

# FROM LEGAL ADVICE TO LEGAL ASSISTANCE: RECOGNISING THE CHANGING ROLE OF THE SOLICITOR IN THE GARDA STATION

## *Abstract*

*The primary aim of this article is to encourage reflection by those working in the criminal justice sector on how recent developments, in Europe and Ireland, have brought significant changes for the work and role of criminal defence solicitors. These changes require specific skills and training and thus we provide an account of the 'SUPRALAT' training being rolled out in Ireland. But these changes also need to be accounted for in police, prosecutorial and judicial decision-making and we hope this article contributes to a wider and much-needed discourse on the role of the police interview in the criminal justice process.*

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## Introduction

In May 2014, the Director of Public Prosecutions wrote a letter which heralded a shift in Irish criminal process. In reaction to the case of *DPP v Gormley and White*,<sup>1</sup> and cognisant of emerging European Court of Human Rights (ECtHR) jurisprudence, Director Loftus instructed gardaí to permit solicitors to attend suspect interviews in garda stations with immediate effect.<sup>2</sup> For thirty years this had been permitted in England, Wales and Northern Ireland,<sup>3</sup> however until this point, solicitors were only permitted to consult with clients in garda stations, not attend the interview. Since May 2014 solicitors have been allowed to attend the interview, not as a legal right, but on the basis of this letter.

Permitting solicitors to enter what has always been a closed, police space creates the potential for significant change in the criminal process. This, in fact, is part of a cumulative process, building on other recent changes, such as An Garda Síochána adopting a new interviewing model, changes in evidential rules, and developments in the jurisprudence of superior courts of Ireland and Europe. The result is that the nature and status of the Garda station interview has altered dramatically.

The focus of this article is to consider what these changes in the police interview mean for the role of the criminal defence solicitor. Practically speaking, solicitors must incorporate this time-consuming, and often anti-social work, of attending police interviews, into existing practice. But more than this, they must increasingly conceptualise their role differently, with both the ECtHR and solicitors themselves recognising that attending interviews generates a multitude of functions: building the defence, supporting clients in very stressful situations, in addition to providing advice and ensuring that rights are protected whilst in custody. The lack of a clear legal framework means that many solicitors have felt somewhat at sea in terms of knowing what they can and cannot do, but they also increasingly appreciate that they need to enhance their skillset to be effective in this new dimension of their work.

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<sup>1</sup> [2014] 2 IR 591 (SC).

<sup>2</sup> See Ruadhán Mac Cormaic, 'Solicitors May Attend Garda Interviews' *The Irish Times* (Dublin, 19 May 2014).

<sup>3</sup> As will be seen later, this was an exceptional position: Scotland and continental Europe have only recently permitted this, while Canada still does not, see Dimitros Giannouloupoulos, 'Strasbourg jurisprudence, law reform and comparative law: A tale of the right to custodial legal assistance in five countries' (2016) 16(1) *Human Rights Law Review* 103.

As part of an EU-funded project<sup>4</sup> with colleagues across Europe, the authors developed interdisciplinary, skills-based training, centred on a broad concept of the solicitor's role, wherein the lawyer is encouraged to be active and client-centred. In the last two years, over 85 Irish criminal defence solicitors have undertaken this 'SUPRALAT' training.

This article aims to broaden understanding of the changing role of the criminal defence solicitor, and to highlight how the SUPRALAT training prepares practitioners for that expanded role. We will commence with a review of changes in jurisprudence, policy and procedure which have been occurring at the European and Irish levels. We will then provide an account of the range of functions which now fall within the role of the lawyer when attending the police station. This will be followed by an exploration of the SUPRALAT training. We will provide insights into how that intensive, immersive training is delivered and indicate some concerns which are emerging from interactions with solicitors.

Other actors in the space – particularly legislators, prosecutors and judges – need to reflect on the changes in the work of Gardaí and solicitors in the police station to consider what that means for criminal prosecutions and evidence. We say this for three reasons. First, solicitors are anxious that they may be criticised by the judiciary for their actions in the interview setting, and thus, greater shared understanding of what solicitors aim to do in interviews may minimise those concerns. Second, the decision of the Supreme Court in *DPP v Doyle*<sup>5</sup> declined to recognise the existence of a constitutional right to have the solicitor present in the interview: discussion of the broader role of the solicitor may be important as jurisprudence develops. Third, we believe strongly that legislation is required in this area and we seek to highlight certain issues that should be borne in mind when drafting that legislation.<sup>6</sup>

## European Developments

At a European level, changes regarding the right of access to a lawyer have come both from the European Court of Human Rights and the European Union, indicating that this is an issue bound up in fundamental concepts of human rights, but which also requires regulation to ensure consistency. Article 6(3)(c) of the European Convention on Human Rights states that a person charged with a criminal offence has the right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

The interpretation of this provision was revolutionised in *Salduz v Turkey*,<sup>7</sup> where the Grand Chamber pronounced what is known as 'the Salduz principle'; there should be access to a lawyer from the first interrogation unless there are compelling reasons not to. That case concerned a 17-year-old who was interviewed by anti-terrorism police without a lawyer present, during which time he admitted involvement in offences. The applicant argued that the absence of a lawyer was in breach of Article 6. Previously, the Court assessed this question by considering the fairness of the proceedings *as a whole*,<sup>8</sup> however in *Salduz* the Court departed from this approach, basing its decision on the belief that: 'The rights of the defence will in principle be irretrievably prejudiced

<sup>4</sup> European Commission grant (JUST/2014/JTRA/AG/EJTR/6844; October 2015-September 2017).

<sup>5</sup> [2017] IESC 1.

<sup>6</sup> See Yvonne Daly and Vicky Conway, 'Submission to the Law Reform Commission' (Dublin City University 2018) <<https://www.dcu.ie/lawcentre/blog.shtml>> accessed 15 March 2019.

<sup>7</sup> (2008) ECHR 1542.

<sup>8</sup> *Imbrioscia v Switzerland* (1994) 17 EHRR 441; *Murray v the United Kingdom* (1996) ECHR 3; *Averill v the United Kingdom* (2000) ECHR 212.

when incriminating statements made during police interrogation without access to a lawyer are used for a conviction'.<sup>9</sup>

This is a key point, that the prejudice is 'irretrievable', that the absence of a lawyer at that point is not a factor which can be rectified at a later point in the process. In the case at hand 'neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody'.<sup>10</sup> The centrality of the interview to the process necessitates that the right to legal assistance include a right to access in the interview.

A series of judgments confirmed the commitment of the Court to this new jurisprudential thinking which recognised that centrality of the police interview. Case-law clarified that *Salduz* was not to be interpreted narrowly, as applying solely to minors, or to anti-terrorism legislation. In *Dayanan v Tukey*, the Court stated that even where the detainee remained silent in interviews, the lack of access was a breach of the right to a fair trial.<sup>11</sup> And while this helped to clarify the breadth of *Salduz*, more important, for current purposes, was the consideration of the concept of legal assistance and what that entails:

Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel must be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.<sup>12</sup>

This is a broad conception of the role of the defence lawyer at the police station, which goes far beyond more traditional views that fixated on the lawyer's functions on giving advice or protecting rights. Instead, the ECtHR recognised the role lawyers can play in providing support and the need to commence building the defence at this point in proceedings.

In *Pishchalnikov v Russia*,<sup>13</sup> this broader conception of the lawyer's role was central to finding a breach of Article 6: 'the lack of legal assistance to the applicant at the initial stages of police questioning irretrievably affected his defence rights and undermined the appearance of a fair trial and the principle of equality of arms'.<sup>14</sup> The Court incontrovertibly stated in *Brusco v France*<sup>15</sup> that the lawyer should have been available to assist the applicant in interview, not just in advance. In *Sebalj v Croatia*<sup>16</sup> the Court held that questioning in the absence of a defence lawyer is a breach of Article 6, unless the detainee has effectively and unequivocally waived that right. The Court ruled in *Borg v Malta*<sup>17</sup> that the right to legal assistance should be available to *all* suspects, not just vulnerable ones, overturning a narrow interpretation at the domestic level. In *AT v Luxembourg*<sup>18</sup> the Court reiterated the breadth of functions comprising the concept of legal assistance, clarifying that a breach does not only arise where a detainee makes a confession in the absence of a lawyer. Legal assistance is not solely to guard against improper confessions.

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<sup>9</sup> *Salduz* (n 7), para 55.

<sup>10</sup> *ibid*, para 58.

<sup>11</sup> (2009) ECHR 2278.

<sup>12</sup> *ibid*, para 32.

<sup>13</sup> (2009) ECHR 1357.

<sup>14</sup> *ibid*, para 91.

<sup>15</sup> (2010) ECHR 1621.

<sup>16</sup> *Sebalj v Croatia* App no 4429/09 (ECtHR, 28 June 2011).

<sup>17</sup> (2016) ECHR 53.

<sup>18</sup> (2015) ECHR 367.

Thus, there is no doubt that the ECtHR has established a right to have a lawyer in the interview, but also that this right is one of legal assistance, which includes a range of component functions, not just legal advice. Indeed, the Court in *Aras v Turkey (No 2)* clarified the need for a lawyer to be active in defending a detainee's rights in order to fulfill Convention requirements: 'a passive presence without any possibility at all to intervene to ensure respect for the applicant's rights... cannot be considered to have been sufficient by Convention standards'.<sup>19</sup>

There has been some pull-back of late, whereby decisions have focused on the statement in *Salduz* that there should be a lawyer present, unless 'compelling reasons' exist. In *Ibrahim and Others v UK*,<sup>20</sup> the ECtHR outlined that 'the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case'<sup>21</sup> might be considered a compelling reason, while a risk of leaks would not. A two-stage test should be applied to establish a breach of Article 6 based on lack of access to a lawyer: (i) determine if compelling reasons exist for non-provision of access, and if not (ii) conduct 'a holistic assessment of the entirety of the proceedings to determine whether they were "fair" for the purposes of Article 6'.<sup>22</sup> The Court set out a non-exhaustive list of factors to be considered in determining fairness.<sup>23</sup> This approach has subsequently been followed in *Simeonovi v Bulgaria*<sup>24</sup> and in *Beuze v Belgium*.<sup>25</sup>

Despite this recent turn in the case law, the implications of the ECtHR jurisprudence – both in terms of establishing the right, and the range of component functions of lawyers – have been vast and tangible. The pronouncement of the *Salduz* principle caused what Giannouloupoulos has called 'legal earthquakes' across Europe.<sup>26</sup> In 2010, the UK Supreme Court ruled in *Cadder v Her Majesty's Advocate*<sup>27</sup> that it would be a breach of Article 6 to admit confessions obtained where the suspect did not have access to legal advice. This decision, concerning Scotland, relied on *Salduz*.<sup>28</sup> France enacted legislation giving the right in April 2011 and Belgium in August 2011. Giannouloupoulos highlights the speed with which these three states responded to the decision, although to varying extents.<sup>29</sup>

These national responses to *Salduz* have been somewhat overtaken by developments by the other European source of change, the European Union. The EU has taken a determined approach to increase consistency and transparency across Europe in relation to criminal procedure. In 2009, following previous failed efforts to reach agreement, the EU produced the Stockholm programme<sup>30</sup> and a roadmap on how to achieve procedural safeguards for the rights of suspects or accused persons in criminal proceedings.<sup>31</sup>

<sup>19</sup> *Aras v Turkey (No 2)* App no 15065/07 (ECtHR, 18 November 2014), para 40.

<sup>20</sup> *Ibrahim and Others v UK* App no 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016).

<sup>21</sup> *ibid*, para 259.

<sup>22</sup> *ibid*, para 264.

<sup>23</sup> These include: applicant's vulnerability; legal framework for pre-trial proceedings and admissibility of evidence (including exclusionary rule); applicant's opportunities to challenge evidence; quality and reliability of evidence; existence of unlawfully obtained evidence and related Convention violations; nature, retraction or modification of any statement; use and extent of reliance on evidence in question; training and direction of those assessing guilt; public interest in investigation and punishment; other safeguards in domestic law.

<sup>24</sup> (2015) ECHR 921.

<sup>25</sup> *Beuze v Belgium* App no 71409/10 (ECtHR, 09 November 2018).

<sup>26</sup> Giannouloupoulos (n 3), 112.

<sup>27</sup> [2010] UKSC 43, 2010 SLT 1125.

<sup>28</sup> Fiona Leverick, 'The right to legal assistance during detention' (2011) 15(3) *Edinburgh Law Review* 352, 353.

<sup>29</sup> Giannouloupoulos (n 3), 120.

<sup>30</sup> The Stockholm Programme — An Open And Secure Europe Serving And Protecting Citizens [2010] OJ C 115/01. See [http://eujustice.net/images/uploads/pdf/the\\_stockholm\\_programme.pdf](http://eujustice.net/images/uploads/pdf/the_stockholm_programme.pdf).

<sup>31</sup> For further discussion, see Laurens van Puyenbroeck and Gert Vermeulen, 'Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU' (2011) 60(4) *International and Comparative Law Quarterly* 1017.

The Stockholm programme sought to enhance protection and consistency in relation to a number of core rights: legal assistance, interpretation and translation, information, legal aid, vulnerable persons, pre-trial detention. The programme of implementing directives according with each of these is well under way, though it should be noted that the UK, Ireland and Denmark have to opt into these directives.

The Directive on the Right of Access to a Lawyer, which Ireland did not opt into, entered into force in 2016.<sup>32</sup> Article 3 of that Directive establishes that suspects have a right to access, without undue delay, before they are questioned by police. The right must enable suspects ‘to exercise their rights of defence practically and effectively’. They are entitled to meet their lawyer in private and they are entitled to have ‘their lawyer to be present and participate effectively when questioned’. The lawyer should also be permitted to attend ID parades, confrontations and reconstructions of crime scenes. Thus the Directive confirms, and arguably expands, the position in *Salduz*. Soo has found that 18 of the 22 implementing Members States are introducing domestic legal changes to satisfy the Directive.<sup>33</sup>

Between the work of the ECtHR and the EU, the last decade has seen a dramatic shift in the criminal procedure landscape in Europe. Ten years ago England, Wales and Northern Ireland were unusual in permitting lawyers to attend police interviews. Now this is permitted in all member states, with it established as a firm right in the vast majority. Although Ireland has not opted in to the Directive, making it a clear outlier in the European context, notable change has taken place in garda interviews, changes which shall be explored in the next section.

## Changes in Irish Context

Police interviews have long been a source of concern in Ireland. In the 1970s, detention and interrogation were marked by informality: there was no general power of arrest for the purpose of questioning but many attended stations to ‘assist gardaí with inquiries’, there was no recording of the interview, no stated rights of a detainee, and very limited access to legal advice.<sup>34</sup> The Criminal Justice Act 1984 remedied this to a certain extent,<sup>35</sup> wherein increased police powers of arrest and detention were partly balanced by regulations concerning the treatment of persons in custody, though this did not extend to permitting legal representatives to attend interviews.

Those regulations were supplemented in 1997 by the Electronic Recording of Interview Regulations, which provided for the recording of all interviews.<sup>36</sup> The effect of this statutory intervention on ill-treatment is apparent in reports of the European Committee for the Prevention of Torture (CPT).<sup>37</sup> Despite these safeguards, problems in record-keeping, the role of

<sup>32</sup> 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 the European Arrest Warrant proceedings.

<sup>33</sup> Anneli Soo, ‘How are the member states progressing on transposition of Directive 2013/48/EU on the right of access to a lawyer? An inquiry conducted among the member states with the special focus on how Article 12 is transposed’ (2017) 8(1) *New Journal of European Criminal Law* 64.

<sup>34</sup> Yvonne Daly and John Jackson, ‘The Criminal Justice Process: From Questioning to Trial’ in Deirdre Healy, et al (eds), *The Routledge Handbook of Irish Criminology* (Routledge 2016).

<sup>35</sup> Liz Campbell, ‘The culture of control in Ireland: Theorising recent developments in criminal justice’ (2008) 1 *Web Journal of Current Legal Issues* 1.

<sup>36</sup> Steering Committee on Audio and Audio/Video Recording of Garda Questioning of Detained Persons, ‘Third Report – September, 2004’ (Department of Justice and Equality 2004) <<http://www.justice.ie/en/JELR/AudioVideoReport.pdf/Files/AudioVideoReport.pdf>> accessed 15 March 2019. This reported that in 2003 96% of interviews were recorded. We should, however, be mindful of concerns in relation to conversations which happen outside of the official interview.

<sup>37</sup> 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) September 2014, February, 2010, October, 2006, May 2002

the member in charge and oppressive questioning continued to be identified<sup>38</sup> in the Birmingham Report on the false confession of Dean Lyons for murder,<sup>39</sup> and the Morris Tribunal reports.<sup>40</sup>

In response, An Garda Síochána developed a new model of conducting interviews, the Garda Síochána Interview Model (GSIM).<sup>41</sup> This involves a complete shift in how interviews are conducted. Interviews, under the model change from confession-seeking to information-gathering spaces. They are conducted in a structured manner, going through the ‘Generic Phases’: planning and preparing; first contact; rapport building; account of knowledge; assess, corroborate and challenge; and closure. Interviews should be conducted in the same way whether the individual is a suspect, victim or witness with emphasis placed on the specific considerations of the individual being interviewed, including their level of cooperation, intellectual and psychological capacity. There is a competency framework for interviewers, with Gardaí trained to different levels dependent on their involvement in interviewing.

GSIM should change how interviews are conducted in garda stations, moving from confession-seeking to rapport-led, information-gathering. Interviews should be very much based on available evidence, well planned, but also allowing for effective use of challenge (a dimension which is lacking in the equivalent British PEACE model<sup>42</sup>). The prioritisation of active listening, empathy and rapport-building is particularly notable and should create dramatically different atmospheres in interviews. The economic crash and the impact on policing meant that roll-out of training in this model, which was finalised in 2008, was delayed until 2014/15 but it is now (early 2019) the case that in serious crime investigations, interviews will invariably be conducted by Gardaí who have been GSIM trained. In 2018, An Garda Síochána put out a tender to independently evaluate the operation of the model, the results of which will be important in assessing its impact.

Further changes can be anticipated. An advisory committee on the Garda interviewing of suspects was established in 2010, chaired by Justice Esmond Smyth, ‘to keep under review the adequacy of the law, practice and procedure relating to the interviewing of suspects detained in Garda custody, taking into account evolving best international practice.’<sup>43</sup> One necessary change is the alteration of the caution to eradicate the taking of contemporaneous notes, which would alter the conduct and pace of interviews significantly, arguably making the presence of a lawyer even more important.

## The Right to Legal Advice

A right of reasonable access to legal advice, if requested by the detainee and if a lawyer was available, was established in *People (DPP) v Madden*.<sup>44</sup> Denial, in such circumstances, would render

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and August 1998. A distinct difference is notable in the CPT reports of 2002 (page 8) and 2006 (page 11), from serious concern to no mention. We also see an immediate reduction in those reports in the allegations of physical ill-treatment.

<sup>38</sup> See further Vicky Conway, *Policing Twentieth Century Ireland: A History of An Garda Síochána* (Routledge 2014).

<sup>39</sup> ‘... the Garda written records of some of the interviews with Dean Lyons were incomplete, potentially misleading and could have led to a miscarriage of justice’. See George Birmingham, ‘*Report of the Commission of Investigation (Dean Lyons Case)*’ (Department of Justice and Equality 2006) <<http://www.justice.ie/en/JELR/DeanLyonsRpt.pdf/Files/DeanLyonsRpt.pdf>> accessed 19 March 2019, page 6.

<sup>40</sup> Justice Frederick R Morris, *Report on the arrest and detention of seven persons at Burnfoot, County Donegal on the 23rd of May 1998* (Prn A6/1096, 2006).

<sup>41</sup> Geraldine Noone, ‘An Garda Síochána Model of Investigative Interviewing of Witnesses and Suspects’ in John Pearse (ed), *Investigating Terrorism: Current Political, Legal and Psychological Issues* (Wiley-Blackwell 2015) 268.

<sup>42</sup> Andy Griffiths and Rebecca Milne, ‘Will it all end in tiers? Police interviews with suspects in Britain’ in Tom Williamson (ed), *Investigative interviewing: Rights, research, regulation* (Willan Publishing 2006) 167-189.

<sup>43</sup> ‘Minister Aherne establishes Advisory Committee on Garda Interviewing of suspects’ (Department of Justice and Equality 2010)

<<http://www.justice.ie/en/JELR/Pages/Minister%20Aherne%20establishes%20Advisory%20Committee%20on%20Garda%20Interviewing%20of%20suspects>> accessed 17 November 2018.

<sup>44</sup> [1977] IR 336 (CCA).

detention unlawful. In *DPP v Healy*,<sup>45</sup> the Supreme Court confirmed that the right of reasonable access was constitutional in nature. The right, including the right to be informed, was given legal standing in both the Criminal Justice Act 1984<sup>46</sup> and the Treatment of Persons in Custody Regulations 1987.<sup>47</sup> In *Lavery* the Supreme Court held, rather bluntly, that reasonable access does not include attendance at interview.<sup>48</sup> Justice O’Flaherty held:

... if a person in custody is denied blanket access to legal advice, or if he is subjected to ill-treatment by way of assaults, for example, then that would render his detention unlawful. However, the gardaí must be allowed to exercise their powers of interrogation as they think right, provided they act reasonably... The solicitor is not entitled to be present at the interviews.<sup>49</sup>

This adopts the position that defects in the Garda station can be ‘cured’ by the courts, a belief that the ECtHR has dismissed. In *Buck*,<sup>50</sup> the Supreme Court held that as long as ‘gardaí make *bona fide* attempts to comply with’ a request for access to legal advice, the right would not be automatically breached if they proceeded to interview prior to legal advice being accessed. In *O’Brien*,<sup>51</sup> the Court clarified that a ‘deliberate and conscious’ violation of the right would render detention unlawful and any evidence obtained during such period inadmissible, (rather than a breach of fair trial rights as per the ECtHR).

Once a solicitor was requested and Gardaí made *bona fide* efforts to contact one, it was not necessary to delay commencement of interviews until the solicitor arrived. Further, ‘the unlawfulness of the period of detention subsists only for so long as the suspect is deprived of reasonable access to a solicitor’ and so a breach, rendering detention unlawful, could be ‘cured’ by providing even brief, subsequent access to a lawyer, as per *O’Brien* and *Ryan*.<sup>52</sup> Thus, a suspect could be lawfully interviewed prior to consultation or any form of legal advice.

As Legal Aid does not cover the detention period, in 2001 the Garda Station Legal Advice Scheme was established to provide some coverage for solicitor work in garda stations and is available to persons in receipt of social welfare payments or whose earnings are less than €20,316 p.a..

The last decade has seen activity, although inconsistent, from the judiciary and legislature alike. Section 9 of the Criminal Justice Act 2011 provided that questioning must not commence until legal advice has been accessed.<sup>53</sup> However, this section has not been commenced. In May 2013, the High Court, in the case of *JM v MIC Coolock Garda Station* declined to require the presence of a lawyer at interview,<sup>54</sup> despite the detainee in question being a vulnerable minor with mental health difficulties. In January 2013, the Government established a working group to advise on a system providing for the presence of a legal representative during Garda interviews, implying consideration was being given to implementing the EU Directive. The Report, published in July

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<sup>45</sup> *People (DPP) v Healy* [1990] 2 IR 73 (SC).

<sup>46</sup> Section 5.

<sup>47</sup> See, regulations 8 (1)(b) and 11 of the Treatment of Persons in Custody Regulations 1987.

<sup>48</sup> *Lavery v The Member in Charge, Carrickmacross Garda Station* [1999] IESC 29.

<sup>49</sup> *ibid* [19].

<sup>50</sup> *People (DPP) v Buck* [2002] 2 IR 268 (SC).

<sup>51</sup> *People (DPP) v O’Brien* [2005] 2 IR 206 (SC). See also *People (DPP) v Creed* [2009] IECCA 90.

<sup>52</sup> *DPP v Bryan Ryan* [2011] IECCA 6.

<sup>53</sup> Liz Heffernan, ‘The Right to Legal Advice, Reasonable Access and the Remedy of Excluding Evidence’ (2011) 1 *Criminal Law and Procedure Review* 111.

<sup>54</sup> [2013] IEHC 251.

2013,<sup>55</sup> stated that the group received legal advice that Irish law fell short of the principles set out in *Salduz*.<sup>56</sup> The group proceeded to recommend how the Directive could practically be implemented in Ireland.

In 2014, in *DPP v Gormley and White*,<sup>57</sup> the Supreme Court departed from previous case law and ruled that interrogation should not commence until after legal advice, where sought, has been obtained. Moving toward European jurisprudence, the Court shifted its focus from viewing a breach of the right of access to legal advice as rendering the detention unlawful and excluding evidence, to viewing this as a breach of the right to a fair trial. On this, Clarke J importantly found that the arrest of an individual, by ‘the coercive power of the State’,

...represents an important juncture in any potential criminal process... Thereafter the suspect has been deprived of his or her liberty and, in many cases, can be subjected to mandatory questioning for various periods ... It seems to me that once the power of the State has been exercised against a suspect in that way, it is proper to regard the process thereafter as being intimately connected with a potential criminal trial rather than being one at a pure investigative stage.<sup>58</sup>

Justice Clarke, relying on *Salduz*, recognised the need at this point for the solicitor to engage in work connected to building the defence,<sup>59</sup> to advise on the lawfulness of the arrest and detention, and advise on questioning. Justice Hardiman, concurring, highlighted the increasing complexity of the law for which the specialist expertise of a solicitor is required and indicated that the Court might well find a right to have the solicitor in the interview if asked in an appropriate case.<sup>60</sup>

This *obiter* indication of an inclination to find a right to have a lawyer attend the interview prompted an unexpected response. Two months later, on 07 May 2014, the Director of Public Prosecutions issued a letter to An Garda Síochána instructing that where requested, the attendance of solicitors should be facilitated and that all suspects should be advised that they may request a solicitor to attend interviews.<sup>61</sup> Solicitors were permitted to attend the very next day, though by way of concession rather than a legal or constitutional right, with no legal clarity on how attendance should operate.

In April 2015 An Garda Síochána issued a Code of Practice on Access to a Solicitor by persons in Garda Custody<sup>62</sup> and in December 2015, 19 months after it commenced, the Law Society issued Guidance for Solicitors Providing Legal Services in Garda Stations.<sup>63</sup> The Garda Code provides a narrow interpretation of the role of the solicitor: ‘[t]he solicitor’s only role in the

<sup>55</sup> Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews, ‘Report – July 2013’ (Department of Justice and Equality 2013) <<http://www.justice.ie/en/JELR/Report%20Final%2015%20July.pdf/Files/Report%20Final%2015%20July.pdf>> accessed 20 November 2018.

<sup>56</sup> Working Group report (n 55), 4.

<sup>57</sup> [2014] IESC 17.

<sup>58</sup> *ibid*, [8.8].

<sup>59</sup> *DPP v Gormley and White* (n 57), [9.2].

<sup>60</sup> *ibid*, [5].

<sup>61</sup> See Ruadhán Mac Cormaic, ‘Solicitors may attend Garda interviews’ *Irish Times* (Dublin, 19 May 2014) <<https://www.irishtimes.com/news/crime-and-law/solicitors-may-attend-garda-interviews-1.1800400>> accessed 15 March 2019.

<sup>62</sup> An Garda Síochána, ‘Code of Practice on Access to a Solicitor by Persons in Garda Custody’ (An Garda Síochána 2015) <<https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Code-of-Practice-on-Access-to-a-Solicitor-by-Persons-in-Garda-Custody.pdf>> accessed 26 November 2018.

<sup>63</sup> Law Society of Ireland, ‘Guidance for Solicitors Providing Legal Services in Garda Stations’ (Law Society of Ireland 2015) <<https://www.lawsociety.ie/globalassets/documents/committees/criminal/guidance-for-solicitors-providing-legal-services-in-garda-stations.pdf>> accessed 26 November 2018.

Garda station should be to protect and advance the legal rights of their client'.<sup>64</sup> This language is mirrored in the Law Society Guidance, which comments that '[s]olicitors are required to protect and advance their client's rights without fear or favour'.<sup>65</sup> The Garda Station Legal Advice Scheme was amended to cover attendance at interviews, following the DPP's decision.

Take up is difficult to gauge, as An Garda Síochána does not collate statistics on detentions, interviews and solicitor attendance. The 2013 Working Group to advise on legal representation provided an approximate figure of 20,000 persons detained annually. Drawing on legal aid payments, the group concluded that of those, 21% had consultations with solicitors, as permitted at that time.<sup>66</sup> Going by the 2017 Legal Aid annual report, assuming similar numbers of detainees, 21% had consultations and 10% had the solicitor attend the interview.<sup>67</sup> These figures are low, compared to studies which suggest that 50% of detainees in England and Wales have representation.<sup>68</sup> That figure has not altered significantly in the three years of operation for which statistics are available.

The question returned to the Supreme Court in January 2017 in *DPP v Doyle*.<sup>69</sup> Despite the statements in *Gormley*, the Court, McKechnie J dissenting, refrained from recognising that the constitutional right to reasonable access extended to having a solicitor present in the interview. For the majority, Charleton J firstly stated that ECHR law does not require attendance and secondly that the only reason to permit it was to prevent abuse of suspects during the interview: it is 'designed to lance a poisoned boil of secret compulsion which is utterly foreign to modern police methods'.<sup>70</sup> Justice MacMenamin distinguished *Salduz* from the current case, but stated that he would find the right in a future case. Justice O'Malley indicated that she may find the right in an inference from silence case. Justice O'Donnell, also indicating he could foresee it becoming part of the right in the future, distinguished *Salduz* as relating to a civil law system. He commented specifically on the broader role of the solicitor: 'It is doubtful that it can be said that the function of a lawyer is to provide moral support or indeed that anything in lawyers' training qualifies them for such a role. Indeed the function of a lawyer is to provide legal advice...'<sup>71</sup>

This of course runs very much contrary to developments in European law. Justice McKechnie, dissenting,<sup>72</sup> was deeply concerned by the issue of equality of arms, given the 'armoury and array of resources' at the State's disposal: 'I do not believe that the present safeguards sufficiently address the inequality which now exists in the interview room and which can so threaten the rights being presently discussed'.<sup>73</sup> The decision is somewhat surprising and disappointing, given

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<sup>64</sup> Garda Code (n 62), 2.

<sup>65</sup> Law Society Guidance (n 63), 2.

<sup>66</sup> Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews, 'Report – July 2013' (n 55). It should also be noted that the working group called for 'More comprehensive data on current take-up rates of the Garda Station Advice Scheme should be gathered in order to develop a more informed assessment of likely take-up in future years and to plan accordingly'. (p. 22).

<sup>67</sup> Legal Aid Board, 'Annual Report 2017' (Legal Aid Board 2017) <<https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/lab-annual-report-2017-english-version1.pdf>> accessed 15 March 2019, 40. Note, we do not know how many detained individuals are interviewed.

<sup>68</sup> Layla Skinnis, 'Let's Get it Over With': Early Findings on the Factors Affecting Detainees' Access to Custodial Legal Advice' (2009a) 19(1) *Policing and Society* 58.

<sup>69</sup> [2017] IESC 1.

<sup>70</sup> *Doyle* (n 69) [48].

<sup>71</sup> *Doyle* (n 69) [12].

<sup>72</sup> Neither judge who provided judgments in *Gormley* was on the bench, Justice Hardiman having passed away in 2016.

<sup>73</sup> *Doyle* (n 69) [176]-[178].

the reliance on *Salduz* in *Gormley and White*,<sup>74</sup> however the majority judgments suggest that, when presented with a case concerning inference provisions, the Court may rule otherwise.<sup>75</sup>

Solicitors, therefore have permission, but no right, to attend. Professional guidelines exist, but there is no legal clarity as to what the role of the solicitor is and how they may behave. What makes this somewhat more incongruent is that the Victims of Crime Act 2017 gives victims the right to have their solicitor present in any interaction with Gardaí.<sup>76</sup> This is overtly done, so as to ensure support for the victim at a time when they will be vulnerable.<sup>77</sup> This is entirely appropriate, though surely suspected individuals detained for questioning, facing potential imprisonment, require the same right, particularly given the increased complexity of contemporary criminal procedure and recent developments which have weakened long-standing safeguards for the defendant.

Noting that there has been a dilution of the evidential safeguards created to protect the accused, Campbell concludes that '[a]t all stages of the criminal process, from investigation through to sentencing and into the civil realm, the rights of the accused have been subsumed by the demands of the State'.<sup>78</sup> Similarly, Daly, placing the 2015 alteration of the long-standing exclusionary rule relating to unconstitutionally obtained evidence in context, observed that:

we have seen extended detention periods, extremely broad intrusions on the right to silence, the curtailment of the right to bail, an increase in reliance on opinion evidence from gardaí at trial, alterations to the rule against hearsay in relation to witness statements and so on. The existence of the strict exclusionary rule from *Kenny* may have been thought of as a last refuge of 'due process' in a swell of 'crime control' rights-limiting enactments.<sup>79</sup>

The diminution of due process protections at the trial stage of the criminal process makes the insistence on effective rights-protection in the preliminary, evidence-gathering stage more important than ever. In that context the role of the solicitor in ensuring that suspect rights are upheld and the process as a whole can be viewed to be fair is essential. We shall now examine what this means for the role of the solicitor in the pre-trial process.

## The Role of the Solicitor

One of the more significant dimensions of European developments, is the conceptualisation of the role of the lawyer as one of legal assistance, rather than legal advice. This is where the ECtHR and the Irish case law diverge. This difference in conception may explain why there is no recognised *right* to have a solicitor present in interviews in Ireland. Pivaty presented the distinction as:

[W]hether the right to custodial legal assistance plays only a 'protective' role, or whether it (also) has a 'participatory' value. The former encompasses protection of the accused

<sup>74</sup> See Giannouloupoulos (n 3), for a discussion of this.

<sup>75</sup> See further, Vicky Conway, 'Dr Vicky Conway provides a case comment on DPP v Doyle' (SCOIRLBLOG 2017) <<https://scoirl.wordpress.com/2017/01/19/dr-vicky-conway-provides-a-case-comment-on-dpp-v-doyle/>> accessed 15 March 2019 and Conor Duff, 'DPP v Doyle – "The Road not Taken"' (2018) 28(1) *Irish Criminal Law Journal* 10.

<sup>76</sup> Section 14(2).

<sup>77</sup> Select Committee on Justice and Equality Debate, 17 May 2017.

<sup>78</sup> Liz Campbell, 'Decline of Due Process in the Irish Justice System: Beyond the Culture of Control' (2006) 6 *Hibernian Law Journal* 125, 157.

<sup>79</sup> Yvonne Daly 'Overruling the protectionist exclusionary rule: DPP v JC' (2015)19(4) *International Journal of Evidence and Proof* 270, 279-280. See *DPP v JC* [2015] IESC 31, overruling *DPP v Kenny* [1990] 2 IR 110 (SC).

against abuses of their rights, including the right to silence, and procedural breaches. The latter implies facilitation of their participation in criminal proceedings, or ensuring an ‘effective defence’.<sup>80</sup>

Irrespective of case-law, Irish solicitors attend interviews and negotiate the normative and practical consequences of that. We suggest, drawing on the European jurisprudence, literature, and the experience of solicitors, that they perform seven functions during the police interview: provide legal advice; protect the detainee’s rights; protect the right to silence; prevent miscarriages of justice; provide support; achieve equality of arms; and ensure an active defence. In our view, it is important that this complete range of functions is recognised, confirmed and regulated for.

### **Provide legal advice**

The first role of the lawyer, universally acknowledged and forming part of the definition of the constitutional right in Ireland, is to provide legal advice. This involves understanding the legal significance of what is happening, explaining relevant law and legal principles and also giving advice to the client on what, in their particular circumstances, might be the best approach. While this will predominantly be achieved in consultation, there are exceptions. During the interview information may be disclosed which requires an immediate response and change in advice from a solicitor and, where numerous interviews occur, the solicitor will be better able to advise a client where she has attended the interviews and is not relying on the client’s memory of questions asked and evidence put.

### **Protect rights**

The solicitor undoubtedly ensures that the rights of the detainee are protected while in custody: from requesting medical attention, to not being questioned about an offence other than the one for which he has been arrested, to not being ill-treated or asked oppressive questions. And while the CPT has documented that recording interviews had a significant impact on the allegations of ill-treatment in Garda stations,<sup>81</sup> case-law shows that this has not prevented all ill-treatment in Ireland.

In the 2018 Northern Irish case of *R v McLoughlin*,<sup>82</sup> relating to the murder of a prison officer, the evidence which the prosecution relied upon was incriminating statements made during an interview in a Garda station. Despite video-recording, Gardaí behaved, according to Justice Colton, aggressively, abusively and oppressively.<sup>83</sup> The detainee was misled and threatened, but also advised that Gardaí would help him. He was denied access to a lawyer despite repeated requests. The recording of the interview did not prevent this behaviour. Justice Colton expressed his confidence that the presence of a lawyer would have made a difference: the individual’s rights may have been protected at the time of the interview and the case may not have been dismissed.

Leverick has suggested that solicitors’ presence can prevent ill-treatment, or act as an independent witness if it does occur.<sup>84</sup> To this we add that the solicitor has an expertise to indicate when questioning is straying into territory, which may later be considered by a court to

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<sup>80</sup> Anna Pivaty, ‘The Right to Custodial Legal Assistance in Europe: In Search for the Rationales’ (2018) 26(1) *European Journal of Crime, Criminal Law and Criminal Justice* 62, 63.

<sup>81</sup> 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 2 to 13 October 2006’ (Council of Europe 2007) para 19.

<sup>82</sup> [2018] NICC 10.

<sup>83</sup> *ibid*, [123]: ‘Throughout the questioning the interviewer literally roars and shouts at the suspect using questions replete with expletives’.

<sup>84</sup> Leverick (n 28), 364.

be abusive or oppressive, even in instances where police may not appreciate that this is an issue. The solicitor's knowledge of their client can also help them to spot uncharacteristic behaviour which may warrant medical attention.

### **Specifically, protection of the right to silence**

In the interview context, the right to silence perhaps stands apart from other rights in terms of its significance. Ensuring that the detainee understands the significance and importance of their right to silence was core to the reasoning in *Salduz*<sup>85</sup> and in subsequent national court determinations, such as in France and Scotland.<sup>86</sup> Even before *Salduz* the ECtHR had linked the right to legal advice with the protection of the right to silence.<sup>87</sup>

In Ireland, the existence of various legislative measures now allowing for inferences to be drawn from a suspect's failure or refusal to provide certain information during garda interview generates additional concerns, which the presence of a solicitor may address.<sup>88</sup> As Leverick points out, the solicitor can help the client to understand both the right to silence and what inferences are permitted, help him to decide how best to proceed, and support him in enforcing his right to silence.<sup>89</sup> If any comments are made at interview which, inadvertently or otherwise, tend to undermine the suspect's right to silence, the solicitor can intervene to ensure that the suspect still understands that he is entitled to remain silent.

Furthermore, while a client may have decided, in consultation with his solicitor, to give a 'no comment' interview, matters may take unexpected turns during the interview. For example, the revelation of previously undisclosed evidence may challenge the value of such advice to remain silent. A solicitor who hears or sees this first-hand in the interview, will be better placed to interpret its significance and to discuss with the client what approach would be in his best interests. This may result in a decision to be more cooperative with police at an earlier point in the process, which aids the police investigation, respects the suspect's rights, and is most likely to achieve the best potential outcome for the suspect.

### **Prevent miscarriages of justice**

Whether by preventing false confessions or confessions obtained under oppressive circumstances, the presence of solicitors can contribute greatly to preventing miscarriages of justice. Not only can their presence encourage appropriate police behaviour but, if they have consulted well with a client and notice them deviating substantially from what was said then, they may spot when a client is suggestible or appearing oppressed. In *R v McLaughlin*, Colton J specifically stated that the presence of a solicitor increases the legitimacy of the evidence-gathering process and the reliability of evidence.<sup>90</sup>

The risk of a miscarriage of justice may be low, but the impact on the individual, on victims and on public confidence in the criminal justice system, which is essential for effective operation, means that efforts to minimise this risk are essential.

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<sup>85</sup> *Salduz* (n 7), para 54.

<sup>86</sup> John Jackson, 'Responses to *Salduz*: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) *Modern Law Review* 987.

<sup>87</sup> *Murray v United Kingdom* (1996) 22 EHRR 29; *Averill v United Kingdom* (2001) 31 EHRR 839; *Condon v United Kingdom* (2001) 31 EHRR 1.

<sup>88</sup> ss 18, 19 and 19A of the *Criminal Justice Act 1984*, as amended; s 2 of the *Offences Against the State (Amendment) Act 1998*; and, s 72A of the *Criminal Justice Act 2006*, as inserted by the *Criminal Justice (Amendment) Act 2009*.

<sup>89</sup> See Leverick (n 28).

<sup>90</sup> See *McLaughlin* (n 82) [189].

## Provide support

As noted by Hardiman J:

Many cells in garda stations are frankly unsanitary and in a condition such that no normal person would wish to spend time there. Foul smells are not uncommon. They may be in a permanent state of semi-darkness, lighting, or the extinguishment of lights, being controlled from outside only. The seating or bedding may be such that no reasonable person would wish to use it. The sense of being in someone else's power may be utterly overwhelming especially to an inexperienced or sensitive person, or to an entirely innocent person. The noisy closing of a cell door, and the turning of a heavy key, leaving one alone in fetid semi-darkness is not an ideal preparation for what may well be the most important confrontation of one's life.<sup>91</sup>

Those who work within the criminal justice system may become accustomed to Garda stations, arrest, and detention, but it is important to remember Justice Hardiman's words and just how horrible, stressful and scary detention can be. The presence of an individual whose primary concern is your rights and well-being, can make a substantial difference to stress levels in that context. A core dimension of this can be the solicitor's ability to resolve extraneous concerns (e.g. detainee concerns about the impact of missing work because of detention), enabling the detainee to focus directly on the issues at hand.

We should not assume that this is only true for those without experiences of being arrested previously or who have particular vulnerabilities. Addressing a conference organised by the authors on the right to legal assistance in police interviews, Shalom Binchy, solicitor and member of the Criminal Law Committee of the Law Society of Ireland, recounted one interview she attended with an experienced detainee.<sup>92</sup> She felt her presence contributed little, that her client confidently maintained a 'no comment' approach to interview. However, on departing the station she met her client who described her presence as 'brilliant' and that it meant a great deal to him to have someone in that room who was there for him.<sup>93</sup> While O'Donnell J stated in *Doyle* that this was not part of the role of the lawyer, we argue that the attendance of a solicitor in itself is supportive. Furthermore, just as one would expect, for instance, a solicitor working with a bereaved family in relation to a will, to show empathy and compassion for their situation, while advising them on the law, we suggest that the active support of detained suspects is part of the defence solicitor role in the Garda station.

## Equality of arms

Equality of arms is at the core of the right to a fair trial under Article 6 and is central to the decision in *Salduz*.<sup>94</sup> The Supreme Court in *Healy* stated that: '[t]he availability of advice from a lawyer must...be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators'.<sup>95</sup> Justice McKechnie similarly expressed concerns about the scale of inequality in the interview, in his dissent in *Doyle*.<sup>96</sup>

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<sup>91</sup> *Gormley and White* (n 57) [10] per Justice Hardiman.

<sup>92</sup> As yet there is no published study analysing the experiences of solicitors in attending interviews. Ms Binchy's conference presentation is used in this paper as illustrative of some points made, but should not be taken as a representative view of the entire legal profession.

<sup>93</sup> Shalom Binchy, 'Experiences of a Practitioner' (The Right to Legal Assistance in Police Interviews Conference, Dublin, September 2017).

<sup>94</sup> *Salduz* (n 7), para 53

<sup>95</sup> *Healy* (n 45) 81.

<sup>96</sup> *Doyle*, (n 69) para 71/72.

The complexity of criminal law, the law of evidence, and the regulation of criminal procedure, all of which has to be grasped in the stressful context of detention, places the detainee at an immense disadvantage. Decisions with significant consequences have to be made quickly. We contend that recent evidential changes and alterations to how interviews are conducted, have enhanced the power of the State, thereby increasing the inequality of arms. The presence of a solicitor in the interview may redress that disadvantage, especially where the detainee has particular vulnerabilities. This becomes even more important when we consider that increasingly cases are not going to trial.<sup>97</sup> Where there is a confession, there will customarily not be a trial and the increasing use of diversionary methods like restorative justice and cautioning also eliminates trials. Thus, opportunities to ‘cure defects’ are lost and the station becomes a more central moment in the process. Jackson urges that this demands the presence of the solicitor:

If the investigatory phase is being transformed in many cases into the accusatory phase of the trial, then it must follow that the procedural safeguards that have traditionally been considered necessary for the legitimacy of the trial need to be frontloaded on to the investigatory phase. The *Salduz* principle ... becomes necessary to ensure compliance with the principles of equality of arms and adversarial procedure that have traditionally been reserved for the trial phase.<sup>98</sup>

### An active defence

Finally, a factor much recognised by the ECtHR is that attendance at the interview is an essential part of building the defence for any future charge and prosecution. The Court in *Salduz* saw this stage as important in preparing criminal proceedings because ‘the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial’.<sup>99</sup> As already noted in *Dayanun*, the Court identified a range of roles that this involved, including building the defence, supporting the accused and checking conditions of detention.<sup>100</sup> Lord Kerr stated in *Ambrose*:

[A]t this investigation stage, evidence which may be instrumental in securing a finding of guilt against him is being obtained and collated. The way that he reacts during the collection of that evidence may prove to be of critical importance in his subsequent trial.<sup>101</sup>

These views clearly influenced Justice Clarke in his reasoning in *Gormley and White*, where he mentions building the defence as part of the role.

Jackson links this quite definitely to the equality of arms issue, arguing that the way in which the police dominate the investigatory stage demands an active defence, equating it with the same requirement in the criminal trial.<sup>102</sup> The International Covenant on Civil and Political Rights 1966 discusses the right to communicate with counsel in preparation of defence and the right to legal assistance (rather than legal advice) of one’s own choosing.

If we accept the premise that things can happen in the station, which cannot be adequately remedied later, then we should see the importance of the station as a key moment in the criminal

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<sup>97</sup> Fair Trials, ‘*The Disappearing Trial*’ (Fair Trials 2017) <<https://www.fairtrials.org/publication/disappearing-trial-report>> accessed 15 March 2019.

<sup>98</sup> Jackson (n 86), 1017.

<sup>99</sup> *Salduz* (n 7), para 54.

<sup>100</sup> *Dayanun* (n 11), para 32.

<sup>101</sup> [2011] 1 WLR 2435.

<sup>102</sup> Jackson (n 86) at 1015.

process and one at which someone is entitled to have legal representation working on their defence. An active defence is required because this is an active part of the criminal investigation. Binchy, highlighting the notion of active defence, noted that, as a solicitor,

[y]ou are involved in the trial process at a much earlier stage and can make a real difference by defending your client effectively at this crucial stage... You gain an insight into the case from an early stage that pays dividends right through the trial process... Your intervention may result in a person not being charged who shouldn't be.<sup>103</sup>

While the judiciary may be slow to recognise this as core to the role of the solicitor, it is certainly being experienced in practice.

## Discussion

One might assume solicitors understand this contemporary iteration of their role, but in circumstances where the change was introduced overnight, and where limited training and guidance exists, there can be uncertainty. One study, *Inside Police Custody*, which conducted empirical research in four jurisdictions (England and Wales, France, Netherlands and Scotland), considered in detail the extent of protection and enforcement of procedural safeguards.<sup>104</sup>

A key finding of the study was the extent to which solicitors did not conceive of their role in broad terms.<sup>105</sup> This had direct consequences for whether or not they attended interviews and how they behaved in them when they did. The study found that lawyers were largely 'inactive' at the investigative stage.<sup>106</sup> Consultations were short and focused on providing advice about the interview itself and did little about other relevant client needs, e.g. welfare, conditions of detention, advice re other investigative issues. Lawyers were reluctant to attend interview and when they did attend, they were passive. In a separate UK study, Baldwin commented on the 'extreme passivity' he encountered:

I came across many examples of legal advisers remaining silent when questioning was very persistent, harrying or confusing, when officers were rude to suspects, or where they were clearly operating on the basis of crude assumptions of guilt from the outset... Taking the 182 cases together, two-thirds of legal advisers said nothing at all in interviews and, when they intervened to any significant extent, it was almost as often to help the police interviewers as it was to assist their clients.<sup>107</sup>

This reasserts one of the more notable judicial statements on the failing of solicitors in interviews. In *R v Paris, Miller and Abdullahi*, Lord Taylor CJ said '[s]hort of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect and concluded that 'the solicitor appears to have been at fault for sitting through this travesty of an interview'.<sup>108</sup>

The need to be active can be hard to appreciate when practitioners have to weigh attending interviews against the difficulties involved. Binchy noted numerous problems: the working hours can be difficult, especially given 3 and 7 day detentions; there are consequences for work and home life; it can leave you exhausted for days; the facilities at garda stations do not cater for

<sup>103</sup> Binchy (n 93).

<sup>104</sup> Jodie Blackstock, et al, *Inside police custody: An empirical account of suspects' rights in four jurisdictions* (Vol. 113, Intersentia 2013).

<sup>105</sup> *ibid*, page 335.

<sup>106</sup> *ibid*, page 350.

<sup>107</sup> John Baldwin, 'Legal advice in the police station' [1993] *Criminal Law Review* 371, 372.

<sup>108</sup> (1993) 97 Cr App R 99.

solicitors who often wait between interviews, at night, in their car; the work is challenging with important decisions to be made on the spot; that decision-making will be made on camera, with the knowledge that a judge may critique it in the future; and it can be hostile:

*Some* Gardaí seem to think it is part of their job to make the solicitor feel unwelcome or even intimidated. You are on their turf and the absence of a proper legal framework for our respective roles means to some extent you are at their mercy. This part of the trial process has no referee. It is more bare-knuckle fighting than Queensbury Rules.<sup>109</sup> (emphasis in original)

*Inside Police Custody* concluded that specific training was required for solicitors on their role in the police station.<sup>110</sup> In the next section, we will outline SUPRALAT, the training developed in response to *Inside Police Custody*, which has been running for two years. But to conclude this section, if we acknowledge the variety of changes in recent years empowered the state, then we have to question more stringently whether existing safeguards are sufficient, or whether, in fact, only the presence of the lawyer will suffice. If the role is to ensure access to legal advice, that is one thing, but if it is to provide an active defence or to protect the right to silence, then that is a very different matter. If the solicitor is present to provide those safeguards, then their role is one of providing legal assistance, not legal advice. This has consequences for professional interactions between members of the criminal justice system. For instance, it may affect whether gardaí feel solicitors are over-stretching their role in the interview and potentially impact judicial decision-making on issues of admissibility of evidence and lawfulness of detention.

## The Training

In the immediate aftermath of the DPP's decision, the Law Society of Ireland arranged a conference, bringing practitioners with vast experience from the UK to discuss the major issues which emerge in interviews. There was, however, no further training and it took over a year and a half for both professional bodies to issue their guidance.

In 2015 the authors, together with colleagues in Belgium, the Netherlands and Hungary secured EU funding to develop a training programme for lawyers attending police interviews called SUPRALAT (strengthening suspects' rights in pre-trial proceedings through practice-oriented training for lawyers).<sup>111</sup> Each of our partner jurisdictions was adjusting to the implementation of the EU directive on the right to legal assistance.<sup>112</sup> The support of the Law Society was quickly established for the Irish iteration. The project had an international advisory board and, in each jurisdiction, a national advisory board. Throughout 2015/16 the team developed the training and translated it to the specific jurisdictional contexts. In January 2017, we commenced delivery of the training, with the first Train the Trainer course of the entire project taking place in Dublin.

Building on *Inside Police Custody*, the overarching aim of the training is to encourage active, client-centred practitioners. By 'active' we do not mean someone who intervenes continuously in interviews. We encourage solicitors not to be passive; to continually think of their role in the interview, to listen, to take notes, to actively support their client through their body language, to intervene when necessary, to think of the future defence, to note concerns on the video recording, to deploy their legal expertise to rapidly think through issues as they arise. In this

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<sup>109</sup> Binchy (n 93).

<sup>110</sup> Supra (n 104) page 450.

<sup>111</sup> Funded by the Justice Programme of the European Union.

<sup>112</sup> Violet Mols, 'Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers' (2017) 8(3) *New Journal of European Criminal Law* 300.

conception, solicitors should not see themselves as a witness to an interview but should be fully engaged at all times in all of the functions discussed above.

By ‘client-centred’, we mean that there should be no question of stock advice in response to a particular charge or situation. The solicitor should take time to understand the position of the client and the consequences of this arrest, and potential charge, for him. This will require that she spend time building rapport and creating trust with the client, thus the consultation becomes even more central in the SUPRALAT model.

Further, the training actively promotes a more reflective mind-set in criminal defence practitioners, in order to enhance future decision-making abilities. Each solicitor is encouraged to pause and consider their own core professional values, recognising that these will be personal to each practitioner. SUPRALAT does not intend to create carbon-copy solicitors, but to encourage solicitors to know their professional values to enable them to make split-second decisions in the challenging environment of the Garda interview.

Unlike much training for legal professionals, the focus in SUPRALAT is not on building legal knowledge, but on developing the necessary practical skills. Particular attention is paid to the communication skills necessary to effectively defend suspects at police stations, which are vastly different to those required to negotiate a contract or put forward a motion in court. The emphasis in the police station is on strong interpersonal skills, as a solicitor needs to engage effectively with a range of individuals: clients, who may be uncooperative, stressed or under the influence of intoxicating substances; Gardaí, who may or may not value the presence of a solicitor; family members, with varying levels of stress and expectation of the solicitor’s role; and others, such as interpreters or appropriate adults. By placing the training of communication skills in context, we place an emphasis on *how* to deliver advice and intervene during the suspect interview, instead of focusing (only) on the content of advice or interventions.

## Structure

The training commences with six e-learning modules, which are accessed via an online learning platform. These modules convey information on the law and practice (including information on GSIM) and introduce core concepts on communication skills and vulnerable suspects. Interactive modules are accompanied by expert video-lectures and presentations. Participants are requested to submit brief reflective pieces, outlining cases they have encountered themselves or their initial view of the e-learning materials.<sup>113</sup>

The e-learning phase is followed by an intensive 2-day face-to-face session. These days focus on the development of practical skills, covering four substantive topics: the role of the lawyer, communication skills, the consultation and the interview. There are three trainers on each course: two criminal defence solicitors who have undertaken the Train the Trainer course and one of the authors in support. There are twelve participants on each course and we aim to have diversity in terms of gender, firm size, and location. These distinct characteristics contribute to different experiences of attending the Garda station and discussing those differences deepens understanding of the dynamics at play in interviews. A core pedagogical component of the training is peer learning: participants learn as much from each other as they do from the

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<sup>113</sup> All materials are available online: Salduzlawyer, ‘Training’ (Salduzlawyer) <<http://www.salduzlawyer.eu/training/>> accessed 4 February 2019. A detailed Trainers’ guide explains the SUPRALAT philosophy, and both the mechanics and the aim of every section and exercise. Original European Training Guide (Salduzlawyer, ‘Train the Trainer Guide’ (Salduzlawyer) <<http://www.salduzlawyer.eu/training/train-the-trainer-guide/>> accessed 4 February 2019) developed by Rebecca Heemskerck, Robert Horselenberg, Violet Mols, Anna Pivaty, Miet Vanderhallen with contribution from: Yvonne Crotty, Yvonne Daly, Sarah Pryor and Daniëlle Versteegen. SUPRALAT Ireland version further developed and applied by Yvonne Daly, Vicky Conway, Yvonne Crotty and Sarah Pryor.

trainers.<sup>114</sup> To make this work, substantial effort is invested at the outset to establish an environment of trust and openness, so that participants feel comfortable sharing their fears and concerns and discussing those with colleagues.

We also prioritise experiential learning, and the two days are peppered with a range of tasks, discussion and interactive learning moments. Very early on in the training, we realised that the exercises on the course have a value to participants beyond what was anticipated. One exercise, for example, is based on a video of a purposefully 'bad' police interview, with 'gardaí' (played by actors) doing many unacceptable things. Participants watch the video together and are asked to indicate when, if they were a solicitor attending that interview, they would intervene and why. We pause the video when a participant says 'stop' and discuss this. While solicitors often hope to be told the 'right way' to respond to a particular situation, this exercise shows them that there can be different, equally legitimate ways to engage. Some solicitors choose to be more interventionist in interviews, as they are less tolerant of behaviour which may fall into grey areas and they see that as core to defending a client. Others adopt more of a wait and see approach, for fear of creating a hostile dynamic in the interview. Both are acceptable, but will have different consequences for their client and the interview. This video exercise is particularly productive because, as participants have noted, attending interviews is a solitary role and they are never afforded opportunities to watch how other solicitors engage in the interview.<sup>115</sup> This differs substantially from court work. Discussing in a group why you would or would not intervene in a particular instance, and how you might do so, affords a unique opportunity to consider how different colleagues perform the same role in different ways and to pre-empt scenarios solicitors may face in the future. This exercise can help solicitors understand some of the reasons why they find interviews challenging (e.g. the closed nature of the garda interview room, the lack of judicial presence as independent arbiter to resolve disagreement) and, in addition to realising that different approaches are valid, this alone can enormously increase confidence in performing this role.

The training focuses heavily on enhancing communication skills as while lawyers are often of the view that they are strong communicators, their skills have been developed in relation to particular forms of communication, such as making submissions to a judge, or cross-examining witnesses in court, with a particular goal of persuasion. However, interacting with detained individuals, gardaí, families and so on requires very different skills.

We include role-plays to afford opportunities for participants to experience use alternative communication skills, to see how colleagues approach those engagements, and to experience being in the other party's shoes, enhancing understanding of their position. It is pedagogically well-established that the more a learner can relate to tasks, the more engaged they will be and the more they will absorb.<sup>116</sup> Accordingly, all tasks are authentic in nature, and practitioners were consulted throughout the design of the role-plays and other materials.

As much time is dedicated to consultations as it is to interviews themselves. Although solicitors have been permitted to have consultations with clients for decades the nature of the task is changing. If solicitors intend to attend the interview the consultation takes on a substantially different focus than if they are not attending the interview. Discussion and role plays cover the aim of the consultation, difficulties which may be encountered, how to overcome these as well as

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<sup>114</sup> David Boud, Ruth Cohen, and Jane Sampson (eds), *Peer learning in higher education: Learning from and with each other* (Routledge 2014).

<sup>115</sup> The Garda Code (n 62) does provide for the possibility of trainee solicitors attending an interview where they accompany a qualified solicitor, where the client and the gardaí in question agree to this.

<sup>116</sup> John Seely Brown, 'Learning, working, and playing in the digital age' (American Association for Higher Education Conference on Higher Education, 1999).

practical strategies for how to ensure clients understand what is going to happen and what the legal advice is. For many participants this is the area of practice which, following the training, has changed most. They take more time over consultations, have a different aim, build greater rapport with clients, ask open rather than closed questions in order to get a clearer narrative, reflect more on whether clients understand the discussion and consider the broader dimensions of their role, as discussed above, such as supporting the client and building the defence.

The final session centres on the interview itself. We consider the lawyer's aim in the interview and what they hope to achieve, from the perspective of encouraging active lawyers and the variety of ways that should be achieved in the interview. As it is often a point that solicitors are anxious about, we spend time on interventions and when and how to do that effectively. The day builds towards a final 'real deal' role play. This involves actors playing the suspect and gardaí, though in a number of courses we had the much-appreciated assistance of An Garda Síochána in providing highly trained detectives to 'play' the Gardaí. Thus, we create a situation which is as real as possible in which the solicitor can test out their new skills without fear of it having real-life ramifications.

Following the face-to-face days, participants take 4-6 weeks to practice their newly-developed skills. They submit further reflective entries on attendances during that period before reconvening for one further face-to-face day. The focus of this day is constructive reflection on their experiences in the intervening period. We aim to build solicitors' understanding of reflective practice,<sup>117</sup> so that they can become continual learners and potentially turn each attendance into a learning experience. Time is dedicated to thinking about what their core values are, which can be of huge assistance when faced with a difficult situation: knowing whether a solicitor prioritises truth and kindness or justice and integrity can assist in making better, more grounded on-the-spot decisions. We consider a range of scenarios to tease out the idea of reflection, and ask participants to reflect, in a very structured way, on one of their own recent Garda station experiences.<sup>118</sup>

While feedback clearly indicates that the programme is proving to be of substantial benefit, it has its limitations. There are certain topics which could usefully be covered in greater depth, such as disclosure and the right to silence, often two of the most challenging dimensions of this work for solicitors.<sup>119</sup> There are additional dimensions of training which could be added, such as follow-up supervision, peer-to-peer discussion, assessment of a reflective portfolio, and refresher days at regular intervals to ensure the maintenance and focus on acquired skills. Having said that, Prof Ed Cape, author of *Defending Suspects in Police Stations*,<sup>120</sup> has described SUPRALAT as 'the best training for police station lawyers that I have seen anywhere in the world'<sup>121</sup> and a number of the SUPRALAT materials are now featured in the University Module on Crime Prevention and Criminal Justice developed by the United Nations Office on Drugs and Crime (UNODC).<sup>122</sup>

## Delivery

In January 2017, 12 experienced, senior criminal defence practitioners participated in the Trainer programme. Four of these participants then delivered the training to 24 colleagues in

<sup>117</sup> Donald A Schön, *The reflective practitioner: How professionals think in action* (Routledge 2016).

<sup>118</sup> We draw on the work of Gibbs in guiding participant reflection: Graham Gibbs, *Learning by Doing: A guide to teaching and learning methods* (Further Education Unit 1988).

<sup>119</sup> A further programme which builds on SUPRALAT, called NETPRALAT, intends to add modules on interpreters and vulnerable suspects.

<sup>120</sup> Ed Cape, *Defending Suspects in Police Stations: The Practitioner's Guide to Advice and Representation* (7th edn, Legal Action Group 2017).

<sup>121</sup> Personal Communication (03 October 2017).

<sup>122</sup> UNODC, 'Module 3: Access to Legal Aid in Criminal Proceedings' (United Nations Office on Drugs and Crime 2019) <<http://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-3/>> accessed 4 February 2019.

two parallel sessions in April 2017. These first programmes all took place in Dublin, in the Law Society of Ireland, and costs were covered under the EU funding, so participation was free.

Feedback was sought which, while suggesting some additional materials which participants wished to see covered, was extremely positive. One participant, for example, described the programme as ‘simply superb’ and said:

It provided very useful and practical advices in relation to what, until then, was simply a theoretical knowledge about advising the client in Garda Stations. That was invaluable. It was reassuring to learn that we all had our doubts about the approach we were taking to cases and that this was a common concern. I loved the fact that we got to act out scenarios in ‘class’. I would recommend this course to everyone.

On the back of such feedback, and with the support of the Law Society Finuas Skillnet, further training programmes were delivered in 2017 and 2018, in Dublin (3 courses), Cork and Carrick-on-Shannon. Over 70 criminal defence solicitors have undertaken the course from all across the country, from large and small, rural and urban practices. Further courses are planned for 2019.

Other senior practitioners have become involved in delivering the course and we have also assisted in establishing SUPRALAT-based training in Scotland. One of the dimensions which we are most pleased with is the generosity of An Garda Síochána in getting involved in the training, a partnership we hope will continue in the future. Not only has it aided in making scenarios more realistic, but it is also beneficial for solicitors and detectives to be given spaces to interact that do not have the inevitable dynamics of stations and courts. By way of reciprocity, we have contributed to the Senior Investigating Officer course in Templemore on a number of occasions, outlining the aim and nature of the SUPRALAT training so that they have a sense of how solicitors are learning to approach the interview.

A further positive dimension to have emerged is the networking that has been created amongst participants. Most groups have exchanged contact details and arranged to stay in touch. Participants now have a group of peers to contact when faced with a difficult Garda station situation.

## Conclusion

There is no denying that the interview in the Garda station is now vastly different from what it was 20 years ago. Gardaí are more skilled, the interviews are recorded, inferences from silence can be drawn, and solicitors can attend. All of this means that the role of the solicitor has changed dramatically, and we have outlined in this article 7 different functions which solicitors perform when attending the police station. This is best encapsulated by the phrase ‘legal assistance’, which dominates European discourse, rather than the term ‘legal advice’, more commonly used in Ireland.

We believe there should be at least a statutory right to have legal assistance in the interview, and that this is the only way to achieve the range of functions we have outlined. Certain legal reforms would be necessary in order to give effect to this right and to ensure compliance with other rights while a suspect is in garda custody.<sup>123</sup> Some of the main areas requiring regulation or reform in this area include:

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<sup>123</sup> See the authors’ submission to the Law Reform Commission (n 6).

- The manner of selecting solicitors to attend at the station;
- The manner in which detainees are informed of their right to access a solicitor, including that one may be provided free of charge in specific circumstances;
- Effective provision of medical assessment and assistance in the pre-trial process;
- Effective provision of interpreters in the pre-trial process;
- The role of the member-in-charge;
- Pre-interview disclosure;
- CCTV recording within the garda station and attendant data protection issues;
- The current caution, which leads to the ongoing requirement of contemporaneous notes of interview;
- The operation and value of inference-drawing provisions;
- Taking and retention of forensic samples, fingerprints, and photographs;
- Supports for suspects with disabilities or other vulnerabilities, including the potential creation of an appropriate adult scheme;
- Independence of decision-making in relation to extensions of detention;
- The taking of witness and victim statements; and,
- Oversight and inspection of detention.

While further legal research, regulation and reform are, in our view, very necessary, we have not sought, in this article, to provide legal analysis alone. Instead, we have sought to highlight the new dimensions of a criminal defence solicitor's role within Garda interviews, and the related requirement for very specific training to equip solicitors to perform that role. We have learned from delivering the training that solicitors find attending interviews challenging, if not unnerving, and that their traditional training does not prepare them for this role. They worry about doing wrong by their client in the moment, but also worry about the lack of legal clarity and how this might affect their professional careers going forward. The open space created in the training for discussions of their role, for peer-to-peer learning exchange, and for developing a broad range of practical skills helps to address many of these concerns.

It would be extremely beneficial for members of other related professions, Gardaí, prosecutors, barristers and judges, to reflect on how the interview has changed, what this means for the work of both Gardaí and solicitors, and what that means in turn for the criminal justice process. Such an understanding may influence jurisprudential thinking in the future. We contend that legislation is sorely needed to address much of this, but equally greater mutual understanding is essential.