



# An Garda Síochána

## Human Rights Framework

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## TABLE OF CONTENTS

<b>TABLE OF CONTENTS .....</b>	<b>2</b>
<b>SECTION 1.....</b>	<b>7</b>
INTRODUCTION.....	7
AIMS .....	9
RELEVANT TERMS AND DEFINITIONS .....	10
HUMAN RIGHTS SCREENING TOOL.....	11
<b>SECTION 2.....</b>	<b>12</b>
<b>HUMAN RIGHTS LAW OVERVIEW .....</b>	<b>12</b>
INTRODUCTION.....	12
WHAT ARE HUMAN RIGHTS?.....	12
UNIVERSAL AND INALIENABLE.....	12
INTERDEPENDENT AND INDIVISIBLE .....	12
EQUALITY AND NON-DISCRIMINATION .....	13
WHAT DO HUMAN RIGHTS DO? .....	13
WHAT IS A HUMAN RIGHTS VIOLATION? .....	14
HUMAN RIGHTS BASED POLICING .....	14
MARGIN OF DISCRETION.....	15
HUMAN RIGHTS IN THE LAW .....	16
HUMAN RIGHTS OF GARDA PERSONNEL .....	17
LEGALITY, NECESSITY, PROPORTIONALITY, ACCOUNTABILITY AND NON-DISCRIMINATION .....	17
INTERFERENCE WITH HUMAN RIGHTS .....	18
LEGITIMATE AIM .....	18
LEGALITY.....	19
NECESSITY AND PROPORTIONALITY .....	20
ACCOUNTABILITY .....	21
NON-DISCRIMINATION.....	24
<b>SECTION 3.....</b>	<b>25</b>
<b>SUBSTANTIVE HUMAN RIGHTS .....</b>	<b>25</b>
INTRODUCTION.....	25
KEY CONSTITUTIONAL AND HUMAN RIGHTS .....	27
PRINCIPLES FOR A HUMAN RIGHTS BASED APPROACH TO POLICING.....	30
RIGHT TO DIGNITY .....	31
RIGHT TO LIFE .....	32
PROHIBITION OF TORTURE .....	36
PROHIBITION OF SLAVERY AND FORCED LABOUR.....	39
THE RIGHT TO LIBERTY AND SECURITY OF PERSON .....	40
RIGHT TO FAIR TRIAL.....	43
NO PUNISHMENT WITHOUT LAW .....	45
THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE.....	46
THE RIGHT TO THE INVOLABILITY OF THE DWELLING.....	49
FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION .....	51
FREEDOM OF EXPRESSION .....	53
FREEDOM OF ASSEMBLY AND ASSOCIATION .....	55
RIGHT TO MARRY AND FOUND A FAMILY .....	57



# NEAMHSHRIANTA / UNRESTRICTED

RIGHT TO EFFECTIVE REMEDY .....	58
EQUALITY/NON-DISCRIMINATION.....	59
CHILDREN’S RIGHTS.....	61
PROPERTY .....	62
RIGHT TO EDUCATION .....	63
RIGHT TO FREE ELECTIONS .....	64
FREEDOM OF MOVEMENT.....	65
EXPULSION PROTECTIONS/ASYLUM.....	66
HUMAN RIGHTS IN AN OPERATIONAL CONTEXT .....	67
<i>Investigations/Operations</i> .....	67
<i>Discretion</i> .....	69
<i>Note taking</i> .....	70
DECISION MAKING MODEL .....	70
<b>SECTION 4.....</b>	<b>73</b>
<b>FURTHER READING .....</b>	<b>73</b>
RIGHT TO DIGNITY .....	73
<i>CONSTITUTION OF IRELAND 1937</i> .....	73
<i>ECHR</i> .....	73
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	74
<i>Code of Ethics for An Garda Síochána</i> .....	74
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	74
RIGHT TO LIFE.....	76
<i>CONSTITUTION OF IRELAND</i> .....	76
<i>ECHR</i> .....	76
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	86
<i>Code of Ethics for An Garda Síochána</i> .....	86
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	87
PROHIBITION OF TORTURE.....	88
<i>CONSTITUTION OF IRELAND 1937</i> .....	88
<i>ECHR</i> .....	88
<i>Procedural Obligation</i> .....	91
<i>Criminal Justice (United Nations Convention against Torture) Act 2000</i> .....	92
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	92
<i>Code of Ethics for An Garda Síochána</i> .....	92
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	93
PROHIBITION OF SLAVERY AND FORCED LABOUR.....	96
<i>CONSTITUTION OF IRELAND 1937</i> .....	96
<i>ECHR</i> .....	96
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	97
<i>Code of Ethics for An Garda Síochána</i> .....	98
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	98
RIGHT TO LIBERTY AND SECURITY .....	100
<i>Constitution of Ireland 1937</i> .....	100
<i>ECHR</i> .....	100
<i>Charter of Fundamental Rights of the European Union</i> .....	109
<i>Garda Code of Ethics for An Garda Síochána</i> .....	109
<i>Other Relevant International Standards</i> .....	109
RIGHT TO FAIR TRIAL.....	115
<i>CONSTITUTION OF IRLEAND</i> .....	115
<i>ECHR</i> .....	119
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	123



## NEAMHSHRIANTA / UNRESTRICTED

<i>Code of Ethics for An Garda Síochána</i> .....	123
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	124
NO PUNISHMENT WITHOUT LAW .....	128
<i>Constitution of Ireland</i> .....	128
<i>European Convention on Human Rights</i> .....	131
<i>Charter of Fundamental Rights</i> .....	133
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	134
THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE.....	136
<i>Constitution of Ireland 1937</i> .....	136
<i>ECHR</i> .....	137
<i>Charter of Fundamental Rights of the European Union</i> .....	142
<i>Code of Ethics for An Garda Síochána</i> .....	142
<i>Other Relevant International Standards</i> .....	143
THE RIGHT TO THE INVIOABILITY OF THE DWELLING.....	146
<i>Constitution of Ireland 1937</i> .....	146
<i>ECHR</i> .....	153
<i>Charter of Fundamental Rights of the European Union</i> .....	153
<i>Code of Ethics for An Garda Síochána</i> .....	153
<i>Other Relevant International Standards</i> .....	153
FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION.....	155
<i>CONSTITUTION OF IRELAND</i> .....	155
<i>ECHR</i> .....	156
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	160
<i>CODE OF ETHICS FOR AN GARDA SÍOCHÁNA</i> .....	161
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	161
FREEDOM OF EXPRESSION .....	163
<i>CONSTITUTION OF IRELAND</i> .....	163
<i>ECHR</i> .....	164
<i>CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION</i> .....	168
<i>Garda Code of Ethics for An Garda Síochána</i> .....	168
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	168
FREEDOM OF ASSEMBLY AND ASSOCIATION.....	170
<i>CONSTITUTION OF IRELAND</i> .....	170
<i>ECHR</i> .....	171
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	177
<i>Code of Ethics for An Garda Síochána</i> .....	178
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	179
RIGHT TO MARRY AND FOUND A FAMILY .....	180
<i>CONSTITUTION OF IRELAND</i> .....	180
<i>ECHR</i> .....	180
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	181
<i>Code of Ethics for An Garda Síochána</i> .....	181
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	182
RIGHT TO AN EFFECTIVE REMEDY .....	183
<i>CONSTITUTION OF IRELAND</i> .....	183
<i>ECHR</i> .....	184
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	185
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	186
EQUALITY/NON-DISCRIMINATION .....	188
<i>CONSTITUTION OF IRELAND</i> .....	188
<i>ECHR</i> .....	188
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	191
<i>Code of Ethics for An Garda Síochána</i> .....	192



## NEAMHSHRIANTA / UNRESTRICTED

<i>Other Relevant International Standards</i> .....	193
CHILDREN’S RIGHTS .....	199
<i>CONSTITUTION OF IRELAND</i> .....	199
<i>ECHR</i> .....	201
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	202
<i>Code of Ethics for An Garda Síochána</i> .....	203
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	203
PROPERTY .....	207
<i>CONSTITUTION OF IRELAND</i> .....	207
<i>ECHR</i> .....	209
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	210
<i>CODE OF ETHICS FOR AN GARDA SÍOCHÁNA</i> .....	210
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	210
RIGHT TO EDUCATION .....	211
<i>CONSTITUTION OF IRELAND</i> .....	211
<i>ECHR</i> .....	212
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	213
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	213
RIGHT TO FREE ELECTIONS .....	217
<i>CONSTITUTION OF IRELAND</i> .....	217
<i>ECHR</i> .....	218
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	218
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	219
FREEDOM OF MOVEMENT .....	220
<i>CONSTITUTION OF IRELAND</i> .....	220
<i>ECHR</i> .....	220
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	223
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	223
EXPULSION PROTECTIONS/ASYLUM .....	224
<i>PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS</i> .....	224
<i>CONSTITUTION OF IRELAND 1937</i> .....	224
<i>ECHR</i> .....	224
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	226
<i>PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS</i> .....	227
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	227
<i>PROHIBITION OF EXPULSION OF NATIONALS</i> .....	228
<i>RIGHT TO ASYLUM</i> .....	228
<i>CHARTER OF FUNDAMENTAL RIGHTS</i> .....	229
<i>CODE OF ETHICS FOR AN GARDA SÍOCHÁNA</i> .....	230
<i>OTHER RELEVANT INTERNATIONAL STANDARDS</i> .....	230
SECTION 5 – ADMINISTRATION .....	232
<i>Welfare Support Mechanisms</i> .....	232
<i>Seconded Police Officers to An Garda Síochána</i> .....	234
<i>Publication</i> .....	234
<i>Monitoring and Review</i> .....	234
<i>Consultation</i> .....	234
<i>Compliance</i> .....	235
<i>Related Documents</i> .....	235
<i>Legal &amp; Human Rights Screening</i> .....	235
<i>Ethical Standards &amp; Commitments</i> .....	236
<i>Failure to comply with Human Rights Standards</i> .....	236
<i>Disclaimer</i> .....	236
<i>Framework &amp; Screening Tool Feedback</i> .....	236



# NEAMHSHRIANTA / UNRESTRICTED

Human Rights Framework

Version No 1.0

<b>APPENDIX 1</b> .....	<b>237</b>
ABBREVIATIONS AND GLOSSARY OF TERMS .....	237
<b>APPENDIX 2</b> .....	<b>237</b>
LIST OF HUMAN RIGHTS INSTRUMENTS .....	238
INTERNATIONAL STANDARDS .....	238



## SECTION 1

### Introduction

*“Treat others the way you would like to be treated”.*

Human rights are, in many ways, the modern, more detailed formulation of this rule. Human rights principles are built on the idea that all human beings have inherent human dignity. In addition to dignity, human rights also encompass the ideas of freedom, justice, equality and solidarity. In the performance of their functions, Garda Personnel must therefore refrain from infringing upon that dignity and must also act to protect the human dignity of others and of themselves. It is the aim of An Garda Síochána to uphold and protect the human and constitutional rights of individuals by providing a high quality, effective policing service in partnership with the community and in co-operation with other agencies.

An Garda Síochána is the national police service of Ireland and as such, each individual member of the Gardaí are directly invested with powers under statute and common law to assist in the performance of its functions. Without these and other powers, it would not be possible for An Garda Síochána to perform the functions as set out in the Garda Síochána Act 2005 (the 2005 Act).

Garda Personnel, by virtue of their position in society, are subject to many responsibilities in the performance of their functions. The Council of Europe<sup>1</sup> has recognised this, stating ***“police play a vital role, they are frequently called upon to intervene in conditions which are dangerous for their members, and their duties are made yet more difficult if the rules of conduct of their members are not sufficiently precisely defined”***.<sup>2</sup> Abuse of Garda

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<sup>1</sup>An international organisation established in 1949, to, amongst other things, defend human rights and promote the rule of law. The European Convention on Human Rights is a Council of Europe Treaty.

<sup>2</sup>Resolution 690 (1979) of the Parliamentary Assembly of the Council of Europe on the Declaration on the Police.



powers can have extremely serious consequences for the rights of the individual and for society as a whole. For these reasons, clear guidance regarding respect for individual's human rights by Garda Personnel is important.

Members of An Garda Síochána have the power under statute and common law to carry out their duties including defending themselves and others. A member of An Garda Síochána is defined in section 3 of the 2005 Act. If members of An Garda Síochána do not take the necessary and proportionate action to protect others from harm they may be violating the human rights of others. Therefore, it is important that members of An Garda Síochána give due regard to the rights of all individuals in how they exercise their discretion.

Garda Personnel must always consider their own health and safety when making decisions in the performance of their functions. Garda Personnel should accurately document all relevant information in relation to decisions made (actions/inactions), contemporaneously with every event in which they are engaged and the rationale for their decisions.

An Garda Síochána is fully committed to the fundamental principle of protecting the human and constitutional rights of all those it interacts with in everyday policing in accordance with section 7(1) of the 2005 Act. Human rights demands that An Garda Síochána applies best practice policing skills to achieve good results. In this respect, the least intrusive means should be applied in pursuing the objectives as provided for in section 7(1) of the 2005 Act. Upholding human rights standards, professional standards and policing ability are interdependent skills. The continuous development of these skills is necessary for Garda Personnel to be competent professionals. This document contains a comprehensive set of human rights standards which must be respected and protected by An Garda Síochána and Garda Personnel alike in the performance of their functions. This document demonstrates An Garda Síochána's commitment to providing a lawful, necessary, proportionate, accountable and non-discriminatory response to policing in a modern Irish society.





The fundamental principle underpinning this document must be demonstrated in every case where called upon to account, that is, ***any action taken must comply with the fundamental principles of legality, necessity, proportionality and accountability and be applied in a non-discriminatory manner.*** It is acknowledged that members are required to exercise considerable discretion in fulfilling their objectives. Decisions are often made instantly on the spot when responding to situations. This Human Rights Framework does not change this.

This Human Rights Framework has been drafted in accordance with the Constitution of Ireland, 1937, the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (Charter). This Human Rights Framework also documents other relevant international human rights standards as appropriate. Other international human rights instruments refer to human rights in specific contexts and these are reflected in Irish law transposing those instruments.

## AIMS

This Human Rights Framework formalises the principles that are already operated by An Garda Síochána, the aim of which is to:-

- ensure An Garda Síochána and Garda Personnel alike are fully aware of the human rights standards which must be respected and protected by An Garda Síochána and Garda Personnel in the performance of their functions including in relation to operational decision making and the preparation and implementation of operational orders;
- ensure that Garda Personnel can safely and effectively carry out their statutory and common-law duties in a human rights compliant manner;
- ensure that Garda Personnel accurately document all relevant information including the rationale for decisions and action taken/inaction, contemporaneously with every



- event in which they are engaged, which is essential in ensuring accountability as required;
- ensure that the development of all policies, procedures and guidance is supported by a comprehensive framework of human rights standards for use in embedding relevant human rights principles throughout the documents and ensuring they are drafted in a human rights compliant manner;
  - ensure that training and training materials are supported by a comprehensive framework of human rights standards for use in embedding relevant human rights principles in the training environment;
  - provide a framework of human rights standards against which all policies, procedures, guidance, training, training material, decision making, operational orders and practice is to be measured when reviewing and monitoring human rights compliance;
  - implement the Public Sector Equality and Human Rights Duty under the Irish Human Rights and Equality Commission Act 2014 (section 42).

### **Relevant Terms and Definitions**

The term ‘**member of An Garda Síochána**’, is defined in the Garda Síochána Act 2005, as amended, as a member of any rank (including the Garda Commissioner) and a reserve Garda but does not include a member of the civilian staff of An Garda Síochána.

The term ‘**civilian staff**’ in the Garda Síochána Act 2005, as amended, is utilised to reference civilian staff of all grades within An Garda Síochána.

The term ‘**Garda Personnel**’ in this Human Right Framework and accompanying Human Rights Screening Tool will be utilised to reference both members of An Garda Síochána and Garda staff.



**Appendix 1** to this Human Right Framework provides a table of Abbreviations and Glossary of Terms.

**Appendix 2** to this Human Right Framework provides a list of human rights instruments and international standards.

### **Human Rights Screening Tool**

This Human Right Framework is accompanied by a Human Rights Screening Tool which provides a structure for the development, implementation and monitoring of human rights compliance consistently across the three pillars of policy, training and operations. It aims to ensure human rights standards are met in accordance with legal obligations. This Screening Tool provides a set of questions to be applied and completed by those developing and implementing policy, developing and implementing training material, developing and implementing operational orders and inspection by supervisory officers, inspection and review teams or other agreed processes.



## SECTION 2

### HUMAN RIGHTS LAW OVERVIEW

#### Introduction

This Section is designed to provide guidance to Garda Personnel, so that they are aware of their rights and responsibilities in relation to respecting and protecting individuals' human rights.

#### What are human rights?<sup>3</sup>

The most important thing to understand about human rights is that they are just that, the rights of all humans. Human rights attach to all people solely by virtue of our humanity; every human being is born with these rights and maintains them throughout their entire life. A person's entitlement to their human rights is inherent to their person regardless of their gender, marital status, family status, sexual orientation, religion, age, disability, race, and membership of the travelling community.

#### Universal and Inalienable

The principle of universality is essential to understanding human rights. As indicated above, human rights attach to all human beings regardless of any other consideration. Human rights are inalienable in that they are not subject to being taken away or given away by the possessor, save their limitation in accordance with due course of law.

#### Interdependent and indivisible

Human rights function interdependently and are indivisible meaning that they are linked and cannot be separated. They strengthen and support each other and infringing upon one right may have a consequent impact on others.

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<sup>3</sup> *Office of the High Commissioner of Human Rights (2012) What Are Human Rights? Dewherst, E., Higgins, N. and Watkins, L. (2012) Principles of Irish Human Rights Law. Dublin, Clarus Press; Ireland, Irish Human Rights Commission (2012) 'European Convention on Human Rights Guide for the Civil and Public Service'. Dublin: IHRC.*



## Equality and non-discrimination

Under Article 40 of the Constitution all citizens are to be held equal before the law. This means that the State cannot unjustly, unreasonably or arbitrarily discriminate as between citizens. The Oireachtas may consider differences of capacity and of social function when legislating but any such differences must be for a legitimate legislative purpose, be relevant to that purpose and each class must be treated fairly. The concept of equality also requires that organs of the State, in exercising their powers, must have due regard to the concept of equality. A person cannot be treated as inferior or superior to any other person just because of their ethnic, racial, social or religious background. Equality and the principle of nondiscrimination are core to the concept of human rights. They are essential in securing the universal goal of human dignity that human rights seek to promote and uphold.

## What do human rights do?

Human rights involve both rights and obligations. Human rights create an environment in which all people can live in dignity. Human rights confer different rights and obligations on individuals and on States. Human rights specify the State's responsibilities to respect and protect individuals. From a Garda perspective, human rights:

- help Garda Personnel to decide what is permissible or forbidden;
- specify Garda Personnel duties as agents of the State, to respect and protect individuals. This means an obligation to protect human rights by exercising due diligence to protect human rights;
- secure core human values for Garda Personnel who are also rights holders.

In order for human rights to be fully realised, Garda Personnel must both respect and protect rights. Policing based on human rights helps to enhance the successful administration of justice by ensuring a greater respect for human rights when An Garda Síochána gather evidence which is then used in court proceedings. Respecting human rights helps to ensure that evidence is not declared inadmissible because of misconduct. Respecting and protecting human rights means that Garda Personnel must:



- not arbitrarily, or without justification, interfere with the human rights of individuals;
- take concrete measures to guarantee enjoyment of human rights. This means an obligation to take measures to secure the effective enjoyment by an individual of his or her human rights. If there is a failure to secure the human rights of an endangered person without proper justification, this failure amounts to a human rights violation. This obligation also requires An Garda Síochána to conduct effective investigations to establish the facts in order to protect the rights of others. The duty of An Garda Síochána to protect is what makes human rights the foundation of the work of An Garda Síochána.

### **What is a human rights violation?**

There is a distinction between **interference** with human rights and **violations** of human rights. Not every interference with a human right is also a violation of that right. An Garda Síochána may interfere with the human rights of crime suspects in order to protect victims. The interference becomes a violation when the action/omission is not based on a legal ground or if the action/omission is arbitrary and/or disproportionate.

A human rights violation occurs if an action by An Garda Síochána limits or interferes with a human right and this interference is not justified. The Gardaí are obliged to exercise due diligence to prevent human rights abuses before they occur and to respond effectively when they occur. A human rights violation occurs if An Garda Síochána fails, without justification, to take appropriate steps to protect human rights. The violation occurs through State action or omission.

### **Human rights based policing**

An Garda Síochána plays a key role in maintaining conditions necessary for vindicating human rights, which include maintenance of public order, law enforcement, prevention and detection of crime, assistance and service to the public.



For An Garda Síochána as law enforcers, no law stands higher in authority than that of human rights. It is a well-established legal principle that all laws should be interpreted and implemented in a way that is in strict accordance with human rights norms. When An Garda Síochána prevent or detect a crime, human rights are protected, such as the right to property, life, physical and psychological integrity, personal liberty and security.

As a service provider, An Garda Síochána makes a fundamental contribution to the protection of human rights. An Garda Síochána not only respects people's human rights by detecting crime it also focuses on preventing crimes and violations of human rights. By detecting and preventing crimes, they help to protect and maintain respect for human rights. Therefore, An Garda Síochána engages with communities to better serve the public. This understanding of policing leads to a stronger focus on crime prevention than on crime detection as well as on efforts to tackle the underlying causes of crime.

### **Margin of discretion**

There are no ready-made answers, no checklist to follow in the complex field of human rights. Garda Personnel must shape their work and actions in line with human rights guidelines; they face the task of using their discretion and balancing perceived conflicting interests in each situation.

In order to fulfil their functions Garda members must inevitably interfere with the rights of individuals, whether in order to arrest them, search them or take other action that impacts upon their freedom, privacy or other human right. Garda interference with a suspect's human rights must be as limited as possible, in line with the principles of legality, necessity, proportionality, accountability and non-discrimination. At the same time however, An Garda Síochána must also render effective protection to an endangered person such as crime victims. This requires a balancing of conflicting interests and using the appropriate measures in meeting the obligations both to respect and protect. A margin of discretion enables a member of An Garda Síochána to tailor his or her response to each particular situation, taking into account all the relevant factors of each case.



The appropriate use of discretion is particularly complicated because An Garda Síochána must often act in complex, unclear and emotionally stressful situations, such as disputes or acts of violence. An Garda Síochána is called upon when something has gone wrong or there is a problem. Decisions are made on the spot, in the heat of the moment, often within seconds and without preparation.

It is precisely when exercising discretion, in particular in stressful situations, that human rights principles become particularly relevant. This discretion requires the member of An Garda Síochána to display an appropriate attitude and exercise a strong sense of responsibility. The principles of equal treatment and of proportionality, including taking the least intrusive measures or stopping if the damage from Garda action would clearly outweigh its benefits, are of most relevance.

Garda members are independent legal officers with legal powers of arrest and control of the public that are vested in them directly. It is because these are powers that every member has by virtue of being a member and which they must exercise both in accordance with law and with a degree of discretion that makes the screening of the use of those powers for human rights a frontline task of each member.

### **Human rights in the law**

Human rights are inherent to our humanity and exist regardless of whether there are legal standards that enshrine them; however, human rights are often expressed in and guaranteed by law. Human rights guarantees at a domestic level include the Constitution of Ireland 1937 and general legislation and at the regional/European level include both European and United Nations treaties. The State has responsibilities to respect, protect and fulfil human rights.<sup>4</sup> As an organ of the State, An Garda Síochána is required, subject to any statutory

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<sup>4</sup> Article 40.3.1 of the Constitution of Ireland; Article 1 of the European Convention on Human Rights; Article 46 & 51(1) of the CFR; Article 6(1), (2) & (3) of the TEU; The Preamble and Article 1 of the UDHR; Article 2(1) of the ICCPR; Article 2(1) of the ICESCR; Article 2(1) of the UNCAT; Article 2(1) of the CRC; Article 2(1) of the CERD; Article 2 of the CEDAW.





provision or rule of law, to perform its functions in a manner compatible with the State's obligations under the European Convention on Human Rights.

### **Human rights of Garda Personnel**

Garda Personnel as agents of the State are also deemed to be “*rights bearers*” and are entitled to the protection that is provided by such rights. Human rights apply to Garda Personnel when operating in both their internal and external environments. Externally for example, Garda Personnel have an entitlement that their right to life will be protected and that their right not to be ill-treated will also be protected. Equally, internally Garda Personnel have an expectation that their rights to privacy and dignity in the workplace will be upheld.

The working conditions of Garda Personnel contributes to facilitating compliance with human rights standards for example, the provision of sufficient training in responding to difficult tasks such as use of force in public order situations or having sufficient staff to deal with difficult situations. In such situations Garda Personnel who may be subjected to serious injury or even death are entitled to human rights protection. Human rights protection in such circumstances includes the provision of effective protective equipment, careful planning, including preventive measures. In addition, human rights protection of Garda Personnel includes the provision of effective training so that members engaged in the use of force in public order situations have the requisite skills necessary to safeguard their human rights and the human rights of others while also securing public order in such situations.

### **Legality, Necessity, Proportionality, Accountability and Non-Discrimination**

As outlined in Section 1 of this Human Rights Framework, the fundamental principle underpinning this document and which must be demonstrated in every case where called upon to account is that ***any action taken must comply with the fundamental principles of***



*legality, necessity, proportionality and accountability and be applied in a non-discriminatory manner.*

### **Interference with human rights**

Actions of Garda Personnel, because of their potentially intrusive nature, may interfere with a human right. Some human rights are absolute and cannot be infringed for any reason, such as the prohibition against torture, inhuman and degrading treatment (Article 3 of the ECHR). There is no justification for interferences with absolute human rights such as the prohibition of torture. Every interference with an absolute human right is also a violation of that right.

Others are structured to allow for interference or limitations under certain conditions. Interference with such rights does not necessarily violate the suspect's rights provided it is grounded in law and respects the principles of legality, necessity, proportionality, accountability and non-discrimination. Every interference with a human right must serve a legitimate aim. These matters must be satisfied to ensure justifiable reasons for interference with a human right.

### **Legitimate aim**

A legitimate aim may include, but is not limited to:

- national security;
- territorial integrity or public safety;
- prevention of disorder or crime;
- protection of health or morals;
- protection of the reputation of others;
- protection of the rights and freedoms of others.

To help identify whether there is a legitimate aim involved it will be necessary to consider the law(s) and human right(s) relevant to a situation.



## Legality

All actions by An Garda Síochána must have a clear basis in law. Therefore, any interference with human rights must be grounded in law. Garda Personnel must consider the relevant law(s) related to the action and its interference with the human right(s) at stake. This is because any interference with a human right must be based on a legal provision. This stems from the basic principle of the rule of law and legality. The rule of law requires powers to be exercised only in accordance with duly enacted laws or, in the case of the common law, clearly defined established rules. The rule of law means that An Garda Síochána must act in accordance with the law and that there are mechanisms in place for challenging the legality of actions or omissions by An Garda Síochána. The phrase “in accordance with law” in the ECHR, means that for the interference with the rights of an individual to be in accordance with law, the interference must have a basis in law, the law must be clear, precise and detailed and must indicate with reasonable clarity the scope of the authority’s discretion in exercising an intrusive power.<sup>5</sup> The principle of legality is a fundamental safeguard against arbitrary action. The rule of law and legality is a central pillar of the human rights system and of the legal system in general. The extent and detail in which interferences are legally determined depends on the particular right at stake. Some rights can be legally restricted in certain circumstances (*Article 8 of the ECHR on the right to private and family life or Article 11 of the ECHR on freedom of assembly, for example*), while others may be legally restricted on a very limited basis (*Article 5 of the ECHR on the right to liberty and security of person*). The following questions should be considered:

- What are my legal powers in this situation?
- What legal action am I obligated to take?
- Have I any discretionary power in this situation?
- What are the limits of that discretion?

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<sup>5</sup> (Huvig & Kruslin v France [1990] ECHR, application no. 1105/84, judgment of 24 April 1990).



## Necessity and proportionality

The principles of necessity and proportionality can be reduced to a simple maxim – that relates to all human rights: *“treat others the way you would like to be treated”*. The following questions must be satisfied:

1. Is action by An Garda Síochána strictly necessary in order to resolve a particular problem or deal with a threat?
2. Can it be demonstrated that any action taken by An Garda Síochána is proportionate to the threat or problem that they seek to prevent?

The principles of necessity and proportionality are used to determine whether an action that interferes with human rights is necessary in order to achieve an aim and if the measures used are proportional to the aim pursued. Understanding the principles of necessity and proportionality is particularly important as Garda Personnel must effectively and adequately use the right measures to cope with dangers and threats to others and to themselves.

Appropriate actions need to be selected to achieve the intended objective. Unnecessary or excessive measures are disproportionate, and should be avoided. The anticipated result of the action and its interference with human rights must be weighed against the relevance of the aim. This also includes considering the interference or damage non-action could cause. If the harm caused by the action clearly outweighs its benefit, the action must be avoided. Therefore, an action must not go beyond what is required by the circumstances and the need to achieve the aim. The least intrusive and damaging, but still effective, action should be taken. The idea of a “pressing social need” is often used to identify whether an action is necessary.

Adhering to the principle of proportionality is one of policing’s major challenges: thinking of different options, balancing the various interests involved, identifying the least intrusive measures and determining the right measure to take. This is particularly difficult in stressful or dangerous situations where events happen quickly. The basic idea of proportionality is



encapsulated in the common phrase of “*not using a sledgehammer to crack a nut*”. It is about establishing the proper relationship between the means employed and the aims pursued. The end does not justify the means. It is important to achieve objectives in the least intrusive way.

The question when it comes to proportionality is whether the action taken to prevent the perceived harm was no more than the minimum required to prevent that harm. In other words, the question is what is the least I have to do in order to ensure that the undesired event does not occur. Put in the positive, what is the least I have to do in order to achieve the desired result.

The following questions are a useful guide to determine necessity and proportionality:

- Is the action appropriate to achieve the legitimate aim?
- In answering this question, examine whether the measure is appropriate and effective. Ineffective measures are not proportionate.
- Is it necessary (a “pressing social need”)?
- Is it the least intrusive measure?
- Are there any alternatives?
- Excessive measures are not proportionate.

It will be noted that the reason proportionality is such a challenge is because the Gardaí are left with discretion in many areas and it is then necessary to determine how that discretion may be exercised proportionately.

## **Accountability**

*“Accepting individual responsibility and ensuring public accountability”<sup>6</sup>*

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<sup>6</sup> *Garda Síochána Strategy Statement 2016-2018 at p 3.*

Can it be shown that Garda action is sufficiently open to scrutiny by the public and other authorities (such as the Garda Síochána Ombudsman Commission, the Garda Inspectorate and/or the Policing Authority) in order to ensure that An Garda Síochána is accountable in practice, as well as in theory?

The function of An Garda Síochána is broad and varied with a margin of discretion in a role that demands on-the-spot decision making in potentially complex situations. This varied function requires that Garda Personnel demonstrate a high degree of professionalism and are held accountable for their actions.

An Garda Síochána operates on the basis of the consent of the Irish people and is accountable to the people of Ireland through the law, professional and ethical standards and by the independent over-sight provided by the Garda Síochána Ombudsman Commission, the Garda Inspectorate and the Policing Authority.

The Garda Commissioner is accountable to the Minister for Justice and Equality for the performance of their functions by the members of the Gardaí. This is set out in section 26 of the Garda Síochána Act 2005. The Minister, in turn, is responsible to the Dáil pursuant to Article 28.4 of the Constitution. The line of accountability therefore ultimately runs from the Garda Member, through the Commissioner and the Minister, to the Dáil.

The ultimate responsibility of Garda Personnel is fidelity to the law. As such, claims of obedience to the orders of supervisors will not excuse Garda personnel for undertaking an order which they knew or ought to have known was unlawful and that they had reasonable opportunity to refuse. The supervisor who issued the unlawful order will also be accountable as appropriate.

Garda personnel who have reason to believe that an improper action has been taken by or is about to be taken by another member or Garda staff, shall, to the best of their capability, prevent and rigorously oppose any such action. The matter shall be reported at the earliest opportunity to their supervisor and, consider whether it is necessary to report to other



appropriate authorities vested with responsibility for investigating such matters. Notwithstanding this responsibility all Garda Personnel are of course compelled to adhere to all lawful orders.

Supervisory personnel have a duty to prevent Garda Personnel under their command resorting to an unlawful action and will be accountable for failure to take all reasonable measures in their power to prevent, suppress or report such action, that they knew or ought to have had knowledge.

The recording of all relevant information, contemporaneously with every event in which human rights are engaged is essential in helping establish the validity of all actions taken should they be subject to challenge.

Accountability contributes to the transparency of the work of An Garda Síochána. This is another key element of democratic policing. Measures to establish transparency and accountability of An Garda Síochána contribute to trust building. The trust and confidence of the public are a necessary prerequisite for effective policing by An Garda Síochána. It is imperative that Garda Personnel in their day-to-day duties engage in trust building and establish appropriate communication structures with the public. The community policing approach and Joint Policing Committees can inspire the establishment of appropriate communication structures. Clear acceptance of and acting in accordance with human rights is highly relevant for building and maintaining trust. The principle of non-discrimination is of particular relevance in relations with marginalised groups.<sup>7</sup>

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<sup>7</sup> *FRA (European Union Agency for Fundamental Rights) (2010), EU MIDIS Data in Focus 4: Police Stops and Minorities, available at: <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-4-police-stops-and-minorities>.*

## Non-discrimination

What steps have been taken to ensure that Garda action will avoid discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status?<sup>8</sup>

The term “*other status*” however has been expanded upon by the ECt.HR and to date it has been determined that it includes, age, sexual orientation, marital status, illegitimacy, status as a trade union member, military status, conscientious objection, professional status and imprisonment.<sup>9</sup> Even this list is not exhaustive however and the Court has reiterated that all differences “*having as their basis or reason a personal characteristic by which persons or groups of persons are distinguishable from each other*”<sup>10</sup> come under the scope of Article 14 of the ECHR.

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<sup>8</sup> See also the Code of Ethics for the Garda Síochána and Sections 3 and 4 of this Human Rights Framework.

<sup>9</sup> Dewherst, E., Higgins, N. and Watkins, L. (2012) *Principles of Irish Human Rights Law*. Dublin, Clarus Press at p 42.

<sup>10</sup> *Kjeldsen, Busk Madsen and Pedersen V Denmark*, (Application No 5095/71; 5920/72; 5926/72) at para 56.





## SECTION 3

### SUBSTANTIVE HUMAN RIGHTS

#### Introduction

This Section sets out the main human rights provisions relevant to policing, and provides some practical examples, referring to leading cases and other sources of law, as necessary. It is essential that any action taken by Garda Personnel is only applied in a human rights compliant manner. Garda Personnel carrying out their functions must do so in accordance with the:

- Constitution of Ireland;
- Irish statute and common law;
- European Convention on Human Rights;
- European Convention on Human Rights Act 2003;
- Irish Human Rights and Equality Commission Act 2014 (Section 42);
- United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Criminal Justice (United Nations Convention Against Torture) Act 2000;
- Charter of Fundamental Rights of the European Union when implementing EU law;
- 1951 Convention Relating to the Status of Refugees, given effect in the International Protection Act 2015;
- Code of Ethics for An Garda Síochána.

This Human Rights Framework will also document other relevant international human rights instruments and international best practice guidance documents relevant to policing in this jurisdiction.

The function of An Garda Síochána is set out in section 7(1) of the 2005 Act which is to provide policing and security services for the State with the objective of:

- (a) preserving peace and public order,



- (b) protecting life and property,
- (c) vindicating the human rights of each individual,
- (d) protecting the security of the State,
- (e) preventing crime,
- (f) bringing criminals to justice, including by detecting and investigating crime, and
- (g) regulating and controlling road traffic and improving road safety.

Section 7 sets out a general duty to protect life and preserve peace and public order. As set out in section 7(1)(c) of the 2005 Act, the function of An Garda Síochána is to provide policing and security services for the State with the objective of vindicating the human rights of each individual. Section 7(3) of the 2005 Act also provides that An Garda Síochána has such functions as are conferred on it by law including those relating to immigration.

In addition to the obligations contained in section 7(1) of the 2005 Act, the European Convention on Human Rights Act 2003 (2003 Act), which came into force on 31 December 2003 and which incorporated the ECHR into Irish law, provides that *“every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.”* An Garda Síochána is an *“organ of the State”* for the purposes of the 2003 Act.

Section 3 of the 2003 Act obliges An Garda Síochána, as an organ of the State, to perform its functions in a manner compatible with the State’s obligations under the ECHR provisions. In this regard there are a number of seminal findings of the European Commission on Human Rights and judgments of the European Court of Human Rights that outline clearly the duty placed on the member states. This duty is commonly known as *“the positive obligation”* and once a positive obligation on a member state exists, an *“omission”*



by a public authority, or the absence of a legal remedy against another individual, may constitute a violation under the ECHR. There also exists a “*negative obligation*” to refrain from unjustified actions which limit human rights. This obligation must inform all actions taken where human rights are engaged.

In addition, the enactment of the Irish Human Rights and Equality Commission Act 2014 (2014 Act) which came into force on 27 July 2014, obliges An Garda Síochána under section 42 as a public body shall, in the performance of its functions, have regard to the need to – eliminate discrimination, promote equality of opportunity and treatment of its staff and the persons to whom it provides services and protect the human rights of its members, staff and the persons to whom it provides services.

### Key constitutional and human rights

The key constitutional and human rights from a policing perspective are detailed hereunder:

*Table of key constitutional and human rights*

Key Human Rights	Constitution of Ireland	European Convention on Human Rights
Right to dignity	Preamble Article 40.3.1	Implicit in Article 2 and 3
Right to life	Article 40.3	Article 2
Prohibition on torture	Article 40.3.1	Article 3
Prohibition of slavery and forced labour	No direct referral	Article 4
Right to liberty and security	Article 40.4	Article 5
Right to a fair trial	Article 38.1 Article 40.3.1 Article 40.4	Article 6



## NEAMHSHRIANTA / UNRESTRICTED

Human Rights Framework

Version No 1.0

No punishment without law	Article 38.1 Article 40.3.1 Article 40.3.2 Article 40.4.1	Article 7
Right to privacy	Article 40.3.1	Article 8
Right to the inviolability of the dwelling	Article 40.5	Article 8
Freedom of thought, conscience and religion	Article 44	Article 9
Freedom of expression	Article 40.6.1	Article 10
Freedom of assembly and association	Article 40.6.1 ii	Article 11
Right to marry	Article 41	Article 12
Right to an effective remedy	Article 40.3.1	Article 13
Equality/Non-discrimination	Article 40.1	Article 14
Rights of the child	Article 42A	Article 14
Protection of property	Article 40.3 Article 43	Protocol 1, Article 1
Right to education	Article 42	Protocol 1, Article 2
Right to free elections	Article 6.1 Article 12.2 Article 16.2 Article 28A.2 Article 28A.4 Article 46 Article 47	Protocol 1, Article 3
Freedom of movement	Article 40	Protocol 4, Article 2
Asylum/Expulsion and related safeguards	No direct referral	Protocol 4 Article 3 and 4 Protocol 7, Article 1



There is a degree of overlap between the Constitution and the ECHR in terms of individual's rights. In this regard, such rights must be respected and protected at all times. In relation to the Charter<sup>11</sup>, it is given binding legal effect by the entry into force of the Lisbon Treaty<sup>12</sup> on 1<sup>st</sup> December 2009 and was introduced into Irish Law by the European Union Act 2009. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.<sup>13</sup> The provisions of the Charter are enforceable against the EU institutions and national authorities only when they are implementing EU law.<sup>14</sup> From a Garda perspective the rights and freedoms must be respected and protected in the context of enforcing EU law. The Charter replicates rights in the ECHR and adds to them only slightly to reflect modern developments in human rights, e.g. the right to good administration.

An individual can only engage the protections afforded under human rights law that has been incorporated into national law as the Irish Constitution states that “*no international agreement shall be part of the domestic law of the State save as may be provided by the Oireachtas*”. Notwithstanding the non-binding effect of international human rights treaties that have not been incorporated into national law, this Framework requires members of Garda personnel in the performance of their functions to have regard to the relevant unincorporated international human rights.

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<sup>11</sup> At the European Council in Cologne in June 1999 it was decided to produce a Charter of Fundamental Rights, “*in order to make their overriding importance and relevance more visible to the Union's Citizens*” (Conclusions of the Cologne European Council, 3<sup>rd</sup> and 4<sup>th</sup> of June 1999). On 7<sup>th</sup> December 2000 the Nice European Council welcomed the joint declaration by the Council, the European Parliament and the Commission of the Charter of Fundamental Rights of the European Union ([2000] OJ C 364/8, 18 December 2000).

<sup>12</sup> The Lisbon Treaty consolidates the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union.

1. Treaty on European Union sets out the general provisions governing the EU and part recognises the rights set forth in the Charter (Article 8 - General Provisions: inserting a new article 6 to the Treaty on European Union).

2. Treaty on the Functioning of the European Union sets out the specific objectives of the EU's various policies.

<sup>13</sup> The Charter does not declare new rights but instead places the existing International Human Rights standards at the centre of the policies and functions of the European Union, by entrenching the judgments of Court of Justice of the European Union (CJEU), the ECt.HR, the common Constitutional traditions of EU countries and other international instruments in its provisions.

<sup>14</sup> Art 52(5), Charter of Fundamental Rights of the European Union.



## Principles for a Human Rights based approach to Policing

1. Respect human dignity and uphold and protect individual rights.
2. Identify the outcome you wish to achieve and exercise the least intrusive/ invasive measures to achieve it.
3. Do not discriminate but if you must differentiate amongst them with whom you interact, ensure you can justify it and that the differentiation is proportionate.
4. Identify the key rights engaged in the proposed action or inaction, including competing rights, and consider the discretion available to you.
5. Ensure that the action you take has a legal basis in the law in the particular circumstances you are confronting.
6. Consider the different approaches to address the issue and determine which will ensure the rights of all are respected and protected.
7. Use the decision making model, apply the human rights and ethical principles, consider the appropriate tactical options, and before deciding on the action to be taken, check how it will respect those principles.



## Right to Dignity

Human dignity is both a right enjoyed by all persons and the core concept on which human rights law is based. The inherent human dignity of all persons requires that human rights protections are afforded to all. From an operational policing perspective, the right relates to all areas of policing, including:

- (a) Treatment of all persons interacting with An Garda Síochána
- (b) Arrest/detention
- (c) Use of handcuffs and other means of constraint
- (d) Use of force
- (e) Use of personal data

Human dignity is inviolable. It must be respected and protected. Everyone working in An Garda Síochána and those with whom it interacts, are entitled to have their dignity respected and protected. The right to be treated with dignity is recognised by the Constitution. All individuals have a constitutional right to be treated with dignity.<sup>15</sup> All arrested persons shall be treated with dignity.<sup>16</sup> The right to dignity interacts with other rights such as, for example, the right to privacy in detention.

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<sup>15</sup> *In Re Ward of Court* (No. 2) [1996] 2 I.R. 79; Article 40.3.1 and Preamble of the Constitution.

<sup>16</sup> *People (DPP) v Gormley*, Supreme Court, 6 March 2014, Clarke J., para 9.15.

## Right to life

This right relates to all areas of policing but it is of particular relevance to:

- a) Use of lethal and potentially-lethal force (all use of force is potentially lethal)
- b) Duty to pass on important information concerning a risk to an individual's life<sup>17</sup>
- c) Arrest
- d) Treatment of detained persons

The right to life is one of the most fundamental of all human rights. No person should be deprived of their right to life except in very limited circumstances; the deprivation of life should only arise when absolutely necessary. When deciding what is absolutely necessary, members should consider if the action was:

1. in defence of a person from unlawful violence;
2. to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
3. lawfully taken for the purposes of quelling a riot or insurrection

However, recourse to potentially lethal force, even in the situations outlined above, should only occur in very limited circumstances; actions should always be proportionate to the threat faced. Members should maintain a detailed knowledge of the most up-to-date Use of Force Policy.

### NEGATIVE OBLIGATION

The importance of the right to life imposes a responsibility to take all appropriate care to avoid, to the greatest possible extent, risk to life. In situations when members employ lethal force, an honest belief that the force was necessary is not sufficient. The honest belief must be based on reasonable grounds given the information available at the time. The use of lethal force against a person known to pose no threat to life or limb and not suspected of having committed a violent offence can never be necessary, even if that results in the person escaping. The question of whether the taking of life was absolutely necessary in the circumstances is one that depends to a very large degree on the facts of the individual case. The key issues to consider include the following:

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<sup>17</sup> General Information Notice (GIM).



1. The nature of the aim pursued – was it the protection of a person from unlawful violence which poses a real and immediate risk to life?
2. Was the use of lethal/potentially lethal force absolutely necessary in the circumstances, bearing in mind the dangers to the lives of all persons involved?
3. What were the risks to others, including the person subject to the force and all others in the vicinity?
4. What other options were considered before resorting to the use of force?
5. What weapons or equipment were available at the time?
6. Have all relevant decisions been recorded and reported?

**POSITIVE OBLIGATION**

The State has a positive obligation to protect the right to life of members of the public; this includes providing a legal structure wherein killing is prohibited and punishable. Reasonable steps must be taken to protect a person from a real and immediate risk to life which they are aware or ought to have had knowledge. Garda Personnel are under an obligation to take operational measures to protect a person's life in certain situations. This is necessary to meet the obligation to exercise due diligence to prevent human rights abuses before they occur. It should also be noted that in a recent decision the ECt.HR held that domestic violence amounted to gender-based violence. The court held that the failure of the authorities who knew, or ought to have known, of the existence of a real and immediate risk to the life of a woman from the criminal acts of a third party, to act positively to protect the woman and to take measures within the scope of their powers to avoid that risk, violated the right to life of the woman who was murdered by the third party.

The main issues for members of An Garda Síochána include:

1. establishing what is a real and immediate threat; and
2. if such a threat is established, what steps must be taken to seek to avert it?



The European Court of Human Rights has held that there is a duty to investigate circumstances where the State has failed in its positive obligation to take reasonable care to avert a foreseeable death from taking place.

### **INVESTIGATION**

In addition to the general duty to investigate,<sup>18</sup> there is an obligation on An Garda Síochána by virtue of the Article 2 ECHR to conduct an effective investigation to establish the facts in circumstances where a suspicious death has occurred.<sup>19</sup>

There is an obligation placed upon the State to perform an independent, effective official investigation if a person's life is deprived by any State agent. If any member of An Garda Síochána discharges lethal force, an independent enquiry is required. This is also true if a death or injury occurs to a person held in custody. Where the conduct of a member of An Garda Síochána results in the death or serious harm of an individual the matter is referred to the Garda Síochána Ombudsman Commission (GSOC). In this respect, existing instructions on referrals and notifications to GSOC must be complied with. In addition, the memorandum of understanding, protocol and agreement on operational matters between GSOC and An Garda Síochána must be complied with.

In principle, an investigation shall be conducted in an effective and efficient manner in order to establish the facts, and shall be:

- Independent and impartial,
- Conducted with promptness and diligence,
- Subject to public scrutiny,
- Be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.

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<sup>18</sup> *Barabanshchikov v Russian* App. No. 36220/02, judgment delivered on 8<sup>th</sup> January, 2009. *DPP v Bartley*, unreported, High Court, June 13, 1997.

<sup>19</sup> *Rod v Croatia*, App no 47024/06, 18 September 2008.

All reasonable steps should be taken to secure the evidence.



## Prohibition of torture

This right relates to all areas of policing but is of particular relevance to:

- a) Arrest
- b) Treatment of detained persons
- c) Use of handcuffs and other means of restraints
- d) Interrogation
- e) Use of force

Any excessive and non-consensual interference with a person's physical security, which is not authorised by law, will be considered constitutionally and conventionally impermissible. Even in the most difficult circumstances, such as the fight against terrorism or organised crime, the use of torture, inhuman or degrading treatment or punishment is never lawful. There is no exception to this rule, even in times of national emergency. Treatment or use of force that attains a certain minimum level of severity falls into the scope of this prohibition. The assessment of the minimum depends on all circumstances of the case such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age and state of health of the victim. Any recourse to physical force not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of Article 3 of the ECHR.

## TORTURE

Torture involves suffering that is of a particular intensity or cruelty. The prohibition of torture is absolute, meaning that it must never be infringed upon nor violated: under no circumstances can any treatment falling within its scope be deemed lawful. Thus, elements taken into account for qualifying an act as torture are the following:

- Nature of the act
- Intention of the perpetrator
- Purpose of the act
- Involvement of public officials



**INHUMAN AND DEGRADING TREATMENT**

The element that distinguishes inhuman treatment from torture is the absence of the requirement that the treatment be inflicted for a specific purpose. It is considered degrading treatment in circumstances where it arouses in the victims' feelings of fear, anguish and inferiority capable of humiliating and debasing them. Any action by Garda personnel that impacts on the body of another may engage Article 3 of the ECHR depending on the circumstances. While such action may be necessary in the circumstances it is essential that any such action is only applied in accordance with the law. Use of force is not necessary for treatment to be considered inhuman or degrading. In this regard, conduct considered to arouse such feelings may constitute inhuman and degrading treatment. Further, inhuman or degrading treatment can be caused by negligence or by the unintended consequences of actions, such as inadvertently causing a detainee pain or suffering.

**NEGATIVE OBLIGATION**

Garda Personnel must never consider it proportionate or necessary to inflict ill-treatment or punishment; the prohibition of such treatment is absolute. Use of force is only justifiable, or considered proportionate, when made strictly necessary by the person's own conduct. Members must maintain a detailed knowledge of the most up-to-date *Use of Force* policy for guidance on the use of force.

**POSITIVE OBLIGATION**

Further to the obligation placed upon Garda Personnel to refrain from inflicting ill-treatment or punishment upon persons, Garda Personnel are under a positive obligation to take steps to avoid a real and immediate risk of ill-treatment, including ill-treatment administered by private individuals.

Rape is an example of a crime which engages the Article 3 ECHR protections and would require reasonable steps to be taken to prevent the commission of the offence, where a real and immediate risk is reported and shall be investigated. Where it is required to investigate allegations of ill-treatment inflicted by Garda Personnel or private individuals under Article



3 ECHR, the investigation shall be conducted in an effective and efficient manner in order to establish the facts, and shall be:

- Independent and impartial,
- Conducted with promptness and diligence,
- Subject to public scrutiny,
- In principle, be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.

All reasonable steps should be taken to secure the evidence, including:

- Eyewitness testimony,
- Forensic evidence,
- Where appropriate, additional medical reports.



## Prohibition of Slavery and Forced Labour

From a policing perspective, this right particularly but not exclusively relates to:

- a) Combating trafficking of human beings;
- b) Tackling the sexual exploitation of vulnerable people;
- c) Tackling the exploitation of vulnerable people in the labour market including domestic servitude.

Article 4 of the ECHR is an absolute prohibition of slavery or servitude and forced or compulsory labour. This prohibition applies even in times of war or public emergency.

### POSITIVE OBLIGATION

In so far as An Garda Síochána is concerned this right is applicable from an investigation standpoint in the context of enforcing human trafficking legislation. The State has positive obligations under Article 4 of the ECHR to protect individuals from slavery, servitude, forced or compulsory labour. These positive obligations entail both the effective criminalisation of treatment contrary to Article 4 and the effective investigation of complaints or suspicions of such treatment.

In this context, the relevant domestic criminal legislation in the area is primarily human trafficking legislation. An Garda Síochána is responsible for the effective investigation of instances where there is a suspicion or report that a person may be subject to such treatment falling under the scope of domestic legislation. In such instances investigations should be conducted in an effective and efficient manner and without delay. A victim of human trafficking is required to be provided with assistance and support as soon as there are reasonable grounds for believing that he or she might be a victim of trafficking. The Gardaí have an obligation to identify whether a person is a victim of human trafficking.



## The Right to Liberty and Security of Person

This right is engaged in the following operational policing areas:

- a) Arrest – Grounds for arrest - Information about arrest;
- b) Detention – continued detention;
- c) Charging suspects;
- d) Bail – Garda bail conditions – Court bail conditions;
- e) Detentions under the Mental Health Act 2001;
- f) Detention of children when the Gardaí act to safeguard them (section 12 of the Child Care Act 1991);
- g) Compensation for unlawful arrest/imprisonment.

Liberty is a fundamental right which everyone should generally enjoy. However, Article 40 of the Constitution and Article 5 of the ECHR clearly contemplate that a person may under certain circumstances be deprived of his/her personal liberty.<sup>20</sup> The right to liberty is of the highest importance in a democratic society.<sup>21</sup> State organs have a fundamental duty to respect the right to liberty of all human beings.<sup>22</sup> There are however, exceptions to this rule as a State may breach the right to personal liberty in circumstances that are lawful, proportionate, and continue for no longer than is necessary. Article 5(1) (a) to (f) of the ECHR lists the six reasons for which a person can lawfully be deprived of their liberty by agents of the State, including An Garda Síochána. This is an exhaustive list, in other words, to deprive a person of his/her liberty for any other reason will be unlawful.

The deprivation of a person's liberty and security can have a direct and adverse effect on the enjoyment of many other rights including<sup>23</sup>:

- a) The right to freedom of assembly, association and expression;
- b) Private life;

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<sup>20</sup> *Fajujonu v The Minister for Justice* [1990] 2 IR 151.

<sup>21</sup> *Ladent v Poland* App. No 11036/03 (2008).

<sup>22</sup> Mark Janis, Richard Kay, Anthony Bradley, *European Human Rights law Text and Materials* (2<sup>nd</sup> ed Oxford University Press (2000) 308.

<sup>23</sup> Monica Macovei, *The right to liberty and security of the person*, Human rights handbooks, No. 5.





- c) The right to freedom of movement;
- d) The right to a fair trial.

The protection of a person's other individual rights becomes illusory when the right to liberty and security is not efficiently guaranteed.<sup>24</sup> Any deprivation of liberty will consequentially put the affected person into an extremely vulnerable position. The person who is limiting another's liberty therefore, has to be able to justify that the deprivation falls within one of the grounds for exception and that its exercise was applicable in that particular situation. The key issues to consider include the following:

- a) Reasonable suspicion;
- b) Informed promptly of reasons for arrest;
- c) Informed of nature of charge;
- d) Compliance with law;
- e) The decision to arrest must not be arbitrarily made.

There is a presumption that everyone has the right to liberty. The importance of the right to liberty and security imposes a responsibility upon members of An Garda Síochána to ensure that any deprivation of liberty is in accordance with law. An Garda Síochána has a positive obligation to take steps to guarantee a person's right to liberty and security; this includes a duty to show that custody pursuant to arrest was lawful, reasonable and necessary<sup>25</sup> and the requirement for accurate recording of data such as the grounds for detention. Having assumed control of an individual, it is incumbent on An Garda Síochána to account for his/her whereabouts. All persons under any form of detention shall be treated in a humane manner and with respect for the inherent dignity of the human person.

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<sup>24</sup> Office of the High Commissioner for Human Rights (OCHR) *Chapter 5 Human Rights and Arrest, Pre-trial Detention and Administrative Detention*.

<sup>25</sup> Committee's Views in respect to communication No. 305/1988 (*Van Alphen v The Netherlands*).



All persons in Garda custody are to be treated in accordance with the Custody Regulations. This includes a requirement that the member in charge must, where an arrested foreign national makes a request for his consul to be contacted, cause the consul to be notified as soon as practicable. The member in charge and other Garda personnel have specific duties in this regard. The maintenance of the custody record, the recording of all details in relation to arrest and detention and any reasonable force used are all vital components of lawful detention. The provision of reasonable rest periods, medical access and toilet facilities are also essential in respecting the health and dignity of the detained person. Accordingly, any deprivation of liberty that is not in accordance with law will be considered constitutionally and conventionally impermissible.



## Right to Fair Trial

This right is engaged in the following operational policing areas:

- a) Conducting expeditious investigations;
- b) Collection, recording, disclosure and admissibility of evidence;
- c) Detention of suspects;
- d) Access to legal advice;
- e) Good practice in interviewing suspects.

A person is entitled to be presumed innocent until guilt is proven in a court of law. Ultimately the presumption of innocence must be protected and respected throughout the overall trial process, including from the time of arrest. To secure the protection of the presumption, it is incumbent on Garda Personnel to ensure that all components of the right to a fair trial are respected. The fair trial rights from which all individuals benefit, apply from the time of arrest. This protection contributes to maintaining the fundamental fairness of criminal proceedings and assists in affording society the best possible chance that a guilty person will be convicted at trial.

Criminal investigations must be conducted in an expeditious manner in order to respect the rights of suspects not to be subject to an unnecessarily protracted investigation. Garda Personnel are primarily responsible for collecting and recording evidence in relation to the investigation of a criminal offence. Appropriate and responsible handling of evidence protects suspects from being wrongly accused/convicted, but also provides victims of crime and society at large with the greatest chance of securing convictions against the perpetrators of crimes. The gathering and retention of evidence must have a legal basis. Evidence must be handled in such a way as to ensure its admissibility is not compromised. Failures in this regard may lead to the exclusion of probative evidence. Garda Personnel must also have regard to their responsibility to facilitate the disclosure of evidence to the defence in accordance with law, including the disclosure of information that would assist an accused person.



The suspect's ability to conduct an adequate defence and/or challenge the legality of their arrest/detention requires certain positive actions by An Garda Síochána. The nature of the accusation against a suspect must be provided to him/her in a prompt and intelligible manner. Members are additionally reminded of their responsibility to communicate all information in a manner that is respectful, easy to understand and sensitive to the circumstances. Consultations with a solicitor must also be facilitated, and the confidentiality of their discussions guaranteed. The paramount consideration in this regard is the maintenance of the presumption of innocence and the privilege against self-incrimination. In a criminal trial the State must prove each element of the offence or offences with which the defendant is charged. The defendant does not have to prove their innocence and does not have to testify in their own defence. In order for this right to prove effective in practice, a suspect also has the right to remain silent under Garda questioning.<sup>26</sup> The interviewing of suspects must be conducted in a manner which respects their rights. Vulnerable suspects require further protection in this regard, and members are reminded of the need to be sensitive to the difficult circumstances individuals may find themselves in when in contact with An Garda Síochána.

Consideration must be given to any communications with the media, or any other person outside the investigation, to ensure that no publication suggests that a suspect or person of interest is guilty of an offence. This is necessary to ensure that the presumption of innocence is guaranteed.

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<sup>26</sup> Subject to inference provisions.

**No punishment without law**

The right has relevance particularly in relation to determining the existence of a criminal offence at the date of the alleged occurrence. The fundamental legal principles which arise in this area are the need for laws to be defined with clarity, and the necessity to afford individuals the ability to foresee the legal consequences of their actions. Garda Personnel must be vigilant and thorough in establishing that the alleged conduct is criminal and is defined as such within the context of an existing offence, and that the offence identified is the appropriate means by which to pursue an investigation and consequent prosecution. When satisfied that there are reasonable grounds to believe that a criminal act has been committed, and that act clearly falls within the ambit of an existing criminal offence, Garda Personnel must also ensure that the offence is/was one recognised by law at the time of its alleged commission. A subsequent declaration of an offence does not make a past act criminal.



## The Right to Respect for Private and Family Life

The scope of the right to privacy has been progressively expanded by the courts, but at its core is ‘the right to be left alone’. Awareness of, and sensitivity to the importance of privacy is essential to policing. Privacy is a fundamental right to which all people are entitled. However, Article 8(2) of the ECHR clearly contemplates that a person may under certain circumstances have their right to respect for private and family life interfered with by the State. The Constitutional right to privacy is an unenumerated constitutional right, and the grounds for lawful interference have been established by the superior courts. The permissible grounds for any restriction are the constitutional rights of others, the requirements of the common good or of public order and morality.

The dignity and freedom of an individual in a democratic society cannot be ensured if he or she must suffer arbitrary interference with their privacy. State bodies, including An Garda Síochána, have a fundamental duty to respect the private and family life, home and correspondence of the individual. Respect for the sensitive nature of information gathered, received and held by An Garda Síochána helps protect the rights of the people who provide information and the rights of people to whom the information refers. It also ensures that the public feel safe in volunteering information to An Garda Síochána. There are exceptions to this rule, as the State may breach the right in circumstances that are lawful, necessary and proportionate. Article 8(2) of the ECHR lists exhaustively the general interests which may justify interference with the personal right to privacy by agents of the State.

Many operational activities of An Garda Síochána engage the right to privacy, as follows:

- a) **Covert Surveillance** – People enjoy a ‘reasonable expectation’ of respect for their privacy, which can extend to activities in public places. The ‘reasonable expectation’ will not extend to those engaged in serious crime. The Criminal Justice (Surveillance) Act 2009 (2009 Act) takes account of people’s privacy



rights, and all surveillance by or with the assistance of surveillance devices must be carried out in compliance with the 2009 Act.

- b) Use of CCTV and the Taking of Photographs** – A persons’ image is protected by the ECHR and has been held to ‘constitute one of the chief attributes of his or her personality’. An Garda Síochána must be cognisant of this right when determining how they may acquire images, how they are used, and if they may be publicised.<sup>27</sup> The Gardaí are the only ones entitled to record by CCTV where individuals are identifiable in public places, i.e. the interference with the right to privacy must be “in accordance with law” and the only law authorising CCTV in public places is section 38 of the 2005 Act
- c) Interception of Communications** – This activity is regulated by the Interception of Postal Packages and Telecommunications Messages (Regulation) Act 1993 (1993 Act). An Garda Síochána must ensure compliance with the 1993 Act in the context of intercepting any form of private communication. The privacy of persons detained by An Garda Síochána must also be respected, and the interception of correspondence or communication with their lawyers is not permitted.
- d) Data Protection** – An Garda Síochána have responsibilities regarding how they process the personal data of individuals under the Data Protection Acts 1988 - 2018 and the Law Enforcement Directive (LED) and General Data Protection Regulation (GDPR). The GDPR requires an organisation can only process personal data under certain conditions. For instance, the processing should be fair and transparent, for a specified and legitimate purpose and limited to the data necessary to fulfil this purpose. It must also be based on one of the following legal grounds:

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<sup>27</sup> Criminal Justice Act 1984; Offences Against the State Act 1939; Criminal Law Act 1976; Criminal Justice Act 2006.

- To satisfy a legal obligation.
- To protect the vital interests of the individual.
- To carry out a task that is in the public interest.

The LED deals with the processing of personal data by competent authorities which includes the Gardaí for law enforcement purposes. Processing under the LED must be for law enforcement purposes as defined.

Even where such data is obtained from the public domain, once a systematic or permanent record comes into existence Article 8 of the ECHR is engaged and retention must be justified under Article 8(2) of the ECHR. The keeping of records relating to past criminal cases can be justified as necessary in a democratic society for the prevention of crime. The ECt.HR has held that special circumstances exist around the combating of terrorism which allow for the retention of data even where no criminal proceedings have been brought.

- e) **Personal Bodily Integrity** – The right to bodily integrity is protected as a fundamental right under the Irish Constitution. The taking of fingerprints and intimate and non-intimate samples from detained persons must be carried out in compliance with the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 to ensure that this right is respected.



## The Right to the Inviolability of the Dwelling

This right is engaged in the following operational policing areas:

- a) Entry, search, seizure and arrest – in respect of a dwelling;
- b) Application for, and issuance of search warrants;
- c) Entry and search of premises to effect an arrest - section 6 of the Criminal Law Act 1997.

The right to the protection of the dwelling from intrusion by the forces of the State has been a common law right for many centuries, and this longstanding right has been explicitly recognised and given the status of a constitutional guarantee by Article 40.5. The importance of this protection in a democratic society can be understood through the phrasing of Article 40.5 so as to grant one of the clearest and most unqualified protections given by the Constitution. It is qualified however, in that forcible entry is permitted if it is carried out in accordance with law.

The fact of the person's occupation of the premises is the crucial issue, not the nature of the dwelling itself. Thus it is not limited to a house or apartment, but can be a car, caravan or even a hotel room, once it is determined that the property is a dwelling. The protection is granted to the occupier of the dwelling only. An individual cannot claim that they have the right to the protection if present in another's dwelling. Under certain circumstances the occupation of the dwelling need not be legal in order to attract the constitutional protection, if the fact of the occupation is established.

Interference with this right will in most cases be as a result of an entry. For this reason, any such entry should not be made without careful consideration of the occupier's rights, and the authority under which a member seeks to enter the dwelling. Even where legal authority has, or may be granted, the necessity of the entry and the proportionality of entry as a response should be evaluated by the member. If forcible entry is deemed to be the necessary and proportionate course of action, then such entry must be effected in a lawful manner.



Lawful entry to a dwelling may be made on foot of a valid search warrant. A member of An Garda Síochána may also enter if they are invited or permitted to do so by the occupier. However, if such permission or invitation to enter is withdrawn subsequently, members will be required to leave in order to avoid a risk of being unlawfully on the premises. A dwelling may be entered for the purposes of arrest and search without a warrant or the consent of the occupier, under section 6 of the Criminal Law Act 1997 (the 1997 Act). Such an entry would be in accordance with law, but given the centrality of this right to individual liberty, the procedure for entry under section 6 of the 1997 Act must be strictly adhered to and fully explained to the occupier.

The inviolability of the dwelling is among the most fundamental rights, but it is ranked below life in the hierarchy of rights. It may therefore be necessary to prioritise the protection of an individual's right to life, over another's rights under Article 40.5. This is a determination which a member may be compelled to make in an emergency situation, where the inviolability of the dwelling is clearly of secondary importance to the protection of 'life and limb'.<sup>28</sup> Should such a situation arise, where time or opportunity does not allow for an independent determination, the proportionality and necessity of the action must dictate the response of the member.

In relation to companies/business premises, under the ECHR companies have a right to privacy, therefore any interference must be in accordance with law, necessary and proportionate in order to achieve the aim pursued. A member of An Garda Síochána may also enter if they are invited or permitted to do so by the occupier.

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<sup>28</sup> *DPP v Delaney* [1987] 1 ILRM 507.

## Freedom of thought, conscience and religion

From a policing perspective, these rights particularly but not exclusively relate to:

- a) The rights and responsibilities of Garda Personnel
- b) Garda relations with advocacy and religious groups
- c) The appropriate treatment of persons in custody
- d) The policing of public demonstrations, gatherings or displays motivated by belief or conscience.

The principals contained in this provision are central to the freedoms guaranteed by the Constitution and the ECHR. The beliefs held by individuals are central to their human dignity, and their ability to manifest these beliefs helps to secure and maintain the pluralism which underpins a free society. This freedom gives rise to several rights, which relate to how Garda Personnel perform their policing functions, and their own rights as individuals of conscience and belief. The personal beliefs of Garda Personnel and their right to manifest such beliefs are protected, subject to limitation in the interest of public order and morality. Garda Personnel are additionally subject to the restraints contained in their terms of employment. Members are recruited on the basis that they must enforce legislation, whether they agree with it or not. The importance of discipline to effective policing requires this. Limiting their rights to express or display their personal beliefs also facilitates the exercise of their duty to respect and protect the human rights of all. Garda Personnel will act in the public interest and not allow circumstances to arise that might compromise, or appear to compromise, themselves or An Garda Síochána.

Manifestations of religious belief or conscience are protected under the Constitution and the ECHR. This is not an absolute protection. Manifestations of belief may entail public demonstrations or gatherings or other public displays, if motivated by religious belief or conscience. Section 7(1) of the Criminal Justice (Public Order) Act, 1994 states: *“It shall be an offence for any person in a public place to distribute or display any writing, sign or visible representation which is threatening, abusive, insulting or obscene with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may*



*be occasioned*". This is an example of a provision which depending on the circumstances may require the intervention of members to prevent or suspend the public manifestation of belief. Where it is lawful and necessary, members may be required to intervene to curtail a public manifestation of belief. Members may do so where, public safety, public order, health or morals, or the protection of the rights and freedoms of others are threatened by the public manifestation of religious belief or personal conscience. Such intervention should be necessary, and proportionate to the threat, and conducted with respect for the beliefs and dignity of those involved. As expressions of belief have the potential to cause divisions in society, members should approach these issues with the motivation to promote pluralism. Members are reminded that they are required to intervene in all instances where a breach of the criminal law has occurred.



## Freedom of Expression

From a policing perspective, this right particularly but not exclusively relates to:

- a) The rights and responsibilities of Garda Personnel,
- b) Garda relations with advocacy and religious groups,
- c) The appropriate treatment of persons in custody (right to silence),
- d) The policing of public demonstrations, gatherings or displays motivated by belief, or conscience.

This right protects the dignity of the individual, and the collective interest in maintaining an environment where ideas can be expressed and democracy and pluralism can flourish. Freedom of expression may arise in the context of printed material, spoken words and non-verbal expression related to opinions. Pluralism mandates that unpopular ideas and ones which are in direct opposition to each other should be capable of being expressed without interference from the State. Because of the fundamental nature of this right, members should exercise restraint in circumstances where this right is engaged. Any action taken must be in accordance with law, necessary and proportionate to the aim to be achieved and non-discriminatory. Members are reminded that they are required to act in all instances where a breach of the criminal law has occurred.

Material which may offend, shock or disturb is in principle protected expression. However, hate speech, or expression which spreads, incites, promotes or justifies hatred based on intolerance is not protected, and is regulated by the Incitement to Hatred Act 1989. The permitted justifications for interference with the right to freedom of expression may be invoked to guarantee and protect the following:

- Public order or morality and the authority of the State
- National security, territorial integrity or public safety
- Prevent disorder or crime
- Protect health or morals
- Protect the reputation or rights of others
- Prevent the disclosure of information received in confidence



- Maintain the authority and impartiality of the judiciary

Any action taken by An Garda Síochána that restricts this right must be in accordance with law. The freedom of expression of Garda Personnel may be curtailed as a condition of their service. Garda Personnel must uphold the Official Secrets Act 1963, which restricts the disclosure of confidential or official information, and must also respect the privacy and confidentiality of members of the public. However, under the Protected Disclosures Act 2014 provision is made for making protected disclosures in respect of relevant wrongdoings and the protection of the identity of those making such disclosures. The right to remain silent under Garda questioning is also protected under the constitutional right to freedom of expression, but will be dealt with in more detail under the right to a fair trial.



## Freedom of Assembly and Association

From a policing perspective, these rights particularly but not exclusively relate to:

- a) The policing of assemblies, for example demonstrations/protests, and
- b) The rights and responsibilities of members of Garda Personnel.

The right to freedom to assemble peaceably is a right recognised by the Constitution and the ECHR. Any assembly organised with a violent purpose can be lawfully dispersed. The State has a positive obligation to protect those assembled from the threat of counter demonstrators. When called upon to police a demonstration/protest, An Garda Síochána should communicate with the organisers in order to facilitate the right and protect the public. An assembly can be dispersed if it results in violence. Members are reminded that they are required to act in all instances where a breach of the criminal law has occurred.

Demonstrations in a public place may cause a certain level of disruption to ordinary life. Garda Personnel should seek to minimise the disruption while facilitating the right to assemble. Unpopular ideas and groupings are equally protected and all restrictions placed on demonstrations must be lawful, necessary, proportionate to the aim to be achieved and non-discriminatory. Pluralism mandates that unpopular ideas and ones which are in direct opposition to each other should be capable of being expressed without interference from the State. Because of the fundamental nature of this right, members should exercise restraint in circumstances where this right is engaged. When it is necessary to use police powers to achieve an objective, members will make sure that their actions are in accordance with law and proportionate to the aim to be achieved and be non-discriminatory. Members who are required to police a demonstration shall endeavour to communicate information to the participants and others in attendance in a manner that is respectful, easy to understand and sensitive to the circumstances. Interference with this right is permitted where the assembly threatens one of the following interests:

- National security or public safety,



- Prevention of disorder or crime,
- Protection of health or morals, or
- Protection of the rights and freedoms of others.

The right to freedom of association allows for individuals to organise collectively by forming associations or trade unions. It too is a fundamental right but one which may be restricted for members of An Garda Síochána or armed forces. The individual rights of members can be curtailed in order that the public can be confident that the members they encounter will be politically neutral.

The free movement of goods is one of the four freedoms of the European Union. Therefore, Garda Personnel should consider the impact on the free movement of goods in and out of a location affected by an assembly, and ensure that the policing plan is proportionate to the competing interests and rights involved.





## Right to Marry and Found a Family

From a policing perspective, this right particularly but not exclusively relates to:

- a) Combating trafficking of human beings
- b) Tackling the exploitation of vulnerable people
- c) Investigation of offences relating to the provision of false or misleading information to the Registrar of Births, Deaths and Marriages<sup>29</sup> (Sham marriages).

The Constitution gives the institution of marriage, including same sex marriage, specific protection against attack in Article 41.3.1. In addition, the importance of one's right to marry has been recognised in Article 12 of the ECHR which provides that "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*".

In so far as An Garda Síochána is concerned, this right is applicable from an investigation standpoint primarily in the context of enforcing human trafficking and immigration legislation and certain offences surrounding sham marriages. An Garda Síochána is responsible for the effective investigation of instances where there is a suspicion or report of a breach of such domestic legislation. In such instances investigations should be conducted in an effective and efficient manner and without delay. This would include liaising with other statutory agencies as appropriate for example, liaising with TUSLA in the case of a child to ensure the protection of their welfare.

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<sup>29</sup> Section 69(3) & 70 of the Civil Registration Act 2004 is relevant in relation to the offence of providing false particulars or information to a registrar which he or she knows to be false or misleading. By way of guidance in relation to sham marriages, section 2 of the Civil Registration Act 2004 as amended by section 3 of the Civil Registration (Amendment) Act 2014 defines 'marriage of convenience' and 'civil partnership of convenience'; 'marriage of convenience' means a marriage where at least one of the parties to the marriage— (a) at the time of entry into the marriage is a foreign national, and (b) enters into the marriage solely for the purpose of securing an immigration advantage for at least one of the parties to the marriage; 'civil partnership of convenience' means a civil partnership where at least one of the parties to the civil partnership—(a) at the time of entry into the civil partnership is a foreign national, and (b) enters into the civil partnership solely for the purpose of securing an immigration advantage for at least one of the parties to the civil partnership.

## Right to Effective Remedy

From a policing perspective, this right particularly but not exclusively relates to:

- d) Investigations, and
- e) Trial of offences.

The right of access to the courts is a constitutional right which carries with it procedural protections. Article 13 of the ECHR requires the existence of an effective remedy, in theory as well as in practice, to every person whose ECHR rights have been violated, even if their rights have been violated by Garda personnel.

In so far as An Garda Síochána is concerned this right is applicable from a policing perspective primarily in the context of investigations including habeas corpus applications and the trial of offences. Vindicating the human rights of the individual is a function of An Garda Síochána.<sup>30</sup> This requires the effective investigation of crimes and of complaints made to An Garda Síochána. It is also incumbent on Garda Personnel when carrying out operations where an ECHR right is engaged, to ensure that they are conducted in a manner which is proportionate, necessary and in accordance with law. Where a breach of the criminal law is suspected or has been alleged, an investigation should be conducted in an effective and efficient manner and without delay. Any investigation into allegations of misconduct by Garda personnel must be conducted in an objective and professional manner. Where investigations are carried out by an external body, full cooperation by members insofar as is possible in accordance with law is required to ensure the effectiveness of the remedy in practice. Garda Personnel shall fulfil any duty to disclose information and records in accordance with the law and in a timely, truthful and transparent manner. Safeguards which have been adopted to protect fundamental rights should at all times be recognised, respected and complied with.

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<sup>30</sup> Section 7(1)(c) of the Garda Síochána Act 2005; Section 3 of the European Convention on Human Rights Act 2003; Section 42 of the Irish Human Rights and Equality Commission Act 2014.



## Equality/Non-Discrimination

From a policing perspective, this principle particularly but not exclusively relates to:

- a) Treating everybody with respect and fairness,
- b) Opposing discrimination and unfair treatment,
- c) Giving special consideration to vulnerable people including children, and
- d) Building trust and cooperation with communities.

Individuals have a constitutional right to be held equal before the law. This does not require that all individuals are treated identically, but any distinction made must not be arbitrary in respect of the wrongful reasons contained in the *Code of Ethics for An Garda Síochána* and as set out below. Any differential treatment must have an objective and reasonable basis. The principle of equality can be summarised as prohibiting superior or inferior treatment of individuals on the basis of personal characteristics such as for example, race or gender. In these respects, Garda Personnel must carry out their duties in a non-discriminatory manner.

Where any differential treatment is being considered the following questions should be addressed to establish and enquire into the justification for it:

- a) What is the justification for this differential treatment? Does it pursue a "legitimate aim"?
- b) Is the justification objective and reasonable or arbitrary?
- c) If the justification is considered to be arbitrary (in respect of the wrongful reasons) the document shall be revised.
- d) If the justification is considered objective and reasonable, then consider whether the differential treatment is proportionate ie. are the means used proportionate to the aim sought to be achieved by the document, or could that aim be achieved without resorting to differential treatment.



Vindicating the human rights of the individual is a function of An Garda Síochána.<sup>31</sup> The ECHR requires that these rights are secured in a non-discriminatory way. Garda Personnel should always bear this principle in mind when carrying out their duties. Any difference in treatment must have a reasonable and objective basis, otherwise it will be deemed discriminatory, unless deemed to be a positive measure intended to promote equality of opportunity.<sup>32</sup>

The standard of ‘*Respect and Equality*’ in the *Code of Ethics for An Garda Síochána* contains invaluable guidance on implementing the principle of equality/non-discrimination. In this respect, everyone working in An Garda Síochána must: (i) recognise and respect the dignity and human rights of all people, (ii) treat people with courtesy, respect and fairness, and not discriminate wrongfully, (iii) oppose and challenge any behaviour or language that demonstrates discrimination or disrespect, (iv) be sensitive to the vulnerabilities of individuals and show understanding and empathy to those they come into contact with, (v) take steps to improve relations with the public.<sup>33</sup>

There are a number of examples of wrongful reasons for discrimination, as follows:

Age,	Colour,
Disability,	Nationality,
Family status,	Ethnic or National origins,
Gender,	Sexual orientation,
Marital status,	Gender non-conformity,
Membership of the Traveller Community,	Political opinion,
Religion,	Residence status,
Race,	Social origin. <sup>34</sup>

<sup>31</sup> Section 7(1)(c) of the Garda Síochána Act 2005; Section 3 of the European Convention on Human Rights Act 2003; Section 42 of the, Irish Human Rights and Equality Commission Act 2014.

<sup>32</sup> Section 14(b) of the Equal Status Act 2000.

<sup>33</sup> Code of Ethics for the Garda Síochána.

<sup>34</sup> Code of Ethics for the Garda Síochána.

## Children's Rights

From a policing perspective, children's rights particularly but not exclusively relate to:

- a) Reporting obligations to Tusla under Children First Guidance,
- b) Combating trafficking in children,
- c) Tackling the sexual exploitation of children,
- d) Garda attendance in court, and
- e) Appropriate treatment of child suspects at investigative stage.

Garda Personnel must be aware of the particular vulnerability of children and shall be sensitive, especially as regards their age and to the difficult circumstances they may find themselves in when in contact with An Garda Síochána. The State is obliged to seek to protect children from all forms of physical and mental violence, sexual exploitation, abduction and trafficking. Members are required to intervene wherever a breach of the criminal law is suspected. When dealing in this context with child victims it is essential that the particular needs and vulnerabilities of these victims be a primary concern. All those below 18 years of age are regarded as children. All children who Garda Personnel encounter in the course of their duties must be treated with dignity and with due regard to their age and level of maturity. This applies equally to suspects and victims of crime alike.

Children should be addressed in child appropriate language in order to ensure that they understand the nature and significance of any process or investigation to which they are subject. A primary focus for all those dealing with children should be the best interests of the child. This entails affording children the right to be heard, endeavouring to detain them apart from adult offenders, and always taking into account the desirability of promoting the child's reintegration into society.



## Property

From a policing perspective, this right particularly but not exclusively relates to:

- a) The seizure and retention of property/assets,
- b) Prevention of damage to public/private property,
- c) Respect for, and appropriate use of Garda property.

The right to private property is recognised and protected under the Constitution and ECHR. The right is not absolute, however from a Garda perspective, respect for individual property rights should inform all operational activities. The lawfulness, necessity and proportionality of all actions must be considered where an operation poses a risk of damage to public or private property. Garda Personnel must also respect and make appropriate use of Garda property in carrying out their duties.

An Garda Síochána has a right and a duty to seek out and retain evidence including the seizure of property, either as evidence or as the proceeds of crime. Seized property must be treated respectfully and in accordance with law.



## Right to Education

From a policing perspective, the operation of this right may trigger the necessity for Garda action in circumstances where persistent absence from school may be connected with child welfare issues.

The right to education seeks to achieve more than a minimum level of scholastic education. It offers the child the opportunity to make the best possible use of their inherent and potential capacities, physical, mental and moral. While An Garda Síochána has a limited role in enforcing this right, its importance to the development of the individual and its impact on cohesion in society require an appreciation and understanding of the importance of education by all Garda Personnel.

School attendance was formerly an area of policing responsibility. Although members are no longer required to detain children for persistent absence from school, An Garda Síochána maintains a duty to have regard for the welfare of all children in the State. Children below the age of sixteen must attend school or receive adequate schooling in their home. If they are not receiving such schooling this has negative implications for the child's development and welfare. Members of An Garda Síochána who identify an issue concerning the welfare of a child, including where connected with persistent failure to attend school, should consider their reporting obligations under the Children First Guidance.



## Right to Free Elections

From a policing perspective, this right particularly but not exclusively relates to:

- a) The policing of public demonstrations/gatherings,
- b) Policing elections,
- c) Prohibition on political activities by members of An Garda Síochána.

The powers of the Government and the State derive from the free choice of the people. The people exercise their choice through free elections in order to select their public representatives. An Garda Síochána plays its role in this regard through the enforcement of the electoral legislation in particular, to ensure the effective operation of the system of free elections.

Public meetings and demonstrations are essential elements of political mobilisation and campaigning and therefore integral to a free political system. Members are responsible for ensuring that such political assemblies take place peacefully. Election staff and members of An Garda Síochána must work together to secure this right by ensuring the effective running of the system of free elections on polling day. Members of An Garda Síochána are prohibited from being members of political parties and must at all times carry out their duties in a politically neutral manner. Throughout the campaign and polling stages members are reminded that they are required to act in all instances where a breach of the criminal law has occurred.





## Freedom of Movement

From a policing perspective, this right particularly but not exclusively relates to:

- a) Stopping an individual/vehicle in the course of duty,
- b) Curfews,
- c) Confinement to a particular area, and
- d) Exclusion from a particular area.

The right to move freely within the territory of the State is enjoyed by all those lawfully resident in the State. The right to enter and leave the country extends to all European Economic Area (EEA)<sup>35</sup> nationals.<sup>36</sup> Restrictions may apply to the citizens of other States who are lawfully resident in Ireland but may not move freely within the EEA. An Garda Síochána may place certain restrictions on the exercise of these rights, but only if those restrictions can be shown to be lawful, necessary and proportionate.

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<sup>35</sup> The EEA is an area of free trade and free movement of peoples comprising the member states of the European Union, in addition to Norway, Iceland and Liechtenstein.

<sup>36</sup> S 18(1), European Communities (Free Movement of Persons) (No.2) Regulations 2006, SI No 656/2006.



## Expulsion Protections/Asylum

These rights and safeguards are engaged in the following operational policing areas:

- a) Arrest, and
- b) Detention prior to expulsion.

The rights and procedural safeguards which arise in this operational area are derived from the State's international commitments, but are also grounded in constitutional principles. Those individuals awaiting a determination on their status as refugees are deemed to be legally resident asylum seekers. The concept of expulsion is used in a generic sense but does not include extradition. Insofar as An Garda Síochána is concerned, these rights and safeguards are applicable particularly when enforcing immigration legislation and deportation orders which involve arrests and detentions of persons. Members enforcing this legislation must ensure that their actions are in accordance with law. Persons being removed from the State, who are the subject of a deportation order, must be treated with dignity and respect. There is an absolute rule that a person may not be returned to a country where they will suffer persecution. Although this is a matter for the Minister for Justice & Equality in deciding whether to expel a non-national, it is possible that the issue will arise in the course of the arrest or detention of the non-national due to recent changes in circumstances in their home state. If this arises, the member is under a duty to check with the Department of Justice & Equality whether such a claim is correct. Members shall at all times be sensitive to the difficult circumstances individuals may find themselves in when in contact with An Garda Síochána.



## Human Rights in an Operational Context

The vindication of human rights is a key policing objective, and is in fact the very basis of policing. Any interference with a suspect's human rights must be as limited as possible, in line with the principles of legality, necessity, proportionality, accountability and non-discrimination.

## Investigations/Operations

Garda investigations shall be objective and fair. They shall be sensitive and adaptable to the special needs of vulnerable persons, including children. Engagement with victims and their families is a primary consideration. Victims should be informed of the timing and progress of the investigation of their cases and subsequent proceedings.<sup>37</sup> The remarks by Carney J. in *DPP v Bartley*, unreported, High Court, June 13, 1997 are noteworthy where he stated:

*“Where a credible complaint of felony is made to a policeman, he has no discretion under the Common Law not to investigate it and apprehend a named offender. A failure to carry out this duty vigorously constitutes an illegality on the policeman's part and renders him liable to prosecution on indictment”.*

Carney J. referred to *Creagh v Gamble* 1887 XXIV L.R.I. p. 458, where Pallas C.B. said that *“A person against whom a reasonable suspicion of a felony exists shall be brought to justice. The Peace Officer is not only entitled but bound to arrest him”*. Carney J. said that *“this principle of the common law still holds good 110 years later. It is an indictable offence at Common Law for a public officer wilfully and without reasonable excuse or justification to neglect to perform a duty imposed on him either by Common Law or Statute”*.

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<sup>37</sup> Article 6, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; ‘Victims’ Directive’, Directive 2012/29/EU of the European Parliament and of the Council, 25 October 2012; Sections 7-11 of the Criminal Justice (Victims of Crime) Act 2017.

The ECtHR has stated the following in relation to the standard required for the purpose of an investigation:

*‘general duty under Article 1 of the convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention’, requires by implication that there should be an effective official investigation. An obligation to investigate is not an obligation of result, but of means. Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events, however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, the identification and punishment of those responsible. That meant that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the facts will risk falling foul of this standard....’<sup>38</sup>*

In relation to undercover operations and informers, it is imperative that members and informers do not engage in any conduct that would in any way incite an individual to commit a crime he or she would not otherwise commit.<sup>39</sup> In relation to the admissibility of evidence arising from an undercover operation, the ECtHR in the case of *Matanović v Croatia*<sup>40</sup> noted that the absence of “procedural safeguards in the ordering of an undercover operation generates a risk of arbitrariness and police entrapment”.<sup>41</sup> The Court of Appeal in *DPP v Mills*<sup>42</sup> has also stated in relation to Article 38 of the Constitution and Article 6 of the ECHR that “it is desirable that the details of such operations be recorded in a dedicated manner. Dedicated recording of such information would undoubtedly assist a court when called upon to make a determination as to the lawfulness of prosecutions or the admissibility of evidence arising from undercover operations”.<sup>43</sup>

There are a number of obligations on An Garda Síochána that must be met in order to support the lawful interference with the rights of individuals. This varies on a case by case

<sup>38</sup> *Barabanshchikov v Russian* App. No. 36220/02, judgment delivered on 8<sup>th</sup> January, 2009.

<sup>39</sup> *Teixira de Castro v Portugal* (1998) 28 EHRR 101, at para 39.

<sup>40</sup> *Matanović v Croatia*, App no 2742/12, 4<sup>th</sup> July 2017.

<sup>41</sup> *Matanović v Croatia*, App no 2742/12, 4<sup>th</sup> July 2017, at para 124.

<sup>42</sup> *DPP v Mills* [2015] IECA 305.

<sup>43</sup> *DPP v Mills* [2015] IECA 305, at para 65; See also, *Mills v Ireland* [2017] ECHR 984.

basis and depends on individual circumstances and the presence of sufficient legal basis being present. In addition to compliance with the fundamental principles as outlined in Section 2 of this Framework, the following should underpin all investigations:

- That there were reasonable grounds to suspect some knowledge or involvement relevant to the offence under investigation or disturbance of the peace;
- That the proper procedures have been followed, recorded and all actions were authorised;
- That the nature of the interference is proportional in its seriousness to the matter being investigated;
- All the options were considered and all the relevant factors recorded;
- That the methods used were proportionate and necessary for the purpose of the enquiry.

### Discretion

Police powers are conferred directly on each member of An Garda Síochána by Common Law and statute. A member of An Garda Síochána has an inherent power of discretion by virtue of their office. In relation to the exercise of their powers, individual members must decide in each case, by use of their discretion, if it is appropriate to exercise a power or not. The discretionary powers afforded to each member of An Garda Síochána entail an obligation to act prudently when choosing to use or refrain from using these powers in an individual case.<sup>44</sup> The use of discretion must always aim to avoid arbitrariness. In this regard, the use of discretion should be guided by a process which involves “*taking relevant considerations into account, ignoring irrelevant considerations and acting proportionately*”.<sup>45</sup>

Members also exercise their discretion in determining if a prosecution should be initiated. This discretion shall be exercised in accordance with where the public interest lies.

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<sup>44</sup> Dermot P.J. Walsh, *Walsh on Criminal Procedure* (2<sup>nd</sup> Edition, Thomson Reuters Ireland 2016) 36.

<sup>45</sup> Dermot P.J. Walsh, *Walsh on Criminal Procedure* (2<sup>nd</sup> Edition, Thomson Reuters Ireland 2016) 36, See, for example, *Mohammed-Holgate v Duke* [1984] A.C. 437; and *Vasileva v Denmark* (2005) 40 E.H.R.R. 681.



Members shall be guided by the Director of Public Prosecutions Guidelines for Prosecutors in determining if it is in the public interest to commence a prosecution.<sup>46</sup> *“A prosecution should be initiated or continued, subject to the available evidence disclosing a prima facie case, if it is in the public interest, and not otherwise.”*<sup>47</sup>

### Note taking

The recording of all relevant information including the rationale for decisions and actions/inactions taken as a result, contemporaneous with every event in which a member of Garda Personnel is engaged, is essential to ensure accountability as required. Where force is used, the recording and reporting procedures as provided for in the most up-to date Use of Force Policy will apply. In all cases the Decision Making Model should be considered in relation to assessing the appropriate steps to be taken to ensure that human rights are respected and protected.

### Decision Making Model

To assist in securing respect for and the protection of human rights, a decision making model is provided for in An Garda Síochána which requires the decision maker(s) to identify and acquire knowledge of relevant human rights standards and apply the fundamental principles as set out above. Constitutional and Human Rights, and the Code of Ethics for An Garda Síochána must be the centre of all decision making. The model applies to all decisions, from spontaneous incidents to planned operations, daily duties to strategic planning. The model can be applied by an individual member or teams of people and to both operational policing and non-operational policing matters. It is applicable across all ranks and grades and in all situations and provides for a standardised and accountable framework for internal and external stakeholders.

The model supports and empowers all staff of An Garda Síochána to make effective decisions, to reflect on and evaluate their decisions and to enhance their learning and the

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<sup>46</sup> Guidelines for Prosecutors [4<sup>th</sup> Edition - October 2016] Office of the Director of Public Prosecutions, Chapter 4.

<sup>47</sup> Guidelines for Prosecutors [4<sup>th</sup> Edition - October 2016] Office of the Director of Public Prosecutions, pg. 13.



development of professional judgement over time. The model also supports and empowers all staff of An Garda Síochána to rigorously oppose unprofessional, unethical illegal or corrupt behaviour or decisions. The decision making model provides a framework for continuous review, evaluation and improvement in a simple and easily understood manner.

The advantage of human rights to Garda work is two-fold. Firstly, it underpins societal legitimacy An Garda Síochána receives as a result of such policing and secondly, the recognition that rights are afforded to Garda Personnel. The State has put in place restrictions on An Garda Síochána in relation to human rights entitlements for example:

1. Section 18(3) of the Garda Síochána Act 2005 states that “[a] member of the Garda Síochána shall not be or become a member of any trade union or association (other than an association established under this section or section 13 of the Garda Síochána Act 1924) any object of which is to control or influence the pay, pensions or conditions of service of the Garda Síochána”, and
2. Section 16 of the Offences Against the State Act 1939, places a restriction on Secret societies in army or police, whereby every person who shall—
  - (a) form, organise, promote, or maintain any secret society amongst or consisting of or including members of any military or police force lawfully maintained by the Government, or
  - (b) attempt to form, organise, promote or maintain any such secret society, or
  - (c) take part, assist, or be concerned in any way in the formation, organisation, promotion, management or maintenance of any such society, or
  - (d) induce, solicit, or assist any member of a military or police force lawfully maintained by the Government to join any secret society whatsoever, shall be guilty of an offence and shall be liable on conviction thereof to suffer imprisonment for any term not exceeding five years.



## NEAMHSHRIANTA / UNRESTRICTED

The rationale for such restrictions is to ensure that An Garda Síochána as an institution is respected and has the confidence of the public to carry out its mandate fairly and independently.





## SECTION 4

### FURTHER READING

This Section is designed to provide further reading in respect of each right as set out in Section 3 on a right by right basis capturing the Constitution, ECHR, Charter of Fundamental Rights, Code of Ethics and other relevant International standards.

### RIGHT TO DIGNITY

#### CONSTITUTION OF IRELAND 1937

The right to be treated with dignity is recognised by the Constitution for example, ‘...*in the context of a constitution which in its Preamble proclaims as one of its aims the dignity and freedom of the individual*’.<sup>48</sup> Also, McWilliams J. referred to the Preamble in finding that section 4 of the Vagrancy Act 1824 was inconsistent with the Constitution as the criminalising of acts deemed suspicious or based on reputation undermined *inter alia* human dignity.<sup>49</sup> Denham J. stated that all individuals have an implied constitutional right to be treated with dignity.<sup>50</sup> Keane C.J. linked judicial recognition of the implied right to privacy to the constitutional aspiration to assure the dignity and the freedom of the individual.<sup>51</sup> Herbert J. stated that a law that has the effect of discriminating between persons on the basis of money is an attack upon the dignity of those persons who do not have money.<sup>52</sup>

#### ECHR

The right to dignity is inherent in Article 2 and 3 of the ECHR which is dealt with in detail in this human rights framework.

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<sup>48</sup> *McGee v AG* [1974] IR 284.

<sup>49</sup> *King v AG* [1981] IR 233.

<sup>50</sup> *In Re Ward of Court* (No. 2) [1996] 2 IR 79.

<sup>51</sup> *O’T v B* [1998] 2 IR 321.

<sup>52</sup> *Redmond v Minister for the Environment* [2001] 4 IR 64.



## CHARTER OF FUNDAMENTAL RIGHTS

The **Preamble** of the Treaty of the European Union provides that ‘...[c]onscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity;’

The Preamble of the Charter of Fundamental Rights (CFR) provides that ‘...Union is founded on ...human dignity....’ Article 1 of the CFR provides that “[h]uman dignity is inviolable. It must be respected and protected.”

### Code of Ethics for An Garda Síochána

A commitment is given to the standard of “*Respect and Equality*” in the following terms:

*“I will recognise and respect the dignity and equal human rights of all people.”*

## OTHER RELEVANT INTERNATIONAL STANDARDS

The right to be treated with dignity is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### European Code of Police Ethics:

Article 54 states:

*“Deprivation of liberty of persons shall be as limited as possible and conducted with regard to the dignity, vulnerability and personal needs of each detainee. A custody record shall be kept systematically for each detainee.”*

### UN Body of Principles for Protection of All Persons under any Form of Detention or Imprisonment

Principle 1 provides that:

*“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”*

### UN Convention on the Rights of the Child

#### Article 37

States parties shall ensure that ...



*“(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances ... ”*



## RIGHT TO LIFE

### CONSTITUTION OF IRELAND

In the case of *Conroy v. Attorney General and Another*<sup>53</sup> the comments of Kenny J. must be noted where he said that “*every individual as an individual has certain inherent rights of which the right to life is the most fundamental: after it comes the right to bodily integrity. These inherent rights of the individual impose on everyone an obligation to respect them.*”<sup>54</sup> Article 40.3.2 provides for the express protection of the “*person*”.

### ECHR

Article 2 of the ECHR is set out in the following terms:

*“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*

- (a) in defence of any person from unlawful violence;*
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection”.*

Article 2 provides that “[e]veryone's right to life shall be protected by law”. Article 2 imposes an obligation to “*refrain from intentional and unlawful taking of life*”, an obligation to take positive steps to protect life<sup>55</sup> and a duty to conduct an “*effective official investigation*” when State agents have taken life through the use of force.<sup>56</sup> While the procedural duty is not expressly provided for in Article 2 it is implied to ensure the effectiveness of the substantive right to life in practice.<sup>57</sup>

<sup>53</sup> [1965] IR 411.

<sup>54</sup> [1965] IR 411 at 419-420.

<sup>55</sup> *Osman v The United Kingdom* 23452/94 [1998] ECHR 101 (28 Oct 1998), para 115.

<sup>56</sup> *McCann and Others v The United Kingdom* (1996) 21 EHRR 97, para 161.

<sup>57</sup> *LCB v United Kingdom* (1999) 27 EHRR 212, para 36.



The right to life is one of the basic values of the democratic societies making up the Council of Europe.<sup>58</sup> The European Court of Human Rights has interpreted Article 2 as imposing on member states “*the obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life*”.<sup>59</sup>

The European Court of Human Rights held that the right to life ranks at the top of the human rights hierarchy.<sup>60</sup>

### **OBLIGATION TO PROTECT LIFE**

The positive obligation on States includes a requirement to provide a legal structure to prohibit and punish killings that fall outside the narrow restriction of Article 2, to ensure the effective implementation of the law and the investigation of all killings.<sup>61</sup>

It has been held that the first sentence of Article 2(1) “*enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions*”.<sup>62</sup> In this case the perpetrator’s intention and the level and nature of force used would be relevant in assessing whether the use of non-fatal force inflicting injury short of death breached Article 2.<sup>63</sup>

The obligation that requires appropriate action to be taken by the State to protect life is known as a positive obligation.<sup>64</sup> A positive obligation may be implied from Article 2 on

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<sup>58</sup> *McCann*, para 147.

<sup>59</sup> *LCB*, para 36.

<sup>60</sup> *Streletz v Germany* (2001) 33 EHRR 31, paras 92-94.

<sup>61</sup> Jessica Simor and Ben Emmerson Q.C. Human Rights Practice R. 11 [2006] p 2.002.

<sup>62</sup> *Osman*, para 115.

<sup>63</sup> *Ilhan v Turkey*, 27 June [2000] ECHR 354.

<sup>64</sup> Simor and Emmerson p 2.002 *Ibid*.

public authorities to take preventative measures to protect persons in certain circumstances whose lives are at risk from the criminal acts of others.<sup>65</sup> The European Court of Human Rights held that this duty applies only where “*the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*”.<sup>66</sup> The positive obligation contained in Article 2 to ensure the right to life not only applies to the general population but also to suspects<sup>67</sup>.

The authorities must show that they “*did all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge*”.<sup>68</sup>

The Court pointed out that due to the unpredictability of human conduct, the difficulty of policing modern societies and resource issues, the duty must be interpreted in a manner, which does not impose an impossible or disproportionate burden on the authorities.<sup>69</sup>

Accordingly, An Garda Síochána may be under an obligation to take operational measures to protect a person’s life in certain situations. The main issues for An Garda Síochána is:

1. establishing what is a real and immediate threat; and
2. if such a threat is established, what steps must be taken to seek to avert it?

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<sup>65</sup> *Osman*, para 115.

<sup>66</sup> *Osman*, para 116.

<sup>67</sup> *McCann*, para 202 – 214.

<sup>68</sup> *Osman*, para 116.

<sup>69</sup> *Osman*, para 116.



**REAL AND IMMEDIATE**

Guidance can be gleaned from the leading case in the United Kingdom concerning a “*real and immediate*” threat which is in *Re. Officer L.*<sup>70</sup> In this case, the House of Lords said that a real and immediate threat is one that is:-

1. objectively verified; and
2. present and continuing.

The threshold is a high one. In making this assessment, all relevant sources of information should be considered and ensure that all decisions are justified and recorded. The immediacy of the risk will increase the degree of the obligation.

**FEASIBLE OPERATIONAL STEPS**

In the event that it is established that a real and immediate threat exists the next issue is what, if anything, members of An Garda Síochána are required to do. The legal requirement is for members of An Garda Síochána to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk to life. Accurate and detailed recording of relevant decisions and the decision-making process can assist in this regard.

**NEGATIVE OBLIGATION**

There is a negative obligation placed on states by virtue of Article 2 not to intentionally take life. This obligation can also be interpreted as extending to situations where life has been deprived as a result of an unintentional outcome.<sup>71</sup> The negative obligation in plain terms requires that states refrain from taking life.<sup>72</sup> The right to life is limited in that force may be exercised in defence of any other person from unlawful violence, to arrest or to prevent the escape of a person lawfully detained or to quell a riot or insurrection.<sup>73</sup> These exceptions must be narrowly interpreted.<sup>74</sup>

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<sup>70</sup> [2007] UKHL 36.

<sup>71</sup> *McCann*, para 133.

<sup>72</sup> Simor and Emmerson p 2.002.

<sup>73</sup> European Convention on Human Rights (ECHR) Article 2(2).

<sup>74</sup> *Stewart v United Kingdom* App No 10044/82: 39 DR 162 para 169.



There is no reference in the ECHR to the imminence of the “*unlawful violence*” in Article 2(2) and the European Commission on Human Rights has said that the justification of the prevention of crime could not be relied upon.<sup>75</sup> Furthermore, the deprivation of life will not be justified on the basis of the protection of property.<sup>76</sup>

Therefore, where a killing takes place in the absence of a lawful objective, as outlined in Article 2(1), Article 2 of the ECHR will be engaged. In this regard, the European Court of Human Rights has held that where a person is suspected of a non-fatal offence and it is known the person poses no risk to life and even if the person may escape it will never be “*absolutely necessary*” to use lethal force to arrest.<sup>77</sup>

Article 2 of the ECHR may be engaged even where a person is not deprived of their life. In *Markaratzis v Greece* the ECt.HR concluded that “*the degree and type of force used, ...irrespective of whether or not the police actually intended to kill him, ...put his life at risk, even though, in the event, he survived. Article 2 is thus applicable in the instant case. Furthermore, given the context in which his life was put at risk and the nature of the impugned conduct of the State agents concerned, the Court is satisfied that the facts call for examination under Article 2 of the Convention.*”<sup>78</sup>

### **ABSOLUTELY NECESSARY**

The scope and application of the exceptions in Article 2 are exhaustive.<sup>79</sup> The use of lethal force against the body of a person must be no more than “*absolutely necessary*”<sup>80</sup> and must be interpreted strictly.<sup>81</sup> “*The obligation to use no more force than “absolutely necessary” applies equally to the carrying out of rescue operations intended to liberate individuals*

<sup>75</sup> *Kelly v United Kingdom* (1993) 74 D.R. 139.

<sup>76</sup> Ben Emmerson Q.C., Professor Andrew Ashworth, Alison Macdonald Human Rights and Criminal Justice, 2 Ed, [2007] p 756.

<sup>77</sup> *Nachova v Bulgaria* (2004) 39 E.H.R.R 37 as cited in Emmerson, Ashworth, MacDonald at p755.

<sup>78</sup> *Makaratzis v Greece* (2005) 41 EHRR 1092 at para 54-55.

<sup>79</sup> Simor and Emmerson p 2.002.

<sup>80</sup> ECHR Article 2(2).

<sup>81</sup> *McCann*, para 147.



*who are held captive.*”<sup>82</sup> In the case *Andronicou and Constantinou v Cyprus*<sup>83</sup> which related to an operation to release a person (Constantinou) held at gun point by her fiancé the court considered whether the operation had been planned and controlled in such a way as to minimise the risk of life. The Court found that all appropriate care had been taken to avoid, to the greatest extent possible, risk to life and in this respect had regard to the stringent efforts taken by the authorities to negotiate the release of Constantinou, the instructions and training given to the security forces involved and to the grave risk that Constantinou appeared to face. The Court considered their use of lethal force not to have exceeded what was “*absolutely necessary*” for the purpose of defending their lives and the life of Constantinou in light of that finding and of the circumstances facing the officers. The Court consequently found no breach by the State of its obligations under Article 2(2)(a) and (b) of the ECHR.<sup>84</sup>

The European Court of Human Rights emphasised that the taking of life may only be justified where absolutely necessary “... *where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty*”.<sup>85</sup> This extract demonstrates that even if that honest belief turns out to be a mistake the taking of life will be justified if it was absolutely necessary in the circumstances.

Therefore, the European Court of Human Rights will look at whether the belief was based on reasonable grounds in light of the information available at the relevant time and it will look at the proportionality between the force used and the objective to be achieved.<sup>86</sup> The strict interpretation applies both to intentional and unintentional deprivation of life.<sup>87</sup>

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<sup>82</sup> Simon and Emmerson p 2.027.

<sup>83</sup> (1997) 25 EHRR 491.

<sup>84</sup> *Andronicou and Constantinou v Cyprus* (1997) 25 ECHR 491, paras 181-194.

<sup>85</sup> *McCann*, para 200.

<sup>86</sup> *McCann*, para 156.

<sup>87</sup> *Andronicou and Constantinou v Cyprus* (1997) 25 EHRR 491, para 171.

While Article 2 does not expressly require the proportionality test, the European Court of Human Rights stated that the force used must be “*strictly proportionate*”.<sup>88</sup> The principle of proportionality is “*inherent in the whole of the Convention*”.<sup>89</sup> The European Court of Human Rights will seek to establish whether the State could have realised the objective by alternative means less injurious to the rights of the person.<sup>90</sup> The burden rests on the Government<sup>91</sup> to demonstrate that the measures they used did not exceed what was necessary to realise the objective.<sup>92</sup>

The good reason basis in forming the belief is an objective test which requires that all reasonable attempts be made by officers to establish the true facts prior to using lethal force.<sup>93</sup>

However, the European Court of Human Rights declared in a case, where a police officer encountered a person with what he “*honestly believed*” to have been a firearm which subsequently transpired to be a fake, that the honest belief of the officer that it was necessary to deprive the life of the suspect in order to save his own life, was derived from “*good reasons*” apparent at the time to be legitimate.<sup>94</sup>

The question of whether the taking of life was “*absolutely necessary*” in the circumstances is one that depends to a very large degree on the facts of the individual case. The key issues to consider include the following:

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<sup>88</sup> *Andronicou and Constantinou*, para 171.

<sup>89</sup> *Sporrong and Lonroth v Sweden* [1983] 5 EHRR 35 at para 69; *Soering v United Kingdom* [1989] 11 EHRR 439 at para 89.

<sup>90</sup> Emmerson, Ashworth and MacDonald at p109.

<sup>91</sup> *Smith and Grady v United Kingdom* [2000] 29 EHRR 493 at para 99.

<sup>92</sup> Emmerson, Ashworth and MacDonald at p108.

<sup>93</sup> *Ramsahai v Netherlands* [2006] 43 EHRR 39.

<sup>94</sup> *Brady v United Kingdom*, Admissibility Decision, 3 April 2001.

**Absolutely Necessary – Key Issues**

- 1 The nature of the aim pursued – was it the protection of a person from unlawful violence which poses a real and immediate risk to life?
- 2 Was the use of lethal/potentially lethal force absolutely necessary in the circumstances, bearing in mind the dangers to the lives of all persons involved?
- 3 What were the risks to others, including the subject of the force and all others in the vicinity?
- 4 What other options were considered before resorting to the use of force?
- 5 What weapons or equipment were available at the time?
- 6 Have all relevant decisions been recorded and reported?

**PLANNING**

A planned operation is one where An Garda Síochána has had the opportunity to develop strategies, tactics and contingency plans before an anticipated operation takes place. The ECt.HR will subject these operations to heightened scrutiny and in this regard, the following factors have been taken into account:

*(i) whether the operation was spontaneous or whether the authorities could have reflected on the situation and made specific preparations; (ii) whether the authorities were in a position to rely on some generally prepared emergency plan, not related to that particular crisis; (iii) that the degree of control of the situation is higher outside the building, where most of the rescue efforts take place; and (iv) that the more predictable a hazard, the greater the obligation is to protect against it.<sup>95</sup>*

An incident requiring a spontaneous response is one where An Garda Síochána has had no prior or insufficient warning or notification to develop strategies, tactics and contingency plans for the incident. Where these incidents come to the attention of members of An Garda Síochána, they will by necessity require an initial response and the development of immediate plans. Information may be limited, therefore the immediate plan should, where

<sup>95</sup> *Tagayeva and Others v Russia*, App no 26562/07, 13 April 2017, at para 563.

possible, be one of increasing the level of intelligence available whilst being in a position to contain the threat.

All Garda Personnel involved in any policing operations must ensure that their actions are compatible with the rights of individuals under the ECHR. In *McCann v United Kingdom* the European Court of Human Rights held that the State must provide appropriate training, instructions and briefing to those who are placed in situations where lethal force may be used.

Members should familiarise themselves with the key issues regarding the ‘*absolute necessity*’ test. Each planned operation should have a detailed operational plan and operational briefing order. Special consideration should be taken into account when, in planned operations, it is intended to intercept subjects travelling to, from, or engaged in the commission of an offence which may require the deployment of Trained Firearms Personnel. The operational plan should be continuously assessed and revised in accordance with information available, in order to provide the safest possible resolution to an incident. Those responsible for developing operational plans must consider all tactical options.

All decisions taken during the course of the operation must be recorded and should include any risk assessments undertaken, tactical advice received, where applicable, and should record the rationale for any decision. This should include recording negative decisions not to undertake a particular course of action as well as those decisions that were acted upon. All plans should be recorded in the manner prescribed by Garda policy. This will include consideration of the options rejected or progressed together with the reasons why such conclusions were drawn and by whom.

Firearms may not be specifically required for an operation and may, in certain circumstances, be inappropriate. It is important therefore, that in any operation the appropriateness of the availability of firearms is considered and members connected with the operation should be briefed accordingly.



## INVESTIGATION OF DEATHS

In addition to the general duty to investigate,<sup>96</sup> there is an obligation on An Garda Síochána by virtue of the Article 2 ECHR to conduct an effective investigation to establish the facts in circumstances where a suspicious death has occurred.<sup>97</sup>

Moreover, the European Court of Human Rights held that where a person is killed by an agent of the State, Article 2 will require an “*effective official investigation*”.<sup>98</sup> The adequacy of the investigation will be considered in relation to its effectiveness. The European Court of Human Rights has held that the key issue to be examined is not the launch of an investigation as such, but rather its scope, since if its scope is restricted to specific lower liability offences then its findings will be affected.<sup>99</sup>

The mere knowledge of such killing will require an effective investigation which is independent both institutionally and in practice on the circumstances surrounding the death.<sup>100</sup>

Where injury or death occurs to a person in custody the burden of proof will rest on the authorities to provide an explanation to the satisfaction of the court.<sup>101</sup> The purpose of such investigation is to “*secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for the deaths occurring under their responsibility*”,<sup>102</sup> in other words to establish whether or not the force used was justified<sup>103</sup> and “*the identification and*

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<sup>96</sup> *Barabanshchikov v Russian* App. No. 36220/02, judgment delivered on 8<sup>th</sup> January, 2009. *DPP v Bartley*, unreported, High Court, June 13, 1997.

<sup>97</sup> *Rod v Croatia*, App no 47024/06, 18 September 2008.

<sup>98</sup> *McCann*, para 161.

<sup>99</sup> *Öneryildiz v Turkey*, Judgment of 18 June 2002, App. No. 48939/99, para 104.

<sup>100</sup> *Ergi v Turkey*, Judgment of 28 July 1998, App. No. 66/1997/850/1057, para 82.

<sup>101</sup> *Hugh Jordan v The United Kingdom* [2001] 37 ECHR 52, para 103.

<sup>102</sup> *Jordan*, para 105.

<sup>103</sup> *Jordan*, para 107.

*punishment of those responsible.*<sup>104</sup> The investigation must be prompt<sup>105</sup> to ensure confidence and it must involve effective participation of the victim or family member to safeguard their interests.<sup>106</sup> The authorities must act on their own initiative and not leave it for the next of kin to lodge a complaint.<sup>107</sup>

A failure to investigate will constitute a breach of Article 2<sup>108</sup> and will be in addition to any breach in relation to the killing itself.<sup>109</sup> Therefore, where the police have discharged lethal force, whether or not death occurs, an inquiry “*wholly independent of the police*” will be required.<sup>110</sup>

The European Court of Human Rights has extended the duty to investigate to circumstances where the State has failed in its positive obligation to take reasonable care to avert a foreseeable death from taking place.<sup>111</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 1 of the CFR provides that “*human dignity is inviolable. It must be respected and protected.*” Article 2 of the CFR provides that:

- “1. *Everyone has the right to life.*
2. *No one shall be condemned to the death penalty, or executed.*”

## Code of Ethics for An Garda Síochána

A Commitment is given to the standard of “*Police Powers*” in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.*”

<sup>104</sup> *Öneryildiz v Turkey.*

<sup>105</sup> *Jordan*, para 108.

<sup>106</sup> *Jordan*, para 109.

<sup>107</sup> *Jordan*, para 105.

<sup>108</sup> *Yasa v Turkey* (1999) 28 EHRR 408.

<sup>109</sup> *Cakici v Turkey* (2001) 31 EHRR 133, para 87.

<sup>110</sup> Walsh at 248, also Clayton, Tomlinson Buckett & Davies at 653.

<sup>111</sup> Edwards (para 69-74).



*When it is necessary to use police powers to achieve an objective, I will make sure that my actions are in accordance with the law and proportionate.*

...

*When a situation requires me to use force I will, as soon as possible, make sure that the person I used force against is safe and receives any necessary assistance.”*

## **OTHER RELEVANT INTERNATIONAL STANDARDS**

The right to life is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### **INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS**

Article 6(1) provides that “[e]very human person has an inherent right to life . . . No one shall be arbitrarily deprived of his life”

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

Article 3 provides that everyone has the right to life, liberty and security of person.

### **EUROPEAN POLICE CODE OF ETHICS**

Article 35 provides that “[t]he police, and all police operations, must respect everyone’s right to life.”

## PROHIBITION OF TORTURE

### CONSTITUTION OF IRELAND 1937

Article 40.3.1 of the Constitution of Ireland provides that “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.” Personal rights guaranteed by Article 40.3.1 include “freedom from torture, and from inhuman and degrading treatment and punishment.”<sup>112</sup> In addition, the comments of Kenny J. in the case of *Conroy v. Attorney General and Another*<sup>113</sup> must be noted where he said that “every individual as an individual has certain inherent rights of which the right to life is the most fundamental: after it comes the right to bodily integrity. These inherent rights of the individual impose on everyone an obligation to respect them.”<sup>114</sup> Article 40.3.2 provides for the express protection of the “Person”. The right to bodily integrity was upheld by the Supreme Court in *Ryan v AG*<sup>115</sup> as being one of the unenumerated rights protected by Article 40.3.

Any excessive and non-consensual interference with a person’s physical security, which is not authorised by law, will be considered constitutionally impermissible and evidence obtained in an unlawful personal search may be inadmissible in criminal proceedings.

### ECHR

Article 3 of the ECHR prohibits ill-treatment and provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Article 3 of the ECHR enshrines one of the most fundamental values of a democratic society. The ECHR prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article

<sup>112</sup> *The State(C) v Frawley* [1976] IR 365 at para 374 and also cited in Report of the Committee to Review the Offences Against the State Acts 1939-1998 and Related Matters (Dublin: Stationary Office, 2002), at para. 3.35.

<sup>113</sup> [1965] IR 411.

<sup>114</sup> [1965] IR 411 at 419-420.

<sup>115</sup> *Ryan v AG* [1965] 1 IR 294.





15(2) of the ECHR even in the event of a public emergency threatening the life of the Nation *Ilaşcu v Moldova and Russia*.<sup>116</sup>

Article 3 of the ECHR sets an absolute prohibition on torture, inhuman and degrading treatment or punishment. The test established by the European Court of Human Rights is that of attaining a certain minimum level of severity. The approach is that:

*“... ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration or the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim”.*<sup>117</sup>

The European Court of Human Rights in *Ireland v UK* held that torture involves suffering of a particular intensity and cruelty, attaching a “*special stigma to deliberate inhuman treatment causing very serious and cruel suffering*”. Inhuman treatment covers at least such treatment as deliberately causes severe mental and physical suffering. Degrading treatment or punishment consists of treatment or punishment which grossly humiliates a person or drives him to act against his will or conscience.

The European Court of Human Rights has also deemed treatment to be “degrading” in circumstances where it arouses in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.<sup>118</sup>

In considering whether a punishment or treatment was “*degrading*” within the meaning of Article 3, the European Court of Human Rights will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are

<sup>116</sup> (2005) 40 EHRR 46; *Selmouni v France* (2000) 29 EHRR 403 at para 95; *Labita v Italy* App. No.26772/95, 6 April 2000, at para 119.

<sup>117</sup> *Ireland v UK* 18 January 1978, Series A, No. 25; 2 EHRR 25 at para 167; *Kafkaris v Cyprus* App. No.21906/04, February 12, 2008 at para 95; *A v United Kingdom* (2009) 49 EHRR 29 at 89 para 127.

<sup>118</sup> *Tali v Estonia* App. no. 66393/10, 13 February 2014 at para 57; *Kudla v Poland* (2002) 35 EHRR 11 at para 92; *Ilaşcu v. Moldova and Russia* (2005) 40 EHRR 46 at para 93 para 425; *A v United Kingdom* (2009) 49 EHRR 29.

concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

In *Timurtas v Turkey*,<sup>119</sup> the European Court of Human Rights stated; “... where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention.” In *Ribitsch v Austria*<sup>120</sup> the European Court of Human Rights held that: “... In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.”

The European Commission on Human Rights found in the case of *Z v United Kingdom*<sup>121</sup> that States are under a positive obligation to take those steps that could reasonably be expected of them to avoid a real and immediate risk of ill-treatment contrary to Article 3 of which they knew or ought to have had knowledge, including ill-treatment administered by private individuals.

Any action of Garda personnel that impacts on the body of another may engage Article 3 of the ECHR depending on the circumstances. While such action may be necessary in the circumstances it is essential that any such action is only applied in accordance with the law.

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<sup>119</sup> (2001) 33 EHRR 121.

<sup>120</sup> (1996) 21 EHRR 573.

<sup>121</sup> App. no. 29392/95 10 May 2001 at para 94.

## Procedural Obligation

An Garda Síochána has a procedural obligation to investigate an allegation that Garda personnel has breached Article 3 ECHR. This obligation applies where the alleged conduct has not resulted in death or serious harm.<sup>122</sup> In addition to the general duty to investigate,<sup>123</sup> the ECt.HR considers that “*where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State ... requires ... that there should be an effective official investigation.*”<sup>124</sup>

The application of Article 3 ECHR is not restricted to torture or ill-treatment perpetrated by agents of the State.<sup>125</sup> The ECt.HR has observed that the State’s positive obligation regarding the crime of rape requires the police to protect the rights of individuals “*through effective investigation and prosecution*”<sup>126</sup> of such crimes.

The ECt.HR has distilled the following minimum standards<sup>127</sup> for investigations under Article 3 ECHR from the relevant case law:

The investigation should be:

- Independent and impartial,
- Conducted with promptness and diligence,
- Subject to public scrutiny,
- In principle, be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible.

All reasonable steps should be taken to secure the evidence, including:

<sup>122</sup> Garda Síochána Act 2005, s 102(1).

<sup>123</sup> *Barabanshchikov v Russian* App. No. 36220/02, judgment delivered on 8<sup>th</sup> January, 2009. *DPP v Bartley*, unreported, High Court, June 13, 1997.

<sup>124</sup> *Assenov and Others v Bulgaria*, 28<sup>th</sup> October 1998, App. No. 90/1997/874/1086, at para 102.

<sup>125</sup> *C.A.S. and C.S. v Romania*, 20<sup>th</sup> March 2012, App. No. 26692/05, at para 69.

<sup>126</sup> *M.C. v Bulgaria*, 4<sup>th</sup> December 2003, App. No. 39272/98, at para 153.

<sup>127</sup> *O’Keeffe v Ireland*, 28<sup>th</sup> January 2014, App. No. 35810/09, at para 172; *Beganović v Croatia*, 25<sup>th</sup> June 2009, App. No. 46423/06, at para 75.



- Eyewitness testimony,
- Forensic evidence,
- Where appropriate, additional medical reports.

### **Criminal Justice (United Nations Convention against Torture) Act 2000**

The Criminal Justice (United Nations Convention against Torture) Act 2000 (the 2000 Act) gives effect to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Irish law. It creates an offence of carrying out an act of torture by public officials and an offence of attempt to commit or conspire to commit the offence of torture. Public official *“includes a person acting in an official capacity”*. Torture for the purpose of the 2000 Act means *“an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”*.

Therefore, Garda personnel who commit an act of torture or attempts to commit or conspires to commit an act of torture within the meaning of the 2000 Act will be criminally liable.

### **CHARTER OF FUNDAMENTAL RIGHTS**

Article 1 of the CFR provides *“that human dignity is inviolable. It must be respected and protected.”* Article 3(1) of the CFR provides that *“everyone has the right to respect for his or her physical and mental integrity.”* Article 4 provides that *“no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*

### **Code of Ethics for An Garda Síochána**

A Commitment is given to the standard of *“Respect and Equality”* in the following terms:

*“I will recognise and respect the dignity and equal human rights of all people.”*

A Commitment is given to the standard of *“Authority and Responsibility”* in the following terms:

*“I will act with self-control, even when provoked or in volatile situations.”*



*I will take responsibility for my actions and omissions, and I will be accountable for them.”*

A Commitment is given to the standard of “Police Powers” in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.*

*When it is necessary to use police powers to achieve an objective, I will make sure that my actions are in accordance with the law and proportionate.”*

## **OTHER RELEVANT INTERNATIONAL STANDARDS**

The prohibition of torture, inhuman or degrading treatment is set out in a number of other International Instruments. In this respect, members of Garda Personnel in the performance of their functions should be cognisant of the following:

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

Article 5 provides that *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*

### **INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS**

Article 7 provides that *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*

Article 10 provides that:

*“1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

*2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;*

*(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication...”*

**EUROPEAN POLICE CODE OF ETHICS**

Articles 36 – 40 provide as follows:

*36. The police shall not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances.*

*37. The police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective.*

*38. Police must always verify the lawfulness of their intended actions.*

*39. Police personnel shall carry out orders properly issued by their superiors, but they shall have a duty to refrain from carrying out orders which are clearly illegal and to report such orders, without fear of sanction.*

*40. The police shall carry out their tasks in a fair manner, guided, in particular, by the principles of impartiality and non-discrimination.*

**CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS**

Article 5 provides that “*No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.*”

**BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT**

Principle 1 provides that “*All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.*”

Principle 6 provides that “*No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.*”



*The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time."*

Principle 23 provides that:

*"1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.*

*2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle."*



## PROHIBITION OF SLAVERY AND FORCED LABOUR

### CONSTITUTION OF IRELAND 1937

Dignity, as an unenumerated right, is protected by the Constitution.<sup>128</sup> There is no direct reference to slavery, servitude, forced or compulsory labour under the Constitution but an infringement of this provision is a violation of human dignity.

### ECHR

Article 4 is an absolute prohibition of slavery and forced labour. This prohibition applies even in times of war or public emergency. The terms of Article 4 are set out as follow:

1. *“No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour.*
3. *For the purpose of this Article the term “forced or compulsory labour” shall not include:*
  - (a) *any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
  - (b) *any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;*
  - (c) *any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community;*
  - (d) *any work or service which forms part of normal civic obligations.”*

In relation to a State’s positive obligations the ECtHR was asked in *Siliadin*<sup>129</sup> to consider whether France had afforded sufficient protection to the applicant under its positive obligations, since slavery and servitude were not classified as criminal offences under French criminal law, the court ruled that France had failed to meet its positive obligations under the Convention to afford the applicant effective protection against servitude, as it was not an offence in their domestic law. Since *Siliadin* the Court has expanded on the substance of what is an appropriate legal framework to protect victims in addition to an adequate criminal law. A state should provide relevant training for law enforcement and immigration officials, and there should be effective regulation of businesses used as cover

<sup>128</sup> *Re: A Ward of Court (No.2)* [1996] 2 IR 79 at para 163.

<sup>129</sup> *Siliadin v France, (App. 73316/01), 26 July 2005.*





for trafficking.<sup>130</sup> The Court has also expanded the type of positive obligations that may be placed on a State under Article 4. It has found that a State has a positive duty to protect victims and prevent harm to potential victims. In *J and others v Austria (Application No. 58216/12)* the need for a State to identify and support victims and potential victims of Human Trafficking was highlighted, the Court found that Austria had fulfilled its obligations, as the applicants were interviewed by specially trained police and supported by a Government appointed NGO. The Court made it clear that that the identification of the applicants as victims is separate from a criminal investigation.

## CHARTER OF FUNDAMENTAL RIGHTS

Article 5 of EU Charter of Fundamental Rights (CFR) specifically proscribes slavery, servitude, forced or compulsory labour. In contrast to the ECHR, section 3 of the same Article explicitly prohibited trafficking in human beings. Although, as discussed in detail above, trafficking in human beings still falls under the scope of Article 4 ECHR. Article 5 states:

1. *“No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour.*
3. *Trafficking in human beings is prohibited.”*

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<sup>130</sup> *Rantsev v cypress and Russia (Application No. 25965/04).*

## Code of Ethics for An Garda Síochána

A Commitment is given to the standard of “Respect and Equality” in the following terms:

*“I will recognise and respect the dignity and equal human rights of all people.”*

A Commitment is given to the standard of “Police Powers” in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.”*

## INVESTIGATION

In so far as An Garda Síochána is concerned, this right is applicable from an investigation standpoint in the context of enforcing human trafficking legislation. An Garda Síochána should take reasonable steps to protect the public from slavery, servitude, forced or compulsory labour through the investigation of applicable relevant offences under domestic law. Such investigations will often be multi-faceted involving internal and external stakeholders including Tusla where children are involved. In such instances the investigations should be conducted in an effective and efficient manner and without delay.

## OTHER RELEVANT INTERNATIONAL STANDARDS

The prohibition of slavery and forced labour is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### International Covenant on Civil and Political Rights 1966

Article 8 provides:

1. *“No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*
2. *No one shall be held in servitude.*
3. (a) *No one shall be required to perform forced or compulsory labour;*  
 (b) *Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;*  
 (c) *For the purpose of this paragraph the term "forced or compulsory labour" shall not include:*



- (i) *Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;*
- (ii) *Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;*
- (iii) *Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;*
- (iv) *Any work or service which forms part of normal civil obligations.”*

**Universal Declaration of Human Rights 1948**

Article 4 provides:

*“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”*



## RIGHT TO LIBERTY AND SECURITY

### Constitution of Ireland 1937

Article 40.4.1<sup>o</sup> provides that no citizen shall be deprived of his personal liberty save in accordance with law. In the case of *People (AG) v O’Callaghan*,<sup>131</sup> the Supreme Court stated that “*In this country it would be quite contrary to the concept of personal liberty enshrined in the constitution that any person ... should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances spelled out by the Oireachtas ....*”.<sup>132</sup>

### ECHR

Liberty and security when examined under the ambit of Article 5 of the ECHR refers to the physical liberty and security interfered with as a result of arrest and detention. It is not concerned with restrictions on freedom of movement which are governed by Article 2 of Protocol No. 4 of the ECHR.<sup>133</sup> The ECHR specifically enumerates the grounds which can lawfully justify a deprivation of liberty.<sup>134</sup> Article 5 of the ECHR is set out in the following terms:

*“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

- (a) The lawful detention of a person after conviction by a competent court;*
- (b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
- (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
- (d) The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

<sup>131</sup> *People (AG) v O’Callaghan* [1966] 1 IR 501.

<sup>132</sup> *People (AG) v O’Callaghan* [1966] 1 IR 501.

<sup>133</sup> European Court of Human Rights, *Guide on Article 5 Right to Liberty and Security*.

<sup>134</sup> Office of the High Commissioner for Human Rights (OCHR); *Chapter 5 Human Rights and Arrest, Pre-trial Detention and Administrative Detention*.



*(e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

*(f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

*2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

*3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

*5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”<sup>135</sup>*

In the case of *Gillan and Quinton v The United Kingdom*,<sup>136</sup> the ECt.HR stated that “*in order to determine whether someone has been deprived of his liberty within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.*”<sup>137</sup> Furthermore, the Court observed “*that although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1.*”<sup>138</sup>

<sup>135</sup> Article 5 of the European Convention on Human Rights.

<sup>136</sup> *Gillan and Quinton v The United Kingdom* [4158/05](#) (2010) ECHR 28 (12 January 2010).

<sup>137</sup> *Gillan and Quinton v The United Kingdom* [4158/05](#) (2010) ECHR 28 (12 January 2010).

<sup>138</sup> *Gillan and Quinton v The United Kingdom* [4158/05](#) (2010) ECHR 28 (12 January 2010).



## Reasonable Suspicion

Under Irish law there must be reasonable cause to believe that an arrestable offence has been, is being or about to be committed.<sup>139</sup> This legal requirement protects against “*the arbitrary and capricious use of arrest powers.*”<sup>140</sup> In the case of *DPP v Cash*<sup>141</sup> it was declared that the threshold for reasonable suspicion is not anything like a *prima facie* case for conviction as understood in the law of evidence;<sup>142</sup> “*reasonable suspicion can be based on hearsay evidence ...*”<sup>143</sup> information received from a reliable informer<sup>144</sup> or where one member communicates a suspicion to another.<sup>145</sup>

An Garda Síochána can therefore rely on a lesser standard of reasonable suspicion, or reasonable cause.<sup>146</sup> Furthermore, in *DPP v Cash*<sup>147</sup> it was stated that “*reasonable cause for arrest equates with the concept of reasonable suspicion*”<sup>148</sup> and is therefore “*one founded on some ground which, if subsequently challenged, will show that the person arresting the suspect acted reasonably in suspecting them*”.<sup>149</sup> While there is no express statutory requirement to the effect that the suspicion must be reasonable, the requisite suspicion must be “*bona fide*”,<sup>150</sup> “*not irrational*”<sup>151</sup> and “*not unreasonable*”.<sup>152</sup> In *R v Healy*<sup>153</sup> it was held that reasonable suspicion must be based “*on a consideration of the known facts out of which an apprehension that a person might possibly have committed an*

<sup>139</sup> Section 4 of the Criminal Law Act 1997.

<sup>140</sup> Thomas O'Malley, *The Criminal Process* (Round Hall 2009) 292.

<sup>141</sup> *DPP v Cash* [2008] 1 ILRM 443.

<sup>142</sup> *DPP v Cash* [2008] 1 ILRM 443.

<sup>143</sup> *DPP v Cash* [2008] 1 ILRM 443.

<sup>144</sup> *People (DPP) v Reddan* [1995] 3 I.R. 560 at 572; *DPP v Cash* [2008] 1 ILRM 443.

<sup>145</sup> *People (DPP) v McCaffrey* [1986] ILRM 687; *DPP v Cash* [2008] 1 ILRM 443.

<sup>146</sup> *People (DPP) v McCaffrey* [1986] ILRM 687; *DPP v Cash* [2008] 1 ILRM 443.

<sup>147</sup> *DPP v Cash* [2008] 1 ILRM 443.

<sup>148</sup> *DPP v Cash* [2008] 1 ILRM 443.

<sup>149</sup> *DPP v Cash* [2008] 1 ILRM 443.

<sup>150</sup> *People v Tyndall* [2006] 1 ILRM; *People (DPP) v Quilligan No 2* [1989] IR 46.

<sup>151</sup> *People v Tyndall* [2006] 1 ILRM.

<sup>152</sup> *People (DPP) v Quilligan No 2* [1989] IR 46.

<sup>153</sup> *R v Healy* (1992) Victoria Law Reports 522.



offence is created”<sup>154</sup> and “it is the state of mind of the arresting Garda or policeman alone which is critical.”<sup>155</sup>

In the High Court case of *Director of Public Prosecutions v Farrell*<sup>156</sup> Clarke J. said:-

*“As guardians of the peace, with a duty not only to investigate crime but also to prevent its occurrence, members of An Garda Síochána are required on a daily basis to make on the spot decisions based on available information which they derive from no more than educated impressions. Once the actions of the Gardai are reasonable and bona fide and there is no evidence of abuse of power or arbitrary behaviour the court should be very slow to put technical procedural obstacles in the way of the day-to-day investigation of crime.”*

The Supreme Court case of *D.P.P. v O’ Driscoll*<sup>157</sup> also addressed the issue of reasonable suspicion. In the course of that judgment, Finnegan J. stated as follows.

*“Suspicion” is a word in ordinary use in the English language. It imports not certainty and not probability. In the phrase “reasonable cause for suspicion” it requires something more than a bare suspicion. In Hussein v Chong Fook Kam [1970] A.C. 942 at 948 Lord Devlin attempted a definition of suspicion:-*

*“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.”*

Finnegan J. also said in the course of the case before the court, that in criminal matters the receipt of anonymous information or “tip-offs” by the Gardaí can be the starting point of an investigation. Finnegan J. further said that:

*“While it is for the Garda Síochána to have reasonable cause to suspect the commission of an offence and it is not open for the Garda Síochána simply to rely on the suspicion of the D.S.P.C.A. the fact that the D.S.P.C.A. considered the anonymous complaint worthy of investigation is a surrounding circumstance to which the Garda Síochána can have regard... The information available to the*

<sup>154</sup> *R v Healy* (1992) Victoria Law Reports 522 at 547-548 as cited in *People (DPP) v Cleary* 2001, WJSC-CCA 1684.

<sup>155</sup> *Walsh v Fennessy* [2005] 3 IR 516.

<sup>156</sup> [2009] IEHC 368.

<sup>157</sup> [2010] IESC 42.

*Garda Síochána did not amount to evidence nor did it amount to a prima facie case but neither of these are requirements for a suspicion.”*

Finnegan J stated that:

*“I would adopt a phrase from the judgment in R. v. Da Silva –”  
 “It seems to us that the essential element in the word ‘suspect’ and its affiliates, in this context, is that the defendant must think that there is a possibility which is more than fanciful, that the relevant facts exist.”*

It was set down in *Walshe v Fennessy*<sup>158</sup> that an arrest based solely on a bare order from a superior officer to arrest would fall short of the requisite level of suspicion under Irish Law *“but there is nothing to prevent a superior officer who gives the instruction accompanying it with a few elementary facts, whether of a hearsay nature or otherwise, sufficient for the arresting Garda himself to have the suspicion.”*<sup>159</sup> Therefore, the arresting member must have *“some understanding of the underlying rationale or bases for the arrest”* and there must be *“some other element than a bare order to carry out the arrest”*.<sup>160</sup> The basis for reasonable suspicion is both subjective, in that the arresting member must himself/herself form the suspicion, and objective, in that the suspicion must be formed on reasonable grounds.<sup>161</sup> An honest belief is insufficient<sup>162</sup> and therefore a suspicion formed on reasonable grounds *“forms an essential part of the safeguard against arbitrary arrest and detention”*.<sup>163</sup>

Article 5 of the ECHR allows for arrest on reasonable suspicion that the person has committed an offence. The legal requirement that an arrest be founded on reasonable suspicion has been interpreted by the ECt.HR which has said that reasonable suspicion

<sup>158</sup> *Walshe v Fennessy* [2005] 3 IR 516.

<sup>159</sup> *Walshe v Fennessy* [2005] 3 IR 516.

<sup>160</sup> *Walshe v Fennessy* [2005] 3 IR 516.

<sup>161</sup> *O’Hara v Chief Constable of Royal Ulster Constabulary* [1997] 1 A.C. 286; 2 WLR 1 (1997); also cited in *O’Malley* (2009) at 293.

<sup>162</sup> *Fox, Campbell and Hartley v United Kingdom*, App. No 12244/86; 12245/86; 12383/86 (1990).

<sup>163</sup> *Ibid*, para 32.



“requires the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed an offence ...”.<sup>164</sup>

In *Fox, Campbell and Hartley v UK*<sup>165</sup> the ECt.HR held that there must be an objective basis justifying arrest and /or detention.<sup>166</sup> The requirement of reasonable suspicion provides a safeguard against arbitrary arrest and detention.<sup>167</sup> Furthermore, in the case of *Bykov v Russia*<sup>168</sup> it was held that “*the persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention.*”<sup>169</sup> Therefore, in the absence of reasonable grounds to suspect that the person arrested has committed an offence, the person must be released from custody unless there is in existence a warrant for that person’s detention.

### Arrest

Under Irish law where the reasonable suspicion is formed the person must be informed of the grounds for arrest, unless the reason is clear from the circumstances of the arrest,<sup>170</sup> so that “*he may be aware of his rights and may have regard to his rights in order to use them as speedily as possible to regain his liberty*”<sup>171</sup> or, so that “*he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further inquiries may save him from the consequences of false accusation*”.<sup>172</sup> The failure to communicate the reason or where an untrue reason is communicated will render the arrest unlawful.<sup>173</sup> The High Court held in

<sup>164</sup> *O’Hara v United Kingdom*, (2002) 34 E.H.R.R. 32; See also *Fox and Campbell and Hartley v United Kingdom* No 12244/86; 12245/86; 12383/86 (1990).

<sup>165</sup> *Fox Campbell and Hartley v UK*, App. No 12244/86; 12245/86; 12383/86 (1990).

<sup>166</sup> *Fox Campbell and Hartley v UK*, App. No 12244/86; 12245/86; 12383/86 (1990).

<sup>167</sup> *Fox Campbell and Hartley v UK*, App. No 12244/86; 12245/86; 12383/86 (1990).

<sup>168</sup> *Bykov v Russia* App. No. 4378/02 March 10 2009.

<sup>169</sup> *Bykov v Russia* App. No. 4378/02 March 10 2009.

<sup>170</sup> *DPP v Mooney* [1992] 1 I.R. 548 at 553; *Holgate-Mohammed v Noor* [1984] A.C. 437 at 442; *Christie v Leachinsky* [1947] A.C. 573.

<sup>171</sup> *People (DPP) v Towson* [1978] ILRM 122.

<sup>172</sup> *Christie v Leachinsky* [1947] AC 573.

<sup>173</sup> *People (DPP) v Towson* [1978] ILRM 122.



*People (DPP) v McCormack*<sup>174</sup> that once the person knew in substance the reason for the arrest, the arrest was to that extent valid.<sup>175</sup>

Any arrest or detention must be lawful and must be in accordance with legally prescribed procedures in order to comply with the strict criteria of Article 5 of the ECHR. Article 5(2) of the ECHR provides that every person arrested has the right to be informed of the reasons for his arrest and of any charge against him promptly and in a language which he understands.<sup>176</sup> Article 5(1)(a) to (f) of the ECHR lists the six reasons for which a person can lawfully be deprived of their liberty by an agent of the State, including An Garda Síochána. This is an exhaustive list, in other words, to deprive a person of his/her liberty for any other reason will be unlawful. In circumstances where An Garda Síochána assumes control over an individual it is incumbent on the organisation to account for his/her whereabouts.<sup>177</sup>

In the case of *Fox, Campbell and Hartley v United Kingdom*<sup>178</sup> the ECt.HR held that a person must be informed either at the time of arrest or within a sufficient period of time following arrest “*in simple, non-technical language that he can understand the essential legal and factual grounds for his arrest.*”<sup>179</sup> Legality not only requires compliance with substantive and procedural law but also that any deprivation of liberty must not be arbitrary in its outcome or cause and must be for a purpose allowable under Article 5 of the ECHR.<sup>180</sup>

In addition, an accused person has the right to be “*informed promptly, in detail, of the nature and cause of the accusation against him.*”<sup>181</sup> The right is to be considered in light

<sup>174</sup> *People (DPP) v McCormack* 4 IR 356 [2000]; See *DPP v O'Rourke* [2009] IEHC 314; *Christie v Leachinsky* [1947] A.C. 573.

<sup>175</sup> *People (DPP) v McCormack* 4 IR 356 [2000]; See *DPP v O'Rourke* [2009] IEHC 314; *Christie v Leachinsky* [1947] A.C. 573.

<sup>176</sup> Article 5(2) ECHR.

<sup>177</sup> *Kurt v Turkey (1998)* 27 EHRR 373.

<sup>178</sup> *Fox Campbell and Hartley v UK* App. No 12244/86; 12245/86; 12383/86 (1990).

<sup>179</sup> *Fox, Campbell and Hartley v UK* App. No 12244/86; 12245/86; 12383/86 (1990).

<sup>180</sup> *Winterwerp v Netherlands (1979-80)* 2 E.H.R.R. 387; *K-F v Germany (1998)* 26 E.H.R.R. 390; See also O'Malley (2009) at 292.

<sup>181</sup> Article 6(3)(a) ECHR.

of the accused right to prepare a defence.<sup>182</sup> The accused must be informed of the nature of the charge against him, the material facts that form the basis of the charge and the legal characterisation of the acts which it is alleged that he has committed however, it is not necessary that he/she be informed of the evidence to sustain the charge.<sup>183</sup> The point of charge has been held to include the “*official notification ... of an allegation that he has committed a criminal offence*”.<sup>184</sup>

When a person in custody is charged, “*a copy of the charge sheet containing particulars of the offence shall be given to the accused as soon as practicable.*”<sup>185</sup> In the case of *Attorney General (McDonnell) v Higgins*<sup>186</sup> the Supreme Court stated that the formal charge “... is a statement of facts constituting an offence” and “in the case of a statutory offence that it” refers to “a specific statute and section...”<sup>187</sup> It must “*refer in all respects to the ingredients of the offence and set forth the relevant enactments.*”<sup>188</sup>

Where a person is taken into custody uninjured and is later found to have injuries, the detaining authorities are “*under an obligation to provide a plausible explanation of how*”<sup>189</sup> the injuries occurred in order that it is “*satisfactorily established that the ... injuries were caused otherwise than - entirely, mainly, or partly - by the treatment he underwent while in police custody.*”<sup>190</sup>

<sup>182</sup> *Mattoccia v Italy* App. No [23969/94](#) (2000); *Dallos v Hungary* App. No [29082/95](#) (2001) and also in Emmerson and Simor Emmerson Ben, Ashworth Andrew, Macdonald Alison, *Human Rights and Criminal Justice*, (London Sweet & Maxwell, 2<sup>nd</sup> edn., 2007) para 6.186.

<sup>183</sup> *Brozicek v Italy* App. No [10964/84](#) (1989); also cited in Emmerson and Simor (2007) para 6.186.

<sup>184</sup> *Eckle v Germany* (1983) 5 E.H.R.R. 1.

<sup>185</sup> Regulation 15 (1) of the Custody Regulations 1987.

<sup>186</sup> *Attorney General (McDonnell) v Higgins* [1964] I.R.374.

<sup>187</sup> *Attorney General (McDonnell) v Higgins* [1964] I.R.374.

<sup>188</sup> *DPP v Virginia Morrison* [2000] IEHC 108.

<sup>189</sup> *Ribitsch v Austria* (1995) 21 EHRR 573 para 34.

<sup>190</sup> *Ribitsch v Austria* (1995) 21 EHRR 573 para 34.

### Lawfulness of the detention

Under Article 40.4.2° of the Constitution a detained person can take proceedings before the High Court to put in issue the lawfulness of their detention. The High Court therefore, has a duty to direct a detainees release if the person is unlawfully detained.<sup>191</sup>

Under Article 5 of the ECHR proceedings in respect of the lawfulness of a detention must be determined speedily by a court and the person shall be released if the detention is deemed to be unlawful.<sup>192</sup>

Where a person is arrested and detained for the purpose of questioning An Garda Síochána must act *bona fide* and the detention must be intended to advance the investigation by validating or dispelling the suspicion.<sup>193</sup> Furthermore, a person may be released from custody without being charged or otherwise the person must be brought promptly before a judicial authority.<sup>194</sup>

### Preventative Detention

In the recent case of *D.P.P v Daniels*<sup>195</sup> the court reiterated the principle identified in *People AG v O'Callaghan* by stating that “a person cannot be punished in respect of any matter upon which he has not been convicted or that anyone should be deprived of their liberty upon the belief that he or she will commit further offences if left at liberty”.<sup>196</sup> Preventative detention is not permitted under Article 5 of the ECHR.<sup>197</sup> There must be a reasonable suspicion that the individual committed a concrete and specific offence.<sup>198</sup>

<sup>191</sup> *Croke v Smith* (No. 2) [1998] IR 101.

<sup>192</sup> Article 5(4) ECHR.

<sup>193</sup> O'Malley (2009) at 291.

<sup>194</sup> *De Jong, Baljet and Van den Brink v Netherlands* (1986) 8 E.H.R.R. 20 para 51-53; *Brogan v United Kingdom* (1989) 11 E.H.R.R. 117 para.58. See also O'Malley (2009) at 291.

<sup>195</sup> *D.P.P v Daniels* [2014] IESC 64.

<sup>196</sup> *D.P.P v Daniels* [2014] IESC 64.

<sup>197</sup> Blackstone's Criminal Practice (2012) at 134.

<sup>198</sup> *Guzzardi v Italy* 333 (1980) 3 EHHR.

## Charter of Fundamental Rights of the European Union

Article 6 of the CFR provides that *“Everyone has the right to liberty and security of person.”*

## Garda Code of Ethics for An Garda Síochána

A Commitment is given to the standard of *“Police Powers”* in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.”*

## Other Relevant International Standards

The right to liberty is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### International Covenant on Civil and Political Rights

Article 9(1) provides that *“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”*

Article 10(1) provides that *“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”*

### Convention on the Rights of the Child

Article 37(c) provides that *“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;”*



**International Convention on the Elimination of All Forms of Racial Discrimination**

Article 5 (b) provides for the *“The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution”*

Article 9 provides that:

*“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

*2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

*3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement...”*

**Universal Declaration of Human Rights**

Article 3 provides that *“Everyone has the right to life, liberty and security of person.”*

Article 9 provides that *“No one shall be subjected to arbitrary arrest, detention or exile.”*

**European Police Code of Ethics**

The guidelines for Police action/intervention (articles 54-58) state that:

*“Deprivation of liberty of persons shall be as limited as possible and conducted with regard to the dignity, vulnerability and personal needs of each detainee. A custody record shall be kept systematically for each detainee. The police shall, to the extent possible according to domestic law, inform promptly persons deprived of their liberty of the reasons for the deprivation of their liberty and of any charge against them, and shall also without delay inform persons deprived of their liberty of the procedure applicable to their case.*

*The police shall provide for the safety, health, hygiene and appropriate nourishment of persons in the course of their custody. Police cells shall be of a reasonable size, have adequate lighting and ventilation and be equipped with suitable means of rest.*



*Persons deprived of their liberty by the police shall have the right to have the deprivation of their liberty notified to a third party of their choice, to have access to legal assistance and to have a medical examination by a doctor, whenever possible, of their choice.*

*The police shall, to the extent possible, separate persons deprived of their liberty under suspicion of having committed a criminal offence from those deprived of their liberty for other reasons. There shall normally be a separation between men and women as well as between adults and juveniles.”*

### **UN Body of Principles for Protection of All Persons under any Form of Detention or Imprisonment**

Principle 1 provides that *“All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”*

Principle 2 provides that *“Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorised for that purpose.”*

Principle 5 provides that

*“1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.*

*2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.”*

Principle 6 provides that *“No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.”*

Principle 7(1) provides that *“States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.”*





Principle 12 provides that

*1. There shall be duly recorded:*

- (a) The reasons for the arrest;*
- (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;*
- (c) The identity of the law enforcement officials concerned;*
- (d) Precise information concerning the place of custody.*

*2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.*

Principle 15 provides that *“Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”*

Principle 18(5) provides that *“Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.”*

Principle 21(2) provides that *“No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.”*

Principle 23(1) provides that *“The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.”*

Principle 24 provides that *“A proper medical examination shall be offered to a detained or imprisoned*





*person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.”<sup>199</sup>*

Principle 37 provides that *“A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.”*

Principle 39 provides that *“Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”*

### **Standard Minimum Rules for the Treatment of Prisoners<sup>200</sup>**

Rule 33 provides as follows:

*“Instruments of restraint, such as handcuffs, chains, irons and strait-jackets, shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraints. Other instruments of restraint shall not be used except in the following circumstances:*

*(a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority*

Rule 43 provides as follows:

*“(1) All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition.*

<sup>199</sup> See Regulation 21 of the Criminal Justice Act 1984, (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.

<sup>200</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

*(2) On the release of the prisoner all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution, or it has been found necessary on hygienic grounds to destroy any article of clothing. The prisoner shall sign a receipt for the articles and money returned to him.*

*(3) Any money or effects received for a prisoner from outside shall be treated in the same way.*

*(4) If a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.”*



## RIGHT TO FAIR TRIAL

### CONSTITUTION OF IRELAND

Article 38.1 protects the right to a fair trial, affirming:

*“No person shall be tried on any criminal charge save in due course of law.”*

It provides the *“constitutional guarantee that criminal trials will be conducted in accordance with the basic concepts of justice.”*<sup>201</sup> In the seminal text on the Irish Constitution, Kelly explains:

*“Article 38.1 has been interpreted to embrace a range of both procedural and substantive rights, the content of which has been influenced the common law tradition, the European Convention on Human Rights and the case law of the European Court on Human Rights, United States constitutional practice, international agreements and, not least the views of the Irish judiciary as to what constitutes minimum standards of procedural and substantive justice in criminal trials.”*<sup>202</sup>

The right to be presumed innocent until proven guilty in a court of law is central to a trial in due course of law. *“The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial.”*<sup>203</sup> In this regard, the pre-trial process is integral to ensure that the trial of an accused is fair. A number of implications of Article 38.1 are of particular importance to An Garda Síochána.

#### (a) Expeditious investigation

By far the most litigated area of Article 38.1 is related to the expeditiousness of a trial.<sup>204</sup> In *H v DPP*<sup>205</sup> the Supreme Court examined the issue of delay between the occurrence of alleged sexual abuse and the report by the complainant to An Garda Síochána, which in turn delayed the bringing of charges against the accused. The Court considered whether the delay in bringing charges would impede the accused’s right to fair trial, deciding that

<sup>201</sup> *Heaney v Ireland* [1994] 3 IR 593 at para 605.

<sup>202</sup> GW Hogan, G Whyte, JM Kelly: *The Irish Constitution*, Dublin, Lexis-Nexis, 4<sup>th</sup> ed., 2003, at p1042.

<sup>203</sup> *The People (AG) v O’Callaghan* [1966] IR 501 at p 513.

<sup>204</sup> The seminal case in the area, *State (O’Connell) v. Fawsitt* [1986] IR 362, deals with the nature of and rationale for the delay.

<sup>205</sup> *H v Director of Public Prosecutions*, unreported, 31 July 2006.



the delay did not give rise to serious risk of an unfair trial. In a recent case McKechnie J. outlined the procedure to be adopted when deciding if a criminal trial should be prohibited on the grounds of delay:

- (i) The court should determine whether specific prejudice had resulted from the delay, and where there was such prejudice, the trial should be prohibited,
- (ii) Where no specific prejudice had occurred, the court should determine whether the right of an accused to an expeditious trial had been violated, and where there is no such violation the trial should proceed,
- (iii) Where the right to an expeditious trial had been violated, the court should engage a balancing process between the right of an accused to be protected from the stress and anxiety caused by unnecessary and inordinate delay and the public interest in having the prosecution of serious charges brought to a conclusion.<sup>206</sup>

Members of An Garda Síochána are therefore required to conduct an effective investigation as expeditiously as is possible, given the circumstances of the case, to ensure that an individual's right to a fair trial is respected.

#### (b) Presumption of innocence

Central to the protection afforded to an accused by virtue of the right to a fair trial is the presumption of innocence. Described by Costello J. as basic to the concept of a fair trial,<sup>207</sup> the presumption ensures that an individual accused of an offence is afforded the opportunity to fairly defend himself against charges levelled by the State, or its agents. However, this does not mean that inferences cannot be made in the process of a trial, arising from evidence; the possession of incriminating documents, for example, does not negate the presumption of innocence as it amounts to evidence of an offence rather than proof.<sup>208</sup> The Supreme Court has stated that where a suspect has been placed under arrest, “*it is*

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<sup>206</sup> *Cunningham v President of the Circuit Court* [2010] 1 IR 18.

<sup>207</sup> *Supra*, note 1 at paras 605-606.

<sup>208</sup> *O’Leary v Attorney General* [1995] 1 IR 254.

*proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage”.*<sup>209</sup>

(c) *Non bis in idem*

The principle of *non bis in idem* protects individuals from being tried twice for the same offence. Notably, this is not a blanket prohibition but rather a protection from arbitrary retrial without substantive reasoning for such an undertaking: such an endeavour would violate the basic right to a fair trial, as enshrined in Article 38.1. In situations where new and compelling evidence comes to light, or where the previous acquittal was obtained by, for example, the intimidation of jurors, then a new trial is possible.<sup>210</sup>

(d) Informed of charges

Every accused person has the right to be informed of the charge against him, in a language that he understands and in detail. Moreover, during the pre-trial process the duty of disclosure places a constitutional obligation on the prosecution to make available to an accused all materials that have been compiled in the preparation of their case.<sup>211</sup>

*‘The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parole or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so.’*<sup>212</sup>

Insofar as the formulation of criminal law is concerned, there must be clarity as to the offence contained therein. In *King*, Kenny J. stated that “[i]f the ingredients of the offence charged are vague and uncertain, the trial of an alleged offence based on those ingredients is not in due course of law.”<sup>213</sup>

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<sup>209</sup> *People (DPP) v Gormley* [2014] IESC 17, at para 8.8.

<sup>210</sup> *McGrath v Commissioner of An Garda Síochána* [1991] 1 IR 69.

<sup>211</sup> *McKevitt v DPP*, unreported, Supreme Court, 18 March 2003.

<sup>212</sup> *People (DPP) v Tuite* (1983) 2 Frewen 175, at paras 180-181.

<sup>213</sup> *King v Attorney General* [1981] IR 233, at para 264; *Dokie v DPP* [2011] IEHC 110; *DPP v Cagney & Anor* [2007] IESC 46; *AG v Cunningham* [1932] IR 28; *John Cox v Director of Public Prosecutions* [2015]

## (e) Privilege against self-incrimination

The common law privilege against self-incrimination is provided constitutional protection under, *inter alia*, Article 38.1. “[T]he privilege against self-incrimination has always encapsulated a right of the individual to refuse to answer a question or produce a document when to do so would, in the opinion of the court, tend to expose such an individual to a real risk of criminal prosecution or penalty.”<sup>214</sup> This right is related to a defendant’s right not to give evidence in their own defence at trial. To give effect to this right, members must inform a suspect on arrest of their rights by use of the *Judges Rules*’ caution.<sup>215</sup>

## (f) Access to legal advice

The Supreme Court’s decision in *People (DPP) v Gormley*<sup>216</sup> has widened the interpretation of the right to legal advice after arrest. It was held that “*the entitlement not to self-incriminate incorporates an entitlement to legal advice in advance of mandatory questioning of a suspect in custody*”.<sup>217</sup> However, this right can be waived by the suspect, if done so in a manner which is clear, explicit and documented.<sup>218</sup> An accused has a constitutional right to legal representation,<sup>219</sup> but this “*right is one of access to a lawyer, not of the presence of a lawyer during an interview.*”<sup>220</sup> However, as a matter of practice, all suspects detained in Garda stations for questioning must be advised, in advance of any questioning, that they may request a solicitor to be present at interview. Therefore, a suspect in Garda custody, unless he/she expressly waives his/her right to be given legal advice, should not be interviewed prior to him/her obtaining legal advice except in wholly

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IEHC 642; *Douglas v Director of Public Prosecutions* [2013] IEHC 343; *Sweeny v Ireland and Ors* [2017] IEHC 702.

<sup>214</sup> *Re National Irish Bank Ltd* [1999] 3 IR 145 at para 153.

<sup>215</sup> “*You are not obliged to say anything unless you wish to do so, but anything you say will be taken down in writing and may be given in evidence.*”

<sup>216</sup> *People (DPP) v Gormley* [2014] IESC 17.

<sup>217</sup> *People (DPP) v Gormley* [2014] IESC 17, at para 9.13.

<sup>218</sup> Code of Practice on Access to a Solicitor by Persons in Garda Custody, April 2015, para 9.

<sup>219</sup> *State (Healy) v Donoghue* [1976] IR 325.

<sup>220</sup> *People (DPP) v Barry Doyle* [2017] IESC 1, at para 17.



exceptional circumstances involving a pressing and compelling need to protect other major constitutional rights such as the right to life or where there is a clear waiver of the right by the suspect.<sup>221</sup> In relation to the waiving of this right of access, the ECt.HR opined that “*if it is to be effective for Convention purposes, a waiver of the right ... must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.*”<sup>222</sup> In *Healy* the right of access to a solicitor was held to be a constitutional right, as “*to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give.*”<sup>223</sup> This was further expanded in *Ryan* to include the right to choose one’s legal representative, and not merely have one appointed.<sup>224</sup> The other core concept which this judgment addressed was that of basic fairness of procedures, which a trial in due course of law and Article 38 of the Constitution requires. “[*T*he requirement that persons only be tried in due course of law ... requires that the basic fairness of process identified as an essential ingredient of that concept by this Court ... applies from the time of arrest of a suspect ... such that any breach of that requirement can lead to an absence of a trial in due course of law.”<sup>225</sup>

## ECHR

Article 6 of the ECHR states:

1. *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*”

<sup>221</sup> *People (DPP) v Gormley* [2014] IESC 17, para 9.2. per Clarke J., Code of Practice on Access to a Solicitor by Persons in Garda Custody, April 2015, para 2.

<sup>222</sup> *Salduz v Turkey*, App no. 36391/02, 27 November 2008, at para 59.

<sup>223</sup> *People (DPP) v Healy* [1990] 2 IR 73, at para 81.

<sup>224</sup> *Ryan v DPP* [2011] IEHC 208.

<sup>225</sup> *People (DPP) v Gormley* [2014] IESC 17, at para 8.8.



2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
  - a. *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
  - b. *to have adequate time and facilities for the preparation of his defence;*
  - c. *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
  - d. *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - e. *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”*

Article 6 imposes two different types of obligations on the State:

- A negative obligation not to punish anyone without a fair trial; and
- A positive obligation to establish a court system which upholds this right, for example, by providing interpreters or legal aid in criminal proceedings.

The key provision of Article 6, in the first sentence of paragraph 1, is that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, anyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The length of time cases take will depend in part on the efficiency of police investigations. The ECt.HR includes the investigatory phase when assessing if the time taken is reasonable.<sup>226</sup> This right is engaged from the moment a person is ‘charged’. The meaning of ‘criminal charge’ has an autonomous meaning under the ECHR.<sup>227</sup> The ECt.HR has held that it can “be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.”<sup>228</sup> In determining if the matter is one of a criminal charge or otherwise, the ECt.HR will assess the following:

<sup>226</sup> Section adapted from Committee of experts on the reform of the Court, Steering committee for human rights, *Draft toolkit to inform public officials about the State’s obligations under the Convention*, Strasbourg: Council of Europe, 2014) at pp. 10-13.

<sup>227</sup> *Adolf v Austria*, App no. 8269/78, 26 March 1982, para 30.

<sup>228</sup> *Deweere v Belgium*, App no. 6903/75, 27 February 1980, at para 46.



1. Classification in domestic law;
2. Nature of the offence;
3. Severity of the penalty that the person concerned risks incurring.<sup>229</sup>

In addition to the above, the following matters arise in respect of a person charged with a criminal offence within the meaning of Article 6:

A person is innocent until proven guilty. The presumption of innocence affords the right not to incriminate oneself. *“The right not to incriminate oneself is primarily concerned ... with respecting the will of an accused person to remain silent.”*<sup>230</sup> In regard to the investigative stage of a criminal inquiry, the ECt.HR acknowledged the fact that, *“an accused often finds himself in a particularly vulnerable position at that stage of the proceedings ... In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused”*.<sup>231</sup>

The right to remain silent is not absolute in that adverse inferences may be drawn from such silence. In this context the ECt.HR will consider *“whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.”*<sup>232</sup> Where information is elicited via an informer it may be excluded as evidence where the freedom to choose to remain silent has effectively been undermined by the actions of the authorities. In this

<sup>229</sup> *Engel and others v the Netherlands*, App no. 5100/71; 5101/71; 5102/71; 5354/72; [5370/72](#), at para 82–83.

<sup>230</sup> *Saunders v the United Kingdom*, App no. 19187/91, 17 December 1996, at para 69.

<sup>231</sup> *Salduz v Turkey*, App no. 36391/02, 27 November 2008, at para 54.

<sup>232</sup> *Condron v the United Kingdom*, App no. 35718/97, 2 May 2000, at para 56.

regard, the ECt.HR observed that “[s]uch freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.”<sup>233</sup> In this respect, the ECt.HR considered this issue in *Allan v UK*<sup>234</sup> where an informer was placed in a cell with a suspect for the purpose of eliciting information and stated, “Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused.”<sup>235</sup>

The right to a fair trial may be breached if it is stated or implied publicly, for example, to the media, that a person is responsible for a crime before a court has found him so.<sup>236</sup>

Suspects should be given prompt and intelligible information of the nature and cause of the accusation against them. The person must be able to understand the information, including, if necessary, by being provided with a translation (at the State’s expense).<sup>237</sup> A suspect is entitled to an interpreter<sup>238</sup> free of charge if he/she cannot understand or communicate in the language used in court.<sup>239</sup>

Suspects should be afforded adequate time and facilities for the preparation of their defence. The ECt.HR observed that “the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance.

<sup>233</sup> *Allan v the United Kingdom*, App no. 48539/99, 5 November 2002, at para 50.

<sup>234</sup> *Allan v the United Kingdom*, App no. 48539/99, 5 November 2002.

<sup>235</sup> *Allan v the United Kingdom*, App no. 48539/99, 5 November 2002, at para 51.

<sup>236</sup> *Ürfi Çetinkaya v. Turkey*, App no. 19866/04, 23 July 2013.

<sup>237</sup> *Baytar v Turkey*, App no. 45440/04, 14 October 2014.

<sup>238</sup> European Communities Act 1972 (Interpretation and Translation for Persons in Custody in Garda Stations) Regulations, 2013; European Communities Act 1972 (Interpretation and Translation in Criminal Proceedings) Regulations, 2013; HQ Directive No. 24/2014.

<sup>239</sup> *Baytar v Turkey*, App no. 45440/04, 14 October 2014.

*In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.*"<sup>240</sup>

Article 6 ECHR affords the right to defend oneself in person or through legal assistance of his or her own choice, provided free where the interests of justice so require. Similar issues of access by lawyers to the accused also apply. "Article 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".<sup>241</sup> The ECt.HR has held that legal assistance must be practical and effective including at the pre-trial stage as well as in court.<sup>242</sup> Thus, where a high-profile prisoner was interrogated for nearly seven days without being allowed access to his lawyer, in *Öcalan v Turkey*, there was a breach, because his defence risked being irretrievably prejudiced. In the same case, because the files were so big, two one-hour visits a week were not enough to allow the defence to be prepared.<sup>243</sup> Legal consultations need to take place out of earshot of officials.<sup>244</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 47 states:

*"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*

*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*

*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."*

## Code of Ethics for An Garda Síochána

A Commitment is given to the standard of "Police Powers" in the following terms:

<sup>240</sup> *Dayanan v Turkey*, App no. 7377/03, 13 October 2009, at para 32.

<sup>241</sup> *Salduz v Turkey*, App no. 36391/02, 27 November 2008, at para 55.

<sup>242</sup> *Salduz v Turkey*, App no. 36391/02, 27 November 2008, at para 50.

<sup>243</sup> *Öcalan v Turkey* (2005) 41 EHRR 985.

<sup>244</sup> *S v Switzerland*, App no. 126829/87; 13965/88, 28 November 1991, para 48.



*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.”*

A Commitment is given to the standard of “*Information and Privacy*” in the following terms:

*“I will not improperly convey Garda information to the media or any third party.”*

## **OTHER RELEVANT INTERNATIONAL STANDARDS**

The right to a fair trial is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### **Universal Declaration of Human Rights**

Article 10 states:

*“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 charge against him.”*

### **International Covenant on Civil & Political Rights**

Article 14 states:

- 1. “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
- 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
- 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*



- a) *To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
  - b) *To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
  - c) *To be tried without undue delay;*
  - d) *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
  - e) *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - f) *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
  - g) *Not to be compelled to testify against himself or to confess guilt.*
4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
  5. *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
  6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*
  7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”*

## **UN Basic Principles on the Role of Lawyers**

**Principle 1:** *“All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”*



**Principle 5:** *“Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.”*

**Principle 7:** *“Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.”*

**Principle 8:** *“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”*

### **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment**

Principle 21 states:

*“1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.*

*2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.”*

Principle 23 states:

*“1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.*

*2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.”*

Principle 27 states:

*“Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.”*



Principle 36 states:

- “1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*
- 2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.”*

Principle 37 states:

*“A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.”*

Principle 38

*“A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.”*

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

Article 15 states:

*“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”*





## No punishment without law

### Constitution of Ireland

Article 15.5.1 provides that “*The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission*”.

The Supreme Court has described this article as an “*unambiguous prohibition against the enactment of retrospective laws declaring acts to be an infringement of the law, whether of the civil or the criminal law*”.<sup>245</sup> Because of the explicit nature of the protection stated in Article 15.5.1, it has not been considered in many cases. However, in *Doyle v An Taoiseach*<sup>246</sup> the Supreme Court chose to interpret a statute as having prospective effect only, as to hold otherwise “*would make s.79 invalid having regard to Art.15.5 of the Constitution*”.<sup>247</sup> The Court expressed their view that legislation declaring acts to be infringements of the law should be read as applying to future conduct only, if possible, to maintain the constitutionality of the legislation. O’ Higgins CJ summed up this approach to statutory interpretation as follows: “*...in interpreting or construing an Act of the Oireachtas where two possible meanings or intentions are open, one which conforms with an Act's validity having regard to the provisions of the Constitution while the other does not, the meaning or intention which so conforms must be preferred*”.<sup>248</sup>

The Chief Justice explained that the reason for this presumption, in favour of prospective effect was attributable to the fact that, “*retrospective legislation, since it necessarily affects vested rights, has always been regarded as being prima facie unjust*”.<sup>249</sup> Henchy J clarified the circumstances under which this presumption should be abandoned as, when “*there is a clear and unambiguous intention to the contrary expressed, or necessarily implied, in the statute, or unless the change effected by the statute is purely procedural*”.<sup>250</sup>

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<sup>245</sup> *McKee v Culligan* [1992] 1 IR 233.

<sup>246</sup> *Doyle v An Taoiseach* [1986] ILRM 693.

<sup>247</sup> *Doyle v An Taoiseach* [1986] ILRM 693.

<sup>248</sup> *Hamilton v Hamilton* [1982] IR 466.

<sup>249</sup> *Hamilton v Hamilton* [1982] IR 466.

<sup>250</sup> *Hamilton v Hamilton* [1982] IR 466.





The tenets of statutory interpretation may favour the prospective application of legislation, but Article 15.5.1 does not prohibit all legislation which is intended to operate retrospectively. Finlay CJ explored this point in declaring that Article 15.5.1 is “*confined to situations where apparently innocent actions are retrospectively construed as constituting infringements of the law*”.<sup>251</sup> Where a provision does not affect a constitutional right, and the common law presumption against retrospectivity has been overcome by the unambiguous intention of the legislature, retrospective effect does not render a statute unjust.<sup>252</sup> In *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*,<sup>253</sup> the Supreme Court was tasked with assessing the constitutionality of a provision which sought to retrospectively make lawful, charges which had been levied on those in residential care, and which had subsequently been found to have been entitled to receive such care free of charge. This was held to be a permissible retrospective application of the law as the Court stated that, “*it does not seek to render unlawful the failure of any persons to pay charges in the past*”.<sup>254</sup> Curative legislation such as this does not engage Article 15.5.1, as it does not create, or substantially change an existing offence.

### Article 38

Article 38.1 states:

*“No person shall be tried on any criminal charge save in due course of law”.*

Article 38.2 states:

*“Minor offences may be tried by courts of summary jurisdiction”.*

Article 38.5 states:

*“Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury”.*

This article of the Constitution establishes the rights and procedures which attach to a criminal proceeding and further still, those which are required by the Constitution in the

<sup>251</sup> *McKee v Culligan* [1992] 1 IR 233.

<sup>252</sup> *Minister for Social Welfare v Scanlon* [2001] 1 IR 64.

<sup>253</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 205.

<sup>254</sup> *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 205.



prosecution of a criminal charge of a minor or non-minor offence. The courts, when required will examine the nature of the offence and its correct designation under Article 38, independently of how the relevant legislation has sought to describe it. Lavery J has stated that, “... *it seems to me clear that a proceeding, the course of which permits the detention of the person concerned, the bringing of him in custody to a Garda Station, the entry of a charge in all respects in the terms appropriate to the charge of a criminal offence, the searching of the person detained and the examination of papers and other things found upon him, the bringing of him before a District Justice in custody, the admission of bail to stand his trial and the detention in custody if bail be not granted or is not forthcoming, the imposition of a pecuniary penalty with the liability to imprisonment if the penalty is not paid has all the indicia of criminal charge*”.<sup>255</sup> Other common features of a criminal offence were listed in this judgment as: offences against the community at large, the sanction is punitive, they require *mens rea* for the act must be done ‘knowingly’.<sup>256</sup> The importance of a ‘crime’ requiring intent (*mens rea*) has been restated by the Supreme Court in the strongest terms: “*I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or dignity of the individual*”.<sup>257</sup>

“*Minor offences can only be such offences the punishment of which interferes with the citizen’s liberty in a minor way, whether that interference be to the citizen in his property or personal liberty*”.<sup>258</sup> In *Conroy v Attorney General*<sup>259</sup> the Supreme Court addressed the factors which are most important in assessing whether an offence is minor or non-minor. “*The moral quality of the act is a relevant though secondary consideration ... the primary consideration in determining whether an offence be a minor one or not is the punishment which it may attract*”.<sup>260</sup> The Court further clarified that it is the ‘primary punishment’

<sup>255</sup> *Melling v O Mathghanhna* [1962] IR 1.

<sup>256</sup> *Melling v O Mathghanhna* [1962] IR 1.

<sup>257</sup> *CC v Ireland* [2006] IESC 33.

<sup>258</sup> *Melling v O Mathghanhna* [1962] IR 1.

<sup>259</sup> *Conroy v Attorney General* [1965] IR 411.

<sup>260</sup> *Conroy v Attorney General* [1965] IR 411.



which must be considered and not, as in the instant case, the secondary punishment of disqualification from driving as, “*disqualification cannot be regarded as a punishment in the sense in which that term is used in considering the gravity of an offence by reference to the punishment it may attract upon conviction such as imprisonment or a fine, but rather is a finding of unfitness*”.<sup>261</sup> The severity of ‘primary punishment’ allowable for a minor offence is not established, but a custodial sentence of two years has been rejected,<sup>262</sup> as has a fine of £10,000.<sup>263</sup> The current threshold indicated by the courts for a minor offence is one attracting a sentence of six months imprisonment.<sup>264</sup>

Article 38 of the Constitution also prohibits the introduction of laws which are drafted in vague terms, or that are open to arbitrary use. The Supreme Court struck down section 4 of the Vagrancy Act 1824 on such grounds, as it had created the offence of “loitering with intent” which applied to “every suspected person or reputed thief”.<sup>265</sup> Henchy J summed up the objection of the Court to a provision which was, “*so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly proscribed standard of conduct*”.<sup>266</sup>

## European Convention on Human Rights

Article 7 of the ECHR provides as follows:

*(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

<sup>261</sup> *Conroy v Attorney General* [1965] IR 411.

<sup>262</sup> *Mallon v Minister for Agriculture* [1966] 1 IR 517.

<sup>263</sup> *O’Sullivan v Hartnett and the Attorney General* [1983] ILRM 79.

<sup>264</sup> *Conroy v Attorney General* [1965] IR 411.

<sup>265</sup> *King v Attorney General* [1981] IR 233.

<sup>266</sup> *King v Attorney General* [1981] IR 233.



*(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*

The guarantee enshrined in Article 7 ECHR is an essential element of the rule of law and, “occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible ... in time of war or other public emergency”.<sup>267</sup> It embodies a core principle of the European democratic tradition. Article 7 ECHR only applies to prosecutions which have resulted in a conviction.<sup>268</sup> Given the fundamental nature of the principle which prohibits the retroactive application of criminal law, challenges brought under Article 7 ECHR tend to relate to the ‘penalty’ imposed, rather than a claim that they have been convicted for an offence which was not a crime at the time of its alleged commission. The Court has developed an autonomous convention definition of ‘penalty’. “The starting point in any assessment of a penalty is whether the measure in question is imposed following conviction for a ‘criminal offence’. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measures and its severity”.<sup>269</sup>

Article 7 ECHR does not just prohibit the retrospective application of criminal sanctions, it also “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law”.<sup>270</sup> The ECt.HR has consistently employed national case law in interpreting an offence in order to determine whether there is any uncertainty regarding the essential elements of criminal liability. In *Handyside v United Kingdom*<sup>271</sup> it

<sup>267</sup> *Veeber v Estonia (No 2)* (2004) 39 EHRR 6.

<sup>268</sup> *X v UK* (1973) 3 Digest 211.

<sup>269</sup> *Welch v United Kingdom* (1995) 20 EHRR 247.

<sup>270</sup> *Kokkinakis v Greece* (1994) 17 EHRR 397.

<sup>271</sup> *Handyside v United Kingdom* (1979-80) 1 EHRR 737.



was sufficient that the legislation provided a general description of the offence that can then be interpreted and applied by courts.

In the case of *Kononov v Latvia*<sup>272</sup> the applicant claimed that his conviction was a violation of Article 7 ECHR because the alleged war crimes carried out by him as a soldier in the Soviet Army were not a domestic offence in Latvia at the time of World War II. The Court found that the conviction did not violate Article 7 ECHR because he was convicted of an offence that was a crime under international law at the time that it was committed. Further, in a case against Estonia:

*'The Court reiterates that Article 7(2) of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal.'*<sup>273</sup>

Applying this line of authority to Garda operations, it is necessary that the offence(s) and penalty, with respect to a criminal investigation, are known in law.

## Charter of Fundamental Rights

Article 49 provides:

*(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.*

*(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.*

*(3) The severity of penalties must not be disproportionate to the criminal offence.*

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<sup>272</sup> *Kononov v Latvia* [2010] ECHR 667.

<sup>273</sup> *Kolk & Kislyiy v Estonia*, Application no. 23052/04, Application no. 24018/04, 17 January 2006.



## OTHER RELEVANT INTERNATIONAL STANDARDS

The prohibition of the use of retroactive criminal law is set out in a number of other International Instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### International Covenant on Civil and Political Rights 1966

Article 15 provides:

1. *“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”*
2. *Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”*

### Universal Declaration of Human Rights 1945

Article 11 provides:

1. *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”*
2. *No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.*

### Rome Statute of the International Criminal Court 1998

Article 22 provides:

1. *“A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”*



2. *The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*
3. *This article shall not affect the characterisation of any conduct as criminal under international law”.*

Article 23 provides:

*“A person convicted by the Court may be punished only in accordance with this Statute”.*

Article 24 provides:

1. *“No person shall be criminally responsible under this statute for conduct prior to the entry into force of the Statute.*
2. *In the event of a change in the law applicable to given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply”.*

## The Right to Respect for Private and Family Life

### Constitution of Ireland 1937

An individual's right to privacy was recognised by the Supreme Court in *Kennedy v Ireland*.<sup>274</sup> In *Kennedy*,<sup>275</sup> Hamilton P said of privacy that, “*though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State*”.<sup>276</sup> The exercise of the right may be restricted by, “*the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality*”.<sup>277</sup> The court in *Kennedy* had to determine if telephonic communications were protected by the right to privacy.<sup>278</sup> In accepting that they were, Hamilton P explained that, “*the dignity and freedom of an individual in a democratic society cannot be ensured if his conversations of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with*”.<sup>279</sup> Privacy, in the form of marital privacy, was first accepted as among the unspecified rights in the case of *McGee v The Attorney General*.<sup>280</sup>

The Constitutional right to privacy was further explored by Clarke J in *Cogley v RTE*<sup>281</sup> and the principles derived from all authoritative Irish judgments on privacy were enumerated by Dunne J in *Herrity v Associated Newspapers Ltd*<sup>282</sup> and followed in subsequent cases.<sup>283</sup> The established principles are as follows:

<sup>274</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>275</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>276</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>277</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>278</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>279</sup> *Kennedy v Ireland* [1987] IR 587.

<sup>280</sup> *McGee v The Attorney General* [1974] IR 284.

<sup>281</sup> *Cogley v RTE* [2005] IEHC 181.

<sup>282</sup> *Herrity v Associated Newspapers Ltd* [2008] IEHC 249.

<sup>283</sup> *Murray v Newsgroup Newspapers Ltd & Ors* [2010] IEHC 248; *LK (a Minor Suing by her Mother and Next Friend MK) v Independent Star Limited, the Dundalk Democrat Ltd and Independent Broadcasting Corporation Ltd T/A LFMFM* [2010] IEHC 500.



1. *There is a Constitutional right to privacy.*
2. *The right to privacy is not an unqualified right.*
3. *The right to privacy may have to be balanced against other competing rights or interests.*
4. *The right to privacy may be derived from the nature of the information at issue - that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or to the public generally.*
5. *There may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make complaint in relation to the manner in which the information was obtained.*
6. *The right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions.*<sup>284</sup>

*“Provided appropriate safeguards are in place, it would have to be acknowledged that in a modern society electronic surveillance and interception of communications is indispensable to the preservation of State security”.*<sup>285</sup> This statement by Hogan J addresses the necessity to adopt practices which may interfere with the privacy rights of individuals, but which are justified by the requirements of the common good.

## ECHR

Article 8 of the ECHR is set out in the following terms:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such 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 well-being*

<sup>284</sup> *Herrity v Associated Newspapers Ltd* [2008] IEHC 249.

<sup>285</sup> *Schrems v Data Protection Commissioner* [2014] IEHC 310.



*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.”<sup>286</sup>*

*“The concepts of ‘private life’, ‘family life’, ‘home’ and ‘correspondence’ are autonomous under the convention, and the ways in which they have been defined in domestic law are therefore of limited assistance”.*<sup>287</sup> These concepts have been further interpreted by the ECt.HR.

When considering employing an investigative method, Garda Personnel should assess the privacy implications of that method in three stages:

1. Will their actions engage any of the rights protected by Article 8 (1)?
2. It should be considered if the proposed interference is in accordance with law, and
3. Garda personnel must establish if interference with an Article 8 right is necessary.<sup>288</sup>

#### **‘In accordance with law’**

The ECt.HR stated in *Copland v the United Kingdom*<sup>289</sup> that, *“in accordance with law’ implies that there must be a measure of legal protection in domestic law against arbitrary interference by public authorities with the rights safeguarded by Article 8(1)”*. A legal basis in national law may include *“statute law, secondary legislation, applicable rules of European Community law, ascertainable common law ... However, non-statutory guidance to the executive is unlikely to be sufficient”*.<sup>290</sup> Laws which allow for interference with the privacy of individuals have been scrutinised by the ECt.HR, and when found to be

<sup>286</sup> Article 8 of the European Convention on Human Rights.

<sup>287</sup> Deirdre Fotherell and Karim Khan, *‘Human Rights Practice’* In Jessica Simor (ed), (Sweet & Maxwell 2012).

<sup>288</sup> Necessity in this context relates to whether the aim pursued is one of those listed in Article 8(2), and if the interference is proportionate to this aim.

<sup>289</sup> *Copland v the United Kingdom* 62617/00 (2007) 45 ECHR 235.

<sup>290</sup> Ben Emmerson et al, *‘Human Rights and Criminal Justice’* (Sweet & Maxwell 2012) para 2-80.

deficient, the court has held that the very existence of such laws may constitute a breach of Article 8.<sup>291</sup>

The ECt.HR has stated that “*the storing by a public authority of data relating to the private life of an individual amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding*”.<sup>292</sup> An Garda Síochána may collect and retain information about the private lives of individuals in order to carry out its duties effectively. The Commission has noted, “*that the keeping of records relating to criminal cases of the past can be regarded as necessary in a modern democratic society for the prevention of crime*”,<sup>293</sup> and that even if no prosecution is brought against the individual “*special considerations, such as combating organised terrorism, can justify the retention of the material concerned*”.<sup>294</sup> As the decisions of the ECt.HR reveal, any interference must be justified as being necessary and proportionate. The Commission found no breach of Article 8 where photographs were used by the Police to identify suspects, as they were taken in a way which did not impinge on privacy and were only used for investigative purposes.<sup>295</sup> The gathering, retention and storage of personal data must be in accordance with law.

The interception of telephonic communications “*represents a serious interference with private life and correspondence and must accordingly be based on a ‘law’ that is particularly precise*”.<sup>296</sup> For this reason, Garda Personnel need to ensure that the methods used by them are specifically provided for by legislation. Here the case of *Sciacca v Italy*<sup>297</sup> is noteworthy, as it involved a ruling by the ECt.HR that the release of a photograph of an individual being investigated by the Revenue Police was not in accordance with law. The Court held that a suspect should benefit from a greater protection of their image, as an

<sup>291</sup> *Klaas and ors v Federal Republic of Germany* 5029/71 (1979) 2 EHHR 214.

<sup>292</sup> *Amann v Switzerland* 27798/95 (2000) 30 EHRR 843.

<sup>293</sup> *Friedl v Austria* 15225/89 (1996) 21 EHRR 83.

<sup>294</sup> *Friedl v Austria* 15225/89 (1996) 21 EHRR 83.

<sup>295</sup> *Doorson v Netherlands* 20524/92 (1996) 22 EHRR 330.

<sup>296</sup> *Kruslin v France* 11801/85 (1990) 12 EHRR 547.

<sup>297</sup> *Sciacca v Italy* 50774/99 (2006) 43 EHRR 400.



‘ordinary person’, and the publication of such photographs was not “governed by a ‘law’ that satisfied the criteria laid down by the Court’s case law, but rather by a practice”.<sup>298</sup> The image was one taken by the police to be included in the investigation file, but the release of the image was not for the purpose of furthering that investigation.

In the case of *PG & JH v the United Kingdom*<sup>299</sup> covert surveillance was carried out in police stations under the authority of Home Office guidance which was not publicly accessible or legally binding. The Court held that the “principle that domestic law should provide protection against arbitrariness and abuse of covert surveillance techniques applies equally to the use of devices on police premises”.<sup>300</sup> In relation to employees in the workplace the ECt.HR has opined that employers cannot covertly surveil all staff.<sup>301</sup> *Halford v the United Kingdom*<sup>302</sup> concerned the interception of an employee’s phone calls by her employer, the Merseyside Police. There was no regulatory regime in place governing the interception of calls on the employer’s internal telecommunications network, and as such the calls were intercepted without any external approval or oversight. The ECt.HR observed that “[i]n the context of secret measures of surveillance of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights”.<sup>303</sup> The protection against unregulated monitoring of an employee’s communications extends beyond the content of phone calls. Accordingly, the ECt.HR considered “that the collection and storage of personal information relating to the applicant’s telephone, as well as to her e-mail and internet usage, without her knowledge, amounted to an interference ... within the meaning of Article 8”.<sup>304</sup>

<sup>298</sup> *Sciacca v Italy* 50774/99 (2006) 43 EHRR 400.

<sup>299</sup> *PG & JH v the United Kingdom* 44787/98 (2001) ECHR 546.

<sup>300</sup> *PG & JH v the United Kingdom* 44787/98 (2001) ECHR 546. See *López Ribalda and others v Spain* App no. 1874/13, 8567/13, 9 January 2018, at para 61 in relation to employees in the workplace.

<sup>301</sup> *López Ribalda and others v Spain* App no. 1874/13, 8567/13, 9 January 2018, at para 69.

<sup>302</sup> *Halford v the United Kingdom* 20605/92 (1997) ECHR 32.

<sup>303</sup> *Halford v the United Kingdom* 20605/92 (1997) ECHR 32.

<sup>304</sup> *Copland v the United Kingdom* 62617/00 (2007) 45 EHRR 37.



Even where the potential monitoring of professional communications had been communicated to an employee the ECt.HR determined that prior notice should be given before such monitoring could commence. “[T]o qualify as prior notice, the warning from the employer must be given before the monitoring activities are initiated, especially where they also entail accessing the contents of employees’ communications.”<sup>305</sup> While the ECt.HR did not opine on when the content of communications made in the workplace could be monitored, it found that the national court had “failed to determine, firstly, the specific reasons justifying the introduction of the monitoring measures; secondly, whether the employer could have used measures entailing less intrusion into the applicant’s private life and correspondence; and thirdly, whether the communications might have been accessed without his knowledge.”<sup>306</sup>

#### ‘Necessary in a democratic society’

“The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued”.<sup>307</sup> The ‘pressing social need’ referred to in this passage from *Leanders v Sweden*<sup>308</sup> must concern one of the general interests listed in Article 8(2). In assessing the proportionality of actions taken in the pursuit of a conventionally permissible social need, the ECt.HR will look to whether the actions taken represented the minimum effective interference with Article 8 rights. For this reason, Garda Personnel should always consider less intrusive methods before proceeding - even with full legal sanction – to interfere with a person’s Article 8 rights.

Many operational activities engage and potentially interfere with Article 8 rights. However, “questioning, searching, fingerprinting, photography and the retention of records may in certain circumstances constitute an interference necessary for public safety

<sup>305</sup> *Bărbulescu v. Romania* [GC], App no 61496/08, 5 September 2017, at para 133.

<sup>306</sup> *Bărbulescu v. Romania* [GC], App no 61496/08, 5 September 2017, at para 140.

<sup>307</sup> *Leanders v Sweden* 9248/81 (1987) 9 EHRR 433.

<sup>308</sup> *Leanders v Sweden* 9248/81 (1987) 9 EHRR 433.

and for the prevention of crime”.<sup>309</sup> A pressing social need may justify “the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime”.<sup>310</sup> The ECt.HR has also found that even where a legitimate aim is being pursued, the law itself may be deemed “too lax and full of loopholes for the interference with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued”.<sup>311</sup>

## Charter of Fundamental Rights of the European Union

Article 7 and 8 provide as follows:

### Article 7

“Everyone has the right to respect for his or her private and family life, home and communication”.

### Article 8

“(1) Everyone has the right to the protection of personal data concerning him or her.

(2) 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.

(3) Compliance with these rules shall be subject to control by an independent authority.”

## Code of Ethics for An Garda Síochána

Commitments are given to the standard of “Information and Privacy” in the following terms:

- “I will recognise and respect every person’s right to privacy. I will interfere with this right only when it is lawful and necessary to achieve a legitimate objective.
- I will never hide, exaggerate, invent, interfere with or improperly destroy information or evidence.

<sup>309</sup> *McVeigh, O’Neill and Evans v the United Kingdom* 8022/77, 8025/77 and 8027/77 (Joined) (1981) 25 DR 15.

<sup>310</sup> *Klaas and ors v Federal Republic of Germany* 5029/71 (1979) 2 EHHR 214.

<sup>311</sup> *Funke v France* 10828/84 (1993) 16 EHRR 297.

- *I will gather, retain, access, disclose or process information only in accordance with the law and principles of data protection.*
- *I will not improperly convey Garda information to the media or any third party."*

### **Other Relevant International Standards**

The duty to respect the privacy of individuals is set out in a number of other international instruments. In this respect, members of Garda Personnel in the performance of their functions should be cognisant of the following:

#### **Universal Declaration of Human Rights**

Article 12 provides that *“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”*.

#### **International Covenant on Civil and Political Rights**

Article 17 (1) and (2) provide as follows:

*“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*(2) Everyone has the right to the protection of the law against such interference or attacks”*.

#### **European Code of Police Ethics**

Article 41 provides that *“The police shall only interfere with individual’s rights to privacy when strictly necessary and only to obtain a legitimate objective”*.

Article 42 provides that *“The collection, storage and use of personal data by the police shall be carried out in accordance with international data protection principles and, in particular, be limited to the extent necessary for the performance of lawful, legitimate and specific purposes”*.

#### **United Nations Convention on the Rights of the Child**

Article 16 (1) and (2) provide as follows:





*“(1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*

*(2) The child has the right to the protection of the law against such interference or attacks.”*

### **United Nations Code of Conduct for Law Enforcement Officials**

Article 4 provides that *“Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise”.*

### **UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**

*“6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:*

*(d) Taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.”*

### **UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)**

Rule 5 provides:

*“The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”*

Rule 8 provides:

1. *“The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.*
2. *In principle, no information that may lead to the identification of a juvenile offender shall be published.”*

Rule 21 provides:





## NEAMHSHRIANTA / UNRESTRICTED

1. *“Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.*
2. *Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.”*



## The Right to the Inviolability of the Dwelling

### Constitution of Ireland 1937

Article 40.5 provides that “*the dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law*”. The importance of the protection guaranteed by Article 40.5 was stressed by Hardiman J in the case of *DPP v Barry O’Brien*<sup>312</sup> as it “*presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and reinforces other constitutional guarantees and values ... thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee*”.<sup>313</sup> Although the constitutional protection also envisages lawful interference with this right, its importance is fully embraced by the provision. As Carney J stated in *DPP v Dunne*,<sup>314</sup> “*The constitutional protection given in Article 40.5 of the Constitution in relation to the inviolability of the dwelling house is one of the most important, clear and unqualified protections given by the Constitution to the citizen*”.<sup>315</sup>

### The Dwelling

The issue of what constitutes a dwelling for the purposes of Article 40.5, and who must benefit from the protection, has been established by the courts. Only the person or persons residing in the dwelling can benefit from the protection. In *DPP v Lawless*<sup>316</sup> this issue arose because the warrant used by the Gardaí to enter a dwelling was found to be invalid. McCarthy J, in the Court of Criminal Appeal found that no constitutional infringement arose, as the accused was found in possession of heroin in another individual’s flat. This individual’s rights under Article 40.5 had been unlawfully infringed, but this fact could not be relied upon by the applicant to exclude the evidence on the grounds that it was unconstitutionally obtained. Under certain circumstances a hotel bedroom may be

<sup>312</sup> *DPP v Barry O’Brien* [2012] IECCA 68.

<sup>313</sup> *DPP v Barry O’Brien* [2012] IECCA 68.

<sup>314</sup> *DPP v Dunne* [1994] 2 IR 537.

<sup>315</sup> *DPP v Dunne* [1994] 2 IR 537.

<sup>316</sup> *DPP v Delaney* (1985) 3 Frewen 31.



considered as a dwelling.<sup>317</sup> However, even where the premises in question would appear to be a conventional dwelling, portions of it may not attract the attendant constitutional protection. In *DPP v. McMahon & Others*<sup>318</sup> the court distinguished the residential portion of a public house from the part which comprised the licensed premises, which the Gardaí had entered without lawful authority. Finlay J ruled that “*the act of entering, as a trespasser, the public portion of a licensed premises which is open for trade does not, of course, constitute any invasion or infringement of any constitutional right of the owner of those premises*”.<sup>319</sup> Blayney J of the High Court further clarified the definition of the dwelling as “*a house, or part of a house, and that this is what is made inviolable by the Constitution. The protection would not extend accordingly to a garden surrounding the dwelling, or leading to it*”.<sup>320</sup> Walsh J went further by looking beyond a superficially unitary dwelling, and postulated that “*If a member of a family occupies a clearly defined portion of the house apart from the other members of the family, then it may well be that the part not so occupied is no longer his dwelling*”.<sup>321</sup> This view may potentially restrict or enhance the protection depending on the circumstances, by allowing for both the existence of several separate dwellings on the one premises, and the resultant limitation/extension of Article 40.5 protection to those individual dwellings.

Even where the person occupying a premises is doing so as a trespasser, this fact may not defeat a claim that it was their constitutionally protected dwelling. The Court of Criminal Appeal quashed the conviction of a squatter found in possession of stolen goods, on the grounds that the use of a defective warrant to search the flat he was occupying breached Article 40.5. In determining that Article 40.5 applied, Fennelly J relied on the Irish language version of the provision. “*The question of whether a place is the ‘dwelling’ of a person for the purpose of this provision...is one of fact, a view reinforced by the Irish*

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<sup>317</sup> *DPP v Yamanoha* [1994] 1 IR 565.

<sup>318</sup> *DPP v McMahon & Others* [1986] IR 393.

<sup>319</sup> *DPP v McMahon & Others* [1986] IR 393.

<sup>320</sup> *DPP v Corrigan* [1986] IR 290.

<sup>321</sup> *The People (AG) v O’Brien* [1965] IR 142.



*language version*".<sup>322</sup> The 'fact' of the applicant's occupation of the premises could not be denied as, "*the application for the warrant to search the flat was made precisely because the gardaí believed that the accused lived there*".<sup>323</sup> The Court further stated that "*It is at least quite obvious that the constitutional protection would extend to a wide variety of people with dubious legal titles, such as an over holding tenant, the widow of a deceased legal owner, or a person in bona fide possession on foot of an invalid title*".<sup>324</sup>

### Entry

"Entry into a home is at the core of potential State interference with the inviolability of the dwelling".<sup>325</sup> For this reason it is essential that members are aware of when they may lawfully enter a dwelling. "*The dwelling of every citizen is inviolable save where entry is permitted by law and that, if necessary, such law may permit forcible entry*".<sup>326</sup> This summation by Walsh J in *O'Brien*<sup>327</sup> expresses the principle that although the law may allow for forcible entry Article 40.5 exists to enshrine a protection rather than as a constitutional guarantee of the right to forcible entry subject to lawful authority. The statement can be best understood as reinforcing the principal of necessity and proportionality which should guide all operational activities of An Garda Síochána. "*It has been recognised that where the restriction of a constitutional right is permitted by law, it must be restricted to the least extent necessary for the achievement of the desired objective*".<sup>328</sup>

There are multiple legislative provisions under which a warrant may be granted, and a premises entered and searched. The authority to enter a dwelling without a warrant for the purposes of arrest and search is also provided for by section 6 of the Criminal Law Act 1997 (the 1997 Act). However, the procedure under section 6 of the 1997 Act must be fully

<sup>322</sup> *DPP v Lynch* [2010] 1 IR 543.

<sup>323</sup> *DPP v Lynch* [2010] 1 IR 543.

<sup>324</sup> *DPP v Lynch* [2010] 1 IR 543.

<sup>325</sup> *Demach v DPP* [2012] IESC 11.

<sup>326</sup> *The People (AG) v O'Brien* [1965] IR 142.

<sup>327</sup> *The People (AG) v O'Brien* [1965] IR 142.

<sup>328</sup> *DPP v Dermot Laide, Desmond Ryan* [2005] 4 ICLMD 32.



complied with and explained to the occupier, as can be seen from the case of *DPP v Laide*.<sup>329</sup> “The finding that the warrant was bad has therefore removed the very foundation on which the entry was made, and in the absence of the Gardaí informing the occupiers of the house that they had another purpose apart from searching, namely the arresting of Desmond Ryan, it is the view of this court that the power provided by s.6 (2) of the 1997 Act cannot be relied upon, since it was never invoked by the Gardaí at the time”.<sup>330</sup> In exercising the authority to enter conferred by section 6(2) of the 1997 Act, An Garda Síochána does not require the consent of the occupier, but “the fact that the power of entry exists does not mean ... that the purpose of entry, namely the arrest of somebody who resides in the house, does not have to be explained before entry is enforced on foot of the power”.<sup>331</sup> The Supreme Court cited the ruling in *DPP v Dunne*<sup>332</sup> in finding that the Gardaí could not rely on the authority granted by section 6 of the 1997 Act to gain entry to the dwelling as it was not expressed by them in “clear, complete, accurate and unambiguous terms”.<sup>333</sup>

### Invitation/Permission

A member may also enter a dwelling by invitation or permission, which may be express or inferred from the circumstances. In the context of a prosecution under section 13 of the Road Traffic Act 1994 O’Flaherty J of the Supreme Court stated that, “a householder gives an implied authority to a member of the Garda to come onto the forecourt of his premises to see to the enforcement of the law or prevent a breach thereof. However, this is an application which the evidence may, on occasion, rebut”.<sup>334</sup> In *DPP v Malloy*<sup>335</sup> a member acting on this implied authority to effect the arrest of the occupant, but on his own driveway, was later found to be unlawful by the Supreme Court as McCracken J was “satisfied that at the time of the actual arrest, that is the physical restraint of the

<sup>329</sup> *DPP v Dermot Laide, Desmond Ryan* [2005] 4 ICLMD 32.

<sup>330</sup> *DPP v Dermot Laide, Desmond Ryan* [2005] 4 ICLMD 32.

<sup>331</sup> *DPP v Dermot Laide, Desmond Ryan* [2005] 4 ICLMD 32.

<sup>332</sup> *DPP v Dunne* [1994] 2 IR 537.

<sup>333</sup> *DPP v Dunne* [1994] 2 IR 537.

<sup>334</sup> *DPP v Forbes* [1993] ILRM 817.

<sup>335</sup> *DPP v Malloy* [2003] 5 ICLMD 89.



*respondent, the implied consent had been withdrawn, the Garda was a trespasser and the arrest was unlawful”.*<sup>336</sup>

Where a member has been given permission to enter the dwelling, that permission may be revoked by the occupant. However, the circumstances of that revocation will determine if it is valid. In *DPP v Closkey*<sup>337</sup> O’Hanlon J found that the revocation of permission to enter was invalid, as the arrest had already commenced – but had not concluded – when the occupants attempted to resist the Gardaí. The arrest was therefore lawful, and no constitutional breach had occurred. *“An invitation cannot be presumed either as a matter of fact or of law simply because there was no express refusal ... it is my view that the absence of an express refusal or of an express order to leave cannot be construed as an implied invitation or permission to enter”.*<sup>338</sup>

### **Protection of life**

Another circumstance where the courts have deemed it lawful to enter a dwelling is in order to preserve life. This is a power which is not conferred by statute but has been established by the courts as resulting from the existence of a hierarchy of constitutional rights. This arose in the case of *DPP v Delaney*,<sup>339</sup> where the Gardaí entered a dwelling despite the refusal of the occupants to grant permission because they feared for the safety of those inside, most especially several children. *“The sergeant was entitled to enter the premises to safeguard the life and limbs of the woman who was there as well as the children ... because the safeguarding of life and limb must be more important than the inviolability of the dwelling of a citizen, especially when it is under attack in any event”.*<sup>340</sup>

In relation to admissibility of evidence, the concept of ‘extraordinary excusing circumstances’, which Walsh J referred to in his judgment in *O’Brien*<sup>341</sup> has been used as

<sup>336</sup> *DPP v Malloy* [2003] 5 ICLMD 89.

<sup>337</sup> *DPP v Closkey* High Court, Unreported, 6<sup>th</sup> of February 1984.

<sup>338</sup> *DPP v Kenneth Gaffney* [1988] ILRM 39.

<sup>339</sup> *DPP v Delaney* [1987] 1 ILRM 507.

<sup>340</sup> *DPP v Delaney* [1987] 1 ILRM 507.

<sup>341</sup> *DPP v O’Brien* [1965] IR 142.



a justification for the inclusion of evidence obtained in contravention of an individual's constitutional rights. The circumstances which to date have been found to qualify include, *"the imminent destruction of vital evidence or the need to rescue a victim in peril"*.<sup>342</sup> It is essential to recall however, that this statement does not empower An Garda Síochána to interfere with constitutional rights in 'extraordinary excusing circumstances'; the principle relates solely to the subsequent admissibility of evidence.<sup>343</sup> Nevertheless, the approach taken by the courts in assessing An Garda Síochána's actions in such extraordinary circumstances has been summarised by Kenny J as, *"when passing judgement on the actions ... we must remember that they have to make many immediate decisions and cannot possibly get a court decision to guide them. Our function is to decide whether the choice they made in the priority of constitutional or legal rights was correct"*.<sup>344</sup>

In *DPP v Shaw*,<sup>345</sup> from where this passage originates, An Garda Síochána had held the suspect beyond the lawful period of detention, because of a reasonable belief that a victim in peril could still be alive and that their actions were necessary to vindicate her right to life. The majority view of the Supreme Court was expressed by Griffin J when he stated that, *"viewing the matter objectively from the point of view of foresight and not hindsight, in my opinion he made the correct choice and, indeed, the only choice which he could reasonably have made in the circumstances"*.<sup>346</sup> He further clarified this reasoning by explaining that, *"although the right to personal liberty is one of the fundamental rights, if a balance is to be struck between one person's right to personal liberty for some hours or even days and another person's right to protection against danger to his life, then in any civilised society, in my view, the latter right must prevail"*.<sup>347</sup>

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<sup>342</sup> *DPP v O'Brien* [1965] IR 142.

<sup>343</sup> *Freeman v DPP* [1996] 3 IR 565.

<sup>344</sup> *DPP v Shaw* [1982] IR 1.

<sup>345</sup> *DPP v Shaw* [1982] IR 1.

<sup>346</sup> *DPP v Shaw* [1982] IR 1.

<sup>347</sup> *DPP v Shaw* [1982] IR 1.

**In accordance with law**

The phrase ‘in accordance with law’ was first held to refer to a substantive protection in relation to the right to liberty guaranteed by Article 40.4.1. This required that there not just be a law which allowed for the deprivation of liberty, but that that law complied with constitutional norms such as the rule of law.<sup>348</sup> This same understanding was definitively accepted and applied to Article 40.5 by Barr J in *Ryan v O’Callaghan*.<sup>349</sup> This illustrates the view of the superior courts, as expressed by Hogan J, “*that the dwelling should enjoy the highest possible level of legal protection which might realistically be afforded in a modern society*”.<sup>350</sup> This protection is secured by examining the legality of an entry, as well as the policies and practices put in place by Garda management. In *DPP v O’Brien*<sup>351</sup> Kingsmill Moore J indicated that courts should consider: “*was the illegal action intentional or unintentional, and, if intentional, was it the result of an ad hoc decision or does it represent a settled or deliberate policy?*”<sup>352</sup> This consideration was also alluded to by McCarthy J when speaking of the trial judge’s discretion to exclude illegally obtained evidence, and how in the instant case such discretion could be exercised to exclude, “*having regard to the multiplicity of searches and the rank of the searching officers, that there was a policy to conduct searches without a warrant*”.<sup>353</sup>

This principle is now firmly established, and the judicial assessment is summarised by Clarke J as, “*whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct and state of mind not only of the individual who actually gathered the evidence concerned but also of any other senior official or officials within the investigating or enforcement authority concerned who are involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned*”.<sup>354</sup>

<sup>348</sup> *The People (AG) v O’Callaghan* [1966] IR 501.

<sup>349</sup> *Ryan v O’Callaghan* (Unreported, High Court, 22<sup>nd</sup> July 1987).

<sup>350</sup> *Wicklow County Council v Fortune* [2012] IEHC 406.

<sup>351</sup> *DPP v O’Brien* [1965] IR 142.

<sup>352</sup> *DPP v O’Brien* [1965] IR 142.

<sup>353</sup> *DPP v McMahon & Others* [1986] IR 393.

<sup>354</sup> *DPP v JC* [2015] IESC 31.





It must be noted that in circumstances where the right to the inviolability is engaged the right to privacy is also engaged.

## ECHR

Article 8 of the ECHR is set out in the following terms:

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such 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 well-being 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”.*

## Charter of Fundamental Rights of the European Union

Article 7 provides as follows:

*“Everyone has the right to respect for his or her private and family life, home and communication”.*

## Code of Ethics for An Garda Síochána

A commitment is given to the standard of *“Information and Privacy”* in the following terms:

*“I will recognise and respect every person’s right to privacy. I will interfere with this right only when it is lawful and necessary to achieve a legitimate objective.”*

## Other Relevant International Standards

The protection from arbitrary interference with the home is set out in a number of other international instruments. In this respect, members of Garda Personnel in the performance of their functions should be cognisant of the following:

## Universal Declaration of Human Rights

Article 12 provides that *“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.*



### **International Covenant on Civil and Political Rights**

Article 17 (1) and (2) provide as follows:

*“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*(2) Everyone has the right to the protection of the law against such interference or attacks.”*



## FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

### CONSTITUTION OF IRELAND

The Constitution makes provision for religious guarantees. In this regard Article 44 of the Constitution of Ireland provides:

1. *“The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.*
2. *1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.  
2° The State guarantees not to endow any religion.  
3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.  
4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.  
5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.  
6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.”*

In the case of *McGee v Attorney General*,<sup>355</sup> the Supreme Court stated that religious protection extended beyond the majority Christian religions,<sup>356</sup> particularly in light of the fifth constitutional amendment in 1972 removing express reference to the elevated position of Catholicism. When incorporating the offence of blasphemy into the Defamation Act 2009 (the 2009 Act) a definition of religion was not provided however, according to section 36 of the 2009 Act, religion does not include an organisation or cult, which has a principle object of making a profit, or that utilises coercive or manipulative psychological techniques on its followers or for the purposes of gaining new followers.

<sup>355</sup> *McGee v Attorney General* [1974] IR 284.

<sup>356</sup> *McGee v Attorney General* [1974] IR 284 at page 317.



The freedom of conscience referred to in Article 44 of the Constitution exclusively refers to matters of religious conscience. As Walsh J stated in *McGee*,<sup>357</sup> “*It is not correct to say ... that the Article is a constitutional guarantee of a right to live in accordance with one’s conscience subject to public order and morality. What the Article guarantees is the right not to be compelled or coerced into living in a way which is ... contrary to one’s conscience so far as the exercise, practice or profession of religion is concerned*”.<sup>358</sup>

Freedom of conscience, practice and profession of religion are all subject to limitations in the interest of public order and morality; limitations are always subject to a proportionality assessment. In this regard the State may regulate or prohibit activities which are motivated by religious teaching and observance, including making such practices punishable under the criminal law, for example bigamy.<sup>359</sup>

## ECHR

Article 9 ECHR provides:

- 1 *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2 *Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

The ECt.HR explained the importance of this freedom in *Kokkinakis v Greece*<sup>360</sup> where it stated that:

*“[F]reedom of thought, conscience and religion is one of the foundations of a ‘democratic society’... It is, in its religious dimensions, one of the most vital*

<sup>357</sup> *McGee v Attorney General* [1974] IR 284.

<sup>358</sup> *McGee v Attorney General* [1974] IR 284 at page 316.

<sup>359</sup> Section 57 of the Offences Against the Person Act, 1861.

<sup>360</sup> *Kokkinakis v Greece* (1993) 17 EHHR 397.



*elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostic, sceptics and the unconcerned. The pluralism in dissociable from a democratic society, which has been dearly won over the centuries, depends on it.*<sup>361</sup>

Philosophical beliefs are also protected under Article 9 ECHR.<sup>362</sup> In these respects, the ECt.HR has interpreted Article 9 ECHR in the context that philosophical belief and religion should “...attain a certain level of cogency, seriousness, cohesion and importance”.<sup>363</sup> Manifestations of religious belief have formed the basis of much of the litigation in this area. Individuals alone or in community with others may manifest their beliefs in the form of “worship, teaching, practice and observance.”<sup>364</sup> Where “religious beliefs are opposed or denied in a manner which inhibits those who hold such beliefs from exercising their freedom to hold or express them”, the State has a positive obligation “to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs.”<sup>365</sup> However, in this context it is important to note that manifestation “does not cover each act which is motivated or influenced by a religion or a belief.”<sup>366</sup> The central role of pluralism in a democratic society necessitates tolerance of religious practice, but believers must also “tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”<sup>367</sup>

The State has a wide margin of appreciation in assessing the necessity of an interference with Article 9. In this regard the legitimate aims listed are as follows:

- (i) public safety;
- (ii) the protection of public order;
- (iii) health or morals; and
- (iv) the protection of the rights and freedoms of others.

<sup>361</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397 at para 31.

<sup>362</sup> For example *veganism: H v United Kingdom* (1993) 16 EHRR 44.

<sup>363</sup> *Campbell and Cosens v United Kingdom* (1982) 4 EHRR 29 at para 36.

<sup>364</sup> Article 9(1) of the European Convention on Human Rights and Fundamental Freedoms.

<sup>365</sup> *Ollinger v Austria* (2008) 46 EHRR 859 at para 39.

<sup>366</sup> *Arrowsmith v United Kingdom* (1978) 3 EHRR 218 at para 71.

<sup>367</sup> *Otto-Preminger-Institut v Austria* (1994) ECHR 26 at para 4.



An interference will not be compatible with Article 9(2) unless it is:

1. Prescribed by law,
2. Pursues one or more of the legitimate aims set out above, and
3. Is ‘necessary in a democratic society’ to achieve the aims concerned meaning that there must be a pressing social need for the interference and it must be proportionate to the aims it hopes to achieve.

In *Larissis v Greece*<sup>368</sup> the ECt.HR upheld an army officer’s conviction for proselytising to subordinates. In that case Greek law outlawed proselytism, and defined it as any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs. Although there was no evidence of undue pressure or abuse of power, the two subordinates did feel constrained.<sup>369</sup> “*The hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel ... Thus, what would in the civilian world be seen as an innocuous exchange ... within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power.*”<sup>370</sup> This case is relevant in the context of the structure of An Garda Síochána.

In relation to the employment setting, the ECt.HR has tended to treat employment situations as containing a freedom of choice; the employee may leave the employment if they so decide.<sup>371</sup> In *Ahmad v United Kingdom*<sup>372</sup> the applicant “*remained free to resign if and when he found that his teaching obligations conflicted with his religious duties.*”<sup>373</sup> In *Kalac v Turkey*,<sup>374</sup> a judge-advocate in the air force was subjected to compulsory retirement as he was known to have fundamentalist tendencies in breach of the principles of

<sup>368</sup> *Larissis v Greece* (1999) 27 EHRR 329.

<sup>369</sup> *Larissis v Greece* (1999) 27 EHRR 329 at para 52.

<sup>370</sup> *Larissis v Greece* (1999) 27 EHRR 329 at para 51.

<sup>371</sup> *Stedman v United Kingdom* (1997) 23 EHRR 168.

<sup>372</sup> *Ahmad v United Kingdom* (1981) 4 EHRR 126.

<sup>373</sup> *Ahmad v United Kingdom* (1981) 4 EHRR 126 at para 135.

<sup>374</sup> *Kalac v Turkey* (1997) 27 EHRR 552.



secularism central to the Turkish armed forces and nation. There had not been an interference with the applicant's Article 9 freedoms as, *"In choosing to pursue a military career was accepting of his own accord a system of military discipline that by its nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians."*<sup>375</sup>

The Council of Europe's Commissioner for Human Rights has stated in this regard that:

*"[i]t is ... legitimate to regulate that those who represent the state, for instance police officers, do so in an appropriate way. In some instances, this may require complete neutrality as between different political and religious insignia; in other instances, a multi-ethnic and diverse society may want to cherish and reflect its diversity in the dress of its agents."*<sup>376</sup>

In *Sahin v Turkey*<sup>377</sup> the ECt.HR held that there was a legal basis for prohibiting students at an Istanbul University from wearing a headscarf during classes and exams. This limitation had been prescribed by law. It was clear from the point the student first entered the university that wearing a headscarf was restricted and she was liable to be refused from entering lectures and exams. The ECt.HR held that the interference could be considered necessary in a democratic society, particularly due to the impact of wearing the Islamic headscarf, often presented as a compulsory religious duty, might have on those who chose not to wear it.<sup>378</sup>

The ECt.HR considered the French ban on full-face veils in *SAS v France*.<sup>379</sup> The law, which came into effect in April 2011, banned the concealment of one's face in public. The legislation particularly affected about 2,000 Muslim women in France that wore this form of dress, either the niqab or burqa. The Court held that the ban under certain conditions

<sup>375</sup> *Kalac v Turkey* (1997) 27 EHRR 552 at para 28.

<sup>376</sup> Thomas Hammarberg, *'Human rights in Europe: no grounds for complacency: viewpoints,'* Council of Europe Commissioner for Human Rights, Council of Europe publishing (2011) at p41.

<sup>377</sup> *Sahin and others v Turkey* [2005] ECHR 61.

<sup>378</sup> *Sahin and others v Turkey* [2005] ECHR 61 at para 115.

<sup>379</sup> *SAS v France* (2014) [2014] ECHR 695.



came under the remit of ensuring ‘*respect for the minimum requirements of life in society*’, or ‘*living together*’ as referred to by the French government, can be linked to the legitimate aim of the ‘*protection of the rights and freedoms of others*’.<sup>380</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 10 states:

1. *“Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*
2. *The right to conscientious objection is recognised in accordance with the national laws governing the exercise of this right.*

The European Court of Justice (ECJ) has recently addressed the issue of whether it is discriminatory to prohibit the wearing of religious symbols in an employment context. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, is the EU legal provision which the Court was called upon to clarify. In its judgment the ECJ stated that such a ban may amount to indirect discrimination “*if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary.*”<sup>381</sup>

This judgment thus allows for a ban on religious symbols only where it is objectively justified by a legitimate aim.

<sup>380</sup> *SAS v France* (2014) [2014] ECHR 695 at para 116.

<sup>381</sup> Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017.



## CODE OF ETHICS FOR AN GARDA SÍOCHÁNA

Commitments are given to the standard of “*Respect and Equality*” in the following terms:

- *“I will treat everyone with fairness at all times, and not discriminate wrongfully.*
- *I will oppose and challenge any behaviour or language that demonstrates discrimination or disrespect, in particular with regard to vulnerable individuals or minority groups.”*

## AN GARDA SÍOCHÁNA DRESS CODE FOR GARDAÍ AND GARDA STAFF MEMBERS

Section 2.3 states:

*“The Garda Síochána is a pluralist organisation with no stated affiliations that affect the duty it is entrusted with. Great care must be taken to ensure that members of the public do not feel that the organisation, or any particular member of it, represents his or her religious affiliation over that of the organisation in their capacity as a member of the Garda Síochána.”*

## OTHER RELEVANT INTERNATIONAL STANDARDS

The duty to respect the freedom of thought, conscience and religion of individuals and groups is set out in a number of other international instruments. In this respect, Garda personnel in the performance of their functions should be cognisant of the following:

### UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 18 states:

*“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”*

### INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS 1966

Article 18 states:

1. *“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*



2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."*

## UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Article 14 states:

1. *"States Parties shall respect the right of the child to freedom of thought, conscience and religion.*
2. *States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."*

## EUROPEAN CODE OF POLICE ETHICS

Article 43 states:

*"The police, in carrying out their activities, shall always bear in mind everyone's fundamental rights, such as freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions."*

## FREEDOM OF EXPRESSION

### CONSTITUTION OF IRELAND

Article 40.6.1 states:

*“The State guarantees liberty for the exercise ... subject to public order and morality of ... the right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.”*

This provision has received little attention from the courts.<sup>382</sup> However, the Supreme Court has found the right of suspects to remain silent under questioning to be implicit in Article 40.6.1.<sup>383</sup> In *Heaney v Ireland*<sup>384</sup> O’Flaherty J held that *“the right to silence is but a corollary to the freedom of expression that is conferred by Article 40 of the Constitution.”*<sup>385</sup> This statement elevates the right to the status of a constitutional right, but it remains subject to the numerous qualifications contained in the Article. These permitted grounds for interference with freedom of expression have allowed for bans on the broadcast of religious advertising,<sup>386</sup> and adverts by advocates for subversive groups.<sup>387</sup>

Freedom of expression has a dual function, that is to say, the protection of human dignity and to ensure that political opinions may be freely voiced. Within a democratic society the protection of this freedom is essential. In *Attorney General v Paperlink Ltd*<sup>388</sup> the right to receive and impart facts and opinions on matters of political importance was distinguished from the general right to communicate, *“It seems to me that as the act of communication is the exercise of such a basic human faculty that a right to communicate must inhere in the*

<sup>382</sup> James Casey, *Constitutional Law in Ireland* (3<sup>rd</sup> edn, Roundhall Sweet & Maxwell 2000) p543.

<sup>383</sup> *Anthony Heaney and William McGuinness v Ireland and the Attorney General* [1997] 1 ILRM 117.

<sup>384</sup> *Anthony Heaney and William McGuinness v Ireland and the Attorney General* [1997] 1 ILRM 117.

<sup>385</sup> *Anthony Heaney and William McGuinness v Ireland and the Attorney General* [1997] 1 ILRM 117.

<sup>386</sup> *Murphy v Independent Radio and Television Commission* [1998] 2 ILRM 360.

<sup>387</sup> *State (Lynch) v Cooney* [1982] I.R. 337.

<sup>388</sup> *Attorney General v Paperlink Ltd.* [1984] ILRM 373.



*citizen by virtue of his human personality and must be guaranteed by the Constitution.*<sup>389</sup>

The Supreme Court located this distinct right among the unspecified personal rights contained in Article 40.3.1 of the Constitution. The right to freedom of expression in the Irish Constitution, also encompasses the right not to express one's self, and to remain silent when questioned by An Garda Síochána.<sup>390</sup> This will be dealt with in more detail in respect of the right to a fair trial.

## ECHR

Article 10 states:

1. *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

The right protected by this provision is very widely drawn. There is no definitive list, but the ECt.HR has held that the following media are covered: books, cartoons, the internet, radio, and works of art. It includes *“not only ideas that are favourably received or regarded as inoffensive... but also those that offend, shock or disturb the State or any sector of the population.”*<sup>391</sup> Therefore, opinions that might be regarded as extreme and offensive, and art that might be considered obscene, may in principle be expressed and displayed. Article 10(2) lists the permitted grounds for limiting freedom of expression.

<sup>389</sup> *Attorney General v Paperlink Ltd.* [1984] ILRM 373.

<sup>390</sup> *Anthony Heaney and William McGuinness v Ireland and the Attorney General* [1997] 1 ILRM 117.

<sup>391</sup> *Handyside v United Kingdom* [1976] ECHR 5 at para 49.



Any interference with freedom of expression must be necessary for one of the following legitimate aims:

- National security, territorial integrity or public safety,
- Prevention of disorder or crime,
- Protection of health or morals,
- Protection of the reputation or rights of others,
- Preventing the disclosure of information received in confidence, or
- Maintaining the authority and impartiality of the judiciary.

An interference will not be compatible with Article 10(2) unless it is:

1. Prescribed by law,
2. Pursues one or more of the legitimate aims, as set out above,
3. Is ‘necessary in a democratic society’ to achieve the legitimate aims concerned meaning, that there must be a pressing social need for the interference and it must be proportionate to the aims it hopes to achieve.

Any action taken by An Garda Síochána that restricts this right must be in accordance with law. Even where the ideas concerned are extreme, suppressing them requires strong justification. Nevertheless, members are reminded that they will be required to act where there is a breach of the criminal law.

### **Artistic expression**

Artistic expression is protected by Article 10. In *Vereinigung Bildender Künstler v Austria*<sup>392</sup> the Court held that a politician was portrayed in an outrageous manner, but the painting was satirical and was protected under Article 10. According to the ECt.HR, satire was a form of artistic expression and social comment which, by exaggerating and distorting

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<sup>392</sup> *Vereinigung Bildender Künstler v Austria* [2008] 47 EHRR 5.

reality, was intentionally provocative.<sup>393</sup> Consequently, any interference with an artist's right to such expression must be considered with particular care.

Artistic expression through paintings, films or photographs come within the protection of Article 10. In *Müller and Others v Switzerland*<sup>394</sup> the ECt.HR considered that an application which concerned the confiscation of paintings from a public exhibition, because they included sexually explicit scenes, gave rise to interference under Article 10(1). However, as the ECt.HR pointed out in this case, offensive and indecent material could be regulated by domestic law provided it caused more than mere shock to the public and was likely to grossly offend the sense of sexual propriety of persons of ordinary sensibility.<sup>395</sup> Where there is a breach of the criminal law An Garda Síochána is required to act.

### Hate Speech

In *Erbakan v Turkey*<sup>396</sup> the ECt.HR accepted that, “[I]t may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.”<sup>397</sup> Garda Personnel are reminded that the Incitement to Hatred Act 1989 limits any speech, publications and other forms of communications that are likely to stir up hatred.

### Protected Disclosures

In the *Guja v Moldova*<sup>398</sup> case the ECt.HR concluded that an interference with the right to freedom of expression, in particular his right to impart information, was not ‘*necessary in a democratic society*’ given the public interest in receiving it.<sup>399</sup> Although the ECt.HR recognised that civil servants owe a duty of loyalty and discretion to their employer, they still maintain their right to freedom of expression, and may under certain circumstances

<sup>393</sup> *Vereinigung Bildender Künstler v Austria* [2008] 47 EHRR 5 at para 33.

<sup>394</sup> *Müller and Others v Switzerland* (1988) 13 EHRR 212.

<sup>395</sup> *Müller and Others v Switzerland* (1988) 13 EHRR 212 at para 89.

<sup>396</sup> *Erbakan v Turkey*, App no 59405/00, 6 July 2006.

<sup>397</sup> *Erbakan v Turkey*, App no 59405/00, 6 July 2006 at para 56.

<sup>398</sup> *Guja v Moldova*, App no 14277/04, 12 February 2008.

<sup>399</sup> *Guja v Moldova*, App no 14277/04, 12 February 2008 at para 91.



reveal information where its “*publication corresponds to a strong public interest.*”<sup>400</sup> “*This may be called for where the employee concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large ... disclosure should be made in the first place to the person’s superior or other competent authority or body. It is only where this is clearly impracticable that the information can, as a last resort, be disclosed to the public.*”<sup>401</sup>

Garda Personnel are reminded of their duty to maintain confidentiality and privacy unless otherwise provided for by law. In particular, Garda Personnel are reminded that the Protected Disclosures Act 2014 makes provision for the making of protected disclosures which includes measures to safeguard the identity of whistleblowers.

### Protection of the media

The ECHR not only protects the content of information and ideas but also the means for transmission of that information. In general, Garda Personnel must respect the vital role of ‘public watchdog’ which the press fulfils. Journalists also have the right to protect the identity of their sources,<sup>402</sup> and the ECt.HR has not looked favourably upon the imposition of orders upon journalists for disclosure of sources.<sup>403</sup> The ECt.HR has also held that even where the source has committed a criminal offence, the journalist may not lose the protection as, “*the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution.*”<sup>404</sup>

<sup>400</sup> *Guja v Moldova*, App no 14277/04, 12 February 2008 at para 72.

<sup>401</sup> *Soaris v Portugal*, App no. 79972/12, 21 June 2016 at para 41.

<sup>402</sup> Steering committee for human rights, *Draft toolkit to inform public officials about the State’s obligations under the Convention*, Strasbourg: Council of Europe, (2014) at pp. 17-18.

<sup>403</sup> See: *Goodwin v United Kingdom* (1996) EHRR 123; *Voskuil v Netherlands* (2007) 50 EHRR 202(9); *Telegraaf Media Nederland Landelijke Media BV and Others v Netherlands*, App no 39315/06, 22 November 2012.

<sup>404</sup> *Nagla v Latvia*, App. No. 73469/10, 16 July 2013 at para 97; the ECt.HR has also stated in *Pentikainen v Finland*, App no 11882/10, 20 Oct 2015 at para 110 “*The concept of responsible journalism requires that*



**CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION**

Article 11 states:

1. *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”*
2. *The freedom and pluralism of the media shall be respected.”*

**Garda Code of Ethics for An Garda Síochána**

A Commitment is given to the standard of “Police Powers” in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.”*

**OTHER RELEVANT INTERNATIONAL STANDARDS**

The duty to respect freedom of expression is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

**UNIVERSAL DECLARATION OF HUMAN RIGHTS**

Article 19 states:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

**INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966**

Article 19 states:

1. *“Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

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*whenever a journalist ... has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she assumes the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, inter alia, the police.”*





3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
- a) For respect of the rights or reputations of others;*
  - b) For the protection of national security or of public order (ordre public), or of public health or morals.”*

## EUROPEAN CODE OF POLICE ETHICS

Article 43 states:

*“The police, in carrying out their activities, shall always bear in mind everyone’s fundamental rights, such as freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions.”*



## FREEDOM OF ASSEMBLY AND ASSOCIATION

### CONSTITUTION OF IRELAND

Article 40.6.1.ii and iii states:

*“The State guarantees liberty for the exercise of the following rights, subject to public order and morality:*

- ii. *The right of the citizens to assemble peaceably and without arms. Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.*
- iii. *The right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.”*

Article 40.6.1.ii concerns the right of citizens to assemble peacefully without arms. This Article is subject to public order concerns. There is a proviso that meetings which are intended to cause a breach of the peace or to be a danger or nuisance to the general public, must be controlled or prevented by law. Freedom of assembly does not override property rights and an assembly held on private property, without the owner’s permission, can constitute trespass. This Article does not protect non-peaceable assemblies. Further, there is a statutory prohibition on meetings in support of unlawful organisations,<sup>405</sup> and members may also disperse public meetings or processions taking place within one half mile of a sitting of either house of the Oireachtas.<sup>406</sup>

In *People (DPP) v Kehoe*<sup>407</sup> a large group assembled at St Stephen’s Green and marched together to Ballsbridge. As the protestors approached the British embassy, An Garda Síochána erected barricades to prevent the group from approaching the building. McCarthy J noted that a *“very large proportion of those taking part in the march were there for the purpose of exercising their constitutional right to express peacefully their social and*

<sup>405</sup> Offences Against the State Act 1939, s 27(1).

<sup>406</sup> Offences Against the State Act 1939, s 28(1).

<sup>407</sup> *People (DPP) v Kehoe* [1983] IR 136.



*political opinion,*<sup>408</sup> but others among the crowd were found to be carrying poles, pick-axe handles, stones, bricks and a slash-hook. “*These, as the court of trial found, were not the accoutrements of peaceful protesters.*”<sup>409</sup>

Article 40.6.1.iii provides for citizens to form associations and unions. The exercise of this right may be subject to control or regulation in the public interest. From a Garda perspective provision is made in the Garda Síochána Act 2005 in relation to representative associations.<sup>410</sup>

## ECHR

Article 11 states:

1. “*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*”
2. “*No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*”

This Article guarantees two rights to act collectively with others, namely freedom of assembly and association. The ECHR requires contracting states to tolerate a certain level of disruption in order to allow persons the right to assemble peacefully.<sup>411</sup>

## Assembly

The right to freedom of assembly allows for people to participate in peaceful demonstrations/protests. The protection of Article 11 ECHR extends to public or private

<sup>408</sup> *People (DPP) v Kehoe* [1983] IR 136, page 139.

<sup>409</sup> *People (DPP) v Kehoe* [1983] IR 136, page 139.

<sup>410</sup> Garda Síochána Act 2005, s 18.

<sup>411</sup> E. Dewhurst, N. Higgins, & L. Watkins, ‘*Principles of Irish Human Rights Law*’ (Clarus Press, Dublin: 2012) at p.354.



meetings,<sup>412</sup> marches/processions,<sup>413</sup> static assemblies/sit-ins.<sup>414</sup> No limitation has been imposed on purpose, but any assembly must be peaceful and in accordance with law. Incidental violence will not mean an assembly forfeits protection unless it had a disruptive purpose. In this regard, the ECt.HR has provided guidance: “[A]ny demonstration in a public place may cause a certain level of disruption to ordinary life, including disruption of traffic, and where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings.”<sup>415</sup>

Furthermore, the ECt.HR observed that while there is a duty on authorities “to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used.”<sup>416</sup> The State has a duty to protect those exercising their right of peaceful assembly from violence by counter-demonstrators.<sup>417</sup> In one case the police had formed a cordon to keep rival demonstrators apart but failed to prevent physical attack and damage to property. The ECt.HR found they had not done enough to enable a lawful demonstration to proceed peacefully.<sup>418</sup> The State has a broad discretion in exercising its duty to protect the safety of all those in the vicinity of a demonstration, however “it is important that preventive security measures such as, for example, the presence of first-aid services at the site of demonstrations, be taken in order to guarantee the smooth conduct of any event, meeting or other gathering”.<sup>419</sup>

Any interference with this right must be necessary for one of the following legitimate aims:

- National security or public safety,

<sup>412</sup> *Rassemblement Jurassien and Unité Jurassienne v Switzerland* (1979) 17 DLR 93.

<sup>413</sup> *Christians Against Racism and Fascism v UK*, App no 8440/78, 16 July 1980.

<sup>414</sup> *G v Germany* [1989] ECHR 28.

<sup>415</sup> *Ashughyan v Armenia*, 17 July 2008, App No 26986/03, at para 90.

<sup>416</sup> *Plattform “Ärste Für Das Leben” v Austria* (1991) 13 EHRR 204 at para 34.

<sup>417</sup> *United Macedonian Organisation Ilinden and Ivanov v Bulgaria* (2007) 44 EHRR 4 at para 115.

<sup>418</sup> *United Macedonian Organisation Ilinden and Ivanov v Bulgaria* (2007) 44 EHRR 4 at para 104.

<sup>419</sup> *Giulliani and Gaggio v Italy*, App No 23458/02, 24 March 2011 at para 251.



- Prevention of disorder or crime,
- Protection of health or morals, or
- Protection of the rights and freedoms of others.

Any interference will not be compatible with Article 11(2) unless it is:

1. Prescribed by law,
2. Pursuing one or more of the legitimate aims, as set out above,
3. Is necessary in a democratic society' to achieve the legitimate aims concerned meaning, that there must be a pressing social need for the interference and it must be proportionate to the aims it hopes to achieve.

Any action taken by Garda personnel must be in accordance with law. It is not a breach of Article 11 to require prior notification or authorisation but refusing permission, if requested, is an interference which requires justification by the strict standards of Article 11(2). There can be a breach even if the assemblies went ahead in defiance of the refusal.<sup>420</sup> *“The limits of tolerance expected towards an unlawful assembly depend on the specific circumstances, including the duration and the extent of public disturbance caused by it, and whether its participants had been given sufficient opportunity to manifest their views.”*<sup>421</sup> It should also be noted that *“even a lawfully authorised demonstration may be dispersed, for example when it turns into a riot.”*<sup>422</sup>

The authorities need to be cautious that restrictions are non-discriminatory. The fact that organisers are an unpopular group of individuals is not a sufficient reason to prevent their assembly as the State must embrace and encourage *‘pluralism, tolerance and broadmindedness’*.<sup>423</sup> The same principles apply to minority, ethnic or political groups, or

<sup>420</sup> *Baczowski v Poland* (2009) 48 EHRR 19 at para 68.

<sup>421</sup> *Frumkin v Russia*, App No 74568/12, 5 January 2016 at para 97.

<sup>422</sup> *Kudrevičius and Others v. Lithuania*, App no 37553/05, 15 October 2015 at para 154.

<sup>423</sup> *Baczowski v Poland* (2009) 48 EHRR 19 at para 63.



to other minorities like lesbian, gay, bisexual, transsexual and intersex (LGBTI) groups wishing to hold marches and demonstrations.

Article 11 of the ECHR provides that states are not only required to ensure that there is no interference with the right but states are obliged to ensure that people can exercise their rights effectively. The ECt.HR has held 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.”<sup>424</sup>*

This right entitles every member of the public to attend and organise marches as long as they are peaceful and as long as the right is balanced with others who wish to use the same space. When called upon to police a demonstration/protest, members should communicate with the organisers in order to facilitate the right and protect the public. In this regard, the authorities were found to have breached Article 11 in *Frumkin v Russia*<sup>425</sup> where, *“the authorities made insufficient effort to communicate with the assembly organisers to resolve the tension caused by the confusion about the venue layout. The failure to take simple and obvious steps at the first signs of the conflict allowed it to escalate, leading to the disruption of the previously peaceful assembly.”<sup>426</sup>*

Where an assembly is not peaceful or incites violence, criminal sanctions are permissible under Article 11 of the ECHR. If an assembly takes on disorderly characteristics in breach of the criminal law, members of An Garda Síochána will be required to act.

### **Adjoining demonstrators**

Members should ensure that they have some knowledge of protesters and their campaign to ensure that, when planning operational responses to demonstrations, there is some knowledge of peripheral groups that might join the demonstrators and incite violence or

<sup>424</sup> *Plattform “Ärste Für Das Leben” v Austria* (1991) 13 EHRR 204 at para 32.

<sup>425</sup> *Frumkin v Russia*, App No 74568/12, 5 January 2016.

<sup>426</sup> *Frumkin v Russia*, App No 74568/12, 5 January 2016 at para 128.

cause the assembly to transform from peaceful to non-peaceful. With this information, responses can be planned in such a way to ensure that the freedom of assembly of the majority of participants does not need to be interfered with, while public safety and order can be preserved.<sup>427</sup>

### Counter-demonstrations

The right to freely assemble imposes an obligation on An Garda Síochána to protect protestors from counter-demonstrations. In the *Plattform* case<sup>428</sup> a demonstration held by doctors against abortion was disrupted by a counter-demonstration despite a large police presence. The court held that:

*“A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.”<sup>429</sup>*

There is a positive obligation on the State to ensure that the right may be enjoyed.<sup>430</sup> In this respect, An Garda Síochána is obliged to protect peaceful protestors from counter-demonstrations that aim to interfere with the right to freedom of assembly of those peaceful protestors.

### Public thoroughfares

The right to assemble peacefully confers an implicit right to gather in public spaces subject to a number of limitations as outlined above. An assembly on a public highway may constitute a public nuisance, which is both a criminal offence and a civil tort that can lead to the imposition of an injunction. If a court imposed injunction exists preventing an

<sup>427</sup> *Christians Against Racism and Fascism v UK* (1980) 21 DR 138.

<sup>428</sup> *Plattform “Ärste Für Das Leben” v Austria* (1991) 13 EHRR 204.

<sup>429</sup> *Plattform “Ärste Für Das Leben” v Austria* (1991) 13 EHRR 204 at para. 31.

<sup>430</sup> *Plattform “Ärste Für Das Leben” v Austria* (1991) 13 EHRR 204 at para 32.



assembly on a public highway, then a member of An Garda Síochána may disperse the assembled group in accordance with the authority of the injunction. However, when an injunction is not in place, members should have regard to the importance of the right to freedom of assembly under the ECHR, if considering dispersing an assembled group.

### Association

Freedom of association is the right to associate with others to form bodies in which to pursue common objectives collectively. It specifically includes the right to form and join trade unions for the protection of members' interests. Article 11 expressly permits the restriction of these rights for "*members of the armed forces, of the police or of the administration of the State.*" Such limitations are to be construed restrictively.<sup>431</sup> Political activities of members of An Garda Síochána may also be restricted under this provision.<sup>432</sup> Such restrictions, although limiting the associative rights of members, contribute to the democratic legitimacy of the organs of the State: "*In the Court's view, the desire to ensure that the crucial role of the police in society is not compromised through the corrosion of the political neutrality of its officers is one that is compatible with democratic principles.*"<sup>433</sup> The public are also "*entitled to expect that in their dealings with the police they are confronted with politically neutral officers who are detached from the political fray.*"<sup>434</sup>

The ECt.HR has treated restrictions on industrial action as interferences with freedom of association that the State is required to justify under Article 11(2). In relation to religious groups, Article 11 read in conjunction with Article 9 creates an expectation that believers will be able to associate freely without state intervention.

<sup>431</sup> *Demir and Baykara v Turkey*, App no 34503/97, 12 November 2008 at para 146.

<sup>432</sup> Garda Síochána (Discipline) Regulations 2007 - Acts or Conduct constituting Breaches of Discipline:  
16. Prohibited spare-time activity, that is to say  
(a) identifying himself or herself actively or publicly with a political party,  
(b) behaving in relation to political matters in such a manner and in such circumstances as to give rise to reasonable apprehension among members of the public in relation to his or her impartiality in the discharge of his or her duties...

<sup>433</sup> *Rekvényi v Hungary*, App no 25390/94, 20 May 1999 at para 53.

<sup>434</sup> *Rekvényi v Hungary*, App no 25390/94, 20 May 1999 at para 41.





## CHARTER OF FUNDAMENTAL RIGHTS

Freedom of assembly and association is protected under Article 12 of the Charter of Fundamental Rights, which states:

- (i) *“Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*
- (ii) *Political parties at Union level contribute to expressing the political will of the citizens of the Union.”*

An essential element to the Treaty of the European Union is the free movement of goods. This must be balanced with the rights of others to enjoy freedom of assembly as guaranteed by the Charter of Fundamental Rights of the European Union. The response by An Garda Síochána must be proportionate to the threat to the rights of freedom movement of goods.

The European Court of Justice (ECJ) looked at this issue in *Schmidberger, Internationale Transporte and Planzüge v Republik Österreich*<sup>435</sup> where local authorities allowed a demonstration to go ahead on a motorway. There was a four-hour expected road closure. The complainant took action against Austria, complaining that the demonstration and its associated road closure restricted the free movement of goods within the European Union. The Court took into account the nature of the demonstration, the duration and extent of the road closure and the fact that the aim of the closure was not a restriction on the free movement of goods. It held that the restriction on the free movement of goods was essential to ensure that the demonstrators’ enjoyment of the freedom of assembly was not violated. Therefore, the *de facto* restriction on the free movement of goods was proportionate. The impact on the free movement of goods in and out of a location affected by an assembly should be considered when preparing and implementing the policing plan in order to ensure a proportionate response is delivered in regard to the competing interests and all rights involved.

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<sup>435</sup> [Case C-112/00](#). *Schmidberger, Internationale Transporte and Planzüge v Republik Österreich* [2003] ECR I-5659.



## Investigation

An Garda Síochána has statutory powers in relation to assemblies and demonstrations.<sup>436</sup> When required to act, Garda Personnel should always ensure that the response is proportionate to the threat faced given the information available at the time. Responses should be as well-informed as possible to ensure that the right to freedom of assembly is not unfairly restricted.<sup>437</sup> According to the Use of Force Policy, *“all planning meetings should be documented including details of who was present, start and finish times, issues discussed and decisions made and by whom.”*<sup>438</sup>

## Code of Ethics for An Garda Síochána

A commitment is given to the standard of *“Authority and Responsibility”* in the following terms:

*“I will act with self-control, even when provoked or in volatile situations.”*

A Commitment is given to the standard of *“Police Powers”* in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.”*

<sup>436</sup>For example, under section 8 of the Criminal Justice (Public Order) Act, 1994 members may direct an individual or group to leave an area where they believe that they pose a risk to the safety of persons or property. Under the Public Meeting Act, 1908, it is an offence to act in a disorderly manner for the purpose of preventing a public meeting from continuing as planned. Furthermore, section 14 (1) of the Criminal Justice (Public Order) Act, 1994 provides for the offence of Riot where:

- a) 12 or more persons who are present together at any place (whether that place is a public place or a private place or both) use or threaten to use unlawful violence for a common purpose, and
- b) the conduct of those persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or another person's safety.

<sup>437</sup> As part of the Garda Síochána's functions under section 7(1) of the Garda Síochána Act 2005, members are required to preserve and prevent a breach of the peace. Section 21(1) of the Criminal Justice (Public Order) Act 1994 makes provision for when policing an event which is likely to attract a large assembly of persons, a member of the Garda Síochána not below the rank of Superintendent has the power to set up a barrier around an area that they reasonably believe is going to cause public order concerns.

<sup>438</sup> *‘The Garda Síochána Overarching Use of Force Policy’* - HQ Directive 047/2012.



**OTHER RELEVANT INTERNATIONAL STANDARDS**

The duty to respect freedom of assembly and association is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

**Universal Declaration of Human Rights 1948**

Article 20 states:

1. *“Everyone has the right to freedom of peaceful assembly and association.*
2. *No one may be compelled to belong to an association.”*

**International Covenant on Civil and Political Rights 1966**

Article 21 states:

*“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”*

**UNITED NATIONS BASIC PRINCIPLES ON THE USE OF FORCE AND FIREARMS FOR LAW ENFORCEMENT OFFICIALS**

12. *“As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights...*
13. *In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”*

## RIGHT TO MARRY AND FOUND A FAMILY

### CONSTITUTION OF IRELAND

The right to marry and found a family is recognised in the Constitution. In this regard, Article 41.1.1 provides that, “*The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law*”. Moreover, Article 41.3.1 provides that, “*The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack*”.

Amendments to the Constitution have allowed for dissolution of marriage subject to certain circumstances. In this respect, Article 41.3.2 provides that:

*A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that -*

- (i) at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,*
- (ii) there is no reasonable prospect of a reconciliation between the spouses,*
- (iii) such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and*
- (iv) any further conditions prescribed by law are complied with.*

Article 41.4 provides that, a ‘*marriage may be contracted in accordance with law by two persons without distinction as to their sex*’.

### ECHR

Article 12 of the ECHR provides that, “*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*”. The right to marry and found a family under Article 12 is an absolute right as it has no limitations or qualifications as with Articles 8-11.<sup>439</sup> However, marriage for the purpose of Article 12 has been interpreted to apply to heterosexual marriage only. The

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<sup>439</sup> Jessica Simor and Ben Emmerson, *Human Rights Practice*, (Release 31, Sweet and Maxwell 2016) 12.001.

European Commission on Human Rights has held that the essence of the right to marry is the formation of a legally binding association between a man and a woman.<sup>440</sup> The ECt.HR had maintained this position in *Oliari v Italy*.<sup>441</sup> Nevertheless, as will be noted, the Constitutional position is broader and extends to same sex marriages.

The Commission has also held that the right to marry does not include the right to choose the geographical location of the marriage,<sup>442</sup> that is to say, that a person is not entitled to enter a jurisdiction for the sole purpose of marriage. It has been held that the right to marry is not a right which may override a country's national immigration laws.<sup>443</sup>

There is an overlap with the rights provided for in Article 12 and those provided for in Article 8 with regard the context of the family.

The right to marry may be regulated by national law as to procedure and substance but may not be subjected to conditions which impair the essence of that right.<sup>444</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 9 of the Charter provides that, “*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*”.

## Code of Ethics for An Garda Síochána

A Commitment is given to the standard of “*Police Powers*” in the following terms:

*“I will respect the human rights of all people, including the right to life, to security of the person and bodily integrity; to freedom of expression; to freedom of assembly and association; to privacy; and to be free from arbitrary arrest or detention.”*

<sup>440</sup> Hamer v UK, App 7114/75; (1982) 4 E.H.R.R 139.

<sup>441</sup> Oliari v Italy, App 18766/11 and 36030/11 21<sup>st</sup> July 2015 at para 185.

<sup>442</sup> A v United Kingdom (1983) 5 E.H.R.R CD296.

<sup>443</sup> Klip and Krüger v Netherlands (1997) 91 A-D.R.

<sup>444</sup> Rees v United Kingdom (1987) E.H.R.R 56.

**OTHER RELEVANT INTERNATIONAL STANDARDS**

The right to marry is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

**INTERNATIONAL CONVENANT ON CIVIL & POLITICAL RIGHTS**

Article 23 provides:

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*
- 3. No marriage shall be entered into without the free and full consent of the intending spouses.*
- 4. States Parties to present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

**UNIVERSAL DECLARATION OF HUMAN RIGHTS**

Article 16 states:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.*
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

## RIGHT TO AN EFFECTIVE REMEDY

### CONSTITUTION OF IRELAND

The right to an effective remedy is not specifically recognised in the Constitution. However, a right of access to the courts has been acknowledged as being one of the rights included in Article 40.3.<sup>445</sup> This right was also described by the Supreme Court as, “*the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong*”.<sup>446</sup> In this regard, Article 40.3.1 provides that:

*“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”.*

Moreover, Article 40.3.2 provides that:

*“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.”*

The Article implies that all citizens have the right of recourse to the State’s legal mechanisms to vindicate infringement of their rights. “*The right to a trial with reasonable expedition*”<sup>447</sup> gives further procedural protection to those being brought before the courts on criminal charges. The right to fair procedures in decision making offers procedural guarantees for those before decision making bodies other than the courts.<sup>448</sup> Article 40.4.2 provides for *habeas corpus* applications to be made before the High Court in order to review the legality of detention.

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<sup>445</sup> *Maccauley v Minister for Posts and Telegraphs* [1966] IR 345.

<sup>446</sup> *Tuohy v Courtney* [1994] 3 IR 1, at 45.

<sup>447</sup> *State (Healy) v Donoghue* [1976] IR 325.

<sup>448</sup> *Garvey v Ireland* [1981] IR 75.

## ECHR

Article 13 ECHR provides:

*“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”*

The effective remedy referred to in Article 13 must exist where an arguable claim can be made that one of the rights contained in the Convention has been breached. *“Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order.”*<sup>449</sup>

Article 35(1) ECHR provides:

*“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”*

Applicants are required to exhaust the available domestic remedies before applying to the ECt.HR. *“The only remedies ... to be exhausted are those that relate to the breach alleged and are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.”* Where effective remedies exist under national law, the opportunity is *“afforded to Contracting States, of preventing or putting right the violations alleged against them”*<sup>450</sup> without the need for the ECt.HR to adjudicate on the matter.

From a Garda perspective the ECt.HR has stressed the importance of effective domestic remedies relating to secret surveillance.<sup>451</sup> In this regard the legislation governing

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<sup>449</sup> *McFarlane v Ireland* [2011] 52 EHRR 20, at para 108.

<sup>450</sup> *McFarlane v Ireland* [2011] 52 EHRR 20, at para 107.

<sup>451</sup> *Szabó and Vissy v Hungary* (2016) 63 EHRR 3, at para 57; *Kennedy v the United Kingdom*, App no 26839/05, 18 May 2010, at para 119; *Roman Zakharov v Russia*, App no 47143/06, 4 December 2015, at para 231; *Liberty and Others v the United Kingdom*, App no 58243/00, 1 July 2008, at para 69.



surveillance<sup>452</sup> and the interception of communications<sup>453</sup> under Irish law makes provision for judicial oversight.

Further to the protection provided by Article 13 ECHR, additional procedural protection is provided for by Article 2 (right to life) and 3 (prohibition of torture) ECHR in terms of the positive obligation placed on the State to investigate and in certain instances to take preventative measures in this regard; *“That investigation should be conducted independently, promptly and with reasonable expedition. The victim should be able to participate effectively.”*<sup>454</sup> This obligation, in practice is largely fulfilled by An Garda Síochána, and although the obligations under Article 13 ECHR are less directly linked to the process of securing or vindicating the right to an effective remedy, the actions of Garda Personnel may contribute to the operation of remedies which are *“effective in practice as well as law.”*<sup>455</sup> The effectiveness of the remedies in place to address alleged Garda misconduct, and the operation of the system for Protected Disclosures require an understanding of the Convention and a culture driven by a desire to secure the enjoyment of the rights contained therein. The appropriate chapters on the right to life and the prohibition on torture contain further information on substantive and procedural components of these rights.

## CHARTER OF FUNDAMENTAL RIGHTS

Article 47 provides:

*“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”*

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<sup>452</sup> Criminal Justice (Surveillance) Act 2009.

<sup>453</sup> Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993.

<sup>454</sup> *O’Keefe v Ireland*, App no 35810/09, 28 January 2014, at para 172.

<sup>455</sup> *McFarlane v Ireland* [2011] 52 EHRR 20, at para 108.



## **OTHER RELEVANT INTERNATIONAL STANDARDS**

The right to an effective remedy is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### **UNIVERSAL DECLARATION OF HUMAN RIGHTS**

Article 8 states:

*“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.”*

### **INTERNATIONAL CONVENANT ON CIVIL & POLITICAL RIGHTS**

Article 2(3) provides:

*Each State Party to the present Covenant undertakes:*

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) 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, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.”*

### **UNITED NATIONS CONVENTION AGAINST TORTURE**

Article 14 provides:

*“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”*

## **BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT**

Principle 11 states:



## NEAMHSHRIANTA / UNRESTRICTED

*1. “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or be assisted by counsel as prescribed by law.”*



## EQUALITY/NON-DISCRIMINATION

### CONSTITUTION OF IRELAND

Article 40.1 states:

*“All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”*

This constitutional provision does not *“require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids arbitrary discrimination.”*<sup>456</sup> Although it is primarily the function of legislation to prohibit particular types of discrimination,<sup>457</sup> the courts have stated that the constitutional protection extends to *“classifications based on sex, race, language, religious or political opinions.”*<sup>458</sup> The nature of the protection has been summarised as, *“a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of the other individuals in the community.”*<sup>459</sup>

### ECHR

Article 14 ECHR states:

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*

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<sup>456</sup> *de Búrca and Anderson v Attorney General* [1976] IR 38 at 68.

<sup>457</sup> Employment Equality Act 1998; Equal Status Act 2000; Disability Act 2005; Equality Act 2014; Irish Human Rights and Equality Commission Act 2014.

<sup>458</sup> *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 at 347.

<sup>459</sup> *Quinn’s Supermarket v Attorney General* [1972] IR 1 at 13-14.



This provision guarantees non-discrimination as regards the other Convention rights. Article 14 ECHR forms an “*integral part of each of the Articles laying down rights and freedoms whatever their nature.*”<sup>460</sup>

In order for a claim to be made under Article 14 to be established an applicant must demonstrate that the claimed discrimination took place within ‘the ambit’ of a convention right. This does not mean that the substantive right need be breached in order to plead discrimination under Article 14 ECHR. The ECt.HR has not defined the term ‘ambit’ in this context, however guidance can be gleaned from the United Kingdom’s House of Lords which has said the following about the Etcher’s approach to this assessment:

*“the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article ... the ECt.HR makes in each case what in English law is often called a ‘value judgement.’”*<sup>461</sup>

Ensuring that the rights contained in the ECHR are enjoyed without discrimination does not require that all individuals are treated identically. ‘*Positive discrimination*’ in the form of differential treatment for the purpose of assisting a disadvantaged group is permitted under the ECHR.<sup>462</sup> Measures introduced by the State for this purpose are not discriminatory, because they seek to correct ‘factual inequalities’ that exist between groups in society.<sup>463</sup>

The ECt.HR has given some guidance in its judgments as to how it determines whether Article 14 ECHR has been breached in a given case. In the ECt.HR case *Rasmussen v Denmark*,<sup>464</sup> which involved a dispute about the paternity of a child, the questions which

<sup>460</sup> *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578.

<sup>461</sup> *Secretary of State for Work and Pensions v M* [2006] UKHL 11, para 14.

<sup>462</sup> *Wiggins v UK* App No 7456/76, 8 February 1987.

<sup>463</sup> Daniel Denman, ‘*Article 14: Prohibition of Discrimination*’ Jessica Simor (ed), *Human Rights Practice* (Sweet & Maxwell 2005), pg. 14.041.

<sup>464</sup> *Rasmussen v Denmark*, App no 8777/79, 28 November 1984.



the ECt.HR sought to answer in this case have nevertheless been repeatedly deployed in order to help establish if Article 14 ECHR has been breached:

- I. Do the facts of the case fall within the ambit of one or more of the other substantive provisions of the convention?<sup>465</sup>
- II. Was there a difference in treatment?<sup>466</sup>
- III. Were the applicant and his former wife placed in analogous situations?<sup>467</sup>
- IV. Did the difference of treatment have an objective and reasonable justification?<sup>468</sup>

The ECt.HR has further said that a difference of treatment is discriminatory if it:

- “has no objective and reasonable justification”,
- does not pursue a "legitimate aim" or,
- if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised".<sup>469</sup>

Further, the ECt.HR observed that Article 14 ECHR “*is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. ... However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14 .... [it] is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.*”<sup>470</sup>

<sup>465</sup> *Rasmussen v Denmark*, App no 8777/79, 28 November 1984, at para 29.

<sup>466</sup> *Rasmussen v Denmark*, App no 8777/79, 28 November 1984, at para 34.

<sup>467</sup> *Rasmussen v Denmark*, App no 8777/79, 28 November 1984, at para 35.

<sup>468</sup> *Rasmussen v Denmark*, App no 8777/79, 28 November 1984, at para 38.

<sup>469</sup> *Karlheinz Schmidt v Germany*, App no 13580/88, 18 July 1994, para 24.

<sup>470</sup> *Thlimmenos v Greece*, App no 34369/97, 6 April 2000, at para 44.

The matters as referred to above are particularly relevant to workplace related issues and therefore, compliance with Equality related legislation.<sup>471</sup>

Race is one of the prohibited grounds of discrimination listed in Article 14 ECHR, and racial discrimination has been specifically criticised by the ECt.HR as, “*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.*”<sup>472</sup>

In this respect, it is incumbent on An Garda Síochána to be vigilant for potential racist motives for an attack. The ECt.HR has criticised the State authorities where they “*had plausible evidence at their disposal suggesting possible racist motivation for the violence inflicted on the applicant and failed in their obligation to take all reasonable measures to investigate a possible racist motive for the violence which occurred.*”<sup>473</sup> By disregarding any racist motive the investigating authorities are effectively “*treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights.*”<sup>474</sup> This includes where the victim may not be a member of a particular group but has been targeted because of their association with members of that group.<sup>475</sup> Matters of this nature coming to the attention of An Garda Síochána should be fully investigated to establish the facts.<sup>476</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 20 provides:

*“Everyone is equal before the law.”*

<sup>471</sup> Employment Equality Act 1998; Equal Status Act 2000; Disability Act 2005; Equality Act 2014.

<sup>472</sup> *Timishev v Russia*, App no 55762/00 and 55974/00, 13 December 2005, at para 56.

<sup>473</sup> *Abdu v Bulgaria*, App no [26827/08](#), 11 March 2014, at para 50.

<sup>474</sup> *Škorjanec v Croatia*, Application no. 25536/14, 28 March 2017, at para 53.

<sup>475</sup> *Škorjanec v Croatia*, Application no. 25536/14, 28 March 2017, at para 56.

<sup>476</sup> See for example offences under Prohibition of Incitement to Hatred Act, 1989.



Article 21 provides:

*“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

*2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.”*

Article 22 provides:

*“The Union shall respect cultural, religious and linguistic diversity.”*

Article 23 provides:

*“Equality between women and men must be ensured in all areas, including employment, work and pay.  
The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”*

Article 25 provides:

*“The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”*

Article 26 provides:

*“The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”*

## **Code of Ethics for An Garda Síochána**

Commitments:

*“I will recognise and respect the dignity and equal human rights of all people.*

*I will treat people with courtesy and respect.*

*I will treat everyone with fairness at all times, and not discriminate wrongfully.  
I will oppose and challenge any behaviour or language that demonstrates discrimination or disrespect, in particular with regard to vulnerable individuals or minority groups.*

*I will be sensitive to the vulnerabilities of individuals, for example because of their age or a disability. I will be sensitive to the difficult circumstances individuals may find themselves in when in contact with the Garda Síochána.*





*I will show appropriate understanding and empathy to people I come into contact with.*

*I will make accommodation for an individual's particular needs where possible. Wherever possible, I will take steps to improve relationships with the public, in particular with individuals or groups that may have previously had a limited or challenging relationship with policing services.*

*Examples of wrongful reasons for discrimination:*

<i>Age,</i>	<i>Colour,</i>
<i>Disability,</i>	<i>Nationality,</i>
<i>Family status,</i>	<i>Ethnic or National origins,</i>
<i>Gender,</i>	<i>Sexual orientation,</i>
<i>Marital status,</i>	<i>Gender non-conformity,</i>
<i>Membership of the Traveller Community,</i>	<i>Political opinion,</i>
<i>Religion,</i>	<i>Residence status,</i>
<i>Race,</i>	<i>Social origin.”</i>

## **Other Relevant International Standards**

The right to equality/non-discrimination is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### **Universal Declaration of Human Rights**

Article 2 states:

*“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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”*

Article 7 states:

*“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

### **United Nations Convention on the Rights of the Child**

Article 2 states:

1. *“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”*

### **International Convention on the Elimination of All Forms of Racial Discrimination**

Article 2 states:

1. *States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation...*

Article 5 states:

*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, ...*

### **UN Convention on the Elimination of All Forms of Discrimination against Women**

Article 3 states:

*States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them*

*the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

### **UN Convention on the Rights of Persons with Disabilities**

Article 4 states:

*1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability...*

Article 5 states:

*1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*

*2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*

*3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.*

*4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.*

Article 14 states:

*1. States Parties shall ensure that persons with disabilities, on an equal basis with others:*

*a) Enjoy the right to liberty and security of person;*

*b) Are not deprived of their liberty unlawfully or arbitrarily, and*

*that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*

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



**International Covenant on Civil and Political Rights**

Article 26 provides:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

Article 27 provides:

*“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”*

**International Convention on Economic, Social and Cultural Rights**

Article 3 provides:

*“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”*

**UN Charter**

Article 1(3) provides:

*“To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...”*

**European Social Charter**

The Preamble states:

*“Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.”*

Part II - Article 15 provides for:

*“The right of persons with disabilities to independence, social integration and participation in the life of the community ...”*

Part II - Article 20 provides for:

*“The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex ...”*



Part II - Article 23 provides for:

*“The right of elderly persons to social protection.”*

Part II - Article 27 provides for:

*“The right of workers with family responsibilities to equal opportunities and equal treatment.”*

Part V - Article E states:

*“The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”*

### **Body of Principals for the Protection of all persons under any form of Detention or Imprisonment**

Principle 5 states:

*1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.*

*2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.*

### **European Code of Police Ethics**

Paragraph 25 states:

*“Recruitment procedures shall be based on objective and non-discriminatory grounds, following the necessary screening of candidates. In addition, the policy shall aim at recruiting men and women from various sections of society, including ethnic minority groups, with the overall objective of making police personnel reflect the society they serve.”*

Paragraph 40 states:

*“The police shall carry out their tasks in a fair manner, guided in particular, by the principles of impartiality and non-discrimination.”*



Paragraph 49 states:

*“Police investigations shall be objective and fair. They shall be sensitive and adaptable to the special needs of persons, such as children, juveniles, women, minorities, including ethnic minorities and vulnerable persons.”*

Paragraph 52 states:

*“Police shall provide the necessary support, assistance and information to victims of crime, without discrimination.”*



## CHILDREN'S RIGHTS

### CONSTITUTION OF IRELAND

Article 42A states:

1. *“The state recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*

2. *1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the state as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

*2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*

3. *Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*

4. *1° Provision shall be made by law that in the resolution of all proceedings –*  
*i. brought by the state, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*  
*ii. concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.*

*2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.”*

Many of the rights contained in the Constitution apply equally to children. All individuals below the age of 18 years are regarded as children.<sup>477</sup> The Constitution requires additional protection of the particular interests of children. *“The child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being.”*<sup>478</sup>

<sup>477</sup> Article 1, United Nations Convention on the Rights of the Child; Section 3(1), Children Act 2001; Section 2(1), Child Care Act 1991.

<sup>478</sup> *G v An Bord Uchtála*, [1980] IR 32 at 69.



Children who come in contact with the criminal justice system benefit from the same procedural rights and protections which adults enjoy. In order to ensure that they truly benefit from these protections they must be treated in a manner befitting their age and level of understanding, including the use of age appropriate language by members of An Garda Síochána.<sup>479</sup> While members of An Garda Síochána have a duty to investigate breaches of the criminal law, they also have a statutory duty to approach child offenders in manner sensitive to their inherent vulnerability as children.<sup>480</sup> Interviews with child suspects must be conducted in a manner which takes account of their age,<sup>481</sup> and where possible children should be kept apart from adult suspects.<sup>482</sup> The State should seek to avoid formal criminal prosecution of child offenders.<sup>483</sup> Members of An Garda Síochána may be required to participate in and facilitate non-punitive<sup>484</sup> and restorative justice<sup>485</sup> programmes for child offenders. These programmes give effect to the principle that the operation of the juvenile justice system should reflect the *“desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”*<sup>486</sup>

The court process can be intimidating and bewildering for children who are required to participate in a trial. This issue affects victims and offenders alike. The Children Court is designed to operate in a child friendly manner. Members of An Garda Síochána must be aware of and abide by the altered arrangements in place when attending the Children Court. Members must also be aware that the fair trial protections are engaged from the time of

<sup>479</sup> Section 57, Children Act, 2001.

<sup>480</sup> Section 55, Children Act, 2001: *“In any investigation relating to the commission or possible commission of an offence by children, members of the Garda Síochána shall act with due respect for the personal rights of the children and their dignity as human persons, for their vulnerability owing to their age and level of maturity and for the special needs of any of them who may be under a physical or mental disability, while complying with the obligation to prevent escapes from custody and continuing to act with diligence and determination in the investigation of crime and the protection and vindication of the personal rights of other persons.”*

<sup>481</sup> Section 61, Children Act, 2001.

<sup>482</sup> Section 52, Children Act, 2001.

<sup>483</sup> Section 96, Children Act, 2001.

<sup>484</sup> Section 18, Children Act, 2001.

<sup>485</sup> Section 26 and 29, Children Act, 2001.

<sup>486</sup> Article 40(1), United Nations Convention on the Rights of the Child.





arrest.<sup>487</sup> In this context child suspects are entitled to the additional presence of a Responsible Adult during interview at a Garda station.<sup>488</sup> Child victims of crime also benefit from specialist interviewing in an appropriate environment, and evidential arrangements<sup>489</sup> which take into account their particular vulnerability.

## ECHR

The ECHR does not contain any child specific provisions. However, all rights which are not subject to age restrictions apply equally to children. Article 8 (private and family life) is often invoked when applications are made by or on behalf of children, but the right of children to assemble in protest – subject to their parent’s consent - has also been explicitly recognised by the ECt.HR.<sup>490</sup>

Despite the lack of child specific provisions in the ECHR, the ECt.HR has, through incorporating the principles found in other international conventions and instruments in their judgments, embraced certain standards for the treatment of juveniles who are criminal suspects or defendants. *“The right of a juvenile defendant to effective participation in his criminal trial requires that the authorities deal with him with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to reduce as far as possible the child’s feelings of intimidation and inhibition and ensure that he has a broad understanding of the nature of the investigation, of what is at stake for him, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent.”*<sup>491</sup>

<sup>487</sup> *People (DPP) v Gormley*, Supreme Court, 6 March 2014, Clarke J., para 8.8.

<sup>488</sup> Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Stations) (Amendment) Regulations 2006; Section 61, Children Act, 2001; Regulation 13, Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Stations) Regulations 1987.

<sup>489</sup> Section 16(1)(b), Criminal Evidence Act, 1992.

<sup>490</sup> *Christian Democratic People’s Party v Moldova*, App no 28793/02, 14 February 2006, at para 74.

<sup>491</sup> *Blokhin v Russia*, App no 47152/06, 23 March 2016, at para 195.



The ECt.HR has criticised States for failing to house children in institutional settings which are appropriate to their needs.<sup>492</sup> Although such rulings seek to encourage the development of facilities which address the needs of children, the ECt.HR does not require that the police refrain from utilising traditional methods of restraint on juvenile offenders, when necessary. “[T]he Court does not consider that the fact that he was a minor is sufficient to bring the handcuffing of the applicant within the scope of Article 3: he was ... a danger to himself and to others in light of his history of criminal activity, of self-harm and of violence to others.”<sup>493</sup> Members of An Garda Síochána are required to intervene in all instances where a breach of the criminal law has occurred and must ensure that their actions are necessary, proportionate and in accordance with law.

## CHARTER OF FUNDAMENTAL RIGHTS

Article 21(1) states:

*“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”*

Article 24 states:

*1. “Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*

*2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*

*3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”*

Article 32 states:

*“The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.*

<sup>492</sup> *Bouamar v Belgium*, App no 9106/80, 29 February 1988; *DG v Ireland*, App no 39474/98, 16 May 2002.

<sup>493</sup> *DG v Ireland*, App no 39474/98, 16 May 2002, at para 99.



*Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.”*

## **Code of Ethics for An Garda Síochána**

*Respect and Equality – Commitments:*

*“I will be sensitive to the vulnerabilities of individuals, for example because of their age or a disability. I will be sensitive to the difficult circumstances individuals may find themselves in when in contact with the Garda Síochána.”*

## **OTHER RELEVANT INTERNATIONAL STANDARDS**

The rights of children are set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### **International Covenant on Civil and Political Rights**

Article 24(1) states:

*“Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”*

### **United Nations Convention on the Rights of the Child**

Article 1 states:

*“For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.”*

Article 2 states:

*1. “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

*2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the*



*status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”*

Article 3(1) states:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*

Article 12 states:

*1. “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

Article 19(1) states:

*“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”*

Article 32 states:

*“States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”*

Article 34 states:

*“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse ...”*

Article 35 states:

*“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”*

Article 40(1) states:

*“States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent*

*with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."*

### **European Social Charter (Revised)**

Article 7 states:

*"Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed."*

Article 17 states:

*"Children and young persons have the right to appropriate social, legal and economic protection."*

### **UN Standard Minimum Rules for the Administration of Juvenile Justice**

Rule 5(1) states:

*"The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."*

Rule 7(1) states:

*"Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings."*

Rule 8 states:

1. *"The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling."*
2. *"In principle, no information that may lead to the identification of a juvenile offender shall be published."*

### **European Code of Police Ethics**

Article 49 states:

*"Police investigations shall be objective and fair. They shall be sensitive and adaptable to the special needs of persons, such as children, juveniles, women, minorities, including ethnic minorities and vulnerable persons."*



**UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")**

Rule 5 provides:

*“The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”*

Rule 7(1) states:

*“Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.”*

Rule 8 provides:

- 1. “The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.*
- 2. In principle, no information that may lead to the identification of a juvenile offender shall be published.”*

Rule 21 provides:

- 1. “Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.*
- 2. Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.”*

**UN Rules for the Protection Juveniles Deprived of their Liberty**

Rule 1 states:

*“The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.”*

Rule 2 states:

*“Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.”*



## PROPERTY

### CONSTITUTION OF IRELAND

The right to private property is protected under Article 40 and Article 43 of the Constitution.

Article 40.3.2 states:

*“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”*

Article 43.1 states:

*“1. The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*

*2. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.”*

Article 43.2 states:

*“1. The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*

*2. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.”*

These provisions operate to protect differing aspects of the right. Article 43 *“prohibits the abolition of private property as an institution, but at the same time permits, in particular circumstances, the regulation of the exercise of that right and of the general right to transfer, bequeath and inherit property ... In addition he has the further protection under Article 40 as to the exercise by him of his own property rights in particular items of property.”*<sup>494</sup> Neither provisions guarantee an absolute protection from interference with property, but protects against ‘unjust attack’. This term refers to an attack *“which*

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<sup>494</sup> Blake v AG [1982] IR 117.



*endangers or which is injurious to those rights, and, which is not, and cannot be justified, under other provisions of the Constitution.*”<sup>495</sup>

An Garda Síochána’s duties and functions require that Garda Personnel interact with private and State property on an ongoing basis. Respect for private and public property is essential and should always be a key consideration in planning and carrying out operational activities. The seizure and retention of property<sup>496</sup> may be required in the context of evidence gathering or as the proceeds of crime.<sup>497</sup> In addition to the right to retain property for a lawful purpose An Garda Síochána also has “*a duty to take possession of and retain any evidence which may affect the guilt or innocence of the accused person.*”<sup>498</sup> In terms of the destruction of evidence the Supreme Court stated that, “*it would be best practice ... to give notice, to inform an accused, or a potential accused ... of the intention to destroy a vehicle, or evidence, which may reasonably be materially relevant to a trial, giving such person time to have the vehicle or evidence examined, or take any other relevant steps, if they so wish.*”<sup>499</sup>

Individuals may apply for and have their property returned to them,<sup>500</sup> but “*property which is lawfully in the hands of the Gardaí may be retained for a lawful purpose and that such a purpose includes the sending of the property out of the jurisdiction in connection with a criminal investigation or trial in that jurisdiction.*”<sup>501</sup>

<sup>495</sup> O’Callaghan v Commissioner of Public Works [1985] I.L.R.M. 364.

<sup>496</sup> For example, under Section 9 of the Criminal Law Act, 1976; Section 7 of the Criminal Justice Act 2006; Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 as amended. See also *Jennings v Quinn* [1968] IR 305.

<sup>497</sup> Section 15, Proceeds of Crime Act, 1996.

<sup>498</sup> *Ludlow v DPP* [2008] IESC 54, Unreported, 31 July 2008; *Savage v DPP* [2008] IESC 39; *Toohey v DPP* [2007] IEHC 64; *McFarlane v DPP* [2007] 1 IR 134; *Scully v DPP* [2005] 1 IR 242; *Bowes and McGrath v DPP* [2003] 2 IR 25; *Dunne v DPP* [2002] 2 IR 305; *Braddish v DPP* [2001] 3 IR 127; *Murphy v DPP* [1989] ILRM 71.

<sup>499</sup> *Ludlow v DPP* [2008] IESC 54, Unreported, 31 July 2008; See also section 35 of the Criminal Procedure Act 2010.

<sup>500</sup> Police (Property) Act 1897.

<sup>501</sup> *Brady v Haughton*, 29 July 2005, Supreme Court, Unreported.



## ECHR

Article 1 of Protocol 1 states:

*“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*

This Protocol to the ECHR has relevance for An Garda Síochána as Garda Personnel may be required to protect, seize, store or return possessions in the course of their duties. Respect for people’s proprietary rights is a fundamental duty of all Garda Personnel. The ECt.HR stated as follows:

*“The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.”<sup>502</sup>*

*“An interference with the right to the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.”<sup>503</sup> There must also be “a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.”<sup>504</sup> The State is granted a wide margin of appreciation in assessing the requisite balance to be struck.<sup>505</sup>*

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<sup>502</sup> *Holy Monasteries v Greece*, App no 13092/87; 13984/88, 9 December 1994, at para 56.

<sup>503</sup> *Platakou v Greece*, App no 38460/97, 11 January 2011, at para 55.

<sup>504</sup> *Holy Monasteries v Greece*, App no 13092/87; 13984/88, 9 December 1994, at para 70.

<sup>505</sup> *Former King of Greece and Others v Greece*, App no 25701/94, 23 November 2000, at para 87.



## CHARTER OF FUNDAMENTAL RIGHTS

Article 17 states:

*“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.  
2. Intellectual property shall be protected.”*

## CODE OF ETHICS FOR AN GARDA SÍOCHÁNA

A commitment is given to the standard of “*Authority and Responsibility*” in the following terms:

*“I will endeavour to ensure the proper, effective and efficient use of public money and resources.”*

## OTHER RELEVANT INTERNATIONAL STANDARDS

The right to property is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

## UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 17 states:

*“1. Everyone has the right to own property alone as well as in association with others.  
2. No one shall be arbitrarily deprived of his property.”*

## EUROPEAN CODE OF POLICE ETHICS

Article 43 states:

*“The police, in carrying out their activities, shall always bear in mind everyone’s fundamental rights, such as freedom of thought, conscience, religion, expression, peaceful assembly, movement and the peaceful enjoyment of possessions.”*



## RIGHT TO EDUCATION

### CONSTITUTION OF IRELAND

Article 42 designates the family as the primary educator of children. International instruments which address the right to education generally place the onus on the State to provide education. The Irish constitutional position requires the protection of the family's role as the primary educators of the child, and the provision of free primary education to all children.<sup>506</sup> The constitutional concept of education is not limited to a scholastic education. In *Ryan v Attorney General* the Supreme Court opined that “*education essentially is the teaching of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.*”<sup>507</sup>

The State's obligation was clarified by the Supreme Court in *Crowley v Ireland*<sup>508</sup> as a requirement to ‘provide for’ education, not necessarily provide the education directly in State schools. The courts have also established that the right does not extend to funding every type of educational choice which parents may wish to have available for their children.<sup>509</sup>

An Garda Síochána no longer has a responsibility as regards school attendance.<sup>510</sup> This role is performed by the National Educational Welfare Board. Under the *Children First Guidance*<sup>511</sup> the welfare of the child is among the priorities for any State agency which interacts with children/families. Members of An Garda Síochána who become aware of child welfare concerns, including where connected with persistent failure to attend school, shall consider their reporting obligations under the Children First Guidance.

Article 42 states:

<sup>506</sup> *Sinnott v Minister for Education* [2001] 2 IR 545 at para 654.

<sup>507</sup> *Ryan v Attorney General* [1965] IR 295 at p310.

<sup>508</sup> *Crowley v Ireland* [1980] IR 102.

<sup>509</sup> *O’Shiel v Minister for Education* [1999] 2 IR 321.

<sup>510</sup> School Attendance Act, 1926 (repealed by Section 8, Education (Welfare) Act, 2000).

<sup>511</sup> *Children First National Guidance for the Protection and Welfare of Children* 2017



1. *“The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.*
2. *Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.*
3. *1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.*  
*2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.*
4. *The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.*
5. *In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.”*

## ECHR

Article 2 of Protocol 1 states:

*“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*

No person shall be denied the right to education, which is in practice a right of access to such education as the State has undertaken to provide, and as regulated by the State. Regulations may, for example, make education compulsory up to a certain age, permit or ban home schooling, and allow schools to exclude unruly pupils. This Article does not require any particular system of education, nor does it confer the right to access a particular school. It is neutral as between public and private education and has been interpreted to



guarantee freedom to establish private schools.<sup>512</sup> Education that is provided, whether public or private, must respect parents' religious and philosophical convictions. Provided that the curriculum and tuition are objective and pluralistic, the fact that it may conflict with some parents' convictions is not a breach.<sup>513</sup>

In *Campbell & Cosans v UK* the ECt.HR pointed out that “*the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.*”<sup>514</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 14 states:

1. *“Everyone has the right to education and have access to vocational and continuing training.*
2. *This right includes the possibility to receive free compulsory education.*
3. *The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.”*

## OTHER RELEVANT INTERNATIONAL STANDARDS

The right to education is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### Universal Declaration of Human Rights

Article 26 states:

1. *“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be*

<sup>512</sup> *Kjeldsen Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711.

<sup>513</sup> Section adapted from Committee of experts on the reform of the Court, Steering Committee for Human Rights, *Draft toolkit to inform public officials about the State's obligations under the Convention*, Strasbourg: Council of Europe, (2014) at p23.

<sup>514</sup> *Campbell and Cosans v UK*, Application no 7511/76 and 7743/76, 25 February 1982, at para 33.



*compulsory. Technical and professional education shall be made generally available and higher education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*

2. *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.*
3. *Parents have a prior right to choose the kind of education that shall be given to their children.”*

### **International Covenant on Civil and Political Rights**

Article 18.4 states:

*“The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”*

### **International Covenant on Economic, Social and Cultural Rights**

Article 13 states:

*1.” The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

*2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*

- (a) Primary education shall be compulsory and available free to all;*
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*



*(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*

*(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

*3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.*

*4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”*

### **The United Nations Convention on the Rights of the Child**

Article 28 states:

*1. “States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*

*(a) Make primary education compulsory and available free to all;*

*(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;*

*(c) Make higher education accessible to all on the basis of capacity by every appropriate means;*

*(d) Make educational and vocational information and guidance available and accessible to all children;*

*(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.*

*2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention.*





*3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.*

Article 3(1) states:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*

Article 12 states:

*1. “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*



## RIGHT TO FREE ELECTIONS

### CONSTITUTION OF IRELAND

Article 6.1 states:

*“All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.”*

Aside from the overarching right to elect the Government, the Constitution details the system of parliamentary representation that will be employed in the State and the process for the election of a President in Article 12.2:

*“1° The President shall be elected by direct vote of the people.  
2° Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at an election for President.  
3° The voting shall be by secret ballot and on the system of proportional representation by means of the single transferable vote.”*

Article 16.1 states:

*“1° Every citizen without distinction of sex who has reached the age of twenty-one years, and who is not placed under disability or incapacity by this Constitution or by law, shall be eligible for membership of Dáil Éireann.*

*2° (i) All citizens, and*

*(ii) such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáil Éireann, shall have the right to vote at an election for members of Dáil Éireann.”*

Article 28 provides for the election of Local Authorities and gives a constitutional mandate for democratic local Government. With regard to amendments to the Constitution, Articles 46 and 47 set out the conditions for such changes by way of referendum. Every citizen with the right to vote in Dáil elections has the right to vote in such referenda. While members



of An Garda Síochána retain an equal right to vote with other citizens, they however shall not be a member of a political party or secret society.<sup>515</sup>

## ECHR

Article 3 of Protocol 1 states:

*“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”*

The ECt.HR has repeatedly stated that democracy is *“the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”*<sup>516</sup> This Article does not require any particular electoral system and States have a wide discretion in how they regulate elections, including the conditions to be fulfilled by would-be candidates for office. However, the Article *“presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of democratic society.”*<sup>517</sup>

Members of An Garda Síochána are responsible for ensuring that political meetings, demonstrations and elections occur peacefully. These responsibilities arise under the right to Freedom of Assembly and are explored in detail in the relevant section of this guide. Holding such forms of assembly is fundamental to democracy and, therefore, essential for the exercise of the right to free elections. Members of An Garda Síochána are responsible for ensuring the effective running of elections, in conjunction with election staff.

## CHARTER OF FUNDAMENTAL RIGHTS

The Charter provides for free elections and suffrage at both a national and European level.

Article 39 states:

*1. “Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.”*

<sup>515</sup> Section 16(1), Garda Síochána Act 2005.

<sup>516</sup> *United Communist Party of Turkey and Others v Turkey*, App no 133/1996/752/951, 30 January 1998, at para 45.

<sup>517</sup> *The Greek Case* (1969), 12 YB 1 at 179.



*2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.”*

Article 40 states:

*“Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.”*

## **OTHER RELEVANT INTERNATIONAL STANDARDS**

The right to free elections is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### **Universal Declaration of Human Rights**

- 1. “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
- 2. Everyone has the right of equal access to public service in his country.*
- 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”*

### **International Covenant on Civil and Political Rights**

Article 25 states:

*“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
- (c) To have access, on general terms of equality, to public service in his country.”*



## FREEDOM OF MOVEMENT

### CONSTITUTION OF IRELAND

A restriction on the right to freedom of movement was identified in *Attorney General v X*.<sup>518</sup> In light of the decision in this case the thirteenth amendment to the Constitution was accepted in a referendum by the electorate. In this regard Article 40.3.3 states:

*“[t]his subsection shall not limit freedom to travel between the State and another state.”*

This constitutional amendment arose from the constitutional prohibition of abortion in the State and an injunction preventing a person from travelling to another jurisdiction for purposes that constituted an offence in this State. McCarthy J stated that *“injunctions should not be granted to restrain activity in another jurisdiction since the right to travel should not be curtailed because of a particular intention.”*<sup>519</sup>

The power to stop an individual necessitates a reasonable restriction on their freedom of movement. *“The power to stop is an initial step on the path to arrest.”*<sup>520</sup> However, the restriction on freedom of movement may be extremely brief where the member does not detect any criminal activity. *“The power to stop must be exercised (like all powers) not in a capricious manner but in a constant fashion and with due civility and courtesy.”*<sup>521</sup>

### ECHR

Article 2 of Protocol 4 states:

1. *“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”*
2. *“Everyone shall be free to leave any country, including his own.”*
3. *“No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public,”*

<sup>518</sup> *Attorney General v X* [1992] 1 IR 1.

<sup>519</sup> *Attorney General v X* [1992] 1 IR 1 at para 5.

<sup>520</sup> *DPP (Stratford) v Fagan* [1994] IR 265, at p 281 (Denham J).

<sup>521</sup> *DPP (Stratford) v Fagan* [1994] IR 265, at p 273 (O’Flaherty J).



*for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

*4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”*

This provision contains two rights:

1. Everyone lawfully within a State’s territory may move freely within that territory and choose their residence there;
2. Everyone may leave any country including their own.

The ECt.HR has stated that Article 2 of Protocol 4 guarantees to any person a right to freedom of movement. Any measure taken restricting that right must be lawful, pursue one of the legitimate aims referred to in the said provision and strike a fair balance between the individual’s rights and the public interest.<sup>522</sup> In this regard any restriction on the Freedom of Movement must be necessary for one of the following legitimate aims:

- i) National security, public safety and public order;
- ii) Prevention of crime;
- iii) Protection of health and morals, and
- iv) Protection of the rights and freedoms of others.

An interference will not be compatible with the Freedom of Movement unless it is:

1. Prescribed by law,
2. Pursues one or more of the legitimate aims set out above, and
3. Is ‘necessary in a democratic society’ to achieve the aims concerned meaning that there must be a pressing social need for the interference and it must be proportionate to the aims it hopes to achieve.

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<sup>522</sup> *Gochev v Bulgaria*, App no 34383/03, 26 November 2009, at para 44.

Any restriction must be proportionate to the legitimate aim pursued. The difference between a restriction on personal liberty and that of freedom of movement is “*merely one of degree or intensity, and not one of nature or substance.*”<sup>523</sup> Actions which may engage the right include curfews, confinement to or exclusion from a particular town or area of the country. In the case of *Olivieira v Netherlands* the ECt.HR held that a 14 day prohibition order imposed on the applicant to refrain from entering an area of Amsterdam did not breach Article 2 of Protocol 4. He had previously been found to have “*overtly used hard drugs or had had hard drugs in his possession in streets ... and he had been told that he would either have to desist from such acts, which disturbed public order, or stay away from the area.*”<sup>524</sup> The authorities’ response was not disproportionate “*as the applicant had already been issued with several eight-hour prohibition orders but had nevertheless returned each time to the area to use hard drugs in public.*”<sup>525</sup>

In several decided cases restrictions on free movement, initially justifiable under the ECHR, became unjustified when continued for several years.<sup>526</sup> Restrictions on free movement are usually imposed by courts but administered by the police. In this context, An Garda Síochána need to be vigilant in ensuring that the justification for such restrictions is and remains valid.<sup>527</sup>

The EEA is an area of free trade and free movement of people comprising the member states of the European Union, in addition to Norway, Iceland and Liechtenstein. The State may legitimately place restrictions on the freedom of movement of non-EEA nationals. Persons falling into this category are required to obtain a visa for entry into the State and their freedom of movement is subject to further restriction when seeking to travel to other EU states. EU-wide freedom of movement and the right to work in member states is not

<sup>523</sup> *Guzzardi v Italy*, App no 7367/76, 6 November 1980.

<sup>524</sup> *Olivieira v the Netherlands*, App no 33129/96, 4 June 2001, at para 10.

<sup>525</sup> *Olivieira v the Netherlands*, App no 33129/96, 4 June 2001, at para 65.

<sup>526</sup> *Labita v Italy* (2008) 46 EHRR 50.

<sup>527</sup> Section adapted from Committee of experts on the reform of the Court, Steering Committee for Human Rights, *Draft toolkit to inform public officials about the State’s obligations under the Convention*, Strasbourg: Council of Europe, (2014) at pp 24-25.

afforded to non-EEA nationals. However, similar limitations may not be placed on those from EEA member states except in limited circumstances.<sup>528</sup>

## CHARTER OF FUNDAMENTAL RIGHTS

Article 45 states:

1. *“Every citizen of the Union has the right to move and reside freely within the territory of the Member States.*
2. *Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.”*

## OTHER RELEVANT INTERNATIONAL STANDARDS

The right to freedom of movement is set out in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following:

### Universal Declaration of Human Rights

Article 13 states:

1. *“Everyone has the right to freedom of movement and residence within the borders of each state.*
2. *Everyone has the right to leave any country, including his own, and to return to his country.”*

### International Covenant on Civil and Political Rights

Article 12 states:

1. *“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
4. *No one shall be arbitrarily deprived of the right to enter his own country.”*

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<sup>528</sup> S 19(1) and S 20(1)(a)(iv), European Communities (Free Movement of Persons) (No.2) Regulations 2006, SI No 656/2006 provides that limitations may be placed on EEA-nationals for, *inter alia*, public policy, public security and public health concerns.

**EXPULSION PROTECTIONS/ASYLUM****PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS****CONSTITUTION OF IRELAND 1937**

The Constitution does not refer to the right to asylum or circumstances under which individuals may be expelled from the State. However, general guidance is found in other provisions of the Constitution.

Article 40.4.1 provides that:

*“No citizen shall be deprived of his personal liberty save in accordance with law.”*

In this regard, persons may only be removed from the State in accordance with law. Persons being removed from the State, who are the subject of a deportation order, must be treated with dignity and respect.

**ECHR**

Article 1 Protocol 7 of the ECHR provides that:

*1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:*

- (a) to submit reasons against his expulsion,*
- (b) to have his case reviewed, and*
- (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.*

*2. An alien may be expelled before the exercise of his rights under paragraph 1. (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.*

The ECHR specifically enumerates the grounds which can lawfully justify a deprivation of liberty.<sup>529</sup> Article 5 of the ECHR, insofar as it relates to deportations, is set out in the following terms:

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<sup>529</sup> Office of the High Commissioner for Human Rights (OCHR); *Chapter 5 Human Rights and Arrest, Pre-trial Detention and Administrative Detention.*



*“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

*(f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

*2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

*3. ...*

*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

*5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”<sup>530</sup>*

The main objective of procedural safeguards is to prevent expulsions which would result in violations of other human rights guarantees such as arbitrary detention, the prohibition of torture and ill-treatment and denial of a fair trial. Procedural guarantees are to be offered prior to expulsion of a non-national who is lawfully resident in the territory of the State.<sup>531</sup> Procedural safeguards can however, be restricted when the expulsion is necessary in the interests of public order or is grounded on reasons of national security.<sup>532</sup>

Article 1 of Protocol No. 7 extends to aliens “*lawfully resident*” in the territory of the State in question. Therefore the inquiry conducted by the ECt.HR will be into whether the person was lawfully resident in the territory.<sup>533</sup> The word “*lawfully*” refers to the domestic law of the State concerned.<sup>534</sup> It is therefore the duty of the State to set down the conditions which must be met for a person's presence in the territory to be accepted as lawful.<sup>535</sup> The word

<sup>530</sup> Article 5 of the European Convention on Human Rights.

<sup>531</sup> *Geleri v Romania*, App no 33118/05, 15 February 2011.

<sup>532</sup> *Expulsions of aliens in international human rights law*, OHCHR Discussion paper Geneva, (September 2006).

<sup>533</sup> *Nowak v Ukraine*, App no 60846/10, 15 September 2011, at para 79.

<sup>534</sup> *Explanatory Report to Protocol No. 7*, Council of Europe (ETS No. 117).

<sup>535</sup> *Explanatory Report to Protocol No. 7* (ETS No. 117).



resident is to be understood as the exclusion from the application of Article 1 Protocol 7 of an alien who has arrived at a port or other point of entry but has not been processed through immigration control.<sup>536</sup> Furthermore, the exclusion is intended to apply to an alien who has been admitted to the territory solely for transit or for a limited period for non-residential purposes.<sup>537</sup> This period also covers the period pending a decision on a request for a residence permit.<sup>538</sup>

In the case of *Vouloffovitch and Oulianova v. Sweden*,<sup>539</sup> two people arrived in Sweden on one-day tourist visas and unsuccessfully sought political asylum there. The Commission opined that under normal circumstances an alien whose visa or residence permit has expired cannot be lawfully resident in the country.<sup>540</sup>

The grounds for exceptions are contained in Article 1.2 of Protocol 7. These grounds are exclusively applicable when considered “*necessary in the interest of public order or where reasons of national security are invoked.*”<sup>541</sup>

Insofar as An Garda Síochána is concerned the relevant domestic legislation in this area is primarily immigration legislation and its enforcement. Members enforcing this legislation must ensure that their actions are in accordance with law and that persons are treated with dignity and respect.

## CHARTER OF FUNDAMENTAL RIGHTS

Article 19(2) provides that:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

<sup>536</sup> Explanatory Report to Protocol No. 7 (ETS No. 117).

<sup>537</sup> Explanatory Report to Protocol No. 7 (ETS No. 117).

<sup>538</sup> Explanatory Report to Protocol No. 7 (ETS No. 117).

<sup>539</sup> *Vouloffovitch and Oulianova v. Sweden*, App no 19373/92, 13 January 1993.

<sup>540</sup> *Vouloffovitch and Oulianova v. Sweden* App no 19373/92, 13 January 1993.

<sup>541</sup> Article 1.2 Protocol 7 ECHR.



## PROHIBITION OF COLLECTIVE EXPULSION OF ALIENS

Article 4 of Protocol No. 4 of the ECHR provides that:

*“Collective expulsion of aliens is prohibited.”*

The ECt.HR has stated that *“the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.”*<sup>542</sup> The procedural right which this provision affords is enjoyed by those present in the territory, whether lawfully resident or not, and has been held to include asylum seekers<sup>543</sup> and migrants.<sup>544</sup> The term ‘aliens’ refers to *“all those who have no actual right to nationality in a State, whether they are merely passing through a country or reside or are domiciled in it.”*<sup>545</sup> Collective expulsion is defined as *“any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”*<sup>546</sup> Where state authorities sought to prevent migrants from entering their territory by intercepting them on the high seas,<sup>547</sup> and where border Police operated a system of immediate expulsion of aliens crossing into the State’s territory,<sup>548</sup> the ECt.HR held that these actions amounted to prohibited collective expulsion.

## CHARTER OF FUNDAMENTAL RIGHTS

Article 19 provides that:

1. *“Collective expulsions are prohibited.”*

<sup>542</sup> *Hirsi Jamaa and Others v Italy*, App no 27765/09, 23 February 2012, at para 177.

<sup>543</sup> *Čonka v Belgium*, 51564/99, 5 Feb 2002, at para 63.

<sup>544</sup> *Georgia v Russia (I)*, 13255/07, 3 July 2014.

<sup>545</sup> *Hirsi Jamaa and Others v Italy*, App no 27765/09, 23 February 2012, at para 174.

<sup>546</sup> *Georgia v Russia (I)*, 13255/07, 3 July 2014, at para 167.

<sup>547</sup> *Hirsi Jamaa and Others v Italy*, App no 27765/09, 23 February 2012.

<sup>548</sup> *Sharifi and Others v Italy and Greece*, App no 16643/09, 21 October 2014.



## PROHIBITION OF EXPULSION OF NATIONALS

Article 3 of Protocol No. 4 of the ECHR provides that:

*“1. No one shall be expelled, by means of an individual or of a collective measure, from the territory of the state of which he is a national.*

*2. No one shall be deprived of the right to enter the territory of the state of which he is a national.”*

The term expulsion in this context is to be *“obliged permanently to leave the territory of a state of which he is a national without being left the possibility of returning later.”*<sup>549</sup>

## RIGHT TO ASYLUM

There is no direct referral to Asylum in either the Constitution or the ECHR. Asylum seekers are people that are legally present in the State while awaiting a decision on their application for refugee status. A refugee may be defined as someone who *“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.”*<sup>550</sup> *Non-refoulement* is a core principle of asylum/refugee law. It operates as a prohibition on the return of a true victim of persecution to the persecutor.<sup>551</sup> Therefore, in order to lawfully deport someone who is seeking asylum, their claim must be assessed before a determination is made.

Should an asylum seeker fail in their application for refugee status, they may still be allowed to remain in the State under the system of ‘subsidiary protection’<sup>552</sup> or be granted

<sup>549</sup> *X v Austria and Germany*, 46 CD 214 (1974).

<sup>550</sup> Refugee Act 1996 section 2; taken verbatim from the United Nations Convention relating to the Status of Refugees 1951 Article 1(2).

<sup>551</sup> United Nations Convention relating to the Status of Refugees 1951, Article 33(1): *“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”*

<sup>552</sup> This type of protection is granted to people who are located outside of their home country and who are unable to return there due to fear of suffering serious harm, such as inhumane treatment: The European Union (Subsidiary Protection) Regulations 2013 provides for protection for persons that would face serious harm if returned to their country of origin, including:

1) *“Death penalty or execution; or*



leave to remain on humanitarian grounds.<sup>553</sup> ‘Programme refugees’ may also be transferred to the territory of the State on foot of a request from bodies such as the United Nations High Commission for Refugees (UNHCR).

### Return to country of origin

Upon finding that an asylum seeker does not have the right to protection under one of the procedures outlined above, the Minister for Justice and Equality may make a deportation order against that person to be executed by An Garda Síochána.

## CHARTER OF FUNDAMENTAL RIGHTS

Article 18 provides that:

*“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”*

The asylum process is governed on a community basis by specific provisions of EU law.<sup>554</sup> The Dublin III Regulation is the legal code for establishing the criteria and mechanism for determining the EU Member State’s responsibility for examining asylum applications. Under the system, an asylum seeker can only file an application for protection in one Member State.<sup>555</sup> This procedure is facilitated by the Eurodac system which ensures all asylum seekers and irregular migrants that enter the EU have fingerprints taken and stored for a limited time, according to data protection laws.<sup>556</sup>

- 
- 2) *Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;*  
*or*
  - 3) *Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”*

<sup>553</sup> Section 3, Immigration Act, 1999.

<sup>554</sup> Council Directive 2003/9/EC (“the reception directive”), Council Directive 2005/85/EC (“the procedures directive”), Council Directive 2004/83/EC (“the qualification directive”).

<sup>555</sup> The state in which the asylum seeker first entered the EU will usually be responsible for processing that applicant’s request. If it is found that an asylum seeker entered the EU through another state then an application for that other state to either take back or take charge of that application will be made. If the third state agrees, then the asylum seeker will be transferred to that state.

<sup>556</sup> These databases are then used to determine, in light of to the Dublin Regulations, asylum seekers’ first point of entry into the EU. If an asylum seeker’s fingerprint appears to have been recorded somewhere in the EU on an earlier occasion, then the asylum seeker is liable to be returned to that country.

## CODE OF ETHICS FOR AN GARDA SÍOCHÁNA

Commitments are given to the standard of “*Respect and Equality*” in the following terms:

- *“I will recognise and respect the dignity and equal human rights of all people.*
- *I will oppose and challenge any behaviour or language that demonstrates discrimination or disrespect, in particular with regard to vulnerable individuals or minority groups.*
- *I will be sensitive to the vulnerabilities of individuals ... I will be sensitive to the difficult circumstances individuals may find themselves in when in contact with the Garda Síochána.”*

## OTHER RELEVANT INTERNATIONAL STANDARDS

The right to asylum and the circumstances under which individuals may be removed from the State are provided for in a number of other international instruments. In this respect, Garda Personnel in the performance of their functions should be cognisant of the following.

### International Covenant on Civil and Political Rights 1966

Article 9 provides:

*“1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*

*2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

*3. ...*

*4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”*

Article 13 provides:

*“An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against this expulsion and to have his case*



*reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”*

Article 16 provides:

*“Everyone shall have the right to recognition everywhere as a person before the law.”*

### **Universal Declaration of Human Rights 1948**

Article 6 provides:

*“Everyone has the right to recognition everywhere as a person before the law.”*

Article 9 provides:

*“No one shall be subjected to arbitrary arrest, detention or exile.”*

Article 13 provides:

*“1. Everyone has the right to freedom of movement and residence within the borders of each State.*

*2. Everyone has the right to leave any country, including his own, and to return to his country.”*

Article 14 provides:

*“1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.*

*2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”*

Article 15 provides:

*“1. Everyone has the right to a nationality.*

*2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”*

## SECTION 5 – ADMINISTRATION

### Welfare Support Mechanisms

This Human Rights Framework recognises that support mechanisms may be necessary in certain situations where Garda Personnel have been exposed to significant stress or has a disproportionate impact on certain groups.

The Garda Employee Assistance Service (GEAS) provides early support and assistance to members of An Garda Síochána who may be experiencing or developing a variety of personal difficulties/problems, which if not addressed could adversely affect the quality of life of individual members of An Garda Síochána and their families, work performance or attendance. An Garda Síochána recognises that the continued wellbeing of each member of An Garda Síochána is essential from a personal level and contributes to the overall efficiency and effectiveness of the organisation.

The GEAS is a proactive response by An Garda Síochána to support and assist members of An Garda Síochána in managing and resolving personal difficulties/problems at an early stage and therefore maintaining their health and wellbeing.

The purpose of the GEAS is to provide a confidential professional support and referral service to both serving and former members of An Garda Síochána, their immediate families, to students and to retired members of external police services and their immediate families' resident in the State. The service is available to help resolve work or personal issues that are causing stress, worry or disruption to an individual's life. These difficulties could include:

- stress;
- exposure to traumatic events;
- injury on duty;
- discipline;
- death/ bereavement/ suicide.





The objectives of the Garda Employee Assistance Service are:

1. to respond to the needs of employees in times of difficulty;
2. to retain the services of members of An Garda Síochána who have developed or may be developing personal difficulties/problems by helping them to obtain the best professional assistance;
3. to provide support and assistance to members of An Garda Síochána in order to help achieve a satisfactory resolution for their concerns;
4. to contribute to enhancing the quality of life of all members of An Garda Síochána;
5. to provide support and assistance to Garda management/supervisors who are trying to resolve a member's personal difficulties/problems;
6. to provide impartial support, information and advice;
7. to provide a referral service to relevant specialist agencies, where appropriate, and where necessary in consultation with the Chief Medical Officer or the individual's General Practitioner (GP).

An Garda Síochána is conscious of the need to provide support to Garda Personnel particularly in the complex area of modern policing. With this in mind An Garda Síochána has secured the expertise of EAP Consultants/Carecall to deliver an independent, confidential counselling service. The service is free. Garda Personnel can call this service anytime 24/7, 365 days a year. EAP Consultants/Carecall can help a person cope with:

- Trauma
- Illness
- Personal or work related issues
- Stress at work or at home
- Families/Relationship difficulties
- Financial difficulties
- Addictions



- Bullying/Harassment/Sexual harassment
- Bereavement
- ... and other concerns.<sup>557</sup>

Supervisors have a responsibility to identify Garda Personnel who are experiencing personal problems, discuss the situation with the Garda personnel and assist him/her in resolving these problems or getting further help if required. Supervisors have a right to approach Garda personnel who may be having personal problems or if their work performance has been adversely affected.

Members of An Garda Síochána can also avail of the services of the Peer Support Network and the Chief Medical Officer and his staff.

### **Seconded Police Officers to An Garda Síochána**

This Human Rights Framework applies to any police officer seconded to An Garda Síochána from the Police Service of Northern Ireland in accordance with section 53 of the 2005 Act.

### **Publication**

This Human Rights Framework will be published on the Garda Website and the Garda Portal. *(This matter is subject to consideration and approval by the Commissioner).*

### **Monitoring and Review**

This Human Rights Framework and associated Human Rights Screening Tool will be reviewed 12 months from its date of effect and every three years thereafter or as otherwise required.

### **Consultation**

The following have been consulted in preparation of this Human Rights Framework and associated Human Rights Screening Tool:

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<sup>557</sup> [www.employeesfirst.ie](http://www.employeesfirst.ie)

## External Consultation

Department of Justice and Equality  
Policing Authority  
Garda Inspectorate  
Garda Síochána Ombudsman Commission  
Irish Human Rights and Equality Commission  
The Irish Centre for Human Rights  
Independent Consultant Ruth A. FitzGerald BL  
Irish Council for Civil Liberties

## Internal Consultation

Deputy Commissioner, Policing and Security  
Assistant Commissioner, Dublin Metropolitan Region  
Executive Director Legal  
Director of Civilian Human Resource Management  
Chief Superintendent Crime Legal  
Chief Superintendent, Director of Training, Garda College  
Superintendent Garda Ethics and Culture Bureau  
Superintendent Foundation Training, Garda College  
Superintendent Policy and Governance Coordination Unit  
Garda Síochána Analysis Service  
Human Resources & People Development

## Compliance

Compliance with this Human Rights Framework is mandatory for all Garda personnel.

## Related Documents

This Human Rights Framework should be read in conjunction with the Human Rights Screening Tool and Operational Guidance Document.

## Legal & Human Rights Screening

This Human Rights Framework has been legal and human rights screened in terms of the respective obligations placed on An Garda Síochána for the subject area concerned.



## **Code of Ethics, Standards & Commitments**

Every person working in An Garda Síochána must observe and adhere to the standards and commitments set out in the [Code of Ethics](#) for An Garda Síochána and uphold and promote this Code throughout the organisation.

## **Failure to comply with Human Rights Standards**

The Human Rights Framework provides for human rights standards that must be respected and protected by all Garda Personnel. Any behaviour falling short of this requirement is unacceptable and will be treated with the utmost seriousness. The Human Rights Framework will therefore co-exist with and support the Garda Discipline Regulations and the Civil Service Code of standards and Behaviour.

## **Disclaimer**

This document is not intended to, and does not represent, legal advice to be relied upon in respect of the subject matter contained herein. This document should not be used as a substitute for professional legal advice.

## **Framework & Screening Tool Feedback**

The Policy and Governance Coordination Unit maintains a Policy Issues Log. Where there are potential issues regarding the implementation of the Framework set out in this document, please forward an outline of same through the relevant Divisional Office to the Section mail-box [policy.governance@garda.ie](mailto:policy.governance@garda.ie). Divisional submissions will be recorded in the Policy Issues Log and forwarded to the Policy Owner for whatever action deemed necessary.



## Appendix 1

### Abbreviations and Glossary of Terms

ECHR	European Convention on Human Rights
GSOC	Garda Síochána Ombudsman Commission
Member(s)	A member of any rank of The Garda Síochána (including the Garda Commissioner) appointed under <i>Part 2</i> of the Garda Síochána Act 2005 or under an enactment repealed by the Garda Síochána Act 2005 and, a reserve member, but does not include a member of civilian staff of The Garda Síochána.
the 2005 Act	Garda Síochána Act 2005
the 2000 Act	Criminal Justice (United Nations Convention Against Torture) Act 2000
the 2003 Act	European Convention on Human Rights Act 2003
TEU	Treaty of the European Union
CFR	EU – Charter of Fundamental Rights
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNCAT	United Nations Convention against Torture
CRC	Convention on the Rights of the Child
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
UN Charter	United Nations Charter



## Appendix 2

### LIST OF HUMAN RIGHTS INSTRUMENTS

Constitution of Ireland 1937

European Convention on Human Rights 1948

European Convention on Human Rights Act 2003

Irish Human Rights and Equality Commission Act 2014

United Nations Convention against Torture 1984

Criminal Justice (United Nations Convention against Torture) Act 2000

Charter of Fundamental Rights of the European Union

Code of Ethics for An Garda Síochána

### INTERNATIONAL STANDARDS

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Convention on the Rights of the Child

Convention on the Elimination of All Forms of Racial Discrimination

Convention on the Elimination of All Forms of Discrimination against Women

United Nations Charter

The European Social Charter

European Code of Police Ethics

United Nations Basic Principles on the Use of Force and Firearms for Law Enforcement Officials

Body of Principals for the Protection of All Persons under Any Form of Detention or Imprisonment

United Nations Code of Conduct for Law Enforcement Officials

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("**The Beijing Rules**")

