Submission of Dr Vicky Conway, DCU on the General Scheme of Garda Síochána (Powers) Bill

Garda Síochána (Powers) Bill

Submission by Dr Vicky Conway, Associate Professor of Law, Dublin City University.

To the Members of the Justice Committee,

I wish to make the following submission on the General Scheme of the Garda Síochána (Powers) Bill. I have attempted to be as comprehensive as possible, but do not suggest that this is exhaustive. As with any Bill of this size reflection on every head from different perspectives can generate additional thoughts. Therefore I submit the following as preliminary thoughts on the General Scheme.

If I can be of any further assistance to the Committee members I would be delighted to.

Dr Vicky Conway

Associate Professor of law, Dublin City University

Host of Policed in Ireland podcast

Former member of the Policing Authority and of the Commission on the Future of Policing

Email: Vicky.conway@dcu.ie

12 October 2010

Submission of Dr Vicky Conway, DCU on the General Scheme of Garda Síochána (Powers) Bill

Head 2

'serious offence' the inclusion of all of the Schedule 5 offences broadens the basis for what is considered serious, given that not all of these offences carry a 5 year term. We should be very wary of such expansions, especially where no justification for so doing is provided.

'reasonable suspicion' This is a largely ineffective standard in policing which is vague and does not engage with the reality of police work. Research from the UK shows that police find ways to make their actions fit such language, rather than having it as a guiding principle.

Head 5

It is essential that the codes of practice have full legal effect. They should, therefore be introduced by way of statutory instrument. This is key, given how much regulation of key powers in the Bill is being relegated to codes of practice.

Head 6

While it is welcomed to see respect for rights being placed on a statutory footing, the section is awkwardly worded. Rather than 'fundamental' it would be preferable to specify clearly both constitutional and human rights. Fundamental is not defined in Head 2 and it would be best to ensure clarity on this. Subsection b then goes on to mention fairness and non-discrimination, which are two of those rights. It is unclear why these, and not other rights, are pulled out for special mention in this way (right to privacy, family life or bodily integrity could just as easily be mentioned). Further, the following phrase similarly pulls out some duties of gardaí for special mention (investigation of crime, and respecting rights of the victim), but not others. One could argue that all obligations need to be observed at all times, but one might question whether the implication of this phrase is that the need to comply with the rights of an individual may breached on occasion. This would be problematic. If the intention is to clarify that, save for inhuman and degrading treatment, no right is absolute, then this is what should be said, but even then there are clear legal parameters which should be followed in the curtailment of any right. However, it needs to be very clear that this is what is intended, and it is not implying the other extreme, that a suspect's rights are superseded by the rights, for instance, of a victim. The Supreme Court, and the European Court of Human Rights have been clear that it is not for police to say that the investigative needs of a case outweigh the duty to comply with human rights (whether that relates to unlawful detention, oppressive questioning or assault).

Head 7

Beyond simply mentioned an appropriate person, the opportunity should be taken to create an appropriate adult scheme, such as operates in the UK and other jurisdictions. In the UK this is provided for in the Codes of Practice for PACE. The benefit of a properly regulated scheme is that it creates standards, consistency and permanence in the provision of this vital safeguard to those in need. This scheme is well regarded in the UK, and if anything authors like Dehaghani have sought its development (see https://academic.oup.com/ojls/advance-article-abstract/doi/10.1093/ojls/gqab029/6374802). This was also a key recommendation of a recent study by Prof Kilkelly and Dr Forde for the Policing Authority (https://www.policingauthority.ie/assets/uploads/documents/Children%E2%80%99s_Rights_and_P

olice_Questioning_-_A_Qualitative_Study_of_Children%E2%80%99s_Experiences_of_being_interviewed_by_the_Garda_S%C3%ADoch%C3%A1na.pdf)

There should also be a statutory requirement to conduct a risk assessment in the exercise of powers, particularly of arrest, detention and interrogation, of children.

There should be a statutory requirement to actively consider the juvenile diversion programme in every case where a charge is being considered. Its use should also be expanded to cover minor drug offences.

Head 8

It is good to see specific coverage of impaired capacity. However it is reliant on garda knowledge or suspicion of such impairment. It would not be problematic, and would be respectful of individual rights, to place a duty on gardaí to actively ascertain whether an individual as impaired capacity. In a detention context this should proactively include an assessment of capacity. There is also too much discretion in terms of how such an assessment should be acted upon. Much greater detail should be included in the legislation.

Guidelines on the treatment of person with impaired capacity should be on a statutory footing, given the extent to which such guidelines will overlap with legal rights and obligations. Further, given what we know of persons who have contact with police, a significant majority will have either a mental disorder or be under the influence of a substance which impairs their capacity. Therefore this section applies to most persons gardaí interact with, which enhances the need for legal clarity and certainty.

It would also be good, under 4(a) to include 'unable to communicate effectively with legal advisors'. It is essential that a detainee be able communicate with their legal advisor, understand legal advice and discuss their specific needs. If they are unable to do so they should not be considered to have full capacity.

It is also suggested that the criteria under 4 (a) and (b) should be the same. There is no justification for saying that if a person cannot communicate effectively with gardaí because of a substance they have taken that they should not be considered to have impaired capacity.

Head 9

It is very encouraging to have a consolidated power of stop and search. However, despite what police suggest, the existence of stop and search powers is highly questionable. It has been shown repeatedly that stop and search results in miniscule numbers of charges and convictions and yet has notably disastrous consequences for community relations. In the ECHR case of Gillan and Quitan v UK [2009] it was stated that just 1% of stops resulted in arrests, and fewer again in charges and convictions. Thus the efficacy of stop and search as a police power is minimal. Yet when we consider existing evidence we see that it is a breach of privacy, it is proven to be used in highly discriminatory ways that makes citizens feel subjugated. Indeed one UK study from that it was not a crime fighting tool, but one of social control (see https://academic.oup.com/bjc/article/58/5/1212/4827589?login=true) Indeed, it can be seen in the UK that stop and search is linked to many of the more violent experiences of policing: from race riots to the London riots.

In Ireland we do not have holistic evidence on the use of the powers because AGS has not produced it, but numerous studies suggest similar trends are evident in Ireland (see for instance https://www.youthworkireland.ie/images/uploads/general/YWI_Journal_Vol_5_No_1_Article_Niamh_Feeney_and_Sin%C3%83%C2%A9ad_Freeman.pdf and this episode of Policed in Ireland https://tortoiseshack.ie/9-policed-in-ireland-stop-and-search/).

For these reasons it is submitted that stop and search has more detrimental effects than benefits and should thus be terminated as a practice.

If this position is not accepted, I make a number of suggestions to amend the proposed powers to enhance safety.

Legislation should set out factors which cannot be taken into account in deciding to conduct a stop and search, including age, gender, ethnicity, clothing, hairstyles and so on. Only factors which suggest possession of a weapon should be considered.

While it is stated that a person can be removed to a garda station for the purpose of conducting a search it would helpful to clearly state that an individual's privacy must be respected in conducting a search and that clothing (including outer clothing) should not be removed in public.

Some limitation should be provided on what might be considered a reasonable length of time to detain someone under this head, given that the usual safeguards attaching to a detention do not apply under this head. There is too much discretion included here.

The concept of 'relevant article' is too broad in its inclusion of any article intended for use in a criminal offence. Given that any item could potentially be used in an offence, and the current wording assumes an ability of the officer to assess, on the side of the road, the intention of the member of the public, this is too broad. The explanatory note uses a slightly narrower phrasing than the head itself, of any item for a theft or fraud offence, but again this is too broad and gives too much subjective thinking.

Head 12

The ethnicity of the person searched should also be recorded. As mentioned previously discriminatory use of the power is a consistent feature internationally, in breach of rights of non-discrimination, and with adverse consequences not just for the individual but for police community relations. Without these strong relations the police are significantly impeded from doing their job. Thus it is essential that we record this data. It can be recorded either as indicated or as perceived by the officer (which it is being clearly labelled). This is not in breach of GDPR as such information can be gathered for justifiable purposes, such as this.

The destruction period for records should be set out in legislation, rather than codes of practice.

In addition to the making of the record, statistics on the use of police stop and search powers should be published.

It is also worth noting that in certain forces in England committees have been established to review bodycam footage of stops and searches to give feedback on the community perspective on the use of these powers. You can hear more about that here: https://tortoiseshack.ie/policed-the-beat-body-worn-cameras/

Head 13

Given the importance of this Code of Practice it should have the status of a statutory instrument. It should also be drafted by the Department, in consultation with others, rather than by the Commissioner. These should not be matters for AGS to determine.

For a full understanding of the importance of these Codes, and the level of detail which they should go into, it is worth viewing the UK codes of practice for the equivalent legislation: https://www.gov.uk/government/publications/pace-code-c-2019

Further, failure to abide by the Code, which has legal standing, should be a breach of discipline.

The statement that a breach of the Code will not affect admissibility needs to be carefully worded to comply with Supreme Court jurisprudence of JC. If it is a knowing breach of rights then this would affect admissibility.

Head 14

The Committee should satisfy itself that the wording is consistent with what was recommended by the Law Reform Commission, given the expansion that is involved.

The wording considers 'a member of AGS' can be an applicant. This suggests any rank, which differs with what is in the explanatory note.

Head 16

Again this applies to any member of AGS.

It is submitted that the requirements to bypass passwords and encryption is an unjustifiable interference with the right to privacy at this stage in proceedings. As has been argued by Dr McIntyre of UCD, the lack of safeguards mean these proposals quite possibly breach constitutional and human rights (see https://www.irishtimes.com/opinion/new-garda-powers-bill-must-go-back-to-the-drawing-board-1.4595274)

Head 19

The ability to seize privileged information seems very broad. Could this include information held by a solicitor and could seizure impact on ability to prepare for trial? All consequences of this need to be carefully considered.

Head 21

This head empowers a superintendent or above to issue a search warrant in urgent circumstances. Both the courts and the Law Reform Commission have been clear that search warrants should always come from the courts. We saw in the Morris Tribunal how such internally sanctioned search warrants could be abused. Given the impact on fundamental rights at the pre-trial stage this heading should be removed.

Head 22

Again this Code of Practice should be a statutory instrument, drafted by the Department. Search Warrants have been a deeply problematic space for the guards in the past and this needs to be properly regulated. Previous statements in relation to earlier mentioned codes (under Head 13) in terms of breaches of discipline and impact on admissibility of evidence also apply here. For clarity the Commission on the Future of Policing did not recommend that such codes be drafted by the Commissioner.

Head 23

This head includes a vast expansion on the garda power of arrest. Under the Criminal Law Act 1997 the guards can only arrest without warrant where they believe someone is committing an 'arrestable offence'. This is an offence for which you could be imprisoned for 5 years or more. This element is proposed to be deleted allowing the guards to arrest without warrant for any offence. This represents an enormous shift in police powers.

Traditionally arrest only existed to facilitate the delivery of a person to court to be charged. It is only since 1984 that we have permitted the police to arrest – and thereby deprive someone of their liberty – without intending to charge them immediately. This in effect permitted, for the first, arrest for the purpose of furthering an investigation but it was limited to serious offences. This proposal would remove that limitation, allowing arrest without charge even for minor offences. While there are some criteria set out in sub heading (3) it is still very broad. It is unclear what the reason for this is. I have not seen any evidence that the gardaí are impeded by not having this power. At a minimum evidence should be presented publicly to justify such a wide and significant shift in police powers. It is worrying that the explanatory note does not even acknowledge the breadth of this shift.

Head 27

It is very welcome to see the removal of the phrase 'taken down in writing' from the caution. This has meant that gardaí have had to transcribe, in writing, all that is said in an interview. The new wording recognises the fact that interviews are now recorded. This will prevent delays in interviews, meaning suspects can be deprived of their liberty for less time, less garda time will be spent in interviews (enhancing time spent on investigation), and less solicitor time (which is invariably provided for by legal aid). It will make interviews more fast paced which will take adjustment for all parties.

Head 28

Whilst it is good to see it clearly stated that a person should be informed of their arrest there is no information on what should happen where a person is not so informed. In interviewing people for my podcast Policed In Ireland this is a complaint I have heard repeatedly (for instance in this episode with Oscar https://tortoiseshack.ie/5-policed-in-ireland-children/). Given that this is essential both as a safeguard to ensure police can justify their use of the arrest power, but also for someone to know why they are being held and be able to discuss that with their legal team and build a defence, then the legislation should at least mention what should happen if this right is breached – such as invalidating the detention or rendering inadmissible any evidence secured during the detention.

In addition to the provision of information there should be a statutory duty to conduct a risk assessment on arrest, and a further risk assessment prior to release. This is essential to ensure that the police are aware of all potential issues, and can more fully understand and realise their duty of care towards a detainee. This is an issue that again we have covered on Policed in Ireland, in the context of a young man who died by suicide hours after he was released from garda custody: https://tortoiseshack.ie/10-policed-in-ireland-a-voice-for-niall/

Head 29

It should be stated that this should be done where at all possible, at a reasonable time (e.g. 9 am to 9pm). There is reference in the exercise of search warrants of doing so at a reasonable time. Complaints have been made that the use of midnight or dawn raids have been disproportionately been used on more working class sections of the community.

Head 30

The power of seizure on arrest is very broad, including the seizure of any item which may harm another. Given that the individual is under arrest, should seizure not be limited to either illegal items, or items which are permitted to be seized under a search warrant?

Head 33

Again a Code of Practice is proposed to be drafted by the Commissioner, rather than the Department. This needs to be a statutory instrument.

There are a great many elements to be regulated in the processing of arrests, in terms of information to be provided, information to be gathered, risk assessment to be undertaken, accessing appropriate supports (from social workers, doctors, interpreters, appropriate adults and so on).

There should also be a clear statement on the gathering of data to be published. We have no data at all in Ireland on how many people are arrested on an annual basis or any breakdowns of where, or what their needs are. This makes it incredibly difficult to plan effectively for estates, for medical supports, for interpreters, lawyers and so on. It also prevents us understanding the demographics of those going through the criminal justice system. Thus it is very important that the recording and publishing of this data be required so that we can meet our requirements to prevent discrimination in the criminal justice system.

We need provisions on the standards of interpreters. There are no standards required at present and significant issues in the provision of interpreters who can be unclear as to their role, and for whom they work.

There are also significant issues in the provision of medial support in garda stations. The current system of a gp being called if there is an issue is inadequate and lacks transparency. Instead we should have retained doctors and mental health staff collocated in detention centres. This model would enhance the medical services given to detainees in need, and save a great deal of time in call outs.

If this code of practice is where protections for children and vulnerable persons will be then detailed consideration needs to be given to the content of these, referring to research by scholars such as

Prof Kilkelly of UCC and Dr Cusack of UL, to ensure all rights are being protected. There is a wealth of excellent knowledge in this ever developing space that needs to be effectively drawn on.

Head 34

The custody officer needs to be an individual of sufficient rank or grade to be able to command respect and authority. This was identified as a serious issue by Justice Morris whereby a garda may have difficult telling a sergeant that they believe regulations have not been followed. This undermined the potential of the role and he was clear that the holder of that role needed to be of sufficient rank.

Head 35

This head should be amended to include a clear statement of the role of the custody officer, to ensure that the rights of the detainee are being protected and to complete and maintain the custody record (preferably electronic). Much more detail on the role needs to be provided, including a requirement of specialised training. It reads like a largely administrative role from this which undermines how essential it is in the protection of the detainee.

Head 37

Additional details on the conduct of a search are required to ensure that privacy and dignity are maintained, and also to minimise a potentially stressful and triggering event. The location, the number of officers that can be present, the gender of officers, the exact parameters of a search and when intimate searches can be conducted should be provided for. Again reviewing the UK codes of practice can show the scale of issues which need to be provided for.

Head 39

It is good to see the level of detail provided on rest periods, but it is notable that this very much contrasts with a lack of detail in other places such as the role of the custody officer or the protections for vulnerable detainees. The level of detail provided here should be replicated throughout.

While it is understandable that there may be grounds for suspending the night time rest period (6) this should be balanced against the capacity of the detainee: if they are overly tired or stressed and unlikely to understand the nature and purpose of the questioning then it should not be possible to suspend the questioning. In addition to being unfair on the detainee, it is also unlikely to produce reliable information and so will be a waste of garda time. So an assessment of the detainee should be part of any suspension.

Head 40

At present the determination of whether medical attention is required is entirely at the discretion of the garda. To protect the rights of the detainee, who has not at this point even been charged, the detainee should be seen where a lawyer, guardian or appropriate adult feels it is necessary. Some may suggest this could be used as a way to delay questioning but 1. That is not in the interest of the

detainee whose primary concern is invariably to be released from custody and 2. This is part of the inefficiency of the current system. If we had more centralised custody suites with medical practitioners and mental health practitioners in situ then there would be no such delay. Indeed, it could be argued, given the prevalence of mental health difficulties and substance abuse among detainees that all persons should be assessed by a medical practitioner on arrival at the station, as part of the risk assessment. This would be the best way to meet the duty of care which police owe to people they detain.

Further if a person has spent a period of their detention time in hospital, and are then returned to the station, it should be mandatory for a medical assessment to be conducted on their return to the station to ensure they are fit for questioning. Such a person is in a highly vulnerable position and the gardaí have a duty of care towards them.

Head 41

Where a decision is made under subsection 2 that a person will not be contacted, the detainee should be advised and offered an opportunity to substitute an alternative person to be contacted. This is required to ensure the person is not held in cognito.

Head 42

It is excellent to see legal provision for the right to access a solicitor, and for that person to attend the interview. Attendance at interview has been operating on the say of the DPP since 2015 (it was not permitted prior to that). Legal clarity is much needed.

There is much additional detail required – it may be sufficient for this to be covered in codes of practice which take the form of statutory instruments. For instance in subsection 6 it talks of the solicitor being overly disruptive but there is no indication of what this might look like. Part of the issue here is the need for clear statements on what the role of the solicitor is, what they are entitled to in the performance of that role, and what they are not entitled to do. At present there are two separate sets of guidelines, one from the Law Society and from AGS, covering this issue which is not ideal. There should be absolute clarity. Prof Yvonne Daly and have been doing a huge amount of work in this space, training solicitors on how to attend interviews. There are a great many issues to be covered from what information the solicitor is entitled to, the privacy of consultations, the length of consultations, the safety of solicitors, their right to engage interpreters to maintain confidentiality and so on that need to be addressed. Above all it must be recognised that the solicitor is building the defence from the moment they take the call, and given moves to non-trial disposal the interview takes on an increased importance in the legal process (to understand this further please read https://www.ijsj.ie/assets/uploads/7.%20Vicky%20Conway.pdf 0

There is current a great deal of discretion in the removal of a solicitor, too much so. If there was greater clarity on the role of the solicitor and what they are permitted to do this would minimise the scope for removal. For instance, it could be argued that under the current phrasing a solicitor who, legitimately, advises no comment is prejudicing an investigation. This however is well within the right of the detainee to silence. For such reasons much more clarity is needed.

Stating that the consultation shall take place in the sight of gardaí is in breach of the requirement of privacy under the European Convention of Human Rights. I have heard it said that this is for the

safety of the solicitor but the insertion of a call bell in the consultation room can satisfy this requirement.

We should also see clarity, either in the Bill or the Codes of Practice, on how solicitors are to be contacted. Prof Daly and I have done researched on the difficulties which emerge in current practice whereby options are inconsistently provided to detainees in different garda stations. We recommend that a consistent system be introduced which removes discretion from gardaí. Further details can be provided if helpful. We have encountered allegations of corruption in the contacting of certain solicitors, as well as an inclination to contact solicitors who are less inclined to attend interviews, or to intervene in interviews.

Head 43

Prof Kilkelly and Dr Forde, in research cited above, were very clear in their recommendation that children should never be able to waive their right to a lawyer. International experience shows very high rates of waiver, but the factors that inform this can be short sighted, such as a desire to get out of the station as soon as possible. This can cause serious harm to the building of the defence with significant consequences for the life of the child, consequences which may not be appreciated by the child. This is the expert view and should be respected.

Subsection 4 permits questioning to proceed prior to consultation with a solicitor in certain circumstances. This is in direct conflict with the Supreme Court. In 2014 in *DPP v Gormley and White* the Supreme Court ruled that questioning could not commence, ever, until a detainee who had requested legal advice had access to that advice. The Supreme Court ruled this to be on the basis of the constitutional right to a fair trial and so it should not be for the legislature to overrule this.

Head 44

For detention periods beyond 72 hours an application must be made to the court. At present this must be done by a Chief Superintendent, and this legislation reduces the rank to the Superintendent. The reason for this change is not addressed in the explanatory note so it is unclear why it is sought.

Head 45

Here we have a further example of the rank level being reduced. Now an inspector, rather than a superintendent for 6 hours and a chief superintendent for a further 12. Enabling an inspector to do something that previously was done by a chief superintendent is a significant change and again no reason has been provided for this shift.

This section goes on to permit a chief superintendent to authorise an addition 24 hours, something that can currently only be done by a judge. This means that a person who has not been charged can be detained for 48 hours on the say of a garda, without any external oversight. It is submitted that this is excessive and is an unjustified change. No evidence has been presented that this is necessary. Given that this involved a deprivation of liberty, without even a charge, let alone a conviction, the external oversight of a judge should be maintained from the 24 hour period.

Head 47

This provision seeks to extend the number of offences for which detention of 168 hours can apply. At present 7 day detention without charge can only be used for drug trafficking and certain other offences but here it is porposed to extend this to a further range of offences. While this is explained in the explanatory note it is not explained why this has been deemed necessary. Detaining someone for a week who has not been charged it is a hugely significant infringement of the right to liberty and should only be done for clear necessity.

Head 52

Any use of force under this head should be required to be recoded to ensure that use of force statistics are accurate.

Indeed, it could be made explicitly clear at some point that all uses of powers, including and particularly use of force, must be recorded and statistics on their use and outcomes published.

Head 53

It should also be included and explicitly required that a risk assessment be conducted on release to ensure that AGS is fulfilling its duty of care towards the detainee (to determine matters such as is the individual at risk of suicide or self harm as a result of detention, are they at risk of harm from others as a result of their arrest, if abuse has been disclosed – particularly by children- what actions do AGS need to take etc).

Head 59

Following what I've stated in previous heads, the custody record should also include the outcomes of risk assessments, any use of force, the outcome of a standardised medical assessment.

Head 60

Provision should not be made for alternatives to electronic recording. This should now be mandatory. If recording cannot happen in a particular station the individual should be transferred to a station where that can happen. An electronic record is the best, most reliable record and is the standard of evidence we should expect and demand.

Head 62

This generates a question of how little is covered in the Bill as to how interviews should be conducted. The Bill should include a head which explicitly states that oppressive and unfair questioning will not be used in questioning. It should state that the Garda Siochana Interview Model will be used and that a trauma informed approach will be adopted.

Head 64

Again, these codes of practice should be drafted by the Department and have the status of statutory instrument. These should also include the recording of uses of powers and the publication of statistics.

Head 65

Every use of force should be recorded, and statistics will be published on use of force.

Rather than discussing what is reasonably necessary, it would be preferable to discuss the minimum amount of force necessary.

Clarity and detail should be in the legislation on when lethal force options can be used.

Again a detailed code of practice will be required to set out the use of force options, the factors to be taken into account in using force, the difference between use of force options, and in particular factors to be taken into account in the use of lethal force. This should also provide for clear reviews of use of force, as well as how the use of serious force must be referred to GSOC.

It would also be helpful to clarify in the legislation that the unlawful use of force by a garda constitutes criminal assault.

Head 66

It is worrying to see a provision which allows for the seizing and retaining of communications between solicitors and clients where a garda has reasonable grounds for believing that the communications were not solely about legal advice. This has the potential to infringe upon or stymie the confidential communications between lawyers and clients.

It is surprising that a Bill to regulate the use of garda powers says nothing about what will happen if the provisions of this bill are not complied with. This should be clear address in the Bill itself. Regulation of police powers should not just be about *giving* the police powers, but regulating broadly how they are used.