



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

Response to consultation

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Introduction

1. 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 branch, JUSTICE Scotland.
2. We welcome the Scottish Government consultation on the Letter of Rights and that it has prioritised the preparation of the Letter prior to the EU Directive on the Right to Information coming into force¹, and also ahead of more general criminal justice reforms recommended by the Carloway Review. We agree that notification of rights of suspects held in police detention must be given in writing in order to help suspects understand the rights that they have.
3. We have recently completed empirical research as part of an EU Commission funded project² which demonstrated that the current Solicitor Access Recording Form is extremely confusing and difficult to follow. Furthermore, whilst a 'Notes for the Guidance of Accused Persons' is available in Scottish police offices (though we are not certain if in *all*), this notice is not prominent, and not drawn to the attention of suspects when they are presented at the custody bar for their detention to be authorised. The rights contained in it are also out-dated and articulated in language which suspects would find difficult to understand.³
4. We have been very engaged in the advancement of procedural safeguards for suspects and accused persons in criminal proceedings at EU level, and have lobbied the EU institutions for the adoption of legislation in this area for the past ten years.

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

² *Suspects Rights in Police Detention* which will be reported in *Inside Police Custody*, forthcoming. The research has been conducted in England, Scotland, France and the Netherlands. The project partners are University of Maastricht, University of the West of England, University of Warwick, JUSTICE, OSJI and Avon and Somerset Police. The project provides empirical research considering the delivery of rights to suspects by police and defence lawyers in police stations.

³ We consider the 'Notes' in our response to the Carloway consultation, which can be accessed on our website, <http://www.justice.org.uk/data/files/resources/278/JUSTICE-Scotland-Response-to-Carloway-Consultation.pdf> at p29.

Previous research we have been engaged in has informed recent developments.⁴ We welcomed the Resolution for a Roadmap on strengthening procedural safeguards in criminal proceedings,⁵ the adoption of the directive on the right to interpretation and translation⁶ and the directive on the right to information. We are currently engaged in lobbying on the adoption of the proposed directive on the right of access to a lawyer and to consular assistance.

5. Our responses to this consultation are therefore informed by our research and lobbying work in this field as well as practical knowledge.

A. Content

6. In general the draft Letter is easy to understand and covers most of the rights that suspects ought to be informed of. 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:

Children

- (a) Annex A, page 7: the text box entitled 'Remember your rights' contains six key rights. Point 3 provides 'If you are under 16, you have the right to have your parent or guardian told that you are at the police station.'

In our view, this should say 'If you are under 16, you have the right to *be accompanied* by your parent or guardian at the police station.'

- (b) page.9: the text box states 'If you are under 16, the police must try to inform your parent or guardian that you are at the police station'

We would add '*and make sure they or another adult come to see you and support you at the police station*'

7. In our response to the Carloway consultation we expressed our view that children should not be engaged in the criminal justice system at all but be diverted to a more social care approach to addressing their offending⁷. With reference to police

⁴ E. Cape *et al.* *Effective criminal defence in Europe* (Intersentia, 2010)

⁵ Resolution (2009/C 295/01), OJ C 295/1 (04.12.2009)

⁶ Directive 2010/64/EU, OJ L 280/1 (26.10.2010)

⁷ Note 3 above, pp 40-42.

detention we repeat our view that whilst children between the ages of eight to fifteen are normally diverted to the Children's Hearing system, Part V of the 1995 Act provides for children to be kept in detention, which in police custody is defined as a 'place of safety' away from adult suspects and, following court appearance, in local authority care. Given that children under twelve cannot be prosecuted, it seems that children up to this age should not be taken to the police station at all. For children between the ages of twelve and eighteen, detention ought only to be used as a last resort and for the shortest period possible.⁸ ACPOS Guidance⁹ provides that custody management regimes must identify where children will be detained. It does, however, state that lodging a child in a cell is acceptable providing the decision can be accounted for and shown to be proportionate to the circumstances. Whilst the guidance identifies the limited circumstances in which a child can be detained in a police office at all, it is concerning that detention in a *police cell* is considered acceptable in any circumstances. Our observations in *Suspects Rights in Police Detention* saw few children in the police office, but those who were there were kept in exactly the same type of cell, adjacent to the adult cells. The environment is not one in which children should be detained, irrespective of whether they are unfit through drink or drugs or display some risk of harm. Alternative accommodation more suitable for children should be made available.

Against this background, s15(4) of the Criminal Procedure (Scotland) Act 1995 provides not only for intimation to a parent or guardian but requires that a parent or guardian *shall be permitted access to the child*. In our view no person under 16 should be in police detention without a parent or guardian to assist them. This right should be made clear to children as well as the right to have a parent or guardian informed that they are in police detention. As Lord Carloway observed in his report, the role of a responsible person is to provide moral support and parental care to the child to promote the child's understanding of communications by the police, and solicitor if requested.

Questioning by the police

(c) Page 7: the text box at point 6 provides 'If you are going to be questioned by the police, you have the right to speak to a lawyer in private.'

⁸ Article 37 UNCRC

⁹ ACPOS Custody Manual of Guidance (2010), part 14.

We would add *'and for them to assist you at the police station.'*

- (d) Page 8: under heading 'Telling a lawyer that you are at the police station' the paragraph ends with 'The police will arrange for a lawyer to be contacted as soon as they can.'

We would add to the end of the paragraph *'The lawyer will explain to you whether they can advise you free of charge or how much advice will cost you and how to pay for it.'*

- (e) Page 10: this concerns the heading 'Getting a lawyer to help you.' Paragraph 2 provides 'You are entitled to a private conversation with a lawyer on the telephone or they may come and see you at the police station.'

In our view this should say 'You are entitled to a private conversation with a lawyer on the telephone *following which* they may come and see you at the police station *if you want them to do so.*'

- (f) The third paragraph provides: 'If you want to speak to a lawyer, then the police are not normally allowed to ask you questions until you have had the chance to talk to your lawyer. When the police ask you questions, you can ask for a lawyer to be in the room with you.'

We would add *'The lawyer can ensure the police questions are appropriate and offer you advice if you need it.'*

- (g) The fourth paragraph provides: '...If you tell the police that you don't want to speak to a lawyer but then change your mind, tell the police custody officer. The police will then arrange for a lawyer to be contacted for you.'

We would add *'You can change your mind at any time.'*

8. These suggested amendments reflect the law and practice. With respect to (c), 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 Guidance¹⁰ and the ACPOS guidance¹¹ 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).

9. Our amendment at (d) addresses the fact that currently advice may incur a financial cost to some suspects. We consider that all police station advice should be available free of charge. This is because most suspects will fall into the exemption from payment category anyway and the administrative burden of assessing whether a payment should be taken and then enforcing it incurs time and cost of solicitors and Scottish Legal Aid Board staff for a small number of claims. It also can be very difficult to evidence means during the stressful and incapacitating conditions of police detention and adds unnecessary obstacles, both in time and confusion, to the solicitor who is contacted. It also is a known reason for why suspects waive the right to advice¹² and could be a reason why, in Scotland, so few people are seeking legal advice at the police station despite it being a crucial stage in the case against them. However, since there is currently a fee chargeable for some suspects, this must be made clear in the Letter of Rights so that suspects are aware that they may or may not be charged for advice and will have this explained to them by the solicitor.
10. At (e) our amendment reflects that this is the decision of the suspect and this is how the right will operate. At (f) we include a simple explanation as to why a suspect might want a solicitor to be present since any waiver of the right to a lawyer must be one that is knowing and intelligent.¹³ Without doing so, the right will be meaningless to most suspects who will not implicitly understand its value. At (g) we add the

¹⁰ 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>

¹¹ ACPOS Manual of Guidance on Solicitor Access, v. 1.2, (2011)

¹² L. Skins, *The Right to Legal Advice in the Police Station: Past, Present and Future*, [2011] Crim LR 19, at 34; Pleasance et al, *The Justice Lottery? Police Station Advice 25 Years on from PACE* [2011] Crim LR 1, pp 3-18

¹³ *Jude, supra*.

current guidance that police officers give to suspects who are unsure about whether to seek legal advice following the Solicitor Access Recording Form procedure.¹⁴

Detention

(h) Page 10: under the heading 'How long can you be detained for questioning' the paragraph ends 'You have the right to have a say about this decision, unless you are not in a fit state.' We would add at the end of the paragraph '*A lawyer can advise you about this.*'

11. This is again to emphasise the role of a lawyer and to reduce any anxiety or confusion that the suspect will experience on being advised by the Letter that they could be further detained.

Interview Recording

(i) At page 11 under heading 'If the police question you' we would add at the end of the paragraph '*The questioning may be audio or visually recorded.*'

12. Since this section is about what to expect at the police station, we consider it would be helpful to inform the suspect in advance that this procedure may take place, particularly since Lord Carloway's recommendation is for all interviews to be recorded. It will ensure that suspects are less anxious when faced with recording when they enter the interview room.

Interpretation

(j) Page 12: under heading 'Getting an interpreter to help you' it provides 'If you do not speak or understand English the police will arrange for someone who speaks your language (an interpreter) to help you.'

We would add '*Even if you speak or understand some English, if you cannot follow what is being said by the police or your lawyer you can ask for an interpreter.*'

¹⁴ Observed in *Suspects Rights in Police Detention*.

(k) We would add at the end of the paragraph '*An interpreter will attend the police station to help you.*'

13. Our amendment at (j) aims to avoid the situation where suspects who assume because they speak some English that they can communicate are faced with legal terminology and procedure that they cannot understand. By acknowledging this in the letter of rights it might ensure that suspects admit their difficulty more readily. At (k) we clarify that this will be a personal attendance. This is because the solicitor will initially provide advice by telephone and the suspect may assume the interpreter will also not be in person. Given the decision by the police to move from interpretation by telephone to personal attendance because of poor quality and difficulties in communication,¹⁵ explaining that this will be in person will aid the suspect in understanding how the right will operate.

B. Language

B1

14. Overall the language is clear and appropriate for the audience. However there are some places where we feel this could be improved:

(l) Page 7: the first paragraph provides 'This leaflet gives you important information about your rights under the law in Scotland.' We would add '*when you are detained by the police.*'

This amendment clarifies the limitation of the information provided by the Letter of Rights from the outset.

- (m) Page 8: the first sentence provides 'Please note: In special cases, the police have the right to delay or withhold your access to these rights.' We would amend 'on special cases' to '*in limited circumstances.*' This reflects the fact that the terminology may mislead the suspect about when their rights may be delayed. 'Special' for suspects will usually be understood as positive rather than negative occurrences. 'Cases' in this context may lead the suspect to think literally of the case against them by police. By describing the situation as 'exceptional,' an

¹⁵ This was explained to us during *Suspects Rights in Police Detention*.

indication of the regularity of occurrence is given. 'Circumstances' is a more context neutral term than 'case'.

- (n) Page 8: the text box entitled 'People who need extra support' provides 'Some people may require the support of another adult called an Appropriate Adult.'

We would amend this to 'Some people may require *help understanding what is happening* when they are in the police station. *This can be provided by a support person called an Appropriate Adult.*' This amendment would clarify why the appropriate adult may be needed. We consider 'the support' to be too vague for people who may wish to access this service.

- (o) Page 9: under heading 'Getting a lawyer to help you' the second sentence of the first and second paragraphs provide 'If you say you do want to speak to a lawyer, the police will arrange for a lawyer to be contacted as soon as possible.'

'If you ask to speak to a lawyer, it does not make it look like you have done something wrong. It will not count against you if you ask to speak to a lawyer.'

We would rephrase this as follows: 'If you want to speak to a lawyer, *tell the police and they* will arrange for a lawyer to be contacted as soon as possible.'

'If you ask to speak to a lawyer, it does not make it look like you have done something wrong *and* it will not count against you.'

This is to make clear who the suspect should tell and to remove unnecessary repetition in the second paragraph which detracts from the point being made.

- (p) Page 11: under paragraph 1, bullet point 2, we would insert 'If your own clothes are taken from you *as possible evidence*'...This is because otherwise the suspect may be confused as to why their clothes would be taken from them at all and it may cause undue anxiety and confusion at the prospect of their clothes being taken away.

B2

15. With respect to differing levels of literacy, the letter is drafted in clear and accessible language which it would be difficult to improve (other than with the suggestions we make above). 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.

16. With respect to persons with learning difficulties or disabilities, we do not have sufficient expertise to advise on appropriate drafting to ensure better communication for this group. We would however reinforce the role of the appropriate adult as an intermediary in the delivery of the letter of rights to the suspect. Custody sergeants must make sure that an appropriate adult is able to attend the police station and assist the suspect with understanding what their rights are and the process in the police station in general if they have a disability, and specifically with the delivery of the letter of rights. It is therefore essential that there are sufficient suitably trained and experienced individuals in Scotland to undertake this important role, an issue about which there has been some concern in the past.

B3

17. The letter of rights must be available in all EU languages to comply with the directive on the right to information when it comes into force. Whilst the prison service has provided the top eight non-EU languages, we wonder whether the police forces agree with this list, as not all suspects detained in police detention end up in prison. There may be particular groups that the police consider ought to be reflected in the translated versions. It is also not clear to us why the non-EU languages are limited to eight? It would be helpful to consider the percentages of different language groups that pass through Scottish police stations as it may be that the first fifteen languages have a similar percentage, for example. A cut off at eight may be arbitrary.
18. We note that Scottish Gaelic is not on the list, yet Irish is. We would suggest it appropriate to have the letter available in Scottish Gaelic as well as English as some suspects in some areas of Scotland may find this helpful.

C. Format

19. The letter should be available in Braille and audio format, as indicated above. It should be possible for custody officers to print the letter off the computer system in

whichever language is requested and present the printed copy to the suspect. This way the costs of publication will reflect demand.

20. We were informed by officers during our research in *Suspects in Police Detention* that where the 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. To avoid this, the custody sergeant will be in a position to make an assessment of whether a printed copy will cause any health or safety concerns. However, to ensure that all suspects see a copy of the letter of rights, we suggest a robust copy is nailed to the wall in each cell and that their attention is 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 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.

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1st March 2013