

RECOGNISING AND RESPONDING TO VULNERABILITY: SECURING ACCESS TO JUSTICE FOR VULNERABLE ACCUSED PERSONS IN IRELAND

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Abstract: This paper outlines international obligations and domestic safeguards that shape the treatment of suspects with intellectual disabilities in Ireland. In recognising that the meaningful operationalisation of these safeguards, and, by extension, the realisation of Ireland's international human rights obligations, is often contingent upon securing a correct, and early, identification of a suspect's disability, the paper places an emphasis on the unmet need for dialogue, training and enculturation at all frontiers of the Irish criminal process. Against a backdrop of heightening political, media and legal debate concerning the focus, content and reach of the terms of the draft An Garda Síochána (Powers) Bill, insights are raised to offer policymakers a blueprint for legislative and procedural reform that promises to align Irish criminal procedure with the human rights exigencies mandated under international conventions.

Introduction

Whilst there has been a 'victims revolution' in respect of the rights of vulnerable victims in Irish legislation, there remains a discrepancy in the pace of legislation to support the rights of accused persons.¹ The Criminal Justice (Victims of Crime) Act 2017 & Criminal Law (Sexual Offences Act) 2017 have been important pieces of legislative reform whereby specific protections and measures are offered to vulnerable victims of crime.² The pace of legislative reform in respect of vulnerable suspects, such as those with disabilities, has to date had less momentum.³ This momentum lag is somewhat surprising, and operates in contrast to the orthodox evolution of the Irish criminal process. The modern understanding of resolving a crime conflict – dating from the mid nineteenth century – rested on a strong State; prescriptive laws; specialised and professionalised investigation, prosecution and enforcement; a methodological, objective and reasoned mode of inquiry; and a weak accused scaffolded by procedural and substantive rights that upheld 'le principe de l'égalité des armes'. It is only recently that victims and complainants of crime have been recognised as a 'community of identity' with a juridical status and discourse has further progressed with an emphasis on strengthening their rights, with recognition of the

¹ Alan Cusack, 'Addressing vulnerability in Ireland's criminal justice system: A survey of recent statutory developments' (2020) 24(3) International Journal of Evidence and Proof 280-306.

² Alan Cusack (forthcoming) 'From Special Measures to Separate Legal Representation: Charting Shifts in the Treatment of Victims of Crime with Intellectual Disabilities in Ireland' 43(1) Dublin University Law Journal; Alan Cusack, 'Beyond Special Measures: Challenging Traditional Constructions of Competence and Cross-Examination for Vulnerable Witnesses in Ireland' (2021) 4(2) Irish Judicial Studies Journal 98-115; and Liz Campbell and others, Criminal Law in Ireland: Cases and Commentary (2nd edn, Clarus Press 2021).

³ Alan Cusack, 'An Overview of the Legal Position of Vulnerable Suspects and Defendants in Ireland' Irish Criminal Justice (Agencies Annual Conference, Dublin, 4 June 2021).

vulnerable victim.⁴ Yet, there remains significant scope to strengthen procedural rights for the vulnerable suspect such as the person with an intellectual disability.⁵

Terminology in respect of intellectual disability varies across contexts and jurisdictions. Many representative organisations for people with disabilities utilise the terminology of ‘people with disabilities’ as it is person-centred. The preferred term in Ireland for intellectual disabilities is therefore ‘people with intellectual disabilities’ whilst in some other jurisdictions, the term ‘learning disabilities’ or ‘intellectual impairment’ may be used. The International Classification of Diseases, 11th revision defines intellectual disability as a neurodevelopmental disorder highlighting the importance of adaptive functioning. It includes a tripartite diagnostic approach: a) intellectual functioning on standardised IQ assessment two or more standard deviations below the mean; b) onset in the developmental period (childhood, before the age of 18); and c) a significant impairment in adaptive functioning.⁶ The definition of ‘persons with disabilities’ in Ireland is as used in the UNCRPD: ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.⁷ This recognises that disability is a result of the interaction between a person’s impairments and his or her physical and social environment.

With an over-representation of people with intellectual disabilities in Irish prisons,⁸ which is in excess of international and general population estimates,⁹ concerns have been raised in respect of trans-institutionalisation of people with disabilities in Ireland,¹⁰ and barriers for these persons in respect of equal access to justice.¹¹ Principally, these concerns relate to the adherence by adversarial models of justice to exacting forensic formalities that, arguably, fail to take account of the unique needs of accused persons with intellectual disabilities.¹² Psychological vulnerabilities amongst this cohort relating, for instance, to suggestibility and acquiescence during interrogation, a tendency to exhibit a final option bias on closed questioning mean that in the absence of safeguards, there is a very real risk of a false

⁴ See Shane Kilcommins and others, *The Victim in the Irish Criminal Process* (Manchester University Press 2018).

⁵ Alan Cusack, Gautam Gulati, Colum Dunne and Shane Kilcommins, ‘Towards inclusionary policing: A critical inquiry into the pre-trial treatment of suspects with intellectual disabilities in Ireland’ (2022) *Policing: an International Journal*. <https://doi.org/10.1108/PIJPSM-10-2021-0142>

⁶ World Health Organization (2019). *International Statistical Classification of Diseases and Related Health Problems* (11th ed.).

⁷ Article 1 UNCRPD.

⁸ Gautam Gulati and others, ‘Intellectual disability in Irish prisoners: systematic review of prevalence’ (2018) 14(3) *Int J Prison Health* 188-196.

⁹ Seena Fazel, Kiriakos Xenitidis and John Powell, ‘The prevalence of intellectual disabilities among 12,000 prisoners - a systematic review’ (2008) 31(4) *Int J Law Psychiatry* 369-73.

¹⁰ Gautam Gulati and others, ‘Trans-institutionalisation in Ireland: New and Emerging Congregated Settings for People with Disabilities’ (2021) *Health and Human Rights Journal* <<https://www.hhrjournal.org/2021/08/trans-institutionalisation-in-ireland-new-and-emerging-congregated-settings-for-people-with-disabilities/>> Accessed 3 June 2022.

¹¹ Gautam Gulati, Alan Cusack, Shane Kilcommins and Colum P. Dunne, ‘Intellectual disabilities in Irish prisons: Could Article 13 of the UNCRPD hold the key?’ (2020) 68 *Int J Law Psychiatry* 101540.

¹² Alan Cusack, ‘Victims of Crime with Intellectual Disabilities and Ireland’s Adversarial Trial: Some Ontological, Procedural and Attitudinal Concerns’ (2017) 68(4) *Northern Ireland Legal Quarterly* 433; Janine Benedet and Isabel Grant, ‘Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues’ (2007) 52(3) *McGill Law Journal* 515.

confession and a potential miscarriage of justice.¹³ In a recent US dataset, for example, a quarter of exonerations from false confessions were from people with intellectual disabilities.¹⁴ In Ireland, this risk was realised in the findings of the Commission of Investigation into the Dean Lyons case, where a young man who was described as ‘borderline learning disabled’ falsely confessed to a double murder in Grangegorman.¹⁵

Despite international recognition of a need for awareness around disabilities in the criminal justice system, less than half of the signatories of the United Nations Rights of People with Disabilities (UNCRPD) report disability awareness training for law enforcement officers and even fewer report advances in measures taken specifically in respect of access to justice for people with intellectual disabilities.¹⁶ Meanwhile, evidence suggests that people with intellectual disabilities can feel ‘frightened and confused’ in their interactions with the legal system, report challenges in understanding information and a broad paucity of practical and emotional supports in their experience of the criminal justice system.¹⁷

In this paper, we briefly outline the international obligations, and set out national safeguards, that shape the treatment of suspects within intellectual disabilities in Ireland. In recognising however that the meaningful operationalisation of these safeguards – and, by extension, the realisation of Ireland’s international human rights obligations – is often contingent upon securing a correct, and early, identification of a suspect’s disability, the paper places an emphasis on the unmet need for dialogue, training and enculturation at all frontiers of the Irish criminal process with regard to the cognitive and social indices of intellectual impairment. Against a backdrop of heightening political, media and legal debate concerning the focus, content and reach of the terms of the draft *An Garda Síochána (Powers) Bill*, the timing of this reformative dialogue, it is submitted, is uniquely ripe.¹⁸ It is hoped that the insights raised herein will generate light, not further heat, for policymakers by offering a blueprint for legislative and procedural reform that promises to align Irish criminal procedure with the human rights exigencies mandated under international conventions.

International Obligations

The Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 (‘The Declaration’) includes articles in respect of access to

¹³ See generally, Samson J. Schatz, ‘Interrogated with intellectual disabilities: The risks of false confession’ (2018) 70(2) *Stanford Law Review*, 643–690; Saul M. Kassin and others, ‘Redlich Police-Induced Confessions: Risk Factors and Recommendations’, (2010) 34 (3) *Law & Human Behaviour* 3.

¹⁴ Samson Schatz, ‘Interrogated with Intellectual Disabilities: The Risks of False Confession’ (2018) 70 *Stanford Law Review* 643.

¹⁵ George Birmingham SC, ‘Department of Justice, Commission of Investigation into the Dean Lyons case’, 149 <<https://www.justice.ie/en/JELR/DeanLyonsRpt.pdf/Files/DeanLyonsRpt.pdf>> Accessed 1 January 2021.

¹⁶ Gautam Gulati and others, ‘Human Rights, Public Health, and Disability Awareness Training of Police’ (2021) *Health and Human Rights Journal* <<https://www.hhrjournal.org/2021/12/human-rights-public-health-and-disability-awareness-training-of-police>>. Accessed 8 December 2021. See also, UN Treaty Bodies Database <<https://tbinternet.ohchr.org/SitePages/Home.aspx>> Accessed 1 November 2021.

¹⁷ Gautam Gulati and others, ‘Experiences of people with intellectual disabilities encountering law enforcement officials as the suspects of crime - A narrative systematic review’ (2020) 71 *Int J Law Psychiatry* 101609.

¹⁸ Department of Justice, ‘An Garda Síochána (Powers) Bill, General Scheme’ <[https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf/Files/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf/Files/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)> Accessed 26 October 2021.

justice. Article 8 of the Declaration states that ‘Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’ Article 10 of the Declaration states that ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.’ Accordingly, barriers to a fair and public hearing or to an effective remedy are contrary to human rights as described in the Declaration.¹⁹ The principle of access to justice for all under international law was further strengthened on 23 March 23 1976 when the International Covenant on Civil and Political Rights (‘The Covenant’) entered into force. Article 2 of the Covenant states that each party to it will ‘ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.’ The Covenant also includes the obligation to ‘ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.’²⁰

The UN Convention on the Rights of Persons with Disabilities (‘The Convention’) was adopted in 2006.²¹ Ireland signed the Convention in 2007 and, further to its ratification in March 2018, it entered into force from 19 April 2018. It applies established human rights principles from the UN Declaration on Human Rights to the situation of people with disabilities. Article 13 of the UNCRPD on ‘Access to Justice’ states:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

While the UNCRPD has been of significant influence at an international policy level in establishing universal rights for persons with disabilities, the commitments contained in the instrument – including Article 13 – are notable for their lack of lawful authority.²² Arguably a stronger source of justiciable rights, at an international level, in this regard is the European Convention of Human Rights which enshrines an individual’s right, not only to liberty and security (Article 5), but also to a fair trial (Article 6) and to freedom from torture (Article 3).²³ Indeed, the commitment within Strasbourg to vindicating the rights of

¹⁹ United Nations, *Universal Declaration of Human Rights* <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> Accessed 1 November 2021.

²⁰ United Nations, *International Covenant on Civil and Political Rights* <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> Accessed 24 October 2021.

²¹ United Nations, *Convention on the Rights of People with Disabilities* <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> Accessed 1 January 2021.

²² See, for instance, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland (CRPD/C/15/R.2/Rev.10).

²³ The protections contained in the European Convention on Human Rights were given lawful authority in Ireland with the enactment of the European Convention on Human Rights Act 2003. Section 2 of the Act

persons with intellectual disability was recently brought to the fore in *Alajos Kiss v. Hungary*, where the European Court of Human Rights noted that people with an intellectual disability are ‘a particularly vulnerable group in society’.²⁴ In overturning a Hungarian blanket provision which denied voting rights to people with a mental disability under partial guardianship, it held that if a restriction on fundamental rights applies to a particularly vulnerable group who have suffered considerable discrimination in the past, such as the mentally disabled, the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. More recently, in *ZH v Hungary*,²⁵ the Strasbourg Court ruled that Article 3 and Article 5 of the Convention had been breached in circumstances where Hungarian police authorities failed to take special measures to address the communication needs of a detainee who was ‘innately deaf and dumb and had medium-grade intellectual disability’.²⁶

At an EU level meanwhile, Directive 2012/13/EU on the right to information in criminal proceedings lays down rules concerning suspects’ or accused persons’ right to information relating to their rights in criminal proceedings and to the accusation against them. Under Article 3, suspects or accused persons should be provided promptly with information concerning certain procedural rights, such as the right of access to a lawyer, any entitlement to free legal advice, the right to remain silent and the right to interpretation and translation, which may include sign language interpretation or alternative communication mechanisms. Member States are also to ensure that the information provided for is given in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons. At the time of writing, Ireland has yet to transpose this instrument into law and it remains to be seen whether the terms of the Directive would be regarded by Ireland’s courts as being ‘sufficiently precise’ and ‘unconditional’ to have direct effect in this jurisdiction.²⁷ However, the momentum within the EU in the direction of approximating domestic laws to establish common, procedural safeguards for accused persons is clear from this instrument.

More recently, this trend is evident in the terms of Recommendation C (2013) 8178/289 on ‘procedural safeguards for vulnerable people suspected or accused in criminal proceedings’ which was passed by the European Council with the aim of encouraging Member States to strengthen the procedural rights of all suspects or accused persons who are not able to understand and effectively participate in criminal proceedings due to their age, mental or physical condition or disabilities.²⁸ In particular, the instrument aims to ensure that vulnerable persons are recognised and should be offered additional safeguards

provides that Irish laws will be interpreted, ‘in so far as is possible’, in a manner that is compatible with the Convention. Thus, the Convention is incorporated in an interpretative or indirect, as opposed to direct, manner in Ireland. For a discussion of the standing of the Convention in Ireland, see Suzanne Egan, ‘The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation’ (2003) 25(1) *Dublin University Law Journal* 230.

²⁴ *Alajos Kiss v. Hungary*, Application no. 38832/06 (ECtHR, 20 May 2010).

²⁵ App no. 28973/11 (ECtHR, 8 November 2012).

²⁶ *ibid* p2, [7].

²⁷ Case 26/62 N.V. *Algemeine Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

²⁸ European Commission, ‘Commission recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings: C(2013)8178’ (2013) <[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2013\)8178&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2013)8178&lang=en)> Accessed 1 October 2021.

such as an appropriate adult and that ‘in order to ensure that their fair trial rights are ensured, they should not be able to waive their right to a lawyer.’

Domestic Safeguards

Quite apart from the international imperatives which operate to safeguard the rights of vulnerable suspects, a series of domestic safeguards have evolved within Irish criminal procedure and policy over the past four decades for the purpose of vindicating the rights of members of this constituency.

Right to Medical Assistance

In Garda custody, there is a requirement for a member in charge to summon a doctor under the Criminal Justice Act 1984 (Treatment of Persons in Custody of in Garda Síochána Stations) Regulations 1987 (‘Custody Regulations’) in certain specified situations (including where a person fails to respond normally to questions or appears to suffer from mental illness), and this is usually a general practitioner. Few cases involving detained suspects get referred to psychiatrists. Helpfully, in the limited cases where such referrals do take place - namely, where a question of involuntary psychiatric admission under the Mental Health Act 2001 exists - an opinion on fitness to be interviewed can be requested. There is however a paucity of training for medical practitioners attending Garda stations. Concern was 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, ‘perfunctory’ medical examinations, limitations to record sharing and a need for better training of medical practitioners attending Garda stations.²⁹ With training and additional resources both in primary and secondary healthcare, general practitioners needing specialist advice should be able to access psychiatric expertise and it has been argued that this should not be predicated on making a recommendation under the Mental Health Act 2001.³⁰

Access to a Solicitor

Access to a solicitor while detained in Garda custody is in particular seen as a means of equalising relations between the accused and the state in the detention process. It had previously been held in Ireland that an accused had a common law right of reasonable access to a solicitor while detained in such custody.³¹ The right was deemed to be constitutional in origin in 1990.³² Two recent Supreme Court decisions considered the right of reasonable access to a solicitor in Garda custody.³³ The Supreme Court judgment in

²⁹ Council of Europe, ‘Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 26 September 2014’ (2014) <<https://rm.coe.int/1680696c9a>> Accessed 1 October 2021.

³⁰ Gautam Gulati and others, ‘What is the role of doctors in respect of suspects with mental health and intellectual disabilities in police custody?’ (2021) *Ir J Psychol Med.* <<https://www.cambridge.org/core/journals/irish-journal-of-psychological-medicine/article/what-is-the-role-of-doctors-in-respect-of-suspects-with-mental-health-and-intellectual-disabilities-in-police-custody/6FC09AA845C86BEAD894D3A6E363F7A8>> Accessed 1 November 2021.

³¹ See *People (DPP) v Madden* [1977] IR 336. See also s 5 of the Criminal Justice Act 1984 and the Criminal Justice Act (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987. See also the EU Access to a Lawyer Directive 2013/48/EU from which Ireland has a derogation.

³² *People (DPP) v Healy* [1990] 2 IR 73.

³³ *In People (DPP) v Gormley and White* [2014] IESC 17.

People (DPP) v Gormley and White was significant in that it expands the protection afforded to detainees by making it clear that they should not be interrogated without having first had access to legal advice, should it be requested.³⁴ The decision also locates the right of access to a lawyer within the right to a fair trial. The decision is also interesting in that it had long been accepted that there was no entitlement for a solicitor to sit in on the interrogation of the detainee. But this position was cast into doubt by the obiter comments of Clarke J (as he then was) and by a subsequent Practice Direction issued by the Director of Public Prosecutions on access to a solicitor by persons in Garda custody, which permits the presence of a solicitor during interview, if necessary.³⁵

This issue subsequently fell to be determined in *The People (DPP) v Doyle*.³⁶ The Supreme Court held that it could not be concluded that it was a necessary part of the right to a trial in due course of law under Article 38.1 of the Constitution that a lawyer should be present for the interviewing of a suspect in Garda custody. The European Court of Human Rights in *Doyle v Ireland* (51979/17) further held that there had been no breach of Article 6 of the European Convention on Human Rights.

The right of access to a lawyer is, of course, also safeguarded by Art 6(3)(c) of the European Convention on Human Rights.³⁷ In *Salduz v Turkey*, for example, the Court noted that:

in order for the right to a fair trial to remain sufficiently ‘practical and effective’, Art.6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.³⁸

The exclusion of lawyers during interrogation in Ireland remains problematic however having regard to ECHR jurisprudence, not least because there are no compelling justifications for the practice. In these circumstances, the fairness of admissions, when challenged, will be considered on a case-by-case basis, having regard, inter alia, to considerations including detainee vulnerability. The indices of fairness considered in *Doyle* provide considerable scope to challenge admissions made in an interrogation in Garda custody when a lawyer is not present, particularly in relation to detainee vulnerability.

Specialist Interviewing

Following the Commission of Investigation into the Dean Lyons case, and the Morris Tribunal with respect to police investigative practices,³⁹ a new interview model –the Garda

³⁴ See also *DPP v Howard* [2016] IECA 219; *DPP v Mooney* [2015] IECA 173; *DPP v Nash* [2018] IECA 147.

³⁵ See An Garda Síochána, ‘Code of Practice on Access to a Solicitor by Persons in Garda Custody’ (2015) <<https://www.garda.ie/en/about-us/publications/policy-documents/code-of-practice-on-access-to-a-solicitor-by-persons-in-garda-custody.pdf>> Accessed 16 January 2022.

³⁶ [2017] IESC 1.

³⁷ See *Averill v UK* (2001) 31 EHRR 36.

³⁸ (2009) 49 EHRR 19 [55]. The recent decision in *Beuze v Belgium* (2019) 69 EHRR. 1 is also instructive. See also *Ibrahim v United Kingdom* (2015) 61 EHRR 9.

³⁹ Frederick Morris P, ‘The interrogation of Suspects in Garda Custody: Report VI’, delivered to the Minister for Justice on April 24th, 2008’ <<https://morristribunal.ie/Narrative.asp-ObjectID=310&Mode=0&RecordID=113.htm>> Accessed 1 October 2021.

Siochana Interview Model— was mainstreamed in Irish policing operations,⁴⁰ which includes accommodations for specialist ‘cognitive interviews’ for individuals with intellectual disabilities. The key elements of a cognitive interview include the development of rapport with the witness, the use of open-ended questions, neutral questions and avoidance of leading or suggestive questions and funnelling the interview, beginning with broader questions and narrowing down to more specific questions.⁴¹ The model of cognitive interviews adopted in Ireland is based on an adaptation of the PEACE method, which has been described as ‘very effective in decreasing suggestibility in vulnerable persons’.⁴²

The Responsible Adult safeguard and Registered Intermediaries

Whilst the presence of a ‘Responsible Adult’ for people with ‘mental handicap’ is within the An Garda Síochána’s custody regulations,⁴³ there is no data as to the consistency of application of this safeguard and further a lack of an accompanying code of practice that defines who may be an responsible adult and what their roles may usefully be.⁴⁴ The Garda Síochána (Powers) Bill 2021 may be an opportunity to develop this safeguard and an accompanying code of practice.⁴⁵ Studies of the views of people with intellectual disabilities reveal that the support needed is not limited to communication but also includes practical and emotional support.⁴⁶ The role of the responsible adult may usefully mirror the roles of an ‘Appropriate Adult’ as in the Police and Criminal Evidence Act 1984 (England and Wales) encompassing support with communication as well as practical support.

The provision of registered intermediaries may be another potential future safeguard. The National Disability Authority envisages the role of an intermediary as facilitating communication during the police investigation and at trial between a person with significant communication difficulties and others in the justice system. They recommend that a ‘Registered Intermediaries Scheme’ should be available to witnesses, victims and significantly, to accused persons who may be in need of support due to their communication difficulties, to give better evidence, at all stages of the criminal justice system, including in Garda stations and in court settings.⁴⁷

⁴⁰ Geraldine Noone, ‘An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects’ in John Pearse (ed), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (Wiley Blackwell 2015).

⁴¹ Ronald P Fisher and Edward R Geiselman, ‘The cognitive interview method of conducting police interviews: Eliciting extensive information and promoting therapeutic jurisprudence’ (2010) 33 *Int J Law Psychiatry* 321–328.

⁴² Kevin Sweeney, ‘The Changing Nature of Police Interviewing in Ireland’ (PhD Thesis, University of Limerick 2016).

⁴³ Garda Custody Regulations, S.I. No. 119/1987 Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987 as amended by S.I. No. 641/2006 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) (Amendment) Regulations 2006.

⁴⁴ See further, Alan Cusack, ‘An Overview of the Legal Position of Vulnerable Suspects & Defendants in Ireland’ (Irish Criminal Justice Agencies Conference, 4 June 2021).

⁴⁵ Department of Justice, ‘An Garda Síochána (Powers) Bill, General Scheme’ <[https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf/Files/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf/Files/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)> Accessed 26 October 2021.

⁴⁶ Gautam Gulati and others, ‘Experiences of people with intellectual disabilities encountering law enforcement officials as the suspects of crime - A narrative systematic review’ (2020) 71 *Int J Law Psychiatry* 101609.

⁴⁷ National Disability Authority, ‘NDA Independent Advice Paper on the use of intermediaries in the Irish justice system’ (2020) <<https://nda.ie/publications/justice-and-safeguarding/access-to-justice/nda-independent-advice-paper-on-the-use-of-intermediaries-in-the-irish-justice-system.pdf>> Accessed 1 October 2021.

Accessible Information

There is a real need to provide information in an accessible format to people with disabilities as they interface the criminal justice system.⁴⁸ This may include Braille, Irish Sign Language, Makaton or at the very minimum an easy-to-read version of information prepared with plain English and images that improve comprehension. This is particularly poignant in matters relating to the comprehension of basic rights such as the rights of silence and others as set out in the Form C72 (s) Notice of Rights given to accused persons in Garda custody. In *DPP v O'Kelly*, McCracken J stated:

...The Regulations require that the accused be informed of his rights, whether he understands them or not, and the essential proof at the hearing is that he was so informed. In my opinion, all that is required is that the relevant information is given to the accused, and the relevant notice is handed to him.⁴⁹

Nonetheless, there are obligations on An Garda Síochána and Court services to adopt inclusionary communication practices arising under both national⁵⁰ and international law.⁵¹ Arguably, accessibility of information needs consideration at each stage of the criminal justice pathway including at Court. Whilst courts can facilitate Irish sign language and other translators, much progress remains to be made to develop appropriate easy to read materials for accused persons with an intellectual disability. Even if specialist mental health courts are considered for development in Ireland,⁵² the issues of accessible information will remain equally, if not more pertinent. One useful approach for people with intellectual disabilities, is the preparation of booklets with stories in picture format, which may usefully inform people what to expect in the court setting. An initiative in England and Wales, '*Books Beyond Words*' is notable in this respect and may usefully be developed for an Irish context.⁵³

Defining and Identifying Vulnerability

It has been acknowledged that 'there exists no overarching legal definition of vulnerable adult persons on the international or European level' and this remains a real challenge.⁵⁴ Whilst there are clear legal imperatives – at a domestic and international level – for adopting safeguards to protect vulnerable accused persons, the findings from Ireland's largest and most contemporary empirical inquiry in this area similarly report that law

⁴⁸ Gautam Gulati and others, 'Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; thematic analysis informed by 1537 person-years' experience' (2021) 75 Int J Law Psychiatry 101683.

⁴⁹ *DPP v O'Kelly* [1998] IEHC 22.

⁵⁰ s 28, Disability Act 2005; and s 42, Irish Human Rights and Equality Commission Act 2014.

⁵¹ Article 9, UNCRPD.

⁵² Sarah Ryan & Darius Whelan, 'Diversion of Offenders with Mental Disorders: Mental Health Courts' (2012) Web Journal of Current Legal Issues

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010512> Accessed 1 October 2021.

⁵³ Sheila Hollins and Valerie Sinason. *Going to Court: Books Beyond Words* (London, UK).

⁵⁴ Barbara Linder, Nora Katona and Julia Kolda, 'Dignity at trial: Enhancing procedural safeguards for suspects with intellectual and psychosocial disabilities' (2018).

<https://bim.lbg.ac.at/sites/files/bim/attachments/04_handbook_dignity_at_trial.pdf> Accessed 12 April 2022.

enforcement agencies have difficulties recognising and responding to the needs of vulnerable accused persons, in particular those with intellectual disabilities.⁵⁵

The Custody Risk Assessment

The current procedure for identifying vulnerability in Garda custody relies on the Custody Risk Assessment (C84(A)) and the member in charge who is additionally tasked with decision to seek medical advice where necessary based on Custody Regulations.⁵⁶ The current C84(A), which was introduced in September 2018 following recommendations from the Advisory Committee on the Garda Interviewing of Suspects (“Smyth Committee”) includes questions asked of the detainee in respect of medication, drug ingestion, alcohol consumption, drug or alcohol dependence, but equally prompts Gardaí to enquire of the detainee in respect of ‘self-harm, mental health problems, depression....or are you considered mentally vulnerable’. It includes questions in respect of ‘help with reading/writing or do you have any learning difficulties’. The custody risk assessment in addition asks for ‘Garda observations’ in respect of self-harm, mental illness or ‘does the arrested person exhibit any sign of learning difficulties’.

The Custody Regulations

The Custody Regulations, meanwhile, state:

- Regulation 21. (1) If a person in custody—
- (a) is injured,
 - (b) is under the influence of intoxicating liquor or drugs and cannot be roused,
 - (c) fails to respond normally to questions or conversation (otherwise than owing to the influence of intoxicating liquor alone),
 - (d) appears to the member in charge to be suffering from a mental illness, or
 - (e) otherwise appears to the member in charge to need medical attention,
- The member in charge shall summon a doctor or cause him to be summoned...⁵⁷

The above indices are expected to act as a prompt for the member in charge to consider potential vulnerability. Nonetheless, the present C84(A) is heavily reliant on self-report and observations of Gardaí in respect of identifying mental illness or learning disability (a term used interchangeably with intellectual disability). Similarly, the criteria outlined in Regulation 21(1)(c) of the Custody Regulations offer limitations in respect of identifying people who may, for example, have an intellectual disability.

Recognising the Presence of Intellectual Disability

The challenge of recognising the presence of an intellectual disability is in itself, not specific to the Irish context. Law enforcement officers worldwide report challenges in this respect,⁵⁸ and may use informal methods to help to identify someone with an intellectual disability, including facial characteristics and comprehension, as well as behaviour in

⁵⁵ Gautam Gulati and others, ‘Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; thematic analysis informed by 1537 person-years’ experience’ (2021) 75 *Int J Law Psychiatry* 101683.

⁵⁶ The Risk Assessment Form was introduced via HQ Directive No.: 048/2018.

⁵⁷ S.I. No. 119/1987 - Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.

⁵⁸ Gisli Gudjonsson, ‘Persons at risk during interviews in police custody: The identification of vulnerabilities’ (London: HMSO 1993).

custody.⁵⁹ Some other jurisdictions have attempted to develop ‘checklists’. For example, in the US, one such checklist includes when a suspect changes version of events in response to questions from police more than once; when a suspect agrees without objection to waiver of Miranda rights; when they cannot explain Miranda rights to police officers, when a suspect agrees to allow police officers to search or confiscate personal property without a search warrant, agrees to meet and be interviewed by police officers without an attorney present, when a suspect’s version(s) of events does not match information obtained by police, when a suspect does not understand the questions being asked by police or when a suspect responds to investigator queries with irrelevant and/or highly improbable versions of events.⁶⁰

The Garda Síochána (Powers) Bill 2021

In recent months however, emergent evidence of a welcome commitment to addressing the diagnostic shortcomings of Irish criminal procedure appears to have taken hold at a political level. Most notably, the General Scheme of the Garda Síochána (Powers) Bill (Head 8), which was published by Minister for Justice, Heather Humphreys TD on 14 June proposes to empower the Garda Commissioner (subject to the consent of the Minister for Justice) to issue guidelines detailing, inter alia, the steps which a member of the Garda Síochána may take to identify a person with ‘impaired capacity’.⁶¹

Significantly, this constituency appears to be broadly conceived under the legislation and under, Head 8, Subhead 4 (a) of the Bill, the ‘impaired capacity’ designation includes:

Any person who is at the time at which the power is being or is to be exercised in relation to him or her— (a) suffering from a disorder of the mind, intellectual disability or physical disability which renders him or her, at the time— (i) unable to understand what is happening or to make decisions; (ii) unable to understand a caution; (iii) unable to act in their own best interests during interview; (iv) unusually suggestible or compliant; or (v) unable to communicate effectively with members of the Garda Síochána.

(b) under the influence of any substance which renders him or her, at the time, unable to understand what is happening or to make decisions affecting his or her rights or treatment.

A Functional Assessment Model

In representing an express procedural alignment with a functional assessment model (ie based on ability at the time of assessment) the proposed approach is to be welcomed for empowering members of An Garda Síochána to identify vulnerability (and, by extension, to take appropriate safeguarding procedural measures) based on an individual’s response to functional questions (as opposed to diagnostic criteria).

⁵⁹ Lyn Douglas and Monica Cuskelly, ‘A Focus Group Study of Police Officers’ Recognition of Individuals with Intellectual Disability’ (2012) 19 *Psychiatry, Psychology and Law* 35-44.

⁶⁰ Daniel W. Close and Hill M. Walker, ‘Navigating the criminal justice system for youth and adults with developmental disabilities: Role of the forensic special educator’ (2010) 2 *The Journal of Behavior Analysis of Offender and Victim Treatment and Prevention* 74-103.

⁶¹ Head 8(3)(a) of An Garda Síochána (Powers) Bill, General Scheme <[https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf/Files/Gen_Scheme_of_AGS_\(Powers\)_Bill.pdf](https://www.justice.ie/en/JELR/Gen_Scheme_of_AGS_(Powers)_Bill.pdf/Files/Gen_Scheme_of_AGS_(Powers)_Bill.pdf)> Accessed 15 February 2022.

The mere presence of a diagnosis does not mean there is an impairment of capacity. Therefore, to say that all people with an intellectual disability or a particular condition, simply because of the condition (or 'Diagnosis') are not capable doing something is a fallacy, not only stigmatizing individuals but it is also an affront to their personhood and ability to exercise legal capacity. A person should not be defined by a disability. Therefore any model assessing ability that relies solely on diagnosis (a 'Diagnostic' or 'Status' approach) is intrinsically flawed.

...A person with disabilities may be regarded as a person with a disability in one society or setting, but not in another, depending on the role that the person is assumed to take in his or her community. The perception and reality of disability also depend on the technologies, assistance and services available, as well as on cultural considerations. Disability resides in society, not in an individual (UN Enable).⁶²

A functional approach to assessing capacity has the advantage of being time specific, decision specific and context specific. Moreover, this does not reside in a diagnosis. A functional approach to the assessment of capacity is widely accepted over a status approach,⁶³ but is not uncontested.⁶⁴ The assessment in any functional approach may include, for example, *'is this person able to make the decision to do this, at this time, in this set of circumstances?'* This is the approach used, for example, in the Assisted Decision Making (Capacity) Act 2015.

The Act proposes to change the law from the current all or nothing status approach to a flexible functional definition, whereby capacity is assessed only in relation to the matter in question and only at the time in question. If a person is found to lack decision-making capacity in one matter, this will not necessarily mean that s/he also lacks capacity in another matter. The Act recognises that capacity can fluctuate in certain cases.⁶⁵

Given the finding that Irish law enforcement officers find it challenging to recognise people who may have disabilities,⁶⁶ the functorial criteria set out in the Garda Síochána (Powers) Bill 2021 could usefully enhance recognition of vulnerability in the setting of the police station, whilst moving away from a 'Diagnostic/Status' approach.

Defining 'Vulnerability' in Policing (England and Wales)

An example of a similar functional standard that has been introduced successfully in another common law jurisdiction can be found in Code C of the Code of Practice the

⁶² UN Enable, 'FAQs' <<https://www.un.org/esa/socdev/enable/faqs.htm>> Accessed 18 February 2022.

⁶³ Mary Donnelly, 'Assessing Legal Capacity: Process and Operation of the Functional Test' (2007) 2 *Judicial Studies Institute Journal* 141-168.

⁶⁴ Eilionóir Flynn, 'The rejection of capacity assessments in favor of respect for will and preferences: the radical promise of the UN Convention on the Rights of Persons with Disabilities' (2019) 18 (1) *World psychiatry* 50-51.

⁶⁵ Department of Justice, 'Assisted Decision-Making (Capacity) Act 2015' <[https://www.justice.ie/en/JELR/Pages/Assisted_Decision-Making_\(Capacity\)_Act_2015](https://www.justice.ie/en/JELR/Pages/Assisted_Decision-Making_(Capacity)_Act_2015)> Accessed 18 February 2022.

⁶⁶ Gautam Gulati and others, 'Challenges for people with intellectual disabilities in law enforcement interactions in Ireland; thematic analysis informed by 1537 person-years' experience' (2021) 75 *Int J Law Psychiatry* 101683.

Police and Criminal Evidence Act 1984 of England and Wales.⁶⁷ This protocol sets out criteria for identifying persons who need additional safeguards:

“Vulnerable’ applies to any person who, because of a mental health condition or mental disorder:

(i) may have difficulty understanding or communicating effectively about the full implications for them of any procedures and processes connected with:

their arrest and detention; or (as the case may be) their voluntary attendance at a police station or their presence elsewhere for the purpose of a voluntary interview; and the exercise of their rights and entitlements.

(ii) does not appear to understand the significance of what they are told, of questions they are asked or of their replies:

(iii) appears to be particularly prone to:

becoming confused and unclear about their position; providing unreliable, misleading or incriminating information without knowing or wishing to do so; accepting or acting on suggestions from others without consciously knowing or wishing to do so; or readily agreeing to suggestions or proposals without any protest or question.

Discussion

The proposed Irish position as set out in the general scheme has similarities in respect of ‘vulnerability’ assessment as adopted in Code C. This similarity lies with the adoption of a functional approach to assessment as opposed to the earlier approach which overly relied on diagnostic considerations and self-report. Accordingly, in representing, not only an overdue statutory recognition of the need to provide definitive guidance to frontline police officials about the indices of vulnerability, but also the importance of adopting a functional decision-making model, the proposed legislation is to be welcomed for addressing one of the key challenges, that of recognition, which has been found to inhibit access to justice for vulnerable persons.⁶⁸ This could be argued as a welcome advancement in addressing barriers to accessing justice equally as envisioned in Article 13 of the UNCRPD.⁶⁹

And yet, there is further room for improvement. For instance, the current definition of ‘impaired capacity’ in the general scheme of the Garda Síochána (Powers) Bill does not extend to persons with developmental disabilities. This is concerning as worldwide surveys report that between 7.9% and 32.5% of all people with autism spectrum disorder have

⁶⁷ Home Office, ‘Police and Criminal Evidence Act 1984 (PACE) codes of practice’ <<https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice>> Accessed 1 October 2021.

⁶⁸ Gautam Gulati and others, ‘The evaluation of a training course to enhance intellectual disability awareness amongst law enforcement officers: a pilot study’ (2020) *Irish journal of psychological medicine*, Advance online publication. Available at <<https://doi.org/10.1017/ipm.2021.80>> Accessed 17 January 2022.

⁶⁹ However, it is to be noted that some CRPD Scholars are opposed to a functional assessment. See for example Liz Brosnan and Eilíonóir Flynn, ‘Freedom to Negotiate: A Proposal Extricating ‘Capacity’ from ‘Consent’ (2017) 13(2) *International Journal of Law in Context*; and Eilíonóir Flynn and Anna Arstein-Kerslake, ‘Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity’ (2014) 10(1) *International Journal of Law in Context* 81.

reported contact with the police.⁷⁰ People with autism may find the setting of the police station particularly anxiety provoking.⁷¹ They require particular safeguards in the provision of information, interviews and support in the setting of the police station.⁷² Additionally, law enforcement officers report challenges in identifying people with autism.⁷³ Hence, there is an argument for the inclusion of ‘*developmental disabilities*’ within the relevant definition in the Heads of the Bill.

Moreover, the success of this legislative model will ultimately be contingent upon the both completeness and accuracy of any guidelines that are promulgated by the Commissioner pursuant to this new proposed statutory authority. For this reason, it would be important to evaluate the impact of this change in practice in Ireland when it does occur. There will also be important training considerations for all those who interact with people in the criminal justice system; Gardaí, doctors, court officials, solicitors, barristers and the judiciary; codification in itself and without practical training may not be sufficient. Such training need not be resource intensive or onerous. A pilot scheme in the Irish Mid-West has demonstrated perceptible benefits in perceived confidence and skills in participating Gardaí from a single 90 minute interactive seminar.⁷⁴

Conclusion

There are a range of procedural safeguards that are relevant and potentially available to an accused person with an intellectual disability in Ireland such as those of a responsible adult and the availability of cognitive interviews. Equally there are those that can be further strengthened, such as access to a solicitor during interrogation, access to specialist medical expertise and the availability of information in an accessible format. However, without an emphasis on defining and recognising vulnerability, there is a real risk that the available safeguards may not be applied, thereby compromising the forensic accuracy of the pre-trial process. The direction of legal reform in this area through statutory definition of ‘impaired capacity’ and the codification of procedures in recognising vulnerability is arguably a progressive development in respect of aligning Irish criminal procedure with the human rights exigencies mandated under international conventions. However, there are significant training considerations, and further, empirical research will be needed to evaluate the consistency of application of these procedures, and the subsequent application of safeguards in a real-world setting.

⁷⁰Dylan S Cooper and others, ‘Policy Gaps and Opportunities: A Systematic Review of Autism Spectrum Disorder and Criminal Justice Intersections’ (2022) *Autism* <<https://doi.org/10.1177/13623613211070341>> Accessed 18 February 2022.

⁷¹Chloe Alice Holloway and others, ‘Exploring the autistic and police perspectives of the custody process through a participative walkthrough’ (2020) 97 *Research in developmental disabilities* 103545.

⁷²Dylan S Cooper and others, ‘Policy Gaps and Opportunities: A Systematic Review of Autism Spectrum Disorder and Criminal Justice Intersections’ (2022) *Autism* <<https://doi.org/10.1177/13623613211070341>> Accessed 18 February 2022.

⁷³Kirsten S Railey and others ‘An Exploration of Law Enforcement Officers’ Training Needs and Interactions with Individuals with Autism Spectrum Disorder’ (2020) 50 *J Autism Dev Disord* 101–117.

⁷⁴Gautam Gulati and others, ‘The evaluation of a training course to enhance intellectual disability awareness amongst law enforcement officers: a pilot study’ (2020) *Irish journal of psychological medicine*, Advance online publication. Available at <<https://doi.org/10.1017/ipm.2021.80>> Accessed 17 January 2022.