

The Garda Dispute - What might possible legislation look like?

Following weeks of failed negotiations, a last minute Labour Court recommendation led both the GRA (Garda Representative Association) and the AGSI (Association of Garda Sergeants and Inspectors) to call off planned strike action. IRN asked Jeffrey Greene from William Fry Solicitors to speculate on the legislative or other changes that might emerge as a follow-on from the current Garda pay dispute. In particular, what might be done to protect the State from a future threat of all-out Garda industrial action?

In its November 3, 2016, recommendation, the Labour Court referred to "what appears to be a shared commitment to developing the means for the GRA to access the industrial relations institutions of the State (the WRC and the Court) as a mechanism to resolve appropriate industrial relations disputes", and stated that "the Court understands that the timelines outlined by An Taoiseach would normally make possible to completion of the legislative process in 2017".

An outside observer might wonder how it could potentially take that long simply to legislate for Garda access to the State's industrial relations institutions. However, this is just one strand of a spider's web of legislation involving Gardaí that would need to be examined and potentially amended as part of the overall dispute.

Legislation might allow Gardaí to participate in industrial action, but carve out certain locations that must remain protected

A full resolution of the Garda dispute would likely involve reflecting the Labour Court recommendation, assuming it is accepted through the ballots, as well as the 2014 decision of the European Committee of Social Rights (the "Committee") involving the Gardaí and their rights under the European Social Charter (the "Charter").

The primary objective of the Garda representative bodies was not necessarily to achieve "trade union" status as defined in legislation, and they have admitted that they essentially serve that purpose already.

However they wanted, and achieved in the Labour Court recommendation, the means of accessing the State's industrial relations machinery on a formal basis just like trade unions. The Attorney General has been asked by An Taoiseach to produce heads for such legislation as soon as possible, and these are expected in the first quarter of 2017.

Perhaps more important to the Garda representative bodies was greater involvement in public sector pay discussions, which could mean either participation through an affiliation with ICTU (which option would itself require an amendment to Garda Síochána Act 2005 to allow such affiliation), or more preferably from the Garda perspective, an acknowledgment of their alleged "unique" circumstances and the provisions of a separate Garda pay review body.

The Horgan Report on Garda remuneration and industrial relations is due in December and we will have to see what it recommends in this regard, but certainly the Government has accepted the principle of direct Garda involvement in the newly established Public Service Pay Commission (a non-statutory body, so amending legislation is not required to include the Gardaí), rather than the Garda representative bodies simply rowing in behind an ICTU-agreed deal in which they had no input.

EUROPEAN SOCIAL CHARTER

The Charter is a Council of Europe treaty relating to social and economic rights, such as employment, health and education. It exists as a counterpart to the European Convention on Human Rights, which provides for civil and political rights. Ireland ratified the Charter in 1964, as well as a revised form of the Charter in 2000.

The Charter exists in a slightly unusual space legally, in that the Charter and decisions made under it are stated to be binding on member states. However, decisions are not directly enforceable in the domestic legal systems of member states and there is really no enforcement mechanism other than 'naming and shaming' at a European level.

Nevertheless, a complaint under the Charter was taken against Ireland by the European Confederation of Police (EuroCOP), on behalf of the AGSI. The Committee concluded:

- By 10 votes to 1, that there was no violation of Article 5 in relation to the prohibition on the police force establishing a trade union;
- Unanimously, that there was a violation of Article 5 in relation to the prohibition on police representative associations joining a national employee organisation;
- Unanimously, that there was a violation of Article 6.2 in relation to restricting the access of police representative associations to pay agreement discussions;
- By 6 votes to 5, that there was a violation of Article 6.4 in relation to the right to strike of members of the police.

CONUNDRUMS ARISING

Although the decision of the Committee issued on 17 May 2014, and the State committed to review the matter and report back on the Committee's findings, nothing concrete materialised. With no enforcement mechanism of note, there was simply no Government appetite to upset the status quo. However, if the ongoing GRA and AGSI ballots on the Labour Court recommendations lead to a resolution involving Garda access to State industrial relations machinery, the Government may well decide to fix the violations under the Charter at the same time.

Difficulties are immediately foreseeable. The Committee's decision, if the State decides to comply, must then be meshed with the negotiations that culminated in the Labour Court recommendation, even though the arguments and subject matter are not fully consistent.

For example, the Labour Court recommendation for the GRA provides for access to the WRC and the Labour Court (on a formal basis as opposed to the 'ad hoc' basis on which the recommendation itself was issued), but the decision of the Committee in relation to the claim that access must be provided to the LRC (now WRC) and Labour Court was that "access to a particular dispute resolution mechanism cannot be required for the fulfilment of the requirements of Article 6", and the EuroCOP complaint in that regard was rejected.

Similarly, the Committee's decision went into great detail on the question of a "right to strike", narrowly deciding that a blanket ban on Garda strikes is a violation of the Charter, yet the Labour Court recommendation and media reports on the negotiations do not refer to this "right" as being a primary Garda objective.

This may well be because the Garda representative bodies could not figure out a logical way to protect themselves and their members from legal or disciplinary action for taking strike action that the bodies claimed was not unlawful, while at the same time seeking a "right to strike" (a tacit admission that such right did not exist in the first place).

However, in reality clarity is needed on both sides. For the Gardaí and their representative bodies, clarification and protection would be welcome in respect of possible breaches as detailed in *IRN 37/2016 ('Gardaí industrial action faces uncharted legal maze')* and below. And for the Government, some form of Garda right to strike would put the State in compliance with the Charter (though in legal terms a 'right to strike' is really a misnomer, and Irish legislation instead provides protection for workers against wrongs that otherwise could be committed while participating in industrial action), but may also be an opportunity to copperfasten protection for the State from a future all-out Garda strike threat, by placing restrictions on that right.

TABOO BROKEN

It seems inevitable that primary legislation in the form of an Act will be required, as there are a number of pieces of primary and secondary legislation that would need to be amended. If strike action had proceeded, there may well have been consequences under a number of statutes, including the Garda Síochána Act 2005, the Offences Against the State Act 1939 and the Garda Síochána (Discipline) Regulations 2007.

The immunities under the Industrial Relations Act 1990 in respect of industrial action would also not have applied to members (or the representative bodies), as the definition of "worker" specifically excludes a member of the Garda Síochána. Individual Gardaí may also have been subjected to disciplinary action, not least following the direct order of the Garda Commissioner to individual Gardaí that they should attend work as required.

It is doubtful whether the Government would have proceeded against Gardaí or the representative bodies under the above legislation, considering that would likely have annihilated any remaining relationship or goodwill between the parties. The logistics of mass disciplinary action against Gardaí appears so unwieldy as to make it very unlikely also.

But Gardaí and the representative bodies will want certainty in any event through legislative amendments. Similarly, now that the taboo of Gardaí threatening strike action has been broken without being strongly faced down by Government, it would appear inevitable that at some point in the future industrial action by Gardaí will again be threatened.

The current dispute makes clear that the Government will struggle to rely on existing legislative provisions in such a case, and the best course of action may therefore be to grasp the nettle and legislate for the form of that industrial action.

POTENTIAL LEGISLATION

What might such legislation look like? Private Members' Bills ("PMB") become law on the rarest of occasions and are typically not of great worth, but potential pathfinder legislation has already been proposed in this manner. In February 2015 Labour TD Michael McNamara proposed as a PMB the Industrial Relations (Members of the Garda Síochána and the Defence Forces) Bill 2015. Mr McNamara's stated aim was that the Bill would "introduce the necessary amendments to primary legislation to bring Ireland into compliance with the Social Charter".

Leaving aside the Bill's references to the Defence Forces (but perhaps only temporarily, as it is understood that the Defence Forces representative body PDFORRA has lodged its own complaint under the Charter along the same lines as the EuroCOP complaint), the Bill does provide a relatively neat solution to certain of the violations referred to under the Charter.

It is rather simplistic, which is to be expected from a PMB at first instance, but it provides for legislative amendments that allow the Garda representative bodies to become members of an umbrella organisation of employees, such as UCTU, and for them and their members to obtain similar rights as regards industrial action as everyone else.

The Bill was voted down, again due to a lack of appetite by Government to take on the issue without a pressing need. However, records of the Dáil debate on 24 April 2015 at the Second Stage of the Bill show that it was generally well received on all sides, though it was also clear that the inclusion of a blanket ability to take industrial action (which would include strike action) without any form of restriction was going to be strongly resisted by both Fine Gael and Fianna Fáil.

Interestingly, in the UK for example, where the police force is also prohibited from striking, in 2010 the UK Government proposed allowing police officers a right to industrial action, but only in return for changes to lucrative remuneration provisions. This did not proceed.

Then in 2013 the UK Police Federation (the police union) failed to secure a mandate from its members following a ballot to pursue the Government for a right to take industrial action, which could indicate that Gardaí themselves would closely weigh up the benefits of such a right versus what they would be asked to give up in return.

However if Garda industrial action is to be permitted, this would probably be by including them as "workers" under section 8 of the Industrial Relations Act 1990 as suggested in the above PMB, though part of the delay in producing any such legislation would arise from cross-checking any unnecessary consequences this would cause to other Industrial Relations Acts and elsewhere. However it would be prescient for the Government to limit any such industrial action.

RESTRICTED RIGHT?

The decision of the Committee, and other previous decisions under the Charter, indicate that a prohibition on police forces striking is acceptable in domestic legislation if it is drafted in a restricted manner.

For example, legislation might allow Gardaí to participate in industrial action up to and including strikes, but specifically carve out certain locations that must remain protected (such as airports, ports and Government buildings) and functions that must remain operational (such as anti-terrorism units, emergency response units and court prosecutions).

This has been done in a number of other EU member states. In essence, the legislation would provide that industrial action is only permitted subject to the provision of agreed emergency cover. At the last minute before the threatened strike the GRA agreed to exempt 18 units (approximately 800 Gardaí) from the industrial action (*see IRN 41/2016, 'Facing implications of strike, GRA acted to protect its interests'*) and it could be this cover and/or more that would form the basis for legally required emergency cover.

The Industrial Relations Act would also be amended to provide that an injunction could be obtained should this agreed emergency cover not be made available (presumably drafted widely enough to cover a repeat of the 'blue flu' or wildcat action by individual Gardaí). This compromise would certainly satisfy the Committee's decision under the Charter, but also ensure that the State is not held to ransom in future by the threat of an all-out Garda strike.