

Legal assistance in the police station

A report by JUSTICE Scotland

Chair of the Committee

The Rt. Hon. Lord Eassie



Established in 1957 by a group of leading jurists, 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. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary. In Scotland we work under our title JUSTICE Scotland and through the assistance of our expert volunteers.

Our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law. To this end:

- We carry out research and analysis to generate, develop and evaluate ideas for law reform, drawing on the experience and insights of our members.
- We intervene in superior domestic and international courts, sharing our legal research, analysis and arguments to promote strong and effective judgments.
- We promote a better understanding of the fair administration of justice among political decision-makers and public servants.
- We bring people together to discuss critical issues relating to the justice system, and to provide a thoughtful legal framework to inform policy debate.

© JUSTICE Scotland 2018



THE WORKING PARTY

The Rt. Hon. Lord Eassie (Chair)

Jodie Blackstock (rapporteur)

Ch. Insp. Alexander Brodie

Prof. James Chalmers

Niall McCluskey, advocate

Jim Cormack, solicitor advocate

Liam Ewing, solicitor advocate

Prof. Pamela Ferguson

Tina McGreevy, solicitor

Fraser Gibson, Procurator Fiscal

Michelle Gordon, solicitor

Gordon Martin, senior solicitor advocate

Derick Nelson, advocate

Please note that the views expressed in this report are those of the Working Party members alone, and do not reflect the views of the organisations or institutions to which they belong.

CONTENTS

Executive Summary

- I. Introduction. 6
- II. Arrangements for Providing Legal Assistance 17
- III. Informing the Suspect. 28
- IV. The Role of the Lawyer During Police Custody. 46
- V. The Professional Challenge for Solicitors 59
- VI. Conclusion and Recommendations. 72
- VII. Annex 1. 77
- VIII. Annex 2. 82
- IX. Acknowledgements. 86

EXECUTIVE SUMMARY

Recent years have seen considerable change to the criminal justice process in Scotland. What is said by a suspect during interview by the police is regularly relied on by the prosecution and, in the case of “mixed” statements, may also be relied on by the defence. In 2010, reversing the previous legal position, the UK Supreme Court in its judgment in *Cadder v HM Advocate* held that a suspect was entitled to receive legal advice before and during interview. The Criminal Justice (Scotland) Act 2016 re-affirmed this right in statutory form and also provided that a suspect was entitled to have a solicitor present during interview. This report is concerned with the provision of the legal assistance to which those detained by the police are entitled to receive.

A concerning number of suspects in Scotland – around 70% - continue to waive their right to receive legal advice at the police station. Moreover, of those who request legal assistance, only around 25% receive this in person at the police station and during police interview. On statistics prepared for the Working Party in February 2017, this meant that just 9% of suspects actually received legal assistance in the police station that month. These figures put in issue whether a suspect’s right to legal assistance, though now unquestionably established in law, remains ineffective in practice.

The approach of the Working Party has been to seek to ensure that all suspects have the best opportunity to exercise their right to legal assistance and that the legal assistance which they are given is of proper quality and scope. In particular, our report is concerned with:

1. whether people can make informed decisions about exercising their right to legal advice;
2. the availability and quality of the legal advice which they receive; and
3. the presence of a solicitor at the police station, particularly during interview and the role which the solicitor may play.

We make 17 recommendations aiming to ensure that the right to legal advice is effective. These are set out in the conclusion to this report and cover:

- making the public and suspects better aware of what legal assistance entails during police detention through simple and accessible information;
- in-person assistance by solicitors, rather than solely telephone advice, as the normal professional service which should be provided; and,

- for solicitors, the provision of skill-based training, innovative restructuring, and adequate remuneration sufficient to enable appropriate, quality legal assistance to be provided in the police station.

More broadly, we suggest that a cultural shift is required by the legal profession and others engaged in the criminal justice system. This would involve the recognition that what happens in the police station is an important part of the criminal process and that a suspect's need for quality, professional advice and representation at this stage is an important, if not critical, safeguard of a suspect's right to a fair trial.

I. INTRODUCTION

[An] accused often finds himself in a particularly vulnerable position at [the investigation] stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.¹

- 1.1 The right of a person suspected of committing a crime (referred to in this report as a “suspect”) and held in police custody for further investigation, including questioning, by the police (referred to in this report as “detention”) to receive legal assistance was introduced by statute in England and Wales and Northern Ireland over thirty years ago. Its arrival in Scotland is more recent, following the judgment in October 2010 of the UK Supreme Court in *Cadder v HM Advocate*.² Since then JUSTICE – which intervened in *Cadder* in the Supreme Court – has continued to engage in the process of implementing the practical steps which necessarily flow from that judgment. That process is still attended by problems. Relatively few of those detained seek legal assistance. For those who do, the service which they receive is often limited in its scope and value. Without the suspect’s right to legal assistance being effective in practice, the rights of the suspect subsequently to receive a fair trial are diminished rather than enhanced.
- 1.2 This Working Party was therefore asked by JUSTICE Scotland to consider the provision of legal assistance to persons who are detained in a police station in Scotland on suspicion of having committed a crime or an offence. In particular our report is concerned with –
 - a. Whether people can make informed decisions about exercising their right to legal advice;
 - b. The availability and quality of the legal advice which they receive; and
 - c. The presence of a solicitor at the police station, particularly during interview and the role which the solicitor may play.
- 1.3 As we narrate later in this chapter of our report, the *right* to have such legal assistance and the *right* to have a solicitor present in any interview by the police are no longer in question. Those rights are now enshrined in legislation. Our concern is with the way in which those rights can be made effective and with

¹ *Salduz v Turkey* (2009) 49 EHRR 19, Grand Chamber, para 54.

² [2010] UKSC 43; 2011 SC (UKSC) 13.

the responsibilities which making those rights effective places on the legal profession, Government, the police and others engaged in the criminal justice system in Scotland.

Context

- 1.4 The setting up of the Working Party was prompted by important recent developments in the law and practice of criminal procedure in Scotland. It is helpful to describe briefly how the law has changed.
- 1.5 Historically, Scots law did not give the police any power to detain and question someone whom they suspected of having committed a crime or offence. The only legal power was that of arrest. On arrest the suspect had to be cautioned and charged with the offence which the suspect was alleged to have committed; while evidence might be given in court of any reply to the caution and charge, the police had no power to ask the accused any questions. A person who had been arrested and charged might subsequently make a voluntary statement to police officers, but any questions asked by the police during the giving of the voluntary statement had to be confined to elucidating some ambiguity.³
- 1.6 In the absence of any legal power to detain a suspect for questioning, the practice prevailed of the police “inviting” a suspect to accompany the police officers to a police station to answer questions. While, as was judicially noted,⁴ for many suspects the liberty to refuse such detention was theoretical, the underlying theory of voluntary provision of information by the person “invited” to the police station meant that there was no legal requirement to give the suspect any opportunity to obtain legal advice before or during police interview; nor was there any practice of doing so.
- 1.7 In 1980 however, in light of recommendations in the second report of the Thomson Committee on Criminal Procedure,⁵ Part 1 of the Criminal Justice (Scotland) Act 1980 gave the police statutory powers to detain someone reasonably suspected of committing or having committed an offence and to put questions to the detainee respecting the suspected offence. Put briefly, the police were empowered to detain a suspect for a maximum period of six hours, unless earlier arrested and charged. The suspect was obliged to give his name and

³ See P. Duff, ‘Chalmers to Cadder: full circle on police interrogation?’ (2015) 19 Edin LR 186 for an overview.

⁴ *Swankie v Milne* 1973 JC 1, 6, per Lord Cameron.

⁵ *Criminal Procedure in Scotland (Second Report)* Cmnd 6218 (HMSO, Edinburgh, 1975), available at <http://www.gov.scot/Resource/Doc/925/0110006.pdf>

address but was otherwise free to refuse to answer any question, and the police were obliged to inform the suspect of the right not to answer other questions. The new power to detain a suspect was accompanied by a requirement on the police to notify the fact that the suspect had been detained to (i) a solicitor and (ii) one other person reasonably named by the suspect. But the suspect was not given any right to be allowed to seek legal advice or to have the assistance of a solicitor present while being questioned. This was in accordance with the Thomson Committee's second report, which recommended, "that a solicitor should not be permitted to intervene in police investigations before charge. The purpose of the interrogation is to obtain from the suspect such information as he may possess regarding the offence, and this purpose might be defeated by the participation of his solicitor."⁶ Whether a suspect might be allowed access to legal advice prior to questioning was, in the Thomson Committee view, a matter of police discretion.

1.8 The provisions of Part 1 of the Criminal Justice (Scotland) Act 1980 were subsequently transferred into the consolidating statute Criminal Procedure (Scotland) Act 1995, as sections 14 and 15. As amended in 2010, they remained the basic governing statutory provisions when the Working Party began its examination of the issues in its terms of reference.

1.9 The 1995 Act obviously preceded the Human Rights Act 1998, which incorporated directly into Scots law the provisions of, among other articles, Article 6 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). That article, put shortly, gives any person accused of a crime a right to a fair trial; of particular relevance to this report is Article 6 (3) which provides:

Everyone charged with a criminal offence has the following minimum rights:

.....

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

1.10 In *Paton v Ritchie*⁷ the High Court of Justiciary held that neither common law nor the Convention required that a person detained for police interview should

⁶ Cmnd 6218, *supra*, para 7.16. The Committee felt that there should not be undue interference with citizens, but equally that criminals should not be able to "render the investigation of their crimes difficult or even impossible merely by standing on their rights," *ibid*, para 2.03.

⁷ 2000 JC 271; 2000 SLT 239; 2000 SCCR 151.

be afforded legal assistance, the question whether a trial had been fair being one which required the whole proceedings to be viewed; and other protections were in place to avoid conviction on admissions unfairly obtained. That approach was subsequently affirmed by larger benches of the High Court of Justiciary in *Dickson v HM Advocate*⁸ and in *HM Advocate v McLean*,⁹ the latter being delivered after the decision of the European Court of Human Rights in *Salduz v Turkey*.¹⁰

- 1.11 The decision of the Grand Chamber of the European Court of Human Rights in *Salduz v Turkey* was a landmark development in its jurisprudence on Article 6. In paragraph 55 of its judgment, the Grand Chamber stated its conclusion thus:

Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

- 1.12 The decision of the Grand Chamber had important consequences for criminal procedure across Contracting States, in particular other Member States of the European Union,¹¹ and in a consistent line of cases thereafter the European Court of Human Rights affirmed the views expressed in *Salduz*.¹² In particular, in *Dayanan v Turkey*¹³ at paragraph 32, the Court suggested that suspects are entitled to a “whole range of services specifically associated with legal

⁸ 2001 JC 203; 2001 SLT 674; 2001 SCCR 397.

⁹ [2009] HCJAC 97; 2010 SLT 73; 2010 SCCR 59.

¹⁰ (2009) 49 EHRR 19.

¹¹ For example, Belgium, Croatia, Cyprus, France, Hungary, Ireland, Malta, the Netherlands and Poland.

¹² There have been some 300 subsequent decisions reiterating and developing the scope of the right, A. Pivaty, ‘The right to custodial legal advice in Europe: In search for the rationales,’ *European Journal of Crime, Criminal Law and Criminal Justice* 26 (2018) 62-98, at 63.

¹³ ECtHR App. No. 7377/03 (unrep, 13 October 2009).

assistance” from the outset of police custody to “secure without restriction the fundamental aspects of...[the] defence,” which may include “discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking the conditions of detention.”

- 1.13 So far as Scotland is concerned, in its decision in the much publicised case of *Cadder v HM Advocate*,¹⁴ the Supreme Court of the United Kingdom observed that the decision in *Salduz* was by then well established in the Strasbourg jurisprudence. The Supreme Court ruled that the guarantees otherwise available under the Scottish system were incapable of removing the disadvantage a detainee would suffer if, not having had access to a solicitor for advice before he was questioned, he made incriminating admissions or said something which enabled the police to obtain incriminating evidence from other sources which was then used against him at his trial. Accordingly, the system of detention under sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995 was irreconcilable with the rights of an accused under the Convention.
- 1.14 In light of that far-reaching ruling, the Scottish Parliament enacted “emergency” legislation in the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which passed through Parliament in three days. It provided that any suspect, whether detained under section 14 of the Criminal Procedure (Scotland) Act 1995 or attending voluntarily at a police station, must be afforded the opportunity of access to a solicitor before being questioned; and if the suspect wished to take up that access, the suspect must be allowed to consult privately with the solicitor, which might be by telephone. However, because of the speed of the legislation, insufficient thought had been given to the impact of such changes on the system and procedures required to ensure that the right operated effectively in practice.¹⁵
- 1.15 At the request of the Scottish Government, the then Lord Justice General nominated a senior judge, Lord Carloway, to conduct a review into various aspects of criminal procedure and practice, including the questioning of suspects in police custody and the provision of legal advice to them. The Carloway Review made broad recommendations for the reform of the police detention

¹⁴ [2010] UKSC 43; 2011 SC (UKSC) 13.

¹⁵ See for example the Justice Committee of the Scottish Parliament Inquiry, Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act (March 2011), available at <http://archive.scottish.parliament.uk/s3/committees/justice/or-11/ju11-0902.htm>

stage, many of which have now been introduced.¹⁶ The Carloway Review also recommended abolition of the long-standing principle that an accused might only be convicted on corroborated evidence. This recommendation encountered resistance, including widespread opposition among the judiciary, the legal profession and academics.¹⁷ As a consequence, the Cabinet Secretary for Justice commissioned a further review under the chairmanship of Lord Bonomy into other possible safeguards in the event that the need for corroboration were abolished. Lord Bonomy reported in April 2015.¹⁸ In chapter 5 of its report, The Post Corroboration Safeguards Review also considered police interviews of suspects and the right to legal advice, waiver of that right and the quality of advice being provided. Following upon those reviews, the Scottish Parliament re-visited the law regarding the right to legal assistance of those in police custody or attending voluntarily for interview by a police officer in the Criminal Justice (Scotland) Act 2016, the relevant sections of which came into force on 25 January 2018.

Current legislation: The Criminal Justice (Scotland) Act 2016

- 1.16** The Criminal Justice (Scotland) Act 2016 – the “2016 Act” – deals with a number of matters but the principal provisions relating to the subject of this Report are contained in Chapter 4, headed “Police Interview”, and Chapter 5, headed “Rights of Suspects in Police Custody” of Part 1 of the Act.
- 1.17** In summary, the principal features of those chapters of the 2016 Act are these:

¹⁶ *The Carloway Review: Report and Recommendations* (2011), available at <https://www.webarchive.org.uk/wayback/archive/20170107061637/http://www.gov.scot/Resource/Doc/925/0122808.pdf>

¹⁷ See for example, D. Nicholson, ‘Scrapping corroboration rule will undermine Scottish justice,’ *The Conversation*, 4 March 2014, and also J. Chalmers, ‘Corroboration: consequences and criticism,’ in: J. Chalmers, F. Leverick, and A. Shaw (eds.), *Post-Corroboration Safeguards Review Report of the Academic Expert Group* (The Scottish Government, 2014) pp. 5-18, available at <http://eprints.gla.ac.uk/99080/1/99080.pdf>. JUSTICE Scotland also raised concerns in *Reforming Scots Criminal Law and Practice: The Carloway Report, Response to Consultation* (2012) at pp 50-69, available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/01/JUSTICE-response-to-Carloway-Consultation.pdf>

¹⁸ *The Post Corroboration Safeguards Review, Final Report* (2015), available at <http://www.gov.scot/Resource/0047/00475400.pdf>

Representation during interview

- A person detained, or attending voluntarily, has a right to have a solicitor present while being interviewed by a police officer.
- Accordingly, an interview cannot begin without a solicitor being present unless the person concerned so consents; and a person who is being interviewed cannot be denied access to a solicitor at any time during the interview.
- Where a person consents to interview without a solicitor being present, the time of that consent, and any reason offered, must be recorded.

However, in the case of some categories of persons who may be thought to be vulnerable, the ability of the person to consent to interview without a solicitor being present is excluded. Thus, a solicitor must always be present during interview in the cases of:

- a child under the age of 16 years;
- anyone (of 16 years or older) who appears to the police to be unable by reason of mental disorder to be able to understand sufficiently what is happening or communicate effectively with the police; and
- a young person who is 16 or 17 years of age *and* subject to a compulsory supervision order (under the Children's Hearings (Scotland) Act 2011).

There is a further category of vulnerable suspect, namely a young person aged 16 or 17 but not subject to a compulsory supervision order, or from mental disorder, who may consent to interview without a solicitor only with the additional agreement of "a relevant person" – essentially a parent or similar person.

Intimation to a solicitor

In addition to the right to have a solicitor present during interview, the 2016 Act provides that a person who is in police custody has a right to have intimation sent to a solicitor of a number of matters, including that the person is in custody, the location in which he or she is being held, whether an official accusation has been made and details of the place and date of the court appearance following on that accusation.

Private consultation with a solicitor

A person in custody has a right to consult in private with a solicitor at any time by whatever means may be appropriate, including a telephone discussion.

In exceptional circumstances the exercise of the rights to consultation and representation during interview may be denied in so far as necessary in the interests of the investigation or prevention of crime, or the apprehension of offenders.

- 1.18 It is also necessary to note a further change to the law brought about by the 2016 Act which may prove to have an important bearing on the position of a person who is detained, or attending voluntarily, for interview by the police. The change is to be found in section 109 of the 2016 Act; it relates to the law of evidence and the admissibility at trial of a hearsay statement by the accused. The leading of evidence of what an accused said at interview by the police is, of course, the leading of hearsay evidence.
- 1.19 By way of a brief explanation, the law of evidence has been traditionally hostile to the admission of hearsay evidence as evidence of the facts in its contents (being not the “best” evidence) but it allowed for a number of exceptions. One such exception was hearsay evidence of a statement against interest – a confession or other potentially incriminating statement by an accused being a clear instance of that exception to the restriction on leading hearsay evidence. With the advent of recorded police interviews after 1980, the problem of the “mixed” statement – a composite statement containing some material incriminatory of the accused but also statements by the accused which were exculpatory – became more prevalent and the position required clarification by judicial decision.¹⁹
- 1.20 Briefly, if the prosecutor leads hearsay evidence of a “mixed” statement by the accused for its inculpatory value, the defence may rely on the exculpatory elements in the statement as evidence of the facts. But the defence could not invoke the exculpatory material in a mixed statement if the prosecutor had not adduced the statement for its incriminatory value.²⁰ Hearsay evidence of an exculpatory account by the accused – a “self-serving” statement – was also inadmissible. The accused’s exculpatory account could only be given by evidence on oath at the trial. That rule of the law of evidence is changed by section 109 of the 2016 Act.²¹ An exculpatory account given to the police will now be admissible as evidence of the facts there described by the accused. So, in the view of some practitioners, there may now be cases in which a suspect may well be advised to give an exculpatory account in the police station (since it will now be admissible at trial) rather than having to wait (as hitherto) until the trial and face the decision whether to go into the witness box and give evidence, and be cross-examined, on oath.

¹⁹ *Morrison v HM Advocate* 1990 JC 299; 1991 SLT 57; 1990 SCCR 235.

²⁰ *McCutcheon v HM Advocate* 2002 SLT 27.

²¹ Which inserted a new section, s. 261ZA, into the Criminal Procedure (Scotland) Act 1995.

The sea change in pre-trial criminal procedure

- 1.21 The change in the law of evidence which we have just mentioned is among the latest steps in the evolution of fundamental change in the nature of the criminal justice process in Scotland which has taken place over the course of recent decades.
- 1.22 Prior to the introduction, under the Criminal Justice (Scotland) Act 1980, of the power to detain and question a suspect, proceedings in the police station were largely confined to arresting the suspect; cautioning and charging the suspect with the offence; and noting any reply to the caution and charge. There was no real role for a solicitor to play in the police station (save, for example, the relatively rare event of a suspect who instructed his solicitor to accompany him while he attended voluntarily “to assist the police with their enquiries”). The arrival of the power to detain and question a suspect had the consequence that the investigating officer’s note, or the transcript, and the audio/visual recording of the police interview of the suspect during that detention acquired an important place in the subsequent trial. The legislative policy in the 1980 Act of excluding legal advice or representation during detention and interrogation was dramatically reversed by the decisions in *Salduz v Turkey* and *Cadder v HM Advocate*. The legislature has now enshrined, as a right of the suspect, not only the right to legal advice but also the right to have a solicitor present with the suspect during police questioning. Moreover, in the case of certain suspects, interview may not proceed unless a solicitor is present.
- 1.23 The pre-trial procedure of interview in the police station has thus become a material component of the criminal justice procedure. The suspect’s need for sound, professional advice and representation at that initial stage of the criminal process may now often be as important as advice and representation in the courtroom at the later stage of trial. In the view of the Working Party, it must now be recognised by the legal profession and others engaged in the criminal justice process that that process has changed significantly. The traditional primacy or centrality of the trial and evidence on oath has, in that respect, been diminished.
- 1.24 By way of observation, a similar diminution in the primacy of evidence on oath at trial may also be seen in the presentation of the evidence of witnesses. For various reasons, the reality of a criminal trial nowadays frequently involves the examination of statements earlier noted from witnesses by police officers. Current thinking on vulnerable witnesses favours the early recording of evidence, which will later be presented to the jury, or the fact-finding judge, with the witness no longer appearing to give evidence on oath, or doing so only to a limited extent.

- 1.25 In our view, it is against that landscape of radical change in the nature of our criminal procedure that the provision of legal advice and representation to those detained by the police needs to be examined.

Structure of the report

- 1.26 In the next chapter we describe the arrangements for providing legal advice to people who have been detained for interview current prior to and after the coming into force on 25 January 2018 of the 2016 Act – recognising of course that the arrangements will have required at least some adaptation, for example, to address the new statutory requirement for attendance of a solicitor in the case of vulnerable suspects. Thereafter, in the succeeding chapters, we consider in turn the two broad areas of concern which emerged in the course of our work.
- 1.27 The **first** of these is the large proportion – around 70% – of those detained by the police for interview who do not take up the opportunity to get legal advice before being questioned by the police; and who consequently not only lack such advice but also the assistance and protection of having a solicitor present during their interview.
- 1.28 The **second** of these two broad areas is the nature and quality of the service which the solicitor profession in Scotland, and the Scottish Government, is now called upon to provide by reason of the changed and changing nature of the criminal justice process which we have just endeavoured to describe.
- 1.29 In this report we refer to the right to legal assistance, as opposed to the right to advice, a lawyer or access to a lawyer. This is to underline that the right now available to suspects should be *active, appropriate and expert assistance* while the suspect is detained in police custody.²² As the subsequent chapters describe, for a variety of reasons, this is not necessarily the assistance that suspects receive.
- 1.30 Our approach has been to seek to ensure that all suspects have the best possible opportunity to exercise their right to legal assistance, and receive effective assistance in practice, irrespective of their personal characteristics, location, or

²² Research study *Inside Police Custody* recommended active representation following extensive empirical observations and interviews in police stations and accompanying lawyers in England and Wales, France, the Netherlands and Scotland: J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova and T. Spronken. *Inside Police Custody: An Empirical Account of Suspects Rights in Four Jurisdictions* (Intersentia, 2014), see Chapter 10. *Salduz* also highlights that the right to a lawyer must be *practical and effective*.

the offence that they are suspected of committing.²³ We make recommendations throughout the report to achieve these aims. A list of our recommendations is set out in the concluding chapter. The organisations and individuals that have assisted us in understanding the complexities of this area are acknowledged in the final chapter.

²³ Although some offences may not be of a serious nature, where the police arrest and detain in police custody for questioning, the alleged offence is likely to be one that will have serious consequences for the suspect.

II. ARRANGEMENTS FOR PROVIDING LEGAL ASSISTANCE

- 2.1 As we note in the Introduction, the decision of the Supreme Court of the United Kingdom in *Cadder* on 26 October 2010 brought about an immediate change in the legal position of a suspect detained in a police station. In this chapter we consider how the right to legal assistance is communicated to suspects and how the right is facilitated in practice.

Notifying suspects of the right to a lawyer

- 2.2 In November 2010, the then Association of Chief Police Officers in Scotland issued the “Solicitor Access Recording Form,” which had quickly been drawn up to ensure a uniform police procedure for recording that a detained suspect had been given the opportunity to request and obtain legal advice. However, it was not until 2013 that the Scottish Government provided the “Letter of Rights”²⁵ for issue by the police to a suspect and intended to explain to the person concerned the rights of a suspect in police custody. As we will go on to discuss in the next chapter, neither document was drafted in a way which might easily and readily communicate to the detainee what was involved in deciding whether to seek legal advice.
- 2.3 Government introduced the “Letter of Rights” to give effect to the EU Directive on the Right to Information.²⁴ Certain rights are delivered orally by the custody officer ahead of the suspect being handed the document.²⁶ All suspects are to be given a copy of the Letter of Rights upon arrival at the police station and to be allowed to keep it with them for the duration of their stay. It is of course right that a detainee has an adequate opportunity to read and digest the information.
- 2.4 Until recently, the investigating officer asked whether the suspect wished to exercise the right to seek advice from a solicitor. To do so, the officer followed verbatim the procedure set out in the Solicitor Access Recording Form –

²⁴ EU Directive 2012/13 of the Council and the Parliament of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 No. L294.

²⁵ The current version is available at <http://www.gov.scot/Resource/0053/00530265.pdf> and is set out in **annex 1**.

²⁶ Ss. 5, 8 and 12 of the 2016 Act require rights to be explained to detained suspects when they arrive; when a decision is taken to keep a suspect in custody and when a decision is taken to extend the period a suspect is kept in custody.

“SARF.” However, this form was repetitive and complicated. It was drawn up quickly in response to the introduction of the right in 2010 and as such, was problematic for both officers administering the right and suspects trying to follow it.

2.5 A new Police Interview – Rights of Suspects (“PIROS”) form has now been introduced to address the provisions of the 2016 Act, which came into force on 25 January 2018. It is delivered by the custody officer rather than the investigating officer. We are grateful to Police Scotland for taking on board some of the comments that we, and the linguistic experts we consulted, made for improving the process. We note that by way of advance on SARF, the new PIROS form has a contents page, a clearer format and instructions throughout to make it easier for officers to use. It includes explanatory information for the officer to read out to signpost to the suspect what is going to happen at each stage. It uses the term “lawyer” in place of “solicitor,” the former being more generally understandable to lay people. The form directs the officer to read out information explaining that any lawyer is independent of the police and free of charge. It includes the right to have a lawyer present during interview, and explains that this right will be offered after the private consultation, if the right is taken up.

2.6 While we happily acknowledge that the drafting of the PIROS form represents an improvement on the SARF, it should still be borne in mind that its primary purpose is procedural and archival – in other words going through the procedure of asking the suspect whether the services of a lawyer are required and ensuring that all the necessary questions are asked, the boxes are ticked and that thereby, matters are duly recorded for the future. While it is plainly necessary for such a procedure to be followed and recorded, it should be recognised that as a means of communication PIROS is, in that respect, of limited value.

Take up of the right to a lawyer

2.7 When surveys were carried out to see how many people detained by the police did ask to have the advice of a lawyer, the uptake was found to be very low. The Post Corroboration Safeguards Review recorded that in June 2013 a data gathering exercise by Police Scotland across all custody stations in Scotland had revealed that around 75% of suspects had waived their right to legal advice. This proportion was confirmed by an analysis of 1000 interviews by Police Scotland in October and November 2014 which showed that 71% of those in custody had not sought a consultation with a solicitor.²⁷ At the request of our

²⁷ Post Corroboration Safeguards Review, *supra*, para 5.2.

Working Party, Police Scotland helpfully agreed to carry out a further review of the waiver rate to see if there had been a subsequent increase in the uptake. However, a three-week recording exercise across three custody suites in February 2017 showed that 75% of suspects continued to waive their right to a solicitor. Cross-referencing the Scottish Legal Aid Board daily average number of requests for legal advice in February 2017 with data provided to us by Police Scotland suggests that in February 2017, over the country as a whole, only about 30% of those detained took up the offer of legal advice.

- 2.8 The Working Party was advised that Police Scotland has invested in new national software, which will enable fuller details of waiver rates to be routinely captured and monitored. The single national custody system shows that between 25th January and 2nd May 2018, 65% of suspects requested that intimation be made to a solicitor that the suspect was being held in the police station; 30% of suspects requested consultation with a solicitor; and 13% requested a solicitor to be present during their police interview.²⁸
- 2.9 Therefore, only around one quarter to one third of those detained for interview ever ask to speak to a solicitor and far fewer ask for a solicitor to attend the interview with them. It is consequently necessary to endeavour to ascertain the factors which may be contributing to this decision.
- 2.10 The low rate of uptake in Scotland replicates the situation in England and Wales when the right to legal assistance was first introduced. In England and Wales, various studies indicate that the proportion of requests slowly increased over time – from 20% in 1986²⁹ to 45% in 2009.³⁰ Skinns suggests that “[t]his increase over time may be because suspects and staff have greater awareness of rights and entitlements in the police station than was the case prior to [the introduction of the Police and Criminal Evidence Act 1984]. Staff may also be concerned about the admissibility of evidence in court if they fail to make suspects aware of their rights and act on their requests, including requests for legal advice.”³¹ However, such data as is available in Scotland does not indicate that there has been any material increase since 2010 in the proportion of those detained who take up the opportunity to have the assistance of a solicitor.

²⁸ These three positions reflect the three rights that police officers are required to notify suspects of through the PIROS form, which we set out in **Chapter 3**, at paragraph 3.42.

²⁹ Recorded in L. Skinns, ‘The right to legal advice in the police station: past, present and future,’ *Crim LR* [2011] 19 at 22.

³⁰ From an analysis of 30,921 electronic custody records across 44 stations in 4 police force areas, P. Pleasence et al. ‘The justice lottery? Police station advice 25 years on from PACE,’ *Crim LR* [2011] 3.

³¹ Skinns, *supra*. at 22.

- 2.11 In the next chapter we explore the reasons for waiver of the right to legal assistance and how take up of the right could be improved.

Contact Line and Duty Plans

- 2.12 Following the enactment of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, Scottish Ministers promulgated the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011. These regulations placed a duty upon the Scottish Legal Aid Board (“SLAB”), from July 2011, to make solicitors available to provide advice to suspects in police detention. SLAB responded by setting up the Solicitor Contact Line (“SCL”), a telephone service which operates throughout the day and night, seven days a week. SLAB employs currently 16 solicitors to operate the contact line and provide personal attendances. The solicitors on the Contact Line work in 12-hour shifts, with usually two being on duty at any time. Since January 2018, a second model has been operating to provide personal attendance; comprising three solicitors available for 24 hours over three shifts.
- 2.13 SLAB also introduced a police station duty scheme for solicitors. The duty scheme operates across Scotland, enabling legal assistance to be given in all areas. It is provided by solicitors in private practice, solicitors employed by the Public Defence Solicitors Office (“PDSO”) and also solicitors employed by SLAB as members of the SCL team. Prior to the relevant provisions of the 2016 Act coming into force in January 2018, there were 835 solicitors taking part in the Scheme, comprising 23 PDSO solicitors; 13 SLAB employed solicitors; and solicitors from 344 private firms. Of the 49 duty plans in operation across Scotland, six were covered by private solicitors alone; 41 were covered by a combination of private solicitors, SLAB employed solicitors and PDSO; and two were covered by PDSO and SLAB solicitors alone.³² At the time of publication in June 2018, we were informed by SLAB that there were 571 solicitors from 270 firms registered on the plans, a significant reduction on the previous numbers. The number of SLAB employed solicitors has increased to 16, due to the change in operating model. There are now 10 areas with no private police station duty solicitors.³³

³² SLAB, ‘Police Station duty scheme update – Solicitor Contact Line,’ 9 January 2018, available at https://www.slab.org.uk/common/documents/news/2018/Police_Station_Duty_Update_9th_January_2018.pdf

³³ Aberdeen, Banff, Dundee, Edinburgh, Elgin, Falkirk, Jedburgh, Livingston, Peterhead and Selkirk.

- 2.14 A suspect who wishes to receive legal assistance is asked by the police whether the assistance is sought from a solicitor whom the detainee knows – a “named” solicitor – or, if the suspect does not name a solicitor, from the duty solicitor. Until very recently the SCL organised both named and duty legal assistance. Since January 2018, if the suspect requests a solicitor solely for intimation purposes but does not nominate a named solicitor, the police will contact the court duty solicitor. If a named solicitor is requested, the police officer should contact the solicitor directly. Where a duty solicitor is required, the police officer should call the SCL.

Delivery in Practice

- 2.15 Although the process of channelling requests through the SCL is fully established and well run by the SCL, the nature of the advice and assistance actually provided remains limited. Suspects generally receive a telephone consultation, either from a named solicitor or the SCL. However, despite a modest increase in personal attendances since the right to legal advice was introduced, the majority of requests for advice are concluded with the telephone call to a solicitor.
- 2.16 We were informed by the SCL that when a request for personal attendance is made, the SCL solicitor manning the phone line would usually have to contact three duty solicitors before one could be found willing and able to attend. It used to be the case that if no duty solicitor could attend, the SCL sought a solicitor from the PDSO; failing that, efforts were made to find a solicitor in the SCL team not on the shift operating the contact line. Due to the limited scope for drawing on off-duty members of the SCL team, for example, by reason of the protections for employees in the Working Time Regulations and the SCL solicitors’ geographical location in the Central Belt, the new model was set up, organised to provide personal attendance as part of SCL employment. It should be added that although the SCL solicitors were not contractually obliged to turn out to provide personal attendance in a police station, they regularly and willingly did so and for this they are to be commended. Nonetheless, despite such laudable efforts on the part of the SCL team of solicitors, the Director of the SCL estimated that, prior to the new model, in around 5 cases a year in which personal attendance was sought the SCL could not find any solicitor to attend. On the other hand, where a named solicitor is requested, the number of personal attendances has steadily increased from 27% at the start of the scheme, to 66% in December 2017, with a corresponding decrease in the number of duty solicitor attendances requested.³⁴

³⁴ SLAB, ‘Police Station duty scheme update – Solicitor Contact Line,’ 9 January 2018, *supra*.

- 2.17 It is too soon to see if the new SCL model will make a significant difference to the provision of legal assistance. Overall, the number of personal attendances on those who request legal advice remains concerningly low, at around 25%. In the context of our snapshot of the total number of people in detention in February 2017, this means that just 9% of people in detention received the advice and assistance of a solicitor present in person in the police station.³⁵
- 2.18 Comparison with other jurisdictions is complicated, given the lack of uniform data collection and potential differences in the provision of legal assistance.³⁶ However, the Scottish statistics contrast with England and Wales, where legal representatives are required to attend the police station in person, except for in minor cases where the suspect is not being interviewed.³⁷
- 2.19 The low proportion of cases in which a solicitor actually attends on the client in the police station indicates that in practice matters are not being conducted as envisaged in the guidance provided by the Law Society of Scotland. That guidance points out that:

³⁵ Applying the SLAB daily average of 14 personal attendances in February 2017, see https://www.slab.org.uk/export/sites/default/common/documents/news/2017/Police_Station_Duty_Update_11th_April_2017.pdf against the total number of national s. 14 detentions in weeks commencing 13, 20 and 27 February of 3,116.

³⁶ For example in Ireland, known statistics indicate that in 2015, solicitors personally attended for consultation only in 3,007 cases, for interview only in 32 cases, and for both in 1,345 cases. In 2016 these numbers were 2,602; 44; and 1,612 respectively, demonstrating an increase in interview attendance. In Ireland the right to legal consultation during police custody is not new. However, the right to legal assistance during police interview was introduced through guidance of the Director of Public Prosecutions in 2014, following the decision of the Irish Constitutional Court in *DPP v Gormley and White* [2014] IESC 17 which confirmed a constitutional right to legal advice prior to police interview and, *obiter*, that consideration would likely be needed as to whether the right ought to extend to legal assistance in interview. For further information, see An Garda Síochána, Code of Practice on Access to a Solicitor by Persons in Garda Custody (2015), available at <https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Code-of-Practice-on-Access-to-a-Solicitor-by-Persons-in-Garda-Custody.pdf>

³⁷ Legal Aid Agency, 2017 Standard Crime Contract Specification (February 2017), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/596286/2017-scc-specification.pdf para 9.38. Para 9.39 provides that if exceptional circumstances exist which justify non-attendance these reasons must be recorded on the case file. Paras 9.9 and 9.10 list the circumstances which fall outside of this and will be handled by Criminal Defence Direct, a telephone only service (non-imprisonable offences; bench warrants, breach of police or court bail conditions.) However, a police station attendance will be required in cases where, for example, an interview or identification procedure is going to take place, the suspect is eligible for appropriate adult assistance, or the suspect cannot communicate over the telephone.

*When a duty solicitor is called upon to attend a police station to provide advice in person to a suspect, it is because the suspect has requested a personal attendance, and not further telephone advice from another solicitor.*³⁸

The guidance further advises solicitors that they should consider attending the police station in all cases:

*It may be that merely advising clients over the telephone will not be sufficient to ensure proper exercise of the right to legal advice...Solicitors should bear in mind that, in England and Wales, telephone advice is only sufficient for the most minor offences for which an interview is not ordinarily required.*³⁹

2.20 However, this is not binding and there is no professional or legal obligation to attend.⁴⁰ Nor can SLAB compel solicitors to attend. Once the SCL hands the case to a solicitor, whether a duty or named solicitor, it is for the solicitor to decide whether to attend or not. The Working Party understands that in England and Wales, because research revealed that solicitors were relying on telephone advice and unqualified staff in the firm to attend the police station,⁴¹ legal aid contracts evolved to require a personal attendance in all cases.⁴²

2.21 As already mentioned, solicitors are expected to arrive at the police station within an hour of the request to attend. If the suspect is detained in a rural area, the expectation is two hours. However, we were informed by the SCL that sometimes solicitors agree to attend but then, understandably, have to undertake other matters leading to a delay in arrival of three or four hours. The SCL does not know what solicitors tell suspects to expect about such a delay and has no control over how quickly solicitors attend. Sometimes the police contact the SCL asking the whereabouts of the solicitor. Although the police may not start

³⁸ The Law Society of Scotland, *Police Station Interviews: Advice and Information from the Law Society of Scotland* (undated) available at <https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf>, section 1(B) (unnumbered).

³⁹ *Ibid*, also section 1(B).

⁴⁰ But note that s. 33 of the 2016 Act requires as of 25 January 2018 a solicitor to be present in the case of a child or vulnerable adult. A vulnerable adult is a person 16 years of age or over and, owing to mental disorder, appears to a constable to be unable to (i) understand sufficiently what is happening, or (ii) communicate effectively with the police.

⁴¹ M. McConville and J. Hodgson, *Custodial Legal Advice and the Right to Silence*, (HMSO, 1993).

⁴² Save for the exceptions set out at note 37 above.

an interview without a solicitor present unless there are exceptional circumstances,⁴³ concern was expressed to us that officers may invoke this provision where a solicitor does not attend. But perhaps the greater risk is that the longer the delay in a solicitor attending, the more likely it is that the suspect may have a change of mind about the benefit of legal assistance. Despite delay, the SCL does not pass the case on to another solicitor if the required one or two hour limit cannot be met. We consider that it should be made clear that solicitors should not take on a case if they cannot attend within the specified period; and that if delayed, they should advise the police station and/or the SCL, so that the suspect or SCL may consider finding another solicitor.⁴⁴

Facilities for providing legal advice in the police station

2.22 Police Scotland guidance emphasises the right to private consultation and the need to facilitate private consultation, both by telephone and in person and that such conversations are subject to legal privilege.⁴⁵ When the right was first introduced, solicitors were suspicious that telephone advice would not be private.⁴⁶ However, most concerns about this have now dissipated. We were told that the SCL always asks the suspect where they are taking the call and whether anyone is within hearing distance.⁴⁷ There have been problems, for example personal attendances were necessary in Livingston for two months because the telephone provided for suspects was too close to a corridor. However, an upgrade scheme has been underway refitting police stations to accommodate legal advice, both by telephone and in person. Police Scotland prioritised refurbishment of its custody suites to ensure that the most frequently used were the first to receive new solicitor consultation rooms. This has ensured that, combined, custody facilities receiving 90% of the custody throughput now have such a facility in place.

⁴³ Pursuant to s. 32 CJSA in the interests of the investigation or prevention of crime or apprehension offenders.

⁴⁴ An additional difficulty that solicitors experience is that frequently when they arrive at the requested time, interviewing officers are not ready to conduct the interview and solicitors will wait at the police station for a considerable period – sometimes one or two hours – for the interview to commence. This is a poor use of solicitors' scarce time and may result in a delay in their arrival in anticipation of a later start time.

⁴⁵ Police Scotland, Solicitor Access Guidance Document, v. 1, 20th March 2015, available at http://www.scotland.police.uk/assets/pdf/151934/184779/psos_solicitor_access_guidance_document_ver_1.00.pdf p. 14, section 8.

⁴⁶ *Inside Police Custody*, *supra*, p. 271.

⁴⁷ This is prompted by the SCL Telephone Advice Record.

St Leonards Police Station in Edinburgh is reflective of the new arrangements. In this station there are three booths for consulting. Each booth comprises two windowless, cell like rooms with a clear screen between the two sides and seats below the screen – for reasons that are unclear, a chair welded to the floor on the solicitor side and a stool on the suspect side. This enables the solicitor to enter from the non-secure side where the interview rooms are situated and the client to enter from the custody side. It is possible to converse through the screen without the need for telephones. There is a ledge below the screen on each side where documents could be read or a statement written. However, reading a document together would be problematic because of the screen. If a solicitor wants their client to see a document they must give this to the custody officer to pass through the custody door. The rooms are impersonal and may make it difficult to establish a client-suspect relationship. If not in use, interview rooms, where solicitor and client may sit across or beside each other at a table, could still be used to give advice, as was the case before the booths were introduced. However, the few solicitors who make personal attendances do not ask to use these. The police also consider that the booths are better for keeping the solicitor safe if there is a safety concern with the suspect.

The suspect side is also used for telephone advice. The room is equipped for phone calls to be patched through to a speaker and a microphone will pick up the suspect. However, when we visited the volume was too low and therefore a mobile phone with no dial out facility was being used instead.

With respect to maintaining confidentiality of solicitor-client consultation, from the corridor it is possible to hear voices in the consulting rooms but not the words spoken. An officer standing immediately outside the door might, in principle, be able to hear the conversation. However, the corridor is regularly used to take people to interview and the other consulting booths. CCTV cameras also cover the area. Were an officer tempted to do so, both features provide a disincentive to trying to listen outside and capture any of the conversation.

- 2.23** It is important that solicitors can build trust and confidence with their client despite the security focussed conditions of the police station. It is particularly important to be able to engage with a suspect who is vulnerable, by nature of their age, language, medical condition, or mental health or learning disabilities.

Suspect needs

- 2.24** We have not been able to look in any detail at the arrangements for suspects who require additional assistance at the police station. However, we are aware that suspects coming into police custody often have complex needs, which may

not be identified or receive an appropriate response. In 2014, HM Inspector of Constabulary in Scotland took a sample of 310 custody records from 22 custody centres, in which 68% of detainees declared a health or substance abuse issue.⁴⁸ A SLAB 2016 telephone advice survey gathered data on long-standing illnesses, health problems and disabilities of their respondents. All respondents were over 18. In 2016, 24% of suspects had a long-standing illness, health problem or disability that limits their daily activity or the kind of work they do. 20% of these suspects reported mental illness.⁴⁹

2.25 A previous JUSTICE working party that reported in November 2017 on *Mental Health and Fair Trial*,⁵⁰ looked at the provision for vulnerable suspects in England and Wales across the criminal justice process. Although the procedure in England and Wales is different to that in Scotland, the concerns raised as to how mental health and learning difficulties amongst suspects are identified and responded to are similar. In England and Wales, community mental health professionals are now located in around 80% of police stations, with an intention to have full coverage by 2019. Although far more development is needed, these professionals can help identify the capacity of the suspect and what additional services may be required for them to participate effectively at interview, if at all – such as an appropriate adult, intermediary with specific communication skills, or suitably trained lawyer.

2.26 The SCL attendance form prompts solicitors to consider whether the suspect has any mental health or learning difficulties. However, if the suspect does have such difficulties, there is no procedure for addressing these other than arranging for an “appropriate adult” to attend.⁵¹ Solicitors with whom we spoke were

⁴⁸ HMICS, *Thematic Inspection of Police Custody Arrangements in Scotland* (2014), para 4, available at <https://www.hmics.scot/sites/default/files/publications/Thematic%20Inspection%20of%20Police%20Custody%20Arrangements%20in%20Scotland.pdf>

⁴⁹ SLAB Research Briefing, August 2016, available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiIz7T amMTZA hWFBcAKHdvuDYEQFggnMAA&url=https%3A%2F%2Fwww.slab.org.uk%2Fcom mon%2Fdocuments%2Fabout_us%2Fresearch%2Fstakeholders%2FSCL_Client_Survey_Research_Briefing_Aug_2016_FINAL.docx&usg=AOvVaw24zxtrr5Toawl vOP7Lzz8G

⁵⁰ JUSTICE Working Party Report, *Mental Health and Fair Trial* (JUSTICE, 2017), available at <https://justice.org.uk/mental-health-fair-trial/>

⁵¹ Police officers must follow the call out procedure in Police Scotland, ‘Appropriate Adults Standard Operating Procedure,’ v.3, 6th July 2017, available at <http://www.scotland.police.uk/assets/pdf/151934/184779/appropriate-adults-sop>

concerned that the custody environment needed to be made more appropriate for vulnerable suspects; and finding support at unsocial hours is difficult. There were good and bad experiences of police identifying vulnerability and attempts to provide assistance, or carry on without it.⁵² Solicitors and the Law Society of Scotland were also concerned that, despite the work of the Scottish Appropriate Adult Network, there is no requirement for training, regulation or accreditation of appropriate adults, who can be volunteers, and the quality varies greatly.⁵³ Given the lack of independence and potential for confusion as to their role, the Relevant Person⁵⁴ may also be a cause for concern.

2.27 As already mentioned, the 2016 Act makes mandatory the provision of legal assistance to children and vulnerable adults at the police station, which we commend. However, the statute does not address the difficulties which may arise where the child or vulnerable adult refuses to have legal assistance at interview or where it has not been possible to find a solicitor able and willing to attend. While it is to be hoped that such instances will be rare, these provisions of the 2016 Act thus pose important deontological issues for the solicitor profession to consider and resolve. But those issues apart, solicitors will have to attend cases where the suspect is a child or vulnerable adult and should therefore be aware of the particular communication difficulties which arise with these groups and of how to address those difficulties.

⁵² In one instance, where officers could not arrange an appropriate adult so continued to interview without one, the solicitors obtained evidence from the suspect's social worker and the case was abandoned at the intermediate diet.

⁵³ Police Scotland Guidance indicates that the Appropriate Adult will have been specifically recruited for their experience in the field of mental health and their communication skills, see note 51 above, para 4.2. We understand that many Appropriate Adults in Scotland are social workers or mental health nurses. Nevertheless, volunteers may lack experience and understanding of their role in the police station setting. Scottish Government is currently consulting, until June 2018, on whether to place existing, non-statutory, Appropriate Adult services on a statutory footing. See <https://consult.gov.scot/criminal-justice/appropriate-adult-service/>

⁵⁴ This may be a parent or other adult nominated by the suspect where that suspect is 17 years old or younger, pursuant to ss. 33, 40, 39 and 38 of the 2016 Act.

III. INFORMING THE SUSPECT

*It's the most confusing document I've ever come across. It's the most confusing set of questions. It's bonkers. It's horrendously worded. If I were a suspect, and I'm asked the question whether I want to have access to a further consultation at any point during the procedure, and how do I know if this will come up? How do I know? What if I say no? Do I know if I can still request a lawyer later? Madness. A Scottish solicitor.*⁵⁵

- 3.1 At the time of the *Cadder* decision, it appears that the Scottish Government was principally concerned about how the right of a suspect to obtain legal advice might affect police detention time limits and the operation of other elements of Scots criminal law, such as the requirement for corroboration and the right to silence. The media reported on the significant change presented by the *Cadder* judgment, but little was done to explain to the public that the judgment established an important safeguard in the right to a fair trial.⁵⁶
- 3.2 As we set out in the previous chapter, suspects detained by the police in Scotland are informed of their right to legal advice and assistance by two methods:
 - a. the “Letter of Rights;” and
 - b. the reading out to them of what was until very recently the “Solicitor Access Recording Form,” now replaced by its equivalent the “Police Interview – Rights of Suspects” form.
- 3.3 This chapter considers whether suspects that waive the right to legal assistance are making a fully informed decision and how to assist them to do so.

Reasons for waiver

- 3.4 Given the significant consequences which may ensue for a detainee’s subsequent trial from what happens in police custody, we have tried to discover the various reasons for which suspects waive the right to legal advice.⁵⁷

⁵⁵ *Inside Police Custody*, Scotland Fieldwork Report pp. 29-30.

⁵⁶ BBC, ‘Landmark ruling on questioning powers sparks law change,’ 26 October 2010; *The Scotsman*, ‘Cadder: judgment days for Scots law,’ 31 October 2010.

⁵⁷ Until April 2016, legal assistance in the police station was means tested, which we thought might feature in the reasons for waiver. However, the waiver rate has not decreased subsequent to the change in law entitling all suspects to free legal assistance.

3.5 Interviews with suspects in England and Wales have revealed a range of explanations for waiver:⁵⁸

- Suspects do not want to have to wait to see a solicitor; they want to get out of custody as soon as possible;
- Suspects do not want the police to infer guilt from a request to see a solicitor;
- Suspects who are innocent do not believe they need a solicitor;
- Suspects who have decided to admit their offence do not believe they need a solicitor;
- Suspects with prior experience know what is going to happen so do not need a solicitor to tell them;
- Suspects who have never been arrested before do not appreciate the importance of legal assistance in the custody process.

3.6 The interplay between a suspect's characteristics, the offence and the suspect's assumptions about the value of legal advice are complex.⁵⁹ It is also clear that the staffing levels, arrangements, and practices vary considerably between police stations, all of which might influence the rate at which suspects request advice.⁶⁰ Variation in information provision to detainees and attempts to dissuade detainees from requesting advice have also been observed, even in recent empirical studies, and are shown to affect legal advice take up.⁶¹ Research conducted in England and Wales over the past 30 years highlights the significant variation in request rate between police stations. A similar variation was also found across the three stations where Police Scotland recorded data for our Working Party.⁶²

3.7 The availability of lawyers and prior experience of legal assistance also plays a significant factor in subsequent decisions. When advisers arrive shortly before the interview, suspects may assume that this is due to delay on their part, rather

⁵⁸ Skinns (2011), *supra*.

⁵⁹ It has been found that request rates increase along with gravity of offence; "vulnerability;" those who consult the doctor; and intoxication. See Pleasence and Skinns, *supra*.

⁶⁰ Pleasence, *supra* at 13.

⁶¹ L. Skinns 'Let's Get it Over With: Early Findings on the Factors Affecting Detainees: Access to Custodial Legal Advice' (2009) 19(1) *Policing and Society*, 58; V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (Legal Services Research Centre, 2010), available at http://webarchive.nationalarchives.gov.uk/20110206195830/http://lsrc.org.uk/publications/TransformingCrimDefenceServices_29092010.pdf

⁶² With solicitor request rates at 38%; 21% and 16% respectively.

than an informed decision following discussion with the interviewing officer. General mistrust of lawyers can be compounded by impressions of inexperienced and poor quality or inadequate advice. The converse may also be true. For example, a higher rate of request in one English police station was concluded to be a product of detainees' "better relationship and prior experiences" with solicitors in that area.⁶³

- 3.8 *Inside Police Custody* noted similar features in the four jurisdictions where research was conducted,⁶⁴ as well as the added complication of explaining the right to foreign nationals who may need interpretation. An account from the researcher's notes in a Scottish police station incorporates a number of the previously recorded reasons for refusing advice:⁶⁵

When informed about his right to a solicitor the suspect said:

Suspect: 'Do I need one?'

Custody Officer: "It is up to you."

Suspect: "Is it just for the letter thing?"

Custody Officer: 'Yes, we're anticipating that you're not here for long.'

Suspect: 'Then no, I don't want one.'

...During the SARF [Solicitor Access Recording Form] the suspect was very dismissive and reluctant to cooperate (he made a dismissive waiving gesture with his hand), saying: 'I don't need a lawyer; I just want to go home.'

- 3.9 The Working Party invited solicitors to assist our enquiries by asking clients who had waived their right during police detention but subsequently sought legal assistance to explain their reasons for doing so. While this was a very small sample, the clients' views cover a range of explanations and are similar to those expressed in the research set out above:

⁶³ Skinns, *ibid*, at 33.

⁶⁴ These were England and Wales, France, the Netherlands and Scotland.

⁶⁵ *Inside Police Custody*, *supra*, p. 247.

- 2 out of 11: declined access to a lawyer for an awareness reason: I did not realise I could speak with a lawyer;⁶⁶
- 8 out of 11: declined access to a lawyer for a substantive reason:
 - 4 out of 7: I simply thought that I could handle the police questions by myself;
 - 3 out of 7: I reckoned that if I asked to speak to a lawyer before the police questioned me, I would be kept in custody for much longer;
 - 2 out of 7: I knew that the lawyer would be likely simply to tell me to make no comment so it seemed a bit pointless;
 - 1 out of 7: I knew from past experience that if I asked for my lawyer to come, that would take a long time and I wanted to get out of the police station as soon as I could;
- 2 out of 10: declined access to a lawyer for other reasons:
 - “Cops told me getting out, nothing to worry about so did not ask for a lawyer.”
 - “Had phoned solicitor before attending at the police station. Did not feel needed further advice. Knew what was going to be interviewed for and had decided to say no comment.”⁶⁷

3.10 Police in one custody suite also asked suspects for their reasons during the three week recording exercise in February 2017. Reasons recorded were:

- I am innocent so don't need a lawyer
- I know I can change my mind at any time
- I want to find out what's gone on first
- I knew the lawyer would tell me to make no comment so it seemed pointless

3.11 It is not surprising that suspects make assumptions about taking up the right to legal advice, given that they are being held in detention with limited awareness of what is happening during the police investigation, and may additionally be intoxicated or otherwise have particular vulnerabilities. However, it is important that suspects make decisions that are not based on false assumptions. Of most concern is that suspects across all studies were shown to waive their right because they believed that a lawyer was not necessary.

⁶⁶ One did not appreciate that a telephone consultation could take place. He thought advice would require attendance which would take a long time.

⁶⁷ Some participants ticked multiple answers.

Public education about the right to a solicitor in police custody

- 3.12 As the High Court of Justiciary has recognised, it is important that suspects understand their right to legal assistance and, if waiving it, do so voluntarily on a fully informed basis.⁶⁸ A series of Strasbourg decisions have stressed the need for waiver to be genuine.⁶⁹ Therefore, all suspects need fully to understand not only the availability of legal advice but also the role of a lawyer and why getting legal advice and assistance might be in their best interest.
- 3.13 Information directed towards informing the public on the right to legal advice in police detention is minimal. There was no public information campaign conducted by public bodies at the time that the right came into force, to explain why it is valuable and what it involves. Searching online to try to access public-facing information yields very few results. Of the information that can be found, most refers to the *Cadder* decision and its impact and most of the information is not written for the general public but for legal professionals or academic purposes.
- 3.14 Material that is directed towards the general public is not easily available, either by using search engines or by consulting the websites of bodies to which one would think to go for information on the right. Accessing relevant information requires extensive navigation of both search engines and the websites of various bodies and sources. This requires time, resources and skills which not all individuals may have when endeavouring to inform themselves.⁷⁰

⁶⁸ The suspect must understand the right; must choose to give up the right free from any pressure to do so; and must display no hesitancy or uncertainty in doing so: *Paul v HM Advocate* [2013] HCJAC 13; 2014 SCCR 119.

⁶⁹ See for example, *Pischalnikov v Russia*, App. No. 7025/04 (24 September 2009) (unreported): For a waiver to be effective it must be established in an unequivocal manner, made voluntarily and constitute a knowing and intelligent relinquishment of the right. It must be shown that the accused could reasonably have foreseen what the consequences of his conduct would be (para 77). The Court strongly indicated that these additional safeguards were necessary because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that his rights will be respected (para 78).

⁷⁰ Of the material that appears in a web search on “right to a lawyer in Scotland”, only three sources generate public information, but of varying quality: 18th result - Fair Trials’ ‘Arrested in: Scotland’ provides a comprehensive Q&A outlining what an individual can and cannot do upon arrest and their relevant rights. However, this advice is not entirely accurate, <https://www.fairtrials.org/arrested-abroad/arrested-in/arrested-in-scotland/>; 15th result – ‘Scottish Criminal Law - The Complete Guide’ from Unlock the Law refers to the right but all too briefly, <https://www.unlockthelaw.co.uk/scottish-criminal-law.html>; 7th result - MTM Defence Lawyers provides a succinct two page outline of the right which is useful and could be of value in understanding the right, <http://www.mtmdefence.co.uk/assets/documents/MTM%20Legal%20Topics%20-%20Your%20Rights.pdf>

3.15 Few public bodies provide on their websites helpful information, directed towards the public, on the right to a solicitor or the function of a solicitor while a person is in police custody.

The Scottish Government has recently introduced a helpful and clear section on its MyGov Scotland website to reflect the 2016 Act changes. This explains in plain English what happens following an arrest. It does set out the right to a solicitor. However, it could provide more detail on the role of a solicitor. It might also deter take up of the right by some of the wording chosen.⁷¹ The page also includes a link to the Letter of Rights, which we discuss further below. With a search, it is possible to find on the Police Scotland website the guideline “Know Your Rights” which is directed towards young people. This document has the potential to be very useful. However, currently, the right is briefly referenced: *“you have a right to a solicitor and one other person informed.”*⁷²

Citizens Advice Scotland does provide some easily accessible and useful information entitled “If you are detained or arrested by the police.”⁷³ However, it does not outline the role of a solicitor in this situation. The Young Scot website, through the topic of “Rights” also provides a basic outline in a useful and easily accessible page entitled “Arrest, Detention and Sentencing: What Happens” which is directed towards informing the public.⁷⁴ However, it is quite brief.⁷⁵

The Public Defence Solicitors’ Office website appears to provide the clearest explanation of the right directed towards the public.⁷⁶ This resource is particularly helpful as it is set out in Q&A format and provides succinct answers to a series of questions that are very relevant to the right and its use in practice. It is also easily accessible via the logical topic of “Need legal help?” followed by selecting “Advice.” However, this website is not easily found unless you know to look for it.

⁷¹ “If you don’t want to have a solicitor with you during your police interview, you don’t need to. Sometimes you can’t refuse to have a solicitor present, for example if you’re under 18 or a vulnerable adult.” See <https://www.mygov.scot/arrested-your-rights/legal-advice-at-a-police-station/>

⁷² http://www.scotland.police.uk/assets/pdf/keep_safe/know-your-rights?view=Standard Additionally, the link on the Police Scotland website does not appear to work; to find the document, a web search must be undertaken.

⁷³ See <https://www.citizensadvice.org.uk/scotland/law-and-courts/legal-system-s/police-s/if-you-are-detained-or-arrested-by-the-police/>

⁷⁴ See <https://young.scot/information/rights/arrest-detention-and-sentencing/>

⁷⁵ The Police Scotland website also provides a link to the Young Scot website.

⁷⁶ See <http://www.pdso.org.uk/advice.php#001>

3.16 Greater awareness of what a lawyer can do to assist a suspect in the police station would help the public understand better why this right is valuable. We consider it important that much more public information should be provided to make the right known, understood and appreciated. Such information could, and in our view should, be made available on the websites of the Scottish Human Rights Commission, the Law Society of Scotland, the Scottish Legal Aid Board, the Scottish Government and MyGov Scotland.

3.17 Lots of organisations now use video to communicate messages quickly and clearly, such as the successful Rape Crisis Scotland animated video campaign “I Just Froze.”⁷⁷ The Law Society of Scotland already utilises animated videos about how solicitors can help with certain areas of law and legal aid.⁷⁸ This mode could be adopted to help the public better understand the right to legal advice during police detention and utilised on the websites of all relevant organisations.

What suspects are told about their rights

3.18 An extensive literature on understanding legal rights has raised concerns about the way in which information about rights is communicated.⁷⁹ Studies considering the Scottish caution and the right to legal advice suggest that the processes of communicating these rights largely serve an archival purpose and use written formulations which poorly translate into spoken information about those rights. They use complex language or legal terminology.⁸⁰ Participants in these studies were shown to have a low understanding of both the terminology and the rights of which they had been formally notified. They were also shown

⁷⁷ See <https://www.rapecrisisscotland.org.uk/i-just-froze/> Organisation MediaCoop has produced lots of engaging digital media and films to communicate messages for the third sector, including Rape Crisis Scotland, and could be engaged to assist with informing the right to legal advice, see <http://mediaco-op.net/portfolio/latest-work>

⁷⁸ See <https://www.lawscot.org.uk/for-the-public/what-a-solicitor-can-do-for-you/>

⁷⁹ For example see F. Rock, *Communicating rights: The language of arrest and detention* (Palgrave MacMillan, 2007), p. 208; J. Cotterill, ‘Reading the rights: A cautionary tale of comprehension and comprehensibility,’ *Forensic Linguistics* (2000) 7 (1) 4-25; G. Heydon, ‘Silence: Civil right or social privilege? A discourse analytic response to a legal problem,’ *Journal of Pragmatics* (2011) 43(9): 2308-2316; F. Rock, ‘The caution in England and Wales’ in L. Solan, and P. Tiersma (eds.) *The Oxford Handbook of Language and Law* (OUP, 2007) 312-325.

⁸⁰ D. Cooke and L. Philip, ‘Comprehending the Scottish caution: Do offenders understand their right to remain silent?’ (1998) 3 *Legal and Criminological Psychology* 13 (carried out with offenders); E.J. Cooke, ‘Do you understand? Comprehending Spoken Legal Rights in Scotland’ (thesis submitted to University of Edinburgh, 2013) (carried out with 16 year old students).

to over-estimate their own level of understanding. Moreover, suspects' literacy skills and abilities to interpret written information are likely to vary, and so reliance upon written materials alone to communicate rights is unsatisfactory.⁸¹

- 3.19 The provision of clear and accurate information concerning the right to legal advice at the time suspects are required to exercise their rights is therefore crucial to ensuring they do so in a voluntary and fully informed way.⁸²

The Letter of Rights

- 3.20 The version of the Letter of Rights currently given to a detainee takes into account the changes brought about in the 2016 Act.⁸³ The Working Party naturally understands that in order to meet the requirements of the EU Directive on the right to information in criminal proceedings, the content must cover the matters specified in the Directive, which gives an indicative model. However, the Directive also requires information on rights to be given 'in simple and accessible language.'⁸⁴ In its Explanatory Memorandum on the Directive, the EU Commission also observes that 'the ECtHR stresses that authorities have to take all reasonable steps to ensure that a suspect is fully aware of his rights'.⁸⁵ Further, it recommends that the Letter of Rights 'should be drafted in language which is easily understood by a lay person without any knowledge of criminal procedure'.⁸⁶

- 3.21 In our view, which is shared and informed by the forensic linguistic experts whom we have consulted, in many respects the Letter of Rights is composed in a way which is likely to be confusing to suspects in detention and to make it difficult for them properly to understand the document. A supposedly "easy read" version of the Letter of Rights is available; but our clear impression is that this version is rarely offered or used. More importantly, however, the only real difference between the supposedly "easy read" version and the standard version of the Letter of Rights is that the "easy read" version has the addition

⁸¹ Cooke and Philip, *supra*; Carlin, *The comprehensibility of judges admonitions and warnings to accused persons* (Glasgow Caledonian University MSc thesis, 1999).

⁸² See also <https://centerforplainlanguage.org/learning-training/five-steps-plain-language/>

⁸³ See link at footnote 25 above and **annex 1**.

⁸⁴ EU Directive 2012/13, *supra*, Article 3(2).

⁸⁵ Para 16, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2010:0392:FIN>

⁸⁶ Paras 22 and 25.

of some drawings; the text is the same as the standard version.⁸⁷ Moreover, the images depicted are only loosely connected to the matching text, are repetitive and ambiguous and the structure of the “easy read” version is unclear.

- 3.22** We consider that in principle the standard version which all suspects receive should be composed as a document which has as its primary purpose the imparting of important information to a readership which includes many who may require a text with simple, short sentences and a layout which makes it an “easy read.” We would observe, in support of that recommendation, that the current approach of only offering an “easy read” version within the body of the Letter of Rights (“Please ask if you want an easy-read copy”) requires an ability to read that far into the text. Moreover, while those with evident visual impairment will be used to the provision of large text versions many people may be embarrassed to reveal the much less evident fact that their reading ability is poor by asking for an “easy read” version.
- 3.23** As such, while the current version of the Letter of Rights may contain a technically accurate statement of the rights enjoyed by a detained suspect, it is drafted in a way which is unclear and confusing; and it fails in what ought to be its primary objective of giving clear and easily understandable information to a suspect.
- 3.24** By way of illustration, we set out a few of the problems which we, and the experts whom we consulted, have identified with the current version of the Letter:

⁸⁷ Easy read has been developed to help people with language difficulties understand information more easily, using short, simple sentences and pictures, lowering the ‘readability level’. Little research has been carried out to understand whether it is an effective strategy, with that research giving mixed results, (see Inkle Comms, ‘Claims Easy Read Works – a closer look’, (2015), available at: <http://www.inklecomms.co.uk/claims-easy-read-works-closer-look/>) although more research is being conducted (See J. Hughes, ‘Comparing understanding of Health related knowledge following Easy Read alone or Easy Read with additional support in adults with intellectual disabilities’, 2015, available at: <http://www.hra.nhs.uk/news/research-summaries/easy-read-and-health-related-knowledge/> and S. Buell, ‘The Easy Read Project. Participation in healthcare: an investigation into the accessibility value of health-based literature for people with poor literacy skills associated with intellectual disability’, (2014), available at: <http://www.hra.nhs.uk/news/research-summaries/the-easy-read-project-version-1/>) Keyring has been working to improve the use of easy read documents in the criminal justice system, see <http://www.keyring.org/cjs/easy-read> It records that the use of an easy read application form to the Criminal Cases Review Commission has resulted in a significant surge in applications from vulnerable groups, and helped prisoners access services. Likewise, the organisation Change develops easy read documentation for people with learning disabilities, provides guidance and makes available appropriate images for use in easy read documents, see <http://www.changepeople.org>

- The opening definition of what is contained in the Letter – “By rights we mean important freedoms and supports” – is unhelpful and confusing.⁸⁸ It is significant to note that only 6% of people in Cooke’s study on the caution understood what “rights” meant.⁸⁹ However, defining rights as “freedoms and supports” is unlikely to help the relevant readership of this document.
- What appears in the box on the first page is presumably intended as an overview or summary of the succeeding four pages, but that is far from clear and it does not achieve that purpose. There is no linking between the information in the box and the contents of those pages.
- The layout and sequence followed in stating the suspect’s rights – not only in the first page box, but also particularly in the ensuing pages - has no evident logical order.
- Importantly, the right to legal advice and assistance is buried among other text and little is attempted by way of explaining to the suspect the role of the lawyer or that a lawyer may help and support the suspect.⁹⁰
- Rights which apply only to a limited category of person are placed next to rights which apply to all; this can lead to confusion on the part of the reader as to their relevance and importance.
- The rights are expressed in the abstract with no information on how to invoke them in practice. The interchange between modal verbs, such as “the police might” and the “police will” also creates confusion about the nature of actioning these rights.
- The document makes lexical choices, such as selecting the phrase “on-call lawyer”, which are likely to be unfamiliar to suspects; and the interchange of “questioning” with “interview” is not explained.
- Bold text is applied without clear purpose.

These are just some of the problems which may be mentioned. More generally, the document – which is relatively lengthy – assumes an above-average reading ability, which many suspects will not have. And for many suspects being detained in a police station places them in a stressful situation in which it is difficult to read and understand with ease.

3.25 Drawing on the comments from the experts whom we consulted, we have prepared an alternative version of the Letter of Rights. For it we have chosen the title “Your Rights in the Police Station”, which we consider to be more

⁸⁸ Lawyers might regard it as also jurisprudentially inaccurate, at least in the Hohfeldian analysis.

⁸⁹ Cooke, *supra*.

⁹⁰ The Letter simply states that “*A lawyer’s job is to protect your rights and give you advice about the law.*”

informative and understandable than the current “Letter of Rights”.⁹¹ This alternative version is set out in **Annex 2** to this Report. Our document aims to tell suspects, in simple language, what they need to know about their rights at this point in the criminal process by listing and answering, in such accessible language, the questions which are likely to be in the mind of anyone detained in a police station. It also aims to give better information about what a solicitor can do to help someone detained in the police station (telling detainees that they may consult a solicitor is of little value if the detainee has little, or no, understanding of the help which a solicitor may provide.) Our document covers all the matters which need to be covered by the requirements of the Directive. It also takes into account the provisions of the 2016 Act.

3.26 We do not, of course, suggest that our attempt at drafting an alternative version to the existing Letter of Rights is incapable of further improvement or refinement. But we believe that it demonstrates that something noticeably better than the current offering can be provided. We would commend our draft to the Scottish Government for consideration, in the hope and belief that it will be of assistance.

Voice and Vision

3.27 As linguistic experts have confirmed, relying on written information in the context of police detention assumes both literacy ability and an attention span which in the case of many suspects may not exist to the necessary extent. Research on effective learning demonstrates that information should be presented on different occasions and in different ways. Information should be communicated aurally as well as in written form, and, ideally, involve an opportunity to experience or engage, to be fully understood.⁹² Increasingly people are becoming accustomed to receiving information not from the printed page but on-screen through video footage or animated, or illustrated, text. To give a couple of examples, nowadays anyone travelling by air will commonly

⁹¹ We appreciate that the term “Letter of Rights” is used in the English language version of the Directive, but it is clear that use of that term is not mandatory. Other language versions of the directive employ more general terms, for example, “*Une déclaration de droits écrite*”; “*Eine schriftliche Erklärung der Rechte*.” In England and Wales it is called “the Notice of Rights and Entitlements.”

⁹² For example, J. Kruger and S. Doherty, ‘Measuring cognitive load in the presence of educational video: Towards a multimodal methodology,’ *Australasian Journal of Educational Technology* (2016) 32(6); See also Legal Tech Design, which conducts research into complex communication, including in law, science and healthcare and considers that visual design improves laypeople’s understanding of complex information, <http://www.legaltechdesign.com>.

be advised about security search procedures and on-board safety measures by screen presentation or video; or those seeking DIY advice will get it by video instruction on YouTube.⁹³

3.28 Although suspects are told certain rights when they arrive in custody and following a decision to keep them in custody, they are not told about those rights in detail. The Letter of Rights is intended to convey to the suspect those rights in detail and in language that the suspect can understand. We appreciate that at the stage of asking the suspect whether the services of a lawyer are sought, there is some further oral communication of the right to legal advice. However, that oral communication consists in the reading out of the wording on a form devised essentially for record purposes and not for communication of information. Given all the technical possibilities available in the current digital age, and following discussion with linguistic experts, we recommend that urgent consideration be given by the Scottish Government to the production of a video which can be viewed by the suspect during or after the booking in process or at any event before the suspect is asked whether legal assistance is wished. The video would necessarily have to be short and clear. It would need to be viewed in conjunction with the rights information leaflet, which suspects are entitled to keep with them throughout their detention. We are unable to see any real difficulty in providing such a means of communication, so long as operational practicalities are taken into consideration. It could be played on a screen in the custody area or on a robust hand-held device.⁹⁴

3.29 Care, thought and attention would of course need to be given to such a video explaining the rights of a suspect. (It would be different to the public information video we suggest above at paragraph 3.17.) In our view it should be easily relatable to the situation in which suspects are placed. Our provisional view favours using actors in real spaces rather than animation. The video would feature professionals explaining their different institutional roles (a police officer; a solicitor) and show what would happen in practice if the person requested legal assistance (a private consultation on the telephone and in person; a solicitor present in the police interview). But obviously expert advice on the production of such a video would need to be sought.

⁹³ See also A. Brandt, 'On Making Privacy Policies More Simple and User-Friendly', *The International Association of Privacy Professionals*, 10 December 2013, available at <https://iapp.org/news/a/on-making-privacy-policies-more-simple-and-user-friendly/>

⁹⁴ As the justice system in England and Wales is digitised, there are examples of prisons providing laptops for remand prisoners to view their case files. At HMP Peterborough laptops are being adapted with robust casing and without access to other software or the internet to ensure that they are fit for purpose. A similar approach could be taken by Police Scotland in custody suites.

Informing of the right to legal assistance

- 3.30** In the previous chapter we explained that Police Scotland has reviewed the notification process informing of the right to legal assistance. As a consequence, it has introduced the PIROS form, which is a significant improvement on the SARF, the problems with which are noted in the opening quotation to this chapter. However, one of the limitations on the usefulness of the PIROS form as a means of communication is that the police officer is required to read its contents out to the detainee. Reading such a text out aloud often results in a stilted, monotonous delivery which is difficult for the listener to follow. We consider that internal police guidance should stress to officers the need to go through the PIROS form in a way which avoids that result; to be alert to signs, such as body language, on the part of the suspect which indicate the suspect's lack of understanding; and in such cases to supplement the text of the form with a further explanation in the officer's own words.
- 3.31** Section 2 of the PIROS form – “Explanation of Rights to the Suspect” illustrates the problem. At the end of each of its four sub-sections the officer is required to pose to the suspect the question “Do you understand?” with the option of ticking either the box “Yes” or the box “No”. The PIROS form appears to assume that having received a negative response the officer then proceeds nevertheless with the questions in the ensuing sections of the form. Guidance should make clear that the officer should endeavour to explain matters in simpler language (the nature of which should be recorded in the “Notes” field) and that, if that fails to bring about genuine comprehension, should secure legal assistance anyway.

Verifying comprehension

- 3.32** The decision by a suspect to waive the opportunity of legal assistance should be taken by a suspect only on a fully informed basis. We have therefore considered what methods might be adopted in order to verify that the suspect has properly understood the information provided about the availability of legal assistance and its value to a suspect.
- 3.33** As we just mentioned, in section 2 – “Explanation of Rights to the Suspect”– the PIROS form requires the officer to ask “do you understand?” after each right is narrated and it provides a box in which the officer is to record “yes” or “no.” Having already touched upon it, we leave aside the absence of any indication in the form of what the officer should do if the answer is “no”. More importantly, simply asking the question “do you understand” is not a reliable means of testing whether information has been fully digested and understood. The simplicity of the question masks misunderstanding in the obvious sense

that a person who believes that he or she has grasped the information provided but who in fact is labouring under a mistaken appreciation of the import of the information will happily answer the question in the positive. The question is also criticised by linguistic experts for the ease with which it elicits acquiescent responding. It is likely that suspects will state that they do understand, even though they do not have the understanding to which the questioner is referring. As the studies above indicate, they may even think they understand when they do not.⁹⁵ Rock also suggests that it is ‘pragmatically inappropriate’ for a suspect to answer this question in the negative, as to do so is to admit that ‘they have inconsiderately not listened, are not capable of understanding or that the speaker explains poorly.’⁹⁶

3.34 Finding a suitable alternative approach is not an easy task. Linguistic academics suggest that it would be preferable to ask suspects to explain in their words the gist of what they have been told. However desirable that course might be – and it is obviously a good, though not infallible, way of trying to verify comprehension – we have come to the conclusion that for a variety of reasons it is simply not practicable in the police station setting. Suspects may not understand the point of, nor appreciate, the request, which will confuse them further. It also places upon the suspect the intellectual task of correctly recalling the information, ordering it, and communicating it back in different language. For suspects in custody this is likely to be seen as another frustrating and difficult request. From the point of view of the police officer, it would place on the officer the potentially difficult task of having to form a judgement as to whether the suspect’s explanation of his or her understanding was adequate; and the officer’s efforts to bring clarification may cause further confusion and indeed result in the giving of erroneous advice.⁹⁷

3.35 Asking the suspect who waives the right to legal assistance to explain the reason or reasons for so opting may in some instances reveal that the decision is based on a misunderstanding; and we are conscious of the opinion expressed by Lord Kerr in his minority judgment in *McGowan v B*.⁹⁸ It would no doubt be the case

⁹⁵ Cooke and Philips; E.J. Cooke.

⁹⁶ Rock, *Communicating rights: The language of arrest and detention*, *supra*, p. 208.

⁹⁷ We recognise that commonly at the beginning of a police interview the interviewing officer will ask questions to verify the suspect’s understanding of the police caution. However, this is a different setting to the booking in procedure where the suspect will be asked a series of questions including whether they wish to take up legal assistance.

⁹⁸ *McGowan v B* [2011] UKSC 54; 2012 SC (UKSC) 182; at [112]: “Certainly, in the absence of any inquiry whatever (whether of the suspect directly or, if they are capable of revealing it, by examination of the surrounding circumstances) as to why a suspect has decided to waive the right, it is, in my opinion, simply impossible to say that an intelligent, knowing decision has been made.”

that requiring any suspect who opts not to have legal assistance to specify the reason or reasons for so deciding would provide useful research material. We are also advised that in England and Wales the relevant Code of Practice includes a requirement to ask suspects who waive their rights the reason for doing so, as part of the process of verifying understanding.⁹⁹

3.36 The procedure to be followed under the PIROS form provides for police officers to note “Any reason given by suspect for waiving the right to solicitor.” This follows faithfully the recording requirement set out in section 32(7)(b) of the 2016 Act.¹⁰⁰ It is, we think, clear that both the legislation and the consequent framing of the PIROS form encompass noting only a reason which has been freely volunteered by the suspect.

3.37 The Working Party carefully considered whether it is sufficient to only note in the form any reason spontaneously offered by the suspect without invitation from the police officer or whether suspects should be specifically asked by the police officer to provide a reason for opting not to seek legal assistance. There are, in our view, problems about asking such a question. It risks eliciting an answer which is incriminatory. While it might be provided by statute that any answer to the question would not be admissible as evidence against an accused, that would require to be explained to the suspect; or the suspect would require to be cautioned about answering the question with the explanation that any response might be used as evidence in any prosecution. It would also depart, in our view significantly, from the principle that the only information which a suspect must provide are basic identifying details: name; address; date and place of birth; and nationality.

⁹⁹ The Police and Criminal Evidence Act Code of Practice C, para 6.5 requires that officers ask suspects the reasons why they decline legal advice and the reasons should be recorded on the custody record or interview record as appropriate. It is the custody sergeant’s role to record these reasons. A dialogue box is prompted by clicking “no” to legal advice on the custody software. According to an officer that we spoke to, the reasons suspects give include: “I don’t want one”; “I don’t need one;” “solicitors aren’t helpful;” “It will take too long;” “It will cost too much;” “Do I need one?” Although the police cannot advise on whether a suspect should have a solicitor, for the last three responses officers usually give further information – it won’t take longer because the arrival of the solicitor is dependent upon the interviewing officer being ready to interview, not the other way around; it is free; and if they seem unsure, officers will usually say “you might as well have one if you aren’t sure about it.” If the person is a foreign national or it is their first arrest, this is usually suggested. The officer we spoke to took the view that it is fairer for suspects to have a lawyer as they then have “someone in their corner.” If suspects continue to decline, they receive the Notice of Rights and Entitlements, which they can take to their cells and will sometimes change their mind later.

¹⁰⁰ “Where a person consents to being interviewed without having a solicitor present, there must be recorded...any reason given by the person at that time for waiving the right to have a solicitor present.”

- 3.38 For these reasons, we have come to the conclusion that the position reached by the Scottish Parliament in the 2016 Act and reflected in PIROS – namely, that only a spontaneously offered reason for waiving legal assistance should be recorded – is sound.
- 3.39 We also considered the process used in Belgium, whereby all suspects have a telephone conversation with a duty lawyer about the role of a lawyer prior to deciding whether to waive their right or not. In principle, this means that legal professionals can accurately explain what their role and professional obligations entail, independently of the police; and police officers are not then put in a position of trying to explain a role that they do not fully understand themselves, or confusing their own role. However, the fact that this is done by telephone and not face to face means that the lawyer providing the explanation is also impeded in verifying whether the explanation has been understood by the suspect. Moreover the suspect may be confused by not being able to speak about his particular case. We understand that within Belgium the procedure has encountered problems and does not appear to be effective. Accordingly we do not recommend currently that it be pursued in Scotland.
- 3.40 Since 25th January 2018, when the relevant provisions of the 2016 Act came into force, the PIROS form has been conducted by custody officers, rather than the investigating officers engaged in the particular case. The Working Party welcomes this change in police procedures. In our view the change presents an opportunity for all custody officers to be better trained in techniques to ensure understanding. As with conducting a risk assessment of a suspect's welfare, a good custody officer will spend time with each suspect and make sure that the individual suspect understands. *Inside Police Custody* records that while officers were generally observed to be diligent in the administration of suspects' rights, many of the custody officers were long serving and believed in the value of due process rights, thereby making a real effort to inform those taken into custody effectively.¹⁰¹

Intimation to solicitor

- 3.41 Since at least the Criminal Procedure (Scotland) Act 1887, once a person was arrested, statute conferred on the person arrested the right to have that fact intimated to a solicitor, along with intimation that the solicitor's services were required.¹⁰² When, in 1980, the police were given the new power of detention for questioning, prior to any arrest, the legislature provided that the detainee

¹⁰¹ *Inside Police Custody*, p. 234.

¹⁰² 1887 Act, s. 17; Criminal Procedure (Scotland) Act 1975, s. 19; Criminal Procedure (Scotland) Act 1995, s. 17.

might require intimation of the detention to be made to a solicitor. But the right was restricted to intimation of the fact of detention, the policy being that a detainee should not have a right to legal assistance during the detention.¹⁰³ Following *Cadder*, the right to intimation to a solicitor was extended to include informing the solicitor that the solicitor's services were required. Overlapping with this right to intimation are, of course, the rights to receive legal advice in private and, as a result of the 2016 Act, the right to have the assistance of a solicitor present during interview.

3.42 As such, police officers are required to notify suspects of three rights which are set out in the PIROS form thus:

- “You are entitled to have a lawyer informed that you are being held by the police/have attended voluntarily at a police station (delete as necessary) to be questioned in relation to an offence and that you require their help;”
- “You are also entitled to a private consultation with a lawyer at any time while you are here. This means you can speak with the lawyer and get independent legal advice without anyone else listening to the conversation;”
- “As police officers wish to ask you questions regarding (insert suspected offence here) you are entitled to have a lawyer present with you while you are being interviewed.”

3.43 Yet little if any explanation is given to a suspect as to why intimation rather than legal consultation might be requested. Plainly, by asking for legal advice, a solicitor would implicitly be informed that the suspect is present in police detention. We are concerned about the obvious potential for confusion in the mind of the detainee when presented with these seemingly different rights in the hierarchy in which they are presented. The recent statistics from Police Scotland set out in **Chapter 2** - that 65% of all those arrested ask for intimation to a solicitor but only 30% of suspects who are to be interviewed ask for consultation and only 13% request a solicitor to be present at interview - heightens our concern.

3.44 On the view that the right simply to have intimation to a solicitor might be seen as largely historical and superseded by the advent of the right to legal assistance we considered whether it would seem sensible to remove the former right, allowing the suspect to simply decide whether to ask for legal advice or

¹⁰³ The Thomson Committee, *supra*, recommended at para 5.08 that detainees' rights be confined to having a solicitor advised of the detention and that it be a matter of police discretion whether to allow the detainee an interview with his solicitor. The report of the Thomson Committee did not consider the reasons for this in any specific terms; it may be that, at that time, it was seen as a protection against a suspect being held in excess of the six hour limit and “disappearing into the system.”

assistance. We have, however, come to the conclusion that formal intimation to a solicitor of the suspect's detention is a fundamental right, irrespective of whether the suspect considers that he or she needs or wishes legal assistance, and may be acted upon if circumstances calling for action were to arise.

- 3.45 However, in the presentation of rights to the detainee in the PIROS form, the right to simple intimation should, in our view, be given as the final default right – rather than as at present, the leading right. In other words, prominence throughout should be given to the right to have legal assistance in the police station, through advice from and the personal presence of a solicitor, with the right to intimation being raised as an option if the detainee has opted not to have legal assistance. We recommend that the PIROS form be amended accordingly.

Prior experience of police station legal advice

- 3.46 One factor in the low uptake of legal advice in Scotland may relate to prior experience of legal advice during police detention. It is no doubt the case that many individuals coming into custody as suspects have been through the system before.¹⁰⁴ This may mean that they have previously experienced legal assistance and presume that they will simply be given the same advice as on the last occasion. In the limited responses to our survey of reasons for waiving legal advice, one finds responses to the effect that the detainee in question “knew that the lawyer would advise ‘no comment’ so it seemed pointless.” One may observe that while that may have been appropriate advice in the suspect's earlier case or cases, it obviously does not follow that it is the correct advice in the suspect's current position.
- 3.47 As officers have also pointed out to us, the lack, hitherto, of solicitors attending in person in the police station and making representations on behalf of suspects, means that there is little real appreciation among those with previous experience of the system of what a solicitor will do to assist a suspect during detention.
- 3.48 The quality of legal advice and assistance is therefore an important aspect of whether suspects will choose to exercise their right to legal assistance. Ensuring an *effective* right to legal assistance is the subject of the next chapter.

¹⁰⁴ Police Scotland has informed us that the national custody system indicates that since January 2017, 39% of custody “nominals” were in custody more than once in that 15-month period. Since the relevant parts of the 2016 Act were implemented on 25th January 2018, of the 30,000 custody records created, there were 24,000 different “nominals.”

IV. THE ROLE OF THE LAWYER DURING POLICE CUSTODY

To advise someone of the right to remain silent is, to my mind, done just as well over the telephone as it is face to face. At the end of the day, when we first see the accused it's through a screen anyway and you're actually speaking to them through an intercom system and apart from actually seeing a person, you're still speaking to them via a phone line and it really doesn't make a huge deal of difference in my opinion. Scottish solicitor¹⁰⁵

Solicitor attitudes towards personal legal assistance

- 4.1 We have already noted in **chapter 2** the low number of cases in which following a request for advice, personal attendance by the solicitor in the police station takes place. One would think that, having requested legal assistance and then, having had a telephone call with a solicitor, relatively few suspects would decide that they do not need further assistance from the solicitor in person, were the solicitor to have advised that this would be in the suspect's best interests. The low number of personal attendances by solicitors may therefore relate more to the opinion of the solicitor than that of the suspect. It is important therefore to explore the reasons offered by solicitors for deciding not to attend in person. Our solicitor members, and some consultees, sensed that some solicitors tended to steer clients away from personal attendance and towards telephone advice alone.
- 4.2 We conducted a series of interviews, workshop and consultation sessions with solicitors, many of whose identity we have kept anonymous for the purposes of the research. These solicitors were drawn from private and employed practice, of varied levels of experience and geographical location.¹⁰⁶ Amongst our members are also solicitors with experience of police station assistance. From our inquiries and experience we understand that in almost all telephone advice calls the client is simply advised to remain silent in an interview.¹⁰⁷ With this advice, most solicitors are satisfied that their role is fulfilled and the telephone advice is sufficient. In the relatively few cases in which solicitors consider it advisable for the suspect to provide an account in interview, those with whom we consulted considered it appropriate to attend for interview. They

¹⁰⁵ Interviewed for *Inside Police Custody*, *supra*, p. 288.

¹⁰⁶ The answers we received reflected similar responses to the semi-structured interviews conducted in *Inside Police Custody* with Scottish solicitors.

¹⁰⁷ This advice is usually given because of either or both of the lack of information supplied by the police and the risk that saying something may provide corroboration sufficient for the police to then charge the suspect. We explore this further below.

also stated that they would do so in serious solemn cases, for example, where murder or rape is alleged, or, prior to this being a mandatory requirement under the 2016 Act, where the client is a child or a vulnerable adult.

- 4.3 However, our consultees also indicated that a ‘good,’ or ongoing client will have a bearing on their decision, as will, perhaps unsurprisingly, where a client ‘insists’ that the solicitor attends.¹⁰⁸ Conversely, we were informed that knowledge of the client can work the other way: a solicitor may believe that a particular, experienced client can handle the interview alone.
- 4.4 Other factors affecting the decision of which we were informed relate to the suspect’s grasp of the legal system; the suspect’s intellect; and the known evidence. But other, in a sense ordinary, practical factors – such as the time of day, distance to travel, court and other commitments and, out of ordinary business hours, family or social commitments or indeed whether the solicitor might have consumed any alcohol – could all enter into the equation.
- 4.5 We would add that some solicitors are aware of the responsibility involved in attending the police station and as a consequence have advised the SCL that, for reasons such as lack of training and guidance, they will not attend for fear of undermining the client’s case. However, since the suspect has had telephone advice, a decision by the solicitor not to attend will not normally assist in any subsequent contention that, by reason of want of legal assistance, reliance by the prosecution at trial on any admissions made by the suspect renders the trial unfair.
- 4.6 Duty solicitors are asked to confirm to the SCL via email whether they attended the police station or not. Where the solicitor does not attend, the SCL will ask each solicitor for a reason for non-attendance, but this data is not currently collated and it is not known how often solicitors provide a reply. We recommend that in all cases in which a solicitor does not attend recording in writing the reasons for non-attendance and advising these to the SCL should be seen as essential to proper professional practice. Apart from the consideration that doing so may help solicitors consider more carefully their justification for non-attendance, such recording is important for the operation of any quality assurance scheme, may assist researchers to identify matters which may require to be addressed in reviewing arrangements and may be relevant if there is a challenge to the admissibility of any alleged admission at trial.

¹⁰⁸ Although a client may indicate a preference for or against an attendance, relying on a client’s opinion is problematic as the client will usually not be in a good position to assess this. We do not think that suspects should have to decide whether they want legal advice just over the ‘phone or in person, but this is what the 2016 Act and PIROS form require them to decide.

4.7 In very general terms it seems to us that there has not yet been a sufficient cultural and professional shift of thinking to enable solicitors to see their role as encompassing important professional services in the police station in a systematic and routine way. This is a cause for concern. Many of the features that solicitors assess in determining whether to make a personal attendance are difficult to verify over the telephone and rely upon the police and suspect volunteering information. This means that the complexity of an offence and vulnerability of a suspect may be missed. As we have already observed, the provisions of the 2016 Act underscore the need for a shift in thinking, if only in the respects that the statute confers on those who are undergoing interview a right to have a solicitor with them and in the case of a child or vulnerable adult requires the presence of a solicitor. We recognise that this requires solicitors practising in criminal cases to have the capacity to provide legal assistance alongside their other very busy schedules. It is for the solicitor profession to meet these needs; and for the State to see that the provision of legal aid is sufficient to provide adequate professional remuneration to the solicitors providing those services. We further consider these aspects in **Chapter 5**.

Benefits of legal advice in person

4.8 Despite solicitors generally being content to provide telephone advice, the majority of solicitors whom we consulted were all very clear of the benefit of the solicitor being with the client in the police station, and in particular in the police interview. For example, we were told that:

- It reassures the client; makes the client feel less isolated or intimidated; and safeguards the client's welfare;
- It affords a check on the client's inclination to respond to "impact questions" or deliberate diversions in the course of the interview;
- It provides a check on police aggression;
- It prevents police going 'off the record' and asking questions outside of interview;
- Where the client has been counselled not to answer questions, it ensures that the client does not inadvertently break that silence;
- It may lead to an end to the case at an early stage;
- Solicitors can give the client options from which to make an informed decision;
- Solicitors know the law and can make appropriate decisions;
- It makes attending in court the next day easier.

4.9 We explored this question in our training workshops, to which see **chapter 5**. All of those who participated agreed that suspects benefit from the assistance of a lawyer in the custody environment and interview. It is much easier for a

suspect to follow advice when the solicitor is with the client rather than imposing on the client the task of trying to remember the advice alone. It is not possible for a solicitor to fully prepare a client for the interview strategy by prior telephone or other advice in advance of the interview since neither client nor solicitor can be sure of what the police officers may do or ask. However, if a solicitor is present in the interview room with the client, the solicitor can respond to unexpected lines of questioning and, if appropriate, assist the client to maintain silence. Solicitors can also assess evidence as it is revealed and any inappropriate attitude or body language of the investigating officers. And, as we shall discuss more extensively below, the solicitor can intervene to prevent objectionable questions.

4.10 As is no doubt obvious, these benefits would apply to any client in detention, not just those facing a serious charge or with a vulnerability of some kind. Significantly, the jurisprudence of the ECtHR and the UK Supreme Court on the right to a lawyer at this stage does not distinguish between types of offence or personal characteristics: all suspects are entitled to legal assistance.

4.11 Apart from the role of a solicitor in the interview itself, a consultation with a client can be far easier to conduct if it is done in person. We consider that assessing body language and verifying vulnerability (whether permanent or temporary) and understanding is nigh on impossible by telephone. Building a rapport through which to gain a client's trust and confidence is frequently extremely difficult and those difficulties are much increased if the communication is by telephone with a client they have not previously met. Some solicitors with whom we spoke also identified practical problems encountered in consulting by telephone:

- The line is very poor;
- It is difficult for both parties to focus;
- It is difficult to understand the client;
- The client cannot give the whole background.¹⁰⁹

4.12 The role of the solicitor may also involve making representations concerning any extension of detention and decision to charge the suspect. The 2016 Act introduces investigative liberation to which a police officer may attach conditions, which adds a layer of complexity to the police decision whether to detain. A solicitor once instructed should be making representations on behalf of the client as to whether any of these routes are appropriate. If the solicitor is not at the police station to do so, it will be necessary to request that the police

¹⁰⁹ It may also be very difficult to verify if the call is private, despite the efforts taken by Police Scotland to adapt facilities.

officer telephone the solicitor to enable representations to be made. This will be difficult to do accurately and persuasively away from the police station, and even less so if the solicitor has only provided telephone advice to the client.

- 4.13 The availability of police liberation also raises concerns for a suspect without legal assistance. Where a suspect is offered investigative liberation at interview, he or she may think it more likely that by cooperating with the police he or she will be released, and, in the absence of a solicitor, be therefore more likely to volunteer an account, without considering that an account will in fact provide a sufficiency of evidence to charge.¹¹⁰

Advising silence and police disclosure

- 4.14 While by no means the only reason for which a solicitor may advise the client to make a “no comment” interview response, concerns were voiced to the Working Party that the information provided by the police concerning the circumstances of the alleged offending was often meagre; and in the absence of a reasonably full account of the evidence upon which the police based the allegation, it was not possible to do other than advise the client to maintain silence.
- 4.15 Section 31(2) of the 2016 Act requires that, not more than one hour before any interview, the detainee be informed ‘of the general nature’ of the offence of which the detainee is suspected of having committed. The provision must be interpreted in accordance with Article 6 of EU Directive 2012/13/EU on the right to information in criminal proceedings, which provides that suspects must be provided with information about the criminal act which they are suspected of having committed and the reasons for arrest. Information should be provided promptly and “in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.”¹¹¹ Police Scotland Solicitor Access guidance advises that the provision of a pre-interview

¹¹⁰ Pursuant to s. 16 of the 2016 Act, which enables release on conditions pre-charge, and s. 25 post charge. The 2016 Act also introduces provisions to allow questioning after charge, pursuant to s. 35, which may make release on conditions more common.

¹¹¹ Recital 28 provides 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.”

briefing is at the investigating officer's discretion, but that not doing so may increase the likelihood of a 'no comment' interview or interruption of interviews for a solicitor to provide advice when unexpected questions arise.¹¹² It does not refer to the EU Directive.

- 4.16 The amount of information provided by police ahead of interview varies broadly depending upon the offence, the nature of the investigation, the suspect, the officer and the solicitor asking for information. Solicitors with whom we spoke were generally of the view that they do not receive sufficient information to advise their client to provide an account.¹¹³ Even when officers provide some information, they may not have gathered all the evidence at that stage and answering questions is therefore seen as a risk. Solicitors who are not present at the police station have a limited opportunity to request a pre-interview briefing, though SCL solicitors informed us that some officers will provide a detailed account over the telephone of the allegation – particularly where it appears that there is a sufficiency of evidence.
- 4.17 In England and Wales it is apparently also difficult to obtain disclosure: it is within the investigating officer's discretion and although officers may provide more of a summary than Scottish counterparts, often they provide very little specific information ahead of interview.¹¹⁴ But it must be borne in mind that interviews in England and Wales take place against the background of different rules in the law of evidence. Juries in that jurisdiction may draw an adverse inference from an accused's silence at interview if a piece of evidence put to

¹¹² Police Scotland Solicitor Access Guidance Document, *supra*, section 14. The Guidance suggests areas for briefing such as an outline of the suspected offence; circumstances of arrest; any significant comments or material recovered, and the reasons an interview is deemed necessary.

¹¹³ All Scottish cases observed for *Inside Police Custody* also involved advice to remain silent, *supra*, p. 322.

¹¹⁴ The Police and Criminal Evidence Act 1984 Code of Practice C, para11.1A provides that: "Before a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it (see paras 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence. However, whilst the information must always be sufficient for the person to understand the nature of any offence (see Note 11ZA), this does not require the disclosure of details at a time which might prejudice the criminal investigation. The decision about what needs to be disclosed for the purpose of this requirement therefore rests with the investigating officer who has sufficient knowledge of the case to make that decision." Note 11ZA elaborates as follows: "What is sufficient will depend on the circumstances of the case, but it should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly."

the suspect called for an explanation; but the defence may argue that such an inference may not be drawn where insufficient information has been provided to the suspect prior to questioning. This may favour a freer disclosure by the police. Further, the prosecution there does not need to prove its case by corroborated evidence. As already mentioned, fear of curing a want of sufficiency may operate to prevent an account being offered by a suspect. But awareness by police officers of this fear may operate to encourage fuller disclosure where corroborated evidence is available.

4.18 We should make clear that, notwithstanding the absence in Scotland of a rule entitling a jury to draw an adverse inference from silence, a good number of the solicitors with whom we spoke recognised that, in reality, there were many cases in which silence might not prove to be a good tactic to pursue. Thus, it would be appropriate for the detainee to put forward an account where it is obvious that a sufficiency of evidence will be available and consequently a prosecution will be brought; where there is an obvious defence (such as alibi or self-defence); or where the suspect has relevant information to demonstrate innocence. Some solicitors thought it inappropriate to advise silence in these circumstances also in light of the further consideration that silence might deprive the client of the opportunity to be freed from suspicion or benefit from an early admission of guilt. As we earlier touched upon in the introduction, the provisions of section 109 of the 2016 Act enabling an exculpatory statement by an accused to be admissible, also creates a greater obligation on solicitors to consider whether the interview is an appropriate opportunity to present the suspect's account.

4.19 It also appears to us that the problem of not receiving sufficient information from the police is more acute where the solicitor is endeavouring to give pre-interview advice by telephone and does not propose to assist the client in the interview. A fuller disclosure of the information possessed by the police is likely to occur in the course of the interview and the solicitor present with the client at that interview can then react to the disclosure by tendering appropriate advice. Awareness by the police officers that the client will be assisted during interview is, we think, likely to encourage fuller disclosure in advance. This, in our view, underlines the importance of the solicitor's attending at the interview, thereby avoiding the inherent risks and drawbacks of merely giving telephone advice.

The role of the lawyer during interview

4.20 In our view, perhaps the most important aspect of the solicitor's role in assisting those in police custody is attending with the client during the police interview. While commonly the sound advice to the client will indeed be to decline to answer police questions, we have serious concerns that many, if not most, suspects find it very hard to stick to this advice when faced with police

questioning. The views which we received on this from solicitors with whom we spoke did, however, vary. Some told us that suspects who have notable previous experience of the system understand the right to silence such that they do not ask for a legal representative and answer every question at interview with ‘no comment;’ indeed one solicitor told us “I have never had a client who broke silence despite being advised against it.” But other solicitors thought that advice to remain silent is often undermined by the nature of the questions asked or by assertions made by the police officer such as “this is your chance to explain...” In some cases, solicitors were concerned that if the suspect were to indicate any wish to speak again with the solicitor, officers might impress upon the suspect the time the solicitor would take to arrive.

- 4.21 In our training workshops we explored the issue of suspects maintaining silence in interview. Some of the solicitors attending had experience of having given advice to remain silent to established clients, with substantial acquaintanceship with the system and its procedures but finding thereafter that in face of questioning the client proceeded to give answers. Even where the client believed that the advice had been followed and that he or she had remained silent, the interview transcript not infrequently revealed otherwise. A solicitor interviewed for Dr Vicky Kemp’s research also observed:

“I often have to intervene to remind my client that he doesn’t have to answer any questions. There are some clients where you almost have to remind them of this after every question. This is because some people find it difficult not to answer questions put to them by people in authority.”¹¹⁵

- 4.22 In our view it is necessary fully to appreciate that all people, including previous offenders, who are detained by the police on suspicion of a criminal offence are inherently vulnerable to factors such as - the environment of the police station; the late hour; the uncertainty of what may happen to them; the impact upon their dependants, employment and other responsibilities; and the lines of questioning which the police may adopt. This makes the police interview a daunting and difficult process even for the most intelligent and confident of people to navigate.

- 4.23 We do not doubt that in the vast majority of cases the police officers conducting the interview of a suspect do so in good faith, without any deliberate intention to be oppressive or misleading. Nevertheless, officers conducting interviews are usually trained in particular techniques designed to elicit answers from suspects. The police are of course attempting to establish the truth following

¹¹⁵ V. Kemp, *Effective Police Station Legal Advice: Country Report for Scotland* (University of Nottingham, 2018) (forthcoming).

an allegation that has been made, and making these enquiries is perfectly proper. However, techniques used by interviewing officers are designed to persuade; and can thus be difficult to resist. If nothing more, they attempt to break the suspect's silence. Remaining silent in the face of questioning is unnatural. We learn as children that we are expected to answer questions when asked, especially by those in a position of authority. During our workshop training, solicitor participants who were playing the role of suspects in a simulated interview experienced for themselves just how difficult it can be not to succumb to the natural inclination to respond.¹¹⁶

4.24 Moreover, questioning in a police interview differs from the questioning of a witness in court in the important respect that in the latter the presiding judge may intervene, *ex proprio motu* or by invitation, where the question is confusing, misleading, insulting, inappropriate or otherwise illegitimate. By contrast, at the police station there is no independent arbiter to control or umpire the process. The balance between trying to protect and enforce the criminal law, whilst recognising the rights of victims and suspects can be a real challenge for interviewing officers. The presence of a solicitor at the side of the suspect during the interview thus represents an important protection for the suspect against inappropriate questioning, whether “oppressive” or simply confusing or irrelevant or badly phrased.

4.25 Solicitors with whom we spoke were generally of the view that police questioning rarely amounted to oppressive questioning which would be judged unfair but was often of poor quality. Fairness can be a difficult concept in this regard; but it is the test where, at the trial stage, an accused seeks the exclusion of admissions made in interview. In *HM Advocate v Mair*¹¹⁷ Lord Hunter held that:

In order that a statement made by an accused person to the police may be available as evidence of guilt the statement must be truly spontaneous and voluntary. It must be given freely and not in response to pressure or inducement. The overriding test established by the authorities is one of fairness. Therefore if a statement has been extracted by unfair or improper means it cannot be employed as evidence of guilt.

¹¹⁶ *Inside Police Custody* collated data from the cases observed on the prevalence of silent interviews. The writers observe that in all four jurisdictions the majority of suspects answered some or all of the questions put to them by the police. In France no suspect remained silent. In England and Wales, Scotland and the Netherlands the numbers were 10%; 7% and 16% respectively, p. 375. This confirmed previous research in England and Wales, see McConville and Hodgson, *supra*.

¹¹⁷ 1982 SLT 471 at 472.

Lord Hunter went on to identify the unfairness in that case thus:

*The matters put to the accused at this interview by the interviewing officer were for the most part not questions in any normal sense of the word. They amounted to assertions of guilt expressed by an officer who had made up his mind that the accused was the perpetrator of the crimes. They come in my opinion into the category of interrogation, cross-examination and pressure in the proper sense of these terms.*¹¹⁸

- 4.26 While it is unlikely that officers are regularly making bold assertions that the suspect is guilty of a crime, this is not unknown. More often, the problematic questions are more nuanced. In her opinion in the recent case of *HM Advocate v Hawkins*,¹¹⁹ Lady Scott considers at [22] the nature of the modern police interview:

Here the stated purpose of the questioning, in the face of the accused's clear position he wished to make no comment, was to get him to change his position and answer the questions with intention of giving him the opportunity to "give his side of the story". The Crown suggested there was nothing wrong with that. As an abstract proposition that is correct. But this is a matter of fact and degree. Where the police try to get a change of position in order to get the accused to provide answers, they are, as has long been recognised, entering dangerous territory.

- 4.27 The case illustrates the risks of leaving a client to face the interview alone. Although the suspect had received legal advice, his solicitor was not present in the interview. Lady Scott held at [23] that:

On repeated occasions and at length, the police suggested to the accused he should reconsider the advice of his solicitor to make no comment. Although the police also told the accused it was his right or choice not to answer, the admitted purpose behind these statements was for the accused to change his position and the way this was done constituted pressure.

- 4.28 Members of the Working Party are familiar with reading instances in transcribed interviews where police officers repeatedly ask questions that appear to be unclear, unduly lengthy, repetitive or misleading as to the law or facts. For example:

¹¹⁸ Lord Hunter at 473.

¹¹⁹ [2017] H CJ 79.

Questions that contain lengthy, multiple elements:

You don't do that? No what you do is you then set about the father you set about the son you have a fight with the uncle you smash a bottle over the father's head and you stab the son with a bottle that's basically what you did wasn't it?

Questions that are confusing:

While in a punching motion with the bottle in your hand did you stab X in the bottom left hand side of his back?

- 4.29 Crucially, suspects regularly break silence under the questioning that officers' conduct. For example, in one recent case the police made repeated assertions that now was the chance for the suspect to give his side of events, coupled with assurances that he was entitled to remain silent. Then the following was stated by the officer:

It's ok for your solicitor to advise you not to make a comment. That's perfectly within your rights. Its ok for him but he's not the one lying in here for four days.

Shortly afterwards the suspect departed from the no comment response previously advised by his solicitor. In another transcribed interview, we counted 17 examples of police attempts to break silence over 32 pages of otherwise "no comment" answers. The following series of questions finally elicited a response:

- *[X], this is like a story that's getting outta control here pal. And you look like you're struggling to deal wi' it. Just tell us what happened.*
- *You're the one yourself saying you cannae get to sleep at night cos o' what's been happening [allegedly said upon attendance at police station]. Talk us through what happened fae the start?*
- *Come on, X, talk to us, we're willing to listen to what you've got to say?*
- *It's no' something that's gonnae go away either, so...*
- *X, I think you do have a conscience and, if you didnae, you wouldnae be getting upset about it.*

- 4.30 Additionally, it must be borne in mind that there will also be instances where it is inappropriate to interview because the person is not fit through medical or other reason, or where it is clear that a break would benefit the suspect. Although officers are required to assess the suspect's welfare, it is possible that, with their competing responsibilities in the custody environment, a health concern may be missed. Similarly, in interview, the investigating officer has an imperative to further the investigation, not safeguard the rights of the suspect.

- 4.31 In our view a solicitor's presence at the police station is necessary for two fundamental reasons. Firstly, to evaluate the suspect's welfare and fitness to be interviewed. Secondly, if the suspect is fit for interview, to seek clarification or rephrasing of questions to make sure the suspect understands them and to moderate and control any improper attempts by an interviewing officer to pressure or persuade the suspect. Without a solicitor to provide these protections, there is a material risk that the resulting unfairness of the interview may lead to the judicial exclusion of the interview at trial. While it is, of course, necessary that the court have the power to exclude evidence of admissions improperly obtained, we regard it as unsatisfactory that the system should rely on the courts to exercise that power. The exclusion of evidence of admissions which have been improperly obtained frequently has the consequence that the prosecution comes to an abrupt end. This results in a fruitless expenditure of resources; it is unsatisfactory for the accused to have had to go through a trial which was initiated on the basis of inadmissible evidence; and it is similarly unsatisfactory for the complainer to see the prosecution collapse. It is therefore better to have arrangements in place to avoid that unsatisfactory result. We believe that this is what the court in *Cadder* and subsequent procedures seek to achieve.
- 4.32 In practice, a high degree of unfairness generally requires to be present before a presiding judge will exclude evidence of statements made at a police interview. This is no doubt in part a reflexion of the consequences of taking a step which may bring the trial process to an abrupt end. There are instances, however, where, following a badly conducted police interview, the resulting unfairness may not have reached the extreme stage at which a trial judge feels constrained to exclude evidence of all or part of the interview. In the view of the Working Party, the aim should be to secure procedural and practical arrangements whereby all police interviews are conducted with scrupulous fairness to the person being interviewed. As we have already pointed out, the proceedings in the police station have become an important stage in the criminal process. Legal assistance in the form of the presence of the solicitor with the interviewee (to which the interviewee has, of course, a statutory right) is accordingly an important, if not critical, safeguard in ensuring that the police interview is conducted with that fairness, which can only be of benefit to the functioning of the criminal justice system as a whole.
- 4.33 It follows from the views which we have expressed on the importance of a solicitor's role that we are firmly of the view that where a suspect seeks legal assistance, the standard provision of that assistance should be in the form of personal attendance by the solicitor in the police station to advise the detainee and support the detainee during interview. In contrast to the situation hitherto,

merely providing telephone advice should be the exception, rather than what happens in most cases.¹²⁰

- 4.34 We readily acknowledge that for that important change to come about it will be necessary not only that there be a “change of culture” in the thinking of the legal profession, the police, the judiciary and all otherwise engaged in the criminal justice process but also that the remuneration provided to a solicitor for attending a police station fully recognises the importance of the professional function thereby performed – sometimes at unsocial hours and at personal inconvenience.

¹²⁰ The authors of *Inside Police Custody* reached the same conclusion, observing that telephone advice alone is:

[A] long way from the professional ideal of personal service. It fails to grasp the importance of individualized advice, tailored to the specific suspect, case and evidence. It also fails to take account of the importance of seeing the suspect, noting their physical and emotional state and, of course, being present during the police interrogation, at p. 288.

V. THE PROFESSIONAL CHALLENGE FOR SOLICITORS

Changes to legislation make the Course even more important. Awareness of the importance of a solicitor being present at police interview really hit home through the training.

The open discussion was particularly useful. It highlighted the fact that even experienced practitioners had different views about... issues such as the nature of the solicitor's role whether it was appropriate to advise a client to answer questions and so on. Training workshop participants.

- 5.1 The solicitor members of the Working Party, and also many with whom we have spoken, were of the view that giving useful advice to the client in advance of interview by the police frequently involves difficult issues of professional judgement. While in many cases the appropriate advice would indeed be to decline to answer questions (particularly if the police had been unwilling or unable to provide any real information about the evidence upon which they were relying) there are other cases in which such an approach would be ill-advised. In order that useful advice could be given, it was considered highly desirable that the advisor should have had trial experience and a “feel” for how a jury might instinctively respond to a “no comment” approach – even assuming that the client would be consistent in following that advice. As noted earlier, the provisions of section 109 of the 2016 Act, making admissible evidence of a wholly exculpatory statement to the police by an accused now presents an additional element in weighing up the relevant considerations.
- 5.2 We consider it important to appreciate that the work of a solicitor in advising and assisting the detainee in the police station can often be difficult and demanding. The client may often be unknown to the solicitor; be intoxicated; or be anxious and distraught. Establishing a rapport sufficient to obtain an understanding of the client's situation and an account of the relevant events which have led to the client's detention may require particular skill, including empathy and the ability to quickly distil the essentials. Police stations can be an intimidating environment not only for the suspect but also for a solicitor, especially if young or inexperienced. Deciding when and how to intervene in the course of the interview is a matter which calls for sound judgement and may frequently need to be accompanied by personal courage and dedication on the part of the solicitor.
- 5.3 The challenges of the role were underscored for members of the Working Party by their participation in the sample training sessions provided for us by the SUPRALAT team from Ireland, to which see below. These illustrated the very significant demands placed upon the solicitor providing police station assistance but which are different from the traditional demands on a solicitor in a forensic

setting. As is put by the authors of the *SUPRALAT Train the Trainer Guide*, to which we refer later:

*Assisting suspects at police stations requires a different approach, and a different set of practical skills, than representing clients before a prosecutor or in court. Thus, whilst in-court representation prioritises strong persuasive, argumentation and rhetoric skills, the provision of police station assistance calls for strong interpersonal communication skills. These skills need to be applied in a very challenging context.*¹²¹

Qualifications, Guidance and Training

5.4 The legislation currently allows only qualified solicitors to provide legal advice and assistance to those detained in police custody.¹²² The Working Party considered arrangements in England and Wales. Research in that jurisdiction demonstrated that initially the quality of legal advice was very poor. Qualified solicitors generally confined their assistance to giving telephone advice and would send junior members of the office staff, without any relevant legal qualification to the police station.¹²³ As noted by Lord Carloway in his review, this research into the delivery of assistance in England and Wales led to the creation of the Police Station Accreditation Scheme.¹²⁴ This scheme permits people who are not solicitors to provide legal advice and assistance in police stations in England and Wales provided that they have undertaken an accreditation course.¹²⁵ We understand that some such police station representatives are retired police officers.

5.5 The Working Party decided that it could not support the creation of a similar scheme in Scotland for a number of reasons. First, and importantly, as we have

¹²¹ R. Heemskerk, R. Horselenberg, V. Mols, A. Pivaty, M. Vanderhallen, *SUPRALAT Train the Trainer Guide* (2017), p. 8.

¹²² Law Society of Scotland rules enable second year trainees who can provide advice and assistance to also provide advice at police stations.

¹²³ McConville and Hodgson, *supra*. See also M. McConville, J. Hodgson, L. Bridges and A. Pavlovic, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, 1994).

¹²⁴ The Carloway Review, Report and Recommendations, *supra*, p. 160-161.

¹²⁵ See Solicitors Regulation Authority (SRA), <http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page> See also SRA, Standards of competence for the accreditation of solicitors and representatives advising at the police station, v. 1, 2007, available at <https://www.sra.org.uk/documents/solicitors/accreditation/criminal-litigation-psq-standards.pdf>

just described the task of providing sound advice and useful assistance to the suspect in the police station is a demanding one, which draws on prior trial experience and calls for many other professional skills. Decisions taken in the police station may have just as much importance for the outcome for the client as decisions taken in the courtroom; and the public would not readily welcome the courtroom defence being conducted by someone not a solicitor or counsel. In so far as there may be organisational issues to be faced in providing legal assistance in Scottish police stations – particularly in the rural areas outwith the central belt – it did not appear to us that a scheme for training and accrediting non-solicitors would materially assist. Further, the 2016 Act is clear that that assistance must be provided by a solicitor; and in the case of some vulnerable suspects assistance from a solicitor is mandatory. We would also observe that, so far as we are aware, none of the other jurisdictions elsewhere in Europe affected by the *Salduz* decision has done other than provide for assistance through duly qualified lawyers.¹²⁶

5.6 That said, there is in our view a clear need to improve the training and guidance available to solicitors in Scotland. In 2015 the Post Corroboration Safeguards Review noted that there was a “disturbing lack of general clarity about the role and responsibility of solicitors” which required improved communication and training.¹²⁷

5.7 The Law Society of Scotland later issued some detailed guidance on police station attendance, which covers various aspects of how to advise clients in police stations, both in person and over the telephone.¹²⁸ The guidance states that the rules in it are not practice rules nor an authoritative guide, and cannot substitute for independent decision making.¹²⁹ The guidance also suffers from the absence of case scenarios to assist solicitors in taking appropriate steps in

¹²⁶ We understand that a research project in the Netherlands is considering this, see D. Brouwer, M. Klein and M. Vanderhallen, ‘De meester in het Salduz-verhaal: de inzet van paralegals’ (forthcoming, 2018). Some solicitors in England and Wales are concerned that accredited representatives need more rigorous training, with more observation and supervision requirements before they can attend on their own, and that they should also understand how the police station stage can impact upon the case at trial, by being required to attend a number of sittings at court with solicitors, Brouwer *et al*, *ibid*, ‘Focus Group with English and Welsh solicitors’, November 2017.

¹²⁷ Post-corroboration Safeguards Review, *supra*, para 5.12.

¹²⁸ The Law Society of Scotland, *Police Station Interviews: Advice and Information from the Law Society of Scotland*, *supra*.

¹²⁹ *Ibid*, see Introduction.

particular circumstances. The guidance will need to be updated to reflect the new provisions of the 2016 Act. We consider that this is an opportunity to provide more examples of good practice and make bolder recommendations about the role of the solicitor at this stage. We would urge the Law Society of Scotland to make clear – perhaps by a practice rule – that particularly in light of the statutory entitlement of the suspect to have a solicitor present during interview, attendance at the police station will normally be expected.

- 5.8 To be entered and retained on the register for criminal legal assistance, solicitors and the firms with which they are connected must comply with the requirements of the SLAB Code of Practice.¹³⁰ The Code of Practice was revised in 2017. The revised Code sets out general standards of conduct, which require a solicitor to prepare and conduct work to the standard of a reasonably competent solicitor. Section 4 sets out the standards for conducting a case.¹³¹ While it might possibly be argued that these also extend to advice and assistance in the police station this is far from clear. The express provisions on police station advice are limited to the requirement to have a working contact and messaging system; where a solicitor “elects to provide advice and assistance” to do so in a reasonably practicable timescale under regard to the best interests of the client and circumstances of the case; and a duty to take and maintain records of the work, including client’s instructions and advice given. We consider that the Code of Practice could, and should, be further revised to address the substantive requirements of giving police station assistance.
- 5.9 Section 25C of the Legal Aid (Scotland) Act 1986 obliges SLAB to monitor compliance with the Code of Practice, which includes the Criminal Quality

¹³⁰ Solicitors are also required to have undertaken 15 hours of relevant continuing professional development in the year previous to be registered with SLAB, and 5 hours thereafter annually, SLAB, Code of Practice for Criminal Legal Assistance (December 2017), available at https://www.slab.org.uk/common/documents/profession/SLAB_Criminal_Code_of_Practice_-_Dec_2017.pdf, paras 2.09 and 2.10.

¹³¹ These include considering whether the client understands the proceedings; giving clients accurate, appropriate, well informed and complete advice and explanations to help them make informed decisions; communicating effectively with the client; engaging with the client and others as necessary for the proper conduct of the case, SLAB, Code of Practice for Criminal Legal Assistance, *supra*.

Assurance Peer Review Scheme.¹³² We understand that police station work is included in the current review and the Quality Assurance Committee has made criticism of how solicitors have handled police station work. However, we consider that peer review of police station legal advice and attendance should be assessed against specific criteria so that solicitors know that their work could be reviewed and quality can therefore improve. The Scheme is due for review in 2018, which is timely. The assessment criteria should include whether it was necessary to attend the police station to provide legal assistance in person.¹³³

5.10 Turning from guidance to training, we are not aware of any current training programmes to ensure consistency and adequacy in the provision of advice and assistance by solicitors at police stations. Very limited training has been provided for solicitors thus far and this has largely been in a lecture-style, update format rather than being skills focussed.¹³⁴ Consistently with this, it appears that trainee solicitors also receive no formal training in, or experience of, the work of a solicitor in assisting those detained in police custody. We are concerned that without more guidance, training and assessment, some solicitors may continue to believe that telephone advice is adequate, in circumstances where this is clearly not the case. Partial legal advice does not provide an effective delivery of the suspect's right to legal assistance.¹³⁵

¹³² The peer reviews consist of an examination of a range of solicitors' files by one or more of a panel of peer reviewers who are experienced and currently practising criminal solicitors, and who were appointed after an open recruitment process from the profession. The purpose of the review is to examine the quality of the work carried out on behalf of the client, based on the evidence contained within the files. Files are assessed against set peer review criteria for summary, solemn and criminal appeal cases. The criteria cover issues such as initial client contact, bail matters, handling of preliminary or guilty pleas, trial preparation, communication of outcomes, and legal aid matters. The criteria were developed in consultation with the Law Society, and with the reviewers themselves. See SLAB, 'Outline of the Quality Assurance Scheme for criminal legal assistance and the Peer Reviewer role,' available at <https://www.slab.org.uk/about-us/CriminalPeerReviewScheme.html>

¹³³ We understand that SLAB will shortly be consulting on revisions to the quality assurance criteria, which will include questions on how a solicitor dealt with the provision of legal advice in a police station. The new questions will reflect the increased importance of police station work, particularly following the implementation of the 2016 Act. They will include references to performance at interviews, as well as the new Investigative Liberation and bail condition reviews, and Post Charge Questioning challenges.

¹³⁴ JUSTICE Scotland has held two training sessions, immediately as the 2010 legislation came into force and subsequently for the Scottish Young Lawyers Association. The Law Society of Scotland held a roadshow of training around Scotland in 2011 that JUSTICE Scotland members contributed to. SCL and PDSO internal training is provided for new employees, of approximately three hours. The Law Society of Scotland has also provided legal updates on the 2016 Act.

¹³⁵ *Inside Police Custody* noted that the conflicting views of solicitors about whether to make a personal attendance highlighted the importance of a sustained programme of professional training on the value of the lawyer's role, at p. 289.

5.11 Fortunately, some training resources are already available. Subsequent to the conclusion of *Inside Police Custody*, which recommended comprehensive, skills-based training for lawyers at this stage, a project organised through the European Union and completed in 2017 has developed an extensive training course available on-line. The course is titled “*SUPRALAT - Strengthening suspects’ rights in pre-trial proceedings through practice-oriented training for lawyers.*” Conceived in part as a response to the *Salduz* judgment of the ECtHR, it aims to contribute to the professional training of criminal lawyers in the effective delivery of suspects’ rights during police custody.¹³⁶ The goal of SUPRALAT training is to promote:

*[T]he development of an active, reflective and client-centred culture of criminal defence at the early stages of criminal proceedings, namely at the stage of police detention and in the context of investigative (police) interviews of a suspect. It does so by developing practical, skills-oriented training for lawyers engaged in the provision of legal assistance at the police detention stage and during suspect interview.*¹³⁷

5.12 In Ireland, the course is available through the Law Society of Ireland in conjunction with academics at Dublin City University, and it has been met with increasing interest and enthusiasm amongst practitioners to take part in the course. This is developing something of a quality badge that Irish solicitors are able to assert that they hold.¹³⁸ A similar approach in Scotland would develop demand for SUPRALAT (or the equivalent) trained solicitors to provide legal assistance.

¹³⁶ See project website, <http://www.salduzlawyer.eu/>

¹³⁷ *SUPRALAT Train the Trainer Guide, supra.* The training combines self-study of the applicable theory, such as relevant international and national laws and procedures, with practical skills based training. It incorporates active learning through simulation, discussion and exercises; authentic learning tasks using real case scenarios that range in complexity, blended learning through e-modules and face to face sessions; collaborative learning through unstructured and structured feedback roles; and reflexivity requiring continuous reflection on choice of actions, attitudes and values.

¹³⁸ For example, a SUPRALAT Masterclass is being held in Cork in May and June 2018 for 12 solicitors currently attending Garda interviews, with further training planned for 2018. 50 solicitors have now completed the course and given exceptionally positive feedback, such as:

It provided very useful and practical advices in relation to what, until then, was simply a theoretical knowledge about advising the client in Garda Stations. That was invaluable. It was reassuring to learn that we all had our doubts about the approach we were taking to cases and that this was a common concern. I loved the fact that we got to act out scenarios in ‘class’. I would recommend this course to everyone.”

See Law Society of Ireland, Skillnet, SUPRALAT Masterclass 2018, available at <https://www.lawsociety.ie/globalassets/documents/lcpt/2018/sl1813-brochure.pdf>

- 5.13 We held two afternoon workshops as condensed examples of the SUPRALAT programme, run by the Irish project team and trained Irish solicitors. One of these was with the Law Society of Scotland. The workshops were with Scottish solicitors of all levels of experience from private firms, the PDSO and SCL. The training incorporated exercises in questioning techniques for consultation with clients, role play of consultation and role play of police interview. At each stage there was discussion about the process and then reflective feedback on the scenario. All participants found the experience useful, as it was an opportunity to discuss approaches to advice and representations. By contrast to the gown room at court, there is no opportunity to discuss police station advice because solicitors are usually alone at this stage and require to make quick decisions. Solicitors must make a judgement call as to the best approach in the scenario with which they are faced. Most crucially this is whether to intervene during police interview. A number of variables are at play here. For example, how often is it appropriate to do so? Will this deter or aggravate the officer? Will the client find this supportive or confusing since they are trying to maintain silence? How will the interventions or absence thereof appear to the court should the interview be played as evidence? Such decisions are made without knowing the interview plan, the evidence that the interviewing officer is drawing on and, not infrequently, without knowing what the attitude of the officer or the client will be to the intervention. This involves difficult, yet instant, judgement calls.
- 5.14 Particularly valuable for our participants was the opportunity to conduct role-plays of consultations and interviews and reflect on how to approach the different scenarios that might occur with colleagues in a supportive environment. A junior practitioner very early into practice found even the three hours spent in the workshop immensely helpful in developing her skills. Despite having colleagues in the office available to give advice, this is very different to in-depth, skill-based training.
- 5.15 While the Working Party does not believe it would be helpful at this stage to introduce a mandatory training requirement, we nevertheless consider that, particularly in light of its success in Ireland, a training programme similar to the SUPRALAT course should be developed and made available in Scotland as soon as possible, operated or endorsed by the professional bodies responsible for training to enable solicitors going into the police station to receive appropriate training about the nature of their role. We highly recommend the SUPRALAT programme as a starting point for this course. It has been rigorously tested in four EU jurisdictions by academic institutions applying appropriate criteria. Being skills based, the course is universal and therefore directly relevant to the experience of solicitors in Scotland. Those who attended our workshop training sessions agreed that training of this kind is essential in Scotland. We would add that attention should now be paid to including police

station assistance in the training of young lawyers passing through the Diploma in Legal Practice and solicitor traineeships. We understand that the Law Society of Scotland is currently looking into developing such training, initially with train-the-trainer sessions and thereafter an offer to undertake training to the profession. We hope that this will reflect the recommendations of the SUPRALAT project.

- 5.16 However, a training course only goes some of the way to equipping solicitors for the role. The SUPRALAT course is designed to enable follow up reflection and further training. For trainee solicitors, as in England and Wales, we consider that following the training, a period of observation and then supervised attendance at police stations with their supervisors would be helpful to ensure that newly qualified solicitors are satisfactorily equipped for the task.

Organisational issues

- 5.17 Concerns have understandably been expressed about the burden likely to be placed on the solicitor profession if personal attendance in the police station and at interview is accepted as being the norm. It is of course difficult to make precise forecasts of what may be required, but we believe one should guard against over-amplification of these concerns. Plainly a significant factor in the requirement for police station assistance is the extent to which the police exercise their powers to arrest and detain suspects for interview (which in turn may depend on changes in the extent and patterns of criminal offending). It appears that in recent times the number of police station detentions for investigation and interview has been in decline. According to information provided to us by Police Scotland, the overall number of detentions has reduced by 33% between 2012/13 and 2017/18.¹³⁹

- 5.18 We understand that, based on its existing data, SLAB has predicted that following the introduction of mandatory representation for children and vulnerable adults pursuant to the 2016 Act, approximately 25 solicitors will be required to attend a police station across Scotland each day; about a third of those 25 attendances (say, 8 solicitors) will be duty solicitors on one of the 40 duty plans; and less than half of those attendances will occur during unsocial hours between 7pm and 7am Monday to Friday, weekends and public holidays. From these predictions, SLAB concludes that during their duty period, each solicitor on duty will therefore be required to attend a police station once in every five days. However, this is a rough average as requests will vary depending on geographical location and number of solicitors on the local duty plan. For example, given the number of solicitors in Edinburgh, were they to

¹³⁹ From 197,034 in 2012/13 to 130,755 in 2017/18.

undertake duty work, each solicitor would be on the duty rota for one week every 18 months.¹⁴⁰ SLAB also assumes that a significant number of attendance requests will be directed towards named solicitors, which may increase the number of attendances for particular solicitors.¹⁴¹

- 5.19 On the face of matters, with 835 solicitors enrolled on it, the SLAB duty plan previously appeared in terms of total numbers to have sufficient solicitors and enabled the individual responsibility for police station work to be spread out across a period of time. However, the resignations in response to the 2016 Act affected 13 of the 40 plan areas and reduced the number of enrolled solicitors to 571. We are concerned that this will make the work more difficult for those remaining to cover. Moreover, previously the duty plan was not necessarily working at a local level. The problem is particularly felt in rural areas away from the Central Belt where there are few or no solicitors on the plan. For example, the average number of solicitors available per week for three sheriff court duty plan areas, based on the duty plans made available to us for those areas, were as follows:

Duty Plan Area	Period	Average
Aberdeen	01/10/16-01/07/17	2.05
Glasgow	13/10/16-06/07/17	3.95
Tain	01/01/16-30/06/17	1.00

The length of the duty will also vary considerably depending upon geographic location. For example, in Glasgow, each duty is for a week, with three back up options available. Those firms may not then be required to cover a duty week again for two or three months, depending upon their position as a backup. By contrast, in Tain, each duty period is for an entire month, with no backup. This duty comes around every three months. Notwithstanding that the number of arrests in rural areas will be considerably lower than in urban locations, this appears to us to be an onerous task, which is replicated in other remote areas. As we set out in **Chapter 2**, there are now ten plans, affecting mainly the North

¹⁴⁰ By way of observation, attending a police station only once every 18 months to provide legal assistance will be insufficient to build any skill at it.

¹⁴¹ SLAB ‘Police Station Advice Arrangements,’ *supra*. In releasing the data from the first week post CJSa implementation at the end of January 2018, SLAB stated that the demand for police station duty advice was “manageable”: SLAB, ‘Latest data for calls and attendance for police station advice’ at <https://www.slab.org.uk/permalink/6a84feb8-faa8-11e7-90ca-0015c5f5117d.html> accessed 27th February 2018.

East, East Coast and Edinburgh in which none of the local private practice solicitors have been prepared to enrol in the duty plan, thus placing the whole burden of police station attendance on PDSO and SCL employees. We would add that there are almost 600 more solicitors registered to undertake criminal legal assistance than are taking part in the duty scheme.¹⁴²

5.20 It would also appear that it may be wrong to think that most police station attendances actually require the solicitor to spend a lengthy period in the police station. Data published by SLAB indicates that the majority of legal aid claims have been for one or two hours attendances. As at March 2017, SLAB had paid 2,282 accounts¹⁴³ for police station attendance by a solicitor. The time spent attending the police station was as follows for these accounts:

- 40% of claims were up to one hour;
- 36% of claims were for one to two hours;
- 14% of claims were for two to three hours;
- 5% of claims were for three to four hours; and
- 5% of claims were over 4 hours.¹⁴⁴

5.21 We recognise that these accounts may include a number in which the solicitor gave advice and then departed before the interview took place. However, the statistics rather call into question perceptions that enrolling on the police station duty plan carries the risk of many long and disruptive attendances. We expect that most attendances, taking into account the full role of a solicitor, will require a couple of hours, if solicitors are not required to wait an unduly lengthy period prior to an interview commencing.

5.22 All of that said, the Working Party is very conscious that, irrespective of the overall numbers in the profession, the structural organisation of the profession currently presents practical constraints on providing personal attendance in the

¹⁴² There were 499 firms and 1,210 solicitors registered to provide criminal legal assistance in March 2017. These providers come from a mix of different sized firms and individual practitioners. Some offer both criminal and civil legal assistance. SLAB has very little power to either manage the number of firms or solicitors registered, or the level of legal aid work delivered by those that are registered, M. Evans, *Rethinking Legal Aid: An Independent Strategic Review* (February 2018), available at <http://www.gov.scot/Resource/0053/00531705.pdf> p. 53. As at April 2018 SLAB advises that there are now 483 firms and 1,168 solicitors on the Criminal Legal Assistance register.

¹⁴³ Note that it is unclear from SLAB's commentary what the time of day for the advice associated with these 2,282 accounts was.

¹⁴⁴ SLAB, 'Criminal Justice Act (Scotland) Act 2016 Fee Proposals – Revised Proposals Discussed with the Law Society on 23 March 2017', 23 March 2017, available at <https://www.lawscot.org.uk/media/10299/revised-cjsa-fees-proposal-23-march-2017.pdf>

police station. The reasons for the recent resignations from the duty plans were a combination of concerns about the new arrangements, the new fees on offer for police station work, and concerns about the wider legal aid system in general. By its nature, the call to provide professional assistance in the police station is usually unplanned and unpredictable. Many of those providing criminal legal aid services are sole practitioners or members of relatively small firms. They may be due in court when the call to attend comes; or they may have to consult or do other preparation for a court engagement the following day; and a solicitor cannot reasonably be expected to attend late at night or in the early hours if he or she has to conduct a trial or perform other important forensic business the next day. For solicitors with caring or other personal commitments, legal aid work already involves long hours with overnight preparation work that is difficult to manage. Some large firms have arrangements in place to relieve colleagues on the duty plan, or who give named advice, of work the following day. A number of those we spoke to said that arrangements can be made with colleagues to accommodate the attendance. However, the majority of solicitors in this sector are not organised in this way and may have difficulty finding a colleague to cover the other work.

5.23 As solicitors with whom we have spoken acknowledged, some police officers are willing to try to re-arrange interview times to accommodate the solicitor's other commitments. As we observed in **Chapter 2**, frequently solicitors arrive at the police station and have to wait a considerable period for the interviewing officer to be ready. We believe that Police Scotland should encourage and foster communication and agreement with regard to when the interview will be held, while taking account of the detention time limit. We would add that Police Scotland might give consideration to where investigative detentions are held since that may also assist in the availability of legal assistance. Urban areas have greater coverage than rural areas, as the above duty plans indicate. Where reasonably practicable, arresting officers could take suspects to urban areas for interview. The more firms available to spread the workload, the more likely it may be that solicitors will be willing and able to provide assistance. Moreover, if detention is not "necessary and proportionate"¹⁴⁵ interviews can be planned in advance, taking into account the solicitors' availability.

5.24 While there may thus be scope for the police to assist in practical terms in facilitating the provision of legal assistance in the police station, it is in our view indisputable that the solicitor profession faces an organisational challenge if it is properly to provide the more extensive legal assistance to which people detained in police stations are now entitled. In other words, the solicitor profession is going to need to make alternative and more innovative

¹⁴⁵ See s. 14 of the 2016 Act.

arrangements to ensure that requests for police station assistance can be responded to in a sustainable and effective way.

- 5.25** Plainly, members of the solicitor profession are best placed to work out how working patterns and inter-firm assistance can be adapted to meet this challenge. By way of possibilities, it may be that with the establishment of a thorough, skills-based course in police station assistance, a pool of solicitors with a specialism in this field can be developed and be available to firms on an agency basis. Or smaller firms might join in a co-operative arrangement. Firms with a number of practitioners may consider introducing arrangements whereby one of their number is allocated to police station work for a specific period and relieved of court commitments.
- 5.26** While the Working Party would thus not presume to make specific recommendations on how the profession should organise itself, there is one particular matter to which the Working Party believes it should draw attention. SLAB informs us that in fact the majority of requests for personal attendance are not during the night hours but during the day; most police interviews take place between 10am and 2pm due to police shift patterns. However, currently in some duty plan areas a practitioner's duty weeks on both the court and police station duty plans frequently coincide. No doubt, particularly from the standpoint of the solicitor, this may offer some advantages - such as having all duty work contained within one period rather than spread over two; or the ability to follow up a client to whom telephone advice may have been given when the client appears next day in the custody court. On the other hand, coincident periods of duty on both plans may often result in competing duty interests. In other words, by committing to do the court duties, it may be more difficult for the solicitor also to perform the police station duties. The Working Party therefore considers that the conflicting nature of coincident duty on both duty plans may need to be better recognised and given fuller consideration in order to make adequate provision of legal assistance in the police station.

Remuneration

- 5.27** Finally, we turn to the question of remuneration – which is highly important for the effective delivery of the rights which the legislature has recognised and for the means whereby the solicitor profession can organise that delivery.
- 5.28** One of the reasons offered by solicitors for not attending at the police station in person is that the remuneration is unacceptably low for the obligation expected. Until 2018, fees were paid under the existing Advice and Assistance scheme for criminal legal aid work. This inadequately reflected the nature of police station work and was arranged in a way that discouraged solicitors from making personal attendances. A means assessment and complex claim method

also compounded this problem. Indeed, some solicitors volunteered that the remuneration available did not justify the administrative costs of claiming it and many undertook the work *pro bono*. As we mentioned earlier, all suspects in police detention have been entitled to legal aid since April 2016. We also understand that the fees have now substantially increased, reflecting the greater importance placed on providing legal advice to suspects in police stations. The method of claiming has also been streamlined to create a quick claims process.¹⁴⁶ However, the Law Society of Scotland and local bars consider the increase to be inadequate. The recent Independent Legal Aid Review has recommended a review of fees in criminal legal aid, and that fees for an early guilty plea should be the first priority. We would also suggest that fees for police station assistance be accorded like priority. The Working Party further notes that the Review also recommends that “[a]ny law firm or advice service receiving funds from the legal aid fund should have a clear memorandum of agreement setting out the extent of the service they will offer including their willingness to take a minimum number of appropriate referrals.”¹⁴⁷ This would provide an opportunity to ensure firms are providing a full and effective service for suspects in detention.

5.29 But the Working Party cannot stress too strongly the need to recognise the importance which police station assistance has now assumed in the criminal justice process. As we have discussed more fully earlier in this report, the work of a solicitor at this stage in the criminal justice process is just as complex and demanding as at the later stages in court. It presents its own particular challenges. And it has to be provided on-call, without pre-planning. It is therefore essential that those providing these important professional services be properly remunerated.

¹⁴⁶ See SLAB, ‘New fees and arrangements for police station work’ available at <https://www.slab.org.uk/providers/newfeesandarrangements.html> and for comparison with previous scheme, SLAB, ‘Criminal Justice Act (Scotland) Act 2016 Fee Proposals – Revised Proposals Discussed with the Law Society on 23 March 2017,’ *supra*.

¹⁴⁷ Independent Legal Aid Review, *supra* p. 82.

VI. CONCLUSION

- 6.1 Pre-trial criminal procedure in Scotland has undergone notable change in recent times, affecting the nature of the criminal justice process. What happens in the police station when the police decide to use the powers conferred on them to detain and interview a suspect may have important consequences should the suspect be prosecuted and brought to trial. Evidence of what is said by the suspect in interview commonly forms a material part of the subsequent prosecution case against him. While the suspect has of course a right to remain silent in face of police questioning, there are cases in which the credibility of subsequent evidence from the accused may be damaged by its having been delayed until the trial.
- 6.2 The introduction in 2010 of a right to receive legal advice in the police station and, with the Criminal Justice (Scotland) Act 2016 a right (and in some cases a requirement) to have a lawyer present during police interview in Scotland is a significant development in this process. The police station has now become an important forum in which defence lawyers are called upon to provide their professional services. The European Court of Human Rights has recognised how criminal procedure has developed in the judicial systems of the Contracting States. It has firmly determined that, in order for a trial to be fair, the accused must have had a practical and effective right to legal assistance during police detention - ahead of, and during, police questioning.
- 6.3 In order for that right to legal assistance to be effective, two fundamental features are required:
- The first is notification of the right in simple and accessible language so that suspects can make a knowing and voluntary decision about whether they wish to exercise their rights.
 - The second is a comprehensive and quality legal defence service available prior to and, importantly, during any police interview.
- 6.4 We recognise that much useful work to facilitate the right to legal assistance has been undertaken over the past seven years since the right was introduced in Scotland. A “Letter of Rights” has been developed by the Scottish Government; and uniform procedures were introduced and revised by Police Scotland to enable the person detained to be better informed of the right. The Solicitor Contact Line was established by the Scottish Legal Aid Board in 2011 and runs efficiently 24 hours a day, seven days a week, to enable suspects who request legal assistance to receive that right. Legal aid provision has been extended to cover this work, and recently increased. The Law Society of Scotland has prepared guidance for solicitors concerning their role at the police

station stage. And solicitors have signed up to cover duty plans and provided named solicitor advice, despite busy practices, an absence of training, and, until recently, inadequate and inefficient legal aid provision.

- 6.5 However, despite these efforts, the majority (70%) of suspects waive their right to a lawyer and of those who do exercise the right, most (again, 75%) receive only telephone advice. The obstacles in the way of an effective right in practice are complex, but in our view they are not insurmountable.
- 6.6 More work is needed to explain the importance of legal assistance during police detention, not only to suspects but also to the solicitors tasked with providing that assistance. A cultural shift is required in order fully to realise the importance of this stage in the criminal justice process. This needs to start with public legal education, which should embed an understanding of the value of legal assistance within the general population so that suspects are as familiar with requesting assistance at this stage as they are at the stage of court proceedings. The Scottish Government has recently provided information on the MyGov Scotland website about rights upon arrest, but the role of a lawyer needs to be more prominent in this information and other sources of publicly available information.
- 6.7 We did not receive any evidence to suggest that police officers fail to offer the right to legal assistance to suspects in detention, or delay or deny this in any circumstances (other than those duly allowed by legislation). However, there nevertheless is a far lower take-up of the right to legal assistance than we would expect of suspects who fully understand what a lawyer can do for them.
- 6.8 We consider that the Letter of Rights which suspects receive during police detention needs to explain more clearly, and in a way that all suspects can understand, the role of a solicitor during police detention. Police Scotland has overhauled its notification procedure on the right to legal assistance, which has improved the clarity of this process for suspects. But the process of ensuring that suspects understand the rights about which they are being told by the police officer is a difficult task for the officer to undertake. It is therefore of primary importance that the person detained should be provided with clear, understandable information on the right to legal assistance and the scope and value of that assistance – and sufficient time to digest that information – before the police officer goes through the procedure of ascertaining whether the suspect wishes to have legal assistance. Training custody officers in how better to communicate an understanding of these rights will be beneficial to their custodial work.

- 6.9 For suspects who do choose legal assistance, telephone advice is readily available, but this will often be inadequate to enable the rights of a suspect to be fully protected and exercised. We consider that in order properly to understand the needs and instructions of a client, a solicitor requires a face to face consultation in almost all circumstances. Moreover, in our view, where a suspect is to be interviewed by the police, best practice suggests that a solicitor should usually be present to represent the client's interests – for example, addressing inappropriate, unclear, repetitive or misleading questions; reinforcing the right to silence where agreed or assisting the suspect to give the suspect's account; and requesting breaks if the suspect appears to need one.
- 6.10 Currently solicitors are not providing this assistance in the majority of cases. From our conversations, we are aware that solicitors are influenced by the way that their practices are organised, often in small firms or as a sole practitioner. Although a duty scheme operates, a significant number of criminal practitioners do not take part, and in some rural areas there are in any event few solicitors available. Where a named solicitor is requested by a suspect, the duty scheme cannot assist in sharing the work burden. We consider that solicitors must innovate to enable their practices to embrace this new area of work. Police station defence work presents an opportunity for the profession if it can organise itself to perform this work effectively and consistently with court practice. It is also necessary that those responsible for the provision of legal aid should fully recognise the importance of legal assistance in the police station and the demands which it places on the solicitor.
- 6.11 Most solicitors we spoke to were content to provide telephone advice for the majority of their clients, while at the same time accepting the benefit of a solicitor's presence during police interview. This demonstrates the need for further discussion amongst the legal profession about the important role of legal assistance during police detention. We consider that skills based, practical training on the role is necessary to instil a new approach to police station clients and equip solicitors with the ability properly to defend their clients at this important stage. Our two pilot trainings with Irish experts from the SUPRALAT project demonstrated an enthusiasm and appetite for such training amongst participants. We commend this training course to the Law Society of Scotland and the Scottish Legal Aid Board. We trust that they will use it to introduce similar provision in Scotland as soon as possible.

Recommendations

Notification of the right to legal assistance

1. Police Scotland should record and publish data on the take up of legal assistance compared with the overall detention population, the data being broken down according to whether suspects ask for intimation, to speak to a solicitor or for a solicitor to be present when being questioned.
2. More public information should be provided to make the right to legal assistance in the police station known, understood and appreciated. Such information should, be made available on the websites of public bodies such as the Scottish Human Rights Commission, the Law Society of Scotland, the Scottish Legal Aid Board (“SLAB”), the Scottish Government and MyGov Scotland. Video could be used to better engage the public.
3. The “Letter of Rights” provided to suspects in police detention should be composed as a document which has as its primary purpose the imparting of important information to a readership which includes many who may require a text with simple, short sentences and a layout which makes it an “easy read.”
4. Urgent consideration be given by the Scottish Government to the production of a video which can be viewed by suspects during or after the booking in process or at any event before the suspect is asked whether legal assistance is wished. The video would necessarily have to be short and clear, could be played on a screen in the custody area or on a robust hand-held device for in the cell.
5. Guidance should make clear to police officers that the officer notifying the suspect of the right to legal assistance should endeavour to explain the right in simple language (the nature of which should be recorded in the “Notes” field on the Police Interview – Rights of Suspects form) and that, if that fails to bring about genuine comprehension, should secure legal assistance anyway.
6. Custody officers should be better trained in techniques to ensure suspects understand the rights that officers inform them of.
7. Prominence throughout the PIROS form should be given to the right to have legal assistance in the police station, through advice from and the personal presence of a solicitor, with the right to intimation being raised as an option if the suspect has opted not to have legal assistance.

Provision of the right to legal assistance

8. Where a suspect seeks legal assistance, the standard provision of that assistance should be in the form of personal attendance by the solicitor in the police station to advise and support the suspect during interview.

9. In addition to making it clear that solicitors should attend within the specified period, professional guidance should make clear that, if delayed, the solicitor should advise the police station and/or the Solicitor Contact Line (“SCL”), so that the suspect or SCL may consider finding another solicitor.
10. In all cases in which a duty solicitor does not attend the police station, it should be seen as essential to proper professional practice that the reasons for non-attendance should be recorded in writing and advised to the SCL.
11. The Law Society of Scotland should make clear – either in terms of the Code of Conduct on criminal legal aid, or, if felt appropriate perhaps by a practice rule – that, particularly in light of the statutory entitlement of the suspect to have a solicitor present during interview, attendance at the police station will normally be expected.
12. The SLAB Code of Practice for Criminal Legal Assistance should be revised to address the substantive requirements of giving police station assistance.
13. Peer review of police station legal advice and attendance should assess specific criteria so that solicitors know that their work could be reviewed and quality can therefore improve.
14. A training programme similar to the SUPRALAT skill-based course should be developed and made available in Scotland as soon as possible, operated or endorsed by the professional bodies responsible for training. Attention should be paid to including police station assistance in the training of young lawyers studying the Diploma in Legal Practice and in solicitor traineeships.
15. Where possible, police officers should arrange interviews to accommodate solicitor availability. Police Scotland should give consideration to the location of investigative detentions to improve the availability of solicitors to attend interviews. If reasonably practicable, arresting officers could take detainees to urban areas for interview.
16. The solicitor profession should make alternative and more innovative arrangements to ensure that requests for police station assistance can be responded to in a sustainable and effective way; in doing so the conflict inherent in coincident periods of duty on both the court duty plan and the police station duty plan should be more fully recognised and considered.
17. It is essential that solicitors providing these important professional services be properly remunerated through legal aid and that the recommendations of the Independent Legal Aid Review be given consideration.

VII. ANNEX 1

This is the current Letter of Rights given to suspects in police detention.

Letter of Rights

This leaflet gives you **important information** about your rights when you are at the police station.

By **rights** we mean **important freedoms and supports** that the law says everyone can have. **Knowing about your rights will help you** be sure that you are being treated fairly by the police.

Please read this information as soon as possible. It will help you to make decisions when you are at the police station. **Please ask for help** if you do not understand anything in this leaflet. **Please ask** if you want an **easy-read copy** or a **translation**.

Your rights:

1. You have the right to know why the police are keeping you at the police station.
2. You have the right to know what the police think you have done.
3. You have the right not to speak. You do not have to answer any questions the police ask you. BUT you do have to give your name, address, date of birth, where you were born and your nationality.
4. You have the right to have someone else told you are at the police station. If you are under 16, this must be a parent or guardian. If you are 16 or over, this might be a family member, a carer or a friend.
5. You have the right to have a lawyer told that you are at the police station. This is free.
6. You have the right to speak to a lawyer in private at any time. This is free.
7. You have the right to have a lawyer present if the police interview you. This is free.
8. If you are under 16, a lawyer must be present when the police interview you unless there are exceptional circumstances. If you are 16 or 17 and subject to a compulsory supervision order, a lawyer must be present when the police interview you unless there are exceptional circumstances.
9. If you are under 16 you have the right to be visited by your parent or guardian at the police station.
10. If you are 16 or 17 and subject to a compulsory supervision order you have the right to be visited by your parent or guardian at the police station.
11. You have the right to medical help if you are ill or injured.

Your rights

In exceptional circumstances, some of **these rights** may not apply. For example, if the police think you have important information to stop someone being hurt they might need to ask you questions before your lawyer arrives.

The police cannot delay or remove your right to remain silent.

More information for people kept at the police station (known as "held in custody").

- **Your right not to speak** (known as "right to silence")

You do not have to answer any questions the police ask you, apart from to give your name, address, date of birth, place of birth and nationality.

Anything you say may be written down or recorded. Anything you say could be used as evidence at trial, if your case is taken to court.

- **Telling a lawyer you are at the police station**

You can ask the police to tell a lawyer that you are at the police station. This can be your own lawyer or the on-call lawyer. The police will arrange for a lawyer to be contacted as soon as possible. This is free.

- **Telling someone else that you are at the police station**

If you are 16 or over and not subject to a compulsory supervision order you can **ask the police to tell someone** that you are at the police station. This could be **someone in your family, your partner, your carer, your friend or another person you know**. You might not be allowed to speak to this person.

If you are 16 or 17 you will be allowed access to this person unless there are exceptional circumstances.

If you are:

- **under 16**

or

- **under 18 and subject to a compulsory supervision order**

The police must try to tell your parent or guardian that you are at the police station.

- **If you are ill or injured**

The police will ask you questions about your health and wellbeing. It is important that you tell the police if you have a medical condition that may affect you while you are at the police station.

The police might ask a healthcare professional to check on you. This is to help make sure you are looked after properly while at the police station. If you think you need to see a doctor or a nurse tell the police. If you are ill or injured, you will be provided with medical help.

- **Food and Drink**

Water will be provided if you ask for it. You will be offered food if you are at the police station for more than four hours. If you have any dietary or religious needs then tell the police as early as possible.

If you need extra help

This is information about a service only. It is not a right.

You might need help understanding what is happening when you are at the police station. This help can be provided by a support person called an Appropriate Adult. This might be needed if you have a mental disorder or learning disability. **Speak to the police if you think you need this help.**

If the police think that you need the help of an Appropriate Adult, they will get you one, even if you do not ask.

- **Getting an interpreter to help you**

It is important that you can understand what is being said at the police station.

If you **do not speak or understand English**, the **police will get someone** who speaks your language **to help you**. This person is called an interpreter. This is free.

- **Getting help with communication**

Lots of people find it hard to understand what is happening at the police station. **Please ask for help if you are not sure about anything. Please ask for help with reading** if you need it.

If you are **deaf or have trouble communicating** clearly, **the police will get someone to help you**. This could be a BSL interpreter or another appropriate professional. This is free.

- **If you are not British**

If you are not British, you can ask the police to contact your High Commission, Embassy or Consulate, to tell them where you are and why you are in the police station. Someone can then visit you in private and arrange for a lawyer to see you.

- **What happens if you are charged or brought into the police station on a warrant?**

If you are charged with an offence, you might be allowed to leave or you might be kept in the police station and taken to court on the next possible day.

If you have been brought into the police station on a warrant, you can be held and taken to court on the next possible day. In some situations you may be allowed to go home.

- **Getting to see paperwork**

A note of the evidence in the case will be given to you or your lawyer, if your case goes to court. This will let you or your lawyer prepare your defence.

You have the right to a translation of at least the relevant parts of important paperwork if you do not understand English.

- **Information about the right of access to a lawyer**

- Tell the police if you want to speak to a lawyer. The police will contact a lawyer for you as soon as possible.
- You are allowed to have a private conversation with a lawyer at any time. This might be on the telephone, or they might come and see you at the police station.
- Speaking to a lawyer does not make it look like you have done something wrong.
- A lawyer's job is to protect your rights and give you advice about the law.
- You can choose to speak to a lawyer you know or the on-call lawyer. The on-call lawyer is independent and does not work for the police.
- If the police interview you, you can ask that the lawyer is in the room with you when this happens.
- The police are not normally allowed to interview you without a lawyer if you have asked for a lawyer to be in the room with you.
- You can change your mind about speaking to a lawyer and can ask for a lawyer at any time. Tell the police as soon as possible and they will contact a lawyer for you.
- If the lawyer does not come to the police station when they said they would, or you need to talk to the lawyer again, ask the police to contact him or her again. The police have no influence on when the lawyer arrives at the police station once they are contacted.

- **How long can you be kept in custody?**

The police can normally keep you for up to **12 hours** without charging you with an offence.

The police can extend this up to a maximum of **24 hours**, but only if a Police Inspector agrees to this (Chief Inspector if you are under 18).

You have the right to have your say about this decision, or you can choose to have your lawyer speak to the police for you.

© Crown copyright 2018

ISBN: 978-1-78851-326-5

APS Group Scotland
PPDAS721811 (01/18)



VIII. ANNEX 2

The Working Party has produced the following example of a simple leaflet to inform suspects of their rights in the police station. This would benefit from easy read pictures, layout and colours to help illustrate the rights that are notified.

Your Rights in the Police Station

- This leaflet is important. It is a Statement of your Rights. So please take time to read it now.
- The leaflet tells you about your rights while you are at the police station.
- These are rights which the law gives to you. These legal rights are there to help you and to protect you from being treated unfairly. You need to know these rights to be sure that you are being treated fairly by the police.
- If there is anything in this leaflet which you do not understand, please ask a police officer for help.
- If you find English difficult, please ask for a translation in another language.
- If you would prefer a larger print version, ask the police for it.

Why am I here in the police station?

You have a right to know why the police are keeping you at the police station.

So, the police must tell you about what crime or offence they think you may have done. You have a right to know those details.

Do I have to tell the police about things if they ask questions?

The only things you have to tell the police are these personal details -

your name,
your address,
your date of birth,
your place of birth, and
your nationality.

You do not have to answer any other questions from the police officers.

You have a legal right NOT to answer other questions. You have the right to remain silent and to refuse to answer the police questions.

How long can I be kept here in the police station?

Normally, the police can only keep you in the police station for questioning **for a maximum of 12 hours**.

If the police do not charge you with a crime or offence (“officially accuse”) by the end of 12 hours, they must let you leave the police station.

In some special circumstances a senior police officer – a Police Inspector – may extend this 12 hour period by another 12 hours. But you or your lawyer have to **have a say** before this can happen and **you must be given reasons** for the time being extended.

If you have been charged (officially accused) by the police, they may keep you in custody. But you have to be brought to a Court as soon as practicable. The Court will then decide whether you will be kept in custody or released on bail.

If you are kept in the police station for more than four hours, you will be given food. If there are any foods you cannot eat for religious or dietary reasons, tell the police as soon as possible. You can get water to drink at any time.

Who can I tell that I am here in the police station?

You can choose anyone, such as *a member of your family, a friend or a carer* to be contacted by the police to tell them that you are here in the police station. **The police must tell the person you choose that you are in the police station.**

In addition, you have a right to ask the police to tell a *lawyer* that you are being kept in the police station.

If you are not British, you can also tell the police to tell the *embassy, consulate or high commission* of your country that you are in the police station.

Getting help from a lawyer

You can get help and support from a lawyer while you are in the police station.

- You have a right to speak with a lawyer in private before the police start asking you questions.
- You have a right to speak with a lawyer in private at any time even when the police have started asking you questions.
- You have a right to have a lawyer with you in the room while the police are asking you questions.

Why do you need a lawyer?

A lawyer is independent of the police or prosecution and is there to help you. Getting help from a lawyer will not make it look as if you are guilty of a crime. A lawyer can, for example:

explain legal matters and procedures to you;

give you advice about answering questions from the police;

be with you while the police are interviewing you;

How can you get a lawyer?

You will normally not have to pay for a lawyer to help you in the police station. It is free.

The police must ask you if you want a lawyer.

If you want a lawyer, the police must arrange to contact a lawyer as soon as possible.

If you know the name of a lawyer and wish the police to contact that lawyer, tell the police officer the lawyer's name. They will try to contact that lawyer.

If you do not know any lawyers, there are lawyers available, on-call 24 hours of the day, each day of the week. The police will arrange for you to speak to one of them. They are all independent and not part of the police.

When and where can you speak to a lawyer?

You can ask for a lawyer at *any* time - even if you said you did not want a lawyer when the police asked you before.

- You can speak to the lawyer privately on the phone to get help and advice.
- You can also ask that the lawyer comes to meet you in the police station to help you.
- And you can ask the lawyer to be with you in the interview room while the police are asking you questions.
- At any time during the interview you can ask to speak to a lawyer – even if you had spoken with a lawyer already; or even if you did not ask for a lawyer earlier.

Are you a young person?

- If you are under 16,

OR

- If you are 16 or 17 and there is a compulsory supervision order for you (an order from the Children's Panel that says you are under the supervision of social workers),

the police must tell your parent or guardian that you are in the police station and allow your parent or guardian to see and speak with you.

The police MUST NOT ask you questions about the crime or offence they think you may have done without a lawyer present in the room with you.

Ask for a lawyer or the police will arrange for one.

- If you are 16 or 17 and there is no compulsory supervision order in relation to you, **you can ask the police to tell your parent or guardian that you are in the police station and the police must allow your parent or guardian to see you and speak with you.**

A lawyer must be present in the room with you when the police ask you any questions about what they think you may have done. But you and your parent or your guardian can agree not to have a lawyer there if you wish so.

Do you need medical attention?

If you are feeling ill or suffering from some medical condition requiring urgent attention, tell a police officer.

The police must arrange for you to have any urgent medical help which you might need.

Interpretation and translation

If English is not your native language and you are not able fully to understand and speak English, **you have a right to get a qualified interpreter. The interpreter is free. You do not have to pay for the interpreter.**

The interpreter will help you speak with the police when they ask you questions.

The interpreter will also help you speak with the lawyer.

Anything you say to the lawyer is confidential. So, the interpreter will not tell the police, or anyone else, anything at all about what you said to the lawyer.

If you are later brought to the Court, **you have a right to an interpreter in the Court.** You also have **a right to a translation, by a qualified translator, of the essential parts of the court documents** such as the charges against you and the orders made by the judge.

Please ask for help if there is anything in this leaflet which you do not understand.

Please keep this leaflet with you while you are in the police station.

IX. ACKNOWLEDGMENTS

The Working Party would like to give particular thanks to **Lloyds Banking Group**, in particular Paul Barry, Richard Blann, Lucy Brown, Giulia Da Re, Caroline Douglas, Michelle Gordon and Sarah McIvor and **Pinsent Masons LLP**, in particular Jim Cormack, Fiona Cameron, Catriona MacDonald, Katrina McKnight and Lee Ward-Poulton for their generous support and research assistance and associated law firms who assisted with comparative research.

We are grateful to all the solicitors who, with their clients, completed our questionnaires or who agreed to be interviewed for this research, but whom we cannot name individually for reasons of confidentiality.

We thank the solicitors and members of the academic community who attended our two training workshops.

We would also like to acknowledge and thank the following individuals – and their organisations – who generously gave of their time to meet with us, respond to our call for evidence or otherwise support our work:

Dr. Michelle Aldridge-Waddon, Deputy Head of School of English, Communication and Philosophy, University of Cardiff

Andrew Alexander, Head of Policy, Law Society of Scotland

Matthew Auchincloss, Director and Solicitor Advocate, Public Defence Solicitors' Office and Solicitor Contact Line

Andrew Beadsworth, Procurator Fiscal Depute, tutor, Diploma in Professional Legal Practice, Criminal Litigation, University of Glasgow

Aine Bhreathnach, Solicitor, Ireland and SUPRALAT trainer

Shalom Binchy, Solicitor, Ireland and SUPRALAT trainer

Sonia Cheema, Solicitor, Public Defence Solicitors' Office

Dr. Vicky Conway, Dublin City University, SUPRALAT Project

Dr. Yvonne Daly, Dublin City University, SUPRALAT Project

Professor David Cooke, Professor of Forensic Clinical Psychology, Glasgow Caledonian University

Chief Inspector Michael Duddy, Police Scotland, Greater Glasgow Division
Martyn Evans, Chair of Independent Strategic Review of Legal Aid

Inspector Richard Emerson, St Leonards Police Station, Edinburgh

Inspector Duncan Fraser, Policy Unit, Criminal Justice Services Division, Police Scotland

Dr. Vicky Kemp, University of Nottingham

Gillian Koren, Solicitor, Public Defence Solicitors' Office

Gillian Mawdsley, Secretary, Criminal Law Committee, Law Society of Scotland

Alan McCreadie, Head of Research, Law Society of Scotland

Anna Pivaty, PhD Candidate, University of Maastricht

Robert Purcell, Solicitor, Ireland and SUPRALAT trainer

Dr. Frances Rock, Reader, School of English, Communication and Philosophy, University of Cardiff

Sgt. Pauline Rowell, Business Improvement Team, Metropolitan Police Detention Command

Chief of Police, Rudi Schellingen, Belgian Police Force

John Scott QC, Partner, Capital Defence Lawyers

Kingsley Thomas, Head of Criminal Legal Assistance, Scottish Legal Aid Board

Dr. Tatiana Tkacukova, Linguistics, School of English, Birmingham City University

Dr. Miet Vanderhalen, University of Maastricht

We are also most appreciative of the valuable research assistance contributed by JUSTICE interns Alastair Young and Gabrielle Sumich and JUSTICE Scotland volunteer Luigi Pedreschi.



Ronald J. Mackay

The Rt. Hon. Lord Eassie
Chair
June 2018



JUSTICE
Scotland

www.justice.org.uk