



## **Response to the Lord Advocate's Guidelines on Access to a Solicitor by Suspects: Interim guidance**

We welcome the acknowledgment of the Lord Advocate that, pending the outcome of the UK Supreme Court's decision in *Cadder v HMA*, detained persons have a right to advice and representation at the police station. We consider that the decision of the European Court of Human Rights in *Salduz v Turkey* is clear and incontrovertible: the European Convention provides a right to a fair trial under article 6; In order to ensure a fair trial takes place, a suspect is entitled to legal representation, and this must take place as from the first interrogation by the police.

It is a significant moment for fairness in the Scottish criminal justice system that a detained person can now receive the advice of a solicitor and be represented in police interviews as a result of the Guidelines.

However, many decisions now need to be made about how this right will be properly guaranteed. It was two years until the Police and Criminal Evidence Act 1984 in England and Wales came into force, accompanied by a set of police practice codes (the PACE Codes). Sufficient public funding, duty solicitor scheme and training of police and solicitors all had to be developed. The PACE Codes are still evolving in response to problems that occur in practice.

### *The Guidelines*

The Lord Advocate's Guidelines in many ways reflect what is contained in Code C of the PACE Codes (Detention, treatment and questioning of persons by police officers),<sup>1</sup> but there are some significant issues which are not addressed and require clarification. Below are some examples of how the Code has developed to give effect to these concerns:

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<sup>1</sup> Code C alone is 87 pages long and is available here:  
[http://webarchive.nationalarchives.gov.uk/20100413151426/http://police.homeoffice.gov.uk/publications/operational-policing/2008\\_PACE\\_Code\\_C\\_\(final\)2835.pdf?view=Binary](http://webarchive.nationalarchives.gov.uk/20100413151426/http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final)2835.pdf?view=Binary)

**1) Lack of timescale indicating how long an officer should wait for a solicitor before carrying out an interview.**

Paragraph 6.6 of PACE Code C provides that an interview cannot be conducted until a suspect has received advice. The delay would provide a necessary ground for an extension of time past the initial six hour period of detention in England and Wales, up until the maximum 24 hour period of detention under PACE, prior to authorisation of a magistrate. (In Ireland a 'reasonable period' is required pursuant to reg. 12(6) of the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, S.I. No. 119/1987. The six hour period of detention may be extended for a further six hours where such detention is necessary for the proper investigation of the offence (s. 42(2) Criminal Justice Act 1984.)

**2) Lack of standard indicating when the police should exercise a ground of refusal.**

Annex B to Code C sets out the circumstances in which access to a lawyer may be denied. Note B3 provides that a decision to delay access to a specific solicitor is likely to be a rare occurrence. It should only be exercised when it can be shown the suspect is capable of misleading that particular solicitor and there is more than a substantial risk that the suspect will succeed in causing information to be conveyed which will lead to one or more of the specified consequences. The police officer must have a reasonable belief that one of the grounds applies and he must believe that the consequence will very probably occur if access is granted. The test is derived from *Samuel* [1988] QB 615 (Court of Appeal).

**3) Lack of indication as to how long such a refusal should last.**

Paragraph A(6) of Annex B to Code C provides that the right to advice may be delayed only for as long as grounds exist and that if the grounds cease to apply within this time, the detainee must, as soon as practicable, be asked if they want to exercise their right. Paragraph 6.7 of Code C provides that where an immediate interview is necessary to preserve evidence, the investigation or public safety, once sufficient information has been obtained to avert the risk, questioning must cease until the detainee has received legal advice.

**4) Paragraph 10 provides that a solicitor can be removed from an interview if they are being obstructive, argumentative or are hindering the police investigation, and therefore the interviewer is unable to properly put questions to the suspect.**

The ground in paragraph 10 replicates paragraph 6.9 to Code C. Paragraph A(4) of Annex B to Code C specifically recognises that if the detainee wishes to see a solicitor, access may

not be refused on the ground that the solicitor might advise the detainee not to answer questions. Note 6D to the Code provides:

*The solicitor's only role in the police station is to protect and advance the legal rights of their client. 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. 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. Paragraph 6.9 only applies 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. Examples of unacceptable conduct include answering questions on a suspect's behalf or providing written replies for the suspect to quote.*

Paragraph 6.10 requires the opportunity to consult another solicitor. Paragraph 6.11 confirms that the removal of a solicitor from an interview is a serious step and consideration must be given to whether the incident should be reported to the Law Society and the Legal Services Commission (the SLAB equivalent).

#### **5) Lack of disclosure obligations upon the officer.**

Paragraph 10.3 of Code C requires an officer to inform a detained person of the grounds for their arrest. Note 10B expands upon this '*e.g. when a person is arrested on suspicion of committing an offence they must be informed of the suspected offence's nature, when and where it was committed. The suspect must also be informed of the reason or reasons why the arrest is considered necessary. Vague or technical language should be avoided.*'

Pre-interview disclosure in England and Wales largely remains within the discretion of the police and will be determined on the circumstances of each case. As such it is a complex area. The Police Station Representatives Accreditation Scheme devotes 60 pages of its training manual to this subject.

There is no legal obligation to reveal evidence before questioning; However, if the police disclose little or nothing of the case against the suspect so that a legal advisor cannot usefully provide advice to their client, this may be a good reason for the suspect remaining silent (and adverse inferences under English law should not be drawn): *Argent* [1997] 2 Cr App R 27; *Imran and Hussain* [1997] Crim L.R. 754 CA; *Roble* [1997] CLR 346 (Court of Appeal).

Crown Prosecution Service guidance states that if the investigator feels that it is necessary to withhold information from the legal representative during a pre-interview briefing, they should

be able to explain clearly the reasons supporting this approach in any future proceedings. There is a duty on the police not to actively mislead a suspect as to the nature of the investigation and information known: *Imran*.

### *Realising Effective Defence*

Whilst we very much hope that, as of the 8<sup>th</sup> July all people detained by the police will be able to request and receive high quality assistance at the police station, the reality may be far from this if funding, a duty plan and training of both police and solicitors is not provided.

We are aware that the Scottish Government, Crown Office, and the Legal Aid Board have been working hard to ensure the concerns of solicitors are addressed. There is real value in ensuring all professionals engaged in the process communicate and consult to identify the problem areas before they occur in practice and adversely affect people's ability to defend themselves. We welcome in this regard the Government's move to provide out of hours funding to solicitors.

We trust that the relevant interest groups will continue to work together on resolving these issues, with the primary focus on ensuring detained persons have access to full and appropriate representation from the moment they request it.

**JUSTICE**  
**8<sup>th</sup> July 2010**

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