

### **3.3 AN GARDA SÍOCHÁNA**

In this section we set out the general structures of An Garda Síochána, the current procedures for investigating allegations of child sexual abuse, the role of the DPP and the underlying legislation. The files made available to this Inquiry by An Garda Síochána date from 1990 and are discussed at Chapter 7 of this report.

The Garda Commissioner is appointed by the Government and is ultimately responsible to the Minister for Justice, Equality and Law Reform. His management team comprises two Deputy Commissioners and eleven Assistant Commissioners.

Assistant Commissioner, Security, has overall responsibility for crime policy and administration, subversion and security issues within An Garda Síochána. This particular office has been routinely involved in the handling of cases which have been reviewed by the Inquiry.

In January 1996, the Garda Commissioner appointed six regional Assistant Commissioners. The office covering the area represented by the Diocese of Ferns is based in Kilkenny. It acts as a review layer in addition to managing performance and resources available to the Deputy Commissioner, Operations. The Inquiry has identified this office as having extensive involvement in the response of An Garda Síochána to cases involving child sexual abuse since its inception in 1996.

The South Eastern region is comprised of the Garda divisions of Waterford/Kilkenny, Wexford/Wicklow and Tipperary. The region is headed by a regional Assistant Commissioner who reports to the Deputy Commissioner Operations. This region caters for a population of approximately 450,000 with a Garda strength reported in 2002 at 971, serving 117 Garda stations, in sixteen Garda districts.

Each region is divided into divisions commanded by a Chief Superintendent and each division is then divided into districts commanded by a Superintendent assisted by a number of Inspectors. The districts are divided into sub-districts, each normally the responsibility of a Sergeant. Each sub-district usually has one station, the strength of which may vary on a nationwide basis. In some areas there are stations known as sub-stations usually occupied by one Garda.

It is noted from the Inquiry's review of files furnished to it by An Garda Síochána that during the course of an investigation a constant stream of correspondence is

maintained between the office of the Garda Commissioner and local level by way of Assistant Commissioners and Chief Superintendent/Superintendent.

A systemic change occurred within An Garda Síochána from November 1999 whereby a paper trail evidencing such correspondence has now been supported with a computerised system which records all incidents that An Garda Síochána deal with from the time of the initial contact made to it by a complainant or witness until a particular offender is dealt with by the court. This is known as the PULSE system. It is a system which is available online to all networked Garda stations throughout the country. All members are required to record information in relation to incidents which will then be accessible by another member involved in the investigation of that case. It is also safeguarded by restrictions on the access to certain levels of information which is also governed by seniority and area of specialisation.

In this regard, cases involving child sexual abuse would usually be accessible to an investigating Garda, his or her Superintendent and certain Assistant Commissioners. A further notable feature on this system is that it contains no deletion mechanism and it is capable of correlating information to an extensive data bank.

From the Garda Annual Report 2002 it appears that of 1,626 reported complaints of sexual assault in 2002, 534 cases involved criminal proceedings and of those cases which were completed at the date of that report, 157 cases (9.65%) resulted in convictions. 206 cases (12.67%) were still pending and the remaining 171 cases (10.52%) completed without a conviction.

Under the 1995 guidelines, 'Notification of Suspected Cases of Child Sexual Abuse between Health Boards and An Garda Síochána'<sup>51</sup>, where a Health Board suspects a child has been physically or sexually abused, An Garda Síochána must be formally notified. The process of establishing this suspicion involves consulting with professional experts, although the agreement provides that the Health Board need not be satisfied that such abuse is confirmed before reporting. The notification is made by a designated officer of the Health Board to the Superintendent of the district in which it is suspected the offence occurred. The reciprocal duty to report on the part of An Garda Síochána requires it to notify the Health Board where it suspects a child has been a victim of abuse. It is not necessary in this regard for the Gardai to have sufficient evidence to support a criminal prosecution. The Inquiry is advised by both organisations that the identity of the complainant and accused would be made known when a notification is made.

The Gardai participate in the work of the Inter-Agency Review Committee referred to at pages 42 and 58 above. An Garda Síochána is represented on this committee by a Superintendent appointed by the Chief Superintendent of Wexford Division. This Superintendent has described the working of this Review Committee "*as a step forward for all parties involved*".

The Garda structure is also served on a nationwide level by the Domestic Violence and Sexual Assault Investigation Unit (the National Unit) which is based in Dublin. The National Unit was established in 1997 but emanates from the 'Woman and Child

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<sup>51</sup> See page 58.

Unit' established in 1993. It consists of a Detective Superintendent, a Detective Inspector, three Detective Sergeants and up to eleven Detective Gardai. Many of these officers have been sponsored to complete a Postgraduate Diploma in Child Protection and Welfare at Trinity College Dublin which is funded by the Department of Health & Children. The National Unit works within the National Bureau of Criminal Investigation. In cases where a complainant does not wish local Gardai to become aware of his/ her complaint, the National Unit can in exceptional circumstances, carry out its own investigation whilst only notifying the local Superintendent as to progress on the investigation. The National Unit is in a position to refer cases directly to the Director of Public Prosecutions (DPP) via the Chief Prosecution Solicitor for decisions on prosecutions. However, in most cases investigations would be done in conjunction with local Gardai.

Some complainants indicated to the Inquiry that they were reluctant to report to local members of An Garda Síochána either because of personal friendships or connections or because they were fearful that confidential information would be disclosed. It is appreciated that in small communities, whilst friendship with particular members of An Garda Síochána may be seen as support to some, it has undoubtedly been an inhibiting factor for others. The Inquiry noted that complainants could and did choose where they would report the complaint and decided whether to make the complaint to a male or female Garda. If particular circumstances existed that made reporting in the Wexford District undesirable or excessively embarrassing, the complaint could be made to the National Unit. That was done in one case which came to the attention of the Inquiry.

In at least two cases, complaints were made to the Inquiry that information which they gave to Gardai in confidence was improperly divulged. The Inquiry discussed this issue generally with Superintendent Kieran Kenny. The position of the An Garda Síochána is clear. They have stated that they would not condone any breach of confidence and any complaint that confidence was breached would be fully investigated and the culprit punished appropriately. There are ample procedures both within and without the structure of An Garda Síochána for making such complaints and one or other of those procedures should be followed in the event of any complainant suspecting improper disclosure of confidential information. The Gardai did point out however, that anonymity could not be guaranteed fully to a complainant. His identity and the evidence tendered by him must ultimately and as a matter of due process be communicated to the accused.

In 1999, a victim's charter was published by the Department of Justice, Equality and Law Reform. This emphasised the importance of keeping the victim of a crime informed about the progress and outcome of the criminal investigation and trial.

An Garda Síochána works in close cooperation with victim groups who are available to provide assistance to victims in terms of medical care and advice in relation to the criminal process. In some cases, the victim will be brought to court beforehand and shown the witness box and the court procedures involved. The evidence which that person will provide at the trial is not discussed.

## **The Garda Process of Investigation**

When a complaint is received, a statement is normally taken, typed and logged at the incident room where a working file containing the original statement in typed form together with copies thereof will be filed. If a person wishes to attend An Garda Síochána confidentially, that is to say without disclosing his name, that is respected although these persons would be encouraged, perhaps with the assistance of a victim support person, to make a formal statement at a later date.

A statement will be taken from the complainant as soon as is practicable and only then will an investigation team be assembled. In the case of serious complaints, this investigation would usually be lead by a Detective Superintendent with a team of detectives. The nature and extent of the complaint will determine the volume of work involved and this in turn, together with the resources of a particular district, will determine the size and composition of any investigation team. The Inquiry has observed cases which arose prior to 1995 where the entire investigation of child sexual abuse allegations was undertaken by one Garda. The Inquiry has been advised that this practice is no longer continued.

The PULSE system will record the general progress and status of the investigation. Incident Room records including a job book, record every piece of work carried out during the course of an investigation. Regular meetings are held in which the investigation and its progress are discussed. All evidence to the investigating team is analysed and corroborating evidence is sought where appropriate.

An Garda Síochána requires a complainant to make a formal statement of complaint before a criminal prosecution process can begin. However, anonymous complaints made directly to An Garda Síochána or through a third party of rumour, innuendo and suspicion in relation to any crime including child sexual abuse may be filed by An Garda Síochána for intelligence purposes, and an attempt can be made to corroborate and test the truth of such information. If the information is found to have substance, the investigating Garda may make enquiries to encourage the victim to come forward and make a formal complaint. Such information could also be used in linking it with other areas of investigation.

The Inquiry was told that An Garda Síochána does not seek out or canvas for complainants. They generally will not contact a complainant directly unless the complainant has expressed a willingness to co-operate in a Garda investigation. Where a complaint is notified to An Garda Síochána by a third party, such as a diocese or Health Board, it would request the notifying party to invite the complainant to meet with the investigating Gardai. The Inquiry was told that An Garda Síochána would not betray the confidence of that third party in contacting a complainant, although a decision to visit complainants would ultimately depend on the circumstances of each case. In all cases, An Garda Síochána is dependent upon the co-operation of the complainant and if it is seen not to respect confidentiality, then it is unlikely that it will obtain such co-operation.

On completion of the investigation, the Superintendent must decide whether or not to refer the matter to the DPP. His communication with the DPP is channelled through the State Solicitor. The decision to refer any complaint to the DPP for directions

rests with the local Superintendent who will consider the evidence available and the seriousness of the alleged crime. In all cases, as required by the victims' charter, the complainant should be notified of the decision to refer or not to refer the complaint to the Director of Public Prosecutions.

The role of regional Assistant Commissioners is also relevant in this regard. A Superintendent would normally refer complaints of significant importance to this office. Since this office is located on a regional basis it can access all information in relation to alleged crimes committed in its region. Nowadays an investigating Garda will initially log details of a complaint on the PULSE system which will be reviewed by a Supervisor, usually of Sergeant rank, who certifies that he or she is satisfied with the entry.

As already stated, An Garda Síochána was advised by the Attorney General in 1999 in relation to the issue of notification to other bodies or persons of complaints, anonymous complaints, rumour, innuendo or suspicion about child sexual abuse. The Attorney General advised that *"the principal avenue for disclosure of sensitive information to third parties for the protection of children should be through Health Boards rather than the Gardai"*. In all cases, even those involving unsubstantiated allegations, Garda practice as identified by this Inquiry in the Wexford area, is to notify the Health Board, in view of their specific function for the protection of children. In cases involving substantiated allegations where Gardai consider there to be a risk of harm to children, the employer may be notified that an investigation is being conducted but no warning about the employee should be given. It is only where Gardai believe there is a real danger of injury to children that they should inform the employer for the purpose of preventing further offences being committed. In cases where an employer is notified, the accused will usually be advised as to the proposed step to be taken and given an opportunity make a submission. The advice also provides that Gardai must be careful to only notify the proper authority within the employer organisation. The Attorney General has further advised Gardai that liability for non disclosure of certain information where injury results from a person being left in a position with close contact with children would not normally arise. The foregoing advice relating to employers applies equally to other bodies such as sporting associations and dioceses.

The issue of third party involvement also raises concern over the potential impact that interviews conducted by persons other than An Garda Síochána with the accused or accuser may have on the evidence presented at a subsequent criminal trial. Gardai have expressed a desire to be the first party to interview a complainant and the accused in order to elicit information which cannot be claimed to have been tainted. In this regard, An Garda Síochána would wish that the Health Services Executive, Diocese or employer who receives a complaint, allegation, rumour, innuendo or suspicion about child sexual abuse should notify An Garda Síochána before initiating their own investigation. The Inquiry appreciates these concerns but is satisfied that child protection requires an immediate, if limited, investigation by the Bishop (or employer) to ensure that the alleged wrongdoer stands aside pending all other appropriate inquiries. The Inquiry has been informed that collaboration between the Health Services Executive and An Garda Síochána is a matter that is under ongoing review.

Once a Garda investigation is completed and a file is sent to the DPP, then all further action in relation to the criminal investigation and prosecution is done at the direction of the DPP.

The office of the DPP decides on whether a prosecution should proceed in cases concerning child sexual abuse. It examines all files received from its Solicitors Division and local State Solicitors. The office provides ongoing instruction and legal advice to its solicitors division and local State Solicitors in every case. The decision on whether to prosecute is made on the file assembled by Gardai. The conduct of proceedings is entrusted to Counsel in such cases nominated by the office.

In most child sexual abuse cases, the file is reviewed by a second officer in the DPP's office. It is important to highlight that the DPP's decisions in child sexual abuse cases are generally not final; the matter may be reviewed if further evidence is obtained. The DPP does inform its solicitors division or local State Solicitor of the reasons for not proceeding. The reasons are then furnished to the investigating Gardai. However, such information is not made public.

The victim should be kept fully informed of the handling of a criminal prosecution by An Garda Síochána. In addition, the victim or a member of the victim's family or his or her lawyer is authorised by law to request the DPP to review a particular decision although section 6 of The Prosecution of Offences Act 1974 states that it shall "not be lawful" for any person not so authorised to contact the DPP in relation to such matters. This section does not prescribe any sanction for a breach of that provision.

To initiate a prosecution, the DPP requires a complainant and it will not generally subpoena a non-cooperative victim to give evidence in criminal proceedings. It should be observed that complainants are well protected by courts in securing their anonymity. However, a complainant's identity is necessarily made known to the accused in accordance with his or her constitutional rights.

The DPP believes that Gardai now tend to refer all child sexual abuse cases for the attention of the DPP. He also referred to the rights of a victim to ascertain the current status of his or her complaint with An Garda Síochána or the DPP directly.

In deciding whether or not to prosecute in a particular case, the DPP will consider the public interest which prescribes that serious offences should be prosecuted in so far as is practicable. The DPP also considers whether any aggravating or mitigating factors are relevant. The DPP's Guidelines for Prosecutions published in October 2001 list, among others, the following aggravating factors which would influence the decision to prosecute in a particular case.

- Where a conviction is likely to result in a significant penalty;
- If the accused was in a position of authority or trust and the offence is an abuse of that position;
- Where the accused was a ringleader or an organiser of the events;
- Where the offence was premeditated;
- Where there are grounds for believing that the offence is likely to be continued or repeated, for example where there is a history of reoccurring conduct.

The list of mitigating factors, on the other hand, does not appear applicable to cases involving allegations of child sexual abuse. Moreover, these are factors which can be taken into account by the sentencing court in the event of a conviction, rather than factors which should lead to a decision not to prosecute. The DPP will also have regard to the views of a victim and the impact of a failed prosecution on the victim. He informed the Inquiry of two significant developments in the treatment of child sexual abuse cases by the courts that have occurred in recent years, which further impact upon the decision to prosecute or the likelihood of obtaining a successful prosecution.

Firstly, there is an increasing demand for separate trials for child sexual abuse cases involving multiple victims. This may arise even where victims allege similar facts. Secondly, delay in bringing a complaint to the attention of An Garda Síochána does encourage an accused to seek an order of prohibition on the grounds that such delay has prejudiced the fair trial of the charge. The DPP provides in his Guidelines that a prosecutor should, in any case where there has been a long delay since the offence was committed, consider in the light of the case law whether that delay was such that the case should not proceed.

The DPP was concerned about the emerging jurisprudence in regard to the failure of victims to report promptly to Gardai allegations of child sexual abuse, the causes of this delay and the consequences which it may have for the accused in defending proceedings instituted against him. He expressed the view that the grounds currently accepted for justifying the delay were quite narrow.

The Inquiry sought the views of the DPP on authorities other than An Garda Síochána conducting limited investigations for an immediate child protection result parallel to a criminal investigation. These investigations could take the form of a minor scale church investigation into whether or not a reasonable suspicion existed against a priest to justify his immediate stepping aside in accordance with Canon law. The DPP confirmed that such limited investigations do not and have not in his experience, adversely affected a criminal prosecution. However, he advised that protracted parallel investigations and indeed attendances on victims by support persons may prove prejudicial to a criminal prosecution by giving rise to conflicting statements or claims of contaminated evidence. The DPP also stated that he had no difficulty with information on the status of a particular case being shared with the Health Boards and dioceses provided personal information and the reasons for any decision regarding prosecution taken by the DPP were not shared.

The Inquiry has reviewed the principal legislative provisions relating to child sexual abuse in this chapter. The DPP expressed himself satisfied with the powers available to proceed with prosecutions in child sexual abuse cases.

It is clear from the Inquiry's review of the handling of cases by An Garda Síochána at Chapter 7 of this Report that a prosecution was initiated by the DPP only where there were multiple alleged victims of an accused or in one case where there was one victim and the incident was witnessed by family members. The Inquiry therefore asked the DPP whether or not there is a reluctance on the part of his office to prosecute in cases where it merely has an account of child sexual abuse of one victim which is completely denied by the accused. The DPP confirmed that every case would be

carefully looked at by his office individually and his office would certainly be prepared to proceed in a case involving one complainant against an accused who denies the allegation in its entirety and in fact many cases which begin with a multiplicity of alleged victims are ultimately heard on an individual basis.

The Inquiry also raised with the DPP the question of whether or not there was ever a reluctance on the part of prosecutors to prosecute members of the clergy. The DPP stated clearly that neither he nor any of his staff were ever influenced in deciding to initiate criminal proceedings by the identity of the accused as a priest.

## **SEXUAL OFFENCES LEGISLATION**

The response of An Garda Síochána depends largely on the nature of the crimes they are investigating. It is therefore necessary to examine the laws which create the crimes comprised in the general expression “child sexual abuse”. This expression is one widely used in this and other jurisdictions to describe a range of sexual misconduct. The relevant legislation and the material provisions of it are as follows:

### **1& 2) Offences against the Person Act 1861 & Criminal Law (Amendment) Act, 1885**

The Offences against the Persons Act 1861 and the Criminal Law (Amendment) Act 1885 prescribed penal servitude for life for rape and buggery and a maximum sentence of ten years imprisonment for indecent assault. In all cases, it was necessary to prove some physical form of assault on the part of the accused, and in cases of rape and indecent assault the issue of consent was an important constituent of those offences.

The 1885 Act provided for an offence of gross indecency of a male which attracted a term of imprisonment of up to two years. This offence did not depend upon issues of age or consent and encompassed most forms of homosexual activity which were not dealt with under the 1861 Act.

### **3) Criminal Law Amendment Act 1935**

Much of this Act has now been repealed, but of the provisions still in operation, ss. 1 and 2 still form the bedrock of the protection given by the law to girls under 17 years of age. Section 1 of the Act provides a penalty of up to life imprisonment on conviction for unlawfully and carnally knowing a girl under 15 years of age. Section 2 provides for maximum penalties of five years imprisonment in the case of a first conviction and ten years in the case of a second or any subsequent conviction for unlawfully and carnally knowing any girl under 17 years of age.

#### **4) Criminal Law (Rape) (Amendment) Act 1990.**

This legislation was enacted pursuant to the recommendations made by the Law Reform Commission in 1988. It replaced the offence of indecent assault on a male or a female with offences of aggravated sexual assault with a maximum penalty of life imprisonment, and sexual assault with a maximum penalty of 5 years imprisonment. Aggravated sexual assault is defined as sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation, or degradation of a grave nature to the person assaulted.

It also created a new offence of rape under section 4, defined as a sexual assault which includes penetration of the mouth or anus by the penis or the vagina by an object manipulated by another person. This carried a maximum penalty of life imprisonment.

#### **5) Criminal Law (Sexual Offences) Act 1993**

This Act made it a statutory offence to commit an act of buggery with persons of either sex under 17 years of age. The Act also created a new statutory offence of gross indecency by a male with a male under 17 years of age.

Section 3 of the Act imposed a maximum penalty of life imprisonment for buggery with persons under 15 years of age and also provided for a maximum penalty of 5 years imprisonment for a first conviction and ten years for a subsequent conviction in respect of buggery with a person of or over 15 years and under 17 years of age.

Furthermore, s.6 made it an offence to importune a child in relation to buggery, gross indecency or unlawful carnal knowledge. The penalty in relation to this offence is a term of imprisonment for a period not exceeding twelve months on summary conviction.

#### **6) Sex Offenders Act 2001**

This Act requires a person who has been convicted of the prescribed sex offences to furnish to An Garda Síochána their name and address and any changes which may be made to either his address or name from time to time. This legal requirement enables An Garda Síochána to maintain a record of the identity and whereabouts of persons who had been convicted of the prescribed sexual offences. The manner in which this record is kept and the categories of persons who may have access to it are not dealt with in the legislation. The Act imposes an obligation on sexual offenders to disclose to certain categories of employers their previous convictions in relation to such offences. Provisions are also made by the 2001 Act for the imposition by the court of a Supervision Order. In addition, the court is authorised, on the application of a member of the Garda Síochána of the rank of Chief Superintendent, to impose such restrictions on the activities of a person convicted of sexual offences as the court may consider necessary for the protection of the public. The threshold for granting such an order is that the court should be satisfied on the balance of probabilities that the person has acted on one or more occasions in such a manner as to give reasonable grounds for believing that an order is necessary to protect the public from serious harm. Furthermore, the order may remain operable for an indefinite period of time

and any breach of the order will attract a maximum penalty of five years imprisonment. One such application has been made by Gardai since the Act came into operation.

In addition to the important protections this Act provides, the legislation is significant administratively in that it confers or imposes on An Garda Síochána powers and obligations designed to protect the community against the perpetration of sexual offences rather than the detection or punishment of offences already committed.

The Inquiry has reviewed corresponding English legislation which was recently updated in the Sexual Offences Act 2003. In brief, this Act provides a modern and comprehensive list of child sex offences which are more specific in nature than prevailing Irish law. It also provides for a series of new orders which may be granted by a court in respect of convicted and in limited cases, suspected, child sex offenders. The Inquiry has identified, by way of example only, the following English offences which do not exist in Irish law:

- (i) Section 15 of the Sexual Offences Act 2003 relates to the offence of meeting with a child following sexual grooming whereby an adult, having met or communicated with a child on at least two earlier occasions, intentionally meets a child or travels with the intention of meeting a child in any part of the world and at the time of doing so, intends to do anything to or in respect of the child, during or after the meeting and in any part of the world which if done will involve the commission by the perpetrator of a relevant offence. A “relevant offence” is defined to include most sexual offences. This offence requires the child to be under 16 years and for the perpetrator to believe that the child is not 16 years or over.
- (ii) The Act also creates offences in relation to abuse of positions of trust whereby it is a separate offence for a person aged 18 years or over to involve a child under that age in sexual activity where he is in a specified position of trust in relation to that child. This list does not include priests or ministers of religion. Even though the age of consent in England is 16, this offence relates to victim or victims under the age of 18.

## **7) Law Reform Commission Recommendations**

In its Report on Child Abuse made in 1990, the Law Reform Commission recommended the creation of an offence of child sexual abuse. Its proposed definition has already been set out at Chapter 2. Furthermore, Article 19(1) of The United Nations Convention on the Rights of the Child 1989, obliges the State to introduce such an offence. It could be committed by any person with a person less than 15 years of age or by a person in authority with a person under the age of 17. This would certainly remove the technical assault requirement and put the emphasis on acts that are abusive and exploitative.