

Selecting a Lawyer: The Practical Arrangement of Police Station Legal Assistance

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The importance of the right to legal assistance for suspects detained for police questioning, as part of the right to a fair trial, has been emphasised within the jurisprudence of the European Court of Human Rights and the Procedural Rights Roadmap Directives of the European Union. This article examines an overlooked aspect of the protection of that right: the selection of a lawyer in the police station. The selection process is unregulated in jurisdictions across Europe. Using Ireland as a case study, and drawing on interviews with 44 criminal defence solicitors, this article highlights concerns around the influence of police on the selection decision, the favouring of certain (types of) solicitors, and the impact on the quality of legal assistance, particularly for persons with additional vulnerabilities. The authors argue that the lack of a formal, transparent system for selection of lawyers undermines the effectiveness of the right to legal assistance.

I INTRODUCTION

In November 2008 the European Court of Human Rights (ECtHR) signalled to states party to the European Convention on Human Rights (ECHR) that the right to legal assistance in the pre-trial period of investigation is of utmost importance in giving practical and effective protection to the right to a fair trial, under Art 6 ECHR. In the pivotal case of *Salduz v Turkey*, the ECtHR held that every suspect detained in police custody must be provided with access to a lawyer before their first interrogation, unless there are compelling reasons not to.¹ The Court stated unequivocally 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.”² Subsequent cases confirmed and expanded protections of the right to legal assistance.³ The ECtHR has descended from this high watermark of *Salduz*, holding in *Ibrahim v UK* that use at trial of statements obtained from a detainee

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¹ *Salduz v. Turkey* [2008] ECHR 1542.

² *id.*, para 55.

³ For example, *Dayanan v. Turkey* (2009) ECHR 2278.; *Pishchalnikov v. Russia* (2009) ECHR 1357; *Brusco v. France* (2010) ECHR 1621; *Sebalj v. Croatia* App. No. 4429/09 (ECtHR, 28 June 2011); *AT v. Luxembourg* (2015) ECHR 367.

in the absence of access to a lawyer may not necessarily give rise to a breach of Art 6, if overall fairness of the proceedings was intact.⁴

Nonetheless, individual European jurisdictions have sought to organise their systems so as to comply with *Salduz*, ensuring access to legal assistance from the earliest stages of police detention and interrogation. The need for relevant domestic improvements was further stimulated by the European Union's 2013 Directive on the right of access to a lawyer in criminal proceedings.⁵

While much has been written about the impact of *Salduz*,⁶ the retreat within *Ibrahim*,⁷ and the EU procedural rights roadmap directives,⁸ there has been less scrutiny of the manner in which legal assistance for detained suspects is arranged and provided. The ECtHR has consistently stated that the protection afforded to ECHR rights must be practical and effective, not theoretical and illusory. Accordingly, the practical logistics of the operation of the right to legal assistance are critical.

This article examines one small but pivotal moment in the process: selecting a criminal defence lawyer in the police station for an unrepresented detainee. Jackson demonstrates the centrality of the police interview to the building of a defence,⁹ and Blackstock et al show that different lawyers can produce vastly different results.¹⁰ Active lawyers, rather than passive observers, enhance the protection of

⁴ *Ibrahim and others v. United Kingdom* [2016] ECHR 750. See also *Beuze v. Belgium* App. No. 71409/10 (ECtHR, 09 November 2018) and *Doyle v. Ireland* App. No. 51979/17 (ECtHR, 23 August 2019).

⁵ Directive 2013/48/EU, OJ L 294 6 November 2013.

⁶ D. Giannouloupoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries' (2016) 16 *Human Rights Law Rev.* 103; J. Jackson, 'Responses to *Salduz*: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) *Modern Law Rev.* 987.

⁷ R. Goss, 'Out of Many, One? Strasbourg's Ibrahim Decision on Article 6' (2017) 80(6) *Modern Law Rev.* 1137; A. Soo, 'Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings? *Ibrahim and the others v. the UK* (13th of September 2016)' (2017) 25(4) *European J. of Crime, Criminal Law and Criminal Justice* 327; E. Celiksoy, '*Ibrahim and Others v. UK*: Watering down the *Salduz* principles?' (2018) 9 *New J. of European Criminal Law* 229; E. Celiksoy, 'Overruling 'the *Salduz* Doctrine' in *Beuze v Belgium*' (2019) 10 *New J. of European Criminal Law* 342.

⁸ A. Soo, 'How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer?' (2017) 8 *New J. of European Criminal Law* 64; A. Pivaty and A. Soo, 'Article 7 of the Directive 2012/13/EU on the Right to Information in Criminal Proceedings: A Missed Opportunity to Ensure Equality of Arms in Pre-Trial Proceedings?' (2019) 27 *European J. of Crime, Criminal Law and Criminal Justice* 126; L.B. Winter, 'The EU Directive on the Right to Access to a Lawyer: A Critical Assessment' in S. Ruggeri, ed., *Human Rights in European Criminal Law. New Developments in European Legislation and Case Law after the Lisbon Treaty* (2015); E. Symeonidou-Kastanidou, 'The Right of Access to a Lawyer in Criminal Proceedings: The transposition of Directive 2013/48/EU of 22 October 2013 on national legislation' (2015) 5(1) *European Criminal Law Rev.* 70.

⁹ Jackson, op. cit. n 6, pp. 987-1018.

¹⁰ J. Blackstock et al. *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (2013). See also S. Leahy-Harland and R. Bull, 'The impact of context on real-life serious crime interviews' (2020) *Police Practice and Research* DOI: [10.1080/15614263.2020.1848565](https://doi.org/10.1080/15614263.2020.1848565).

rights and the building of a defence at this early stage.¹¹ Thus the choice as to which lawyer to contact impacts substantially on future proceedings. There has been limited research on this selection process,¹² a significant lacuna given its relationship to the effective realisation of the right to legal assistance. In this article, using Ireland as a case study, we speak to that lacuna, exploring how solicitors are selected to provide legal assistance to detained suspects. We reflect on the law and policies in place and draw extensively on interviews with 44 Irish criminal defence solicitors. Our findings highlight the absence of a formal system for the selection of criminal defence solicitors.

Further, our qualitative data illuminates the impact the selection process has on the role of lawyers at the police station and on the protection of suspect rights. We find that lawyers working within the system have fundamental concerns about different selection processes being operated in different Garda (police) stations. They raise concerns about the influence of gardaí on the selection decision, about the reasons for certain solicitors being favoured over others, and about the impact of this disorderly, unregulated process on the quality of legal assistance provided to criminal suspects, particularly those with additional vulnerabilities. We explore these concerns, and recommendations for reform, while ultimately arguing that the lack of a formal, transparent system for selection of lawyers undermines the effectiveness of the right to legal assistance, potentially across Europe.

The opening section outlines relevant standards emerging from both the EU and the ECtHR. Then, the structures for selection in other European jurisdictions are examined, as a comparative background to the Irish context, which follows afterwards. We set out our empirical methodology and the core of the article is a presentation of our findings, including extracts from participant interviews. We conclude that the absence of a formal, transparent, consistent system in Ireland undermines the realisation of the right to a fair trial and is an issue which all Member States need to reflect on.

II EUROPEAN LAW ON ACCESS TO LEGAL ASSISTANCE

The *Salduz* jurisprudence provides clarity on numerous issues relating to access to legal assistance, though few cases address the specifics of how lawyers ought to be selected. Art 6(3)(c) ECHR states that everyone charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing.” This applies at the pre-trial investigation stage as well as at trial.

¹¹ See V. Mols, ‘Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers’ (2017) 8(3) *New J. of European Criminal Law* 300; A. Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study* (2020).

¹² R. Pattenden and L. Skinnis, ‘Choice, privacy and publicly funded legal advice at police stations’ (2010) 73(3) *Modern Law Rev.* 349.

The issue of choice of legal representation was directly addressed by the ECtHR in *Dvorski v. Croatia*.¹³ The Court spoke to a hierarchy of protections under the right of access to legal assistance, whereby the denial of access is more serious than the denial of choice of a lawyer. When denial of choice is claimed, the task of the Court is to assess whether, in light of the proceedings as a whole, the rights of the defence have been adversely affected to such an extent as to undermine their overall fairness.

On the facts in *Dvorski*, the applicant was afforded access to a lawyer from his first interrogation, but not, he claimed, his choice of lawyer. The lawyer supplied was a retired police chief from the local district. The Court looked first for any relevant and sufficient grounds for overriding the applicant's choice. Finding none, it considered the overall fairness of proceedings in the case. Existing Croatian procedures called for a list of duty lawyers to be provided to the police by the Croatian Bar Association but there was no conclusive evidence as to whether these procedures were followed in this case. The Court expressed the wish for recording of procedures and decision making to avoid any doubts raised about undue pressure in respect of the choice of lawyer.¹⁴ Referencing *Salduz*, the ECtHR emphasised the importance of the investigation stage for future proceedings. As regards fairness, the Court noted that "[i]n the abstract, if a suspect receives the assistance of a qualified lawyer, who is bound by professional ethics, rather than another lawyer whom he or she might have preferred to appoint, this is not in itself sufficient to show that the whole trial was unfair – subject to the proviso that there is no evidence of manifest incompetence or bias."¹⁵ However, on the facts of *Dvorski*, where the suspect had given a confession while advised by a lawyer not of his choosing, and where no effective opportunity had been provided by the domestic courts to challenge that evidence, the Court ruled his right to a fair trial under Arts 6(1) and 6(3)(c) had been breached.¹⁶

Concurring, Judges Kalaydjieva, Pinto De Albuquerque and Turkovic stated that

“... an unjustified denial or restriction of, or interference with, [the right to a lawyer of one's own choosing] will always leave the inevitable impression of an attempt by the authorities to influence the suspect's choice of professional assistance so as to impose on him a lawyer who is “convenient” for the police or the accusatory party, and will raise doubts and suspicions that its purpose was to trick or mislead the suspect with a view to obtaining evidence in breach of the principles of fairness. The mere appearance of bad faith on the part of the police is

¹³ App. No. 25703/11 (ECtHR 20 October 2015).

¹⁴ See also *Martin v Estonia* App. No. 35985/09 (ECtHR 30 May 2013).

¹⁵ Op. cit., n. 13, para 111.

¹⁶ On the denial of choice, see also *Lobzhanidze and Peradze v Georgia* App. Nos. 21447/11 and 35839/11 (ECtHR 07 July 2020) wherein it was held, on the facts, that Arts 6(1) and 6(3)(c) had been violated by the appointment of a legal aid lawyer without a clear waiver of the suspect's right to a lawyer of his own choice.

sufficient to cast doubt on whether a self-incriminatory confession given in such circumstances was truly voluntary.”¹⁷

Even an appearance of bad faith can undermine the voluntariness of a statement. The lack of a formal, transparent process for the selection of lawyers can, we argue, give rise to similar impressions, doubts and suspicions, undermining the process and the realisation of rights.

European Union law also speaks to this issue. Articles 47 and 48 of the Charter of Fundamental Rights guarantee certain rights to defendants in criminal proceedings, including the presumption of innocence, the right to a defence, the right to a fair trial and the right to an effective remedy. Directives drawn up under the Roadmap for strengthening procedural rights in criminal proceedings, provide detail on the content and application of these rights. Article 3(4) of the Directive on access to legal assistance provides that “Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.” Recital 28 suggests that Member States ought to make necessary arrangements, for suspects deprived of their liberty, to ensure that they can effectively exercise their right to a lawyer “including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right.” It continues to suggest “that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose.”

In the Commission’s 2019 report to the Parliament and the Council on the implementation of this Directive, it stated that member states “must make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer.”¹⁸ It noted that member states had underpinned the transposition of Article 3(4) by national measures such as providing information, clarifying rights and providing means of direct contact with lawyers “such as a helpline, systems of on-call duty lawyers, lists of lawyers, dedicated websites, search engines, leaflets and — in the case of one Member State — a chat service.”¹⁹ This is all underpinned by the Directive on Legal Aid,²⁰ which requires, under Art 7, that Member States ensure an effective legal aid system, of adequate quality, adequate to safeguard the fairness of proceedings.

While Ireland has not opted into the Legal Aid Directive, or the Directive on Access to Legal Assistance, the Fundamental Rights Agency has pointed out that “all EU member states, regardless of any opt-out

¹⁷ Op. cit., n. 13, Concurring opinion, para 14.

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0560> para 3.3.3.

¹⁹ id.

²⁰ Directive 2016/1919/EU, OJ L 297, 4 November 2016.

regime, are bound by the minimum standards of defence rights as developed in the case law of the European Court of Human Rights and embodied in the Roadmap's instruments."²¹ Furthermore, Ireland is bound by the Directive on the Right to Information in Criminal Proceedings which specifies that its provisions should be implemented in accordance with the principles recognised by the Charter and with respect for fundamental rights.²² More specifically this Directive seeks to "promote the right to liberty, the right to a fair trial and the rights of the defence."²³ Under Article 3 it provides that suspects ought to be promptly provided with information on procedural rights "in order to allow for those rights to be effectively exercised", and among those specified are the right of access to a lawyer, any entitlement to free legal advice, "and the conditions for obtaining such advice".²⁴

European law thus unequivocally aims to insist on effective access to legal assistance for detained suspects in the criminal process. However, the practicalities of arrangements for access to legal assistance are left to States' discretion, and the formality, as we will now see, varies significantly.

III PRACTICAL ARRANGEMENTS FOR LAWYER SELECTION IN OTHER JURISDICTIONS

Procedures differ across jurisdictions for the selection of lawyers for detained suspects. Some utilise an intermediary system to moderate this process. In Scotland 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 wishes for a solicitor to attend the police interview, the referral is passed to a duty solicitor, often provided through the Public Defence Solicitors' Office.²⁵

In England and Wales, which has the longest established regime of pre-trial, custodial legal advice in Europe, stemming back to the introduction of the Police and Criminal Evidence Act 1984, there is a similar remove between the police and the designation of a legal advisor. The police call the Defence Solicitor Call Centre (DSCC) as soon as is practicable, relaying a suspect's request for legal advice.²⁶ If a suspect is paying privately the DSCC will contact their nominated solicitor. Otherwise, a decision is made, based on the nature of the offence, by a DSCC employee as to whether to refer to a solicitor,

²¹ EU Fundamental Rights Association *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings* (2019) <<https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest>>

²² Directive 2012/13/EU, OJ L 142, 1 June 2012.

²³ Recital 41.

²⁴ Art 3(1) (a) and (b).

²⁵ V. Kemp, 'Effective Police Station Legal Advice Country Report 6: Scotland' <<http://eprints.nottingham.ac.uk/51251/1/Country%20Report%20Scotland%20Final.pdf>>

²⁶ Section 58(4) PACE 1984 and Code of Practice C, para 6.5. See Blackstock, *op.cit.* n. 10, pp 77-79.

or to the telephone-advice-only Criminal Defence Direct call centre. If a solicitor is to be engaged, the DSCC will contact either a named solicitor (if contracted to deliver legal aid services), or the duty solicitor.²⁷ While solicitors can advise at the police station, it is often done by accredited police station representatives.²⁸

Other jurisdictions do not have this intermediary step. In Austria, Bulgaria and Greece, lists of lawyers are drawn up by local law associations, or in some other manner, and are provided to suspects from which to choose.²⁹ Sometimes detainees make the phone-call themselves, sometimes police make it on their behalf.³⁰ In the Netherlands, various types of police station duty solicitor schemes exist under the aegis of the Legal Aid Board in each of the five judicial regions. In some there is a centralised system of referral, similar to that in Britain, whereas in others police directly contact lawyers.³¹ A similarly mixed approach occurs in France, with more rural areas finding it more difficult to provide a co-ordinated, centralised system of referral.³² Similarly in Northern Ireland, a rota system of duty solicitors was set up by the Law Society and operates in Belfast, but outside of Belfast no formal rostering is in place and the process of solicitor selection is less clear.³³ In Poland, if a detained suspect cannot name a lawyer for police to contact, police indicate to family members that they should make arrangements for a lawyer.³⁴ This can be difficult and causes variance in the quality of representation provided, as well as significant delays in the provision of legal advice and assistance.³⁵

It is clear that there is no standardised, transparent approach to the selection of the legal advisor across Europe. Through exploring this process in Ireland we will highlight that this in itself raises questions about the adequacy of the protection being afforded to the right to legal assistance which may be generalizable across Europe.

²⁷ Police and Criminal Evidence Act 1984 Code of Practice C, Note for Guidance 6B. See also V. Kemp, 'Effective Police Station Legal Advice Country Report 2: England And Wales' <<http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf>>

²⁸ See <<https://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation>>

²⁹ See FRA 2019, op. cit., n. 21, p. 45.

³⁰ id.

³¹ Blackstock, op.cit. n. 10, p. 268.

³² id., p. 265.

³³ See V. Kemp, 'Effective Police Station Legal Advice Country Report 5: Northern Ireland' <<https://nottingham-repository.worktribe.com/output/936798>>

³⁴ FRA 2019, op. cit., n. 21, p. 46.

³⁵ id.

IV IRELAND

The Irish Court of Criminal Appeal held in 1977, in *People (DPP) v Madden*,³⁶ that a detained suspect has a right of reasonable access to legal advice, denial of which would render detention unlawful. In *DPP v Healy*,³⁷ in 1990, the Supreme Court confirmed that this right was constitutional in nature.³⁸ Accordingly, for over forty years, detained suspects in Ireland have been entitled to access legal advice. However, until 2014 this was limited to consultations, and did not permit representative attendance in garda interviews.³⁹ The issue of selection of solicitors had arisen in *People (DPP) v O'Brien*⁴⁰ where it was held that gardaí had breached the accused's right of reasonable access to legal advice by recommending and then contacting a solicitor who they knew to be a busy sole practitioner, some distance from the relevant station. Police were, at that time, permitted to commence interviewing a suspect as long as *bona fide* attempts were being made to comply with the request for attendance.⁴¹ In *O'Brien* there was an absence of *bona fides* and a violation of the right to legal advice, rendering the detention unlawful and any evidence obtained inadmissible. However, the detention could become lawful again, as occurred in *O'Brien*, once access to legal advice was provided, so a breach of the constitutional right to legal advice could be "cured" by providing even brief, subsequent access to a lawyer. The *bona fides* of police actions is therefore important under Irish law.

The change in practice to permit solicitor attendance at interviews came about through a circular issued by the Director of Public Prosecutions to An Garda Síochána in May 2014 instructing that where requested, the attendance of solicitors should be facilitated, and that all suspects should be advised of this entitlement. The catalyst for this circular was the Supreme Court judgment in *DPP v Gormley and White*,⁴² wherein the Court ruled that interrogation of detained suspects should not commence until after legal advice, where sought, had been obtained. While not asked to permit attendance at interview, the Court was clearly influenced by European movements to accentuate the protection of the right of access to legal assistance. In a significant shift, in line with ECtHR jurisprudence, the Supreme Court viewed a breach of the right of access to legal advice as a breach of the right to a fair trial, rather than a matter of unlawful detention. Justice Clarke found that from the point of arrest onwards the process is "intimately connected with a potential criminal trial rather than being one at a pure investigative stage."⁴³ Relying on *Salduz*, he recognised the need for the solicitor to engage in

³⁶ [1977] IR 336.

³⁷ *People (DPP) v Healy* [1990] 2 IR 73.

³⁸ Legislated for via the Criminal Justice Act 1984 and the Treatment of Persons in Custody Regulations 1987.

³⁹ See further *Lavery v The Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390.

⁴⁰ [2005] 2 IR 206.

⁴¹ *People (DPP) v Buck* [2002] 2 IR 268.

⁴² [2014] 2 IR 591.

⁴³ *id.* at 629.

work connected to building the defence,⁴⁴ to advise on the lawfulness of the arrest and detention, and advise on questioning. Mr Justice Hardiman, concurring, indicated that the Court might find a right to have the solicitor present in the interview if asked in an appropriate case.⁴⁵ The DPP could clearly see the direction of travel. When the EU Directive was implemented, the government had, in 2013, established a working group to advise on a system providing for the presence of a legal representative during Garda interviews, indicating an openness to the possibility. The Working Group provided practical recommendations on how to implement the Directive.⁴⁶ Building on both these developments, solicitors were permitted to attend Garda interviews with detained suspects immediately after the DPP's circular had issued. The circular does not establish a legal or constitutional right, and as yet it has no statutory basis or clarity.⁴⁷ In April 2015 An Garda Síochána issued a Code of Practice on Access to a Solicitor by persons in Garda Custody⁴⁸ and in December 2015 the Law Society issued Guidance for Solicitors Providing Legal Services in Garda Stations.⁴⁹ The Garda Station Legal Advice Scheme, which was established in 2001 to provide payment for solicitors' work in garda stations, was extended in 2014 to provide additional fees for solicitors' attendance at garda interviews. Such payment is available in respect of persons in receipt of social welfare payments or whose earnings are less than €20,316 per annum.

The Criminal Law Committee of the Law Society sought to regularise the manner in which a solicitor could be selected for a detained suspect who did not already have one or know of one to call. They created an online list of solicitors who have registered as willing to attend at a station, divided by relevant division, which displays in a random order each time it is renewed. The list is provided for in the Guidance for Solicitors issued by the Law Society of Ireland.⁵⁰ This "Find a Garda Station Solicitor"⁵¹ system would allow gardaí to provide a randomised printed list to detained suspects from which they could select a solicitor to be contacted. This has not, however, been formally adopted in any way, although it was referenced by the State in evidence to the Committee on the Prevention of Torture during its 2019 visit to the state.⁵²

⁴⁴ id. at 630.

⁴⁵ id. at 599.

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<<http://www.justice.ie/en/JELR/Report%20Final%2015%20July.pdf/Files/Report%20Final%2015%20July.pdf>>

⁴⁷ See further V. Conway 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 J.* 103.

⁴⁸ <<https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Code-of-Practice-on-Access-to-a-Solicitor-by-Persons-in-Garda-Custody.pdf>>

⁴⁹ <<https://www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf>>

⁵⁰ id., para 2.14-2.17.

⁵¹ <<https://www.lawsociety.ie/Find-a-Solicitor/Find-a-Garda-Station-Solicitor/>>

⁵² <https://rm.coe.int/1680a078cf> p. 15.

After five years of lawyers being permitted to attend interviews we undertook a study to evaluate solicitors' experience of attending, the results of which we shall now discuss.

V METHODOLOGY

The remainder of this article draws on qualitative data from semi-structured interviews with 44 criminal defence solicitors in Ireland between 2018-2019. The aim of the study was to document and analyse the experiences of attending in these early years. There were three phases to the process of recruiting participants. First, we contacted those who had completed a skills-based training programme, delivered by the authors, on advising clients at the Garda station (the "SUPRALAT" programme).⁵³ Second, some snowballing resulted from those interviews. Given that those who had voluntarily undertaken the programme were a self-selecting group we wanted to ensure we engaged with a broad spectrum of perspectives, including those who did not access this training. Third, to this end, we engaged a purposive sampling technique, utilising the Find A Solicitor Scheme list to approach solicitors who had not undertaken the training. This achieved broader diversity of experience and outlook. We purposefully sampled to ensure a mix of genders, rural and urban locations, newly qualified and experienced, as well as sole practitioners and those working in firms. Of those we interviewed 23 were male and 19 were female. Half had completed SUPRALAT training. We interviewed solicitors operating in 11 of 26 Irish counties. Given its size and centrality, 21 of the 44 were based in Dublin.⁵⁴

It is unknown exactly how many solicitors in Ireland consider themselves criminal defence solicitors. There is no particular training or qualification required to engage in criminal defence work. Particularly in rural areas, the local solicitor will be a general practitioner, dealing with all areas of law, including criminal. The Legal Aid Board annual report tells us that 241 firms claimed for garda station visits in 2019,⁵⁵ but it does not tell us how many solicitors are engaged by each firm. From our field work, including analysis of the Find a Solicitor list, we estimate that there are circa 250-350 solicitors actively engaged in criminal defence work, but many others who engage occasionally. Our sample is therefore not representative, but we are confident that we have interviewed a significant cross-section of solicitors.

⁵³ A. Pivaty, et al. 'Contemporary criminal defence practice: importance of active involvement at the investigative stage and related training requirements' (2020) 27(1) *International J. of the Legal Profession* 25.

⁵⁴ As per the 2016 census, a quarter of the national population resides in Dublin city and suburbs. See <https://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_2_Geographical_distribution.pdf> p. 3.

⁵⁵ <<https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2019-pdf-version.pdf>>

Institutional ethical approval was secured. Interviews followed an interview schedule, relating to the participants' experiences of attending garda station interviews, though were semi-structured to permit exploration of unanticipated issues. Interviews were conducted face to face, usually in the lawyer's own office. Anonymity was assured and important: given the nature of the discussion, being named could have significant consequences for participants' businesses. All participants signed consent forms. The length of interviews ranged from 15 to 105 minutes, most lasting around an hour. All were recorded and transcribed, and then coded and analysed using NVivo. We jointly developed thematic codes and then each coded the interviews conducted by the other, ensuring all data was double-viewed. Additional codes were proposed, discussed, and agreed as they emerged. Participants are referred to, quite simply, by interviewer and order (YD1 = the first solicitor interviewed by Yvonne Daly, VC1 = the first solicitor interviewed by Vicky Conway). This method ensures the anonymity of participants. Further, this designation demonstrates that topics arising and answers to questions were not dependant on the identity of the interviewer or her style of interaction.

VI FINDINGS

As noted above, while solicitors in Ireland have been attending Garda stations for consultations since the mid-80s, attendance at interview has only been permitted since 2014. The Find a Solicitor List maintained by the Law Society is the only attempt by any associated body to create a mechanism to enable selection of a solicitor. However, those we interviewed indicated that this system is not consistently utilised on the ground. Indeed, while our interviews centred on solicitors' experience of attendance at interviews more broadly, the degree of disquiet as to how solicitors were selected was unexpected. It is a finding in and of itself, meriting deeper analysis, which was facilitated by the semi-structured nature of the interviews. Concerns highlighted, which will now be discussed in turn, include the failure to use the list, alternative selection methods, the selection by gardaí (rather than clients) of 'favourite' solicitors, the influence of factors such as speed and suggestibility, the consequent dangers for due process and the need for reform.

1. Use of a List

Across our participants there was an alarming lack of clarity on how detained suspects select a solicitor if they do not already have one, or have a recommendation from someone.

YD6: ...it's far from clear how solicitors are selected. Like, I've had examples where a guard or a member in charge might ring you and say 'Your name has been picked off a list,' and I kind of think 'What list?'

Some simply do not know of its existence:

YD18: I wasn't aware of that. I'd say I'm probably not on it [the list].

Given that our participants actively identify as criminal defence solicitors, this may raise questions about the promotion of the list by the Law Society to its own members. There's an additional lack of clarity as to how it operates:

VC13: I know that the Law Society have, you can put it up on the website as to whether or not you attend. I don't know if the Guards have access to that.

Most were aware of the "Find a Garda Station Solicitor" list, but no-one expressed the view that it was effectively in operation in all instances. Indeed, the most certainty expressed came as a bi-product of clients mentioning it:

YD9: I've had a couple of calls where we've been told that our name has been picked off a list... So I'd be very confident that it is in use.

Even amongst those who are aware of it, there is a lack of transparency about when and how it is used. Many of our participants believe the list is not used by gardaí.

VC12: No, the guards don't have that list... that document that you're referring to on the Law Society web page, it's never used up here anyway, I've never seen it.

YD23: **So the Guards in [X location] aren't necessarily using that?**⁵⁶ No, no, not at all

This was not universal. Some with broad experience of different stations could see a difference between stations:

YD14: I suspect they don't do it in [X station] because the calls I've gotten there have been more sort of organic or someone I might have known from [Y station] or from wherever. [Z station] would appear to be a kind of rotation.

One suggested that they tended to be called from that list when specialist teams, rather than local gardaí are investigating (VC20). Clearly the list is not being consistently and effectively utilised. The ineffectiveness of the list is a cause of deep concern for many practitioners:

VC9: The actual process I think lacks transparency, and there's no accountability.

YD11: It is absolutely appalling and should be discontinued immediately.

VC17: That is useless. I think I am up there, but I don't think I have had anything.

⁵⁶ Words in bold are those of the interviewer.

Others suggested that initial teething problems are being resolved and increasing use of the list will follow (VC5). There appears to be support in principle for the list. YD24 stated it would be “the clearest and fairest way of doing it.” Our participants want a clear, fair, transparent and consistent method of selection but this list is not used with sufficient consistency to provide that. In part these concerns are motivated by business concerns: interview attendance generates income, but some sense of predictability enables proper planning and resourcing. But additionally, as we will see, solicitors have due process concerns, including fair treatment of their clients.

2. Non-Sanctioned Selection Processes

Participants described alternative methods of selection in stations where the list was not in operation. In some Garda stations solicitors’ business cards are available, sometimes stuck to the wall, and detainees are invited to select a solicitor from those.

YD4: I’ve had clients who have been in custody and been brought out on a warrant to be detained and have been given certain solicitors’ cards. So the Guards were giving business cards saying ‘Choose between these two people’...

YD15: ...the solicitors tend to have their stickers and the sergeants in the stations are actually pretty decent for taking it and putting them up. Usually there is a board with everybody’s... business card....

This may be somewhat transparent but it can at best be categorised as a laissez-faire approach to providing effective and practical realisation of the right to legal assistance. Furthermore, if it is abused as per the first quote, restricting a detainee’s selection to between those approved by gardaí, then it would be in breach of the right.

Other stations have compiled their own list of local practitioners:

VC12: They have their own laminated [list] and I think the way it comes about is, the way we got it is, you write in and you say simply ‘Look, we’re here, we’re ready to give advice, can you please put our number down?’

In one area of the country the local Law Association compiled the relevant list.

YD21: there is a laminated list of solicitors who might attend at the station and this is created by the [XX] Law Association and that is the list which would be handed to persons who can’t name their own solicitor in the Garda Station.

Some firms have adapted to this reality and become proactive in ensuring that the Gardaí know that they are available, sending details of on-call solicitors each week.

Some participants were able to demonstrate that this whole issue operates differently in criminal law than it does in other areas such as family law or immigration, which also have on call demands.

VC16: I'm on the Family Legal Aid Panel...And I'd say this week I got three clients, just from picking my name out... you're given a sheet of maybe 20 pages and you're told 'Pick a solicitor.' That's it. And so I would get probably, luckily, because my name is [high up the alphabet] ... I would have got three or four clients this week alone... That clearly doesn't happen [in relation to Garda stations]... And with the immigration stuff the way it comes through, it comes through the Refugee Legal Service. And you would be bombarded with cases. They'd send you as many as you could take... there was no favourites, it was go alphabetically and just keep going around and around and around. So, yeah, when you see it from the other point of view, from the other systems, this one isn't working.

Instead, solicitors secure criminal law clients through habitual clients, family members and friends of existing clients, referral from other firms, or through representation on other issues like civil road traffic claims, family law, or immigration. Some will receive calls where they have developed expertise such as sex based crime, juvenile justice, or alleged paramilitary activity. One solicitor discussed the difficulty of building a client base as families are loyal to already-established colleagues:

YD13: Most of them are blue chip clients, they're a generation of families and they've got their own guy.

In addition to rights-based concerns, the inconsistent, non-transparent systems utilised by gardaí inhibit the building of a client base.

3. Client Choice

Previous studies have emphasised the importance of suspects having their own choice of solicitor.⁵⁷ Kemp argues that "choice of a solicitor can help to increase people's trust and confidence, not only in their legal adviser but also in the criminal process."⁵⁸ Trust in that relationship is crucial. Smith observes that "If the client does not trust that their lawyers will loyally act in their interests, guard their confidences, or act diligently, they will disengage from any meaningful relationship; effective criminal defence becomes virtually impossible, rendering representation a merely symbolic

⁵⁷ See V. Kemp and N. Balmer 'Criminal Defence Services: Users' Perspectives' Legal Services Research Centre, Research Paper No. 21 (2008) and Pattenden and Skinns, *op. cit.*, n.12.

⁵⁸ V. Kemp *Transforming legal aid: access to criminal defence services*, Legal Services Commission Ministry of Justice (2010).

gesture.”⁵⁹ If the client cannot trust their representative then the right is not effective. Establishing trust in the context of a detention is difficult:

VC1: Maybe it’s a person who you’ve never met before and they all of a sudden, have to trust you, trust the advice that you’re giving and you have a short amount of time.

A detained suspect who already has a solicitor they trust is in a better position, and somewhat favoured by the system, than one who does not know who to contact. In the latter circumstances, a space can arise for gardaí to influence the choice of solicitor. This may be benign, but as per *Dvorski*, even the appearance of bad faith can undermine the voluntariness of the statement.

VC12: Gardaí have a huge role in which solicitors come, as you know, that makes sense, they are the person picking up the phone and if the client is saying ‘who am I to call?’ it’s not hard for a guard to say ‘call this guy’ for whatever reason.

VC13: But generally it’s the Guard might know you, might say look, I can get a solicitor for you, I’ll ring Martin and I’ll ring whoever.

What is believed to influence the garda decision will be discussed below, but it is important to note that solicitors believe gardaí, rather than clients, have that power and choice.

VC10: *a Guard isn’t* going to pick a solicitor that is going to be very procedural (emphasis added)

VC5: you’ll always have a situation where the Garda might suggest to somebody, this solicitor should be available or that solicitor should be available, but the solicitor is named by the Garda, not by the client or chosen by the client.

This power of the police is only reinforced by the fact that, unlike many jurisdictions, it is the garda making the phonecall rather than the client or an intermediary. Some believe the choice of their client can be actively overridden by gardaí.

VC17: I have had it once where a client of mine contacted me saying ‘I was in detention’. I said, ‘Why didn’t you contact me?’ He goes ‘Oh, I asked for you, but they said, no, they had another solicitor on the way, kind of thing.’

⁵⁹ T. Smith ‘Trust, Choice and Money: Why the Legal Aid Reform ‘U-turn’ is essential for effective criminal defence’ (2013) 11 *Crim L.R.* 906 at 908.

VC20: We've had situations where longstanding clients of ours have been provided a different solicitor... and we've had cases where they have actually asked for our office and have been given whoever and we don't think any attempt was made to contact our office.

Comparing such practice to the facts of *Dvorski*, a specific denial of access to a requested, named solicitor would be in breach of the suspect's right to a fair trial. Similarly, it raises the question of the bona fides of the garda action, as per the decision in *O'Brien* discussed above. One solicitor pointed to an instance where the custody record stated that she had been contacted when she had not:

YD5: So, I looked through it [the custody record] and it said that James [the client]... had asked for me and then the member in charge said in their statement 'I phoned [YD5], but it went straight through to a message.' And I looked at the time it was like seven in the morning, and it was a weekday, so I mean my phone is on permanently. At seven in the morning I'm nearly awake anyway, and I have been woken at five or four.

Directly over-riding the choice as exercised by the detainee in this way would constitute a breach of the right to a fair trial. Further, it will undermine a client's trust in a solicitor if they falsely believe there were unwilling to attend when needed.

Trust can also be undermined by a client's concern that the solicitor might be somehow connected to the gardaí.

YD18: a lot of the clients that you deal with are paranoid about your relationship with the guards...they have to trust you, and if they believe that you're on the guards' side, that trust is gone, no matter what you do for the client.

Another explained the need to reassure some clients about the solicitor's independence from gardaí, particularly in a first meeting:

VC5: If they're not inclined towards wanting to engage with me, I think there might be a trust issue especially, if I don't know the person. I say 'even if the Gardaí may have called me, I'm not a Garda solicitor' and that kind of reassurance.

The need for transparency then also contributes to the relationship between the solicitor and client, which is core to the effective realisation of the right to legal assistance. It is a complex process, with a solicitor attempting to establish rapport and trust in a difficult situation and as shown here, the approach of the police can interfere with that process. Having established how gardaí can influence

the choice, we will now discuss the concerns solicitors have as to garda motivation to call particular solicitors.

4. Favourite Solicitors

In addition to believing gardaí are not using the sanctioned list, participants believe that in many instances gardaí, not the client, make the choice of solicitor. Most worrying, participants feel gardaí have 'favourites'.

VC20: The Guards certainly would have.... their 'people', Solicitors who they'd prefer, you know?

YD5: I mean there are also a few ex-Garda who have now converted to solicitors, they're getting fed an enormous amount of work and their attitude to the work is quite interesting.

VC9: there are some stations in Dublin that I never get a call from, despite the fact that I'm in practice for over twenty years.

It is particularly noteworthy that half of solicitors we interviewed explicitly stated that they did not receive calls 'out of the blue', i.e. to advise new clients in Garda detention.

VC10: I think the practice here is that there are certain solicitors that are called from the list, and certain solicitors who are not... I mean [Town A] hasn't a load of solicitors on the list, as far as I can see, but we are never called randomly... I know that there is one that is the most popular solicitor to be called off the list.

VC16: I was in Saturday Court last Saturday and I was asking people if they'd got calls at the weekend. And people's reaction is 'Oh, sure no, I wouldn't expect to get a Garda Station call.' They go to certain offices and that's it.

By watching representation at court, solicitors can observe which solicitors or firms are regularly called to advise in a given station. In the Criminal Courts of Justice (CCJ) complex in Dublin, for example, certain courtrooms align with certain Garda stations and observation quickly establishes which stations have called which solicitors.

YD5: My experience, and it's not peculiar to me, is that some Garda stations are feeding some solicitors – and we can name the Garda station, name the solicitors – because if you're sitting ... in the CCJ down in court [A]... we know [station X] feeds in there in court [A], so we know what solicitors are getting stuff from [Station X].

Both in Cork and Dublin solicitors referenced the fact that particular firms continuously deal with drug cases arising at the airports.

YD5: ... if people are coming in there with drugs, I mean they haven't got such a state of preparedness that they're saying well, 'in the event that I'm going to get caught, I know the name of a criminal defence solicitor'. That doesn't happen. But Dublin Airport always call the same criminal defence solicitors...

Research with detainees would be required to confirm the accuracy of this, but again, as per *Dvorski*, even the appearance of bad faith is detrimental. We asked participants for their view on the reasons for certain solicitors or firms being preferred by gardaí. Some believe it is simply familiarity, that gardaí happen to know a particular solicitor and rely on them. VC16 said "it'd probably be helpful to be male, into the GAA, that kind of stuff." YD14 also mentioned sport, saying "these guys go to the same sports clubs as everyone else or they know people from school..." Others cited more loaded explanations.

YD14 felt a need to "cosy up" to a Member in Charge in order to be selected in a particular station, observing that where the role of member in charge rotated more, they were more likely to get a call from a new client. Concerns that something more than familiarity might be at play were expressed:

YD8: There's a lot of people who would have favour in certain Garda stations, who you'll find will generally get the calls to go out.... there's an element that it's, 'they're the people that we ring all the time'... I don't know whether it's rightly or wrongly but I'd have a sense that people get calls because they're people who will generally play along or get the process over quickly, or whatever sort of thing that they want.

One actively named this as avoidance by gardaí of troublemakers

YD5: it could be as innocent as they have a few drinks, they're friends, they're married to the sergeant and yada, yada, yada. But it could be up to something infinitely more sinister in terms of them feeding solicitors whom they know will not put them to any trouble. So, if you know a solicitor is not going to ask in a drugs case for the cert of analysis or the precis or whatever, then you're more inclined to give it to that solicitor as well rather than the troublemaker.

Another went so far as to mention the potential giving of gifts to solidify relationships between stations and solicitors.

VC17: I don't know whether it does or doesn't happen. I don't think it would happen in [small Irish city], but I am sure in bigger stations it has got to be a huge temptation. Maybe not money, but you know they get a big Christmas box, or a bottle of whiskey at Christmas or

whatever else. So, it is open to corruption and needs to be a far more regular way of having that system run from the Garda Station because it is too open to corruption.

One even expressed a concern that this could be mutually beneficial.

VC3: In some cases, if a person for example, was arrested for not turning up in court on a bench warrant, that a certain solicitor's firm were insisting to the Gardaí in [station M] that the person would be charged with a section 13 charge so that they could make an application for Legal Aid... Now, a lot of people arrested on bench warrants will be charged with a section 13, but not always and it's obviously not in your client's interest that another charge is added to the matters already there and I think that is extremely concerning. The solicitors involved in that, I believe, are simply doing it for monetary reasons. There's no other explanation for it.

The allegation here is that a particular firm is selected which seeks additional charges to enhance their financial payment. That charges would be added to a charge sheet by gardaí at the request of a defence solicitor for financial reasons would constitute corruption, both on behalf of the garda and the solicitor.⁶⁰ Whilst the officer may not financially benefit from the interaction, this would constitute corruption under Morton's classic definition of 'bent for the job', whereby the corruption is engaged in for the benefit of an outcome in the case.⁶¹

In addition to familiarity, or some degree of corruption, the most commonly cited reason for favoured solicitors was the impact on the investigation at hand. The likelihood of advice to a client to rely on their right to remain silent might make a difference in relation to Garda recommendations of solicitors:

VC12: Some stations prefer some solicitors over others, they might have a perception of how that solicitor might approach the case ... they might look at me and look at my client and say 'we know "no comment" will be the result of this, therefore we're not going to call him.' I have been told by a guard, 'we might call this solicitor because we know he might be more inclined to go guilty with his client.'

VC17: If there is a risk that the solicitor alone will stop the statement, then they are going to look for someone else. If someone might have been going to give a statement or make admissions but because the solicitor is in there saying 'say nothing, say nothing' or cutting them off and that has happened to them in the past, they are going to look past them...

⁶⁰ Section 5, Criminal Justice (Corruption Offences) Act 2018.

⁶¹ J. Morton, *Bent coppers: a survey of police corruption* (1993).

VC3: The Gardaí tend to contact certain solicitors on a very regular basis... it's for the easy life that they're not looking to be challenged, if I could put it that way.

Participants explicitly believe that those who make it 'easier' for gardaí in the interview are more likely to be called. Inclination to physically attend is also believed to be relevant:

YD24: ...perhaps certain lawyers would be contacted because a) they mightn't attend at the garda station, or b) if they do attend, that they may not be in a position to provide attendance on a detention all the way through.

We heard repeatedly that the reason participants do not receive unsolicited calls from Garda stations is because of the strength of defence of a detainee's rights which they would provide.

VC5: I suspect and I could be wrong, that the Gardaí would prefer not to ring my office if they could avoid it because they might think we're a bit too robust dealing with people in detention.

VC20: **your feeling as to why you wouldn't be called in those circumstances?** Well we tend to, I suppose, be very robust and, you know, it's more likely if we don't get disclosure there's going to be a 'no comment' interview until we actually have some more information. Some other solicitors tend to facilitate admissions, I want to be careful, but it tends to be cases where there is guilty pleas and open and shut cases arise out of the interviews where the client makes admissions. I would be less inclined to allow admissions be made, particularly if we weren't to get full disclosure. And maybe we have a reputation for being strong on that.

Some saw this as a badge of honour.

VC1: I don't think we'd necessarily be the first choice for Gardaí because we've always, we're known for doggedly fighting for our client's rights. Do I agree with the way the selection process is? Perhaps it could be more transparent, but I think it's to our credit that this is how it is certainly, from our experience...

... we are never called randomly. It kind of gives the impression that there must be solicitors that are easier to deal with, either from the client perspective or the Guard's perspective.

One indicated a belief that behaviour in detentions could affect future selection.

VC18: I think that on the occasion where I wanted the blood test, that they thought I was being a smart arse. And they would choose not to ring me again. If they had a choice between me and somebody else they wouldn't ring me.

Taking their role seriously, can thus lead to not being called.

YD11: I don't think I would be called by any Guard unless a client specifically asked for me because I typically press the Gardaí for information and decisions and outcomes ... I think that's part of my job, I don't think it's my job to be a pushover.

YD6: ... I don't think that my office would be seen as a rollover, you know, someone to call in if you just want the clients to roll over and tell them what you want.

YD10: ...we always take our jobs seriously regardless of whether the guard thinks it's a minor thing, you know, we'll do what we have to do and a lot of them, they want to keep this straightforward and get the client to talk, in and out and you've a solicitor coming in and just doing their job and making life harder for them.

It was noted that not all in the legal profession approach things this way.

YD20: [the gardaí] would know that by contacting this solicitor that a certain course will definitely be taken. That it's not going to end up going to trial or anything like that.

Another, more animatedly, suggested that...

YD7: I think there are solicitors who will say mass for the Guards and they'll be phoned by the Guards so they won't kick up a fuss in the Garda Station... I wouldn't kick up a fuss in a Garda Station but I will object to unreasonable questions, I will protect my client's interests, I will ensure my client makes an informed choice and knows his or her options. And if I have to unfortunately have a difficult discussion with a Guard or a member in charge, I'll have it. So I won't be phoned by the Guards because that's the type of work that I do ...There are certain solicitors who will be phoned because they won't do that and they're known for saying mass for the Guards.

A large portion of participants actively feel that the quality of the defence that they offer influences whether or not they receive requests to attend stations. Solicitors are forthright in their belief that less active and rights-driven solicitors are being selected or suggested by gardaí. This raises serious questions as to whether the rights of the accused are being respected in good faith. As Jackson has argued, the interview is taking a more central role in criminal cases which necessitates the provision of greater protections for suspects. The fact that solicitors may be selected and contacted by gardaí because they will be less active, less robust undermines the rights of the detainee.

Conversely, supporting this line of analysis, the solicitors that rarely get called are exactly those that are called when a garda is in trouble:

YD7: They're probably the most successful firm, one of the most successful firms in the state because they did things the right way... And, you know, I don't think Guards sent any work to them ever but, I'll tell you one way, the only Garda that ever got sent to them was when Guards were in trouble.

It was, importantly, noted by some solicitors that this approach was not universal. There is some evidence of change and that some gardaí are starting to realise the benefits of active lawyers, especially in relation to vulnerable clients, or more serious cases. VC6 felt in some stations her willingness to attend interviews made her more likely to be called for cases involving minors. And in more serious cases it may increase the reliability of the evidence.

YD4: I think particularly when the charges are more serious, or potential charges, the offence is more serious, I think Guards know, even just to cover themselves, sometimes it might be better to have a Solicitor there.

However, even in such cases, the process of selecting a particular solicitor lacks transparency or regulation.

5. "Everyone's a winner other than the client"

Participants also expressed concerns about the motivations and practices of those solicitors who are favoured. Given the levels of legal aid payment, financial success in criminal law is dependent on a large throughput of cases. It could be considered easier, and more financially rewarding, to have lots of clients who plead guilty, rather than to attend interviews, contest charges and trials.⁶²

YD7: You will get certain Guards, certain Garda Stations and they will push work to a particular solicitor or a particular firm of solicitors or a few different solicitors but all of whom have a similar way in running their practice. And to be quite blunt, cynically is it the most intelligent way to run your practice because legal aid crime is, it's all about volume, if you can have as much legal aid certificates in each court with each solicitor and/or barrister and if your clients are pleading guilty, not fighting the cases, it takes a lot less time, a lot less management and you're not falling out with anyone. So if you theoretically can get 100 clients in a month, all 100 plead guilty, you've got 100 happy Guards, 100 clients who now know better, 90% of whom were going to plead guilty anyway, even with the right legal advice probably, and 100 files opened and closed in the same month and you've made your money. If you have to fight 20 of those, they have to go back to another hearing date, you have to write letters to the Guards seeking evidence, you're only going to get paid in the District Court an extra €50 for

⁶² T. Cyrus, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work' (2007) 34(4) *J. of Law and Society* 489.

that hearing date and you may be instructed to run a defence that this Guard that refers all this work to your firm lied, is dishonest, beat you up in custody, sure you don't want to do that if that Guard sends you half the work you get each year.

This is an especially worrying point, that to argue dimensions of a case may involve challenging the gardaí sending you so much of your work. There is a conflict of interest at play here which can only be averted through greater transparency.

Several participants viewed solicitors themselves as being culpable in this regard.

YD12: ...it's a sad indictment on the profession where you see them going in and they'll plead them out at the first opportunity. So, it clears the decks for the guards, everyone's a winner other than the client.

VC1: Are they there just to get a couple of hundred quid, or are they there to actually help this client?

YD7: if solicitors don't want to do their job properly or know they're being compromised to get easier work from the Guards, that's the fault of the solicitor, it's not actually the fault of the Guard. Well I mean I suppose it is, the Guards are complicit in it, but I'd easier understand why the Guards are doing it than my own colleagues.

The solicitors that we spoke to distanced themselves from this type of approach and spoke about their own ethical and moral perspectives.

YD2: Everybody wants a piece of the pie, there are certain things going on there in the background which I don't think a lot of solicitors, other solicitors can stand over. And therefore you have to watch the kind of, the ethics of everything and this is another step forward I think in terms of making sure that everything is done right and independent.

YD20: I'm not going to be going down that route. Selling myself just to get a few extra cases. But it definitely does pay off.

Thus the issue is a complex one, involving the intersection of the cultures, ethics, transparency and accountability of two different professions.

6. Speed and Suggestibility

It is currently for the police in Ireland to access legal advice when requested, but there is a conflict because they might lose investigative time when waiting for a solicitor to attend, and arrest periods

are strictly time-bound. The most common arrest power has an initial period of six hours detention.⁶³ This can cause difficulties.

YD15: I'm down in the court, I get a call at 10.30, some guy was arrested... I'll get down as soon as I can, 'well when's that going to be?' So they're all sitting down there doing nothing, and prime investigative opportunity is moving on by the minute. Now it doesn't happen a lot, but it happens, so they have to get at the questioning.

If a solicitor is in court this might delay their arrival by hours. The value of being able to attend the station quickly was also mentioned by others.

YD13: sometimes they would just call you because you're the first guy to pick up and they just want you to get to the station as soon as possible so they can tick the box and get on with whatever they're doing.

There can be a difference between those who will arrive quickly, and those who will progress the interview quickly.

VC18: ... the guard said to me 'I knew that if we got you over here, we'd be in and out' and that was it, because I knew, had talked to the client who'd done it, I said 'Look tell them you've done it' and the interview lasted about 20 minutes.

The interests of both the gardaí and the detainee in progressing matters quickly was observed by another:

YD8: the guards, they don't want to have people in the Garda station; it's a burden for them to have somebody in overnight because they've got to watch them every fifteen minutes and they've got to do whatever they have to do...they'd prefer the process to be speedy, a lot of the time the clients do as well...

Detainees' interest in being released as quickly as possible sometimes leads them to forego the opportunity to access legal assistance altogether. Solicitors mentioned clients who called to let them know that they were in custody, but did not want them to attend the station, and others who showed up later with a charge sheet and made no contact at the time of arrest. Thus speed can influence these decisions in a range of understandable ways, none of which should actually impact on the quality of legal representation. Gardaí should never dissuade a detained suspect from obtaining legal assistance, whether for reasons of speed or otherwise.

⁶³ Section 4, Criminal Justice Act 1984.

However, we heard about clients being put under pressure to choose a different solicitor, or not to have a solicitor present at all.⁶⁴ Solicitors reported hearing from their clients that they had been told “ah sure you don’t need it, you don’t need them” (YD10).

YD3: ...there’s always a subtle pressure sometimes on certain clients not to get a solicitor.

One solicitor placed this in the context of the possible suggestibility of clients:

YD3: ...my clients...a lot of them would be, are young, unsophisticated, some of them with mental health problems, some of them with low IQs and they’re easily influenced and.... Like the ideal is that your client will call for you, because you’re his solicitor, but they’re very easily influenced... I’ve had different experiences where, you know, other solicitors have appeared for my client, because other, the prosecutors have influenced that decision.

This was echoed by others.

YD7: I’ve even lost clients who have gone into a Garda Station being a bit vulnerable and being told not to use me and use another solicitor.

These vulnerabilities combined with concerns about time, and the impact of choice of solicitor, might mean that suspects’ rights to legal representation are diluted, if not entirely breached.

7. Inherent Dangers

Loss of business was not the only concern expressed by solicitors. Participants were concerned about due process and the impact of unfair procedures on the criminal process in both individual cases and on a wider basis. A point was made about the danger of the same solicitor always being called by the same guards and then appearing before the same judge.

YD14: If you put your due process hat on, you are worried that there’s just the same people turning up... and it’s that circular motion. It’s that same judge in front of the same solicitor from the same Garda station from the same list. Whether that’s doing a disservice to the public as well.

The needs of detainees who have not been involved in the criminal process before were noted. To a significant extent, these are the people most likely to suffer on the basis of any improper recommendation to select a particular solicitor, as experienced detainees already have a solicitor. For these ‘first timers’, solicitors noted their vulnerability and often emotional state. YD10 described how

⁶⁴ Ireland is not unique in this experience. In a recent EU Fundamental Rights Agency report, for example, similar experiences were said to occur in Poland: FRA 2019, op. cit., n. 21, p. 45. Blackstock, op.cit. n. 10, p. 274 also notes the same in England and Wales, Scotland, France and the Netherlands.

“they’re scared, it’s all very daunting, particularly if it’s their first time in a Garda station”. This differs from “hardened criminals” because...

YD5: ... they have their solicitors, they know what to do, they could tell me what I should do. The difficulty is for the newbies, the new people coming in, they’re completely intimidated by what’s happening and if they’re fed a solicitor, that solicitor’s not fully equipping them with what they’re entitled to do or not do in a Garda Station.

In relation to the value of being represented in a Garda station by solicitors of varying quality, one said

YD7: 90% of the time it doesn’t make a difference whether they have a crap solicitor or a good solicitor. And crap is a solicitor who doesn’t put the client first and good is a solicitor who does, notwithstanding the consequences might be you’ll no longer get phone calls from that Garda Station. So 90% of the time it doesn’t make a difference. Now that 10% is obviously what we’re all there for, that’s the critical time.

YD6: I would have worked on cases before where very serious trials were...I can see that a solicitor was picked by a favoured station, or a favourites list was picked by a station, I can see that the advice was really not appropriate.

It is not acceptable for inappropriate legal advice to be provided to detained suspects facing any criminal charges. Furthermore, it is one thing if this happens organically within the system due to a failure on the part of an individual legal advisor, but if the system itself has facilitated, or promoted, the provision of substandard advice then the State is not protecting the right to legal representation.

8. Views of Reform

Solicitors with whom we spoke were united in the need for change, but not necessarily united on what that change should be. Some made reference to the rota system which exists in Northern Ireland, suggesting that this might be a beneficial model for improvement in this jurisdiction. VC17 called for a roster to be put in place, whereby solicitors or firms indicate availability to the guards for the next number of months. Difficulties could be facilitated through swaps on the rota. YD12 suggested that the Law Society should be the ones to draw up the rota, which would then be available to the Gardaí.

The need to record proceedings from the earliest stages of detention was voiced by a number of solicitors also. VC3 suggested video recording both the giving of the notice of rights and the selection of a solicitor.

VII CONCLUSION

This article draws attention to an overlooked moment in the criminal process: the selection of a criminal defence solicitor. Existing literature has established that the presence of an active lawyer in the police interview is necessary for the effective protection of the right to legal advice, and thereby the right to fair trial. European Directives and ECtHR jurisprudence have made this clear, with cases such as *Dvorski* stating that even the appearance of bad faith on the part of the police in this process could undermine the voluntariness of any statement made. For these reasons, a transparent, open, informed system of selection is required in order to ensure that a detainee makes informed choices in relation to the making of any statements during police interview, or co-operation with any other police procedures.

We have presented data from semi-structured interviews with 44 criminal defence practitioners in Ireland. The absence of a consistently-utilised, formal process for the selection of solicitors to provide legal assistance to unrepresented detainees at Garda stations is clearly raising concerns amongst lawyers within the process. They need to be selected to attend garda stations in order to keep and grow their practices, but their concerns also lie in due process and speak to the importance of appropriate, active legal assistance at this increasingly important stage of the criminal process. They are concerned that by doing their job properly, by advocating for their clients during interviews, or requesting disclosure of evidence or additional medical attention, they are doing themselves out of a job: their name will not be suggested to an unrepresented detainee, but that of a more passive, obliging, or compliant solicitor will.

The failure of the Irish legislature to provide an obligatory process for the selection of solicitors is lamentable, but so too is the failure of the Garda authorities to require the use of the Find A Solicitor Scheme or to arrange another formalised process in its place if they have objections to it. While solicitor attendance at interview came in almost overnight in Ireland, that was seven years ago, and solicitors had been attending for consultations for decades before that. The question of selection is not new. The ongoing informality and lack of regulation might suit some parties and our interviews indicate that it is not only gardaí, but certain solicitors or firms, that might view the status quo as preferable. This is a complicated process, involving the intersection of two distinct professional cultures and ethics and it is an area laden with potential for conflicts of interest. Formality, transparency and consistency would minimise those.

Given that systems in many other EU member states lack formality and consistency of application also, we suggest that the issue of selecting lawyers to provide legal assistance is in need of European-wide review and consideration. It is clear that consistency and transparency need to be at the heart of any

mechanism utilised in any state for the selection of criminal defence representation. Such systems need to ensure that conflicts of interest and any potential inappropriate influence of corruption is avoided. Systems also need to promote spaces and dynamics within which a relationship of trust between solicitor and client can be built, and client choice is central to that. Failure to address this leaves open the potential for police to (appear to) inappropriately influence the selection and thereby interfere with the effective protection of the right to legal assistance. What may at first seem like a technical matter of procedure and selection, in fact goes to the heart of the right to a fair trial.