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LEGAL ASSISTANCE IN POLICE CUSTODY

An Irish Solution to Safeguarding Suspects

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Introduction

Access to legal assistance in the pre-trial, investigative stage of the criminal process is recognised as a fundamental protection for those who are suspected of criminal offending and detained in police custody.¹ Anyone who is arrested and detained for questioning is vulnerable, and many suspects in the Irish criminal process have additional vulnerabilities in terms of low levels of educational attainment, mental ill-health, learning disabilities, addiction issues, and so on.² The investigative stage of the criminal process, and in particular, the garda interviewing of suspects, can be a crucial aspect of building a case against a suspect. As the centre of gravity of the criminal justice system has moved backwards into the privacy of the police station and away from the public courtroom, the need for additional safeguards to ensure fairness for suspects has been heightened.³

1 On an international level, see the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (approved by UN General Assembly in 2012) <<https://digital-library.un.org/record/735513?ln=en>> accessed 27 July 2023. Note also, that in the Principles on Effective Interviewing for Investigations and Information Gathering, the so-called Mendez principles, the right of access to a lawyer is specifically listed as one of 13 legal and procedural safeguards which are necessary to ensure respect for human rights and enhance the reliability and evidentiary value of the information obtained. 'Principles on Effective Interviewing for Investigations and Information Gathering' (May 2021) <<https://interviewingprinciples.com/>> accessed 29 June 2023.

2 V Conway and Y Daly, *Criminal Defence Representation at Garda Stations* (Bloomsbury 2023) Chapter 6.

3 See Y Daly and J Jackson, 'The Criminal Justice Process: From Questioning to Trial' in D Healy and others (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016) 280

In the Irish context, as discussed in other chapters in this volume, many safeguards for particularly vulnerable suspects are underdeveloped. We do not have a clear system for the use of appropriate adults for adult suspects with learning disabilities, for example.⁴ Interpreters, outside of Irish Sign Language interpreters, are not required to have any particular qualification in interpreting and there are no formal registration requirements for them.⁵ There are, as yet, no unannounced oversight visits to garda stations to ensure that custody records are being properly kept, detainees are being properly treated, and that the facilities are appropriate.⁶ Access to medical review while in custody is in need of significant improvement also.⁷ Given the underdevelopment of those safeguards, and the overwhelming power of the police to hold someone in custody for periods of time ranging from six hours to seven days, the need for a properly functioning system of access to legal assistance for those detained in police custody is even more important than might be the case if those other safeguards were more fully functional.

This chapter begins by outlining the current status of the right to legal assistance in Ireland, and the winding road which has brought us to this point, including European influences on domestic developments. Then, it sets out the important role that a garda station lawyer plays. Following this, this chapter delves into issues which impact the practical and effective functioning of the right to legal assistance, including access to the Garda Station Legal Advice Scheme to cover the costs of legal assistance; the process of selecting a lawyer where a detainee does not know who to contact; time management issues for practitioners; and more. One aspect of the proposed Garda Síochána (Powers) Bill is then examined, before the chapter concludes with a recognition of where we are now and the need for enhancements to ensure effective protection of the right to legal assistance in Ireland.

Legal Assistance in Garda Custody: Current Status of the Right/Entitlement

At the time of writing, a free-standing right to legal advice/assistance⁸ during a period of garda detention is not directly set out in legislation in Ireland, though it is referred to in legislation providing for inferences to potentially be

at 287, 292. See also J Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) *Modern Law Review* 987.

4 See further Chapter 12 in this volume.

5 See further Chapter 7 in this volume.

6 See further Chapter 8 in this volume.

7 See further Chapter 12 in this volume.

8 While the constitutionally recognised right is one of reasonable access to legal advice, the European Court of Human Rights tends to refer instead to "legal assistance." Conway and others have previously argued that the role is broader than advising alone: see V Conway

drawn at trial from the failure or refusal of a suspect to answer certain questions or to provide certain information during garda interview.⁹ There are plans to recognise the right in legislation, within the Garda Síochána (Powers) Bill 2021, well over 30 years since the power of detention for questioning in garda stations became generally available for arrestable offences.¹⁰ The courts have recognised that a right of reasonable access to legal advice stems from the Irish Constitution, but this iteration of the right is more limited than that recognised at a European level, both in the EU Directive on the Right of Access to a Lawyer in Criminal Proceedings¹¹ and in the jurisprudence of the European Court of Human Rights.¹²

One of the main features of the broader iteration of the right to legal assistance which has not (yet) been recognised as part of the constitutionally protected right is the right to have one's lawyer present throughout police interview. Since 2014, however, this has been allowed in Ireland more by way of concession than through its recognition as a substantive right.

The story of how we, in Ireland, arrived at this juncture is a winding, but interesting one. In the 1970s and 1980s, the Irish courts referenced the existence of a right of access to legal advice in the pre-trial investigative stage of the criminal process in a number of cases,¹³ and its status as a constitutional right was eventually declared by the Supreme Court in the 1990 case of *People (DPP) v Healy*.¹⁴ It was expressed as a right of "reasonable access" to legal advice only. This was said to encompass a right to have immediate access to a requested lawyer once a suspect arrived at a garda station, but the

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

- ⁹ See ss 18, 19, and 19A of the Criminal Justice Act 1984, as amended by the Criminal Justice Act 2007; s 2 of the Offences Against the State (Amendment) Act 1998; and, s 72A of the Criminal Justice Act 2006 as inserted by s 9 of the Criminal Justice (Amendment) Act 2009.
- ¹⁰ Offences with a potential sentence of imprisonment of five years or more. The general power of detention post-arrest in such cases was introduced under s 4 of the Criminal Justice Act 1984, though it was not commenced until 1987, following the introduction of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987.
- ¹¹ Directive 2013/48/EU of the European Parliament and of the Council of October 22, 2013, on the right of access to a lawyer in criminal proceedings and in the European Arrest Warrant proceedings.
- ¹² See, for example, *Pishchalnikov v Russia* [2009] ECtHR 1357; *Brusco v France* [2010] ECtHR 1621; *Šebalj v Croatia* [2011] ECtHR 4429/09; *Borg v Malta* [2016] ECtHR 53; *Aras v Turkey (no 2)* [2014] ECtHR 15065/07.
- ¹³ In *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159; *People (DPP) v Madden* [1977] IR 336; *People (DPP) v Farrell* [1978] IR 13; and *People (DPP) v Conroy* [1986] IR 460.
- ¹⁴ *People (DPP) v Healy* (1990) 2 IR 73; [1990] ILRM 313.

notion of having a lawyer present during interview was summarily dismissed in a number of cases.¹⁵

Despite pronouncing the constitutional importance of the right, the courts did not prohibit the practice of gardaí questioning a detained suspect who had requested access to legal advice before they had in fact obtained such advice, so long as *bona fide* efforts were being made to contact a lawyer on their behalf.¹⁶ This changed with the hugely important case of *People (DPP) v Gormley and White*,¹⁷ in 2014. There, the Supreme Court departed from previous case law and ruled that the interrogation of detained suspects should not commence until after legal advice, where sought, has been obtained. Clarke J found that the arrest of an individual, by “the coercive power of the state”:

represents an important juncture in any potential criminal process. . . . Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods . . . It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage.¹⁸

Accordingly, the Court clarified that a breach of the right of access to legal advice in the garda station would amount to a breach of the right to a fair trial under Article 38.1 of the Constitution. Referencing the highly influential European Court of Human Rights (ECtHR) case of *Salduz v Turkey*¹⁹ (see later), Clarke J recognised the need at this early stage of the criminal process for a lawyer to engage in building the defence,²⁰ to advise on the lawfulness of the arrest and detention, and to advise on questioning. Hardiman J, concurring, highlighted the increasing complexity of the law for which the specialist

15 *ibid* 317. Prior to the decision in *Healy*, it had been suggested in a number of cases that the right of access to pre-trial legal advice, whether constitutional or otherwise, was a right of reasonable access only, and there was no entitlement for a suspect to have their solicitor present throughout interrogation: for example, *People (DPP) v Pringle* (1981) 2 Frewen 57. See also post-*Healy*, *Barry v Waldron* (23 May 1996) HC; and *Lavery v Member-in-Charge, Carrickmacross Garda Station* (1999) 2 IR 390.

16 See *People (DPP) v Buck* (2002) 2 IR 260; (2002) 2 ILRM 454 and *People (DPP) v O'Brien* (17 June 2002) CCA; (2005) 2 IR 206 SC.

17 *People (DPP) v Gormley and White* (2014) 2 IR 591; [2014] IESC 17.

18 *People (DPP) v Gormley and White* (2014) 2 IR 591, 629. A distinction was drawn in this case between the right of access to a lawyer prior to interview and prior to the taking of forensic samples.

19 *Salduz v Turkey* [2008] ECtHR 36391/02.

20 *People (DPP) v Gormley and White* (2014) 2 IR 591, 630.

expertise of a solicitor is required and indicated that the Court might find a right to have a solicitor present during garda interview if asked in an appropriate case.²¹

This *obiter* indication of an inclination to possibly recognise a right to the presence of a lawyer throughout interviews prompted an unexpected response. Two months later, in May 2014, the DPP issued a letter to An Garda Síochána instructing that where requested, the attendance of a solicitor at interview should be facilitated and that all suspects should be advised that they may request a solicitor to attend interviews. Solicitors were permitted to attend the very next day, though by way of concession rather than a legal or constitutional right, and with no legal clarity on how attendance should operate.²² A year later, in 2015, the Garda Síochána issued a Code of Practice on Access to a Solicitor by Persons in Garda Custody²³ and the Law Society issued Guidance for Solicitors Providing Legal Services in Garda Stations.²⁴ While these documents brought some clarity to the context of solicitor attendance at interviews, they are not entirely *ad idem* on all issues, and they do not have the force of law behind them. They are essentially internal protocols for each profession to follow.²⁵

There continues to be no detailed regulation of this stage of the criminal process, and while the Garda Síochána (Powers) Bill purports to engage with certain aspects of it, legitimate concerns remain about the Bill as it stands at the time of writing (discussed later).

The route which brought us to the current, somewhat equivocal, status of the right to legal assistance in Ireland, was paved not only by domestic case law and executive decisions but by developments at a European level also. Article 6 of the European Convention on Human Rights (ECHR) protects the right to a fair trial. Article 6(3)(c) specifically states that a person charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” The ECtHR has sought to ensure effective and practical implementation of these provisions by not only recognising the right to have a lawyer

21 *Ibid.*, 599.

22 See further Conway and Daly (n 8); Conway and Daly (n 2) 53.

23 An Garda Síochána, ‘Code of Practice on Access to a Solicitor by Persons in Garda Custody’ <www.garda.ie/en/about-us/publications/policy-documents/code-of-practice-on-access-to-a-solicitor-by-persons-in-garda-custody.pdf> accessed 29 June 2023.

24 The Law Society, ‘Guidance for Solicitors Providing Legal Services in Garda Stations’ <www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf> accessed 29 June 2023.

25 Conway and Daly (n 2) 57–63.

present during police interview but also clarifying that this right is one of legal assistance, which goes beyond legal advice alone.²⁶

In *Salduz v Turkey*,²⁷ which, as noted earlier, was later cited in *Gormley and White*,²⁸ the Grand Chamber declared clearly that, unless there are compelling reasons in an individual case, access to a lawyer should be provided from the first interrogation of a suspect by the police.²⁹ Prior to *Salduz*, the ECtHR had assessed whether a breach of the right of access to a lawyer amounted to a breach of the right to a fair trial by considering the fairness of the proceedings as a whole.³⁰ However, the Court departed from this approach in *Salduz*, basing its decision on the belief that “[t]he rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”³¹ The Court was clear on the centrality of the police interview to the fairness of the criminal process as a whole, and the requirement for access to legal assistance, where requested, throughout the interview to ensure fairness.

There has been some regression since the heights of protection afforded to the right to legal assistance in *Salduz*. In *Ibrahim and Ors v UK*,³² the ECtHR held that a two-stage test should be applied to consider any claimed breach of Article 6 based on lack of access to a lawyer:

- (i) determine if compelling reasons exist for the non-provision of access; and if not,
- (ii) conduct “a holistic assessment of the entirety of the proceedings to determine whether they were ‘fair’ for the purposes of Article 6.”³³

Despite this regression in terms of the approach to assessing any possible breach, the ECtHR has reiterated the principles which apply under Articles 6(1) and 6(3), in relation to the right of access to legal assistance in police custody. In *Atristain Gorosabel v Spain*,³⁴ for example, the Court reiterated that, as a rule, access to a lawyer should be provided as soon as there is a criminal charge and, in particular, from the time of the suspect’s arrest. Access

26 See, for example, *Pishchalnikov v Russia* [2009] ECtHR 1357; *Brusco v France* [2010] ECtHR 1621; *Šebalj v Croatia* [2011] ECtHR 4429/09; *Borg v Malta* [2016] ECtHR 53; *Aras v Turkey (no 2)* [2014] ECtHR 15065/07.

27 *Salduz v Turkey* (2008) ECtHR 36391/02 (n 19).

28 *People (DPP) v Gormley and White* (2014) 2 IR 591 (n 17).

29 *Salduz v Turkey* [2008] ECtHR 36391/02 (n 19) at 55.

30 *Imbrioscia v Switzerland* [1993] ECtHR 13972/88; *Murray v UK* [1996] ECtHR 18731/91; *Averill v UK* [2001] ECtHR 36408/97.

31 *Salduz v Turkey* [2008] ECtHR 36391/02 (n 19) at 55.

32 *Ibrahim and Ors v UK* [2016] ECtHR 50541/08; 50571/08; 50573/08 and 40351/09.

33 *Ibid.*, para 264.

34 *Atristain Gorosabel v Spain* [2022] ECtHR 15508/15.

to a lawyer should be provided from the first interrogation of a suspect by police, unless it is demonstrated in the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction must not unduly prejudice the rights of the accused under Article 6. Furthermore, a person charged with a criminal offence who does not wish to defend themselves in person must be able to have recourse to legal assistance of their own choosing, from the initial stages of the proceedings.

The Court listed the value of “prompt access to a lawyer” for arrested suspects, stating that it:

constitutes an important counterweight to the vulnerability of suspects in police custody . . . Provides a fundamental safeguard against coercion and ill-treatment of suspects by the police . . . [and] one of the lawyer’s main tasks at the police custody and investigation stages is to ensure respect for the right of an accused not to incriminate himself . . . and for his right to remain silent.³⁵

The Court observed that assigning a lawyer does not in itself ensure the effectiveness of the assistance of that lawyer, and minimum requirements must be met. Suspects must be able to engage with a lawyer from the time at which they are taken into custody. It must therefore be possible for a suspect to consult with his or her lawyer prior to an interview. The lawyer must be able to confer with his or her client in private and receive confidential instructions. Suspects are entitled to have their lawyer physically present during their initial police interviews and whenever they are questioned in subsequent pre-trial proceedings. Furthermore, such physical presence must be of a nature that enables the lawyer to provide assistance that is effective and practical rather than merely abstract, and in particular, to ensure that the defence rights of the interviewed suspect are not prejudiced.³⁶

Ireland found itself before the ECtHR in relation to an alleged breach of Article 6 in the case of *Doyle v Ireland*.³⁷ The applicant had been convicted of murder, in part based on a confession he made while in garda custody. He claimed a breach of his right to legal assistance as his lawyer was not present during this, or any other, garda interview. The relevant arrest was in 2009 when the attendance of a lawyer during interview was not yet permitted in Ireland, and the applicant had not been denied access to his lawyer at any point *outside* of the interviews. He was detained for over 60 hours and had 40 minutes of consultation with his solicitor across that time; no

³⁵ *Ibid.*, para 46.

³⁶ *Atristain Gorosabel v Spain* [2022] ECtHR 15508/15 (n 34) para 49.

³⁷ *Doyle v Ireland* App no 51979/17 (23 May 2019).

one consultation period lasted longer than 10 minutes. Gardaí had stopped interviews and facilitated consultations on request. The admission was made in the course of the fifteenth interview.

The ECtHR, applying its post-*Salduz* assessment of the overall fairness of proceedings, found no breach of Article 6. It did, however, emphasise the importance of the right to legal assistance and clearly stated that Article 6(3) (c) encompasses a suspect's right to have their lawyer physically present during police interviews.³⁸

Before the *Doyle* case got as far as the ECtHR, there was some speculation that the Supreme Court would make good on its previous *obiter* suggestion that in an appropriate case it might recognise the presence of a requested lawyer during interview as part of the constitutional right of access to legal advice. This did not happen. A majority of the Supreme Court in *Doyle* refrained from recognising that as an aspect of the constitutional right, though there were again indications from a number of members of the Court that this might be recognised at some point in the future.³⁹ O'Malley J mentioned, in particular, that a case involving inferences from silence might give rise to such a future finding. In dissent, McKechnie J was deeply concerned by the issue of equality of arms, given the "armoury and array of resources" at the State's disposal: "I do not believe that the present safeguards sufficiently address the inequality which now exists in the interview room and which can so threaten the rights being presently discussed."⁴⁰

Interestingly, in the 2022 case of *DPP v JD*,⁴¹ MacMenamin J made passing, *obiter*, reference to "the right to the presence of a lawyer" while being interviewed by An Garda Síochána.⁴² He also referred more directly to the decision in *Gormley & White* to the effect that the process of taking a statement in garda custody was so clearly connected to the trial process that Article 38 of the Constitution (the right to a fair trial) must be held to apply outside the temporal confines of the trial itself, and to require that a person in custody have access to, and the assistance of, a lawyer before being questioned. He noted that that decision "has led to a salutary change in official practice in respect of questioning in custody."⁴³ The concession to having a requested lawyer present during garda interview appears to now be well settled, despite not being officially recognised as part of the constitutional right to legal advice.

38 *Ibid.*, para 74.

39 See the judgments of MacMenamin, O'Malley and O'Donnell JJ: *People (DPP) v Doyle* (2018) 1 IR 1; [2017] IESC 1.

40 *Ibid.*, para 176–78.

41 *People (DPP) v JD* [2022] IESC 39.

42 *Ibid.*, paras 4, 106, 109.

43 *People (DPP) v JD* [2022] IESC 39 (n 41) para 118.

The increasing interest of the EU in the harmonisation of suspect rights across member states has also impacted the development of the current Irish position on the right of access to legal assistance. In 2016, an EU Directive on the Right of Access to a Lawyer in Criminal Proceedings entered into force. This is one of the so-called Procedural Rights Roadmap Directives, which emerged from the 2009 EU Stockholm Programme. Ireland does not participate fully in Justice and Home Affairs matters and maintains an “opt in” approach to directives in this area. While it has opted in to the Directive on the Right to Interpretation and Translation in Criminal Proceedings,⁴⁴ and the Directive on the Right to Information in Criminal Proceedings,⁴⁵ it has not opted in to other criminal justice directives, including this one. Its provisions confirm, and arguably expand, the position adopted by the ECtHR in *Salduz*. Article 3, for example, establishes that suspects have a right to access a lawyer, without undue delay, before they are questioned by police. Suspects must be enabled to “exercise their rights of defence practically and effectively.”⁴⁶ They are entitled to meet their lawyer in private and for “their lawyer to be present and participate effectively when questioned.”⁴⁷ The lawyer should also be permitted to attend ID parades, confrontations, and reconstructions of crime scenes. While Ireland has not (yet) opted in, the very existence of the directive has been influential on our domestic approach to the issue⁴⁸ and the European-wide consensus on the importance of legal advice and assistance in the early, investigative stages of the criminal process is clear.

We turn now to examine the specific role played by lawyers in fulfilling their clients’ right to legal assistance, noting that this goes beyond the mere provision of legal advice to include other important functions also.

Role of the Lawyer

The lawyer’s role at the police station is not simply to give legal advice, it has evolved into a more expansive role, as what happens in the police station has become more important to the overall trajectory and disposal of the

44 Directive 2010/64/EU of the European Parliament and of the Council of October 20, 2010, on the right to interpretation and translation in criminal proceedings.

45 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

46 Directive 2010/64/EU (n 45) Article 3(1).

47 *Ibid.*, Article 3(3).

48 In January 2013, the Government established a working group to advise on a system providing for the presence of a legal representative during Garda interviews: Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews, *Report – July 2013* (Department of Justice and Equality 2013). The group outlined the manner in which the Directive on the Right of Access to a Lawyer in Criminal Proceedings could practically be implemented in Ireland, if the state were to opt into it.

case. In 90% of cases, there will be no trial, and therefore, no later testing of the evidence against the accused.⁴⁹ What happens in the police station then can, in the vast majority of cases, be determinative of next steps, and ultimately of the outcome of the case. Accordingly, it is necessary for the lawyer not to simply tell the detainee what their legal rights are, or to recite the law to them: there is a more involved engagement necessary, which the SUPRALAT project has termed active, client-centred lawyering.⁵⁰ The term active here does not connote that the lawyer should be intervening unnecessarily throughout interviews, for example, but they should be fully engaged while present at the police station: listening actively to their client and to gardaí; seeking disclosure in advance of interview; assessing the well-being of their client and discussing any medical needs with gardaí; taking good notes in both the consultation and interview; supporting their client through the process; intervening when necessary during the interview; and casting their minds forward to the likely next steps of gardaí or the likely way the case might be perceived at trial, so as to continually give the best advice possible to the client. Being client-centred means that this is not a “one size fits all” exercise: the advice which might be appropriate for one detainee in certain circumstances might not be for another in a similar situation. A good garda station lawyer should be very aware of their client’s concerns and any specific vulnerabilities, should be focused on the specific needs of the individual client, and should assist that client to make the decisions in the garda station that will lead to the best outcomes for them in their individual circumstances. Performing all of the necessary tasks which are required of a garda station lawyer is not easy, and it requires, in particular, strong communication skills which will need to be employed with both clients and gardaí so as to give the best representation possible to the detainee.

Writing with my late colleague Dr Vicky Conway, and drawing on empirical research conducted with criminal defence solicitors around Ireland, we identified seven specific functions of a garda station lawyer.⁵¹ We used the mnemonic ADJRESS to assist lawyers to remember these:

A – Advise.

D – Actively Defend.

J – Prevent miscarriages of Justice.

49 Conway and Daly (n 2) 68–69.

50 The SUPRALAT project was an EU-funded project titled “Strengthening suspects’ rights in the pre-trial proceedings through practices orientated training for lawyers” which brought together researchers from Ireland, the Netherlands, Belgium and Hungary to develop and deliver training for police station lawyers. See Conway and Daly (n 2) 2–4.

51 Conway and Daly (n 2) Chapter 4.

- R – Protect Rights.
- E – Ensure Equality of Arms.
- S – Provide Support.
- S – Protect the right to Silence.

Each of these is now briefly examined in turn, to give a flavour of the important and multifaceted role played by garda station lawyers.

1) Advise

In order to give useful legal advice to a detained client, the lawyer must get a good understanding of the charges of which their client is suspected and the justification on which that suspicion is based. They will need to explain the relevant law and legal principles to their client, in a comprehensible manner, and advise the client on what, in their particular circumstances, might be the best approach to take and what the consequences of any decision made at that point might be. Doing this effectively requires building trust with the client. It also requires the use of adaptive language, to ensure that the particular client understands what the lawyer is explaining to them, and, of course, a clear understanding of substantive law and procedure.

As lawyers are now entitled to be present throughout the garda interview, there is an opportunity to provide ongoing legal advice, or to respond immediately to unexpected turns in interview or the revelation of evidence which had not previously been disclosed. The lawyer can also clarify any inaccuracies or misunderstandings about the law should they occur during interview.

2) Actively Defend

The defence of a client in a criminal case does not begin at the doors of the courtroom; rather, for clients who have engaged a lawyer at the early stages of an investigation, it begins in the garda station. Bearing in mind that the vast majority of detentions will not lead to a trial at which interactions in the garda station will be scrutinised, it is very important for suspects in garda detention to have not just legal advice but legal defence. Again, this is not about objecting to every garda statement, question or action, or creating unnecessary disturbances but rather insisting on the upholding of all protections for one's client, and fully engaging in the process on their behalf. This would include seeking all necessary and available information from gardaí; considering, on the basis of knowledge and experience, what would be the approach most favourable to one's client; taking the time to clearly outline options and consequences to the client; and supporting them in giving effect to whichever option they select, be that remaining silent throughout interview, engaging with gardaí to a certain extent, or preparing a statement.

3) *Prevent Miscarriages of Justice*

We are not at a point where we could suggest that there is no risk of miscarriages of justice occurring in our criminal justice system. There is always likely to be such a risk as even where the conditions of custody are relatively good and no oppressive behaviour, threats, or inducements are present, individual vulnerabilities of suspects might still lead to false confessions or acquiescence. The presence of a lawyer throughout the period of custody and questioning can operate as a safeguard against such outcomes, particularly where they are aware of their client's specific vulnerabilities and are alert to the risks of miscarriages of justice occurring, whether that be through improper police conduct or otherwise. Part of the role of the lawyer in this context may be to advocate on their client's behalf that a planned garda interview should not go ahead, where they are concerned that their client is unfit for interview. Gardaí should, of course, also be alert to concerns around fitness for interview and the well-being of the suspect throughout the detention period. The presence of the lawyer can be very important, nonetheless, in articulating specific concerns around the detainee's well-being and its impact on the fairness of any interview.

4) *Protect Rights*

It is clearly an important function of the lawyer in the garda station to protect the rights of their client, from requesting medical attention, to not being questioned about an offence other than the one for which they are arrested, to not being ill-treated or asked oppressive questions. Protecting rights is not just a matter of insisting that gardaí do things in an appropriate manner but also ensuring that the client appreciates the significance of what is at play during detention, understands the legal advice given, and is in a position to decide on which advice to take. As noted by Conway and Daly, "[t]he lawyer, by their presence [at interview] alone can impact on the tone of the interview, the pressure felt by detainees, and through their interventions can ensure that rights are protected during the interview."⁵² Findings in other European jurisdictions support this and suggest that where lawyers were present police were less likely to act oppressively or unfairly towards suspects, and more likely to follow procedural rules.⁵³

There are concerns that gardaí sometimes interact with suspects outside of the interview room in an improper manner which might put the suspect under pressure to respond in a particular way during interview. Conway and Daly's study suggested that the presence of a lawyer at interview can

⁵² *ibid.*, 188.

⁵³ J Blackstock and others, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Vol 113, Intersentia 2014) at p 409.

counteract any such interaction which may have previously occurred, or the fact that the lawyer is soon to arrive at the station might ensure that such interactions do not occur in the first place.⁵⁴

5) *Ensure Equality of Arms*

Equality of arms is at the core of the right to a fair trial under Article 6 ECHR and was central to the decision in *Salduz*.⁵⁵ It was also referenced in *Healy* as one of the grounding rationales for the recognition of the right of reasonable access to legal advice under the Constitution.⁵⁶ Suspects in the garda station are not on an equal footing with others. They are deprived of their liberty, held in cells which are generally unpleasant, unsure of their future time of release or the potential outcome of the ongoing investigation, and almost always unsure of the law and legal procedures. Even those who have previous custody experience, and who may indicate externally that they are unperturbed by their detention, are in a very disadvantaged position in garda custody.⁵⁷ It is one of the ultimate displays, really, of the power of the State interfering in the private life of the citizen. Furthermore, the (increasing) complexity of criminal law, the law of evidence, and the regulation of criminal procedure places the detainee at a disadvantage, further exacerbated by the need to try to understand and apply the law to one's own circumstance, while being detained in a garda station.⁵⁸ Decisions with significant and potentially long-term consequences have to be made quickly. All of this requires that some protections are provided on the side of the individual detainee, and access to legal assistance is one of the more important amongst those. The lawyer brings with them not just substantive knowledge of the legal rules but their knowledge from previous experiences in the garda station and from the operation of the criminal justice system as a whole.

Lawyers in Conway and Daly's study considered that the presence of a lawyer throughout interview, in particular, can give detainees a sense of confidence and can

provide the client with the reassurance that all necessary legal advice will be given to them and they are not disadvantaged by their own lack of full

54 Conway and Daly (n 2) 188.

55 *Salduz v Turkey* [2008] ECtHR 36391/02 (n 19) at 53.

56 *People (DPP) v Healy* (1990) 2 IR 73, 81.

57 In the context of accused persons at the crown court in England and Wales, research has shown that even those who had repeat experience of the criminal process may fail to understand or be unable to meaningfully engage with its complex processes and procedures: J Jacobson, G Hunter and A Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press 2016).

58 See further, Conway and Daly (n 2) 75.

understanding of the procedures, the charges or the likely consequences of their responses to garda questions.⁵⁹

6) Provide Support

The process of arrest and detention can clearly be extremely stressful for a suspect, and the conditions are unpleasant and unfamiliar. The presence of a lawyer, whose primary concern is the protection of their client's rights, can offer some support to the detainee in this position. While the lawyer's primary role might be to advocate for their client's rights and to advise them on the law, doing so offers support in and of itself, and it is argued that performing those tasks is difficult unless the lawyer offers support in a broader manner also. For example, detained suspects can find it difficult to concentrate on the important matters occurring in the station if they have external concerns, such as missing work, needing to collect children from school, worries about family members, and so on. A lawyer may be able to address these matters, thereby allowing the detainee to focus on the significant issues which are ongoing in the station. While there are, of course, limits to the role of the lawyer in this context, and lawyers should be sure to operate only within ethical and appropriate boundaries in offering support to clients, simple words of comfort to acknowledge the stressful position the client is in or to give a listening ear to their concerns can be a good way to establish trust in the lawyer–client relationship, and to help the client to focus on the importance of the detention in the short term and the legal advice they are being given.

In the course of a garda interview, even where a lawyer is not making many interjections, their very presence can offer support to the detainee. This may assist the detainee to maintain silence, if this is the decision they have taken pursuant to legal advice, or indeed, as noted by lawyers in the Conway and Daly study, it may be important where a detainee is admitting their involvement in the criminal offence also. Presence at interview allows the lawyer to give the client some reassurance that they are doing ok and provides an opportunity for discussions between interviews of the shared experience, again building trust and supporting the client through a difficult experience.

7) Protect the Right to Silence

The right to remain silent is an important protection for suspects in the criminal process, and the presence of a lawyer prior to and during interview can assist in the upholding of this right. While remaining silent is not necessarily the best legal advice in all circumstances, if the client decides that this is the

⁵⁹ Ibid., 189.

approach they wish to take, the presence of the lawyer can support them in maintaining that stance and can ensure that police do not attempt to dissuade them from standing upon this right.

Conway and Daly recount that:

Lawyers felt that, to some extent, their mere presence at interview leant support to the client in holding their “no comment” position. While the lawyer could explain to their client about the right to remain silent at the consultation stage, and role play them saying “no comment,” the reality of saying that in response to garda questions may only fully crystallise in the interview itself.⁶⁰

Having the lawyer present in the interview could assist the client in maintaining the “no comment” approach on which they had decided, on the basis of legal advice. Lawyers can also remind the client of their right to silence during interview, if newly presented evidence arises, for example, which they have not previously discussed, or if the client seems to be wavering from their planned position in the face of ongoing police questioning.

Pivaty notes that:

[i]n many European countries, police are likely to use at least some degree of persuasion to obtain self-incriminating accounts from suspects, and in a minority of cases they may resort to improper compulsion. As a result of such persuasion or pressure, suspects may fail to adhere to their initial decision concerning whether to remain silent or to respond to questioning, and whether or not to confess. The lawyer’s role in this respect would be to counteract the coercion exercised by the authorities.⁶¹

There is an additional role for the lawyer in terms of the right to silence in Ireland also, because several legislative provisions allow for inferences to be drawn from the silence of the suspect at garda interview, in certain circumstances.⁶² These provisions specifically require that the suspect ought to have had a reasonable opportunity to consult a lawyer in relation to the operation of inference provisions, and the courts have clarified that there must be an opportunity (if the detainee wants it) to specifically discuss the inference

60 Ibid., 192.

61 A Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study* (Routledge 2020) 23–24.

62 On the operation of the inference provisions in Ireland, see Y Daly, A Muirhead and C Dowd, ‘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.

provisions, and their implications in their individual case, with their lawyer.⁶³ This reflects ECtHR jurisprudence which, for a long time, has linked the right to silence with the right to legal assistance.⁶⁴ The lawyer will also need to engage with gardaí in advance of an inference interview to gain relevant disclosure which will assist in advising the client. It can be difficult to explain the inferences and to assist the client in determining whether the better approach is to engage with the questions or to remain silent and run the risk of adverse inferences being drawn at trial. This is another example of where a suspect alone would be disadvantaged in their lack of understanding of complex legal and procedural concepts, and the assistance of a lawyer can be extremely important.

Practical and Effective Operation of the Right to Legal Assistance

The ECtHR has emphasised continually the need for rights to be practical and effective, not theoretical and illusory. While a suspect in garda custody is entitled to have access to a lawyer, and to have that lawyer present throughout interview, there are a number of limitations or challenges which restrict the practical and effective operation of the right in the Irish context including cost, the selection process, practitioner availability, and other practicalities which are now considered.

Cost

Currently, if a person detained in garda custody is on social welfare benefits or earning less than €20,316 per annum, they will be entitled to access legal advice free of charge while in garda custody, through the non-statutory Garda Station Legal Advice Scheme. According to the Central Statistics Office, the average salary per annum in Ireland is over €45,000.⁶⁵ The threshold for access to the Garda Síochána Legal Advice Scheme seems very low and exclusionary in that context. For anyone earning €30,000, €40,000, €50,000, or even more per annum it would likely be very difficult to find the money from everyday finances to pay for the cost of having a lawyer attend at the station, and stay throughout garda interviews. The take-up rate for accessing a lawyer in the garda station is low. Drawing on legal aid figures, Conway and Daly contend that approximately 21% of detainees access a lawyer during

63 *People (DPP) v Fitzpatrick* [2012] IECCA 74.

64 *Murray v United Kingdom* (1996) 22 EHRR29; *Averill v United Kingdom* (2001) 31 EHRR 839; *Condon v United Kingdom* (2001) 31 EHRR 1.

65 Central Statistics Office, *Earnings and Labour Costs Q3 2022 (Final) and Q4 2022 (Preliminary Estimates)* (Central Statistics Office 2022).

detention.⁶⁶ A similar figure is discernible from the 2021 Garda Síochána Inspectorate Report *Delivering Custody Services*.⁶⁷ Conway and Daly suggest that an average of just over 10% of those interviewed in garda stations, who were not paying privately for a lawyer, had one in attendance at interview.⁶⁸

The reasons for this are not clear, but it is at least possible that the cost of accessing a lawyer, or even the perceived cost, may be off-putting for detainees. While the right of reasonable access exists, then it is not being adequately funded or resourced, which perhaps reflects a lack of acceptance of the fundamental nature of the right to legal representation in garda custody. By contrast, in England and Wales, access to the duty solicitor is free of charge, no matter the earnings or financial status of the detainee.

Access to the Garda Station Legal Advice Scheme is only for those who have been arrested and detained in relation to arrestable offences, under certain provisions. Persons who attend voluntarily at a garda station for a cautioned interview are not entitled to benefit under the scheme. This needs to be reviewed to ensure an adequate level of protection for such persons. There are many reasons why someone might prefer to attend at the station in a voluntary manner rather than being subject to arrest, and while their liberty might not be at stake (save for the fact that they could at any point be arrested) they ought to have the same protections as those arrested and subject to interview.

Remuneration for garda station lawyers also needs to be reviewed and enhanced.⁶⁹ The rates of payment are low, and restrictions apply to the number of consultations which will be funded.⁷⁰ Such restrictions are based on the specific statute under which a suspect is being detained rather than any examination of the particular circumstances of the individual detainee or their possible additional needs or requirements.⁷¹

Lawyering at the garda station is challenging, taxing, and hugely important work. It takes a very unique set of knowledge, experience, and communication skills to do this work well. In order to ensure fairness in our criminal process, the existence of an expert cohort of lawyers who are willing to represent clients detained in garda stations at any hour of the day or night

66 Conway and Daly (n 2) 5.

67 Garda Síochána Inspectorate, *Delivering Custody Services* (Garda Síochána Inspectorate 2021).

68 Conway and Daly (n 2) 5.

69 *Ibid.*, 205–9.

70 See Legal Aid Board, ‘Garda Station Legal Advice Revised Scheme Guidance Document’ <www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-criminal-legal-aid-ad-hoc-cases/garda-station-legal-advice-revised-scheme/> accessed 29 June 2023.

71 There is a proviso allowing for additional payments where a solicitor is “specifically required” to attend at the station or at an interview, but the meaning of this phrase is not clear. See further, Conway and Daly (n 2) 206–7.

is necessary. Without improved remuneration we are likely to see further departures from the specialism, and a dearth of experienced individuals who are willing to continue doing garda station work. Practitioners are concerned that their numbers are dwindling and the number of new entrants is low.⁷²

Selection of a Garda Station Lawyer

Article 6(3)(c) of the ECHR declares that a person is entitled to legal assistance “of his own choosing” and this has been reiterated in the decisions of the ECtHR.⁷³ Where a detainee indicates a preference for a particular lawyer, that lawyer ought to be contacted. However, detainees sometimes do not know who to contact, and the system which has developed in Ireland where this arises is ad hoc and inconsistent. In fact, it is not really a system at all. While the Law Society has provided a process for use in this situation, it is not consistently used by gardaí. The Law Society provides a webpage which lists lawyers who have registered as willing to attend at particular garda stations – the “Find a Garda Station Solicitor” tool.⁷⁴ This list displays in a random order each time the webpage is renewed, in an effort to ensure transparency, fairness, and equitable distribution of work. This tool was referred to by the State in evidence to the European Committee on the Prevention of Torture during its 2019 visit to Ireland.⁷⁵ However, lawyers in Conway and Daly’s study reported their views that:

the list is not used, or is not consistently used; alternative methods have been developed by gardaí; gardaí sometimes influence the choice of lawyer; and gardaí had the opportunity to sway selection towards their “favourite” lawyers, with serious consequences for due process.⁷⁶

Many solicitors interviewed in the Conway and Daly study expressed concerns around the lack of transparency in the process of selecting a garda station lawyer. The Garda Inspectorate noted that different stations employ

72 Conway and Daly (n 2) 35–37.

73 For example, *Dvorski v Croatia* [2013] ECtHR 25703/11; *Martin v Estonia* [2013] ECtHR 35985/09.

74 Law Society, ‘Find a Garda Station Solicitor’ <www.lawsociety.ie/find-a-solicitor/Find-a-Garda-Station-Solicitor> accessed 29 June 2023.

75 European Committee on the Prevention of Torture, ‘Report to the Government of Ireland on the Visit to Ireland Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 23 September to 4 October 2019’ (2019) para 17 <<https://tm.coe.int/1680a078cf>> accessed 29 June 2023.

76 Conway and Daly (n 2) 196. See also Y Daly and V Conway, ‘Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance’ (2021) 48(4) *Journal of Law and Society* 618.

different methods, and that very few gardaí were even aware of the Law Society's tool.⁷⁷ Conway and Daly listed the alternative practices which have developed in some stations, including gathering business cards which might be stuck to the wall and inviting suspects to choose from amongst those, or to choose between two or three of those as offered by a garda; maintaining a laminated list, which solicitors could request to be added to; providing a list that was completed by a local Law Association. Many of the lawyers in that study reported that they rarely received calls relating to clients with whom they had no pre-existing relationship, either through direct prior contact, or from representing family members, or through having a specific reputation in relation to certain types of offences. A sense of unease around the lack of transparency or consistency in the selection of garda station lawyers was clear in that study, and there was a perception amongst some lawyers that gardaí were able to influence the selection process.

This is corroborated, to some extent, by the finding in the Garda Inspectorate report that "certain solicitors were seen [by gardaí] as the 'go to' option, potentially creating an advantage to those concerned."⁷⁸

Conway and Daly examined lawyers' views on how a particular solicitor might come to be seen as the "go to" option, or become a garda "favourite."⁷⁹ A range of factors were cited ranging from simply the fact of a garda knowing a particular solicitor from school or from playing on the same sports team, to the far more concerning suggestion that lawyers might be favoured due to the likely impact on the investigation. In that context, the contention was that lawyers who prioritise the protection of their clients' rights, who are likely to attend in person at the station, who might advise their clients to maintain their right to silence, or who might make specific requests during detention or interventions during interview would not be favoured. Even the perception that this might be happening is damaging to the reputation of An Garda Síochána and to the notion of fair procedures. There is an urgent need to regularise the process of selecting lawyers for garda station work in Ireland, where the detainee does not know who to call. Consideration could be given to systems which remove this role entirely from police. In Scotland, for example, a protocol requires the police to pass all requests for police station legal advice to the Solicitor Contact Line (SCL), which is provided by the Scottish Legal Aid Board. Where no specific solicitor is requested, an SCL employee provides preliminary advice to suspects by telephone. If the suspect asks for a solicitor to

77 Garda Síochána Inspectorate (n 67) 43.

78 *Ibid.*, 43.

79 Conway and Daly (n 2) 195–200.

attend the police interview, the referral is passed to a duty solicitor, often provided through the Public Defence Solicitors' Office.⁸⁰ But we do not even need to go so far. The Garda Inspectorate has indicated its support for the consistent use of the Law Society "Find a Garda Station Solicitor" tool, to ensure transparency and independence in the delivery of legal assistance in garda custody. If this was employed consistently and effectively, and the list was rigorously managed and updated by the Law Society, it would allay much of the concern on this issue.

More innovative solutions could also be considered. In Belgium, for example, an adaptable web-based list is in operation, on which lawyers can update their availability up to two days in advance, allowing flexibility from the lawyers' perspective and providing reliable availability information.⁸¹ In England and Wales, Kemp has piloted a Police Station App to provide detained suspects with information on their legal rights, including the right to legal assistance.⁸² This could be further developed to enhance a rights-based approach to the selection of solicitors, ensuring that suspects are making the choice themselves, improving the quality of the information on which they make that choice, and recording any waivers of the right. Lawyers could potentially upload a brief video or audio clip in which they introduce themselves, which could be provided to suspects on a tablet or played on a screen in the garda station. Given the importance of what is at stake, and the importance of lawyers building rapport with a client, something more than a name or a business card would enhance the decision-making process. As with the "Find a Garda Station Solicitor" list, such a programme could be designed to play in a random, different order each time it is commenced. Of course, some suspects might still struggle to choose, but gardaí could be strictly informed that they should not engage with any request to counsel suspects on this matter and should advise suspects that they must make their own selection. Furthermore, the physical environment in which suspects are informed of their legal rights and are given access to this technology ought to be video-recorded, so that the free choice of the suspect can be verified. As with the Belgian list, solicitors should be able to access this programme from their side to update availability from time to time. If such a system was jointly developed by An

80 V Kemp, 'Effective Police Station Legal Advice – Country Report 6: Scotland' (2018) <<http://eprints.nottingham.ac.uk/51251/1/Country%20Report%20Scotland%20Final.pdf>> accessed 29 June 2023.

81 E Maegherman and M Vanderhallen, 'Effective Police Station Legal Advice – Country Report 1: Belgium' (2018) <<https://nottingham-repository.worktribe.com/output/927183/effective-police-station-legal-advice-country-report-1-belgium>> accessed 29 June 2023.

82 V Kemp, 'Digital Legal Rights for Suspects: Users' Perspectives and PACE Safeguards' (2018) <<https://nottingham-repository.worktribe.com/output/946048/digital-legal-rights-for-suspects-users-perspectives-and-pace-safeguards>> accessed 29 June 2023.

Garda Síochána and the Law Society of Ireland, it might be more likely to be adopted and applied. In the interim, the existing Law Society tool should be formally adopted at the highest levels of AGS as the correct procedure to employ where a suspect wants assistance from a lawyer in garda custody but does not know who to call.

Practitioner Availability

As the system currently operates, there is a very practical difficulty for solicitors in organising their time, and being available to drop everything and attend at a garda station to represent a client at any time of the day or night. This is a particularly difficult situation for sole practitioners or small firms. If a lawyer is in court in the morning, and has meetings planned with clients in the afternoon, but suddenly receives a call from a garda station to say that a client has been arrested, what are they supposed to do? It is very difficult to hand over court work or to reschedule all planned meetings, in order to attend at a station for an unknown period of time. Similarly, a lawyer might be at their child's football match on a Saturday morning, or asleep in bed in the early hours, when they get a call to say there is a client in a certain garda station in need of their representation. Nighttime calls can be particularly demanding, as while gardaí may be operating within their rostered hours, a lawyer will have a full day of work to complete the next day. The difficulty of continuously being subject to this work/life, and indeed work/other work imbalance is a challenge which lawyers in the Conway and Daly study mentioned often.⁸³

In larger firms, it can be easier to deal with this, and some smaller firms have developed rota systems to cover for one another on an on-call basis. There may be a need to operationalise this on a broader scale in time – either through a formal duty solicitor scheme or through a more regularised on-call rotation.

There would also be a benefit to increased use of pre-arranged interviews, whether voluntary or pursuant to an arrest, where possible. This would allow lawyers to plan their time better, and to consult with clients in their own offices rather than within the less accommodating facilities of the garda station.⁸⁴ Having said that, legislative confirmation that the rights and protections afforded to arrested detainees should also be afforded to those who attend for a voluntary, cautioned interview is necessary. Similarly, the Garda Station Legal Advice Scheme should be extended to include voluntary questioning and the necessary preparatory legal consultations.

⁸³ Conway and Daly (n 2), see Chapter 2.

⁸⁴ *Ibid.*, 263–65.

Other Practical Issues

Conway and Daly's study pointed to the differing challenges and experiences which present for access to legal assistance in garda custody in rural Irish settings, as compared with urban centres.⁸⁵ Small-town familiarity between lawyers, gardaí, and clients, as compared to the relative anonymity of city work, could have both disadvantages and advantages in terms of engagement and communication. The distance a lawyer might need to travel to attend at a station, and therefore the time involved in attending in person was noted as a particular difference. A further important concern in rural areas is that there might not be a specialist criminal defence lawyer available, and because garda station representation requires a very unique set of skills and expertise to be done well, it is not the type of work that a non-specialist can easily perform. If the local conveyancing and probate solicitor were to attend at the station to advise a detainee, they would simply not have the depth and breadth of experience in the criminal justice system to provide the same level of service as a criminal defence lawyer working within the system on a daily basis.

Lawyers in that study also referenced the lack of facilities provided to them at garda stations. There are 564 operational garda stations in the country, and 120 of those have custody facilities totalling 492 cells.⁸⁶ Many of these are in old buildings, which were not designed with the attendance of lawyers in mind. Lawyers spoke to Conway and Daly about having to sometimes wait in the public reception area before and between interviews. This can sometimes be uncomfortable, particularly at night when other residents of the public reception area may be drunk or otherwise intoxicated. Safety concerns can also arise, particularly where the identity of the lawyer representing a high-profile detainee might be exposed.⁸⁷ A lack of access to parking for lawyers at garda stations was also cited, which can not only add to the stress of attending but also, again, pose safety concerns for those advising detainees. One lawyer in the study recounted leaving a very serious detention late at night and being watched for a protracted time by someone across the road when leaving.⁸⁸ Walking to their car down the street felt unsafe.

Lawyers noted the lack of consultation rooms, meaning that consultations are sometimes held in the interview room, a medical office, or even in a cell.⁸⁹ None of these options is ideal.

As noted, garda station representation is a very particular aspect of lawyering, and there is very little formal training provided. Criminal law and

85 *Ibid.*, 27–28.

86 Garda Síochána Inspectorate (n 67) 16.

87 Conway and Daly (n 2) 29–30.

88 *Ibid.*, 30.

89 *Ibid.*, 29.

practice is not afforded significant space in the Law Society of Ireland initial solicitor education programme. While the Law Society supported Conway and Daly in providing the SUPRALAT training programme to practising criminal defence lawyers, so as to assist them in their garda station work, there is no regular, ongoing training on this issue. Neither is there any specific accreditation necessary to conduct garda station work, other than being a solicitor. In England and Wales, by contrast, lawyers are not permitted to attend at stations without full training and accreditation for that role.⁹⁰ Lawyers in Ireland told Conway and Daly that they would like training, in particular, on recognising client vulnerabilities, the procedural aspects of attendance, giving the best possible advice, intervening in interviews, challenging gardaí, and dealing with the heightened emotions of detention.⁹¹

One final point is worth making here, while having a lawyer in attendance throughout detention and interview is extremely important, at the end of the day their power is limited. There is no referee, or independent judge, to adjudicate on disputes between a lawyer and a member-in-charge who does not want to note something on the custody record, for example, or an interviewing garda who does not agree that the question they have put to the detainee is oppressive. While lawyers can intervene, there is no guarantee that their intervention will be successful. This can be difficult for lawyers to experience, particularly when they are used to the resolution of dispute by a judge at trial, for example, where an objection is raised to a question asked in cross-examination. Lawyers, while striving at all times to represent their clients to the very best of their abilities, have to accept the limitations of their role. Sometimes all they can do is take a comprehensive note of what they have requested and why, mention their objections and justifications clearly on camera during interview, or perhaps email concerns to the relevant superintendent, to ensure they have been placed on record. The absence of strong regulation in this area confounds the difficulty as the rules of engagement, so to speak, are not entirely clear.

The Garda Síochána (Powers) Bill 2021

As noted earlier, there are several concerns around the General Scheme of the Garda Síochána (Powers) Bill 2021. One of these is the provision for a Code of Practice on custody and detention to be drawn up by the Garda Commissioner (following consultation with the Policing Authority, the Garda Síochána Inspectorate, and the Irish Human Rights and Equality Commission), for subsequent approval by the Minister for Justice.⁹² This Code is to

90 Ibid., 32–33.

91 Ibid., 33.

92 General Scheme of the Garda Síochána (Powers) Bill 2021, Head 64.

address the treatment of persons detained in Garda custody on suspicion of the commission of an offence and other matters related to detention which might be deemed appropriate by the Minister. In relation to legal assistance specifically, the General Scheme of the Bill suggests that the Code of Practice on custody and detention “shall provide for procedures in relation to access to a legal representative by persons detained in Garda custody facilities.”⁹³ Furthermore, the General Scheme suggests that the time between a request for legal assistance up to and including the first consultation between a detainee and their lawyer can be excluded in reckoning the overall period of detention permitted.⁹⁴ So, for example, if a detainee requests legal assistance and his lawyer is in court and cannot attend for an hour, and then spends half an hour in consultation with the detainee, the detention clock is essentially stopped for that hour and a half, and only starts to run again after the consultation has ended. It is proposed that the Code of Practice would determine the maximum period of time which might be excluded in reckoning a period of detention in such circumstances.⁹⁵ This seems like a very strange way to establish an important boundary in relation to the right of access to legal assistance. As discussed later, there are legitimate reasons why it might take a lawyer some time to attend a station, and while one can understand the policing desire not to lose time from the investigative detention period, it is suggested that the determination of the maximum period of exclusion in these circumstances ought to be objectively and firmly established in law rather than in a Code of Practice which is drawn up by the Garda Commissioner. The devolution of responsibility from the Minister to the Garda Commissioner for the creation of this Code of Practice (following consultation with the designated bodies), though subject to ministerial approval, seems extraordinary. Looking at England and Wales by comparison, the highly detailed and comprehensive Codes of Practice which accompany the Police and Criminal Evidence Act 1984 are statutory codes, prepared and published by the Secretary of State, laid before both Houses of Parliament for approval by way of resolution, and brought into operation as a statutory instrument. They therefore have the appropriate force of law behind them. The plans for Codes of Practice within the General Scheme of the Garda Síochána (Powers) Bill 2021 are confusing in terms of their legal value and seem to pass the planning and drafting power to the police rather than having the Department of Justice engage in an objective consultation process, as an independent arbiter.

93 Ibid. Head 64(3).

94 Ibid. Head 42(2).

95 Ibid. Heads 42(2) and 64(3).

Conclusion

It is beyond time for the right of access to legal assistance in garda custody in Ireland, including the presence of one's chosen lawyer during any garda interviews, to be put on a clear statutory footing with relevant, comprehensive regulations provided. The current situation gives a sense of the sort of double-think that usually underlies the phrase "an Irish solution to an Irish problem": the rationale and importance of the right to legal assistance are accepted, but the legal clarity, agreed practical protocols and financial resources necessary to give full effect to the right for those who need to avail of it are not in place. If people are to be adequately and appropriately protected in the Irish criminal process, particularly while in garda custody, then their rights need to be properly recognised and resourced. The acceptance of rights or entitlements in theory, without robust systems to ensure practical and effective operation of those rights in reality, falls far short of what is truly necessary to assist those who find themselves in police custody in Ireland.

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