



**EFFECTIVE POLICE STATION LEGAL ADVICE
COUNTRY REPORT 6: SCOTLAND**

BY

DR. VICKY KEMP

**SCHOOL OF LAW
UNIVERSITY OF NOTTINGHAM**

April 2018

1. INTRODUCTION

This Country Report for Scotland has arisen out of a comparative study into police station legal advice, led by Dr Vicky Kemp, University of Nottingham. She received a small grant from the British Academy/Leverhulme to undertake semi-structured interviews with defence lawyers and policy officers responsible for criminal legal aid in six jurisdictions. Dr Miet Vanderhallen was the consultant responsible for the research undertaken in Belgium and the Netherlands, assisted by Enide Maegherman, both from the University of Maastricht.

The criminal law in Scotland is largely statutory, although it is rooted in a common law, an adversarial tradition that has historically been more influenced by the Romano-canonical and French systems than the rest of the UK.¹ There are similarities in relation to procedure and substantive law between Scotland and England and Wales but, as Blackstock et al. (2014: 118) note, the applicable laws are quite different. There are two routes of trial procedure in Scotland, solemn and summary. The solemn procedure deals with trials on indictment before a jury, which takes place in the sheriff or High Court. Summary procedure applies to all other offences, with trials being conducted by the sheriff, stipendiary magistrate or justices of the peace.

Following the *Salduz* decision in 2008, there was significant change for suspects in accessing legal advice brought about by the judgment of the UK Supreme Court in *Cadder v HM Advocate (Cadder)*.² The *Cadder* ruling prohibited the police from questioning a suspect without giving them the option of having legal advice. The case was to have an immediate impact on suspects' legal rights, as hundreds of cases had to be abandoned as they did not comply with the decision. Within three days, the Scottish Parliament had implemented emergency legislation, in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. This gave all suspects detained under Section 14 of the Criminal Justice (Scotland) Act 1995, or attending voluntarily at a police station, the right to 'a private consultation with a solicitor' prior to, and at any time during, questioning at a police station, which could include advice given over the telephone. The 2010 Act also extended the period of detention in police custody from six to twelve hours, with a possible extension of a further twelve hours.

The *Cadder* decision led to an extensive review of the criminal justice system, undertaken by Lord Carloway (2011), and the consequent Criminal Justice (Scotland) Act 2016. The review included recommendations to modernise and enhance the efficiency of the Scottish criminal justice system and these provisions were implemented on 25 January, 2018. Prior to the 2016 Act, there had been a system of investigative detention,

¹ For further details see Blackstock et al. (2014:118-136).

² [2010] UKSC 43.

arrest and then charge. People were also arrested for a charging decision without an investigative detention, which was to enable an interview to take place. The Act now consolidates arrest and investigative detention and imports a test of necessity and proportionality to the requirement to detain following arrest. The 2016 Act is far-reaching in that it gives all suspects the right to consult with a solicitor and for suspects to decide whether or not they want a solicitor to be present during the police interview. The rationale for the right to have a solicitor present would seem to be largely based on the need to ensure respect for the right of the suspect not to incriminate himself (Jackson, 2016: 1003, 1007). Without changes being made to the organisation of criminal defence solicitors, however, such changes will be difficult to achieve. There are logistical issues to be overcome, therefore, in increasing the role of solicitors in police stations and in funding such changes. It is timely, therefore, to explore such developments with policy makers and practitioners in this study, although it is important over the coming months to examine empirically what changes were actually brought about by the 2016 Act.

2. METHOD

Four semi-structured interviews were conducted with five respondents and an informal interview held with two solicitors. Two of the interviews were with experienced solicitors, one in private practice and the other in the Public Defence Solicitors' Office (PDSO) – both males based in Edinburgh. Two policy officials were interviewed consecutively; a female from the Scottish Legal Aid Board (SLAB) and a male from the Police Division of the Scottish Government. The Solicitors' Call Line (SCL) was also observed and an informal interview held with the two SCL solicitors. A generic topic list was used for all interviews – one for defence practitioners and the other for legal aid policy makers. The interviews were transcribed and analysed using NVivo, which assists in the identification of key themes.

3. ORGANISATION OF POLICE STATION LEGAL ADVICE IN SCOTLAND

3.1 Publicly-funded police station legal advice

Police station legal advice in Scotland is available through solicitors in private practice and those employed by SLAB, either through the PDSO or the SCL. The PDSO is the biggest single provider of police station legal advice, covering seven different geographical areas.

It was following the *Cadder* decision that SLAB set up the SCL and the duty solicitor rota for police station work. While clients can choose their own nominated solicitor, those without their own solicitor will either receive telephone-only advice from the SCL or, if the SCL assesses that an attendance from a solicitor at the police station is required, the case will be referred on to the duty solicitor.

Notification system. A protocol requires the police to pass on to the SCL all requests for police station legal advice and, if the request is for a nominated solicitor, this is to be passed on by the SCL within 30 minutes of receiving the referral. With all other requests, SCL provides preliminary advice to suspects over the telephone and there is a discussion about whether or not they want a solicitor to attend for the police interview. If so, the referral is then passed on to the duty solicitor scheme. While the intention at that stage is for a solicitor to attend, the duty solicitor can revise the decision after having spoken to the client.

The public defence (PD) solicitor said that they would always attend at the station in duty cases because the SCL had already decided that the presence of a solicitor was required. If the duty scheme is unable to provide cover, the SCL can use its off-duty solicitors to provide advice in person. It had been intended that, by referring cases to the SCL, that this would be the mechanism to monitor what happens in all referrals for legal advice. In practice, the SCL solicitors said that this does not always happen because, once a case is referred direct to a named solicitor, the SCL's role ends.

Having received a referral from the police over the telephone, SCL will obtain basic details of the case using a pro forma sheet and this information is then passed on to the nominated solicitor, again over the telephone. The expectation is that the nominated solicitor will take over the case, but it can be referred back to SCL if the named solicitor is not available. In cases where there is no named solicitor, the SCL will provide initial legal advice over the telephone and, if an attendance is required, the duty solicitor will be called.

With solicitors in private practice, the information will be notified by SCL via the telephone, but, if the referral is to the PDSO, it will be by way of email. The PD solicitor explained that, by working in the same organisation, and when sharing the same secure internet system, "SCL can give us more background information. They'll email the advice log of what has been said to the client and this provides us with all the information we need" (NB.6).³ This is also available to private solicitors if they need it. In addition to receiving referrals for legal advice over the telephone from the police and the SCL, the solicitor in private practice said that they had clients coming directly to them, particularly when the police had asked them to attend at the station for an interview (ER.6).

Availability of lawyers. In 2013/14, it was noted from information provided by Police Scotland that around 70 to 75 per cent of suspects waived their right to legal advice (Bonomy, 2015). In an earlier study of police station legal advice, while there seemed to be a sufficient number of specialised criminal solicitors available in Scotland to cover this work, they were noted to be dispersed amongst individual practices or small firms, which

³ References are made in this report to both male and female research participants, but, for reasons of confidentiality, they are referred to in the masculine and a coded reference is used instead of their initials.

had few staff available to attend police stations (Blackstock et al., 2014: 305-306). Many firms also have to manage busy legal practices with a constant flow of court cases, which made it difficult to balance custodial legal advice with court work. It is within this context that solicitors raised concerns of having to cope with the additional pressure of work following implementation of the 2016 Act, particularly in remote areas. As one solicitor remarked, "We're finding the coverage in rural areas is very poor and we're talking about there being legal aid advice deserts" (ER.6). The PD solicitor also commented on this issue when saying, "The biggest problem we have is getting a solicitor out to some remote locations, particularly in areas where there is no police station duty lawyer available" (NB.6). Such problems are considered further below when examining the organisation of legal aid for police station work.

Telephone contact. When examining police station work, Blackstock et al. (2014: 287) found that, "The most significant feature of custodial legal advice in Scotland is that it is provided almost entirely by telephone". From 2011 to 2013, for example, the official statistics show that 84 per cent of advice was provided over the telephone." While it remains that the majority of legal advice is over the telephone, this has reduced to 75 per cent, with a quarter of suspects receiving face-to-face advice (SLAB, 2017a).

When first setting up the SCL, the PD solicitor said that a colour-coded matrix had been developed to assist SCL decision-making over the type of advice required. When describing the matrix, he said:

"On one side, there's the type of the offence and along the bottom is the type of client. At one end of the spectrum, such as a child with a learning disability being dealt with for a serious offence, there's no equivocation and they will send out a solicitor. At the other end, if you have a professional shoplifter in his 50s, then telephone advice is probably appropriate for them" (NB.6).

The solicitor stressed that the matrix was for guidance only and the 'golden rule' to follow is that if the suspect wants a solicitor to be present, then that is what will happen. As he put it, "It isn't the SCL solicitor's decision. They can give advice, but, ultimately, if a suspect wants a solicitor there, even if it's for shoplifting a Mars bar, the law is that they have this right" (NB.6).

When providing advice over the telephone, the solicitors in this study commented on needing to ensure that the discussion with their client takes place in private. As the PD solicitor put it, "It's one of the first questions the SCL solicitors ask, checking that they are on their own and in a private room. If there's any doubt over whether it's a confidential call, a solicitor is asked to attend" (NB.6). The solicitor also commented on a review currently being undertaken by Police Scotland of new police station facilities, ensuring that there are rooms available where a private conversation between a solicitor and their client can be held.

Potential obstacles to providing police station legal advice. When asked why he felt that so many people waive their right to legal advice, one solicitor replied, "People don't know that they can speak to somebody over the phone straightaway. There isn't a financial barrier any more, but there are some people who think they have to pay" (NB.6).⁴ Another solicitor commented on the police sometimes discouraging suspects from consulting with a solicitor because they are told this could delay matters. He remarked, "This is rubbish because you get a solicitor at the end of a phone quite quickly" (ER.6). When asking his clients why they waived their right to legal advice at the police station, the solicitor said that the main reply he received was that "They were innocent and have nothing to hide." He continued saying, "This is a huge problem and I have to explain to them that if they'd had advice and made no comment [in the interview] they wouldn't be in court" (ER.6). In addition, when dealing with clients, the solicitor pointed out, "They feel disempowered when they've been arrested. They're no longer calm and making rational choices. This is far worse with people with mental health problems, which is estimated to be around one third of all suspects" (ER.6).

When advising people of their legal rights, a solicitor said that suspects were given a written notice by the police, with a copy also being available on the Scottish Government's website (Scottish Government, 2018). In attempting to make people's rights transparent, the policy officer said, "There's also an 'easy-to-read' version of the notice of rights and a standard version has been translated into 34 different languages. A new notice will be available once the 2016 Act is implemented" (LO.6).⁵

In an attempt to address potential obstacles to legal advice for children and young people, the policy officer commented on provisions contained in Section 33 of the 2016 Act (LO.6). This states that if you are: a child, or aged between 16 to 17 years with a compulsory supervision order, or an interim compulsory supervision order, or have a mental disorder, you cannot consent to an interview without a solicitor. An individual between 16-17 years who is not subject to a supervision order, may do so only with the agreement of a relevant person.

A solicitor commented on enhancing suspects' legal rights by requiring a video recording to be made of the suspect when going through their rights and deciding whether or not to have a solicitor. He explained that this proposal had been put forward for consideration by the Law Society of Scotland, but that it was not being pursued at the present time. The solicitor felt that such a development would be helpful at court when stating, "While it would not routinely be available at trial the proposal would allow a judge to make an order for it to be produced" (ER.6).

⁴ Police station legal advice had been means tested in Scotland, but it became freely available following the *Cadder* decision.

⁵ A copy of the 2018 Letter of Rights and the Easy Read Letter of Rights are set out in the Appendix.

Voluntary interviews. While suspects interviewed voluntarily by the police are entitled to free legal advice, a solicitor said that the police were reluctant to conduct voluntary interviews. He said, "I haven't done one for a number of years" (ER.6). The other solicitor explained why this was so in saying:

"I think voluntary interviews are a bit of a myth in Scotland. If somebody phones the SCL and says I'm here as a volunteer and I want legal advice, they'll be advised to leave the station. This is because there's no advantage in a suspect making an exculpatory statement in a police interview without being detained because of the evidential status of what's said. It only enhances your credibility if you're giving evidence at a trial and so, most of the time, it's not in your interest to be interviewed, so why would you be there voluntarily? There again, we know that if they try to walk out of the station they'll be detained. So, it's all a bit of a scam" (NB.6).

If the police do start to use voluntary interviews more in the future, then suspects are entitled to free legal advice in the same way as if they were detained.

Criminal Justice (Scotland) Act 2016. When considering implications for the 2016 Act on police station legal advice, one solicitor said:

"It completely changes the process at the police station and, for the first time, it frames suspects' rights fully in statute. It'll widen the scope and pool of people who will have access to police station legal advice" (NB.6).⁶

While the proposals are intended to transform access to legal advice for suspects dealt with by the police, questions arise concerning the extent to which solicitors will be available to provide cover under the new arrangements. The view of one solicitor is that the changes will lead to fewer suspects being interviewed by the police. He said, "They will still have to interview people in cases involving murder and serious offences, but if people can't waive [their right to legal advice] they might decide not to interview. If they have the evidence, then there's really no point in interviewing them because they generally get 'no comment' responses" (ER.6).

While the solicitor in private practice is well aware of these proposed changes, he did not think this was the case with other defence practitioners. As he remarked:

"I've warned solicitors about the changes because the client will be told for the first time that he has a right to have a solicitor present at the interview. Up to now, he's been told he has a right to a consultation with a lawyer prior to the interview, or any time during the interview. That could be over the phone, but soon the right is to have a solicitor present in the interview" (ER.6).

⁶ In addition to suspects, detainees arrested on a warrant for failing to attend at court will have access to legal advice. As noted above, there is now increased protection for children and those aged 16 and 17 years who are subject to a compulsory supervision order.

With the current low take-up of legal advice, and with solicitors tending to prefer providing telephone-only advice, it will be interesting to observe what impact the new arrangements will have on the delivery of police station work.

3.2 Pre-Interview disclosure

Pre-interview disclosure was highlighted by research respondents as a problem area. This was the comment of the PD solicitor when discussing disclosure:

“It’s patchy. There’s no statutory disclosure regime. The police simply describe the general nature of the offence they’re investigating ... A verbal summary is probably overstating what’s given. Some officers are willing to give you a lot of information, but not others. We train solicitors in the SCL and the PDSO to assume that, even if they are given a lot of information, that they’re not giving them everything because the police are trained to hold information back so they can drop it into the interview. It depends on the individual officers and the rapport that you can build up with the police when you get there” (NB.6).

A policy officer reflected on police practice when saying, “There are key pieces of information the police need to share with the lawyers, but you’ll get some who will test how much information they are willing to give them. You also get some officers who are very robust and will tell solicitors that’s all they’re allowed to give them” (LO.6).

When receiving disclosure from the police, one solicitor said that it is never in writing and they are not shown a copy of a witness statement or CCTV evidence prior to the interview. Instead, he noted, “It is just an oral summary of what they’re willing to tell you” (NB.6). The policy officer acknowledged that, “The police will introduce pieces of information throughout the interview, similar to what happens in England and Wales, but they’re a lot more cautious up here in what they are willing to share” (LO.6). Reflecting on practice from the lawyers’ perspective, the policy officer said, “Without any information from the police, the only advice the lawyers can give their clients is to make no comment. Only if they get more disclosure will lawyers be able to advise their clients to engage” (LO.6). This view was supported by a solicitor who stated that “Without sufficient disclosure, I would estimate that ‘no comment’ is made in about 90 per cent of police interviews” (ER.6).

In addition to the police not providing sufficient disclosure, a solicitor complained about the police not always following up on leads which could be helpful to the defence. As he put it, “I recently had a client raise an alibi, but the police didn’t check it out. It came down to identification at court and, in the end, the Crown conceded that it was a wrong identification because of the alibi evidence” (ER.6).

With the majority of advice being provided by solicitors over the telephone, however, the solicitors are not in a position to engage with the police over disclosure. On the other

hand, even if they do attend at the station, Blackstock et al. (2014: 296) were told by the police, that “they did provide lawyers with information about the evidence in a case”, but it was also noted that “often they did not have a great deal of information to disclose.” They cited an officer saying, “he would sometimes disclose only the briefest outline, simply because that is all he normally had at that stage.”

3.3 The role of the lawyer providing legal advice and assistance at the police station

3.3.1. Consultation

The solicitors raised a number of issues when discussing what happens during the consultation with their clients. When dealing with new clients, for example, the solicitors commented on the importance of seeing their clients in person. As one solicitor put it, “It’s about rapport-building. I first check my client’s mental welfare to see if he understands what’s happening” (ER.6). Another solicitor commented on the importance of meeting with clients when making an assessment about them. When considering the potential vulnerability of clients, the solicitors said that they needed to assess basic things, such as whether their client can read or write, or if English is not their first language. One solicitor also commented on needing to understand the cultural background of clients, particularly as, in some cultures, people think they have to answer questions which are put to them by the police (ER.6). With the majority of advice being provided over the telephone, however, there are evidently limitations for solicitors when conducting such assessments.

When advising his clients, a solicitor said it was his priority in the consultation to explain the caution to clients when saying, “I break it down and tell them that it means they do not have to answer questions. You need to tell your client what’s going to happen and how they need to conduct themselves in the interview and they’re a lot happier then” (ER.6). The solicitor said that, when advising clients of their right of silence, he will “tell them that if they don’t answer any questions then the evidence can’t be used in court against them. If they do answer, I tell them that it can be used against them, even if it seems to them to be an innocent comment” (ER.6). The solicitor then asks his client to comment on the allegation, he tells them what evidence the police have against them, and explains that they have to decide whether or not to respond to police questions. Nevertheless, the solicitor also said, “I’m there as an adviser and so I also advise them as to tactics. I’ll tell them to ask for a consultation during the interview if they feel under pressure because it gives us time to talk. I also warn them that it will also lengthen the process” (ER.6).

Another solicitor commented on the importance of receiving good disclosure from the police in being able to advise his client properly in the consultation. In one case, he explained:

"I got very good information from the police and I was able to lay it out for my client and he had a coherent position and so he took the view that he would answer questions. He did get charged, but, within a week, we had a letter from the Crown saying that they were not proceeding" (NB.6).

When observing the SCL, the solicitors commented on what typically would happen when receiving a referral. They would first ask the police a number of questions concerning the suspect, the offence and to clarify what was happening. At this initial stage, the solicitors said that they could be challenging of police decisions, particularly in cases where there had been long delays and/or over the suspect's fitness to be interviewed. Having obtained information from the police, the solicitors would then speak to the suspect over the telephone. After making sure the client is in a private room, and that the call cannot be overheard, the SCL solicitors were then able to discuss details of the case and answer any questions raised. This early contact was evidently important to clients, not least because the SCL solicitor was able to inform them of what was happening and answer any queries the client might have at that stage. In cases that were to be referred on to the duty solicitor to attend at the station, the SCL said they would keep the conversation with clients short, telling them that they were arranging for someone to attend. They will also advise the client not to say anything to the police in the meantime.

The solicitor in private practice commented positively on the role played by SCL when stating, "I have no difficulty with the call centre. I think the advice they give is good. They must use a questionnaire because they get a lot of information out of the police" (ER.6). The solicitor also commented on the SCL solicitors being robust, particularly when dealing with vulnerable suspects. He continued saying, "They [SCL solicitors] are quite firm with the police, particularly if there's a question on mental health and vulnerability. They will challenge the police over the evidence and ask if they really need to interview someone. That's the question - why interview him if you don't need to?" (ER.6).

3.3.2. Legal assistance during the interview

The solicitors said that their role in the police interview was to protect the rights of their clients. As this solicitor put it:

"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" (NB.6).

When the interview begins, the other solicitor commented on police tactics which could sometimes be used when saying, "They first put personal questions to my client in the hope that this will encourage a response. They'll next ask him to give his account about what happened and then they'll try to trip him up by showing him what evidence they've

got" (ER.6). The solicitor said that such tactics can only work if the police do not provide any disclosure before the interview. If this is the case, he commented, "I'll say for the benefit of the tape that the police haven't given me any disclosure and so I've advised my client not to answer any questions because we don't know what the evidence is" (ER.6).

Both solicitors commented on the importance of intervening during the police interview if an issue arose rather than waiting until the trial to challenge the police. As the PD solicitor stated, "I'll challenge the police there and then and if I'm not getting anywhere I'll ask to speak to the duty inspector" (NB.6). The other solicitor said, "If solicitors fail to challenge inappropriate police behaviour during the interview then it could later be argued at the trial that we acquiesced to what was happening" (ER.6). He also commented on the importance of challenging the police, particularly as recent changes were leading to the interview effectively becoming part of the trial. Overall, he saw his role as being about achieving fairness.

While the solicitors were willing to challenge the police, they recognised that this was not always the case with other solicitors, including those who were experienced. One solicitor remarked, "They're worried about challenging the police and putting themselves under the microscope if they're questioned about the advice they give at the trial". Accordingly, he lamented, "The sad thing is I don't think enough people take challenges to interviews to court because they don't want this attention" (ER.6). The view of the other solicitor was that some solicitors would not attend the interview because they were concerned that their professional judgement could later be challenged at court. However, he also commented on there being regional variations in solicitors' behaviour and that, "In one area there seems to be a collective view among solicitors that they won't be involved in the interview because if they miss something they can be criticised for it professionally." He continued in saying, "There's no logic in it for me, because, if that was right, you would never run a criminal trial" (NB.6). The solicitor was of the view that such attitudes would have to change when the new Act is implemented and solicitors are trained to provide a more active defence of their client.

The solicitors also acknowledged that solicitors new to police station work could find it difficult to intervene during the interview, particularly as such interruptions could be resented by the police. Highlighting the tension which can arise, one solicitor said, "I've come close to being assaulted by the police officers for intervening" (NB.6). Also recognising this as a problem, the other solicitor said, "I've been thrown out of the interview, but I don't worry about it because I report it to the inspector. No court is going to let an interview stand unless the solicitor has behaved badly" (ER.6). While guidance from Police Scotland in 2011 allows the police to remove solicitors from the interview if they are being disruptive, a solicitor said that such practices would no longer be possible under the 2016 (NB.6).

When dealing with children as vulnerable suspects, a solicitor commented on the need to protect them from undue pressure arising during the police interview and he was critical of the current protections. In particular, he said, "There's guidance for supporting a child complainant when taking a witness statement, which recognises that things have to be done differently, but there's no difference when interviewing an adult or a child as a suspect" (ER.6).

Interview record. Police interviews in Scotland tend to be audio recorded, but, when dealing with less serious offences, a solicitor described that in addition to recording the interview on a PDA (personal digital assistant) the police would write out the interview. A solicitor explained why this was so in saying, "The recording equipment is terrible. They use PDAS, but they have to write down the question and the answer because they're frightened it won't record. Why not just record it onto a hard drive?" (ER.6). The other solicitor said, "With the PDA, the officer writes out the question, asks the question, and then writes down the answer. It takes ages. It's a real pain in the neck" (NB.6). For more serious offences, dealt with by CID (criminal investigation department), the PD solicitor said that interviews are audio and video recorded and this was his preferred option because it was a lot quicker. He did comment that solicitors were not allowed to record the interview, but he suggested that it would be useful for them to do so in saying, "We can use this for training and supervising solicitors" (NB.6).

After the police interview. Both solicitors said that they would talk to their client after the police interview. However, the main issue to be dealt with at that stage, they said, was to find out if their client was to be held in custody and, if so, on what basis. One solicitor said that a primary concern for clients from the outset is when they will be released and if they will go to court. When asked about this in the consultation, he said, "I use a horse racing analogy and say let's take it one fence at a time. The first fence is the interview and once we get through that we can reassess the situation" (ER.6). He explained that he would then speak to the police officers after the interview to see what was going to happen next. If his client was to be released on bail, he said he would check on what conditions and if he is to be remanded he will make representations for bail, if he felt it appropriate to do so.

The other solicitor said that, after speaking to his client, he would not wait around after the interview, but he would ask the police to contact him if his client was to be charged. He commented that, "Most of the time, they're charged at the end of the interview and so you've got an opportunity to make representations about bail straightaway. If they're going to be charged later on, I'll ask the police to call me and, in my experience, they will generally do so" (NB.6).

3.4 Diversion procedures.

As an alternative to taking a child to court, there is the 'Children's Hearings System' in Scotland to which children and young people under 18 years can be referred. The referrals are based on some aspect of the child's life which is giving cause for concern and while social work departments and education can refer cases, 75 per cent of referrals in 2016/17 came from the police.⁷ As noted by the PD solicitor, "It isn't the police who decide that a case can be referred and the prosecutor can only make this decision once he gets the police report" (NB).

4. STRUCTURE OF LEGAL AID REMUNERATION AND IMPLICATIONS FOR QUALITY

4.1 Organisation of legal aid

The majority of publicly-funded police station work is provided by solicitors in private practice and they are paid for their time on a case-by-case basis for both their own clients and duty solicitor work. As noted above, around 25 to 30 per cent of suspects request legal advice.⁸ The PDSO and SCL also deal with a significant proportion of cases. In relation to telephone advice, for example, from July 2015 to June 2017, 42 per cent of suspects received advice from the SCL, either because they did not have a named solicitor, or their named solicitor was unavailable to give advice. So far as attendances at the police station are concerned, in the 9,061 cases dealt with during the same period of time, a named lawyer attended in 57 per cent of cases, the duty lawyer in 31 per cent, the PDSO in six per cent and in six per cent of cases a SLAB employed solicitor attended (SLAB, 2017a).

When considering the availability of solicitors above, it was noted that there can be problems in arranging for a duty solicitor to attend in remote areas and, if there are problems, it is SCL's responsibility to provide cover. Elgin was mentioned by all solicitors as a remote area where SCL solicitors have to provide cover because solicitors locally are not involved in the duty solicitor scheme. A solicitor was critical of the pressure that travelling such long distances can put on the solicitors when he said, "Elgin is up in the north and it's a dangerous road, particularly in the middle of the night. A solicitor has to drive all the way up there for an interview and then come back down again" (ER.6). The solicitor was also concerned that there could be a conflict of interest if the SCL solicitor has to deal with multiple suspects in the same case.

In relation to the changes intended under the 2016 Act, the solicitor remarked, "There won't be enough solicitors involved to make the system work. You've got to reflect what the legislation requires and if someone asks for a solicitor and a solicitor

⁷ Children's Hearings Scotland (2017).

⁸ From information provided by Police Scotland in 2013, 75 per cent of suspects waived their right to legal advice. Thereafter, in an analysis of 1,000 interviews by Police Scotland in October and November 2014, 71 per cent of those in custody did not seek a consultation with a solicitor (Bonomy, 2015).

isn't present, then the police can't proceed with an interview" (ER.6). In seeking to address such problems, SLAB had piloted a video-conferencing facility in a couple areas through which the SCL could provide virtual advice in an initial consultation to clients in remote areas. There was also the potential through the video link for solicitors to have a virtual presence in the police interview. However, as noted below, the project was abandoned before this could be tested more widely. The solicitor explained why, stating, "The new legislation gives the right to suspects to have a solicitor present during the interview and the Scottish Government requires this to be physical presence in the room and not by a video link" (NB.6).

It is evident that long delays involved in waiting for a solicitor to attend a station in remote locations could discourage suspects from having legal advice, mainly because this would significantly increase their time spent in custody. However, in relation to delays, Blackstock et al. (2014) found that, from the police perspective, there was only a minority of cases where they experienced long delays while waiting for a solicitor to attend at the station. In these cases, however, it meant that, not only were clients held in custody for longer, but that sometimes police officers had to remain at the station for several hours after the end of a 12-hour shift waiting for solicitors to arrive.

From the perspective of solicitors, on the other hand, the researchers noted that they could sometimes be kept waiting for several hours after arriving at the station before consulting with their client. As this solicitor put it, "It's not really a problem in the Central Belt, but some police stations don't operate all the time and there can be a bit of a wait. You can also get officers who are not attached to the same station where your client is detained and you can wait for several hours before they arrive to do the interview" (NB.6). In addition, it was noted that there were difficulties for solicitors attending at the station in the early hours of the morning and, more generally, having to accommodate unpredictable working hours into the workload planning. It was because of such delays, together with the low remuneration paid at that time for police station work, that Blackstock et al. (2014) found that the default position for solicitors was to provide telephone-only advice.

Prior to the *Cadder* judgement in 2010, the police could detain a suspect for six hours without having access to a lawyer. While a solicitor could be advised that their client was being detained, it was not until after the six hours that they could speak to their client. During that six hours, the police could question the suspect and the prosecution could rely on the interview at court in support of other prosecution evidence. Emergency legislation following the *Cadder* judgement, provides suspects with access to a lawyer, but they can now be held in police custody for a maximum of twelve hours, with a review of detention required after six hours. It is also possible for a senior police officer to authorise an extension of detention for a further twelve hours, although a policy officer said that, "This

happens in less than one per cent of cases" (EN.6). The PD solicitor acknowledged that delays were not generally a particular feature within the Scottish process when he said, "Statistics show that around 80 per cent of police interviews are conducted within six hours" (NB.6).

It was when envisaging changes required under the 2016 Act that the solicitors raised concerns over meeting the increase in demand for police station work. With solicitors focusing on court-based work, the PD solicitor said, "The legal profession hasn't structured itself to cope with it properly" (NB.6). The solicitor in private practice said that his firm has a business model that enables them to provide police station legal advice locally, but that there are limitations. He said, "I need to look after my employees. I can't send them to a police station at two o'clock in the morning when they're in the middle of a jury trial. Our business model is based on most jury trials being done by solicitors" (ER.6). However, the solicitor was concerned that the new arrangements could lead to duty solicitors being required to provide cover in other areas. As he put it, "We're worried that, if we sign up to a new duty scheme, that they might want us to cover interviews in remote areas and, if we don't, we'll be taken off the scheme. It isn't part of our business model to cover police stations outside of our area" (ER.6).

When commenting on solicitors' reluctance to join the duty solicitor scheme in some areas, the solicitor said that this was due to having to provide 24-hour cover when managing a busy court practice. He said, "Some solicitors won't touch duty work in police stations because they want a better quality of life." Commenting on the impending reforms, he remarked, "They're laying too much work onto us that we don't currently cover. That, along with the low fees we have already, it's too much grief. That's why it comes back to the quality of life" (ER.6).

The reforms in Scotland are clearly intended to require solicitors to attend in person at the police interview and comments from solicitors help to highlight why this is so. One solicitor, for example, commented on the importance of attending at the police station to get disclosure from the police and generally to find out what the case is really about (NB.6). The other solicitor said, "Your clients can be put under pressure to answer questions and that's why we go out to the interviews. If there isn't a solicitor in the room they [the police] will be more aggressive. They're less so if I'm sitting there" (ER.6).

When looking to the future, it will be interesting to see how the reforms lead to changes in the legal profession. One way forward could be for defence practitioners to join together to provide an informal local rota for covering police station work. However, recognising the problems involved, a policy officer said, "There's a lot of sole practitioners doing police station work. They're competitors at the end of the day and it's very difficult for them. I think this is why so many solicitors like the SCL, because it's non-threatening" (EN.6).

For one solicitor, he felt that the reforms are intended to encourage private practice to take on a more active role in providing police station legal advice and that the remit of the SCL will then contract. On the other hand, if solicitors do not adapt to meet the higher volume of cases being referred following the 2016 Act, the role of SCL could expand to meet the increase in demand for legal advice.

4.2 Remuneration

Following the *Cadder* judgment, the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 require SLAB to make arrangements for solicitors to be available to provide advice and assistance to suspects. While legal advice was initially means tested, under the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013, it is now free to all suspects questioned by the police. The advice is paid for under Advice and Assistance, although additional work undertaken can be paid for under ABWOR (advice by way of representation) or summary criminal legal aid in the case. Police station work had been paid 'time and line' fees, which remunerated solicitors for the time spent on cases. With the new provisions under the 2016 Act coming into force, a simplified process of new fees has been introduced for police station work.

According to SLAB, the new fees will increase payments to solicitors for carrying out police station work and there will be a simplified payment process, which will make it easier for solicitors to claim payment. Under the current scheme, the PD solicitor stated that, "Solicitors only claim for around 30 per cent of cases referred to them under advice and assistance, but, under the new 'block fee' system, their involvement in cases will immediately attract a payment" (NB.6). With the changes intended to increase the take-up of legal advice, to require solicitors to attend more at the police station and to cover the work not currently claimed for, the solicitor said the Scottish Government was making available an additional £3.5 million to spend on this work. The solicitor in private practice was, however, sceptical of any new monies being made available, in saying, "Most of the money available is for telephone advice and there's not enough to cover the cost of solicitors attending at the station" (ER.6).

The new block fee system is intended to provide flexibility when taking into account the amount of time that solicitors have to expend on cases. For the consultation, for instance, there is a single fee of £30 paid for telephone-only advice, increasing to £75 for an attendance if the police have assessed the client to be vulnerable. The fees increase by one-third if the advice falls between 7pm-7am (to £39.90 and £99.75, respectively), or at weekends and public holidays. For attending at the police station and being present during the interview, solicitors are to be paid £115 for up to two hours, £200 for between two and four hours, and beyond four hours there is a payment

of £200 plus £50 for each hour (or part of an hour) thereafter. Once again, there is an uplift applied if the advice is provided during 7pm-7am, weekends or public holidays (to £152.95 and £266, respectively). There is also travel time which can be claimed for under the block fee (SLAB, 2017b).

When translating the fees into an hourly rate, the solicitor in private practice said that the work should be remunerated at £114 per hour, being the hourly rate paid for solicitors attending a VIPER (Video Identity Parade Electronic Recording) parade. In justifying this amount, the solicitor remarked, "It's accepted now that the trial starts at the police interview, so if you're talking about a murder trial then a solicitor is being paid £50 an hour. Even at £114 an hour, you might think it's a bit shy, but the profession has accepted that this would be an acceptable rate" (ER.6).

SLAB has consulted on the new fee regime and a policy officer said that he had been involved in engagement events with the legal profession across the country about the new fees. While accepting that solicitors wanted a higher fee for the work undertaken, the policy officer was of the view that, "They're generally happy with the changes" (LO.6). This was not the view of the solicitor in private practice, however. When considering the 'swings and roundabouts' approach to fixed fees adopted in England and Wales, based on a proportion of cases being dealt with in less than an hour, the solicitor said, "Tell me, what's a swing and what's a roundabout? What do you win on and where do you make a loss? That's the argument" (ER.6). Accordingly, the solicitor said that the new rates were not acceptable to the Law Society of Scotland for covering the cost of police station work.

The solicitor in private practice commented on how financial pressures made it difficult for new solicitors to engage in legal aid work. Indeed, he said that a child abuse enquiry had recently started and that, "Almost all the young solicitors applied to work on the enquiry because they were being offered over £40,000 to do a nine to five job and they can work from home one day a week" (ER.6).

While the PDSO does not have the financial worries of solicitors in private practice, the PD solicitor said that they were under far more scrutiny. As he put it, "We have an internal audit and various layers of audit that deal with financial matters. We've got all the equalities legislation we have to comply with. We're a public-sector organisation with all the challenges that brings" (NB.6).

4.3 Quality of police station work

It is only a qualified solicitor who can provide publicly-funded legal advice and assistance to suspects in Scotland, although the Law Society of Scotland can issue a restricted Practising Certificate that would allow a second-year trainee solicitor to carry out police station work. As this solicitor observed, however, "Trainees can only do police station work

if they've done three months in a criminal department" (ER.6). There is a requirement for solicitors who apply for registration with SLAB to provide publicly-funded criminal legal assistance to have attended, or conducted, 15 hours of CPD (continuing professional development) training in the twelve months prior to the application. Thereafter, a solicitor has to complete a minimum of five hours CPD training in each year (SLAB, 2017c). This requirement was not considered to be too onerous with the solicitor in private practice when he noted, "You can do five hours in a day" (ER.6).

The Law Society of Scotland (2014) publishes guidance for police station legal advice, which includes information to assist solicitors when deciding whether or not to provide telephone advice or make a personal attendance. While not an exhaustive list, it includes taking into account the complexity and/or seriousness of the offence, where the suspect is under 18 years of age, a vulnerable person, and if appropriate advice cannot be given confidentially over the telephone. In cases where the SCL has referred a case requiring the attendance of the solicitor at the station, solicitors in urban areas are generally required to attend within one hour and in rural areas they have two hours, or longer if required.

SLAB has introduced a new Code of Practice, which came into force from 25 January, 2018.⁹ This includes the existing requirement for criminal legal aid work to be 'peer reviewed', which involves experienced criminal solicitors examining the files of other solicitors' firm against a check-list of quality standards.¹⁰ The solicitor in private practice was critical of 'peer review' for increasing the amount of work required on cases. He said:

"We get criticised because the reviewer can't see what was said to the client after the court case and so we've had to alter our system. Instead of the letter summarising the outcome, such as he pled not guilty and these are the fixed dates, we now have to say in detail who attended with them at court, what they were advised and what happened. It probably helps to protect us, but when you're talking about fixed fees we aren't getting paid for the letter" (ER.6).

When commenting on quality, both solicitors mentioned the important role of judges in criminal defence work. One solicitor, for example, said, "You get peer review every time you go to court because there's a judge there" (ER.6). The other solicitor reflected saying, "I think the court has a role to play. We've not had any cases yet, but it will shake things up if a solicitor is criticised for not having done their job. There's cases like Pavlenko v

⁹ SLAB (2017c).

¹⁰ The quality standards do not include police station criteria, although this requirement is currently being reviewed.

Russia¹¹ and other English cases where the court has basically criticised solicitors for not doing a good job, but we haven't had that yet in Scotland" (NB.6).

As noted above, the main criticism of the quality of police station legal advice in Scotland is the reliance on providing advice over the telephone. Blackstock et al. (2014: 288) were critical of such advice for being brief when stating:

"This is a long way from the professional ideal of personal service. It fails to grasp the importance of individualised 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."

For some solicitors in that study, the reliance on telephone advice, rather than attending in person, was said to be linked to the right of silence and the operation of the corroboration rule, which requires that all evidence must be corroborated by a second evidential source. By providing advice over the telephone only, however, solicitors are unable to obtain disclosure from the police, assess the vulnerability of their client, or engage with the police over the release decision. Without a solicitor being present, there is also no one to keep the police in check. In addition, by adopting telephone advice as a 'uniform strategy', the researchers note that this "ignores the fact that some suspects will wish to (and may be best advised to) respond to questions and to admit their involvement" (Blackstock et al., 2014: 288). The reluctance of solicitors to attend police stations was recognised by the researchers to be due to a number of factors, including the unavailability (or unwillingness) of solicitors to attend at the station, especially during anti-social hours, as well as the then low remuneration for police station work.

In this study, a solicitor commented that while, over the telephone, solicitors can advise clients to make 'no comment', the police can put suspects under pressure in the interview to respond to their questions. When commenting on the need to intervene during the interview, for example, a solicitor said:

"I'll stop police officers who try to give their opinion, saying that they believe the complainer, for instance. I'll tell them that it isn't their role to give an opinion, but to gather evidence. I remind the police that it's a matter for the court to decide what the truth is. So, I'm there to keep the police in check" (ER.6).

As the PDSO does not have to worry if there is any profit in a case, the PD solicitor confirmed that, in all cases referred by the SCL for a solicitor to be present, they will attend at the police station. In addition, as a public-sector organisation, he said, "We can try and do a good job for our client, look after their wellbeing and what it might take to stop them

¹¹ [2010] 42371/02. The case states that regulation of legal aid lawyers must be stringent as quality and effectiveness must not become substandard.

offending. There are public defenders out there in the world that are doing this successfully and I'd like to do that in the future" (NB.6).

The main challenge to solicitors' firms in Scotland, particularly for sole practitioners who concentrate on court-based work, will be in managing the increased volume in police station work intended by the 2016 Act. When dealing with this problem following implementation of the Police and Criminal Evidence Act 1984 in England and Wales, non-solicitors began to be used by solicitors to do this work. For the solicitor in private practice in Scotland, however, this was not a solution because of the complexity of the work involved. As he remarked, "The trial starts at the police interview. It has to be a solicitor who's doing the work, someone who is capable of doing a trial" (ER.6). The PD solicitor similarly recognised the complexity of the work in saying, "It's difficult work, particularly with changes in the admissibility of interviews at court. You need to have someone who has a strong handle on how things are going to play out at trial" (NB.6). However, he also commented that the profession was not ready to cope with an additional workload, saying:

"No one has structured themselves to cope with the changes. It's still court-based, court-focused and with offices staffed to cover the courts. There's no consideration being given as to how to cover the police station work" (NB.6).

Accordingly, he suggested that, if solicitors were not available to attend in person at the police station, then non-solicitors should be able to provide advice in appropriate cases, subject to being appropriately trained and under the supervision of a criminal defence solicitor. As he put it, "This could help to increase the likelihood of a suspect who asks for advice to get it in a timely way" (NB.6). While no consideration is being given to paralegals providing police station legal advice in Scotland at the present time, it will be interesting to see how the legal profession responds to the reforms and what impact this has on the take-up of legal advice and the attendance of solicitors in the police interview.

Training. There is no requirement for solicitors to be accredited to provide police station legal advice, but a policy officer was of the view that this would change in the future. While recognising that the Law Society of Scotland is responsible for accreditation, he said:

"I think that's where we'll end up going. The whole narrative around the new Act is the importance of what's happening in the police station. Some of the changes means that a no comment interview isn't always going to be appropriate and this is where the skills and knowledge necessary for police station work are likely to develop" (EN.6).

For the solicitor in private practice, he was of the view that there would eventually be a new Code of Conduct for police station work that could lead to such an accreditation.

Joint training. When considering some of the problems arising between the police and the defence, particularly over the issue of disclosure, a policy officer suggested that joint training events could help to improve matters. Elaborating on this, he said:

“We had an event involving the police and the legal profession that looked at collaboration in the police investigation. It was helpful to discuss disclosure and how it could help if more information was given to solicitors in the first instance. There was talk about this changing, but I don’t think it will happen any time soon. The new Act is likely to lead to solicitors giving more pre-prepared statements and the police need to be ready for this” (EN.6).

The PD solicitor was also positive about joint training between the police and defence solicitors. Having attended a recent event, he said:

“We did an exercise for a CID officer to play the role of a solicitor. He’d been critical of solicitors advising clients to make no comment, but, when he was given very little information prior to the interview, this is what he advised his client. His colleagues nearly fell off their chairs. It was brilliant” (NB.6).¹²

The solicitor also commented on the SUPRALAT training programme, coordinated by the University of Maastricht and co-funded by the European Union, which provides practice-oriented training for lawyers.¹³ He said, “This is being rolled out in Ireland at the moment and it might be coming to us next. I think it will help to change people’s perception over the need for solicitors to engage in the interview” (NB.6).¹⁴

5. TECHNOLOGY

When faced with the cost and logistics of getting a solicitor to attend police stations in remote areas, SLAB piloted the SCL video-conferencing link so that SCL solicitors could talk to clients virtually. A policy officer commented on this project, saying, “We could see the advantage of using it in areas where it’s difficult to get there, either because of long distances or the weather conditions. Getting to the islands, for instance. It was helping to facilitate people’s rights” (EN.6).

A virtual link was established between the SCL solicitors and police stations based in two remote areas. While the link was useful in providing advice, there were difficulties arising when considering the potential for solicitors being virtually involved in the police interview. As the PD solicitor explained:

“There were some technology issues because, even with the best Internet connection, there can be a time lag; but you need the link to be instantaneous so that your client

¹² This was part of the ‘Inside Police Custody Training’ training pilot project that was held in Bristol in 2013 (see Blackstock et al., 2014: 467-531).

¹³ SUPRALAT (strengthening suspects’ rights in the pre-trial proceedings through practices orientated training for lawyers) is currently being piloted in Belgium, Hungary, Ireland and the Netherlands. For further information on SUPRALAT, see the Country Report for the Republic of Ireland.

¹⁴ JUSTICE Scotland, as part of its Working Party on Legal Advice and Waiver, has held two SUPRALAT example training workshops, with the assistance of the Irish SUPRALAT team. Discussions are taking place with the Law Society of Scotland Criminal Law Committee about setting up a training programme.

doesn't blurt something out before you get the chance to object to the question. There also needs to be at least two cameras, so you can see your client and the police at the same time" (NB.6).

When commenting on the pilot, the solicitor in private practice said that the Law Society of Scotland opposed the virtual arrangements because it did not allow the solicitor to participate in the process. As he put it, "You're not there. You can't intervene. You can't even assess what's going on. Even if you've got a camera showing the whole room, you don't know if someone is kicking someone under the table" (ER.6). While advances in technology could help to address some of the problems raised, the PD solicitor said that the policy position in Scotland had now changed, particularly as suspects can now require that a solicitor attends the police interview.

It seems that there is the potential for video-conferencing to be reconsidered if solicitors continue to rely predominantly on providing telephone-only advice following implementation of the 2016 Act. As the PD solicitor noted in relation to speaking to clients over a virtual link, "It's a step up from telephone advice. It's easier to build a rapport with somebody and come to an assessment about their level of understanding if you can look them in the eye" (NB.6). At the present time, and when considering the practicalities, however, the solicitor said, "There's no way that Police Scotland were going to roll out the pilot and spend millions of pounds on the infrastructure if the legislation precludes solicitors having a virtual link with their clients" (NB.6). In addition, while recognising that the new Act requires the attendance of a solicitor, a policy officer said, "We've put the scheme on the backburner. We'll have to monitor how the new legislation operates and it might be that it comes back onto the table if solicitors don't attend at the station" (EN.6).

The solicitor in private practice spoke positively about talking to clients virtually, but he also noted the limitations of technology when saying, "We're big fans of video-conferencing. We use it in our office a lot more now when speaking to clients in prison. The police station is different and, if you've got a client who's going to be interviewed, and they want to speak to a solicitor, then he's going to want a solicitor to be there" (ER.6).

Research participants were asked what they thought about the potential for using a Police Station App to provide information to suspects about their legal rights and all responded positively to such an idea. A policy officer said that the Scottish Government makes information about people's legal rights from arrest to court available online to provide help and support. As noted above, when considering some of the potential obstructions to suspects accessing police station legal advice, a solicitor commented positively on such an App helping to improve matters, saying, "The police don't always advise suspects that they can have a solicitor present during the interview because they

don't want a solicitor to be involved. It would be good to have an App to let people know what their rights are" (ER.6).

When recognising that only around 25 to 30 per cent of suspects take up their right to legal advice, Bonomy (2015) recommends that the way in which suspects decide to waive the right is monitored and before the waiver is effective. He states that it needs to satisfy the following requirements: "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. In other words, the decision must be a voluntary decision made on a fully informed basis" (Bonomy, 2015: para. 5.10). In addition, having regard to the importance of any incriminating statements made by a suspect, and the significance attached to them by the jurisprudence of the ECtHR and the judgment in the *Cadder* case, it is suggested that "an audiovisual recording of the process during which the suspect is advised of the right and decides to waive it would provide a valuable safeguard ensuring that the decision to waive the right is voluntary, informed and unequivocal" (Bonomy, 2015: para. 5.11). Accordingly, a facility could be incorporated into the tablet hosting the App, which records a suspect when making a decision about whether or not to have legal advice.

6. CONCLUSION

The research interviews have helped to highlight how police station legal advice is provided in Scotland and to explore how government reforms are intended to increase access to legal advice for suspects detained by the police. This study has highlighted tensions within the legal profession over the proposed changes, particularly due to the increased pressure that this could place on duty solicitors. The relevant sections of the Criminal Justice (Scotland) Act 2016 came into force on 25 January, 2018 and, while it is early days, there has been resistance from defence solicitors to the new arrangements. Some Bar Associations, for example, including the Edinburgh Bar Association, have withdrawn from the police station duty scheme due to concerns over the impact of the new arrangements on duty solicitors (Davison, 2018). It is important that research in the future examines the reforms to see how these influence changes on the ground. In the meantime, the findings from this study provide a useful update on the organisation and delivery of effective police station legal advice following research conducted by Jodie Blackstock and her colleagues in 2014. It has also been useful to explore with research participants how technology has the potential to improve procedural safeguards for suspects and to help increase access to legal advice.

While it is solicitors in private practice who predominantly provide police station legal advice in Scotland, there is a not insignificant proportion of cases dealt with by salaried solicitors employed by SLAB, either through the PDSO or the SCL. There is flexibility within

the SCL so that, in addition to providing telephone-only advice to clients who do not have their own solicitor, SCL can speak early on to suspects to assist them when deciding if the attendance of a solicitor is required. This early contact is important because the SCL solicitor can give suspects information about what is happening in their case and advise them not to say anything to the police until they have spoken to their solicitor. The SCL solicitors can also attend police stations to provide legal advice to suspects where it is not possible for a local duty solicitor to attend.

Around 25 to 30 per cent of suspects request legal advice and it seems that the advice is predominantly provided over the telephone. The reforms are intended to significantly increase the number of suspects receiving legal advice and also to require solicitors to attend the police interview in a higher proportion of cases. When receiving a referral, solicitors have to decide whether or not to attend the police station. While this will depend on the seriousness of the offence and the vulnerability of the suspect, it is a decision that is also influenced by what is happening in court. This is because many criminal legal aid solicitors are sole practitioners or based in small firms and it can be difficult to manage cases both in the police station and at court.

There are implications for the quality of legal advice if this is predominantly provided over the telephone. As Blackstock et al. (2014) note, this is because solicitors are not in a position to assess their clients, engage with the police over disclosure or support them during the interview. It should be noted, however, that there are limitations for solicitors in getting disclosure from the police, particularly as little information tends to be provided. The corroboration rule in Scotland means that, in the majority of cases, solicitors' advice to clients is to exercise their right of silence. While such advice can be provided over the telephone, it is not known to what extent suspects can maintain silence when under any pressure from the police to respond to their questions.

The structure of legal aid remuneration has changed from 25 January, 2018 and, instead of solicitors being paid for the time spent on cases, there is now a new streamlined system of block fees. The new system has enhanced legal aid rates and, while the government has provided additional funding for the extra work required, solicitors do not consider that this is sufficient to cover this additional work (Davison, 2018). Payment under block fees is more flexible than a fixed fee, because the fee increases when solicitors have to spend more time on cases. By paying solicitors a block fee based on 2-hour blocks, however, remuneration is based on a 'swings and roundabouts' approach. As noted in other jurisdictions, solicitors do not generally consider such an approach to be fair and they would prefer to be paid an hourly rate for the time spent on cases. Increasingly, however, jurisdictions are turning to fixed or block fees as this is a more efficient system to administer.

With the reforms requiring a more active role for solicitors when providing police station legal advice, there are also increased quality requirements. All solicitors registered with SLAB to provide criminal legal aid services, for example, are subject to peer review. SLAB also requires legal aid solicitors to comply with the Code of Practice when undertaking police station work. In addition, the SUPRALAT programme of training is to be rolled out in Scotland.

In relation to technological developments, Scotland was one of the first countries to use video-conferencing as a way of linking suspects in remote police stations with SCL solicitors. While there had been teething problems, particularly in maintaining a strong Internet connection during the consultation, the recent reforms have put an end to such efforts due to solicitors having to attend detained suspects in person. However, if the reforms do not have this desired effect, then it could be possible to return to pursuing such developments if it was found that such a mechanism could help to provide legal advice to suspects who are not otherwise receiving such advice.

There was support for developing a Police Station App through which to advise suspects of their legal rights. In addition, and arising out of a review of safeguards for suspects in Scotland, it has been proposed that there should be a video of suspects taken as they read through their rights and when making a decision about whether or not to have a solicitor (Bonomy, 2015). This facility is to be incorporated into the Police Station App in England and Wales and this would provide a mechanism through which to capture this information.

It is important for researchers to examine what happens in Scotland following implementation of the new arrangements. The intention of government is to strengthen legal rights for suspects, including extending access to legal advice for all those detained by the police. However, such developments require changes within the legal profession and, over the next few months, it will be interesting to see how the reforms influence the organisation and delivery of police station legal advice.

References

Blackstock, J. et al. (2014:118-136) *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Cambridge: Intersentia).

Bonomy, I. (2015) *The Post-Corroboration Safeguards Review: Final Report* (the Bonomy Review): <http://www.gov.scot/Resource/0047/00475400.pdf>

Children's Hearings Scotland (2017) *How Does the Children's Hearings System Work?:* <http://www.chscotland.gov.uk/the-childrens-hearings-system/how-does-the-childrens-hearings-system-work/>

Davison, J. (2018) 'Serious Concerns from Solicitors as Expansion of Police Duty Scheme comes into Force' in *Holyrood* (26 January 2018).

Jackson, J.D. (2016) 'Responses to *Salduz*: Procedural Tradition, Change and the Need for Effective Defence' 79 *Modern Law Review* 987-1018.

Law Society of Scotland (2014) *Police Station Interviews: Advice and Information:* <https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf>

Scottish Government (2018) *Letter of Rights:* <http://www.gov.scot/Publications/2018/01/4470/downloads#res530265>

Scottish Legal Aid Board (2017a) *Police Station Duty Scheme Update – Solicitor Contact Line:* https://www.slab.org.uk/export/sites/default/common/documents/news/2017/Police_Station_Duty_Update_12th_October_2017.pdf

Scottish Legal Aid Board (2017b) *Criminal Justice Act: Police Station Proposals:* <https://www.slab.org.uk/providers/mailshots/newsfeed/Police.html>

Scottish Legal Aid Board (2017c) *Code of Practice for Criminal Legal Assistance:* https://www.slab.org.uk/common/documents/profession/SLAB_Criminal_Code_of_Practice_-_Dec_2017.pdf

Appendix

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**

- o Tell the police if you want to speak to a lawyer. The police will contact a lawyer for you as soon as possible.

- o 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.

- o Speaking to a lawyer does not make it look like you have done something wrong.

- o A lawyer's job is to protect your rights and give you advice about the law.

- o 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.
- o If the police interview you, you can ask that the lawyer is in the room with you when this happens.
- o 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.
- o 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.
- o 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)

Safer Scotland: Scottish Government

Your Rights when you are at the Police Station Easy Read

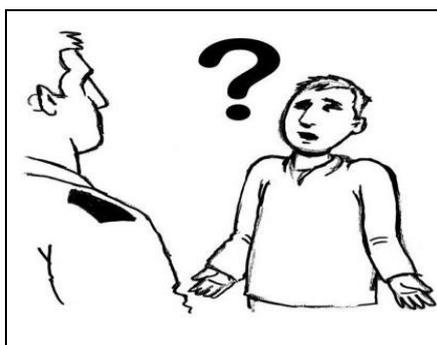


This leaflet gives you **important information** about your rights when you are at the police station.

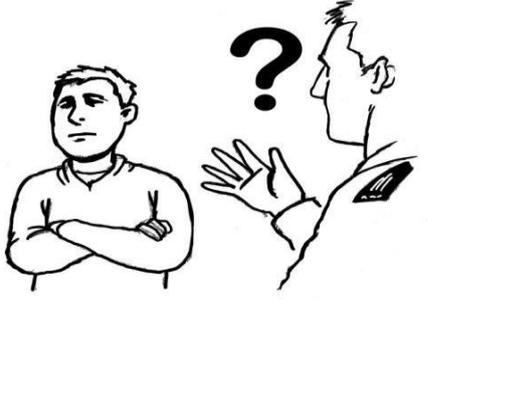
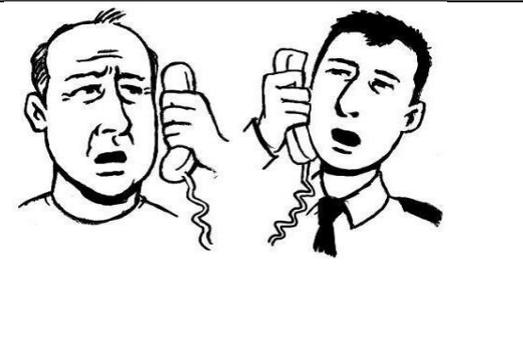
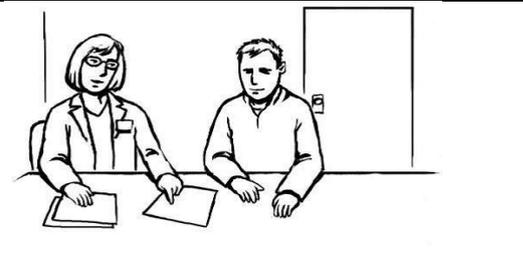
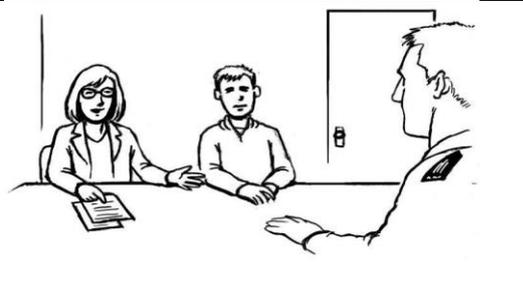
By **rights** we mean **important freedoms and supports** that the law says everyone can have. **Knowing about your rights** will help you be sure that you are being **treated fairly** by the police.

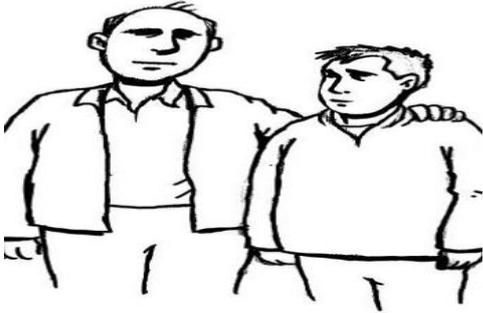
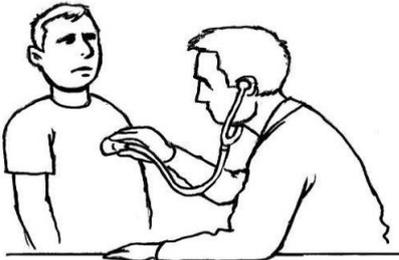
Please read this information as soon as possible. It will help you to make decisions when you are at the police station. **Please ask for help** if you do not understand anything in this leaflet. **Please ask** if you want a translation.

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.**

	<p>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 tell them your name, address, date of birth, where you were born and your nationality.</p>
	<p>4. You have the right to have someone told you are at the police station. If you are under 16, we must tell a parent or guardian. If you are 16 or over, this might be a family member, a carer or a friend.</p>
	<p>5. You have the right to have a lawyer told that you are at the police station. This is free.</p>
	<p>6. You have the right to speak to a lawyer in private at any time. This is free.</p>
	<p>7. You have the right to have a lawyer in the room with you if the police interview you. This is free.</p>
	<p>8. If you are under 16 a lawyer must be with you while the police interview you unless there are</p>

	<p>exceptional circumstances. If you are 16 or 17 and subject to a compulsory supervision order, a lawyer must be with you when the police interview you unless there are exceptional circumstances.</p>
	<p>9. If you are under 16 you have the right to be visited by your parent or guardian at the police station.</p> <p>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.</p>
	<p>11. You have the right to see a doctor or a nurse if you are ill or injured.</p>

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.

- 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**

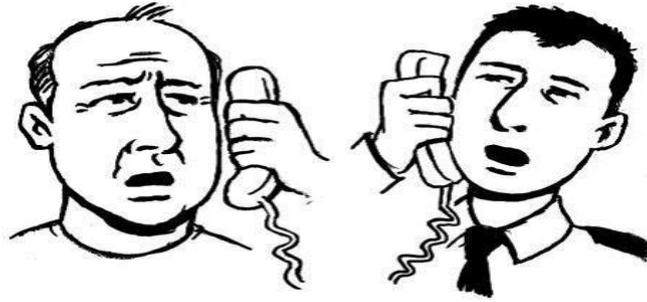
You can ask the police to tell a lawyer that you are at the police station. This can be your own lawyer or the duty lawyer. The police will arrange for a lawyer to be contacted as soon as possible. This is free.



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.**

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



If you are:

- **under 16**

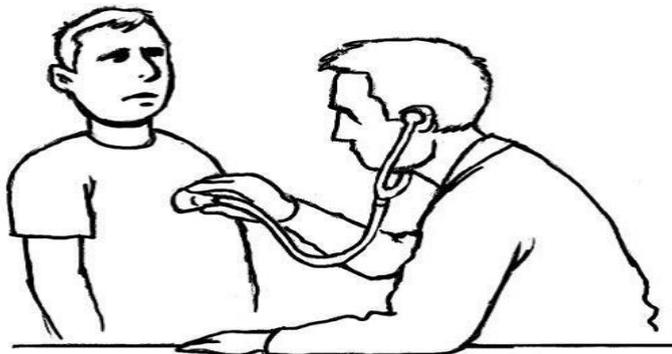
or

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

The police must try to tell your parent or guardian that you are at a 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 could affect you while you are at the police station. The police might ask a healthcare professional which will be a doctor or nurse to check on you. This is to help make sure you are looked after properly while you are 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 given medical help.



Food and Drink

Water will be given to you if you ask for it. You will be offered food at meal times if you are at the police station for more than four hours. If there are any foods you can't eat them tell the police as soon as possible.



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 is free.



If you are not British

If you are not British, you can ask the police to contact someone from your country, 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.

If you need extra help

You might need help understanding what is happening when you are at the police station. This help can be given 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.

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

If you are charged, 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.

• **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 important paperwork if you do not understand English.

Information about the right to speak to a lawyer



o Tell the police if you want to speak to a lawyer. The police will contact a lawyer as soon as possible.

o 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.

o Speaking to a lawyer does not make it look like you have done something wrong.

o A lawyer's job is to protect your rights and give you advice about the law.

- o You can choose to speak to a lawyer you know or the duty lawyer. The duty lawyer is independent and does not work for the police.
- o If the police do interview you, you can ask that the lawyer is in the room with you when this happens.
- o 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.
- o You can change your mind about speaking to a lawyer at any time. Tell the police as soon as possible and they will contact a lawyer for you.
- o If the lawyer does not come to the police station when they said they would, or you need to talk to the lawyer again, tell the police. They will 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 at the police station?**



The police can normally keep you for up to **12 hours** without charging you with a crime. The police can extend this for up to **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.

