

**Working Group to Advise on a System Providing for the
Presence of a Legal Representative During Garda Interviews.**

Report - July 2013

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Final Report July 2013

1. Introduction

The Department of Justice and Equality, prompted by emerging international jurisprudence particularly as reflected in the proposed EU Directive on Access to a Lawyer in Criminal Proceedings, is considering the possibility of a scheme providing for the presence of a legal representative during Garda interviews with persons in custody. As part of that process, the Secretary General of the Department of Justice and Equality in January 2013 established a Working Group to advise him on various issues identified as relevant should Ireland choose to opt in to the proposed Directive (see Section 3), which includes a right to the presence of a lawyer during questioning of a detainee by police.

The terms of reference for the Working Group were as follows:

- To consider the content and requirements of the proposed draft Directive on Access to a Lawyer in Criminal Proceedings.
- To recommend one or more practical and cost-effective options for the establishment of a scheme to facilitate the implementation of the provisions in the draft Directive in this jurisdiction.
- In making its recommendations, to have regard to arrangements in comparable jurisdictions.
- In making its recommendations, to take specific account of current budgetary constraints and to provide an estimate of potential costs that might accrue to the Garda Station Legal Advice Scheme.
- To provide a written report incorporating recommendations within four months.

The Group was specifically not required to make recommendations on the role of the legal representative during interviews.

The membership of the Working Group was:

Dr Moling Ryan (Chairperson), Chief Executive, Legal Aid Board

Asst. Commissioner Derek Byrne, National Support Services, An Garda Síochána

Mr Kevin Clarke, Garda Division, Department of Justice and Equality

Mr Pat Gilheaney, Criminal Legal Aid Section, Legal Aid Board

Mr. Billy Keane, Criminal Law Division, Department of Justice and Equality

Mr James MacGuill, Solicitor, MacGuill and Company Solicitors (representing the Law Society of Ireland)¹

¹ The Law Society was not circulated with a draft of the Report nor was its approval sought as to the content.

Inspector Michael McNamara, An Garda Síochána

Ms Margaret O'Connor, Criminal Law Division, Department of Justice and Equality

Mr. Seamus O'Reilly, Legal Aid Board, was Secretary to the Working Group

The Working Group met on 6 occasions between February and June 2013.

2. Matters addressed

The Working Group determined that the terms of reference encompassed a number of key matters which provided a framework for its deliberations and for this report. The matters identified were as follows:

- Background to the draft Directive
- Content and implications of the Directive
- Current practice pertaining to Garda Station detentions and questioning
- Operation of the Garda Station Legal Advice Scheme
- Experience in other relevant jurisdictions
- Potential new requirements to comply with the Directive and their implications
- Developing options to facilitate implementation of the Directive
- Assessment of the potential cost of the options
- Offering recommendations.

3. Background

At present, there is no defined legal obligation to change Ireland's policy of not permitting solicitors to be present during Garda interviews of arrested persons. However, the trend in the case law of the European Court of Human Rights suggests that Ireland's policy of not permitting solicitors to be present during interviews will come under pressure in the medium term. Legal advice is that the emphasis of the ECtHR to date has been on a suspect having access to legal advice prior to questioning². However, legal advice is also that the trend in the case law (which includes a number of judgments which contain references to the attendance of lawyers during questioning³) is such that it will become the ECtHR standard in the future.

The right to have a lawyer present during questioning is also a key feature of the EU Directive on the Right of Access to a Lawyer⁴. The Irish Presidency, on behalf of the EU Council, reached agreement with the European Parliament on a final compromise text of that Directive on 28 May 2013. The text will be formally voted on

² e.g. *Salduz V Turkey*, 27 November 2008; *Dayanan v Turkey*, 13 October 2009

³ *Brusco v France*, 14 October 2010, *Mader v Croatia*, 21 June 2011, *Sebalj v Croatia*, 28 June 2011

⁴ Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, and on the rights to have a third party informed upon deprivation of liberty and to communicate, while deprived of liberty, with third persons and with consular authorities.

in plenary session by the Parliament in September and will be formally adopted by the Council shortly thereafter.⁵ The text as agreed is appended to this Report.

The Directive is one of a number of legislative measures set out in the EU Roadmap on Procedural Rights which aim to set common minimum standards in the area of procedural rights for suspects across the Union. It sets common minimum standards on the rights of suspects and accused persons in criminal proceedings to have access to a lawyer and to communicate upon arrest with a third person. For the purpose of its work, the Group has focussed on the right of the person to have his/her lawyer present at any questioning by the authorities.

Ireland did not opt in to the Directive at the outset of negotiations but can opt in to the measure once it has been adopted.

4. Current law and practice in relation to the right of persons in Garda custody to access legal advice and changes contained in the Criminal Justice Act 2011

4.1 Constitutional nature of right

The constitutional nature of the right of reasonable access to a solicitor when requested by a person in Garda custody or the person's family on his/her behalf was recognised by the Supreme Court in 1989 in *DPP V Healy*⁶.

This right of reasonable access is a continuing right throughout the period in custody. It is given practical effect by means of primary and secondary legislation.

4.1.1 Presence of solicitors during interviews

Solicitors are not currently permitted to be present during interviews. In *Lavery v Member in Charge, Carrickmacross Garda Station*⁷, O'Flaherty J rejected the argument that the constitutional right of reasonable access to a solicitor extended to the right to have a solicitor present during interviews. This decision was followed by the more recent case of *J.M. v Member in Charge of Coolock Garda Station*⁸ in which Sheehan J agreed that "the judgment in *Lavery v Member in Charge, Carrickmacross Garda Station* represents the law in this jurisdiction concerning whether or not one is entitled to have a solicitor present when being interviewed by the Gardai while in custody."

4.1.2 Consequences of breach of right of access

As a consequence of the constitutional nature of the right of access any deliberate and conscious act on the part of a member of the Gardaí which breaches the detainee's right in the absence of "extraordinary excusing circumstances"⁹ renders the detention unlawful and may render any inculpatory statements inadmissible.¹⁰ Examples of such acts include refusing a solicitor access on arrival at the station,

⁵ While the text is not final until this formal approval procedure is completed, for ease of reading the proposal is referred to as 'the Directive' throughout this Report.

⁶ [1990] ILRM 313

⁷ [1999] 2 IR 390

⁸ Judgment of Mr. Garret Sheehan, delivered on 3rd May 2013, Record no. 2013/648 S.S.

⁹ *The People (DPP) v Kenny* [1990] 2 IR 110

¹⁰ *People (DPP) v Buck* [2002] 2 ILR M 454

delaying access or not making *bona fide* efforts to contact a solicitor. The admissibility of statements made is determined by whether there is a causative link between obtaining the admissions and the breach of the right of access to a solicitor. Where a period of detention becomes unlawful it may regain validity before admissions are made if the breach of the right of access is remedied.¹¹ Recent jurisprudence of the ECtHR, in particular *Salduz*,¹² had not been considered by our courts prior to the J.M. case.

5. Detained persons

5.1 Detained persons – current law

Section 5 of the Criminal Justice Act 1984 provides that an arrested person who is detained pursuant to section 4 of that Act must be informed without delay that they have the right to consult a solicitor. The obligation to inform / cause to be informed rests with the member in charge of the Garda station. The member in charge is further obliged, at the request of the detainee, to cause the solicitor to be notified of the person's detention and of the station where they are being detained as soon as practicable. Section 5 also applies to the other Garda detention powers¹³. Section 5 is limited to adults. Part 6 of the Children Act 2001 makes similar provision for child suspects.

5.2 Detained persons – changes contained in 2011 Act

In *Salduz*¹⁴ the ECtHR stated *at para. 55*:

"that in order for the right to a fair trial to remain sufficiently 'practical and effective' Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in light of the particular circumstances of each case that there are compelling reasons to restrict this right."

Legal advice received was that current arrangements (based on domestic case law) fell short of this principle of prior access to legal advice in two respects: only reasonable efforts needed to be made to meet a detainee's request to access legal advice; and questioning of a detained person could start prior to them having an opportunity to obtain legal advice (provided reasonable efforts had been made to meet their request). While Garda practice was generally to delay questioning until such time as the detainee had access to legal advice (other than where exceptional circumstances applied) legal advice was that the introduction of legislation would be beneficial from the perspective of certainty and transparency.

¹¹ People (DPP) v O'Brien [2005] 2 ILRM 444

¹² *Salduz V Turkey*, 27 November 2008

¹³ Section 30 of the Offences Against the State Act 1939, section 2 of the Criminal Justice (Drug Trafficking) Act 1996, section 42 of the Criminal Justice Act 1999, section 50 of the Criminal Justice Act 2007 and sections 16 and 17 of the Criminal Procedure Act 2010

¹⁴ *Salduz V Turkey*, 27 November 2008

To achieve this, section 9 of the Criminal Justice Act 2011 inserts a requirement in the 1984 Act¹⁵ to the effect that the questioning of a detainee must not start until such time as they have had access to legal advice. This requirement is subject to two exceptions: where the detainee waives or is deemed to have waived their right to prior legal advice; or where certain compelling circumstances exist.

As was already the law, the detainee has a right to a “consultation in private” whether by telephone or in person. For reasons of security, “consultation in private” includes within sight of, but not within hearing distance of, a member of the Gardaí.

The 2011 provisions have yet to be commenced. Their commencement is dependent on the regulations under new section 5B being in place¹⁶.

5.3 Arrested persons in Garda custody

The statutory obligations in section 5 in relation to detained persons are supplemented by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (as amended by the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) (Amendment) Regulations 2006) (the ‘Custody Regulations’) which apply to all arrested persons in Garda custody. Key provisions in the Regulations include the following:

- Reg. 8 makes it clear that the member in charge must also explain to the arrested person that if they do not wish to exercise their right to consult a solicitor immediately they will not be precluded from doing so at a later date. The information is to be given orally but must also be given in writing.
- Reg. 9 makes it clear that where an arrested person has asked for a solicitor the member in charge shall notify or cause to be notified the solicitor as soon as practicable, and, that if the solicitor cannot be contacted within a reasonable time, or if the solicitor is unable or unwilling to attend at the station, the arrested person shall be given an opportunity to ask for another solicitor and if they ask for another solicitor the member in charge shall notify or cause to be notified that other solicitor as soon as practicable.
- Reg. 11(1) provides that an arrested person shall have reasonable access to a solicitor of their choice and be enabled to communicate with them privately.

¹⁵ Section 5A of the 1984 Act inserted by section 9 of the Criminal Justice Act 2011

¹⁶ Garda Division is preparing the regulations under section 5B and any consequential amendments to the Custody Regulations under section 7 of the 1984 Act.

- Reg.12(6) requires that where an arrested person has asked for a solicitor, they shall not be asked to make a written statement in relation to an offence until a reasonable time for the attendance of the solicitor has elapsed.

These regulations also apply to child suspects (see section 70 of the Children Act 2001).

It should be noted too that interviews and the style of questioning that may be used by Gardaí are already subject to constitutional, ECHR, and statutory restrictions and sanctions including the following:

- Interviews are generally electronically recorded.¹⁷
- Interviews must be “conducted in a fair and humane manner”.¹⁸
- An interview must be terminated or adjourned if it has lasted for more than 4 hours.¹⁹
- In the case of child suspects and other vulnerable suspects the parent/guardian or another adult who is not a member of the Gardaí is generally required to be present during interviews.²⁰
- For a confession to be admissible it must have been made voluntarily - inducements (whether promises or threats) or oppressive questioning may render confession evidence inadmissible.²¹
- Gardaí are liable to disciplinary proceedings and/or criminal sanction in the event of misconduct.²²

6. Current Arrangements: the solicitor’s role

Upon arrival at a Garda Station a person who is being detained under any of the powers that provide for questioning (Section 4 Criminal Justice Act 1984 as amended, Section 30 Offences Against the State Act 1939 as amended, Section 2 Criminal Justice (Drug Trafficking) Act 1996, Section 50 Criminal Justice Act 2007, Section 42 Criminal Justice Act 1999 and Sections 16 and 17 Criminal Procedure Act 2010) is advised by the member in charge of his rights and is provided with a written notice of rights (Form C72(s)) including the right to seek legal advice.

When a suspect seeks access to a solicitor it is for the Gardaí to make contact either with the solicitor nominated by the suspect, or any other available solicitor willing to act. There are no rules governing the selection of such solicitors. In most cases, advice is given initially over the phone. The detainee and the solicitor then jointly assess whether a face-to-face meeting is required. In virtually all cases, bar the most straightforward cases or, perhaps, with the more experienced detained persons, a face-to-face meeting is held. The main reason for this, in the view of solicitors, is the

¹⁷ Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 as amended

¹⁸ Reg. 12(2) of the Custody Regulations

¹⁹ Reg. 12(3) of the Custody Regulations

²⁰ Regs. 12 and 22 of the Custody Regulations and section 61 of the Children Act 2001

²¹ See generally McGrath, D (2005) Evidence

²² See eg. section 7 of the Criminal Justice Act 1984

difficulty of ensuring trust and candour and for the solicitor to be in a position to evaluate how vulnerable the person is.

When the Gardaí contact the solicitor, they will typically inform the solicitor of the power of detention in the case and of the time of arrest.

There are no rules regarding the duration or number of consultations permitted between the detainee and the solicitor, subject of course, to the understanding that access be reasonable. It may also be noted that limitations are provided for under the Garda Station Legal Advice Scheme as to the number of such consultations that will attract a fees payment.

In addition to giving legal advice, solicitors attending persons in custody also record on behalf of their client any issues of concern such as alleged ill-treatment, medical records and requests for consular or translation assistance.

7. Garda Station Legal Advice Scheme

Detained persons who cannot afford legal advice can apply to avail of the Garda Station Legal Advice Scheme. The scheme commenced on 14 February 2001 and was extended, with effect from 1 July 2007, to provide for payments to solicitors in respect of extension of detention court hearings. Persons who are in receipt of social welfare payments or whose earnings are less than €20,316 p.a. are eligible to receive assistance under the scheme. No financial contribution is required from detained persons who are eligible for the scheme.

The scheme does not restrict access by the solicitor to the detainee but does limit the number of consultations (whether by telephone or by attendance at the station) per person that will attract a consultation payment under the scheme as follows:

Detention Legislation	Number of consultations
Section 4 of the Criminal Justice Act 1984 Act ²³	3
Section 30 of the OAS Act 1939	7
Section 2 of the Criminal Justice (Drug Trafficking) Act 1996	11
Section 50 of the Criminal Justice Act 2007	11

The limits set relate to the maximum length of the detention periods which range from 24 hours in the case of section 4 to 7 days in the case of section 2 and section 50.

The cost of the scheme (inclusive of VAT) was €1,172,300 for 2011 and €887,500 in 2012 compared to €612,000 for 2007.

The fees and travel expenses payable to solicitors have been reduced a number of times in the past 3 years and are currently set as follows.

²³ For the purposes of the Scheme, detentions under Section 42 of the Criminal Justice Act, 1999 and Sections 16 and 17 of the Criminal Procedure Act, 2010 are included with this provision.

Details of consultation	Rate payable
Visit between 9.00am – 7.00pm Monday to Friday	€97.22 plus VAT
Visit between 7.00pm – 9.00am Monday to Friday And also on weekends and Bank Holidays	€132.19 plus VAT
Telephone Consultations	€39.59 plus VAT
Extension Hearings	€201.50 plus VAT
Travel rate per kilometre	€0.24

The figures for 2012 indicate that approximately 17% of the expenditure on the scheme relates to telephone consultations while some 82% relates to station visits by solicitors. Expenditure on extension hearings was less than 1% of the total.

The number of authorised claims in 2012 was 4,155 (5,026 in 2011). Each claim relates to an individual detained person. Approximately 20,000 persons were detained last year which suggests that approximately 21% availed of the scheme. Of course, other detained persons may have availed of their right of access to legal advice but funded it through their own resources.

The Legal Aid Board (LAB) has taken over the administration of the scheme from the Courts Policy Division of the Department since 1 October 2011. The LAB has developed a database for the implementation of the scheme and produces detailed statistical reports on a quarterly basis providing analysis by Garda Station, solicitor firm etc. It anticipates that over time and as trends emanating from the collated statistics are substantiated, the information will be used to inform future policy developments. The LAB is not in a position to collect data on the length of consultations or time spent by solicitors at stations. A detailed statistical report of the operation of the scheme in 2012 is included at Appendix B.

The LAB does not, of course, have any data relating to detained persons who exercise their right of access to legal advice but fund it from their own resources.

8. Nature of right under the Directive

The Directive requires Member States to ensure that the suspect or accused person has the right for his/her lawyer to be present and participate effectively when s/he is questioned.

It allows for temporary derogation from this right in exceptional circumstances only. These are:

- (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person ;
- (b) an urgent need to prevent a situation where there could be a substantial jeopardy to criminal proceedings.

It also requires Member States to ensure that the suspect or accused person has the right for his lawyer to be present at certain investigative and evidence gathering acts of which only identity parades would be relevant in the Irish context.

9. International Experience

The Working Group undertook an examination of the practice relating to the presence of a solicitor during police interviews in a number of common law jurisdictions. In each of the jurisdictions examined, the principle of having a solicitor or legal representative present during interview is intrinsically linked to the right to legal advice/assistance while in police custody. As a consequence of this, it is not costed separately in any fee paid for attendance at a police station.

It was noted that both England and Wales, and Scotland have opted to provide initial advice and assistance to suspects via telephone consultation, and the possibility that consultations may take place through other means such as Skype is being considered (in Scotland at least).²⁴

The main features relating to legal services for detained persons in England and Wales are:

- There is no right to have a solicitor present during any interview but such presence must be afforded if requested;
- The detainee may have the services of the solicitor without the application of financial means criteria;
- There is a Duty Solicitor Call Centre (CDS Direct) in place to which all requests for legal advice are first routed.

In Scotland, the main features are:

- A suspect has the right to have a private consultation with a solicitor before any questioning by the police and at any other time during questioning;
- There is a new Police Station Duty Scheme and Solicitor Contact Line in place since July 2011;
- The Contact Line is operated by solicitors employed by the Legal Aid Board and is located in the Board's headquarters in Edinburgh;
- Contact is made with a suspect's own solicitor or, if the suspect does not name a preferred solicitor, advice and attendance can be given by solicitors from the Contact Line.

In Northern Ireland:

- Free legal advice with no contributions is available for persons being interviewed in police stations on criminal charges;

²⁴ *Carloway Review* (Edinburgh, 2011).

- Any solicitor in private practice with a practicing certificate is entitled to provide such advice;
- A detained person can choose their own solicitor or be given a phone book to choose a solicitor.

In the USA:

- There is a constitutional right to the presence of an attorney during police questioning;
- The suspect may contact his/her own lawyer or the police must contact the Public Defender's office on his/her behalf.

Greater details of the procedures in place in these jurisdictions are included at Appendix A.

10. Likely Take-Up Rate in Ireland of right to request presence of solicitor during interviews

The rate of take-up of a right to request the presence of a solicitor during interviews in this State has implications for the management of investigations and for the cost to the Garda Station Legal Advice Scheme should that be the vehicle chosen to provide for the requirements of the Directive.

Data on the proportion of detained persons who exercise their right to consult a solicitor at present (and the break down of those consultations between telephone consultations and face to face consultations) would provide a basis from which to extrapolate the likely take-up of a right to request the presence of a solicitor during interview. While the Gardaí collect this data for each detainee in their individual custody record, cumulative data is not readily available and would prove particularly challenging to collate from existing records.

The experience in England and Wales may provide some insight into the likely take-up rate. However, it is not directly comparable as that jurisdiction provides free legal advice to all arrested persons in custody whereas the Irish scheme is limited to arrested persons detained under one of the detention powers and is means tested. Ashworth (2005)²⁵ refers to the 1997 Home Office study by Bucke and Brown²⁶ which found that:

- 40% of detainees (suspects and persons in custody for other reasons e.g. arrested for failing to appear / pay a fine) requested advice,
- around 34% of suspects and 27% of other detainees received legal advice,
- a legal advisor was present at all interviews in 37% of cases where suspects were interviewed, and
- in over 50% of cases where suspects were interviewed no legal advice was received prior to or during interview.

²⁵ A Ashworth, M Redmayne, *The Criminal Process* (2005), pg 88

²⁶ T. Bucke and D. Brown, *In Police Custody: Police Powers and Suspects' Rights under the Revised PACE Codes of Practice* (1997), pg 19, pg 24, pg 32

The study showed wide variations between police stations, men and women, ethnicity etc. Ashworth concludes that the majority of suspects do not receive legal advice and do not have a legal advisor with them during questioning.²⁷

According to Cape (2010),²⁸ although statistics are not routinely kept by police forces in England and Wales, it would appear that around 50% of persons arrested and detained ask for legal advice and the majority receive it. Studies generally show an upward trend since the introduction of the Police and Criminal Evidence Act, 1984 (PACE). In the United States it appears that 80% of suspects waive their Miranda right to have counsel present during interview.²⁹

More recent work by Vicky Kemp (2010) indicates that the take-up of legal advice in the UK (admittedly on the basis of a small sample) had increased to 54%. She also reported on an examination of over 30,000 police custody records showing the request rate overall for legal advice as being 45%. She further noted a number of factors influencing users' choice of a solicitor:

- 9 out of 10 respondents in her study said that having a choice of solicitor was important.
- Respondents' first choice of solicitor was based mostly on a recommendation, with others reporting that their solicitor had acted for them as the duty solicitor on a previous problem.
- Some confusion prevailed about the independence of police duty solicitors and a quarter of those interviewed in police stations and magistrates' courts and 40% of those interviewed in prison, believed that the police duty solicitor was directly employed by the police.
- When choosing a solicitor, the majority said it was important theirs was a 'good' solicitor, defining 'good' as someone who is experienced, knowledgeable and knows what they are doing. A good relationship with their solicitor was also desired so as to promote ease of communication.

The Irish experience, in so far as it can be ascertained from a comparison of the number of claims authorised under the Garda Station Legal Advice Scheme in 2012 with the number of persons detained in that year, would also appear to exhibit a lower take-up rate of the right to access legal advice than might be expected. In 2012, 4,155, claims (a mix of telephone consultations and face to face consultations) were authorised under the scheme. When compared to the number of persons detained, approximately 20,000, this suggests that less than 21% of detained persons exercised their right to legal advice in some form in 2012. This does not, of course, include persons whose claims for free legal advice were refused; persons who, from the outset, funded the cost of accessing legal advice from their own resources; or persons who did not request or withdrew their request for access to legal advice because, for example, of the impact it might have in lengthening their period in detention.

In view of this incomplete picture, there would be merit in gathering accurate data on current take-up rates from which the likely take-up rate of the new right could then be

²⁷ A Ashworth, M Redmayne, *The Criminal Process* (2005), pg 88

²⁸ E Cape, Z Namoradze, R Smith, T Spronken, *Effective Criminal Defence in Europe* (2010) Pg 124

²⁹ Statistic quoted by McLachlin CJ at para. 41 of his judgment in *R v Sinclair* (2010 SCC 35 [2010] 2 S.C.R 310)

extrapolated to provide a more informed basis for assessing the impact of a reversal of policy for the management of investigations / resources in stations and the costs to the Garda Station Legal Advice Scheme. This data could be gathered either:

- through the implementation of internal Garda arrangements to collect the data over a period of time across all stations or a representative sample of stations; or
- by means of commissioning an outside study to report on the operation of the current right of reasonable access to legal advice.

The Group is of the view, based on the experience of neighbouring jurisdictions that the take up following an opt-in to the Directive would increase (and, perhaps, substantially) from the current 21% of detainees opting to utilise the Garda Station Scheme. It is proposed, therefore, for the purpose of this report to offer the Group's best assessment of the anticipated take up and cost the implications accordingly. The Group will also cost on the basis that a greater take up is experienced.

11. Options for the introduction of the new process

11.1 Introduction

Clearly, in the event of Ireland opting in to the Directive, there will be considerable implications in terms of the provision of new procedures and structures. Obviously too, additional costs, which may be significant, will arise.

Having considered the various issues associated with implementing the Directive, the Working Group considered that the existing Garda Station Legal Advice Scheme offered the best framework to act as the vehicle for implementing the necessary changes to provide for the new solicitor consultation / attendance at interview categories arising.

These sections offer a brief reprise of the current Garda Station Legal Advice Scheme and propose a framework and associated costs for its extension to incorporate changes required by the Directive. It does not seek to be prescriptive in relation to possible fees payable but, rather, identifies the Working Group's recommended options for establishing new fee structures and maps out the costs likely to be incurred in the event of such fee options being implemented.

11.2 Garda Station Legal Advice Scheme

Details of this Scheme have already been outlined in Section 7 earlier. In summary:

- the scheme is available for consultations (free legal advice) by solicitors with persons detained in Garda Stations under the provisions of 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, Section 50 of the Criminal Justice Act 2007, Section 42 of the Criminal Justice Act 1999 and Sections 16 and 17 of the Criminal Procedure Act 2010 and certain extension hearings.

- Eligibility for the scheme is means tested with detainees in receipt of Social Welfare payments or persons in employment with earnings of less than €20,316 per annum being deemed eligible under the Scheme.
- There is a limit on the number of consultations attracting a payment and this varies with the legislation under which the person is detained.
- Solicitors are not required to be on a particular panel under the Scheme but are specifically requested by detainees or sourced by the Gardaí at the request of the detainee.
- Fees payable are €97.22 plus VAT for a consultation during a visit to a Garda Station from 9am to 7pm Monday to Friday, rising to €132.19 plus VAT should visits be between 7pm and 9am Monday to Friday plus all weekends and bank holidays. Telephone consultations attract a payment of €39.59 plus VAT and Extension Hearings give rise to payments of €201.50 plus VAT.

The Scheme, which does not have a statutory footing, is administered by the Legal Aid Board as an Ad-hoc Legal Aid Scheme.

11.3. Implications of Directive on the Scheme

If solicitors are to be present during questioning it is clear that the Scheme would need to be revised to incorporate the additional requirements that will arise for both the Gardaí and the legal practitioners directly involved in the process. The most immediate additional matters would be those of solicitor attendance at Garda / detainee interviews and at identity line-ups. These are unlikely to be merely discrete add-ons to the existing provisions of the Scheme. They may, however, overlap with the existing consultation categories in place under the Scheme. This brings into question whether the current practice of basing the Garda Station Scheme's operation on detainee / solicitor pre-interview consultations will still be relevant if the solicitors themselves will in future be also attending the detainee / Garda interviews. In considering such issues, it must be borne in mind that under the existing Garda Station Scheme two distinct types of detainee consultation occur, namely solicitor / detainee telephone consultations and solicitor / detainee consultations arising from a visit to the Garda Station by the solicitor.

Apart from the necessity of establishing the new fee categories and ensuring that the detainee receives the appropriate legal advice, there will also be costs associated with management of the scheme. It will be necessary to introduce the fees at levels that are appropriate to the services being delivered while also providing value and being sensitive to the State's financial position. It may also be appropriate to give some consideration to the existing means test threshold to determine if it is still set at an appropriate rate and also with a view to seeking consistency with other schemes, e.g. civil legal aid.

In addition, it is likely that extra levels of administration will be required by the Gardaí, Legal Aid Board and the Financial Shared Services (FSS) Centre to authorise and process the claims and payments that will arise. For example, the Gardaí may have to amend their custody records process to accurately account for the entire time spent by a solicitor at a Garda Station while also detailing all the solicitor's activities (e.g. pre-interview consultations, attendance at interviews and identity parades) that may be required to facilitate the processing of fees under any

new system. Equally, solicitors will have extra paperwork to complete in the preparation and submission of their claims. The complexity of any new Scheme will have a direct impact on efficiency and the administration costs arising. Further, both the Legal Aid Board and the FSS will need to update their administrative processes and upgrade their IT Systems to cater for the new processing demands that will arise and these too will have cost implications.

While the Scheme currently has no statutory footing and will require significant amendment to meet the proposed Directive's requirements, the Minister may see a benefit in both providing for the required amendments and establishing a statutory footing for the Scheme in the proposed Criminal Justice (Legal Aid) Bill. In addition, in contrast to the civil legal aid scheme, there is currently no Garda Station Scheme panel in place on which solicitors must be registered before they can represent detainees and subsequently receive State funding of their fees. This, too, is an issue that the Working Group will offer some observations on, though it is not one directly covered by its terms of reference.

11.4 Means Testing Threshold.

As outlined above, persons who are detained under the particular legislation and who are in receipt of Social Welfare payments **or** persons in employment whose earnings are less than €20,316 per annum (gross) are eligible to receive assistance under the Scheme. Detainees, in requesting a free consultation with a solicitor under the Garda Station Scheme, are required while under detention in the station to formally apply for access to the Scheme. This includes the completion of the appropriate application form and by making a formal declaration as to their income.

It is of note that a detainee in receipt of Social Welfare payments in excess of €20,316 is, under the Scheme's current provisions, entitled to receive the benefits of the Scheme while a person in employment on the same income would not be entitled to access the Scheme. The Group proposes that the current position whereby applicants in receipt of Social Welfare payments are automatically eligible under the Garda Station Legal Advice Scheme would continue under the proposed revised scheme.

The current established income threshold of €20,316 has been in place for many years without being reviewed. Under the Civil Legal Aid Scheme the income threshold above which a person is not entitled to access that Scheme is set at €18,000 regardless of whether they are in receipt of Welfare payments or not. There is also a capital resources threshold in place.

It is considered that from a policy perspective and to put in place some element of consistency in the means tested legal aid arena that there is justification in having the income thresholds for the Garda Station Scheme and the Civil Legal Aid Scheme set at the same level.

11.5 Availability of solicitors.

Under the existing Scheme, representation to detainees is provided by a solicitor who is either specifically named and requested by a detainee or sourced directly by the Gardaí for the detainee. The Group supports the continuation of the principle of the detainee having choice of solicitor and of this practice. While in certain

circumstances or at certain times (e.g. night time or weekends) Gardaí may experience difficulties in contacting a solicitor, in general there is no evidence that there is a shortage of solicitors willing and available to provide the required representation to detainees. Solicitors may deem the Garda Station Scheme work to be a viable stream of income in its own right or they may take the view that it is worthwhile as in many instances they will retain the client if the case progresses to a Court hearing. In addition, recently collated statistics indicate that many users of the scheme are repeat detainees and, accordingly, it may be assumed that solicitor firms would be keen to retain such clients on their books.

Under the Directive, it is clear that the functions solicitors will be required to fulfil will increase. Should they be requested by a detainee to attend the detainee / Garda interviews the solicitor will be required to spend increased time at the Garda Station. While it is considered that the new circumstances arising should not represent a real problem for solicitor availability in cities or towns with a larger legal representation, it is possible that issues could arise in the smaller rural areas.

The potential difficulties with the available solicitors may be mitigated by the fact that the Gardaí have focussed much of their activities on a smaller number of stations in recent years. In that regard, it is noted that while the Legal Aid Board have some 700 Garda Stations registered on their database (a number of which are currently being closed), only 137 stations generated cases under the Garda Station Scheme in 2012.

Notwithstanding the above, the point has been made that it may be beneficial to establish a formal panel or panels of solicitors to provide representation under the Garda Station Scheme in respect of detainees who wish to get legal advice but who have not chosen a particular solicitor. Panels already exist for both the Criminal Legal Aid Scheme and the Civil Legal Aid Scheme with particular terms and conditions applying for inclusion on the latter panel. Such a panel could be used to invite solicitors to signal their availability to take on cases under the Garda Station Scheme. Further, by establishing mandatory criteria for access to any such panel, a measure of quality control could be placed on the standard of representation being delivered under the Scheme.

Accordingly, the Working Group is of the view that, while it would require a new administrative process to be developed, consideration should be given to establishing a solicitor's panel as identified above with specific terms and conditions applying for inclusion for the purpose of operating this scheme.

12. Possible new fee structures

Should the State decide to opt into implementing the Directive, apart from a new fee structure, consideration will need to be given to a range of issues such as the availability of solicitors in appropriate locations to provide the necessary additional services; the use of the Gardaí Custody Records to authenticate the claims process; the issue of telephone and other potential electronic consultations etc. It is proposed to address the issue of fees and resultant costs by firstly identifying a number of potential options that could form the basis of any new Scheme. A number of different approaches could be taken and while the delivery of the required legal services must be put in place, it will obviously be a pre-requisite that cost effectiveness and efficiency be achieved.

For the purposes of this exercise, the following individual options (or a combination of them) could represent the basis of a potential new fee structure:

- (1).** Create stand-alone fee structures for each new category of representation that will arise under the Directive with a set fee per case being implemented for each new category. This would operate in conjunction with the existing categories of representation that operate under the Scheme.
- (2).** Create new stand-alone fee structures for each new category of representation that will arise under the Directive with the fee being calculated on set hourly rates and the actual time spent at the Garda Station by the solicitor who provided the representation. This would operate in conjunction with the existing categories of representation that operate under the Scheme. A variation on this is where the hourly rates could be determined on a sliding scale.
- (3).** Create a new level of fixed fee that will incorporate both a consultation and the attendance at an interview and / or an identity line-up.
- (4).** Create a new hourly rate that will incorporate both a consultation and the attendance at an interview and / or an identity line-up. The hourly rate could be fixed or sliding.
- (5).** Based on the above options, create a new fee where the existing set fee for a telephone consultation is incorporated into any other fee that may arise later for either a visit consultation or an attendance at an interview.
- (6).** Create a new single set fee to cover all work done by a solicitor for a single detainee under the Garda Station Scheme.
- (7).** Create a new set fee that will incorporate all work done by the solicitor at the Garda Station with the representation provided at Court Hearing level.
- (8).** Place a cap on the overall payment that may be made to a solicitor in respect of detainee interview attendance.
- (9).** For certain more minor offences consider if it would be possible to limit the solicitor engagement to just a telephone consultation.
- (10).** Based on the above options, place a cap on the levels of overall fees that will apply to the various detentions that may occur under each piece of legislation covered under the Scheme.

In its consideration of the various options, the Group noted that a constant factor in all is the presence of a solicitor in the Garda Station for a readily verifiable period of time.

All of the above options were considered by the Working Group which determined that the ones most worthy of meaningful consideration were those based on the implementation of a fee structure incorporating an hourly rate to provide for the time spent by a solicitor in actual attendance and representation on behalf of the detainee at the Garda Station.

In this regard, it was considered that for practical reasons it would be necessary to retain a separate process to provide for any detainee / solicitor telephone consultations that will occur in a case. In some instances no further solicitor involvement will be required after a telephone consultation. In those instances where an actual visit to the Garda Station is required after the telephone consultation, it is

considered that it would not be practical to try to incorporate the fee for the telephone consultation with that arising for the solicitor's later attendance at the Garda Station.

13. Overall Costs

The Legal Aid Board commenced administering the Garda Station Scheme in October 2011 and has collated a range of statistics on various aspects of the Scheme's operation since that commencement date. Detailed statistics are not available for prior years. Though only relating to a limited period, the statistics collated in 2012 are informative and are included in Appendix B for information purposes. The overall cost (post tax) of the Scheme in recent years is as follows:

Year	Expenditure (post tax)
2009	€1,001,000
2010	€1,280,000
2011	€1,173,000
2012	€887,500

While it is difficult to provide informed estimates at this stage of how usage of the scheme might evolve, using the figures collated by the Legal Aid Board in 2012 it is possible to begin to explore the costs that may arise over the coming years. For example, the Board processed in excess of 4,000 claims for solicitor consultations with individual detainees in 2012. The Board's records clearly indicate that the vast majority of those cases included a visit to the station by the solicitor to consult in person with the detainee. It is considered that in such circumstances where the detainee and solicitor believe that it was necessary to have the physical presence of the solicitor at the Garda Station to carry out the consultation (rather than by just a telephone consultation), it is reasonable to extrapolate that they will also require that the solicitor should sit in on the Garda / detainee interviews that arise.

Accordingly, for the purposes of attempting to put a cost on the new circumstances that will arise under the proposed Directive, it would be appropriate as a starting point to estimate notional costs for the legal representation of some 4,000 detentions arising each year where a solicitor would be required to attend at least one interview on behalf of the detainee at the State's expense.

However, given that some 20,000 Garda detentions arise every year and taking into account the potential for the demand to increase as the Scheme develops further, for comparison purposes and to allow some consideration of future potential costs in the coming years, notional costs for 6,000 and 8,000 detentions are also included. Of course, it is entirely possible that as the Scheme's profile increases, demand could significantly increase beyond the levels estimated and, accordingly, the estimates set out below may well be exceeded. In this regard, it is noted that in England and Wales some 50% of detainees in police stations request legal advice.

While, as discussed above, a range of different options might be available under which the new fees system could be structured, the Working Group considered that

the best approach from both the practical administrative and cost efficiency perspectives would be to consider the introduction of a system to cater for the solicitor's engagement on the following basic method:

Establishing an hourly rate for the entire time spent by the solicitor in actually attending the Garda Station in the provision of detainee / solicitor consultations, the attendance at Garda / detainee interviews and also identity parades.

It should be added that it would still be necessary to retain a stand-alone process to facilitate the provision of telephone detainee / solicitor consultations. It may be useful at this stage, too, to outline the current payment regimes in the jurisdictions closest to us if only as a point of information:

	England and Wales	Scotland	Northern Ireland	Ireland
Telephone Advice	£30.25 - £31.45 (€35.79 – 37.21)		£19.33 (€22.87)	€39.59 (fixed individual consultation fee)
Advice in Police/Garda Station	£52 - £80 per hour up to fixed fee of £138.72 - £301 (€61.49 – 94.58 up to fixed fee of €163.94 – 355.73)	£11.60 per quarter hour to £15.47 (unsociable hours – 10pm – 7am)). Minimum of £30.94 (€13.70 - €18.28. Minimum of €36.55)	£43.25 per hour. £24.25 travel. (€51.08 per hour, €28.64 travel)	€97.22 (standard hours) €132.19 (unsociable hours) (Both are fixed individual consultation fees)

14. Potential costing of options

A range of possible expenditure figures based on the above proposal has been developed and are presented in the table below. In presenting the various figures it may be noted that while statistics from individual Garda Stations are not available to accurately inform the process, anecdotal evidence would indicate that solicitor consultations with detainees can regularly be for less than 30 minutes but that for more complex cases there can be a number of consultations over the course of the detention resulting in significantly longer attendance times being required of the solicitor at the station. Inevitably, solicitor attendance time at the Garda Station will

increase if the solicitor is also required to attend at Garda/detainee interviews and it is reasonable to assume that attendance time will vary depending on the nature of the alleged offence and the legislation under which the person is detained.

In that regard, a number of statutes confer both general and specific powers on the Gardaí to detain suspects. Where a person is arrested and subsequently detained in a Garda station for the proper investigation of the offence(s) for which the person is arrested, the detention may be under one of the following provisions and for the indicated length of time:

- Section 4 of the Criminal Justice Act, 1984 as amended (*maximum detention period of 24 hours excluding time period not included in reckoning the period of detention*);
- Section 30 of the Offences Against the State Act, 1939 as amended. (*maximum detention period of 72 hours excluding time period not included in reckoning the period of detention*);
- Section 2 of the Criminal Justice (Drug Trafficking) Act, 1996 (*maximum detention period of 168 hours excluding time period not included in reckoning the period of detention*);
- Section 42 of the Criminal Justice Act, 1999 (where the suspect is in prison) (*maximum detention period of 24 hours excluding time period not included in reckoning the period of detention*);
- Section 50 of the Criminal Justice Act, 2007 (*maximum detention period of 168 hours excluding time period not included in reckoning the period of detention*);
- Section 16 or 17 of the Criminal Procedure Act 2010 (*maximum detention period of 24 hours excluding time period not included in reckoning the period of detention*).

Thus, depending on the piece of legislation that facilitates the detention, the period of Garda Station detention may extend from 24 hours to 168 hours. Figures collated by the Legal Aid Board for 2012 indicate that of the 4,155 claims authorised for payment, some 80% (3,350) fell under Section 4 of the Criminal Justice Act, 1984 with a further 8% (345) coming within Section 2 of the Criminal Justice (Drug Trafficking) Act, 1996. Thus, should the Scheme be extended as proposed, the great bulk of cases involving solicitor attendance during questioning by Gardai will be related to cases involving detention periods of a maximum of 24 hours. However, in a considerable number of cases, the solicitor's attendance could be required on a regular basis over a period of 7 days.

The table below provides a notional costing for the solicitor's total attendance time at the Garda Station from a minimum of 30 minutes up to a maximum of eight hours. While it is believed that this offers a fair representation of the great majority of cases that will arise, there will be situations as noted above where the attendance time may far exceed this figure.

In presenting a range of potential rates payable per hour, it may be noted that the current rate for telephone consultation (regardless of the length of the consultation)

is set at €39.59 and the standard rate for an individual solicitor consultation at the Garda Station (regardless of the length of the consultation) is set at €97.22. The Working Group's attention has also been drawn to the fees currently payable under the main Criminal Legal Aid Scheme³⁰ The Group is also of the view that provision needs to be made for services provided in what has been termed 'unsociable hours'. The current premium for unsociable hours consultations within the Garda Station Advice Scheme is of the order of a third of the amount payable during the day. There seems little reason to alter this arrangement. Unsociable hours in this jurisdiction run from 7pm to 9am whereas in Scotland they run from 10pm to 7am. It would appear reasonable to also continue with the arrangements currently in place here relating to unsociable hours. It is estimated that the premium in respect of unsociable hours is likely to add at least 14% to the base hourly cost of the revised scheme. This calculation is based on the Legal Aid Board's experience with the current Garda Station Advice Scheme.

It should be noted that some 3,200 telephone consultations also took place in 2012 with the fee, as noted earlier, set at €39.59 per consultation regardless of when they occur. Such telephone consultations cost some €125,000 (pre-tax) in 2012. This expenditure would continue in parallel with the revised scheme as costed in the table below.

An obvious challenge lies in establishing an appropriate hourly rate for the time spent by the solicitor in actually attending the Garda Station in the provision of detainee / solicitor consultations, the attendance at Garda / detainee interviews and also identity parades. Some options are presented below in order to provide an indication of possible costs arising under a new Scheme.

It will be recalled that expenditure under the existing Garda Station Scheme in 2012 was some €887,500 (post tax). Examination of the table below clearly indicates that expenditure under the Garda Scheme would significantly increase.

For example, assuming that 4,000 detentions occurred in a single year and averaging out at a five hour solicitor involvement per case and taking a basic hourly payable rate of €100 per hour, expenditure would rise to some €2m per annum. The figure does not include the costs incurred on solicitor / detainee telephone consultations. Nor does the table below embrace the additional administrative costs that will also arise.

It might be added too that An Garda Síochána anticipates additional costs relating to Garda Station detentions arising from the transcription of interview tapes/DVDs which will become a matter of further consideration in light of developments in legislation dispensing with the legal requirement to take contemporaneous notes of interviews in order to pave the way for the implementation of Section 57 of the Criminal Justice Act, 2007.

The table below sets out an indication of the potential expenditure that could arise based on a rate payable to solicitors ranging from €40 per hour to €100 per hour.

³⁰ SI 234 of 1976, SI 33 of 1978, SI 362 and 363 of 2011

Time spent by solicitor at Garda Station	Hourly rate (€)	Overall pre-tax cost per 4000 detentions (€) (including payment for unsociable hours)	Overall pre-tax cost per 6000 detentions(€) (including payment for unsociable hours)	Overall pre-tax cost per 8,000 detentions (€) (including payment for unsociable hours)
30 minutes	40	91,000	137,000	183,000
1 hour	40	183,000	274,000	365,000
2 hours	40	365,000	547,000	730,000
5 hours	40	912,000	1,368,000	1,824,000
8 hour	40	1,460,000	2,189,000	2,918,000
30 minutes	50	114,000	171,000	228,000
1 hour	50	228,000	342,000	456,000
2 hours	50	456,000	884,000	912,000
5 hours	50	1,140,000	1,710,000	2,280,000
8 hour	50	1,824,000	2,736,000	3,648,000
30 minutes	75	171,000	257,000	342,000
1 hour	75	342,000	513,000	684,000
2 hour	75	684,000	1,026,000	1,368,000
5 hour	75	1,710,000	2,565,000	3,420,000
8 hour	75	2,736,000	4,104,000	5,472,000
30 minutes	100	228,000	342,000	456,000
1 hour	100	456,000	684,000	912,000
2 hour	100	912,000	1,368,000	1,824,000
5 hour	100	2,280,000	3,420,000	4,560,000
8 hour	100	3,648,000	5,472,000	7,296,000

15. Summary and Recommendations

1. Even if Ireland chooses not to opt into the Directive, the trend in case law of the European Court of Human Rights suggests that current policy of not permitting solicitors to be present during Garda interviews with detainees will come under pressure in the medium term.

2. The common law jurisdictions closest to Ireland currently provide for such solicitor presence.

- In England and Wales, there is no express right to have a solicitor present during police interviews, but such presence must be afforded if requested. There are no financial tests for legal advice in this instance. All calls for advice are routed through the Criminal Defence Services (CDS) Direct Scheme.
- In Scotland, a new Police Station Duty Scheme and Solicitor Contact Line are in place since July 2011. The latter is operated by solicitors employed by the Legal Aid Board and located at its HQ in Edinburgh. These solicitors can access solicitors chosen by the detainee or, if none is chosen, provide telephone advice and even advice in the Police Station.
- In Northern Ireland a person being interviewed by the police in connection with criminal charges is entitled to free legal aid for Police Station advice, including having the solicitor present when they are interviewed. There is no means testing and no contributions are payable.

3. The Working Group noted the fact that some 20-25% of current detainees seek legal advice under the Garda Station Legal Advice Scheme. In 2012 this came to about 4,100 such requests. Taking account of the trends in the jurisdictions referred to above, the Working Group is of the view that this percentage could increase quite significantly and that planning for opting in to the Directive should provide for the possibility of an increase over time up to 50% of detainees. In 2012 terms, this would mean an increase from 4,000 to 10,000.

4. As well as the extra costs payable to solicitors arising from opting in to the Directive, further costs would inevitably be incurred in the administration of the revised scheme, such costs arising for the most part in the Legal Aid Board and the Financial Shared Services.

5. 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.

6. The existing Garda Station Legal Advice Scheme offers the best framework to which the processes and structures required for a revised scheme can be appended.

7. Consideration should be given to having the income thresholds for the Garda Station Scheme and the Civil Legal Aid Scheme at the same levels.

8. The current practice of detainees having free choice of solicitor should remain.

9. A panel of solicitors, similar to that operating under the Criminal Legal Aid Scheme and the Civil Legal Aid Scheme, should be established. This panel would be utilised in the case of detainees wishing to avail of legal advice under the scheme but who do not request a named solicitor. Specific terms and conditions should apply to inclusion on the panel and it should be administered centrally.

10. Fees payable to solicitors under the revised Scheme should be in the form of an hourly rate for the time spent in actual attendance and representation on behalf of the detainee at the Garda Station. A premium should be payable in respect of solicitor presence during unsociable hours.

11. There should be continued provision for a separate specific fee for detainee/solicitor telephone consultations.

Appendix A

Legal Services for Detained Suspects in other Jurisdictions

(1) England & Wales

There is no express right to have a solicitor present during any interview, but such presence must be afforded if requested.³¹

Until 1st April 2013, the right of persons in custody to access to legal advice came from the Police and Criminal Evidence Act 1984 (PACE). This has recently been superseded by Section 13 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) and its accompanying Regulations.³²

The new governing Section states, in relevant part:

13 (1) Initial advice and initial assistance are to be available under this Part to an individual who is arrested and held in custody at a Police Station or other premises if the Director [of legal aid casework] has determined that the individual qualifies for such advice and assistance in accordance with this Part (and has not withdrawn the determination).

(7) For the purposes of this section, in relation to an individual who is in custody—

“initial advice” means advice as to how the law in relation to a matter relevant to the individual’s arrest applies in particular circumstances and as to the steps that might be taken having regard to how it applies;

“initial assistance” means assistance in taking any of those steps which the individual might reasonably take while in custody, including assistance in the form of advocacy.

However, accompanying regulations clarify that individual determinations on financial eligibility are not made in relation to persons in police custody:

5 (1) The Director must make a determination in respect of an individual’s application for relevant advice and assistance without making a determination in respect of that individual’s financial resources.³³

³¹ *Carloway Review* (Edinburgh, 2011).

³² The guidelines contained in Code C to PACE continue to apply.

³³ The Criminal Legal Aid (Financial Resources) Regulations 2013 - SI 2013 No. 471. Note: The UK government had intended to implement individual assessments for those in custody. The Law Society of England and Wales takes credit for pressurising the government into a u-turn on this measure - <http://www.lawsociety.org.uk/representation/parliamentary-briefings/documents/laspo-amendments-and-concessions/>

In terms of how the right is provided to detainees, PACE introduced a Duty Solicitor Call Centre in 1984, the idea being that no matter what time of day a person was arrested, a solicitor would always be available to dispense advice. The scheme was initially of limited scope, covering only the most minor offences, but was gradually expanded. Wycherley notes that:

*“In October 2005, the Legal Services Commission (LSC) introduced a pilot Criminal Defence Services (CDS) Direct scheme to provide telephone-only advice to suspects who requested the duty solicitor for specified less serious offences. The police would, as previously, pass on such requests to the Defence Solicitor Call Centre which would then refer those who seemed eligible for telephone-only advice to CDS Direct, rather than to the duty solicitor. The scheme was made national in April 2008 and under this new scheme, quite controversially, all requests for legal advice are routed first to a CDS Direct adviser, regardless of whether the case is covered by the CDS Direct scheme or whether the suspect intends to pay privately or not”.*³⁴

LASPO Regulations have now put this practice on a secure legislative footing.³⁵ In 1989, Andrew Sanders *et al* found that telephone-only advice was provided in as many as a third of all requests for legal advice. What is significant about these figures is that suspects place very little weight on the value of such advice. 46 percent of those interviewed described it as worthless, compared to just 8 percent of those attended to by a legal adviser in a police station.³⁶

Under both PACE and LASPO, the legal adviser who attends the police station need not be a solicitor. Under the Access to Justice Act 1999, a “Police Station Representative” may attend to give advice and assistance to a person in custody. The Carloway Review found significant delegation to non-solicitors when PACE was first introduced in England and Wales, particularly for calls outside of normal working hours. It found that:

There was a variety of reasons for this, partly, but not exclusively, related to the legal aid rates for police station work. The use of non-qualified persons posed a problem in relation to the quality of advice being tendered, which of itself in turn discouraged suspects from seeking advice. Even in relation to qualified persons, research indicated that, to be effective, the regime required the solicitor to be able to establish and maintain a relationship of trust with the

³⁴ Wycherley, *Custodial Legal Advice in Ireland: Lessons Learned from England and Wales* (2010) 28 I.L.T. 190-195. References omitted.

³⁵ Criminal Legal Aid (General) Regulations. SI 2013 No. 9.

8. An application for initial advice and initial assistance must be made—

- (a) to the Defence Solicitor Call Centre established by the Lord Chancellor under section 2 of the Act (arrangements); and
- (b) in accordance with the requirements set out in the 2010 Standard Crime Contract for the Unit of Work which is the subject of the application.

³⁶ Sanders, A., Bridges, L., Mulvaney, A., and Crozier, G., *Advice and Assistance at Police Stations and the 24 Hour Solicitor Scheme* (London: Lord Chancellor’s Department, 1989). Quoted in Wycherley, *supra*.

*client. This necessitated a willingness on the solicitor's part to take an active interest in the client's predicament, including his/her welfare, to spend sufficient time to understand the nature and extent of that predicament and to provide reasonably comprehensive advice where appropriate.*³⁷

In general, the Police must provide a detainee with immediate access to his legal representative, and may only delay this in certain exceptional circumstances such as a threat to life and limb, or a terrorist threat. In practice, there is little information on whether this immediate access is in fact provided. Under LASPO, all requests for legal advice will be routed through the Defence Solicitor Call Centre, but it remains to be seen how this will factor into representative attendance at Police Stations.

Indeed, it is difficult to see what exactly the differences are between the PACE system and the LASPO system in relation to detainee access to legal advice. It seems that the main changes are the placement of the routine use of the "telephone gateway" on a secure legislative footing, and the downgrading of the guarantee against means testing for access to advice to regulatory status; this gives rise to the possibility that individual means testing may be implemented in the future.

As it stands, the solicitor or representative is paid in accordance with the Standard Crime Contract 2010, which has been updated to reflect the LASPO changes. The accompanying Payment Annex was updated in April 2012. The Police Station Telephone Advice Fixed Fee is £31.45 in London and £30.25 elsewhere, with a Fixed Acceptance Fee of £8.00 per matter. Solicitors or Representatives may claim an hourly rate of between £52 and £80 for attendance at a station, depending on their status and location, up to a total fixed fee of between £138.72 in Blackpool, Lancashire, and £301 in Heathrow, Greater London.

(2) Scotland³⁸

The key legislation in Scotland is the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which was passed by the Parliament on 27th October 2010 in the wake of the decision of the United Kingdom Supreme Court in *Cadder v. HM Advocate*³⁹, on 26th October 2010 (relying on the reasoning in the European Court of Human Rights' decision in *Salduz v. Turkey*⁴⁰).

It is interesting to note that after publication of the Carloway Review, Kenny McAskill, the Scottish Justice Minister, was quoted as saying, "*Following the UK Supreme Court's ruling on the Cadder case last year, we immediately passed emergency legislation to protect the victims of crime and make sure our police could continue to investigate crime effectively.*"⁴¹ i.e. the 2010 Act was passed not to ensure access to justice for suspects, but to limit the effect of the ruling in *Cadder*.

³⁷ *Carloway Review*, supra., at 153-154 References omitted.

³⁸ Some of the information in this section is gleaned from *The Carloway Review*, which analysed the impact of the 2010 Act and made far-reaching recommendations for change to the Scottish justice system in general.

³⁹ *Cadder v. HM Advocate* [2010] UKSC 43

⁴⁰ *Salduz v. Turkey* 36391/02 [2008] ECHR 1542

⁴¹ Scottish Government Press Release made 17th November 2011.
<http://www.scotland.gov.uk/News/Releases/2011/11/17105250>

The recommendations made in the review have not been implemented as yet, and were subject to further consultation, which closed in March 2013. Thus, this section will concentrate on law and practice as they currently stand in Scotland.

Section 1 of the 2010 Act inserts a new Section 15A into the Criminal Procedure (Scotland) Act 1995, including the following sub-sections:

(3) The suspect also has the right to have a private consultation with a solicitor—

(a) before any questioning of the suspect by a constable begins, and

(b) at any other time during such questioning.

(5) In subsection (3), “consultation” means consultation by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone.

(7) Where the suspect wishes to exercise a right to have intimation sent under subsection (2), the intimation must be sent by a constable—

(a) without delay, or

(b) if some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is necessary.

As such, a suspect who is detained, arrested or merely attending voluntarily at a police station now has a statutory right to a private consultation with a solicitor⁴² before questioning begins and at any other time during questioning. This consultation may be by telephone as well as in person.⁴³

The new Police Station Duty Scheme and Solicitor Contact Line which came into force on 4 July 2011 following the enactment of the emergency legislation as a response to the Cadder case has the following key aspects:

- A Solicitor Contact Line operated by solicitors employed by the Legal Aid Board and located in LAB HQ in Edinburgh provides 24/7 cover and is the initial point of contact for the police after a suspect indicates that he/she wishes to receive legal advice.
- If the suspect has their own solicitor, the contact line solicitors contact that named solicitor or firm so that they can provide telephone advice or attend in person if this is needed.

⁴² There is no provision similar to that in England and Wales which authorises “Police Station Representatives”, allowing legal assistance from anyone other than a solicitor in Scottish law.

⁴³ It is interesting to note that during the consultation process on the *Carloway Review*, the responses collated by Fawcett & Mulholland in, *Response to Carloway – Reforming Scots Criminal Law and Practice: The Carloway Report – Analysis of Consultation Responses* (Scottish Government Social Research, 2012) they state:

One advocacy respondent expressed the view that “it is not possible to properly represent the interests of a suspect over the telephone”. The same respondent noted that the Scottish Legal Aid Board’s Solicitor Contact Line has focused solely on provision of advice concerning the police interview and expressed agreement with Lord Carloway that the role is much wider.

- Where there is no named solicitor or firm or the named solicitor is unable to provide advice, the contact line solicitors will provide telephone advice and, where a personal attendance is required, arrange for a duty solicitor to attend with the suspect.
- All criminal solicitors were invited in 2011 to apply for inclusion on the 49 new Police Station Duty Plans (now being amalgamated) which were drafted up. These plans are rotas of local solicitors' firms and not individual solicitors, the intention being that this would allow for greater flexibility. The eligibility criteria for inclusion are: that solicitors must have a practising certificate, be accepted onto the Criminal Legal Assistance Register, have a place of business in the particular Sheriff court area, and be experienced and/or regularly practising criminal solicitors.
- Named solicitors or duty solicitors providing advice to suspects in police stations do so under the existing arrangements with enhanced payments for work carried out between 10pm and 7am. The upper income and capital thresholds were removed so that every suspect qualifies for advice and assistance, although contributions remain in place.

Planning for this new process was originally done on the understanding that there were about 100 detentions for questioning per day, with about 25% of these suspects seeking legal advice. The daily average of suspects seeking legal advice has, however, been much greater and has been consistently around the 60 mark over the past 2 years. As a result, the solicitor contact line now has 11 solicitors covering 12 hour shifts.

The proportion of suspects receiving advice from the Solicitor Contact Line is about a third with the other two thirds referred to named solicitors.

Where a local attendance is requested or required, this will normally be provided by the named solicitor if there is one. If the suspect does not have a solicitor, or that solicitor cannot attend, attendances will then be provided by the local duty solicitor, the Public Defender Solicitors Office (PDSO) or off-duty solicitors from the contact line.

The Solicitor Contact Line appears to have developed a positive reputation amongst the legal profession and with the police. The Carlway report described the service as a "sensible and practical approach in which efforts are made to contact the solicitor requested by the suspect". Justice, the UK based human rights and law reform organisation have worked with the Contact Line and have observed that "there is advice available within a reasonable period of time" and that the "system is operating satisfactorily as a mechanism of preserving choice".

The total cost of providing advice to clients in police stations in the year to the end of June 2012 was just over £820,000 comprising:

Solicitor Contact Line⁴⁴: £644,000

Grants of advice and assistance by private solicitors: £180,000.

⁴⁴ Costs include salaries, professional subscriptions, recruitment costs, travel, accommodation, office equipment/phones and other costs.

Section 2 of the 2010 Act inserts a new Section 8A into the Legal Aid (Scotland) Act 1986, which provides that advice and assistance is to be provided without reference to the financial limits set out in the 1986 Act.

In terms of how the assistance is financed, the Board notes that:

... If [a suspect's] income does exceed £245 [the statutory income threshold for criminal legal aid], Advice and Assistance can be provided, although the applicant would be required to pay a contribution up to £142. This only applies to advice given at a police station. If the client is subsequently charged, then the usual income and capital thresholds would apply for any subsequent applications for ABWOR [Assistance by Way of Representation] or summary criminal legal aid.⁴⁵

The Police Station Duty Guidelines, issued in May 2011, provide that the standard criminal advice and assistance rate is £11.60 per quarter hour, with an increase of one third to £15.47 per quarter hour during the hours of 22.00 and 07.00. During these hours, where the provision of advice and assistance takes less than 30 minutes, a minimum payment of £30.94 is still paid.

(3) Northern Ireland

PACE⁴⁶, updated in 2012, applies to legal advice and assistance at police stations in Northern Ireland, and has not been affected by the recent commencement of LASPO in England and Wales.

A person being interviewed by the police in connection with criminal charges is entitled to free legal aid for police station advice. This scheme is not means tested and no contributions are payable.

The basic principle from a legal aid point of view is that any solicitor in private practice with a practicing certificate is entitled to provide advice at a police station. A detainee in a police station can phone his/her solicitor of choice or be given a phone book to choose a solicitor.

PACE Code C states:

6.4 ... Whenever legal advice is requested, and unless [an exception, such as risk to life or limb, or potential destruction of evidence] applies, the custody officer must act without delay to secure the provision of such advice.

6.7 A detainee who has been permitted to consult a solicitor shall be entitled on request to have the solicitor present when they are interviewed...⁴⁷

⁴⁵ Scottish Legal Aid Board Criminal Legal Assistance Update January 2013, available at http://www.slab.org.uk/common/documents/Criminal_Legal_Assistance_Mailshot31Jan13.pdf

⁴⁶ Police and Criminal Evidence (Northern Ireland) Order 1989. Code C, Chapter 6 deals with the Right to Legal Advice.

6.12 If a solicitor arrives at the station to see a particular person, that person must, unless [an exception] applies, be so informed whether or not they are being interviewed and asked if they would like to see the solicitor.

In theory, the individual can receive telephone advice but this is likely to be limited to situations such as arrest on a bench warrant when the solicitor will meet the individual next day in court. The reality in Northern Ireland is that the vast majority of cases involve face-to-face consultations.

The rates for police station advice are as follows:

- £43.25 per hour.
- £24.25 for travel and waiting
- £19.33 for telephone advice
- 37.5p mileage.

If the advice is provided during 'unsociable hours' (i.e. between 7pm and 9am on weekdays and at anytime over weekends or public holidays) then a one third uplift applies.

It might be noted that in Northern Ireland only qualified solicitors can provide the advice; paralegals are not permitted to do this work.

(4) USA

The right to the presence of an attorney during police questioning emerged from the 1964 Supreme Court ruling in *Escobedo v. Illinois*,⁴⁸ which rooted the right in the Sixth Amendment to the US Constitution. Later, in *Miranda v. Arizona*⁴⁹ this was implicitly overruled by the holding that pre-indictment interrogations violate the right to silence, grounded in the Fifth Amendment. Regardless of its basis, the right to an attorney is now contained in the famous "Miranda Warning" given to suspects on arrest.

The general rule is as follows,

...[O]nce a warned suspect asserts his right to silence and requests counsel, the police must scrupulously respect his assertion of right. The Miranda Court strongly stated that once a warned suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Further, if the suspect indicates he wishes the

⁴⁷ The interview may commence prior to the arrival of the solicitor where one of the exceptions applies and there will be a delay in the arrival of the solicitor. Guidance Note 6A to Code C states:

In considering if paragraph 6.5(b) applies, the officer should, if practicable, ask the solicitor for an estimate of how long it will take to come to the station and relate this to the time detention is permitted, the time of day (i.e. whether the rest period under paragraph 12.2 is imminent) and the requirements of other investigations. If the solicitor is on their way or is to set off immediately, it will not normally be appropriate to begin an interview before they arrive. If it appears necessary to begin an interview before the solicitor's arrival, they should be given an indication of how long the police would be able to wait before 6.5(b) applies so there is an opportunity to make arrangements for someone else to provide legal advice.

⁴⁸ *Escobedo v. Illinois* 378 U.S. 478 (1964)

⁴⁹ *Miranda v. Arizona* 384 U.S. 436 (1966)

assistance of counsel before interrogation, the questioning must cease until he has counsel. At least with respect to counsel, the Court has created practically a per se rule barring the police from continuing or from reinitiating interrogation with a suspect requesting counsel until counsel is present, save only that the suspect himself may initiate further proceedings.⁵⁰

The police must allow a suspect to contact his/her own lawyer, or must contact the Public Defender's office on his/her behalf, and all questioning must then cease until the lawyer appears, or until the suspect has given a fully informed waiver.

States (as well as counties and cities) have Public Defender Offices which provide legal assistance to indigent clients. Public Defenders are government employees, paid at the same rate as Public Prosecutors (although they are widely acknowledged to be considerably more over-worked). Their attendance at the police station for any suspect is free of charge to the client, but if the person is subsequently charged and the Public Defender's Office is appointed as counsel, the suspect must immediately pay a kind of retainer-fee which in most states seems to be approximately \$50, and if found guilty will be expected to contribute what they can to the costs of the defence, in the form of 'recoupment'.

Counsel will be appointed where the applicant is in receipt of government benefits, or where his/her total income is at or below 187.5% of the Federal Poverty Guidelines. These are published each January by the Department of Health and Human Services and the level for 2013 is \$11,490 for a single person household. This means that a person must be earning less than \$21543.75, or approximately €16,500.

⁵⁰ FindLaw.com annotation on the Fifth Amendment. References omitted. Accessible at <http://constitution.findlaw.com/amendment5/annotation09.html>

Appendix B
Legal Aid Board / Garda Station Legal Advice Scheme
Annual Statistical Report 2012

1. General Statistics

1	Total cost of authorised claims this year (pre-tax)	€718,739
2	Cost of mileage authorised this year	€13,610
3	Overall number of claims authorised this year	4,155
4	Total claims authorised under Section 30, Offences Against the State Act 1939 (as amended) for the year	401
5	Total claims authorised under Section 4, Criminal Justice Act 1984 (as amended) for the year	3,350
6	Total claims authorised under Section 2, Criminal Justice (Drug Trafficking) Act 1996 (as amended) for the year	345
7	Total claims authorised under Section 50, Criminal Justice Act 2007 (as amended) for the year	59
8	Total claims authorised in respect of Extension Hearings for the year	27
9	Total cost of Extension Hearings for the year	€5,568
10	Total number of individual consultations authorised during the year in respect of day-time period (9am-7pm)	2,897
11	Total number of individual consultations authorised during the year in respect of night-time period (7pm-9am)	1,289
12	Total number of individual consultations authorised during the year in respect of weekend or bank holiday period	853
13	Total number of individual phone consultations authorised during the year	3,178
14	Total number of solicitor firms who had authorised claims during the year	225

2. Top 10 Garda Stations generating claims in 2012, the number and cost of claims authorised for each & the number of solicitor firms used to carry out the consultations

	Garda Station	No. of solicitor firms used	Overall cost per Garda Station	No. of claims
1	Store Street	21	€34,186	198
2	Henry Street - Limerick	9	€29,391	160
3	Tallaght	15	€27,043	140
4	Waterford	7	€23,354	135
5	Bridewell – Dublin	21	€21,277	128
6	Pearse Street	18	€24,909	125
7	Mountjoy	23	€20,567	119
8	Sligo	9	€16,720	118
9	Tralee	4	€16,188	108
10	Blanchardstown	22	€17,992	94

3. Garda Stations and number of claims authorised in 2012

Total number of Garda Stations on LAB database*	702
Total number of Garda Stations with claims processed	137
Total number of Garda Stations with no claims processed	565

* Number includes part time stations

4. Number of solicitor firms utilised by Garda Stations for the Garda Station Scheme in 2012

Number of Garda Stations that utilised 1 solicitor firm during the year	12
Number of Garda Stations that utilised 2 to 5 solicitor firms during the year	31
Number of Garda Stations that utilised 6 or more solicitor firms during the year	94

5. Number of claims authorised by Solicitor firm in 2012

Number of firms with 1-10 claims processed	148
Number of firms with 11-20 claims processed	34
Number of firms with 21-40 claims processed	17
Number of firms with 41 and over claims processed	26

6. Claims processed for top 5 Solicitor firms during the year

Solicitor firm	No. of claims	Cost of claims processed
Firm 1	277	€60,583
Firm 2	239	€41,466
Firm 3	173	€31,938
Firm 4	178	€31,780
Firm 5	170	€30,956

7. Repeat offenders/number of applications for legal aid in Garda Stations in 2012

Number of detainees with 1 application	3,707
Number of detainees with 2 to 4 applications	630
Number of detainees with 5 applications and over	36

8. Number of solicitor claims where maximum payable consultation limit was reached in 2012

Legislation	Maximum consultations allowed under legislation	Number of claims authorised at max rate
Section 4, Criminal Justice Act 1984	3	645 (out of 3,350)
Section 30, Offences Against The State Act 1939	7	8 (out of 401)
Section 2, Drug Trafficking Act 1996	11	1 (out of 345)
Section 50, Criminal Justice Act 2007	11	0 (out of 59)

9. Financial averages for the year

Average payment to a solicitor firm in 2012	€3,194
Average cost per solicitor claim in 2012	€173
Average cost per individual consultation in 2012	€87
Average number of claims per solicitor firm in 2012	18
Highest cost of an individual claim processed in 2012	€1,637
Lowest cost of an individual claim processed in 2012	€40

