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## VULNERABILITY IN POLICE CUSTODY

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### Introduction

When a suspect enters the realm of the criminal process – whether detained in police custody or subject to a voluntary interview – they may be considered vulnerable. The vulnerability of suspects with certain characteristics or conditions – such as young age, and intellectual and psychosocial disability – has been recognised in domestic legislation (e.g. in England and Wales)<sup>1</sup> and by the Council of Europe and the European Union.<sup>2</sup> Yet, the mere engagement with the criminal process and all it involves, particularly at the police custody stage, has also been recognised as something which can render someone vulnerable.<sup>3</sup> While this certainly acknowledges the vulnerability of suspects generally, it does little to ensure that the vulnerability of suspects is recognised in law and in practice. An adequate and appropriate response to a suspect’s vulnerability is a human rights concern whereby failure could result in an interference with the suspect’s right to a fair trial under Article 6 of the ECHR.<sup>4</sup> The recognition and appropriate definition of “vulnerability” is

1 See R Dehaghani, *Vulnerability in Police Custody: Police Decision-Making and the Appropriate Adult Safeguard* (Routledge 2019).

2 See L Mergaerts and R Dehaghani, ‘Protecting Vulnerable Suspects in Police Investigations in Europe: Lessons Learned from England and Wales and Belgium’ (2020) 11(3) *New Journal of European Criminal Law* 313–34.

3 See, e.g. *Salduz v Turkey* App no 36391/02 (ECtHR 27 November 2008).

4 Although there are challenges even here. See *Hasáliková v Slovakia* App no 39654/15 (ECtHR 22 November 2021). See also R Dehaghani, ‘Not Vulnerable Enough? A Missed Opportunity to Bolster the Vulnerable Accused’s Position in *Hasáliková v Slovakia*’ *Strasbourg Observer* (23 November 2021).

important to minimise the risks to justice, to the investigation and wider case, and to the suspect. One particular obstacle is how vulnerability is defined. There remains a lack of clarity with regard to how vulnerability is framed in law and understood – and operationalised – in practice. This chapter will address the question of how vulnerability is and could – or should – be defined.

How vulnerability is defined has been subject to some debate. The term has been criticised for its over- and under-inclusivity.<sup>5</sup> Brown<sup>6</sup> has identified five principal manifestations of vulnerability – two of which are relevant here. First, vulnerability is seen to be determined by physical and/or personal factors (childhood, old age, disability, sensory impairment, and mental health problems, and/or “temporary biological states associated with elevated fragility, and which inspire protective responses, such as acute illness or pregnancy).”<sup>7</sup> Second, vulnerability can be situational and includes those who are experiencing “elevated fragility or ‘risk of harm’ due to biological circumstances, situational difficulties or transgression.”<sup>8</sup> Situational vulnerability is, however, linked with notions of deservingness and tends “to be associated with the active input of a human third party or a structural force but also imagined to contain elements of individual choice or agency.”<sup>9</sup>

This chapter examines how vulnerability is, and could, or should be defined in the context of suspects in police custody. While the focus is on the potential for improvements in Ireland, experience in England and Wales, where the law, practice, and research on this issue are at a more advanced stage, is referred to throughout. First, this chapter briefly examines how the vulnerability of suspects has been framed within European Union (EU) developments and within judgments of the European Court of Human Rights (ECtHR), based on the European Convention on Human Rights (ECHR), including the limitations of this framing. Then, this chapter adopts a psychology and law perspective to defining vulnerability in respect of suspects and explores why (some) suspects are vulnerable, and in what way(s). Thereafter, this chapter considers a more comprehensive approach to defining the vulnerability of suspects, considering the ways in which processes and procedures of police custody – as the beginning and often the end of the criminal process – may create or exacerbate vulnerability, and argues that a more encompassing approach is necessary. This chapter urges that more work is necessitated to – accurately and adequately – define vulnerability and provide

5 Dehaghani (n 1).

6 K Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (Policy Press 2015).

7 *Ibid.*, 29.

8 *Ibid.*, 28.

9 *Ibid.*, 31.

support to vulnerable suspects and argues that law and regulation in Ireland should acknowledge a holistic approach to the vulnerability of suspects.

### Defining Vulnerability: The EU and ECHR Approach

Young age is widely recognised as constituting a vulnerability (at least in law, if not necessarily in practice).<sup>10</sup> The ECtHR lists several considerations that could render a suspect acutely vulnerable. In addition to young age, factors include chronic alcoholism and/or acute alcohol intoxication; a physical disability or medical condition; belonging to a socially disadvantaged group; and mental disorder (e.g. ADHD).<sup>11</sup> The vulnerability of a suspect or defendant may be relevant to the right to a fair trial under Article 6 of the ECHR if there has been an alleged or actual failure to make adjustments for a suspect's or defendant's vulnerability. In a recent case, *Hasáliková v Slovakia*,<sup>12</sup> the ECtHR considered whether the applicant (A) – who had been convicted of murder – was a vulnerable person and whether she therefore, required reasonable adjustments to understand and participate meaningfully in the criminal process. A had attended “special school,” was entitled to disability benefits, attended a psychiatrist, had an “obvious” physical disability, and an evident intellectual disability. Further, in addition to noting A's intellectual disability, an expert psychiatric assessment<sup>13</sup> explained that A displayed infantile and simplistic thinking, and was “very naïve, emotionally immature, and easily influenced.”<sup>14</sup> However, the majority considered A not to be vulnerable because she was not suffering from mental illness or disorder, could recognise the dangerousness of her actions, and had foresight of the consequences.<sup>15</sup> They also considered that A was an adult, was literate, had been assisted by a lawyer, and had not indicated that she experienced difficulty understanding or expressing herself until a year into the process. In doing so, the Court adopted a very narrow – and problematic – interpretation of vulnerability or, more accurately, non-vulnerability. The dissenting judges, Judges

10 Ibid. See R Dehaghani, “Vulnerable by Law but Not by Nature”: Examining Child and Youth Vulnerability in the Context of Police Custody’ (2017) 39(4) *Journal of Social Welfare and Family Law* 454–72; See also Chapter 11 in this volume.

11 *Blobkin v Russia* App no 47152/06 (ECtHR 23 March 2016); *Borotyuk v Ukraine* App no 33579/04 (ECtHR 16 December 2010); *Bortnik v Ukraine* App no 39582/04 (ECtHR 27 January 2011); *Plonka v Poland* App no 20310/02 (ECtHR 31 March 2009); *Orsus and others v Croatia* App no 15766/03 (ECtHR 16 March 2010).

12 *Hasáliková* (n 4).

13 This problematically focused on A's responsibility for the offence rather than her ability to understand process and procedure within the context of the criminal process. The dissenting judges highlighted this issue in their dissenting judgment.

14 *Hasáliková* (n 4) para 2.

15 Ibid.

Turković and Schembri Orland, finding that there had been a violation of A's fair trial rights, argued that A's intellectual disability and the consequences thereof would have made her vulnerable – and in doing so drew upon existing research on wrongful convictions and false confessions, in addition to the special consideration for vulnerable suspects by the Council of Europe and European Union, such as the Roadmap discussed later.<sup>16</sup>

The definition of vulnerability has also been addressed by the European Union. The European Commission, in its development of minimum procedural safeguards for suspects and defendants, defines vulnerability to include foreign nationals, children, those with a psychosocial disability (“mental or emotional handicap”) or physical illness or disability, carers for young children, those with trouble reading and writing, refugees and asylum seekers, and those with alcohol and/or drug issues.<sup>17</sup> The Resolution for a Roadmap on the Strengthening of Procedural Rights of Suspected or Accused Persons in Criminal Proceedings<sup>18</sup> Measure E urges that special attention be given to suspects and defendants “who cannot understand or follow the content or the meaning of the proceedings, for example because of their age, mental or physical condition.”<sup>19</sup> This can be said to constitute a definition of vulnerability, particularly as this element of the Roadmap has been reflected in a Recommendation encouraging EU member states to introduce measures to bolster the procedural rights of vulnerable suspects and defendants.<sup>20</sup> Several Directives, while focusing on strengthening procedural rights for all suspects and defendants, include provisions on the consideration of the particular needs of vulnerable suspects and defendants;<sup>21</sup> Ireland has opted into some, but not all, of these Directives.

16 Ibid.

17 European Commission, *Green Paper from the Commission: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union* (European Commission 2003) 32–34.

18 Resolution of November 30, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings [2009] OJ C295/1.

19 Resolution of November 30, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings [2009] OJ C295/1, Measure E.

20 European Commission, Recommendation of November 27, 2013, on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C378/02.

21 Directive 2010/64/EU of October 20, 2010, on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of October 22, 2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive 2016/343 of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

The Recommendation, unlike the Directives, contains a definition of vulnerability: “all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities.”<sup>22</sup> This definition has not, however, been accepted amongst member states.<sup>23</sup>

### Defining Vulnerability: The Legal Psychology Approach

The legal psychology (or psychology and law) perspective offers useful insights into what may make a suspect vulnerable. This approach has significantly influenced the legal framework on vulnerable suspects in England and Wales, and Northern Ireland, under the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (NI) Order 1989, specifically Code C of the Codes of Practice, which detail how vulnerability is defined for the purposes of the “appropriate adult” safeguard – a safeguard for vulnerable suspects.<sup>24</sup> Indeed, by adopting such an approach, England and Wales have been commended for “taking the lead”<sup>25</sup> in respect of police investigations. It also seems to have significantly influenced – or dictated – definitions of vulnerability at a European level, and was explicitly discussed by the dissenting judges in *Hasáliková*.

22 Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings [2009] OJ C295/1.

23 This is arguably why implementation was through a non-binding Recommendation (rather than a Directive). See Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings [2013] OJ C378/02.

24 In England and Wales, an appropriate adult is available for all children under 18 years of age and for adults with a mental disorder or mental health condition who may struggle to communicate, understand their rights and entitlements or what they are told, may be confused or unclear about their position, may provide unreliable, misleading or incriminating information without knowing or wishing to do so, or may be suggestible or acquiescent. Home Office, *Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Home Office 2019). Similar provisions exist Northern Ireland – Department of Justice, *Police and Criminal Evidence (NI) Order 1989 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* (Department of Justice 2015). In Ireland, suspects under 18 years of age or with a “mental handicap” are entitled to have an appropriate – or responsible – adult present during questioning per the Criminal Justice Act 1984 and the Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987, Regulations 13(2), 22(1) and 22(2). In England and Wales, and Ireland, there are problems with how the safeguard is implemented for adults and a general lack of understanding of the provisions, particularly the role of the appropriate/responsible adult and the definition of vulnerability. See *Salduz* (n 3) (England and Wales); Garda Síochána Inspectorate, *Delivering Custody Services: A Rights-Based Review of the Treatment, Safety and Wellbeing of Persons in Custody in Garda Síochána Stations* (Garda Síochána Inspectorate 2021) (Ireland).

25 G Gudjonsson, ‘Psychological Vulnerabilities During Police Interviews: Why Are They Important?’ (2010) 15 *Legal and Criminological Psychology* 161–75, at 161.

The first significant point of note is that there is no “generally agreed definition” of psychological vulnerability.<sup>26</sup> In the context of police custody, however, vulnerability has been defined as “psychological characteristics or mental states which render a [person] prone, in certain circumstances, to providing information which is inaccurate, unreliable, or misleading.”<sup>27</sup> Yet, rather than providing definitive markers, vulnerability is viewed as a range or continuum of potential risk factors.<sup>28</sup> Generally, vulnerable suspects are recognised as “not fully understand[ing] the significance of the questions put to them or the implications of their answers [or being] unduly influenced by short-term gains (e.g., being released from custody) and by the interviewer’s suggestions.”<sup>29</sup> It is generally accepted that children are vulnerable,<sup>30</sup> although the situation is a little more complicated for adults who are not generally seen as vulnerable unless additional factors are present.<sup>31</sup>

Gudjonsson – whose research has been particularly influential in this area – identified four “types” of vulnerability relevant to suspects: (i) “mental disorder,” (ii) abnormal mental states, (iii) intellectual functioning, and (iv) personality.<sup>32</sup> “Mental disorder” includes mental illness, personality disorder, and learning disability (although the terms “psychosocial disability” in relation to the first two terms and “intellectual disability” in relation to the last term may be preferred). The second category – abnormal mental states – is said to include anxiety (which is high amongst suspects<sup>33</sup> and correlates closely with suggestibility),<sup>34</sup> phobias, bereavement, intoxication, withdrawal, and mood disturbance (some of these may be considered a “psychosocial disability”). The fourth category includes traits such as suggestibility, compliance, and acquiescence, although some suspects falling into the other three categories may exhibit such traits because of their “mental disorder.” While authentication regarding these traits is “regularly

26 Ibid citing R Bull, ‘The Investigative Interviewing of Children and Other Vulnerable Witnesses: Psychological Research and Working/Professional Practice’ (2015) 15 *Legal and Criminological Psychology* 5–23.

27 G Gudjonsson, ‘The Psychological Vulnerabilities of Witnesses and the Risk of False Accusations and False Confessions’ in A Heaton-Armstrong and others (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (OUP 2006) at 68.

28 Gudjonsson (n 25); G Gudjonsson and T Joyce, ‘Interviewing Adults with Intellectual Disabilities’ (2011) 5(2) *Advances in Mental Health and Intellectual Disabilities* 16–21, at 18.

29 G Gudjonsson, ‘Confession Evidence, Psychological Vulnerability and Expert Testimony’ (1993) 3 *Journal of Community and Applied Social Psychology* 117–29, at 121.

30 See also Chapter 11 in this volume.

31 See Dehaghani (n 1).

32 G Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley 2003) at 61–75.

33 Gudjonsson (n 25).

34 G Gudjonsson, S Rutter and I Clare, ‘The Relationship Between Suggestibility and Anxiety Among Suspects Detained at Police Stations’ (1995) 25 *Psychological Medicine* 875–78.

admitted as evidence to challenge admissibility and the weight of the confession evidence,<sup>35</sup> some conditions – such as personality disorder – may prove difficult to evidence owing to the little scientific information regarding the impact on reliability,<sup>36</sup> in police interviews.<sup>37</sup>

An intellectual disability<sup>38</sup> can result in feelings of intimidation when interviewed by those in positions of authority<sup>39</sup> and can increase the likelihood of suggestibility, compliance, and acquiescence.<sup>40</sup> O’Mahony et al. have found that those with an intellectual disability may be more likely to change their behavioural responses on the basis of communication; may respond in the affirmative when asked questions regardless of what that question is asking; and may go along with statements that they disagree with,<sup>41</sup> doing so to maintain self-esteem or avoid conflict.<sup>42</sup> Even those with a mild learning disability can struggle with communication or may have to make a concerted effort to be sufficiently understood, particularly in unfamiliar circumstances. That said, they may struggle to differentiate statements from others, handle or recall information, or pay attention, plan, and control inhibitions.<sup>43</sup>

While Gudjonsson’s more recent research has identified four traits that may render a suspect vulnerable, his earlier work – with MacKeith – acknowledged that a suspect’s capacity to cope with police interview (and arguably also the broader processes and procedures in police custody) depends upon “circumstances (the nature and seriousness of the crime, pressure on the police to solve the crime) . . . interactions . . . personality . . . and health (physical and mental health, mental state).”<sup>44</sup> Physical illness – such as epilepsy, diabetes, and heart problems – has also been noted to lead to heightened agitation and distress, and thus, impair the accuracy and reliability of confession

35 Gudjonsson (n 32) 3.

36 It is worth noting that reliability is a key factor when the courts consider the admissibility of evidence in England and Wales (where much of Gudjonsson’s research and expert witness activities have been based).

37 Gudjonsson (n 25) 167.

38 See also Chapter 12 in this volume.

39 M St-Yves, ‘The Psychology of Rapport: Five Basic Rules’ in T Williamson (ed), *Investigative Interviewing: Rights, Research and Regulation* (Willan 2006).

40 *Ibid.* at 98.

41 B O’Mahony, B Milne and T Grant, ‘To Challenge, or Not to Challenge? Best Practice When Interviewing Vulnerable Suspects’ (2012) 6 *Policing* 301–13.

42 Gudjonsson (n 32).

43 X Moonen, M de Wit and M Hoogeveen, ‘Mensen met een licht verstandelijke beperking in aanraking met politie en justitie’ (2011) 90(5) *Proces*, tijdschrift voor strafrechtspleging 235–50, at 235–39.

44 Gudjonsson (n 25) citing G Gudjonsson and J MacKeith, *Disputed Confessions and the Criminal Justice System* (Institute of Psychiatry 1997). See also Gudjonsson and Joyce (n 28).

evidence.<sup>45</sup> Neurological conditions – which may or may not impair intellectual functioning – such as Parkinson’s disease, stroke, and dementia, can impair an individual’s cognitive abilities; those with neurological conditions may therefore also be considered vulnerable.<sup>46</sup>

Although false confessions are not the only risk to justice for failing to safeguard a vulnerable suspect, and not all vulnerable suspects falsely confess, being “vulnerable” can increase the risk of false confession evidence. There are several reasons why a suspect may falsely confess. First, they voluntarily falsely confess in the absence of police pressure because they desire notoriety, feel a need to redress guilt (e.g. from a previous transgression), are unable to differentiate between fantasy and reality, expect leniency, wish to protect or assist the actual offender, or are seeking revenge on another person.<sup>47</sup> Such false confessions are not confined to those with mental health problems and may occur when a suspect is above average intelligence.<sup>48</sup> Second, a suspect may falsely confess because they wish to gain something such as being able to leave custody earlier, bringing the interview to an end, or avoiding detention altogether – known as coerced-compliant confessions. With coerced-compliant confessions, the “perceived immediate gains outweigh the perceived and uncertain long-term consequences” and “suspects may naively think that somehow the truth will come out later, or that their solicitor will be able to sort out their false confession.”<sup>49</sup> Suspects who are prone to anxiety, succumb easily to pressure, or have an intellectual disability may be more prone to coerced-compliant confessions.<sup>50</sup> Finally, false confessions may occur when a suspect believes that they have committed the crime without any memory of having done so.<sup>51</sup> The suspect may either have no memory of what they were doing at the time of the alleged offence from the outset of the police interview or develop a distrust of their memory owing to “subtle manipulative influences by the interrogator.”<sup>52</sup> These coerced-internalised false confessions can occur if the suspect, for example, experiences blackouts due to excessive alcohol or drug consumption, or where the suspect has poor self-esteem and succumbs to pressure.<sup>53</sup> The psychology and law literature thus recognises a myriad of factors that can render a suspect vulnerable,

45 G Gudjonsson and others, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Procedure Research Study no 12, HMSO 1993) at 16.

46 Justice, *Mental Health and Fair Trial* (Justice 2017) at 15.

47 Gudjonsson (n 32) 194–95.

48 *Ibid.* at 218–24.

49 *Ibid.* at 196.

50 *Ibid.* at 224–33.

51 *Ibid.* at 196.

52 *Ibid.* at 197.

53 *Ibid.* at 233–42.

although tends to focus more on the individual and less on the broader systemic structures and processes. Moreover, the focus within this literature is largely, although not exclusively related to how to identify risks of and thus, avoid false confessions. However, false confessions should not be considered the only risks posed to justice – it is necessary to view vulnerability in a much broader frame with consideration to the right to a fair trial and the right to humane treatment.<sup>54</sup>

### A More Inclusive Approach to Defining “Vulnerability”

As noted in the introduction, vulnerability can be viewed as, *inter alia*, innate and/or situational.<sup>55</sup> In the context of police custody, individuals can be innately vulnerable owing to, for example, young age or psychosocial disability. This “type” of vulnerability, while at times connected with notions of deservingness, is broadly recognised in domestic and European documents and frameworks.<sup>56</sup> There are, however, some limits placed on this approach – often physical disability and the effects thereof (as earlier) are given limited, to no recognition, in the law as it relates to vulnerability in police custody.<sup>57</sup> The psychology and law approach, explored earlier, defines vulnerability as a set of “psychological characteristics or mental states which render a [person] prone, in certain circumstances, to providing information which is inaccurate, unreliable or misleading.”<sup>58</sup> This approach also considers the factors that may impact the mental state of an individual. In doing so, it largely focuses on innate vulnerability, although certainly situational vulnerability can be “read into” this approach.<sup>59</sup> Thus, the psychology and law approach, while incredibly helpful in highlighting the ways in which a suspect’s mental state(s) or characteristic(s) can render them vulnerable (in the manner noted earlier), does not fully examine the ways in which someone’s situation may

54 On humane treatment and special measures for defendants in England and Wales, see S Fairclough, ‘The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment’ (2021) 41(4) *Oxford Journal of Legal Studies* 1066–95.

55 Gender, sexuality, and race/ethnicity may also be considered, but will not be explored within this chapter. On race and police custody see Chapter 10 in this volume; on gender, sexuality, and ethnicity, see V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury Professional 2023).

56 R Dehaghani, S Fairclough and L Mergaerts, *Vulnerability, the Accused, and the Criminal Justice System: Multi-Jurisdictional Perspectives* (Routledge 2023).

57 The only exception here is arguably the assessment for fitness for interview, which acknowledges the impact of physical illness on the suspect. This approach does not, however, lead to the provision of additional support. In short, it results in a delayed interview or possibly no interview at all; the process is not adjusted; it is simply delayed and/or avoided.

58 Gudjonsson (n 27) 68.

59 See, e.g. R Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) 30(2) *Social and Legal Studies* 251–71.

render them vulnerable. In the context of police custody, an individual is situationally vulnerable in a myriad of ways, as discussed later.

First, suspects can be situationally vulnerable because, through the act of being detained, their liberty has been restricted, which results from the authorisation, and continuation of, their detention. Provisions invoked in non-terrorist<sup>60</sup> cases in England and Wales, allow an initial period of 24 hours detention without charge upon authorisation of a custody officer,<sup>61</sup> 36 hours without charge upon authorisation of a senior officer (of rank Superintendent or earlier) if the offence is indictable,<sup>62</sup> and thereafter, up to a maximum total of 72 hours by application to the magistrates' court.<sup>63</sup> In Ireland,<sup>64</sup> the situation is a little more complex; depending on the offence in question, provisions variously allow for detention up to an initial period of six<sup>65</sup> or 24 hours;<sup>66</sup> initial extensions can be authorised by a Superintendent after six hours<sup>67</sup> and 18 hours<sup>68</sup> and by a chief superintendent after 18<sup>69</sup> and 24 hours.<sup>70</sup> Further extensions, by Chief Superintendent, are permitted for 12 hours<sup>71</sup> and 24 hours;<sup>72</sup> and any further extensions can be authorised by the courts,<sup>73</sup> with a total maximum of detention time of between 24 hours and seven days. Average detention lengths in Ireland are not (yet) known;<sup>74</sup> in England

60 The maximum length of detention without charge is longer in terrorism cases – a maximum of 28 days under the Terrorism Act 2006 per s 23.

61 Police and Criminal Evidence Act 1984 s 41. Within the initial 24-hour period, detention must be reviewed no later than after six hours from the authorisation of detention (first review) and then, no later than nine hours after the first review (second review), with subsequent reviews occurring at intervals of not more than nine hours – PACE s 40(3) – and can only be postponed under certain circumstances as per PACE 1984 s 40(4).

62 PACE 1984 s 42. Indictable offences in England and Wales are those to be tried at the Crown Court.

63 PACE 1984 s 43.

64 For more information, see Y Daly, A Muirhead and C Dowd, 'EmpRiSe Ireland Final Report' <<https://empriseproject.files.wordpress.com/2022/06/ab912-emprise-ireland.pdf>> accessed 6 March 2023. Offences Against the State Act 1939 s 30.

65 Criminal Justice Act 1984 s 4; Criminal Justice (Drug Trafficking) Act 1996 s 2; Criminal Justice Act 2007 s 50. Those arrested under Criminal Justice Act 1999 s 42, Criminal Procedure Act 2010 s 16, or Criminal Procedure Act 2010 s 17 may be detained for the same periods as is authorised under Criminal Justice Act 1984 s 4.

66 Offences Against the State Act 1939 s 30.

67 Criminal Justice Act 1984 s 4.

68 Criminal Justice (Drug Trafficking) Act 1996 s 2.

69 Criminal Justice Act 2007 s 50.

70 Offences Against the State Act 1939 s 30.

71 Criminal Justice Act 1984 s 4. See also Criminal Justice Act 1984.

72 Criminal Justice (Drug Trafficking) Act 1996 s 2; Criminal Justice Act 2007 s 50.

73 24-hours is the maximum time under the Criminal Justice Act 1984 s 4, with no further authorisation by the courts; see also n.72. 72 hours is the maximum under the Offences Against the State Act 1939 s 30; 7 days is the maximum under Criminal Justice (Drug Trafficking) Act 1996 s 2 and Criminal Justice Act 2007 s 50.

74 The Garda Inspectorate report on police custody (n 24) published in July 2021 was the first of its kind but regrettably did not examine detention lengths.

and Wales detention has been found to last an average of ten hours.<sup>75</sup> This restriction of liberty may be justified on various grounds (see Article 5 of the ECHR), but it may render a suspect vulnerable or enhance an already existing “innate” vulnerability. Detention also occurs within an environment that is designed to manage and mitigate risks (e.g. of suicide, self-harm, or harm to others),<sup>76</sup> is generally unpleasant,<sup>77</sup> and often sensorily overwhelming – with bright strip-lighting in reception areas and dimly lit cells, noisiness or eery silence, and smells of urine, vomit, faeces, stale blood, (stale) alcohol, body odour, and disinfectant.<sup>78</sup> Such conditions can be destabilising, overwhelming, and bewildering.<sup>79</sup>

Within police custody, a suspect may be isolated in a multitude of ways. First, a suspect has restricted – if not entirely absent – interaction with relatives and friends. Although a suspect cannot be held incommunicado, they are not permitted to interact with loved ones as, and when, they wish during their period of detention. In England and Wales, a suspect is permitted to have someone – a friend, relative, or other person with an interest in their welfare – informed of their arrest and detention as soon as is practicable (although delays are permitted in some circumstances).<sup>80</sup> This may be in the form of a phone call from the custody officer<sup>81</sup> or detention officer to the selected person or, at the officer’s discretion, a phone call from the suspect to the selected person. For those entitled to an appropriate adult,<sup>82</sup> they may have longer interactions with someone known to them, although these interactions are arranged for particular legal purposes such as facilitating participation in police interview, often to the benefit of the police.<sup>83</sup> In Ireland, an arrested person is permitted a visit from a relative, friend, or other person with an interest in their welfare, although this visit can be supervised and must not hinder or delay the investigation.<sup>84</sup> Supervised phone calls and

75 L Skinnis, ‘“Let’s Get It Over with”: Early Findings on the Factors Affecting Detainees’ Access to Custodial Legal Advice’ (2009) 19(1) *Policing and Society* 58–78.

76 Although Skinnis found that some facilities in Ireland had escape routes and ligature points – see L Skinnis, *Police Powers and Citizens’ Rights: Discretionary Decision-Making in Police Detention* (Routledge 2019). See also An Garda Síochána Inspectorate (n 24).

77 See L Skinnis, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Willan 2011) 26(3).

78 R Dehaghani, ‘Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody’ (2021) 30(2) *Social and Legal Studies* 251–71.

79 *ibid.*

80 PACE 1984, s 56.

81 An officer of at least rank sergeant. In Ireland, this would be the “member in charge” (at garda or sergeant rank).

82 See Home Office (n 24).

83 See Dehaghani (n 1).

84 Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987 s 11.

letters to a nominated person are also permitted in the same circumstances.<sup>85</sup> These communications are not, importantly, privileged<sup>86</sup> and may therefore be stifled. A responsible adult may be called for those entitled to one;<sup>87</sup> although provisions are scant, entitlement is limited to interview, and, for adults, entitlement is only for those with a “mental handicap.”<sup>88</sup> In both jurisdictions, therefore, interaction with relatives and friends is limited in terms of form and/or function.

Of course, suspects may have several interactions with the police during their stay in police custody. These interactions are typically centred on particular stages of the process – the authorisation of detention;<sup>89</sup> the communication of rights and entitlements; welfare checks and/or gathering evidence (such as, but not limited to, police interview) – and/or the safeguarding obligations placed on the police and related individuals such as healthcare and medical practitioners. For example, in England and Wales, there are a range of safeguarding measures to prevent harm to, and by, a suspect in police custody. At booking-in, a suspect will typically be asked a range of questions relating to their health and well-being, with the purpose of ascertaining and appropriately managing risk. Significant attention is paid to the risk assessment, at least in terms of safeguarding the police from accusations of a breach of duty of care.<sup>90</sup> These interactions, in addition to being purely (or at least mostly) motivated by concerns regarding risk management,<sup>91</sup> can themselves be destabilising, frustrating, and/or upsetting.<sup>92</sup> Thus, not only are these interactions limited, if not entirely ineffective, in ameliorating the sense of isolation that a suspect may be experiencing, but they may also serve to further exacerbate any sense of vulnerability, such as through discussion of, the nature and gravity of, previous self-harm and/or suicide attempts. Conversations with any healthcare practitioners – who are usually present in large custody facilities in England and Wales – may also be driven by risk management procedures and arguably arise solely because the individual has been detained in police custody. As these interactions are not wholly voluntary, they may do little to dispel any feelings

85 Ibid.

86 Ibid.

87 See Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987, Regulation 13(1), Regulation 13(2), Regulation 22(1).

88 Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987, Regulation 22(1). The term “mental handicap” is archaic. Moreover, this category is particularly restrictive as it requires a significant impairment. See Dehaghani (n 1).

89 Although, only by a member in charge in Ireland, for serious offences. See An Garda Síochána Inspectorate (n 24).

90 See Dehaghani (n 1).

91 In the England and Wales context, see, e.g. Dehaghani (n 1).

92 Ibid.

of isolation. In Ireland, there are similar questions asked as part of a risk assessment, as per garda policy.<sup>93</sup> Information regarding mental health, learning difficulties, and self-harm, in addition to information regarding the condition of the person (to include any visible injuries, illness, medical condition, and consumption of drugs or alcohol), is gathered through questions posed to the detainee, garnered from general observations, and information from the arresting officer.<sup>94</sup> Contrastingly, in England and Wales, questions regarding an individual's previous self-harm attempts and other confidential information about their mental (ill) health are asked as part of the risk assessment process. While the purpose of the risk assessment is also, in Ireland, about keeping detainees safe through the prevention and minimisation of harm, similar issues regarding the voluntariness (or otherwise) of these interactions and the effects of the questions asked must be acknowledged.<sup>95</sup>

While isolation may adversely impact any suspect, it also has practical implications in relation to understanding rights and entitlements in custody for those who experience barriers when reading and writing. As Rock notes, detention can interfere with a suspect's ability to understand rights and entitlements because "reading in detention . . . necessitates reading alone";<sup>96</sup> police custody "dismantles" the support networks upon which individuals may rely in their day-to-day lives.<sup>97</sup> Therefore, those who can read (somewhat) independently outside of police custody may be unable to do so when detained. This has serious implications for a suspect's understanding of their rights and entitlements and therefore, upon their ability to understand the process and meaningfully engage therein. Attempts may be made to ameliorate this through the provision of an appropriate (in England and Wales) or responsible (in Ireland) adult, although the remit of this safeguard is restrictive in law and restricted practically – it only applies to a narrow category of suspects.<sup>98</sup>

93 See Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987. The Garda Inspectorate also raises concerns regarding the lack of statutory footing for the rights, entitlements, and processes designed to protect suspects' rights and well-being. See An Garda Síochána Inspectorate (n 24). See Conway and Daly for further information on the Garda risk assessment (n 55) at 115–19.

94 Conway and Daly (n 55) at 115–19.

95 In Ireland, there are also concerns about the recording of risk assessment information – paper-based (Ireland), which reduces accessibility of information, particularly information from previous records, as compared with electronic (England and Wales) – and availability and quality of medical attention-on-call and low quality (Ireland) compared with in situ and reliable quality (England and Wales). See Conway and Daly (n 55) at 115–21.

96 F Rock, *Communicating Rights: The Language of Arrest and Detention* (Palgrave Macmillan 2007) at 109.

97 *ibid* at 109.

98 See, e.g. Chapter 12 in this volume; see also Dehaghani (n 1) in the context of England and Wales.

There are also restrictions on matters of daily routine such as eating, drinking, exercise, personal hygiene, and taking medication, which can reduce freedom and autonomy and further contribute to feelings of isolation and vulnerability. Suspects are restricted by the practicalities of detention – they are locked in a cell for most of their stay, with movements controlled and supervised by custody staff. A suspect, while permitted rest time and meals, has limited to no control over when to rest and eat. Showering and toileting may also be limited or restricted. Showers in custody suites may lack functionality and/or privacy<sup>99</sup> or may depend upon staff availability to provide access. Toilets, typically within the cell, afford some level of privacy, although unannounced welfare checks and lack of access to toilet paper<sup>100</sup> may impede such privacy, and may, therefore, be destabilising, interfere with autonomy, and exacerbate feelings of dependence.<sup>101</sup> Consumptions of alcohol, cigarettes, and illicit substances are also prohibited, and access to medication is restricted: in England and Wales, medication must be provided by a healthcare professional subject to restrictive controls<sup>102</sup> and, in Ireland, is subject to medical advice and provided only where the health condition is deemed serious.<sup>103</sup> The suspect is, therefore, physically and territorially controlled by police,<sup>104</sup> where freedom and autonomy are almost entirely absent.

Suspects may also be subject to behavioural or social control; they may be limited in terms of permitted or accepted behaviour and may be reprimanded or treated punitively for a failure to comply with expected behavioural and/or social norms. Compliance and deference are expected within the context of police custody – suspects are expected to comply with officers' requests<sup>105</sup> and can be punished – or at least treated somewhat punitively – for failing to comply. During observations in police custody in England in 2014 and 2015,<sup>106</sup> suspects who were deferent and compliant were typically treated with courtesy, kindness, and (often) afforded special treatment such as being allowed to take reading materials into their cell or being given extra food and

99 See, e.g. An Garda Síochána Inspectorate (n 24) 68.

100 *ibid* 67. Skinns' research found cell sharing in Ireland to be a not uncommon practice, which can be particularly degrading where a detainee must use the toilet in front of another detainee. Skinns (n 76).

101 Dehaghani (n 1); Dehaghani (n 59).

102 College of Policing, 'Authorised Professional Practice: Detainee Care' <[www.college.police.uk/app/detention-and-custody/detainee-care/detainee-care](http://www.college.police.uk/app/detention-and-custody/detainee-care/detainee-care)> accessed 18 November 2022.

103 Criminal Justice Act 1984 and Treatment of Persons in Custody in Garda Síochána Stations Regulations 1987 s 21.

104 J Hodgson, 'Adding Injury to Injustice: The Suspect at the Police Station' (1994) 21 *Journal of Law and Society* 85–101.

105 S Holdaway, *Inside the British Police: A Force at Work* (Basil Blackwell 1983).

106 See Dehaghani (n 1).

drink (although there were certainly classed, gendered, and racialised elements to this treatment and to perceptions of deference and compliance). However, those suspects who were unwilling to answer questions during “booking-in” (such as when questions are asked as part of a risk assessment)<sup>107</sup> or who were seen to be disrespectful, demanding, or difficult, were treated with disdain, and were often threatened with being taken “straight to cell” as a form of punishment. These suspects, while not necessarily treated in breach of law and guidance, were not given the same “luxuries” as those who had been – or were perceived to be – deferent and compliant. Indeed, as Choongh highlights, the “booking-in” procedure, such as risk assessment and searches, can serve as a status degradation ceremony.<sup>108</sup> Less is known about risk assessment procedures in Ireland, although it is likely, given what we know about police culture generally,<sup>109</sup> that booking-in procedures – and other related procedures in police detention – are here too experienced as a form of social discipline.<sup>110</sup>

The suspect is also subject to informational control<sup>111</sup> as the police maintain power over the timing, format, and amount of information provided to the suspect. In England and Wales, where a suspect has access to a lawyer, a request for disclosure can be made but may not always be forthcoming.<sup>112</sup> In Ireland, where access to a lawyer during police detention has been a relatively recent development, there is no legal obligation on An Garda Síochána to provide information prior to interview (although, practically, not providing information may hamper the police interview and may increase the likelihood of a “no comment” interview).<sup>113</sup> Thus, in both jurisdictions, the police have the upper hand through informational control. The maintenance of informational control can bring with it some degree of uncertainty for

107 Risk assessments are conducted in England and Wales, and in Ireland, although in Ireland, the risk assessment is limited to booking-in only. In comparison, in England and Wales there is an ongoing assessment of risk (at least in theory) and an assessment of risk pre-release. See An Garda Síochána Inspectorate (n 24) and Conway and Daly (n 55) for more information on the risk assessment in Ireland, and College of Policing (n 102) and Dehaghani (n 1) for more information on the risk assessment in England and Wales.

108 S Choongh, *Policing as Social Discipline* (Clarendon Press 1997); see also Dehaghani (n 1).

109 R Reiner, *The Politics of the Police* (4th edn, OUP 2010).

110 Skinnis found that “staff across all . . . detention facilities . . . displayed a . . . coercive style of authority in their relationships with detainees” which included “using a variety of sanctions and rewards to encourage but also reward compliance.” In Ireland, this included the use of cigarettes to get a drunk detainee to sign a consent form. Skinnis (n 76) 146–47.

111 Hodgson (n 104).

112 See, e.g. T Smith, ‘The “Near Miss” of Liam Allan: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice’ (2018) 9 *Criminal Law Review* 711–31.

113 An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Custody* (An Garda Síochána 2016) at 5.

the suspect regarding the evidence available and the progress of the case, including, but not limited to, the length of their detention.<sup>114</sup> The suspect also lacks information regarding the outside world, at least for the period of their detention – for those with caring responsibilities, for example, they may worry about how – or whether – their loved one is being looked-after during their detention. Uncertainty can destabilise a suspect to the point that they confess,<sup>115</sup> and it is not unusual for suspects to falsely confess when faced with uncertainty.<sup>116</sup>

Detention in custody also often marks the commencement of the criminal process.<sup>117</sup> Within this process, suspects are expected to engage with the legal sphere which brings with it alien, impenetrable, and archaic convention, language, and procedure. Those without legal training (i.e. most suspects) may struggle to comprehend the terms used, and their impacts. One such example is offered by McConville, Sanders, and Leng.<sup>118</sup> In this case, the suspect, during an altercation with his girlfriend, had swung his arm out and had hit the windscreen of a parked car leading to his arrest for suspected criminal damage. When asked whether he had swung his arm out “recklessly,” the suspect replied that he had, although it was evident to the researchers that he interpreted “recklessly” to mean “accidentally.” The officer knew that by using the term “recklessly” the *mens rea* of the offence would have been made out (as criminal damage can be committed intentionally or recklessly); the suspect did not understand this to be the case and, by agreeing to have swung his arm out in a reckless manner, had *de facto* admitted to committing the offence.

Access to effective legal advice and representation may ameliorate this legal vulnerability. In Ireland, suspects are permitted to consult a lawyer, but the threshold for access to the state-funded Garda Station Legal Advice Scheme is relatively high, meaning that some suspects may not be in a financial position to pay for legal assistance.<sup>119</sup> The position in England and Wales

114 See, e.g. Dehaghani (n 1); Skinns (n 75).

115 See Holdaway (n 105) at 102.

116 See generally, Gudjonsson (n 32). Uncertainty generally can cause a suspect or defendant to act against their own best interests. See, e.g. on guilty plea decision-making. RK Helm, R Dehaghani and D Newman, ‘Guilty Plea Decisions: Moving Beyond the Autonomy Myth’ (2022) 85(1) *Modern Law Review* 133–63.

117 It can also be the end point of the criminal process. See J Jackson, ‘Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence’ [2016] *Modern Law Review* 987–1018 – when cases are effectively tried at the police station, or by a police officer rather than a criminal case where detention is used as a form of social discipline and cases were never destined for the criminal justice system. See Choongh (n 108).

118 M McConville, A Sanders and R Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Routledge 1991).

119 A person earning more than €20,316 per annum will not be able to avail of legal assistance under the scheme and will need to pay privately. According to the Central Statistics Office, the average salary per annum in quarter two of 2022, in Ireland, was over €45,000. Central

is considerably more generous – suspects are entitled to free and independent legal advice and representation at police stations, regardless of their income, and may consult their lawyer at any time.<sup>120</sup> However, the right to legal advice and representation at police stations is found to be restricted in practice. Research in England and Wales has highlighted problems with how suspects understand their right to legal advice and its importance. They may be keen for release as soon as possible and may therefore, view the accessing of legal advice as something that could delay their release (despite the fact that delays are often unconnected with legal advice).<sup>121</sup> They may believe that the offence is less serious, and therefore, no legal advice is required; and/or they may feel that requesting legal advice could undermine the perception of innocence in that the police would infer guilt from the request.<sup>122</sup> Police ploys may also influence a suspect’s decision to obtain legal advice: important information may be omitted; rights may be read quickly or only once, even where the suspect has not understood what is being said; and rights may be provided verbally.<sup>123</sup> This is exacerbated by how the right to legal advice is triggered in England and Wales – as McConville, Sanders, and Leng highlight, it is provided only after a “*positive* request.”<sup>124</sup>

The right to legal advice is also subject to further practical limitations. Legal advice and assistance may be undermined in terms of quantity and quality of provision owing to the paucity of fees for attendance at the police station. In England and Wales, lawyers are paid a fixed fee per police station visit. This fee includes travel costs and time spent waiting at the police station. Research in England and Wales has found that lawyers are reluctant to attend the police station and may offer merely routinised advice.<sup>125</sup> In Ireland, the right to legal advice and representation throughout police interviews is a more recent development than that in England and Wales – lawyers are accessing a space from which they have previously been largely excluded.<sup>126</sup> Indeed, as Daly and Conway highlight, it is only a minority of suspects who access legal assistance at garda stations.<sup>127</sup> Thus, in both jurisdictions,

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Statistics Office, *Earnings and Labour Costs Q1 2022 (Final) Q2 2022 (Preliminary Estimates)* (2022).

120 Delay may be permitted in some circumstances. See, e.g. PACE 1984 s 58.

121 See *Skinns* (n 75).

122 *Ibid.*

123 *Ibid.*

124 McConville, Sanders and Leng (n 118) at 50.

125 See D Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart 2013).

126 Lawyers in Ireland “were only permitted to consult with clients in garda stations, not attend the interview” until May 2014. See V Conway and Y Daly, ‘From Legal Advice to Legal Assistance: Recognising the Changing Role of the Solicitor in the Garda Station’ (2019) 3 *Irish Judicial Studies Journal* 103–23.

127 Conway and Daly (n 55).

suspects may experience legal vulnerability<sup>128</sup> caused by paltry provisions on the books or in action. For those with additional needs, a lawyer may be a necessary but insufficient support.

Relatedly, legal advice and assistance have been significantly undermined by adverse inferences on the right to silence.<sup>129</sup> Not only do adverse inferences interfere with the lawyer–client relationship – as Quirk points out, lawyers are damned if they advise silence and damned if they do not – they also remove the last remaining source of control for the suspect.<sup>130</sup> A suspect lacking in knowledge of legal language and process may face significant detriment because of adverse inferences, thus further creating or exacerbating vulnerability.<sup>131</sup> Even where legal provisions – and arguably legal processes – are markedly improved, any type of custodial interrogation is coercive when viewed in terms of police power and control.<sup>132</sup>

## Conclusion

This chapter has examined how vulnerability is and could – or should – be defined in respect of suspects detained in police custody. It is worth noting that young age is not often contested as a category of vulnerability, at least in law.<sup>133</sup> For adults, the situation is more complicated: there is no widely agreed-upon definition in law and a suspect’s vulnerability may be contested.<sup>134</sup> Definitions that rely on innate vulnerability may also be somewhat lacking

128 That is vulnerability due to a lack of understanding of legal provisions and process and/or an ability to enforce one’s rights and entitlements. Those who are recognised as particularly vulnerable may have a legal vulnerability, although arguably, suspects’ understanding of their rights is poor. See, e.g. G Gudjonsson, I Clare and P Cross, ‘The Revised PACE “Notice to Detained Persons”’: How Easy Is It to Understand?’ (1992) 32(4) *Journal of the Forensic Science Society* 289–99.

129 In England and Wales, the Criminal Justice and Public Order Act 1994 allows adverse inferences to be drawn from a suspect’s failure to account for certain facts (s 34); refusal or failure to account for objects, substances or marks (s 36); and/or refusal or failure to account for his or her presence at a particular place (s 37). S 35 allows inferences to be drawn from silence at trial. Similarly, in Ireland, adverse inferences can be drawn from an accused’s silence in similar ways. See ss 18, 19 and 19A of the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007. For fuller discussion of the operation of adverse inferences provisions in Ireland, see 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.

130 H Quirk, *The Rise and Fall of the Right of Silence* (Routledge 2017).

131 See, e.g. Skinnis (n 76).

132 Gudjonsson (n 32) at 25. Coercion in police interviews could potentially result in Post-Traumatic Stress Disorder, although a link is yet to be established. See Gudjonsson (n 32) at 35.

133 See Dehaghani (n 10); Mergaerts and Dehaghani (n 2).

134 See, e.g. Mergaerts and Dehaghani (n 2); An Garda Síochána Inspectorate (Ireland) (n 24).

and may fail to consider the broader impacts of police custody and the wider criminal process on a suspect. The psychology and law literature sheds some light on what it means to be a vulnerable suspect and demonstrates why some suspects may potentially be “more vulnerable” than others. Yet, it arguably does not adequately acknowledge the myriad factors which result in the situational vulnerability of a suspect in police custody.

There is a clear need to define vulnerability – and to do so holistically. Without a clear definition of who is included – and excluded – from this category, decision-making on vulnerability could be contested.<sup>135</sup> The judgment in *Hasáliková* has demonstrated that how vulnerability is defined (or not defined) can impact whether a suspect is protected, which may subsequently impact their fair trial rights. This case also demonstrated the need for clear(er) definitions and greater awareness amongst criminal justice practitioners of the ways in which suspects may be innately or situationally vulnerable.

The issue of situational vulnerability also requires greater attention. Although recognised in *Salduz* and acknowledged in other legal frameworks and cases, there has been insufficient attention paid to the general vulnerability of all suspects. While the argument here has been for a more holistic definition of vulnerability, it is acknowledged that domestic, ECtHR/ECHR, and EU definitions have been so narrow that the starting point would at least be to update the law in line with the evidence base so that innately vulnerable suspects are afforded adequate protection. Importantly, this should include physical, in addition to psychosocial disability. It could also be broader to consider matters such as caring responsibilities (as acknowledged by the ECtHR) which could render a suspect psychologically vulnerable (as it may make a carer feel under pressure to leave the situation to return to those they care for). If there is the will, however, in Ireland, there is significant potential to make strides in this area, and to think more holistically about who is vulnerable in police custody and why – and subsequently, to consider what type(s) of support can be offered to (vulnerable) suspects. Addressing a suspect’s vulnerability – whether specific needs or the general impacts of police custody and the criminal process – should be viewed as a human rights commitment, particularly in securing the suspect’s right to a fair trial. As it stands, a narrow or ill-defined concept of vulnerability may undermine fair trial rights and limit or exclude legal remedies.

135 It is worth acknowledging that England and Wales have had legal provisions aimed at protecting vulnerable suspects since 1986 (and Northern Ireland since 1989). Despite these longstanding provisions, obstacles remain for vulnerable suspects – vulnerability is defined narrowly in law and even more narrowly in practice, vulnerability can be difficult to identify owing to insufficient tools and resources, and police officers may, for myriad reasons, feel safeguards for vulnerable suspects are unnecessary. See Dehaghani (n 1).

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