ACCESS TO A LAWYER AND LEGAL AID – WHY WE ALL NEED THE EU – BUT HOW MUCH MORE REMAINS TO BE DONE

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Friends and colleagues

I am very grateful to the organisers for being given the opportunity to address you on the Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings and on the right to have a third-party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Irish legal history – why no-one should be complacent

You might very well question why it was considered appropriate that a lawyer from Ireland would address this topic.

As you all know while we are very enthusiastic and committed members of the European Union we, together with the United Kingdom, have a unique position insofar as measures in the Justice and Home Affairs area are concerned, namely that we have chosen an *a la carte* membership where we can, measure by measure, either opt in or opt out.

This is in Irelands case partly on the misguided premise that our domestic legal protections far exceed anything that might emanate from the EU or ECtHR.

Some political figures were more progressive and welcomed the Roadmap. But despite promising initial signs when we opted in to both Measure A and Measure B, ultimately we chose not to opt into Measure C the first of Directives we are discussing here today. We were never going to welcome a Legal Aid measure however.

As such they are not part of our law, (to my personal great regret).

Insofar as C is concerned it is precisely because it is not part of our law that we are a good case study as to how important the Measure is and why we are the losers for not enjoying the benefit of enhanced procedural safeguards that the Measure provides.

No right to silence and no lawyer present - 1998 edition

So that you will have the fullest opportunity of assessing the point I wish to make I would like to tell you a little bit about Irish criminal law and our constitutional framework in general.

As you know we are a common law country a legacy of our 800 year association with what is now the United Kingdom where the English common law was imposed on us in place of our own native Brehon law system.

The English model is of a constitutional monarchy with Parliament notionally answerable to a monarch but without a written Constitution.

When Ireland gained its independence in 1922 it will come as no surprise that effectively the first item of business in legal terms was to develop our own written Constitution that of *Saorstat Eireann*

As the fledgling State developed a more ambitious programme of constitutional law was undertaken and on in 1937 the people in popular referendum adopted *Bunreacht na hEireann,* the Irish Constitution, which remains our constitutional law to this day but with to date thirty four amendments. .

In terms of our subject for today two articles are particularly important.

Article 38 provides fair trial rights in relation to the criminal process.

Article 40 provides personal rights and critically, our courts have held since the 1960s that these personal rights are not in any way limited but are in fact unenumerated and fall to be identified on a case-by-case basis by the courts discharging their duty of protecting the fundamental rights of all citizens.

While in retrospect it is now almost humorous to reflect on what the state of the law was originally, it is embarrassing to say that until the introduction of our **Criminal Justice Act 1984** there was no general power of arrest for the purposes of detaining and questioning a person suspected of serious crime, for instance murder.

This gave rise to an entirely unacceptable practice of persons being stated to be *"helping the police with their enquiries"* where they were notionally free to leave the police station, save for the presence of several uniformed officers blocking their exit, while they were questioned about the offence under investigation.

Even more laughably was the fact that in dealing with our political crime a theme that I shall return to shortly, there was a power of arrest. Under our **Offences Against the State Act 1939** persons could be held for up to 48 hours for the investigation of scheduled offences, generally offences such as membership of an unlawful organisation, and other offences likely to be committed by political

activists such as explosives and malicious damage offences.

This legislation even criminalised failing to give an account of your movements to the police when asked until that provision was found to be a violation of Article 6 of the European Convention of Human Rights in the case of *Heaney and McGuinness -V -Ireland*.

Police frustrated at the lack of power of arrest for ordinary crime resorted to colourable devices whereby they would seek to use the Offences Against the State Act for the investigation of crimes which were clearly utterly non-political. For instance in a famous case a suspect was held for 48 hours of questioning in relation to a murder, but of course could not be held for that stated reason and instead was held for malicious damage (a scheduled OASA offence) to the knife, the murder weapon!.

It had been established in the case of *State (Healy) –v- Donoghue* in 1976 that part of the fair trial rights of any citizen was the right to have legal assistance, and if their means were not such that they could afford legal representation themselves for legal representation to be provided to them by the State.

Mirroring the discussions that took place in the court in Strasbourg there was the obvious issue as to <u>when</u> your right to representation engaged. Was it only when a charge was preferred and you were appearing before a court - or did you enjoy a right to legal assistance at the time that you were detained.

Our courts concluded in the leading case of *DPP-v-Healy 1990* that a person was entitled to the benefit of legal advice when they had lost their liberty and were being held for questioning. It appears that the idea of remaining during questioning itself did not find a voice at that time.

I should digress at this juncture to emphasise that with the exception of the provisions of Section 52 of the Offences Against the State Act, and certain other minor exceptions including under our road traffic laws, by and large citizens enjoyed an absolute right to silence while in conditions of detention. It followed therefore that citizens once advised of this right could protect their position legally by simply following that advice. A robust (and for this I suppose I mean experienced) detainee properly advised would simply assert their right to silence and the interviewing process would be pointless from the investigator's point of view. This led us all to take the view that a suspect's rights were adequately protected by the exercise of their having had the benefit of legal advice before they were subjected to questioning. Of course in individual cases there were difficulties in relation to what was a reasonable time to allow for a lawyer to arrive for the purpose of giving advice and questions as to whether questioning that was conducted before the arrival of the lawyer would be considered a violation of the Constitution. Today's topic does not require a detailed consideration of the various conflicting authorities on these topics.

In point of fact from the legal community's point of view the major criticism of our legal framework at that time was not that the access from the point of view of the suspect was inadequate, but rather that the State had not put in place a scheme of legal aid to pay lawyers for attending at the police stations in the first instance.

Lawyers by and large did respond to the request to attend to give advice to their client's pre-interview and this can be characterised, depending on your point of view, either as an exercise in civil liberties where principled lawyers gave up of their time freely to assist detained persons, or reflecting the *realpolitik* of a competitive legal environment where a lawyer who did not attend with his client when they were in custody was at a marked disadvantage compared to his competitors who would.

In our legal aid system considerable emphasis is placed on the right of choice of lawyer and therefore we do not have a duty solicitor scheme in place to provide advice in these situations, a topic again to which I will return later.

Accordingly as of August 1998 the Irish legal regime insofar as Measure C issues concerned was as follows.

1. The police enjoyed a right to detain suspects for ordinary crime for up to 24 hours during which they could interrogate them.
2. An arrested person had the right to notify a solicitor of the fact of their arrest (with no exceptions unlike what I understand to be the Spanish system).
3. The client had the right to consult with their solicitor, with a grey area as to whether or not questioning could commence before that consultation took place.

With very limited exceptions the client enjoyed an absolute right to silence.

The lawyer was not permitted to be present with his client during interrogation.

If a suspect was questioned in breach of these guarantees it was a breach of their constitutional right, and not merely a breach of a legal right, and the sanction that then applied was the automatic exclusion from admissibility as evidence of the content of the interview. This exclusionary rule has recently been abandoned by our Supreme Court in the case of *JC –v- DPP* 2015 to which I will return later. However as of 1998 it was fully established with some room for argument as to whether evidence obtained by the police as a result of what they learned in an unconstitutionally conducted interview, would be admitted in its own right. Colleagues will be familiar with the *" fruit of the poisoned tree"* argument and issues as to whether the evidence had an independence apart from the content of the interview itself.

Again on a theme that I imagine will be familiar to everyone in this room, Ireland

has over the years responded to violent political developments with emergency legislation. While opinions naturally differ ,my personal opinion is that immense damage has been done to our legal system by the emergency legislation which has been introduced, largely because it has tended to be introduced with inadequate reflection, and where the motivation has been to demonstrate a desire to be tough rather than to be strategic.

Quite ridiculous propositions were introduced into our law along the line including that we can convict persons of membership of unlawful organisations based simply on the opinion of a senior police officer that they are such a member. Other accepted forms of proof include a failure to deny a published report to the effect that you are a member of an unlawful organisation!

These special legislative powers were compounded by the fact that trials for terrorist offences were not conducted in the ordinary civil courts where serious charges are tried by a judge and jury but were instead tried in a Special Criminal Court which comprised three judges, albeit civilian professional judges. This I suppose was an improvement from the precursor which were military tribunal's comprising of three officers.

The fact that there had to be a special court system and special laws led the public generally to the belief that these persons were being convicted in the absence of fair procedures and indeed in the absence of real evidence because it was politically imperative to do so and the alternative of internment would have been more difficult politically.

(Colleagues will be aware that since the late 1960s a new phase of armed struggle against British occupation was underway in the North of Ireland. Armed uprising against colonial rule has been a feature of Irish history from the very beginning of British occupation. It tends to skip a generation or two from time to time but then to resume. There is a very real concern at home at present that if there is a hard Brexit, with the re-establishment of a physical border between Ireland north and south that this will be the catalyst for a new phase of politically motivated violence leading to a loss of life that we had all hoped was now well behind us.)

In any event the phase of political violence that had commenced in the late 1960s had developed into something of a stalemate by the early 1990s. The now world renowned Irish peace process had not alone led to a ceasefire which had been in place, with only minor breaches, since 1994 In addition an agreement in relation to the future of political life of the island of Ireland was achieved by the main players, known as The Good Friday Agreement it was signed on 10th April 1998 Among its many provisions was the important agreement that the principle of consent would govern the future political development of the island, namely that if a majority of persons north and south wished it Ireland could be reunited, but without consent this would not occur.

That agreement was put to a plebiscite throughout the island and was on 22nd May 1998

The only real opponents of the agreement were a splinter group from the main Irish Republican Army, known then and since as dissidents and operating under the title RIRA.

On 15th day of August 1998 this organisation placed a car bomb in the commercial centre of the town of Omagh, County Tyrone. The intention had been to cause disruption and chaos but to avoid loss of life. With this in mind a warning was to be communicated to the authorities which would give them adequate time to evacuate the commercial centre of the town in good time before the bomb exploded. The bomb planters got the warning wrong and the miscommunication meant that not alone was inadequate time available but the authorities directed people towards rather than away from the bomb site. The bomb exploded with a loss of twenty nine lives including some visitors from Spain.

The public outrage was immediate and given the scale of loss of life entirely predictable. This was not a military target but was an atrocity in direct contravention of the recently expressed will of the people as a whole.

Predictably the political response was a call for stronger powers directed at terrorist organisations. There were those at that time who called for internment without trial but that had been such a political own goal in the 1970s that no government would consider it. Instead, as had been the case in the past, the emphasis from a law making point of view was on securing convictions more readily. Politicians had long denounced the right to silence believing that of course only guilty people remain silent and if persons were forced to answer questions they would volunteer their guilt and our jails would be full.

Accordingly it was to the right of silence that the next legislative intervention was addressed.

August is in Ireland as in Spain a holiday month for our parliamentarians. In point of fact our parliamentarians enjoy lengthy holidays encompassing much of September as well. Notwithstanding the holiday month the legislature got to work effectively immediately and by 3rd September 1998 the **Offences Against the State Act 1998** had been passed. In legislative terms this is Usain Bolt compared to our normal legislative tortoise.

I mentioned previously that it was possible to secure convictions of membership of an unlawful organisation based on the bare opinion of a Garda Chief Superintendent.

The persons prosecuted for such crimes quickly realised that they should abandon their previous practice of not recognising the court and instead ought to give

evidence. They were permitted by their military superiors to give perjured evidence to the effect that they were not a member of the IRA. The courts then concluded that if they were faced with a bare opinion on the one hand and a bare denial of the other that they could not meet the criminal threshold of proof beyond a reasonable doubt and acquitted in those circumstances. Membership prosecutions fell into abeyance except in those cases where there was some other incriminating evidence available such as being found in possession of firearms or explosives.

In 1998 the Legislature took the opportunity of introducing a new category of corroborative evidence and they did so in Section 2 of the Act.

2. – (1) Where in any proceedings against a person for an offence under section 21 of the Act of 1939 evidence is given that the accused at any time before he or she was charged with the offence, on being questioned by a member of the Garda Sı´ocha´na in relation to the

offence, failed to answer any question material to the investigation of the offence, then the court in determining whether to send forward the accused for trial or whether there is a case to answer and the court (or subject to the judge's directions, the jury) in determining whether the accused is guilty of the offence may draw such inferences from the failure as appear proper; and the failure may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence in relation to the offence, but a person shall not be convicted of the offence solely on an inference drawn from such a failure.
(2) Subsection (1) shall not have effect unless the accused was told in ordinary language when being questioned what the effect of such a failure might be.
(3) Nothing in this section shall, in any proceedings –
(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his or her presence relating to the conduct in respect of which he or she is charged, in so far as evidence thereof would be admissible apart from this section, or
(b) be taken to preclude the drawing of any inference from the silence or other reaction of the accused which could be properly drawn apart from this section.
(4) In this section –
(a) references to any question material to the investigation include references to any question requesting the accused to give a full account of his or her movements, actions, activities or associations during any specified period,
(b) references to a failure to answer include references to the giving of an answer that is false or misleading and references to the silence or other reaction of the accused shall be construed accordingly.

As you can see it was now going to be corroboration that a person failed to answer a material question. As properly advised suspects tended to answer no questions at all it followed that the simple fact of arresting and questioning a suspect would lead to the Garda Chief Superintendent's opinion being corroborated by their probable approach to the interview process and the no comment stance they were taking. Equally the provisions of Section 5 meant that if a person was ultimately to challenge the evidence against them at trial the fact that they remain silent in custody could be used against them and inferences could be drawn.

This gave us as practitioners a significant dilemma how were we to advise detained persons as to what their legal obligations where in respect of questions that we did not have prior knowledge of and where we would not be permitted to be present with our clients to monitor the developing questioning. It was against that backdrop that I received a phone call in October 1998 to attend at a garda station where a client of mine was being held pursuant to the provisions of the Offences Against the State Act.

Upon my arrival at the station and having established what the background was I made a number of requests. First and foremost I asked that I be permitted to be present with my client during the questioning in the light of the change to the law that had relatively recently been introduced. This was refused.

I asked that before the interview process of my client was terminated that I would be given access to the note of the questions that had been posed and the answers given by my client and that he be given an opportunity of consulting privately with me with a view to identifying whether any question was truly "material" and as such required that he give an answer. As you can imagine the question as to whether or not a question is a "material" question may require special knowledge that only the questioner would hold. If for instance the question was a "did you meet Peter Csonka and Salvador Guerrero on last Wednesday" that is not apparent on the face of it a material question unless you are also appraised of the fact that the questioners believe that both Peter and Salvador are senior members of a terrorist organisation and that the meeting on Wednesday was in furtherance of the objectives of that organisation.

In any event I was refused that permission also.

I formed the view that questioning my client in the absence of a lawyer and of denying him the opportunity to have a considered review of an interview where inferences could be drawn against him or a failure to answer a material question could actually be considered evidence against him was such as to amount to a denial of his rights to fair procedures under the Irish Constitution.

We made an immediate application to the Irish High Court for his release from custody on the basis that the surrounding circumstances of his detention were unlawful and amounted to a violation of his constitutional rights. The Irish High Court agreed and Mr Lavery was released from custody in what was a highly significant case which was front-page news at the time because it was the first legal challenge to the 1998 legislation.

In point of fact Mr Lavery had been questioned not because of any belief that he was actually involved in terrorism but in the hope that he was in a position to give background information in relation to the provenance of a stolen car used as part of the bombing. He was not charged with any criminal offence arising from his arrest

and detention.

Ordinarily in the Irish legal system that would have been the end of the matter. The legal issues that arose from his detention were effectively moot as no further legal proceeding was or could arise.

In a departure from normal practice the Supreme Court agreed however to hear the State appeal against the High Court decision. This was presented as being necessary to protect the fundamental legal order of the State. The general presentation of the issues was political in the sense that the court was clearly being invited to do the right thing by protecting the peace process and making life more difficult for terrorist elements – notwithstanding the fact that it was now beyond doubt that Mr Lavery was not considered to be in that category and all.

The Supreme Court gave its decision which was allowed the State appeal and involved some fairly unflattering observations on the role of defence lawyers and I suppose on this defence lawyer in particular.

The Supreme Court laid down as a matter of constitutional law that while you had an entitlement to have a lawyer advise you prior to interrogation you did not have a constitutional right for your lawyer to be present with you and pointedly that it was for the gardai (police) and not for defence lawyers to determine how detentions should progress.

A familiar Strasbourg response

As a European I immediately lodged an application with the European Court of Human Rights to the effect that the failure to accord Mr Lavery the right to legal assistance while in detention in circumstances where he had very difficult legal terrain to negotiate, was a violation of his Article 6 rights.

I was confident that the Strasbourg court would be free of domestic political considerations and would see the broader picture of the unfairness of the situation confronting detainees under these legislative provisions.

To my horror our application was rejected, not on its merits, but on the basis that as no criminal charge had been laid against Mr Lavery he was not a *victim* and accordingly his complaint was not admissible. As we shall see shortly this issue is likely to come before the Strasbourg courts again from an Irish case.

EU or ECHR right – the more effective

In passing I would observe that I know many colleagues are firmly of the view that the unmanageable caseload of the ECtHR has lead it to abdicate its real responsibility by rejecting good cases on an administrative (unreviewable and

unreasoned !) basis – the very antithesis of guarding human rights. For this reason an enforceable EU right even if couched in or mirroring Convention language is in my view to be much preferred. This remains the position notwithstanding that ECHR is now (2003) part of our domestic law.

The position on the ground in Ireland post 1998

While things had improved marginally in Ireland namely we were paid on an ad hoc basis for attending at the garda stations, we were left with the unsatisfactory situation of being unable to be present with our clients during interrogation.

We watched obviously with interest at the developing jurisprudence in ECtHR including the leading cases of *Salduz* and *Bruscoe* and with particular relevance in an Irish context the case from the adjoining jurisdiction of Scotland *Cadder –v- Her Majesty's Advocate*. These cases we felt ably demonstrated the paucity of principle in the *Lavery* case which was considered by practitioners to have been wrongly decided – or so we thought.

MEASURE C

When is he ever going to talk about Measure C you might well ask. That rather elaborate introduction was to give you a sense of the situation that presented itself to lawyers practising in Ireland and I know that the same difficulties have been encountered in other jurisdictions.

We obviously therefore watched with interest at the developments in the field of procedural safeguards across the European Union and in particular the lofty commitments to those safeguards that accompanied the introduction of the Directive on the European Arrest Warrant. Unfortunately the Green Paper which set out significant procedural safeguards did not get the political support necessary to be implemented notwithstanding that its measures were not in my opinion particularly far reaching. It is to my eternal shame that Ireland were one of the six countries to block the Green Paper along with United Kingdom, Cyprus, Malta and the Czech and Slovak Republics.

The strategic decision was taken to try and introduce the measures on a piecemeal basis in the Stockholm roadmap. This as we know has worked well. Measure A on the right to interpretation and translation and Measure B on the right to information in criminal proceedings not alone were passed but Ireland exercised its entitlement to opt in to both Measures.

All the signs were that we were likely to opt in to Measure C also.

Regrettably we have been inclined to take our lead from what the larger common

law jurisdiction the United Kingdom has agreed to in justice and home affairs measures.

Measure C for the United Kingdom would not have been a particularly problematic directive given that solicitors had been permitted to be present at interviews in England and Wales since the **Police and Criminal Evidence Act 1984** and following the decision in the *Cadder* case they were now to be present in Scotland also. They had been present in interviews in the North of Ireland of course, and the exclusion of a solicitor from interview was a consideration in the case of *Murray and The United Kingdom* where Mr Murray won on that point, but failed on his argument in relation to inferences to which we shall return later.

So convinced was our government that it was only a matter of time when the decision of the Strasbourg Court, or Measure C itself, would lead to a situation where it was forced upon them to accommodate the desire for clients to have their solicitors with them during interview that a working group was established to examine the practical and particularly financial impacts on Ireland on having lawyers present during detention

The key recommendations following that study were as follows and I believe that they are worthy of consideration in the context of our analysis of Measure C.

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.

A change in Personnel Shatter out – Fitzgerald in

It is a truism, at least in my jurisdiction that minor changes in personnel can have dramatic consequences in terms of political developments and the Minister for Justice at the time was forced into resignation on an entirely different political controversy and the replacement minister had not the same level of commitment to Measure C and ultimately we did not opt in.

The Courts move or do they ?

However it was not only the government that were monitoring the developments politically and intellectually at European Union level on the issue of the right of access to a lawyer during interrogation. Our Supreme Court in the linked cases of *White* and *Gormley* decided on 6th March 2014 gave very heavy hint that whilst the issue of access to lawyers during interrogation did not arise directly in those appeals, were the issue to come before the courts again the court would hold that the denial of access to a solicitor in those circumstances might amount to a breach of constitutional rights.

The two most significant judgements were those of Mr Justice Hardiman and Mr Justice Clarke, both rightly regarded as heavyweights and realistically a class apart. Sadly Adrian Hardiman has since died but I know that he would be horrified at the thought of being referred to in a complimentary fashion at a meeting of European

lawyers as there was no greater Eurosceptic on the planet!

The *White* and *Gormley* decision had obvious significance and led to an immediate reaction from the Director of Public Prosecutions. She together with her advisers obviously were now faced with the prospect that future prosecutions could be compromised if the prevailing practice of excluding solicitors from garda interviews was permitted to continue. She gave a direction to the national police that in the event that a suspect asked for their solicitor to be present during detention that this request should be accommodated.

This was followed very shortly thereafter by a further direction to the effect that suspects should be advised positively of their entitlement to ask for a solicitor to be present. This second direction reflected long-standing constitutional understanding in Ireland that there is no point in having a constitutional right if you are not aware of having it.

A defence lawyers tsunami ?

What followed might be described with no exaggeration as a *tsunami* in the world of criminal defence practitioners.

With no warning, training or infrastructure we now had an entirely new service to deliver to our clients. This was after all an issue upon which defence lawyers had been united for many years in the view that the clients were being treated unfairly by being questioned in the absence of a legal adviser. The situation had become more acute since 1998 because emboldened by the decision of the Court of Human Rights in *Murray –v- The UK* where the quite ludicrously concluded that in certain circumstances common sense required that answers should be given to questions posed by police officers our legislature did what had been occurring also in the United Kingdom, namely to introduce quite a number of provisions where adverse inferences could be drawn against suspects for failure to answer questions in custody based against a certain factual background, or based upon their volunteering at trial an account which they did not volunteer in custody. These inference provisions were not confined to terrorist cases, or indeed to particularly serious or reprehensible type crime such as crimes against the person but covered all crime.

Section 2 of the Offences against the State (Amendment) Act 1998, as amended by Section 31 of the Criminal Justice Act 2007;
Section 72A of the Criminal Justice Act 2006, as inserted by Section 9 Criminal Justice (Amendment) Act 2009;
Section 18 of the Criminal Justice Act 1984, as substituted by Section 28 of the Criminal Justice Act 2007;
Section 19 of the Criminal Justice Act 1984, as substituted by Section 29 of the Criminal Justice Act 2007;
Section 19A of the Criminal Justice Act 1984, as inserted by Section 30 of the Criminal

Justice Act 2007.

The sole safeguard is a recognition on the part of the legislature that this was such an invasive power that it should not be used against a citizen unless that citizen had the benefit of legal advice.

***Quis Custodiet Ipsos Custodes* – but in reverse**

It is what happened next that is the most perplexing and which informs some of what I will have to say about the practicalities of Measure C.

The government, like every other government in the Union, are notoriously reluctant to commit to spending public funds. Even though there was a clear template identified in the report of the Moling Ryan Committee, we had all expected that there would be delay and procrastination in putting in place a scheme of legal aid to provide for the payment of lawyers rendering the service of advising clients in custody.

In point of fact they were relatively swift about putting a scheme in place and while practitioners were, true to form, critical of the level of remuneration, it would not be realistic to say that the scheme was entirely illogical or egregiously parsimonious.

My personal view is that the government realised that there was a political imperative to pay private practitioners and to do so promptly rather than face a situation where they may be called upon by the courts to establish a fully State operated public defender system to fill the gap. We will return to this topic shortly.

Government responded constructively what of the police ?.

The police who were not used to having lawyers present during their interviews faced an internal challenge within their own organisation from members who did not have the training as to how to deal with this new dispensation. However the response of the police force was imaginative and constructive. They prepared a guidance document for their own members which they permitted defence lawyers to review and have an input into. While not in any way tying our hands it nonetheless did reflect a broad measure of agreement as to what a properly conducted professional interview would entail. While it might be expected that they would give guidance to their members as to what would amount to impermissible conduct on the part of lawyers interrupting the flow of the interview they equally gave a constructive guidance as to what was required by way of pre-interview disclosure and how the act of disclosure should be verified and recorded so that there would be no dispute at a later stage as to whether or not the lawyer had adequate information provided to him to give his client advice.

Their motivation was mixed. Some of those with whom we were dealing were genuinely progressive and accepted that this was a right that had been identified as

an important one and which should be according to citizens. However equally the prize of being able to use the inference provisions, which had effectively been withering on the vine because they had not developed a workable scheme of ensuring that proper legal advice was available, was immense. These strong legislative provisions which had been ignored would now come into play with potentially dramatic results.

The police force were constructive what of the defence lawyers ?

My great surprise unfortunately derives from the response of my colleagues, the defence lawyers.

Having wholeheartedly complained about this gross violation of their client's rights for decades, when given the opportunity to do something about that violation their response was disappointing to say the least of it.

I had expected of course that there would be complaints about the level of remuneration (which I suspect would be considered to be quite generous in many European countries and is certainly not out of line with what is paid in our nearest neighbour the United Kingdom.)

There obviously were going to be scheduling difficulties for individual practitioners, and in the Irish model most of our law firms are small, either sole practitioners or no more than two or three defence lawyers. Self-evidently we can't be in two places at one time and if a detention is ongoing and a practitioner has court commitments something will suffer. Some of our detentions are potentially extremely long-running as in organised crime and in drug trafficking cases it can last for seven days. The capacity for disruption is obvious but one would have thought that with a degree of understanding from other professional colleagues and from the courts that these situations, on the seldom occasions that they do arise, can be accommodated.

There is also the option of having a working relationship or understanding with other colleagues who can provide cover in this eventuality.

Something else that I had not anticipated was that the colleagues actually took fright at the responsibility that was involved in giving professional guidance to clients in the heat of the interview process.

They had all been used to a system whereby you had a private consultation with your client where you could give relatively generic advice, and in the main to advise the client not to answer questions and then simply go on your way. For many reasons the uniform approach of not answering questions was in fact <u>bad advice</u> but it was commonplace and in real terms a colleague would not expect himself to be criticised by a court or elsewhere for having given that advice.

The new situation however was entirely different. Colleagues were now to be asked to evaluate disclosure for its evidential merit admissibility etc and then to advise their clients to make decisions that could potentially affect the defence of charges carrying mandatory life imprisonment.

The response I had hoped for was that colleagues would seek further training and to raise their level of professionalism to accommodate this new challenge.

In point of fact many colleagues have taken the reverse position, either refusing to attend at garda stations at all, which is bad enough, but even worse of the significant number of colleagues who attend at the garda stations but who advise their clients that there is no real benefit to the client in the solicitor remaining during the questioning and to simply continue to remain silent.

We know from studies which were conducted in the United Kingdom in relation to the take-up rate of advice during custody that it does fluctuate. Some communities are more likely to seek solicitors to be present throughout questioning than others. That has racial implications in the United Kingdom which they are keenly aware of as it reflects the level of distrust held by significant sections of the community with all institutions, even defence lawyers.

However the take-up rate of advice in Ireland is far lower than that in the United Kingdom, and even allowing for the fact that this is a new right that people are getting used to suggests to me that clients are being actively dissuaded by solicitors from insisting on their rights. I find that to be reprehensible as such advice is not merely incomplete and inaccurate but is plainly dishonest.

Having been at many interviews myself I know how easy it is for a client to depart from the advice that they have been given if they are overwhelmed by the presence of two skilled interrogators and they are by themselves. The presence of your own lawyer is not only reassuring but provides the essential support that is needed for a suspect to maintain their independence of will which is after all at the centre of our privilege against self-incrimination.

Loathe though I am to say it, and committed as I am to the right of clients to the practitioner of choice, I am increasingly of the view that private practitioners on their own will never fill the gap that is required to ensure that persons in detention will have the benefit of legal advice.

I think that the obligation must fall on the State to provide a duty solicitor scheme to guarantee that any detained person can have access to a solicitor when they most require one.

Two significant and relevant Supreme Court decisions

DPP v JC Supreme Court 2015

In this case the Court reversed earlier rulings going back 50 years to the effect that evidence obtained in breach of Constitutional as opposed to mere legal rights was automatically excluded as evidence. The issue will now fall to be determined on a case by case basis with a test clearly resonant with the formula "overall fairness of the proceedings" found in the Directive. On the issue of the presence of a lawyer during questioning this ruling is potentially highly pertinent,

7. The Test

7.1 For the reasons which I have sought to analyse in section 5 of this judgment, it seems to me that the elements of the test to be applied to the question of exclusion of evidence taken in circumstances of illegality or unconstitutionality are those identified in that section of the judgment.

7.2 In summary, the elements of the test are as follows:-

(i) The onus rests on the prosecution to establish the admissibility of all evidence. The test which follows is concerned with objections to the admissibility of evidence where the objection relates solely to the circumstances in which the evidence was gathered and does not concern the integrity or probative value of the evidence concerned.
(ii) Where objection is taken to the admissibility of evidence on the grounds that it was taken in circumstances of unconstitutionality, the onus remains on the prosecution to establish either:-

(a) that the evidence was not gathered in circumstances of unconstitutionality; or
(b) that, if it was, it remains appropriate for the Court to nonetheless admit the evidence.

The onus in seeking to justify the admission of evidence taken in unconstitutional circumstances places on the prosecution an obligation to explain the basis on which it is said that the evidence should, nonetheless, be admitted AND ALSO to establish any facts necessary to justify such a basis.
(iii) Any facts relied on by the prosecution to establish any of the matters referred to at (ii) must be established beyond reasonable doubt.

(iv) Where evidence is taken in deliberate and conscious violation of constitutional rights then the evidence should be excluded save in those exceptional circumstances considered in the existing jurisprudence. In this context deliberate and conscious refers to knowledge of the unconstitutionality of the taking of the relevant evidence rather than applying to the acts concerned. The assessment as to whether evidence was taken in deliberate and conscious violation of constitutional rights requires an analysis of the conduct or state of mind not only of the individual who actually gathered the evidence concerned but also any other senior

official or officials within the investigating or enforcement authority concerned who is involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned.

(v) Where evidence is taken in circumstances of unconstitutionality but where the prosecution establishes that same was not conscious and deliberate in the sense previously appearing, then a presumption against the admission of the relevant evidence arises. Such evidence should be admitted where the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments.

(vi) Evidence which is obtained or gathered in circumstances where same could not have been constitutionally obtained or gathered should not be admitted even if those involved in the relevant evidence gathering were unaware due to inadvertence of the absence of authority.

DPP V Barry Doyle 2017 Supreme Court

The final purely Irish development that I want to discuss with you is the recent and surprising decision of our Supreme Court in the case of Barry Doyle –v- DPP.

This is a case in which there was a mistaken identity murder where admissions to the crime were made by the accused.

An issue arose as to whether or not the admissions should be admitted into evidence having regard to the fact that they were made without a solicitor being present. The questioning predated the change of policy on the part of the Director of Public Prosecutions but the accused had had the benefit of legal advice albeit that the solicitor was not present during the particular interview.

In many ways it might be possible to dismiss the case as being a product of the particular time and of the very stark facts in the case. However the court went out of its way to reverse what had been the clear understanding in the White and Gormley case and expressly stated that there is no constitutional right in Ireland to the presence of a solicitor during questioning**.**

There is no denying that the Court moved back from the direction it had been going in holding that the right to a solicitor during questioning was not a <u>Constitutional</u> right.

The composition of the Court was very different to *Gormley and White*. Neither Clarke nor Hardiman JJ sat.

The following quotation from O'Donnell J shows that in truth the Court is not speaking with one voice on the issue.

[
Judgment of Mr. Justice O'Donnell delivered the 18th of January 2017

1 I hesitate to add further observations on the issue of entitlement to the presence of a lawyer when a substantial majority of the Court is agreed as to the result, but where a range of different views have been expressed by my colleagues as to the precise reasoning. Here, the fact is that although the accused/appellant had considerable access to a solicitor and advice and representation while in custody, he did not have a solicitor present during the entire period of his detention. Certain dicta, undoubtedly obiter, in DPP v. Gormley & White [2014] 2 I.R. 591 ("Gormley"), are relied on by the appellant as suggesting that a right to the presence of a solicitor during detention and questioning, is or may be, part of the guarantee of a fair trial on a criminal charge pursuant to Article 38 of the Constitution, and that accordingly, the statements made while in detention ought to have been excluded with the result that the conviction must be set aside and, presumably, a retrial ordered.

2 The position as I understand it is that Charleton J. for the majority of the Court concludes that the Constitution should be interpreted as requiring and guaranteeing access to a lawyer but that the Constitution does not require more, and in particular does not require presence of a lawyer during detention and questioning. MacMenamin J. holds that the Constitution does require that a lawyer be present for the full detention. However, he would hold that, insofar as the constitutional right goes, the decision of this Court in DPP v. JC [2015] I.E.S.C. 31, it would have the effect that the evidence would not be excluded. As for the claim based on the Convention, he concludes that the overall test is the fairness of the trial, and that it has not been established that the trial here was unfair. O'Malley J., would reserve the question of the existence of a constitutional right but considers that even if so, there must be a causal connection between any breach of that right, and the statements sought to be admitted. In the admittedly unusual circumstances in this case, the degree of engagement by the solicitor was more significant and central than might have been the case if he or she was merely present, and accordingly, she concludes that no causal connection has been established so that the statements made were properly admitted. McKechnie J. addresses the inducement issue primarily but would also allow the appellant's appeal on the ground that presence of a lawyer during questioning is now constitutionally required. An important additional consideration is that at a practical level, matters have moved on since the decision in Gormley, and the State has introduced a code of practice permitting the attendance of a solicitor if necessary under the legal aid scheme, when a suspect is questioned by the gardaí.

3 It might be thought that there is little benefit therefore in considering further this issue since all questioning of suspects in detention since 2015 has presumably been conducted pursuant to the Code of Practice on Access to a Solicitor by Persons in Garda Custody. However, the matter is of relevance, and is indeed acute, in respect of those cases which are still live within the system, and in which statements were taken prior to the introduction of the Code of Practice where access to a solicitor was permitted, but a solicitor was not present during all of the detention. Furthermore, it becomes important to consider the basis of any entitlement to the presence of a lawyer post-2015. If such presence is constitutionally required, and if indeed it is part of the Article 38 guarantee of trial in due course of law, then further consequences might flow in the event that it was not available for

any reason, and perhaps irrespective of whether evidence was obtained as a result. Moreover, questions remain as to the precise role of the solicitor during such detention. In my view it would only be productive of uncertainty and confusion to find that there is an entitlement to the presence of a lawyer without specifying exactly what is entailed in such presence. That may depend however on whether presence of the solicitor is something which is constitutionally required, and if so the precise constitutional basis. In any event, the issue also raises the difficult question discussed in the judgment of MacMenamin J. as to the consequences of a novel interpretation of the Constitution on existing cases. It is apparent therefore that issues are touched on in this case, which extend well beyond the outcome of the case, and accordingly I consider it necessary to set out my views.

4 Gormley was a case which explicitly raised the question of pursuing the questioning of a suspect or proceeding to take samples from him or her, in the period between the point at which a suspect had sought a solicitor's attendance, and the arrival of that solicitor at the garda station. This is clear from the questions certified in Mr. Gormley's case referred to at page 607 of the judgment of Clarke J.:

"1 Does the constitutional right of access require the commencement of questioning of a detained suspect (who has requested a solicitor) be postponed for a reasonable period of time to enable the solicitor who was contacted an opportunity attend at the garda station?
2 Is the constitutional right of access to legal advice of a detained suspect vindicated where members of An Garda Síochána make contact with a solicitor requested by the suspect but do not thereafter postpone the commencement of questioning for a reasonable period of time in order to enable the named solicitor to actually attend at the garda station and advise the suspect?" (Emphasis added)

In Mr. White's case, the question referred to at page 607, was whether:

"In circumstances where a person is in custody and has requested a solicitor, are members of An Garda Síochána, for the purpose of ensuring protection of rights of an accused, obliged not to take, or to cease if they have commenced taking, any forensic samples until such time as the person who has sought access to a solicitor, and that solicitor has indicated that he/she will attend, has had actual access to that solicitor." (Emphasis added)
5 It is clear therefore that the case proceeded on the basis that there was a constitutional right of access to a solicitor while in custody: the only question was whether evidence obtained before that solicitor arrived, could be admissible in a trial. Accordingly, the case did not, and could not, raise the question of a more general right to presence of a solicitor during detention. Accordingly, the observations made by the Court on that issue are obiter.

6 The Court referred to international jurisprudence. In the well known and controversial case of Miranda v. Arizona [1966] 384 U.S. 436, a five to four majority of the United States Supreme Court held that the US Constitution required a bright-line rule that a defendant had a right to the presence of a lawyer (if necessary provided by the state) during questioning, and to be informed of his right. This decision has been heavily qualified in subsequent years in the US, most obviously by the relative facility with which a waiver of the so called Miranda rights can be found. Significantly in 2011, the Supreme Court of Canada rejected the argument that Miranda should be "transplanted in Canadian soil": R v. Sinclair [2011] 3 S.C.R. 3.

7 The issue has been touched in the jurisprudence of the European Court of Human Rights. The leading decision is that of Salduz v. Turkey (2009) 49 E.H.R.R. 19. Mr. Salduz was 17 years of age, and was interrogated in the absence of his lawyer. The Grand Chamber held that this was a violation of his rights. Paragraph 3 of the Convention was a guarantee of fair trial, but could extend to the period before trial, and when the person was being questioned. The overall test was whether the proceedings were fair. In Salduz, the Court used language relating to the "benefit from the assistance of a lawyer … at the initial stages of police interrogation". Subsequently at paragraph 54, it referred to "early access to a lawyer", and "access to legal advice [as] a fundamental safeguard against ill-treatment". At paragraph 55 the judgment, the Court concluded that Article 6.1 required as a rule "access to a lawyer should be provided as and from the first interrogation of a suspect". Subsequently in Dayanan v. Turkey (App. No. 7377/03), the Court concluded at paragraph 32 that the fairness of proceedings required that:

"an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to 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."

8 Given the fact that the jurisprudence of the ECtHR has to date largely been developed in the context of civil law systems with early supervision of investigation by a magistrate, it cannot be said that it has been definitively determined that the Convention requires a bright-line rule that in a common law system, an accused person must have not just access to, but the assurance of the presence of, a lawyer during any detention. This is particularly so because, until now, the Convention jurisprudence has not adopted any absolute rule that evidence obtained in breach of a Convention right must be inadmissible, but rather has applied a test of considering the overall fairness of the proceedings.

9 In Cadder v. Her Majesty's Advocate [2010] U.K.S.C. 43, the United Kingdom Supreme Court did consider the application of the Convention and held that the Scots law of criminal investigation which did not permit access to a lawyer, was incompatible with the Convention. The judgment used the language of access and presence interchangeably, but it is clear that the case was not directed to the precise issue raised before this Court. Indeed since the decision in Cadder did not specify an absolute rule of presence during the entire period, it might perhaps be thought to require access and advice only. The issue did not arise, and is unlikely to do so now because the changes to the detention system adopted in the UK in the aftermath of the decision appear to provide for the presence of a lawyer during detention and questioning.

10 In Gormley, Clarke J. referred to the developing jurisprudence of this Court in relation to the right to be assisted by a lawyer in criminal proceedings. In particular, he referred to the well known statements in McGee v. The Attorney General [1974] I.R. 284, at p.319, where Walsh J. stated that:

"It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts"
Significantly this passage was quoted with approval by O'Higgins C.J. in The State (Healy)

v. Donoghue [1976] I.R. 325, at p.347, where the Court held that legal aid in criminal proceedings involving a risk of imprisonment was now a constitutional requirement. The Constitution, O'Higgins C.J. said:
"[falls] to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or acceptable with regard to these virtues at the time of its enactment".
Accordingly, the Court in Gormley concluded that:
"it is now necessary to interpret the "due course of law" provisions of Bunreacht na hÉireann as encompassing the asserted right to access to a lawyer prior to interrogation or the taking of forensic samples". (Emphasis added). (p.628 per Clarke J.)
In particular the Court concluded that the Article 38 guarantee of a criminal trial in due course of law was capable of having an application prior to the commencement of the trial proper, and was engaged at the point at which the coercive power of the State in the form of an arrest was exercised against a suspect. In that regard, i.e. the engagement of fair trial rights at the questioning stage, the Irish position was the same as that understood to be acknowledged by the ECtHR and by the Supreme Court of the United States. In relation to the specific issue which arises in the present proceedings, the Court observed:
"[T]he question as to whether a suspect is entitled to have a lawyer present during questioning does not arise on the facts of this case for the questioning in respect of which complaint is made occurred before the relevant lawyer even arrived. However, it does need to be noted that the jurisprudence of both the ECtHR and the United States Supreme Court clearly recognises that the entitlements of a suspect extend to having the relevant lawyer present." (p.633 per Clarke J.)
11 I recognise the reasons why the Court in Gormley considered that it might be the case that the Constitution could be held to require a bright-line rule of presence of a lawyer. Neatness, clarity and simplicity are powerful practical reasons for a clear bright-line rule. However, there are also strong reasons for caution in that regard. First, the obligation to decide cases on the issues and arguments addressed and in relation to the precise factual circumstances necessarily raised, means that courts must decide cases on their own facts and arguments, rather than on the expression of views by other courts, however considered. Second, for the reasons already addressed, it cannot in my view be said that the ECtHR has adopted a bright-line rule demanding the exclusion of evidence obtained in a common law system where an accused makes a voluntary statement after having had access to an advice from a lawyer. The legal argument for adopting an absolute rule of presence of a lawyer as a matter of constitutional principle, rather than pragmatism or even enlightened administration, rests almost entirely therefore on the decision in Miranda.

12 While undoubtedly such a rule was adopted in 1966 in the United States in Miranda, that occurred in the context of a significantly different criminal justice system to that which applies now in Ireland, and little enthusiasm has been shown here in later years for adopting some of the subsequent developments in the US criminal justice system. It is often forgotten that most of the major developments in the jurisprudence of the Warren Court occurred in the overarching context of that Court's concerns with the central issue of race. In a federal system much criminal law (and indeed much civil law) is state law, and just as significantly, is enforced and adjudicated upon, at state level. That was a matter of obvious concern in the segregated United States of the early 1960s. The decision appears to rests as much if not more on policy than principle. Indeed and rather ironically, when the majority judgment did refer

to case law, it approved the Scots law on admissibility, a system that fell foul of the Convention in Cadder, which is perhaps a warning against too ready reliance on foreign case law. The majority judgment in Miranda also focussed on interrogation practices in the US which, without any undue self-congratulation, are certainly not the norm in Ireland. The judgment made it clear that the rule was introduced as a preventative measure, and that if changes were made to the process of arrest and questioning, the rule might be adjusted. Certainly most of the justifications offered for the rule in Miranda would require reconsideration in context of the regime now applicable in Ireland. A lawyer's presence is no longer necessary as an independent witness of events during questioning. It is also doubtful that it can be said that 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, which was available, and provided, here.

13 The question posed most starkly now, is whether, when there is a fully accurate record of police questioning and the suspect's response, a judicial finding that a statement is made voluntarily, and access to and advice from a lawyer, it is nevertheless necessary to exclude the statement from evidence at a trial, because the accused did not have a lawyer present at all stages during his detention was not told (and in this case could not have been told) that he was entitled to have one? As already noted the Supreme Court of Canada was not persuaded to adopt the same approach. Although Miranda was perhaps one of the best know decisions of the US Supreme Court in the 20th century, and although the question of admissibility of statements made in police custody has been the subject of numerous cases in this jurisdiction since Miranda, it has not been adopted in Irish jurisprudence, or it appears in the jurisprudence of any other common law country, in the 50 years since it was decided. Whatever merit Miranda had in the context in which it was decided, and leaving to one side the significant subsequent qualification of the decision in both law and practice in the US, I would be slow to adopt it unhesitatingly in what is now a very different factual and legal context. Neither its own reasoning nor its subsequent treatment suggests that Miranda can be regarded as dispositive of the issue whether the Irish Constitution should now be interpreted to require the presence of a lawyer at all times during a detention.

14 It must be remembered that it was held by the trial judge here, having heard all the relevant evidence and having reviewed the videos of the interviews, that the confession here was voluntary, beyond reasonable doubt. Furthermore, it is apparent from the conclusions of both MacMenamin and O'Malley JJ. that the admission of the statement in evidence is not, and was not, unfair. Third, it must be recognised that if a single bright-line rule is adopted by this Court, it would have the potential to exclude key evidence in the shape of statements voluntarily given, with the benefit of legal advice, in circumstances otherwise beyond criticism. Whatever its virtue in terms of neatness, this is the unavoidable price of a single bright-line rule. If it does not exclude evidence which otherwise would be admitted, it would be of no effect or benefit. I do not doubt that if the Court considered that this was the only way to ensure fairness in garda questioning, that it could and would adopt such a rule. I also recognise in particular the strength of the matters adverted to in the judgment of O'Malley J. in relation to the complex provisions which are now available for the drawing of inferences from refusals or failure to answer questions, and I also recognise the reality that it may in due course be simply easier and neater to provide for presence by a lawyer as the best guarantee that such provisions are operated properly and fairly. Finally, the introduction of the Code of Practice of 2015 on Access to a Solicitor by Persons in Garda Custody is of course a

significant practical step, which may in due course render this debate redundant. However, I would for my part stop short at this point of finding that in addition to the video taping of interviews, the access to and advice from a lawyer (provided if necessary by the State), and the requirement that only statements found to be voluntary beyond reasonable doubt be admitted in evidence, the Constitution nevertheless requires and perhaps has always required, the presence of a lawyer at all times during questioning, as a condition of admissibility of any evidence obtained.

15 Furthermore, as O'Malley J. points out, the consequences of a finding that Article 38 is engaged after arrest and during any questioning has not been fully elaborated upon, and I am reluctant to unhesitatingly accept this analysis. It may be that it means no more than that a trial at which evidence was adduced which had been obtained in circumstances which the Constitution condemns, would not be a trial in due course of law. That may also suggest that any breach of the requirement is not itself fatal but must be judged in the context of the trial as a whole. However, if it means that Article 38 guarantee of trial in due course of law applies in its full force after arrest and to detention in a garda station long before a trial, and perhaps even if no trial ensues, then a number of difficult questions arise. A trial in due course of law under Article 38 normally requires an impartial judge, and, in the case of non-minor offences, a jury. Obviously these features are not required at arrest and interview. Other less dramatic issues arise. In particular, is the solicitor permitted only to observe the questioning and to offer advice or may he or she participate, ask questions, and demand disclosure of the information available to the investigating gardaí as they undoubtedly would at a trial? If Article 38 is engaged and breached because a lawyer was not present, would that fact alone require that the trial be prohibited even if no evidence emerged from, or was sought to be adduced, as a result of, the interview? It is true that in Miranda v. Arizona [1966] 384 U.S. 436 (and Escobedo v. Illinois (1964) 378 U.S. 478 which preceded it) it was held that fair trial rights applied at the arrest stage but as one distinguished commentator observed, that required radical (and I think dubious) textual surgery. See: Friendly, "The Bill of Rights as a Code of Criminal Procedure" (1965) 53 Cal. L Rev 929, at p. 946. The approach may have been adopted in the ECtHR of finding that a person was charged, and thus entitled to a lawyer, at a point prior to any formal charge, but that fits more easily in the civil law system, and is not a basis for reading Article 38 of the Constitution as engaged on arrest, particularly since it is not necessary to do so . I should add that I do not doubt that constitutional rights are engaged at the stage of arrest and questioning, and again that Article 38 applies at trial and may require the exclusion of evidence if it is considered that any trial at which such evidence was adduced would be unfair, but I respectfully question however the analysis that Article 38 applies directly, and with full force, at the arrest stage.

16 I accept that many of these difficulties, and the particular difficulty posed in this case, might perhaps be addressed by the application of the decision of this Court in DPP v. JC, as suggested by MacMenamin J. However, that matter was not argued in this Court and it is in any event not self-evident that it would apply. In JC, the accused was not entitled to take advantage of the decision in Damache v. DPP & ors [2012] 2 I.R. 266, to exclude evidence obtained under a search which was valid according to the law at the time at which it was carried out. It did not however suggest that the plaintiff in Damache was not entitled to the benefit of the decision in his favour. If the application of the principle in JC would automatically neutralise any innovation in the constitutional law relating to evidence, then there would be no incentive to raise such issues. This is the first case which squarely raises

the question of whether the Constitution requires not just access to, but presence of, a lawyer. If that is the true position, it is not self-evident why the appellant in this case should be deprived of the benefit of a successful argument establishing that right. I also agree with O'Malley J. that a causal connection should be established between a breach of a constitutional requirement and the evidence sought to be admitted, but if there is a constitutional bright-line rule requiring presence, I would have thought that principle required that the prosecution demonstrate that the evidence was obtained irrespective of the breach, or would perhaps have been obtained in any event if the rule had been adhered to.

17 The argument in this case also raises a very difficult and related issue as to the capacity of this Court to limit the effect of any ruling it should make. It is self-evident from the decision in Gormley that if this Court were to hold that the Constitution required the presence of a lawyer not merely access to a lawyer, it could only do so in application of the dicta in McGee and State (Healy) v. Donoghue that the Constitution must be applied in changing circumstances, and because it is, in the language of the well-worn metaphors, a living tree and a document which speaks in the present tense. As it was put in Gormley itself, the necessary conclusion would be that the Constitution now requires such a rule with however the necessary implication that it did not do so until now and interviews held when there was access afforded to a solicitor, even if a solicitor was not present for all of the interview, were lawful, and more importantly, constitutional. What then is the logic of maintaining that the Constitution (or its interpretation) can develop and change but that the new rule must nevertheless be held to have applied apply since 1937, and probably (since Article 38 in this regard follows closely from Article 70 of the Free State Constitution) since 1922? However, if the new rule of a constitutional right to presence of a solicitor is held not to have applied until some point, how is that point to be identified? Is it from the date of the decision in Gormley, the date of the interviews in this case, or the date of this judgment? If such a line is to be drawn, does it include or exclude this case? These are very complex issues, of fundamental importance in relation to the scope and limits of judicial review, which have been much debated in other jurisdictions, in both case law and scholarly analysis and a variety of interpretive solutions have been discussed. This matter has not been much discussed in this jurisdiction beyond the very general statements in Mc Gee and State (Healy) v Donoghue referred to above, and was not addressed in argument in this case, and I would not consider it appropriate to address it without such argument. Even then it would not be desirable to offer any views on the issue unless it was unambiguously required by the particular circumstances of the case. In this case, such a point could only be reached, if the Court was first persuaded that the Constitution required the exclusion at a trial of a statement made by an accused person which had been demonstrated to have been made voluntarily, and after access to and advice from a lawyer. While I can see many arguments at a practical level for a simple rule, I am not persuaded that the Constitution requires such an approach, and accordingly I agree in this respect with the judgment of Mr. Justice Charleton.

18 Finally, I should say recognise the force of the analysis offered by McKechnie J. on the question of inducement. I also accept that the function of an appellate court is to provide a real and searching scrutiny of the reasoning of trial judges. However, if it is permissible to draw together a number of fragments from interviews spread over time and then collected together in a portion of a submission, in order to discount the findings of a trial judge who not only heard and observed witnesses (which we did not) and who viewed the tapes of the full interviews (which again we did not, and were not invited to), and further make

inferences as to the content of communications between client and solicitor, then little if anything would remain of the important division of functions between trial courts and appellate courts. I also consider that the law relating to inducements referred to by McKechnie J. should be reconsidered in the context of a general review of the law relating to detention and questioning in the light of a number of developments already discussed. Should it really be the case that any comment however "slight and trivial," can be treated as an inducement and result in the exclusion of a statement that is recorded and available to the trial court, voluntary, and made with the benefit of legal advice? It is obvious that developments in the law in this area are not always consistent, and at times point in different directions. It is surely important to recognise on the one hand that the law now provides for extended periods of detention and that there are now a variety of complex statutory provisions that permit the gardaí to pose questions on the basis that inferences may be drawn from a failure or refusal to respond, and on the other hand, that detention is subject to a high degree of regulation and, importantly, that all interviews are now recorded. This is a world unrecognisable to anyone familiar with criminal law and procedure when the rules on inducements were developed. It is desirable in my view that stock should be taken of all the developments in the law and technology, and fresh consideration given to what constitutional fairness or public policy requires in that context at each stage of the process. I would however dismiss the present appeal.

I have no doubt but that this issue will be referred either in Mr Doyle's case itself or in another case to the Court of Human Rights.

It is a clear illustration of why we are now very much at a disadvantage compared to other European countries because we do not have the protection of the Measure that we will shortly discuss, Measure C. Interestingly even though the court have indicated that there is no constitutional right to the presence of a solicitor during questioning, there has been no move on the part of the Director of Public Prosecutions or on the part of the police to change the administrative practice that was put in place following White and Gormley in permitting the solicitor to be present. Whatever about the Supreme Court it appears to me that our prosecuting authority see that there is a real value to having properly supervised interrogation where the evidence is going to be admitted and will be perceived as being reliable. This is a proper approach in my view to the fair administration of criminal justice and makes for better investigation and fairer trial processes.

In the background The EU and ECHR

Before comparing the changes brought about by measure C we can briefly remind ourselves of the *European* standard

• Article 6 (3) (c) of the ECHR and Article 48 (2) of the EU Charter of Fundamental Rights explicitly guarantee the right to legal assistance in criminal matters.
• Article 6 (3) (b) of the ECHR sets out the right to adequate time and facilities to prepare one's defence. This is closely linked to Article 6 (3) (c) because adequate time

and facilities are required to make effective the right to legal assistance.
• The right to legal assistance applies to the entire proceedings, from the police investigation to the conclusion of the appeal. Access to a lawyer in the early stages of proceedings is particularly important.
• The right may be subject to restrictions, provided that the restrictions do not undermine the essence of the right.
• The right to legal assistance requires the provision of effective representation and notjust the mere presence of a lawyer.
• Waiver of the right must: (i) be established in an unequivocal manner; (ii) be attendedby minimum safeguards commensurate to its importance; (iii) be voluntary and (iv)constitute a knowing and intelligent relinquishment of a right. It must also be shown that the defendant could reasonably have foreseen the consequences of his/her conduct.

Applying the Irish experience to Measure C – Pitfalls and Prizes

(Issues for discussion in bold italics)

Article 1 Subject matter
This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Framework Decision 2002/584/JHA ("European arrest warrant proceedings") to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Article 2 Scope
1. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to European arrest warrant proceedings (requested persons) from the time of their arrest in the executing Member State in accordance with Article 10.
3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of

questioning by the police or by another law enforcement authority, become suspects or accused persons.
4. Without prejudice to the right to a fair trial, in respect of minor offences:
(a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
(b) where deprivation of liberty cannot be imposed as a sanction,
this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.
In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

Article 3 The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.
2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:
(a) before they are questioned by the police or by another law enforcement or judicial authority;
(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragaph 3;
(c) without undue delay after deprivation of liberty;
(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.
3. The right of access to a lawyer shall entail the following:
(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;
(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;
(ii) confrontations;
(iii) reconstructions of the scene of a crime.
4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.
Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.
5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.
6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:
(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Related articles

(14) This Directive should be implemented taking into account the provisions of Directive 2012/13/EU, which provide that suspects or accused persons are provided promptly with information concerning the right of access to a lawyer, and that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights containing information about the right of access to a lawyer.

(25) Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During questioning by the police or by another law Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned.

During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.

(27) Member States should endeavour to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate the obtaining of a lawyer by suspects or accused persons. However, Member States would not need to take active steps to ensure that suspects or accused persons who are not deprived of liberty will be assisted by a lawyer if they have not themselves arranged to be assisted by a lawyer. The suspect or accused person concerned should be able freely to contact, consult and be assisted by a lawyer.

28) Where suspects or accused persons are deprived of liberty, Member States should make the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right. Such arrangements could imply, inter alia, that the competent authorities Where suspects or accused persons are deprived of liberty, Member States should make the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right. Such arrangements could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. Such arrangements could include those on legal aid if applicable.

(31) Member States should be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without the lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

(31) Member States should be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without the lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence.EN L 294/4 Official Journal of the European Union 6.11.2013

(32) Member States should also be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase where immediate action by the investigating authorities is

imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without a lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence

Issues

- ***Note all directives potentially capable of Art 267 reference to CJEU and in EPPO cases this is specifically proposed***
- ***- Is the loose language of right of access Art 3(1) which might be interpreted narrowly to the effect that the State need not do more than not impede that right ,strengthened in Art 3 (b) – right to be present – and in the recitals that State should provide lawyer in legal aid cases ?***
- ***Despite what we know about the probable preferences of Member States are these provisions (when read with Arts 3 , 4(1), 4(4) and 4(5) of Directive (EU) 2016/1919) mean there is now a real obligation to ensure meaningful access to a lawyer at public expense ?***
- ***If so what if lawyers not prepared to attend – remuneration/anti-social hours/distance/other obligations/conflict of interest***
- ***Is the participate effectively test satisfied by the right existing or does it require a lawyer with the expertise to act efficiently ?***
- ***If so how is this to be validated***
- ***Special considerations if the lawyer is assigned rather than chosen***
- ***Should there be a "quality control" aspect to general information.Danger of police promoting tame lawyers***

Article 4 Confidentiality

Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law

Note this Article is not stated to be subject to any right of derogation.

However note also the conflict between the Article and these regulations which will give rise to difficult questions of interpretation.

(22) Suspects or accused persons should have the right to meet in private with the lawyer representing them. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the circumstances of the proceedings, in particular the complexity of the case and the procedural steps applicable. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where such a meeting is conducted. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to meet their lawyer.

(23) Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication may take place at any stage, including before any exercise of the right to meet that lawyer. Member States may make practical arrangements concerning the duration, frequency and means of such communication, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to communicate with their lawyer.

(33) Confidentiality of communication between suspects or accused persons and their lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence. Any criminal activity on the part of a lawyer should not be considered to be legitimate assistance to suspects or accused persons within the framework of this Directive. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is without prejudice to any mechanisms that are in place in detention facilities with the purpose of avoiding illicit enclosures being sent to detainees, such as screening correspondence, provided that such mechanisms do not allow the competent authorities to read the communication between suspects or accused persons and their lawyer. This Directive is also without prejudice to procedures under national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.

(34) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance(34) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work that is carried out, for example, by national intelligence services to safeguard national security in accordance with Article 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Article 72 TFEU, pursuant to which Title V on an area of Freedom, Security and Justice must not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Issues
-how are we to advise with confidence that the consultation whose privacy is guaranteed is in fact private ?
- if the lawyer is suspected of complicity ("the iniquity exception") why not exclude that lawyer subject to judicial review, but permit access to another

Article 5 The right to have a third person informed of the deprivation of liberty

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay if they so wish.
2. If the suspect or accused person is a child, Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.
3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 where justified in the light of the particular circumstances of the case on the basis of one of the following compelling reasons:
(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
(b) where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.
4. Where Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

Issues
- ***Incommunicado cases***
- ***-Note read across to 3(6)***

Article 6 The right to communicate, while deprived of liberty, with third persons

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.
2. Member States may limit or defer the exercise of the right referred to in paragraph 1 in view of imperative requirements or proportionate operational requirements.

Issues
- ***Much broader derogation,what does it mean ?***

Article 7 The right to communicate with consular authorities

1. Member States shall ensure that suspects or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. However, where suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.
2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned.
3. The exercise of the rights laid down in this Article may be regulated by national law or procedures, provided that such law or procedures enable full effect to be given to the purposes for which these rights are intended.

Issues

- ***No derogation possible***
- ***Consular role in dual representation cases – see legal aid directive***

Article 8 General conditions for applying temporary derogations

1. Any temporary derogation under Article 3(5) or (6) or under Article 5(3) shall
(a) be proportionate and not go beyond what is necessary;
(b) be strictly limited in time;
(c) not be based exclusively on the type or the seriousness of the alleged offence; and
(d) not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Article 3(5) or (6) may be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.
3. Temporary derogations under Article 5(3) may be authorised only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

38) Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from the rights granted under this Directive, and they should make restricted use of those temporary derogations. Any such temporary derogations should be proportional, should be strictly limited in time, should not be based exclusively on the type or the seriousness of the alleged offence, and should not prejudice the overall fairness of the proceedings. Member States should ensure that where a temporary derogation has been

authorised under this Directive by a judicial authority which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.

Issues
-is deferring judicial review to the trial stage, months or years later an adequate safeguard

Article 9 Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:
(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
(b) the waiver is given voluntarily and unequivocally.
2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

Issues

- ***Importance of Measure B in this context***

Article 10 The right of access to a lawyer in European arrest warrant proceedings

1. Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant.
2. With regard to the content of the right of access to a lawyer in the executing Member State, requested persons shall have the following rights in that Member State:
(a) the right of access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty;
(b) the right to meet and communicate with the lawyer representing them;
(c) the right for their lawyer to be present and, in accordance with procedures in national law, participate during a hearing of a requested person by the executing judicial authority. Where a lawyer participates during the hearing this shall be noted

using the recording procedure in accordance with the law of the Member State concerned.
3. The rights provided for in Articles 4, 5, 6, 7, 9, and, when a temporary derogation under Article 5(3) is applied, Article 8, shall apply, mutatis mutandis, to European arrest warrant proceedings in the executing Member State.
4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.
5. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.
6. The right of a requested person to appoint a lawyer in the issuing Member State is without prejudice to the time-limits set out in Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time-limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

(45) Executing Member States should make the necessary arrangements to ensure that requested persons are in a position to exercise effectively their right of access to a lawyer in the executing Member State, including by arranging for the assistance of a lawyer when requested persons do not have one, unless they have waived that right. Such arrangements, including those on legal aid if applicable, should be governed by national law. They could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which requested persons could choose.
(46) Without undue delay after being informed that a requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State should provide the requested person with information to facilitate the appointment of a lawyer in that Member State. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, who can provide information and advice in European arrest warrant cases. Member States could request that the appropriate bar association draw up such a list. information to facilitate the appointment of a lawyer in that Member State. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, who can provide information and advice in European arrest warrant cases. Member States could request that the appropriate bar association draw up such a list.
(47) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time-limits contained in Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, while requested persons should be

able to exercise fully their rights under this Directive in European arrest warrant proceedings, those time-limits should be respected.
(48) Pending a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.
(49) In accordance with the principle of effectiveness of Union law, Member States should put in place adequate and effective remedies to protect the rights that are conferred upon individuals by this Directive.
(50) Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer, or in cases where a derogation from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the ongoing investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.

Issues

- **The right to consult in private Art3(3) is not imported here – is that deliberate**
- **Impact on dual representation – low level of obligation, provide information but without prejudice to timescale**

Article 11 Legal aid

This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.

Issues

- ***Where do we start ?***

Article 12 Remedies

1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

Issues

- ***Very broad discretion***

Article 13 Vulnerable persons

Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive.

Article 14 Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 15 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by …*. They shall immediately inform the Commission thereof.
2. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

LEGAL AID

Article 1
Subject matter

1. This Directive lays down common minimum rules concerning the right to legal aid for:

(a) suspects and accused persons in criminal proceedings; and
(b) persons who are the subject of European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (requested persons).
2. This Directive complements Directives 2013/48/EU and (EU) 2016/800. Nothing in this Directive shall be interpreted as limiting the rights provided for in those Directives.

Article 2
Scope
1. This Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:
(a) deprived of liberty;
(b) required to be assisted by a lawyer in accordance with Union or national law; or
(c) required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following:
(i) identity parades;
(ii) confrontations;
(iii) reconstructions of the scene of a crime.

2. This Directive also applies, upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU.
3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.
4. Without prejudice to the right to a fair trial, in respect of minor offences:

(a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
(b) where deprivation of liberty cannot be imposed as a sanction;
this Directive applies only to the proceedings before a court having jurisdiction in criminal matters.
In any event, this Directive applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings.

Issues

- *Measure C clearly engaged*
- *-does it cover EAW cases where the suspect achieves conditional release*

Article 3
Definition
For the purposes of this Directive, 'legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.

Issues

- *Do they suggest a right can exist if it is not enabled in some situations*

Article 4
Legal aid in criminal proceedings
1. Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.

2. Member States may apply a means test, a merits test, or both to determine whether legal aid is to be granted in accordance with paragraph 1.
3. Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.
4. Where a Member State applies a merits test, it shall take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:
(a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive; and
(b) during detention.
5. Member States shall ensure that legal aid is granted without undue delay, and at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts referred to in point (c) of Article 2(1) are carried out.
6. Legal aid shall be granted only for the purposes of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence.

Issues

- *Must the MS ensure the availability of a lawyer or just the funding ?*

- *-difficulties such as inadequate remuneration/anti social hours/geographical remoteness/court commitments/lack of expertise/conflicts of interest*

Article 5
Legal aid in European arrest warrant proceedings

1. The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.
2. The issuing Member State shall ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice.
3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(3), which shall apply mutatis mutandis.

Issues
- *Potentially a big step towards dual representation*

Article 6
Decisions regarding the granting of legal aid
1. Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.

2. Member States shall take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

Article 7
Quality of legal aid services and training

1. Member States shall take necessary measures, including with regard to funding, to ensure that:
(a) there is an effective legal aid system that is of an adequate quality; and
(b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.
2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.
3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.
4. Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.

Issues

- *How far can/should quality control go*
- *- does promote include funding*
- *-what limitations are there in changing lawyer*

- *-distinction between mandatory training of staff and promoting training of lawyers*

Article 8
Remedies
Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Issues
- *Differential outcomes in cases of breach*

Article 9
Vulnerable persons
Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

Article 10
Provision of data and report
1. By 25 May 2021, and every three years thereafter, Member States shall submit available data to the Commission showing how the rights laid down in this Directive have been implemented.
2. By 25 May 2022, and every three years thereafter, the Commission shall submit a report on the implementation of this Directive to the European Parliament and to the Council. In its report, the Commission shall assess the implementation of this Directive as regards the right to legal aid in criminal proceedings and in European arrest warrant proceedings.

Article 11

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 May 2019. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.