



EFFECTIVE POLICE STATION LEGAL ADVICE

COUNTRY REPORT 3: IRELAND

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1. INTRODUCTION

The Irish criminal justice system is based on an adversarial, party-based system in which the gardai have a high level of discretion when investigating cases. It is important to recognise the impact the violent upheaval in Northern Ireland has had on the Irish criminal justice system, with the framework of policing having been intrinsically linked to broader issues of state security (Mulcahy, 2008). Custody Regulations under the Criminal Justice Act 1984 required that all persons arrested and held in Garda custody were informed of their entitlement to consult with a solicitor, but it was not until 1990 that this right gained constitutional status. It was in the case of the *DPP v Healey*¹ that the Supreme Court recognised the right of suspects to have 'reasonable access' to a solicitor. While it was not clarified what 'reasonable' access actually meant, the role of the solicitor was confined to one of giving advice and support (Jackson, 2016, p. 999), which did not include being present in Garda interviews.

The Irish Government did not initially respond to the landmark ruling made by the European Court of Human Rights (ECtHR) in the case of *Salduz v Turkey*² (*Salduz*), but this was to change in the Supreme Court's ruling in *DPP v Gormley (Gormley); DPP v White*.³ In this case, a link between the right to legal advice and the privilege against self-incrimination was evident (Jackson, 2016, p. 1003). Accordingly, the Supreme Court concluded that there is an obligation on investigating police to refrain from interrogating a suspect at a time after the suspect has requested a lawyer and before that lawyer has arrived to advise the suspect concerned.⁴ The impact of the *Gormley* case was felt just over two months later when the DPP advised the Garda Commissioner that, if requested, a suspect was entitled to have a solicitor present during interview in custody (An Garda Síochána, 2015).

While the DPP had instructed gardai to allow solicitors to attend interviews when requested, there had not been a ruling that there was such a right under the Irish Constitution and Ireland has not opted into the EU Directive on the Right of Access to a Lawyer in Criminal Proceedings [2013/48/EU]. In January 2017, in the case of *DPP v Doyle*⁵ (*Doyle*), an appeal against conviction for murder, the Supreme Court ruled that the constitutional right to reasonable access to a lawyer does not extend to a right to have

¹ [1990] ILRM 313.

² [2008] ECHR 1542, 36391/02.

³ [2014] IESF 17 at para. 9.13. In the case of *Gormley*, the Supreme Court quashed a conviction of attempted rape on the grounds that suspects who request a lawyer cannot be questioned by the gardai until they have received legal advice. It was ruled in the second case of *White* that a suspect did not have the right to legal advice in relation to the police demanding or obtaining consent for the giving of forensic samples.

⁴ *Ibid* [7.11].

⁵ [2017] IESC 1.

legal representation in Garda interviews (Conway, 2017a). Accordingly, it was useful to explore with research participants in this study the extent to which the *Doyle* decision was having an impact on solicitors' attendance in Garda interviews.

The Garda Station Legal Advice Scheme was introduced in 2001 and was designed to provide free legal advice to persons detained in Garda stations and who qualified under specific criteria. This means-tested scheme was originally administered by the Courts Policy Division of the Department of Justice and Equality and, in 2011, the Minister for Justice and Equality in Ireland transferred responsibility for the management and administration of the scheme to the Legal Aid Board.

Subsequently, following the Supreme Court's ruling in *Gormley* in 2014 and further to the decision of the DPP to facilitate the attendance of solicitors at Garda/detainee interviews, there was a need to devise new payment headings to accommodate the changes and this resulted in the introduction of the Garda Station Legal Advice Revised Scheme.

This study has involved examining police station legal advice in six jurisdictions and the different models of criminal legal aid being used to fund such services. It has included interviews with defence practitioners and legal aid officials and this has helped to improve our understanding of what happens in relation to police station work in the different countries studied. However, the research has been undertaken at a time of change and a number of issues have been raised which could usefully be further explored by conducting empirical research to examine what is happening on the ground. Such research could also usefully take into account the perspective of the gardai when considering this important topic, as it was not possible to do so within this study.

2. METHOD

Five semi-structured interviews were conducted in total: three with solicitors and two policy officers. The solicitors were all experienced practitioners based in small firms in Dublin - one female and two males. Two solicitors cover both court work and Garda station legal advice, while the other solicitor deals predominantly with work at the Garda station. Of the two male policy officers interviewed, one was based in the Department of Justice and Equality and the other in the Legal Aid Board. A generic topic list was used for all interviews - one for defence practitioners and the other for legal aid policy officers. The interviews were transcribed and analysed using NVivo, which helped in the identification of key themes.

3. ORGANISATION OF GARDA STATION LEGAL ADVICE IN THE REPUBLIC OF IRELAND

3.1 Publicly-funded Garda station legal advice

It is only solicitors who are able to provide publicly-funded Garda station legal advice. While the *Gormley* decision significantly increased the role of solicitors by allowing them to be present in the Garda interviews, there is no duty solicitor scheme to provide cover to suspects who do not have their own solicitor. Under the scheme, all legal advice is provided by solicitors in private practice who are paid by the State for the services they deliver.

Notification system. When a suspect requests legal advice the gardai will phone the solicitor of their choice and, if a suspect does not have their own solicitor, they will be shown a list of available criminal legal aid solicitors by the gardai. The solicitors in this study said that, while the Irish Law Society has drawn up a list of local solicitors, the gardai sometimes put forward their own preferred solicitors. One solicitor said that he was on the preferred list at local Garda stations and he explained why when saying,⁶ “The gardai are used to seeing me around and they know I’ll come out to the station” (JB.3). Another solicitor was critical of the gardai for sometimes removing solicitors from the list who they found to be challenging. He described what happened in one case when saying, “My client said the gardai had given him a list of solicitors, but my name wasn’t on it. He asked for me, but was told that I wasn’t on the list and he would have to choose another solicitor. My client refused to cooperate with the gardai until he’d spoken to me and I was contacted” (FT.3).⁷

Availability of lawyers. While only solicitors are able to provide publicly-funded Garda station legal advice, there is no requirement, at present, for them to be specialised in this area of work. When commenting on the main providers of criminal legal aid work, a policy officer said, “We’ve got around six or so companies dominating the market. They’ve got the availability to provide cover 24-hours a day. These aren’t all huge firms though, there’s one or two sole traders who concentrate only on Garda station cases” (RI.3).

In order to provide cover for Garda station work at the weekends, a couple of solicitors said that they had joined up with other local small firms. As this solicitor explained, “I knew I wouldn’t be able to manage on my own, so there was seven of us who got together and set up an on-call rota. We do a weekend each, which means you’re only on one in eight weekends” (FT.3).

⁶ References are made in this report to both male and female research participants, but, for reasons of confidentiality, they are referred to in the masculine and a coded reference is used instead of their initials.

⁷ There were similar issues arising in England and Wales after the Police and Criminal Evidence Act 1984 provided access to free legal advice and prior to the setting up of a 24-hour duty solicitor scheme (Sanders et al., 1989).

A couple of solicitors commented on Garda station work being demanding during the week, particularly in the mornings when they are dealing with cases at court. A solicitor remarked on such demands when saying, "When it's coming up to court time, I have at least ten people trying to contact me to tell me which court they're in and I have to text them back" (FT.3).

While most criminal legal aid solicitors have to juggle both Garda station and court work, a policy officer did not think that the increase in workload had led to problems for suspects in accessing a solicitor. As he put it, "I've heard anecdotally that there might be delays in contacting a solicitor, but I've never heard that it's got to the point where they haven't been able to get one" (RI.3).

Telephone contact. When responding to a referral for legal advice, the solicitors said that they would attend interviews at the Garda station with clients if they felt this was necessary. One solicitor said, for example, "I'll generally go down to the station and so all I'll usually say to my clients over the telephone is that I'll be with them within the hour. I tell them not to say anything to the gardai in the meantime" (JB.3). Commenting on the content of his telephone conversation with clients, another solicitor remarked, "I give them common sense advice and nothing of a privileged nature. If they start saying something which is significant, then I tell them I'll be with them shortly and not to talk to anybody in the meantime" (TD.3).

Whether or not the solicitors attend at the station, they said, can depend on their client. A solicitor commented that, while some clients want him to sit in on the Garda interview, others do not. He explained the difference when saying:

"You have clients arrested for the first time and they want you there. There are also your 'hard core' clients, those who know the system inside out. They'll often ring to let me know they're at the Garda station, but they don't want me in the interview because they're going 'no comment'. The important thing is that they want me to keep an eye on how long they're being held and to ring the station in two to three hours to check up on what's happening. Once they're released, I can talk to them properly" (FT.3).

When speaking to their clients in custody over the telephone, a couple of solicitors raised concerns over the lack of privacy. As this solicitor explained, "The call is generally in private and you do have an expectation of privacy" (TD.3). Due to concerns that another solicitor had over the telephone call taking place in private, another solicitor said, "I don't discuss anything with them over the phone" (FT.3).

Potential obstacles to accessing legal advice. The solicitors commented on what they considered to be the main barriers to suspects accessing legal advice. For one solicitor, there was a problem with the gardai and he explained why when stating, "They start by

telling suspects they don't need a solicitor. If the client isn't sure whether they want one or not, they'll suggest they can speak to someone over the phone. That'll be one of their mates. They'll have a chat with them and tell them they'll be grand without a solicitor" (FT.3). Another solicitor commented on recent developments within the gardai which he felt had helped to increase access to legal advice. However, he did say that there have been occasions where the gardai tried to exclude him from the interview. By way of example, he said, "If there's a delay and I'm late getting to the station you can sometimes find that your client has been taken into the interview without you. If I think this is likely to happen, I'll talk to my client beforehand and tell him to make no comment until I arrive" (JB.3). On a couple of occasions, the solicitor said that he had not been contacted by the police when waiting to be told that they were ready to proceed with a second interview. He described one such occasion, saying, "I was in a coffee shop next door to the station waiting for the gardai to call to say they are ready to go ahead. I didn't hear anything and they told my client that they couldn't get me over the phone. The interview went ahead without me and I had quite a row with the gardai about that" (JB.3).

Suspects are given a notice of their legal rights, which is intended to help improve access to legal advice. However, one solicitor noted that people needed support in order to access legal advice. As he put it, "You can ask for a solicitor, but it depends whether or not they're available. There also needs to be arrangements in the Garda station for you to have a private telephone conversation with your solicitor, which doesn't always happen" (TD.3).

It was when dealing with the more serious offences that a solicitor was of the view that the gardai were more likely to facilitate access to legal advice, although on a restricted basis. He explained why in saying, "They want a solicitor to be there, although they don't particularly want them to be sitting in on the interview. They want it to form part of the evidence that the suspect was seen by a solicitor before he was interviewed" (JB.3).

Voluntary interviews. The solicitors said that, increasingly, the police were using voluntary interviews because suspects do not have access to publicly-funded legal advice. As this solicitor explained, "We don't get paid a penny unless our client is detained" (FT.3). Another solicitor said, "Some gardai will try to get a voluntary interview because it takes the solicitor out of the loop" (TD.3).

While the solicitors said that voluntary interviews had tended to be used by the gardai when dealing with minor cases, they complained that, increasingly, they were using them for more serious types of offences. In a recent case, for instance, a solicitor said that his client, an accountant, was being investigated for defrauding charities out of a lot of money. The gardai had tried to encourage his client to accept a voluntary interview by telling him that, "The evidence was getting stronger every day and it'd be better if he made a clean breast of it. They said they didn't have the time to do reams of interviews and they just

wanted me to come in and talk to him about his rights." Without legal aid for voluntary interviews, the solicitor said, "All I could do was warn my client. I told him he has a right of silence and that he can get up and leave [the interview] at any time. I also told him that if he makes an admission, then there's no way back from that" (TD.3). Another solicitor complained that, increasingly, the gardai were trying to deal with a lot of sex offences by way of a voluntary interview. Objecting to this approach, he said, "I tell my clients that they have a choice of doing a voluntary interview or being arrested. My advice is that they should ask the police to arrest them so they have their rights" (JB.3).

3.2 Pre-Interview disclosure

The extent to which the solicitors are given pre-interview disclosure was said to vary by the Garda station, the gardai and the seriousness of the offence. In relation to the Garda station, for example, a solicitor said, "It depends on the unit. Local uniform gardai tend to tell you a lot less and say that you'll see the evidence during the interview. Before that, all you tend to get told is the type of offence. I ask for more, but you don't get anywhere" (JB.3). So far as the gardai are concerned, a couple of solicitors commented on having a problem with younger officers, particularly as they could be unsure about what information to disclose. In trying to encourage a response, one solicitor said, "I'll tell them that it would help to simplify things if they told me what they'd got, particularly if the evidence is strong. I explain to them that I can then tell my client he's had it and that he might as well make admissions and get brownie points in court" (JB.3).

A solicitor said that the tactics he uses in trying to get disclosure from the police were as follows, "I ask for the investigating officer when I arrive to see what's going on. I'll ask if they have CCTV or any statements. I try and glean as much information as I can before I see my client" (FT.3). However, when asking for disclosure, the solicitors acknowledged that the gardai would not want to reveal their entire case. In relation to CCTV evidence, for example, one solicitor said, "It can be an own goal for the police if they let you see this evidence too soon, because you can contextualise what happens, or your client can, and it can help to raise a defence" (TD.3). Also, instead of expecting to be shown witness statements, the solicitor said that the gardai would sometimes read through these and summarise what had been said. All the solicitors said that, without being shown any disclosure, they were generally unable to make any progress in the interview.

It was when dealing with Garda units that deal with more serious offences that one solicitor said he gets much better disclosure, albeit through the adoption of a phased approach. As he put it, "If you're dealing with a special type of unit, the National Bureau of Criminal Investigation or the Organised Crime Unit, they'll give you everything they have, although it's interesting the way they circle around it so much. They might not come to the crucial bit of evidence until perhaps the third interview" (JB.3). While the gardai

were generally said to be better at disclosure when dealing with more serious offences, one solicitor said that this was not the case when dealing with rape and sexual offences. Instead, it was his view that, "They're trained to encourage suspects to tell their side of the story first because they want contrasting versions of events. If your client goes on record saying something without disclosure, then they're potentially exposing themselves to criminal culpability" (TD.3).

A solicitor commented on a recent development when a gardai had refused to provide him with any disclosure. He said, "When I asked why I wasn't getting any information the gardai said it was because of a recent EU Directive. I tried to explain that the Directive he was talking about means that I'm entitled to disclosure.⁸ They still wouldn't give it to me. It wasn't done in an aggressive manner and, eventually, they did give me some disclosure and so I just went along with it" (FT.3).

3.3 The role of the lawyer providing legal advice and assistance at the Garda station

3.3.1. Consultation

The solicitors said that, in the consultation, they would generally advise clients to make 'no comment' in response to police questions, although they did stress that their advice depended on the circumstances of each case. As this solicitor explained, "It can depend on the station, on the gardai, on the offence, on the client. It's not harmonised at all" (FT.3). A solicitor commented on the need to work out what was happening in the police investigation as this could influence his advice. By way of example he said, "You need to have experience to spot the 'snakes and ladders' of what's going on in the investigation file". He continued saying:

"You have to make some logical deductions when putting together a picture of what happened from which you can advise your client. It's precarious, because you think you have the right picture, but the reality can be different, so everything comes with a health warning. All an adviser can do is advise their client based on the information they have and tell them that how they proceed is their choice" (TD.3).

The solicitors all said that their advice to clients was generally to 'say nothing' if there was no disclosure forthcoming from the police. A solicitor did comment on exceptions when saying, "If there are allegations of rape or sexual assault and your defence is going to be one of consent or a denial, you should tell the police. It's the same for ordinary assault; if

⁸ EU Directive 2012/13/EU requires member states to ensure that suspects are provided with information about the criminal act they are suspected of having committed. The information is to be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

there's a defence of self-defence, then you should say so" (JB.3). This is why, noted another solicitor, that instead of routinely advising clients to make 'no comment', solicitors have to highlight to clients their options when deciding how best to respond to police questions. As this solicitor explained, "A 'no comment' interview can go against you if the police have strong evidence. If a client says he's not done anything wrong, then I might advise him to make a limited statement which is consistent with innocence" (TD.3). The solicitor explained that a limited statement helps to protect clients from the danger of saying something in the interview before receiving any disclosure. As he put it:

"You can have cases where someone always makes 'no comment', but, unbeknown to you, the gardai have strong evidence against him. If your client doesn't rebut some of the evidence, then they're more likely to be charged. Once at court, it's worrying that inferences can be drawn over someone who makes no comment because it cuts into their right of silence ... If you have eight lines or so written down in a statement, consistent with innocence, then your client either won't be charged or it will at least provide him with a defence at court" (TD.3).

3.3.2. Legal assistance during the interview

When commenting on their role in the Garda interview, one solicitor said:

"We're a catalyst really, there to assist. You're not there to get in the way but to safeguard the rights of my client. To see that there's no bullying, no threats or intimidation, no promises made, no nothing. To see the interview is conducted as fairly and openly as it can be" (FT.3).

This was the response from another solicitor:

"You have to try and work out what disclosure they have and what the rest of the case is about. You need to ensure that your client is fully aware of his constitutional and human rights and that the interview isn't oppressive. Occasionally, you have to interject to advise your client, or maybe remind them about their privilege against self-incrimination, or their right to silence.⁹ It's different if you have a client with a learning disability or a mental health problem, as you may need to step into their shoes a bit more often to protect their rights" (TD.3).

⁹ Historically, solicitors in Ireland would advise clients in custody not to respond to police questions because there was not much to be gained by making a statement when being questioned by the gardai. However, this position has changed over recent years and there is now a growing body of legislation which allows a court to draw an adverse inference from an accused person's failure to mention during questioning a fact that is later relied on in defence.

While these experienced solicitors recognise the need to intervene when required to do so, they commented on the dominance of the gardai in the interview. As this solicitor explained, "You need to be very careful not to overdo it or the officer in charge of the investigation will be called" (JB.3). Another solicitor said, "I've known solicitors to be thrown out of the interviews by the gardai. It hasn't happened to me, but I know solicitors who have been asked to leave" (FT.3).

A solicitor pointed out that the gardai could resent solicitors for interrupting the interview, but said he would do so if he felt it was necessary. Using a recent case as an example, he said:

"I was dealing with an allegation of murder a few days ago and I had to interrupt because the police were trying to explain the law relating to joint enterprise. This is a complex and potentially unfair law and so I had to tell the police that I'll be the one to do the legal advising and they can stick to the investigation. It went down like a lead balloon!" (TD.3).

A solicitor commented on the importance of clients being the ones to make decisions in the interview when he remarked, "Your client might look at you repeatedly for guidance, but, on the third occasion I might have to say, 'Stop doing that. Just follow the advice I gave you earlier', which almost invariably is to make no comment" (JB.3). Another solicitor said that he needed to be tactful if he wanted to talk to his client during the interview. Accordingly, as he put it, "I might suggest to my client that we need to have a chat in private if something new, prejudicial or incriminating comes up" (TD.3). In addition, when commenting on clients needing to take responsibility for what is said in the interview he said:

"It's not up to me to stop the interview and my client has to decide whether they want to speak to me or not. The choice they make comes with consequences and they can't blame me if it goes wrong. If your client admits that she's killed her husband, then she shouldn't be surprised if she's charged with murder" (TD.3).

While the three experienced solicitors recognised that, by intervening, this could upset the gardai, they all stressed that it was important to do so if necessary. As this solicitor put it, "If you don't think things are fair, then you have to say so. There's no point sitting there passively and agreeing with what's being said and later try to argue that there was an unfair question" (FT.3).

A tactic adopted by one solicitor, if he encountered problems with the gardai, would be to make a comment during the interview. He explained this approach in saying, "I'll sometimes make a comment or a complaint at the start of the interview because it's then captured on the video. I'll also say for the record if the police start discussing evidence they haven't disclosed to me" (TD.3).

When commenting on the Garda interviews being video recorded, the solicitors complained that the gardai also have to make a contemporaneous written note of the interview. One solicitor explained why in saying, "It's because of the wording of the caution, so everything works very slowly" (JB.3). The police also have to prepare a written summary at the end of the interview. A solicitor pointed out that the delay in completing this task could be helpful when he said, "I might take my client outside for a minute before the interview is read out and suggest that, when he's offered the chance to make any alterations or amendments, that he does so" (JB.3). Another solicitor commented on the length of time it takes for the gardai to make a written note of the interview when he said, "It's pretty much a verbatim note of the whole interview and you have to read it all over at the end, which can take about 20 minutes" (FT.3).¹⁰

On a positive note, a solicitor said about the gardai, "I've been impressed and surprised by some of the professional interviewing techniques they employ now. They've done quite a bit of work on the techniques used and you can see it's really paying off" (FT.3). As noted below, there is also a new training programme for solicitors providing Garda legal advice, although this had not been implemented at the time of this study.

The Doyle Judgment. While the case of *Gormley* persuaded the DPP to allow solicitors to be present in the Garda interview, as noted above, the Irish Supreme Court declined to declare that there is a constitutional right to such a presence in the case of *Doyle* in 2017. In practice, the solicitors in this study said that the *Doyle* judgment had not led to any changes on the ground. When analysing the *Doyle* judgment, and other Supreme Court cases, Conway (2017a) considers it highly unlikely that the DPP would seek to rescind the permission she granted for solicitors to attend interviews in 2014. In addition, the judicial commentary on the scheme, Conway (2017a) notes, is supportive of the involvement of solicitors in the Garda interviews and so this is likely to continue.

After the Garda interview: All solicitors said that they would talk to their client after the interview, but they would not wait around for the police to make a decision on the case outcome. However, the solicitors did say that they would talk to the gardai about imposing appropriate bail conditions if they were considering remanding their client in custody post charge.

A couple of solicitors described this meeting as a consultation within which they would debrief their client and let them know what was likely to happen next. As this solicitor explained, "Sometimes the police give you the 'heads up', so you know what's happening, but most of the time you know where it's going from your own experience" (JB.3). One of the solicitors, however, said that, while he would talk to his client after the Garda

¹⁰ There had been a similar situation in England and Wales following implementation of PACE with the police being required to take a contemporaneous written record. However, this is no longer required following a revision to PACE which requires an audio-recording of the interview.

interview, this would not include a debriefing because of concerns he has that the gardai can overhear the discussion. Instead, he said, "I'll have a quick chat, but this will be about things like ringing their mum and letting them know what's going to happen next. I won't talk to them about the interview at the station, but ask them to come and see me in my office so we can discuss what happened in private" (FT.3).

3.4 Diversion procedures

There are arrangements in Ireland where suspects can be diverted from court, subject to the offence being admitted, but it seems that solicitors are seldom involved. From the comment of one solicitor, it seems that diversion is mainly for more minor offences when dealing with adults, but can include more serious offences when children and young people are involved. As he put it, "Diversion would normally be for minor public order offences and things like that where there's no power of detention. It can be used for more serious offences when dealing with juveniles, but those cases have to go to the JLO¹¹ or even the DPP. It can take a long time to sort these cases out" (JB.3).

The solicitors said that diversion is not considered in cases until after the Garda interview. Accordingly, this solicitor remarked, "We don't really deal with diversion. It's a matter for the police to consider this when they're charging someone." However, he also said, "If I have a young client and they admit the offence, then I might talk to the JLO about it. You won't do anything unless there's an admission. That includes when you're dealing with an adult caution" (FT.3).

4. STRUCTURE OF LEGAL AID REMUNERATION AND IMPLICATIONS FOR QUALITY

4.1 Organisation of legal aid

Solicitors in private practice provide legal advice to suspects who have been held in custody by the Garda.¹² Access to publicly-funded legal advice is means tested and those with a total gross income not exceeding €20,316 are eligible. In 2015, it was estimated that 71 per cent of people detained in Ireland qualified for free legal aid (Fair Trials, 2015, p. 12). Of all suspects detained, based on Legal Aid Board data, a policy officer estimated that around a quarter of suspects avail themselves of the right to legal advice, although he said that the numbers were increasing each year (RI.3). Solicitors in this study said that they would consult with their client, either over the telephone or in person, and, if required, they would attend the Garda interview. However, it was estimated in 2015/16

¹¹ The 'juvenile liaison offices' (JLO) are gardai who are trained to deal with young offenders out of court.

¹² Suspects are eligible for legal aid if they have been arrested under Section 30 of the Offences Against the State Act 1939 (as amended), Section 4 of the Criminal Justice Act 1984 (as amended), Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 (as amended) or Section 50 of the Criminal Justice Act 2007 (as amended).

that publicly-funded solicitors were only present in around seven to eight per cent of Garda interviews (Conway, 2017b). This is an average taken across Ireland and it is to be expected that solicitors in Dublin will attend the Garda interview in a higher proportion of cases than solicitors in smaller cities, towns and rural areas.

A policy officer described the changes in legal aid which had to be implemented quickly following the *Gormley* judgment in 2014. As he put it, "When the DPP decided that we had to facilitate this change, we had to rewrite the scheme overnight. This meant changing the way it operated and making sure solicitors got paid for this work" (RI.3).

While the changes did not include setting up a duty solicitor scheme, a policy officer said that this option was currently being considered as part of the government's reform programme. He did stress, however, that, "While there's a commitment by the government to look at the potential for a duty solicitor service in Ireland, this isn't to say that it's definitely going to go ahead" (RI.3). Also, as part of the government's reform programme, the other policy officer said that they were considering the potential for a public defender scheme to provide cover in rural areas. He explained why in saying, "Solicitors have told us that there are difficulties in getting someone to attend a Garda station in the countryside, particularly in the remotest part of Western Ireland. You can see why that would be the case and it's in this context that we're looking at setting up a public defender system, or at least some element of it" (LB.3).

There are five separate Criminal Legal Aid Schemes and the Legal Aid Board holds responsibility for three of the schemes, including the stand-alone Garda Station Scheme. A core purpose of the proposed Criminal Legal Aid Bill, commented on by a policy officer, is to provide the statutory footing to transfer the 'main' Criminal Legal Aid Scheme to the Legal Aid Board from the Department. That Scheme provides for legal aid representation in the Courts and responsibility for that Scheme and the proposed Bill rests with the Department. The Bill will also introduce a number of measures intended to strengthen safeguards against abuses of criminal legal aid (Brennan, 2017). While work is being undertaken in developing such measures, it is not yet known what impact such changes will have on the administration of criminal legal aid.

With solicitors being under increased pressure in relation to Garda station work following the *Gormley* decision, a couple of solicitors, as noted above, said that they had joined together with other small firms to set up a local rota to cover weekend work. The solicitors also commented on how difficult it was at times to manage cases in the Garda station as well as at court. This was the comment from one solicitor: "I had a murder section a few days ago and had to put in a lot of hours. I had to brief other solicitors to do my court work. For smaller offices, it does cause problems" (TD.3). The other solicitor said, "You can be involved in a case at the Garda station for days on end. In a recent case

I was at the station for two days and involved in eight interviews. There were another two days of interviews, but I couldn't cover it so I rang a solicitor and he took over" (FT.3).

When deciding whether or not to attend at the Garda station, a solicitor said that he would make a 'judgement call', which would include considering the seriousness of the offence and the vulnerability of the client. As he put it:

"If it's a potential judge and jury case, then I'll attend. I won't attend for someone who's refusing to give a breath specimen when caught drink driving. I'll also not attend for more minor offences, particularly if my client is intelligent and can handle himself. I will go if someone is vulnerable, if they're young or have a learning disability" (TD.3).

4.2 Remuneration

A policy officer explained that statutory funding is only available for the main criminal legal aid scheme, with the other criminal legal aid schemes being operated and funded on an ad hoc basis (RI.3).¹³ Under the Garda Station Scheme, the first fee covers a consultation between the solicitor and their client, either over the telephone or in person. The second fee is for the actual time spent by the solicitor at the station when attending the Garda interview or an identification parade. The third fee covers the attendance of the solicitor at an 'extension hearing', which is heard at the District Court.¹⁴ All fees are exclusive of VAT and, from Monday to Friday, 8am to 8pm, the fee paid for a telephone consultation is €39.59 and, for a face-to-face consultation, it is €97.22, increasing to €132.19 at all other times.¹⁵ The hourly rate paid for a solicitor attending the Garda station from 8am to 8pm on Monday to Friday is €72 and €93 for an attendance at all other times (a half-hourly rate applies after the first full hour). For an extension hearing, the solicitor is paid €201.50 and travel is paid at €0.24 per kilometre (Legal Aid Board, 2014).

A policy officer said that administration of the legal aid fees was overly complicated and he explained why in saying:

"The fees were brought in three years ago in a hurry. They haven't worked out that well from our perspective because of the complexity involved. We have around 4,500 claims a year and every one of them is on paper. This means that, after a solicitor completes the form, it has to be signed by the gardai to certify their attendance" (RI.3).

When commenting on the form, a solicitor remarked, "It needs to be completed properly because the Board will send it back if there's any problems or it isn't signed. The red tape

¹³ There are three different types of fees payable under the Garda Station Legal Advice Revised Scheme (Legal Aid Board, 2014).

¹⁴ The gardai have to apply to the district court to extend the time limit for holding a suspect in custody.

¹⁵ Which is 8pm to 8am and during weekends and Bank Holidays.

involved in completing the forms is horrendous" (TD.3). A policy officer said that administrative aspects of the fee regime were to be considered over the next few months to try and sort out a more streamlined process (LB.3).

The policy officers were of the view that legal aid remuneration was good, but they recognised that this was not the view of the Law Society. As one policy officer put it:

"The feedback we get from the Law Society is that the number of solicitors is falling because they're not paid enough and the working conditions are too hard. I sympathise with the difficult conditions, but the evidence on the ground is the opposite. We have solicitors ringing us up fairly regularly, particularly new solicitors, asking how they can get into this area of work. They know that, if they get a case in a Garda station, then there's a good chance they'll retain it when it goes to court. That's how they build up their practice" (RI.3).

The solicitors generally felt that the fees were quite good for Garda station work. This was the comment from one solicitor when talking about the fee structure:

"On a typical form, you will have a phone call, which is around €40 plus VAT. Then we'd go and attend the client. Even if we're with them for only 10 minutes, its €97. So, that's €140 plus VAT. That might be all you do, and that's fine. If you attend the interview, you get €72 an hour, around €90 an hour with VAT" (FT.3).

However, the solicitor put the fees into context by pointing out that they had to absorb a sharp reduction in legal aid fees following the 2008 financial crisis. Accordingly, he was of the view, "I think the amount we get for Garda station interviews is sufficient, but I'd be happier if they reinstated the amount deducted for our court work" (FT.3). This was the comment from another solicitor, "We got a 40 per cent cut in fees for our court work from the last recession. These haven't been uplifted, but we did get new rates for the Garda station scheme. While it's created an extra layer of work, it does mean that we're getting an extra stream of income" (TD.3).

For one solicitor, who spends a lot of his time in the Garda station, he said that the fees could be quite good, particularly if you are dealing with more than one case. As he explained:

"If I'm lucky, I might have two or even three clients going on at the same time in the same station. So, if you're there from eight in the morning until midnight you'll get all the hours paid. Only the once, of course, but you get paid for all the consultations – nine instead of the three which you're allowed in each case" (JB.3).

While Garda station work is difficult for solicitors to cover when also having to manage court work, there are financial incentives in doing this work. This the comment from one solicitor: "The rate isn't too bad, but it's a pain in the neck to be involved in a long

detention. As lawyers though, we're in business to make a profit. If you have someone detained for organised crime you can make over €5,000. That's rare, but it can happen" (TD.3).

4.3 Quality of Garda station work

The policy officers pointed out that the Irish Law Society is responsible for the quality of Garda station legal advice and that guidance for solicitors has been published (Law Society, 2015). The guidance cross-references the An Garda Síochána Code (2015), which sets out how the gardai are to deal with solicitors. It states, for example, that:

"Solicitors, as officers of the court, should at all times treat members of An Garda Síochána in a professional and courteous manner. The Code similarly recognises the importance that An Garda Síochána enables solicitors to "discharge their duties to their clients in a courteous and professional manner" and requests that solicitors similarly "understand the responsibilities and duties of members" (Law Society, 2015, para. 2.7).

There are contradictions in the guidance, however, when dealing with the issue of disclosure. On the one hand, for example, it states that "Solicitors should obtain as much disclosure as possible to ensure they have all the relevant information to advise their client comprehensively" (Law Society, 2015, para. 5.2). On the other hand, when citing the Garda Code, it states that:

"An Garda Síochána is not obliged to disclose any information that could prejudice an investigation. In this regard, the premature disclosure of information/details may sometimes impede or interfere with the investigation. It must be remembered that an interview is part of the investigation process and there must be some spontaneity about the actual interview. If information is handed out first, the suspect can make up his/her answers and there is no spontaneity about the matter" (Law Society, 2015, para. 5.4).

As noted in other Country Reports, joint training events could help to address some of the difficulties arising in relation to the disclosure of evidence between the gardai and solicitors.

The Law Society guidance covers a number of areas where solicitors are required to provide a quality service. In relation to the initial telephone call between a solicitor and their client, for example, it states that this should take place within 30 minutes of the solicitor receiving the call from the gardai notifying them of the request for legal advice (Law Society, 2015, para 3.8). The guidance also covers the role of solicitors during the Garda interview (Law Society, 2015, section 7).

With the finding that less than 10 per cent of cases involve a solicitor attending the Garda interview (Conway, 2017b), it seems that, in most cases, solicitors manage Garda station work by advising clients in consultation, either over the telephone or in person. When it was suggested that one option to provide cover during the interviews at the Garda station could be to use trained paralegals, as occurs in England and Wales, this option was not supported by the solicitors or policy officers. However, a couple of solicitors did comment positively on the role of paralegals. More generally, for instance, this solicitor said:

"I'm not really a fan of paralegals, although there's some really good ones out there. The longer they're at the job the better they are and some can be as good as solicitors. It's when they're first starting out that it can be a disadvantage and they don't know what they're doing. It can also be a problem if the case goes pear-shaped or a gardai tells your client that you haven't bothered to send a solicitor. If you've been arrested, it's a big deal and I think that having a decent solicitor by your side isn't too much to ask" (FT.3).

The other solicitor uses paralegals when dealing with Garda station work, although he stressed that they have no status when undertaking legal aid work. He described the restricted role for his paralegal in stating:

"I have a legal executive and most of the Garda stations will let him in okay, but some won't. It tends to be the better units who are dealing with very serious offences who have no problem. He's there to help me. While sitting in on the consultation, he might remind me of something important. If he sits in on the Garda interview, he might pass me a note if he thinks there's something I need to pick up on, although that would be unusual. The gardai can object to him being present in the interview. He won't give advice, he's there to help me. It has to be a solicitor who provides advice" (JB.3).

This was the view of the third solicitor: "I think that people need a solicitor and using a paralegal is asking for trouble. If you have solicitors who are experienced in going to the Garda station, at least they'll know what to expect" (TD.3).

The policy officers were also of the opinion that only a solicitor can provide Garda station advice. As this policy officer put it:

"Under no circumstances will we make a payment or authorise anything involving a paralegal. Although, we have had a couple of situations where I've become aware that paralegals had been sent out to the station and it isn't on. We've raised it with the Law Society and they don't want paralegals doing this work either" (RI.3).

Accordingly, the policy officers said that it was not part of the government's reform programme to examine the potential for using paralegals in providing Garda station legal advice.

Training and quality requirements. When asked about what training, supervision or other forms of quality measures were in place, a solicitor replied, "It's a matter for ourselves, unfortunately" (FT.3). While the Law Society (2015) has produced guidance for solicitors, a policy officer said that there is no specialisation required of solicitors acting in criminal cases. As he put it, "You just have to be a registered solicitor" (RI.3).

Following the *Gormley* judgment, and with solicitors now having a role in the Garda interview, the solicitors felt that training was required for those providing legal advice to suspects. As this solicitor explained, "It's no good if someone is good at conveyancing and they then try to deal with a case of murder. They might know the legal principles involved, but they're lacking experience of the investigation stage and also on what happens at court" (TD.3). In a similar vein, this solicitor said that the *Gormley* judgment had taken them by surprise, stating: "There was a lot of scrambling around at the start with people not knowing what to do. There were some solicitors who refused to sit in the interview because they had no training and they didn't want to let anyone down" (FT.3). The policy officers were of the opinion that solicitors had now settled down to what was expected of them in the police interview, although with solicitors attending the interview in less than 10 per cent of publicly-funded cases, this might not be the case.

It was the view of the solicitors that there needed to be specialisation when dealing with Garda work. As this solicitor put it:

"There's a reason why people are specialised in certain areas and you shouldn't let others dabble in criminal law. If a friend of mine in a commercial department has a client who has been arrested, they'll ring me and ask me to deal with it and I'm more than happy to do so. I haven't a clue about buying and selling shares or dividends and so I'd ring them if this is information a client needed" (FT.3).

While accepting the need for training, one solicitor said, "There's no better way of learning than actually doing the work. My colleague's only two years qualified and with a very serious offence the gardai might allow him to sit in on the interview. He'll learn a lot by shadowing me. You just get better as you go along" (TD.3).

With only qualified solicitors being allowed to undertake criminal legal aid work, a policy officer queried why additional training was required and that this was an issue that had been raised with the Law Society. However, he went on to say, "What other solicitors have told me is that some solicitors just aren't good enough. We have a panel scheme for legal aid court work and only solicitors on the panel can do this work. My own view is that

we need a panel system for Garda work too. This is something we will need to look at more closely once the new Criminal Legal Aid Bill comes in" (RI.3).

It was in the Garda station that a solicitor stated that suspects needed to have good quality legal advice. He explained why in saying, "The most important part of the criminal law is the investigation stage because of the proximity to the crime. It's where the police need to be in possession of the information they require to bring a case. By the time you get to court, it's too late" (TD.3). The solicitor also commented on the complexity of the work involved, particularly when dealing with very serious cases. Accordingly, he said, "There are cases where I'll ring a colleague or a trial barrister to ask them questions, particularly about inferences. I might phone him and say what disclosure I've got and, on that basis, what he thinks we should say to the police. Getting a steer early on can be very helpful" (TD.3).

A couple of solicitors were keen for Garda station work to be recognised as a specialisation. This solicitor said, "There's talk about introducing a CPD (continuing practice development) training course for people specialising in Garda station interviews. I think it's a good idea. If you're holding yourself up as a specialist, then you need to have accreditation. It's important, as our job can make a difference to whether people are in prison or at liberty" (FT.3). The other solicitor commented on concerns that he had about the quality of legal aid work when he said:

"I'd welcome some form of accreditation. There's been a proliferation of firms and competition between them is leading to a race to the bottom. It's all about turnover. You'll get pleas cobbled together, or cases where there could be a technical defence, but it gets sent out to a junior barrister" (TD.3).

However, the solicitor also pointed out that criminal legal aid work was not popular with the public. He said, "The problem politically is who cares about legal aid? Irish people are very dismissive and it isn't given enough prominence as a civil right. The media are only interested in the handful of firms where the barristers earn a lot of money through legal aid" (TD.3).

SUPRALAT training. The Irish Law Society (2018) has now adopted the SUPRALAT training programme to help strengthen suspects' legal rights in pre-trial proceedings. The training programme arose out of the EU Directive [2013/48/EU] on the right of suspects to have access to a lawyer. It requires member states to provide access to effective legal advice at the early stages of proceedings, including during police detention and the police interview. Coordinated by the University of Maastricht and co-funded by the European Union, the training programme is designed to "promote the development of an active, reflective and client-centred professional culture of criminal defence at the early stages of criminal proceedings" (Mols, 2017, p. 307). Referred to as the SUPRALAT (strengthening

suspects' rights in the pre-trial proceedings through practices orientated training for lawyers) training programme, it has been designed according to fundamental educational principles and it is currently being piloted in four countries: Belgium, Hungary, Ireland and the Netherlands.

Following the first pilot training sessions, the project received 'unambiguously positive responses' during the evaluation phase. The programme includes engaging with local criminal defence solicitors as SUPRALAT qualified trainers so that local solicitors can provide training to other criminal practitioners. In the evaluation, Mols (2017, p. 308) notes that, "Participants particularly valued the practical, interactive and multidisciplinary approach of the training." The materials have been revised and adjusted and are now being disseminated for further use by professional and educational organisations throughout Europe.

The research interviews in this study took place before the SUPRALAT training commenced, but, subsequently, a number of solicitors have been involved in this training. Commenting on progress, Dr. Yvonne Daly, the Irish principal investigator on the project stated:

"The SUPRALAT training programme has been a great success in Ireland and we are delighted that the Irish Law Society has now brought it under the banner of its Skillnet Professional Training suite of courses. To date, there are 47 SUPRALAT-trained solicitors in Ireland and there are plans to continue the roll-out of the training, delivering the SUPRALAT masterclass around the country in 2018. We have been so impressed with the dedication of the participants to their clients and the protection of their clients' rights during Garda interviews. The SUPRALAT programme advocates an active, client-centred defence practice along with promoting a reflective mindset for practitioners, so as to enhance their decision-making capabilities. It focuses on the myriad of skills necessary to effectively defend suspects detained in police stations, which go well beyond the plain knowledge of the law."¹⁶

5. TECHNOLOGY

When asked about the use of technology in the criminal justice system, the research participants mainly commented on video-conferencing being used between the courts and prisons. A policy officer, for example, said, "We're using video conferencing to a limited extent, but it is increasing. Some judges are pushing it, particularly in the busy courts. I know the Prison Service is particularly keen for this development because it saves them having to transport people to and from court" (RI.3). The other policy adviser said, "We've

¹⁶ Personal email communication sent from Dr. Yvonne Daly to Dr. Vicky Kemp dated 11 January 2018.

a pretty advanced system of video technology throughout the criminal justice system. I think it's particularly good at linking court rooms and prisons" (LB.3).

The research participants did not think that video conferencing would work in Garda stations, either to link up solicitors with their clients or with the gardai. A policy officer said, "I don't think the gardai would like it" (LB.3). A solicitor replied in a similar vein when saying, "I don't think it's a good idea. It's far too dangerous" (FT.3). When considering the potential for solicitors to communicate with clients virtually in the future, however, one solicitor remarked, "I've always abhorred the idea of connecting virtually with my client, but you have to keep up-to-date. I've had Skype consultations with some clients, but not yet with criminal clients. I don't see why this won't happen eventually" (TD.3).

A recent development in relation to technology, commented on by the solicitors, was receiving disclosure from the gardai via email following the interview. As this solicitor explained, "The gardai are sending disclosure by email and the DPP too. We get the file and we can download it. There again, I think hard copy documents are better for lawyers" (TD.3).

In relation to future developments, a policy officer commented on a project that was going to transform the sharing of information between criminal justice agencies. In explaining this project, he said:

"The Department is developing a Criminal Justice Sector IT Hub and this will embrace electronic custody records and this information will be transferrable to the central hub. Where appropriate, this can then link up with relevant information from the Court Service, the Garda, the Prison Service, the DPP and the Legal Aid Board. The proposal is that, if someone's arrested and they request legal advice, the information will go electronically into the central hub and we can activate a claim for legal aid without having to fill out paper forms that have to be certified by the Garda. We want to develop a portal for solicitors so their involvement in a case would automatically activate a claim. This would be noted on the custody record and it would go through to another department for the solicitor to be paid. The court outcomes will also be incorporated into the hub. It will take two or three years to build the hub, but it's the way forward" (RI.3).

When asked about the potential for an App to be used to inform suspects about their legal rights, the research respondents thought this was a good idea. As this policy officer put it, "My view is that we should embrace technology when it can help to make things better. You could put into the App the Law Society's list of criminal legal aid solicitors, which can then be shown to suspects. It's the way forward and we're foolish if we think we can avoid technology" (RI.3). A solicitor mentioned that the Law Society had been

thinking about making it a requirement for a video recording to be made of suspects when being shown a list of solicitors and making their choice (FT.3). The App could incorporate this facility, as a video could capture people when reading their legal rights from the electronic device and it could also record the decision made about whether or not to have legal advice.

6. CONCLUSION

The Supreme Court decision in the case of *Gormley* in 2014 fundamentally changed Garda station legal advice by allowing solicitors to be present in the interview. With many criminal legal aid solicitors being sole practitioners, or coming from small firms, it is difficult for them to cover Garda station work in addition to managing cases at court. Many solicitors have to manage their workload by prioritising cases where they consider an attendance is required and those where just a consultation will suffice. Accordingly, there is a high proportion of cases where many solicitors do not attend the Garda interview.

Garda station legal advice is means tested in Ireland, but it seems that around 70 per cent of suspects are eligible for legal aid. Around a quarter of suspects choose to have a publicly-funded solicitor, a figure which is increasing each year.

There is no duty solicitor rota in Ireland, but a detainee can request a solicitor of their own choice and, in helping suspects who do not request a specific solicitor choose one, the gardai show them a list of local criminal legal aid solicitors. Such arrangements can be unsatisfactory, because the gardai can use their own list of preferred solicitors, which can exclude those considered to be more challenging of the gardai. In the government's reform programme, there is consideration being given to setting up a duty solicitor scheme and there are different ways in which such a scheme can be organised. Solicitors in Belgium, for instance, have used technology to set up a web-based duty solicitor scheme.

While it is difficult for solicitors to manage both Garda station and court work, another reason why some solicitors might be reluctant to attend the Garda interview could be due to the dominance of the gardai. The solicitors involved in this study are experienced practitioners, used to dealing with very serious offences and, where necessary, they will challenge the gardai by interrupting the interview. They did recognise the reluctance of some solicitors to do so, however, particularly as the gardai have the power to remove a 'disruptive' solicitor from the interview. Other less experienced solicitors may prefer to avoid confrontation with the gardai and instead advise their clients by way of consultation only.

When providing Garda station legal advice, the main problem raised by all the solicitors (not only in this study, but in the other five country reports) was over the disclosure of evidence provided by the gardai. While this could vary depending on various factors, it was felt that, due to a lack of disclosure, solicitors were unable to make progress

in the majority of cases. With the courts being able to draw adverse inferences from suspects who exercise their right of silence in Garda interviews, however, the solicitors commented on giving the gardai a 'limited statement' to protect their clients' interests. Depending on the circumstances of the case, the solicitors can include in the statement a reference to their client being innocent and/or details of a possible defence or alibi. This approach is not possible in cases where the solicitor does not meet face-to-face with their client.

It is only a solicitor who can provide Garda station legal advice, but there is no restriction on this work having to be undertaken by a criminal defence solicitor. Increasingly, and recognising the complexity of the solicitor's role in the Garda interview, the Law Society (2018) has published guidance for solicitors and adopted a training programme (SUPRALAT) intended to help strengthen suspects' legal rights in pre-trial proceedings. This is a development welcomed by the criminal legal aid solicitors involved in this study as concerns have been raised over the quality of Garda station legal advice provided by some firms, particularly those managing a high volume of cases quickly and not always in the best interests of their clients. Interestingly, while some solicitors acknowledge that non-solicitors could provide effective Garda station legal advice, if trained and accredited to do so, this is not a development which is being considered by government in its reform programme. However, with a requirement to make available duty solicitors in remote areas, the setting up of a public defender scheme, or some element of such a scheme, is being considered.

It had seemed that, while the *Gormley* case led to suspects having a right to have their solicitors present in the interview, the *Doyle* judgment in 2017 was seeking to overturn this decision. Interestingly, it seems that the *Doyle* case has not influenced changes on the ground as the DPP has not changed her instructions to the gardai and they are continuing to allow solicitors into the interview. Accordingly, it is considered highly unlikely that solicitors will be prevented from attending interviews with their clients in the future (Conway, 2017a).

The Criminal Legal Aid Bill is another change taking place in Ireland, which includes the Legal Aid Board taking over from the Department of Justice and Equality responsibility for administering the 'main' Criminal Legal Aid Scheme in addition to those schemes the Board already operates. At the present time, solicitors are paid a fixed fee for consulting with clients and time spent in the Garda interview is remunerated at an hourly rate. The legal aid fee structure in Ireland is complicated and it is to be anticipated that changes will be made to streamline fees, but this was not an issue raised by policy officers in this study. It is mooted that the proposed Criminal Legal Aid Bill will introduce a number of measures intended to strengthen safeguards against abuses of criminal legal aid, but such changes have not yet been made public by the Department of Justice and Equality.

So far as technology is concerned, while video-conferencing links defendants in prison to court hearings, it is not being used in relation to suspects detained in Garda stations. There is, however, an exciting development which includes the creation of electronic custody records and having a central hub through which information can be shared securely, as appropriate, with relevant criminal justice agencies. This has the potential to improve communication between the different stakeholders involved in the criminal process and it may also provide a simplified electronic system for remunerating solicitors. There was support from research participants for using a Police Station App to digitally inform suspects about their legal rights and, in the absence of a duty solicitor rota, it was noted that this could include a copy of the Law Society's list of local criminal legal aid solicitors.

It is not yet known what changes will follow the government's reform programme and the Criminal Legal Aid Bill and so it is essential that researchers continue conducting empirical research into this important topic.

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