

Selecting a lawyer: the practical arrangement of police station legal assistance

YVONNE DALY | VICKY CONWAY

School of Law and Government, Dublin City University, Glasnevin, Dublin, 9, Ireland

Corresponding author

Yvonne Daly, School of Law and Government, Dublin City University, Glasnevin, Dublin, 9, Ireland

Email: yvonne.daly@dcu.ie

Funding information

Faculty of Humanities and Social Sciences Research Fellowship, Grant/Award Number: 2018/2019

Abstract

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 emphasized within the jurisprudence of the European Court of Human Rights and the European Union Roadmap directives on procedural rights. 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 the selection of lawyers undermines the effectiveness of the right to legal assistance.

1 | 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 Article 6 of the ECHR. In the pivotal case of *Salduz v. Turkey*,

This is an open access article under the terms of the [Creative Commons Attribution](https://creativecommons.org/licenses/by/4.0/) License, which permits use, distribution and reproduction in any medium, provided the original work is properly cited.

© 2021 The Authors. *Journal of Law and Society* published by John Wiley & Sons Ltd on behalf of Cardiff University (CU).

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 do so.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 since descended from the high watermark of *Salduz*, holding in *Ibrahim and Others v. United Kingdom* that use at trial of statements obtained from a detainee in the absence of access to a lawyer may not necessarily give rise to a breach of Article 6, if overall fairness of the proceedings was intact.⁴ Nonetheless, individual European jurisdictions have sought to organize 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 (EU'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 Roadmap directives on procedural rights,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

¹ *Salduz v. Turkey* App. No. 36391/02 (ECtHR, 27 November 2008).

² *Id.*, para. 55.

³ See for example *Dayanan v. Turkey* App. No. 7377/03 (ECtHR, 13 October 2009); *Pishchalnikov v. Russia* App. No. 7025/04 (ECtHR, 24 September 2009); *Brusco v. France* App. No. 1466/07 (ECtHR, 14 October 2010); *Sebalj v. Croatia* App. No. 4429/09 (ECtHR, 28 June 2011); *AT v. Luxembourg* App. No. 30460/13 (ECtHR, 9 April 2015).

⁴ *Ibrahim and Others v. United Kingdom* App. Nos 50541/08, 50571/08, and 40351/09 (ECtHR, 13 September 2016). See also *Beuze v. Belgium* App. No. 71409/10 (ECtHR, 9 November 2018); *Doyle v. Ireland* App. No. 51979/17 (ECtHR, 23 August 2019).

⁵ Directive 2013/48/EU, OJ L 294.

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 *Modern Law Rev.* 987.

⁷ R. Goss, 'Out of Many, One? Strasbourg's *Ibrahim* Decision on Article 6' (2017) 80 *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 *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*: The ECtHR's Further Retreat from the *Salduz* Principles on the Right to Access to Lawyer' (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 *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, ed. S. Ruggeri (2015) 112; 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 *European Criminal Law Rev.* 70.

the police interview to the building of a defence,⁹ and Blackstock and colleagues show that different lawyers can produce vastly different results.¹⁰ Active lawyers, rather than passive observers, enhance the protection of 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 realization 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.

Furthermore, our qualitative data illuminates the impact that the selection process has on the role of lawyers at the police station and on the protection of suspects' rights. We find that lawyers working within the system have fundamental concerns about different selection processes being operated in different garda (police) stations. Our participants raised concerns about the influence of gardaí (police officers) 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 the 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. The structures for selection in other European jurisdictions are then 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 realization of the right to a fair trial, and we make some suggestions for reform and review. Furthermore, we suggest that the selection of police station lawyers is an issue of significance on which all member states should reflect.

2 | 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. Article 6(3)(c) of the 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'.¹³ This applies at the pre-trial

⁹ Jackson, *op. cit.*, n. 6.

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' (2021) 22 *Police Practice and Research* 1009.

¹¹ See V. Mols, 'Bringing Directives on Procedural Rights of the EU to Police Stations: Practical Training for Criminal Defence Lawyers' (2017) 8 *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. Skinns, 'Choice, Privacy and Publicly Funded Legal Advice at Police Stations' (2010) 73 *Modern Law Rev.* 349.

¹³ European Convention on Human Rights, Art. 6(3)(c).

investigation stage as well as at trial. The issue of choice of legal representation was directly addressed by the ECtHR in *Dvorski v. Croatia*.¹⁴ 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 former 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.¹⁵ Referencing *Salduz*, the ECtHR emphasized 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.¹⁶

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 that his right to a fair trial under Articles 6(1) and 6(3)(c) had been breached.¹⁷

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 sufficient to cast doubt on whether a self-incriminatory confession given in such circumstances was truly voluntary.¹⁸

¹⁴ *Dvorski v. Croatia* App. No. 25703/11 (ECtHR, 20 October 2015).

¹⁵ See also *Martin v. Estonia* App. No. 35985/09 (ECtHR, 30 May 2013).

¹⁶ *Dvorski v. Croatia*, op. cit., n. 14, para. 111.

¹⁷ On the denial of choice, see also *Lobzhanidze and Peradze v. Georgia* App. Nos. 21447/11 and 35839/11 (ECtHR, 7 July 2020) wherein it was held, on the facts, that Articles 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.

¹⁸ *Dvorski v. Croatia*, op. cit., n. 14, Concurring opinion, para. 14.

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 realization of rights.

EU 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.¹⁹ 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’.²⁰ Recital 28 suggests that member states ought to make necessary arrangements to ensure that suspects deprived of their liberty 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’.²¹ It goes on 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’.²²

In the European Commission’s 2019 report to the Parliament and the Council on the implementation of this directive, it declared 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’.²³ 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’.²⁴ This is all underpinned by the Directive on Legal Aid,²⁵ which requires, under Article 7, that member states ensure that ‘(a) there is an effective legal aid system that is of an adequate quality; and (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings’.²⁶

While Ireland has not opted into the Directive on Legal Aid, or the Directive on Access to Legal Assistance, the European Union Agency for Fundamental Rights has pointed out that ‘all EU member states, regardless of any opt-out 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’.²⁷ Furthermore, Ireland is bound by the Directive on the Right to

¹⁹ Charter of Fundamental Rights of the European Union, Arts 47 and 48.

²⁰ Directive 2013/48/EU, op. cit., n. 5, Art. 3(4).

²¹ Id., Recital 28.

²² Id.

²³ European Commission, *Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Person Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty* (2019) COM/2019/560 final, para 3.3.3, at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0560>>.

²⁴ Id.

²⁵ Directive 2016/1919/EU, OJ L 297, 4 November 2016.

²⁶ Id., Art. 7.

²⁷ European Union Agency for Fundamental Rights, *Rights in Practice: Access to a Lawyer and Procedural Rights in Criminal and European Arrest Warrant Proceedings* (2019), at <<https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest>>.

Information in Criminal Proceedings, which specifies that its provisions should be implemented in accordance with the principles recognized by the Charter of Fundamental Rights, and, where applicable, in a manner consistent with rights protected under the ECHR, as interpreted by the case law of the ECtHR.²⁸ More specifically, this directive seeks to ‘promote the right to liberty, the right to a fair trial and the rights of the defence’.²⁹ Under Articles 3(1)(a) and 3(1)(b), it establishes 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’.³⁰

European law thus unequivocally insists 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 of procedures, as we will now see, varies significantly.

3 | PRACTICAL ARRANGEMENTS FOR LAWYER SELECTION IN OTHER JURISDICTIONS

Procedures for the selection of lawyers for detained suspects differ across jurisdictions. Some utilize 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 asks for a solicitor to attend the police interview, the referral is passed to a duty solicitor, often provided through the Public Defence Solicitors’ Office.³¹

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.³² While a small number of cases might be directed, at that point, to the telephone-advice-only Criminal Defence Direct call centre (for example, minor non-recordable offences), the majority will be referred by the DSCC to a solicitor named by the suspect (if contracted to deliver legal aid services) or the duty solicitor.³³ Legal advice is provided free of charge to anyone interviewed by the police under caution and, accordingly, while it is possible to pay privately for a solicitor, the vast majority of suspects will avail of the publicly funded scheme. To be permitted

²⁸ Directive 2012/13/EU, OJ L 142, 1 June 2012.

²⁹ Id., Recital 41.

³⁰ Id., Arts 3(1)(a) and 3(1)(b).

³¹ V. Kemp, *Effective Police Station Legal Advice – Country Report 6: Scotland* (2018), at <<http://eprints.nottingham.ac.uk/51251/1/Country%20Report%20Scotland%20Final.pdf>>.

³² Police and Criminal Evidence Act 1984, s. 58(4) and Code of Practice C, para 6.5. See Blackstock et al., op. cit. n. 10, pp. 77–79.

³³ 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* (2018), at <<https://nottingham-repository.worktribe.com/output/925190/effective-police-station-legal-advice-country-report-2-england-and-wales>>.

to provide legal advice and assistance at police stations under that scheme, solicitors' firms must hold a contract with the Legal Aid Agency (LAA) and must comply with certain quality standards. As Kemp outlines, there are also four Public Defence Solicitors' Offices (PDSOs), managed by the LAA, which provide criminal legal aid services.³⁴ While many detainees will request their own preferred solicitor, a 24-hour duty solicitor scheme provides cover for those who do not have an existing relationship with a solicitor. This scheme consists of solicitors and Accredited Police Station Representatives³⁵ from contracted firms and from the PDSO in a given area.³⁶

Other jurisdictions do not have an intermediary step in the process of selecting a lawyer. 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.³⁷ Sometimes, detainees make the phone call themselves; sometimes, police make it on their behalf.³⁸ 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 centralized system of referral, similar to that in Britain, whereas in others police directly contact lawyers.³⁹ A similarly mixed approach occurs in France, with more rural areas finding it more difficult to provide a co-ordinated, centralized system of referral.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³

It is clear that there is no standardized, transparent approach to the selection of legal advisors 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.

4 | ACCESS TO A LAWYER IN POLICE DETENTION IN IRELAND

In 1977, in *People (DPP) v. Madden*,⁴⁴ the Irish Court of Criminal Appeal held that a detained suspect has a right of reasonable access to legal advice, denial of which would render detention

³⁴ *Id.*, p. 19.

³⁵ See Solicitors Regulation Authority, 'Police Station Representatives Accreditation Scheme', at <<https://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation>>.

³⁶ Kemp, *op. cit.*, n. 31, p. 19.

³⁷ See European Union Agency for Fundamental Rights, *op. cit.*, n. 27, p. 45.

³⁸ *Id.*

³⁹ Blackstock et al., *op. cit.*, n. 10, p. 268.

⁴⁰ *Id.*, p. 265.

⁴¹ See V. Kemp, *Effective Police Station Legal Advice – Country Report 5: Northern Ireland* (2018), at <<https://nottingham-repository.worktribe.com/output/936798>>.

⁴² European Union Agency for Fundamental Rights, *op. cit.*, n. 27, p. 46.

⁴³ *Id.*

⁴⁴ *People (DPP) v. Madden* [1977] IR 336.

unlawful. In 1990, in *People (DPP) v. Healy*,⁴⁵ the Supreme Court confirmed that this right was constitutional in nature.⁴⁶ Accordingly, for over 40 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.⁴⁷ The issue of the selection of solicitors had arisen in *People (DPP) v. O'Brien*,⁴⁸ where it was held that gardai had breached the accused's right of reasonable access to legal advice by recommending and then contacting a solicitor whom they knew to be a busy sole practitioner based 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.⁴⁹ 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 are 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 (DPP) 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 *People (DPP) v. Gormley and White*,⁵⁰ 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. Mr 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'.⁵¹ Relying on *Salduz*, he recognized the need for the solicitor to engage in work connected to building the defence,⁵² to advise on the lawfulness of the arrest and detention, and to 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.⁵³ The DPP could clearly see the direction of travel. When the EU Directive on the Right of Access to a Lawyer in Criminal Proceedings was introduced,⁵⁴ 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

⁴⁵ *People (DPP) v. Healy* [1990] 2 IR 73.

⁴⁶ This was legislated for via the Criminal Justice Act 1984 and the Treatment of Persons in Custody Regulations 1987.

⁴⁷ See further *Lavery v. The Member in Charge, Carrickmacross Garda Station* [1999] 2 IR 390.

⁴⁸ *People (DPP) v. O'Brien* [2005] 2 IR 206.

⁴⁹ *People (DPP) v. Buck* [2002] 2 IR 268.

⁵⁰ *People (DPP) v. Gormley and White* [2014] 2 IR 591.

⁵¹ *Id.*, 629.

⁵² *Id.*, 630.

⁵³ *Id.*, 599.

⁵⁴ Directive 2013/48/EU, *op. cit.*, n. 5.

to implement the directive.⁵⁵ Building on both of these developments, solicitors were permitted to attend garda interviews with detained suspects immediately after the DPP's circular was issued. The circular does not establish a legal or constitutional right, and as yet it has no statutory basis or clarity.⁵⁶ In April 2015, An Garda Síochána issued a *Code of Practice on Access to a Solicitor by Persons in Garda Custody*,⁵⁷ and in December 2015, the Law Society of Ireland issued *Guidance for Solicitors Providing Legal Services in Garda Stations*.⁵⁸ 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 of Ireland sought to regularize 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.⁵⁹ This 'Find a Garda Station Solicitor' system would allow gardaí to provide a randomized printed list to detained suspects from which they could select a solicitor to be contacted.⁶⁰ This has not, however, been formally adopted in any way, although it was referenced by the state in evidence to the European Committee for the Prevention of Torture during its 2019 visit to the state.⁶¹

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.

5 | METHODOLOGY

The remainder of this article draws on qualitative data from semi-structured interviews with 44 criminal defence solicitors in Ireland conducted in 2018 and 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

⁵⁵ Working Group to Advise on a System Providing for the Presence of a Legal Representative during Garda Interviews, *Report* (2013), at <<http://www.justice.ie/en/JELR/Report%20Final%2015%20July.pdf/Files/Report%20Final%2015%20July.pdf>>.

⁵⁶ 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.

⁵⁷ An Garda Síochána, *Code of Practice on Access to a Solicitor by Persons in Garda Custody* (2015), at <<https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Code-of-Practice-on-Access-to-a-Solicitor-by-Persons-in-Garda-Custody.pdf>>.

⁵⁸ Law Society of Ireland, *Guidance for Solicitors Providing Legal Services in Garda Stations* (2015), at <<https://www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf>>.

⁵⁹ *Id.*, paras 2.14–2.17.

⁶⁰ Law Society of Ireland, 'Find a Garda Station Solicitor', at <<https://www.lawsociety.ie/Find-a-Solicitor/Find-a-Garda-Station-Solicitor/>>.

⁶¹ Council of Europe, *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* (2020) 15, at <<https://rm.coe.int/1680a078cf>>.

SUPRALAT programme).⁶² 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 that we engaged with a broad spectrum of people, with differing perspectives, including those who did not access this training. Third, to this end, we engaged a purposive sampling technique, utilizing the ‘Find a Garda Station 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, and newly qualified and experienced solicitors, 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 the 26 Irish counties. Understandably, given its size and centrality, 21 of the 44 were based in Dublin.⁶³

It is unknown exactly how many solicitors in Ireland consider themselves criminal defence solicitors. There is no special 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 2019 Legal Aid Board annual report tells us that 241 firms claimed for garda station visits that year but does not specify how many solicitors were engaged by each firm.⁶⁴ From our field work, including analysis of the ‘Find a Garda Station Solicitor’ list, we estimate that there are circa 250–350 solicitors actively engaged in criminal defence work, but many others who engage in it occasionally. Our sample is therefore not representative, but we are confident that we have interviewed a significant cross-section of solicitors.

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, with 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. Furthermore, this designation demonstrates that topics arising and answers to questions were not dependent on the identity of the interviewer or her style of interaction.

6 | FINDINGS

As noted above, while solicitors in Ireland have been attending garda stations for consultations since the mid-1980s, attendance at interview has only been permitted since 2014. The ‘Find a Garda

⁶² A. Pivaty et al., ‘Contemporary Criminal Defence Practice: Importance of Active Involvement at the Investigative Stage and Related Training Requirements’ (2020) 27 *International J. of the Legal Profession* 25.

⁶³ As per the 2016 census, a quarter of the national population resides in Dublin city and suburbs. See Central Statistics Office, *Chapter 2: Geographical Distribution* (2017) 3, at <https://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_2_Geographical_distribution.pdf>.

⁶⁴ Legal Aid Board, *Annual Report 2019* (2019), at <<https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2019-with-financial-statements-pdf-version-.pdf>>.

Station Solicitor' list maintained by the Law Society of Ireland is the only attempt by any associated body to create a mechanism to enable the selection of a solicitor. However, our interviewees indicated that this system is not consistently utilized on the ground.⁶⁵ 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.

6.1 | 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: [I]t'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 interviewees simply did not know of the list's existence:

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

Given that our participants actively identified as criminal defence solicitors, this may raise questions about the promotion of the list by the Law Society of Ireland to its own members.

There was an additional lack of clarity as to how it operates:

VC13: I know that ... 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 participants were aware of the 'Find a Garda Station Solicitor' list, but no one expressed the view that it is effectively in operation in all instances. Indeed, the most certainty expressed came as a by-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 among those who were aware of it, there was a lack of clarity about when and how it is used. Many of our participants believed that the list is not used by gardaí:

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

⁶⁵ A similar finding was reported by Kemp, on the basis of interviews with three solicitors in Ireland: V. Kemp, *Effective Police Station Legal Advice – Country Report 3: Ireland* (2018) 3, at <<https://nottingham-repository.worktribe.com/output/935864>>.

YD23: [asked whether the guards in X location are necessarily using the list] No, no, not at all.

This was not universal. Some participants with broad experience of a range of stations could see differences between them:

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

VC20 suggested that they tend to be called from that list when specialist teams rather than local gardaí are investigating.

Clearly, the list is not being consistently and effectively utilized. 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.

Other participants, such as VC5, suggested that initial teething problems are being resolved and increasing use of the list will follow. There appeared to be support in principle for the list. YD24 stated that it would be 'the clearest and fairest way of doing it'. Our participants wanted a clear, fair, and transparent method of selection, but this list is not used with sufficient consistency to provide that. In part, these concerns were motivated by business imperatives; interview attendance generates income, but some sense of predictability enables proper planning and resourcing. However, as we will see, solicitors also had due process concerns, including fair treatment of their clients.

6.2 | Non-sanctioned selection processes

Participants described alternative methods of selection in garda stations where the list is not in operation. In some 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: [T]he solicitors tend to have their stickers and the sergeants in the stations are actually pretty decent for taking [them] and putting them up. Usually there is a board with everybody's ... business card.

This may be somewhat transparent but can at best be categorized as a laissez-faire approach to providing effective and practical realization of the right to legal assistance. Furthermore, if it is abused

as per the first quote, restricting a detainee's selection of solicitor to between those approved by gardaí, then it would be in breach of the right.

Other stations have compiled their own lists 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 [X] 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.

Drawing on their experience in other areas of practice, such as family law or immigration, some participants were able to point clearly to the fact that the selection process operates differently in criminal practice in garda stations:

VC16: I'm on the family [law] legal aid panel ... And I'd say this week I got three clients, just from picking my name out ... [Y]ou'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 [early in 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 ... [T]here 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 such as civil road traffic claims, family law, or immigration. Some will receive calls about cases in areas in which 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 utilized by gardaí inhibit the building of a client base.

6.3 | Client choice

Previous studies have emphasized the importance of suspects having their own choice of solicitor.⁶⁶ 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’.⁶⁷ Trust in that relationship is crucial. Smith observes that

[i]f 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 gesture.⁶⁸

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 whom 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 participants believed that 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: [Y]ou’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.

⁶⁶ V. Kemp and N. Balmer, ‘Criminal Defence Services: Users’ Perspectives’ (2008) Legal Services Research Centre, Research Paper No. 21; Pattenden and Skinns, *op. cit.*, n. 12.

⁶⁷ V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) 103, at <<https://nottingham-repository.worktribe.com/output/1011764/transforming-legal-aid-access-to-criminal-defence-services>>.

⁶⁸ T. Smith, ‘Trust, Choice and Money: Why the Legal Aid Reform “U-Turn” Is Essential for Effective Criminal Defence’ (2013) 11 *Criminal Law Rev.* 906, at 908.

This power of the police is only reinforced by the fact that, unlike in many jurisdictions, it is the gardaí making the phone call rather than the client or an intermediary. Some participants believed that the choice of clients 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’.

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 they had been contacted when they had not:

YD5: So, I looked through [the custody record] and it said that [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 overriding the choice as exercised by the detainee in this way would constitute a breach of the right to a fair trial. Furthermore, it would undermine a client’s trust in a solicitor if they falsely believed that the solicitor was 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 ... [T]hey 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 participant explained the need to reassure some clients about the solicitor’s independence from the 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.

Accordingly, the need for transparency also contributes to the relationship between solicitor and client, which is core to the effective realization 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

gardai can influence the choice, we now discuss the concerns that participants had as to garda motivation to call particular solicitors.

6.4 | Favourite solicitors

In addition to believing that gardai are not using the sanctioned list, participants stated that in many instances gardai, not clients, make the choice of solicitor. Most worryingly, participants felt that gardai 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 20 years.

It is particularly noteworthy that half of the solicitors whom we interviewed explicitly stated that they did not receive calls ‘out of the blue’ inviting them to advise new clients in garda detention:

VC10: I think the practice here is that there are certain solicitors who 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: [I]f 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 claim, but again, as per *Dvorski*, even the appearance of bad faith is detrimental.

We asked participants for their view on the reasons why certain solicitors or firms are preferred by gardaí. Some believed that it is simply familiarity – that gardaí happen to know a particular solicitor and rely on them. VC16 said, ‘[I]t’d probably be helpful to be male, into the GAA,⁶⁹ that kind of stuff’. YD14 also mentioned sport, saying, ‘[T]hese guys go to the same sports clubs as everyone else or they know people from school’.

Other participants cited more loaded explanations. YD14 felt a need to ‘cosy up’ to a member in charge 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 ... [T]here’s an element that ... ‘They’re the people that we ring all the time’ ... I don’t know whether it’s right or wrong 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 participant actively named this as avoidance of ‘troublemakers’ by gardaí:

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 who 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 participant 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 [there] 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 participant even expressed a concern that this sort of relationship or arrangement could be mutually beneficial:

VC3: [I]f a person, for example, was arrested for not turning up in court on a bench warrant [and] 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

⁶⁹ ‘GAA’ refers to the Gaelic Athletic Association, which oversees the sports of Gaelic football and hurling.

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 that seeks additional charges to inflate the amount that they are paid. Charges being added to a charge sheet by a garda at the request of a defence solicitor for financial reasons would constitute corruption, both on behalf of the garda and the solicitor.⁷⁰ While the officer may not benefit financially from the interaction, it would fall 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.⁷¹

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 advising 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 ... [T]hey 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 ... the solicitor is in there saying, 'Say nothing, say nothing' or cutting [the client] off and that has happened to [the gardaí] in the past, they are going to look past [that solicitor in future].

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

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

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

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

⁷⁰ Criminal Justice (Corruption Offences) Act 2018, s. 5.

⁷¹ J. Morton, *Bent Coppers: A Survey of Police Corruption* (1993).

VC20: 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 [are] 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 [to] be made, particularly if we weren't to get full disclosure. And maybe we have a reputation for being strong on that.

Some participants saw this as a badge of honour:

VC1: I don't think we'd necessarily be the first choice for gardaí because ... 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 ...

VC10: [W]e 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 guards' perspective.

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

VC18: I think that on the occasion where I wanted the blood test, 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.

Solicitors 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 [you] what you want.

YD10: [W]e 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 [got] 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 participant made this point more animatedly:

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 number of participants felt that the quality of the defence that they offer influences whether or not they receive requests to attend stations. They were 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.⁷² The fact that solicitors may be selected and contacted by gardaí because they will be less active and less robust undermines the rights of the detainee.

Conversely, supporting this line of analysis, the solicitors who rarely get called are exactly those who 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.

Importantly, it was noted by some solicitors that this approach was not universal. There is some evidence of change and that some gardaí are starting to realize the benefits of active lawyers, especially in relation to vulnerable clients or more serious cases. VC6 felt that in some stations their willingness to attend interviews made them more likely to be called for cases involving minors. Furthermore, 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.

6.5 | '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 low 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,

⁷²Jackson, *op. cit.*, n. 6.

to have lots of clients who plead guilty, rather than to attend interviews, contest charges, and bring cases to trial:⁷³

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 [of] running their practice. And to be quite blunt, cynically it is the most intelligent way to run your practice because legal aid crime is ... all about volume; if you can have as [many] legal aid certificates in each court with each solicitor and/or barrister [as possible] 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, [and] all 100 plead guilty, you've got 100 happy guards, 100 clients who now know better – 90 per cent 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 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 the dimensions of a case may involve challenging the gardaí who send 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: [I]t's a sad indictment on the profession where you see them going in and they'll plead [their client] 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: [I]f 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 to whom we spoke distanced themselves from this type of approach and talked about their own ethical and moral perspectives:

YD2: Everybody wants a piece of the pie, [and] 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 ethics of everything.

⁷³ T. Cyrus, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34 *J. of Law and Society* 489.

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.

6.6 | 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.⁷⁴ 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.

If a solicitor is in court, their arrival might be delayed by hours. The value of being able to attend the station quickly was also mentioned by other participants:

YD13: [S]ometimes, 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: [T]he 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 ... 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 participant:

YD8: [T]he 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 15 minutes and they've got to do whatever they have to do ... [T]hey'd prefer the process to be speedy, [and] 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

⁷⁴ Criminal Justice Act 1984, s. 4.

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.

However, we heard about clients being put under pressure to choose a different solicitor, or not to have a solicitor present at all.⁷⁵ 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: [T]here’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: [M]y clients ... a lot of them ... are young, unsophisticated, some of them with mental health problems, some of them with low IQs, and they’re easily influenced and ... [T]he 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 ... the prosecutors have influenced that decision.

This was echoed by other participants:

YD7: I’ve even lost clients who have gone into a garda station being a bit vulnerable and [they have been] 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.

6.7 | 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

⁷⁵ Ireland is not unique in this respect. In a recent European Union Agency for Fundamental Rights report, for example, similar situations were said to occur in Poland: European Union Agency for Fundamental Rights, *op. cit.*, n. 27, p. 45. Blackstock and colleagues also note the same in England and Wales, Scotland, France, and the Netherlands: Blackstock et al., *op. cit.*, n. 10, p. 274. See also V. Kemp “‘No Time for a Solicitor’: Implications for Delays on the Take-Up of Legal Advice” (2013) 3 *Criminal Law Rev.* 184. On the Irish experience, see also V. Kemp, *op. cit.*, n. 65, pp. 4–5.

recommendation to select a particular solicitor, as experienced detainees already have a solicitor. Solicitors noted the vulnerability and often emotional state of these ‘first timers’. YD10 described how ‘they’re scared, it’s all very daunting, particularly if it’s their first time in a garda station’. This differs from ‘hardened criminals’:

YD5: [T]hey 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 variable quality of the solicitors representing detainees in garda stations, one participant said:

YD7: 90 per cent 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 per cent of the time it doesn’t make a difference. Now that 10 per cent is obviously what we’re all there for – that’s the critical time.

YD6: I have worked on cases before where ... I can see that a solicitor was picked by a favoured station, or a favourites list was picked by a station, [and] 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; it is quite another if the system itself has facilitated, or promoted, the provision of substandard advice. In such instances, the state is not effectively protecting the right to legal representation, but actively disregarding it.

6.8 | Views of reform

The solicitors to whom we spoke were united on the need for change, but often did not offer solutions – and where they did, they were not necessarily united on what that change should be. Some wanted substantial reform, such as the introduction of a rota system like that 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 their availability to gardaí for the next few months. Difficulties could be facilitated through swaps on the rota. YD12 suggested that the Law Society of Ireland should be the ones to draw up the rota, which would then be available to gardaí.⁷⁶

Other participants were more focused on amending the current system, and often spoke about this in terms of underpinning values:

⁷⁶ Kemp reported in 2018 that the Irish government was considering a duty solicitor scheme, but nothing has come of this in the interim: V. Kemp, op. cit. n. 65, p. 12.

YD10: I do think a list should be given if a person doesn't know anyone and then go from there. For the client as well, so they can't say, 'They suggested this person' further down the line, and I think there should be fairness.

Often, comments on reform were linked very directly to the individual solicitor's more pressing concerns:

VC4: [B]ut I don't know – should there be some restrictions in solicitors putting their names on lists all over the country?

A number of solicitors thought more broadly, linking the issue of selection to the recording of proceedings, with VC3 suggesting video recording of both the giving of the notice of rights and the selection of a solicitor. Overall, however, while certain that the system was unfair and lacking transparency, the participants identified no single solution. It may be that the profession should engage in some dialogue internally to clarify its position.

In our view, the 'Find a Garda Station Solicitor' scheme created by the Law Society of Ireland could work relatively well, if used consistently and transparently across stations, and if more rigorously maintained by the Law Society. However, more innovative solutions should also be considered by all agencies involved. In Belgium, for example, a more adaptable web-based list is in operation, on which lawyers can update their availability up to two days in advance, allowing greater flexibility from the lawyers' perspective. However, once listed as available for a given day, the lawyer must ensure that they are fully available and do not have any other planned appointments.⁷⁷ 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.⁷⁸ Technology also has the potential to enhance a rights-based approach to the selection of solicitors; such an app could be utilized to ensure that suspects are making the choice themselves, to improve the quality of the information that forms the basis of that choice, and to record any waivers from the right. Lawyers could consider the value of uploading 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. The suspect's selection could be recorded on this programme, enhancing confidence that it is their choice. Of course, some suspects might still struggle to choose, but gardaí should be strictly informed that they should not engage with any request for assistance on this issue and should advise the suspect that they must make their own selection. Furthermore, the physical environment in which suspects are informed of their legal rights and given access to this technology ought to be video recorded, so that the free choice of the suspect can be verified, if any questions arise in relation to this. 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, or something like it, was jointly developed by An Garda Síochána and the Law Society of Ireland, it might be more likely to be adopted and applied.

⁷⁷ E. Maegherman and M. Vanderhallen, *Effective Police Station Legal Advice – Country Report 1: Belgium* (2018), at <<https://nottingham-repository.worktribe.com/output/927183/effective-police-station-legal-advice-country-report-1-belgium>>.

⁷⁸ V. Kemp, *Digital Legal Rights for Suspects: Users' Perspectives and PACE Safeguards* (2018), at <<https://nottingham-repository.worktribe.com/output/946048/digital-legal-rights-for-suspects-users-perspectives-and-pace-safeguards>>.

7 | 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 to ensure that a detainee makes informed choices in relation to the provision of any information 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 utilized, formal process for the selection of solicitors to provide legal assistance to unrepresented detainees at garda stations is clearly raising concerns among lawyers within the process. They need to be selected to attend garda stations to maintain 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 in future, but that of a more passive, obliging, or compliant solicitor will.

We did not undertake research on this issue with those who have experienced the process as detainees, or with members of An Garda Síochána, though it would certainly be interesting to do so to capture their perspectives. Anecdotally, we have been told that circulars have been issued from garda management to advise that the ‘Find a Garda Station Solicitor’ system should be utilized. However, on the basis of our interviews with solicitors (and more recent discussions outside of those interviews), this is still not consistently happening on the ground.

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 effectively require the use of the ‘Find a Garda Station Solicitor’ scheme or to establish another formalized 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 also certain solicitors or firms who might view the status quo as preferable to reform. The selection of lawyers in police stations is a complicated process, involving the intersection of two distinct professional cultures and ethics, and it is an area laden with the potential for conflicts of interest. Formality, transparency, and consistency would minimize those.

While we have suggested that innovative technological solutions could be developed by the relevant agencies working in tandem, it is clear that consistency and transparency need to be at the heart of whatever mechanism is utilized 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 problem 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. Given that systems in many other EU member states lack formality and consistency of application as in Ireland, we suggest that the issue of selecting lawyers to provide legal assistance is in need of Europe-wide review and consideration. This issue may not have gained traction at a national level in other jurisdictions; it may not be officially known that there is a difficulty with the manner of selecting police station lawyers, or the issue may be seen as insignificant. However, as this article has shown, 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.

ACKNOWLEDGEMENTS

The authors wish to thank Aimee Muirhead for very useful feedback on an earlier version of this article, the anonymous reviewers for their helpful suggestions, Ben Woolhead for his copy editing of the article, and the solicitors who took part in the interviews that provided the basis for the article. Yvonne Daly was awarded the Dublin City University, Faculty of Humanities and Social Sciences Research Fellowship 2018/2019, which facilitated the completion of this research.

Open access funding provided by IReL.

How to cite this article: Daly Y, Conway V. Selecting a lawyer: the practical arrangement of police station legal assistance. *J Law Soc.* 2021;48:618–644.
<https://doi.org/10.1111/jols.12317>