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## SETTING A NEW AGENDA

### “Appreciating” and Improving Garda Custody in Ireland

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#### Introduction

This chapter takes as its starting point the idea of “good” police custody, which has been a focus of recent research on police custody in England and Wales. This is used to explore how to “appreciate” and improve garda custody in Ireland. “Good” custody may seem like an oxymoron given that police detention concerns the exercise of police authority over vulnerable and often disempowered detainees, who are likely to experience police custody as a painful, if not, punishing experience.<sup>1</sup> In addition, the notion of “good” raises questions, for example, about good for whom and about whether “good enough” might be a more reasonable ambition.<sup>2</sup> Yet, the notion of “good” police custody also offers the possibility of change, which is more likely to be realised by police stakeholders, as a result of the emphasis on the glass being half full rather than half empty.<sup>3</sup>

Indeed, this was the intention of the “good” police custody study (GPCS), from which this chapter draws. The research team worked with police and

1 L Skinns and A Wooff, ‘Pain in Police Detention: A Critical Point in the “Penal Painscape”?’ (2020) 31(3) *Policing and Society* 245; L Skinns, *Police Powers and Citizens’ Rights* (Routledge 2019) 146–50.

2 L Skinns, A Wooff and A Sprawson, ‘Preliminary Findings on Police Custody Delivery in the 21st Century: Is It “Good” Enough?’ (2015) 27(4) *Policing and Society* 358–71; B Bowling, ‘Fair and Effective Policing Methods: Towards “Good Enough” Policing’ (2007) 8(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 17–32.

3 L Skinns, A Wooff and A Sprawson, ‘“My Best Day Will Be My Last Day!” Appreciating Appreciative Inquiry in Police Research’ (2021) 32(6) *Policing and Society* 731–47; SAW Drew and J Wallis, ‘The Use of Appreciative Inquiry in the Practices of Large-Scale Organisational Change: A Review and Critique’ (2014) 39(4) *Journal of General Management* 3–26.

other external stakeholders to identify police custody at its best both for staff and, importantly, for detainees, and as a means of encouraging change to police custody policies, practices, and detainee experiences.<sup>4</sup> By using the methodological framework of appreciative inquiry, this research identified two main features of “good” police custody.<sup>5</sup>

First, the research identified the critical importance of detainee dignity – rooted in decency, equal worth, and autonomy – as an end in itself, rather than as merely a route to legitimacy and detainee cooperation with the police.<sup>6</sup> Dignified means decent, where detainees are not derided or laughed at nor presumed to be liars or guilty of the allegations made against them. Dignified also means staff treating detainees with kindness and recognising them as fellow human beings and of equal worth, that is, as no different from them, as innocent until proven otherwise and, therefore, worthy of their help and respect. Treating detainees with dignity also involves recognising and facilitating their capacity for autonomous decision-making, wherever possible, including about due process rights and entitlements. It was found that feelings of equal worth, for example, were more likely where detainees trusted in police accountability mechanisms; sensed a culture of camaraderie between detainees and staff; had access to material goods that met their basic needs; sensed a culture of decency not derision/suspicion; perceived the material conditions more favourably; and saw custody as being mainly about their welfare.<sup>7</sup> It was concluded therefore that dignity linked to equal worth should be embedded in all encounters between staff and detainees, as well as in the language and cultures of police custody work, starting with police strategies, policies, and codes of practice.

Second, a connection was also found between detainee dignity and the material conditions of custody.<sup>8</sup> These conditions include the lightness and brightness of the physical environment, and its design and layout (e.g. whether there are privacy screens); technology and equipment such as CCTV and in-cell buzzers/intercoms and tools of coercion; smells and soundscapes; and, lastly, but importantly, objects, such as personal effects, food, drink, reading and writing materials, toilet paper, clocks/watches, etc. It was found,

4 Skinns, Wooff and Sprawson (n 3).

5 L Skinns and A Sorsby, ‘Good Police Custody: Recommendations for Practice’ (2019) <[www.sheffield.ac.uk/law/research/directory/police](http://www.sheffield.ac.uk/law/research/directory/police)> accessed 21 December 2022.

6 L Skinns, A Sorsby and L Rice, ‘“Treat Them as a Human Being”: Dignity in Police Detention and Its Implications for “Good” Police Custody’ (2020) 60(6) *The British Journal of Criminology* 1667–88.

7 *Ibid.*

8 L Skinns, A Wooff and L Rice, ‘“Come on Mate, Let’s Make You a Cup of Tea”: An Examination of Sociomateriality and Its Impacts on Detainee Dignity Inside Police Detention’ (2023) 0(0) *Theoretical Criminology* <<https://doi.org/10.1177/13624806231184827>>; Skinns, Sorsby and Rice (n 6).

for example, that feelings of dignity rooted in equal worth were more likely if detainees perceived the material conditions more favourably (e.g. that they felt they were not being held underground and that the suite was well maintained) and if they felt they “had something” in terms of access to material goods that met their basic needs (e.g. reading and writing materials or limited personal possessions).<sup>9</sup> Moreover, *staff* experiences of the material conditions of custody also affect detainee experiences of dignity.<sup>10</sup> In particular, where staff thought the custody facility was bright and light, detainees were more likely to regard their treatment as dignified. In essence, where staff felt good about the material conditions in which they worked, this mapped on to detainees experiencing more dignified treatment. Preliminary analysis suggests that this was because more favourable conditions were associated with staff who were less stressed, more effective at using their authority (e.g. they felt they had some capacity for discretion) and who were more inclined to create a climate of decency (e.g. not laughing at detainees and treating them with suspicion).

Altogether this suggests that “good” custody means not only supporting and encouraging detainee dignity but also offering material conditions which meet detainees’ basic needs for sustenance, warmth, and to alleviate feelings of boredom. This includes reading/writing materials, regular access to food/drink, blankets, mattresses, appropriate clothing, etc. It also means designing dignity into the fabric of police custody buildings, prospectively and retrospectively, such as through the maximisation of natural light, regular cleaning and refurbishment, the creation of private spaces for staff-detainee interactions about personal matters relevant to the assessment of risk, and the inclusion of clocks, adequate pixelation around in-cell toilets on CCTV monitors, and art in communal areas.

## Approach and Methods

In this chapter and drawing on findings from the GPCS, I take an appreciative and comparative approach to assessing garda custody in Ireland. The potential strengths of An Garda Síochána in the delivery of garda custody are assessed, with a view to building on these strengths in the future, rather than An Garda Síochána being solely evaluated by identifying inadequacies. In uncovering these strengths, this also enables the setting of an agenda for positive changes to garda custody policies and practices in the

9 Skynns, Sorsby and Rice (n 6).

10 L Skynns, “‘Seeing the Light’: Material Conditions and Detainee Dignity Inside Police Detention’ (All Souls Seminar Series, Centre for Criminology, University of Oxford, 23 January 2020).

future. This is not to say, however, that negative aspects of garda custody are overlooked and that there is a naive focus only on the positive. This is especially important given that the Garda Inspectorate report, *Delivering Custody Services*, published in 2022, revealed a number of challenges with garda custody.<sup>11</sup> These included the continued existence of paper-based custody records, limited risk assessment processes and, allied to this, limited provisions for identifying and supporting vulnerable detainees, as well as the inadequacies of the material conditions in some garda custody suites. Overall, the intention is to yield a more nuanced understanding of both the positive and the negative, with a view to setting an agenda for the future of garda custody in Ireland.

This chapter is comparative in that similarities and differences in police custody policies and practices between Ireland and England are documented and assessed, while also paying attention to the landscape of historical, legal, social and political factors that may shape them. In identifying differences between the two jurisdictions, the intention is also to examine the “distinctively local flavour” of garda custody in Ireland.<sup>12</sup> In so doing, I tread carefully through “the politics of comparison,” including the related pitfalls of ethnocentrism and relativism,<sup>13</sup> in order to reach reasonable conclusions about strengths, weaknesses, and areas for improvement.

The purpose of this chapter is therefore twofold. First, I critically assess key features of garda custody in Ireland, examining their strengths and weaknesses. While the Garda Inspectorate report, *Delivering Custody Services*, provides a robust assessment of these strengths and weaknesses, compared to England and Wales, New Zealand, Northern Ireland, Norway, and Scotland, it does so largely with reference to police perspectives, rather than empirical evidence, and with reference to policy rather than practice. In other words, the emphasis in the report is more on how things should function, rather than on the lived realities of garda custody, from the perspective of staff and detainees, as documented in the research literature. This chapter therefore builds on the Garda Inspectorate report, using the empirical scholarship of police custody in England and Wales, and in Ireland, where it is available. Second, I set an agenda for the future of garda custody in Ireland, considering how the strengths that have been identified in this chapter could be built on

11 Garda Inspectorate, ‘Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations’ (2022) <[www.gsinsp.ie/delivering-custody-services/](http://www.gsinsp.ie/delivering-custody-services/)> accessed 20 December 2022.

12 C Hamilton, ‘Crime, Justice and Criminology in the Republic of Ireland’ (2022) 20(5) *European Journal of Criminology* 2 <<https://doi.org/10.1177/14773708211070215>>.

13 D Nelken, ‘Whose Best Practices? The Significance of Context in and for Transnational Criminal Justice Indicators’ (2019) 46 *Journal of Law and Society* S31–50; D Nelken, *Comparative Criminal Justice* (Sage 2010); L Zedner, ‘Comparative Research in Criminal Justice’ in L Noaks, M Levi and M Maguire (eds), *Contemporary Issues in Criminology* (Cardiff UP 1995).

to instigate change. Here, I draw on evidence and recommendations from the “good” police custody to make these suggestions for future practice.

To address these aims, first, I examine, in turn, the strengths and weaknesses of: risk assessments, legal advice, identification and support for vulnerable detainees, dignified treatment of detainees, and the material conditions of garda custody. These custody features have been selected because of their “distinctively local flavour,”<sup>14</sup> as revealed in the Garda Inspectorate report, which therefore warrant further examination. Given the breadth of these features, though, they are necessarily skimmed over, with some of them being picked up and considered in more detail elsewhere in this book. In the discussion that follows, second, I reflect on what this assessment of the strengths and weaknesses of the key features of custody reveals for future policies and practices in Ireland, framing this discussion through the lens of “good” police custody.

Throughout this chapter there will be a particular focus on findings from the “good” police custody study, on which I was the principal investigator from 2013 to 2018, meaning it is important to set out its methodology here. This was a five-year national mixed-methods study, the overarching aim of which was to examine rigorously what “good” police custody means. In Phase 1, in 2014, survey data were collected from custody managers in 40 of the 43 police forces in England and Wales about the delivery of police custody. In Phase 2 in 2014/15, the research team spent hours observing and interviewing 47 staff and 50 detainees in four custody blocks in four forces. The Phase 2 data were used to develop a questionnaire which was administered in 2016–2017 to nearly 800 staff and detainees in 27 custody facilities in 13 police forces in England and Wales. Analysis of the Phase 3 data resulted in a set of good practice recommendations launched in Phase 4 in 2019 and a series of publications.

I also draw on the Irish parts of a British-Academy-funded study conducted in 2009, which aimed to examine due process rights in theory and practice, in a comparative perspective. In the Irish part of the research, I observed six custody blocks in one large Irish city, amounting to 41 hours of observation, and interviewed eight members of An Garda Síochána, as well as looking at relevant documents and reports. These data have been published in Skinns (2019) and Skinns (2022).

### **Risk Assessment, Equal Worth, and Decency**

That garda members ask questions to identify risk in detainees in their custody is a positive feature of their working practices, given the highly vulnerable nature of the detainee population<sup>15</sup> and the demands on An Garda

14 Hamilton (n 12) 1.

15 T Rekrut-Lapa and A Lapa, ‘Health Needs of Detainees in Police Custody in England and Wales’ (2014) 27 *Journal of Forensic and Legal Medicine* 69–75.

Síochána to keep people safe, to prevent deaths in custody, and to comply with ECHR Article 2 right to life obligations. From an appreciative inquiry perspective, it is also of note that improvements were made to these risk assessment processes in 2018, in which the risk assessment questions that were once included as part of the paper custody record and which I observed in use in 2009, had been replaced by a separate paper risk assessment form, which enabled more detailed questions to be asked about mental and physical health, use of alcohol/drugs, learning disabilities, dietary requirements, etc. In 2009, this risk assessment process, as I noted in Skinns,<sup>16</sup> was a relatively informal affair, which therefore compromised its potential for consistently and routinely identifying and responding to risk. Questions at this time focused on detainees' physical and mental health, medication, and intoxication, but this was not a rigid checklist and, instead, staff acted based on their intuition. For example, this garda member explained that:

[T]he new custody record now has a series of questions you ask them in relation to, have you taken medication, have you been to a hospital . . . So there's kind of a risk assessment built into that, but there's no separate form . . . they're [staff] go through this risk assessment in their head, they just don't realise they're doing this risk assessment, and it's like the instinct . . . they don't do it in that structured checklist type approach, which is why we don't have very many serious incidents. IREI1.<sup>17</sup>

Other interviewees were more critical of this informal approach and the reliance on intuition which, in one interviewee's opinion, had resulted in vulnerable people being put in cells on their own when other courses of action would have better supported their needs.

More recently, the Garda Inspectorate has noted that “although initial risk assessments are carried out for almost every person in custody, there are significant weaknesses in the identification, assessment and management of risk, as well as in the recording of relevant information and decisions.”<sup>18</sup> In this respect, Ireland was distinctive as result of these weaknesses in the risk assessment process, when compared to the other jurisdictions in the report. Indeed, with the exception of the “significant weaknesses” identified in the formal oversight of custody at local, regional, and organisational levels,<sup>19</sup> there were no other parts of the report where the same level of concern was expressed. By contrast, England and Wales were noted in the report for the

16 Skinns (n 1) 98–100.

17 Skinns (n 1) 99.

18 Garda Inspectorate (n 11) 61.

19 *Ibid.*, 31.

comprehensive and dynamic approach taken to the identification and management of risk on arrival and prior to release, founded on information gathering from police records and information sharing between the police, health and prisons and supported by national-level guidance, such as Authorised Professional Practice (APP).<sup>20</sup> It was therefore recommended that Members in Charge be made responsible for overseeing the assessment of risk both on arrival and release, and the devising and implementation of risk management plans which are formally recorded, updated, shared with relevant partner organisations and that information about risk be added to custody records and electronic records held on PULSE.<sup>21</sup> If followed, these recommendations will mirror risk assessment processes in England and Wales.

It is therefore worth sounding some words of caution about the way risk assessments function in practice in England and Wales and examining the implications of this for changes to risk assessment processes in Ireland. Though national guidance exists about the implementation of risk assessments, practice varies considerably between police forces and between individual officers as to how they are put into practice, underpinned by the discretionary nature of police work.<sup>22</sup> For example, the format risk assessments take, the themes covered and questions asked can vary significantly between *police forces* and also from national guidance. Stoneman et al. found that only one force of the 43 in their research covered all of the parts of the risk assessment suggested by APP guidance.<sup>23</sup> They also found that the content and delivery of the risk assessment also differed considerably between police forces. The findings highlight a practical problem for police forces in ensuring that risk assessment processes are conducted consistently and to the same national standard, which no doubt will be an issue for An Garda Síochána to consider were they to adopt the recommendations of the Garda Inspectorate (2022).

Varied approaches to risk assessment by *individual officers* are also of ongoing concern in England and Wales,<sup>24</sup> particularly where these risk assess-

20 College of Policing, 'Detention and Custody Risk Assessment' (2021) <[www.college.police.uk/app/detention-and-custody/detention-and-custody-risk-assessment](http://www.college.police.uk/app/detention-and-custody/detention-and-custody-risk-assessment)> accessed 9 January 2023.

21 PULSE stands for Police Using Leading Systems Effectively, which is An Garda Síochána's electronic incident recording system.

22 Skins (n 1) 190–92.

23 M Stoneman and others, 'Variation in Detainee Risk Assessment Within Police Custody Across England and Wales' (2019) 29(8) Policing and Society 951–67.

24 G Rees, 'Getting the Sergeants on Your Side: The Importance of Interpersonal Relationships and Cultural Interoperability for Generating Interagency Collaboration Between Nurses and the Police in Custody Suites' (2020) 42(1) Sociology of Health and Illness 111–25; Stoneman and others (n 23).

ments are improperly conducted and contribute to deaths in police custody.<sup>25</sup> This was recently highlighted in the inquest into the death of Kelly Hartigan-Burns in 2016. After being found by the police on a road in the midst of a mental health crisis, saying she wanted to kill herself, she was later arrested and detained at Blackburn police station for assaulting her partner. She took her own life in a cell there, only hours after arriving. The inquest into her death in February–April 2022 recorded an open conclusion, but nonetheless pointed to a number of failures by the police, including with the relaying of important information about the circumstances leading up to her arrest and her suicide risk, an inadequate risk assessment and a lack of concern for warning markers on police records, resulting in improper checks being made and her not being placed in a CCTV cell, even though there was one free. The custody officer who booked her in had also left his shift two hours early on the night that Kelly died, for which he was found guilty of gross misconduct in October 2021. Therefore, national guidance on risk assessments cannot guarantee detainee safety and prevent all deaths *in* police custody, as much also depends on the culture of custody and its staff, the training they receive, and how they implement this. Though there is no space to consider this fully here, identifying and responding to risk also depends on whether custody staff seek advice and support from trained professionals, such as healthcare or liaison and diversion practitioners, the quality of this advice, and whether it is followed.<sup>26</sup>

Nor can custody staff necessarily keep detainees safe *on release* either. In spite of national guidance, at the time of writing, the management of risk on release is of greater concern in England and Wales than deaths in custody.<sup>27</sup> While there has been a downward trend in deaths *in* police custody since the late 1990s, particularly since 2009,<sup>28</sup> there has been an overall increase in the deaths following release, particularly of “Apparent suicides following release from police custody,” albeit these figures have stabilised in recent years. These

25 Independent Police Complaints Commission, ‘Deaths in or Following Police Custody: An Examination of the Cases 1998/9–2008/9’ (IPCC 2011) <[www.ipcc.gov.uk/page/deaths-custody-study](http://www.ipcc.gov.uk/page/deaths-custody-study)>.

26 A Lyall and others, ‘Pre-Release Risk Assessments: Pilot Study of a Novel Tool in One Police Station in the North East of England’ (2022) 17 *Policing: A Journal of Policy and Practice* <<https://doi.org/10.1093/police/paac016>>; R Dehaghani, *Vulnerability in Police Custody: Police Decision-Making and the Appropriate Adult Safeguard* (Routledge 2019) 103–13; Stoneman and others (n 23); Skinns (n 1) 98–100.

27 Lyall and others (n 26); Dehaghani (n 26) 35.

28 Independent Office of Police Conduct, ‘Annual Deaths During or Following Police Contact Statistics: Statistics for England and Wales 2021/22’ (2022) <[www.policeconduct.gov.uk/research-and-learning/statistics/annual-deaths-during-or-following-police-contact-statistics](http://www.policeconduct.gov.uk/research-and-learning/statistics/annual-deaths-during-or-following-police-contact-statistics)> accessed 21 December 2022; Inquest, ‘Deaths in Police Custody’ (2013–2022) <[www.inquest.org.uk/deaths-in-police-custody](http://www.inquest.org.uk/deaths-in-police-custody)> accessed 21 December 2022.



apparent suicides on release from police custody are also greater in number than the deaths in police custody. In 2021/22, there were 11 deaths in police custody, compared to 56 apparent suicides in the 48 hours following release from police custody.<sup>29</sup> A large proportion of those who take their own life on release have been arrested for sexual offences (54% in 2021/22), including the possession of indecent images involving children (48% in 2021/22). Concerns about apparent suicides on release from police custody prompted the 2017 Angiolini Review into deaths in or following police custody to recommend that national APP police custody guidance

should include guidelines for pre-release risk assessment setting out specific practical steps that should be taken to provide support and protection for those at risk of self-harm on release (for example contacting family/carers before release with the detainee's consent, or referrals to community support groups).<sup>30</sup>

It remains to be seen whether these recommendations and guidelines are enough to reduce apparent suicides on release from police custody. Though stable, at 56 they remain persistently high and higher than deaths in police custody.

While clearly an important, albeit imperfect, preventative mechanism which can improve detainee safety in custody and on release, enlarging the focus on risk in Ireland by elevating the importance of the risk assessment process may also have unintended consequences for detainees. In the “good” police custody study, custody was seen as being “all about risk.”<sup>31</sup> Across all four sites in Phase 2 of the research, staff and to a lesser extent detainees exhibited a set of narratives and associated beliefs about the pervasiveness of risk in police custody suites, primarily connected to fears about detainees

29 IOPC (n 28). The equivalent figures for Ireland in 2021 were 6 deaths in garda custody and 5 following release from garda custody. However, these figures may be inaccurate, for example, because not all cases of suicide following garda custody are being referred to GSOC for investigation as required by s102 of the Garda Síochána Act 2005. See GSOC, *Annual Report* (GSOC 2021); S Bowers, ‘At Least 228 Fatalities in or Following Garda Custody Over Past 15 Years, Figures Show’ *Irish Times* (15 July 2022). Given the population differences between the England and Wales, and Ireland (approximately 59 v’s. 5 million), the number of deaths *in* garda custody seems particularly high relative to those in England and Wales, while the deaths following garda custody appear to be broadly equivalent, but objectively high.

30 E Angiolini, ‘Report of the Independent Review of Deaths and Serious Incidents in Police Custody’ (2017) 102 <[www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody](http://www.gov.uk/government/publications/deaths-and-serious-incidents-in-police-custody)> accessed 21 December 2022.

31 L Skinnis and A Wooff, ‘Policing Risk Inside Police Detention in England and Wales’ (Presentation at the American Society of Criminology Conference, Philadelphia, 15–18 November 2017).

dying and the consequences of this. While concerns about a detainee dying was a key part of this culture of risk, motivating staff decision-making and behaviour, staff also recognised the significant threats posed to staff too, including to their safety, reputation, as well as their jobs, their financial security, and their family life, if something were to go wrong.

This culture of risk therefore significantly framed all of what staff did. However, this was sometimes to the detriment of other considerations, such as detainee dignity. This was most apparent in relation to material goods, including personal effects (e.g. wedding bands), food, drink, toilet paper, etc., all of which might be denied and justified on the basis of risk. The Garda Inspectorate also made similar observations in Ireland. They note, for example, that the routine removal of certain items of clothing was not in proportion to risk, and the lack of provision of alternative clothing was “unacceptable.”<sup>32</sup> It was also noted that having to ask for toilet paper or menstrual products negatively impacts dignity. In the “good” police custody study, in some cases, detainees felt decisions to remove or not provide these material goods were unjustified, for example, if based on warning markers on the Police National Computer which were out of date.<sup>33</sup> These decisions also aggravated detainees because they conveyed to them a lack of trust in them by staff, while, for others, it was downright upsetting and dehumanising to have their wedding band removed, on the basis of presumed risk. Some detainees also did not understand or it had not been explained to them that their relatively low-risk wedding band would be returned and, for others, it was symbolic of a loss of identity. The removal of these items can be seen therefore as a form of “degradation,”<sup>34</sup> for example, as a result of the public, humiliating and routinised way in which it happened and a part of “mortifications of the self,”<sup>35</sup> through which detainees are forced to defer to those in charge and are socialised into the ways of the establishment.

In other words, an overemphasis on risk and an over-reliance on out-of-date warning markers on police records can undermine detainee dignity and their sense of being of equal worth and a decent trusted person, and, furthermore, might enflame and escalate detainees’ sense of injustice and the likelihood of them reacting negatively to this, which paradoxically increases not decreases the risk they pose. In order to deliver “good” police custody and given the risky and vulnerable nature of the suspect population, custody staff must continually balance risk against detainee dignity. In Ireland,

32 Garda Inspectorate (n 11) 71.

33 Skinns (n 1).

34 GM Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton UP 1958) 66.

35 E Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Penguin 1961) 24.

this decision-making process is made all the more difficult without the input, for example, of mental health professionals or liaison and pre-charge diversion teams. As the Garda Inspectorate notes, the recommended expansion of pre-charge diversion schemes in 2006 “were not evident, nor was there a consistent approach to signposting people with poor mental health to other organisations upon their release from custody.”<sup>36</sup> In the interests of more effectively managing risk, while also supporting detainees’ sense of equal worth and the decency of police custody, the recommendation made by the Garda Inspectorate to develop “a range of diversion and intervention services for persons in custody” is of critical importance.<sup>37</sup> This should be alongside more effective risk assessment processes and procedures (e.g. standardised, meaningful questions and opportunities to discuss them privately) but also training for staff to empower them to use their judgement to make appropriate decisions for detainees, on a case-by-case basis, which recognise and respect their need for dignity, alongside keeping detainees and staff safe.

### Accessing Legal Advice and Autonomy

Custodial legal advice is a crucial due process feature of police detention. It protects a suspect’s right to a fair trial from the outset and ensures that a legal representative can offer meaningful support and advice to a suspect during, what will be, for most, a moment of extreme vulnerability when arrested and detained by the police, in some cases for the first time.<sup>38</sup> In circumstances where adverse inferences may be drawn from silence – for example, when a suspect fails or refuses to mention certain facts, provide certain information, or answer certain questions – as is the case for a growing range of offences in Ireland, England, and Wales,<sup>39</sup> and where the focus of the criminal trial has shifted from the courtroom to police custody,<sup>40</sup> the

36 Garda Inspectorate (n 11) 23.

37 *Ibid.*, 26.

38 For a fuller discussion of why custodial legal advice is so crucial, see V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury 2023) Chapter 1.

39 Y Daly, C Dowd and A Muirhead, ‘When You Say Nothing at All: Invoking Inferences from Suspect Silence in the Police Station’ (2022) 26(3) *The International Journal of Evidence & Proof* 249–70; Y Daly and V Conway, ‘Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance’ (2021) 48 *Journal of Law and Society* 618–44; Y Daly, ‘Ireland: Curtailment of the Right to Silence Through Statutory Adverse Inferences’ (2021) 12(3) *New Journal of European Criminal Law* 347–64; Y Daly, ‘The Right to Silence: Inferences and Interference’ (2014) 47(1) *Australian and New Zealand Journal of Criminology* 59–80.

40 A Pivaty and others, ‘Contemporary Criminal Defence Practice: Importance of Active Involvement at the Investigative Stage and Related Training Requirements’ (2020) 27(1) *International Journal of the Legal Profession* 25–44; H Quirk, *The Rise and Fall of the Right to Silence* (Routledge 2017) 121.

need for custodial legal advice is even more crucial. A solicitor is needed to help a suspect understand, for example, when adverse inferences apply and what the effect of remaining silent might be on their case at court. This is particularly so, because in Ireland, unlike in England and Wales, the traditional police caution,<sup>41</sup> only gives way to more detailed information about adverse inferences, during late-stage “inference interviews,” at which point gardaí need only explain this caution and its consequences in ordinary language, rather than ensuring that the suspect understands it.<sup>42</sup> Indeed, as has been found in other studies, suspects do not understand the caution because gardaí also fail to fully understand or explain it effectively, drawing on legally inaccurate examples to do so.<sup>43</sup>

From an appreciative stance, Ireland has some of the necessary machinery of criminal justice to facilitate access to custodial legal advice. For example, the right to consult a solicitor is provided for under: administrative arrangements via the Garda Station Revised Legal Advice Scheme, for those receiving benefits or earning less than €20,316 p.a. and depending on the law under which suspects have been arrested; case law, such as *DPP v Gormley*,<sup>44</sup> which requires that a detained suspect who has requested legal advice should not be questioned until such advice has been provided; Garda custody regulations, which provide the right to consult a solicitor privately; HQ Directive 58/08 and Codes of Practices developed by An Garda Síochána and the Law Society; and ECtHR rulings, particularly the seismic, *Salduz v Turkey*, which emphasises the importance of legal advice as a pre-condition to police interrogation,<sup>45</sup> particularly in situations where adverse inferences may be drawn.<sup>46</sup> Indeed, breaches of Art 6(3) of the ECHR may arise where legal advice is not provided in a timely fashion for those against whom adverse inferences are later drawn at court.<sup>47</sup>

Yet these legal and administrative provisions are insufficient to support access to custodial legal advice, in practice, with evidence also of difficulties with the quality of legal assistance provided, though these will not be

41 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.

42 Daly, Dowd and Muirhead (n 39); Daly (n 39).

43 Daly, Dowd and Muirhead (n 39).

44 *DPP v Gormley* [2014] 2 IR 591; for a discussion of the significance of this ruling, see Conway and Daly (n 38) Chapter 3, 11.

45 *Salduz v Turkey* [2008] ECHR 36391/02 [Grand Chamber] (27 November 2008).

46 Garda Inspectorate (n 11); Daly (n 39); Pivaty (n 40); Daly, Dowd and Muirhead (n 39); D Giannouloupoulos, ‘Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries’ (2016) 16(1) Human Rights Law Review 103–29; D Walsh, *Human Rights and Policing in Ireland: Law, Policy and Practice* (Clarus Press 2009) 143.

47 Daly (n 39).

considered here.<sup>48</sup> It is estimated that around 20% of detainees in garda custody consulted in-person with a legal adviser and 11% had a legal adviser present during their interview.<sup>49</sup> Based on a random sample of custody records, in 2019, Garda Inspectorate figures suggest that this figure is lower with approximately 50 of their sample of 318 requesting and receiving legal advice, resulting in a consultation rate of around 15.7%.<sup>50</sup> Figures from the Legal Aid Board show consultation rates to be around 21% (though lawyers are only present in police interviews in 10% of cases).<sup>51</sup> This compares to a higher consultation rate in England and Wales, where it is approximately 25%, based on the average from studies conducted between 1978 and 2009, and may even be as high as 48%.<sup>52</sup>

Some of the reasons that suspects decline legal advice in Ireland are likely to be similar to those in England and Wales. Research in England and Wales has shown that they revolve primarily around the actions and decisions of suspects, the police, and legal representatives.<sup>53</sup> For suspects, being from a minority ethnic background, haste to leave police custody offence seriousness, self-defined guilt/innocence, and prior experience of custody all have an effect. For the police, ploys and informal conversations can be used to suggest to suspects, for example, that a legal advisor will prolong detention. For legal advisers, their availability, including through having sufficient remuneration to ensure attendance at the police station, experience, understanding of their role and competence is crucial, as well as their morale when performing a role, which is often undervalued.

Similarly, in Ireland, Skinns found suspects' prior experience of custody and police ploys dissuaded them to consult with a solicitor. Garda member,

48 Some of these difficulties include delays in accessing a lawyer, with no clear regulations or guidance on when such delays are permitted; limited privacy either during in-person or telephone legal consultations, due to staff standing in sight or earshot of consultation rooms or telephones (Garda Inspectorate (n 11)).

49 Daly (n 39).

50 Garda Inspectorate (n 11).

51 These figures are cited from Conway and Daly (n 38) Chapter 1.

52 L Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2011) 112.

53 J Blackstock and others, *Inside Police Custody: An Empirical Account of Suspects' Rights in four Jurisdictions* (Intersentia Ltd 2014) 247; Conway and Daly (n 38); D Newman and L Welsh, 'The Practices of Modern Criminal Defence Lawyers: Alienation and Its Implications for Access to Justice' (2019) 48(1–2) *Common Law World Review* 64–89; P Pleasence, V Kemp and N Balmer, 'The Justice Lottery? Police Station Advice 25 Years on from PACE' (2011) 1 *Criminal Law Review* 3–18; L Skinns, '“I'm a Detainee Get Me Out of Here”: Predictors of Access to Custodial Legal Advice in Public and Privatized Police Custody Areas' (2009) 49(2) *British Journal of Criminology* 399–417; L Skinns, '“Lets' Get It Over with”: Early Findings on the Factors Affecting Detainees' Access to Custodial Legal Advice' (2009) 19(1) *Policing and Society* 58–78.

IREI4, for example, said that suspects “get very complacent. They’ve been in a Garda station so often they know the way things go.”<sup>54</sup> IRE6, who had a legal background, said, however, that suspects declined legal advice because gardaí told them that they did not need a legal adviser “because all they [the gardaí] wanted to do was ask them a few questions,” which he felt was a “distortion of the interview process” and is suggestive of ploys being used by some of the gardaí, much in the same way that they have been found to be used in England and Wales. As is the case in England, there is also the possibility of solicitor competence undermining custodial legal advice. Conway and Daly highlight some of the challenges in this regard,<sup>55</sup> especially when attending police interviews, which they were not permitted to do until 2014 (30 years after this was the case in England and Wales). The increasingly broad but significant role of defence solicitors in Ireland in providing legal assistance<sup>56</sup> – which encompasses legal advice, but also protecting rights, especially to silence, preventing miscarriages of justice, providing support (e.g. with suspect welfare) and active support, and ensuring equality of arms<sup>57</sup> – also enhances opportunities for their competence to be impugned. Where solicitors do not conceive of their role in these broad terms and/or where there are failings in delivering any one of them, this may deter detainees from requesting custodial legal advice again in the future. As Pivaty et al. say,

[i]n order to provide effective and practical assistance to a detained suspect [which is line with the requirements of the *Salduz* ruling], lawyers need to fully appreciate the nature of their role in the police station, and have the skills to communicate effectively.<sup>58</sup>

However, the reasons for declining legal advice in Ireland also differ from those in England and Wales in three key but interconnected ways. First, there is no statutory basis for custodial legal advice in Ireland of the kind that exists in England and Wales through the Police and Criminal Evidence Act 1984, and second, there is no formalised system for facilitating access. Unlike in England and Wales, there is no duty solicitor scheme, even though this inhibits Ireland from meaningfully operationalising the 2008 *Salduz v*

54 Skinns (n 1) 124–29.

55 V Conway and Y Daly, ‘From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station’ (2019) 1 *Irish Judicial Studies Journal* 103–23.

56 As Pivaty and others (n 40) note, the work that lawyers do in the police station is no longer merely preparatory work for their day in court with their client, it has a significant bearing on the trial and its outcome. For example, statements taken in the police station are unlikely to be modified in court or evidence elicited from a suspect is unlikely to be excluded if their solicitor did not object at the time.

57 Pivaty and others (n 40); Conway and Daly (n 55).

58 Pivaty and others (n 40) 39.

*Turkey* ruling.<sup>59</sup> Indeed, Giannopoulos notes that Ireland responded more slowly than jurisdictions, such as France, Scotland, and the Netherlands, in formalising access to a lawyer prior to interview.<sup>60</sup> It is therefore unsurprising that, in 2009, the status of publicly funded legal advice in garda custody provoked confusion amongst the staff interviewed by Skinns.<sup>61</sup> No doubt it also provoked and continues to provoke confusion for suspects too, who are left to select a lawyer for themselves from amongst any business cards left in garda custody or lists that the police may hold.<sup>62</sup> The Garda Inspectorate notes that sometimes these lists were compiled in conjunction with solicitors, but other times their origins were unknown.<sup>63</sup> While the Law Society has also produced a list of solicitors, which is on their website, it is not routinely used by An Garda Síochána and few staff were aware of its existence.<sup>64</sup>

Third, suspects may also be deterred from seeking legal advice because of concerns about potential costs. As found by Skinns,<sup>65</sup> written information about custodial legal advice indicated to suspects that they may consult with a solicitor, but in a separate paragraph on a different page, suspects were informed that eligibility for legal aid was determined at court.<sup>66</sup> Therefore, suspects were required to connect these two paragraphs together, appearing as they did on different pages of the information sheet provided to them. If/when they did connect the paragraphs, they may have been further deterred from requesting legal advice by ambiguities about whether they would receive legal aid at all, since means-testing to establish their eligibility was done prior to going to court not in the police station. As custodial legal advice is publicly funded and thus free at the point of contact in the police station, in England and Wales, and given that detainees should be informed of this when given their notice of rights and entitlements, ambiguities about the potential cost of custodial legal advice is less likely to deter detainees from making use of it in England and Wales, compared to Ireland.

These uncertainties about eligibility for legal aid and which lawyer to choose rooted, in turn, in the lack of statutory or formalised basis for legal advice, are collectively likely to deter take up in Ireland, in ways that are not the case in England and Wales. The fact that the Garda Inspectorate has recommended that detainees be provided with more information about the Garda Station Revised Legal Advice Scheme (e.g. through

59 *Salduz v Turkey* (n 45).

60 Giannoulopoulos (n 46).

61 Skinns (n 1).

62 Garda Inspectorate (n 11); Conway and Daly (n 55); Daly (2014) (n 39).

63 Garda Inspectorate (n 11).

64 *Ibid.*

65 Skinns (n 1) 124–29.

66 See also Garda Inspectorate (n 11).

posters and explanations from Members in Charge)<sup>67</sup> further underscore these difficulties. Yet, this right is critically important, particularly where adverse inferences may be drawn and given the growing importance of the police station not courts in the criminal process. Beyond this procedural value of the right, deciding about custodial legal advice is also important to detainee dignity rooted in autonomy and therefore to “good” police custody. In order to make autonomous decisions, such as about whether to consult a solicitor, detainees need to have sufficient information to do so. This also needs to be provided in accessible formats and/or explained to them in ways that they are likely to understand, especially if they are vulnerable and if they are to be afforded the same level of autonomous decision-making as others, all of which are central to notions of “good” police custody.

### **Material Conditions as a Precursor to Detainee Dignity**

In terms of the material conditions of garda custody in Ireland, from an appreciative stance, the newest, purpose-built custody blocks delivered, for example, by the Capital Works Plan in Wexford, Galway and Kevin Street, Dublin, and the plans for further new suites in 2022–2026, as well as the cell refurbishment plan which began in 2011 to address problems with ligature points, windows, vents, heating, lighting, sanitation, call bells, and fire detection, provide the basis for creating garda custody suites which are well maintained, have natural light in the main charge rooms and the cells, exercise yards, and other features which are likely to support dignity and safety.<sup>68</sup> This chimes with my observation of new purpose-built facilities in 2009 (e.g. IREPO6), which had a clean, bright, and airy feel and had modern technology, such as automated fingerprint identification machines.

Yet, these favourable material conditions were inconsistent. The Garda Inspectorate notes, for example, that the building of new suites was not co-ordinated with the refurbishment of cells and that guidelines are needed about minimum standards for custody facilities and optimum numbers of custody suites, taking into account capacity versus demand.<sup>69</sup>

In the research I conducted in 2009, there were a different set of inconsistencies. Garda custody blocks were remarkable for the contrast between how favourable (e.g. IREPO6) and unfavourable the material conditions were. At the time of the research, the custody block in IREPO4, was amongst the

67 Ibid.

68 Ibid.

69 Ibid.



worst police detention facilities I had visited in ten years of conducting police custody research:

There were six cells, although only five were fully functioning. One was used as a property store. There were two interview rooms and one medical room/print room with a toilet and sink in it. There were no shower facilities. The print room enabled wet prints to be taken, rather than having livescan technology. The first thing that I noticed about going down to the cell block was how smoky it was. This was because suspects were allowed to smoke in the cells. . . . There were cell buzzers, but . . . they did not work [according to Sarah]. . . . Patrick, said that there were plans to knock the police station down and re-build it, but these had been put on hold due to the financial difficulties . . . I wondered how the custody area affected the morale of staff. Some, such as Sarah, seemed able to just get on with it and accepted that this was how it was. Others, such as Patrick, seemed negative and depressed about working in this kind of environment.

(IREPO4)

Three other facilities, where I conducted research in Ireland in 2009, were also poor in quality. The Garda Inspectorate report confirms that this is still likely to be the case some ten years later, based on their unannounced visits to 12 garda custody facilities in 2019. In 2009, these three facilities were dirty and had crumbling paint and/or plaster, which made them feel somewhat dilapidated and uncared for. Staff were also concerned about potential ligature points in the cells and possible escape routes, which meant that they chose to book-in detainees in the medical room because they felt it was safer (IREPO3). Others, such as Justice Hardiman in the *DPP v Gormley* ruling,<sup>70</sup> have also commented on how these material conditions impact detainees:

Many cells in Garda stations are frankly unsanitary and in a condition such that no normal person would wish to spend time there. Foul smells are not uncommon. They may be in a permanent state of semi-darkness, lighting, or the extinguishment of lights, being controlled from outside only. The seating or bedding may be such that no reasonable person would wish to use it. The sense of being in someone else's power may be utterly overwhelming especially to an inexperienced or sensitive person, or to an entirely innocent person. The noisy closing of a cell door, and the turning of a heavy key, leaving one alone in fetid semi-darkness is not an

70 Conway and Daly (n 44).

ideal preparation for what may well be the most important confrontation of one's life.<sup>71</sup>

These material conditions of garda custody in Ireland matter, both for staff and for detainees. The Garda Inspectorate notes, for example, concerns about safety and security, as a result of ligature points and a lack of secure entrances or routes into the custody block, for example, via multiple corridors without CCTV.<sup>72</sup> Safety alarms did not always work and escape routes existed, for example, where doors were left open into other parts of the police station. These material conditions also matter to detainee dignity, particularly feelings of equal worth. It is not the case that "good" material conditions amount to dignity, as European jurisprudence implies when it describes poor material conditions as undignified.<sup>73</sup> Rather, "good" material conditions are a precursor to dignity.<sup>74</sup> Moreover, staff are also moulded by these material conditions, who in turn pass on these experiences in their interactions with detainees. Improving material conditions is therefore likely to be advantageous not only to detainee dignity but to staff too, particularly to their levels of stress, their capacity for using their authority effectively, and their inclination to create a climate of decency.<sup>75</sup>

Taken together this suggests that to make garda custody "good" will entail improving material conditions in Ireland in the future. "Good" material conditions might include, for example, access to good quality food and drink, toilet paper, menstrual products, books and other distraction items, etc., notwithstanding any considerations of risk, as discussed earlier. More fundamentally, it is about ensuring that custody blocks are light, bright, and with natural light; are clean, regularly repainted, refurbished, and generally well maintained; and have means of telling the time. Were there a set of guidelines for An Garda Síochána about how garda custody facilities should be built and refurbished, taking account of not only detainee dignity but also safety and security and the needs of staff, this would further drive the custody estate in Ireland away from being the punishing and coercive custody blocks of the kind described earlier and towards a more consistently provided "good" set of material conditions, which would be of benefit to staff and to detainee dignity.

### **Conclusion: Setting a New Agenda for the Future?**

In summary, an "appreciative" and comparative approach has been used to examine garda custody in Ireland. Focusing on the assessment of risk, access

71 *Ibid.*, per Justice Hardiman, para 10.

72 Garda Inspectorate (n 11).

73 Skinns, Sorsby and Rice (n 6).

74 Skinns, Wooff and Rice (n 8).

75 Skinns, Sorsby and Rice (n 6).

to custodial legal advice and material conditions, this has highlighted the strengths of custody services in Ireland, but also where improvements can be made. To do this, the Garda Inspectorate's *Delivering Custody Services* report has been not only drawn on but also supplemented by empirical evidence from Ireland and England and Wales, which provides an account of the lived experiences of those who work in, and are, detained in police custody.

This analysis shows that while there are many similarities between Ireland, England, and Wales with respect to the policies, procedures, and practices of police custody, there are also some distinctive elements. While police custody has long been the “Cinderella” of police work in England and Wales, this relegated status seems even more pronounced in Ireland. The Garda Inspectorate, for example, noted “significant weaknesses” in the formal oversight of custody at local, regional, and organisational levels,<sup>76</sup> in spite of the large volumes of citizens that cross through the doors of garda custody settings in Ireland. This likely sets the tone and helps explain some of the other distinctive features of garda custody that have emerged from the analysis presented here, including the “significant weaknesses” with risk assessment processes and procedures;<sup>77</sup> the existence of an entitlement to custodial legal advice in theory, but too limited support for this in practice, for example, in the form of a duty solicitor scheme; and inconsistencies in the material conditions of garda custody, which may compromise detainee safety, security, and dignity and staff morale.

At the same time, there are also other distinctive elements of Irish criminal justice that could be used to further support the goals of “good” police custody, particularly of detainee dignity rooted in equal worth, which emphasises that detainees are human beings, just like everyone else. Drawing on Brangan, Hamilton, for example, notes a “distinctively Irish approach whose aims are driven by ‘humanitarian values, a deep scepticism of the prison and a belief that the community, and not the prison, was a superior form of social control and reintegration’.”<sup>78</sup> This sense of the humanitarian nature of penalty could be readily transferred to garda custody in Ireland not only to humanise it but also to ensure that it provides a rehabilitative function, such as by diverting people from garda custody. Indeed, this form of “coercive caring,”<sup>79</sup> in which the police facilitate access to relevant helping agencies, should be seen as one of its many functions. In so doing, police organisations should also recognise their limitations in this regard. The expectation should not be that the police provide this support themselves, but rather that

76 Garda Inspectorate (n 11) 32.

77 Ibid.

78 Hamilton (n 12) 16.

79 AE Bottoms, ‘An Introduction to “The Coming Crisis”’ in AE Bottoms and RH Preston (eds), *The Coming Penal Crisis* (Scottish Academic Press 1980) 20.

they play a role in identifying those who need it and know when and how to refer people to appropriate external agencies. By diverting people from the criminal justice system and also significantly impacting some of the drivers of offending behaviour, in this way, An Garda Síochána has the opportunity to add to the already distinctive path in criminal justice policy and practice, which has been set in motion in other parts of the criminal justice system.<sup>80</sup>

Framing the analysis presented here through the lens of “good” police custody and notions of dignity rooted in equal worth and autonomy enables the setting of a new agenda for the future of garda custody in Ireland. It has been shown how risk assessments and custodial legal advice could be used to uphold the goals of detainee dignity linked to equal worth and to autonomous decision-making. Moreover, the material conditions of police custody are likely to be a precursor to detainee dignity, as well as being important to staff and their ability to support such experiences. Though steps have already been taken in Ireland for delivering custodial legal advice in a meaningful way, improving risk assessments, and providing favourable material conditions for staff and detainees, the “good” custody framework has implications for further improvements in the future:

- Detainees should be fully informed about their rights and entitlements in garda custody, including custodial legal advice provided through the Garda Station Revised Legal Advice Scheme and any likely costs, so that they can be better supported in making autonomous decisions about matters that deeply affect them and their future.
- While posters and leaflets offer one way of informing detainees of these rights, digital technology, such as Apps or infomercials shown on screens in the cells, might offer a more effective way of doing this, which is something which academics and police forces are beginning to explore in England and Wales, for example, in relation to young suspects.<sup>81</sup>
- An Garda Síochána should make the identification and management of risk through appropriate initial and pre-release risk assessment processes a key priority, but do so in ways that support the dignity of detainees. This is likely to require thoughtful and empowered use of discretion based on the availability of a full range of up-to-date information about detainees, and encouragement and careful line management to support case-by-case decisions.
- As part of this risk management process, careful consideration should also be given to whether the person who is brought to the custody block needs

80 Hamilton (n 12).

81 V Kemp, N Carr, H Kent and S Farrall, ‘Examining the Impact of PACE on the Detention and Questioning of Young Suspects’ (unpublished, Final Report for the Nuffield Foundation 2022).

to be there at all and, in fact, whether they can be diverted through judicious use of voluntary interviews by appointment at the police station and, if in custody, whether pre-charge diversion processes could be used to support referral to appropriate helping agencies and to support the “coercive caring” and rehabilitative functions of garda custody.

- Consistently improving material conditions in garda custody across the Irish custody estate should be a critical priority, given the role it plays in supporting detainee dignity. As noted by the Garda Inspectorate, these improvements should include the routine provisions of material goods, such as high-quality food and drink, books, menstrual products, wash packs, religious text(s) and artefacts, and clothing;<sup>82</sup> appropriate facilities, such as legal consultation rooms for private consultations, appropriately equipped and located medical rooms and places for private conversations during the initial risk assessment; appropriate equipment, such as electronic custody records, breath analysis, electronic fingerprint technology, and computer terminals for accessing electronic police records.
- In addition, thought should be given to building dignity and other humanitarian values into the fabric of the custody environment through facilities which are light, bright, and with natural light, are clean, regularly repainted and refurbished and generally well maintained, and have some means of telling the time. National guidance should also be developed, which sets out these intentions and how they should be realised, in practice.

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