



Giving Legal Advice at Police Stations: Practical Pointers

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Introduction

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its Scottish Advisory Group.

On the 29th October the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 came into force following the judgment in *Cadder v HMA*, UKSC [2010] 43, being handed down on the 26th October. JUSTICE's views on the legislation can be found in our briefing.¹ It makes significant amendments to the Criminal Procedure (Scotland) Act 1995 ("the Act").

We have prepared this short guide to offer practical assistance to practitioners who will be advising and representing detained persons at police stations in these entirely new circumstances. We have drawn on the experiences of colleagues in England and Wales where the Police and Criminal Evidence Act 1984 and its accompanying Codes of Practice set out clear rules about the police station stage of proceedings. These rules have been informed by robust protection of the right by the Court of Appeal, brought about by challenges taken by practitioners who found themselves in a similar position to Scottish colleagues, and through subsequent self-regulation of the profession. There are many approaches from other jurisdictions which we hope the Carloway review will consider in the shaping of Scottish law to ensure the best protection of the rights of suspects.

It should be noted that this guide has been prepared quickly in order to provide assistance at a time when need is greatest. It is likely that it will have to be revisited, perhaps even in early course, depending on other developments in law and practice in Scotland. It is, of course, the responsibility of practitioners to satisfy themselves as to the relevant law which applies in any situation so as to give the advice appropriate to the particular circumstances.

¹ Justice, Briefing on the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Bill, October 2010, available at: <http://www.justice.org.uk/images/pdfs/JUSTICE%20Briefing%20on%20the%20Criminal%20Procedure%20Bill.pdf>

It is imperative too that before being questioned he has the opportunity to consult a solicitor so that he may be advised not merely of his right to silence (the police will already have informed him of that) but also whether in fact it is in his own best interests to exercise it: by saying nothing at all or by making some limited statement. Lord Brown, *Cadder v HMA*, UKSC [2010] 43, 108

BASIC AIMS

- (1) Identify and assess the client's vulnerabilities;
- (2) To advise the client in private;
- (3) To be accurate as to the law;
- (4) To investigate the police case: evidence and procedure;
- (5) To be present at the police interview;
- (6) To avoid the client assisting the police case, subject to obvious exceptions;
- (7) To influence the police as to charge and further investigation;
- (8) To create the most favourable position for the client;
- (9) To act ethically.

BASIC MATERIALS

- Personal Identification – Up-to-date Law Society of Scotland ID card as well as business card
- Headed Note Paper – in case representations in writing are necessary
- Standardised Police Station pro-forma – until a Scottish form is prepared the English version offers a useful guide²
- Legal Aid Forms
- Reference materials

² Public Defender Service, *Police Station Attendance Form* (Legal Services Commission, 2008), available at: http://www.legalservices.gov.uk/docs/pds/PDS_06_Police_Station_Att_v13_Jan_08.pdf. Note the 15 pages provided with large spaces for recording instructions and information received.

1. Intimation of detention and interview

The initial request to consult or attend will usually be received direct from the relevant police officer. In those circumstances there should be no issue in relation to the Law Society's Rules or Code of Conduct.³

Section 15A(2) of the Act provides that the solicitor should be informed of the following:

- *The fact of the suspect's—detention, attendance at the police station or other premises or place, or arrest,(as the case may be),*
- *The police station or other premises or place where the suspect is being detained or is attending,*
- *That the solicitor's professional assistance is required by the suspect*

STEPS

- Details about the detained person /client – e.g. name, date of birth, address
- Tell the custody officer your status in relation to the client
- Request information regarding the client and associated suspects, the alleged offence and the circumstances of the detention or arrest
- Obtain details about the location of the detained person
- Request information regarding the evidence in support of any detention, bail and charging decisions, the police officers involved and the officer's assessment of the client's well being, vulnerability and actions taken/police conduct
- Inform the police and, if possible, the client of your proposed course of action
- Ensure all information obtained is accurately recorded. This should include any refusal of requests made to the police

³ In a smaller number of cases the request may come from someone other than the suspect. In those circumstances care is required in relation to the professional rules. The solicitor who receives the intimation must ensure compliance with the Law Society's Rules and Code of Conduct

<http://www.lawscot.org.uk/members/member-services/a-to-z-rules--guidance/a---f/code-of-conduct/code-of-conduct-for-criminal-work>;

http://www.lawscot.org.uk/media/2933/Police_Station_Interviews_-_Guidance_Note.pdf).

2. Advice by Telephone

A suspect due to be interviewed is entitled to be fully informed of his rights, including a right to legal advice prior to interview. The European Convention on Human Rights (ECHR) requires that rights are 'practical and effective'. For legal advice to be practical and effective it requires *informed* advice. The right to legal advice under the new law extends to obtaining advice during interview and not simply before it.

It may be that merely advising clients over the telephone will not be sufficient to ensure proper exercise of the right to legal advice. In England and Wales telephone advice is only sufficient for the most minor offences for which an interview is not required (such as unfitness to drive cases).

STEPS

In any initial access by telephone the client should be :-

- Informed of the representative's status
- Reminded that the conversation might not be private
- Asked about any questioning or about admissions, about treatment and police responses to any requests
- Information should be sought to enable an assessment about the client's vulnerability to be made
- Advise the client to exercise the right to silence if questioned prior to the solicitor's or representative's attendance
- Where appropriate an assessment must be made of the solicitor's position with regard to the representation of more than one detained person
- Inform the police and, if possible, the client of your proposed course of action

3. Attendance at the Police Station

Remember the solicitor's only role in the police station is to protect and advance the legal rights of their client. This includes protecting his or her right not to incriminate him/herself. On occasions, this may require the solicitor to give advice which has the effect of the client avoiding giving evidence which strengthens a prosecution case.

STEPS

Consult with the custody officer and, if necessary, investigating officer on information about the client, the allegation and the investigation – including :

- The timing and basis of the detention
- Disclosure of the reasons for detention and the purpose of interview
- Information as to the strengths and nature of the information in respect of which the person is detained
- Disclosure of what matters are to be raised at interview in respect of which you require to take instructions and give advice – for example the location and timing of the offence in respect of which s/he is a suspect; whether or not s/he has been identified at the scene of a crime etc
- A copy or sight of any custody record

Ask for a private consultation of adequate duration

4. Consult with the Client

STEPS

- Inform the person detained of your status if not known
- Aim to gain the client's trust and confidence
- Assess the client's vulnerability and fitness for interview - a client might be vulnerable due to age, mental disorder or disability, a difficulty in understanding English, or a hearing or speech disability, or be apparently medically unfit through drink or drugs to be interviewed
- If there is a concern that the client is unfit for interview medical examination should be sought – this may result in an extension of the detention period.
- Ascertain any complaints of maltreatment of the client by the police together with any response made to such complaints
- Keep full records of the consultation with the client
- Inform the client about the offence(s) alleged, what the prosecution would need to prove, the evidence in support, the strengths and weaknesses of the police case and prosecution evidence including questions of corroboration, the likely procedures to be followed in the event of the client being charged

- Take instructions from the client and ensure any information obtained is kept confidential
- Give reasoned and considered advice to the client concerning the answering of questions, the right to silence, the making of a written statement under caution, or the signing of a written record of any comment made to the police. It is appropriate when formulating this advice to have regard to the fact that there is no right of adverse inference in respect of silence in this situation
- Explain how the information gathered has been used to formulate the advice
- Explain the conduct of a tape-recorded interview and ensure that its implications are given to the client
- Explain the solicitor's role during the interview
- Consider whether the client should give a prepared statement. This may allow the client to explain some information but also allow them to remain silent in answer to questions. This is of use if they are vulnerable. Add a statement of truth, explain this and ensure they sign the statement. Get a copy of the statement/write it out twice.

5. Attendance at Interview

Ask for the solicitor's presence during the police interview.

Whilst the Act does not set out a right to be present in interview, the Lord Advocate's Guidelines remain in force and **do require** officers to allow solicitors into interviews – see paragraph 8. Since the ECHR affords this right to representation,⁴ solicitors may wish to be in a position to explain why they thought that a telephone consultation was sufficient in a particular case.

GENERAL STEPS

- Make representations to the police if the interview room is not satisfactorily arranged
- Any improper behaviour by, or questions from, the police must be recognised and responded to appropriately by objection and the taking of record. Any such objections should be taken as soon as any inappropriate or improper conduct occurs.
- Ensure appropriate action is taken to ensure that the interview is accurately recorded

⁴ See *Cadder*, paragraph 35.

- Ensure the time at which the interview should cease is recognised and responded to appropriately
- Check that a full and accurate record of the interview is made.

STEPS DURING INTERVIEW

- Once the interview is being recorded, make an opening statement confirming your role, the information you have been given by the police, the information you have requested and not received, and ask for it again
- Read the prepared statement made by the client if one has been drafted and hand to the interviewing officer(s)
- Advise the client without stopping the interview, when appropriate
- Otherwise ensure, if appropriate, that the interview is stopped in order to give the client legal advice in private
- Seek to ensure the client understands the questions put and is allowed to answer freely. This can include ensuring that there is proper translation taking place
- Object at once to oppressive questioning

7. Representing A Vulnerable Client

Where the solicitor identifies a vulnerable client s/he must :

- Make appropriate representations to the police to ensure that suitable provisions are made to prevent the client from being disadvantaged
- Advise the client about the role of an appropriate adult or an interpreter, as appropriate, and the need to ensure that confidentiality is maintained
- Check that the appropriate adult or interpreter is made aware of his or her role
- Check that the interpreter is made aware of his or her duty to be impartial and to keep information confidential

8. Restriction of Access

The right to have a private consultation with a solicitor exists before any questioning of the suspect by a constable begins, *and at any other time during such questioning* – section 15A (3). However, sections 15A (7) and (8) of the Act allow for questioning to take place without a private consultation where it is ‘*necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders*’ and in ‘exceptional circumstances’. This decision can be made by ‘a constable’. In England and Wales there are very rare circumstances where such restriction has ever been accepted by the courts. Keep a careful note of any cases where such a decision is made by the police. At a suitably early opportunity you should review the case to test the justification offered to exclude access.

STEPS

- Any restriction must be resisted robustly
- The grounds for restriction should be sought once access is gained
- Admission of interviews at trial conducted following a restriction should be challenged where appropriate

9. Exclusion from Interview

The solicitor may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice. Exclusion ought to only apply if the solicitor’s approach or conduct prevents or unreasonably obstructs proper questions being put to the suspect or the suspect’s response being recorded.

In England a solicitor can only be excluded from an interview if the conduct of the solicitor is such that the interviewer is unable properly to put questions to the suspect (Police and Criminal Evidence Act 1984, Code C para 6.11).

The Lord Advocate’s Guidelines remain in force:

For the avoidance of doubt advice given by a solicitor not to answer a question or to offer no comment does not fall to be regarded as being either obstructive or hindering the investigation. (paragraph 9)

10. Extension of Detention

Section 14A(4) of the Act provides that authorisation of an extension of detention for up to 24 hours is allowed where the custody review officer is satisfied that :

(a) the continued detention of the detained person is necessary to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is being detained;

*(b) an offence in connection with which the detained person is being detained is one that is an **indictable** offence, and*

(c) the investigation is being conducted diligently and expeditiously.

If there is to be an extension to the detention period the Solicitor should :

- Enquire as to the reasons for same
- Make representations - before deciding whether to authorise the extension, the custody review officer must give either the detained person or his/her solicitor an opportunity to make representations.
- Obtain a copy of the written record of the decision – required under s14B(8)
- The extension to 24 hours will not be required in most cases. Indeed it is expected that most cases will be dealt with as before, and accordingly within the 6 hour period which applied until the Act came into force. Solicitors should attempt to arrive in good time and seek expeditious process of the client towards charge or release

11. Representing the client after the interview

STEPS

- Ensure that improper questioning does not take place – including further questioning in the solicitor's absence and advise the client accordingly
- Where appropriate make representations to the police that the client should be charged or released without further questioning
- Where appropriate make representations regarding bail

Undernote :

Solicitors should be familiar with police procedures and interviewing techniques as well as the applicable law. Helpful guidance can be found in :

E. Cape, J. Blackstock, '*Legal Advice at Police Stations - the Experience in England and Wales*' produced for the Glasgow Bar Association (JUSTICE, 29th October 2010)

Police and Criminal Evidence Act 1984, Code C (detention, treatment and questioning of suspects not related to terrorism in police custody) (Home Office, 2008) available at :

<http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-c?view=Binary>

The Law Society of England and Wales '*Criminal Litigation Accreditation Scheme: Standards of competence for the accreditation of solicitors and representatives advising at the police station*' (Law Society, 2009) available at :

http://www.lawsociety.org.uk/new/documents/accreditation/criminallitigation_standardspolice_station.pdf

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