



**Stakeholder discussion paper on a
Letter of Rights for Scotland**

Response to consultation

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. On Scottish matters it is assisted by its branch, JUSTICE Scotland.
2. We welcome the further Scottish Government consultation on the Letter of Rights, which follows its consultation in June 2013, ahead of the Letter of Rights coming into force in July 2013, the EU Directive on the Right to Information coming into force in June 2014,¹ and also ahead of more general criminal justice reforms recommended by the Carloway Review, which will be enacted by the Criminal Justice (Scotland) Bill 2013. We responded to the consultation last year, supporting the provision of written information to suspects held in police detention in order to aid the understanding and exercise of their rights.²
3. We have been very engaged in the advancement of procedural safeguards for suspects and accused persons in criminal proceedings at EU level, and have called upon the EU institutions for the adoption of legislation in this area for the past ten years. Research we have been engaged in has informed recent developments.³ We welcomed the Resolution for a Roadmap on strengthening procedural safeguards in criminal proceedings,⁴ the adoption of the directive on the right to interpretation and translation,⁵ the directive on the right to information and the directive on the right of

¹ Directive 2012/13/EU, OJ L 142/1 (1.06.2012) which must be implemented through national law by 2 June 2014.

² Available at <http://www.justice.org.uk/resources.php/343/stakeholder-discussion-paper-on-a-letter-of-rights-for-scotland>

³ J. Blackstock et al, *Inside Police Custody: and Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, 2014); E. Cape et al, *Effective criminal defence in Europe* (Intersentia, 2010)

⁴ Resolution (2009/C 295/01), OJ C 295/1 (04.12.2009)

⁵ Directive 2010/64/EU, OJ L 280/1 (26.10.2010)

access to a lawyer.⁶ We are currently engaged in briefing on proposed directives concerning legal aid,⁷ child suspects⁸ and the presumption of innocence.⁹

4. Our responses to this consultation are therefore informed by our research and work in this field as well as practical knowledge.
5. At the outset, we wish to register our concern that the current Letter of Rights is not being distributed to all suspects during police detention. We have received reports from a number of practitioners, attending police stations across Scotland that they have not seen the Letter, nor have their clients received it. Some have been told that officers are putting the Letter into suspects' property rather than giving it to them during detention.
6. During the research conducted for *Inside Police Custody*¹⁰ we were informed by officers that where the former notice of rights had been made available in the past, it had been misused by some suspects (i.e. blocking the toilet, eating it etc) and therefore print copies had been suspended. This may provide an explanation for the lack of provision of the current Letter. However, if the Letter is not being given to suspects upon arrival at custody, they are being denied their right to information under the Directive. This is a breach of EU law, and negates the good work being achieved in the drafting of the Letter, to aid suspects in understanding their rights.
7. In any event, as we suggested in our prior consultation response, to ensure that all suspects see a copy of the letter of rights, a robust copy should be nailed to the wall in each cell and their attention should be drawn to this when they are taken there. The Letter should also be prominently displayed as a poster in the custody area and the interview rooms and the attention of the suspect drawn to it. This will ensure that

⁶ 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, OJ (6.11.2013) L 294/1

⁷ Proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings COM(2013) 824

⁸ Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings COM(2013) 822/2

⁹ Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013) 821/2

¹⁰ Note 3 above.

all suspects have an opportunity to consider the Letter, even if a printed copy is not made available. It will also ensure that an interpreter can orally translate the letter to a suspect who cannot read English in this scenario.

A. Content

8. In general the draft Letter is easy to understand and covers most of the rights that suspects ought to be informed of. We were pleased to see that almost all of our suggested amendments were incorporated into the published version of the Letter.
9. However, there are a few places in which we feel further content is necessary to explain a right or to ensure a right is included. These relate almost exclusively to the requirements of the EU directive on the right to information, which is now in force and must be complied with by all EU Member States.

Right to Information

10. Articles 3 and 4 of the Directive are intended to ensure respect for the right to a fair trial by ensuring that suspects are made aware of their rights upon arrest so that they are able to exercise them. Article 3 requires that suspects or accused persons are promptly provided with information about certain rights, while Article 4 obliges Member States to ensure that suspects or accused persons receive written notification of their arrest rights promptly following arrest or detention. The Letter of Rights goes some way to making sure that the rights of suspects are delivered on arrival at the police station in Scotland, although this should be a record of what the custody sergeant tells them orally, not a substitute.
11. However, we are concerned that the Letter does not fully comply with this right to receive information about suspect's rights because article 4(3) provides that:

The Letter of Rights shall also contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.

There is currently no such information in the Letter. Further, it does not set out the right to challenge any refusal to afford a suspect a right that they have requested, nor what that process is, as required by article 8(2) of the Directive. Provision must be made to set out a right of redress.

12. Another important aspect of the right provided in the Directive is missing from the Letter of Rights. Article 6 of the Directive requires Member States to provide information to the person about the criminal act they are suspected or accused of having committed and the reasons for their arrest or detention. It should be provided promptly and in such detail as to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. Recital 28 provides further that:

The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.

13. Likewise, article 7 of the Directive requires that suspects and accused persons are given access to the materials of the case. Article 7(1) requires that people arrested or detained must be provided with any documents 'which are essential to challenging effectively (...) the lawfulness of the arrest or detention.' Article 7(2) requires that access is granted 'at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons (...) in order to safeguard the fairness of the proceedings and to prepare the defence.'

14. Although points one and two in the box on the first page of the Letter provide:

- You have the right to know why the police are holding you in custody
- You have the right to know what the police suspect you have done

these are not elaborated on any further in the Letter and in our view the information provided is insufficient to comply with the Directive, or to make sensible the right to information that the suspect holds. Moreover, the bullet point on page 7 headed

'Access to documents' suggests this will only be available if the case goes to court, which is inaccurate and denies the suspect their rights under the Directive.

15. By contrast, the England and Wales Notice of Rights and Entitlements¹¹ reflects these rights by saying in summary on the first page:

- The police must tell you about the offence they think you have committed and why you have been arrested and are being detained.
- The police must let you or your solicitor see records and documents about why you have been arrested and are being detained and about your time at the police station.

Bullet point one is then detailed under the heading at paragraph 6 'Knowing about the offence you are suspected of committing and knowing why you have been arrested and detained':

- The police must tell you about the nature of the offence they think you have committed. This includes when and where they think it was committed.
- The police must tell you why they think you committed the offence and why they believe they needed to arrest you.
- At the police station, the police must tell you why they believe you need to be detained.
- Before you are asked any questions about any offence, the police must give you and your solicitor enough information about what the police think you have done so you can defend yourself but not at a time which would harm the police investigation.
- This applies to any other offences the police think you have committed.

Bullet point two is then detailed under the heading at paragraph 7 'Seeing records and documents about your arrest and detention':

- When you are detained at a police station, the police must:
 - Record in your custody record, the reason and need for your arrest and why they believe you need to be detained.
 - Let you and your solicitor look at these records. The police custody officer will arrange this.

¹¹ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332266/CodeC-NoRE.pdf

- This applies to any other offences the police think you have committed.
 - The police must allow you or your solicitor access to documents and materials essential to effectively challenging the lawfulness of your arrest and detention.
16. In our view, much more detail is required in the Letter, and revision of what is already contained, in order to provide suspects with their right to information. We consider the information provided in the England and Wales Notification should be replicated in the Scottish Letter as closely as possible, albeit modified to reflect Scots law and procedure.

Questioning by the police

17. Under the heading 'Getting a Lawyer to Help You', on page 9, the Letter continues to provide only that 'You can ask for a lawyer to be in the room with you when the police ask you questions' We would add '*The lawyer can ensure the police questions are appropriate and offer you advice if you need it.*'
18. This would reflect the law and current practice. As provided in *Cadder v HM Advocate* [2010] UKSC 42; and subsequently in *Jude et al v HM Advocate* [2011] UKSC 55 the Court acknowledged the right not only to speak to a lawyer but to be represented during interview by a solicitor and for that solicitor to help prepare the suspect's defence. The Lord Advocate's Interim Guidance¹² and the former ACPOS guidance¹³ both reflect the possibility for a solicitor to represent the suspect during police interview and this practice has been in operation since the summer of 2010 following the introduction of the Guidance. Furthermore, the Solicitor Access Recording Form, whilst explaining the right in a confusing manner, also intends to afford this right. The Letter of Rights must therefore indicate to suspects that their right is not only to speak to a solicitor but to be represented during any questioning and subsequent proceedings in the police station (which might encompass, for example, a decision by the police to extend s14 detention, to charge, or to keep in custody post charge for attendance at court).

¹² Lord Advocate's Guidelines to Chief Constables on Liberation by the Police (July 2010), available at Available at <http://www.copfs.gov.uk/sites/default/files/Publications/Resource/Doc/13547/0000523.pdf>

¹³ ACPOS Manual of Guidance on Solicitor Access, v. 1.2, (2011)

B. Language

19. Overall the language is clear and appropriate for the audience. However on page 8 a new addition refers to the provision of food and drink. This is welcome but it is vague. It says that 'You will also be provided with food if in custody for a *length of time*.' The provision should specify the accepted period of time after which food will be available otherwise the provision will lead to uncertainty for the suspect.
20. In our response to the previous consultation we observed that if a person cannot read as a result of literacy problems, an audio version of the letter should be available for them to listen to. Sufficient time must be given to the suspect to take account of what the letter says, in private. The opportunity to listen to the letter multiple times must be communicated by the police to the suspect in order to avoid discrimination between those who have a written copy of the letter and those that cannot read. We are not aware if this facility is now available, but it does not appear on the Letter of Rights website. If an audio version has not been recorded, this should be made available, with audio files on the website for ease of access, in each language.

C. Format

21. The letter should be available in Braille and audio format, as indicated above.
22. We agree that an easy read version should be made available for those with literacy and learning difficulties. This should incorporate pictorial representation so far as possible and be developed with the assistance of appropriate experts.

JUSTICE Scotland
30 July 2014