
IMPLEMENTATION OF THE RIGHT OF ACCESS TO A LAWYER

TRAINING MANUAL TEMPLATE FOR ADAPTATION IN OTHER JURISDICTIONS



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ACKNOWLEDGEMENTS

This publication has been produced with the financial support of the Criminal Justice Programme of the European Union. The content of this publication is the sole responsibility of the Irish Council for Civil Liberties, the implementing beneficiary, and can in no way be taken to reflect the views of the European Commission. The Irish Council for Civil Liberties is grateful for the expertise of members of the *High Level Expert Group on Access to a Lawyer* in developing this resource.

1 INTRODUCTION TO THE TRAINING MANUAL TEMPLATE

1.1 INSTRUCTIONS FOR USE

This template is designed for the use by practitioners in EU Member States other than Ireland. The Manual follows the same structure and content as the Training Manual for Ireland.

For this Manual to be effective in other jurisdictions, country-specific sections need to be added for each of the Member States, based on cases and law particular to that Member State.

Where such information needs to be added, sections are colour-marked in a grey box and further explanation provided as to how to make this manual relevant to a specific Member State. Please note that any text in grey box must be adapted to a local context.

To see how case law has been applied to the Directive in Ireland, please see the relevant training manual for Ireland; this provides a useful reference in the preparation of a country-specific training resource.

1.2 INTRODUCTION

The purpose of this manual is to provide practitioners with a practical, applied and accessible resource to support them in interpreting and applying the provisions of the EU Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, 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 (the Directive).

1.3 ORIGINS OF THE DIRECTIVE

The Directive arose out of a Roadmap on procedural rights of suspected and accused persons, which was adopted in 2009 during the Swedish Presidency of the European Union (EU). The aim of the Swedish Roadmap is to strengthen the procedural rights of suspected and accused persons in the EU through the adoption of a series of measures to safeguard those rights in all Member States. It sets out common minimum standards for the protection those rights. The Swedish Roadmap forms the action plan, in the area of procedural rights, of the Stockholm Programme

2010-2014, which set out the EU's priorities in the area of justice, freedom and security.

1.4 TRAINING OVERVIEW AND LEARNING OBJECTIVES

There are four core learning objectives for participants who use this resource:

- Participants will be informed about the content of the Directive, the importance of rights contained in the Directive and the obligations the Directive imposes on Member States;
- Participants' understanding of the Directive will be tested and there will be an opportunity for focussed analysis and exploration of potential human rights violations through the training;
- Participants will be provided with a set of tools to assist them in benchmarking national policies and guidance on the standards which must be met by Member States in order to meet the legal requirements of the Directive;
- Participants will be empowered to share this learning with other practitioners, thereby increasing knowledge of EU law on defence rights and the Swedish Roadmap on Procedural Rights.

2 OVERVIEW OF TRAINING RESOURCE

2.1 OVERVIEW

This section:

- Introduces the aims of this training resource and provides an overview of the training resource to participants
- Provides a simple guide on how to use this resource as an individual or organisational learning support
- Outlines the background to, and context for the Directive on the Right of Access to a Lawyer.

2.2 HOW TO USE THIS RESOURCE

2.2.1 STRUCTURE OF THIS RESOURCE

This resource is divided into two parts. The first part is an introduction and overview, the second part is the body of the resource which contains all information on the Directive (the breakdown of which is further detailed below).

Section two breaks the Directive down into six core facets or sub-sections relating. Each sub-section is structured in the following way:

- General information: this section provides detailed information on the application of the Directive
- Case Study: this section allows practitioners and their colleagues to consider how the law might be applied to a particular case outlined
- Case Study discussion: this section provides key points of information for the case study, and further reading for practitioners on the case provided and the relevant area of law
- Further reading: an index of relevant guides, articles and case law is provided at the end of each section.

2.2.2 ADDITIONAL RESOURCES TO SUPPORT LEARNING AND APPLICATION

A quiz to assess learning and retention, and a review tool for practitioners to apply to cases is available on www.eujusticia.net. You can use these resources to test your learning and application of the Directive.

2.2.3 USING THIS RESOURCE FOR YOUR OWN LEARNING

This Manual will support practitioners to familiarise themselves in a practical, applied way with the Directive on the Right of Access to a Lawyer. This resource is designed to provide quick reference guide to the various facets of the Directive. Each section gives practitioners the information they need to fully understand the Directive, and provides a case study or series of questions that supports the practitioner to apply their learning to a real or realistic scenario. Practitioners can use this, in conjunction with the ICCL's Guide to the Directive referenced throughout this resource, to improve their own knowledge base, review their learning, and review cases they may encounter in their practice where they feel a client's rights have not been upheld. Practitioners can test their own learning using the quiz included with the original training manual.

2.2.4 USING THIS RESOURCE FOR LEARNING IN YOUR ORGANISATION

A practitioner may also choose to use this resource with a group of colleagues in order to improve collective understanding of this Directive and its implications for their clients. In such a scenario, it can be useful to work together as a group through the case studies presented, either by role playing the scenario, or reading through and brainstorming the answers to key questions as a group. Teams of colleagues can also use the quiz to assess their retention of the important information on the Directive contained in this Manual.

3 THE DIRECTIVE

3.1 GENERAL INTRODUCTORY INFORMATION

On 29 November 2000, the Council of the European Union (EU) adopted a set of measures implementing the principle of mutual recognition of decisions in criminal matters across the European Union (EU). Mutual recognition of judicial decisions is based on the assumption that Member States have trust in each other's criminal justice systems and the judicial authorities of the different countries must be assured that a person has been treated fairly throughout the criminal justice process.

Accordingly, the Council of the EU adopted a resolution on a Roadmap for Procedural Rights¹ on 30 November 2009. The aim of the Resolution was to create a set of minimum standards for procedural rights across the EU. The Roadmap was then made part of the Stockholm Programme in the area of freedom, security and justice in the European Union,² agreed in 2010. Measure C1 of the Roadmap relates to access to a lawyer in criminal proceedings and the right to have certain persons informed of the fact of arrest and deprivation of liberty. The resulting Directive 2013/48/EU 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 was adopted in October 2013. Member States are required to transpose the Directive into national law by 27 November 2016.

Please add here any information regarding the transposition of the Directive in your jurisdiction

¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01) (available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>).

² The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) (available here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>).

The Directive protects a number of rights. First of those is the right to access a lawyer in criminal proceedings and in proceedings relating to the execution of a European Arrest Warrant (EAW). In accordance with the Directive, such a right applies from the moment a person is informed that they are suspected or accused of having committed a criminal offence. The right applies irrespective of whether the person is deprived of their liberty (detained).³ In proceedings relating to the EAW, the Directive applies from the moment the person is arrested by the authorities of the executing Member State.⁴ Any person accused or suspected of having committed a criminal offence should have the right to access a lawyer until the conclusion of any proceedings, including sentencing and resolution of any appeal.⁵

The Directive specifically excludes some proceedings from its remit. For example, the Directive does not cover processes relating to minor offences committed in prisons, dealt with under disciplinary rules.⁶ It also explicitly excludes proceedings relating to offences committed in the military context and dealt with by the commanding officer.⁷ The Directive also recognises that it would be impractical to give access to a lawyer in circumstances where an authority other than a court can impose sanctions for relatively minor offences (for example ‘on-the-spot’ fines, handed out by the police). However, where a person subject to such a sanction appeals it to a court, they should be provided with such access for the purposes of court proceedings.⁸

Another of the rights protected by the Directive is **the right to have a third person informed of the deprivation of liberty**. Explained in more detail later in this resource, this right ensures that someone who is detained can inform at least one person of the fact of their detention, if they so wish.

Connected to this is their **right to communicate, while deprived of liberty, with third persons** such as a relative or a friend, protected by Article 6.1 of the Directive. Foreign national arrestees should have **the right to communicate with consular authorities** of their State of nationality, if they so wish.⁹

³ Article 2.1 of the Directive.

⁴ Article 2.2 of the Directive.

⁵ Article 2.1 of the Directive.

⁶ Recital 13 of the Directive.

⁷ *Ibid.*

⁸ Recital 16 and Article 2.4 of the Directive

⁹ Article 7 of the Directive.

Before moving on to a more detailed discussion of the above rights, it is important to state that the Directive recognises that Member States have a particular duty of care towards vulnerable suspects (for example, those with a disability, or minors). It therefore requires that the appropriate authorities of Member States ensure such vulnerabilities are taken into consideration in the application of the Directive, and that such persons are appropriately assisted in exercising their rights of access to a lawyer or other rights covered by it.¹⁰

Questions to consider

- a) In your own practice, do you represent suspects who may be considered vulnerable?
- b) If yes, are you aware of any special measures implemented by the police and the courts to assist them in exercising their right of access to a lawyer?
- c) What are these? In your experience, are those sufficient?

¹⁰ Recital 51 of the Directive.

3.2 THE RIGHT OF ACCESS TO A LAWYER IN CRIMINAL PROCEEDINGS

3.2.1 GENERAL INFORMATION

The Directive requires Member States to ensure that suspects or accused persons have the right of access to a lawyer so they can exercise their defence rights in an effective way.¹¹ Such access should be provided without undue delay, and as a minimum:

- a) Before they are questioned by police or other law enforcement or judicial authority;
- b) When the authorities are carrying out investigative or evidence gathering acts;
- c) Where the person has been deprived of their liberty; and
- d) Where the person has been summonsed to appear before a court, in due time before they appear before that court.¹²

The provision of legal representation may be delayed due to geographical remoteness of the suspect or accused person, but this is only allowed at the pre-trial stage. In such cases, any questioning or other investigative or evidence-gathering acts should also be delayed until access to a lawyer can be arranged.¹³

For the purposes of the Directive, “questioning” does not include preliminary queries by the police or other investigating authority, if the purpose of such queries is to establish or confirm the identity of the person; to verify if they are in possession of any weapons; to establish any other threats to safety; or if they are made to determine if an investigation should be started.¹⁴

To be able to obtain the assistance of a lawyer, suspected or accused persons have

¹¹ Article 3.1 of the Directive.

¹² Article 3.2 of the Directive

¹³ Recital 30 and Article 3.5 of the Directive.

¹⁴ Recital 20 of the Directive.

to know how they can contact one. Accordingly, the police or other investigating authorities should make information available which would facilitate such contact on a practical level.¹⁵ While the authorities should assist anyone held in custody to make practical arrangements,¹⁶ they are not obliged to do so if the person is not deprived of their liberty.¹⁷

Before we move on to explaining in more detail what the right of access to a lawyer means on a practical level, let's consider a case example.

3.2.2 CASE STUDY 1: _____

For this section, please:

- 1) Identify a case from your national jurisdiction which concerned issues regarding access to a lawyer in criminal justice proceedings. This case may, for example, concern:
 - a) Someone who was refused legal assistance
 - b) Had difficulties contacting his/her lawyer
 - c) Did not have access at particular times/events in the criminal justice process
- 2) Write a brief scenario based on the facts of the case for consideration by practitioners. This scenario should include questions about the case [see box below], which will assist the practitioners in their analysis of national law and the requirements of the Directive. Please see the complete Irish training manual for an example of a written case scenario.

¹⁵ Article 3.4 of the Directive

¹⁶ Recital 28 and Article 3.4 of the Directive.

¹⁷ Recital 27 of the Directive

Questions to Consider:

Include here 5 – 6 key questions about the scenario that practitioners can use to guide their analysis of the case in light of the Directive.

To learn about the case upon which this scenario was based on, please continue to the following page for an analysis of the case.

3.2.3 CASE STUDY DISCUSSION

This section should include the analysis of the case, using the national law in your jurisdiction and the requirements of the Directive. The analysis should include the following further general information about the Directive.

It is important to state that, according to the Directive, the right of access to a lawyer in practice entails a number of things:

- The suspected or accused person must be able to meet with the lawyer in private and able to communicate with them;
- The suspected or accused person must have the right to have their lawyer present and participate effectively during questioning (any participation should be regulated by national laws). The lawyer should be able to ask questions, as well as request clarifications or make statement on behalf of the person they represent,¹⁸ and their participation should be appropriately recorded.¹⁹

The authorities can make arrangements with respect to the duration and frequency of meetings between the lawyer and the accused person, taking into account individual circumstances, and in particular the complexity of the case.²⁰ Similarly, the authorities can make arrangements for the suspect to

¹⁸ Recital 25.

¹⁹ Article 3.3 of the Directive.

²⁰ Recital 22.

communicate with their lawyer without their physical presences, for example through a video-link.²¹ The authorities can also make arrangements to ensure the safety and security of the lawyer, and the suspected or accused person, when such meetings are taking place. However, such arrangements should not prejudice the effective exercise of the right of access to a lawyer.

Finally, it is important to stress that the Directive requires that all communications between the suspect or accused person and their lawyer is confidential.²² This includes all meetings, correspondence, telephone conversations, and other forms of communication permitted under national law.²³ The principle of confidentiality is fundamental to the right to fair trial and to ensuring the effective exercise of the right to defence. Accordingly, the authorities should respect confidentiality of communications at all times and without derogations.²⁴ The authorities are, however, permitted to screen correspondence in prisons, provided that any such screening does not allow for an actual reading of the content of communications.²⁵

You can choose where and how to use the above material for analysis, but it is important that this information is provided to the practitioners.

²¹ Recital 23.

²² Article 4 of the Directive.

²³ Recital 33.

²⁴ Confidentiality may be breached in a situation when the lawyer is involved with the suspect or accused person in a criminal offence (Recital 33) or in situations where a breach of confidentiality is incidental to a lawful surveillance operation by competent authorities (Recital 34).

²⁵ Recital 33.

3.2.4 FURTHER READING

For this section, please identify and include any materials that would be useful for practitioners learning about the requirements of the Directive and the national law relevant to access to a lawyer. This may include any publications specific to your jurisdiction on those issues (for example, any guidance or research reports), as well as examples of national cases and cases considered by the European Court of Human Rights.

3.3 THE RIGHT OF ACCESS TO A LAWYER IN EUROPEAN ARREST WARRANT (EAW) PROCEEDINGS

3.3.1 GENERAL INFORMATION

The European Arrest Warrant (EAW), replacing all bi- and multi-lateral extradition mechanisms between Member States of the European Union, was introduced by the Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA).²⁶ In accordance with Article 1(1) of the Framework Decision, the EAW is:

“a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”.

The Framework Decision itself contains a number of procedural guarantees. For example, in Article 11(2), it states that:

“A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.”

Legal advice should also be specifically available if the person is considering their consent to surrender.²⁷ In relation to the EAW, the Directive on access to a lawyer gives further indication of what the right to representation entails in this context. In accordance with Article 10(1), anyone who is subject to an EAW (‘requested person’) must have access to a lawyer in the executing Member State (i.e. the State where the person has been arrested on foot of the Warrant). Just as with the rules for representation in national criminal proceedings, the requested person should be able to access a lawyer without delay, and have the right to meet and communicate with them as appropriate.²⁸ The lawyer should be able to be present and participate

²⁶ The Council Framework Decision came into force in 2004.

²⁷ Art. 12(2) and Art.27(3)(f) of the Framework Decision.

²⁸ Article 10(2) of the Directive.

in any judicial hearing relating to the execution of an EAW.²⁹ The principle of confidentiality of lawyer-client communications, contained in Article 4 of the Directive, applies to proceedings concerning an EAW, as do the rights to have a third person informed about the fact of detention; to communicate with a third person and to communicate with consular authorities, discussed in the following sections.

³⁰

Unlike in most national criminal proceedings, the process of surrender under the EAW involves enforcement actions in two different jurisdictions. In this context, therefore, the person subject to the EAW also has the right to be represented in the issuing (requesting) State and should be informed of this right, without delay, by the authorities of the executing Member State.³¹ It is then an obligation of the issuing (requesting) State to furnish the requested person with information enabling them to appoint such a lawyer.³²

²⁹ *Ibid.*

³⁰ Article 10(3) of the Directive.

³¹ Article 10(4) of the Directive.

³² Article 10.5 of the Directive.

3.3.2 REFLECTION ON YOUR EXPERIENCE: WHAT DO YOU THINK?

Instead of looking at a specific case study, in this section we ask you to reflect on your own experience as a lawyer. Consider, therefore, the following questions:

Questions to consider

- a) As a practitioner, do you represent individuals who are subject to a European Arrest Warrant? If yes, how often do you have such clients?
- b) In your experience, is legal representation provided ‘without delay’ in such cases? Are you able to communicate with your clients in an effective way, and participate in any judicial hearings of their cases? Are your communications with your clients confidential and can you meet them in private?
- c) In your experience, are your clients – who are subject to European Arrest Warrant – informed about the fact that they can appoint a lawyer in the issuing country? How often do they appoint such a lawyer? Do you have experience of working with lawyers in other countries on EAW cases? If yes, is your co-operation effective?

If you are using this resource in a session with colleagues, discuss those questions with them and write down your answers.

3.3.3 FURTHER INFORMATION

As in the previous section, here you should include any material relevant to your jurisdiction. This will include, for example, discussion of any implementing legislation relating to the Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA) (available at: http://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF) and any guidance which exists in your country referring to European Arrest Warrant cases.

3.3.4 FURTHER READING

For this section, please identify and include any reference materials that would be useful for practitioners learning about the requirements of the Directive and the national law relevant to access to a lawyer in European Arrest Warrant proceedings. This may include any publications specific to your jurisdiction about the issue, as well as examples of national cases, if available.

3.4 THE RIGHT TO HAVE A THIRD PERSON INFORMED OF THE DEPRIVATION OF LIBERTY

3.4.1 GENERAL INFORMATION

As stated in the introductory part of this resource, the Directive protects the right of those who are suspected or accused of having committed a criminal offence and have been detained, to inform at least one person of the fact of their detention.³³ If the person so wishes, they should be able to decide who will be informed, and can nominate, for example, a relative or an employer. This should be done without delay.

3.4.2 CASE SCENARIO: WHAT DO YOU THINK?

For this section, please:

- 1) Identify a case from your national jurisdiction, which concerned issues regarding the provision of information to a third person of the fact of detention. This case may, for example, concern a situation where a suspect or accused person has been told that they cannot inform third persons of the fact of detention. If no case can be identified in your jurisdiction, you can write a fictional scenario which reflects the legal position in your country.
- 2) Write a brief scenario based on the facts of the case for consideration by practitioners. This scenario should include questions about the case [see box below], which will assist the practitioners in their analysis against national law and the requirements of the Directive. Please see the complete Irish training manual for an example of a written case scenario.

Questions to Consider:

Include here 5 – 6 key questions about the scenario that practitioners can use to guide their analysis of the case in light of the Directive.

³³ Article 5.1 of the Directive.

3.4.3 CASE SCENARIO: DISCUSSION

This section should include the analysis of the case, using the national law in your jurisdiction and the requirements of the Directive. The analysis should include the following further general information about the Directive.

When the suspect or accused person is a child (i.e. anyone under 18 years of age), the authorities should ensure that they inform the holder of parental responsibility of the fact of detention and the reasons for it, unless informing them would be contrary to the best interests of the child.³⁴

3.4.4 FURTHER READING

For this section, please identify and include any reference materials that would be useful for practitioners learning about the requirements of the Directive and the national law relevant to informing third persons of the fact of detention. This may include any publications specific to your jurisdiction about the issue, as well as examples of national cases, if available.

³⁴ Article 5.2 of the Directive.

3.5 THE RIGHT TO COMMUNICATE, WHILE DEPRIVED OF LIBERTY, WITH THIRD PERSONS

3.5.1 GENERAL INFORMATION

In accordance with Article 6.1 of the Directive, suspected or accused person should have the right, while deprived of their liberty, to communicate without undue delay with at least one person, such as a relative. The exercise of this right can be delayed or limited if there are imperative requirements or proportionate operational requirements in the case.³⁵

3.5.2 CASE SCENARIO: WHAT DO YOU THINK?

For this section, please:

- 1) Identify a case from your national jurisdiction, which concerned issues regarding the right to communicate with third persons while in police custody. This case may, for example, concern a situation where a suspect or accused person has been told that they cannot communicate with third persons while in police detention. If no case can be identified in your jurisdiction, you can write a fictional scenario which reflects the legal position in your country.
- 2) Write a brief scenario based on the facts of the case for consideration by practitioners. This scenario should include questions about the case [see box below], which will assist the practitioners in their analysis against national law and the requirements of the Directive. Please see the complete Irish training manual for an example of a written case scenario.

Questions to Consider:

Include here 5 – 6 key questions about the scenario that practitioners can use to guide their analysis of the case in light of the Directive.

³⁵ Article 6.2 of the Directive.

3.5.3 CASE STUDY: DISCUSSION

This section should include the analysis of the case, using the national law in your jurisdiction and the requirements of the Directive. The analysis should include the following further general information about the Directive.

The right to communicate with third persons can be delayed or limited in certain circumstances, in light of imperative or proportionate operational requirements. Such requirements may include, for example, the need to avert serious adverse consequences for the life, liberty or physical integrity of a person; the need to prevent prejudice to criminal proceedings; the need to prevent a criminal offence or the need to protect victims of crime.³⁶ When the police (or other investigating authorities) are considering deferring or limiting contact with a specific person, they should consider whether the suspect could communicate with another person of their choosing.

You can choose where and how to use the above material for analysis, but it is important that this information is provided to the practitioners.

3.5.4 FURTHER READING

For this section, please identify and include any reference materials that would be useful for practitioners learning about the requirements of the Directive and the national law relevant to communicating with third persons while in police detention. This may include any publications specific to your jurisdiction about the issue, as well as examples of national cases, if available.

³⁶ Recital 36 of the Directive.

3.6 THE RIGHT TO COMMUNICATE WITH CONSULAR AUTHORITIES

3.6.1 GENERAL INFORMATION

When the suspected or accused person who has been deprived of their liberty in the course of criminal proceedings is a national of another State, the authorities must ensure that they have the right to have the consular authorities of their State of nationality informed about the fact of detention without undue delay, if they so wish.³⁷ Such suspected or accused person should also have the right to communicate with their consular authorities. In cases where the person has two or more nationalities, they should be able to choose which consular authorities are to be informed about the deprivation of liberty and with whom they wish to communicate.³⁸

The suspects or accused persons also have the right to be visited by representatives of their consular authorities, as well as the right to correspond with them and the right to have legal representation arranged by them if they so wish.³⁹

You can choose where and how to use the above material for analysis, but it is important that this information is provided to the practitioners.

3.6.2 THE LAW IN _____

As discussion of this right does not include a case scenario, in this section please include any relevant information about how this right is guaranteed in your country. This includes information about any legal guarantees, together with – for example – any procedural guidelines for the police.

³⁷ Article 7 of the Directive.

³⁸ *Ibid.*

³⁹ Article 7.2 of the Directive.

3.7 WAIVING THE RIGHT OF ACCESS TO A LAWYER

3.7.1 GENERAL INFORMATION

The right to legal assistance is fundamental to fair trial. However, the suspected or accused person may wish to waive their right of access to a lawyer. As lack of legal representation can have very serious consequences for the accused, both the jurisprudence of the ECtHR and the Directive set out some minimum requirements in relation to any waiver of that right that are to safeguard the interests of the accused.

3.7.2 CASE STUDY: WHAT DO YOU THINK?

Before we move on to a more detailed discussion of these issues, consider the following case:

For this section, please:

- 1) Identify a case from your national jurisdiction, which concerned issues regarding waiving the right of access to a lawyer. If no case can be identified in your jurisdiction, you can write a fictional scenario which reflects the legal position in your country.
- 2) Write a brief scenario based on the facts of the case for consideration by practitioners. This scenario should include questions about the case [see box below], which will assist the practitioners in their analysis against national law and the requirements of the Directive. Please see the complete Irish training manual for an example of a written case scenario.

Questions to Consider:

Include here 5 – 6 key questions about the scenario that practitioners can use to guide their analysis of the case in light of the Directive.

3.7.3 CASE STUDY: DISCUSSION

This section should include the analysis of the case, using the national law in your jurisdiction and the requirements of the Directive. The analysis should include the following further general information about the Directive.

In line with the jurisprudence of the ECtHR on this issue, the Directive outlines a number of requirements for an effective waiver of the right to legal representation. Firstly, the suspected or accused person must be provided (orally or in writing) with clear and sufficient information in simple, understandable language about the content of the right of access to a lawyer and the possible consequences of waiving that right.⁴⁰ Such information must be provided in a way that takes into consideration the individual circumstances of the suspected or accused person, for example: their age, and their mental and physical condition.⁴¹ The waiver must then be given voluntarily and unequivocally.⁴²

If the person decides that they do not wish to exercise their right of access to a lawyer, the waiver (whether given in writing or orally) must be recorded, together with the circumstances under which it was given.⁴³ The person must also be able to revoke the waiver at any point in the criminal proceedings and must be informed of such a possibility (Article 9.3). The revocation has the effect from the moment it is made and normally it would not be required to repeat any questioning or investigative acts that have been carried out during the time when a waiver was in place.⁴⁴

⁴⁰ Article 9.1.a of the Directive.

⁴¹ Recital 39 of the Directive.

⁴² Article 9.1.b of the Directive.

⁴³ Article 9.2 of the Directive.

⁴⁴ Recital 41 of the Directive.

You can choose where and how to use the above material for analysis, but it is important that this information is provided to the practitioners.

3.7.4 FURTHER READING

For this section, please identify and include any reference materials that would be useful for practitioners learning about the requirements of the Directive and the national law relevant to waiving of the right of access to a lawyer. This may include any publications specific to your jurisdiction about the issue, as well as examples of national cases, if available.

3.8 DEROGATIONS

3.8.1 GENERAL INFORMATION ON TEMPORARY DEROGATIONS

In certain, limited circumstances, and only at the pre-trial stage of criminal proceedings, the authorities of the Member States are allowed to temporarily limit or delay access to a lawyer⁴⁵ or informing a third person of the fact of detention.⁴⁶ Such derogation needs to be justified by the circumstances of the case, and can only apply where:

- There is an urgent need to avert serious, adverse consequences for the life, liberty or physical integrity of a person;
- An immediate action by investigative authorities is imperative to prevent substantial jeopardy to criminal proceedings.⁴⁷

When access to a lawyer is temporarily delayed/denied on the above grounds, the questioning of the suspected or accused person is permitted, provided that they have been informed of their right to remain silent and provided that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination.⁴⁸ It does not, however, mean that the police or other authorities are allowed to question a suspect about all the circumstances of a particular offence. The extent of any questioning is limited – it can only concern information which is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person⁴⁹ or information that is essential to prevent substantial jeopardy to criminal proceedings.⁵⁰ Any derogation must be authorised by a judicial authority or other competent authority (for example, a prosecutor or a police officer of an appropriate rank) on condition that any such decision can be submitted to judicial review.⁵¹

When temporarily derogating from the application of the right to have a third person informed about the fact of detention of the suspected or accused person, the authorities should consider whether a person other than that firstly nominated by the suspect

⁴⁵ Article 3.6 of the Directive.

⁴⁶ Article 3.6 of the Directive.

⁴⁷ Article 3.6 of the Directive.

⁴⁸ Recital 31 of the Directive.

⁴⁹ *Ibid.*

⁵⁰ Preamble, at para. 32.

⁵¹ Article 8.2 of the Directive.

could be informed.⁵² In cases of children, Member States must ensure that a State authority responsible for the protection or welfare of children (for example, social services) is informed of the fact of detention.⁵³ Any derogation must be authorised by a judicial authority or other competent authority (for example, a prosecutor or a police officer of an appropriate rank) on condition that any such decision can be judicially reviewed.⁵⁴

More generally, any derogation must:

- Be proportionate and not go beyond what is necessary in the circumstances;
- Be strictly limited in time;
- Not be based exclusively on the type and seriousness of the alleged offence;
- Not prejudice the overall fairness of the proceedings.⁵⁵

3.8.2 WHAT DO YOU THINK?

In this last exercise, we ask you to reflect on your own practice. Consider, therefore, the following questions from your perspective as a practitioner.

- a) Have you ever come across cases where the police delayed access to a lawyer?
- b) If yes, what were the circumstances?
- c) What was the legal basis used to justify the delay in access to a lawyer?
- d) In your view, did the delay fall within the legitimate derogations as outlined in the Directive?

⁵² Preamble, at para. 35.

⁵³ Article 5.4 of the Directive.

⁵⁴ Article 8.3 of the Directive.

⁵⁵ Article 8.1 of the Directive.

3.8.3 FURTHER READING

For this section, please identify and include any reference materials that would be useful for practitioners learning about the requirements of the Directive and the national law relevant to possible derogations of the right of access to a lawyer and associated rights covered by the Directive. This may include any publications specific to your jurisdiction about the issue, as well as examples of national cases, if available.

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