

# RECORDING PROCEDURES AND GUIDELINES RELATING TO CHILDREN IN THE CARE OF AN GARDA SÍOCHÁNA

## SECTION 1

### 1. Policy Statement

An Garda Síochána must always operate to the highest professional standards. The Garda Síochána policy is to ensure that all children who come into contact with members of An Garda Síochána are treated with dignity, regardless of the nature of that contact and to that end the rights of arrested / detained children are covered by a separate policy.

### 2. Introduction

- (1) The purpose of this Policy Directive is to set out the policy on the Recording Procedures and Guidelines relating to children in the care of An Garda Síochána. This Policy details the procedures to be followed when dealing with children at Garda stations and good practice dictates that the recorded details are accurate and complete.
- (2) This policy sets out the member's responsibility for each child in Garda Care and each member will ensure that the policy is adhered to until such time as the child is placed back into the care of a parent/guardian or the Health Service Executive.
- (3) This Policy Directive contains advice on legal obligations placed on members of An Garda Síochána. The appendices describe the process to be followed and the roles and responsibilities of members of An Garda Síochána involved in that process.
- (4) **It is important, nevertheless, that Child Protection is seen as a fundamental role of all members of An Garda Síochána and that members understand that it is an essential part of their duties.** Gardaí may, in all aspects of police duty, come across situations where child protection must be considered. When attending incidents of violence, especially those involving domestic violence or bullying, Gardaí should be aware of the effect of such violence on children and the duty they have towards such children.

- **Aims**

This is an important policy to address the issue of recording details of children who come into the care of An Garda Síochána but who are not arrested or detained. **Examples** of the type of children referred to are:

- (1) Lost child at Garda station
- (2) Child of an arrested person - where a child may remain in a Garda station for a period of time
- (3) Child is subject to the provisions of **Section 12 of the Child Care Act, 1991** and is brought to a Garda station

#### (4) Child seeking the services of the Health Service Executive\*

\*A number of points may need to be considered, for example, where a parent/guardian/appropriate person/social services cannot be contacted the welfare of the child may become an issue and the exercise of section 12 may need to be considered.

\*the exercise of powers under section 12 of the Child Care Act, 1991 must be considered in all cases where the welfare of the child is in question.

The Policy addresses the legal obligations on members of An Garda Síochána and provides a process by which Gardaí can demonstrate the discharge of that obligation.

#### • **Legal Basis**

Although section 3 of the Child Care Act 1991 places upon the Health Service Executive the overriding duty to promote the welfare of all children within its functional area who are not receiving adequate care and protection, it is also the duty of every member of An Garda Síochána to safeguard and protect children. The abuse of children, whether sexually, physically, emotionally or by neglect and whether in the home or outside is unacceptable and An Garda Síochána play an important role both in the prevention of such abuse and in the investigation of criminal abuse of children.

An Garda Síochána operates in compliance with the Children First National Child Protection Guidelines. These guidelines were established for the benefit and support of professionals who have interaction/contact with children and who are therefore in a position of responsibility in recognising and responding to possible child abuse. The guidelines allow for a mutual understanding among all agencies who deal with children. All agencies that provide services to children have an overall corporate duty and responsibility to safeguard children.

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

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

(1) Section 7 sets out a general duty to protect life. The objective section 7 includes the vindication of individuals' human rights. It also requires Gardaí to take action to prevent

the commission of offences and investigate where offences have been committed. To achieve this objective, An Garda Síochána is required to co-operate with other State bodies having legal responsibility for matters relating to the objective.

- (2) International human rights standards particularly the United Nations Convention on the Rights of the Child identify four core principles:
  - (a) The best interests of the child must be paramount (Article 3);
  - (b) Children have a right to be heard (Articles 12 and 13);
  - (c) Children have a right not to be discriminated against (Article 2);
  - (d) The State has a duty to protect children (Article 19).
- (3) Section 3 of the European Convention on Human Rights Act 2003 (the 2003 Act) obliges An Garda Síochána, as an organ of the State, to perform its functions in a manner compatible with the State's obligations under the Convention provisions. Articles 2 and 3 of the European Convention on Human Rights (ECHR), which are incorporated into Irish law by the 2003 Act, set out the right to life and the right not to be subjected to inhuman or degrading treatment respectively. The Human Rights legislation applies equally to adults and to children. Every child is entitled to have these important rights upheld.
- (4) Gardaí are frequently required to deal with situations of conflict. The careful use of well chosen and appropriate words and the management of human interaction will resolve many situations. Others will necessarily involve the application of varying degrees of physical force.

Gardaí have power under statute and common law to take action to defend themselves and others. If Gardaí do not take appropriate and proportionate action to protect others from such harm they may be violating the human rights of those others. Therefore, it is important that Gardaí give due regard to the rights of individuals in how they exercise their discretion.

In making these important decisions, Gardaí are reminded that they are accountable through the law for their actions. Apart from the criminal law, there may follow a civil suit, complaints may be made against individual members, and in cases where death has resulted, a public inquest or other inquiry will be held by the coroner or other statutory bodies at which members of An Garda Síochána may be called to testify.

Every effort should be made to resolve conflict without resorting to the use of force. Whenever it is necessary for Gardaí to resort to the lawful use of force they shall:

- Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate object to be achieved;
- Minimise damage and injury, and respect and preserve human life;
- Ensure that assistance and medical aid are secured to any injured person at the earliest opportunity;
- Ensure that relatives or close friends of the injured or affected person are notified at the earliest opportunity;

- Report the incident promptly to their supervisors.

The primary responsibility for using force rests with the individual member who is answerable ultimately to the law. Individual members are accountable and responsible for whatever force they use and must be in a position to justify their actions in the light of their legal responsibilities and powers.

- (5) The 2003 Act, in relation to Article 2, incorporates three separate duties on an organ of the State:
  - (a) a duty to refrain from intentional taking of life (with very narrow defined exceptions)
  - (b) a duty to protect life; and
  - (c) a duty to investigate suspicious deaths.
- (6) The duty to protect life is often referred to as the “positive obligation” or the “Osman ruling”. In *Osman v United Kingdom* (29 EHRR 245), the European Court of Human Rights stated that there is a specific obligation on the authorities to take feasible operational steps within their powers to avert a real and immediate threat to the life of an individual or individuals of which they are, or should be, aware. This is in addition to the general duty to have in place criminal law provisions and law enforcement mechanisms to deter the commission of crime. The Court pointed out that due to the unpredictability of human conduct, the difficulty of policing modern societies and resource issues, the duty must be interpreted in a manner, which does not impose an impossible or disproportionate burden on the authorities.
- (7) Accordingly, Gardaí may be under an obligation to take operational measures to protect a person’s life in certain situations. The main issues for Gardaí are:
  - (a) establishing what is a real and immediate threat; and
  - (b) if such a threat is established, what steps must be taken to seek to avert it?

This legal guidance seeks to set out some general advice on these issues.

(8) **“Real and immediate”**

Guidance can be gleaned from the leading case in the United Kingdom concerning a “real and immediate” threat which is *In re. Officer L* [2006] UKHL 36. In this case, the House of Lords said that a real and immediate threat is one that is:

- (a) Objectively verified; and
- (b) Present and continuing. The threshold is a high one. In making this assessment, police officers should consider all relevant sources of information and ensure that all decisions are justified and recorded.

(9) **“Feasible Operational Steps”**

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

(10) **Article 3** of the Convention sets an absolute prohibition on torture, inhumane and degrading treatment or punishment. There are no stated exceptions to this rule. The test established by the European Court is that of attaining a certain minimum level of severity. The basic approach is:

“... ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.” (*Ireland v U.K.* January 18, 1978, Series A, No. 25; 2 EHRR 25, para. 167).

The Court in *Ireland v United Kingdom* held that torture involves suffering of a particular intensity and cruelty, attaching a “special stigma to deliberate inhuman treatment causing very serious and cruel suffering”. Inhuman treatment covers at least such treatment as deliberately causes severe mental and physical suffering.

Degrading treatment or punishment consists of treatment or punishment which grossly humiliates a person or drives him to act against his will or conscience. (*The Greek Case*, 3321-3/67 and 3344/67, 11 YBK of the ECHR (Rep.) November 5, 1969, (1969), 501).

The European Commission on Human Rights found in the case of *Z v United Kingdom* (Application Number 29392/95) that States are under a positive obligation to take those steps that could reasonably be expected of them to avoid a real and immediate risk of ill treatment contrary to Article 3 of which they knew or ought to have had knowledge, including ill treatment administered by private individuals. In particular, the Commission held that “the protection of children who by reason of their age and vulnerability are not capable of protecting themselves requires not merely that criminal law provides protection against Article 3 treatment but that, additionally, this provision will in appropriate circumstances imply a positive obligation on the authorities to take preventative measure to protect a child who is at risk from another individual. It should be noted in this regard the international recognition accorded to this principle in Article 19 of the United Nations Convention on the Rights of the Child which enjoins States to take all appropriate measures to protect the child from all forms of physical and mental violence, injury or abuse” (paragraph 93). Endorsed by the European Court of Human Rights ([2002] 34 EHRR3).

When Gardaí are required to use force to achieve a lawful objective (such as removing a child to a place of safety, making a lawful arrest, acting in self-defence or protecting others or property or the prevention of crime or a breach of the peace) the legal basis are to be found in sections 18 and 19 of the **Non Fatal Offences against the Person Act, 1997**.

All force used must be ‘*reasonable in the circumstances*’ as the member of An Garda Síochána believes them to be. Section 1(2) provides that having regard to the belief of the person using force. ‘*it is immaterial whether a belief is justified or not if it is honestly held but the presence or absence of reasonable grounds for the belief is a matter to which the court or the jury is to have regard, in conjunction with any other relevant matters, in considering whether the person honestly held the belief.*’ The use of force must be proportionate to the objective that is sought to be achieved. Factors which may assist in establishing whether or not the use of force was reasonable in the circumstances are:

- Was the use of force lawful? – e.g. is the aim one of those outlined in section 18 or 19 of the Non Fatal Offences against the Person Act, 1997?
- Was the degree of force used proportionate in the circumstances?
- What other options were considered? If so, what were they? Why were those options discounted? Has an adequate record of all relevant decisions been made?
- Was the method of applying force in accordance with training instructions?

Any force used must not be greater than was reasonable in the circumstances. If force used is not reasonable it may leave the member open to criminal or disciplinary proceedings. In addition, it may constitute a violation of the human rights of the person against whom the force was used.

Excessive use of force by Gardaí can engage Article 3. In *Timurtas v Turkey* [(2001) 33 EHRR 121] the European Court of Human Rights stated; "... where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention." In *Ribitsch v Austria* [(1996) 21 EHRR 573] the Court held that: "... In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention. "

The use of force by members of An Garda Síochána may be necessary in some circumstances. It is essential that any use of force is only resorted to and applied in accordance with the law.

- (11) **Article 8** provides that everyone has the right to respect for his private and family life, his home and his correspondence. Removing custody or parental responsibility, *prima facie* constitute interferences with family life which require justification under Article.8, paragraph.2 which states that:

*"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Section 12 of the Child Care Act, 1991 provides such justification for such an interference in circumstances where the removal of a child is necessary and is a proportionate response.

### 3. Implications of the Policy

- (1) Gardaí have emergency powers to enter premises and to ensure the immediate protection of children where there are reasonable grounds for believing there is an immediate and serious risk to the health or welfare of the child and there are reasonable grounds for believing that it would be insufficient, for the purpose of obviating such risk, to wait for the health board to apply for an emergency care order under section 13 of the 1991 Act.

An Garda Síochána must deliver the child to the custody of the Health Service Executive as soon as possible.

- (2) Appendix 1 sets out the member's responsibility for each child in Garda care and each member will ensure that the guidelines are adhered to until such time as the child is placed back into the care of a parent/guardian/appropriate person or the Health Service Executive.
- (3) The form at Appendix 2 "*An Garda Síochána Child Care Form*" will be completed for **each and every child** that comes into Garda care (who is not an arrested/detained person). The member in charge will ensure that the child is supervised while he/she is in Garda care. The member in charge will ensure that the Form (appendix 2) is completed.

## **Information Sharing**

Section 3 of the Protection of Persons Reporting Child Abuse Act, 1998 protects An Garda Síochána from civil liability when reporting information on child abuse "reasonably and in good faith" to designated officers of the Health Service Executive.

## **4. Consultation**

### **(1) Internal Consultation**

- Assistant Commissioner Human Resource Management
- Assistant Commissioner Strategy Training and Professional Standards
- Chief Superintendent Internal Affairs
- Head of Legal Affairs
- Legal Section Crime Policy & Administration
- Association of Garda Chief Superintendents
- Association of Garda Superintendents
- Association of Garda Sergeants and Inspectors
- Garda Representatives Association

### **(2) External Consultation**

- Ombudsman for Children

## **5. Monitoring And Review**

- (1) Crime Policy & Administration is responsible for reviewing the contents of this policy on an annual basis.
- (2) This Policy Directive will be reviewed again on the 1<sup>st</sup> June 2011
- (3) Feedback relating to this Policy should be made to Chief Superintendent Crime Policy & Administration

## **6. Human Rights**

- (1) The Human Rights as outlined in this Policy Directive should be considered and applied in Garda interactions with children.
- (2) Due to the vulnerable nature of children, it is extremely important that all members of An Garda Síochána engaging with them ensure that every effort is made to inform children of their rights.
- (3) In carrying out their functions in accordance with this Policy Directive members of An Garda Síochána shall act with due respect for the personal rights of the child and their dignity as human persons, for their vulnerability owing to their age and level of maturity and for the special needs of any of them who may be under a physical or mental disability.
- (4) This Policy is deemed to be Human Rights compliant.

## **7. Publication**

Section 1 of this policy will be published on the Garda website and will be available to members of the public.

Section 2 of this policy is confidential and will only be published on the Garda portal. Section 2 will only be available to members of An Garda Síochána.

## **8. Approving Authority**

This policy has been approved by the Garda Commissioner. No amendments shall be made to this policy, procedure or guidelines except by the prior approval of the Commissioner.

## **9. Disclaimer**

*“This document is not intended to, and does not represent, legal advice to be relied on by members of the public on the subject matter considered herein. This publication should not be used by members of the public as a substitute for professional legal advice.”*