, the NICHE system is dip-sampled against reports to check whether officers are recording cases correctly. Within a human rights framework, such dip-sampling should become a matter of routine.

While a number of initiatives are positive they have been piecemeal, under-resourced and not mainstreamed within the organisation. The impetus created in 2004 by the Human Rights Audit has waned, with most of the recommendations left unimplemented. In any event, from the feedback provided by minority ethnic communities and the Traveller community it seems to be clear that the initiatives that were progressed have not achieved their objectives. This is unsurprising. There is no written policy on hate crime which is likely to mean that training is not focused and practice suffers. While there are Ethnic Liaison Officers and the GRIDO, there is little to unite and steer officers and members more generally.

Across Europe police services have undertaken reviews, from a human rights perspective, of their response to racist crime and implemented targeted action plans. First and foremost, they adopted a human rights-based approach which thereafter required them to collect, analyse and publish statistics on reports of hate crime, response rates and outcomes. That informed their subsequent adoption of clear human rights-based policy, which was delivered through training of all ranks and monitored by independent oversight bodies. If real change is desired nothing short of such an all-encompassing structure will achieve it.

**Experience from Northern Ireland**

The PSNI has already undergone significant reform to bring human rights into the organisation as its core function, rather than a core value or aspiration. That approach has been adopted across the organisation, in every area of policing. The benefits of that approach, while not yet fully resolved, can be seen in the PSNI’s policing of racist crime. The PSNI model deserves some attention but cannot be adopted without modification and learning from the gaps that remain.

The following is an overview of the lessons learned from Northern Ireland.

**Lessons learned**

Clear, accessible, mandatory policy contained in PSNI Service Instructions, which incorporate the international human rights obligations and their operational requirements, is an essential foundation but not the end in itself. PSNI Service Instruction, which is publicly available, advises both officers and members of the public of the steps officers are expected to take in response to a report of a hate incident. PSNI policy makes it clear that

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284 Hate Crime/ Incidents, PSNI Service Procedure 01/2016, January 2016.
while not all hate incidents will include crimes, the recording, monitoring and support to victims applies equally to hate incidents whether it constitutes a criminal offence or not. It also explains that hate incidents and crimes are particularly hurtful to victims who are targeted because of their racial or ethnic origin. Officers are reminded that the impact varies from victim to victim but it leaves many feeling permanently unsafe. As well as having a physical impact on victims, hate crime can lead to poor mental health and increase the risk of suicide. The impact of the incident or crime is also likely to resonate throughout the wider community.

To ensure that policy was put into practice a new policing structure was put in place. That structure mirrors police command structures that were used effectively to manage other critical incidents. There is one Gold Commander (at Assistant Chief Constable rank) who defines the strategic objectives, one Silver Commander (at Superintendent rank) who develops the tactical plan to coordinate and deliver the strategic priorities and seven Bronze Commanders (at Chief Inspector rank) who take the lead on each of the following areas: policy, investigative standards, communications, training, engagement, analytical information and intelligence. Bronze Commanders meet regularly with each other and with the Silver Commander. There are regular meetings between the Gold and Silver Commanders. In developing the new structure the intention was that hate crime would be and remain a strategic priority across all policing districts with consistency in practice under a single command structure.

Each policing district nominated a Chief Inspector to take the lead for hate crime within his or her district. All Chief Inspectors now meet on a quarterly basis with the Silver Commander chairing. These meetings are aimed specifically at driving improvements in performance and sharing information. Each district commander identified at least one Lead Hate and Signal Crime Officer (LHSCO) to oversee a number of Hate and Signal Crime Officers. The relevant district commander is responsible for determining the number of HSCOs based on the level of local need. Each Commander is accountable through the hate crime command structure to justify his or her decisions and demonstrate that local need is being met. That is yet another reason for encouraging the reporting of hate crime and collecting accurate data - unless need is accurately assessed, the number of officers required to deal with it will be not available.

The key priority for the PSNI in terms of hate and signal crime is:

“...to ensure that the needs of the victim are paramount, these in turn will shape the nature of the police response and subsequent investigation: (a) To assess and manage the risks to the victim/s and to manage those risks through appropriate interventions; (b) To effectively investigate all reported hate incidents in line with investigative standards; (c) To work in partnership with other agencies and organisations to collaboratively address Hate Crime.”

That key priority reflects the human rights-based approach which is victim-centred and protective in the widest sense.

The PSNI’s approach is overseen by the Northern Ireland Policing Board which receives reports on: statistics; cases; community engagement; implementation of good practice recommendations; and complaints and discipline arising from cases of racist crime and progress made or not made. Those reports were considered from a human rights perspective by the Independent Human Rights Advisor and thereafter published and monitored. The Police Ombudsman who deals with complaints made by members of the public also considers the context within which a complaint is made against the human rights standards contained in the Police Code of Ethics. Those findings and any recommendations made are shared with the Policing Board which also monitors their implementation. The human rights approach to policing racist crime therefore runs through every aspect of police performance.

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284 For further research into the impact of hate crime on victims, see for example Equality Groups Perceptions and Experiences of Crime, S. Botcherby, F. Glenn, P. Iganaski, K. Jochelsen and S. Lagou for the Equality and Human Rights Commission and University of Lancaster, 2011, which considers findings from the British Crime Survey, including the emotional reaction to crime of victims who perceived the crime to have been an identity based crime.

285 PSNI Service Instruction.

286 See further below.
In Northern Ireland, as in Ireland, stakeholders reported their frustration that PSNI officers had been querying with the victim whether there really was a hate motivation. The Policing Board pursued that issue with the PSNI who accepted the criticism and revised its procedure to include the following important statement:

“Evidence is NOT the test when reporting a hate incident; when an incident or crime has been reported to police by the victim or by any other person and they perceive it as being motivated by prejudice or hate, it will be recorded and investigated as a hate incident or crime. The perception of the victim or any other person is the defining factor in determining whether an incident is a hate incident, or in recognising the hostility element of a hate crime. Perception-based recording refers to the perception of the victim, or any other person. It would not be appropriate to record a crime or incident as a hate crime or hate incident if it was based on the perception of a person or group who had no knowledge of the victim, crime or the area, and who may be responding to media or internet stories or who are reporting for a political or similar motive. The other person could, however, be one of a number of people, including: police officers or staff; witnesses; family members; civil society organisations who know details of the victim, the crime or hate crimes in the locality, such as a third-party reporting charity; a carer or other professional who supports the victim; someone who has knowledge of hate crime in the area – this could include many professionals and experts such as the manager of an education centre used by people with learning disabilities who regularly receives reports of abuse from students; a person from within the group targeted with the hostility, for example, a Traveller who witnessed racist damage in a local park. When an incident or crime has been reported to police by the victim or by any other person and they perceive it as being motivated by prejudice or hate, it will be recorded and investigated as a hate incident or crime... PSNI will accept without challenge the view of a victim or any other person that the crime was motivated by hate on one of the defined grounds.”

This express guidance leaves officers in no doubt about their obligations and also makes it clear to victims that they will be taken seriously and should report racist motivation whether there is corroboration or not. PSNI also introduced a new Hate Crime Investigatory and Risk Assessment Process which, in essence, requires all officers to follow two concurrent processes when responding to hate incidents and crimes: (i) an investigation process; and (ii) a risk assessment process. The addition of that risk assessment process was welcomed and has proved effective in mitigating risk and responding to potential escalation.

The human rights-based approach requires officers to proactively seek to increase the rate of reporting and recording of hate crime. This can be counter-intuitive as it is then reflected in statistics as an increase in hate incidents but it recognises that the service’s ultimate responsibility is to tackle hate crime and protect victims, not to give the impression that hate incidents and crimes are stable or decreasing.

The Policing Board reported its satisfaction that the new approach had been effective and begun to drive improvements in victim support, investigative standards and the collection of analytical information. However, further work was identified in respect of training and partnership working, both of which had suffered as a result of austerity measures. The Policing Board recommended greater partnership working with, for example, social housing providers to make the protection of human rights more practical and responsive to the needs of victims. Further, more focused, training was also recommended to enshrine the principles contained in the service procedure into practice. That training will be delivered to all officers and civilian personnel who have or might have contact with victims of racist crime such as station enquiry agents, call-handlers, response officers, investigators, intelligence officers and safe-guarders.
**Recommendations**

**RECOMMENDATION 15**
To underpin the Garda Síochána’s efforts to improve its response to tackling hate crime there should be enacted specific hate crime legislation to include, at least, enhanced sentencing for crime motivated by or demonstrating hostility.

**RECOMMENDATION 16**
An Garda Síochána should develop with the assistance of human rights legal experts a written policy on responding to hate crime to put the protection of victims at the centre of its service.

**RECOMMENDATION 17**
An Garda Síochána should amend its guidance and working definition of hate crime as follows: “A hate incident is defined as any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by hostility or prejudice. A hate crime is defined as any incident, which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by hostility or prejudice.”

**RECOMMENDATION 18**
An Garda Síochána should develop and integrate into its written policy a risk assessment for hate crime with particular attention paid to minimising the risk of further harm. That policy should thereafter be published.

**RECOMMENDATION 19**
Minority liaison officers should be appointed on a full-time basis for each minority group such as: minority ethnic people; Travellers and Roma; lesbian, gay bisexual and transgender people; persons living with a disability; children; and, vulnerable adults. Those officers should be trained in hate crime investigation and perform an investigative role.

**RECOMMENDATION 20**
An Garda Síochána should strengthen the formal and operational links between ELO/LGBT officers and Garda Victims Services Offices.

**RECOMMENDATION 21**
An Garda Síochána should, working with the Traveller and Roma communities, forthwith commence a review of its policy, training and practices with a particular focus on their impact on Travellers and Roma. Thereafter, an action plan with time-limited targets should be published to deal with the issues identified.

**RECOMMENDATION 22**
An Garda Síochána should establish specialist hate crime investigation units across the country, members of which should be selected by reference to aptitude and experience. Each should receive high quality intensive training in the investigation of hate crime. Thereafter, all hate crime investigations should be referred to a specialist unit. Bespoke training in identifying, recording and initiating an investigation of hate crime should also be developed for all response officers.

**RECOMMENDATION 23**
An Garda Síochána should establish under a central lead a single command structure for all hate incidents and crimes.

**RECOMMENDATION 24**
An Garda Síochána should collate disaggregated data on: the number of incidents and crimes reported to police; the number of incidents and crimes recorded as having a hate motivation; the
number of arrests, charges and prosecutions that follow; and the number of complaints arising from the handling of reports of hate crime. The figures should be disaggregated according to the relevant hate motivation and the district within which the report was made. At the conclusion of 12 months and thereafter on an annual basis the statistics should be published.

**RECOMMENDATION 25**

An Garda Síochána should carry out on an annual basis a dip-sampling exercise in which entries recorded on PULSE with a hate motivation are compared to reports of hate incidents and crimes. That dip-sampling exercise should then be analysed to identify any trends and patterns. Those trends and patterns should be published.

**RECOMMENDATION 26**

An Garda Síochána should publish a revised and up-dated Diversity Strategy.
CHAPTER 7
STATE SECURITY, PRIVACY AND SURVEILLANCE
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Introduction

Because there is little oversight and no public accountability for state security my consideration of this aspect is severely limited. In many jurisdictions, responsibility for ‘normal’ policing and national security is split with national security handled by non-policing security services (such as MI5 in the United Kingdom) albeit there is considerable overlap with police remaining responsible for the executive policing functions involved in security operations. In Ireland, it is the Garda Síochána which has sole responsibility for all aspects of policing including state security. In theory that should make it easier to assess and monitor compliance with human rights obligations. That is not the case in practice.

It is important before going any further to acknowledge that the garda need powers to prevent crime including terrorism and thereby protect the rights of the public. That includes powers to carry out surveillance and other covert activity. Indeed, the public have a legitimate expectation that the state will protect them but also that the means used will be proportionate.

It is essential that powers permitting surveillance and interference with privacy are lawful, necessary in pursuit of a legitimate aim and proportionate. To be lawful, they must comply with the requirements of the Irish Constitution, the ECHR and the EU Charter of Fundamental Rights, as supplemented and interpreted by reference to other unincorporated treaty obligations. They must be the least intrusive means of achieving a legitimate aim and be regulated with a regime of safeguards so that an appropriate balance is struck between the public interest and individuals’ human rights. Critically, there is no dispensation for state security in human rights law; it applies in the same way and with as much force to security policing as it does to community policing. The extent of compliance in state security policing is essentially a mystery, which is the greatest concern of all.

Garda Síochána state security: current practice

Issues regarding the garda’s approach to the rights protected by Article 8 ECHR (the right to privacy) raise concerns about the respect paid to ECHR rights. This does not bode well for security policing which is completely closed to public scrutiny. For example in 2017, Mr. Justice Fennelly reported that no consideration whatsoever was given by garda management or the Department of Justice to the legality of systematically recording calls on non-999 phone lines in stations throughout the country. He noted the absence of written policies covering the recording of such calls or the use of the information recorded and found that the recording systems were contrary to the common law, infringed the constitutional right to privacy, violated Article 8 ECHR, breached the EU Charter of Fundamental Rights and breached EU Directives. He recorded and was critical of the history of apathy towards human rights obligations within the Garda Síochána.

This problem is not confined to the garda. Former Chief Justice Murray considered the application of the law on the retention of and access to communications data following concerns over GSOC having accessed in the course of its investigation the communications data (‘metadata’) of journalists to identify their sources. Mr Justice Murray found that the indiscriminate and unsupervised manner in which An Garda Síochána, GSOC and other state agencies are currently entitled to require communications providers to retain and provide access to subscriber ‘metadata’ is wholly contrary to the requirements of the ECHR and EU law. To put this in perspective, I recall that “the risks associated with access to communications data may be as great or even greater than those arising from access to the content of communications... metadata facilitate the almost instantaneous cataloguing of entire populations something which the [storage of the] content of communications does not.”

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292 Joined Cases C-203/15 and C-698/15 Tele2 and Watson (Grand Chamber), European Court of Justice, 21 December 2016.
As technology advances the temptation grows to use every means available to combat crime and keep people safe; so does the potential for grave interference with rights. With intrusive powers there should be a commensurate level of regulation and oversight, not least for the sake of state security police. Increasingly, police will be required to explain to the courts their rationale for any interference and demonstrate how relevant human rights principles were applied. In the absence of robust policies and procedures which guide the practical application of human rights principles the garda are likely to fall foul of the courts. That will only undermine the purpose of the interference – to secure evidence to bring offenders to justice.

**International legal framework**

The interception of communications, data retention, surveillance, the use of Covert Human Intelligence Sources (CHIS) and other covert activity by the police raise significant issues in which various rights enshrined in the ECHR are engaged and must be balanced. The first and most obvious ECHR right engaged in any covert policing is Article 8 (the right to respect for private life). Article 8 extends beyond the right to privacy. It protects four distinct interests: private life, family life, the home and correspondence albeit there is a degree of overlap between them. Article 8 is engaged in every interception of communications, every covert surveillance operation whether involving technology or otherwise, every intelligence gathering operation and the capture and retention of personal information. Article 8 is a qualified right which means that interferences may be permitted, but only if they are in accordance with the law and are necessary in a democratic society.

Importantly, even if no use is made of material or information the very act of storing it will almost always engage Article 8 if the material relates to some aspect of private life. The concept of ‘private life’ has been described as illusory but it certainly covers the physical and physiological integrity of a person and includes multiple aspects of a person’s physical and social identity including a person’s image. Article 8 protects a person’s right to personal development and the right to establish and maintain relationships. Private information includes a person’s relationships. The protection of the home will often be central to any property interference or intrusion into the home whether by listening device or otherwise. ‘Home’ includes business premises. ‘Correspondence’ extends beyond traditional means of communication such as letter and includes all forms of communication such as emails, text messages, telephone calls, video calls, instant messaging and communication through social networking sites.

Article 8 imposes a positive obligation on the state: to ensure that the rights protected are effective and meaningful; and, to prevent interference by others or require those others to provide access to information acquired by the interference. In every covert operation the garda must establish whether Article 8 is engaged, whether it has been interfered with (it almost always will be in a covert policing operation), whether the interference is in accordance with the law and, whether the interference is necessary in a democratic society. ‘Necessary’ is not defined but the ECtHR has indicated that it means less than indispensable but more than reasonable, useful or desirable. Necessity itself is further broken down into two parts: whether there is a pressing social need for the interference in all of the circumstances and, if so, whether that interference is proportionate.

Proportionality, an essential element of human rights, tends to be considered by police in a formulaic manner so that a proposed action is justified because it might result in useful intelligence or evidence. That should be unsurprising; police want to prevent crime and protect the public and in pursuing that aim can be easily persuaded that what they want to do is legitimate and necessary. The very laudable desire to protect is the very reason why the rules must be strictly applied. The articulation of human rights (or lip-service) should not become a substitute for the proper consideration of principles. Even if the interference with the right has

293 Article 8 ECHR provides “1) Everyone has the right to respect for his private and family life, his home and correspondence; 2) There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

294 For example, in Niemietz v Germany (1992) 16 EHRR 97 and R v Broadcasting Standards Commission, ex parte the BBC (2000) 3 WLR 1327.
an obvious legitimate purpose police must still consider whether the proposed interference goes no further than what is strictly necessary for achieving that purpose.\footnote{Digital Rights Ireland Limited v Minister for Communications C-293/12, 8 April 2014.} In an important case, the Court of Justice of the European Union held that the utility of the Data Retention Directive in the fight against serious crime was not enough to render it necessary, in the absence of adequate safeguards.\footnote{Digital Rights Ireland Limited v Minister for Communications C-293/12, 8 April 2014.}

In every operation less intrusive measures should be considered before a decision is made. The question is not whether the right can be balanced against the interference (a mistake commonly made) but whether the nature and extent of the interference is balanced against the reason(s) for interfering. In other words, a blanket policy which dictates when a measure is proportionate will likely offend against the principle of proportionality. It was held by the ECtHR that opening all prisoners’ mail for the purposes of determining whether it contained prohibited articles was in breach of Article 8 because the decision-making was not informed; it was only justifiable where there was a reasonable suspicion that the mail may have contained prohibited material.\footnote{Campbell v UK (1993) 15 EHRR 137.} It is precisely because police officers are motivated to combat crime and keep people safe that there is a great risk of ‘overstepping the mark’. That is why oversight both internal and external is so important, accepting however that the fact of oversight in itself does not equate with human rights compliance.

Human rights and proportionality are not simple concepts, particularly for a garda having to decide what he or she may do when confronted with a potential interference with for example the Article 2 right to life. The law recognises that the right to respect for private life and correspondence can be overridden (where it is necessary and proportionate to do so) in the interests of national security, public safety and the prevention of disorder or crime but officers charged with determining when and how that right may be overridden are presented with an almost insurmountable challenge, not assisted by the impenetrability of the domestic regulatory regime. It is essential that gardai have expert knowledge of the domestic legal framework, an in-depth and instinctive understanding of the human rights obligations and access to high quality advice. The ECHR provides a framework of principles that help guide a garda to improve his or her decision-making. In this area, perhaps more than any other, comprehensive written policy which incorporates human rights combined with effective training including refresher training, is essential to equip gardai to respond to fast-moving and stressful situations.

If interference with ECHR rights is to be lawful, it goes without saying that there must be law – a legal framework to regulate covert operations and provide the rules within which such operations can be conducted. That law must, by virtue of the European Convention on Human Rights Act 2003, be in compliance with the ECHR.

**Irish legal framework**

**Domestic legislation**

The domestic legal framework governing surveillance, interceptions and data retention is opaque, piecemeal and out of date. The governance arrangements are muddled and complex. A detailed analysis is beyond the scope of this report, but if it is to comply with human rights obligations a comprehensive review is required followed by, most probably, a radical reconfiguration. The following is an overview only to highlight the primary issues of concern and gaps in oversight.

The services for which the garda are responsible are divided into policing services and security services.\footnote{See section 3A and 7 Garda Síochána Act 2005.} Security services are simply services “protecting the security of the state.” A list is provided but that is illustrative, not exhaustive. The security of the state is such a broad term that it is impossible to ascertain its parameters. Moreover, the policing principles which include the vindication of human rights apply only to policing services, not to security services. Policing services are defined as the functions of garda other
than the provision of security services. The vindication of human rights is included however as an objective of policing and security services. I do not know whether that disparity is deliberate or an oversight but it is certainly confusing.

It is impossible to know in advance what will be treated as security rather than policing. The garda (and the oversight bodies) must also be confused because it is the Minister for Justice and Equality who ultimately determines which aspects of policing are or are not state security. It is possible therefore that they will change but without external oversight of the propriety of their categorisation.

Some powers are governed by the Postal and Telecommunications Services Act 1983 and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. The 1993 Act for example permits ‘phone tapping’ and the interception of mobile phone calls and text messages but there is no judicial oversight or independent tribunal of inquiry to receive complaints. The Acts are out-dated and do not include expressly much of the modern technologies we now use. That does not mean that modern technologies are not accessed; it means there is no regulation for their access. As technology becomes more sophisticated the law becomes more detached from reality. While a review of the legislation was promised it has yet to be carried out. In the absence of a clear domestic legislative framework adherence to the ECHR and the case law thereon will guide gardai in the discharge of their duties.

The Criminal Justice (Surveillance) Act 2009 introduced a statutory basis for covert surveillance. It permits gardai to carry out surveillance with the permission of the District Court or, in urgent cases, by the garda ‘self-authorising’. The Act applies only to the use of covert devices; it does not apply to a covert operation in which a suspect is followed by gardai or watched via a long lens camera. It does not apply to live monitoring of internet activity or to the use of covert human intelligence sources (CHIS) commonly referred to as informers or agents. The Act established the office of Complaints Referee who hears individual complaints of wrongful surveillance. In relation to interception, data retention and covert surveillance covered by the above legislation, there is a Designated Judge of the High Court to keep the Acts under review. The Designated Judge publishes an annual report but that report is extremely restricted and does not provide an analysis of the process followed to ensure compliance, the number of intercepts, or the actions taken in respect of wrongful interference. There does not appear to be any real commitment to the functioning of the Complaints Referee and Designated Judge role given the low level of resourcing provided to them.

The Communications (Retention of Data) Act 2011 obliges communications service providers to retain communications data (‘metadata’) such as date, time, location, user name, address, phone number and IP address of everyone’s phone calls, text messages, emails and internet communications. The Act requires providers to disclose the data upon a request by a senior member of the Garda Síochána, the Defence Forces or GSOC, among others. The EU Directive, which prompted the 2011 Act, has been found to be unlawful, in breach of the EU Charter of Fundamental Rights. The reasoning was that it failed to require adequate safeguards against unlawful access to individuals’ data. That has since been reiterated in terms which leave little doubt that the 2011 Act is incompatible with the EU Charter and by extrapolation the ECHR.

The Criminal Justice (Mutual Assistance) Act 2008 has been used by the Minister for Justice and the Garda Síochána to gain access to data retained under the Communications (Retention of Data) Act 2011 for the purpose of providing data to foreign law enforcement authorities. While applications are made for a court order Mr Justice Murray found the system to be insufficiently rigorous with inadequate safeguards regarding the use of the data by foreign authorities. There is no oversight of its use, which almost certainly brings it into conflict with the ECHR and the EU Charter of Fundamental Rights.

The Garda Síochána Act 2005 permits the Garda Commissioner to authorise CCTV surveillance throughout the
country. Private individuals may also be authorised to set up CCTV. The Minister for Justice is responsible for setting the requirements for access and control but there is no requirement for judicial authorisation. It should be noted in this context that even if the CCTV is placed overtly in a public place, Article 8 ECHR may still apply if it monitors a person’s public activity which is recorded systematically or stored permanently. In one case, the ECtHR held that monitoring an individual in public but not recording his or her activity did not infringe Article 8. In another case, however, the ECtHR held that “private life” includes a person’s physical and psychological integrity and affords a “zone of interaction of a person with others, even in a public context.” In other words, the right to privacy can be said to vest in people rather than places and is capable of being exercised in public spaces.

While it is very unlikely that the Article 8 right will be infringed simply by the use of overt surveillance it is entirely possible, likely even, that the systematic recording and storage of material will constitute interference. The English Court of Appeal has found, for example, that the taking and retention of photographs of protesters in public was disproportionate as per Article 8. The UK Supreme Court has also held that the state’s systematic collection and storage in retrievable form even of public information about an individual is “clearly” an interference with private life under Article 8 ECHR. The use of material captured overtly must only be for a specified purpose which is in pursuit of a legitimate aim and necessary to meet an identified pressing need. No more material (i.e. images and information) should be stored than that which is strictly required and the material should be deleted when that purpose has been served.

The Data Protection Commissioner has commenced a review of the garda use of CCTV and automatic number-plate recognition, which will be helpful. However, the Commissioner does not have a remit over state security and any review will be limited by the state security exception in the relevant data protection legislation.

Surprisingly, there is no legislation regulating the use of covert human intelligence sources (CHIS) commonly known as informers. Nor is there any law regulating the use or activities of undercover police. Given the extreme risk associated with undercover activities it is particularly concerning that there is not a clear and robust policy. Northern Ireland demonstrates the inherent risks associated with the use of CHIS and the importance of police having strict rules and oversight. Ireland is now very much out of step with Great Britain and Northern Ireland. The Regulation of Investigatory Powers Act (RIPA) 2000, and associated orders and codes, provide the legal framework for authorising and managing CHIS within the UK. RIPA requires that the use of a CHIS is subject to prior authorisation, limits the purposes for which a CHIS may be used, requires detailed records, establishes independent oversight and inspection, and provides an independent appeals mechanism to investigate complaints. The police are guided by strict handling protocols and there is an Independent Reviewer of National Security Arrangements who reviews the arrangements for managing CHIS. Within Northern Ireland, the Independent Human Rights Advisor to the Policing Board also reviews PSNI CHIS arrangements. At this point it is worth adding that there is no statutory underpinning to the witness protection programme in Ireland. That is concerning, particularly in the context of the positive obligation to protect life under Article 2 ECHR.

Even if one adopts the philosophy that a person can complain if affected by an interference with his or her rights, the ability to complain in respect of covert activity is severely limited. One is unlikely to know that it has happened, even after the event, and is highly unlikely to ever get access to sufficient information to maintain a complaint. It is easy to accept that the nature of covert activity means that it will and should remain secret while it is happening but that is less persuasive after the event. The ECtHR has reiterated that “subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies and hence to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken taken.

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305 Von Hannover v Germany (2005).
306 In Wood v Commissioner for Police of the Metropolis [2009].
308 In Northern Ireland the use of CHIS, particularly those authorised to engage in criminality has been at the centre of a number of legacy cases currently going through the courts.
309 See below.
Intrusive surveillance is defined as covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle (and that involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device). An application for authority to use intrusive surveillance may be made by a limited number of public authorities, which includes the police but excludes local authorities.

That is particularly true in Ireland, where the accountability deficit is compounded by the absence of state-funded legal assistance for those whose human rights have been abused by gardai. It would seem that the circumstances in which a person is able to seek or receive legal assistance for such infringements is vanishingly rare.

The EU Fundamental Rights Agency has observed that intelligence services must be held accountable and by a range of actors which must include parliament. In Ireland state security is not subject to parliamentary oversight. Every other member of the EU (save for Malta) provides parliamentary oversight of intelligence and national security services. It seems to me obvious that the current arrangements will not resist scrutiny according to human rights standards.

**The regime in Great Britain and Northern Ireland**

In the United Kingdom, in an attempt to bring surveillance and covert operations into compliance with the state’s human rights obligations, the Regulation of Investigatory Powers Act 2000 (RIPA) was enacted to govern the authorisation of covert policing methods. One of the safeguards provided by RIPA is the requirement that covert operations must be subject to an authorisation regime. Only a distinct category of person is entitled to grant authorisations and, save in urgent cases, any police authorisation of intrusive surveillance must be approved by the independent Surveillance Commissioner. The Surveillance Commissioner inspects all police services and issues inspection reports containing recommendations. Surveillance activity by the Intelligence Services and Ministry of Defence is reviewed by Investigatory Powers Commissioner. A complainant may bring a complaint to the Investigatory Powers Tribunal (and may in limited circumstances bring a claim before a domestic court). As noted above, the Independent Reviewer of National Security Arrangements also reviews and reports upon national security policing.

Even those more robust arrangements have been criticised as insufficiently transparent but they do at least represent a layer of accountability which is absent in Ireland.

External accountability arrangements and oversight of covert policing are discussed in more detail below.

### Recommendations

**RECOMMENDATION 27**
The legal framework for the authorisation and regulation of all covert activity should be reviewed to provide a clear statutory framework in which Article 8 might be interfered with lawfully. In particular the law should include authorisation and use of: Covert Human Intelligence Sources; interception; surveillance; collection, use and retention of personal data; an independent appeals and/or complaints mechanism; and, oversight of all covert activity by an independent person or body.

**RECOMMENDATION 28**
An Garda Síochána should, with the assistance of human rights legal experts, devise an overarching written policy on all covert activity which incorporates expressly the relevant human rights standards and their practical application. Within the framework of the overarching policy there should be service directives dealing in detail with the various covert tactics and authorisations. Thereafter those documents which can be published without detrimental impact on state security should be published. Those documents which cannot be published should be accessible to the Policy Authority’s human rights legal expert.

**RECOMMENDATION 29**
An Garda Síochána should employ a human rights legal expert to advise on the operational use of powers.

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310 Weber & Saravia v Germany (2006)
311 Intrusive surveillance is defined as covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle (and that involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device). An application for authority to use intrusive surveillance may be made by a limited number of public authorities, which includes the police but excludes local authorities.
CHAPTER 8
IMPLEMENTING A HUMAN RIGHTS-BASED APPROACH – A STEP BY STEP GUIDE
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Willingness to Change

1. Cultural transformation

As reiterated many times, the central purpose of policing is the protection and vindication of the human rights of all. If that is to be translated into practice the realisation of rights must be secured so that they are practical and effective, rather than abstract or inspirational.

It is clear that a wholesale review of policing in Ireland is both desired and required. For the reasons set out above, there needs to be a paradigm shift in policing to a human rights-based approach that will achieve reform and sustain it over the longer term. The Garda Síochána must embrace human rights not only as a core value or objective but as a practical guide to decision-making and behaviour.

It is self-evident that reform is led from the top but it must be driven by and responsive to the needs of those the police are there to serve – the public. To be effective, cultural reform should result in the willing acceptance of a human rights-based approach and permeate every area of policing. It must be welcomed by every person who serves policing, which means every person within the Garda Síochána, the Garda Síochána Ombudsman Commission, the Garda Inspectorate, the Policing Authority, the legal profession and the judiciary. If a human rights-based approach is adopted by the garda it should be reflected in all of the oversight bodies. The single thread of human rights (of which equality is an integral part) should run throughout everything the garda do and every element of oversight.

If human rights are to be effectively protected, compliance must be monitored and the public informed of the success or failure of the Garda Síochána. To use a cliché – what is measured gets done – for human rights protections to become practical and effective they must be the standard by which the garda and gardai are measured and reported upon.

If change is to be effected, the Garda Síochána culture must change. Cultural change enables meaningful reform – meaningful reform encourages and reinforces cultural change. Police must accept transparency and accountability not because they have to (although with a human rights-based approach they do) but because it improves policing; it will make them more effective (including cost-effective), efficient, legitimate and professional. Such an approach will build community support and cooperation and make their extremely challenging job much easier. Ultimately, police will not combat crime if they do not have the support and cooperation of the community. No amount of force will be sufficient without the willing observance of the rule of law and respect for the honour of police and policing.

Cultural change does not happen in the blink of an eye; it is a gradual process but it must start somewhere and with some impetus. Cultural reform will be achieved more quickly and more fully if gardai are ‘on board’ from the outset.

Recommendation

RECOMMENDATION 30
From the earliest possible stage but at least before any process of reform is implemented the Garda Síochána leadership together with the Policing Authority should engage with all garda members and reserves to explain the process and encourage support for it.
2. Representativeness

Police serve the public as a whole and ‘the public’ comprises many diverse and sometimes hard to reach communities with their own vulnerabilities and needs. It is often said that a “them and us” environment exists with police occupying a closed and self-protective world that is not easily penetrated by others. That applies both to police/public generally but to police/minorities particularly. A number of contributors to this and previous reviews have questioned the fairness and impartiality of the Garda Síochána and its ability – desire even – to serve all communities and be accountable under the law to those communities. The Garda Síochána needs support from all communities but will struggle to attract and sustain that support if it bears no relationship to the composition of those communities.

The Garda Síochána is not representative of Irish society. In August 2017, for example, only 63 gardaí and 37 reserves were from minority ethnic backgrounds. The Head of Communications for Garda Representative Association said “the Diversity Strategy & Implementation Plan 2009-12 contained fine words about the ability to recognise difference, the ability to acknowledge it and the ability to respect it, yet we still fall way short of a representative police force in 2017.” While that was followed by a recruitment campaign, which did include a call for applications from people from diverse backgrounds, the campaign was not sufficiently proactive in targeting people from minority groups. A recruitment campaign must reach under-represented communities and actively encourage them to join the garda. However, unless and until the Garda Síochána is seen to have embraced cultural reform and embraced human rights and equality it is unlikely that members of minority groups will be persuaded in much greater number to join its ranks. All future recruitment drives should focus specifically on minority groups and target proactively potential applicants in partnership with civil society and those representing minority groups.

**Recommendation**

**RECOMMENDATION 31**

In future recruitment campaigns the Garda Síochána should first consult with minority groups and work with representative groups to target advertisements specifically those groups that are under-represented.

**Building the Foundations**

1. Dedicated expert advice

An Garda Síochána will almost certainly need the assistance of dedicated human rights experts to implement and sustain a human rights-based approach. The service should recruit people of sufficient standing and experience to exert authority and challenge officers. Police culture can be exclusive with police reluctant to accept that non-police can understand or add anything to their experience. Anyone coming in from the outside needs to be valued, supported and protected in the difficult work they will undertake.

There is a clear operational need for human rights advice: to implement a human rights-based approach; to review, devise and oversee training; to develop policy; for real-time advice in operational scenarios; to carry out monitoring of human rights compliance. While there is some overlap in those functions there are three clear roles, requiring different expertise and experience. At the very least there should be one full-time dedicated role to offer advice and assistance operationally. Training would also benefit from having a full-time human rights training advisor who can review and advise upon training at Templemore and on continuing professional development.

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*IRISH COUNCIL FOR CIVIL LIBERTIES A HUMAN RIGHTS-BASED APPROACH TO POLICING IN IRELAND*
In Northern Ireland, the PSNI employs a full-time human rights legal advisor who provides strategy and policy advice as well as operational advice. He attends public order planning sessions for example and is present in the command room during contentious operations. That advice is invaluable and welcomed by police officers. The PSNI also employs a full-time human rights training advisor who keeps training needs under review, develops training packages to ensure that human rights run through all training and trains the police trainers to deliver human rights training. The training advisor has both legal and teaching experience.

Recommendation

RECOMMENDATION 32

An Garda Síochána should recruit human rights experts of sufficient standing and experience to influence real change. There should be at least one human rights legal expert to assist in the development of policy and operationally and one human rights training expert.

2. Policy development

Police officers are bound by the law, not policy. However, policy is often the touchstone for frontline police officers in understanding what their obligations under the law are. Policy does not simply advise officers what they ought not to do, it is a positive statement of what officers can do within the confines of the law and sets out how they can uphold and vindicate the human rights of all persons, including their own human rights and those of their colleagues. As such, policy should instil confidence in officers when carrying out their duties and exercising their powers.

Police policy sets the parameters for behaviour. It sets out the framework within which decisions may be made. It should contain guidance on relevant legislation, police powers and duties and relevant provisions in the Code of Ethics together with operational scenarios to explain their practical effect. The garda are law enforcers so it should be obvious that they must understand the law that they are enforcing. That law includes human rights obligations. By virtue of the European Convention on Human Rights Act 2003, the rights enshrined in the ECHR and other international treaty obligations used to interpret those rights are as much a part of the law as the Garda Síochána Act and the Public Order legislation. They should be seen as such.

Policy must be clear, readily accessible and comprehensive. It should dictate that all decision-making is in accordance with human rights obligations and inform how decisions should be made, what procedure must be followed and what standards are expected. Simply put, if policy is itself human rights compliant it is much more likely that training, decision-making and practice will be human rights compliant. Good policy is the first and most basic step in ensuring a human rights-based approach. Any member of the garda should be able to pick up a policy and know what is expected of him or her, regardless of experience, thereby promoting consistency across the service and in all parts of the country. Moreover training is dependent upon the quality of governing policy. A comprehensive policy which itself has human rights embedded within it will better equip trainers to deliver human rights-based training.

Policy offers an organisation a means by which to keep members up-dated on legal development but it also provides a measure against which practice can be monitored internally and externally. If a garda’s actions are questioned in court proceedings, for example, one of the first questions asked might well be “what policy were you following?” For the avoidance of doubt, policy should cover all areas of policing from the routine to the unusual and should include internal policy protecting the human rights of gardai and civilian staff. Human rights compliant policy should be developed to cover, at least: recruitment; culture and human rights awareness; training and professional development; public order; protests; use of force; stop and search/question and entering premises to search; arrest and detention; state security, surveillance and covert tactics; responding to hate crime; domestic and sexual violence; treatment of victims; safeguarding of vulnerable adults and
Children; community engagement; personal data collection retention and processing; investigations; the rights of children both as victims and perpetrators; and, roads policing.

Human rights will be engaged in everything the police do; written policy should reflect that.

**Recommendation**

**RECOMMENDATION 33**
An Garda Síochána should, with the assistance of independent human rights experts, human rights proof all policy documents and instructions to ensure that they are clear, accessible and articulate relevant human rights obligations which are explained in their operational context. Where there is no policy on a particular area of police practice a policy should be developed which incorporates relevant human rights obligations. The Garda Síochána should engage with its oversight bodies in its development of policy.

Importantly, policy can and should be shared with the public to inform what might be expected of the policing service and what is expected of the public. Publication of policy demonstrates transparency, which is a fundamental aspect of legitimacy, and treats the public with respect. For police action to be human rights compliant it must, amongst other things, have a lawful basis which includes a requirement that it is sufficiently accessible and foreseeable by those against whom it may be imposed. An Garda Síochána permits very limited access to its operational policy. Some policies are available through the publicly accessible website such as the Domestic Abuse Intervention Policy (2017) which is welcomed but An Garda Síochána should publish all policy unless there are genuine operational reasons for not doing so. It is accepted that publication of some policy documents might impact adversely upon state security or operational capability but even if such a policy cannot be published in full, a summary of the policy with the restricted information redacted from it can, and should, be published. Policy documents should be published in formats that enable persons with disabilities to have equal access to the information.313

The PSNI has published all of its policies and service instructions save those that contain such sensitive information that they cannot be put safely into the public domain. Any suggestion that to inform the public about police tactics is counter-productive and equips the potential criminal is ill-founded; that has not been the experience in Northern Ireland. PSNI for example has published its public order policy and its Conflict Management Model both of which are comprehensive documents explaining many areas of policing such as: use of force; public order; training and accountability. It has not exposed the PSNI to criticism, left them vulnerable to counter-tactics or weakened them operationally. Quite the contrary; the public welcomes the transparency afforded and appreciates their inclusion. The PSNI adopts a ‘no surprises’ approach to its public order policing operations, which has proved extremely effective.314

**Recommendation**

**RECOMMENDATION 34**
An Garda Síochána should publish all policy documents, instructions and directives save for those which cannot be put into the public domain for reasons of security. If sensitive security information can be redacted from a document the redacted document should be published with an explanation for the redaction. If a document cannot be published at all the existence and title of the document should be published with an explanation for not publishing the document.


314 See further above at X.
3. Training

Effective training in human rights principles and practice is fundamental to any organisation committed to compliance with its human rights obligations. The Patten Report observed, “Training will be one of the keys to instilling a human rights–based approach into both new recruits and experienced police personnel.” For that reason, it was recommended that, as a matter of priority, all members of the PSNI should be instructed in the implications for policing of the Human Rights Act 1998 and the wider context of the ECHR. It was also recommended that, “all police officers, and police civilians, should be trained (and updated as required) in the fundamental principles and standards of human rights and the practical implications for policing.” To reflect the ever changing environment in which police officers and staff operate, the emerging jurisprudence of the courts and the development of new international treaties and instruments, for example the United Nations Convention on the rights of Persons with Disabilities, training must be routinely reviewed and up-dated.

Training is often recommended whenever something goes wrong but by then it is too late and in any event reactive training does not achieve wholesale reform and certainly does not deliver a service that is human rights-based. Instead, training should be planned for and adequately resourced. Human rights should not be taught solely in a stand-alone lesson, although a dedicated introduction to human rights is important and effective. Human rights training should be mandatory and integrated into all training in a meaningful and practical way. The most effective training is interactive and reinforced in operational scenarios. Training should not cease once confirmed in rank but should continue throughout a member’s career. Every profession requires continuing professional development and any policing organisation that aspires to delivering a professional service must value such development and its people.

In Northern Ireland, the PSNI developed training both for new students and experienced officers in districts. That training was commented upon favourably across the sector and produced quality officers. That is, until leaders within the training college became complacent and oversight (both internal and external) in that important area was rolled back. That coincided with the loss of a dedicated PSNI human rights training advisor who was not replaced. The culture within the college deteriorated rapidly with significant consequences for the PSNI. To their credit, they called in an independent body to conduct a review and set about a programme to implement their recommendations. The lesson learned was that training requires significant commitment and dedicated resources and must continue to develop and progress. It is never ‘done’ and must be monitored for its effectiveness. The importance of an in-house training advisor of sufficient experience and ‘rank’ to challenge culture and steer the development of training was recognised but only to the extent necessary after she had left her post. That position has now been rectified, which has helped to bring the PSNI training college and human rights training more generally back to the position it once enjoyed.

If and when the Garda Síochána training programme is reviewed – with an emphasis on human rights – it should include consideration of the capacity of trainers who must themselves be sufficiently knowledgeable about their subject, skilled in the delivery of training and given sufficient time to engage with students during lessons. It is highly likely that trainers will not be experts in every subject and even more unlikely that they will have lived experience of many of the issues that arise. For example, training on policing racist hate crime (considered above) would benefit greatly from including those who work with and advocate for minority ethnic people and Travellers. Including them in training is productive, cost-effective and symbolic. It must however be meaningful and lasting. An occasional dipping in and out of training will not suffice.

Training must ‘hit home’ in that it must be welcomed by gardai and it must better equip them to discharge their obligations. There is a debate about what style of training works – some believe that training (particularly human rights training) should steer away from legal concepts. Some have suggested that human rights training should be delivered by stealth, disguised almost as something else. With respect to those observations and recognising the origin of them it should not be forgotten that human rights standards are legal standards and should be given due deference. A certain degree of technical information is required. It would never be suggested that gardaí should not be ‘troubled with’ the provisions of the Criminal Justice Act. Knowledge should not be a ‘dirty word’. Certainly, knowledge should be delivered in such a way that it is accessible and
related to practice but effective and enjoyable training can be achieved by skilful trainers using the law and building on its operational application though practical scenarios. There is no need to train human rights ‘by stealth’. Rather, trainers should receive sufficient training themselves in the delivery of human rights that both engages gardaí and informs them.

Part of the rationale for avoiding explicit human rights training is the belief gardaí see human rights as bureaucratic, tedious and something which gets in the way of them fulfilling their duties. In other words, trainers should not articulate human rights during training for fear of putting trainees off and should ‘dress it up’ differently. Before that becomes accepted as truth and negative perceptions based upon ignorance pandered to, human rights should be presented as a tool to improve gardaí in their operational effectiveness and instil a sense of professionalism. Negative attitudes to human rights should be confronted and countered, not allowed to dictate the nature and quality of the training.

I attended numerous PSNI training sessions and recognise the occasional resistance to human rights being taught as a legal subject but I also saw how skilled trainers could combine technical knowledge of human rights legal obligations, proudly declared as such, with interactive problem-solving. When it was done well, I saw students (both new recruits and experienced officers) enthusiastic, responsive and empowered by the training.

Human rights training should be interwoven in all training from firearms training through to community policing and engagement. There is no area of policing that does not engage human rights in some way and training should reflect that.

**Recommendations**

**RECOMMENDATION 35**
An Garda Síochána should engage independent experts both in human rights law and training to review training needs and thereafter devise a training programme that has human rights obligations embedded within each element of training. In doing so, the garda should consult with representatives of minority groups to ensure that diversity and cultural awareness training is tailored to meeting human rights obligations for diverse and hard to reach groups. The training programme should include foundation training for new recruits and continuing professional development.

**RECOMMENDATION 36**
An Garda Síochána should engage with its oversight bodies and the Irish Human Rights and Equality Commission on its revised human rights training programme.

**4. Data collection and analysis**

The collection of data on the police use of powers is both a human rights legal obligation and essential for the delivery of effective services. It is the cornerstone of transparency and enables accountability mechanisms to discharge their functions. It also enables the public – by whose consent and financial contribution the police operate.

An Garda Síochána, if interested in whether the hard work it will undertake to implement human rights reform is successful, should want to monitor all areas of policing. If it is to apply the law, it must monitor all areas. That means collecting disaggregated data on, at least: reported incidents of crime; recording rates for hate crime; recording rates for domestic and sexual violence; use of powers to stop, search, question and enter premises; use of security powers including surveillance and covert operations; use and deployment of CHIS; detentions; use of force; arrest, charge and outcome rates; complaints; training delivered; and, the representativeness of the service. All data should be collected and collated so that it might be presented in a meaningful way to the
Policing Authority and other oversight bodies. Statistics should be produced in a form which can be shared with the public by routine publication.

**Recommendations**

**RECOMMENDATION 37**
An Garda Síochána should, liaising with the Policing Authority, devise the means by which data, disaggregated according to its eleven categories and by district, can be recorded, collated and published. Thereafter, statistics should be produced and published on a quarterly basis. Data collected should include reported incidents of crime; recording rates for hate crime; recording rates for domestic and sexual violence; use of powers to stop, search, question and enter premises; use of security powers including surveillance and covert operations; use and deployment of CHIS; detentions; use of force; arrest, charge and outcome rates; complaints and internal discipline and outcomes; breaches of data protection; training delivered; and, the representativeness of the service.

**RECOMMENDATION 38**
An Garda Síochána should establish and maintain its own internal human rights monitoring framework. That monitoring framework should cover the performance of the organisation as a whole and also that of individual members.

**RECOMMENDATION 39**
Individual members’ performance in respect of human rights compliance should form part of their performance review and matter for their prospects of promotion. Supervisors and line-managers should be equipped to make those assessments and guide members on any improvement that is required.

**RECOMMENDATION 40**
The professional standards unit should develop a process by which to keep members’ performance under review and identify training needs.

**External Monitoring**

**Oversight and accountability**

This is perhaps the most critical element of all. It should, of course, be independent if it is to maintain the confidence of the public but it must be much more than that. Each organisation fulfilling an oversight role must be well resourced and have the statutory power to hold the garda to account and effect change. Currently, each oversight body has restrictions placed upon it and is limited in its remit. None of the oversight bodies has been established within a human rights framework, albeit they take account of human rights. The Garda Síochána Act 2005 (as amended) provides that the garda must “provide policing and security services with the objective of... vindicating the human rights of each individual.” Moreover, the Garda Síochána’s policing principles provide that policing services will be provided “in a manner that respects human rights.” However, the legislation which establishes the oversight bodies does not make it an express function to monitor compliance with human rights obligations or to hold the garda to account for failures in compliance. The Policing Authority should have such a function including a duty to report on its findings.

Moreover, in Northern Ireland the investigation of complaints about the police is undertaken by the Police Ombudsman, which is fully and obviously independent of the police. Because the Ombudsman measures police conduct according to the standards set by the PSNI Code of Ethics (which is a human rights measurement)

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235 Section 7.
complaints are investigated according to human rights standards. In addition to the Police Ombudsman and the Policing Board, there is a Criminal Justice Inspectorate.

Criminal Justice Inspection Northern Ireland (CJI) is an independent, statutory inspectorate, established in 2003, under s.45 of the Justice (Northern Ireland) Act 2002. It is a Non-Departmental Public Body (NDPB) in the person of the Chief Inspector. CJI is unified inspectorate whose remit extends to all criminal justice agencies apart from the judiciary. CJI inspects, for example, the police service, the prison service, the prosecution service, youth justice services and the courts.

Because its remit extends to all agencies within the criminal justice system CJI can identify common issues and promote good practice across and between the various agencies. Without a unified inspectorate, gaps remain and each oversight body is often forced to ignore obvious findings or refrain from making relevant recommendations. Very few issues are confined to the Garda Síochána alone. As said elsewhere, policing is a much broader concept than the police. Oversight should be capable of making links between agencies and addressing the gaps revealed by inspections. Ireland would benefit from a unified inspectorate that can inspect the various agencies that make up the criminal justice system.

**Recommendation**

**RECOMMENDATION 41**

The Department of Justice should consider the establishment of a criminal justice inspectorate with power to inspect, of its own volition, all criminal justice agencies and report publicly on its findings. Any inspectorate should have as a statutory function inspecting for compliance with human rights obligations.

In Northern Ireland, where the oversight arrangements are respected internationally, the Policing Board's mandatory functions include monitoring the compliance of the police with the Human Rights Act 1998. The statutory underpinning of that mandatory function has enabled the Board to: require the provision of information; to monitor all aspects of policing from a human rights perspective; to require the Chief Constable to attend and present on the PSNI's compliance with human rights; to report publicly on PSNI's compliance with sufficient information that its assessment is reliable; and, prioritise resources to ensure a human rights compliant service.

Northern Ireland is a good model albeit practical oversight has sometimes fallen short of what was anticipated by the Patten Report for reasons of under-funding, complacency, political disagreement and the antipathy of some to the very notion of human rights. If the Northern Ireland model is to be adopted, the oversight bodies must be occupied by people with experience and standing who share the vision for a human rights-based approach. As in all areas of life, the practical success or failure of an organisation will depend upon its people. Therefore, the right people must be in the right jobs. Just as the Garda Síochána must be transparent and held to account, so must the oversight bodies.

The strength of the Northern Ireland Policing Board is a combination of its functions and its programme of work.

An essential element of the Board’s work is the publication of an annual human rights report, which covers all aspects of policing. To assist it in fulfilling its human rights monitoring function, undertake thematic review of specific areas of concern and publish an annual human rights report, the Board engaged the services of an independent human rights advisor who was a practising human rights lawyer. The advisor was not an employee, to maintain independence. The advisor developed the monitoring framework, kept the Code of

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216 See the Police (NI) Act 2000, as amended.
Ethics under review, undertook on behalf of the Board a continuing monitoring function, provided advice to the Board, carried out thematic reviews of areas of concern, produced an annual human rights report and undertook extensive engagement with the community to inform a practical assessment of policing on the ground. In particular the advisor: reviewed police training (including by proofing lesson plans and sitting in classes); observed and monitored the planning and execution of operations; reviewed strategy, procedure and planning for public order events; analysed quantitative and qualitative data; attended public processions; attended training and planning sessions regarding use of force; visited detention facilities and kept under review legislative reforms, developments in case law and any other matters impacting upon police compliance with human rights.

The Board’s human rights thematic reviews were an extremely important aspect of the Board’s human rights monitoring work as they enabled a very in-depth, precise and community-led assessment to be made of areas about which members of the community had expressed concern. Not only did thematic reviews provide analysis of particular issues, they often revealed more systemic issues across the police service. At a recent community event hosted by the ICCL, many community representatives expressed their concern about the Garda Síochána’s approach to policing with children and young people. The same concerns were raised in Northern Ireland, which resulted in the Policing Board’s thematic review of policing with children and young people and the annual inclusion of assessment in the human rights annual reports. Since then, a number of recommendations have been made. The thematic review process identified, for example, the tendency to stereotype young people and target resources unnecessarily towards young people leading to their greater alienation, with no improvement in policing outcomes. By looking at all aspects of policing from a children’s and young person’s perspective the Board recognised that work was required in all police departments. Traditionally, engagement with children and young people was left to community police as an ‘add-on’ to their already busy schedules. After the thematic review, all officers including those involved in stop and search, public order and counter-terrorism policing considered their policy, training and operational application of powers from a children’s and young person’s perspective.

That role of human rights advisor was critical to the Board’s discharge of its human rights function.

The Policing Board’s human rights monitoring work has been recognised as good practice nationally and internationally with notable figures such as Baroness Nuala O’Loan, Dr Michael Maguire (Police Ombudsman), Brendan McGuigan (Chief Inspector Criminal Justice Inspectorate), Sir Hugh Orde (former president of ACPO) and Sir Keir Starmer (former DPP) all highlighting the benefit and continuing importance of the work. Various human rights annual reports and thematic reports have been cited by other organisations and individuals such as the UK Government appointed reviewers of terrorism legislation and national security arrangements and have been cited in court proceedings. The Equality and Human Rights Commission for England and Wales for example adopted the Board’s children and young people thematic review as a good practice guide for police. That recognition is good for public confidence in policing and for the police who have benefitted from strong accountability arrangements.

Another important aspect of the work of the independent human rights advisor was the monitoring and oversight of national security, Annex E to the St. Andrews Agreement which transferred primacy on national security to the British Security Service (M15) includes a statement by the British Government on national security arrangements in which it states:

“There will be no diminution in police accountability. The role and responsibilities of the Policing Board and the Police Ombudsman vis a vis the Police will not change... The Policing Board will, as now, have the power to

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207 The Board chose, from the outset, to appoint a barrister in private practice to demonstrate its commitment to independence, to ensure the separation of interests and to apply a rigorous legal analysis to human rights compliance. An advisor was in place between 2003 and 2017

208 At the launch of the Human Rights Annual Report in February 2015, videos of all of these individuals talking about accountability and the Board’s human rights monitoring work are available through the Board’s youtube page: www.youtube.com/user/nipolicingboard

209 Including during the Supreme Court hearing of JR38’s application for Judicial Review. This case challenges the legality of PSNI’s decision to publish images of children wanted for questioning in connection with sectarian interface violence as part of ‘Operation Exposure’ in 2010. Extracts from the Board’s thematic review on policing with children and young people were relied upon during submissions made by Counsel for the Applicant.
require the Chief Constable to report on any issue pertaining to his functions or those of the police service. All aspects of policing will continue to be subject to the same scrutiny as now.”

The transfer of primacy was controversial as the Board does not have a role in relation to oversight of MI5 but the importance of accountability in all aspects of policing was recognised. Annex E contains five key principles one of which is that:

“There will be no diminution of the PSNI’s ability to comply with the Human Rights Act 1998 or the Policing Board’s ability to monitor that compliance.” It goes on to state that the Board’s Human Rights Advisor “should have a role in human rights proofing the relevant protocols that will underpin the key principles and in confirming that satisfactory arrangements are in place to implement the principles.”

Although the Board has no remit in respect of the Security Service, the Chief Constable remains responsible for and accountable to the Board in respect of all PSNI officers and staff involved in intelligence work and those working alongside the Security Service. This is recognised by the St Andrews Agreement and, since 2007, the Board’s Human Rights Advisor has assisted the Board in fulfilling its responsibilities as per Annex E. For example, the advisor human-rights-proofed the relevant memoranda of understanding, protocols and service level agreements between PSNI and the Security Service and met with the Director of the Security Services in Northern Ireland, senior officers in PSNI Crime Operations Department, the Secretary of State for Northern Ireland, the Independent Reviewer of National Security Arrangements in Northern Ireland and the Independent Reviewer of Terrorism Legislation and the Independent Reviewer of the Justice and Security (NI) Act 2007. The Human Rights Advisor was sighted on all relevant material in its unredacted form. Having reviewed the documentation, the Human Rights Advisor reports to the Board, and publically, through the Human Rights Annual Report. Such access was permitted because the advisor had gone through a sufficiently high level of security clearance. This arrangement enabled comprehensive monitoring and access to highly sensitive documents such as the Surveillance Commissioner’s annual report and Guidance on Participating CHIS/Informants.

The role of human rights advisor was also written in to various codes of practice. For example, the Codes of Practice issued by the Northern Ireland Office on the authorisation and exercise of Terrorism Act 2000 and Justice and Security (Northern Ireland) Act 2007 stop and search powers state that the “appropriate use and application of these powers should be overseen and monitored by the Northern Ireland Policing Board.”

It was recognised that to do so required close scrutiny of sensitive national security material so the role was discharged by the human rights advisor. She would for example review authorisations for operations including the intelligence product which informed the authorisations. The extent of oversight has been of great value to the police. In one human rights legal challenge to the stop and search regime the PSNI resisted a judicial review because the court was satisfied with the safeguards in place including expressly scrutiny by the Policing Board. Treacy J. said “I am satisfied that there are now sufficient safeguards against arbitrariness to render the power compatible with the Convention.”

All of the above demonstrates that even in the area of national security, mechanisms can and should be found to monitor human rights compliance. The importance of that oversight was emphasised in the Patten Report in which it was recommended that no area of policing should be free from appropriate oversight. It said “Secretive policing arrangements run counter not only to the principles of a democratic society but also to the achievement of fully effective policing.” Or, as Lord Bingham put it “Democracies die behind closed doors.”

In Ireland, there is no external or transparent oversight of state security policing. If, as suggested in this report, sufficiently senior human rights lawyers are engaged to assist the oversight bodies those lawyers can be security cleared to enable access to sensitive material thereby removing an obstacle to such oversight.

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320 Ramsey’s (Steven) Application [2014] NIQB 59.
Recommendations

RECOMMENDATION 42
The Policing Authority’s statutory functions should include the duty to monitor the Garda Síochána’s compliance with the European Convention on Human Rights Act 2003 and to report annually on its assessment of the Garda Síochána’s performance according to an agreed human rights monitoring framework.

RECOMMENDATION 43
State security should be subject to the statutory oversight arrangements. The statutory exceptions which apply to those bodies should be repealed. Oversight should proceed on the basis that all policing is subject to the accountability arrangements subject only to strictly limited exceptions on defined security grounds. Those excepted matters should be considered by the Policing Authority’s independent human rights legal expert.

RECOMMENDATION 44
The Policing Authority should engage the services of an independent human rights legal advisor of standing and experience to advise the Authority on the discharge of its human rights function. The legal advisor should conduct a root and branch review of the Garda Síochána with the purpose of assisting in the development of a human rights monitoring framework, devise the standards by which to measure compliance and thereafter monitor and report upon the Garda Síochána’s compliance with the European Convention on Human Rights Act 2003.

RECOMMENDATION 45
The Policing Authority should publish its human rights monitoring framework, which should be followed by the Garda Síochána’s human rights action plan setting out how, when and by whom the various elements of monitoring will be facilitated. Thereafter, annually, the Garda Síochána should publish a human rights action plan responding to all recommendations made in the previous 12 months in the human rights annual report or relevant thematic review report.
APPENDICES
APPENDIX 1
LEGAL FRAMEWORK RELEVANT TO POLICING

INTERNATIONAL STANDARDS

International human rights standards require the state to refrain from violating individuals’ rights but also require the state to take positive action to ensure that the rights of individuals are not violated by others.

United Nations Treaties

The United Nations was founded in 1945 by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. On 10 December 1948, the member states of the United Nations (by then there were 58) adopted the Universal Declaration of Human Rights. That represented “a world milestone in the long struggle for human rights.” For the first time, a document considered to have universal value, setting out in detail how fundamental human rights should be universally protected, was given broad international support.

Whilst the 58 member states of the United Nations had differing values and ideologies, different political systems and different religious and cultural backgrounds, the Universal Declaration of Human Rights represented a common statement of goals and aspirations: a vision of the world as the international community wanted it to be, free from tyranny and oppression. Its creation arose largely from the strong desire for peace following World War II. The preamble to the Declaration emphasises that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”

Despite their conflicting views on certain questions those tasked with drafting the Declaration agreed to include in the document the principles of non-discrimination, civil and political rights, and social and economic rights. Fundamental rights recognised by the Declaration include, among others, the right to life, liberty and security of person; the right to an adequate standard of living; the right to seek and to enjoy in other countries asylum from persecution; the right to own property; the right to freedom of opinion and expression; the right to education; the right to freedom of thought, conscience and religion; and the right to freedom from torture and degrading treatment. These rights are inherent rights, to be enjoyed by all human beings equally. They are particularly pertinent for members of minority communities.

Since 1948, the Universal Declaration of Human Rights has been translated into more than 200 languages and remains one of the best known and most cited human rights documents in the world. Although the Declaration is not a legally binding document in the sense that it cannot be relied upon directly by an individual in a domestic court in the United Kingdom, it has inspired more than 60 other human rights instruments and is meant to be implemented by member states.

The United Nations human rights framework requires states to guarantee equal rights and the equal protection of laws and to prevent discrimination. The Universal Declaration of Human Rights provides the framework for the principles of equal rights and non-discrimination, and was the first international instrument to affirm that “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as “race”, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly in 1966 and ratified by Ireland on 8 December 1989, expands on those principles. For example, Articles 6 and 7 ICCPR protect an individual’s right to life and freedom from inhuman and degrading treatment, respectively. Article 2 requires that states have sufficient legislative, judicial and other measures to ensure that a remedy is available in the event of treaty violations.

The United Nations Human Rights Committee, which oversees the ICCPR’s implementation, has observed that

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231 In the words of a United Nations General Assembly representative from France.
states have an obligation to investigate violations committed by state and private actors against individuals.\footnote{That framework comprises the Universal Declaration of Human Rights and core treaties: the UNCRD; the International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural Rights; The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; The International Convention on the Elimination of All Forms of Racial Discrimination; The Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of Persons with Disabilities.} In particular, Article 2 ICCPR provides for the non-discrimination principle while Article 26 provides for equality before the law, equal protection of the law and protection from discrimination. The ICCPR therefore obliges states to investigate, for example, offences of violence and to do so without discrimination.

The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations Assembly in 1966 and ratified by Ireland on 8 December 1989, recognises that all human beings should “enjoy freedom from fear and want which can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights” and that everyone should enjoy those rights without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations Assembly in 1966 and ratified by Ireland on 8 December 1989, recognises that all human beings should “enjoy freedom from fear and want which can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights” and that everyone should enjoy those rights without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), adopted in 1979 and ratified on 23 December 1985, “is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. The present document spells out the meaning of equality and how it can be achieved. In so doing, the Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights.” The Convention defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.” Gender based violence has been recognised within society regardless of age, race, national origin and class. It is a profound and insidious form of discrimination against women and a fundamental breach of human rights. There is a General Recommendation attached to CEDAW which deals with violence against women.

Specific provision is made within CEDAW in respect of trafficking and exploitation. States Parties must take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

**The Convention on the Rights of the Child**

In November 1989, the UN General Assembly adopted unanimously the Convention on the Rights of the Child (UNCRC) was adopted in 1989 and ratified in 1992. The UNCRC is the most universally accepted human rights instrument which provides the most comprehensive framework for the responsibilities of states parties to all children within their jurisdiction.

The UNCRC is sub-divided in four parts. The Preamble contains the key principles which underpin it. Part I (Articles 1 to 41) contains the substantive rights of the child and the corresponding obligations of State Parties. Part II (Articles 42-45) contains the procedural provisions for monitoring implementation. Part III (Articles 46-54) contains the provisions providing for entry into force of the UNCRC. Two optional protocols have subsequently been adopted. The UNCRC and its optional protocols form part of a wider UN human rights framework within which the UNCRC must be read.\footnote{That framework comprises the Universal Declaration of Human Rights and core treaties: the UNCRC; the International Covenant on Civil and Political Rights; The International Covenant on Economic, Social and Cultural Rights; The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; The International Convention on the Elimination of All Forms of Racial Discrimination; The Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of Persons with Disabilities.} The Preamble to the UNCRC (which is a guide to interpretation of substantive rights) provides that “childhood is entitled to special care and assistance” and “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.” The UNCRC defines a “child” as anyone less than 18 years of age “unless under the law applicable to the child, majority is attained earlier.” The exception is an empowering one, in other words children under 18 years can claim the benefits of adulthood if granted by national law while still able to claim the protection of the UNCRC. This is particularly important where issues or questions which relate to the “age of consent” arise.
The International Convention on the Elimination of all forms of Racial Discrimination

The International Convention on the Elimination of all forms of Racial Discrimination (CERD), adopted in 1965 and ratified on 29 December 2000, provides specifically states’ duties to investigate racist violence. CERD also requires states to implement legislation prohibiting acts of violence and incitement to violence based on racism. The CERD Committee, which oversees the treaty’s implementation, has stressed the “importance of investigating racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole.” The Committee has also recommended that, in order to assist victims of racism in bringing cases to court, states should ensure that victims are allowed to participate in criminal proceedings, are kept informed about progress, are protected against reprisals or intimidation and that they have access to compensation and assistance, where available.

It is the duty of the state agencies to ensure that a racist motivation is investigated fully. Failure to do so when there is prima facie evidence of motivation in connection with a serious crime is considered to be a violation of Article 6 CERD (on effective remedies) and Article 2 CERD (on bringing an end to racial discrimination by all appropriate means). The CERD Committee has considered the duty to take effective action against acts of discrimination under Article 2, and to provide effective remedies under Article 6 in relation to the adequate investigation and prosecution of hate crimes. In the case under consideration, the petitioners were a family of Iraqi immigrants living in Denmark, who were repeatedly subjected to racist taunts and verbal abuse. On one occasion neighbours broke into the family’s home causing damage and physically assaulting two male occupants.

The police investigated the incident however when the prosecution service secured admissions of guilt on assault and property damage charges it amended the charges to refer only to the violent offences but not to the aggravating racial motivation and requested a summary hearing. The prosecutor thereby failed to inquire into the potential bias motivations of the crime. The CERD Committee was of the opinion that when investigating and prosecuting crimes with a potential bias motivation, the prosecution has a duty to ensure that racist motivation is fully investigated through the criminal proceedings. The Committee stressed that the potential gravity of the incident required a full investigation of the potential bias motivation. In that case, the offensive comments made during the attack and the xenophobic statements leading up to the incident imposed a duty to consider fully the racist motivation of the crime. Even though there were other possible motives, racist motivation must not be excluded without a thorough investigation.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted in and ratified on 11 April 2002, prohibits torture in all circumstances and requires states to prevent and investigate torture and punish anyone who carries it out. CAT applies to for example arrest, detention and imprisonment, interrogation, and should be taken into account in the training of police, medical staff, public officials and anyone else who may be involved in the arrest, detention and questioning of a person. In particular, each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture; and ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction; ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.

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324 General Comment 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, Committee on the Elimination of Racial Discrimination, Sixtieth Session, Supplement No. 18 (2005) UN Doc A/60/18, page 103, para. 15.
325 Ibid. At pages 104–05, para. 17.
327 Article 11.
328 Article 12.
Convention on the Rights of Persons with Disabilities

Convention on the Rights of Persons with Disabilities, adopted in 2006 and ratified on 1 March 2018 [CONFIRM DATE], sets out what human rights mean in the context of disability. The Convention represents a major step towards realising the right of disabled people to be treated as full and equal citizens. It provides specifically that states parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. To ensure effective access to justice for persons with disabilities, states parties must promote appropriate training for those working in the field of administration of justice, including the police. There is also an obligation on states parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, to prevent all forms of exploitation, violence and abuse, put in place effective legislation and policies to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Other United Nations Standards

The United Nations has also issued standards and guidelines specific to law enforcement. Of particular relevance are the following.

UN Code of Conduct for Law Enforcement Officials

The Code of Conduct was adopted in December 1979. It provides that “Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.” Police officers must in the performance of their duty, respect and protect human dignity and maintain and uphold the human rights of all persons. They may only use force when strictly necessary and to the extent required for the performance of their duty and they must keep private matters of a confidential nature in their possession. Furthermore, they may not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment. They must ensure the full protection of the health of persons in their custody and, in particular, take immediate action to secure medical attention whenever required. They must not commit any act of corruption and rigorously oppose and combat all such acts.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

The Basic Principles require governments and law enforcement agencies to adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, they must keep the ethical issues associated with the use of force and firearms constantly under review. A number of measures apply to the use of force such as the requirement to develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms to include non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. It is recognised that it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.
UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment\textsuperscript{332}

The Body of Principles, issued by resolution in December 1988 provides that all persons under any form of detention or imprisonment must be treated in a “humane manner and with respect for the inherent dignity of the human person.” More particularly, all detention must: be by and subject to the effective control of a judicial authority; include the right of the detained person to be informed at the time of arrest of the reason for arrest and thereafter promptly informed of any charges; incorporate the protection of human rights for all persons without distinction of any kind; not involve any form of torture or cruel or inhuman or degrading treatment or punishment; provide an effective opportunity to be heard promptly by a judicial or other authority; provide that the detained person can defend himself or be assisted by counsel as prescribed by law; include a mechanism for a judicial or other authority to review the continuance of detention; be accompanied by a record (which must be communicated to the detained person or his counsel) of the reasons for arrest, time of arrest and taking into custody, precise location of custody, time of appearance before an appropriate authority and the identity of the law enforcement officials concerned.

A detained person must also be permitted, promptly, to notify or to require the competent authority to notify members of the family or other appropriate persons (of his choice) of the arrest and detention, including on any transfer, of the precise location of detention. If the detained person is a foreigner he must also be promptly informed of the right to communicate with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Furthermore, undue advantage must not be taken of detention for the purpose of compelling a detained person to confess, to incriminate himself or to testify against any other person. Specifically, a detained person must not be subjected to violence or threats during interrogation or to any other method which might impair his decision-making or judgement.

Importantly, any official who has reason to believe that there has been or is likely to be a violation of the Principles must report that to the appropriate authorities including where relevant those authorities in which are vested reviewing or remedial powers.

UN Standard Minimum Rules for the Treatment of Prisoners\textsuperscript{333}

The Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules, adopted in revised form in December 2015, don’t set out a detailed model but “seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.”

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power\textsuperscript{334}

The Basic Principles, adopted in November 1985, lay down standards for the treatment of victims of

\textsuperscript{332} General Assembly Resolution 43/173 of 9 December 1988.

\textsuperscript{333} 17 December 2015 a revised version of the Standard Minimum Rules were adopted unanimously by the 70th session of the UN General Assembly in Resolution A/RES/70/175.

\textsuperscript{334} Adopted by General Assembly resolution 40/54 of 29 November 1985.
crime and abuse of power. They cover for example: access to justice and fair treatment; restitution; and compensation. Importantly, they apply to all victims and person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. Victim includes, where appropriate, the immediate family or dependants and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Victims must be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

**Organisation for Security and Cooperation in Europe (OSCE)**

The OSCE comprises 57 participating states in North America, Asia and Europe, including the United Kingdom, and is the world’s largest regional security organisation. The OSCE is a forum for political dialogue on a wide range of security issues and a platform for joint action to improve the lives of individuals and communities. The 2009 OSCE Ministerial Council Decision on Combating Hate Crimes for example remains one of the most comprehensive commitments by the international community concerning state obligations to address hate crimes. In this decision, participating States committed themselves to, amongst other things: collect, and make public, data on hate crimes; enact, where appropriate, specific, tailored legislation to combat hate crimes; take appropriate measures to encourage victims to report hate crimes; develop professional training and capacity-building activities for law enforcement, prosecution and judicial officials dealing with hate crimes; and promptly investigate hate crimes, and ensure that the motives of those convicted of hate crimes are acknowledged and publicly condemned by the relevant authorities and the political leadership.

The OSCE has restated many times that “What police officers do and say in the first several minutes at a crime scene can affect the recovery by victims, the public’s perception of governmental commitment to addressing hate crimes, and the outcome of the investigation. Officers who recognize a probable hate crime, interact with the victims with empathy, and take action to initiate a hate crime investigation send a strong message that hate crimes are a serious issue.”

**European Union**

The European Commission (which represents the interests of the EU as a whole) proposes new laws, which are debated, revised and adopted by the directly elected European Parliament and the Council (representing the governments of the member states). Thereafter, legislation is implemented by member states and the Commission. The EU takes decisions only in those areas where it has either exclusive or shared competence. In health, education, and social policy for example the Commission cannot propose new laws: those areas remain within the competence of each individual member state.

EU law has primacy which means that in those areas in which EU law applies, it takes precedence over domestic law, including the Constitution. There are a number of EU Directives that apply in Ireland such as the Victims’ Directive and the Data Protection Directive, which have had a direct impact upon the actions of state bodies including the Garda Síochána.

Most significantly, where EU law applies the EU Charter of Fundamental Rights also applies. The Charter replicates the rights contained within the ECHR but adds to those rights in important respects.

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335 Decision No. 9/09 on combating hate crimes, OSCE Ministerial Council, December 2009.
The European Charter of Fundamental Rights\textsuperscript{337}

The Charter of Fundamental Rights was intended to pull together and bring clarity to the protection of rights across EU Member States. It contains a broad range of civil, political, economic and social rights to supplement other international conventions such as the ECHR and the EU Social Charter. The Charter became legally binding on EU Member States when the Treaty of Lisbon entered into force in December 2009. While largely replicating the rights contained with the ECHR it contains additional protection to for example: the right to protection of personal data; the right of persons with disabilities to independence, integration and participation; and, the right of the elderly to lead a life of dignity, independence and participation. In respect of personal data it provides that such data “must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”\textsuperscript{338}

Importantly, the rights of the child are specifically highlighted. It provides that EU policies which directly or indirectly affect children must be designed, implemented and monitored taking into account the principle of the best interests of the child. It also guarantees the right to such protection and care as is necessary for the well-being of the child and recognises the need to protect children from abuse, neglect and violations of their rights and well-being.

The Charter applies only to matters concerning EU Law but it is directly enforceable in Irish courts.

**EUROPOL**

EUROPOL is the EU’s own law enforcement agency. It supports member states by collecting information and coordinating operations with a cross-border nature dealing with serious international crime and terrorism. Member states need to know that when information is shared that it will be protected according to the law common across the EU.

**COUNCIL OF EUROPE**

The Council of Europe was founded on 5 May 1949 by 10 states (including the United Kingdom). It was formed as a result of popular movements to improve society and create a lasting peace following World War II. The Council of Europe now has 47 member states and works to protect and promote democracy, human rights and the rule of law for its 800 million citizens.

The European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights (ECHR) was the first Council of Europe convention\textsuperscript{339} to deal with the protection of human rights. It is based directly upon the Universal Declaration of Human Rights\textsuperscript{340} and was signed by member states of the Council on 4 November 1950. The ECHR came into force on 3 September 1953 and consists of a number of articles which have been supplemented over the years by protocols. By ratifying the ECHR, member states of the Council of Europe must guarantee for their citizens the rights and freedoms contained within the ECHR. The United Kingdom ratified the ECHR in 1991 but did not incorporate it into domestic law until 2000. Not all rights contained within the ECHR are absolute. There are some specified

\textsuperscript{337} As December 2000, 2000/C 364/01.

\textsuperscript{338} Article 8.

\textsuperscript{339} A convention is a legal agreement between two or more states. States are invited to first sign a convention, showing that they want to follow what it says, then, when they are sure that they are able to do so, they can ‘ratify’ the convention: this means that they commit themselves to its values and instructions.

\textsuperscript{340} However, whilst the Universal Declaration of Human Rights includes civil, political, social and economic rights, the ECHR mostly contains civil and political rights..
circumstances which enable a member state to lawfully interfere with certain individual rights. The rights can be categorised as follows:

- **Absolute rights**, such as the right to protection from torture and inhuman and degrading treatment (Article 3 ECHR), are rights which member states can never withhold or take away in any circumstances.
- **Limited rights**, such as the right to liberty (Article 5 ECHR), are rights which may be limited by member states under explicit and finite circumstances.
- **Qualified rights** are rights which require a balance between the rights of the individual and the needs of the wider community or state interest. These include: the right to respect for private and family life (Article 8 ECHR); the right to manifest one’s religion or beliefs (Article 9 ECHR); freedom of expression (Article 10 ECHR); freedom of assembly and association (Article 11 ECHR); the right to peaceful enjoyment of property (Protocol 1, Article 1 ECHR); and, to some extent, the right to education (Protocol 1, Article 2 ECHR). An absolute right may never be interfered with. In other words, interference with an absolute right will never be lawful. In respect of limited or qualified rights, they may only be interfered with by a member state if the interference: (i) is intended to serve a legitimate aim; (ii) is proportionate to the intended objective (i.e. do not use a sledgehammer to crack a nut); and, (iii) is necessary in a democratic society.

To guarantee the rights enshrined in the ECHR for everyone under the jurisdiction of member states, the European Court of Human Rights (ECtHR) was set up in 1959 and sits permanently in Strasbourg, France. Case law emanating from the ECtHR ensures that the ECHR remains a ‘living instrument’ capable of adapting as society evolves. The ECtHR consolidates the rule of law (i.e. it enforces the legal maxim that no-one is above the law) and democracy throughout the Council of Europe’s jurisdiction. In its 52 years, the ECtHR has delivered more than 10,000 judgments. Those judgments are binding on member states. If the ECtHR finds that a violation of the ECHR has occurred, the member state concerned is required to take action to ensure a similar violation will not recur. Judgments of the ECtHR therefore supplement the law in the United Kingdom.

**Other Council of Europe Treaties**

In addition to the ECHR, there are a number of other treaties some of which Ireland has signed and ratified and some which Ireland has signed but not yet ratified.

**European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

The EU Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted November 1987 and ratified by Ireland on 14 March 1988, was intended to build upon the ECHR, enforcement of which is based on complaints from individuals or from States. The EU Convention for the Prevention of Torture supplements the ECHR by non-judicial machinery of a preventive character, whose task it is to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of persons from torture and from inhuman or degrading treatment or punishment. There was established a new Committee which may visit any place within the jurisdiction where persons are deprived of their liberty by a public authority, including police, to seek improvements, if necessary, in the protection of persons deprived of their liberty.

The original text has been amended by two protocols, which came into force on 1 March 2002.

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341 When the United Kingdom ratified Protocol 1, Article 2, it accepted the principle of education in conformity with parents’ religious and philosophical convictions “only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable expenditure.”

342 The ECHR is also enforceable through the United Kingdom’s domestic courts by virtue of the Human Rights Act 1998, details of which are provided below at page 41.

343 European Treaty Series – No. 126 as amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) on 1 March 2002.
The Convention on Preventing and Combating Violence against Women and Domestic Violence344

The Convention on Preventing and Combating Violence against Women and Domestic Violence, signed by Ireland on 5 November 2015 but not yet ratified, aims to further safeguard and protect human rights recognising that violence against women, including domestic violence, undermines the core values on which the Council of Europe is based. Building on Recommendation Rec(2002)5 on the protection of women against violence, the Convention sets, for the first time in Europe, legally binding standards to prevent violence against women and domestic violence, protect its victims and punish the perpetrators. It fills a significant gap in human rights protection for women and encourages states parties to extend its protection to all victims of domestic violence. It nonetheless frames the eradication of violence against women in the wider context of achieving substantive equality between women and men and thus significantly furthers recognition of violence against women as a form of discrimination.

Framework Convention for the Protection of National Minorities345

The Framework Convention, adopted November 1994 and ratified by Ireland on 7 May 1999, is aimed at achieving greater unity between member states for the purpose of safeguarding and realising the ideals and principles which are their common heritage. It specifies the legal principles which underpin States obligations to ensure the protection of national minorities through national legislation and government policies. For example, it includes the principles of equality and non-discrimination; the right to maintain and develop culture and preserve identity; the right to freedom of expression; the right to freedom of religion; and the right to use a minority language freely and without interference.

European Social Charter (Revised)346

The Revised Charter adopted in 1996 and ratified by Ireland on 4 November 2000, supplements civil and political rights contained within the ECHR.

Council of Europe standards and guidelines on policing

The Council of Europe has also issued standards and guidelines specific to law enforcement. Of particular relevance are the following.

The European Code of Police Ethics Recommendation (2001) 10

The European Code of Police Ethics, adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, was issued as guidance to member states in their internal legislation, practice and codes of conduct of the police. The opening words of the recommendation are important and set the context

“Bearing in mind that it is also the purpose of the Council of Europe to promote the rule of law, which constitutes the basis of all genuine democracies; Considering that the criminal justice system plays a key role in safeguarding the rule of law and that the police have an essential role within that system; Aware of the need of all member states to provide effective crime fighting both at the national and the international level; Considering that police activities to a large extent are performed in close contact with the public and that police efficiency is dependent on public support; Recognising that most European police organisations – in addition to upholding the law – are performing social as well as service functions in society; Convinced that public confidence in the police is closely related to their attitude and behaviour towards the public, in particular their respect for the human dignity and fundamental rights and freedoms of the individual as enshrined, in particular, in the European Convention on Human Rights.”

345 February 1995, H (95) 10.
Council of Europe Parliamentary Assembly, Declaration on the Police

Council of Europe Parliamentary Assembly, Declaration on the Police, made on 8 May 1979, covers issues such as police ethics and the status of the police. By way of example the Declaration provides:

“A police officer shall fulfil the duties the law imposes upon him by protecting his fellow citizens and the community against violent, predatory and other harmful acts, as defined by law... A police officer shall act with integrity, impartiality and dignity. In particular he shall refrain from and vigorously oppose all acts of corruption... A police officer shall not co-operate in the tracing, arresting, guarding or conveying of persons who, while not being suspected of having committed an illegal act, are searched for, detained or prosecuted because of their race, religion or political belief... In performing his duties, a police officer shall use all necessary determination to achieve an aim which is legally required or allowed, but he may never use more force than is reasonable... A police officer having the custody of a person needing medical attention shall secure such attention by medical personnel and, if necessary, take measures for the preservation of the life and health of this person. He shall follow the instructions of doctors and other competent medical workers when they place a detainee under medical care... A police officer shall keep secret all matters of a confidential nature coming to his attention, unless the performance of duty or legal provisions require otherwise.”

Committee for the Prevention of Torture Standards (compiled from annual reports)

The CPT has issued standards which can be found in annual reports and supplemented by Development Reports such as the following.

Council for Europe Committee for the Prevention of Torture Developments Concerning Standards in Respect of Police Custody

The CPT reminds us that

“It is essential to the good functioning of society that the police have the powers to apprehend, temporarily detain and question criminal suspects and other categories of persons. However, these powers inherently bring with them a risk of intimidation and physical ill-treatment. The essence of the CPT's work is to seek ways of reducing that risk to the absolute minimum without unduly impeding the police in the proper exercise of their duties.

Thereafter, the CPT includes guidance on the questioning of criminal suspects, the recording of police interviews, the right of access to a lawyer and medical services, the right to have a person notified of detention, the right to be brought before the competent judicial authority in respect of detention, conditions in police custody and the inspection of police custody by an independent authority.

Council of Europe Committee for the Prevention of Torture Access to a Lawyer as a Means of Preventing Ill-Treatment

The CPT stresses that the possibility for persons taken into police custody to have access to a lawyer is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons. Further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs. To be effective, direct and private access should be provided from the very outset.

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of deprivation of liberty and should be available during questioning. Funding should be available to ensure that access to a lawyer is practically effective. The CPT has “repeatedly found that the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. The right of access to a lawyer should apply as of the moment of deprivation of liberty, irrespective of the precise legal status of the person concerned: more specifically, enjoyment of the right should not be made dependent on the person having been formally declared to be a “suspect”.

Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police

An independent and effective police complaints system is of fundamental importance for the operation of a democratic and accountable police service. Independent and effective determination of complaints enhances public trust and confidence in the police and ensures that there is no impunity for misconduct or ill-treatment. A complaints system must be capable of dealing appropriately and proportionately with a broad range of allegations against the police in accordance with the seriousness of the complainant’s grievance and the implications for the officer complained against. A police complaints system should be understandable, open and accessible, and have positive regard to and understanding of issues of gender, race, ethnicity, religion, belief, sexual orientation, gender identity, disability and age. It should be efficient and properly resourced, and contribute to the development of a caring culture in the delivery of policing services. The European Court of Human Rights has developed five principles for the effective investigation of complaints against the police that engage Article 2 or 3 of the European Convention on Human Rights.

The principles are as follows: (i) Independence - there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence; (ii) Adequacy - the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible; (iii) Promptness - the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law; (iv) Public scrutiny - procedures and decision-making should be open and transparent in order to ensure accountability; (v) Victim involvement - the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.

These five principles must be adhered to in the investigation of a death, serious injury or allegation of torture or inhuman or degrading treatment in police custody or as a consequence of police action. They also provide a useful framework for the investigation of all other complaints. What is required is an independent police complaints body which conducts article 2 and 3 investigations and also have oversight of the police complaints system. That body should share responsibility with the police for: visibility and oversight of the system; procedures for the notification, recording and allocation of complaints; mediation of complaints that are not investigated; investigation of complaints; and resolution of complaints and review.

The expectation that criminal or disciplinary proceedings will be brought against a police officer against whom there is evidence of misconduct is an important protection against impunity and essential for public confidence in the police complaints system. The prosecution authority, police and independent police complaints body should give reasons for their decisions relating to criminal and disciplinary proceedings for which they are responsible.

DOMESTIC STANDARDS

The Irish Constitution

The purpose of the Constitution of Ireland (1937), as stated in its preamble, is to “promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained...” It provides expressly for the protection of fundamental rights. For example it states that “All citizens shall, as human persons, be held equal before the law.”

Rights must be respected, defended and vindicated. Those rights include: the right to life; the right to liberty; respect for the person; respect for one’s good name; respect for property; freedom of expression, peaceful assembly and association; freedom of religion; the right to marry; the right to receive an education; respect for the rights of the child. Importantly, the courts have by implication held that the Constitution protects a range of other rights such as the right to respect for home and private life, the right to bodily integrity and the right to protection from torture or other inhuman or degrading treatment.

It is firmly enshrined in the Constitution that Ireland is a democratic state serving all of the people within its territory regardless of their varied identities and traditions. The Constitution is therefore founded in the universal and inalienable principles of freedom, democracy, peace and the rule of law; principles mirrored in international human rights laws. Those laws supplement and give effect to the Constitution.

The European Convention on Human Rights Act 2003

With the introduction of the European Convention on Human Rights Act 2003, the ECHR became directly enforceable in domestic courts. The Act enables individuals to litigate and enforce their ECHR rights in their local courts. Importantly, all organs of the state are required, as a matter of domestic law, to comply with the ECHR and the judiciary are obliged to take judicial notice of the ECHR as well as any declaration, decision, advisory opinion or judgment of the European Court of Human Rights, any decision or opinion of the European Commission of Human Rights and any decision of the Committee of Ministers.

“Organ of the State” includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.

When carrying out its duties and exercising its powers the Garda Síochána must act compatibly with all convention rights. All policies, practices and procedures must be compatible. In order to act compatibly, gardai must not only refrain from unlawfully interfering with an individual’s convention rights, they must also intervene in certain situations to protect third parties from violating another person’s convention rights. For example, under Article 2 ECHR (the right to life) gardai must not only refrain from the intentional and unlawful taking of life, they must also take all reasonable steps to safeguard lives within their jurisdiction from a threat of which they are aware. Where a death has occurred under suspicious circumstances, they must carry out an independent, effective, timely investigation which is capable of holding the perpetrator to account and which affords the relatives of the deceased sufficient access to the investigative process.

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350 Article 40.1.
351 Articles 40–44.
352 For example in Kennedy v Ireland [1987] Irish Reports 587, which concerned the right to privacy in telephone conversations.
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Editor: Jonathan Cooper

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APPENDIX 2
LIST OF RECOMMENDATIONS

Chapter 1: A human rights-based approach to reform: what is it and why adopt it?

(1) It should be agreed by government, the police and the oversight bodies that a human rights-based approach will be adopted and that all will cooperate and share responsibility for its delivery. That should be accompanied by a public awareness campaign with a focus on the rationale for and expected benefits of reform.

Chapter 2: An Garda Síochána: culture and ethos

(2) An Garda Síochána, working with the Policing Authority, should assess human rights awareness within and across policing. As part of that review garda culture and acceptance of a human rights-based approach should be measured.

(3) Having measured garda culture and acceptance of a human rights-based approach, a strategy should be developed and implemented to address any issues or themes arising with a particular focus on eliminating obstacles to embedding a human rights-based approach and ensuring that cultural reform will be translated into the practical and effective protection of rights.

(4) The Garda Síochána Code of Ethics should be revised so as to include expressly the human rights standards expected of garda and civilian staff and their practical application. Thereafter, the Code of Ethics should take effect as a discipline code with all alleged breaches of human rights investigated by the Garda Síochána Ombudsman Commission. The Code should be kept under review by the Policing Authority which should monitor and report upon any human rights themes and trends emerging from reported breaches of the Code.

Chapter 3: Policing of public order and protest

(5) An Garda Síochána should, with the assistance of human rights legal experts, revise and publish policy and guidance on public order and policing of protest incorporating expressly the relevant ECHR rights and their practical application. All gardai who might be involved in the policing of public order and protest including close protection officers and state security police should be trained in the revised policy.

(6) On an annual basis, Garda Síochána leaders should consider, with relevant community and response teams, the public order and protest operations conducted throughout the previous 12 months with a particular focus on any human rights issues that arose. As part of that consideration garda should consult with relevant non-governmental organisations and community groups. Lessons learned from that exercise should be disseminated amongst all gardai who have been or might be involved in such operations.

(7) When collating data on the use of police powers (see below) those incidents in which powers or force was used in the public order context should be identified and highlighted. That data should be reported to the Policing Authority and published in an easily accessible format.

Chapter 4: Use of force

(8) The Garda Síochána should, with the assistance of human rights legal experts, develop and publish an overarching policy on the use of force to include expressly the relevant human rights standards and their practical application. That policy should include: the training required for gardaí prior to deployment; provision for the planning of any operation in which force might be used; preventative measures to avoid recourse to the use of force; the authorisation regime for the use of force; the legal tests for the various weapons deployed; the provision for medical assistance; the requirement for post-operative briefings in any case where force is used; and, the requirement to report the use to the relevant oversight bodies.
(9) All deployments of weapons and all uses of force should be recorded together with a brief explanation of the circumstances surrounding the use, the location of the use, the outcome and the identity of the gardaí who used force. That information should be collated and shared with the Policing Authority. Statistics should thereafter be produced and published on an annual basis on the use of force broken down according to the force used and the circumstances in which force was used.

(10) The Garda Síochána should produce and publish Standard Operating procedures for the deployment of armed units, including those on close protection duties.

(11) The Garda Síochána should keep under review the availability of less lethal and non-lethal technology.

**Chapter 5: Suspects and detainees**

(12) The State should immediately ratify OPCAT and establish a National Preventive Mechanism.

(13) Consideration should be given to providing appropriate statutory authority to the most appropriate independent oversight body to inspect all places of detention. Those inspections should not require permission or advance notice. Inspectors should also be entitled to speak with detainees and to consider detention both in police custody and in transit.

(14) There should be established, with statutory authority, an independent custody visiting scheme where lay members might make unannounced visits to all places of detention. The custody visitors should be given access to all detainees and their custody records with the consent of the detainee. Thereafter custody visiting reports should be submitted to the oversight body with responsible for inspecting places of detention, which should report on an annual basis on the operation of the scheme.

**Chapter 6: Racist hate crime**

(15) To underpin the Garda Síochána’s efforts to improve its response to tackling hate crime there should be enacted specific hate crime legislation to include, at least, enhanced sentencing for crime motivated by or demonstrating hostility.

(16) An Garda Síochána should develop, with the assistance of human rights legal experts a written policy on responding to hate crime to put the protection of victims at the centre of its service.

(17) An Garda Síochána should amend its guidance and working definition of hate crime as follows: “A hate incident is defined as any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by hostility or prejudice. A hate crime is defined as any incident, which constitutes a criminal offence, perceived by the victim or any other person, as being motivated by hostility or prejudice.”

(18) An Garda Síochána should develop and integrate into its written policy a risk assessment for hate crime with particular attention paid to minimising the risk of further harm. That policy should thereafter be published.

(19) Minority liaison officers should be appointed on a full-time basis for each minority group such as: minority ethnic people; Travellers and Roma; lesbian, gay bisexual and transgender people; persons living with a disability; children; and, vulnerable adults. Those officers should be trained in hate crime investigation and perform an investigative role.

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353 The identity of the officer who used force need not be revealed in the published statistics but the statistics should identify where and when force tends to be used. For example, it should identify whether force is used primarily during public disorder or as a result of arrest.
(20) An Garda Síochána should strengthen the formal and operational links between ELO/LGBT officers and Garda Victims Services Offices.

(21) An Garda Síochána should, working with the Traveller and Roma communities, forthwith commence a review of its policy, training and practices with a particular focus on their impact on Travellers and Roma. Thereafter, an action plan with time-limited targets should be published to deal with the issues identified.

(22) An Garda Síochána should establish specialist hate crime investigation units across the country, members of which should be selected by reference to aptitude and experience. Each should receive high quality intensive training in the investigation of hate crime. Thereafter, all hate crime investigations should be referred to a specialist unit. Bespoke training in identifying, recording and initiating an investigation of hate crime should also be developed for all response officers.

(23) An Garda Síochána should establish under a central lead a single command structure for all hate incidents and crimes.

(24) An Garda Síochána should collate disaggregated data on: the number of incidents and crimes reported to police; the number of incidents and crimes recorded as having a hate motivation; the number of arrests, charges and prosecutions that follow; and the number of complaints arising from the handling of reports of hate crime. The figures should be disaggregated according to the relevant hate motivation and the district within which the report was made. At the conclusion of 12 months and thereafter on an annual basis the statistics should be published.

(25) An Garda Síochána should carry out on an annual basis a dip-sampling exercise in which entries recorded on PULSE with a hate motivation are compared to reports of hate incidents and crimes. That dip-sampling exercise should then be analysed to identify any trends and patterns. Those trends and patterns should be published.

(26) An Garda Síochána should publish a revised and up-dated Diversity Strategy.

**Chapter 7: State security**

(27) The legal framework for the authorisation and regulation of all covert activity should be reviewed to provide a clear statutory framework in which rights might be interfered with lawfully. In particular the law should include authorisation and use of: Covert Human Intelligence Sources; interception; surveillance; collection, use and retention of personal data; an independent appeals and/or complaints mechanism; and, oversight of all covert activity by an independent person or body.

(28) An Garda Síochána should, with the assistance of human rights legal experts, devise an overarching written policy on all covert activity which incorporates expressly the relevant human rights standards and their practical application. Within the framework of the overarching policy there should be service directives dealing in detail with the various covert tactics and authorisations. Thereafter those documents which can be published without detrimental impact on state security should be published. Those documents which cannot be published should be accessible to the Policy Authority’s human rights legal expert.

(29) An Garda Síochána should employ a human rights legal expert to advise on the operational use of powers.
Chapter 8: Implementing a human rights-based approach: A step by step guide

Willingness to change

(30) From the earliest possible stage but at least before any process of reform is implemented the Garda Síochána leadership together with the Policing Authority should engage with all garda members and reserves to explain the process and encourage support for it.

Representativeness

(31) In future recruitment campaigns the Garda Síochána should first consult with minority groups and work with representative groups to target advertisements specifically those groups that are under-represented.

Expert advice

(32) An Garda Síochána should recruit human rights experts of sufficient standing and experience to influence real change. There should be at least one human rights legal expert to assist in the development of policy and operationally and one human rights training expert.

Policy development

(33) An Garda Síochána should, with the assistance of independent human rights experts, human rights proof all policy documents and instructions to ensure that they are clear, accessible and articulate relevant human rights obligations which are explained in their operational context. Where there is no policy on a particular area of police practice a policy should be developed which incorporates relevant human rights obligations. The Garda Síochána should engage with its oversight bodies in its development of policy.

(34) An Garda Síochána should publish all policy documents, instructions and directives save for those which cannot be put into the public domain for reasons of security. If sensitive security information can be redacted from a document the redacted document should be published with an explanation for the redaction. If a document cannot be published at all the existence and title of the document should be published with an explanation for not publishing the document.

Developing and delivering effective training

(35) An Garda Síochána should engage independent experts both in human rights law and training to review training needs and thereafter devise a training programme that has human rights obligations embedded within each element of training. In doing so, the garda should consult with representatives of minority groups to ensure that diversity and cultural awareness training is tailored to meeting human rights obligations for diverse and hard to reach groups. The training programme should include foundation training for new recruits and continuing professional development.

(36) An Garda Síochána should engage with its oversight bodies and the Irish Human Rights and Equality Commission on its revised human rights training programme.

Data collection and analysis

(37) An Garda Síochána should, liaising with the Policing Authority, devise the means by which data, disaggregated according to its eleven categories and by district, can be recorded, collated and published. Thereafter, statistics should be produced and published on a quarterly basis. Data collected should include reported incidents of crime; recording rates for hate crime; recording rates for domestic and sexual violence; use of powers to stop, search, question and enter premises; use of security powers including surveillance and covert operations; use and deployment of CHIS; detentions; use of force; arrest, charge and outcome rates; complaints and internal discipline and outcomes; breaches of data protection; training delivered; and, the representativeness of the service.
(38) An Garda Síochána should establish and maintain its own internal human rights monitoring framework. That monitoring framework should cover the performance of the organisation as a whole and also that of individual members.

(39) Individual members’ performance in respect of human rights compliance should form part of their performance review and matter for their prospects of promotion. Supervisors and line-managers should be equipped to make those assessments and guide members on any improvement that is required.

(40) The professional standards unit should develop a process by which to keep members’ performance under review and identify training needs.

**External Monitoring / Oversight and accountability**

(41) The Department of Justice should consider the establishment of a criminal justice inspectorate with power to inspect, of its own volition, all criminal justice agencies and report publicly on its findings. Any inspectorate should have as a statutory function inspecting for compliance with human rights obligations.

(42) The Policing Authority’s statutory functions should include the duty to monitor the Garda Síochána’s compliance with the European Convention on Human Rights Act 2003 and to report annually on its assessment of the Garda Síochána’s performance according to an agreed human rights monitoring framework.

(43) State security should be subject to the statutory oversight arrangements. The statutory exceptions which apply to those bodies should be repealed. Oversight should proceed on the basis that all policing is subject to the accountability arrangements subject only to strictly limited exceptions on defined security grounds. Those excepted matters should be considered by the Policing Authority’s independent human rights legal expert.

(44) The Policing Authority should engage the services of an independent human rights legal advisor of standing and experience to advise the Authority on the discharge of its human rights function. The legal advisor should conduct a root and branch review of the Garda Síochána with the purpose of assisting in the development of a human rights monitoring framework, devise the standards by which to measure compliance and thereafter monitor and report upon the Garda Síochána’s compliance with the European Convention on Human Rights Act 2003.

(45) The Policing Authority should publish its human rights monitoring framework, which should be followed by the Garda Síochána’s human rights action plan setting out how, when and by whom the various elements of monitoring will be facilitated. Thereafter, annually, the Garda Síochána should publish a human rights action plan responding to all recommendations made in the previous 12 months in the human rights annual report.
ABOUT THE AUTHOR

Alyson Kilpatrick BL

Alyson Kilpatrick studied law at Queens University Belfast, the Inns of Court School of Law London and the College of Europe Bruges. She was called to the Bar of England and Wales in 1992. In 2008, she returned to the Bar of Northern Ireland. Alyson has extensive experience of litigation in the higher courts in a range of public law and human rights cases with a particular emphasis on cases concerning the protection of individuals’ and group rights. For example, she has represented litigants in cases concerning gerrymandering and malfeasance in public office; the rights of Irish Travellers to establish serviced sites; the closure of residential care homes; the right to adequate housing; the right of a transgender person to medical treatment; misdiagnosis of psychiatric injury; and, the application of the human rights in commercial contracts. Between 2005 and 2007, she was junior counsel to the Robert Hamill Inquiry (examining the death of a young man in Portadown). Throughout her practice, Alyson has published extensively including legal textbooks, law reports’ series and encyclopedia of law and practice. For example, she was a contributing author to The Human Rights Act 1998: A Practitioner’s Guide and the author of Discrimination Law and Housing Law in Northern Ireland. Prior to the introduction of the Human Rights Act she trained a number of local councils and other public authorities on the impact of the Act and developed monitoring frameworks to ensure compliance. Thereafter, she trained them on the application of the Act.

In 2009, Alyson was a member of the Irish Government’s delegation to Timor Leste on United Nations Security Council Resolution 1325 where she spoke on policing oversight and provided recommendations for a Code of Conduct for UN military personnel overseas. Alyson was a Commissioner on the Independent Commission on the Future of Housing in Northern Ireland, where she led on equality and human rights. She is Chair of the Gender Identity Panel NI, a member of the board of the One Safe Place Justice Centre, a member of the Board of Community Restorative Justice (Ireland) and a member of the Board of the Northern Ireland Co-Ownership Housing Association. Until November 2017, she was Chair of the Board of the Simon Community Northern Ireland. Between 2009 and September 2017, Alyson was the Independent Human Rights Legal Advisor to the Northern Ireland Policing Board. During that time she advised the Policing Board, was responsible for monitoring the PSNI’s compliance with the Human Rights Act 1998 and published annual human rights monitoring reports and thematic review reports on, for example: domestic violence; lesbian, gay, bisexual and transgender rights; race hate crime; stop and search; child sexual exploitation and; policing with children and young people. In 2016, she was appointed special legal advisor to the UK’s Independent Reviewer of Terrorism Legislation, David Anderson QC, and continues in that role with Max Hill QC. Alyson is a Fellow of the RSA.