Inside Police Custody

An Empirical Account of Suspects' Rights in Four Jurisdictions
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PREFACE AND ACKNOWLEDGEMENTS

This book sets out the research findings of the European Commission funded project 'Procedural rights of suspects in police detention in the EU: empirical investigation and promoting best practice.' The research was an empirical study of the daily routines and practices of those involved in the administration and provision of suspects' rights in four EU jurisdictions: England and Wales, France, the Netherlands and Scotland. The study examined the processes in place in each jurisdiction, making particular reference to the rights (some of which are now incorporated into EU Directives) set out in the EU Roadmap on procedural rights. Underpinned by our empirical findings and the identification of best practices, the book also includes a separate 'Training Framework' for police officers and lawyers. This sets out key training requirements and recommendations, designed to enhance the knowledge, understanding and skills of practitioners in respect of the procedural rights of suspects.

The success of this ambitious project was made possible through the efforts of the many people who assisted us and worked with us over the last two and a half years. Firstly, we must thank the European Commission for funding the project and granting us a short extension to enable us to complete our fieldwork and writing. We would also like to thank John Long (National Police Service lead on integrated offender management), Roger Smith (JUSTICE) and Zaza Namoradze (Open Society Justice Initiative) for their support, advice and encouragement as project partners. We have guaranteed the anonymity of those who kindly allowed us to observe them as they went about their daily work, preventing us from naming the police officers, assistant prosecutors and lawyers and law firms, who welcomed us and assisted us in conducting the research. Nonetheless, they know who they are and we would like to acknowledge our thanks here. Quite literally, we could not have done this without them.

\[1\] JUST/2010/JPEN/AC/1578.
We can, however, mention those who worked with us at the national level, helping us to gain access to the fieldwork sites. In England and Wales, we would like to thank John Long (National Police Service lead on integrated offender), who was instrumental in putting us in touch with key officers and negotiating access. In France, we are grateful to Antoine Garapon (secrétariat général de l’Institut des Hautes Études sur la Justice) for sticking with us until eventually we struck lucky with a new senior prosecutor in one field site, who made it possible for us to conduct observations alongside lawyers at the police station. In the Netherlands, Herman Bolhaar (Head of the Board of Attorney General and the Prosecution Service) ensured that we were able to gain access to the police station without any difficulties. In Scotland, we are grateful to Paul Main (former ACPOS lead on Solicitor Access implementation) for helping us to negotiate access to the police station and to Kingsley Thomas (Scottish Legal Aid Board Manager of Criminal Legal Assistance) who enabled us to observe the Board Solicitor Contact Line lawyers facilitating access to solicitors and, where necessary, advising suspects in police detention. We are also grateful for the assistance of George Runciman of Global Language Services for providing us with information and for giving permission to reproduce the language identification card.

Our researchers did an excellent job conducting fieldwork, providing detailed field notes, carrying out interviews and responding to queries and requests for clarification along the way, enabling us to really understand the daily practices of police and lawyers. They worked long hours, often away from home, and we are grateful to them for all that they have contributed to the project. In addition to Anna Ogodorova, the three other principal researchers were Marc van Oosterhout, Brigitte Perroud and Dan Shepherd. Ciarán Burke also carried out some observations and interviews. We are especially grateful to Laurence Soubise who carried out field observations and interviews in France at very short notice and assisted us with some additional legal research. Marc van Oosterhout also provided a great deal of project support - from note-taking to setting up and managing the secure website where all data was stored.

Maastricht University was responsible for the administration of the project and special thanks must go to Diana Schabregs who managed the complex budget with great efficiency. Thanks also to Yleen Simonis who organized the final project conference in Maastricht. Violet Mols did a fantastic job of formatting the entire manuscript and Marije Mullers worked in record time to ensure that it was camera ready. Marion Isabel, John Long, Zaza Namoradze, Hans Nelen and Miet Vanderhallen were on our advisory board of experts and assisted us in planning, researcher training and participated in the final project conference in May 2013. Miet Vanderhallen deserves special mention for the work she did in analysing the quantitative data for us. We are grateful to all the lawyers and police officers who participated in the training pilots and also to the experts who assisted us; in Bristol: Robert Brown, Angela Devereux, John Long and Zaza Namoradze; in Maastricht:
Geert Vervaete, Yves Liégeois, Imke Rispens and Frans Vluggen. Finally, we thank Kris Moeremans and his colleagues at Intersentia for their support in publishing the book.

This project has demanded intense periods of work. As a team we have worked hard together, but we have also enjoyed the ride! Perhaps our greatest thanks must go to our families, who have tolerated our frequent trips away and months of immersion in analysis and writing, but still supported us throughout.

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BIOGRAPHIES

Jodie Blackstock
Jodie Blackstock is an employed barrister at JUSTICE, in the role of Director of Criminal and EU Justice Policy. JUSTICE is a policy and law reform organisation focusing on human rights, access to justice and the rule of law. It is also the UK section of the International Commission of Jurists. Her position involves briefing on the impact of EU legislation in the criminal justice sphere, conducting research into the effectiveness of criminal justice procedures across the EU, as well as domestic law reform, training practitioners in legal developments and intervening in cases in the public interest. Recent projects include the European Commission funded, European Arrest Warrants: Ensuring an Effective Defence. Recent case interventions have included appeals to the UK Supreme Court in relation to the right of access to a lawyer (2010), positive obligations upon death in the control of the State (2011) and the rights of children of extraditees in preventing extradition (2012). She regularly gives or contributes to lectures and seminars on criminal and human rights law, most recently for the European Academy of Law, the European Criminal Bar Association and the European Parliament.

Ed Cape
Ed Cape is Professor of Criminal Law and Practice at the University of the West of England, Bristol, UK. A former criminal defence lawyer, he has a special interest in criminal justice, criminal procedure, police powers, defence lawyers and access to justice. He is the author of a leading practitioner text, Defending Suspects at Police Stations (6th edition, 2011), and is a contributing author of the leading practitioner text, Blackstone’s Criminal Practice (2013, published annually). His research-based publications include Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work (2005), Evaluation of the Public Defender Service in England and Wales (2007), Suspects in Europe: Procedural rights at the Investigative Stage of the Criminal Process in the European Union (2007), Effective Criminal Defence in Europe (2010), and Effective Criminal Defence in Eastern Europe (2012). Ed is also the co-editor of

Jacqueline Hodgson
Jacqueline Hodgson is Professor of Law at the University of Warwick, UK. She has researched and written on issues within French, English/Welsh and comparative criminal justice, on the role of the criminal defence lawyer, the right to silence, the process of investigation and prosecution, terrorism, miscarriages of justice and suspects’ rights. Much of her work draws upon her own externally funded empirical research and she held a British Academy/Leverhulme Senior Research Fellowship from 2009-2010. Key publications include Custodial Legal Advice and The Right to Silence (1993) Standing Accused (1994), Criminal Injustice (2000) French Criminal Justice (2005) The Investigation and Prosecution of Terrorist Offences in France (2006) Suspects in Europe (2007) The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (2009). She has advised the Parliamentary Select Committees, EU impact assessment studies and her research has been relied on by the Special Immigration Appeals Commission and in European Arrest Warrant proceedings. She is currently involved in a comparative empirical study of the safeguards in place for juvenile suspects during police interrogation funded by a European Commission.

Anna Ogorodova
Anna Ogorodova is PhD researcher at the University of Maastricht, Faculty of Law. She also teaches courses related to criminal procedure and human rights. Her research interests include police custody, suspect interrogations, and the role of defence lawyers therein, studied from a comparative, legal and empirical perspective. She has presented and published internationally on these topics. Previously she worked as Associate Legal Officer at the Open Society Justice Initiative (of the Open Society Institute). In this capacity, she provided technical assistance governments and NGOs on the issues related to reforming their national criminal justice systems. She also served as international consultant on criminal justice and legal aid reforms.

Taru Spronken
Taru Spronken is Professor of Criminal Law and Criminal Procedure at Maastricht University, she has been a criminal defence lawyer for more than 30 years and substitute Judge in the Court of Appeal of Den Bosch. She is specialised in criminal procedure and human rights and has brought numerous cases to the European Court of Human rights. As from September 2013 she has been appointed Advocate
General at the Supreme Court in the Netherlands and has remained part time professor at Maastricht University.

In her research she focuses on the implications of EU cooperation in criminal matters for procedural rights and has acted on numerous occasions as expert for the European Commission. She has published extensively on criminal defence rights and human rights (i.a. with E. Cape, Z. Namoradze, R. Smith (Eds.) Effective Criminal Defence in Europe (2010); EU-wide Letter of Rights in Criminal Proceedings: Towards Best Practice (2010); with Chen Weidong (Eds.), Three Approaches to Combating Torture in China (2012)).
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACPOS</td>
<td>Association of Chief Police Officers in Scotland</td>
</tr>
<tr>
<td>AP</td>
<td>assistant prosecutor (Netherlands: <em>hulpeofficier van justitië</em>, HOV))</td>
</tr>
<tr>
<td>API</td>
<td><em>agents de police judiciaire</em> – France (lower-ranking police officer)</td>
</tr>
<tr>
<td>CCP</td>
<td>Code of Criminal Procedure (Netherlands: <em>Wetboek van Strafrecht</em>)</td>
</tr>
<tr>
<td>CCTV</td>
<td>closed-circuit television</td>
</tr>
<tr>
<td>CDS</td>
<td>Criminal Defence Service (England and Wales)</td>
</tr>
<tr>
<td>CID</td>
<td>Criminal Investigation Department (England and Wales, and Scotland)</td>
</tr>
<tr>
<td>COFFS</td>
<td>Crown Office and Procurator Fiscal Service (Scotland)</td>
</tr>
<tr>
<td>CP</td>
<td>Crown Prosecutor (England and Wales)</td>
</tr>
<tr>
<td>CPP</td>
<td><em>Code de Procédure Pénale</em> – France (Code of Criminal Procedure)</td>
</tr>
<tr>
<td>CPS</td>
<td>Crown Prosecution Service (England and Wales)</td>
</tr>
<tr>
<td>CPT</td>
<td>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
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**D**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Directive on the right of access to a lawyer</td>
<td>Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. 6.11.2013 (L 294)</td>
</tr>
<tr>
<td>DSCC</td>
<td>Defence Solicitor Call Centre (England and Wales)</td>
</tr>
<tr>
<td>E</td>
<td>European Arrest Warrant</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EULITA</td>
<td>European Legal Interpreters and Translators Association</td>
</tr>
<tr>
<td>G</td>
<td></td>
</tr>
<tr>
<td>GAV</td>
<td>garde à vue – France (police custody)</td>
</tr>
<tr>
<td>I</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
</tr>
<tr>
<td>N</td>
<td>non-governmental organisation</td>
</tr>
<tr>
<td>NGO</td>
<td>National Register of Public Service Interpreters (England and Wales, and Scotland)</td>
</tr>
<tr>
<td>O</td>
<td></td>
</tr>
<tr>
<td>OPI</td>
<td>officier de police judiciaire – France (higher-ranking police officer)</td>
</tr>
<tr>
<td>P</td>
<td>Police and Criminal Evidence Act 1984 (England &amp; Wales)</td>
</tr>
<tr>
<td>PACE</td>
<td>Police Community Support Officer (England &amp; Wales)</td>
</tr>
<tr>
<td>PCT</td>
<td>price competitive tendering</td>
</tr>
<tr>
<td>PDSO</td>
<td>Public Defence Solicitor’s Office (Scotland)</td>
</tr>
<tr>
<td>PF</td>
<td>Procurator Fiscal (Scotland)</td>
</tr>
<tr>
<td>PV</td>
<td>procès-verbal – France (official police report of evidence)</td>
</tr>
<tr>
<td>S</td>
<td>Solicitor Access Recording Form (Scotland)</td>
</tr>
<tr>
<td>SIM</td>
<td>standard interrogation method (Netherlands: Standaard Verhoorstrategie, SVS)</td>
</tr>
<tr>
<td>SLAB</td>
<td>Scottish Legal Aid Board</td>
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<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>SOP</td>
<td>standard operating procedure</td>
</tr>
<tr>
<td>SPPF</td>
<td>Scottish Policing Performance Framework</td>
</tr>
<tr>
<td>W</td>
<td>Wet RO (Wet op de rechterlijke organisatie) - Netherlands (Law on Judicial Organization)</td>
</tr>
</tbody>
</table>
POLICE DETENTION TIMELINE
## Police Detention Timeline

<table>
<thead>
<tr>
<th>Hours</th>
<th>England &amp; Wales</th>
<th>Hours</th>
<th>France</th>
<th>Hours</th>
<th>Netherlands</th>
<th>Hours</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>00:00</td>
<td><strong>Arrest</strong> - a person must be taken to a police station as soon as practicable.</td>
<td>00:00</td>
<td><strong>Garde à Vue (GAV)</strong> - effectuated by police for investigative purposes; information sent to prosecutor.</td>
<td>00:00</td>
<td><strong>Investigative detention (ophouden voor onderzoek)</strong> - authorised by police on the grounds of investigative need.</td>
<td>09:00</td>
<td>Pre-charge detention - (section 14 detention) effectuated by police for investigative purposes when there is insufficient evidence to charge a suspect.</td>
</tr>
<tr>
<td>06:00</td>
<td><strong>First review of detention</strong></td>
<td>05:00-15:00</td>
<td>End of detention/Minor crimes: more serious crimes - police decide to release or to prolong detention for a maximum of 3 days (place a suspect in prolonged detention, or onderzoekistingeting).</td>
<td>Before 12:00</td>
<td>End of detention - (section 14 detention) maximum period for which a person can be detained in police custody without charge, unless further detention is authorised.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>09:00</td>
<td><strong>Second detention review</strong> - if detention continues beyond this time, it must be reviewed every nine hours.</td>
<td>Before 24:00</td>
<td>Prosecutor orders release or GAV is extended for a further 24 hours.</td>
<td>Before 24:00</td>
<td>Absolute maximum period of detention before charge.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Before 24:00</strong></td>
<td><strong>End of detention</strong> - maximum period for which a person can be detained in police custody without a charge, unless further detention is authorised.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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1. The purpose of this Timeline is to illustrate the periods in the criminal proceedings by the observations. For a more detailed description of the various stages of police detention and of the suspects' rights during police detention in the four jurisdictions, see Chapter 3.
2. The period between arrest and arrival to the police station was not covered by the observations.
3. *Bidden*.
4. Excluding the hours between midnight and 09 am. If a suspect is arrested in the evening before midnight, the initial detention period may be up to 15 hours.

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<table>
<thead>
<tr>
<th>36:00</th>
<th>Maximum period of pre-charge detention, unless further detention is authorised by magistrates' court.</th>
</tr>
</thead>
<tbody>
<tr>
<td>96:00</td>
<td>Absolute maximum period of pre-charge detention following a decision of magistrates' court.</td>
</tr>
<tr>
<td>Until first available court sitting</td>
<td>Post-charge detention may be ordered by police, if certain conditions apply.</td>
</tr>
<tr>
<td>Detention under common law⁵ - a person must be brought to court as soon as practicable.</td>
<td></td>
</tr>
</tbody>
</table>

| 96:00  | Absolute maximum period of GAV following a decision of a judge.                                                                 |
| 159:00 | Absolute maximum period of police detention.                                                                                   |

| Before 48:00 | End of GAV, unless further GAV authorised by a judge. Prosecutor orders release, an immediate trial or further investigation. |
| Before 87:00 | End of police detention, unless it is prolonged by a decision of a prosecutor for another 3 days.                          |
| Judicial review of legality of detention. |

⁵ A suspect may be detained directly under common law arrest powers (i.e. without a prior arrest/detention), where there is sufficient evidence to charge and there is no need to interrogate (e.g. where a suspect was caught in the act or where an arrest warrant was issued by a court).

⁶ The period of post-charge detention in England and Wales was not covered by the observations.
Chapter 1

INSIDE POLICE CUSTODY: THE AIMS OF THE RESEARCH AND THE NORMATIVE FRAMEWORK

1. Introduction

The year 2013 is the fifth anniversary of the **Salduz v. Turkey** judgment of the European Court of Human Rights (ECtHR). In this prominent ruling, the Court held that suspects arrested by the police should be given access to a lawyer before their first interrogation. The **Salduz** judgment caused a stir in those European countries which had no provisions in their domestic legislation enabling suspects to benefit from legal assistance at such an early stage of the proceedings. The debates around **Salduz** continue until the present day. Arguably, only very few European countries live up to the **Salduz** requirements both in law and in practice. Even if a Member State’s law provides access to a lawyer during police interrogation, this does not mean that legal assistance is always available in practice. Some jurisdictions, namely Scotland, Belgium, France and the Netherlands, accepted that they had not been compliant with the **Salduz** standard and introduced reforms to their laws and practices with a view to meeting the **Salduz** requirements. Reforms in those jurisdictions have been slow and difficult, as the implications of the **Salduz** judgment were felt to intrude into the investigative stage of criminal proceedings which had traditionally been the domain of the police. The **Salduz** judgment also touched upon political sensitivities. Critics argued that early access to a lawyer would compromise the state’s efficiency in fighting crime, and that additional expenditure on legal aid in criminal cases (described as 'spending on criminals') was imprudent in the context of the economic crisis. As a result, the initial steps

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1. ECtHR 27 November 2008, **Salduz v. Turkey**, No. 36991/02.
3. See the note by Belgium, France, Ireland, the Netherlands and the United Kingdom dated 22 September 2011 to the Council of the EU (2011/0154 (COD), No. 14495/11) expressing their serious reservations about the Commission’s proposed Directive on the right of access to a
taken to implement the *Salduz* ruling were not voluntary. Judgments of the highest courts were needed to allow suspects in police custody to consult with lawyers⁴ and the reforms that were introduced were not as complete as they could have been. In France, for example, limitations were imposed on the number and length of lawyer-client consultations. In the Netherlands, the same restriction was imposed on the length of consultations and, in addition, *Salduz* was interpreted as requiring the right to consultation with a lawyer before police interrogation but, in the case of adults, not during interrogation. This interpretation has been upheld by the Dutch Supreme Court despite subsequent, post-*Salduz*, ECHR judgments making it absolutely clear that the right to a lawyer includes a right to have a lawyer present during interrogation.⁵

There is, however, growing pressure from the European Union (EU) on Member States to strengthen their laws and practices concerning early access to a lawyer and other suspects' rights during police detention. Firstly, the ECHR itself has consistently confirmed the *Salduz* approach through a series of subsequent judgments, expanding upon the decision with judgments regarding the conditions required for waiver of the right to a lawyer, and the explicit right to have a lawyer present during custodial interrogations. Secondly, the *Salduz* judgment coincided with a renewed impetus within the EU to develop EU-wide legislation on the rights of suspects in criminal proceedings, following failed attempts to reach consensus on the matter in 2005 and in 2007.⁶ As a result, exactly one year after the *Salduz* judgment, the European Council officially proclaimed the intention of the EU to adopt legislation on the following rights of suspected and accused persons: the right to interpretation and translation, the right to information about rights and about charges, the right to legal assistance and legal aid, the right to communicate with third parties and the rights of vulnerable persons in criminal proceedings.⁷ During the period of the research which forms the substance of this book, EU legislation on the right to interpretation and translation, the right to information in criminal proceedings, and the right of access to a lawyer, has been adopted step-by-step, although their transposition dates had not expired during the period that the research was conducted.⁸ Negotiations on the remaining measures, namely on the lawyer because this would present substantial difficulties for the effective conduct of criminal proceedings and because of its impact on legal aid systems at a time of serious economic and financial constraints.

⁴ See, for example, the Constitutional Council Decision 2010-14/22 QPC of 30 July 2010 and the Cour de Cassation Cass. ass. plen., 15 April 2011, Nos. 10-30.316, 10-30.313, 10-30.242 and 10-17.049; for the Netherlands, see the HR 30 June 2009, NJ 2009, 349; and for Scotland, see the UK Supreme Court decision in *Cadan v. HM Advocate* [2010] UKSC 43.
⁵ See the case law in section 2.3.2 below.
⁶ For more detail, see Cape *et al.* 2010, p. 8–9; Hodgson 2011.
⁷ Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July 2009, 11457/09 DROIPEP 53 COPEN 120.
right to legal aid, the rights of vulnerable persons, and pre-trial detention are still underway. These EU laws, unlike the judgments of the ECtHR, provide specific timelines for their transposition into domestic law, and thus Member States must comply with the directives within the near future. Therefore, many European countries are facing, or will face, the need urgently to reform their domestic systems of criminal procedure to meet the European standards on suspects’ procedural rights.

However, adoption of new laws and regulations is often not sufficient to ensure effective implementation, especially in such a complex and politically sensitive area as the procedural rights of suspects. Previous studies on the position of suspects in criminal proceedings, Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union (2005)9 and the 2008 Update,10 Suspects in Europe: Procedural Rights at the Investigative Stage of Criminal Proceedings in Europe (2007),11 Effective Defence Rights in the EU and Access to Justice: Investigating and Promoting Best Practice (2010),12 Effective Criminal Defence in Eastern Europe (2012),13 and Pre-trial Emergency Defence (2012),14 demonstrate that the observance and effectiveness of defence rights depend to a large extent upon the procedural and institutional enforcement mechanisms adopted to put these rights into practice, as well as the legal and professional cultures that are needed to facilitate them.15 These studies provide evidence that there is much room for improvement. Thus, ideally EU legislation on the procedural rights of suspects should be accompanied by guidance on how these rights should be implemented in practice. Such guidance cannot be developed without a prior empirical examination of how procedural rights of suspects are guaranteed in reality. There is a dearth of topical empirical research on these matters.16

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9 Spronken & Attinger 2005.
10 Spronken et al. 2009.
11 Cape et al. 2007.
12 Cape et al. 2010.
13 Cape & Namaradze 2012.
14 Schumann, Bueckmüller & Soyer 2012.
16 A significant amount of research was conducted following implementation of the Police and Criminal Evidence Act 1984 (PACE) in England and Wales in the late 1980s, but even there relatively little research has been conducted since the mid-1990s. Much of the early research is summarized in Brown 1997.
The aim of our research was to attempt to fill this gap, as far as that is possible within the limits and constraints of a two year study, by conducting empirical research into the most problematic area of the procedural rights of suspected and accused persons, namely the rights of those who are detained and interrogated by the police.17 This is the most critical stage of criminal proceedings because the results of police investigation, including interrogation, often form the core of the prosecution case at trial.18 The significance of the police detention stage, and the rights of the suspect during this period, have traditionally been underestimated. As a result, there has been little or no development of standards for criminal justice practitioners that would ensure the effective provision of suspect’s procedural rights at this stage of the criminal process.16

We chose to undertake empirical research in four jurisdictions within the EU – England and Wales, France, the Netherlands, and Scotland – because these jurisdictions were included in the research projects previously referred to and/or are jurisdictions in which members of the research team have experience of legal reform in respect of procedural rights.20 That research, and the experience of project team members, suggested that there was a clear need for reforms regarding the procedural rights of suspects in police detention in the latter three jurisdictions. We included England and Wales because in that jurisdiction there has been statutory provision for custodial legal advice and assistance, including during police interrogation, since the Police and Criminal Evidence Act 1984 (PACE) came into effect in 1986. We hypothesized, therefore, that England and Wales could provide good practice examples that may be of relevance to the other three jurisdictions.

The objectives of our study were, first, to empirically research the application of provisions purporting to safeguard suspects’ rights during police detention. Thus we set out to examine how the right to interpretation and translation worked in practice, how suspects were informed of their rights, how they were informed of the nature and cause of the criminal offence they were suspected of, how suspects were provided with legal assistance, and how the right to silence was safeguarded. Our second objective was to develop, using the outcomes of the empirical data, training materials for criminal justice actors involved in the police detention process, in particular, police officers and lawyers. Our third objective was to make recommen-

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17 Note that we use the term ‘interrogate’ throughout the book. In England and Wales, and Scotland, the term ‘interview’ is used, and for the purposes of the book the two words are interchangeable.

18 See Cape et al. 2007, p. 8-11, and ECHR, 27 November 2008, Salih v. Turkey, No. 30591/02, para. 51, where the court stated: ‘In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.’

19 Cape et al. 2010, and Cape & Namoradze 2012.

20 In addition to the research mentioned above, see Hodgson 2001, 2002, 2004 & 2005 concerning France, and the work of JUSTICE (Jodie Blackstock) in seeking to ensure the effective implementation of the Salih judgment in Scotland.
ations for legislative, policy and procedural changes to ensure effective compliance with the EU procedural rights' instruments that were adopted during the course of the research. Our ultimate objective is to contribute directly to ensuring the provision of more effective procedural safeguards for people who are arrested and detained by the police.

We did not include access to legal aid as a primary focus of our research. A full examination of legal aid would have required considerably more time and resources to have been devoted to the research. Previous research has shown that only a bare majority of states have a standard legal aid merits test, and there is a considerable variation in approaches to assessing means, and to the level of means for the purposes of determining inability to pay for a lawyer. In many states there is no standard means test. Application procedures are often vague and it is frequently not clear how the determining authorities reach their decisions. In 50 per cent of EU states there is no legally established time limit for determining legal aid applications, and many states do not allow for choice where a lawyer is provided under legal aid. Remuneration for defence lawyers providing legal aid services varies widely among EU member states, and information provided by governments on the (low) level of expenditure on criminal legal aid has indicated that in practice there are inevitable problems in compliance with the requirement of ECHR Article 6(3)(c). As a result, legal aid has been described as the Achilles heel of the criminal justice system in many EU Member States. Although not a primary focus, in conducting our research we did collect some data on legal aid and this is included in the following chapters where appropriate.

1.1. The Empirical Study

In conducting the research we adopted a rigorous social science research methodology to provide reliable and empirically verified cross-jurisdictional data on how procedural rights of suspects are put into practice. The full account of the methodology can be found in Chapter 2. As noted above, the research was conducted in England and Wales, France, Netherland and Scotland, and the empirical analysis addresses the extent to which European standards and domestic regulations on the procedural rights of suspects in police detention were implemented in practice in those jurisdictions. We observed what structures and practices were in place to enable these rights to be 'practical and effective', as well as the impact of the professional cultures of police and defence lawyers. We also examined the practical obstacles and challenges to the effective implementation of these rights. We hope that the research methodology may be adapted for use in research on the procedural

21 Spronken et al. 2009, section 3.2; Cape et al. 2010.
22 See CEPEJ 2008, fig. 18 on p. 46; Spronken et al. 2009, p. 71.
23 Cape et al. 2010, p. 41.
rights of suspects in police detention across Europe, and to this end we include the research instruments used in Annexes 2-7.

1.2. The Training Framework

We have developed a training framework for the training of police officers and lawyers in respect of the four procedural rights that are the subject of the study. An innovative aspect of the project is that the content of the training framework is based on the findings of the empirical research, which made it possible to identify training needs arising in respect of effective implementation of the rights, and which we were able to test in pilot training conducted in England and Wales, and in the Netherlands. The objectives of the training framework are threefold; first, to foster a professional culture based on respect for and active advancement of procedural rights of criminal suspects; second, to address the practical challenges to the effective implementation of suspects' rights by suggesting training approaches designed to overcome those challenges; and third, to promote the use of best practices in safeguarding suspects’ rights in this important phase of criminal procedure. We hope that the training materials developed by the project will be appropriate for use in all jurisdictions within the EU and beyond. The training framework is included in Annex 1 of this book and is also published separately in order that it may be used in the development of training material across Europe.

2. The Normative Perspective: the ECHR and the EU Directives

In order to put the procedural rights we are focusing on in this study in context, in this section we examine how these rights are protected by the European Convention on Human Rights (ECHR) and the ECHR’s jurisprudence which, taken together, have been an important source of inspiration for the EU Directives on procedural rights. Both the ECHR case-law and the EU Directives, although the latter were not formally in force at the time of the research, provide the normative framework against which we have assessed the law, regulations, procedures and practices on which we have obtained data in the four jurisdictions that are the subject of the study. The section is comprised of an overview of the ECHR’s case law regarding the right to interpretation and translation, the right to information, the right to legal assistance and the privilege against self-incrimination and the right to silence.24 It is followed by a summary of the three EU Directives on the right to interpretation and translation, to information in criminal proceedings and the right of access to a

Note that the remainder of the chapter is informed to a large extent by Cape et al. 2010, Chapter 2, which was originally drafted by Spronken; Cape & Namoradze 2012, Chapter 2, which was an updated version of the 2010 publication; and as regards the right to information by Spronken 2010, Chapter 3.
lawyer, and includes an analysis of the way in which they ‘add value’ to the case-law of the ECtHR.

2.1. The Right to Free Interpretation and Translation

A suspected or accused person who does not speak or understand the language of the proceedings cannot fully and effectively participate in the proceedings, and is clearly at a significant disadvantage. In recognition of this the ECtHR Article 6(3)(e) provides that a person charged with a criminal offence has the right to the ‘free assistance of an interpreter if he cannot understand the language used in court’. In addition, ECtHR Articles 5(2) and 6(3)(a) provide that everyone who is arrested or charged with a criminal offence shall be informed promptly, ‘in a language which he understands’, of the reasons for arrest and of the nature and cause of the charge against him. The interpretation must enable the suspected or accused person to understand the case against them and to defend themselves, in particular by being able to put their version of events before the court. Therefore, the scope of this right under the ECtHR is not limited to interpretation of oral statements made at the trial hearing, but also covers pre-trial proceedings, and the translation of relevant documentary material. The ECtHR has held that judicial authorities are required to take an active approach to determining the need for interpretation or translation.

ECtHR Articles 5(2) and 6(3)(a) clearly require that interpretation or translation of the reason for arrest, and the nature and cause of the charge or accusation, be provided at an early stage of the criminal process, including at the investigative stage. It also follows from the general approach to the meaning of the term ‘charge’ that, in principle, the right to interpretation and/or translation under ECtHR Article 6(3)(e) applies from the time that ‘official notification [is] given to an individual by the competent authority of an allegation that he has committed a criminal offence’.

With regard to translation, it was held by the ECtHR in *Kanasinski* that not every document has to be translated in written form. Oral interpretation provided by an interpreter or by the defence lawyer will be sufficient as long as the accused understands the relevant document and its implications. For example, the fact that

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26 This is also expressed in Arts. 143(3)(a) & (f) ICCR, and in Arts. 55(1)(c) & 67(1)(d) of the Rome Statute.

27 See also Art. 67(1)(a) of the Rome Statute.

28 ECtHR 18 October 2006, *Herm v. Italy*, No. 18114/02, para. 70.


the verdict is not translated is not, in itself, incompatible with ECHR Article 6 provided that the defendant sufficiently understands the verdict and the reasoning thereof.

The ECHR Article 6(3)(e) provides that, where the right to interpretation applies, it must be provided 'free'. In the case of Louckie, Belloconn and Koc the ECHR made clear that the term 'free' implies a 'once and for all exemption or exonerating'.\textsuperscript{32} Consequently, an accused person cannot be ordered to pay the costs of an interpreter even if they are convicted of an offence.\textsuperscript{33}

With regard to the quality of interpretation and translation, the approach of the ECHR is that the mere appointment of an interpreter or translator does not absolve the authorities from further responsibility. States are required to exercise a degree of control over the adequacy of the interpretation or translation,\textsuperscript{34} and judicial authorities also bear some responsibility since they are the ultimate guardian of the fairness of the proceedings.\textsuperscript{35}

2.2. The Right to Information

The provision of information to a suspect or defendant is critical to their ability to participate effectively in the criminal process. Three dimensions can be identified. First, there is the issue of information about procedural rights. If a person does not know what their rights are, then either they will be unable to exercise them, or whether they are able to take advantage of them will be a matter of chance. The ECHR does not explicitly provide for a right to information about rights in criminal proceedings. Second, there is the issue of information about arrest and/or charge (or the nature and cause of the accusation). Such a right is provided for by the ECHR Articles 5(2) and 6(3)(a). Third, there is the issue of access to information about the material evidence (sometimes referred to as access to the case file). This is not explicitly provided for in ECHR Article 6, although there is clear ECHR jurisprudence on the issue.

2.2.1. Information Regarding Rights

As noted above, a right to information about procedural rights is not explicitly referred to in the ECHR, but there is ECHR case law that requires judicial authorities to take positive measures in order to ensure effective compliance with Article

\textsuperscript{32} ECHR 28 November 1978, Louckie, Belloconn and Koc v. Germany, Nos. 6210/73; 6877/75; 7132/75, para. 40.

\textsuperscript{33} ECHR 28 November 1978, Louckie, Belloconn and Koc v. Germany, Nos. 6210/73; 6877/75; 7132/75, para. 46.

\textsuperscript{34} ECHR 19 December 1989, Kavaski v. Austria, No. 9783/82, para. 74, and ECHR 18 October 2006, Hervat v. Italy, No. 18114/02, para. 70.

\textsuperscript{35} ECHR 18 October 2006, Hervat v. Italy, No. 18114/02, para. 72, and ECHR 24 September 2002, Cusacini v. UK, No. 32771, para. 39.
6. This is specifically reflected in the decisions in *Padalov and Talat Tunc*, in which the Court required the authorities to adopt an active approach to informing suspects of their right to legal aid. In *Panovis* it was held that the authorities have a positive obligation to provide suspects with information on the right to legal assistance and legal aid if the conditions relating to them are fulfilled. It is not sufficient for this information simply to be given in writing. The Court stressed that authorities must take all reasonable steps to ensure that suspects are fully aware of their rights of defence and, as far as possible, understand the implications of their conduct under questioning.

2.2.2. Information About Arrest, the Nature and Cause of the Accusation, and Charge

The ECHR Article 5(2) provides that a person who is arrested must be informed promptly, in a language which they understand, of the reasons for their arrest and of any charge against them. ECHR Article 6(3)(a) provides that information must be provided to a person charged with a criminal offence, in the same manner, regarding the nature and cause of the accusation. Taken together, and given the meaning of 'charge' of which the ECHR has developed its own, autonomous, definition, they place an obligation on the relevant authorities to inform a person who has been arrested or detained, (a) of the reasons for their arrest or detention, (b) the reasons for any charge, and (c) the nature and cause of any accusation. Mere recital of the legal authority for arrest or detention, or for the charge, is not enough. Furthermore, it is not sufficient for the relevant authorities to simply make the information available on request. The duty to inform the suspected or accused person of the nature and cause of the accusation rests entirely on the authority's shoulders and cannot be complied with passively by making information available without bringing it to the attention of the suspect or accused.

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34 The Court has defined 'charge' as the 'official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence' a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected'. For the first judgment where this was defined see ECHR 15 July 1982, *Eckle v. Germany*, No. 8130/78, para. 73.
The rationale of Articles 5(2) and 6(3)(a) is to enable the suspected or accused person to fully understand the allegations with a view to challenging the lawfulness of their detention\textsuperscript{43} or to preparing a defence.\textsuperscript{44} Even though both articles are fairly specific in the information they require, the obligations are limited to factual information concerning the reasons for the arrest, the nature and cause of the accusation, and the legal basis for both.\textsuperscript{45} The level of information that has to be communicated to the suspect or accused under the ECHR is strongly dependant on the nature and complexity of the case, which is always assessed by the ECHR in the light of the right to prepare a defence (Art. 6(3)(b)) and, more generally, the right to a fair trial (Art. 6(1)).\textsuperscript{46}

Articles 5(2) and 6(3)(c) of the ECHR do not give any indication as to the means by which the required information should be given, although the authorities should take appropriate steps in order to ensure that the suspected or accused person effectively understands the information provided.\textsuperscript{47} In Kanausinskas the ECHR decided that the accused should, in principle, be provided with a written explanation of the indictment in case they do not understand the language used in it, but on the facts of the Court accepted that an oral explanation was sufficient to comply with Article 6(3)(a).\textsuperscript{48}

2.2.3. Information Regarding Material Evidence/The Case File

It is established case law of the ECtHR that the prosecution authorities should disclose to the defence all material evidence for or against the accused,\textsuperscript{49} and that both the prosecution and the accused are entitled to have disclosed, and have the opportunity to comment upon, the observations and evidence of the other party.\textsuperscript{50} It is an element of the principle of equality of arms, and is also regarded as an aspect of the right to 'adequate time and facilities' under ECHR Article 6(3)(b). In Natunner the Court ruled that disclosure obligations must include an opportunity for the suspect

\textsuperscript{43} ECtHR 30 August 1990, Fox v. Campbell and Hartley, A 182, para. 40.
\textsuperscript{44} ECtHR 25 July 2000, Matteoti v. Italy, No. 23969/94, para. 69.
\textsuperscript{45} ECtHR 16 December 1992, Edwards v. UK, No. 12071/87, paras. 35-38.
\textsuperscript{49} ECtHR 16 December 1992, Edwards v. United Kingdom, No. 12071/87, para. 36.
\textsuperscript{50} ECtHR 28 August 1981, Brandstetter v. Austria, Nos. 11170/84, 12876/87, 13408/87, para. 86; ECtHR 16 February 2000, Jaster v. United Kingdom, No. 27052/95, para. 51; and ECtHR 6 September 2005, Solec v. Ukraine, No. 65518/01, para. 87.
to acquaint themselves, for the purposes of preparing their defence, with the results of investigations carried out throughout the proceedings.\textsuperscript{53}

The right to disclosure is, however, not absolute. ECHR case law provides that disclosure can be restricted for a legitimate purpose such as for the protection of national security or sources of information, to protect witnesses at risk of reprisals, or to keep police methods of crime investigation secret.\textsuperscript{54} Any such restriction must be strictly necessary and be remedied in the subsequent proceedings.\textsuperscript{55} For example, non-disclosure of certain material should be counterbalanced by making the information accessible at the appeal stage and by giving the defence sufficient time to respond to it.\textsuperscript{56} The ECHR also requires that the (non-)disclosure of information should always be scrutinized by the trial judge since they are in the best position to make an assessment of the need for disclosure. On the other hand, the ECHR has held that the person requesting that specific documents be disclosed is required to give specific reasons for the request.\textsuperscript{57}

According to the ECHR this means that the accused be given a sufficient opportunity to take account of statements and evidence underlying them, such as the results of police and other investigations, irrespective of whether the accused is able to demonstrate the relevance of such information to their defence. Although the Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that some information may be kept secret in order to prevent suspects from interfering with evidence or undermining the course of justice, this legitimate goal cannot be pursued at the expense of substantial restrictions on the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate and timely manner to the suspect’s lawyer.\textsuperscript{58} In addition the Court has ruled that abstracts of the case file do not suffice, and neither does an oral account of facts and evidence. Authorities should facilitate the consultation of files at times when this is essential for the defence, and should not be over-formalistic in doing so.\textsuperscript{59}

\textsuperscript{53} ECHR 31 March 2009, Nationen v. Finnland, No. 21022/04, para. 42; and ECHR 15 November 2007, Beatles v. Arne, No. 2698/03, para. 84.

\textsuperscript{54} ECHR 16 February 2000, Jasper v. United Kingdom, No. 27052/95, para. 43; and ECHR 21 June 2003, Dusse v. United Kingdom, No. 39482/98, para. 42.

\textsuperscript{55} ECHR 16 February 2000, Jasper v. United Kingdom, No. 27052/95, para. 43; and ECHR 16 December 1992, Edwards v. United Kingdom, No. 13071/87, para. 39.


\textsuperscript{57} ECHR 21 February 1992, Bendifencha v. France, No. 12547/86, para. 52.

\textsuperscript{58} ECHR 13 February 2001, Garcia Alva v. Germany, No. 23541/94, paras. 41-42; and ECHR 9 July 2009, Moor v. Germany, No. 11364/03, paras. 121-124.

\textsuperscript{59} ECHR 13 February 2001, Schöps v. Germany, No. 25116/94, paras. 47-55; and ECHR 9 July 2009, Moor v. Germany, No. 11364/03, paras. 121-25.
2.3. The Right to Legal Assistance

The right to legal assistance is a key aspect of the procedural rights of suspected and accused persons. A suspect who is assisted by an effective lawyer is in a better position with regards to the enforcement of all of their other rights, because they will be better informed of those rights, and because the lawyer is able to assist them in ensuring that their rights are respected.\(^{58}\) In addition, as a result of their knowledge and skills, a lawyer will be able to represent the interests of the suspected or accused person more effectively than if they are unrepresented. In recognition of this, the ECHR Article 6(3)(c) provides that a person charged with a criminal offence has a right to 'defend himself ... through legal assistance'.

An important issue that arises in respect of the right to legal assistance is whether a suspected or accused person is entitled to waive that right. The wording of ECHR Article 6(3)(c) – a person has the right to 'defend himself in person or through legal assistance' – implies that waiver is possible and the emphasis of the ECHR jurisprudence is on the provision of suitable safeguards in respect of waiver. Thus in Pleshchintcev the ECHR emphasized that a waiver:

'\[\text{must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under }\text{Art. 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be}.\]'\(^{59}\)

In the Court's view a valid waiver cannot be established by showing only that a suspect responded to further police-initiated interrogation even if they have been advised of their rights. An accused who has expressed their desire to participate in the investigation only through a lawyer should, according to the ECHR, not be subject to further interrogation by the authorities until legal assistance has been made available to them, unless the accused initiates further communication, exchanges, or conversations with the police or prosecution.\(^{60}\)

2.3.1. The Point at Which the Right to Legal Assistance Arises

For many years the ECHR held that the right to legal assistance arises immediately upon arrest.\(^{61}\) Where the suspect has to make decisions during police interrogation that may be decisive for the future course of the proceedings they have the right to

\(^{58}\) Green Paper, section 4.1.

\(^{59}\) ECHR 24 September 2009, Pleshchintcev v. Russia, No. 7025/04, para. 76. See also ECHR 31 March 2009, Piontek v. Poland, No. 20310/02, and ECHR 1 April 2010, Pucienko v. Russia, No. 42371/02, para. 102.

\(^{60}\) ECHR 24 September 2009, Pleshchintcev v. Russia, No. 7025/04, para. 79.

\(^{61}\) ECHR 8 February 1996, John Murray v. United Kingdom, No. 18731/91; and ECHR 6 June 2000, Magee v United Kingdom, No. 28135/95.
consult a lawyer prior to the interrogation.\(^2\) Although the ECtHR acknowledged
that in certain circumstances the physical presence of a lawyer could provide the
necessary counterbalance to pressure used by the police during interviews,\(^3\) before
the \textit{Salduz} judgment it stated that a right to have a lawyer present during police
interrogation could not be derived from ECtHR Article 6(3)(c).\(^4\) This approach did
not accord with that of either the International Criminal Tribunal for the former
Yugoslavia (ICTY)\(^5\) or the European Committee for the Prevention of Torture and
Inhuman or Degrading Treatment or Punishment (CPT),\(^6\) both of which acknowl-
dged that the right to have a lawyer present during police interrogation is one of
the fundamental safeguards against ill-treatment of detained persons.

As mentioned in the introduction to this chapter the approach of the ECtHR to
the point at which the right to legal assistance arises changed significantly with the
Grand Chamber decision in \textit{Salduz}, in which it stated that:

\begin{quote}
The Court finds that in order for the right to a fair trial to remain sufficiently ‘practical
and effective’ Art. 6(1) requires that, as a rule, access to a lawyer should be provided as
from the first interrogation of a suspect by the police, unless it is demonstrated in the
light of the particular circumstances of each case that there are compelling reasons
to restrict this right.’\(^7\)
\end{quote}

The Court justified the decision by reference to the importance of preserving the
privilege against self-incrimination, and as a necessary safeguard against ill-treat-
ment:

\begin{quote}
‘Early access to a lawyer is part of the procedural safeguards to which the Court will
have particular regard when examining whether a procedure has extinguished
the very essence of the privilege against self-incrimination. In this connection, the Court
also notes the recommendations of the CPT (paragraphs 39-40 above), in which the
\end{quote}

\(^2\) ECtHR 6 June 2000, \textit{Ayerill v. United Kingdom}, No. 36408/97.

\(^3\) ECtHR 6 June 2000, \textit{Magee v. United Kingdom}, No. 28135/95; and ECtHR 2 May 2000, \textit{Condron v. United Kingdom}, No. 35718/97: ‘The fact that an accused person who is questioned under
custody is assured access to legal advice, and in the applicants’ case the physical presence of a
solicitor during police interview must be considered a particularly important safeguard for
dispelling any compulsion to speak which may be inherent in the terms of the caution.
For the court, particular caution is required when a domestic court seeks to attach weight to
the fact that a person who is arrested in connection with a criminal offence and who has not been
given access to a lawyer does not provide detailed responses when confronted with questions
the answers to which may be incriminating’ (para. 60).

\(^4\) ECtHR 6 October 2001, \textit{Brennan v. United Kingdom}, No. 30946/98; and ECtHR 14 December

\(^5\) Art. 18(3) Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).
Decision on the Defence Motion to Exclude Evidence from ICTY in \textit{Zdravko Mamic}, 2
September 1997, Case No. IT-96-21-T, Trial Chamber II.


\(^7\) ECtHR 27 November 2008, \textit{Salduz v. Turkey}, No. 36391/02, para. 55. See also ECtHR 11
committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.66

This new interpretation of the right to legal assistance under the Convention, which has come to be referred to as the Sâlîçu doctrine, has been confirmed in many subsequent judgments.67 Despite the justification that legal assistance is a necessary safeguard in respect of the right against self-incrimination, the Court has held that the Sâlîçu doctrine applies even if the suspect, in fact, exercises their right to silence.68 As the judgment makes clear, although access to legal assistance prior to the first interrogation is to be regarded as the norm, it is not an absolute right. However, it may be restricted only if, in the circumstances of the case, there are compelling reasons to do so.69 Furthermore, even if there are such reasons for restricting the right, use of material obtained in an interrogation conducted in the absence of legal assistance at trial may compromise the right to fair trial.

"Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when inculminating statements made during police interrogation without access to a lawyer are used for a conviction."70

Generally, failure to comply with the right to legal assistance cannot be compensated for by other procedural protections, such as subsequent assistance by a lawyer or the adversarial nature of subsequent proceedings.71

A further issue is whether the right to legal assistance may apply prior to arrest, or prior to the first interrogation. In Zaidenkov72 the applicant was stopped in his vehicle at a road-side check and asked questions without being arrested. The Court found that although he was not free to leave, the circumstances disclosed:

66 At para. 54.
67 See, for example, ECHR 10 March 2009, Eštê and Kandâns v. Turkey, Nos. 71972/01, 26948/02 & 36297/03; ECHR 3 March 2009, Ahs v. Turkey, Nos. 7638/02 & 24146/04; ECHR 17 February 2009, Aysan and Demir v. Turkey, Nos. 38940/02 & 3197/03; ECHR 17 February 2009, Oğur v. Turkey, No. 16500/04; ECHR 24 December 2009, Piskunov v. Russia, No. 7025/04.
68 ECHR 13 October 2009, Dogan v. Turkey, No. 7377/03, para. 33; and ECHR 26 July 2011, Huseyn and others v. Azerbaijan, Nos. 35485/05, 45553/05, 35680/05 & 36085/05, para. 171.
69 The court has not yet had the opportunity to expand on what is meant by ‘compelling reasons’.
70 At para. 55.
71 ECHR 27 November 2008, Sâlîçu v. Turkey, No. 36391/02, para. 58, and see ECHR 13 October 2010, Demirkan v. Turkey, No. 31721/02, para. 16.
72 ECHR 18 February 2010, Zaidenkov v. Russia, No. 39660/02.
'no significant curtailment of the applicant’s freedom of action, which could be sufficient for activating a requirement for legal assistance already at this stage of the proceedings'.

Thus it would seem that the right to legal assistance may apply in the absence of, or before, arrest where a person’s freedom of action has been significantly curtailed. The Court has held that the right will apply where a person held in administrative detention is in fact treated as a criminal suspect. Similarly, the Court has also held that the right applies where a person who was in police custody, was ostensibly treated as a witness, although in fact regarded as a suspect.

2.3.2. Legal Assistance During Interrogation

Whilst the Salicu decision made clear that the right to legal assistance applies ‘as from the first interrogation’ it did not, in clear terms, specify that the right includes a right to have the lawyer physically present during any interrogation. A number of subsequent ECtHR decisions strongly indicated that the right did extend that far, and the decisions in Mader and Sehafi put the matter beyond doubt. In Mader the Court found a breach of Articles 6(1) and 6(3)(c) where the ‘applicant was questioned by the police and made his confession without consulting with a lawyer or having one present’. In Sehafi the applicant had complained ‘about the lack of legal assistance during his initial police questioning’, and the Court again decided that ‘[a]gainst this background the Court finds that there has been a violation of Article 6(1) and 6(3)(c) of the Convention on account of the applicant’s questioning by the police on 9 November 2005 without the presence of a defence lawyer’.

At para. 48.

The UK Supreme Court, following this decision, has held that asking questions of a person slumped in a car, and who appeared to have been drinking, whether they had or intended to drive did not give rise to the right to legal assistance. Conversely, questioning a person during the execution of a search warrant at his home who, whilst he had not been arrested or handcuffed, did trigger the right to legal assistance (Ambrose v. Harris; Fiima v. G; Fiima v. M [2011] UKSC 43).

ECtHR 21 April 2011, Nychponic and Yonkalo v. Ukraine, No. 42310/04, para. 264.

ECtHR 14 October 2010, Brusco v. France, No. 1466/07.

As a result, the governments of a number of member states, such as the Netherlands, maintained that it did not extend that far.

For example, ECtHR 14 October 2010, Brusco v. France, No. 1466/07, and ECtHR 13 October 2009, Duman v. Turkey, No. 7377/05.

ECtHR 21 June 2011, Mader v. Croatia, No. 56185/07.


ECtHR 21 June 2011, Mader v. Croatia, No. 56185/07, para. 133.

ECtHR 28 June 2011, Sehafi v. Croatia, No. 4429/09, para. 256.

At para. 257.
2.3.3. The Right to Private Consultation with a Lawyer

An essential condition for effective legal assistance is the confidentiality of the lawyer-client relationship, which includes the right to confidential communication and unrestricted access by the lawyer to the client. This means that there is a need for guarantees that lawyers are able to visit and speak with their clients in confidence, without surveillance by third parties. There are no explicit provisions in the ECHR concerning this right. However, the ECHR has considered both Article 6 and Article 8 (the right to private life) when considering lawyer-client confidentiality. The landmark decision is *Niemietz*, in which the ECHR stated in general terms that:

> 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by article 6 of the Convention'.

Similarly, in *Öcalan* the court held that intercepting lawyer-client communications violates 'one of the basic requirements of a fair trial in a democratic society'.

In other decisions the Court has referred to rights as guaranteed by Article 6(3), such as the right to seek advice pending criminal proceedings. In *Schönenberger and Durmaz* correspondence sent by the lawyer to his detained client was stopped because the authorities had learned from its contents that Mr. Durmaz had given his client advice to make use of his right to silence. The Court found a violation, reaffirming the right to remain silent as being a right enshrined in Article 6, and that therefore the interference was not in accordance with Article 8(2) because it was not necessary in a democratic society. However, whilst lawyer-client confidentiality is fundamental to a fair trial, it is not an absolute right. Communications may be intercepted in exceptional circumstances where there is a reasonable belief that confidentiality is being abused. Thus whilst routine interception of communications is contrary to fair trial rights, interception may be permissible where, for example, there are reasonable grounds for believing that the contents of the communication would endanger prison security, the safety of others, or further a criminal purpose.

Some states have provisions enabling lawyer-client consultations to be intercepted or to be subjected to surveillance, and the case law of the ECHR in this respect shows that safeguards to protect lawyer-client privilege are left to variable standards.

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91 See, for example, in respect of Poland, Cape *et al.* 2010, p. 482.
local or national customs and often are not in accordance with the requirements of Article 8 of the Convention.\(^{92}\)

### 2.3.4. Choice of Lawyer

The wording of Article 6(3)(c) makes it clear that suspected and accused persons have a right to choose their lawyer if they are paying for the lawyer's services privately. However, it is ambiguous where legal assistance is to be provided free of charge. The ECtHR has held that whilst the relationship of confidence between a lawyer and client is important, the right of choice is not absolute. In particular, it may be subject to limitation where legal assistance is provided free. Whilst the authorities must have regard to the wishes of the suspected or accused person when appointing a lawyer, their wishes may be overridden 'when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.\(^{93}\) In Martin the Court held that the right to a free choice of lawyer was violated because Martin, who was 17 years old at the time that he was arrested for murder, was put under pressure by the police to terminate the services of the lawyer that his parents had chosen on his behalf. The Court was not satisfied that Martin's wish to replace counsel of his own (or his parents') choosing could be considered genuine in the circumstances of the case. As a consequence, the Court concluded that Martin's defence rights were irretrievably prejudiced owing to his inability to defend himself through legal assistance of his own choosing.\(^{94}\)

### 2.3.5. The Role, Independence and Standards of Lawyers

The ECtHR does not contain any explicit provision regarding the role, independence, or standards of criminal defence lawyers. The Havana Declaration\(^{95}\) provides that governments must ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference (Art. 16), and also provides that lawyers must not be identified with their clients or their clients' causes (Art. 18). However, there is nothing that equates with this in the ECtHR.

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\(^{92}\) See ECtHR 25 March 1998, Kopp v. Switzerland, No. 23224/94; ECtHR 25 November 2004, Decision as to the admissibility Adamos and 112 others v. The Netherlands, No. 16269/02; ECtHR 27 September 2005, Petri Sala and others v. Finland, No. 50892/99; ECtHR, 7 June 2007, Siniacev v. Russia, No. 71362/01; and ECtHR, 28 June 2007, The Association for European Integration and Human Rights and Ekmekchiev v. Bulgaria, No. 62540/00. See also Spronken & Feron 2008.

\(^{93}\) ECtHR 25 September 1992, Criscianti v. Germany, No. 13611/88, para. 29; and ECtHR 14 January 2003, Lagerblom v. Sweden, No. 26891/95, para. 54.

\(^{94}\) ECtHR 30 May 2013, Martis v. Estonia, No. 35985/09, para. 97.

\(^{95}\) The Havana Declaration on the Role of Lawyers, agreed at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.
The proper role of the defence lawyer may be discerned from a number of ECHR judgments. One of the basic obligations of a lawyer is to assist their client, not only in the preparation for the trial itself, but also in ensuring the legality of any measures taken in the course of the proceedings.\(^{96}\) With regard to the investigative stage of criminal proceedings, the ECHR has underlined the importance of legal assistance in giving effect to the privilege against self-incrimination and the right to silence, in particular by preventing coercion or oppression.\(^{97}\) In *Dayanat* the Court went further, stating that the principle of equality of arms requires that a suspect, including at the police interrogation stage, be afforded the complete range of interventions that are inherent to legal assistance, such as discussion of the case, instructions by the accused, the investigation of facts and search for favourable evidence, preparation for interrogation, the support of the suspect and the control of the conditions under which the suspect is detained.\(^{98}\)

With regard to independence, national authorities have a certain margin of appreciation under the ECHR in assessing the necessity of any interference with the performance of the lawyer’s role, but this margin is subject to supervision as regards both the relevant rules and the decisions applying them. Where criticism of a judge or prosecutor, by a lawyer, is confined to the courtroom, the margin of appreciation is narrower than where that criticism is publicly voiced, for example, in the media.\(^{99}\) In *Nikula* the ECHR held that:

‘the threat of an *ex post facto* review of counsel’s criticism of another party to criminal procedure (the prosecutor) is difficult to reconcile with defence counsel’s duty to defend their clients’ interests zealously.’

The freedom of a lawyer to defend their client as they see fit has also been assessed by the Court by reference to Article 10 (freedom of expression). In *Nikula* the Court held that it would not exclude the possibility that, in certain circumstances, an interference with counsel’s freedom of expression in the course of a trial could also raise an issue under Article 6 with regard to the right of an accused client to receive a fair trial. Equality of arms and other considerations of fairness militate in favour of a

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96 ECHR 12 July 1984, Cem (R-79), and ECHR 4 March 2003, *Octan* v. *Turkey*, No. 63486/00.
98 ECHR 13 October 2009, *Dayanat* v. *Turkey*, No. 7377/03, para. 32: ‘Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.’
free and even forceful exchange of argument between the parties. The basic approach of the ECHR in this respect is that lawyers are certainly entitled to comment in public on the administration of justice, but that their criticism must not overstep certain limits. Account must be taken of the need to strike the right balance between the various interests involved, which include the public’s right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession.

According to the ECHR, legal assistance must be effective, and the state is under an obligation to ensure that the lawyer has the information necessary to conduct a proper defence.\(^{101}\) If the particular lawyer is ineffective the state is obliged to provide the suspect with another lawyer.\(^{102}\) However, the Court has been reluctant to hold states liable for the failures of lawyers who, as members of independent liberal professions, should regulate themselves. The ECHR has frequently held that:

‘A state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes .... [States are] required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention.’\(^{103}\)

This applies whether the lawyer is the lawyer of choice, or one appointed under legal aid.\(^{104}\) In relation to legal assistance during police interrogation, the ECHR has been willing to critically assess the effectiveness of the assistance given by a legal aid lawyer to their client in police custody, in preventing a breach of the privilege against self-incrimination and in facilitating the effective exercise of the right to remain silent. In \textit{Pavelko} the Court held that the police had a responsibility for keeping a close eye on the (ineff)ectiveness of the lawyer.\(^{105}\) However, this was in the context of the applicant having specifically rejected the legal aid lawyer appointed to assist him (preferring the lawyer who had been appointed by his mother), and where the police had carried out informal ‘talks’ with the applicant in the absence of a lawyer. In \textit{Erkapić} the Court took into consideration the fact that co-accused, whose statements were used against \textit{Erkapić}, were not represented by lawyers of their own choosing; that the lawyers imposed on them by the police had not


\(^{102}\) ECHR 13 May 1980, \textit{Artico} v. Italy, A-37.


\(^{104}\) ECHR 1 April 2010, \textit{Pavelko} v. Russia, No. 42771/02, para. 99.

in fact been present during the questioning but had only attended the police station to sign the ready-prepared statements; and that the co-accused were allegedly pressed to sign the statements whilst suffering from drug-withdrawal, medical assistance having been denied. The Court held that the domestic courts acted in violation of Article 6 ECHR because they had used the statements of the co-accused in evidence without assessing the circumstances surrounding the police questioning, including the lack of effective representation by counsel.\textsuperscript{106}

2.4. The Privilege Against Self-Incrimination and the Right to Silence

In contrast to the right to be presumed innocent, the right to remain silent is not explicitly mentioned in the ECHR Article 6, although they are closely linked.\textsuperscript{107} It is, however, settled case law of the ECHR that the right to silence, and the right not to incriminate oneself, are fundamental features of the concept of fair trial, being 'generally recognized international standards which lie at the heart of the notion of a fair procedure' under the ECHR Article 6.\textsuperscript{108} Their rationale lies, \textit{inter ali\ae}, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.\textsuperscript{109} The right not to incriminate oneself presupposes that the prosecution in a criminal case must seek to prove their case against the accused without resort to evidence obtained through coercive methods or oppression in defiance of the will of the accused.\textsuperscript{110}

Despite its fundamental nature, the right to remain silent can be restricted provided that the authorities can invoke good cause.\textsuperscript{111} The ECHR adopts a rather strict attitude towards accepting justifications, and the right will be violated if the

\textsuperscript{106} ECtHR 25 April 2013, \textit{Erkapi\'e v. Kroatien}, No. 51198/08, paras. 80-84.


\textsuperscript{108} In \textit{Funke}, the Court held for the first time that the right to silence and the non incriminatory principle are part of the fair trial concept of ECHR Art. 6(1); ECtHR 25 February 1995, \textit{Funke v. France}, No. 10828/84, paras. 41-44. See also ECtHR 17 December 1996, \textit{Saunders v. United Kingdom}, Reports 1996-VI, para. 68: ECtHR 8 February 1996, \textit{John Murray v. United Kingdom}, No. 18731/91, para. 45; ECtHR 21 December 2000, \textit{Heaney and McGuinness v. Ireland}, No. 34720/97, para. 40; and ECtHR 22 July 2008, \textit{G"uler v. Turkey}, No. 10301/03, para. 123.


very essence of the right is destroyed. However, a distinction can be made between an attempt to compel the accused to give certain evidence and the drawing of inferences from a person’s silence. In both situations all the circumstances of the case must be taken into account in order to determine whether the right to remain silent has been breached. Factors to which the Court will have regard in determining whether there has been a violation include the nature and degree of compulsion, the existence of any relevant safeguards, and the use of the material so obtained in subsequent proceedings.

With regard to the application of the right to remain silent and the privilege against self-incrimination, the finding of a violation does not depend on the allegedly incriminating evidence obtained by coercion or in contravention of the right to silence or self-incrimination actually being used in criminal proceedings. Thus a violation may be found even though no proceedings were subsequently brought or the person was subsequently acquitted.

Despite the importance placed on the privilege against self-incrimination and the right to silence, ECHR case law on the question of whether a suspected or accused person should be informed of the right is scant. However, the ECHR has indicated in a number of cases that information about the right must be given when the right arises. It is important to note that the privilege against self-incrimination and the right to silence apply from the moment that a person is ‘charged’ with a criminal offence which has been interpreted to mean when ‘the situation of the [person] has been substantially affected’. In Zaitsev the Court considered that, on the facts of the case, police suspicion of theft should have been aroused at the time that the applicant was stopped at a road check and was not able to produce proof that he had purchased the diesel found in his car. Although he was not formally accused at that moment, the Court found that his situation was substantially affected and it was incumbent on the police to inform the applicant of the privilege.

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112 ECHR 21 December 2000, Haney and McGuinness v. Ireland, No. 34720/97, para. 57-58; ECHR 10 March 2009, Rykov v. Russia, No. 4768/02, para. 93; and ECHR 4 October 2010, Pavlenko v. Russia, No. 42571/02, para. 100.


114 ECHR 8 February 1990, John Murray v. United Kingdom, No. 18731/91, para. 45. See also ECHR 29 June 2007, O’Halloran and Francis v. United Kingdom, Nos. 15899/02 & 25624/02, para. 45-46.

115 ECHR 29 June 2007, O’ Halloran and Francis v. the United Kingdom, Nos. 15899/02 & 25624/02, para. 53, and ECHR 2 May 2000, Condron v. the United Kingdom, No. 25718/97, para. 59-63.


117 ECHR 21 April 2009, Marttila v. Finland, No. 19235/03, para. 64.


119 ECHR 18 February 2010, Zaitsev v. Russia, No. 39990/02, para. 52.

against self-incrimination and the right to remain silent before asking him for further 'explanation' for having a container with fuel in his car.\textsuperscript{121}

The ECHR has closely linked the privilege against self-incrimination and the right to silence to the right to legal assistance. It has frequently stated that:

'early access to a lawyer is part of the procedural safeguards to which the court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination'.\textsuperscript{122}

At the investigative stage, the suspect is in a particularly vulnerable position, and:

'this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself'.\textsuperscript{123}

2.5. The EU Directives

As explained in section 1 above, the European Union has adopted legislation on the right to translation and interpretation, the right to information in criminal proceedings and the right of access to a lawyer.\textsuperscript{124} The rationale for the EU legislation governing the procedural rights of suspected and accused persons is that it has become increasingly clear that the ECHR human rights regime is not sufficiently able to make sure that national authorities pay due regard to their responsibilities in safeguarding suspects' procedural rights.\textsuperscript{125} Some of the limitations are practical, such as the backlog of cases to be heard by the ECHR. Others are more systemic, such as the ex post nature of the application process and the weak mechanisms ensuring compliance with ECHR decisions. Although the ECHR has been very successful in setting general (minimum) standards, it cannot provide for general guidelines on how to implement them. Therefore, the practical and effective nature of the ECHR rights leaves much to be desired. As such, the current situation in practically all EU Member States shows that the ECHR lacks the mechanisms

\textsuperscript{121} ECHR 18 February 2010, Zurechovc v. Russia, No. 39660/02, paras. 42 & 52-60.

\textsuperscript{122} See, for example, ECHR 24 September 2009, Piskaladze v. Russia, No. 7025/04, para. 69.

\textsuperscript{123} ECHR 27 November 2008, Saltz v. Turkey, No. 36391/02, para. 54.


\textsuperscript{125} See Spronken 2012, p. 76-79 and Morgan 2012, p. 67-70.
adequately to protect procedural safeguards in criminal proceedings in the Member States.

Following the institutional changes to the EU introduced by the Lisbon Treaty, the legislative powers of the EU in the field of criminal (procedural) law have made it easier for the EU to draw up by means of Directives minimum rules on, inter alia, the rights of individuals. Another consequence of the Lisbon Treaty is that the Charter of Fundamental Rights of the European Union has become legally binding, which creates a new, separate set of rights, freedoms and principles which can be used by the European Court of Justice (ECJ) and national courts when interpreting EU law. The Charter includes the right to a fair trial and respect for the rights of the defence.

The EU potentially has far greater powers than the ECHR institutions and mechanisms to enforce human rights standards. With its powerful legislative tools and effective control mechanisms, the EU is better equipped than the Council of Europe to ensure that national authorities establish the legislative framework necessary for effective criminal defence rights. The Lisbon Treaty has enhanced the role of the ECJ in relation to procedural rights and allows for minimum rules to be adopted in relation to the rights of individuals. This will open the way for enforcement mechanisms which have a different character to ex post complaints to the ECHR, and which can be of additional value to the ECHR mechanisms. The EU enforcement mechanism operates in a different way and provides for the general competence of the ECJ concerning questions of interpretation of the Treaty. Every national court may, in criminal proceedings, ask the ECJ to give a preliminary ruling on a relevant issue. In addition, the European Commission has the power to bring a case against a Member State for failing to fulfil its obligations under the Treaty. A finding that a Member State has not brought its national legislation into compliance may result in financial penalties being imposed by the ECJ. These possibilities will be especially relevant when the Directives on procedural safeguards become binding.

Art. 82(2) of the Treaty on the Functioning of the European Union provides the explicit legal basis for such instruments: "To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:... (b) the rights of individuals in criminal procedure; ... Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals."

The right to an effective remedy and the right to a fair trial are laid down in Art. 47 of the Charter of Fundamental Rights of the European Union.

Art. 267 TFEU.
2.5.1. Scope of the Directives

All three Directives (on the right to interpretation and translation, on the right to information and on the right of access to a lawyer) state that they shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings. This formulation is in alignment with the autonomous interpretation by the ECHR of the concept of ‘charge’ as the ‘official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, a definition that also corresponds to the test whether ‘the situation of the [suspect] has been substantially affected’. As a consequence, the Directives may apply before a person is arrested by the police. In order to avoid misunderstandings regarding their scope, the Directive on the right of access to a lawyer adds, in Article 2(1), the words: ‘and irrespective of whether [the suspect] is deprived of liberty’.

The Directives also stipulate that in the case of minor offences, for instance, routine traffic offences, that are sanctioned by authorities other than a court and where there is a right of appeal to a criminal court following such a sanction, the Directives only apply to proceedings before the court following such an appeal. However the Directive on the right of access to a lawyer provides, with regard to minor offences, that where deprivation of liberty can be imposed as a sanction and where the suspected or accused person is deprived of their liberty, the Directive nevertheless fully applies.

It should be noted that all of the Directives are applicable to European Arrest Warrant procedures and, specifically with regard to the right of access to a lawyer, persons subject to a European Arrest Warrant are offered legal advice in both the country where the arrest is carried out and the one where the warrant was issued.

2.5.2. Directive on the Right to Interpretation and Translation

The first Directive issued under the EU roadmap of procedural rights was the Directive on the right to interpretation and translation. It provides that suspected and accused persons in criminal proceedings who do not understand the language of the proceedings:

129  Art. 1(2) Directive on the right to interpretation and translation; Art. 2(2) Directive on the right to information; Art. 2(4) Directive on the right of access to a lawyer.
130  See for the first judgment where this was defined ECHR 15 July 1982, Eckle v. Germany, No. 8130/78, para. 73.
131  Art. 2(3) Directive on interpretation and translation; Art. 2(2) Directive on the right to information in criminal proceedings and Art. 2(4) Directive on the right of access to a lawyer.
132  Art. 2(4) Directive on the right of access to a lawyer.
a. Must receive interpretation assistance free of charge during police interrogation, for communication with their lawyer, and at trial.

b. Must be provided with a written translation of documents that are essential for them to exercise their right of defence. This includes the detention order, the indictment, the judgment, and other documents that are essential.

The ECHR has held that judicial authorities are required to take an active approach to determining the need for interpretation or translation. This is taken a step further by the Directive, which not only requires Member States to ensure that interpretation or translation is made available where necessary but, at least in relation to interpretation, requires states to ensure that a procedure or mechanism is in place to ascertain whether a suspected or accused person speaks and understands the language of the proceedings and whether they need the assistance of an interpreter. Furthermore, a suspected or accused person must have a right to challenge a determination that there is no need for interpretation or translation.

It should be noted that the rights are not limited to persons who cannot speak or understand the language of the proceedings because their first (or only) language is other than that used in the proceedings, but also potentially includes persons who cannot speak or understand the language because, for example, they have a speech or hearing impediment.

The right to translation, which is not explicitly mentioned in the ECHR, extends under the Directive to translation of all documents essential to ensure an effective defence. The Directive therefore clarifies the ECHR right to translation and explicitly fills the gap left by the ECHR’s silence on the subject. The EU Directive on the right to interpretation and translation limits the documents that must be translated to those “which are essential to ensure that [the suspected or accused person] is able to exercise their right of defence and to safeguard the fairness of the proceedings”. Oral translation, or an oral summary, of essential documents is

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133 Art. 5, stating that this is irrespective of the outcome of the proceedings.
134 Art. 2(1), and see also ECHR 28 November 1978, Luedicke, Bulatović and Koc v. Germany, Nos. 6210/77; 6877/75; 7132/75, para. 46.
135 Art. 2(2).
136 Art. 2(1).
137 Art. 2(1).
138 Art. 2(2).
139 Art. 2(1).
140 See section 2.1 above.
141 Art. 2(2).
142 Arts. 2(5) & 3(5).
143 Although there appears to be no clear ECHR jurisprudence on this issue, it follows from the language of the ECHR articles, and is specifically provided for in respect of interpretation in the EU Directive, Art. 2(3).
144 Art. 3(1).
permitted provided that it does not prejudice the fairness of the proceedings.\textsuperscript{145} Whilst there is no provision for waiver of the right to interpretation in the Directive, it does provide that waiver of the right to translation is possible provided that the suspected or accused person has received prior legal advice or has otherwise obtained 'full knowledge of the consequences of waiver', and that waiver is unequivocal and given voluntarily.\textsuperscript{146}

The Directive places primary responsibility for quality on Member States, requiring them to take concrete measures to ensure that interpretation and translation is 'of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence'.\textsuperscript{147} This obligation is bolstered by a requirement that states endeavour to establish a register of appropriately qualified interpreters and translators,\textsuperscript{148} and ensure that there is a procedure by which a suspected or accused person can complain about the quality of interpretation or translation provided.\textsuperscript{149} States are also required to ensure that interpreters and translators be required to observe confidentiality regarding any interpretation or translation provided.\textsuperscript{150}

2.5.3. Directive on the Right to Information in Criminal Proceedings

Research conducted in recent years has shown that the way in which, and the extent to which, suspects or accused persons are informed of their procedural rights varies widely across European jurisdictions, and that in a majority of them information on procedural rights is provided only orally, decreasing the effectiveness of the information and making it more difficult to monitor.\textsuperscript{151} In this context, the Directive makes explicit provision for a right to information about rights, articulating the right more clearly and more extensively than the ECtHR jurisprudence.

The Directive on the right to information in criminal proceedings was adopted on 22 May 2012, and Member States have until April 2014 to implement it. It provides that all suspected and accused persons in the EU must be informed of their rights orally,\textsuperscript{152} and that if they are arrested, they must be given a written Letter of Rights in a language that they understand.\textsuperscript{153} Furthermore, the Directive lays down

\textsuperscript{145} Art. 3(7).
\textsuperscript{146} Art. 3(6).
\textsuperscript{147} Art. 5(1).
\textsuperscript{148} Art. 3(2).
\textsuperscript{149} Arts. 2(5) & 3(5).
\textsuperscript{150} Art. 5(3).
\textsuperscript{151} Spronken 2010, Chapter I, and Cape et al. 2010, p. 555.
\textsuperscript{152} Art. 3.
\textsuperscript{153} Art. 4(5).
the right to full information about the accusation, and to access to case materials.

Article 3 of the Directive provides that a person who is suspected or accused of having committed a criminal offence must be promptly provided, orally or in writing and in simple and accessible language, with information about, at least:

a. the right of access to a lawyer;
b. any entitlement to free legal advice and the conditions for obtaining such advice;
c. the right to be informed of the accusation, in accordance with Article 6;
d. the right to interpretation and translation;
e. the right to remain silent.

According to Article 3(2), States must take into account any particular needs for explanation of the rights to those who are vulnerable.

In addition, Article 4 provides that where a person is arrested, they must be promptly provided with written information (the Letter of Rights) about the previously mentioned procedural rights and about:

a. the right of access to the materials of the case;
b. the right to have consular authorities and one person informed;
c. the right of access to urgent medical assistance; and
d. the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

The Letter of Rights must also contain basic information about any possibility of challenging the lawfulness of the arrest, obtaining review of the detention or on making requests for provisional release.

The Directive stipulates that suspects must be given an opportunity to read the Letter of Rights and to keep a copy whilst deprived of their liberty. A model Letter of Rights is included as an Annex to the Directive, and Article 4 also makes provision for explanation of the rights to those who might not be able to read them or to understand them. Finally, the Letter of Rights must be made available in the appropriate language.

Information about the criminal act of which a person is suspected must be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. In contrast to

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134 Art. 6.
135 Art. 7.
136 Art. 4(5).
137 Arts. 3(2) & (4).
138 Art. 4(5).
139 Art. 6.
the obligation to provide information about rights in writing, the Directive does not require that information about the charge be provided in written form. The meaning of 'promptly' and the level of detail that should be provided is set out in recital 28 of the Directive:

'The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence.'

As regards disclosure or access to the case file, recent research shows that the extent to which it is provided varies widely across Member States. In most states, neither accused persons nor their lawyers have a right to information concerning the evidence relating to the alleged offence during the investigative stage. However, most Member States do provide for a right to information by the accused person or their lawyer concerning the evidence at the trial preparation or trial stages, although the precise formulation of the right varies enormously and, in particular, depends upon whether the jurisdiction has an inquisitorial or adversarial tradition. Some jurisdictions make a charge for copies of documents in the case file.

The right of access to the case file is not explicitly provided for in ECHR Article 6, although there is clear ECHR jurisprudence on the issue. There is no specific case law under ECHR Article 6 clarifying at what point in proceedings material evidence should be disclosed. The ECHR, in the context of the ECHR Article 5(4) has, however, given some indication of both the stage at which material should be disclosed and the extent of that disclosure. In cases relating to pre-trial detention hearings the Court has ruled that the principle of equality of arms requires defence access to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of pre-trial detention.

This is now reflected in the Directive on the right to information Article 7(1). Article 7(3) of the Directive provides that access to the case file must be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. It also stipulates that where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be

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360 Spronken et al. 2009; Cape et al. 2010.
361 Spronken et al. 2009, p. 94.
362 For example, Belgium. See Cape et al. 2010, p. 77.
363 See section 2.2.3 above.
364 See section 2.2.3 above.
considered. The Directive also provides that access shall be provided free of charge. As to the documents to which access must be given, recitals 30 and 31 to the Directive give the following description:

'Documents and, where appropriate, photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons [...]'

'[...] access to the material evidence, as defined in national law, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case, should include access to materials such as documents, and where appropriate photographs and audio and video recordings. Such materials may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law.'

Exceptions to the right of access to the case file are limited. Access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an on-going investigation or could seriously harm the national security of the Member State in which the criminal proceedings are instituted.

Another improvement compared to the ECHR case law is the provision in Article 7(4) that Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

2.5.4. Directive on the Right of Access to a Lawyer

The Directive on the right of access to a lawyer proved to be the most difficult to negotiate. The European Commission put forward a proposal on 8 June 2011, and after a notable number of eight trilogues an agreement was reached that resulted in the formal adoption of the Directive on 22 October 2013. The Directive aims to realize in practice the right of all suspects to be advised by a lawyer from the earliest stages of criminal proceedings. The Directive provides that Member States must:

a. provide a right of access to a lawyer from the first stage of police questioning and throughout criminal proceedings;
b. allow a right to adequate, confidential meetings with the lawyer for the suspect to effectively exercise their defence rights;
c. allow the lawyer to play an active role during questioning;

Art. 7(5).
COM(2011) 326.
Art. 4.
d. make sure that, where a suspect is arrested, somebody such as a family member can be made aware of that arrest and that there is an opportunity for the suspect to communicate with their family; \(^{168}\) and

e. allow suspects arrested or detained abroad to be in contact with their country's consulate and to receive visits. \(^{169}\)

The Directive provides that Member States must ensure:

'...that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively'. \(^{170}\)

Article 3 specifically provides that the right of access to a lawyer applies to suspected or accused persons without undue delay, as from the following moments, whichever is the earliest: before they are questioned; upon the carrying out of investigative or evidence-gathering acts by the investigative authorities; from deprivation of liberty; and in due time before appearing before a court. \(^{171}\)

Although expressed in different terms, this is consistent with the ECHR jurisprudence providing for the right to legal assistance from the moment that there is any significant curtailment of a suspect's freedom of action. However, the Directive goes further because it gives the right to legal assistance to a person during a police search of their house, irrespective of whether they are subjected to a significant restriction of their liberty, provided that they are made aware that they are suspected of having committed a criminal offence. Similarly, it applies to a person who is questioned without being arrested, but again only provided that they are made aware that they are suspected of having committed a criminal offence.

The Directive explicitly provides that the right of access to a lawyer entails the right to meet with the lawyer in private, including prior to questioning by the police, and also to have a lawyer present during police interrogations, expressed in the following terms:

'Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned.' \(^{172}\)
Recital 23 explains that effective participation means that ‘the lawyer may inter alia, in accordance with such procedures, ask questions, request clarification and make statements’. In addition, Article 3(3)(c) provides that the lawyer also, as a minimum, has the right to be present at other investigative or evidence-gathering acts at which the suspected or accused person’s presence is required or permitted as of right, mentioning specifically identity parades, confrontations and experimental reconstructions of the scene of the crime.

The Directive contains various provisions concerning derogation of the rights provided. With regard to the right to legal assistance and the right of the lawyer to be present during interrogations, derogation is only possible, temporarily, in exceptional circumstances and in the pre-trial stage only: where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty; or when there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or when immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings. This, in effect, articulates in greater detail the requirement of ‘compelling reasons’ for denying access to a lawyer developed in ECHR jurisprudence (see section 2.3.1. above). However, the Directive contains rules on derogations and waiver, and Article 8 requires that a derogation shall be proportionate and not go beyond what is necessary, shall be strictly limited in time, shall not be based exclusively on the type or seriousness of the alleged offence and shall not prejudice the overall fairness of the proceedings. In addition derogations must not only be reasoned, but must also be authorized and determined by a judicial authority on a case-by-case basis, with the possibility of judicial review. In this sense the Directive goes further than ECHR case law.

The wording of ECHR Article 6(3)(c) – a person has the right to ‘defend himself in person or through legal assistance’ – implies that waiver is possible and the Directive regulates this in Article 9. The emphasis of both the ECHR jurisprudence and of Article 9 of the Directive is the provision of suitable safeguards in respect of waiver. The Directive explicitly provides that waiver is conditional on:

a. the suspect or accused person having been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
b. the waiver being given voluntarily and unequivocally.

[279] Art. 3(6).
In addition any waiver, which can be made in writing or orally, must be recorded, as must the circumstances under which the waiver was given, and is revocable at any stage of the proceedings.\textsuperscript{174}

The ECHR does not contain any explicit provision regarding the role, independence, or standards of criminal defence lawyers. The Directive sets out certain functions that a lawyer acting for a suspected or accused person must be permitted to perform (Art. 3), and that there is a right to confidential communication (Art. 4), but contains no provisions regarding independence or standards.\textsuperscript{175}

3. How to Read this Book

This book is the final report of the project entitled 'Procedural rights of suspects in police detention in the EU: empirical investigation and promoting best practices'. The book is structured around the four rights of suspects in police detention that formed the focus of our empirical inquiry: the right to interpretation and translation; the right to information (including access to the case file); the right of access to a lawyer; and the right to silence. Chapter 2 describes in detail the research methodology used in the project. The empirical methodology tools developed for the research are set out in Annexes 2-7. In Chapter 3, the domestic regulatory context governing the four rights in the jurisdictions in the study is described. Chapter 4 analyses the implementation of the right to interpretation and translation in the four jurisdictions. The right to information is addressed in Chapter 5. Chapters 6, 7 and (partly) Chapter 8 are devoted to the right to legal assistance. Chapter 6 describes the organizational arrangements for delivering custodial legal advice in the four jurisdictions. Chapter 7, in turn, deals with the process of providing legal advice to suspects in police custody and the various conceptions of the lawyer's role. Chapter 8 examines the interrogation of suspects, in terms of approaches to the right to silence, and the role played by lawyers during interrogations. Chapter 9 identifies and discusses some of the major issues drawn from the comparative findings discussed in Chapters 4 to 8, and sets out key recommendations for the improvement of national and EU policies on the procedural rights of suspects in police detention. The training framework is set out in Annex 1. The Annexes also include certain forms and protocols used in the jurisdictions in the study.

\textsuperscript{174} Arts. 9(1), (2) & (3).

\textsuperscript{175} This may be contrasted with the Directive on the right to interpretation and translation, Art. 5 of which imposes a duty on member states to take concrete measures to ensure that interpretation and translation meets the quality standards set out in Arts. 2(8) & 3(9).
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Brown 1997

Cape & Namoradze 2012

Cape et al. 2007

Cape et al. 2010

CEPEJ 2008

CPT 1993

Harris et al. 2009

Hodgson 2001

Hodgson 2002

Hodgson 2004
Hodgson 2005

Hodgson 2011

McConville & Hodgson 1993

McConville et al. 1994

Morgan 2012

Newman 2013

Schumann, Brückmüller & Soyer 2012

Spronken 2010

Spronken 2012

Spronken & Attinger 2005
Spronken & Fermon 2008

Spronken et al. 2009

Trechsel 2006
RESEARCH METHODOLOGY

1. Introduction

This chapter details our approach to the empirical study of the procedural rights of suspects, from the initial development of research instruments and the selection of field sites, through to negotiating access and writing up our findings in a comparative and collaborative way. The EU and ECHR legal frameworks that provide the context for suspects’ rights at the European level are sketched out in Chapter 1, and Chapter 3 considers the domestic legal framework in place in each of the four jurisdictions in our study. Measured against these legal standards, the objective of our research was to understand how suspects’ rights operate in practice and whether the procedural safeguards provided for in the current and proposed EU instruments are likely to be effective once transposed into the various national systems of criminal justice.

In order to achieve this, the research seeks to identify best practices as observed in the field, and to understand the constraints that operate on the daily routines of police and lawyers, as well as the drivers for certain forms of behaviour in the delivery of rights – be they embedded within the imperatives of the criminal justice system, or the professional cultures of legal actors themselves. Direct observation is the best way to gather this kind of process information. It enables the dynamics of activities, behaviour and processes of decision-making to be captured; and it provides the opportunity for informal interviewing of criminal justice actors in the field in order to clarify aspects of what has been observed. In our project, we were also able to undertake detailed case file analysis during these periods of observations. By locating researchers in police stations and accompanying lawyers as they attended suspects in police custody, we were able to understand the imple-
mentation of suspects' rights from multiple perspectives and consequently to gain a deeper insight into the practical constraints upon working practices.

In addition to carrying out observations, we also conducted over 80 interviews with police officers and with lawyers. Interviews provide valuable insights into practice, but in order to obtain relevant information, the interviewer must ask appropriate questions. We therefore spent some months compiling sufficient research data from the fieldwork before commencing the programme of interviews. This ensured that we were able to include any issues of which we might have been unaware before beginning the empirical phase of the study. More importantly, having observed police and lawyers at the police station, researchers were sensitized to practice and so able to probe answers that did not reflect what the researcher had observed. This is not to say that interview subjects try to mislead the interviewer. They may describe their actions or motivations in slightly idealized terms, reflecting legal standards or organisational policies, or simply be unaware of their impact on others and so describe them in unproblematic terms. In some of our lawyer interviews in France, for example, lawyers stated confidently that interpreters were always provided to suspects. In fact, we observed cases where this did not happen because neither the police nor the lawyer wanted to delay things; where the suspect spoke some rudimentary French, they preferred to go ahead with the interrogation.

An additional strand of the project is to use our empirical findings to identify possible training needs for police officers and lawyers, in order to promote best practice and to guard against the pitfalls observed in practice. Our recommendations range from consideration of the modes of delivery of suspects' rights, to identifying effective ways to engage with interpreters. We piloted these recommendations through two multi-practitioner workshops held in the UK and the Netherlands, using a range of training techniques. These are set out in more detail, together with a recommended training syllabus, in the Training Framework.²

This chapter sets out in some detail our methodological approach and how we organized the research. It is important to understand the complexity of a qualitative study such as this, and the challenges involved in conducting research that is both empirical and comparative. We hope that it will prove useful to future researchers.

2. Earlier Research Studies

There are many comparative reports covering suspects' rights or criminal procedure, which adopt a questionnaire methodology. Whilst such studies provide useful information on official accounts of how criminal processes are regulated, and how they are intended to operate, they cannot provide reliable data on the daily routines and practices of criminal justice systems. Even when the perspectives of practi-

² See Annex I.
tioners are included, these tend to be largely anecdotal and often provide highly localized information.

In contrast to this, the focus of our research was to observe criminal justice practitioners as they go about their daily, routine, work. The starting point for our research was to discover what was already known about practice in each of the four jurisdictions.

2.1. England and Wales

A considerable amount of empirical research into the process of arrest and detention in police custody has been carried out in England and Wales, although much of it was triggered by the new legal regime introduced by PACE 1984, and so is now more than two decades old. McConville, Sanders and Leng, in a study published in 1991, described the ways in which the police exercise their discretion to arrest and detain suspects, constructing criminal suspicion in a way that overrides formal legal criteria. They also demonstrated the dependence of the newly established public prosecutor (the Crown Prosecution Service, CPS) upon the police when making decisions around prosecution. Dixon and colleagues also found that police officers were able to get around the formal requirements of the then recently introduced PACE 1984 by, for example, creating the idea of a 'consent' search, by which a suspect's consent to be searched was deemed not to be a search under PACE, thus avoiding the statutory protections. These were important studies, demonstrating the limitations of legal rules in ensuring that legal safeguards are effective in practice. These are valuable insights, which helped us to think about the effectiveness of the delivery of legal rights in our own study. However, more than two decades later, there have been changes in training, to the structure of the custody regime and in the relationship between the police and the CPS; there is, therefore, a need for new research investigating current practices, a gap filled in part by this study.

Early studies also demonstrated the ways in which police officers sought to dissuade suspects from taking up their right to legal advice. Sanders et al. identified a range of ploys used, including reading suspects their rights quickly and incomprehensively, or telling suspects that they would have to wait in the cells until their lawyer arrived. There have also been several studies examining the frequency with which suspects request and receive legal advice and assistance - although the most recent have centred on the information contained in custody records, rather than

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3 McConville, Sanders & Leng 1991. The fieldwork was carried out between 1986 and 1988 in three English police force areas. Data was collected in respect of a total of 1,200 cases, and more than 1,700 interviews with police officers were conducted.
5 See further Dixon 1997.
observations of practice. Request rates for legal assistance vary from 25 per cent in the first years following PACE (with 21 per cent actually consulting a lawyer), rising to around 40 per cent in the early 1990s (34 per cent actually consulting a lawyer) and most recently, a request rate of between 42 and 64 per cent, with between 30 and 60 per cent of suspects receiving legal advice. A useful review of these studies is provided in Pleasence, Kemp and Balmer.

Given the almost universal availability of legal aid to suspects held in police custody, it is perhaps surprising that less than half of those detained actually receive legal advice. Research suggests a variety of factors that may influence suspects’ choices to request a lawyer. Maguire found that some suspects will always request a lawyer, others rarely. The group in between these two positions will be most easily influenced by the attitude of the police and the perceived availability of legal advice of reasonable quality. Some suspects believe there is little need for a lawyer if the offence for which they are detained is trivial. Others have a low opinion of the duty lawyer, believing them to work for the police rather than being independent. The primary objective of most suspects is to get out of the police station as soon as possible. Many will therefore refuse legal advice because they believe that it will delay their release.

The quality of legal advice is important if suspects’ rights are to be effective. Research in the years following PACE found that custodial legal advice was often of poor quality. McConville and Hodgson observed the working practices of 17 firms of criminal defence lawyers and three independent agencies to whom custodial legal advice was delegated by solicitors in private practice. They found that most lawyers they observed in England and Wales provided poor quality advice to suspects. Much of the police station work was delegated to inexperienced, unqualified and untrained clerks, who were not able to provide advice in any meaningful sense. These findings were amplified through the larger study of criminal defence lawyers’ practices in McConville, Hodgson, Bridges and Pavlović, in which lawyers

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7 Skinns 2009, which involved extensive use of custody records but just one week of observation at each of two sites; Kemp 2013, which involved even more extensive analysis of custody records but just 18 days of observations across four police stations (some of which was spent conducting 50 interviews).
10 Kemp 2013.
11 Pleasance, Kemp & Balmer 2011.
14 Kemp & Balmer 2008.
15 McConville & Hodgson 1993. Their sample included 26 firms, but nine attended no police station sessions during the research period.
16 See also Sanders et al. 1989.
were shown to treat their clients with little respect and to have little ambition to challenge the prosecution case or to be proactive in defence building.\footnote{McConville \textit{et al.} 1994. Over a three year period, researchers observed 22 firms of solicitors in all aspects of their criminal practice. This sample was boosted by the custodial legal advice data in McConville and Hodgson 1993. The study consisted of data collected over 198 researcher weeks of observations.}

Although many lawyers claimed that poor rates of pay required them to delegate work in this way, the minority of lawyers who were able to provide a high quality criminal defence service within the same constraints of legal aid, demonstrated that this was not the case.\footnote{In fact, legal aid rates were at their most generous at this time.} The primary motivation for this arrangement was the maximisation of profit, even at the expense of the client’s best interests. Solicitors could claim the full remuneration rate, whilst assigning work to staff paid at a lower rate. In response, the Law Society and the Legal Aid Board (then responsible for the administration of legal aid) established a training and accreditation process to address this, which all lawyers providing legally-aided advice and assistance are now required to undertake.

The findings of this body of research are important in understanding how lawyers have responded to changes such as those witnessed in many jurisdictions post \textit{Seldon}, and what has motivated their approach. The introduction of a statutory right to custodial legal advice does not guarantee that all suspects will receive legal advice, nor that legal advice will be of adequate quality. Research suggests that the introduction of a training and accreditation requirement for lawyers has resulted in an improvement in the quality of custodial legal advice.\footnote{Bridges \& Hodgson 1995; Bridges \& Choong 1998. However, the most recent research on the lawyer-client relationship within criminal defence firms suggests that general attitudes to clients have changed little. See Newman 2012 \& 2013.}

The findings of these earlier studies continue to inform our understanding of the provision of legal advice and other safeguards for suspects – in particular the importance of training and of professional ideologies in motivating good practice. This helps us to think about both domestic practice and the effectiveness of EU measures once implemented within national systems. This current study provides new data grounded in contemporary practice and, of course, within a comparative perspective.

\subsection{France}

There is not a tradition of socio-legal empirical research in France. There are some studies of the criminal process by criminologists and sociologists, but not by French legal academics.\footnote{See review of the literature in Hodgson 2005, pp. 2-5.} There have, however, been two major qualitative empirical studies by English academic lawyers. Field and West conducted an observational
study of criminal defence lawyers across two sites. They found that the approach of criminal defence lawyers was grounded within the judge-centred tradition of the inquisitorial system. Lawyers were reluctant to challenge the prosecution case or to present a wholly conflicting account. Instead, they adapted their role to one of 're-reading' the case dossier. Hodgson carried out 18 months of observations across five sites and found that judicial supervision in the form of prosecutorial oversight, placed little constraint on police investigations and provided no real safeguard for suspects detained in police custody (garde à vue, GAV). Lawyers played almost no pre-trial role and where the law did allow for defence lawyer engagement (that is, during the instruction phase), the juge d'instruction often acted to minimize the lawyer's ability to participate in the investigation. Legislative reforms in 2000 allowed the suspect in GAV a 30-minute private consultation with a lawyer. Lawyers were not permitted to be present with their clients in police interrogation and any move in this direction was strongly resisted by both police and prosecutors.

Our current research was carried out after the reforms in 2011, which allowed the suspect to have their lawyer present throughout the GAV, including during police interrogation. The extent to which prosecutorial oversight might work alongside the intervention of the defence lawyer was of interest in our current study, as well as lawyers' willingness to be more proactive under the current regime of access to suspects during police custody and interrogation. Both earlier studies found that duty lawyers were often inexperienced and unmotivated. They were not criminal lawyers, but were required to work as a duty lawyer as part of their training. In the light of what had been learned in England and Wales, evaluating the quality of custodial legal advice (and the impact of remuneration arrangements) was therefore also a key research objective.

2.3. The Netherlands

Like in France, the Netherlands has seen important legal reforms concerning access to custodial legal advice. In 2008, a two-year experiment began, allowing those detained on suspicion of homicide to have access to a lawyer during the first interrogation by the police, in order to improve the quality of the police investigation. The study sought to determine whether the presence of a lawyer would deter the police from placing pressure on suspects to confess, and whether it would result in a greater exercise of the suspect's right to silence. Stevens and Verhoeven observed interrogations with and without the presence of a lawyer in order to examine the

21 Field & West 2003. They carried out 18 months of observations in total and conducted follow-up interviews.
23 The instruction is the investigation phase carried out under the authority of the investigating judge (the juge d'instruction), usually involving the most serious and complex cases. Less than 5 per cent of cases are dealt with through instruction.
24 This was in response to the miscarriage of justice in the Schiedam Park murder case.
impact this had on the length and nature of the interrogation, as well as on the behaviour of the suspect. They found that prior consultation had a greater impact on the behaviour of the suspect than presence during the interrogation; suspects were more likely to remain silent after legal advice. They also observed that the police were more likely to use coercive methods if suspects were silent and if a lawyer was not present. These findings underline the importance of the relationship between the suspect’s consultation with a lawyer and the lawyer’s presence in interrogation; they should not be considered separately, as the lawyer’s presence during interrogation is necessary to reinforce the advice given and the strategy agreed upon during the prior consultation.

The same authors went on to evaluate temporary Dutch guidelines that allowed suspects to consult with a lawyer prior to interrogation, and in the case of juvenile suspects, to also have a lawyer or an appropriate adult present during interrogation. Observations were carried out across three regions – both in the police station and on the street with officers. The researchers noted that lawyers did not always want to attend the interrogation in juvenile suspect cases and more generally, that lawyers believed that their role added little in non-serious cases. There were some difficulties in modes of contacting lawyers when legal advice was requested and in the provision of information to suspects about their legal rights. In particular, suspects were told that seeking legal assistance would lengthen proceedings. The researchers reported that waiting and investigation times increased when a lawyer was requested. In fact, there may be a number of reasons why these delays occur, not necessarily attributable to the request for a lawyer. It was also found that police officers, when interviewed, tended to exaggerate the amount of time spent waiting for a lawyer to arrive. The research did not make any assessment as to the quality of legal advice, but typically, they found that consultations lasted between 15 and 20 minutes – less than the 30 minutes allowed for by law. Furthermore, they found no evidence of lower rates of confessions in cases where suspects received legal assistance, nor of the number of cases where the initial six-hour detention was prolonged, suggesting that lawyers did not in fact hamper investigations in any significant way.

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25 Stevens & Verhoogen 2010. Researchers were present in 108 interrogations of 94 suspects in 70 cases. 12 lawyers and 28 investigators were also interviewed. Observations were conducted in the 2 regions where the experiment took place and in 3 other regions as a control group.

26 Verhoogen & Stevens 2013.

27 They spent an estimated 520 hours in police stations and with police officers on the street. (This might be approximated at 65 days or 13 weeks). They observed 24 lawyer-client consultations and 30 interrogations of suspects. They interviewed 28 investigating officers and 12 lawyers.

28 Their estimates were double the actual waiting times.

29 However, earlier research undertaken in 2010 has shown, in relation to suspects of very serious crimes (murders and manslaughters), that those suspects who were assisted by a lawyer were more likely to remain silent than those who did not have a lawyer.

These findings are important for our own study, providing some insights into the motivation of lawyers, their approach to the new reforms and their views on the limited value of custodial legal advice. It also demonstrates police attitudes to administering suspects’ rights and the kinds of tactics used to discourage suspects from asking for a lawyer.

2.4. Scotland

We were unaware of any similar research having been carried out in Scotland. Since the right to a lawyer during police detention was a recent innovation, our research was the first to review the effectiveness of the right. The only prior consideration of this area was by the Thompson Committee, which reported in 1975. The Committee was set up to consider the prevention of crime and the fairness of the criminal process to the accused, and whether any changes were necessary to law or practice. It concluded that the right to a lawyer during police detention was unnecessary, as it was considered that the purpose of obtaining information from the suspect during detention might be defeated by the presence of a solicitor.

There has been some empirical examination of the shift from hourly rates of pay to fixed fees in Scotland, and the impact this has on criminal defence practice. Tata and Stephen carried out interviews and a questionnaire survey with criminal defence practitioners and interviews with prosecutors, as well as examining data on payments from the Scottish Legal Aid Board. They found that when fixed fees were introduced, incomes dropped to begin with but soon recovered. This appeared to be because solicitors increased their caseloads quite dramatically and decreased the amount of lawyer-client contact. Whilst remuneration is not the sole determinant for lawyer behaviour (lawyers were well paid in the 1980s and early 1990s England and Wales, for example, but delegated custodial legal advice to increase their profits further), decreasing lawyers’ pay will result in a reduction in the quality of service provided.

31 The Committee held 122 meetings, heard oral evidence from 52 witnesses and 17 interested bodies, and visited penal institutions, the Director of Public Prosecutions, New Scotland Yard Police Department, Bow Street Magistrates Court, the Central Criminal Court, the Royal Courts of Justice, and the Judicial Office of the House of Lords, as it then was.
33 McConville & Hodgson 1993; McConville et al. 1994 discussed above.
3. Setting Up and Managing the Project

3.1. The Team

The project ran from June 2011 until the end of August 2013 and was carried out by a team of individuals based in different institutions across Europe. The University of Maastricht administered the project, including the handling of employment contracts, equipment purchase and budget issues.

The project management team were responsible for the day-to-day management of the project, oversight of all aspects of the researchers' work, including the collection of fieldwork data; the analysis of data; and writing for publication. The project employed five researchers in total: three were hired for the first year to gather material on domestic law and any relevant research studies for the desk review, then to carry out fieldwork observations and interviews. The other two researchers, Anna Ogordkova and Marc van Oosterhout, also played an important role in helping to administer and to manage the project. Anna Ogordkova also played a major part in the development and implementation of the project and was part of the writing team. Delays in gaining access to the field in France meant that we needed an additional researcher later on in the project and Laurene Soubise conducted fieldwork observations and additional interviews in France. The project also benefited from an advisory board of experts who contributed to initial planning, assisted us with training and some data processing and who took part in the final project conference in May 2013. In particular, Miet Vanderhallen was responsible for the analysis of the quantitative data, was a key member of the team that wrote and delivered the pilot training in Bristol and Maastricht, and co-authored the Training Framework. See further the Training Framework in Annex 1.

3.2. Getting Started

The project was originally conceived of as a three-country study - England and Wales (with limited consideration of the separate jurisdiction of Scotland), France

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34 Many of us had worked together on research projects before and, more importantly, were prepared to work together again!
35 Diana Schabroga merits special mention. She administered all aspects of the budget, liaised with partner institutions, processed work timesheets and dealt with all expense claims.
36 Jodie Blackstock, Ed Cape, Jackie Hodgson and Teru Spronken.
37 Ciaran Burke, Brigitte Perroud and Dan Shepherd.
38 In this, they dealt with equipment purchase, minute taking of fortnightly conference calls, IT, and general communication issues.
39 The whole team met in September 2011, after the researchers were in place.
40 Miet Vanderhallen was responsible for the analysis of the quantitative data.
41 The board members were John Long (then Assistant Chief Constable, Avon and Somerset police); Hans Neden and Miet Vanderhallen (both criminologists, University of Maastricht); Zaza Namoradze and Marion Isobel (Open Society Justice Initiative).
and the Netherlands. However, in the time between applying for funding and the start of the project, significant changes had taken place in Scotland as a result of the ruling in Calder and the subsequent legislation permitting suspects to consult with a lawyer whilst in police custody.\textsuperscript{2} We decided, therefore, that it was necessary to treat Scotland as a fourth jurisdiction of study, giving it the same emphasis as the other three jurisdictions, and carrying out the same programme of fieldwork there. This did not pose any difficulties, as we were able to draw on contacts and supervise fieldwork from within the existing project team.

Once we had identified the expanded scope of our study, we set about hiring researchers. The team consisted of individuals with a mix of skills. Some were experienced field researchers; some were lawyers, some social scientists; some had a good knowledge of domestic criminal justice, others had already been involved in comparative work. We were also fortunate in that the researchers spoke several languages between them, enabling us to place researchers in more than one jurisdiction, building in a comparative approach even at the fieldwork stage. During the fieldwork, this also enabled researchers to make judgments about the quality of official interpretation, or of police officers' and lawyers' attempts at speaking another language in place of calling an interpreter in some cases observed.

3.3. Managing the Project

The scale and complexity of the project, together with the fact that research was being carried out and supervised across different jurisdictions, meant that good communication and information management were essential. A secure password protected site for the project was established on ‘Keep and Share’. We used this to post a range of documents relevant to the research (current research publications for each jurisdiction, draft EU Directives etc.), as well as the minutes of our meetings and conference calls and eventually, our data. One person was responsible for all non-data postings, ensuring that there was a single central record of research instruments, decisions made and so on, avoiding the circulation and use of different versions of documents.

The project management team had fortnightly conference calls throughout the project, enabling us to keep abreast of progress in each country, to plan and to follow up on earlier discussions, ensuring that tasks were completed. We also maintained a timeline for the project. This was a live document, adjusted in the light of developments such as the timing of access to the field at the start of the project and the progress of our writing at the end.

Our approach was strongly collaborative throughout. Whilst we divided tasks such as the development of research instruments or training materials, the oversight of fieldwork in a particular jurisdiction, and the writing of book chapters, every-

\textsuperscript{2} See the account, in Chapter 3, section 5 of the provisions of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.
thing was available to the whole team and plans, documents and book chapters were discussed, reviewed and commented on at each stage. It was also strongly comparative – not just in the sense of conducting research in different countries – but also in having the perspectives of Dutch, British, Russian, French and Irish comparative lawyers at every stage of the project planning.

Once the fieldwork began, each researcher was assigned a ‘country supervisor’ from the project team. Supervisors read and commented on field notes, fed back to researchers where further information or explanation was needed, or where the focus of the observations needed to change, and served as the primary point of contact if any problems arose. The supervisor also reported back on field observations to the project team. Field notes were posted daily to begin with and then weekly, so that they were available for the whole team to read and comment on.

Once the fieldwork was complete, the primary management task was to keep the coding, analysis and writing on schedule. This was not always easy. Apart from other aspects of our work calling upon our time, the analysis of the quantitative data took longer than expected, and the delays in gaining access in France meant that the fieldwork there was completed several months after the data in the other jurisdictions had been gathered. Interviews also had to be transcribed and a system of coding agreed upon that enabled us to cross-reference our data during writing up, but which was also sufficiently ‘reader-friendly’. We were assisted in these tasks by a variety of student researchers who helped to input data and to transcribe interviews.

4. Developing Research Instruments

During the first months of the project, we devised a number of research instruments to ensure that comparable data was collected across all countries and to guide the researchers through the research issues.

4.1. The Desk Review

The aims of the desk review were to produce an overview of the criminal justice process in each jurisdiction, in order to provide background material against which researchers could collect and interpret information. It included an account of major reforms over the last decade to provide context and a sense of the system’s ‘direction of travel’, a detailed and accurate account of the relevant law relating to arrest, detention, interrogation and the rights of the suspect, and remedies for breach of these provisions; and a report on what was already known about practice, through relevant research studies, official reports and statistics. The desk review template provided a set of headings with explanatory notes, to structure the desk review carried out by several of the researchers.49

49 See shortened version of the desk review structure in Annex 2.
The desk reviews ensured that researchers, and the rest of the team, had a good knowledge of the jurisdictions they were to work in, and they also provided a key resource for later analysis and writing up. Although supervisors worked closely with researchers in the production of the reviews, it was not always possible to obtain comparable information. For example, England and Wales produce extensive statistics on the number of suspects arrested and those receiving legal advice funded through legal aid, but these were very difficult to find in France. Ultimately, they had to be extrapolated from different official sources.

In order to conduct comparative research on the investigative stage of different criminal processes, it is necessary to assimilate large amounts of information. We needed to understand the overall nature of the criminal process, recent trends in reform and the basic legal structures in place, as well as the more obvious legal regulation of detention and interrogation. As a result, the reviews were quite long. We found it useful, therefore, to produce a shortened version that was easier to work with when discussing the research findings.

4.2. The Observation Schedule

The observation schedule was produced as a guide to fieldwork observations. It detailed the key rights of suspects as set out in the relevant articles of the ECHR together with principles derived from the jurisprudence of the ECHR, as well as any relevant EU instruments. We then devised a series of research questions linked to each of the rights, designed to test out how these rights were administered in practice and the extent to which they were effective. The schedule was a lengthy document of 25 pages, so we also provided a short research narrative, explaining the purpose of the document, how it related to the desk review, and how it should be used by researchers. The schedule was designed to frame researcher observations and to demonstrate how fieldwork might be conducted to obtain the kinds of information about daily practice that we required. It also helped to ensure a focus on the same kinds of data in each jurisdiction.

4.3. The Case Pro Formas

Observational research produces rich data, which can be mined repeatedly as new issues emerge. In addition to the qualitative data collected, we wanted to have some quantitative data to be able to extract basic information such as the number of suspects observed, or the number of suspects who required an interpreter. We also wanted to be able to make key comparisons across jurisdictions, such as the typical length of lawyer-client consultations or police interrogations. In order to do this, we designed a case pro forma, which captured biographical information about the suspect (age, gender, vulnerabilities) as well as details about the detention period.

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44 See Annex 3.
There were two forms – one for cases observed when researchers accompanied lawyers (which also included information about the specialism of the lawyer) and one for cases observed while the researcher was based in a police station. This yielded useful information, but the utility of the dataset was limited by difficulties in following cases through to their conclusion; in some instances, researchers saw a case from start to finish, but in others, they were unable to observe the whole detention period of a suspect, or to discover the eventual outcome of the investigation phase.

Overall, we completed 384 case pro formas: 226 based on observations at police stations and 158 based on lawyer observations.

4.4. The Interview Schedules

The final research instruments to be developed for use in the field were the interview schedules, which allowed us to complement information obtained from our observations. We designed one for police officers and one for lawyers. Some questions were exactly the same for both police and lawyer interviewees, but others were phrased differently to reflect their different roles. We decided to keep the list of questions to around 12, focused very much on the suspects’ rights that we were investigating. We were also conscious that police officers and lawyers had given generously of their time, but were very busy. The questions were sufficiently open to allow more detailed discussions and follow-on questions where time allowed.

Interviews lasted from 20 minutes up to an hour and a half for the longest, but most were around 50 minutes. We aimed to conduct five interviews with police officers and five interviews with lawyers in each research site, but in practice, numbers varied slightly. In total we carried out 40 interviews with police officers and 44 with lawyers.

45 See Annexes 4 & 5.
46 See Annex 8.
47 See Annexes 6 & 7.
48 For example question 2: ‘Do you think that generally suspects know what their rights are? How do they get to know about them?’; question 5: ‘What do you think about the current arrangements for providing interpretation at the police station?’
49 For example, the police were asked: ‘Do you ever provide a suspect or their lawyer with information from the case-file (evidential material obtained by the police)? How do you decide what information to give, and when to give it?’ Lawyers were asked: ‘In your experience, do the police generally provide sufficient information to you (a) about the reason(s) for your client’s arrest, and (b) about the evidential materials that they have?’
50 We were not permitted to be based at the police station in France and were therefore unable to make contact with and interview police officers in the two sites. We did, however, manage to interview officers in a third site, FranCity2. We carried out a greater number of interviews in France in order to compensate for the more restricted field observations that were possible.
51 This includes with CDS and SLAB. See Annex 8.
4.5. **Referencing the Data**

Our research data consisted of the case *pro formas*, fieldwork notes and interviews with police and with lawyers, across four jurisdictions, each with two or three field sites. Referencing this for ourselves and in a way that was meaningful and accessible to the reader was quite a challenge! There was a large and a smaller site in each of the four jurisdictions. The large sites are referred to as EngCity, FranCity, NethCity and ScotCity; the smaller sites as EngTown, FranTown, NethTown and ScotTown. FranCity2 was an additional city location where we gained access to interview police officers. We also carried out interviews and some observations with the Scottish Legal Aid Board (SLAB) Solicitor Contact Line, and with Criminal Defence Service (CDS) Direct (England and Wales).

Field notes are referenced by number and indicate whether they originate in police station or lawyer observations. So, an example of something we observed on day 25 during fieldwork carried out in the police station in the large site in Scotland would be ScotCityPol25. An example of day 18 from observations with lawyers in the smaller site in the Netherlands would be NethTownLaw18. Interviews use a similar coding, but are prefixed with an 'i' to make clear that this is an interview. So, an interview with police officer two in the smaller site in England and Wales is iEngTownPol2. An interview with lawyer three in the larger site in France is iFranCityLaw3.

4.6. **Coding for Analysis**

We used the computer data management programme ATLAS.ti to aid in the analysis of the data. The process of computer-assisted coding served primarily to organize and retrieve the data, but also to identify new issues to cross-check information from different sources, and to establish how often certain phenomena were observed. We chose a combination of inductive and deductive approaches to coding, i.e. developing a pre-set coding template, augmented by the codes derived from the data itself.

A list of codes was initially devised based on the project’s legal and theoretical framework, the observations schedule and insights from the fieldwork. The codes were then revised and enhanced in the process of coding the data. The data was coded around the four main research themes - the right to interpretation and translation; the right to information; the right of access to a lawyer, and the right to silence. Altogether some 2,200 pages of text were coded with the help of 215 codes, which corresponded to the main themes, topics and issues arising out of the field.

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52 See section 6 below.
53 Version 7.0; ATLAS.ti Scientific Software GmbH, Berlin, Germany.
54 Although many of such issues had already been identified at the fieldwork stage through an iterative process of collaborative critical reflection on the emerging data.
work.\textsuperscript{55} Coding was completed by two researchers over a one-month period. Researchers strove to ensure reliability and consistency in the coding by comparing their coded notes and discussing their coding strategy.

5. Fieldwork Training and Preparation

5.1. Preparing for the Field

Empirical research is difficult and time consuming for all involved. Access can take many months of negotiation with a range of different people whose busy work commitments mean that the facilitation of external research is, understandably, not always a high priority. Once access is granted, researchers in many instances have to find short-term accommodation away from home at relatively short notice and within a tight budget. And fieldwork itself is demanding; researchers must sometimes work long hours, observing during the day (and sometimes at night and at weekends) as well as writing up field notes whilst the observations are fresh in their minds. Good observation is not passive. The researcher must produce a detailed record of what has happened, but they must also be reflexive in thinking about what they are observing and adjusting their approach where necessary.

Collecting the data in the field can be a frustratingly slow process and the workload at the police station is unpredictable. Sometimes suspects are literally queuing up to be booked in; other times, researchers may be waiting around for several hours when nothing is happening.\textsuperscript{56} For the same reasons, researchers sometimes saw several cases in a day accompanying the duty lawyer, and sometimes none. The presence of the researcher required the consent of lawyers and the police to be obtained in advance, but on some occasions, researchers were also required to negotiate with individual police officers in order to be permitted to be present during interrogations. Similarly, when accompanying lawyers, some suspects objected to the presence of the researcher, resulting in missed opportunities and wasted time waiting for the lawyer to finish and for the next case.

These were all issues we needed to think about and to plan for during our preparations and period of training. Researchers were also supported in the field by supervisors from the project team – providing feedback on field notes, steering the observations where required and being available to advise or to deal with any difficulties that might arise.

As well as gaining the relevant permissions from police and lawyers, we also needed to set up protocols for confidential and secure data storage in a way that

\textsuperscript{55} The number of codes used was well above the maximum recommended in literature (30–40), however it was not possible meaningfully to condense the data into a smaller number of codes. This reflects on the scope and scale of a comparative empirical research project covering four separate rights and four jurisdictions.

\textsuperscript{56} It was frustrating when the police station was quiet for several hours and then a wave of suspects arrived all at once, but the researcher was only able to observe one case at a time.
would be acceptable to our research subjects. Where organizations such as the police are involved, researchers will usually need to be vetted and separate protocols for the recording of data may apply.

We decided that the most effective way to think through how these issues might play out in our own project was to organize several days of training for the whole team – field researchers and project team members together.

5.2. Training

Having assembled the project team, we had an initial project team meeting in September 2011 in Brussels, lasting a full day.\textsuperscript{57} We agreed on work tasks for each jurisdiction (desk review, fieldwork, country supervisors) and a deadline for completion of the desk reviews. We also agreed the broad criteria that we would use to guide our selection of possible field sites: local population; statistics on criminal justice activity in the area (numbers of arrests, police station detentions etc.); and broad demographic trends (immigrant population; unemployment rates etc.). Deadlines were set for the final design of interview schedules, in order that we had as much information in place as possible, ready for the training programme in Warwick in November 2011. The issues to be covered in the training programme to prepare researchers for comparative empirical fieldwork were sketched out, as well as the approach to the production of training materials for criminal justice personnel at the end of the project.

In November 2011, at Warwick University, we ran an intensive three-day training programme for researchers. On the first day we discussed the content of the desk reviews, drawing out emerging themes and their consequences for fieldwork. We then considered how the desk reviews and data findings might feed into the development of training materials and recommendations. The second day was devoted to discussion of fieldwork skills and practical organization in the field (such as note-taking and interview skills) led by experienced empirical researchers from within the team as well as two researchers who had recently carried out an analysis of custody records, interviewed police officers and lawyers, and carried out some observational work.\textsuperscript{58} We also considered the training manual and how we might approach highlighting best practice and training needs based on fieldwork observations.

On the final day, the team discussed the practicalities of doing the research. This included issues such as negotiating access; whether to attach to a lawyer, a firm or a duty role; how long to spend at each site; the supervisor-researcher relationship and so on. We decided to involve each researcher in more than one jurisdiction where possible and to leave some time between observing police and lawyers in the

\textsuperscript{57} We were also able to have a preliminary meeting with many of the team in May 2011 as we were in Paris for a related event with the Paris Bar, kindly organized by the OSJI.

\textsuperscript{58} Layla Skinnns and Vicky Kemp.
same field site. This would reduce the association of the researcher with either police or lawyers and hopefully, any likelihood that researchers might be mistrusted when they appeared to 'switch sides'. Ensuring that we complied with the required research ethics was also discussed, alongside the related issue of a system to securely store anonymized data. All data was initially recorded in an anonymized way and we opted to store all data on a secure, password protected website, thus avoiding the need to keep copies on our own computers. As noted above, this also proved useful as a repository for project administration documents, research articles and reports, and relevant EU legislation. The Research Ethics Committees of our own universities scrutinized and approved our arrangements for gaining the consent of those we were researching and for the collection and storage of data.\[59\]

As well as sharing our knowledge and skills and identifying potential difficulties, the three days was an important time for the team to get to know one another. Fieldwork is exhausting and challenging at points; it is important to have good working relationships within the team so that members are supported and difficulties can be raised and resolved.

6. Agreeing the Field Sites

6.1. England and Wales

The two sites selected in England and Wales were EngCity, with a population of around 450,000 and EngTown, with a population of 40,000. We had originally planned to carry out police station observations in the main city centre station, which has an annual throughput of over 9,500 suspects. However, a combination of delays whilst refurbishment took place, together with concerns that the physical layout of the station would make observations very difficult, caused us to switch to another police station, which was fairly central but less busy.\[60\] EngTown police station has a throughput of around 4,066 suspects per annum.

6.2. France

The two sites selected in France were of very similar size to those in England and Wales. FranCity has a population of 475,000; FranTown has a population of just 40,000.

\[59\] The police in England and Wales also approved our data collection and retention protocols, as did the research institute of the Dutch Ministry of Justice and Security.

\[60\] We were also told that throughput was much lower than usual because it was summer and there was a lot of rain - which was said to result in less crime!
6.3. The Netherlands

The smaller site in the Netherlands has a population of about 120,000 and a throughput of around 1,500 detained suspects. The larger site has a population of approximately 140,000 and around 1,800 detained suspects each year. Our preferred choice for NethCity was one of the larger cities in the Netherlands with detention rates of 9,000 - 12,000. However, these sites had been involved in extensive empirical research conducted immediately before our project and the police did not want the burden of hosting further research.43

6.4. Scotland

We selected a busy central police station in ScotCity, serving a diverse population of approximately 600,000. It had an annual throughput of some 8,000 suspects. ScotTown police station was very much smaller, with a predominantly local Scottish population of 11,000. The throughput of suspects, at around 4,500 each year, was quite large relative to the population, but the station also served several surrounding towns.

7. Negotiating Access and Carrying out Observations

We produced a standard letter explaining the nature of the project, its objectives, our research methodology, and the responsibilities of the project team members. This was translated into Dutch and French and was used in each field site when we first made contact with police and lawyers. Once liaison personnel were identified to us, negotiations continued in a more personal way, between researchers, country supervisors, police and lawyers.

Our experience of negotiating access differed across jurisdictions and between police and lawyers. Things went very smoothly with the police in the Netherlands, in large part due to the existence of strong personal and professional contacts. It took a little longer to get lawyers in NethTown to co-operate. In England and Wales too, we did not encounter any real difficulties, although access to the police station was delayed for a number of practical reasons connected with the choice of site, as mentioned in section 6.1 above. In Scotland, police observations were straightforward, though we were unable to gain access to interrogations, save for one with the police and one with a lawyer via video link. We also received almost no cooperation from private lawyers, with only a few considering our research useful and important for the development of rights in Scotland. In contrast, the Public Defence Solicitors Office and SLAB Solicitors Contact Line accommodated our researchers and assisted with observations and interviews. In France, lawyers were enthusiastic about our research from the outset, but we encountered numerous

43 The final publication of the project is Verhoeven & Stevens 2013.
problems with both the public prosecution service and the police hierarchy, delaying fieldwork by over one year. In the end we were not able to get permission to base a researcher in the police station. After a change in personnel in the prosecution hierarchy, we did, however, carry out observations with lawyers attending suspects in police custody at one field site.

We were careful to separate out our time observing police and lawyers in order to reduce any perception of role change. In fact, we did not encounter any difficulties in this respect. We explained the nature of the project and the importance of understanding issues from the perspectives of both police and lawyers and all parties were quite content with this arrangement. Observing from these two perspectives enriched the data as we had a better understanding of processes, having seen them from the standpoint both of police and of lawyers.

7.1. England and Wales

The project team was able to make use of senior police contacts to facilitate access to the field in England and Wales. Researchers were required to be security cleared and to agree a data security protocol with the police force. The jurisdiction supervisor and each researcher met the Chief Superintendent responsible for custody and then the police inspector responsible for custody officers at each station. One potential difficulty in researching a secure area such as a police station can be maintaining regular access, and having to deal with challenges to the researcher’s presence from people who are unaware of the research. The station inspectors were very helpful and informed all custody officers about the presence of the researchers and even posted a photograph of them so that they would be recognized! Both researchers were also given a key card to access the non-public areas of the police station. Once the fieldwork began, officers were again co-operative, providing researchers with information about the custody process, access to custody records and ensuring that they were able to observe police interrogations with suspects.82

Observations in EngCity police station took place over a two month period with a one week break. In EngTown police station the researcher conducted three weeks of observation, spread over one month.83

Negotiating access to accompany lawyers in England and Wales was a less formal process than with the police. The firm in EngCity was a major criminal defence provider in the area and was approached via a personal contact. The firm specialized in criminal defence work and also participated in the duty solicitor scheme, providing advice and assistance to clients detained at EngCity police station. There were no formal data protocols beyond the usual social science research guarantees of confidentiality and anonymity. Researchers were able to accompany

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82 There was some uncertainty over whether we would be permitted access to interrogations, but fortunately, this was resolved.
83 See Annex 9.
lawyers and accredited representatives to the police station, to attend private consultations with clients, to sit in on police interrogations and to examine case files. In EngCity, we observed lawyers first, as it took a little longer to negotiate which police station would be able to accommodate the researcher. The researcher was based at the firm of criminal defence lawyers in EngCity for a five week period.

In EngTown, the researcher was based with two law firms in order to ensure sufficient cases to observe since, given the population size, their criminal departments were less busy than in EngCity. Each firm employed two criminal solicitors, and also used the same accredited representatives. Observations took place over four weeks.

Minor cases where no interrogation is anticipated are dealt with by CDS Direct, which provides telephone-only advice. Our researcher spent three days in the offices of a firm that is contracted to provide advice through CDS Direct, observing their telephone advice sessions and interviewing lawyers.

Annex 8 shows the number of interviews conducted with police and with lawyers, and the number of cases observed with police, with lawyers’ firms and with CDS Direct.

7.2. France

The process of negotiating access to the field in France was long and complex and ultimately our researchers were able to carry out observations with lawyers, but not with the police. In both research sites, the local bar was supportive and enthusiastic about our research. We were invited to training sessions, to observe duty lawyer coordinators and to accompany lawyers at the police station and gendarmerie. However, in contrast to England and Wales, and Scotland, where we needed only the consent of the lawyer to accompany them to the police station, the written authorization of the prosecutor was required to observe in police stations in France. For this reason, the difficulties in gaining permission to carry out research at the police station also hindered us in carrying out observations alongside lawyers.

We received positive responses from every lawyer, prosecutor and almost every police officer with whom we made contact, but ultimately, the process of negotiating access proved to be laborious and highly bureaucratic. We were required to follow lengthy protocols in order to respect internal hierarchies, only then to receive contradictory instructions and accounts.

Negotiations began when we approached the public prosecutor in October 2011. Our request appeared to be well received and the prosecutor agreed to assist us in gaining access to the police station. We were told not to approach the police directly, but to allow the prosecutor to make contact in order to ‘smooth the path’ of our research. After several more meetings, our researcher was informed that she could commence her research in March 2012 and an induction date was set.

See Chapter 3, section 2.4.5.
Unfortunately, the initial officer to whom the researcher was assigned refused to cooperate with us. It was clear that there was a longstanding staffing resource issue, and the researcher was told to go to one of the other, better staffed, sections. This proved more successful and after a meeting with the senior officer and our original Commissaire contact, the details of what we required were agreed and a date was fixed for research to begin the following week in the smaller of the two sites. The researcher secured accommodation and presented herself at the police station. She was given a brief tour and induction on the first day and everything appeared set. Then, totally unexpectedly, a meeting was called that evening and senior officers decided that the research could not in fact take place without Ministry level approval. We have never been provided with any more information to enable us to discuss this directly with anyone in the Ministry. Essentially, the senior police hierarchy blocked our research.

A shorter period of observation with the police was proposed to us in FranCity, but once again, despite emails and calls, communication ceased and it proved impossible to achieve even this modest access. Neither were we provided with a letter of authorization to enable us to accompany lawyers advising suspects at the police station. Finally, in February 2013, the new procureur in FranTow was able to secure police agreement to allow us to accompany lawyers to the GAV.

Most suspects in France who exercise their right of access to a lawyer are attended upon by a duty lawyer, so there was no sense in attaching the researcher to a single firm. With the help of the local Bar, and a letter of support, we were able to make contact with lawyers on the duty scheme in order to obtain their agreement to accompany them when on duty. We did this by e-mail and by telephone each day. When they received a request to attend, the lawyer would call the researcher and meet them at the police station. This was successful in most instances, though occasionally, the lawyer felt there was not time to contact the researcher. The researcher spent three weeks observing lawyers.

FranCity2, a larger city than FranCity, was selected as a third location where we were able to use our contacts to carry out several interviews with police officers - having been unsuccessful in the first two field sites. Annex 8 shows the number of interviews conducted with police and with lawyers, and the number of cases observed with duty lawyers.

7.3. The Netherlands

Like in France, the Dutch police operate under the authority of the public prosecutor in criminal investigations. We were therefore required to obtain the consent of a senior member of the public prosecution service. This was obtained fairly readily through good contacts within the research team. We obtained the consent of the Head District Prosecutors in NethCity and NethTown and our research proposal was scrutinized and approved by the research institute of the Ministry of Security and Justice. We were further assisted by the fact that one of our researchers had
already undertaken a placement with the police in NethTown. This had gone well and the researcher had also made good contacts there, smoothing the path for our own research.

Both researchers were required to be screened and to sign a confidentiality agreement with the police. Once these formalities were completed, researchers were granted full access to the entire police station and they were also allowed to consult all case-related and other police records. Access was granted to observe all aspects of custody, including interrogations.55

Researchers spent 10 weeks observing in NethTown and 11 weeks spread over the period of three months in NethCity.

There is much less specialism in criminal work at the police station in Dutch lawyers’ practices compared with England and Wales, and Scotland. Even though specialized criminal firms existed in both NethCity and NethTown, the turnover of police station work in these firms was too small to ensure that researchers were able to collect a sufficient amount of data. In practically every law firm in the Netherlands lawyers participate in the duty lawyer scheme, whether or not they are specialized. Therefore, we thought it more productive for the researcher to be attached to the duty lawyer scheme. (This was our approach in France for the same reason.) Negotiations therefore had to be conducted with each individual lawyer attached to a duty scheme. In NethCity, a letter of support was obtained from the head of the local Bar and in NethTown a similar letter was sent by the country supervisor, who herself was a criminal defence lawyer. This was then followed up by contacting each lawyer by e-mail and telephone. Around half of the lawyers we approached agreed to be accompanied by a researcher.56

The most common reason for not wanting to co-operate was that contacting and waiting for a researcher was inconvenient (although the researcher was available to attend at 15-minutes’ notice). Some lawyers said they were unable to inform the researcher in advance, because they had other personal or work commitments on the duty day and planned to undertake police station visits in between, if such commitments would allow. This is interesting evidence of the low priority afforded police station work by some Dutch lawyers. Although lawyers were informed of the researcher’s confidentiality obligations, and that the client’s consent was a necessary pre-condition to observations, several lawyers were concerned that the researcher’s presence would breach lawyer-client confidentiality.

Researchers spent six weeks observing lawyers in NethCity and seven weeks in NethTown respectively.

55 Researchers obtained a visitor’s pass that allowed them to move freely around the relevant departments.
56 In practice, access was denied to some sensitive interrogations (e.g., vulnerable juvenile suspects) or when it was inconvenient (e.g., when an interrogation took place in a small room and there were already four people present, including the suspect).
57 More lawyers in NethCity agreed to co-operate with our research than in NethTown, perhaps because of the more official status of the letter of support from the Bar in NethCity.
Annex 8 shows the number of interviews conducted with police and with lawyers, and the number of cases observed with police and with duty lawyers.

7.4. Scotland

Negotiations took place between the country supervisor and a Chief Superintendent and then a meeting was held with a Superintendent at force level together with the researchers. Meetings also took place with liaison officers at each of the police stations where the research was carried out. No additional data assurances were required beyond those already set up within the project. Researchers were required to wear visitor passes and to be accompanied at all times outside the custody suite. They were given access to custody records in order to gather case information. Likewise, at the SLAB Solicitor Contact Line, our researcher had full access to the facilities and computer network to read case files and standard documents.

The major difficulty that we encountered in the police station observations was access to interrogations. Despite many e-mails, telephone calls and meetings with the Superintendent responsible, the police were not prepared to authorize our presence during the police interrogation of suspects as this required permission of the Crown Office. Unfortunately, the Crown Office did not consider it appropriate for researchers to be present during interrogations as the content of these may be used as evidence at trial and they did not want details to be recorded in our notes. This concern is, of course, a consideration in observations of arrest and custody procedures as well as interrogations, but need not prevent researchers collecting data. They cannot be compelled to disclose their field notes and ethically, they must not do so. However, despite several requests, we were not provided with a liaison contact at the Crown Office in order that we might allay these fears. We tried, once again, to obtain access when posted with SLAB in a different court area, but again were refused access for the same reason.

Observations in ScotCity took place over a three-month period with a one week break. Observations in ScotTown took place over a two-month period.

As noted above, we had little success in negotiating access to allow researchers to be based in law firms. The limited opportunity for observations was largely due to the current arrangements for the provision of legal advice during police detention in Scotland. Many firms have few solicitors, who are very busy. Many solicitors, as our research and the statistics demonstrate, do not, or are not able to attend police interrogation of suspects. Rather, they consider that the strategy of advising suspects to make 'no comment' removes any real need for a solicitor to attend the police station. It may be, therefore, that the firms we contacted did not consider accommodating researchers a priority during our observation period, or that they did not conduct enough police station work to want to discuss this with us.

We were able to spend six days with a firm of solicitors in ScotTown, but this involved mostly court observations, with only three police station cases observed. We were unable to conduct observations with any lawyers in ScotCity although we
were able to carry out interviews. However, we were able to spend six days observing the SLAB Solicitor Contact Line lawyers, who serve as the main legal advice provider and who co-ordinate solicitor access across Scotland. Our sample in Scotland is, therefore, heavily weighted towards police station observations, though we were able to interview lawyers in all three sites.65

Annex 8 shows the number of interviews conducted with police and with lawyers, and the number of cases observed with police, with lawyers in private practice and with SLAB.

8. The Fieldwork Data

Police station observations centred on the researcher spending time with the officers responsible for booking in suspects, notifying them of their rights, contacting lawyers and interpreters and interrogating suspects. Where possible, researchers adopted a case-centred observation strategy, following one suspect from the beginning of the booking-in process. By doing so, they were able to gather the maximum amount of contextual information relevant to the decision-making process in a given case. Researchers were able to consult custody records and case files and, during quieter periods, to talk to officers about their views of the custody process and suspects’ rights, their relationships with lawyers and interpreters, and other matters relevant to the study.

Observations were carried out during the week and at weekends, during the day and into the late evening. Researchers completed case pro formas for each case observed, providing quantitative data that focused on key rights and how they were administered. The bulk of the data, however, was contained in field diaries, where researchers detailed what they observed. This included records of interrogations, informal interviewing, records of conversations regarding custody, and observations of decision-making processes and of suspects being booked in to the police station.

Researchers were made welcome at the police station and were soon accepted within the police environment. Negotiating access at a senior level meant that officers on the ground had been informed of our study, avoiding any awkwardness or need for explanation or justification.66 The majority of officers were open in their discussion of individual cases and of their work in general and often offered

65 Our sample includes 103 police case records, but just 13 lawyer case records. We interviewed 9 lawyers and 12 police in Scotland.

66 Interestingly, this did happen in France on the first occasion that the researcher accompanied a lawyer to the police station. The researcher’s presence was challenged and the gendarmerie checked the authorization provided by the senior prosecutor with his superior. There were no difficulties after this.
additional information that they thought might be useful to the researcher. In some instances, researchers were also invited along to social events.

The nature of our observations differed slightly between jurisdictions, reflecting the differences in the custody procedure. For instance, in the Netherlands — unlike in England and Wales and in Scotland, where the decision-making process regarding detention centres on the figure of a custody officer — the decisions and actions concerning suspects in custody are taken by various types of officers located in different areas of the police station. Thus, in the Dutch sites researchers spent a lot of time circulating between the different departments to find out about the next steps of the case and to locate the relevant officers. At times, this was challenging for the police themselves, and they would ask the researchers to act as messengers to transmit the necessary information to another officer or department, or to clear up misunderstandings. One typical example was organizing the attendance of a lawyer, which may require co-ordination between three different officers. In contrast, almost all the researchers' time in Scotland was spent located in the custody area and back office since we were unable to attend the interrogations. This made it difficult to follow cases through, but we were able to access the custody records to discover case outcomes, speak to arresting officers after the interrogation had been conducted and speak with custody officers during quiet times and their breaks about what we observed.

Arrangements for accompanying lawyers varied, as noted above. In EngCity, for example, the researcher was based with a firm of lawyers. He attended the office each day and as calls came in, he went with lawyers and accredited representatives to the police station. This provided plenty of time to discuss the cases and wider issues related to the lawyer's role, such as their approach to advice and their relations with the police. It also allowed the researcher to develop a relationship of trust with the lawyers, and to follow up on nuances and inconsistencies of what was observed. In the French and Dutch sites, however, the researcher was attached to the lawyers' duty rota. This was a less ideal arrangement than in England and Wales, but it was most efficient for these jurisdictions for the reasons explained above in sections 7.2 and 7.4. In the French and Dutch sites, researchers were on call each day, waiting to be contacted by the duty lawyer. Each day this was a different lawyer, who researchers usually had not met before. When researchers received a call, they then travelled to the police station and met with the lawyer there. Thus, the encounters with lawyers were often short and limited to the police station attendance. The arrangements for contacting researchers worked reasonably well, but sometimes lawyers failed to let the researcher know about a particular case, because they forgot; or they believed that it was too late to call; or that the case was not sufficiently interesting; or because they wished to attend immediately and could not wait for the researcher's arrival. Besides, as noted in section 7.3 above, some lawyers

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This was despite the fact that the main custody area in England and Wales and in Scotland, is monitored through CCTV.
in the Dutch sites refused to let the researcher accompany them at all. On the other hand, many French and Dutch lawyers were enthusiastic about the research and were willing to spend additional time with the researcher.

As with police observations, case record data was collected on the pro formas, and observations were recorded in field diaries. Researchers were able to make a record of the conversations between lawyers and suspects during the private consultation, and the interrogation by the police, and also conversations between lawyers and police officers. They observed what information was disclosed, how lawyers approached securing case-related information, and the nature of the relationships between police and lawyers. They also recorded information about the lawyers – their work experience and their approach to their job.

All field notes were written up regularly and posted on the secure website in order that supervisors (and indeed the rest of the team) could read these and provide feedback and, where needed, a steer on gathering further information. This was sometimes quite minor – a reminder to record the length of time lawyers spent in consultation with the suspect, for example. In some instances, the researcher had the required information, but had not thought to record it until the supervisor asked about it. For example, whether lawyers in France read the interview record before signing it; or whether a commercial lawyer was acting as duty lawyer through choice, to build their business, or because it was required. Sometimes, specific information was sought. For example, in Scotland, following discussion of the weekly progress with the supervisor, researchers spent some time locating the written notification of rights and asking officers whether this was utilized; asking officers their opinions regarding the Solicitor Access Recording Form (SARF), which led to provision of documentation by the police and assessment of its effectiveness; and finding out what information was available to assist foreign suspects. In England and Wales, researchers were directed to explore further how lawyers approached obtaining disclosure form the police, and the issue of whether an out-of-court disposal was possible.

For the reasons set out above, we were not able to gather data on identical numbers of cases in each jurisdiction. The size of field sites differed slightly, and the workload was unpredictable, varying at different times of the year. For example in EngCity, observations at the police station were carried out in the summer, when arrest rates are often low, and this was exacerbated by the fact that it was a very rainy summer, which appeared to affect crime and so arrest rates. The custody suite was also unexpectedly closed for a week for refurbishment. The difficulties we encountered in Scotland (where we could not attend interrogations and observed very few lawyers), and with the police in France (where we were unable to base researchers in the police station), also affected the amount of data gathered. We were very aware of this when writing-up the research. Whilst we gathered further
interview data, this was able to compensate to only a limited extent;21 the nature of the information obtained through observations is different, and ultimately more reliable.

9. Approaches to Data Analysis

This research project was both ambitious and ground-breaking as a comparative empirical study of four different jurisdictions, from the perspective of both the police responsible for suspects in custody and the lawyers who provide advice to those suspects. We chose to carry out observations in order that we could gain a real insight into the daily routines of police and lawyers. This provided a rich source of data, but also a large amount of qualitative data to read, analyse and write up.

We did not wait until the end of the fieldwork to begin data analysis. In addition to regular discussions of our findings through fortnightly conference calls, the project team and researchers met in London in June 2012. Everyone read the field data collected up to this point - both observations and interviews - and researchers presented a short overview of their preliminary findings. This was very productive, providing the opportunity to discuss the significance of findings, to query inconsistencies and to ask questions to understand better the nuances of daily routines and practices. The different backgrounds and experiences of the project team, including the researchers, meant that observations and preliminary findings were naturally interrogated from comparative perspectives. For example, the role of the prosecutor in the Netherlands was of particular interest to lawyers from England and Wales (where there is greater separation between the police and the prosecutor) and even more so when it emerged that the Assistant Prosecutor was in fact a senior police officer.

We also identified broad themes emerging from the data, such as the differences in Scotland between younger police officers (who were generally more adversarial in their approach) and more experienced officers (who tended to accept the value of suspects' rights, or at least see them in more neutral terms); or the social distance between police and lawyers in the Netherlands, which seemed to reinforce the differences between them; the different way in which new and 'repeat' clients were treated by advisers in England and Wales; and the recognition of the need for specialist lawyers in GAV in France (for example in relation to juveniles), despite the lack of specialist within the profession more generally.

The chapter on legal assistance (later to become Chapters 6 and 7) was initially drafted in August 2012 to serve as an example of how we might present our data and develop key findings and themes.

21 We were also able to check queries as to practice with other police contacts. Again, this provided some insight, but could not replace sustained and systematic observations of day-to-day operations.
A second meeting took place in Maastricht in November 2012, this time focusing more strongly on the data analysis. We began with an introductory session on the structure of the book and how we would use the various data sources. We ended with sessions on the themes for comparative analysis and how to approach linking the empirical findings with the training materials, and the organization of the pilot training. The bulk of our two days, however, was spent discussing the outlines of the four (now five) main data chapters.

During the course of the fieldwork the members of the project management team each took primary responsibility for one jurisdiction. This 'vertical' approach meant that each of us had a good knowledge of the operation of all of the rights in our study in one jurisdiction, having read most of the data gathered and provided feedback to the researcher in the field. Based on this, we prepared an overview of the findings relating to each of the rights, for each jurisdiction and circulated these in advance. The second stage was a 'horizontal' approach. In preparation for the November 2012 meeting, the team members each prepared an outline of the data findings in relation to either the right to interpretation, the right to information, the right of access to a lawyer, or the interrogation. These were discussed, and the primary themes identified, along with issues around the inter-relationship between rights, and they formed the basis of the five main data chapters. In this way, we each also developed a 'horizontal' analysis of one topic across all four jurisdictions. The combination of both vertical and horizontal analysis meant that the whole team was able to contribute to and critique each chapter.

The final project conference took place in May 2013. We presented our preliminary findings, including some of the quantitative data analysis, to an audience of practitioners, academics, NGOs and policy makers. The feedback we obtained was useful in the final writing stages and in the development of our training materials. The summer of 2013 was dedicated to writing the report of our results in the form of this monograph. We each took the lead on one or more chapters, then circulated the draft to the rest of the team who commented in turn. This was an intense period of time, with blocks of writing time peppered with e-mail discussions and conference calls about specific points such as the correct balance between setting out the law and the data against which it was to be measured, or how many examples from the fieldwork to provide.
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Verhoeven & Stevens 2013
Chapter 3

THE CONTEXT: AN OVERVIEW OF SUSPECTS' RIGHTS IN ENGLAND AND WALES, FRANCE, THE NETHERLANDS AND SCOTLAND

1. Introduction

The aim of this chapter is to describe the context and scope of suspects' rights in the four project jurisdictions, by providing an overview of the characteristics of the criminal process in each jurisdiction, and an account of the way in which those suspects' rights that are central to this study have been given shape. This is not intended to be a complete and comprehensive overview, but one tailored to facilitate an understanding of the implications of the findings of the fieldwork. As explained in Chapter 1, when the project began in June 2011, France, Scotland and the Netherlands had just gone through a process of digesting the consequences of the Saldus judgment of the ECHR and adjusting their criminal procedure to the newly established right of access to a lawyer before and during police interrogation, whilst in England and Wales this right had been in existence since the introduction of PACE in 1986. Shortly before, and during, the research period, procedural safeguard standards were developed through the EU directives on the right to interpretation and translation, adopted on 10 October 2010, and on the right to information, adopted on 22 May 2012. During the time that the project ran, the proposal for an EU directive on the right of access to a lawyer was negotiated. As a consequence,

1 Chapter 1, section 1.
2 The Police and Criminal Evidence Act (PACE) 1984, which was brought into effect in January 1986.
5 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to
the empirical research that took place from November 2011 until March 2013 – in France, Scotland and the Netherlands – was embedded in practices that were undergoing reform or which were at least influenced by these (sometimes prospective) European developments.

As the empirical research focused on the implementation in practice of European and domestic regulations concerning the procedural rights of suspects in police detention, the status quo had first to be established. For each jurisdiction, data on the relevant legal provisions concerning the position of suspects in the phase of police interrogation and custody were collected, including their recent history, interpretation, application, and remedies for breach.

This chapter is based on the desk reviews that preceded the empirical research to inform and prepare the fieldwork phase with information on the regulations and practices in each criminal jurisdiction. The overview that is provided here is structured to facilitate comparison between the jurisdictions on the relevant provisions and issues and to provide background information for the analysis of the empirical findings in the chapters that follow. For each country the information is provided in the same order, with corresponding paragraphs indicating the topics. The account of each jurisdiction will begin with a short description of the general features of its criminal procedure system and the regulation of arrest and pre-trial detention. Subsequently, the rights of suspects in police detention during the period that the observations took place, are briefly set out. At the end of the account in respect of each jurisdiction, information is added regarding any changes that took place after the conclusion of fieldwork in the respective country.

2. England and Wales

2.1. What Does the System Overall Look Like?

The English and Welsh system of criminal procedure is rooted in the adversarial tradition. Historically, a number of principles and rights have been justified on the basis that they helped to counter the imbalance caused by the fact that the state, in the form of the police and prosecution, has resources and powers that are not available to individual suspects and defendants: the presumption of innocence; the

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8. In the Netherlands observations took place in the period from January 2012 until January 2013. In England and Wales, observations took place between January and October 2012, while in Scotland the field work was carried out from February until August 2012. In France, observations took place in May-June 2012 and February-April 2013. For an overview, see Annex 9.
burden of proof on the prosecution; the ‘right to silence’; the principle that the accused has the right to adduce any relevant evidence at trial.\(^8\)

There is no investigating judge in England and Wales. Criminal investigation is, for most crimes, the exclusive responsibility of the police. The police were traditionally also solely responsible for the decision to charge and prosecute. The establishment of the Crown Prosecution Service (CPS) in 1985 transferred prosecution decisions from the police to the CPS. Legislation in 2003 gave Crown Prosecutors (CPs) the responsibility to decide whether or not to charge a suspect in respect of all but the most minor offences. It was also intended that CPs should become more involved in advising the police on their investigations. However, the policy of the current coalition government is to return more charging decisions to the police.

There is a guilty plea system, and if the defendant pleads guilty the court will be provided with a summary of the written evidence gathered by the police during the investigative stage, in order to verify that the ingredients of the offence are made out and to assist with the sentencing decision. Most cases where a person is charged with an offence are dealt with by way of a guilty plea, and the court deals only with procedural issues, such as bail, and with sentence. If the accused pleads not guilty, a trial will be conducted before a professional judge or, more usually, lay magistrates if the case is tried summarily in a magistrates’ court. Lay magistrates sit as a tribunal of fact and law, assisted by a legal clerk. More serious cases are tried in a Crown Court, presided over by a judge sitting with a jury. Broadly, the judge makes decisions of law and the jury decisions of fact. It is for the prosecution and defence to determine what evidence to adduce at trial, and judges have only a limited power to call evidence on their own account.\(^9\)

The police and CPs have extensive powers to deal with cases by means of out-of-court disposals, and around a quarter of cases where some formal action is taken result in an out-of-court disposal rather than a charge.\(^10\)

The British government has opted in to the EU Directive on the right to interpretation and translation and the EU Directive on the right to information,\(^11\) but during the period of the research project had not introduced any legislative measures to ensure compliance with them.\(^12\) It has not opted in to the Directive on the right of access to a lawyer.

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\(^8\) See Cape et al. 2010, p. 109-114.
\(^9\) See generally Hooper & Omerod 2012.
\(^10\) The proportion of cases dealt with by out-of-court disposals has reduced significantly in the past few years, see Ministry of Justice 2012.
\(^11\) Under the TEU Protocol 21 the UK is not bound by measures concerning the area of freedom, security and justice unless it opts in to them.
\(^12\) PACE Code of Practice C was amended with effect from 27 October 2013 in order to comply with the Directive on the right to interpretation and translation at the investigative stage.
2.2. Status at Trial of Evidence Obtained at the Investigative Stage

Where a suspect is charged with a criminal offence, the police submit the investigatory material (statements of witnesses, expert reports, etc.) to the Crown Prosecution Service. This is quite a complex process, and the CPS may only receive materials that the police regard as relevant to the prosecution, and a list of other investigatory materials. All material gathered in the investigation is potential evidence, but it is up to the CPS to decide which evidence to use at trial. The basic principle is that investigatory material only amounts to evidence if it is adduced at trial, and a court can only take into account evidence that is adduced at trial in determining guilt. The principle of orality means that, generally, evidence of witnesses must be given at court, although there are exceptions where the defence agrees to written statements being adduced, or where (for reasons such as death of the witness, or where the witness is in fear) evidential rules permit written evidence to be adduced. Records of police interrogations of the accused are generally admissible in evidence, in both written and audio or visual format (subject to certain exclusionary rules). Inferences from 'silence' in police interrogation are, broadly, permitted, but not where a suspect requested legal assistance, and was interviewed without being given the opportunity to consult a solicitor. The accused may conduct their own investigations, although given lack of resources and investigatory powers, this is generally limited in practice.

2.3. How Does Police Detention and Interrogation Work in Terms of Power and Responsibilities?

2.3.1. Authority to Stop and Detain

The police power to stop and search someone without arresting them is conferred by PACE 1984 part I, and a range of other legislation. Stop and search powers are of two types; those that require reasonable suspicion and those that do not. The main stop and search power requiring reasonable suspicion is that under the PACE 1984, part I, supplemented by Code of Practice A. A police officer must have reasonable grounds for suspecting that the person is in possession of stolen property or prohibited articles (for example, an offensive weapon), must inform the person of the grounds for the search, and must make a written record. If the search provides grounds for arrest, the officer may place the person under arrest. The police have

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13 See generally Hooper & Ormerod 2012, s. F16. See also ECHR 15 December 2011, Al-Khansha and Talley v. UK, Nos. 26766/05 and 22228/06.
14 S. 11 and 18 PACE 1984.
15 S. 34, 36, and 37 Criminal Justice and Public Order Act 1984, see also Hooper & Ormerod 2012, s. F19.
16 See further in respect of powers and obligations referred to in sections 2.3.1 to 2.3.4 Hooper & Ormerod 2012, s. D1. Approximately 10 per cent of stops and searches result in an arrest, and
broad powers to arrest a person they suspect of a crime. Once arrested, the suspect must normally be taken to a police station as soon as is practicable, where a custody officer (a police officer of the rank of sergeant or above) may authorize their detention for the purpose of investigation and/or questioning. The police are not under an obligation to inform a CP of the detention of a suspect although in more serious or complex cases they may liaise with a CP. The initial maximum period of detention without charge is 24 hours from the time of arrival at the police station, but where a person is detained for an indictable offence (broadly, an offence that may be tried in a Crown Court), this may be extended to 36 hours on the authority of a senior police officer, and to a maximum of 96 hours on the authority of a magistrates' court. Where a person is arrested on suspicion of terrorism, the initial maximum period is 48 hours, and this may be extended to 14 days on the authority of a court. The charge decision is (subject to exceptions) made by a custody officer in respect of minor offences, and a CP in respect of more serious offences. The police have no power to detain a witness (although in practice the level of suspicion for arrest for an offence is low, so that witnesses are sometimes arrested).

Once a person is charged with a criminal offence, they must be released on bail (which may be subject to conditions) pending their first court appearance unless one or more of several statutory grounds for detention are satisfied. Whether or not they are released, their first appearance in court should normally be no later than the first sitting of the relevant magistrates' court after they are charged. If the case is not completed on the date of the first court appearance, the accused must normally be released on bail (which may be subject to conditions), but a court has power to remand them in custody if the statutory conditions are satisfied. Where an accused is remanded in custody, the trial must normally commence within 70 days (in the case of a magistrates' court trial) or 182 days (if before the Crown Court).

the low 'success' rate has prompted the government to review stop and search powers (see Home Office 2013b).
18 S. 30 & 37 PACE 1981.
20 S. 41 PACE 1984.
22 S. 41 and sch. 8 Terrorism Act 2000.
23 See generally, Hooper & Ormerod 2013, section D2.
24 For example, the accused's name or address cannot be ascertained or verified, or the custody officer has reasonable grounds for believing that the accused will commit further offences, will abscond, or will interfere with the course of justice (s. 38 PACE 1984).
26 Bail Act 1976.
2.3.2. Criteria for Detention

Statute provides that an arrested person may only be detained without charge if this is necessary to secure or preserve evidence or to obtain evidence by questioning of the suspect.27 This decision is made by a custody officer. Research suggests that custody officers rarely, if ever, refuse to authorize detention.28 Where a custody officer has before them sufficient evidence to charge, then either a charge decision must be made or the person must be released.29 However, the expression 'sufficient evidence to charge' is flexibly interpreted so that in practice the police may continue to detain a suspect (subject to the maximum time limits) even if they have sufficient evidence to give a realistic prospect of conviction. Conversely, in some circumstances a person may be charged even if this evidential threshold has not been met.30

2.3.3. Minors

The minimum age of criminal responsibility is 10 years so strictly a child under 10 years should not be arrested or detained in respect of a criminal offence.31 A suspect who is at least 10 years, but who appears to be under 17 years, must be treated as a juvenile.32 Since the fieldwork for the project was completed, the High Court has determined that the treatment of 17 year olds as adults is contrary to the ECHR Article 8.33

Juveniles are subject to the same detention regime as adults, but their parent (or guardian) must be notified and an appropriate adult (which may be a parent, social worker or other adult) must be asked to come to the police station.34 Generally, in the case of a juvenile, no investigative action involving the juvenile (e.g. interviewing, fingerprinting, etc.) may be carried out in the absence of an appropriate adult.35

2.3.4. Records

A custody record must be opened for each person who is arrested and detained at a police station.36 All significant events must be entered in the record, and a suspect or

27 S. 37(1) & (2) PACE 1984.
28 Although the research was conducted in the mid-1990s. See Phillips & Brown 1998, p. 49.
30 See Cape 2011, p. 58-60.
31 S. 50 Children and Young Persons Act 1933.
33 R (HC) v. Secretary of State for the Home Department [2013] EWHC 982 (Admin), and this is reflected in a revised Code of Practice C which took effect on 27 October 2013.
34 S. 34 Children and Young Persons Act 1933 and Code of Practice C, para. 3.13.
35 See Cape 2011, Chapter 11.
36 Code of Practice C, para. 2.1.
their lawyer has a right to ‘consult’ it whilst the person is in police custody, and is entitled to a copy of it following charge or release.\textsuperscript{30} The custody record may be adduced in evidence.

Generally, all police interviews are audio-recorded and, in some cases, video-recorded. If charged, the accused is entitled to a copy of the recording.\textsuperscript{38} A recording of an interview, or a summary or transcript of it, may be adduced in evidence.

2.3.5. How Many Police Detentions of Suspects Each Year? Is this Stable?

In 2009-2010, a total of 1.4 million people were arrested for recordable offences, but the annual arrest rate has since declined to 1.2 million in 2011-2012, the lowest number since 1999-2000.\textsuperscript{39} National statistics on the numbers of arrested people who are detained at police stations are not routinely kept (although it is likely that most of those arrested will also be detained at a police station), and neither are statistics on the lengths of those detentions. The overall number of persons detained for more than 24 hours (up to a maximum of 96 hours) under PACE and subsequently released without charge was 4,224 during 2009/10, and this figure increased to 4,420 in 2011-2012.\textsuperscript{40}

2.4. What Rights Does the Suspect Detained in Police Custody Have? At what Point Do the Rights Apply?

2.4.1. External Supervision

There is no external supervision of the investigative process or of police detention of suspects (although there are various lay visiting and inspection regimes).\textsuperscript{41} CPs have no supervisory role in respect of police investigations, though once assigned to a case, either to make a charging decision, or post-charge in order to build the case for court, prosecutors will liaison with the police about making further enquiries to support a charge.

\textsuperscript{37} Code of Practice C, para. 2.4. In July 2012 the term ‘consult’ was replaced by ‘inspect’ in order to make clear that the suspect or their lawyer has a right to see the custody record rather than simply be told what it contains.

\textsuperscript{38} Codes of Practice E and F.

\textsuperscript{39} Home Office 2013a.

\textsuperscript{40} ibidem.

\textsuperscript{41} ‘Custody visiting’ by lay people is governed by the Police Reform Act 2002, and Her Majesty’s Inspector of Constabulary conducts inspections of custody facilities (for details see <www.hmic.gov.uk/inspections/joint-inspections/joint-inspection-of-police-custody-facilities/> (last visited 2 October 2013)).
2.4.2. Right to Know Reason for Arrest and Detention

Statute provides that a person must be informed of the fact of, and reason for, arrest on being arrested or as soon as practicable afterwards. An arrest is unlawful if this is not complied with.\textsuperscript{42} On being detained at a police station, a suspect must be informed of the grounds for detention.\textsuperscript{43} Research from the 1990s suggests that this consists of little more than reciting one or both of the statutory grounds for detention.\textsuperscript{44}

2.4.3. Information on Rights; Letter of Rights

When a person is arrested they must be cautioned (that is, informed of their right to silence and the consequences of exercising it).\textsuperscript{45} Where a police officer has decided to arrest a person, they must normally not be questioned except at a police station.\textsuperscript{46} However, a person may be questioned without being taken to a police station if the officer has not decided to arrest them (for example, when they are stopped and searched (see section 2.3.1 above), and in these circumstances they must be cautioned before being questioned about an offence of which there are grounds to suspect them.\textsuperscript{47} A person who is cautioned in these circumstances must also be told of their right to free legal advice, and be given a copy of a notice explaining the arrangements for obtaining it.\textsuperscript{48}

When a custody officer authorizes detention of a person arrested and taken to a police station, they must inform the suspect – orally and in writing – of their right to consult a solicitor (and the fact that it is free of charge), the right to have someone informed of their arrest, and the right to consult the Codes of Practice, and that this may be exercised at any stage during the period of custody.\textsuperscript{49}

The suspect must also, at the same time, be given a written notice (a Letter of Rights) that lists and describes the arrangements for obtaining legal advice, the right to a copy of the custody record, and the caution. Guidance provides that the notice should also include information on entitlements including:

- visits and contact with outside parties, including special provisions for Commonwealth citizens and foreign nationals;
- reasonable standards of physical comfort;
- adequate food and drink, and

\textsuperscript{42} S. 28 PACE 1981.
\textsuperscript{43} S. 37(5) PACE 1984.
\textsuperscript{44} Phillips & Brown 1998, p. 49.
\textsuperscript{45} Code of Practice C, para. 10.3, which also sets out the terms of the caution.
\textsuperscript{46} Code of Practice C, para. 11.1.
\textsuperscript{47} Code of Practice C, para. 10.1.
\textsuperscript{48} Code of Practice C, para. 3.21, as amended in May 2012.
\textsuperscript{49} Code of Practice C, para. 3.1.
• access to toilets and washing facilities, clothing, medical attention, and physical exercise where practical;

and should also mention:

• provisions relating to the conduct of interviews, and
• circumstances in which an appropriate adult should be available to assist the detainee, and their statutory rights to make representations whenever the period of detention is reviewed.

In addition, at the commencement or re-commencement of any interrogation, the suspect must be cautioned and reminded of their right to free legal advice (and that the interrogation may be delayed to facilitate this).

2.4.4. Right of Access to the Case File and Disclosure at the Investigative Stage

At the investigative stage the police are under no obligation to give disclosure of the evidence gathered to either the suspect or their lawyer. In practice, where a suspect has a lawyer, the police often do provide some information to the lawyer about the evidence prior to a police interview, although it appears that they do not normally provide such information to unrepresented suspects. The police consider what information to divulge, having regard to whether this may lead to admissions being made or whether it may make adverse inferences from 'silence' more likely (see section 2.4.6 below). There is no right for the defendant or his lawyer to inspect the investigator's file or to read witness statements.

2.4.5. Legal Assistance

If the suspect requests a lawyer, the police must generally contact the Defence Solicitor Call Centre (DSCC) as soon as is practicable. If the suspect wishes to pay privately, the DSCC will contact the nominated solicitor. Otherwise, if the case comes within the CDG Direct Scheme (generally minor offences where the police do not intend to interview) the DSCC contacts CDG Direct, and the suspect can then only receive advice by telephone. In other cases, the DSCC contacts the solicitor requested by the suspect (but only if the solicitor's firm has a contract to deliver

50 Code of Practice C, paras. 10.1 & 11.2.
51 Confirmed in R v. Imran and Husain [1997] Crim L.R. 734. The only exception is where the police intend to conduct an identification procedure, in which case they must give to the suspect or their solicitor a copy of the record of the description of the 'suspect' as first given by a potential identifying witness (Code of Practice D, para. 3.1).
54 S. 58(1) PACE 1984 and Code of Practice C, para. 6.5.
legal aid services) or the duty solicitor. There is no set time that the police must wait for a solicitor, but generally (subject to limited exceptions) they cannot interview the suspect until the suspect has consulted with a solicitor. In the case of delay by the solicitor, the police may ask the suspect if they wish to consult another solicitor, or if they are willing to go ahead without a solicitor. The right to consult a solicitor includes the right to have the solicitor present when the suspect is interrogated (unless one of the exceptions applies; see below). There are no special rules for juveniles, except that an appropriate adult may request legal assistance on the suspect's behalf. The police may delay access to a solicitor, for up to 36 hours from the time of arrival at the police station, by a suspect who is detained in respect of an indictable offence (that is, an offence that may be tried in the Crown Court) where this is authorized by a police officer of the rank of superintendent or above. A superintendent may only authorize this if they have reasonable grounds to believe that contact with the nominated solicitor will lead to interference with the investigation (for example, by interfering with or harming evidence, by alerting other suspects or by hindering the recovery of property). There are similar provisions that apply to terrorist suspects, although in that case, the period of delay may be up to 48 hours from the time of arrest. If an interrogation is conducted in such circumstances, inferences cannot normally be drawn from 'silence' (see section 2.4.6 below). Case law has limited the application of the provisions for delaying access to legal advice, and it would seem that the power is relatively rarely used.

In practice, legal assistance is often given by representatives rather than solicitors, and the term 'solicitor' is defined to include representatives for most purposes at the investigative stage. Generally, a representative must be accredited (i.e. they must have passed a test of knowledge and competence), although there is provision for advice to be given by 'probationary representatives' in all but the most serious cases. There are limits on the length of time for which a representative can act as a probationary representative (in order to ensure that the accreditation requirements

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53 See Code of Practice C, Note for Guidance 6B.
54 Code of Practice C, para. 6.6.
55 An interrogation may only go ahead in these circumstances if authorized by a police officer of the rank of inspector or above (Code of Practice C, para. 6.5).
56 Code of Practice C, para. 6.8.
57 Code of Practice C, para. 6.9.
59 Sch. 8 Terrorism Act 2000.
62 Code of Practice C, para. 6.12.
cannot be circumvented). Accredited representatives may be employed by law firms, although law firms may also make use of self-employed representatives.

2.4.6. Right to Silence

The caution referred to in section 2.4.3 above is as follows:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.

The wording of the caution reflects the fact that whilst, in principle, a suspect has a right to silence, ‘proper inferences’ may be drawn if an accused relies on facts at trial which they did not tell the police about on being questioned under caution or on being charged, provided that it is reasonable to expect them to have mentioned them. There are no special rules for juveniles in relation to these provisions. The legislation on inferences from ‘silence’ is complex, and the case-law is extensive, but whilst a person may not be convicted on the basis of an inference alone, an inference may involve the conclusion that the accused did not, at the time of questioning, have an innocent explanation to give, or none that would stand up to scrutiny.

2.4.7. Right to Medical Examination

When a suspect is detained at a police station, the custody officer must carry out a risk assessment, which includes an assessment of whether the suspect is in need of medical attention. If a suspect appears to be suffering from a physical illness or from a mental disorder, is injured, appears to need clinical attention, or asks for a medical examination, the custody officer must ensure that they receive appropriate medical attention. The custody officer must also assess whether a suspect is fit to be interrogated prior to any interrogation. There are no special rules for juveniles.

2.4.8. Right to Have Someone Informed of Detention

Statute provides that an arrested person who is detained may require that a friend, relative, or other person who is known to them or who is likely to take an interest in

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48 For an analysis of the inference provision, and relevant case-law, see Hooper & Ormerod 2013, s. F19.9-F19.40
49 Code of Practice C, para. 3.6-3.10, and H.
50 Code of Practice C, para. 12.3 and Annex G.
their welfare, be informed of their detention (subject to limited exceptions). Where
the suspect is a juvenile the police must, in addition, notify the juvenile’s parent or
guardian and request an appropriate adult to attend the police station.

2.4.9. Right to Interpreter/Translation

The Letter of Rights should be available in Welsh, the main ethnic minority lan-
guages and the principle European languages. In practice the Letter of Rights
(notice of entitlements) is available in 54 languages. If a suspect appears to be deaf
or there is doubt about their hearing or speaking ability or their ability to under-
stand English, and the custody officer cannot establish effective communication, the
custody officer must call an interpreter as soon as practicable. Where a suspect has
difficulty understanding English, the police interviewer does not speak the sus-
pect’s language, and the suspect wants an interpreter, the suspect must not (subject
to limited exceptions) be interviewed in the absence of an interpreter. Where a
suspect requests legal advice and cannot communicate with the lawyer, an inter-
preter must be called. There is no explicit right for a separate interpreter for the
lawyer-client consultation, but the Law Society has issued a practice note which
states that the lawyer should use a different interpreter if the interpreter arranged
by the police cannot meet all of the client’s needs, there are multiple suspects, or the
client knows the interpreter arranged by the police.

Interpreters should be drawn from the National Register of Public Service
Interpreters or the Council for the Advancement of Communication with Deaf
People Directory of British Sign Language/English Interpreters ‘whenever possible’. The NRPSI maintains a register of ‘professional, qualified and accountable
public service interpreters’. All interpreters are subject to a Code of Professional
Conduct, and a criminal records check, and the Register may investigate any alleged
breaches of the Code. The Register is currently made up of the names of over 2,200

71 S. 56 PACE 1984. This may be delayed for up to 36 hours if authorized by a police officer of
the rank of inspector or above. Authorization may be given if the officer has reasonable
grounds for believing that informing such a person will lead to similar consequences as those
that are relevant to delay access to a lawyer (see section 2.4.5 above).
72 S. 34 Children and Young Persons Act 1933, and Code of Practice C, para. 3.15
73 Code of Practice C, Note for Guidance 38.
74 Available at <www.gov.uk/notice-of-rights-and-entitlements-a-persons-rights-in-police-de-
tention> (last visited 2 October 2013).
75 Code of Practice C, para. 3.1-3.5
76 Code of Practice C, para. 11.1 & 11.18-11.20.
77 Code of Practice C, para. 13.9.
78 Law Society 2012.
79 Code of Practice C para. 13.1.
80 See the website for qualification requirements, <www.nrpsi.co.uk> (last visited 2 October
2013).
interpreters in 101 languages. Interpreters are issued with a photo ID card to prove registration.

2.4.10. Right to Inform Consulate/Embassy

Foreign nationals must be informed as soon as practicable of their right to communicate with their High Commission, embassy or consulate. Any request must be acted upon as soon as practicable.81

2.5. What Are the Remedies for Breach of these Rights?

There are two primary exclusionary evidential rules. The first (s. 76 PACE 1984) provides that where a confession may have been obtained as a result of oppression or in circumstances which are likely to render it unreliable, evidence of the confession must be excluded unless the prosecution can prove that it was not so obtained. The second (s. 78 PACE 1984) gives a judge a discretion to exclude prosecution evidence if, having regard to the circumstances, it would have such an adverse effect on the fairness of the proceedings that it ought not be admitted. Thus breach of legislative provisions or provisions of the Codes of Practice, do not, per se, result in exclusion, but breach may support an application for exclusion under s. 76 or 78 PACE 1984.82

2.6. Do Suspects Request a Lawyer? Conditions for Waiver

Approximately 50 per cent of detained suspects request a lawyer.83 There is no system of mandatory legal advice. The right to consult a lawyer according to s. 58 (1) PACE 1984 is an opt-in rather than an opt-out entitlement. PACE 1984 Code of Practice C paras. 3.1(a) and 3.2 state that the custody officer must inform the suspect about the right to legal advice and provide a written notification of the right to the suspect. There is no obligation on the custody officer to inform the suspect about the consequences of using or not using the right. PACE 1984 Code C para. 3.5 imposes an obligation on the custody officer to ask the suspect to sign the custody record to indicate whether or not they want to obtain legal advice. If a person, on being informed or reminded of their right to legal advice, declines to speak to a solicitor in person, the officer must point out that the right to legal advice includes the right to speak to a solicitor on the telephone. The officer must then ask the person whether the person wishes to speak to the solicitor. If the person declines, the officer must ask the reason why, and any answer must be recorded. However, once it is clear

81 Code of Practice C, paras. 3.3 & 7.1.
82 There is extensive case-law on these provisions. See, for example, Hooper & Ormerod 2013, sections F2 and F17.
83 See Pleasence, Kemp & Balmer 2011; Skinnis 2011 and the references therein.
that the suspect does not wish to speak to a solicitor at all, the officer must cease to ask the person the reasons for the decision.84

2.7. **Extent of Lawyer’s Role**

There is no formal limit on the length of a lawyer-client consultation. A suspect has a right to have their lawyer present in police interrogations, and may consult with the lawyer during an interview in private at any time.85 The lawyer may intervene in an interrogation to seek clarification, challenge an improper question or the manner in which it is put, advise their client not to answer particular questions, or to give advice to their client.86 Defence lawyers generally have no right to participate in an investigation and, in particular, have no right to be present at police interviews of witnesses.

2.8. **Power to Exclude a Lawyer from a Police Interrogation**

The police may remove a solicitor from an interrogation if their conduct is such that the interrogator is unable properly to put questions to the suspect.87 Generally, the decision to exclude can only be made by a senior officer not connected with the investigation, and if the decision is made to exclude the lawyer the suspect must be given the opportunity to consult another solicitor. There is no provision for appeal against such a decision.88 In addition, a representative (as opposed to a solicitor) may be excluded from a police station if an officer of the rank of inspector or above considers that their visit would hinder the investigation. If a decision to exclude a representative is made, the officer must notify the solicitor on whose behalf the representative was acting and give them the opportunity to make alternative arrangements.89

2.9. **Arrangements for Provision of and Payment for Custodial Legal Advice**

A person who is arrested and held in custody at a police station is entitled to legal advice paid for by legal aid. There is no means test.90 This is subject to the limitation

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84 PACE 1984 Code of Practice C, para. 6.5 and Note for Guidance 6K.
85 S. 58(1) PACE 1984.
86 Set out in Code of Practice C, Note for Guidance 6D.
87 Code of Practice C, para. 6.9.
88 Code of Practice C, para. 6.10-6.11.
90 Until April 2013, this was governed by the Legal Aid Act 1999, s. 13, and the Criminal Defence Service (General) (No. 2) Regulations 2001, SI No. 1437, reg. 4 and 5. Since April 2013 it has been governed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 13, and regulations made thereunder.
of telephone-only advice provided by the CDS Direct scheme (see section 2.4.5 above).

Police station legal aid work is largely paid for on a fixed fee basis. The level of fee depends upon the geographical location of the firm providing the service (ranging from £138 to £301 (160 Euro to 350 Euro)), although there is provision for payment for work done at an hourly rate if the work carried out exceeds three times the value of the relevant fixed fee. Telephone advice is paid at the rate of about £31 (36 Euro). The level of fee does not differ depending on the type of case or experience of the lawyer, nor on whether it is provided by a solicitor or a representative, but there is provision for an enhanced fee if work is carried out as duty solicitor. The fixed fee system covers profit costs, travel and waiting time. Disbursements for other services, such as interpretation/translation or medical examination, can also be claimed, provided they can be justified and are reasonable. During the period of the fieldwork, legal aid was administered by the Legal Services Commission, but in April 2013 this was replaced by the Legal Aid Agency, which is part of the Ministry of Justice. The government has proposed that the existing system of contracting for criminal legal aid work be replaced by a system of price competitive tendering (PCT) which, if implemented, would also change the basis for payment of police station work. The government envisages that PCT would reduce the number of law firms contracted to carry out criminal legal aid work would be reduced from about 1,600 firms to 400 firms. These proposals have proved highly controversial, and at the time of publication it was not known whether and in what form the proposals will be adopted. However, the government has made it clear that it intends to reduce criminal legal aid expenditure by more than £200 million, which is more than one-fifth of total expenditure.

3. France

3.1. What Does the System Overall Look Like?

France is inquisitorially rooted but is now a mixed legal system in terms of criminal procedure. In theory, it is characterized by a judicial officer conducting or supervising criminal investigations. In 97 per cent of cases, this will be the public prosecutor (procureur); less than three per cent of cases, the most serious and complex, are handled by the investigating judge (juge d'instruction). In all cases supervised by the procureur, the police carry out the investigation and even in those handled by the juge d'instruction, the police will carry out all investigations save those that may not

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51 The fees are those applicable as at April 2013. See the Criminal Legal Aid (Remuneration) Regulations 2013, SI No. 435.
52 Legal Aid, Sentencing and Punishment of Offenders Act 2012, part 1.
53 See Ministry of Justice 2013.
be delegated – principally the interrogation of the suspect. Increasingly, the procedure has become less centralized, with the addition of checks and balances (e.g. a separate judge deciding bail or warrants for extended detention) and a growing role for the defence lawyer. As with many countries, this is seen quite clearly with the defence lawyer being written into accelerated and abbreviated trial procedures, but their role has also gradually increased during the phase of police detention and interrogation (the garde à vue, GAV). France has adopted into its criminal procedure the principle of contradictoire, which is closer to an accusatory (not adversarial) model, where the accusation is made and both sides heard. This provides a limited role for the parties – the prosecutor, accused and the victim. Whilst it provides opportunities to participate, the investigation remains centralized under the authority of a magistrat; the principle of contradictoire does not extend to the whole structure of investigation, evidence gathering being the responsibility of the parties, as in an adversarial model. The preference for many of the hallmarks of inquisitorial justice, such as the written submission of evidence and reliance during the trial phase on the dossier (case file) that has been built during the pretrial investigation, remains.

As regards the position of the suspect in French criminal investigation, until 2011 suspects were permitted only a 30 minute consultation with a lawyer; they did not have the right to have a lawyer present during police interrogation, nor were they informed of their right to remain silent prior to police interrogation.

After the Salduz judgment, French criminal procedure was challenged successfully before the Constitutional Council in July 2010. As well as ruling that suspects should have a lawyer present throughout police detention, including during interrogation, the Council noted that the GAV had become systematic, and produces much of the evidence relied upon directly by the court. The GAV is therefore recognized as a more significant phase in the investigation than was previously the case. Recognizing the enormity of the reform that would be required, the Constitutional Council gave the French government one year to prepare and implement new legislation. Three months later, Briscoe v. France was France’s own Salduz: the ECHR
ruled on 14 October 2010 that without being informed of the right to silence and without a lawyer present during police interrogation, French suspects were not having a fair trial.  In the meantime defence lawyers were not given access to the police interrogation, nor were suspects cautioned as to their right to silence. However, the Grand Chamber of the Cour de Cassation decided on 15 April 2011 that as the EChHR had ruled quite clearly that the right to a lawyer was an essential part of Article 6 EChHR, this should be applicable with immediate effect (as from 15 April 2011), rather than June 2011 when the new legislation concerning the rights of suspects during the GAV officially came into force. In this legislation the routinely degrading treatment of suspects led to a new article to ensure that GAV conditions respect the person’s dignity and use only security measures strictly necessary. A body search must be conducted by an officer of the same sex and in private and strip- or intimate searches must be conducted by a physician.

It is for the prosecutor to decide whether and what proceedings are instigated after the conclusion of the criminal investigation.

Since 2004 a ‘guilty plea’ procedure has been introduced, that may be proposed while the suspect is still in detention; the comparution sur reconnaissances préalable de culpabilité. This procedure applies to all cases punishable by up to five years’ imprisonment (over half the cases handled by the criminal courts). The procureur may propose a sentence of up to one year or half the maximum penalty for the offence. The accused has ten days to decide whether to accept this offer. If accepted, it must be confirmed by a judge. Whilst the level of the offence may not be negotiated, the sentence is. If a suspect admits their guilt vis-à-vis this offence, the procureur may propose a sentence which would be less than that which would usually be requested in such circumstances. This represents a new departure for French law, and is intended to speed up and streamline the justice system, since such pleas will result in expedited trials and less need for judges and lawyers to examine cases in detail.

\[\text{ECtHR 14 October 2010, Brisco v. France, No. 1466/07.}\]
\[\text{Law No. 2011-932 of 14 April 2011.}\]
\[\text{The routine strip searching of suspects was widely reported, even in minor offences and women had their bras removed systematically for example.}\]
\[\text{Art. 63-5, 63-6, 63-7 CCP.}\]
\[\text{The prosecutor may decide that there are no grounds to prosecute, give a warning or a conditional caution (Art. 41-1 CPP), hold a criminal mediation (Art. 41-1 CPP), impose a penal order (Arts. 41-2 - composition pénale - or 495 to 495-6 CPP - ordonnance pénale), refer the case to the juge d'instruction for further investigation (Art. 80 CPP), decide to follow the guilty plea procedure (Arts. 495-7 to 495-16 CPP) or commence proceedings which means referring the case to the court and summoning the defendant (Arts. 390-1, 394 & 395 CPP) or impose a penal order.}\]
\[\text{Arts. 495-7 to 495-16 CPP. See Hodgson 2012.}\]
There was concern that this procedure would usurp the role of the courts as the determinant organ of guilt or innocence, and would infringe the principle of the separation between poursuite (prosecution) and jugement (trial, or judgment), but the Constitutional Council held that it did not.\textsuperscript{3} However, since the accused may nonetheless be sentenced to imprisonment, the hearing must take place in public in order to comply with Article 6 ECHR. The Constitutional Council emphasized that the trial court must look at the facts carefully, as it would in a normal trial, and not act simply as a rubber-stamp. The guilty plea procedure does not sit well with traditional inquisitorial precepts. The judge’s role is limited, insofar as they may only accept or reject the proposed sentence. No modification is possible. In case of rejection, normal trial procedure will begin. This is a disincentive to rejection, undermining the safeguards normally provided by the trial, potentially undermining the right to due process itself. Further, in France, the defence lawyer is an avocat, whereas the prosecutor is a magistrat, perceived as a higher professional standing and rendering any negotiation potentially difficult. Also, victims normally enjoy participation rights in the procedure, but it would seem that they have little or no input into the negotiated settlement under the comparaison sur reconnaissance préalable de culpabilité. Nevertheless in 2011, there were 77,569 uses of the guilty plea procedure,\textsuperscript{10} compared with 28,018 in 2005.\textsuperscript{11} During 2011 5,243,334 crimes were reported. 4,751,586 cases were investigated and of these cases 3,333,020 were not prosecuted mainly because of lack of evidence. Of the 1,418,566 cases that remained, 628,368 cases were brought to trial of which 77,569 cases were dealt with in the comparaison sur reconnaissance préalable de culpabilité procedure and 151,029 cases were dealt with by a penal order of the prosecutor. The remainder was disposed of by alternative procedures.

3.2. Status at Trial of Evidence Obtained at the Investigative Stage

Although France has a broadly inquisitorial procedure that is still considered judge centred, there is a recognition that the pre-trial investigation provides significant evidence for the vast majority of cases tried in the tribunal correctionnel. The Conseil Constitutionnel recognized this in ruling that GAV reforms were necessary, given the importance attached to the evidence gained.\textsuperscript{11} It is the suspect’s statements to the

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\textsuperscript{3} Decision 2004-492 JC of 2 March 2004.
\textsuperscript{10} Ministère de la Justice 2012.
\textsuperscript{15} Ministère de la Justice 2006.
\textsuperscript{11} Decision 2010-14/22 QPC of 30 July 2010, Mr David W. and others, para. 16: ‘even in proceedings involving complex or particularly serious occurrences, a person is henceforth often tried on the sole basis of evidence obtained before the expiry of the period of remand in police custody, in particular on the basis of confessions made during this period of time. Remanding suspected offenders in police custody for questioning has thus often become the main phase of the putting together of the case for the prosecution on the basis of which the person remanded will be tried in court.’
police that will be in the dossier before the court. The overwhelming majority of suspects will not be questioned by a judicial officer. The involvement of a judicial officer only occurs in instruction cases where there will be judicial questioning as part of a more lengthy investigation. Currently, the jurisprudence is that admissions made in GAV without a lawyer present are inadmissible – both at trial and the fuller pre-trial investigation carried out by the juge d'instruction.\textsuperscript{113}

3.3. How Does Police Detention and Interrogation Work in Terms of Powers and Responsibilities?

3.3.1. Authority to Stop and to Detain

In French law there are two distinct modi operandi for stopping and searching: the more general identity control,\textsuperscript{114} and the police power to stop a person suspected of committing or attempting to commit an offence. Article 73 CPP gives power to any person, not just police officers, to stop the 'perpetrator' of a flagrant offence and to bring them before the nearest police officer. It does not define the term 'perpetrator'. Articles 61 (for flagrant offences) and 78 (for preliminary investigations) CPP state that people summoned by a police officer for the requirements of the investigation are obliged to appear. Both articles add:

'With the prior authorization of the public prosecutor, the police officer may use the law enforcement agencies to compel to appear people who have not responded to a summons, or people in relation to whom there is reason to suspect that they would not respond to one.'

Article 75-2 CPP states that police officers who undertake a preliminary investigation must inform the procureur as soon as they identify a person 'against whom there is some evidence to suggest that she has committed or attempted to commit an offence'. Article 62-2 defines the garde à vue as:

'a coercive measure, decided by a police officer under the control of the judicial authority, by which a person against which there exist one or several plausible reasons to suspect that she has committed or attempted to commit an offence is detained in police custody.'

\textsuperscript{112} In 2011 in only 17,548 of the 628,368 cases that were prosecuted; Ministère de la Justice 2012.
\textsuperscript{113} See section 3.5 below.
\textsuperscript{114} Art. 78-2 CPP. This can be carried out when there is reasonable suspicion; to prevent a breach of public order; or, in order to investigate and prosecute specific offences, on the written orders of the procureur, in a defined area and time period, without individual suspicion.
3.3.2. Criteria for Detention

The police investigate and arrest on their own initiative, but the investigation and prosecution of crime, including the conduct of the GAV, is the responsibility of the procureur.\textsuperscript{115} The procureur must be informed immediately when a suspect is detained at the police station. The police may detain a suspect in GAV if there exist one or more plausible reasons to suspect that they have committed or attempted to commit an offence punishable by imprisonment.\textsuperscript{116} If the procureur considers the GAV to be unnecessary or disproportionate, the suspect must be released.

The grounds on which a suspect may be detained are: to carry out investigations requiring the presence of the suspect; to ensure the appearance of the person before the public prosecutor so that the prosecutor can determine what action to take as regards the investigation; to prevent the person from tampering with the evidence; to prevent the person from exerting pressure on witnesses or victims and their family or their relatives; to ensure that the person does not consult with others who may be co-conspirators or accomplices; and/or to ensure the implementation of measures to stop the offence.\textsuperscript{117}

Detention is for an initial maximum of 24 hours, which may be renewed for a further 24 hours on the authority of the procureur. In exceptional cases detention may be extended for up to 96 hours in total on the authority of the detention judge (juge des libertés et de la détention) or the juge d'instruction. Custody may be further prolonged and last for six days for the purposes of the investigation of terrorism. The procureur determines whether to charge or release the suspect and how the case should proceed.

Witnesses and those on ID check can be held in custody, but only as long as strictly necessary and for a maximum of four hours.\textsuperscript{118}

3.3.3. Minors

Concerning minors, rules vary by virtue of age.\textsuperscript{119} For minors of under 10 years, no measures of GAV or detention shall be taken. Aged 10 to 13 years, the minor may not be placed in GAV, but may be in held in a local police station for the purposes of the investigation under the authorization and control of a judicial officer.\textsuperscript{120} This rule is applicable in cases of a crime or délit punishable by at least five years' imprisonment;\textsuperscript{121} for a period of 12 hours, renewable once, and on the same grounds.

\textsuperscript{115} The GAV is governed principally by Arts. 62 to 68, 77 and also 154, 706-88 and 803-2 CPP.

\textsuperscript{116} Art. 62-2 CPP.

\textsuperscript{117} Art. 62-2 CPP.

\textsuperscript{118} Art. 12 CPP.

\textsuperscript{119} Art. 21 of Loi 2011-302 of 14 April 2011, modifying Art. 4 of l'ordonnance du 2 février 1945 relative à l'enfance délinquante.

\textsuperscript{120} This may be a prosecutor, juge des enfants, or juge d'instruction specializing in juvenile matters.

\textsuperscript{121} Offences are divided (in ascending order of gravity) into contraventions, délits and crimes.
required to justify detention in adult cases. Unless it is impossible to do so, the juvenile must be presented to the judicial officer in order to extend detention. GAV for those aged 13 to 16 is possible for a period of 24 hours, and may be extended by 24 hours, again if the offence is punishable by imprisonment of not less than five years. The minor must be presented prior to GAV to the procureur or the juge d'instruction. For those aged 16 to 18, the rules are the same as for adults, with the exception that the minor may not leave police custody without a close family member.

In cases involving minors, parents or guardians must be immediately notified of the decision of the office de police judiciaire under penalty of nullity (unless the procureur or the juge des enfants decide otherwise). Minors of 16 years and under must also be seen by a doctor. Pre-trial interrogations of juvenile suspects are video-taped. In addition, 'the minor must be assisted by his legal representative except where this is impossible' for custody checks, but not for GAV.

Further, the provisions of 'fast-track' proceedings are not applicable to minors.

3.3.4. Records

The police must maintain a custody record with times, grounds for detention, meals and rest times, noting that suspects have been informed of their rights, whether they have been exercised, and any police action. Interrogations are not tape-recorded but rather summarized by way of a written record. Statements made to the police are fully admissible in France. The hearsay rule does not exist. The use of confessions as evidence, in particular, would seem to be widespread. The summarized written record must be signed by the suspect, and special mention is made of any refusal or failure to do so. The summary is inserted in the procès-verbal, which itself is added to the dossier (case file).

The interrogations of those held in GAV for serious offences (crimes) must be recorded through use of audio-visual equipment. This is also obligatory in juvenile cases.

3.3.5. How Many Police Detentions of Suspects each Year? Is this Stable?

The number of GAV has risen dramatically from around 337,000 in 2001, to 578,000 in 2009. When traffic offences are also taken into account, there were around 900,000

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122 Under Art. 62-2 CPP.
123 Art. 4 II of l’ordonnance du 2 février 1945 relative à l’enfance délinquante.
124 Ibid Art. 4 VI.
125 Art. 78-3 CPP.
126 Art. 64; Art. 65 CPP.
127 Hodgson 2005; Cape et al. 2010.
128 Art. 64-1 CPP.
129 Art. 64-1 CPP.
GAV in 2009. Between 2000 and 2007, GAV lasting over 24 hours increased by around 75 per cent. These trends may be due to increased police numbers and/or the premium paid to police stations for the numbers of GAV. Since the 2011 reform, GAV have fallen by around one quarter.

3.4. What Rights Does the Suspect Detained in Police Custody Have? At what Point Do the Rights Apply?

3.4.1. External Supervision

The police must inform the procureur at the start of the GAV (by phone, fax, e-mail, or in person) of the grounds for detention and the time the GAV commenced, of the facts, and how the suspect was informed of them. This is considered a safeguard for the proper treatment of the suspect and marks the beginning of the judicial supervision of the GAV, which must be done in a timely manner or risk total or partial nullity. However, the way in which this supervision is to be effected in practice is not stipulated by law. There is no requirement that the procureur attend the GAV, nor is there a requirement that a copy of the document informing the procureur of the beginning of GAV appear in the final dossier. In practice, supervision is conducted largely by telephone and the procureur rarely visits the police station or gendarmerie in person.

3.4.2. Right to Know Reason for Arrest and Detention

Police must inform suspects immediately that they are in GAV and the nature and date of the offence for which they are held. The suspect must be asked to sign to verify that they have been informed of this. The process must be carried out orally and recorded in writing on the custody record.

3.4.3. Information on Rights; Letter of Rights

Suspects must be informed of the rights to which they are entitled during the GAV, namely: that they are in GAV; the length of detention and of possible extensions; the nature and date of the offence for which they are held; the fact that they may benefit from the right to have a relative or their employer informed; to be examined by a

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133 Cess. Crim. 3 April 2001, 01-80999.
134 Art. 63-1 CPP.
doctor; to be assisted by a lawyer; and the right (after having provided details of their identity) to make a statement, reply to questions or to remain silent. This is done orally and must be noted in the police record, which has to be signed by the suspect, any refusal being noted.

The information must be provided in a language that the suspect understands, and in writing. These rights must be provided through sign language or an interpreter if required.

3.4.4. Right to Access to the Case File and Disclosure at the Investigative Stage

There is no obligation to provide the suspect with access to the case file. The lawyer has access to the notification of rights provided to and signed by the suspect, as well as to any medical certificate and any statements made by the suspect. Lawyers have claimed that the effectiveness of their legal assistance is prejudiced by the fact that they are not party to all the material evidence in the dossier relating to the accusation. A preliminary reference was brought before the Constitutional Council, but was unsuccessful.

3.4.5. Legal Advice and Assistance

Suspect’s rights were improved in 1993 when the lawyer was allowed a 30 minute consultation after the suspect had been in custody for 20 hours. In 2000 this was brought forward to the start of detention. In 2011 the suspect was allowed a lawyer throughout police detention, including during interrogation. There is no means test for legal aid during the GAV, so everyone is entitled to legal aid (except for those arrested for being in France illegally) or to choose their own lawyer if they are in the possession of sufficient financial resources to do so. There are no circumstances where legal assistance is mandatory, not even regarding minors where the parent or guardian has made the request, or the mentally disordered.

The police must wait two hours for a lawyer to arrive, and can then start interrogation if the lawyer has not arrived. It is worth noting that the two-hour delay only applies as regards the first interrogation of the suspect, and not for those which may be undertaken afterwards. Justice Ministry circulars state the importance of informing the lawyer as early as possible regarding the time and duration of later interrogations, and it would appear that the police are duty-bound to do so, but if the lawyer does not turn up on time, then there is no obligation to wait.

Art. 63-1 CPP.
Art. 63-4 CPP.
Decision 2011-191/194/195/196/197 QPC of 18 November 2011, Mrs Èlise A. and others.
Art. 63 CPP.
Arts. 64-1 to 64-3 of Loi 91-847 of 17 July 1991 relative à l’aide juridique.
Art. 63-4-2 CPP.
Art. 63-1 CPP.
The right of access to a lawyer may be suspended for so called important reasons (raisons impérieuses), by a decision of the procureur, the juge d'instruction or the juge des libertés et de la détention. These reasons must be demonstrable in concreto and not solely linked to the facts of the crime being investigated. The tightly circumscribed and highly exceptional nature of this derogation therefore imposes a duty on the police and the procureur to consider carefully whether it may be applied in a given case. In practice, it would seem that this exception is so tightly drafted that it would be difficult to invoke other than in respect of a tiny number of GAV. This was admitted in the parliamentary debates surrounding the measure. The denial of access must be justified, according to Article 63-4-2 CPP, by circumstances which will affect the smooth completion of the investigation, or which relate to the collection or conservation of evidence, or which will prevent an imminent attack upon persons. This restriction may only last for 12 hours for most regular offences, and for 24 hours for offences relating to Article 706-73 of the CPP (organized crime and terrorist offences). It may only be extended by the juge des libertés et de la détention, on a submission referred to them by the procureur. Further, extensions to the twelve-hour limit are only possible in cases involving offences punishable by a custodial sentence of more than five years, and in this case only for a further twelve-hour period. Relating to the twenty-four hour period for offences under Article 706-73, a similar procedure applies, and the total maximum period of denial of access to a lawyer may not exceed 48 hours, or 72 hours in terrorist or drug trafficking cases. In addition, the denial of access to a lawyer only concerns the presence of a lawyer during interrogations and the examination of the procedural documents. The 30-minute consultation with a lawyer from the beginning of the GAV, may not be denied to the suspect, except in cases under Article 706-73 CPP.

Defence work in criminal matters is carried out by lawyers in private practice. Legal assistance during GAV is predominantly provided by inexperienced avocats stagiaires or by non-criminal law specialists. Specialists only participate in GAV if called to do so by paying clients, and in practice even criminal law specialists focus approximately 40 per cent of their workload on non-criminal matters.

There is no special certification requirement or qualification required for such lawyers; it is merely stipulated that they must hold a valid bar licence. Criminal defence work is held in low esteem and does not hold much prestige among lawyers. Such work is mostly carried out by lawyers at an early stage of their career, who either serve as duty lawyers as an obligatory element of their pupilage (stage), whilst they seek to establish their own clientele, or by generalists who have an in-

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143 Ibidem.
144 Field & West 2003, p. 272.
145 De Charette 2009, See also Hodgson 2005, p. 155.
146 Hodgson 2005, p. 115.
sufficient or uncertain client-base. Few lawyers maintain crime as a main interest.

3.4.6. Right to Silence

The right to silence is considered a fundamental right in French law, and has existed since 1897. The caution in respect of the right to silence is, however, a different issue. Notification of the caution at the beginning of the GAV was introduced in 2000, narrowed in 2002 and repealed in 2003. However, under the 2011 reforms, the right to be informed of the right to silence has been reintroduced. The police must inform the suspect of their right to make a statement, to answer questions or to remain silent at the start of the GAV, when other rights are notified. There is no standard text for the caution and there is no requirement to repeat it at the start of interrogation. In practice, this means that a suspect arrested at night will be told of their right to silence on arrival at the police station, but this will not be re-stated at the start of the interrogation the following day. The suspect may not refuse to answer questions about their identity. The right to silence does not include a right for the suspect to put an end to interrogations. The law does not require the police to re-inform the suspect of his right to silence at the start of each interrogation or at the time of prolongation of GAV.

3.4.7. Right to Medical Examination

The police must inform suspects immediately of their right to a medical examination. Detainees may be examined at any time by a doctor upon their request, or by a decision of the prosecutor (or juge d'instruction), the police officer, or at the request of a family member. The physician must indicate on the medical certificate if the detainee's health is sufficiently stable to cope with the measures of detention, including during any extension period. This medical certificate must be attached to the dossier. For a person under 16 years, medical examination is mandatory. For those aged between 16 and 18, medical examination is mandatory at the request of detainees, their parents or guardian.

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147 Hodgson 2005, p. 113.
149 Art. 3 of the law of 8 December 1897. The right to silence is further referenced under Art. 116 CPP.
151 Art. 63.1 CPP
153 See <vosdroits.service-public.fr/F1469.shtml> (last visited 3 October 2013); Art. 63 CPP.
3.4.8. Right to Have Someone Informed of Detention

The suspect has the right to ask that their cohabitant, a parent, or sibling, and an employer be contacted by telephone to warn them that he has been taken into GAV.\(^{54}\)

Article 63-2 CPP prescribes that the maximum delay in informing the persons chosen (family, employer, etc.) by a suspect that they are under supervision is three hours. The 'clock' for this three-hour period begins the moment that the suspect asks for the person to be informed, rather than at the beginning of GAV. It is the responsibility of the suspect to furnish, to the best of their ability, the precise location of, or information allowing the police to make contact with, the chosen person(s). If a police officer decides that for reasons relating to the integrity of the investigation, they should not accede to the request to contact a third party, they must refer this decision without delay to the procureur who decides what action to take.\(^{55}\)

If a minor is placed in GAV, the police must inform their parents or guardian.\(^{56}\) However, there would appear to be no requirement to contact a social worker and no 'rota' of social workers is in operation.

3.4.9. Right to Interpreter/Translation

Under Article 63-1 CPP, suspects have a right to free assistance of an interpreter in cases where they are unable to speak or comprehend the language of the lawyer, the investigator, the person conducting an expert report, or the court.\(^{57}\) However, in reality, during detention, access to the procureur is rarely afforded to suspects. Therefore in practice the police will often decide upon the need for an interpreter.

Suspects also have the right to interpretation to enable proper communication with their legal counsel. Case-law on the right to an interpreter\(^{58}\) refers to the right of free communication with a lawyer (Art. 116 CCP), as well as to Article 6(3)(e) ECHR.\(^{59}\)

\(^{54}\) Art. 63-2 CPP.
\(^{55}\) Art. 63-2 CPP.
\(^{56}\) Title II of Art. 4 of l'ordonnance du 2 février 1945 relative à l'enfance délinquante.
\(^{57}\) For example, in a case of a sexual offence, the interview of the non-French speaking defendant by experts without the assistance of an interpreter has led to the nullity of the expert report; Crim., 21 March 2007, Bull. crim. No. 90, D.2007, A. 1271. See Cape et al. 2010, p. 239-240.
\(^{59}\) Decret No. 2013-958 of 25 October 2013 gives effect to the Directive on interpretation and translation. It adds a new paragraph to the preliminary article of the CPP, guaranteeing the right to an interpreter for suspects and defendants throughout the process, including during the lawyer-client consultation prior to any questioning or court hearing. It also provides for the translation of key documents, which are essential to the exercise of defence rights and the right to a fair trial.
To ensure quality control, certain legal provisions require that court interpreters and translators are registered on a list established by the procureur of each tribunal de grande instance. This list is updated annually. Interpreters and translators must fulfill three criteria: to live or work in the area of the district court; to prove their skills by diploma or experience in the interpretation/translation field; and to have a clean criminal record. Normally, interpreters and translators are requested to swear an oath, although according to case-law, this is not compulsory. However, these stipulations do not apply to interpreters assisting during the GAV.

Suspects have a right to translation of documents, although case-law has held that they are not entitled to a translation of all the documents.

3.4.10. Right to Inform Consulate/Embassy

France is a party to the 1963 Vienna Convention on Consular Relations, and is therefore bound by Article 36 of the Convention which stipulates that foreign nationals who are arrested or detained be given notice ‘without delay’ of their right to have their embassy or consulate notified of that arrest. Article 63-2 CPP, effectively implementing the Convention, states that if a person of foreign nationality is placed in GAV, he or she may demand that the consular authorities of his or her home state are advised of the detention. If a detained foreign national so requests, the police must fax that request to the embassy or consulate.

3.5. What Are the Remedies for Breach of these Rights?

After the reforms of 14 April 2011 evidence obtained without allowing suspect a lawyer must be excluded. It would seem that any cases which breach rights safeguarded by the ECHR (through the new law) will result in nullité.

The importance of the principle of nullité is that, once it has been recognized that breach of rights results in a nullité it cannot be rectified by compliance with other obligations. For instance, when suspects in GAV are subjected to unjustified delay in being produced before an investigating judge, they must be released.

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362 Official Bulletin of the Ministry of Justice, No. 85, 10 January 2002. The Décret No. 2013-958 of 25 October 2013 allows for exceptions, but states that normally all interpreters should be selected from this official list.
364 Art. 279 CPP: ‘copy of the official records establishing the existence of the offence, of the written statements of witnesses and of any experts’ reports’. According to Cape et al. 2010, this is reflected by practice.
365 Cape et al. 2010, p. 218-219.
Further, evidence obtained through a breach of procedure must be excluded at trial, or through pre-trial examination.\(^{166}\)

Case law of the Cour de cassation would seem to indicate that failure to communicate the fact of commencement of GAV to a suspect will always constitute an insurmountable affront to the interests of the person concerned, and may therefore be considered as very likely to result in nullité of the procedure.\(^{167}\) So does the failure to inform the suspect of their right to silence.\(^{168}\) As regards rights of suspects (such as free choice of lawyer, and confidential communication with a lawyer), the Cour de cassation has decided that the non-fulfilment of such requirements will not universally result in nullité, but that it must be assessed on a case-by-case basis.\(^{166}\)

Prior to the GAV reform, two people placed in GAV, respectively for trespassing on private properly and drug trafficking, had been interviewed without being assisted by a lawyer. The Cour de cassation quashed the decision of the Cour d’appel which had rejected their application to invalidate the PVs (procès-verbaux, formal records of evidence) of their interviews, stating that:

‘It was its duty, after having established that the interviews collected during the garde à vue were illegal, to invalidate those interviews and, when appropriate, to extend the effects of this invalidation to acts of which the interviews were the necessary basis’.\(^{170}\)

Even when an act is illegal and must be invalidated, the Cour de cassation limits the effects of this invalidation: ‘when an irregularity is a cause of invalidation of the procedure, only the acts affected by this irregularity and those of which they are the necessary basis must be invalidated’.\(^{171}\) In this particular case, the Cour d’appel had invalidated the whole file, including the summons, because the prosecutor was informed late of the GAV. The Cour de cassation held that the PV of arrest, the complainant’s statement and the other witness statements were not in fact unlawful; the Cour d’appel should have considered whether the summons before the court was in fact founded on lawfully obtained evidence.

In another case, the defendant asked for the invalidation of his interviews because he had not been assisted by a lawyer in GAV. The Cour de cassation decided that, since the court did not base its decision on what the defendant had said during his interviews, admitting them before the court did not harm his interests.\(^{172}\)

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166 Art. 206 CPP.
168 ECtHR 11 October 2010, Briscoe v. France, No. 1466/07.
172 Cass. crim., 7 February 2012, 11-83.676, Bull. crim. 2012, 37. See Art. 171 and 802 CPP, which state that the party who applies for an invalidation must show that the irregularity harmed her interests (these articles are not applicable when the law explicitly says that a formality is required, subject to invalidation).
It should be noted that, in any case, the application for invalidation of part or all the file will be examined by the court just before trial (which means that the judge will already have seen the potentially illegal evidence on the file when preparing for court), or even during trial (the evidence is heard and the court decides whether or not it is admissible at the same time as it gives its decision on guilt).

3.6. **Do Suspects Request a Lawyer? Conditions for Waiver**

Estimated request rates are between 35 and 50 per cent.\(^{173}\) Any renunciation of the right of access to a lawyer must be carried out in an explicit and unequivocal manner.\(^{174}\) It must also be given with full knowledge of the cause and consequences of refusal.\(^{175}\) A waiver must be recorded in the procès-verbal of the interrogation, which must be signed by the suspect.\(^{176}\)

3.7. **Extent of Lawyer’s Role**

At the beginning of the research project the 2011 regime had been in existence for a very short time, but once fieldwork finally began, it had been in place for nearly two years. Although there is not yet a great deal of evidence available on how the new system works, current estimates indicate that one in every two persons in GAV under the new regime asks for legal assistance within the first hour of detention.\(^{177}\) This figure differs slightly from that quoted by the Minister of Justice in parliamentary debates, who stated that 37 per cent had asked for legal assistance, with lawyers responding to the request in 60 per cent of cases.\(^{178}\)

Consultations with lawyers are limited to a maximum of 30 minutes. The lawyer may be present in the interrogation and at any confrontation, but may not intervene. Lawyers may only ask questions at the end of the interrogation and make remarks on the custody record.\(^{179}\) They may also examine the custody record and any statement made by the suspect.\(^{180}\) Lawyers do not play a role in the investigation itself, and are excluded from every acte de procédure apart from the interrogations.

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\(^{173}\) Contrôleur général des lieux de privation de liberté 2013: estimates at less than half the number of cases in which a lawyer is requested. See also Conseil national de l’aide juridique 2013: estimates that lawyers intervene in just over a third of GAVs.


\(^{175}\) CA Agen, 18 février 2010: JurisData No. 2010-003487. See also Capdepon 2010.

\(^{176}\) Art. 63-1 CPP.

\(^{177}\) Figures by the Ministry of Justice, cited in Le Figaro, 11 juillet 2011. See e.g. Contrôleur général des lieux de privation de liberté 2013.

\(^{178}\) TFJ, 15 July 2011.

\(^{179}\) Art. 63-4-3 CPP.

\(^{180}\) Art. 63-4-1 CPP.
tions of their client. So there is no opportunity to participate in the investigation (in contrast to the minority of cases that are dealt with by the juge d'instruction). The procureur oversees detention and makes decisions regarding release, charge and method of case disposition, but in practice, there is little or no contact between the lawyer and procureur until the decision to prosecute has been made. Only at the more formal level of agreeing local policy (e.g. to make allowances for lawyers' travel time in remote areas) or to report problems in the conduct of the CAV via local coordinators, is there contact.

3.8. Power to Exclude Lawyer from an Interview

The procureur may, exceptionally, delay the suspect's access to a lawyer for up to 12 hours. Where there appears to be a conflict of interest with other accused persons, the procureur at the request of the police (as well as lawyers themselves, of course) may contact the head of the local bar to resolve the matter.

3.9. Arrangements for Provision and Payment of Custodial Legal Advice

The local bar organizes a rota for police station call-outs. For lawyers, an early bone of contention with the new regime was remuneration. They previously received 61 Euro for the half-hour police station consultation. Assuming around three hours' work under the new regime, lawyers claim they should be paid 366 Euro for the first 24 hours. Instead, they are paid 300 Euro for the first 24 hours and 150 Euro for the second.

4. The Netherlands

4.1. What Does the System Overall Look Like?

The criminal justice system of the Netherlands is characterized as 'moderately inquisitorial', but it is still strongly influenced by the non-adversarial tradition, particularly during the pre-trial stage. There is an investigating judge, but since 2000 the powers to supervise investigations have been adjusted between the investigating judge and the prosecutor in favour of the latter. Recent reforms, aimed at increasing the powers of police and prosecution during the investigative stage and

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182 Art. 60-4-2 CPP.
184 See Art. 2 of Decree 2011-810 of 6 July 2011 relatif à l'aide à l'intervention de l'avocat au cours de la garde à vue et de la retenue douanière.
vesting prosecutors with broad powers to impose criminal sanctions outside of the court procedure, have effectively strengthened the inquisitorial tendencies in Dutch criminal procedure.186

Criminal investigations are conducted by the police under the supervision of the public prosecutor's office. Only when more intrusive investigative measures are used, such as a search of a dwelling or telephone tapping, is a warrant from an investigating judge required.187 The accused has certain participatory rights, such as calling and questioning witnesses pre-trial, but this has to be done through the investigating judge, who can deny such a request if they regard it as not being in the interests of the investigation.188 Likewise nearly all defence rights pre-trial, such as access to the case file, and investigations on behalf of the defence, can be restricted if they are regarded as being contrary to the interests of the investigation.

As in France and Scotland, the Salduz judgment of the ECtHR has had an immense impact on the right of suspects to legal assistance during the police investigation stage in the Netherlands. Before Salduz, detained suspects did not have the right to consult a lawyer before the first interrogation nor did they have the right to have a lawyer present during police interrogation. The reform which expanded the right to legal assistance to the period before the first police interrogation was, however, initiated before the Salduz decision was delivered by the ECtHR. A number of infamous miscarriages of justice, which had exposed questionable interrogation practices used by the police in relation to potentially vulnerable suspects, resulted in a parliamentary inquiry. At the instigation of Parliament, a pilot project was conducted in Amsterdam and Rotterdam, allowing lawyers to be present during police interrogations in serious criminal cases.189 However, the Salduz judgment was delivered shortly after commencement of the pilot, and the subsequent reform was quickly labelled the 'Salduz' reform. Since Salduz suspects have been entitled to consult a lawyer before the first police interrogation, but only juveniles have the right to have a lawyer present during police interrogations. Until now (August 2013) the Dutch Supreme Court has still not acknowledged that the Salduz doctrine imposes a right to have a lawyer present during police interrogation of all suspects.190

Developments in the ECtHR case-law, and the movement towards common EU standards on the right to legal assistance and the right to information, have resulted in a draft law that allows for access to a lawyer during police questioning.

187 Previous Art. 36a-39a CCP, since 1 January 2013 Art. 181-184 CCP.
188 Stevens & Verhoeven 2010.
of an adult, but only for questioning in relation to criminal offences that are punishable with six or more years of imprisonment and, furthermore, it determines that lawyers may be excluded from attending police questioning if that is in the interests of the investigation.\textsuperscript{191} This draft has not been submitted to Parliament due to the uncertainties about further developments at the EU level on the right to legal assistance in criminal cases.\textsuperscript{192}

The Netherlands has implemented the Directive on the right to interpretation and translation,\textsuperscript{193} and the Directive on the right to information in criminal proceedings,\textsuperscript{194} but only as far as access to the case file is concerned and only from 1 January 2013,\textsuperscript{195} after the fieldwork in the Netherlands was concluded. Although the transposition date of the latter Directive is 2 June 2014, Article 7 of the Directive has been taken into consideration because there was already a legislative reform on access to the case file pending before Parliament at the time that the text of the Directive was finalized.

Since 1 January 2013 the position of the investigating judge has been reformed.\textsuperscript{196} The official judge-led pre-trial investigation has been abolished and the new function of the investigating judge is to oversee the pre-trial investigation, including the decisions of the prosecutor. The aim is to strengthen the possibility for the defence to turn to the investigating judge to end certain investigative activities or to request additional investigations. Doubts have been expressed by academics as to whether the new investigating judge will have the resources to perform these functions.\textsuperscript{197}

In 2009, about 45 per cent of cases registered by the Public Prosecutor's Office were disposed of without a trial.\textsuperscript{198} However, the government believes this to be insufficient, and new measures are regularly introduced to increase the proportion of cases disposed of at the pre-trial stage. One of these measures, launched in 2011, is for accelerated disposal of cases during the police detention stage by means of a penal order.\textsuperscript{199} This is called the ZSM-policy (literally, as soon, smart, selective, simple, together and society-oriented as possible), and its objective is that a penal order imposed by the prosecution service during the period of a deprivation of liberty for the purposes of police questioning or police custody should be the

\textsuperscript{192} See Chapter 1, section 2.5.
\textsuperscript{193} Wet van 28 februari 2013 tot implementatie van richtlijn No. 2010/64/EU (PéEU L 280, Stb. 2013, 85).
\textsuperscript{194} Directive on the right to information.
\textsuperscript{195} Wet herziening regels betreffende de processtukken in strafzaken van 1 december 2011, Stb. 2011, 601.
\textsuperscript{196} Wet voorziening positie rechters-commissaris van 1 december 2011, Stb. 2011, 600.
\textsuperscript{197} Van der Meij 2010, p. 591-595; Franken 2013.
\textsuperscript{198} WODC & CBS 2009, p. 111.
outcome in 70 per cent of ‘minor offences’. Penal orders can be imposed for offences punishable by up to six years’ imprisonment and may comprise all kinds of sanctions, except for prison sentences. The consent of the accused is not required, but they can request that the case be brought before a court within two weeks after the penal order has been imposed. Because adult suspects only have the right to consult a lawyer before the first police interrogation and many suspects waive their right to a lawyer, the majority of penal orders are imposed without suspects having had legal advice on whether to accept the penal order and what the consequences are if they do so.201

4.1.1. Definition of ‘Suspect’, ‘Reasonable Suspicion’ and Charge

In Dutch law, a ‘suspect’ is someone ‘in respect of whom, given facts and circumstances, there arises a reasonable suspicion of guilt in relation to a criminal offence’.202 Thus, the definition of a suspect is closely linked to the existence of ‘reasonable suspicion of guilt’ in respect of a particular person. During police detention and pre-trial detention there is no official or formal charge. The moment at which a person becomes a ‘suspect’ is particularly important in respect of the right to silence, because it determines when the caution should be given, but also in respect of other rights, for example, the right to be informed about procedural rights and the right to interpretation.

The Dutch courts take a rather stringent approach to deciding when a ‘reasonable suspicion’ exists, where the question arises in relation to the moment from which procedural rights granted to the suspect apply. The criterion used is that there should be a substantiated and individualized suspicion.203

4.2. Status at Trial of Evidence Obtained at the Investigative Stage

Criminal proceedings are heavily oriented towards the pre-trial stage. The purpose of the trial is to review the evidence in the case file which had been collected during the pre-trial investigation. Trials in the Netherlands, particularly those conducted by a single judge, are notoriously short.204 Judges are usually well-acquainted with the contents of the case file and take a firm, directive, role during the trial. Witnesses are generally not heard in court, but their pre-trial statements are used in evidence. The accused has some participatory rights such as, for example, the right to call witnesses or to present evidence, but it is normally the judge who gives effect to these rights.

200 See <www.om.nl/onderwerpen/zsm> (last visited 3 October 2013).
201 Commissie Innovatie Strafnechtlvdschop 2012.
202 Art. 27(1) CCP.
203 Cleiren & Verpale 2011, p. 81-82.
204 Average of 15 minutes per case.
The statements of suspects made to police are included in the case file and are fully admissible in evidence.205

As noted above, investigations are conducted by the police under the supervision of the prosecutor’s office. The prosecutor is supposed to play a dual role of guiding the investigation and ensuring that it complies with procedural rules. However, in reality, investigations of ‘ordinary’ cases are usually conducted entirely by the police, whilst the prosecutor takes the decision regarding charge when the investigation is finished. In more ‘serious’ cases prosecutors may participate in the investigation more closely.

Police interrogations of suspects play a crucial role in the investigation. This is partly due to the procedural tradition, and partly as a result of the principle of economy of resources that governs investigations. Interrogations are seen as the most cost-efficient investigative method. The rule is that if a suspect is known, he or she must be interrogated.206 Interrogations are largely unregulated. There are no rules concerning their duration, format, manner in which a written record should be made, etc.207 Interrogations lasting several hours and even days (with breaks) are not uncommon. Excessive pressure is prohibited. ‘Excessive pressure’ is understood as being physical or extreme psychological pressure, deliberate lying about evidence, or making promises in exchange for ‘co-operation’. Other forms of pressure such as, for example, repetitive questioning, continuing to ask questions despite the suspect’s wish not to respond, or taking advantage of the suspect’s emotions of fear, anger, shame, etc., in order to obtain a statement, are permitted.208

The Salduz judgment led to an avalanche of jurisprudence on many details connected with access to a lawyer following arrest, such as what rights apply when the suspect voluntarily attends the police station, the validity of a waiver, and whether statements of co-defendants are admissible in evidence where their right to consult a lawyer was breached, etc. The base-line of this jurisprudence is that admissions made during police detention without the suspect having had the opportunity to consult a lawyer beforehand are inadmissible.209 There are certain caveats to this though, rendering the evidence admissible, for example, where a suspect repeats the same statement after speaking with a lawyer.210

205 Art. 339 CCP; Corstens & Borgers 2011, p. 685.
206 Corstens & Borgers 2011, p. 265-266.
207 Corstens & Borgers 2011, p. 274.
209 See, for Dutch case law after Salduz, section 4.4.5 below.
4.3. How Does Police Detention and Interrogation Work in Terms of Powers and Responsibilities?

4.3.1. Authority to Stop and Detain

The police, as well as some other ‘authorized bodies’ (for example, traffic police and immigration police) have wide powers to stop and detain. All individuals – even if they are not suspected of having committed an offence – may be briefly deprived of liberty under various statutory powers, for example, for an ID check, traffic control, or border check. These ‘administrative’ controls may easily develop into a criminal arrest and detention, for example, for failure to comply with the orders, or if indications of crime are found whilst performing such controls.\(^{211}\)

The strictly ‘criminal’ stops and arrests are generally carried out by the police. A suspect may be stopped for an identity check,\(^{212}\) or by anybody (including civilians) when they are caught red-handed.\(^ {213}\) Non-flagrant arrests require prior authorization of the public prosecutor.\(^ {214}\) In the case of the latter two situations, the person carrying out the arrest has the power to take the suspect to the police station or to hand them over to the police.

Police detention is divided into two stages. Suspects can be held for six hours at the police station (the hours between midnight and 9.00 am do not count for calculating this period), and this period can be extended by six hours if this is necessary to check the identity of the suspect.\(^ {215}\) Within this period it must be decided, by the assistant prosecutor (a senior police officer),\(^ {216}\) whether the suspect should be kept in ‘police custody’ for the maximum period of three days, which may be extended by a further three days.\(^ {217}\) Once the assistant prosecutor has decided that the person can be detained for three days, the actual period is determined by the officers dealing with the case. If a person is still detained at the end of the first three days of police custody, an investigating judge must assess the legality of the arrest and detention\(^ {218}\) and, as a rule, decides whether there are grounds to order pre-trial detention of the suspect.\(^ {219}\)

Thus, the maximum duration of police detention is six days and 15 hours. The ‘initial’ six-hour detention is also used to investigate ‘less serious’ cases (that is, these cases in which pre-trial detention cannot be imposed). If a person is suspected

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211 Corstens & Borgers 2011, p. 369-370.
212 Art. 52 CCP.
213 Art. 53 CCP.
214 Art. 54 CCP.
215 Art. 61 CCP.
216 Art. 154 CCP.
217 Art. 59 CCP.
218 Art. 59a CCP.
219 Art. 60 CCP.
of a crime that warrants more than four years' imprisonment, the use of 'police custody' is standard.

4.3.2. Criteria for Detention

A suspect may be stopped and arrested if there is reasonable suspicion\textsuperscript{220} that they have committed a criminal offence. There is no limitation on the seriousness of an offence; any offence is 'arrestable', including summary offences such as, for example, public drunkenness or speeding, but only where the person is caught in the act.

The sole purpose of police detention is to further the investigation of the crime.\textsuperscript{221} There are no other conditions for placing someone under arrest than the fact that a crime has allegedly been committed, and the need to investigate it. Likewise, the sole criterion used to prolong the initial detention beyond the initial six hours is the need to conduct further investigation. The logic behind this is that by keeping the suspect in custody the suspect can be questioned and any risk of interfering with the investigation would be eliminated. The fact that the suspect would interfere with the investigation is, in effect, presumed.

In theory, a suspect can complain to the prosecutor about the decision of the police to detain them, although a prosecutor is unlikely to overruling that decision. A challenge to the legality of arrest may be made to an investigating judge (\textit{habeas corpus}), but this procedure is rarely used.\textsuperscript{222} The first occasion on which an arrest is reviewed by a judge is usually at the very end of police custody - which seems to make it rather superfluous - but if the arrest was unlawful (for instance, if there was no reasonable suspicion at the time of the arrest) this must result in release of the suspect.\textsuperscript{223} The investigating judge is not authorized to test whether the use of the arrest power was proportionate in the circumstances, but only whether the conditions for arrest above described were met, and whether the proper arrest procedure was followed.

Following police custody, remand in custody can be ordered by the investigating judge for a maximum period of 14 days,\textsuperscript{224} followed by detention on remand by a court order for a maximum period of 90 days.\textsuperscript{225} Within the 90 days there has to be a first court hearing on the merits. The court can suspend the trial for a defined or an unlimited period. During this period the detention on remand stays in force until 60 days after the verdict.\textsuperscript{226} The non-cumulative grounds for detaining a

\textsuperscript{220} The concept of 'reasonable suspicion of guilt', which is relevant to the determination of whether an arrest was performed legally, is defined in Art. 27 CCP, and is further developed in the case law.

\textsuperscript{221} Arts. 57, 58 & 61 CCP.

\textsuperscript{222} Art. 59a (4) CCP.

\textsuperscript{223} See, for instance, Raibank Maastricht 7 December 2012, ECLI:NL:RMMAA:2012:BY5831.

\textsuperscript{224} Art. 63 CCP.

\textsuperscript{225} Art. 65 CCP.

\textsuperscript{226} Art. 66 CCP.
person under these powers include fear that the person will abscond, fear that they will commit further offences, the interests of the investigation, national security and/or public order in case it concerns a severe crime.

4.3.3. Minors

Minors of any age (there is no minimum age, but it is presumed that the child must be able to talk) may be arrested and may be searched and held for questioning for a maximum period of 15 hours (including a night) although they cannot be held criminally responsible.227 From the age of 12 years a minor is criminally liable and may be kept in police custody for up to three days (including possible extension, as noted above), in the same way as for adult suspects. They may also be remanded in custody, and detention on remand can be imposed. However, in practice, minors are normally released within the initial six hours, unless they have a serious criminal record, or are suspected of a more serious crime (for example, aggravated burglary or robbery, sexual crime, or causing serious bodily harm).

4.3.4. Records

The police maintain several types of official records linked to police custody. These are, firstly, the official ‘orders’, that is, decisions to arrest, to take a person into custody, and to prolong detention. The times, grounds for detention and the prolongation of detention, and the fact that the suspect has been informed of their rights, must be noted in the official order. The business processes software of each police force contains a separate module in which all information related to persons detained at the police station are kept (the so-called arrestantennmodule). Secondly, the so-called ‘detainee care officers’ maintain records related to the times when suspects are brought into the station and released, meal and rest times, times and nature of visits, etc. It is the responsibility of the detainee care officer to keep this record. In fact, every time the suspect leaves the cell, this must be recorded.228

There is a requirement for interrogations to be recorded in writing, but no prescribed form for such a record. The law only provides that the record should be ‘as close as possible’ to the suspect’s own words,229 and thus these records vary considerably in length and the amount of detail, the manner in which they are drafted, etc.230 Audio or audio-visual recording of interrogations is the exception, and is only done in respect of interrogations of very young minors, or in relation to

227 Art. 487 CCP.
228 Regel van de Ministers van Binnenlandse Zaken en van Justitie, 25 March 1994, Stelt 1994, 64.
229 Art. 29(3) CCP.
the most serious offences, and sexual offences. If there is an audio-recording, the written record of the interrogation remains the 'official' source of evidence.231

The record from the arrestenbood does not become part of the case file and it is not disclosed to the defence lawyer. The record may be requested by a court if there is a dispute about the legality of actions undertaken by the authorities while the suspect was detained at police station.

The records of the arrest (aanhouding), search and taking into custody of personal items, and appearances of the suspect before the public prosecutor, as well as any other records that reflect procedural actions undertaken with the detainee (for example, informing the suspect of suspicion, and records of interrogation) are included into the case file.232

4.3.5. How Many Police Detentions of Suspects each Year? Is this Stable?

The total number of arrested suspects in 2010 was 202,000 (25 per cent between 16-22 years, 72 per cent men and 18 per cent women, and 45 per cent with a migrant background). Over the five-year period from 2005 to 2011, the numbers of registered suspects (not necessarily arrested suspects) steadily decreased, from 300,000 to 372,000.233

4.4. What Rights Does the Suspect Detained in Police Custody Have? At what Point Do the Rights Apply?

4.4.1. External Supervision

At the investigative stage the public prosecutor is responsible for the actions of the police and officially heads the investigation. The police must obey the public prosecutor’s orders. If the police have acted illegally, or not in accordance with the provisions of the CCP, the prosecutor is held responsible at trial and grave abuse of power may lead to dismissal of the case or exclusion of the evidence that has been obtained in an unlawful way.234 This is particularly the case in respect of breach of defence rights.235 The public prosecution service is responsible to the Minister of Security and Justice who, in turn, is responsible to Parliament.236 The powers that

231 In the Netherlands only the means of evidence summed up in Art. 339 CCP (official records and the observation of the court at the trial) are admitted in evidence. If the court decides to listen or look at tapes of the recording of an interrogation, the observation of the court counts as official evidence.
232 Art. 30 CCP.
234 Art. 359a CCP.
236 It is not rare that the Parliament poses questions to the Minister of Security and Justice on individual criminal cases that have drawn attention.
the police and public prosecutor have under the CCP are regulated by guidelines drawn up by the Board of the Procurator-General (College van Procurators-General), the head of the Public Prosecutor's Office. These guidelines or regulations are published and are binding on the prosecution and the police.287 One of the regulations that is important in respect of this research project is the Regulation on Legal Assistance during Police Interrogation, which was introduced by the Board of the Procurator-General on 15 February 2010 and which implemented the Saadon judgment of the ECtHR.288

Although prosecutors are expected to lead the investigation, in practice many powers are delegated to assistant prosecutors, who are senior police officers who liaise between the police officers conducting the investigation and the public prosecutor.289 As a result many investigative powers assigned to the public prosecutor are in fact delegated to the police.

4.4.2. Right to Know Reason for Arrest and Detention

During the period of this research there was no obligation in domestic law to provide the suspect with information about the charge and/or the reasons for arrest other than the ECtHR jurisprudence, which has direct application in Dutch law.240 The Directive on the right to information had not (as of August 2013) been implemented in Dutch law. Therefore, there are currently no requirements as to how and when this information should be provided, with the exception of the Regulation of the Public Prosecutor's Office relating to access to interpretation and translation for suspects who do not speak the language of the proceedings.241 The regulation provides that suspects who are brought to the police station must:

\[\text{as soon as possible - and in any case during the appearance before the assistant public prosecutor - be provided with brief information about the reasons for arrest and the criminals offence(s) they are suspected of [...] if the suspect is detained for a longer time, then the information about the suspicion and the manner in which it was given to the suspect should be included in the record of taking the suspect into police custody}\.

These provisions, by definition, only apply to suspects who do not have sufficient knowledge of the Dutch language. However, all suspects are normally given the brief facts of the offence(s) they are suspected of, and its (their) legal qualification, at the beginning of the interrogation. There is no obligation to record the way the information is given, but the reasons for arrest and the criminal offence are noted in

289 Art. 154 CCP.
290 Art. 92-95 of the Constitution.
the record of appearance before the assistant prosecutor (which takes place when
the suspect arrives at the police station) an excerpt of which is given to the
suspect.\textsuperscript{242}

4.4.3. Information on Rights; Letter of Rights

Currently, except for the obligation to inform the suspect of the right to silence
before each interrogation,\textsuperscript{243} and the right to legal assistance,\textsuperscript{244} there is no obligation
on the police at the investigative stage to inform suspects of their other rights. The
obligation to inform suspects of the right to a lawyer and the right to silence lies on
police officers - namely, the assistant prosecutor who takes an official detention
decision and the interrogating officer(s). There is currently no obligation to inform
suspects about their rights in writing, although there are two Letters of Rights in-
forming juvenile and adult suspects of their right to a lawyer, but it is not standard
practice to give this Letter of Rights to suspects in every police station.\textsuperscript{245} According
to the EU Directive on the right to information in criminal proceedings, which is not
yet implemented, the suspect must additionally be informed about the right to
translation and interpretation, the right to notify a family member, and the right of
access to the case file.

4.4.4. Right of Access to the Case File and Disclosure at the Investigative Stage

There is a general right of access to the case file for the suspect,\textsuperscript{246} which is equally
applicable to the lawyer,\textsuperscript{247} but until 1 January 2013 the time that it first applied in
the investigative phase was unclear. Since 1 January 2013 (after the fieldwork) the
law has stipulated that access to the case file must be given no later than the first
police interrogation, but that the right may be invoked at an earlier stage, namely
from the moment of a criminal charge in the autonomous sense of the ECHR, which
means from the moment that a suspect’s situation is substantially affected.\textsuperscript{248} During
the period of the fieldwork, access to documents was normally granted for the first
time at the end of the police detention only (after three or six days).

Both under the previous legislation and under the current legislation, ‘proce-
dural documents’ (the case file) are considered to be ‘all documents that may
reasonably be of importance for the decisions to be taken by a judge’, which ob-
viously leads to a lot of dispute as to what documents have the status of ‘procedural

\textsuperscript{242} Art. 54(1)(3) CCP.
\textsuperscript{243} Art. 29(2) CCP.
\textsuperscript{244} Aanwijzing rechtshulpstand politieverhoor 15 Februari 2010, Strij 2010, 4003.
\textsuperscript{245} See for the text of those Letters of Rights: Spronk 2010, p. 143-149.
\textsuperscript{246} Art. 30-34 CCP.
\textsuperscript{247} Art. 51 CCP.
\textsuperscript{248} Rechtbank Amsterdam 21 maart 2013, NsSr 2013, 130.
documents'. Also, under both legislative regimes, access to certain documents may be (temporarily) denied by the prosecutor if this would be in the interest of the investigation or access would harm third parties. There was – and still is – a possibility of appeal to the court – currently to the investigating judge – against a decision of the prosecutor to refuse access to (parts of) the case file. In most cases a decision of the court would, however, be made after the police detention has already ended, for which reason the appeal procedure was hardly ever used when access to documents was refused during the period of police detention. As the practical regulations on the new law on access to the case file per 1 January 2013 have not yet entered into force (August 2013), there is not much information on how the new procedure works in the phase of police interrogation.

When the case goes to court, full access must be given to the case file.

4.4.5. Legal Assistance

The general provision concerning the suspect’s right to legal assistance is to be found in Article 28 CCP:

‘The suspect may be assisted, […] by one or more lawyers of his or her choice. Each time that he/she requests legal advice, the suspect should be given the opportunity, to the extent possible, to communicate with his/her lawyer(s).’

The meaning of this provision is further interpreted in case law, and in general the courts have held that suspects have no right to consult a lawyer before being questioned by the police nor to have a lawyer present during police interrogation.

Since Salduz the right to legal assistance in the context of police interrogation has been guaranteed by an instruction on Legal Assistance during Police Interrogation, issued by the Public Prosecutor’s Office. This includes the right of a suspect to consult with a lawyer before the first interrogation, up to a maximum duration of 30 minutes. Juvenile suspects may request a lawyer or a ‘trusted person’ (a parent or relative) to be present at police interrogations. Despite the Salduz case law of the ECHR, the Supreme Court has held that adults do not have a right to have a lawyer present during police interrogations.

There has been extensive case law regulating various aspects of the right to legal assistance since Salduz: it is the responsibility of the police to inform suspects of their right to consult a lawyer before the first police interrogation; statements of

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246 Van Kampen & Hein 2013.
247 Art. 30(3) CCP and Art. 187d(1) CCP.
248 Art. 34 CCP.
250 Aanwijzing rechtsbijstand politieoorloos 15 Februari 2010, Stort 2010, 4003.
251 See Chapter 1, section 2.3.
253 HR 30 November 2010, LJN BN8387.
suspects who were not informed of, and who did not have access to, a lawyer before the first interrogation should be excluded from evidence, unless suspects have waived their right\footnote{HR 30 June 2009, NJ 2009, 349; HR 15 January 2013, LJN BY5697.} and the right to consult a lawyer only applies to suspects who are deprived of their liberty. Voluntary attenders are presumed to have consulted a lawyer if they want to before they attend the police station.\footnote{HR 20 December 2011, LJN BU5504.}

4.4.6. Right to Silence

The police must inform the suspect about the right to silence before every interrogation (unless it is a continuation of a previous interrogation concerning the same facts)\footnote{Art. 29 CCP.}. The caution must be registered on the interrogation record, otherwise it is presumed not to have been given. Statements made without the caution having been given are excluded from evidence if it is proved that the suspect’s defence interests have been harmed.

Suspects may refuse to answer questions regarding their identity. However, this can lead to an extension of the initial police detention by six hours in order to enable the police to check their identity by other means.\footnote{Art. 61(2) CCP.}

The drawing of adverse inferences from silence is generally not permitted. The fact that the suspect remained silent is not admissible in evidence, although it may have an impact on the evaluation of other evidence and on the sentence.\footnote{See for case law: Cleiren & Verpalen 2011, p. 100-101.}

4.4.7. Right to Medical Examination

There is no explicit right of a suspect to a medical examination, and the police are not obliged to inform suspects about the possibility. Each police corps has its own regulations as to when a doctor must be called. In practice, a doctor is normally called if the suspect has an acute medical condition, or claims to be taking certain medication for which a prescription is required.

4.4.8. Right to Have Someone Informed of Detention

There is no statutory provision requiring the police to inform a family member or other person named by the suspect of the detention. However, in practice this is normally done, but only at the request of the suspect. The police may refuse or delay contact in the interests of the investigation. The Prosecutor may decide to keep a person incommunicado where they believe that this is in the interests of the investigation, for instance, if there is risk of interference with the evidence or of contact with witnesses or with co-suspects who have not yet been arrested. An
incommunicado regime is often applied in more serious or complicated cases, especially when there are several co-suspects. The only person suspects may have contact with in this situation is their lawyer who, however, is bound by the same order and may not inform anybody about the case or the fact that the suspect is in detention.\textsuperscript{262}

In cases involving juvenile suspects, a parent or guardian must be informed by the police irrespective of the wishes of the suspect. Parents and guardians have the same rights of access, and to confidentiality, as lawyers.\textsuperscript{263}

4.4.9. Right to Interpreter/Translation

According to the CCP, a suspect has the right to oral interpretation during interrogations by the investigating judge, and during court hearings.\textsuperscript{264} Interpretation during police investigations is regulated by the Instruction on Access to Interpreters and Translators during Police Investigation adopted by the Public Prosecutor’s Office.\textsuperscript{265} According to this Instruction interrogations of suspects who do not (sufficiently) speak or understand Dutch must be conducted with the help of an interpreter. The test for determining the need for interpretation is whether the suspect understands the questions posed to them, and is able to give a nuanced answer to these questions. The need for interpretation is determined by the interrogating officer and in case of doubt by the prosecutor. It is permissible to conduct the interrogation in any language the suspect understands; interpretation in the native language of the suspect is not compulsory. In principle, interpretation should be conducted by sworn and registered interpreters, unless there is no registered interpreter available at short notice. If a non-registered interpreter is involved the reasons for this have to be recorded.

With regard to the translation of documents of the case file, a summary of the essence of the most important documents must be translated in writing. Which documents should be translated is to be decided on a case-by-case basis.\textsuperscript{266} For the remainder of the documents an oral translation is regarded as sufficient. There is a provision requiring oral interpretation of documents of the file to be provided by an interpreter during a lawyer-client consultation.

Furthermore, the instruction is worded in such a way that it applies to interpretation during the interrogations only, but not, for example, to interpretation of the information about rights.

\textsuperscript{262} Art. 62(2) CCP.
\textsuperscript{263} Art. 400 CCP.
\textsuperscript{264} Art. 191 & 275 CCP.
\textsuperscript{265} Aanwijzing bijstand van tolken en vertalers in het opsporingsonderzoek, Start 2008, 116.
\textsuperscript{266} See for case law: Cleiren & Verpalen 2011, p. 113.
The Dutch CCP has been amended by a new law, adopted on 28 February 2013, to implement the Directive on the right to interpretation and translation. It is not known (as at August 2013) when this new regulation will enter into force. The amendments include a general right of suspects to interpretation throughout all stages of the proceedings, including during the police investigative stage. The new law enhances suspect’s rights in specific situations: for example, the right to interpretation during the interrogation, and the right to translation when police custody is ordered. The new law also includes a provision granting rights to interpretation and translation for persons with hearing difficulties and speech impediments.

With regard to translation of documents, the new law provides that specific documents must be made available in a language that the suspect can understand. These include the police custody order (including the suspicion, grounds for police custody and term of validity of the order), the penal order in case of a misdemeanour, the summons, and the charges immediately after they have been brought by the prosecutor. A suspect who requests a copy of the final judgment must be given the verdict and conviction in writing in a language that they understand, unless they were present when the court decision was made, and this was interpreted for them.

In addition, the new law provides that the suspect has the right to request a written translation of documents in the case file that are necessary for their defence. The request should be addressed to the public prosecutor during the investigative stage, and to the court in the court stage. If the public prosecutor does not grant the requested translation, the suspect must be notified in writing. The suspect can object to that decision before the investigating judge.

A register of sworn interpreters, and the obligation for the respective authorities to engage only interpreters from the register, was introduced by the Law on Sworn Interpreters and Translators in 2007. Quality, integrity and (continuous) education requirements for interpreters and translators, as well as a complaints

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267 Wet van 28 February 2013 tot implementatie van richtlijn No. 2010/64/EU (PfEU L 280), Stb. 2013, 85.
268 New Art. 27(4) CCP.
269 New Art. 29a CCP.
270 New Art. 59 (7) CCP.
271 New Art. 131b CCP.
272 New Art. 59 CCP (bevel inverzekeringstelling) and Art. 78 FCP (bevel voorlopige hechtenis).
273 New Art. 257a para. 7 CCP.
274 New Art. 260 para. 5 CCP.
275 New Art. 314 para. 1 CCP.
276 New Art. 365 para. 6 CCP.
277 New Art. 32a CCP.
278 New Art. 32a para. 2 CCP.
279 New Art. 32a para. 3 CCP.
procedure, are provided by the Law and a regulation that implements the Law. There is also a Professional Code of Conduct for Interpreters and Translators issued by the Legal Aid Board. A non-registered interpreter may be used only if a registered interpreter is not available. If this happens, the fact that a non-registered interpreter was used, and the reasons for it, should be mentioned in the interrogation record. The Register also includes sign language interpreters of different languages.

4.4.10. Right to Inform Consulate/Embassy

Although the Netherlands is party to the Vienna Convention on Consular Relations, Article 30 of which provides that a foreign national who is deprived of their liberty has the right to inform their embassy or consular authority of their detention and have free communication and access to consular officers, there is no obligation to notify the suspect of this right nor a regulation on how this right should be communicated to the suspect. Therefore, in practice the Convention rights only apply if a foreign suspect explicitly asks for consular assistance.

4.5. What Are the Remedies for Breach of these Rights?

Violations of suspects' rights at the police detention stage should be made known by the defence during the pre-trial investigation. For instance, the illegality of police detention cannot be raised for the first time at trial, but must be argued before the investigating judge. Denial of access to legal assistance during police detention may lead to the release of the suspect from police detention or to the denial of an application for pre-trial detention.

Where violation of a suspect's rights have been raised as aforementioned and/or if a procedural violation could not be remedied, the courts may choose between three types of remedy: (a) a reduction in sentence; (b) exclusion of the evidence obtained in breach of the procedural rules; or (c) a declaration that the prosecution is non-admissible. The court can also simply make a declaration of the violation, without imposing a sanction.

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283 Pera, 246. The non-registered interpreter must provide a Declaration of Conduct (Verklaring Omzicht Zet Geleid) issued by the local municipality to prove that the person does not have a criminal record.
285 Clason & Verpallen 2011, p. 267; see, for instance, HR 24 November 2009, Lijn 853252.
287 Art. 359a CCP.
The non-admissibility of the prosecution is the most 'serious' sanction for a procedural violation committed by the investigating authorities. It may be used if the court believes that the violation was such that the handling of the case did not meet the requirements of a 'fair procedure'. According to the case law of the Supreme Court it may be only applied in cases of intentional, serious and conscious breaches of the fair hearing principle committed by the authorities.


Suspects, including juvenile suspects can waive their right to legal assistance. In serious cases, juveniles between 12 and 15 years can only waive their right to legal assistance after consultation with a lawyer. There are no reliable statistics on how many suspects waive their right to a lawyer. In May 2012 statistics were published showing that since implementation of the right to consultation with a lawyer in 2011, the number of consultations at the police station have increased by 32,269 compared with 2010, that is, an increase of 34 per cent. State expenditure on legal consultations rose by 3.5 million Euro compared to the previous year.

4.7. Extent of Lawyer's Role

Once a lawyer has been contacted in respect of a suspect detained at a police station, the lawyer has two hours within which to arrive at the police station, after which the police are permitted to commence an interrogation in the absence of legal assistance. Empirical research conducted in parallel with this research project revealed that this time limit is problematic when the police station is located some distance from the location of the offices of the duty lawyer, and when this is combined with the lawyer's other commitments, such as calls from other police stations and court appointments.

Detained suspects have the right to a private consultation with a lawyer before the first interrogation, subject to a maximum of 30 minutes. Previous research has found that consultations rarely last as long as this. Lawyers are free to visit their clients after the first consultation, during the next three days of police detention.

Generally there is no right for a lawyer to be present during police interrogations. Lawyers may be present in interrogations of juvenile suspects, but previous research has shown that a lawyer is present in only 60 per cent of interrogations of juveniles between the ages of 12 and 15 years, and in 25 per cent of interrogations of

289 Art. 359a(2) CCP.
291 See Aanwijzing rechtsoptreden politieoordeel 15 February 2010, Stelt 2010, 4603.
292 WJDC, CBS & Raad voor de Rechtpraak 2012.
293 Verhoeven & Stevens 2013, p. 308.
294 Verhoeven & Stevens 2013 found that the average consultation lasted between 10 and 15 minutes and the full 30 minutes were hardly ever used, p. 154 & p. 222.
juveniles aged between 16 and 17 years. Many juveniles waive their right to have a lawyer present in interrogations, and lawyers do not really see the added value of their attendance because they have minimal rights to intervene. In addition lawyers feel handicapped in advising their clients because they have no access to any case documents before an interrogation. Although in theory there is such a right, lawyers do not assert it because a court decision on the matter will come too late.

Lawyers do not have many powers to participate in investigations and normally do not have contact with the interrogating officers, or the prosecutors who oversee detention and who take decisions regarding the limitations of rights, such as limiting access to the case file in the interest of the investigation. As noted earlier, in the case of suspects who are held incommunicado, lawyers may not inform anybody regarding details of the case nor the fact that the suspect is in detention. Lawyers who breach the incommunicado detention rules by, for instance, having contact with the suspect’s family or with witnesses, may be disciplined by the disciplinary court.

4.8. Role of Lawyer in Police Interview and Power to Exclude Lawyer from a Police Interview

There are no (statutory) provisions on what a lawyer may do during police interrogation and what the powers of the police are to exclude a lawyer from the police interview. Before the start of the pilot project referred to in section 4.1 above, there was a protocol negotiated between the Bar and the police on what the lawyer’s role could be during interrogation. It has to be kept in mind that this protocol was agreed before the Salduz judgment, and that lawyers had no general right of access to police interrogations. According to the protocol lawyers did not have the right to sit next to their clients, have eye contact with them, to intervene except when undue pressure was applied, or to interrupt the interview to consult their client in private. If they did not behave in accordance with the protocol, they could be excluded by the police after a warning. Although the Salduz judgment changed the legal context in which lawyers may operate, the protocol still seems to be the standard for how lawyers should behave during the interrogation. The Instruction on Legal Assistance during Police Interrogation issued by the Public Prosecutor’s Office states that lawyers should not interfere with the interrogation. They have to remain seated, and may not make sounds or carry out other work. They may only intervene when undue pressure is applied, and to propose corrections to the record at the end.

Verhoeven & Stevens 2013, p. 313.
Verhoeven & Stevens 2013, p. 313.
See section 4.4.4 above.
Art. 62(2) CCP.
Stevens & Verhoeven 2010, p. 40-47.

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of the interrogation. The instruction explicitly states that lawyers who do not abide by these instructions can be excluded by the police. The police have to consult the prosecutor before taking this decision.

On 7 March 2013 the Dutch Bar adopted guidelines on the role of lawyers during police interrogations.302 The guidelines include rules on how lawyers should advise their clients, that lawyers should attend clients at the police station as soon as possible after they receive a call, how to deal with conflicts of interest if there is more than one suspect in the same case, etc. Although lawyers are advised to adopt 'in principle, restrained, but not passive' behaviour, they should ask questions if necessary and sit next to their client and advise them during the interrogation, or ask for a time out when appropriate. They should intervene with a view to ensuring that the suspect's choice of strategy is respected, that no procedural mistakes are made during the interrogation, and 'whenever the lawyer finds it necessary'.303 These guidelines are designed to encourage lawyers to adopt a less passive role than is prescribed in the instruction on Legal Assistance during Police Interrogation of the Prosecutor's Office.304

4.9. Arrangements for Provision and Payment of Custodial Legal Advice

Legal assistance in criminal cases may only be provided by lawyers registered with the Bar.305 There is a duty lawyer scheme for providing legal assistance during police interrogation organized by the Legal Aid Board. It manages the list of lawyers registered for the duty lawyer scheme, runs the roster of on-duty lawyers in each police district, and organizes the appointment of lawyers by a service created for those purposes called piketcentrale.306 The Legal Aid Board also organizes payment for police station legal advice and establishes minimum criteria for admission to the service. The requirements for acceptance on the list of duty lawyers are quite minimal,307 and non-specialists (generalists) lawyers are widely represented on the list.

The police and assistant prosecutors are required to ensure that suspects are informed about the right to be assisted by a lawyer as from the first police interrogation. If a suspect wishes to consult a lawyer, and in cases where consultation with a

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303 Art. 7 Protocol raadsman bij politieverhoor.
304 See section 4.7 above.
305 Art. 37 CCP.
306 Piketcentrale is not functional on the whole territory of the Netherlands, e.g. in the north (Leeuwarden district) and south (Den Bosch district) lawyers are contacted directly by the police. See Interim-regeling strafpiket, available at <www.rv.tr.nl/subhome/trv/Rege lingen> (last visited 3 October 2013).
307 Participate in a one day course organized by the Legal Aid Board, accompanying another admitted lawyer 6 times to the police station and handling at least 10 criminal cases a year; see <www.rv.tr.nl/binaries/trv-downloads/inschrijven/2013/inschrijvingsformulier-staf piket-2013-versie_1.0.pdf> (last visited 3 October 2013).
lawyer is mandatory,\textsuperscript{306} the police are required to ensure that the *piketcentrale*, or the individual lawyer, is informed. The police are also responsible for providing facilities for confidential meetings between the lawyer and the suspect, and for certifying the fact of service provision. Suspects in police detention have the right to choose a particular lawyer provided that they are registered on the list of ‘duty’ lawyers run by the Legal Aid Board.\textsuperscript{307} A suspect has a right to nominate a lawyer who is not on the list, but in that case the lawyer will not be paid under the legal aid scheme. Thus, in practice the right to choose a lawyer during the stage of police detention depends not on the financial resources of the suspect, but on whether a lawyer chosen by the suspect is registered on the list of lawyers entitled to receive remuneration from the state for the provision of legal assistance during the police investigation.

Lawyers are on duty, in principle, for 24 hours (from 8:00 pm the day before until 8:00 pm on the duty day). In practice, the period on duty is normally limited to 7:00 am to 9:00 pm because lawyers are contacted by the police only between 7:00 am and 8:00 pm,\textsuperscript{308} except in very exceptional cases (serious offences such as murder) when a lawyer may be contacted during the night. Furthermore, most police stations are closed to visitors after 9:00 pm. There is also a duty service on the weekends.

The fees for the provision of police station legal advice are fixed. The amount of remuneration is as follows:\textsuperscript{311}

- The fee for consulting an arrested suspect before interrogation is 85 Euro.
- The fee for a second visit to an arrested suspect after the interrogation is 85 Euro.
- If the suspect has waived their right to assistance before the first interrogation, and asks for a consultation after being placed in police custody (*inverzekeringstelling*), the fee is 170 Euro.

The payment for providing free legal assistance to juveniles during an interrogation is as follows:

- 113 Euro, irrespective of the number of interrogations during which a lawyer was present;
- A total fee of about 126 Euro in more serious cases, such as:

\textsuperscript{306} This is the case for juveniles of 12-15 year who are suspected of a serious crime, see Aanwijzing rechtsbijstand politieverhoor 15 February 2010, S overt 2010, 4003.

\textsuperscript{307} These rules are established by the Regulations of Duty Services issued by Legal Aid Boards. See e.g. Art. 9 Regelting piketorganisatie, available at <www.rvr.org> (last visited 3 October 2013).


\textsuperscript{311} As of 15 November 2011.
offences punishable by imprisonment of twelve years or more;
- crimes where the victim is deceased or suffered serious bodily injury;
- sexual offences punishable by imprisonment of eight years or more.

An additional 113 Euro is paid to lawyers for the provision of free legal assistance during the weekend.

Thus, the maximum fee for police station legal advice — a case of a juvenile suspected of a serious crime where assistance is provided at the weekend — is approximately 450 Euro, and the lowest fee is about 85 Euro.

Remuneration for attendance at interrogations is considered by lawyers to be extremely low, because interrogations often last several for hours. However, payment for attendance at police stations is rather lucrative for most lawyers if they only attend for a consultation of less than 30 minutes.

5. Scotland

5.1. What Does the System Overall Look Like?

The countries of the United Kingdom were unified by the Act of Union in 1707. Prior to this, Scots law developed independently, and following Union, its criminal law continued to develop entirely separately to the rest of the United Kingdom. However, the system is still rooted in a common law, adversarial tradition, although historically it has been more influenced by the Romano-canonical and French systems than the rest of the UK.\(^{312}\) Whilst there are similarities in procedure and substantive law between Scotland, and England and Wales, the applicable laws are quite different. The criminal law developed through the jurisprudence of the courts and was expressed in the commentaries of Hume\(^{313}\) and Alison\(^{314}\) until statute began to define its remit towards the end of the nineteenth century. The law is now largely statutory, although both sources continue to be drawn upon in the criminal courts as records of the common law and legal principle.\(^{315}\) There are two routes of trial procedure, solemn and summary. The solemn procedure is reserved for trials on indictment before a jury which take place in the sheriff or High Court. Summary procedure applies to all other offences, originally so called because the trial followed almost immediately after apprehension, although this is no longer the case. Trials are conducted by a sheriff, stipendiary magistrate or justices of the peace. Crimes are defined by statute as triable on indictment, either-way or summary. Common law crimes may all be tried on indictment or summarily, save for murder, rape or

\(^{312}\) See Gordon & Cane 2011; Farmer 1997.

\(^{313}\) Hume 1819.

\(^{314}\) Alison 1835.

\(^{315}\) Gordon & Cane 2011, Chapter 1-02.
‘defacement of messengers’, which must be tried on indictment. Historically, all evidence was taken before a magistrate, and police officers were only deployed to convey the suspect to the courts. Indeed, judicial examination remains a procedure that can be conducted following charge. In contemporary proceedings, it is much more usual for the police to arrest, detain, interrogate and charge a suspect, following which the prosecution will proceed with the matter to trial. Accordingly, procedural laws developed during the twentieth century to prescribe the role of the police in the investigation, a process which continues with the introduction before the Scottish Parliament of the Criminal Justice (Scotland) Bill 2013 as our project was being finalized.

Scotland has a system of public prosecution, the Crown Office and Procurator Fiscal Service, which has its roots in the procureur system in French law, but its modern form is more similar to that in England and Wales. The Lord Advocate, who is part of the Scottish Executive as one of the Law Officers, is the head of the criminal prosecution system. The procurator fiscal prosecute in the sheriff and justice of the peace courts and decide whether a case should be prosecuted on indictment. High Court cases are prosecuted by advocate-deputes, appointed by the Lord Advocate to act as his deputes. The procurator fiscal has responsibility for determining whether a prosecution should be brought, which charges should be made and before which court, as well as whether to accept a guilty plea. The fiscal also has powers to offer an alternative to prosecution (including the fiscal fine and a range of diversion schemes).

The most significant area of change in the last ten years was brought about by judgment of the UK Supreme Court in Cadder v. HM Advocate. The judgment held that the use at trial of inculpatory evidence obtained during police interrogation without access to a lawyer will irretrievably prejudice the fairness of the trial, and that it is ultra vires the powers of the fiscal to admit it in evidence. Cadder had an immediate impact on the criminal justice system. Hundreds of cases had to be

316 Though this may be prosecuted summarily by reformulating as assault or breach of the peace.
317 See Gordon & Gane 2011, Chapter 1-12.
318 See Gordon & Gane 2011, Chapter 12.
320 They are assigned to a particular districts, s. 307(1) Criminal Procedure (Scotland) Act 1995.
321 Hume 1819, ii, 30, which states that the Lord Advocate has the universal and exclusive title to prosecute on indictment. See also Gordon & Gane 2011, Chapter 3.
325 Including the referral of a child to the Children’s Hearing System.

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abandoned because they fell foul of the decision\textsuperscript{327} and it has instigated significant change to criminal procedure in Scotland, with an extensive review of the system\textsuperscript{328} and the consequent Criminal Justice (Scotland) Bill 2013.\textsuperscript{329} The case led to an immediate change in the law by way of emergency legislation, passed by the Scottish Parliament in three days with very little scrutiny or debate, in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. According to this Act all suspects, whether arrested, detained under section 14 of the Criminal Justice (Scotland) Act 1995,\textsuperscript{330} or voluntarily attending a police station, must be offered the right of access to a lawyer prior to any interrogation. If the suspect wishes to exercise the right, they must at least be able to consult with a solicitor in private, which could be by telephone.\textsuperscript{331}

The changes have resulted in the police and legal profession in Scotland having to considerably change their operating practice.\textsuperscript{332}

Where an accused pleads guilty to the offence and the Crown accepts this,\textsuperscript{333} the sentencing judge must take into account the stage at which the accused pled guilty and the circumstances, and may apply a discount to what otherwise would have been the starting point for the sentence.\textsuperscript{334} The procurator fiscal may also offer an alternative disposal of a fixed penalty, compensation order or work order where the offence is triable summarily.\textsuperscript{335}

\textbf{5.2. Status at Trial of Evidence Obtained at the Investigative Stage}

The fiscal will lead evidence at trial obtained through the police investigation, including the record of interview(s) of the suspect. This means that the witnesses who have deposed statements will be called to give oral evidence upon which they will be examined in chief by the fiscal (who may ask only open-ended questions in order to take the witness through their account), and cross-examined by the defence.

\textsuperscript{327} As at February 2011, the number of cases affected was 867, which was much smaller than the thousands anticipated during the litigation by the Lord Advocate, see Cabinet Secretary for Justice, Scottish Parliament Official Report, 23 February 2011. This number slightly increased to 1030 by the end of 2011, see "1000 cases hit by Cadger ruling", STV News, 5 December 2011.

\textsuperscript{328} Carloway 2011, conducted by High Court judge Lord Carloway who made recommendations for significant reform.

\textsuperscript{329} Introduced 20 June 2013.

\textsuperscript{330} Which is a six-hour period (extended to 12 hours by the 2010 Act) in which the police are entitled to detain a person for the purposes of facilitating the carrying out of an investigation.

\textsuperscript{331} S, 15A(3) and (5) Criminal Justice (Scotland) Act 1995.

\textsuperscript{332} For critical accounts of the change see Ferguson 2011 and McCluskey 2011.

\textsuperscript{333} The prosecutor is not bound to accept a plea and can insist on the case going to trial, Peter v. Smith (1849) 2 Swin 492.

\textsuperscript{334} S. 196 Criminal Procedure (Scotland) Act 1995 and Practice Direction (No 1 of 2008), Recording of Sentence Discount, 22 August 2008.

\textsuperscript{335} S, 302-303(Z) Criminal Procedure (Scotland) Act 1995, and various regulations specifying where these powers can be exercised and what penalties must be paid.
advocate (who may ask leading questions that suggest a particular course on behalf of their client). 'No comment' interviews will rarely be referred to as there is little evidential value since inferences from silence are not permitted under Scottish law. In order to prove the case, the essential facts upon which the Crown relies must be corroborated. This demands a distinct and concurring source of evidence to another source of evidence against the accused in order to secure a conviction. A confession alone, even with a lawyer present, is never enough. There would have to be witness or forensic evidence connecting the accused to the crime. Conversely, admissions made in interview can provide corroborative evidence.

5.3. How Does Police Detention and Interrogation Work in Terms of Powers and Responsibilities?

5.3.1. Authority to Stop and Search and Detain

The police investigate and arrest on their own initiative in Scotland and have wide discretionary powers as to how they exercise their role. As regards regulation, some powers are provided by statute, others prescribed by common law. Before police forces were unified in 2013 into the Police Service of Scotland (known as Police Scotland), each force area had its own standard operating procedure, although these are not publicly available. The Association of Chief Police Officers in Scotland (ACPOS) also provided guidance for the eight former police forces, but Police Scotland has also taken over this responsibility. The police may require anyone they believe to have information about the commission of an offence or, upon reasonable suspicion, to have committed an offence, to stop and answer questions relating to their identity, and in the case of the latter, to give an explanation of the circumstances. The officer may then detain a person where they have reasonable grounds for suspecting that they have committed or are committing an offence. The power to detain persons is always exercised on the initiative of the police themselves. Search of a person may only take place once they have been arrested or detained.

336  Hodge v. HM Advocate (No. 5) 2002 SLT 599.
337  Hume 1819, ii:384-386; Alison 1833, ii:351.
339  See the Police and Fire Reform (Scotland) Act 2012, and regulations thereunder.
340  s. 13 CP (Scotland) Act 1995.
341  s. 14 CP (Scotland) Act 1995.
342  Jackson v. Stevenson (1897) 2 Adam 255; the power to take samples is also provided in s. 18 CP (Scotland) Act 1995.
5.3.2. Criteria for Detention

The rights of the suspect are greatly influenced by whether they are arrested or merely detained. Common law arrest can be exercised in certain circumstances: where an offence is in the process of being committed or a suspect is fleeing the scene, or on a court warrant. Arrest is used where no further investigation is necessary and is by and large a mechanism of controlling the suspect in order to charge and take them before a court. By contrast, section 14 of the Criminal Justice (Scotland) Act 1995 provides for detention where there are reasonable grounds to suspect that a person has committed an offence but insufficient evidence to charge. From the point of notification, the person may be detained for a period of 12 hours for the investigation to be conducted, which will involve conveying the suspect to the police station and interrogating them regarding the suspicion held by the police. At the end of the twelve-hour period, or as soon as the investigation is concluded, the suspect must be charged, released with no consequences, or released upon report to the procurator fiscal for a decision as to charge. The Criminal Justice (Scotland) Bill 2013 proposes one system of arrest upon reasonable suspicion, with detention authorized where an officer is satisfied that there are grounds to detain.

Statutory detention can last for a maximum of 12 hours, and in most cases is for much shorter periods. The maximum period was extended by the emergency legislation enacted subsequent to the Cadder decision on the presumption that the introduction of legal advice would delay the investigation. This has not been borne out by available data, with the majority of detention lasting significantly less than 12 hours. Despite this, there is no proposal in the Criminal Justice (Scotland) Bill currently before the Scottish Parliament to reduce the period. However, the extension power pursuant to the 2010 amendments has not been renewed in the Bill. This power provides that a custody review officer may extend the 12-hour period for a further 12 hours in some circumstances. Before exercising the power, the officer must give the suspect or their solicitor the opportunity to make representations. If the extension is authorized, the custody review officer must ensure that the detainee, and any solicitor representing them, is available at the time, are informed of the extension and the grounds on which it was authorized. Common law arrest circumvents this process, but in order to exercise the power, the arresting officer must satisfy themself that they have a sufficiency of evidence upon which to charge.

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343 S. 14 CP (Scotland) Act 1995.
344 S. 14A (2) CP (Scotland) Act 1995: if the custody review officer is satisfied that (a) the continued detention of the detained person is necessary to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is being detained, (b) an offence in connection with which the detained person is being detained is one that is an indictable offence, and (c) the investigation is being conducted diligently and expeditiously.
345 S. 14(2) CP (Scotland) Act.
346 S. 14(5) CP (Scotland) Act.
the suspect with an offence. Once a decision to charge is taken, the suspect held under either status can then be either held further at the police station until the next available court day, or released upon an undertaking to appear at court. A bank holiday weekend can result in a lengthy wait in a cell if the custody sergeant does not believe it is appropriate to release the suspect in the interim. In some cases where the evidence is insufficient to charge, the person can be released pending a report to the fiscal for a decision. Some suspects will attend the police station of their own volition, or be invited to attend for questioning, which they may volunteer to do. Upon attendance at the police station, the police enquiries, including admissions obtained from the suspect during interrogation, may lead to the person being arrested and charged.

5.3.3. Minors

Until 2011, the age of criminal responsibility was eight, one of Europe’s lowest. In practice, most offenders under the age of 16 years were dealt with under the Children’s Hearing System, although the state retained the right to prosecute those aged 8-15 in the courts, usually pursuant to serious charges such as murder and rape, or certain specific motoring offences.

However, in 2010 section 52 of the Criminal Justice and Licensing (Scotland) Act, implementing a 2002 Scottish Law Commission Report, raised the age of criminal responsibility from 8 to 12 years. Resisting calls for the age to be raised to 14 or even 16, this increase brings Scots law into line with jurisdictions across Europe. However, 8 to 15-year-olds are still referred to the Children’s Hearing System, and certain specific motoring offences.

Scotland’s Children’s Hearing system applies to children and young people under 16 (and under 18 in some cases) who commit offences or are considered to be in need of care and protection. A ‘gatekeeper’ (the Children’s Reporter) decides which cases should be referred to a lay tribunal - the Children’s Hearing. The Children’s Hearing is required to consider and make decisions on the welfare of the child or young person before them, taking into account all the circumstances, including any offending behaviour. Cases only go to the sheriff court if an offence is denied; they are then referred to the Children’s Hearing once the facts have been determined in a trial. When dealing with serious offences and 16 and 17-year-old offenders, the courts can also refer cases to the Children’s Hearing for decision on what action should be taken. For an analysis of the effectiveness of the system see JUSTICE & The Police Foundation 2010.


S. 41A of the 1995 Act provides that a child under the age of 12 years cannot be prosecuted for an offence. The amendment to the Act removes children between the ages of 8 and 11 from the traditional criminal justice system. However, s. 41 remains, which provides that the
The law in Scotland requires that children must not be deprived of their liberty upon conviction by being held in prison and must not, in particular, be detained in police custody for any period unless there are exceptional circumstances.

5.3.4. Records

The police must maintain a custody record containing arrest or detention times, grounds for detention, meals and rest times, noting that the suspect has been informed of their rights, whether they have been exercised, and any police action.

Interrogations should be audio or visually recorded. The interrogation record, however recorded, will then be copied and included in the disclosure evidence sent to the Crown Office for the prosecution to consider and where helpful for the pursuance of a conviction, rely upon at trial. It is admissible at trial either as a transcript or with the recording being played.

5.3.5. How Many Police Detentions of Suspects each Year? Is this Stable?

The Association of Chief Police Officers in Scotland (ACPOS), through the Scottish Police Performance Framework (SPPF), published data on the number of individuals brought into custody on an annual and quarterly basis. This information is given by way of an indicator of the level of the demands placed on individual police forces, and is released with the caveat that there is no direct correlation between the number of individuals brought into custody and the number of crimes and offences because it may be that a number of the crimes involve only one person, whilst a number may involve multiple culprits.

For the reporting period of 2011-12, 204,239 individuals were brought into custody, an increase of four per cent on the previous period. From April 2010 to March 2011, there were 200,677 individuals taken into police custody in Scotland, down 6.3 per cent from 214,153 the year before. In 2008-09 there were 230,619 individuals brought into custody, according to figures released under the SPPF in February.

Age of criminal responsibility is 8 years, and referrals can therefore still be made to the Children’s Hearing system.

S 44 CP (Scotland) Act. Rather they must be placed in residential accommodation provided by the local authority for a period not exceeding one year.

S 43(4) CP (Scotland) Act requires the child to be taken to a place of safety other than a police station if they cannot be immediately taken before the sheriff or released on an undertaking.

ACPOS Custody Manual of Guidance, section 4, replaced by the Police Scotland Care and Welfare of Persons in Police Custody Standard Operating Procedures, v1.01, August 2013, which incorporates similar guidance.

Gordon & Cane 2011, para. 24-6.1.


ACPOS 2011, p. 37.

See <www.scotland.gov.uk/Publications/2012/11/139778/7> (last visited 3 October 2013).

ACPOS 2011, p. 47.
January 2010, although subsequent data published in October 2010 puts this figure slightly lower at 228,171. This figure includes common law arrests, statutory detentions, and warrants issued by the court for the arrest of a person due to be tried who fails to attend court.

5.4. What Rights Does the Suspect Detained in Police Custody Have? At what Point do the Rights Apply?

5.4.1. External Supervision

Until 2013, the police received guidelines from their area force on practice and procedure. From 2013 the Police Scotland came into operation and started to develop nationwide policies. The former standard operating procedures were not usually publicly available, nor do the new policies appear to be published at the time of writing. The Association of Chief Police Officers Scotland maintained guidance on custody which it was expected that each force would follow, although this was not mandatory, and is likely to be replaced by Police Scotland guidance, particularly in light of the 2013 Bill. The presence of lawyers (where they attend at the police station) and tape-recording provide an element of supervision. Lawyers are entitled to raise arguments at trial that evidence has been obtained unfairly and that it should be excluded. It is possible to take a civil action against the police for ill treatment or poor conditions. For example, a series of cases have been taken of this nature in relation to prison detention conditions.

Independent custody visiting, previously known as lay visiting, has been taking place in Scotland since 1999 and there were active ‘schemes’ in seven out of eight former police forces in Scotland, the exception being Grampian. Although such visitation schemes are not a statutory requirement in Scotland, the Scottish Government in 2004 issued National Standards requiring the procedures to be followed. These schemes are largely administrated by local authorities and there are around 100 visits to police cells conducted every month across Scotland. These visits also provide an opportunity to scrutinise police practice and procedures in custody facilities and, therefore, provide a mechanism of accountability and reassurance to the public.

361 See <www.scotland.police.uk/> (last visited 3 October 2013).
365 Hanter, Fyfe & Elsins 2010.
5.4.2. Right to Know Reason for Arrest and Detention

At the time when a constable detains a person, they must inform the person of their suspicion, of the general nature of the offence which they suspect has been or is being committed and of the reason for the detention.\(^{366}\) This must later be recorded in the custody record. Upon attendance at the police station, the custody sergeant is obliged to inform the suspect of the grounds for detention (i.e. whether they have been arrested or statutorily detained) but not the nature of the offence for which they are suspected, nor why detention is necessary. There are proposals in the 2013 Bill, however, for the assessment of necessity for detention to take place.

5.4.3. Information on Rights; Letter of Rights

Suspects must be told at the time of their arrest or detention by a police constable and again on arrival at the police station or other premises of their right not to respond to questions.\(^{367}\) Once they have arrived at the police station, they must then be advised of their right of intimation to another person.\(^{368}\) If detained under common law arrest, the person must be informed of the right to intimation also to a solicitor, who can then meet them at court should they be charged. If they are detained under section 14, they must be informed of their right to legal advice.\(^{369}\) A record must be kept of the times when the suspect is told of these rights, and of the identity of the constable who told them.\(^{370}\) This record goes into the police register and the case file.

Regarding section 14 detentions, the information relating to a suspect's decision concerning their right to access a solicitor, including any decision to waive this right and any change in decision, is recorded on a Solicitor Access Recording Form (SARF).\(^{371}\) The SARF requires the arresting officer to deliver the rights using standard wording in order that a consistent approach is taken by officers across Scotland.\(^{372}\) Furthermore, a 'pre-interview review of rights' must be followed in every case at the commencement of every interrogation. A standard form is followed that requires officers to verify whether a suspect was informed of their right to legal advice and whether they exercised it. The review does not, however, ask if

\(^{366}\) S. 14(6) CP (Scotland) Act 1995.
\(^{367}\) S. 14(9) CP (Scotland) Act 1995.
\(^{368}\) S. 15(1)(b) CP (Scotland) Act 1995.
\(^{369}\) S. 15(8) CP (Scotland) Act 1995.
\(^{370}\) ACPOS Custody Manual, section 16.2.1.
\(^{371}\) See for the text Chapter 5, section 2.6.
\(^{372}\) Pursuant to the ACPOS Manual of Guidance on Solicitor Access v1.2 (no longer available and not yet replaced with alternative guidance).
they would like to change their mind if they have waived the right.\textsuperscript{373} Subsequently a common law caution\textsuperscript{374} must also be communicated to the suspect.\textsuperscript{375}

Suspects are informed of their rights orally by the custody and arresting officers. There was no letter of rights distributed during our period of research, but this has since been created and the Government notified us that distribution had begun to all persons detained in police stations from July 2013.\textsuperscript{376} Until then, only a notice was displayed in the custody area concerning welfare rights and communication with a lawyer and third parties, entitled 'Notes for the Guidance of Accused Persons'.

5.4.4. Right to Access to the Case File and Disclosure at the Investigative Stage

In Scotland there is no right of access to relevant documents at the investigative stage. The arresting officer has a discretion whether to provide any information to a solicitor representing the suspect upon request.\textsuperscript{377}

5.4.5. Legal Assistance

There is a right to legal advice throughout section 14 detention.\textsuperscript{378} This affords private consultation including, and invariably by, telephone,\textsuperscript{379} before any police interrogation begins and at any other time during the questioning, unless the questioning is only for the purpose of obtaining the suspect’s name, address, date and place of birth (in such detail as a constable considers that information necessary for establishing his identity), and nationality. Prior to interrogation the interviewing officer must confirm that the person has been notified of this right and the answers they gave at that time. They are not obliged to ask if the suspect has changed their mind.

There is a lack of clarity as to the time at which the right to legal advice begins (as compared to the time at which the police are required to inform the detainee of that right), since a person’s detention usually begins before they have reached the

\textsuperscript{373} Ibidem, p. 10.
\textsuperscript{374} 'I am now going to ask you questions about (crime/ offence). You are not obliged to answer any questions but anything you do say may be noted, may be audio and visually recorded and may be used in evidence. Do you understand that?'
\textsuperscript{375} ACPOS Manual of Guidance on Solicitor Access, p. 44.
\textsuperscript{378} S. 15A CJ (Scotland) Act 1995.
\textsuperscript{379} The most recent SLAB figures reveal that 20 per cent of calls to the Contact Line resulted in personal attendance at the police station over the period 2012-13 as compared to 12 per cent of over the period 2011-12, which shows a significant increase in personal advice and assistance, though the numbers are still low. See SLAB 2013b.
police station and they might be asked questions in the intervening period. In the UK Supreme Court case of Ambrose, the Court held that the act of the Lord Advocate in relying at trial on evidence obtained from suspects in response to initial police questioning without having had access to legal advice was not incompatible with Article 6(1) and (3)(c) ECHR unless there has been a significant curtailment of the person’s freedom of movement. When this occurs it is because the person has become a suspect and is open to coercion by the police. It is not always easy to tell when it has happened, but a good indication is when a person has been cautioned that they are a suspect and are placed in handcuffs. No questions should be asked after this stage without first allowing the person the opportunity to consult with a lawyer.

Whilst the Cadder case brought about the right to legal advice and assistance during interrogation, there is currently no statutory right to assistance during interrogation. The 2013 Bill does, however, provide for this.

There is no time limit on the duration of lawyer-client consultations stipulated in legislation, and this would seem to be determined by what is reasonable in the circumstances.

In exceptional circumstances a police officer may delay the suspect’s right to consultation with a solicitor. However, there is no current statutory definition of what constitutes ‘exceptional circumstances’. The UK Supreme Court in Cadder referred to the Grand Chamber judgment in Saleh in which acknowledged that in particular circumstances where there were compelling reasons, access to a lawyer could be restricted.

There may be exceptional circumstances when it is not appropriate for the solicitor of choice to advise, or to continue to advise, a suspect. The solicitor may, for example, be suspected of involvement in the crime under investigation or be thought capable of passing on inappropriate messages from the suspect to other suspects. In such circumstances, the police will be entitled to refuse a request to contact a solicitor of choice.

Delays in lawyer-client consultations may be encountered where a suspect is to be interviewed at a remote police station, due to the practicalities of travelling to the police station. In the most populated areas of Scotland, it is expected that solic-

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380 *HM Advocate v. Ambrose & Ors (Scotland) (Joined cases) [2011] UKSC 43.
381 The right was confirmed in the Lord Advocate’s Interim Guidelines on Solicitor Access (2010).
382 S. 12A(8) CP (Scotland) Act provides that ‘In exceptional circumstances, a constable may delay the suspect’s exercise of the right under subsection (3) so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor.
tors will be able to attend police stations within an hour of the conclusion of the initial telephone consultation with the suspect. However, Scotland has many inhabited islands and mountain ranges where additional travel time and possibly the use of a boat or aircraft may be required to reach the police station. The ACPOS manual places the police under a duty to be flexible and reasonable in such situations.³⁸⁵

There are no circumstances where legal assistance is mandatory. If a person who has been detained or arrested is vulnerable due to mental illness, a learning disability or suffers from acquired brain damage or dementia, a scheme called the appropriate adult scheme should be running in the area to assist the person. The scheme should provide a specially trained person to assist the vulnerable adult to ensure that they are not disadvantaged during the interview with the police. The appropriate adult scheme covers all categories of persons (victims, suspects, witnesses, and the accused).³⁸⁶

Solicitors in Scotland advise and represent clients through all stages of criminal prosecution. There is no formally specialized criminal bar, though many lawyers only practice in criminal law. Solicitors are supervised by the Law Society of Scotland.³⁸⁷ There also exists a class of advocates in Scotland who are the equivalent of barristers (supervised by the Faculty of Advocates) which may represent an accused person at trial. Both branches of the legal profession may be provided through criminal defence law firms or via Scottish Legal Aid. The Public Defence Solicitors office has seven branches in Scotland. Most, but not all, lawyers who provide criminal legal assistance are specialists, working for specialized firms. Firms of solicitors who undertake legal assistance are listed on the Scottish Legal Aid Board’s Criminal Legal Assistance Register, which shows the names of individually registered solicitors and the address of their firm’s main office. As at 31 March 2013, there were 1,419 individual solicitors and 584 firms registered to provide criminal legal assistance with the Board.

Precognition agents, paralegals, first year trainee solicitors and any other people that are not enrolled solicitors do not have access to suspects at the police station. This situation differs from the practice of access by ‘legal representatives’ elsewhere in the UK, where a large number of access visits are made by individuals who are not solicitors.³⁸⁸

5.4.6. Right to Silence

Arresting officers must inform suspects of their right to silence as soon as they arrest or section 11 detain a suspect. There is no statutory ‘police caution’ in Scotland. The Scottish police caution is a common law caution, used upon arrest or

³⁸⁶ Citizens Advice Bureau.
section 14 detention; when interrogating a suspect; when taking a statement from someone who may end up being an accused person; or when charging someone. The caution is simply informing that person of their right to remain silent: "You do not have to say anything, but anything you do say will be noted and may be used in evidence." On statutory detention the caution is repeated upon arrival at the police station, but not on common law arrest. This is presumably because no questioning of such a suspect will take place during detention, as sufficient evidence already exists to charge them.

The ACPOS Manual of Guidance on Solicitor Access specifies standard wording to be used at the start of an interrogation, which it recommends should be used to ensure that any decision by the suspect to waive the right to silence is properly informed and recorded. The standard wording is:

"I am now going to ask you questions about (crime/offence). You are not obliged to answer any questions but anything you do say may be noted, may be audio and visually recorded, and may be used in evidence. Do you understand?"

No adverse inference may be drawn at trial by a justice of the peace or jury (depending upon whether the matter is tried summarily or on indictment) as to the credibility of the suspect from a suspect's silence when questioned or charged by the police, in answer to a caution or charge or indeed from a failure to give evidence during the trial.

The position can be different, however, where the person is not being interviewed or charged by the police and fails to respond to an allegation made by a co-accused in the presence of others, shortly after the occurrence of the crime. It may be inferred from the person's silence that they admit the allegation. The principle extends to circumstances in which the suspect fails explicitly to refute an allegation, but instead provides an explanation which is, on the face of it, exculpatory or mitigatory. In one case, the accused was asked whether he had set his dog on children. His reply that the children had "no right to be in the garden" was regarded as an admission that he had done so. His silence (or rather his failure to answer the question directly) was taken as proof of the accusation embedded in the question. However, this type of situation does not involve an inference from silence as such, but rather consideration of a constructive admission of fact.

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389 See Tangye v. HM Advocate 1982 SLT 506.
390 ACPOS Manual of Guidance Solicitor Access, p. 44.
391 Huckle v. HM Advocate (No. 5), 2002 SLT 595, para. 107; Lakin v. HM Advocate, 2005 SCCR 302.
392 Buchanan v. HM Advocate 1993 SCCR 1076.
393 Kay v. Allan 1978 SCCR Supp. 188.
5.4.7. Right to Medical Examination

There is a procedural right to a medical examination, though this is not set out in statute.\textsuperscript{394} If a person who is in custody is identified as having medical needs, the Custody Officer must ensure that these needs are acted upon as soon as practicable.\textsuperscript{395} Suspects must be asked about any disability, mental or medical conditions they may have. The presence of a health condition and its severity will affect decisions about how and where that person should be treated.\textsuperscript{396}

5.4.8. Right to Have Someone Informed of Detention

Persons detained have the right to have another person informed of their detention and whereabouts.\textsuperscript{397} They may not make the telephone call personally; the police will do this for them. The police must do this without delay unless there is a good reason not to, for example, that it might lead to the destruction of evidence or the warning of accomplices. There is no fixed time limit but any delay should be no longer than is necessary to investigate or prevent the crime or apprehend offenders. If a young person under 16 years of age is detained by the police, the police should inform their parents or guardians as soon as possible and must allow a parent or guardian access to the young person at the police station.\textsuperscript{398} The police can refuse access if there is a suspicion that the parent or guardian is involved in the crime or offence or if it is in the interests of the child to delay access.\textsuperscript{399}

5.4.9. Right to Interpreter/Translation

Common law evidential rules requiring fairness demand that the right to interpretation and translation is available. There is no statutory right to an interpreter or translator, and the 2013 Bill currently does not address this. If suspects in detention have difficulty understanding English and police officers are unable to speak their language, they must be provided with an interpreter. This is the responsibility of the police. The interpreter should be arranged from an authorized list and is free of charge. In particular, use of an interpreter is mandatory where English is not the person’s first language, or they have a hearing or sight impediment and they are due to be interrogated or charged by the police.\textsuperscript{400} In cases of doubt, a senior officer

\textsuperscript{394} This is addressed in the 2013 Bill.
\textsuperscript{395} ACPOS Custody Guidance Manual, s. 2.3.7.
\textsuperscript{396} ACPOS Custody Guidance Manual, s. 28.3.
\textsuperscript{397} S. 15(4) CP (Scotland) Act 1995.
\textsuperscript{398} S. 15(4)(a) and s. 15(5) CP (Scotland) Act 1995.
\textsuperscript{399} See Police Scotland Interpreting and Translating Procedures Standard Operating Procedure, v1.01, which replicates the former force area procedure. See also Lainy 2012.
should be consulted and the 'principle of fairness to the suspect shall be the prime consideration'\textsuperscript{401}.

The ACPOS Custody Manual stipulated that interpreter services should be utilized for suspects who have communication difficulties to ascertain any medical conditions,\textsuperscript{402} An interpreter must be called for people who appear to be deaf or there is doubt about their ability to hear, speak or understand English, or when the Custody Officer is unable to establish effective communication. If a person is blind, seriously visually impaired or, for other reasons unable to read, an independent person must be made available to help in checking any documentation regarding the custody.\textsuperscript{403}

As regards free translation of documents this is not dealt with in Scots law. It would appear that no such provision currently exists, judging by a statement from the Law Society of Scotland: 'We would welcome clarification that the suspect would be entitled to be provided with free translations of all relevant documents to safeguard the fairness of proceedings.'\textsuperscript{404}

In Scotland, there is no statutory obligation to notify the suspect of the right to contact a lawyer in a language the suspect understands. However, Scottish police regard it as a matter of good professional practice to ensure that all communications are carried out in the language most easily understood by the individual concerned, including, if necessary, arranging for the prompt attendance of an interpreter, consistent with time-critical and, in the main, exceptional situations where vital evidence may be lost, e.g. roadside procedures for road traffic offences. Scottish police forces have access to an interpreting service on a 24 hour/365 day basis.\textsuperscript{405}

The new letter of rights is available in all EU languages and a number of other languages regularly spoken in Scotland (33 in total), as well as large print.

5.4.10. Right to Inform Consulate/Embassy

The UK (including Scotland) is a party to the 1963 Vienna Convention on Consular Relations, and is therefore bound by Article 36 of the Convention which stipulates that foreign nationals who are arrested or detained be given notice 'without delay' of their right to have their embassy or consulate notified of that arrest.

If the detained foreign national so requests, the police must fax that notice to the embassy or consulate, which can then check up on the person. The notice to the

\textsuperscript{401} Police Scotland Interpreting and Translating Procedures Standard Operating Procedure, v1.01, p. 4.
\textsuperscript{402} ACPOS Custody Manual, s. 2.8.3.
\textsuperscript{403} \textit{Ibid.} s. 2.25.4.
\textsuperscript{404} Law Society of Scotland 2008.
\textsuperscript{405} Spronkon \textit{et al.} 2009, \textit{ibid.} England & Wales. See also Police Scotland Interpreting and Translating Procedures Standard Operating Procedure, v1.01, which lists the arrangements each of the old force areas has and with which company for the provision of interpretation and translation services.
consulate can be as simple as a fax, giving the person's name, the place of arrest, and, if possible, something about the reason for the arrest or detention.

The right was noted on the former Notes for the Guidance of Accused Persons and is listed on the Letter of Rights.

5.5. What Are the Remedies for Breach of these Rights?

As regards remedies, the general rule established in Laurie v. Muir\(^{406}\) is applicable, which introduces a balance between the need for due process and finding the truth. The most recent edition of Walker and Walker – the leading text on the Scots law of evidence – lists the following factors which must have a bearing upon the court’s decision as to whether or not to admit illegally obtained evidence:\(^{407}\)

i) The ‘gravity of the crime with which the accused is charged’;
ii) The ‘seriousness or triviality of the irregularity’;
iii) The ‘urgency of the investigation in the course of which the evidence was obtained […] the likelihood of the evidence disappearing if time is taken to seek a warrant’;
iv) The ‘authority and good faith of those who obtained the evidence’; and
v) The ‘fairness to the accused’.

These rules generally also apply to the breach of rights that are set out in this chapter. Unduly aggressive or repeat questioning designed to bully, trick, or induce a suspect to confess is liable to render the resulting evidence inadmissible in a Scottish court.\(^{408}\) Post-Cadder, this evidence must still be excluded.\(^{409}\) Incriminating statements made by a suspect in the absence of a caution will bring the admissibility of any confession into question, but will not necessarily mean that the statement will be excluded.\(^{410}\) The same rule applies for statements made without access to a lawyer being provided.\(^{411}\)

5.6. Do Suspects Request a Lawyer? Conditions for Waiver

Suspects can choose to waive their rights to solicitor access and/or their right to a private consultation with a solicitor. A range of information relating to a suspect’s decision in regard to their right to access a solicitor, including any decision to waive

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408 See, for a review of the authorities, HM Advocate v. Jenkins 2002 SCCR 43.
409 See Cadder 2011.
410 See Stark & Leverick 2010, referring to Tonge v. HM Advocate 1982 JC 130, per the Lord Justice-General (Emistie) at 145-146.
this right and any changes of decision, is recorded on a SARE.\footnote{\textsuperscript{412}} The suspect will be required to sign a waiver of their rights on a SARE and the exercising of such a waiver must be referred to at the start of interrogation.

Any waiver of the rights of a suspect must be ‘informed’, ‘voluntary’ and ‘unequivocal’. To ensure all suspects are fully informed in their decision, they are provided with a specific form of words, standardized in a similar manner to the common law caution\footnote{\textsuperscript{413}} although in certain cases, such as where the suspect is vulnerable, even this will be insufficient.\footnote{\textsuperscript{414}} The ACPO Manual of Guidance for Solicitor Access provides that for children and those aged 16 and 17 there is a presumption that they should have access to advice from a solicitor and every effort should be made to obtain those services. It may be more difficult to establish informed waiver for them due to their age.\footnote{\textsuperscript{415}}

Individuals must be informed that they retain the right of access to a lawyer at any time during which they remain a suspect even if they have previously indicated they did not wish to have access to a solicitor. Where suspects change their mind about the exercising of rights this must be accurately recorded on the SARE.\footnote{\textsuperscript{416}}

ACPO statistics for 2011 revealed that approximately 75 per cent of suspects waive their right of access to a lawyer.\footnote{\textsuperscript{417}} This only refers to choices made when suspects are first informed of their right to legal advice as data on whether suspects later change their minds is unavailable.

According to data gathered relating to the February to April 2011 period, the waiver rate for people being questioned whilst attending voluntarily at a police station is higher than for people either detained by way of section 14 or those who are arrested. Specifically, 85 per cent of people being questioned voluntarily waive their right to a solicitor.\footnote{\textsuperscript{418}}

5.7. Extent of Lawyer’s Role

Suspects have a statutory right to a private consultation with their lawyer.\footnote{\textsuperscript{419}} The extent of their role is otherwise not defined. Initial guidelines from the Lord Advocate issued to police following the hearing of the \\textit{Cadder} case, but before judgment, indicated that access should be given for lawyer-client consultations and, where suspects wished it, for lawyers to attend the interrogation.

Suspects should be permitted to consult their solicitors during interrogation. The solicitor, however, is not permitted to answer questions on behalf of the sus-

\textsuperscript{412} For the text see Chapter 5, section 2.6.
\textsuperscript{413} ACPO Manual of Guidance on Solicitor Access, p. 10.
\textsuperscript{414} See \\textit{McGowan v. B} [2011] UKSC 34.
\textsuperscript{416} ACPO Solicitor Access Data Report 2011.
\textsuperscript{417} \textit{Ibidem}.
\textsuperscript{418} S. 15A(3) CP (Scotland) Act 1995.
pect. Without prescription of the extent of the role, solicitors have been advised that they may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice.\textsuperscript{20}

5.8. Power to Exclude a Lawyer from a Police Interrogation

In circumstances where a solicitor is being obstructive, argumentative or is hindering the police investigation and where, therefore, the interviewer is unable to properly put questions to the suspect, they may be removed from the interview. The reasons should be recorded in the interrogation record (in those cases where the detention interview is subject to recording) and in the interviewing officer’s notebook. For the avoidance of doubt, advice given by a solicitor not to answer a question or to offer no comment does not fall to be regarded as being either obstructive or hindering the investigation.\textsuperscript{21}

5.9. Arrangements for Provision and Payment of Custodial Legal Advice

There is a specialist criminal defence service in Scotland through which a police station duty plan operates to ensure legal advice is available. The Scottish Legal Aid Board organizes the Police Station Duty Scheme. The solicitors registered to provide criminal assistance may further register to act as a duty solicitor under the Police Station Duty Scheme.\textsuperscript{22} As at 13 September 2013, 811 solicitors and 348 firms were registered with the Scheme, which included Public Defence solicitors.\textsuperscript{23}

The scheme was developed after engagement with the Law Society of Scotland, ACPOS, and the Senior Cadder Working Group, which was chaired by the Scottish Government, and the membership of which included the Law Society of Scotland, ACPOS, COPFS and the Board.\textsuperscript{24} The SLAB website lists its objectives as delivering efficient, effective and value for money legal assistance services; broadening access by exploring new ways of providing and supporting quality assured legal advice services; and contributing to the improvement and effective operation of the justice system.\textsuperscript{25} Its function in this context is to provide legal aid solicitors for those suspects who request such aid during police detention.

\textsuperscript{20} JUSTICE 2010.
\textsuperscript{21} Revised Interim Guidelines 2009.
\textsuperscript{22} Details as to its operation are available on <www.slab.org.uk/providers/DutyPlans/PoliceStationDutyScheme/>, with recent amendments following feedback as outlined in a news release on 19th September 2013, available at <www.slab.org.uk/news/articles/Police_station> (both last visited 3 October 2013).
\textsuperscript{23} SLAB 2013b.
\textsuperscript{25} Available at <www.slab.org.uk/about-us/what-we-do/> (last visited 3 October 2013).
The Scottish Legal Aid Board’s Solicitor Contact Line operates 24 hours, seven days a week to ensure that suspects requiring legal assistance receive it in a timely manner. The police call the Solicitor Contact Line. If the suspect has asked for a named solicitor, it is the Contact Line and not the police who will call them. Should a solicitor not respond to the call after 25 minutes, the police station will be informed and the suspect will be asked whether they wish to see the duty solicitor. The duty solicitor has 15 minutes to respond, otherwise another of the firms listed on the duty plan for that day will be contacted. If the solicitor does not respond, a SLAB lawyer will advise the suspect. If the personal attendance of a solicitor at a police station is required, they must be given a reasonable time to attend at the station. The time permitted depends upon where the solicitor lives (one hour is considered reasonable in urban areas, two hours if living in rural areas) and the available modes of transport. The time should be mutually agreed with the investigating officer.\textsuperscript{426}

Currently, there are interim arrangements in place to allow for solicitors to be paid under the advice and assistance scheme for work done on police station duty with an enhanced rate for work done between the hours of 22:00 and 07:00.\textsuperscript{427} Between the hours of 7:00 am and 10:00 pm, standard advice and assistance payment rates apply (£11.60 per quarter hour, £5.80 per quarter hour for travelling). However, enhanced payments are available for advice given between the hours of 10 pm and 7 am. A minimum fee of £30.94 can be claimed for anything up to the first 30 minutes. A fee of £13.47 per quarter hour is payable thereafter.\textsuperscript{428} The pay is subject to a means assessment. The suspect is liable to pay a contribution based on their disposable income. Contributions are calculated on a sliding scale, ranging from a contribution of zero (if income is less than £105 per week) up to a maximum of £142 (if income exceeds £235 per week).\textsuperscript{429}

There was initial resistance from a majority (90 per cent) of criminal law firms to the original form of the duty plan but these problems have now been resolved largely due to improvements in the fee arrangements.\textsuperscript{430}

\textsuperscript{426} SLAB Solicitor Contact Line Guidance Manual 2012.

\textsuperscript{427} Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011.

\textsuperscript{428} Scottish Legal Aid Board, Police Station Advice A&A Payments, undated, obtained from the Board 19 September 2013. For general information about legal aid spending and the cost of the Solicitor Contact Line, see the SLAB 2013a.

\textsuperscript{429} Ibid.

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INTERPRETATION AND TRANSLATION

1. Introduction

In this chapter we consider the position of suspects who may not speak the local language sufficiently to understand and communicate during police detention, the right to interpretation and translation, and how this is delivered by police officers, lawyers and interpreters. In the EU this is no longer a rare event, given the frequency of movement of people across borders. The need to communicate is an essential pre-requisite to the proper functioning of any procedure in the justice system, yet it is only from October 2013 that the right to interpretation and translation applied across the EU Member States, despite a significant number of legal instruments operating to facilitate police and judicial cooperation in criminal proceedings. Whilst Articles 5 and 6 ECHR enshrine the right to interpretation and translation and the ECHR has interpreted this right extensively, the EU Directive on the right to interpretation and translation is the first instrument to attempt to codify procedural guarantees.

It may be assumed that interpretation is an easy right to give effect to, since without the ability to communicate with a suspect, the police are unable to progress an investigation. However, the provision of interpretation and translation must encompass not only those cases where a person has no comprehension of the local language at all, but also those where the person has some comprehension in that language, and in particular it must address the extent to which they are able to grasp often complex legal concepts and procedures. How the need for interpretation...

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1. The need was identified in DG Interpretation 2006, p. 7.
3. See, amongst others, Peers 2011 for a history of this development.
4. Replicated in the EU Charter of Fundamental Rights, Art. 48, as interpreted by the Explanations.
is identified, therefore, is critical to whether a suspect obtains the communication support that they need. All four jurisdictions in our research had provision for free interpretation and translation, but none codified this in a detailed and systematic way, relying largely on the discretion of the police to identify need.

The EU Directive requires Member States to ensure that a procedure or mechanism is in place to ascertain, without delay, whether a suspect speaks and understands the language of the proceedings and whether they need the assistance of an interpreter. Organizing interpretation services involves the facilitation of communication between suspect and police officer, or lawyer, in a way that ensures the communication is accurate and effective. Both police officers and lawyers are responsible for identifying the need for interpretation. Moreover, the actors using interpretation have to become familiar with how to minimize its impact upon the procedure that is being undertaken; the speed, interval and organization of speech that must be refocused to enable interpretation. To do so, those working in and responsible for the legal system, must acquire the skills, the understanding and organizational framework to accommodate the contribution of translators and interpreters.\(^7\)

The Directive requires that interpretation and translation be of sufficient quality to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.\(^8\) Being aware of how interpretation should be conducted, and the ability of the interpreter assessed, is critical to ensuring that communication is effective. Police officers and lawyers hold an important quality control assessment function. To this end, how interpreters are sourced and then briefed about the case and procedure they are interpreting can have important implications for the outcome of the procedure.

In this chapter we consider how the need for interpretation is identified in police custody; the attitudes of police officers and lawyers to the need for interpretation in order to ascertain how well the right of suspects and its crucial role in effective communication is understood; and the quality of interpretation, with regard to accuracy, but also other indicators of difficulty, confusion and discrepancy between the local language speaker, interpreter and suspect. Often our researchers were unable to gain full insight into the quality of the interpretation in the cases they observed, since they did not speak the full range of languages interpreted, and had a limited ability to assess the key indicators that prior research has considered.\(^9\) The focus of our research was to assess how police and lawyers gave effect to the right to interpretation. However, we were fortunate to have three multilingual interpreters who could speak a number of languages between them to a high, if not

\(^4\) Art. 2. For a detailed outline of the requirements of the Directive, see Chapter 1.

\(^5\) Hartog 2001, p. 5.

\(^6\) Arts. 20(6) & 3(9), and according to recital 2b, where the interpretation is deemed insufficient to ensure the right to a fair trial, the interpreter should be replaced.

\(^7\) For example, Braun & Taylor 2011, and the research cited therein.
fluent, standard. Sometimes there were obvious difficulties irrespective of whether the language was comprehended by our researchers, such as asking to repeat or rephrase which occurred in most cases, or a wide divergence in length of speech between the speaker and the interpreter.

Given the limited period of our observations, we observed relatively few cases involving foreign language suspects, which limits our ability to assess how interpretation and translation services are provided. In total we observed 52 cases involving foreign suspects or language where we considered interpretation was required (though this was not always arranged). The vast majority of these were in the Netherlands where 33 cases were seen. Sometimes the police or lawyers interpreted for themselves. As such, we saw no interpreters at all in France. We therefore rely considerably on interview material to ascertain the practice and approach to the use of interpreters. Most police officers and lawyers we interviewed generally thought that the process for arranging interpretation operated well and was properly regulated, although one French lawyer thought there was a lack of resources, and interpreters were ill-equipped and overworked. They considered the gendarmerie to manage their resources better than the police in this regard. Many officers did complain about the delay in interpreters arriving at the police station, where face-to-face interpretation was the method used and even an interpreter complained about the quality of telephone interpretation in an EngCity case.

In none of the observed cases of police detention were suspects informed that they had a right to interpretation, as such. This is in contrast, for example, to the immigration department within the police in the Netherlands, which investigates the status of foreigners allegedly there illegally. An illegal immigrant we observed on one occasion was explicitly informed of his right to engage an interpreter. We also never observed officers asking suspects whether they required interpretation, though a number of them told us that they did so. Rather, they made this assessment for themselves.

2. Regulation of Interpretation in the Four Jurisdictions

This section considers the existing regulations in each jurisdiction concerning how interpretation and translation should be provided and any practice guidance available to police officers and lawyers. It is significant that whilst detailed guidance as

10 Which included Russian, English, French and German.
11 During observations of the police we saw one case in England and Wales, none in France, 23 in the Netherlands, and 12 in Scotland. With respect to observations of lawyers, we observed three cases in England and Wales, three in France, 10 in the Netherlands and none in Scotland.
12 #EngCityLaw6.
13 #EngCityLaw11.
14 #NethCityVol10.
15 For further information see Chapter 3.
to the arrangements for interpreters and translators is available in England and Wales and Scotland, in none of the four jurisdictions is there any established procedure for identification of the need for interpretation by police officers.

2.1. England and Wales

In England and Wales, according to the PACE Code of Practice, chief police officers are responsible for making sure appropriate arrangements are in place for the provision of suitably qualified interpreters for people who are deaf or who do not understand English. The Code is silent as to whether a person should be informed of their rights or the accusation against them in a language that they understand, though it does specify that when a custody officer cannot establish effective communication, or there is doubt about the ability of the suspect to understand, to explain the offence and any other information, an interpreter must be arranged as soon as possible. The Code focuses primarily on interrogation; a person must not be interviewed in the absence of an interpreter if they have difficulty understanding English, the interviewer cannot speak the person’s own language, or the suspect wishes to have an interpreter. Furthermore, if a person appears to be deaf or there is doubt about their hearing or speaking ability they must not be interviewed in the absence of an interpreter unless they agree in writing to being interviewed without one. Likewise, if the suspect cannot communicate with a solicitor, an interpreter must be called.

The National Agreement on the Use of Interpreters provides guidance on arranging suitably qualified interpreters and Language Service Professionals when the requirements of Articles 5 and 6 ECHR apply. Each force area also has standard operating procedures for all aspects of policing. The Regional Interpreters Procedure for EngCity and EngTown also sets out the arrangements at a local level. The

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Footnotes:
21 Code of Practice C, para. 13.10.
22 Code of Practice C, para. 13.2.
23 Code of Practice C, para. 13.5. If a person appears to be deaf, or unable to read or speak, they must be treated as such in the absence of clear evidence to the contrary (although it is not clear that this is intended to apply to a person who cannot read or speak English), Code of Practice C, para. 1.6.
24 Code of Practice C, para. 13.9. The interpreter may not be a police officer or police staff, but in other circumstances, the police may interpret where they have the agreement of the suspect in writing. An amended version of the Code, designed to give effect to the EU Directive, removes this option, see <www.gov.uk/government/consultations/revised-pace-codes-of-practice-c-and-h> (last visited 16 October 2013).
25 Office for Criminal Justice Reform 2008. The document was agreed in consultation with wide ranging criminal justice actors, to include organizational bodies for police, lawyers, judiciary, prosecutors, probation.
26 For deaf or visually impaired suspects.
27 Version 0.5, 27 August 2013.
booking-in process at the police station is usually provided on the telephone by a global interpreting company called ‘Language Line’,24 which is contacted by the police. Language Line is also used by CDS Direct,25 where interpreters are needed two or three times a day.26 Thereafter, an interpreter is contacted by the police to attend at the police station for the purposes of any consultation with a lawyer or interrogation that may take place.27 Neither document sets out when the right to interpretation applies or how to identify need. Both commence from the presumption that need has already been identified, and consider the role of an interpreter during proceedings.

The Law Society has produced guidance for solicitors on using interpreters28 and sign language.29 The guidance gives suggestions for identifying good interpreters, and identifying interpretation needs, as well as whether to use the interpreter arranged by the police or instruct a separate one.30 Specifically the guidance suggests that solicitors should establish whether a suspect has difficulty understanding or expressing themselves in English, in particular formal legal language, or a hearing or speech impediment, or is deaf.31

2.2. France

The French Code of Criminal Procedure (CPP) requires that police officers should inform suspects of their rights in a language that they understand.32 Where the person is deaf or cannot read or write, the assistance of a sign language interpreter must be arranged.33 If the suspect does not understand French, they must be informed of their rights by an interpreter and a written notice of their rights must be provided immediately.34 There is no legislative right to interpretation during inter-

24 The website states: ‘Each of our interpreters must hold appropriate interpreting qualifications and undergo a rigorous assessment to ensure they have the skills required to interpret professionally. In addition to this, all of our linguists must sign a Confidentiality Agreement and accept a comprehensive Code of Conduct before they are accepted to work for Language Line Solutions’, see <www.languageline.co.uk> (last visited 16 October 2013).
25 See Chapter 3, section 2.4.5 for a description of this organization.
26 According to EngCity2Law.
27 Interpreters must be accredited by the NRPSI, see Chapter 3, section 2.4.9.
28 Law Society 2012.
29 Law Society 2011.
30 See section 4 below for further consideration.
31 At para. 3.1.
32 Art. 63(1) CPP.
33 Art. 63(1). The suspect may also be assisted by any qualified person who is able to communicate with the suspect through language or some other method.
34 In November 2012, the Cour de cassation ruled that a suspect who did not understand French must be informed of their rights immediately in a language they understand. This is required to be done in writing, immediately, even if an interpreter has been contacted and will then inform them of these rights again, later. In this instance, the suspect was placed in GAV at 3.30 pm, an interpreter was contacted at 4.25 pm and the suspect was notified of their rights
rogation, though this may be implied by the provision enabling the use of remote interpreters. Interpreters attend in person for all police station interpretation in France, though the telephone may be used for notification of rights and in the middle of the night.

We were told by the French police that, in addition to using the official tribunal de grande instance list of interpreters, they arrange their own lists, since the official lists can be out of date and inaccurate. The police also tend to work with interpreters they know locally and have previously used. As one officer told us, 'If they were good, we will recommend them to colleagues if they need one.' Where unregistered interpreters are used, the police must swear them in, in order for them to interpret. However, a report by the Contrôleur général des lieux de privation de liberté found that in general, interpreters were insufficiently utilized during police detention, other than for rare languages and in those instances, the interpretation would be by telephone. It considered that the police rely on local resources rather than making use of the official lists, which may even involve the wife of a colleague. The report expressed concern that even though interpreters swear an oath, this is insufficient to guarantee impartiality. It identified that there is no legal provision for an interpreter during the lawyer-client consultation and recommended that this right should be incorporated into Article 63-3-1 CPP. We did not discover any procedural guidance on how interpreters should be arranged, nor on their role during police detention. It appears that such arrangements are left to individual police officer to determine.

at 5.20 pm. The court held that this was in breach of Art. 63(1). Cour de cassation, chambre civile, 21 Nov 2012, pourvoi 11-30158.

[35] Art. 706-71 CPP, which may be via video conference.


[37] According to iFranCityLaw1.

[38] See Chapter 3, section 3.4.9 for the accreditation requirements in France. Bulletin Officiel du Ministère de Justice 2000 also indicates that an interpreter need not be on the official list provided they are competent. It is not clear how this would be assessed.

[39] iFranCityPol1; iFranCityPol2; iFranCityPol3; iFranCityPol4; iFranCityPol5.

[40] Ibidem.

[41] Contrôleur général des lieux de privation de liberté 2013.

[42] The Décret No. 2013-958 of 25 October 2013 requires interpreters to be drawn from the official list. Exceptionally, they may come from elsewhere, provided they are not police officers, magistrates, legal clerks, witnesses or one of the parties.

[43] Though this would perhaps more logically fall under Art. 63-4.1, concerning the right of access to a lawyer. The Décret No. 2013-958 of 25 October 2013 now makes provision for access to an interpreter during the lawyer-client consultation. This may be conducted by telephone or video-conference.
2.3. Netherlands

Under the current Code of Criminal Procedure (CCP) a suspect only has the right to oral interpretation during interrogation by the investigating judge, and investigations undertaken by the court,\textsuperscript{45} and not during the police investigation stage. There is, therefore, no explicit right of suspects to be informed of their rights during detention, or of the nature of the accusation against them, in a language that they understand. It is acknowledged that these provisions of the CCP are in violation of the ECHR, and an Instruction on access to interpreters and translators during police investigation issued by the Public Prosecutor’s Office currently governs procedure.\textsuperscript{46} The Instruction provides that interpretation should be provided if the suspect does not have sufficient command of the Dutch language, the suspect should be able to understand the questions posed, and the information provided to him by the police. A ‘yes’ or ‘no’ response is not sufficient. The benefit of the doubt should be given to the suspect in the interests of an accurate representation of their statements. The decision as to whether interpretation is required should be determined by the interrogating officer, and in case of doubt, by the assistant prosecutor or by the public prosecutor.\textsuperscript{47} However, if the investigating officer has sufficient command of a language that the suspect understands, they are permitted to determine that interpretation is not necessary.

The CCP has been amended by the new law to implement the EU Directive,\textsuperscript{48} but this is not yet in force. The amendments entail a general right to interpretation for suspects and accused persons throughout all stages of the procedure,\textsuperscript{49} and a particular right to interpretation during interrogation,\textsuperscript{50} as well as the right to translation when police custody is ordered.\textsuperscript{51}

Almost all interpretation at the police station is provided by telephone, called the Tolkentelefoon. Telephone interpretation services are outsourced to a company called Concorde.\textsuperscript{52} The company gives priority to using sworn interpreters but also engages non-sworn interpreters.\textsuperscript{53} Interpreters are never engaged for the booking-in process, only for the official detention, consultation with a lawyer and interrogation.\textsuperscript{54}

\textsuperscript{45} Arts. 191 & 275 CCP.
\textsuperscript{46} Aanwijzing bijstand van tolken en vertalers in het opsporingsonderzoek, Stort 2008, 116.
\textsuperscript{47} \textit{Ibidem}, para. 2.2.
\textsuperscript{48} Wet van 23 februari 2013 tot implementatie van richtlijn No. 2010/64/EU (PbEU L 280), Stb. 2013, 85.
\textsuperscript{49} New Art. 27(4) CCP.
\textsuperscript{50} New Art. 29a CCP.
\textsuperscript{51} New Art. 59(7) CCP.
\textsuperscript{52} Formerly ‘Interpreter Central’ (Tolkencentrale), the largest national organisation providing interpretation and translation services. See <www.concorde.nl> (last visited 16 October 2013).
\textsuperscript{53} See <www.concorde.nl/tolkennfaq> (last visited 16 October 2013).
\textsuperscript{54} See Chapter 3, section 4.4.9 for further details concerning the accreditation of interpreters.
We were aware of only one case, in NorthCity, where an interpreter personally attended to provide interpretation during an interrogation. This concerned a large-scale investigation, coordinated by an inter-regional police team, the complexity of which may have explained the reason for engaging an interpreter in person.

2.4. Scotland

There are no legislative requirements for interpretation and translation in Scotland. Before the Police Service Scotland was established in March 2013, and thus during the period of the fieldwork, each police force had its own Standard Operating Procedure regarding interpretation and translation. The procedure adopted by the Police Service Scotland replicates the procedure formerly used in in ScotCity and ScotTown,\(^55\) which provided that the use of a qualified interpreter to facilitate communication with a person whose first language was not English was mandatory when the person was interviewed under caution in relation to a suspected offence; the person was required to participate in an identification parade; and where the person was cautioned and charged.\(^56\) There is no requirement for interpretation of the notice of rights to the suspect, nor of the reasons for detention. Furthermore, the Procedure offers no assistance as to how the assessment of need for an interpreter should be made, although it does indicate that where the police officer is unsure as to the requirement for an interpreter, the advice of a supervisor should be sought at the earliest stage. It also sets out advice on the arrangements for appointing an interpreter, and provides good practice guidance as to their role during detention procedures.

By contrast to the approach in England, nearly all interpretation is provided in person.\(^58\) The police in ScotCity and ScotTown employed a local company, Global Language Services, to provide interpreters for all interpretation at the police station.\(^59\)


\(^{56}\) This is not defined in the guide, but the companies engaged to provide the interpretation and translation services are listed as those providing qualified professionals.

\(^{57}\) Since the Procedure later refers to arrangements with Sign Language Interpreters and for blind or partially sighted persons, it may be implicit that these groups are also included.

\(^{58}\) We saw an exception in an Afghan immigration case where, because the asylum seeker was not going to be produced for court, the custody officer advised that using LanguageLine (the same company as used in England and Wales) would be sufficient: ScotCityPol19.

\(^{59}\) <www.globalglasgow.com> (last visited 16 October 2013). Since January 2013 the company has provided interpretation services to the police throughout Scotland. The Company requires its interpreters to be appropriately qualified and to have undertaken its introduction to police interpreting course, for which the tutor is a serving officer from the force local to where the course is run, in a number of Scottish locations. The company advises that it requires the Diploma in Public Service Interpreting, or its equivalent. It
3. Arrangements for Interpretation at the Police Station in Practice

Arrangements were in place in all jurisdictions for interpretation. Whilst these varied, in all sites, all forms of interpretation were consecutive three way conversations, with questions posed and answered through the interpreter, rather than simultaneously whispered. In all sites, face-to-face and telephone interpretation was engaged, but to widely varying degrees. We did not see any video interpretation during our observations, nor did police officers or lawyers indicate a familiarity with this process.\textsuperscript{40} It seems that police officers have no influence on the choice of the interpreter who is to be instructed in England and Wales and Scotland, but the French officers could choose the interpreter themselves, and in the Netherlands, where a face-to-face interpreter was to be engaged, this also seemed to be the case. The use of the NRPSI website had only recently been instigated in England,\textsuperscript{41} prior to which the police retained business cards from interpreters and simply telephoned them as needed. One EngCity officer\textsuperscript{42} complained that using outside bodies, for both interpretation and lawyer arrangements, was difficult: 'We’re at the mercy of somebody else’s organization skills, somebody else’s resourcing, somebody else’s duty schedules, which we can’t control.' French officers, however, resorted to lists of those interpreters they assessed as useful, rather than an independent agency. Equally the choice of interpreter to attend in person was clearly influenced in the Netherlands by who the officers thought would assist them achieve a favourable outcome, as indicated below.

3.1. Level of Demand for Interpretation

Before considering the research data in the four jurisdictions, it is useful to have some understanding of the demographic make-up of the research sites, which helps us understand the frequency with which cases involving interpretation arose in our research samples.\textsuperscript{43} It is estimated that almost a quarter of the population in EngCity is ‘non-white British’, with 15 per cent not having been born in the UK. The largest immigrant

\textsuperscript{40} Remote interpretation by video is increasingly being used by the Metropolitan Police Service in London, and was used extensively during the London 2012 Olympic Games. See Haddon 2012.

\textsuperscript{41} According to iEngCityPol2.

\textsuperscript{42} iEngCityPol2.

\textsuperscript{43} For further information about the sites, see Chapter 2. Of course, despite the influx of immigrant populations in some areas, this did not necessarily mean that suspects of a foreign background could not speak the local language upon arrival, or had not been settled in the locality for a number of years and therefore acquired the language over time.
populations are from Poland, Somalia and India, although many have origins in Jamaica and other EU Member States. However, we were informed by officers in EngCity that the majority of cases where an interpreter is likely to be required are dealt with at EngCity's central police station, since foreign nationals tended to be arrested in and around the city centre. In EngTown 15 per cent of the population was also not born in the UK, originating in a range of other European, East Asian and Indian sub-continent countries.

In France, FranCity had a sizeable immigrant population, the majority from North Africa (Algeria, Tunisia and Morocco) and other EU member states (mainly Portugal). FranTown has a proportionately smaller immigrant population (again, largely from North Africa) than in FranCity. However, as a border town, there is a possible increase in criminal activity due to drug trafficking through the area.\(^4\)

In the Netherlands, a larger proportion of the research sample was foreign or non-native Dutch speaking, compared to the other jurisdictions in the study. NethTown was a border town, which accounted for relatively high numbers of foreign suspects, particularly those from neighbouring countries. In NethCity, which was not a border town, the proportion of foreign suspects was lower than in NethTown. The main non-Dutch ethnic groups were North Africans and Eastern Europeans (Polish, Lithuanian, Romanian).

ScotCity is in an area that has received a large influx of immigrants in recent years, notably from south Asia and Eastern Europe. In stark contrast, no cases requiring interpretation were observed in ScotTown, a predominantly native Scottish area with little immigrant population. Since the Solicitor Contact Line at the Scottish Legal Aid Board was dealing with calls for legal advice from across Scotland, it regularly dealt with suspects requiring interpretation, although we did not observe any cases in our research.

### 3.2. Interpretation at the Initial Stage of Detention

Where the officer in charge of custody decided that interpretation was necessary, they called Language Line in England and Wales or Concorde in the Netherlands to provide interpretation by telephone to assist with the notification of rights and decision to detain.\(^5\) In Scotland, the custody officer contacted Global Language Solutions and organized for an interpreter to attend in person. The arrangement seemed to operate well, although we were told that in order to hear clearly what was being said by the interpreter, it was only possible to use one booking in booth at a time, which slowed down the processing of any other cases arriving conjunct-

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\(^4\) FranCityPolice estimated that they needed interpreters in 'one out of every 10-15 cases'.

\(^5\) This is however for slightly different stages. In England and Wales, notification of rights is given during the initial booking procedure, whereas in the Netherlands the suspect is booked in by a police officer, and thereafter sees an assistant prosecutor for the delivery of their rights. It is only in this latter stage where interpretation will be considered.
tively.\textsuperscript{66} In France, it seems that the police will contact either someone from their personal list to attend, or from the tribunal de grand instance, though we never saw this occur.

We were told that prior to arrival at the police station, officers in EngCity and ScotCity regularly called Language Line at the scene of an investigation to enable initial dialogue to take place. A police officer in England and Wales recounted an occasion when they had been called to a house in the middle of the night where the complainant spoke very little English. The officer called Language Line and it turned out the complainant was feeling unwell and an ambulance was needed, not the police.\textsuperscript{67} A French officer also told us that when they knew that the suspect did not speak French, they arranged for an interpreter to accompany them in order to notify the suspect of their rights immediately at the scene.\textsuperscript{68} In contrast, a Dutch officer said that they would not use an interpreter upon arrest as it was problematic:

\begin{quote}
\textit{We will try to use English or something. We don’t have a book on us with standard sentences and in different languages.}\textsuperscript{69}
\end{quote}

The officer defended the process by saying that within an hour the person would be at the police station and an interpreter would be contacted to help explain why the suspect had been detained. It was not known why the police in the Netherlands are not able to contact the telephone interpretation service for assistance at the scene as in the other jurisdictions, but this would seem to be a useful service to enable understanding from the outset, which ought to be routine in all jurisdictions.

Interpretation of welfare related issues was not generally available at the police station in any jurisdiction, unless these occurred during another procedure. In both Dutch sites, custody welfare officers tried to communicate with non-Dutch speaking suspects in English, German or French, a mixture of these, or simply with the help of ‘sign language’. Inevitably, this communication was never as extensive as with the Dutch-speaking suspects. Communication was rarely possible in the other jurisdictions as police officers often only spoke their local language, although in England and Scotland because interpreters are present at the police station, it is possible that they would be able to assist with welfare related issues.\textsuperscript{70}

In the Netherlands, procedural rules were not available in foreign languages. Furthermore, since interpretation is not used during the booking-in process, suspects who did not understand Dutch did not always know what was going to

\textsuperscript{66} ScotCityPol1.
\textsuperscript{67} fEngCityPol5.
\textsuperscript{68} fFrnCityPol2. However, this officer worked in a large-scale fraud division. This arrangement will only apply where arrests are planned in advance. It would not be feasible in ordinary street arrests.
\textsuperscript{69} fNthTwnPol1.
\textsuperscript{70} Though we did not observe this, and since we did not see an interpreter in France, we cannot ascertain how likely it would be for them to assist with general detention related issues in that jurisdiction.
happen to them, nor what their entitlements were, and they often could not communicate their needs and requests to the custody welfare officers because, if interpretation was provided at all, this was not until the official detention procedure. An illustration of this concerns a case of a Lithuanian-speaking suspect observed in NethCity, who spoke Russian, but not Dutch.²⁷ He suffered from claustrophobia and had been in detention for more than 10 hours. He had apparently tried to explain to the officers that he wished to have medication, which he regularly took, to prevent the symptoms of claustrophobia. His request had not been understood, and when the researcher (who was a Russian speaker) finally interpreted it to the officers it was already too late, because he was going to be interrogated and released shortly thereafter anyway.

3.3. Interpretation During Lawyer-Client Consultation

In England and Wales, France and Scotland, interpretation for the lawyer-client consultation was normally provided by an interpreter attending in person. In England and Wales the custody officer arranged for attendance of the interpreter through the NRPSI website.²² In Scotland the interpreter was already present, having been arranged for the booking-in procedure.

However, as one lawyer in EngCity²⁷ told us, if the case is handled through CDS Direct, where there is not going to be a police interview, the interpretation would not take place in person, but by telephone. The decision as to presence of an interpreter at the police station in England and Wales was therefore one largely taken on the basis of whether an interview was necessary.

Interestingly, by contrast, a Scottish lawyer told us:

‘If the interpreter is sitting beside the suspect, I will give advice via telephone, because I can hear the responses, and can ask the interpreter to explain certain things, asking the suspect to respond. I can hear the suspect saying yes, no, in your language, etcetera. I can tell if you’re giving spiel to the interpreter and if they’re not translating it.’²⁸

However, they went on to say that where the interpreter could not attend the station because of geographical location or rarity of language this could be problematic for telephone advice:

²⁷ NethCityPoi²⁸.
²² An officer in EngCity showed us that the website has a drop down menu from which to select a language, which then brings up the name and contact details of the requisite interpreters. The officer observed that it is quite limiting since only NRPSI interpreters can be used, but ‘the list is growing all the time’.
²⁷ EngCityLaw5.
²⁴ ScotCityLaw1.
Sometimes in the North of Scotland, we have to use Global Translation by telephone, and there, we have to send [lawyers] out to the police station, because I will not have the interpreter on the phone while I'm on the 'phone. You need a solicitor there.'

In the Netherlands, interpretation for the lawyer-client consultation was provided by telephone, and arranged by the police.\(^{25}\) In NethCity the lawyer had to ask a police officer to dial the service and put it through to the consultation room, as the telephone could only receive calls. In NethTown the telephone for calling the interpreter was located in a box in the lawyer's consultation room. In order for a lawyer to be able to make a call, a custody officer had to open the box, take out the telephone and wait until the lawyer was connected. This is because the police suspected that the suspect or lawyer may 'misuse' the telephone by, for example, transmitting messages to the suspect's accomplices.\(^{26}\)

We only observed one case in England and Wales in which an interpreter was present during a lawyer-client consultation.\(^{27}\) The interpreter appeared to translate for both parties verbatim and the lawyers raised no concerns about the quality of the interpretation provided. In a Dutch case observed the approach to the consultation differed.\(^{28}\) The lawyer did not ask the suspect a single question about why they thought they had been arrested. This appeared to result from a combination of factors. Firstly, the communication through an interpreter was less natural, and took more time, and the lawyer may have been attempting to use the time as efficiently as possible;\(^{29}\) secondly, because the suspect did not talk much, giving short answers to what the interpreter said, looking anxious and frightened throughout the consultation; and thirdly because the lawyer had to advise several co-suspects and presumably wanted to avoid a conflict. The interpreter clearly created a barrier between the lawyer and client, perhaps compounded through being present only by telephone.

In none of the cases observed did we see lawyers attempt to set the 'ground rules' for how the interpretation process should proceed; for example, by explaining that the interpreter should introduce themselves and explain their role to the suspect, that the interpreter should use direct speech, that they should interpret as closely to the literal meaning as possible, and that they should interpret everything that is said between the parties. In one case that we observed,\(^{30}\) an interpreter

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\(^{25}\) The exception was at the Border Police where in NethTownLaw10 the lawyer explained 'it is always difficult to arrange interpretation at the Border Police', though it appeared that the only difficulty was having to contact an interpreter himself rather than the police arranging this.

\(^{26}\) For the same reason, lawyers were required to leave their mobile telephones outside of the consultation room. It seemed not to be a concern to the police in NethTown that, once the call with the interpreter had finished, lawyers could use the telephone to contact someone else.

\(^{27}\) NethCityLaw11.

\(^{28}\) NethTwnLaw10.

\(^{29}\) Since they are only entitled to 30 minutes for consultation.

\(^{30}\) NethCityLaw16.
clearly tried to 'help' the lawyer by giving advice to the suspect, a fact which should have been obvious to the lawyer, but they did not intervene. On other occasions we observed the interpreter and the suspect conversing directly with each other without involving the lawyer in the conversation.

Since it was not possible to observe lawyer-client consultations in Scotland, and none were seen in France with an interpreter, no observational data is available. Lawyers interviewed did not raise any concerns about the method of interpretation during their consultations, although some did explain that they had not regularly required an interpreter.

3.4. Interpretation During Interrogation

Since we were not permitted to attend interrogations in Scotland, and we did not observe any case in France involving an interpreter, our data is largely derived from the cases observed in the Netherlands, and interviews with police officers and lawyers in the four jurisdictions. With regards to the process of interrogating with interpretation, one officer in England and Wales told us that interpreters can disrupt the flow of the interrogation and that therefore the interrogation may have to be better planned than interrogations without interpreters. He also found it difficult where the suspect understood the question posed in English and wanted to answer without waiting for interpretation, since the PACE Code of Practice requires that all questions and answers are posed through the interpreter.

As with lawyers in the lawyer-client consultation, none of the police officers observed in the Netherlands attempted to establish the 'ground rules' for interpretation before proceeding with the interrogation. As such, the approach was sporadic and arbitrary. Only in one case, did the interrogating officer inform the interpreter about the details of the suspected offence and the background of the suspect.

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81 NethCityLaw32.
82 fEngCityPo17.
83 The Regional Interpreters Procedure, version 0.5 2013, standard operating procedure (SOP) used in EngCity and EngTown sets out a standard interview procedure to be followed by the interrogating officer and the interpreter. This requires, pre interview, for the officer and interpreter to introduce themselves, for the officer to introduce any documentation that they intend to rely on to the interpreter, and to explain the interrogation technique being adopted; both should thereafter introduce themselves and explain their role to the suspect; and the need to interpret any procedure or statement made during the interrogation. The SOP also contains an 'Interpreters Introduction Sheet' which is to be followed in each case, contained in Annex 11. The Scottish SOP contains a good practice guide that adopted a similar approach. In particular it explains that the interpreter should be fully briefed in advance of the interrogation and the officer should agree the approach to the interrogation and appropriate room arrangements. It also requires that a procedure should be agreed for the resolution of any difficulties: 'It is of crucial importance that the interpreter has the confidence to interrupt.'
84 NethCityPo19.
perhaps because the case concerned a suspect who was homeless and suffered from mental illness. The officer also asked the interpreter to explain who the people in the room were and to ascertain whether the suspect understood. This was helpful for the comprehension of the suspect, but we did not observe it in any other case.

A less concerted attempt at introductory communication was observed in one other case, perhaps prompted by the approach of the interpreter in the preceding interrogation of a co-suspect, who briefly introduced herself and her role. In the following interrogation, a different interpreter simply said to the suspect, in the relevant language, ‘Hello, I am an interpreter.’ This prompted the interrogating officer to suggest to the interpreter that perhaps she could tell the suspect she was an independent interpreter who did not work for the police. We would suggest that it ought to be standard practice for interpreters to introduce themselves, but this was not always observed by our researchers.

The overall quality of the interpretation observed and its effect on the interrogation procedure is considered in section 6 below. However, two observations recorded by our researchers, about the different approaches officers adopted as a result of an interpreter being used, are important to note at this stage. In the only interrogation involving the presence of an interpreter that we observed in England and Wales, the interrogating officer followed the usual procedure until the point of the caution, where he explained the three elements of the caution clearly, and asked if the suspect understood it. However, he did not then ask questions to verify this, which is the usual procedure, and which was observed in other interrogations without interpreters. The lawyer who was present in the interrogation did not challenge this during the interrogation and when queried by the researcher later, explained that the omission is common in cases involving an interpreter because: a) the officer ‘often bottles it’ – he thought it would create confusion and take longer if he asked these questions; and b) there are already safeguards in place since the client had received a clear explanation of the caution. However, taking a less proactive approach in verifying whether the caution has been understood simply because an interpreter is required to assist, indicates that suspects who cannot speak the local language may be treated less favourably. The problem in this case was compounded by the fact that the lawyer identified the omission but did not see it as a cause for concern. The failure to follow standard procedure ought at least to be raised as an issue during the interrogation.

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85 NetnCityPol14. She explained to the suspect that she was an independent interpreter who did not work for the police.
86 NetnCityPol14.
87 EngCityLaw11.
88 See Chapter 8, section 4.2.
89 The lawyer thought that the Codes of Practice only require the officer to satisfy themselves that the caution has been understood properly, so the distinction could not be challenged.
In a second case, this time in NethTown, since each question had to be put through the interpreter over the telephone, the officer often directed his speech to the interpreter and formulated the questions as ‘could you ask her’ rather than addressing the suspect directly. This meant that the interrogator was talking to the interpreter on the telephone rather than the suspect in the room. As a result the effectiveness of the communication between interrogator and suspect was clearly reduced.

3.5. Interpretation by Telephone

Given the prominence of telephone interpretation in England and Wales, and the Netherlands, we consider in this section some of the problems associated with remote interpretation that we encountered during our research. Some police officers in England and Wales complained that using remote interpretation was difficult because of having to pass the receiver back and forth between the officer and the suspect, the quality of the line, or the standard of English of the interpreter. In EngCity, whilst it was intended that the speaker function on the telephone be utilized so that both parties could hear the interpreter at the same time, one officer complained that ‘we don’t seem to have the facility to have a phone loud enough for all parties to hear each other’, so the receiver had to be passed back and forth. This was a problem because it was not then possible to hear the interpreter and assess whether they were speaking for a suitable length of time to interpret fully the information being exchanged. The speaker function was used in some cases that we observed in NethCity and NethTown, but in others the officer and the suspect also had to pass the telephone between them. In another case the interpreter complained that they could not hear the interrogating officer over the speaker, which was resolved by picking up the receiver. However, the officer could not type the inter-

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90 NethTownPo26.
91 Interestingly, this approach is specifically guarded against in the Scottish SOP which advises officers to address the suspect and not address the interpreter with questions such as ‘could you ask the suspect’, para. 3.1.9.
92 The SOP indicates that Language Line should only be used to facilitate the initiation of a crime investigation and to assist with custody procedures, including medical and forensic sampling, reviews of detention, charging decisions and out of court disposals, at para. 2.1. It also states that where available, it is good practice to use a dual handset or speaker phone. This allows the officer to speak with the interpreter without having the telephone earpiece being passed back and forth, at para. 5.1. The National Agreement suggests the telephone is suitable only for brief and straightforward communications. It is not appropriate for use in evidential procedures, both because of the intrinsic limitations of doing so, but because the interpreter cannot make a note of the interrogation in the suspect’s native language for them to sign in this way; pursuant to Code of Practice C, s. 13.3, see para. 9.1.
93 ifEngCityPo22; ifEngTownPo16 who asked for a Vietnamese interpreter and got Japanese.
94 ifEngCityPo22.
95 NethCityPo9.
rogation record whilst holding the receiver, so asked the detention officer present to hold the receiver close to the mouth of the interrogating officer and then the suspect as they spoke in order to keep their hands free. This was a cumbersome process and it is easy to imagine that some of the interpretation was lost in the process.\textsuperscript{96} In England, however, we observed that the telephone had two receivers in order for the suspect and custody officer to both listen to the interpreter. It appeared to work well, although we were unable to hear the interpreter. The call lasted for the duration of the booking in process (which in this case took 45 minutes).

In many of the NethCity cases there were problems with the usual operation of the Tolkentelefoon, with background noise on the line, or connection problems. One lawyer\textsuperscript{97} thought the telephone had not been changed in 20 years. In one case observed the line could not connect and when the detention officer checked the telephone, the cable was found to be defective. On the second attempt, the connection was successful.\textsuperscript{98} In another case, the interpreter complained about the quality of the line and asked for the suspect to speak more slowly and to explain what they meant, as the interpreter could not understand.\textsuperscript{99} These problems would not have occurred had the interpreter been present at the interrogation. Interestingly, after a month of research, our researcher found that the telephone had been replaced.\textsuperscript{100} An assistant prosecutor explained in an interview that this was at their request,\textsuperscript{101} which may have been as a result of the presence of the researcher.

Other views were expressed about the mechanism of telephone interpretation. A Scottish custody sergeant told us they did not like telephone interpretation because it was difficult to hold the interpreter accountable for what they asserted the suspect had said, and also because giving the suspect the receiver was potentially arming them with a weapon that could be used against the police.\textsuperscript{102} The officer also found it difficult to hear or understand what was being said over the telephone, particularly if the interpreter had an accent. Scottish officers generally referred to the fact that telephone interpretation could often be provided by an interpreter based in a foreign country, and that problems would then sometimes arise because the interpreter, perhaps inevitably, might not be familiar with the language and terminology of the booking-in process, particularly relating to rights and risk assessment-based questions.\textsuperscript{103} According to one lawyer in England and Wales,

\textsuperscript{96} The officer became increasingly frustrated and at one point turned to the researcher and said 'this is really tiring'.
\textsuperscript{97} In NethCityLaw8.
\textsuperscript{98} NethCityLaw9.
\textsuperscript{99} NethCityPo128. Though this may also have been due to lack of skill on the part of the interpreter.
\textsuperscript{100} NethCityPo13.
\textsuperscript{101} In NethCityPo13.
\textsuperscript{102} In NethCityPo13.
\textsuperscript{103} In NethCityPo13.

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errors were frequently made, although officers in that jurisdiction did not raise the same concerns.

The problems of using non-local telephone interpreters can range from subtleties lost in translation to much more fundamental omissions. For example, in an English case, when the suspect was being booked-in with the aid of the telephone interpretation service, the interpreter informed the police that the suspect did not want legal advice.\textsuperscript{105} It was only discovered that the suspect had requested legal advice when an interpreter arrived for the purpose of interpreting during the interrogation. That interpreter expressed the opinion that the quality of service provided by telephone interpreters used in EngCity was frequently poor. The lawyer in the case agreed with her, adding that they often just paraphrase rather than interpret verbatim.\textsuperscript{109}

Although we did not observe an interpreter providing interpretation in person in the Netherlands, we were able to obtain some insights from the interviews with police officers. The sole criterion for engaging an interpreter in person appeared to be the seriousness of the suspected offence, and therefore the implications for the police should any difficulties arise due to a lack of communication.\textsuperscript{106} In more important investigations, a relationship of trust with an interpreter, who could understand the context of the proceedings, was considered crucial. Thus, police officers would invest more effort in establishing a relationship with the interpreter. A Dutch officer told us:

"Only those interpreters would be invited with whom we have already worked, who then actually come to sit here and accompany us during the whole investigation, at least as much as possible."\textsuperscript{107}

Another officer commented that he found it strange that interpretation services were no longer in person and lamented the passing of the 'old' times when the police worked with only ten known interpreters who would 'help them out' at the interrogation.\textsuperscript{108} Interestingly, some officers complained that the interpreter could not see the suspect's reactions and whether they were lying if they were interpreting

\textsuperscript{105} EngCityLaw9.
\textsuperscript{106} See section 6 below as to quality. See also Braun & Taylor 2011 for findings that with remote video interpretation was found to magnify known interpreting problems to a certain extent, leading to a higher number of serious interpreting problems (for example, omissions, additions, distortions, lexical/terminological problems, paralinguistic problems and turn taking problems) than in face-to-face interpreting. An inability to use visual signs and cues led to this increase, as well as the early onset of fatigue (perhaps due to the need for greater concentration to correctly hear dialogue and in the effort taken to intervene). Whilst similar studies on telephone interpreting in police stations are unknown to us, it can be assumed that the problems identified with video remote interpretation would be magnified by only having telephone interpretation.

\textsuperscript{108} iNethCityPol1; iNethTownPol2; iNethTownPol3; iNethTownPol4.
\textsuperscript{109} iNethCityPol1.
\textsuperscript{107} iNethTownPol2.
by telephone. These opinions would suggest that the officers did not consider the role of interpreters to be to provide objective and impartial communication services, but rather to assist the police in their investigation. However, one officer told us that they had once participated in a face-to-face interpretation and that the pace was faster, which at least recognizes that the interpreter should facilitate the process:

> When I want to put pressure on the suspect and I use a telephone interpreter, he may not be able to feel the emotional tension. And when an interpreter is present, and if he is good, he would pick up the emotions and will transmit them both ways.

To this end, another Dutch officer observed that the telephone only works for a short interrogation or for some ‘quick questions’: For a lengthy and in-depth interrogation you need the interpreter to be there in person.

Dutch lawyers indicated a preference for face-to-face interpretation in all cases since this would be more accurate, observing that a suspect might find it more difficult to trust an interpreter on the telephone. However, they thought that it would be impossible to organize because of the time constraints on the police, and because if a client was not eligible for legal aid they would have to pay for the interpreter to attend. In our research we did not observe any case in which the lawyer sought to arrange interpretation of the lawyer-client consultation in person.

Vulnerable suspects, or suspects with communication problems were seen to have difficulties communicating through the telephone interpreter in two Dutch cases, which serve to illustrate the value of face-to-face interpretation, at least for these groups of suspects. In one Dutch case, the suspect appeared to suffer from a mental disorder that further impeded his communication abilities. The interpreter reported from the outset that it was difficult to understand the suspect, as his responses did not seem to be logical. After one hour, the suspect demanded the presence of an interpreter, indicating that he could not sufficiently communicate...
through the telephone interpreter, but this was ignored by the police. Afterwards
the interpreter said: 'Of course, interpretation in person is better, because then you
can see the person in front of you', and suggested that she attend at the police
station. The detention officer present looked surprised and indicated it would cost
money. The interrogating officer responded: 'No, this is not allowed. Not in these
kinds of cases.' By contrast, in another case, a 12-year-old girl with limited Dutch,
deafness in one ear and a behavioural disability, was assisted by her brother (due to
her age rather than any other difficulty).\textsuperscript{118} Her brother was able to communicate for
her, as well as explaining her other comprehension difficulties and the circum-
cumstances of the case which related to a complex family arrangement. Had face-to-face
interpretation been provided in the previous case, the suspect may have been able
to explain himself more coherently.

Having an interpreter present at the police station is useful not only to aid the
interpretation process, but it also enables the interpreter to assist with any other
issues that may arise. For example, in an English case observed, at the close of the
interrogation where the interpreter had been present, the lawyer asked the interro-
gating officer whether he would like the interpreter to remain at the police station,
which he confirmed he would.\textsuperscript{117} The interpreter could then assist with explaining
what would happen next, back in front of the custody desk.

One other factor to be considered is the issue of adequate facilities for inter-
preters to perform their functions at the police station. A Scottish lawyer told us
that, following the change in law to allow suspects the right to advice and assistance
during police detention, there are still no facilities for lawyers,\textsuperscript{119} let alone having to
accommodate an interpreter in the station for lawyer-client consultation as well. In
contrast, the arrangements in England were adequate as there were rooms available
where lawyer, suspect and interpreter could privately communicate.

3.6. Using Single or Multiple Interpreters During Detention

An important issue that arises in cases involving interpreters is that of confiden-
tiality regarding lawyer-client communications. Despite the potential problems, it
appears that generally lawyers do not arrange for separate interpretation at the
police station in any jurisdiction we observed, other than in respect of persons
detained by the border police in NethCity.\textsuperscript{120} In a practice note issued by the Law
Society of England and Wales,\textsuperscript{121} lawyers are advised that they must decide whether
an interpreter arranged by the police can also act as an interpreter for the lawyer-
client consultation, taking into account whether, inter alia, the interpreter can meet

\textsuperscript{116} NethCityPoll.
\textsuperscript{117} EngCityLaw.11.
\textsuperscript{118} ScotCityLawA. See Chapter 6, section 2.4.
\textsuperscript{119} Despite which, the same telephone agency is used.
\textsuperscript{120} Law Society 2012.
all of the suspect's needs, and whether the case is particularly sensitive or serious.\textsuperscript{121} We did not see this kind of assessment being conducted in England and Wales, although we saw few cases involving interpreters, nor did any lawyers we interviewed refer to it. A NethCity officer explained to us that whilst the same interpretation company is used for police and lawyer interpretation, there are different contact numbers provided to each profession, in order to ensure that the same interpreter is not used in the same case. However, there appeared to be no mechanisms in place to ensure that this did not happen, for instance, asking the interpreter to provide their name or registration number to check that the same person was not being asked to interpret for both the police and the lawyer. Given that the pool of interpreters was the same for both, the likelihood of the same interpreter being used could be quite high, particularly in respect of rare languages.\textsuperscript{122}

Some officers appeared to focus on the convenience for the processing of the case in engaging only one interpreter. In Scotland and France\textsuperscript{123} the police saw the instruction of one interpreter as the most practical arrangement, since the interpreter was attending at the station in person. However, an officer\textsuperscript{124} clarified that it was not possible to use the same interpreter for the taking of a witness statement and for a suspect in the same case. This demonstrates the identification of one potential conflict of interest, as between a suspect and a witness account, but not perhaps an equally important one, as between the suspect and the police account, during interrogation. One ScotTown officer\textsuperscript{125} also confirmed that if an interpreter has been at the locus, they cannot then interpret at the police station.\textsuperscript{126}

However, some lawyers we spoke to did recognize that using the same interpreter might involve a conflict of interest. An experienced Scottish lawyer\textsuperscript{127} told us that they were concerned about the lack of confidentiality in this arrangement. In one instance, where they had insisted on a separate interpreter, the police did not interrogate the suspect because the solicitor had not been able to consult with the client prior to interrogation. A French lawyer also gave a concerning example of where the interpreter had told the police something said by the suspect during

\textsuperscript{121} Law Society 2012, para. 4.1.1. Where the police interpreter is used, the solicitor should seek the consent of the suspect, advise that the interpreter is an independent, accredited professional, and confirm with the interpreter that their code of conduct requires them to maintain confidentiality.

\textsuperscript{122} During a discussion with the researcher at the Border Police in NethTownLaw, an officer thought lawyers should call a different number to the police one, in order to obtain independent interpreters, but a lawyer responded that it did not matter because interpreters are all the same.

\textsuperscript{123} EtcTool, who also thought that 'It's better for the suspect not to have several interpreters, they can build some trust, and Scottish officers below.'

\textsuperscript{124} EtcPoll.

\textsuperscript{125} ScotTownPoll.

\textsuperscript{126} These explanations follow the ScotCity SOP which suggested that in these instances the interpreter could be called as a witness in the case.

\textsuperscript{127} ScotCityLaw1.
consultation. The lawyer reported the incident to the French bar association. Fortunately, the lawyer did not see the interpreter again.\textsuperscript{128}

With respect to multiple suspects, in England and Wales, and Scotland, it is regarded as inappropriate for the same interpreter to interpret for co-suspects, due to the potential for a conflict of interest, even if the same lawyer acts for more than one suspect.\textsuperscript{129} However we saw an instance in Scotland where there was no alternative. In ScotCity, over the Easter weekend, two Bulgarians were arrested and the duty officer had difficulty finding an interpreter.\textsuperscript{130} One arrived two hours after the initial call. The duty officer spoke to the interpreter near to the charging desk, where conversations were recorded by closed circuit television. He made it clear to the interpreter that because there were no other Bulgarian interpreters available, he was to interpret for both suspects, but was not to talk to them, only to translate questions and responses.\textsuperscript{131} Whilst there may be standards in place, it seems that in practice, resource constraints and adherence to the detention time limits may compromise the aim of preventing evidence contamination by requiring the same interpreter to act where there are multiple accused with the same language requirements.

\textbf{3.7. The Use of Interpreters and Delay}

The involvement of interpreters, whilst aiding communication between suspects, police officers and lawyers, can have indirect effects upon the process. In most jurisdictions, and in the four that we observed, police detention is subject to time limits.\textsuperscript{132} The need to engage an interpreter can delay the investigative process which, of course, has an impact upon completing the investigation within the time limit.

Almost all police officers in England expressed frustration at the length of time it often took for interpreters to arrive at the police station to provide face-to-face interpretation, especially where interpretation was required for a language that was less frequently encountered in that area. Interpreters could often be located many miles away, and it could therefore take several hours before the interpreter arrived at the station. An English officer told us that 'depending on where they are in the country they could be here in 20 minutes or four of five hours',\textsuperscript{133} which was

\textsuperscript{128} iFrcCityLaw8.
\textsuperscript{129} Scottish SOP, para. 2.4.3; and according to iEngCityPol5, although not replicated in the SOP or National Agreement.
\textsuperscript{130} ScotCityPol16.
\textsuperscript{131} ScotTownPol7 also recalled an occasion where the same interpreter was used for multiple Mandarin speaking suspects, when three were required, but where engaging all three would have unduly delayed the case.
\textsuperscript{132} As iEngCityPol2 explained, the police have to 'look for ways to get them within the 24 hour PACE dock'.
\textsuperscript{133} iEngCityPol2.
demonstrated in EngCity when an officer arrived in the custody area to explain to the custody officer that the nearest available interpreter was located a couple of hours away and had been delayed by traffic due to an accident.134 She summed it up thus:

'[Interpreters] can come from anywhere in the country. It can mean a lot of hanging around. I've got on with paperwork this morning, I've prepared for interview, so that's okay, but it can be a bit frustrating at times.'

A lawyer gave us an example of where one interpreter in another EngCity co-suspect case had been found locally but a second had to be flown from a different part of the country, taking seven hours.135 This was an example of where exploring the language ability of the suspect would have been useful, as it transpired that the interpreter who arrived spoke Latvian, not Russian (which is what the suspect required) and the suspect could in fact speak sufficient English for the interview to have gone ahead.

One English officer thought it would be useful if there were a better geographical spread of interpreters to ensure that they arrived quicker.136 They thought that if areas without sufficient interpreters were identified, something could actively be done to improve recruitment there.137 However, another in EngTown thought improvements had been made: 'I've known it in the past where you've had to wait six, seven, eight hours to get an interpreter.'138

This contrasts with the arrangement in ScotCity where interpreters usually arrived within 30-50 minutes. An officer there told us that: 'We're quite fortunate to be in possession of Romanian, Slovakian, Polish, Russian interpreters who all stay in this local area.'139 The longest he could recall waiting was two hours, for a Mandarin interpreter. An EngCity officer thought that, as in Scotland, a database of local interpreters was needed, rather than people having to travel long distances,140 although the NRPSI website does indicate where the interpreter is located and no doubt custody officers will attempt to instruct the closest. Nevertheless, some officers in ScotTown thought that the process could be quicker and could think of

134 EngCityPol10.
135 Acting in the case of EngCityPol11.
136 ifEngCityPol11.
137 The National Agreement 2008 makes this observation and recommends consistent data collection and monitoring in order to make reliable assessment as to demand and supply by language and location, and planning for meeting any shortfall, see para. 121.
138 ifEngTownPol1, ifEngTownPol2 also thought that 'because it isn't a regular daily requirement we couldn't expect a better service'.
139 ifScotPol1.
140 ifEngCityPol6.
cases where they had also had to wait for a few hours. Indeed, in one case we observed, the interpreter took over two hours to arrive.

Significantly, none of the French police officers we interviewed thought there were delays, and said that they could usually find someone who could come to the station within half an hour to one hour, perhaps because they had been able to organize their own lists of local interpreters. Since we did not observe any interpretation cases, we are unable to confirm this assessment.

In NethCity and NethTown, where a telephone interpreter could be found in a matter of minutes, there was clearly not a similar problem. A NethCity officer observed, 'I can call an interpreter on my phone right in the cell, and he is available within seconds.' Since interpretation in person was a rare event, organizing this would involve making an appointment for the same day or the day after, which indicates that a significant amount of time may pass in the Netherlands before a suspect would receive assistance with communication, and then only for the specific purpose of interpreting the interrogation.

Most officers (particularly in EngCity and EngTown) agreed that for languages infrequently encountered in a particular location it was difficult to find interpreters, and that there would be delays in getting an interpreter to the police station. This could be a particular problem during evenings, weekends and public holidays. Also, where one language was in more demand and there were insufficient numbers of interpreters, this could lead to delay. Another difficulty, mentioned by police and lawyers, was where there were several co-accused requiring an interpreter. In the case mentioned above, where only one Mandarin interpreter was engaged because of the delay in waiting for three, the fact that only one was available who had to attend each suspect in turn, considerably delayed the investigation in any event.

While acknowledging the necessity of interpreters, lawyers also expressed frustration about the delay resulting from the involvement of an interpreter, such as their need to take breaks (which, perhaps, demonstrates a lack of insight as to the

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142 ScotCityPol16: The officer pointed that this was because the suspect spoke Bulgarian, which he thought was quite rare. It could also have been because it was the Easter weekend.
143 iEngCityPol5: iEngCityPol3.
144 iNethCityPol2.
145 According to iNethCityPol3.
146 Interestingly, similar languages were deemed rare across the jurisdictions—non-European and non-Indian.
147 iEngTownPol5 told us that Friday and Saturday nights can be problematic because of the number of drunk Polish people in EngTown who each need an interpreter.
148 ScotCityPol8: ScotTownPol7.
149 As iEngTownLaw3 acknowledged, the interview is useless otherwise, also echoed by iEngTownPol6.
level of concentration required for interpretation). Some lawyers observed that delay has procedural consequences: one explained that detention may need to be extended as a result, and another observed that interpreters can double the time needed in lawyer-client consultation, which, given the time limitation on consultation in some jurisdictions, may limit its effectiveness. One French lawyer thought that the biggest issue there was a lack of interpreters. They explained this was particularly felt in mass arrest situations where more interpreters are needed. In contrast, a Scottish lawyer said that there seemed to be lots of interpreters in Scotland and suggested that it was a business opportunity for those finishing university: "They don't seem to be struggling to get people."

In order to mitigate the delay or period without an interpreter, a number of techniques were employed by police officers. Officers in NethCity were observed to attempt to communicate with two Romanian suspects in French since they could not speak Dutch or English and had some French ability. The suspects were provided with an interpreter for the official detention, but prior to this the officers used their language ability to communicate. Also, in NethTown we observed an interrogating officer ask a suspect if he spoke Dutch, then English, then German, which she spoke a little of, in order to ask if she would come to the interrogation room where she would be assisted by a telephone interpreter. In another case, a German suspect who persisted in his request to see a doctor was told, in reasonable German by the assistant prosecutor, that because the first 24 hours of detention had not elapsed, he would not be visited by the duty doctor. These cases demonstrate that between the formal processes of detention, making use of an ability to converse in another language can be useful for basic communication and explanation which otherwise would not be possible. We did not observe police officers going to these efforts in other jurisdictions, perhaps because there, officers possessed less foreign language skills.

150 EngCityLaw3, perhaps because lawyers do not receive the same deference, and often have to attend court the day after a late night attendance at a police station. By way of illustration, EngCityTownPol5 observed that the demand on interpreters was increasing, especially with serious offences where an interpreter has been expected to be at the station for 24 or 36 hours. He thought it was not realistic or healthy for them to be there for that long, but did not make the same observation about lawyers. EngCityLaw3 also thought lawyers were completely dependent upon interpreters, 'the lawyer has to be there at the time the interpreter has given, it's never the opposite'. Both the English National Agreement and SOP highlight the need for interpreters to take regular breaks and that this will help the accuracy of the interpretation.

151 EngCityLaw1.
152 EngCityLaw2.
153 EngCityLaw3.
154 ScotCityLaw1.
155 NethCityPol18.
156 NethTownPol13.
157 NethTown30.
Another technique employed was the use of internet translation to at least enable some information to be communicated:

'I will type a brief paragraph into Google Translate, translate it into their language, give it to them, ask them if they understand and tell them that we will get an interpreter as soon as we can and obviously that works.'

Another mitigating technique observed where an arrest had been anticipated and organized, was to book an interpreter in advance. In a Scottish case, a request for an interpreter was made to the police station by the police officer as he detained the suspect. This meant that the interpreter’s arrival at the police station almost coincided with that of the suspect. A custody officer told us that this was standard procedure; ‘So by the time they get here, at least the interpreter’s on their way, so they’ve only got a 10 minute wait instead of an hour’. We were informed that some response officers also did this at EngCity, although officers still complained in interview about delays. Equally, a French officer explained that in their particular department the police know in advance who they are going to summon to the station so it is usually possible to arrange an interpreter in advance. If they are not sure whether the person speaks French, they will arrange the interpreter in case they are needed. In a case we observed in England, an interpreter informed us that she was notified the previous evening by the police, who said the suspect was too drunk to be processed and that they would call her to attend in the morning.

One English lawyer said that if there is going to be a delay they always ask if the police would release the suspect on bail until the interpreter is available, which one officer confirmed with regard to situations where they could not find an interpreter for a rare language.

4. Identifying the Need for Interpretation/Translation

The process by which police officers and lawyers identify the need for the assistance of an interpreter is crucial to ensuring the right is effective in practice. It is therefore surprising that in none of the jurisdictions was there any guidance as to how this...

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Footnotes:

154 EngTownPoi6.
155 This occurred in NorthCityPoi9 where the suspect spoke a rare language, the Bindehe dialect of Kurdish.
156 ScotCityPol53.
157 ScotCityPolII.
158 ScotCityPolII.
159 EngCityLawII. However, she arrived at the station at 9:30 am and stood around for half an hour because initially the officer in charge of the case could not be located and the client had ‘just been forgotten about’, which caused her some frustration, though she did not indicate this was a usual occurrence.
160 EngCityLaw2.
161 EngTownPoi5.
procedure should be effected. Whilst it may be considered fairly straightforward to recognize the need for an interpreter where a suspect has no local language comprehension, in cases where the suspect can converse, a decision must be made as to whether their comprehension is sufficient. Interestingly, this assessment was seen to vary during our observations depending on the procedure being undertaken. Without any uniform standard as to how the assessment might be made, officers had developed their own decision-making mechanisms.

4.1. Police Identification of Need

In no jurisdiction was there a specific trigger, and no right-based or risk assessment-based question within the custody booking-in process, that signalled whether or not interpretation was needed. Police officers in all jurisdictions therefore relied on discretion and common sense in identifying the need for interpretation. The assessment is not always an easy one; not only do officers need to identify that the person speaks the local language insufficiently to communicate and understand the proceedings, they must also correctly identify the relevant language.

Officers had differing techniques for identifying the need for an interpreter, although in most instances they agreed that it was a matter of perception. There were cases where it was very obvious, or where the suspect asked for assistance outright, and in these an interpreter was usually arranged. There were other cases where more inquiry was necessary. Some officers simply asked the suspect whether they needed interpretation. Most officers, across the jurisdictions, told us that they sought to engage the suspect in conversation and would instruct an interpreter dependent upon the answers received.

Some officers used verification mechanisms to ascertain the level of language comprehension held by the suspect. For example, one English officer asked unusual questions such as, "Have you ever tried to harm yourself?" which wouldn't be in a guidebook! Another said that he gave suspects the English version of the Notice of Rights and Entitlements and asked them to read from the sheet:

"If they can read the three sections from the sheet clearly and plainly, it's obvious they understand English because that is a reasonably complicated set of things."[170]

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[106] Though we observed some concerning examples in the Netherlands where this did not occur, see below.

[107] iErcanCityPol2; iNethTownPol12; iNethTownPol45; iScoatTownPol2; iScoatTownPol15.

[108] The Decret No. 2013-958 of 25 October 2013 states that if an interpreter has not been requested, but there is any doubt as to the person's ability to speak or to understand French, the police (or procureur if brought before them) must satisfy themselves by all appropriate means, that the person speaks and understands the language. If an interpreter is required, they must intervene without delay.


If they could not, he would arrange for an interpreter. A Scottish officer said that he asked the suspect to repeat back what he had explained. Many officers told us that they would err on the side of caution and instruct an interpreter where they were not sure, or once a procedure had commenced and they could see that the person did not understand. Two officers asserted that if the suspect could not speak fluent English, they would instruct an interpreter. Lawyers interviewed in England and Scotland generally thought that the police identified the need for an interpreter adequately and also that they did err on the side of caution when deciding whether interpretation was necessary.

However, from our observations in the Netherlands, it appeared that a different approach was taken. Interpreters were only engaged when it was impossible to ensure any sort of meaningful communication with the suspect without one. Police officers in NethCity told us that there were not many detainees who could not speak Dutch: 'Most of them speak at least some Dutch, or understand it.' This suggests that the police rarely engage interpreters during police detention, despite the fact that we observed a significant number of foreign suspects in NethCity, more than in the other jurisdictions in the study. One NethCity officer said that if they could only communicate with gestures they would contact an interpreter. Another officer in NethTown noted that the ultimate test would be if they told the suspect they were free to go, but the suspect did not react. This assessment seems fairly unsophisticated, since obviously a suspect may understand that they are free to go, but not the detailed procedure of the official detention. Often this reluctance to engage an interpreter was not because officers failed to identify that the suspect did not speak or understand the language, but because they wanted first to attempt communication in another language that they had command of, rather than offering interpretation. Many Dutch officers said they would try to speak to the suspect in another common language, such as English, French or German, even if this was not the suspect’s own language.

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171 ScotCityPolD; iEngCityPol1; iEngCityPol2; iEngCityPol8; iEngCityPol7; iEngTownPol12; iFranCityPol4; iNethTownPol3; ScotCityPolD; ScotCityPol5; ScotTownPol8.
172 iFranCityPol3; iEngTownPol2 said that they had changed their mind during interrogation, starting again with an interpreter.
173 iEngCityPol2; iScotTownPol8.
174 iEngCityLaw1; iEngCityLaw4; iEngTownLaw1; iEngTownLaw2; iEngTownLawRep2 and ScotCityLaw3 all used this exact phrase.
175 Although we did not observe interrogations in the most serious cases, for which the standard may be different, and we did observe some cases where it was deemed necessary to obtain interpretation. In NethCityPol14, two Romanian suspects could speak no Dutch and very little English, so were provided with telephone interpretation for both the official detention and interrogation.
176 During NethTownPol17.
177 iNethCityPol2.
178 During NethTownPol16.
Once assistant prosecutors established that suspects were English, they spoke in English for one NethTown\textsuperscript{180} and four NethCity cases\textsuperscript{181} to perform the official detention procedure. However, in many cases the officer’s comprehension of the other language, and particularly their ability to translate legal terminology, was poor, an assessment with which a Dutch lawyer agreed:

‘When it comes to those languages, the interrogating officers often think very quickly that they can [communicate well enough]. And this is often not the case.’\textsuperscript{182}

For example, in one case observed in NethTown an assistant prosecutor conducted an official detention in English stating, ‘you are here because we are looking for you’.\textsuperscript{183} This was not an accurate explanation of the reason for arrest. A number of assistant prosecutors described their role to suspects in English, inaccurately, as ‘officer of justice’ or ‘representative of justice’, which misled them by implying a more objective role than the assistant prosecutor actually holds. In one case, the assistant prosecutor, on informing the suspect about the right to silence in English, stated: ‘You are not obliged to ask questions’ rather than answer.\textsuperscript{184} Further, in another case observed, the interrogating officer spoke good English but was out of practice and omitted entirely to explain the right to silence.\textsuperscript{185} The officer had to search for the correct words and was not able, or confident enough, to explain the procedure, which led to the suspect having to ask about it. In explaining the procedure the officer failed to mention that the suspect could be released pending appearance in court, but focused on how detention might be extended, or in the alternative, that a fine may be offered. The worst example of attempting to continue without sufficient communication skills was probably in a Dutch case where two officers attempted to interrogate a suspect (who was difficult to understand because he was under the influence of drugs) in German, but were far from fluent in that language.\textsuperscript{186} At one stage one officer exclaimed: ‘I really don’t understand him’, to which the second officer responded: ‘Then you might have to call an interpreter.’ Neither did so, for reasons that were unclear to the researcher.

Such attempts to communicate can create multiple problems. The fact of poor interpretation by the officer may lead to a later challenge to the procedure, which could place the officer in the position of being a witness in their own case.\textsuperscript{187} It can also create a conflict of interest by the officer establishing what could be interpreted as a relationship of trust (by attempting a means of communication), when in fact

\textsuperscript{180} NethTownPo18.

\textsuperscript{181} NethTownPo17, NethCityPo36, NethCityPo17, NethCityPo11.

\textsuperscript{182} iNethTownLaw2.

\textsuperscript{183} NethTownPo17.

\textsuperscript{184} NethCityPo17.

\textsuperscript{185} NethCityPo11.

\textsuperscript{186} NethTownPo30.

\textsuperscript{187} The Scottish SOP specifically prohibits police officers acting as interpreters in circumstances that might lead to their involvement in the formal judicial process, see para. 2.2.2.
the engagement is to pursue a case against the suspect. This is compounded in the Netherlands and France by the fact that interrogations are not electronically recorded, and the interrogation record is compiled by the officer.

It seemed from both interviews with police officers and our observations that a distinction was made by some officers as to the need for interpretation dependent upon the stage of detention. If the custody officer thinks that the suspect can ‘get by’ in the local language at the initial stage of detention where their rights are notified, they may not call an interpreter, even though an interpreter is regarded as being necessary for interrogation. One Dutch officer said that for the official detention the Letter of Rights was available in most languages; only if it was not would they instruct an interpreter, which suggests that they considered the delivery of rights is satisfied by the Letter alone. For interpretation other than of rights, he would attempt a conversation, as the other officers did, but if the suspect did not understand, he would attempt further in his broken English or German. ‘If you say “lawyer” or “interpreter,” then most people understand that. Now and then we proceed further with an interpreter.’ In a number of cases an interpreter was therefore only arranged for interrogation of the suspect, which meant that during the official detention and other procedures their understanding of their rights can have been limited at best. For example, in one Dutch case an English suspect was arrested on suspicion of domestic violence. It was only once the interrogation began that the interrogating officer asked whether they would prefer to be interrogated in English. The suspect answered that they were currently under too much stress to try to express themselves in Dutch. It was clear to the researcher that they had problems communicating because their answers were half Dutch/half English. This must have been the case during the official detention, but until asked in interrogation, all officers had spoken to the suspect in Dutch. Also in another Dutch case, a German suspect was informed that the police were going to start the interrogation, despite his request to see a lawyer. Since two hours had passed, the officers were

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188 Through a phenomenon called ‘linguistic belonging’. See Berk-Seligson 2009, in the context of Spanish speaking police officers in the United States of America. A specific danger is that the police officer becomes the author of the suspect’s testimony, enabling them to systematically ignore (and ultimately erase) testimony that does not accord to their version of events.

189 See section 7 below and Chapter 8, section 3.2.

190 EscotCityPol7 also said that if someone did not understand during the booking in procedure they would try to explain in more simple language prior to instructing an interpreter. Dutch officers indicated for the official that they would only use the Tolkentreferaat if the suspect did not understand Dutch at all: during NethTownPol7 and NethCityPol31. One assistant prosecutor in NethCity however said he always does the official detention with the help of a telephone interpreter, even if the suspect speaks good Dutch, because ‘one can never be sure if the suspect understood what I told him’, and in order to avoid any dispute in the future: iNethCityPol7.

191 NethCityPol11.

192 NethCityPol11.

193 Which we did not observe.

194 NethCityPol11.

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entitled to continue. The suspect objected demanding his right to speak with a lawyer. The suspect was clearly confused and his ability to assert his rights was limited because the assistant prosecutor was talking to him in Dutch, even though the interrogation was going to take place in German.

In our interviews, Dutch lawyers confirmed the problems identified in our observations. They were not convinced that police officers adequately identified a need for interpretation. One lawyer told us that whilst in cases where suspects spoke no Dutch at all, interpreters were engaged by the police, in cases of doubt, the police tended to conclude too quickly that the suspect's knowledge of Dutch was sufficient. There were a few Dutch lawyers who were concerned that the police were not good at identifying when an interpreter was necessary. As one Dutch lawyer told us:

I hear regularly that the police say “his Dutch is sufficient”, or “he can also speak English or German”, and then it turns out that the suspect’s Dutch or English or German was not good enough, and that there should have been an interpreter assigned to them. And then there are also people who completely do not understand why they were arrested, because if the police explained this to them in a language that they could not understand, then it does not get through.

Another Dutch lawyer also said that they sometimes doubted whether suspects are properly informed of their rights, especially when the police officer does not speak the language of the suspect. These lawyers were concerned that interpreters were only provided for the interrogation but not the preliminary stages following arrest. One gave an example of a German suspect refusing to comply with the breath test procedure and when asked why during interrogation, they had said their consent was not asked for. The public prosecutor at court agreed that they had probably not been properly informed about the consequences of not cooperating. As the lawyer said,

(and then you start doubting whether suspects are properly informed about their rights and procedures, even when it concerns German suspects — and German is the most common foreign language [that police officers speak].)

Some police officers assessed need according to the contextual circumstances rather than a test limited to language comprehension. The characteristics of the suspect, such as whether they were attending the police station for the first time, and therefore did not know the procedure already, were taken into consideration.

\[\text{NethTownLaw6} \]
\[\text{NethTownLaw3} \]
\[\text{NethTownLaw4} \]
\[\text{NethTownLaw4} \]
\[\text{EngTownPol12} \]

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Dutch officer said that if the suspect was very emotional they would use a telephone interpreter to ensure there was no misunderstanding. Some also said that the type of offence would trigger the need for interpretation, when the offence is more severe or when it is a complex investigation. In a Scottish case observed a Polish man came in drunk and with a head injury which, after the booking in process, was assessed as needing hospital treatment. The suspect could speak enough English to understand and respond to the process. The custody officer observed that if the alleged crime had been a murder or another very serious crime, an interpreter would have been contacted straightaway but as it was a relatively minor crime, it was not necessary. Equally in another case, although a foreign suspect spoke good English, the custody sergeant decided to call an interpreter for the booking in procedure. The suspect had been arrested on suspicion of murdering his girlfriend and was extremely emotional about what had happened to her. The officer told us: 'We need to be really sure he understands everything, this is a very serious case.' It is not clear whether his emotional state was taken into consideration, or whether the decision was to protect the police enquiries from any potential criticism should the case proceed to court. The latter seems to have been the priority consideration, however since, during the call with the interpreter, it was agreed that there was no need for an interpreter for the suspect's consultation with a lawyer. It is not clear to us why the seriousness of the offence or characteristics of the accused should have a bearing on whether an interpreter is engaged. If the suspect requires an interpreter, due to a lack of language comprehension, this should always be arranged, irrespective of circumstantial matters.

Few officers were forthcoming about admitting they had missed a need for interpretation. Lawyers in all jurisdictions positively reported in interview that they rarely attended on a client at the police station who they assessed was in need of an interpreter but did not already have one. Nevertheless, most lawyers had examples where a need for interpretation had been missed. As a Scottish lawyer told us:

'T've been put on the phone to people who don't speak a word of English. And that person has supposedly understood their SARP form, their SARP rights, and what the police have said to them. The procedure works, usually, but sometimes crazy stuff like this happens. It's strange. Unpredictable.'

A French lawyer also observed:

'It's enough for police officers if the suspect can say one or two words. I think they're not careful enough. They could make an effort. It's not enough to have an answer to

201 &NethCityPd5
202 &NethTownPd4
203 &EngCityPd4
204 &ScotCityPd4
205 &EngTownPd4
206 &ScotCity2Law2.
the first two to three questions to conclude that they can speak French. After less than 10 minutes, you should realise that the suspect is struggling to express herself.\textsuperscript{207}

We also observed a number of interrogations where our researchers thought the suspect had difficulty comprehending the language, yet an interpreter was not obtained. This was borne out in a French case where the suspect was Armenian and spoke with an accent.\textsuperscript{208} The interrogating officer asked whether the suspect could speak and read. They replied: 'Yes, a bit.' The officer then asked whether the suspect understood French. The reply was again: 'Yes, a bit.' The police officer then asked: 'You understand what I'm saying now, don't you?' This is not really a question but rather an affirmation. Indeed, of the few cases we saw in France, it appeared that language comprehension was not fully explored by police officers, or lawyers. In another French case, the interrogation lasted only 30 minutes as the communication with the suspect was difficult due to their poor French.\textsuperscript{209} The police officer had to reformulate questions, sometimes with the assistance of the lawyer; for example, the formal word 	extit{ante} was exchanged for the more familiar word 	extit{copine}. Yet neither the lawyer nor the police officer appeared to even consider that an interpreter might be needed. The suspect confirmed and no further enquiry was made.\textsuperscript{210} Equally, in a Dutch case a Portuguese suspect was interrogated at length without access to an interpreter\textsuperscript{211} although clearly his knowledge of Dutch was very limited. The suspect repeatedly asked for the officers to re-phrase the question, constantly searched for words, and spoke in very simple sentences with poor grammar. In another case, co-suspects were detained on allegations of cultivating marijuana.\textsuperscript{212} Two were Chinese and were illegal immigrants. Whilst we did not observe their interrogations, the records showed that there was an initial attempt in both cases to interrogate them in Dutch. It was recorded that in the first case the suspect had said they did not understand and speak enough Dutch, but the interrogators decided 'to still try'. The record of the first interrogation gave the impression that the suspect did not speak or understand enough Dutch, since the questions and responses were very short. At the end of the record it was written:

'It was difficult to interrogate in Dutch without an interpreter, so it was decided to engage a telephone interpreter for the next interrogation.'

\textsuperscript{207} FranCityLaw9.
\textsuperscript{208} FranTownLaw5.
\textsuperscript{209} FranTownLaw2.
\textsuperscript{210} This lack of engagement with the need for interpretation was also found in Contrôleur général des lieux de privation de liberté 2013. This practice will no longer be permitted under the changes introduced by the Décret No 2013-959 of 25 October 2013 which places the onus on officers to ensure that suspects speak and understand French.
\textsuperscript{211} NethCityPol12. He was interrogated twice during his detention at the police station: the first interrogation lasted 3½ hours and the second interrogation lasted 5½ hours.
\textsuperscript{212} NethCityPol18.
Perhaps even more surprising was that the process was then repeated with the second suspect, but since it appeared they spoke even less Dutch, the attempt was dropped. The interrogation was then repeated, again with a telephone interpreter.

Our data shows, therefore, that officers did not always engage interpreters in circumstances where they should have done.

For foreign suspects assessed to have a good command of the local language without a need for interpretation, legal terminology is likely to be unfamiliar to them. In some cases officers displayed little insight of the need to use alternative, appropriate, language to aid the suspect’s understanding. For example, in a Dutch case observed, a suspect with dual Dutch and Moroccan nationality arrested on suspicion of domestic violence spoke almost fluent Dutch, and overall appeared to understand what was being said. However, the interrogating officer did not try to adjust their pace or manner of talking to the fact that the suspect was not a native speaker. The suspect’s understanding deteriorated when complex language was used, such as when the officer asked whether it was true that he told the brother of the victim that ‘it would be totally finished, should he be arrested again by police’. The question was expressed in the conditional tense and was difficult for the suspect to follow, needing repetition and reformulation a number of times.

4.2. Lawyers’ Identification of Need

Lawyers generally appeared to understand that the legal and technical language used during police detention often required interpretation assistance. As an English lawyer said:

‘...there have been circumstances where someone has answered a few generic questions at a custody area, and might understand these, but when a conversation arises about evidence during the consultation or the interview, it may arise that the person clearly doesn’t understand English well enough to understand adequately.’

Another English lawyer also said they always get an interpreter for borderline cases:

‘Sometimes clients may be able to understand and talk about where they've been that day but when it comes to the legal jargon they struggle and the police need to recognise that they are not fully understanding the advice.’

A Scottish lawyer agreed:

203 NotICityPol29. The officer may have been annoyed that the suspect repeatedly interrupted, sometimes did not seem to be listening, and was repetitious.
204 iEngCity2LawRep.
205 iEngTownLaw2.
One French lawyer also observed that it is complicated, even when you can speak a language well, to really say what you want to say and to understand exactly what question you are being asked.

In the Netherlands, however, almost all lawyers interviewed, like police officers, said that they would try to speak with the suspect in another language, if they were able to speak it, before considering the need for an interpreter. A NethTown lawyer told us: 'I think that my French is good enough to communicate effectively and only if it really does not work, if we cannot understand each other at all on some points' would they engage an interpreter. Likewise, although another NethTown lawyer criticized the police for interrogating in a language other than Dutch, they felt that they spoke quite good English themselves so would try this first for a consultation, presumably because the lawyer trusted their ability more than that of the police. They would not attempt German, French or Danish in a consultation however, despite believing they could make themselves understood, because 'it is about whether the suspect understands what is being told to him'. As with the lawyers above, this lawyer also observed that there are things you may not be able to explain in a foreign language:

'For example, consequences of certain sanctions or other technical terms. Sometimes it is about language nuances. I have had a [Dutch-speaking] suspect, who said that he "picked" a can of a drink from the shop. When I asked him to explain what "picking" for him means, he said that he took a drink, paid for it at the cashier, and walked out of the shop. But in Dutch "pick" also may mean "steal". So if even with a Dutch-speaking suspect such kind of misunderstandings may occur, what about Polish or Arabic-speaking suspects?'

We observed three consultations in NethTown where lawyers attempted to conduct consultations in a different common language that a suspect understood, which had varying difficulties as a result: twice in English and once in French. In the first of these, the lawyer and suspect struggled to communicate in English because they both had strong accents (the suspect being originally from the Democratic Republic of the Congo), and the researcher assisted on occasion with communication. In the second, the suspect was obviously still drunk and appeared to have some type of mental disorder. However the suspect said he spoke Dutch and English so the
consultation commenced in Dutch, though there were problems with the suspect's comprehension and he became irritated. The lawyer saw this as a lack of interest in the consultation rather than a language difficulty. In a third case, the consultation was attempted in French, though it transpired that the lawyer only spoke to a conversational standard, such that they spoke slowly, had difficulty finding the appropriate word and struggled with legal terms.

On a number of occasions where the lawyer decided to attempt to communicate in a language that the suspect understood, they relied on the researcher to assist in interpreting information they found difficult to communicate, such as in one case where the researcher explained in French the detention procedure. Whilst we cannot be certain if the lawyer would have stopped the consultation to seek interpretation assistance had the researcher not been present, given that the consultations were underway and these lawyers had already struggled through most of them prior to seeking the assistance of the researcher, it is unlikely.

In a number of cases, suspects tried to assert that they could speak the local language. This may have been a cultural response where to admit poor language skill could be a sign of weakness. Some police officers and lawyers, particularly in the Netherlands, seemed to rely on this as an assessment of language comprehension without testing it. In a Dutch case observed, the lawyer, after attempting much of the consultation in poor French, suggested that he call an interpreter. The suspect refuted this: 'It is OK like this. You are my lawyer. We understand each other' and the lawyer continued without assistance. Yet as a Scottish lawyer observed, sometimes a detainee may be indignant at the suggestion that they cannot converse or understand English and would seek to dismiss the services of the interpreter, but 'I've always persuaded them that they shouldn't and this advice has been accepted by them'. In contrast, in two other Dutch cases, both suspects asked

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223 NethTownLaw14. As a result, the lawyer wrote 'zonder het' (the right to silence) on their business card and suggested the suspect show this to the interrogating officer. This was far from an adequate explanation of the right. Interestingly, when the lawyer realised that the suspect had in fact already been interrogated he asked if an interpreter was present, and since the officers had also attempted to communicate in French, he then advised the suspect to ask for an interpreter for further interrogation, despite failing to arrange this for the consultation.

224 NethCityPol28. Following interrogation, the suspect asked the police officer lots of questions about the procedure, through the researcher who was native Russian speaking. The suspect may have made use of the researcher rather than the telephone interpreter because the telephone line made it difficult to converse, and also because speaking with someone in person can instil greater trust and confidence. The suspect may also have not thought of their questions until the telephone interpretation had finished at the end of the consultation. This is another demonstration of the problems of remote interpretation.

225 NethTownLaw14.

226 ScotLaw3.
for an interpreter, as whilst they spoke and understood Dutch or English to a certain degree, they appreciated their comprehension would be aided by an interpreter.229

Some French and Dutch lawyers also seemed reluctant to engage an interpreter for consultations with suspects when they could not speak the local language. In some cases our researchers observed clear comprehension, and consequently, communication difficulties between the lawyer and client that the lawyer did not attempt to resolve. For example, in a Dutch case, the lawyer simplified questions which were then too vague for the response to bear any meaning: ‘Have the police told you what was wrong?’ to which the suspect responded: ‘No, told nothing’ or in trying to explain the procedure: ‘The police are going to talk with you’, which does not satisfactorily describe the significance of interrogation.230 The lawyer even gave up trying to explain the right to silence. In another Dutch case, the suspect spoke in short sentences without grammar, which resembled something like: ‘Driving license 2010 end. I here. Why? Others – fine. And I here. Why?’231 It took the lawyer a considerable effort to explain the accusation against him. In a French case, after some time of communication difficulties with the suspect, the lawyer asked if the suspect spoke French.232 He replied: ‘A bit.’ The lawyer then asked whether the suspect understood what had just been explained to him and he replied: ‘Yes.’ The lawyer accepted this without testing it, or asking if the suspect wanted an interpreter. After consultation, the lawyer even told the police that the suspect struggled a bit to speak French but that it would be fine as long as they spoke slowly!233

The consequence of not engaging an interpreter was to sometimes extend the length of the consultation because of the time taken in attempting to communicate, and sometimes to limit it where communication was impossible. It also led to poor advice or inadequate explanation of the suspect’s rights, which in some instances rendered the legal consultation largely ineffective. Due to the challenges of expressing themselves in a foreign language, the lawyers focused their cognitive efforts on the language, and were less able to comprehend important details of the case, provide explanations, or explain legal concepts to the suspects.

The lawyers may have continued these consultations, despite the obvious difficulties in comprehension, as the police had not initially identified the need for interpretation and the lawyers felt it was too late to try and organize an interpreter.234 The lawyer in one Dutch case clearly recognized that an interpreter was

229 NethTownLaw9; NethTownLaw12.
230 NethTownLaw10.
231 NethTownLaw4.
232 FranTownLaw2.
233 Also in FranTownLaw5 the lawyer asked the suspect their nationality, which was Turkish, but this did not prompt the lawyer to explain anything about the right to interpretation or to check their understanding of French. Fortunately the suspect seemed to speak relatively competent French and appeared to understand most of what the lawyer said, though they asked the lawyer to repeat a couple of times.
234 It could also have been a matter of convenience since in one Dutch case the consultation took place in a room without a Tolktelefoon.
necessary as he spent some time trying to make the suspect understand that they should ask for one during interrogation.\textsuperscript{235} Despite the above examples, some lawyers made a concerted effort to involve interpreters where suspects understood and spoke some Dutch or French, but it was not their habitual language.

In interviews with our researchers, some Dutch lawyers offered further explanation. One NethTown lawyer explained that they did not have much trust in telephone interpreters\textsuperscript{235} and others preferred not to have anyone present when speaking with a client.\textsuperscript{237} They considered that face-to-face interpretation may actually be worse in this regard because a third person would be present and the client may react differently, especially concerning sexual offences. Another wondered whether the relationship of trust with the client was affected and whether the suspect would trust the interpreter to keep the information confidential.\textsuperscript{238}

However not all lawyers shared this view:

"I think that it is sad if I cannot win the confidence of my client, with or without an interpreter. I do not agree that the presence of an interpreter makes it more difficult to establish a trust relationship. If you try to speak with someone who does not understand you, then there is no relationship at all."\textsuperscript{239}

Likewise a Scottish lawyer could not think of an occasion where the presence of an interpreter had hindered the process: "Of course it has been quite the opposite and had been a benefit."\textsuperscript{240} This interviewee also commented on an occasion where a deaf client was assisted by a sign language interpreter, which they also thought to be a positive experience.

As with police officers, where the suspect had some comprehension in the local language, some lawyers did not seem to appreciate the need to adjust their language. In one Dutch case, a suspect spoke reasonable Dutch and managed most of the interview without difficulty.\textsuperscript{241} The allegation was of theft of a television which had been left on the street. When the lawyer attempted to explain, by telling the suspect that ‘you may have thought that if the things were laying outside they were for everyone, but juridically it does not work in this way’, the suspect did not understand and it was necessary to repeat it in simpler language. However, the researcher observing the consultation was not convinced that the suspect fully understood why what they had done amounted to theft. Other examples were seen where the lawyer used legal terminology with foreign suspects, such as, ‘breach of Article 252 of the Criminal Code’, judge testing whether you should be put in pre-
trial detention\textsuperscript{242} and a technical term to describe a drug-related offence,\textsuperscript{243} without explaining its meaning, which the suspect could not possibly have understood.

Sometimes, a lawyer may be instrumental in identifying the need for an interpreter, one lawyer in England and Wales explained:

\begin{quote}
If [the custody sergeants] don't pick up [the need for an interpreter], then we usually do and we'll say to the custody sergeant 'I think we need an interpreter here.'\textsuperscript{244}
\end{quote}

This was reinforced by another, who went on to say:

\begin{quote}
'But in those circumstances, I've never had an officer argue with me that they don't require an interpreter. And obviously, they wouldn't want to do so anyway, because if I were to raise that representation prior to interview, and the interview went ahead without an interpreter, and this issue were raised by the defence in court, then it'd be up to the courts to determine whether the interview process would be admissible as evidence [it] probably [would] not.'\textsuperscript{245}
\end{quote}

There were differing approaches amongst lawyers as to how to resolve the problem. Some lawyers in England and Wales said that if they discovered a need for an interpreter they would inform the custody officers and this would be arranged.\textsuperscript{246} One told us that 'The police won't start interviewing unless the lawyer or interpreter is present.'\textsuperscript{247} In contrast, one French lawyer could not remember a case where they had told the police that an interpreter was necessary and it had been arranged.\textsuperscript{248} They explained, 'The interrogation can be straight after the legal consultation in which case there won't be enough time to call an interpreter.'\textsuperscript{249} Another observed that lawyers try to argue for nullity of the procedure at court but some judges rule that the accused can speak French and do understand everything.\textsuperscript{250} Despite this, the same lawyer explained that when this happened, they would prepare a memorandum which they would send to the Bar Association and to the police complaining about the problem, rather than ask the police to arrange an interpreter: 'The police are at fault and it could destroy the procedure so I keep quiet.' Other French lawyers also spoke of the memorandum as a remedy, although in the examples given they told the police that an interpreter was needed but were ignored, echoing some of the police perceptions expressed above:

\textsuperscript{242} NethTownLaw4.
\textsuperscript{243} Stupefiants (which is akin to saying narcotics, rather than drugs) in FranTownLaw2.
\textsuperscript{244} EngCityLaw1.
\textsuperscript{245} iEngCityLawRep.
\textsuperscript{246} Which was repeated by iNethTownLaw2 and iNethTownLaw6.
\textsuperscript{247} iEngTownLawRep2.
\textsuperscript{248} iFranCityLaw9.
\textsuperscript{249} iFranCityLaw2 suggested that they would tell the client not to say anything until the interpreter arrived, though they had never had this problem.
\textsuperscript{250} iFranCityLaw3.
"Often they don't believe it, saying that the suspect was speaking perfectly well earlier. But maybe the suspect understands enough for basic requests."

So, here, their memo for the case file was a record that the lawyer was unable to stop the interrogation. One also told us that a memorandum is written and incorporated into the procedure, but went on to say that if lawyers take the time to explain to the police calmly that an interpreter is needed, 'They are more likely to cooperate; it also protects their procedure.'

4.3. Identifying the Appropriate Language

A number of successful mechanisms were employed by the police to identify the correct language once the need for interpretation was determined. In the research sites in England and Wales and ScotCity, officers could refer the suspect to a poster on the wall by the custody desk. In ScotCity this comprised the 'Language Identification Card', identifying countries by their national flags, and the Language Identification Leaflet, both issued by Global Language Services Limited. The leaflet had been put up shortly before our fieldwork commenced, and contained a paragraph stating, in 32 different languages:

'To enable us to be of assistance to you, if English is not the language you understand, please indicate by pointing to the language you can read on this card in order that we can help and get information to you.'

The police were observed to refer the suspect to this notice in one case observed, where the suspect had only been in the UK for a few days and had been arrested for shoplifting. The detaining officers explained on arrival at the police station that the suspect did not speak English. The custody officer asked the suspect to look at the chart and then pointed at it. The suspect told the officer 'Romanian'. In England and Wales the Language Identification Card, issued by Language Line, contained slightly different wording but fulfilled the same purpose. An officer told us:

'If you're lucky then maybe they're literate and they can point to the relevant language in the board... If you can't identify the language then you usually will try to get hold of an interpreter of say some sort of related language. That interpreter can then hopefully...'

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251 iFranCityLaw9, and also iFranCityLaw8: One example involved a small theft and perhaps the police did not want the added complication.
252 iFranCityLaw5.
253 The language card was not seen on the walls in ScotTown. Whilst we did not see any foreign suspects during our research in ScotTown and it is rare for those to be brought into custody there, the poster is clearly useful when officers cannot identify a language.
254 A similar, though slightly different version is at Annex 10.
255 ScotCityPol22.
speak a limited amount of the similar language, sufficient to ascertain if the suspect
speaks it and to assist the police in finding another interpreter. A Dutch officer said that where it was not immediately obvious in the Netherlands
what language was spoken by a suspect, they would contact an interpreter via the
Tolktelefoon for the language they guessed was the relevant language. The
interpreter could then verify that it was correct, or suggest an alternative, which the
officer would pursue until they found the correct language. In cases involving a
rarely encountered language this process could take some time. A Dutch officer
observed that sometimes it was possible to identify where a suspect came from by
their passport or identification card. One method suggested was to call the local
Chinese restaurant when it was thought the suspect spoke Mandarin and ask them
to verify it.

However, problems may still occur. One lawyer in EngCity told us they knew
of cases where the interpreter attending did not speak the required language. This
was because a custody officer booked the suspect in using Language Line, but the
officer in charge of the case then had to contact a face-to-face interpreter in order to
conduct their interrogation. They did so according to the ‘country of origin’ record-
ed on the custody record. Also, the custody officer may enter the wrong country of
origin on the custody record, through inadvertence or ignorance, for example,
confusing Latvia with Lithuania. We did not observe any cases in any jurisdiction
where the wrong interpreter was booked, and we were unable to ascertain whether
the custody record stated the language spoken, or whether this was something that
the officer in charge of the case did in fact look for, although in one Dutch case,
however, the assistant prosecutor wrote the suspect’s native language on the custo-
dy record as ‘Burundi’ rather than French.

5. Understanding of the Interpretation Requirements

Effective implementation of the right to interpretation requires both police officers
and lawyers to understand the value of interpretation, not only in assisting them
during the investigative process, but also as a right of the suspect to enable them to
understand their other rights, and why they have been detained, and to enable them
to communicate both their needs and their account regarding the alleged offence.
Given the wide variation in practice and perceptions regarding interpretation identi-
fied by the research across the jurisdictions, this section considers the views of
police officers and lawyers expressed to our researchers.

256 EnCityPol3.
257 NethTownPol4.
258 NethCityPol1.
259 NethTownPol5.
260 EngCityLaw11.
261 NethCityPol6.

185
5.1. **Understanding the Right**

Many officers acknowledged in interview the obvious necessity of interpretation for the suspect as an aid to communication. Some officers did speak of this in the language of rights and fairness:

"It's in their interests because even though they've been detained and they're going to be in custody, they've still got rights and they need to understand the whole process of what's going on."\[262\]

With respect to the notification of rights, officers in all jurisdictions emphasized the need for suspects to understand what they are told. In the words of one officer from England and Wales,

"We need to speak to someone of a native tongue so they can be informed of that information without there being any loss in translation from us trying to say something to them and them understanding with broken English... The whole point is to make sure it's a fair process."\[263\]

A French officer highlighted the detail of the process, which cannot be managed by trying to get by without an interpreter:

"The notification of rights is a bit complex, so if we don't do it in a language the suspect understands, it's very difficult."\[264\]

A Dutch officer also observed that the suspect must understand the police officer and know what they mean: "If I say this is red, he must know that I mean the colour red, and not something else" since in his view it is the role of the officer to ensure their rights are delivered.\[265\] Scottish officers observed that suspects might have good conversational English but still not understand legal terminology,\[266\] which is compounded by the conditions of detention,

"However fluent somebody may be in English in a day-to-day situation, during a stressful period such as arrest perhaps it would be clearer and fairer to them to provide an interpreter."\[267\]

This was echoed by an English officer:

\[262\] iEngCityPol5; iNethTownPol2 thought that it was about decency, and adjusting to the suspect's needs. iNethTownPol4 told us that 'Regardless of whether he wants it or not, he has the right to be informed in a language that he understands'.

\[263\] iEngCityPol7.

\[264\] iFrAmCityPol3.

\[265\] iNethCityPol1.

\[266\] iScotPol5.

\[267\] iScotTownPol1.
"You’re keeping people in custody and they don’t have a grasp on English and it causes them stress and you’re supposed to be looking after them."\(^{268}\)

The officer said they would then look at which interpreter could get there the quickest, to relieve this anxiety for the suspect.

Interestingly, despite these observations, officers in all jurisdictions thought that some suspects exaggerated the need for interpretation, although none said that this would prevent them providing it. A custody officer in England and Wales told us that sometimes, on booking in suspects who requested interpretation:

"The officers look really surprised and say, well you’ve been chatting away to us all the way back from the scene of arrest."\(^{268}\)

He further surmised:

"I think they must think that they’re gonna be immediately released if they can’t speak English whereas that’s the complete opposite of course."

For him, failing to provide an interpreter could risk the process being invalidated, leading to inculpatory evidence obtained during interrogation being excluded, ‘So it’s pointless sort of arguing, it’s a bit frustrating, expensive and time consuming.’ Another Scottish officer thought as much as a third of suspects did not actually need interpreters, but that they had to provide them in order to avoid such risks.\(^{279}\)

A number of officers talked about the provision of an interpreter as a safeguard of the process for the police rather than as a right of the suspect. Typical observations were, ‘We have to play safe as otherwise it could be a very serious allegation,’\(^{271}\) and ‘It’s best to make sure than afterwards someone saying that the suspect didn’t understand what we wanted to say about technical terms.’\(^{272}\) In England and Wales, and Scotland in particular, most officers thought that failing to arrange interpretation where it was necessary would be likely to invalidate the procedure, and this seemed to influence their decision-making process. In the Netherlands, however, one police officer said that if it was discovered after the interrogation that a suspect had required interpretation, they would transcribe the record of interrogation and ask the suspect to verify that it was correct, or repeat the interrogation with an interpreter present.\(^{273}\) Such an event would be documented in the written report in each instance, and the officer would deliberate with the public prosecutor about what should happen. It was not, therefore, assumed that the pro-

\(^{268}\) ifEngCityPol1.
\(^{269}\) ifEngCityPol3.
\(^{270}\) ScotCityPol3.
\(^{271}\) ifEngTwonPol1.
\(^{272}\) ifNethCityPol4. ScotPol3 also couched it in these terms: the police have to be seen to be fair and not give a reason for the suspect to say that they did not understand.
\(^{273}\) ifNethTwonPol1.
cedure would be invalidated in the same way as in England and Wales, and Scotland. This may have a bearing on the differing approaches to the assessment of need between officers in England and Wales, and Scotland, who talked about erring on the side of caution, and Dutch officers who were more likely to dispense with an interpreter.

Even where an interpreter is present, the need to explain concepts and processes was not always appreciated. In two Scottish cases, involving Slovakian and Afghani suspects, neither appeared to understand the question of whether they would like a lawyer, but the officer simply recorded this as a waiver of the right. In another case, the suspect seemed confused about whether or not he had been arrested and whether he needed a lawyer. Unfamiliarity with the legal system is even more acute for foreign suspects. The difference between detention and arrest in Scotland is unique amongst the four jurisdictions, and the implications for the suspect under detention are actually more significant than under arrest. Rather than explain the right to legal assistance further and the implications of the s. 14 detention procedure, in this instance the custody officer responded through the interpreter: 'He's jumping too far ahead. Does he or doesn't he want a solicitor?' Afterwards he explained to our researcher:

'It's hard because I'm reading from a script and I don't want to deviate from it. If I do, I have to be careful what I elaborate on. The problem is they don't understand it – what a lawyer is, if they need one, when they need one... I'll go as far as I can. A lawyer is not a lawyer is that, I'll try to explain. Most of them just ask 'do I need one?' I can't tell them. I'll just say 'I can't advise you.'

These cases highlight the importance of explaining the process and the rights applicable to foreign suspects in a language that they can understand, and the provision of this information in a way that can assist in their decisions about whether to exercise their rights. It also highlights the difficulty for suspects in exercising their rights prior to receiving legal advice, and the difficulty for the police in ensuring rights are notified effectively.

5.2. **Familiarity with the Arrangements for Provision of Interpretation**

Knowledge amongst lawyers and police of how the system relating to interpretation operates varied. We did not observe any cases where the police did not know the

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274 ScoCityPol27.
275 ScoCityPol23.
276 See Chapter 3, section 5.
277 See Chapter 5 for further consideration of this issue.

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procedure to follow when the need for interpretation was identified. In all cases the police followed the procedure for engaging an interpreter promptly.

By contrast, it was clear that many of the lawyers we observed were not familiar with the interpretation process in any detail. One lawyer in EngCity explained that interpreters are from 'some sort of central pool, apparently'. As far as he was aware, they may be local or come from further afield, but never further than around 100 miles away. Since the police arranged the interpreter, lawyers in all jurisdictions seemed unconcerned about who they were, or verifying the interpreter was suitably accredited. One NethTown lawyer, who told us that at least once during every duty period there was one foreign suspect in need of an interpreter, knew to call the interpretation service to arrange for an interpreter, but did not realize that the National Register of Interpreters should still be used: 'I thought that the Register was for interpreters in court.' Likewise in Scotland, lawyers knew that the police arranged for interpreters but were unsure of the process.

Some lawyers seemed to have difficulty instigating the process of instructing an interpreter, perhaps because they were duty lawyers and had not yet had to use one. In one case in NethCity the lawyer tried to call for an interpreter from the telephone in the room; he did not seem to know that it could only be used to receive calls. Even more surprising, given the location of NethTown on the border and the greater number of foreign suspects taken into police custody there, lawyers were also seen to be unfamiliar with the process, calling the custody officer to assist once the consultation had commenced, or even contacting the assistant prosecutor in another town to find out the appropriate number to call. On two occasions both the police officer and the lawyer used an outdated telephone number posted on the wall of the consultation room. This instance was compounded by the interpretation company actually taking the calls, despite the fact that it no longer had a contract with the legal aid authority.

278 SAVE for one Scottish case where a new officer did not know how to deal with an Afghani asylum seeker in ScotCityPol19, and the custody officer advised that the immigration authorities ought to be contacted, and thereafter that Language Line should be used to interpret for him.
279 The lack of knowledge in France was understandable since there does not appear to be a standardized procedure. In NethCityLaw8 thought that two laws were in operation, but also personal connections were used, and gave an example of the sister of an interpreter being used for the following day’s interrogation which she could not do herself.
280 During EngCityLaw5.
281 NethTownLaw3.
282 As ScotTownLaw1 said, ‘How they arrange for interpretation in practice, I don’t know, but I am not aware of there being a difficulty in that regard’.
283 See Chapter 6 for the arrangement of duty lawyer in the Netherlands.
284 NethCityLaw9.
285 NethTownLaw4.
286 Also during NethTownLaw4.
287 NethCityLaw9 and NethTownLaw10.
6. Quality of Interpretation

Much of this chapter has been devoted to consideration of how a suspect might obtain the services of an interpreter. This section considers whether the interpretation received in police custody in the four jurisdictions was of sufficient quality to guarantee that the correct information was being communicated. The section considers whether practitioners verified that interpreters had the necessary qualifications or skills, how interpreters carried out their role and, where our researchers were able to verify it, whether the interpretation given was in fact of sufficient quality to ensure effective communication.

Since few cases were observed in England and Wales, France and Scotland, where an interpreter was involved we have relied on formal interviews, and informal conversations with police officers and lawyers to understand whether interpretation was generally of sufficient quality in these jurisdictions. We were, however, able to observe a number of interpretations in the Netherlands.

The only example of an excellent interpretation we observed was in the NethCity immigration department, and concerned Spanish-Dutch interpretation during interrogation. Our researcher formed the opinion that the interpreter was very professional. The interpreter commenced the interpretation by saying that his role was to provide an objective and independent interpretation. He asked the police and suspect to speak in short sentences so that he could translate as literally as possible what was being said. During the course of the interrogation, he stopped them if they talked too quickly or did not pause for interpretation. His interpretation in both languages was fluent and seamless. He appeared to have no difficulty translating legal terms and even transmitted the manner of speaking, and the emotions of the police and suspect. As a result there was direct engagement between the suspect and the interrogating officer, despite the pauses for interpretation. The whole process appeared to contrast with the experience in general police custody since the suspect commented 'good police, much better than what I had before'.

This case demonstrates how interpretation should be conducted, constructing a framework for the interpretation at the outset and intervening where necessary to ensure all communications are conveyed. The interpreter here demonstrated that, whilst at the start of the interrogation they took some of the control from the police officer, the actual effect of this was to facilitate direct communication between the officer and the suspect, with the interpretation then constituting an integral part of the conversation. Unfortunately, however, we observed many other cases in the Netherlands where such standards were not met.

NethCityPoI10.

This is particularly concerning given that it can be difficult to challenge the record of interrogation at a later stage.
6.1. Using Accredited Interpreters

Since in England and Wales it is only possible to use either the NRPSI website or Language Line, and in Scotland, Global Language Services, all of which require qualified and accredited interpreters, it may be assumed that the interpreters used were all suitably qualified.\footnote{The English National Agreement suggests that the identity of an interpreter should be checked prior to their arrival, by way of a photo-identity card, which should be issued by the NRPSI. Likewise the England and Wales regional SOP and Scottish SOP require the face-to-face interpreter to be vetted by providing their accreditation number and photo-identity card prior to commencing their service.} However, a ScotCity duty officer explained that occasionally in the past the previous interpretation company used did not always check the interpreter's credentials. The ScotCity police, therefore, usually asked to see an accreditation document or card when the interpreter arrived at the police station. Only one Scottish lawyer expressed concern about the qualification process for interpreters, although it was not clear if they were referring to court interpreters, who were contracted through a different system:

[T]he quality of interpretation is very patchy. I know that the accreditation isn’t good, and it’s causing issues in court, and causing issues for us. On occasion, it’s been clear that the accused has gotten very upset with the interpreter because on occasion, the English interpretation is better.\footnote{Where the requirement was that only interpreters from the contracted agency could be instructed.}

Whilst in England, the SOP recommends the instruction of an NRPSI accredited interpreter, this was not necessary in Scotland.\footnote{DG Interpretation 2009 highlights the necessity for interpreters to have a professional profile, to include language proficiency, interpersonal skills, legal knowledge and appropriate interpretation skills, as well as adherence to a code of conduct and good practice guidelines.} It would seem appropriate that interpreters belong to the professional organization, which requires certain qualifications, vetting, and adherence to a code of conduct prior to registration, rather than rely upon an agency to establish the appropriate criteria. This would enable police officers and lawyers to place greater trust in the standard of interpretation provided by the interpreter.\footnote{ScotCity21Law3.}

In the Netherlands, interpreters were supposed to provide their interpreter number when they accepted a request, in order to demonstrate their registration as a sworn interpreter. However, it was impossible to verify during our observations whether and how often sworn interpreters were used because police officers did not systematically ask for the interpreter’s number. In the case of more common languages, for example, French, English, Arabic, Russian, it seemed more likely that a
sworn interpreter would be used. However, in a number of cases observed, interpreters did not provide their interpreter number, which suggested that they were not accredited. In one Dutch case observed, the converse happened where the interpreter ignored the attempt of the lawyer to provide his name and number to her, indicating that she did not realize that she needed these to claim payment and did not provide legal interpretation regularly.

We did not see any lawyers verify whether interpreters assigned to their cases were accredited in the appropriate register of interpreters in any jurisdiction, even though in NethTown the lawyers had responsibility for organizing an interpreter for lawyer-client consultations.

6.2. Professionalism of Interpreters

Interpreters introduced themselves and explained their roles in varying ways. Comparing three cases involving Romanian suspects, one interpreter introduced herself by saying she was an independent interpreter who did not work for the police. In a second case, the interpreter said, ‘Hello I am an interpreter’, following which, as recounted above with respect to the conduct of the interrogation, the interrogating officer prompted her to explain more. In a third, the interpreter simply stated ‘Romanian interpreter’ to announce her presence on the telephone. There appeared to be little attempt by interpreters in the Netherlands to explain the process of interpretation to the suspect or to control the process of consultation or interrogation in order to ensure the interpretation could be delivered effectively and to keep the loss of information to a minimum.

Furthermore, we observed two cases in the Netherlands where interpreters did not appear to prioritize the interpretation over personal commitments. In one, the interpreter started by saying to someone in the background: ‘I’m working, don’t bother me.’ Even more surprising, in another, the interpreter answered the call whilst driving a car, which made them almost incomprehensible due to background noise; and for a few minutes, all parties had to repeat and raise their voices until something was done by the interpreter to improve the sound quality, although there

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284 It may be that the availability of sworn interpreters is lower in the unsocial hours and on the weekends, as availability outside of normal business hours is voluntary, and therefore less qualified interpreters might make themselves available at these times to compensate for the fact that sworn interpreters get priority over them.
285 NethCityLaw16.
286 Though in some cases the interpreters volunteered their registration numbers.
287 NethCityPol4.
288 NethCityPol4.
289 NethCityLaw14, which the police officer did not seek her to expand upon.
290 We are unaware whether this occurred in the other jurisdictions due to a lack of data.
291 NethCityLaw16.
continued to be problems until they arrived home, almost at the end of the interrogation.\textsuperscript{302}

Where an interpreter does not adhere to the professional obligation to maintain objectivity and independence, this can confuse their role and adversely impact upon the fairness and effectiveness of the procedure. In one case involving interpretation for a Russian-speaking suspect, which our researcher could follow fluently, the interpreter expanded upon what the lawyer said on a number of occasions.\textsuperscript{303} The suspect said that she thought the victim used ‘alcohol and something else’, which the interpreter interpreted as ‘I think that she used alcohol and drugs’. When the lawyer explained the right to remain silent, the interpreter interpreted this as ‘the lawyer wishes to stress that an important right that you have is the right to keep silent’, but added that ‘he insists on you using this right because if you do not say anything to the police, the judge cannot use this as evidence’, which the lawyer had not said. Furthermore, when the suspect said that she did not understand, the interpreter, without relaying this back to the lawyer, attempted to explain the right to silence: ‘That you can refuse to respond to questions, and you will not be punished for that.’ The interpreter further intervened by voicing their opinion to the lawyer:

‘Could you please stress the importance of the right to silence to your client because the people from that region have an Eastern European mentality; they believe that it is obligatory to respond to the questions of the police.’

This case illustrates the fine line between the obligation upon the interpreter of maintaining an objective position in which they simply verbatim interpret what they hear, and drawing the relevant party’s attention to issues that they feel are relevant. It could be helpful for the suspect for the interpreter to highlight a particular area of procedure, or a right, that in their own country would not be available or might be exercised with a different emphasis. However, this should be effected through the lawyer rather than the interpreter giving their own advice.

Some police officers and lawyers mentioned the benefits of interpreters having a more direct role in the proceedings. French officers said interpreters could assist the process: ‘[the interpreter] explains to me what the suspect wants to say and I try to find the right word’,\textsuperscript{304} or when asked to translate the suspect’s rights, say that they have already explained everything and that the suspect requires a lawyer or doctor.\textsuperscript{305} A Dutch officer actually lamented the fact that interpreters previously assisted the police more: some now were very professional, although others would still inform the officer if they thought the suspect was lying, ‘and I think that is their

\textsuperscript{302} NethCityPol4.
\textsuperscript{303} NethCityLaw16.
\textsuperscript{304} [FromCityLaw9.
\textsuperscript{305} [FromCityPol2.}
role as well. This suggests that at least some interpreters may lack objectivity. It also reinforces the view of some police officers that the interpreter’s role is to assist their investigation, rather than give effect to the right of a suspect.

However, other police officers indicated that they had less control when they could not speak the suspect’s language and had to rely upon the interpreter’s professionalism and integrity. Likewise, lawyers from all jurisdictions expressed concern that however good interpreters are, interpretation interferes with the advice-giving process, and that the precise meaning of what is said by suspects may be lost:

'I don’t like having to use an interpreter. You lose so much... it’s really difficult in an interview. Usually I jump in to stop my clients in their tracks if they are going to say something that I haven’t discussed with them before. I can jump in and say I need further consultation with my client. Through an interpreter you can’t, it’s done, it’s said. You lose a certain amount of control.'

Despite this concern, in no case that we observed did any police officer or lawyer intervene to ask for clarification, or to attempt to control the process.

### 6.3. Standard of Interpretation

Generally, where an interpreter was present, the process seemed to go smoothly with questions and answers being facilitated successfully, though without understanding all languages spoken we were unable to assess whether all were accurate. There were some obvious examples of poor communication, however, as we describe below. It is significant that of the interpretations we could understand through native or good bi-lingual skills of our researchers, there were failings in all of them, which indicated that the interpreters may not have understood the procedure and technical language involved in the police station process. Overall, there appeared to be a higher quality of interpretation in European languages than in non-European languages, which may be due to higher levels of competition for these roles, or better training.

Most police officers interviewed thought that the standard of interpretation was good and that interpreters were useful in enabling the officers to complete their investigation. Equally, across all jurisdictions, most lawyers thought that the...
quality of interpretation was good, describing it as 'fine',
'mostly good and professional',
'translating well', 'very good',
'generally working rather well',
'okay' and even 'superb'. Some Dutch lawyers thought that before the register of sworn interpreters was introduced the quality was terrible but had since improved.

Some of the lawyers who remarked that quality was generally good also pointed to occasions when the standard had been less than adequate. A police station representative in England and Wales thought that interpreters sometimes do not interpret everything that has been said. A French lawyer thought that there was a problem with non-native speaking interpreters who were not able to translate certain idioms or who might misinterpret particular terms used by the suspect. An example of two Chinese clients was mentioned by a Dutch lawyer who explained that a judge found their client's statements contradictory, but observed that the translations were probably inaccurate because two interpreters were used over the course of the detention and may have spoken different dialects to the suspect, and a Scottish lawyer also observed misinterpretation of the Solicitor Access Recording Form (SARF), particularly amongst the Chinese community in ScotCity.

Some lawyers and police officers observed that they could not tell if the interpretation was correct, which is of course a significant barrier to verifying the quality of the interpretation. Nevertheless, like our researchers, lawyers were able to describe examples where it was possible to see problems:

"Once I had a situation where an interpreter and a suspect started to quarrel between themselves. Or you have sometimes interpreters who do other things when providing interpretation – for example, sometimes you hear a doorbell and then you must wait a few minutes before the interpreter opens the door, or an interpreter would receive..."
another call ... it happens that a suspect talks for a long time, and an interpreter makes a translation in two or three sentences.\textsuperscript{326}

As a lawyer in EngCity\textsuperscript{327} also told us:

‘One thing about interpreters, we have no way of checking how good their interpretation is, obviously. But they often go beyond the pale. If the client answers a question in interview with a one-word grunt and the interpreter then gives some long-winded reply you know he’s not doing his job properly. The good ones don’t do that.’

His view was that they varied in quality despite the need for accreditation, and estimated that only half were ‘good’.

Our researchers observed some general problems with interpretation. Rarely did interpreters seem to interpret verbatim what was said. Sometimes, the fact that interpreters were not focused on providing verbatim interpretation led to them conducting conversations with the suspect, no doubt trying to clarify an issue, which were not relayed back to the lawyer or police officer. Thus, on occasions, interpreters were expanding their role into explaining procedures, rather than simply communicating what was said by the lawyer or police officer.

Such ‘interference’ in the process was commented upon by police officers and lawyers. An assistant prosecutor told us that following an official detention by means of telephone interpretation he was not very satisfied with how it was done as there ‘is always a discussion between the suspect and the interpreter’, and he felt excluded from the conversation. He also said he had no way of knowing whether the interpreter was explaining what a certain word or expression meant, or explaining procedures or giving advice, which was the role of the assistant prosecutor and not the interpreter. He explained that he always told the interpreter that they should not enter into a discussion with the suspect without translating it to him, but that this was often ignored.\textsuperscript{328} Some officers in England and Wales gave examples of occasions where interpreters had clearly extended their remit. One described a situation where the interpreter tried to give legal advice, and argued with the police officers, rather than simply interpreting what was being said.\textsuperscript{329} Another recounted a case where the interpreter reprimanded a suspect, who was accused of domestic violence, and who came from the same community. The officer thought it necessary to ensure the interpreters are properly vetted:

\textsuperscript{326} NethTownLaw3, also observed by NethTownPoi3.
\textsuperscript{327} EngCityLaw3.
\textsuperscript{328} NethCityPoi33.
\textsuperscript{329} EngCityPoi32.
‘The force needs interpreters to do it as a proper job not a hobby, if you don’t pay them well enough you won’t get the quality and professionalism which is needed. Language Line is vetted which helps.‘

Often a failure to interpret verbatim would be because of a lack of control of the consultation or interrogation. Attempting to maintain any level of control of the proceedings was compounded where interpretation was provided by telephone. In some cases the suspect spoke at length, with the interpreter translating only the substance of what they said. In one case, the suspect made a long speech, which the interpreter only interrupted sometimes with a short ‘aha’, which made it seem like the conversation was between the suspect and interpreter rather than the lawyer.

In another, the suspect spoke at length at one point, which the interpreter simply translated as, ‘I did not commit any theft.’ The officer did not seek further explanation. A lawyer was also observed to speak at length without stopping for the interpreter. Because the suspect understood Dutch, they responded in Dutch, excluding the interpreter entirely. By contrast, there then followed a four minute discussion between the suspect and the interpreter about the circumstances of the offence, which the interpreter then summarized back to the lawyer.

In cases where the researcher could also speak the language of the suspect, the interpreter often appeared to leave out parts of the communication. For example, in one case a lawyer asked whether this was the suspect’s first arrest, to which he replied that it was in the Netherlands, but not in his country. The interpreter only provided the first part of the answer. In another case the interpreter failed to interpret verbatim throughout most of one consultation, leaving out the fact that the police thought the suspect could herself be a victim because she was a prostitute. The interpreter also only interpreted back to the lawyer that the victim met with the suspect recently, when the suspect had said that they had met the victim about one week previously. The lawyer said that it was very important to tell the police that the victim was able to telephone her family, since this proved she was not kept against her will. The interpreter translated this very generally as ‘it is important to tell the police everything that [the suspect] has told the lawyer’, which was not only incorrect and missed out the specific advice, but it could also have resulted in the suspect divulging information that could harm her defence. Where

330 EngCityPa4.
331 NethCityLaw10.
332 Only after a few minutes did the interpreter start translating, probably after writing down what the suspect had said.
333 NethCityPa4.
334 NethTervenLaw4.
335 NethCityLaw20.
336 NethCityLaw32, concerning false imprisonment.
the researcher could not speak the interpreted language there were a number of occasions where inaccuracies or miscommunication were clear.\textsuperscript{337}

However, there were clear examples of the difficulties faced by interpreters, particularly when a suspect spoke in a disjointed fashion, where it appeared difficult for the interpreter to do anything other than to summarize what was said. This was, again, compounded by the fact that all Dutch interpretation we observed was by telephone. Interpretation by telephone was particularly difficult where the suspect suffered from mental health problems, such as in one case we observed, where it was almost impossible to limit the suspect’s answers in order to interpret them, so that the interpreter had to listen, ask clarificatory questions, and then summarize the answers to the officer.\textsuperscript{338} The interpreter complained repeatedly that she could not hear or understand the suspect, but no attempt was made to improve the communication, for instance, by using an appropriate adult as an intermediary or asking the interpreter to attend in person.

Some interpreters appeared to have specific difficulty in interpreting legal technicalities, which demonstrated unfamiliarity with the legal context and risks a loss of relevant information.\textsuperscript{339} In one case the interpretation of the fact that the suspect had been arrested because Poland had issued a European arrest warrant against him was simply relayed as ‘European rules’.\textsuperscript{340} In the same Russian case mentioned above,\textsuperscript{341} the offence suspected was false imprisonment which the interpreter described as ‘you have been kept somewhere by force’ (instead of ‘you are suspected of keeping someone by force’); and then later as ‘you are suspected of keeping a hostage’, which was still not a literal translation and therefore not an accurate description of the offence. Further, instead of saying ‘you may be brought before the investigating judge for the determination of whether you would be detained for another 14 days’, the interpreter simply said ‘a procedure may follow’. In a second Russian case,\textsuperscript{342} the interpreter used many colloquial terms and made mistakes of grammar and vocabulary. For example, the suspect, in response to the question, ‘Do you know why you were arrested?’, said ‘Yes, I was driving in an intoxicated state’, which the interpreter translated as simply: ‘I was behaving badly.’ The investigator also asked, ‘Do you suffer from any disease that may have an

\textsuperscript{337} NethCityLaw34; NethCityPol14; and NethTownLaw12, where a suspect spoke Dutch but requested an Arabic interpreter, presumably for peace of mind. The interpreter interpreted that the suspect had been arrested for carrying a gun. The suspect corrected this as ‘a knife, not a gun’.

\textsuperscript{338} NethCityPol9.

\textsuperscript{339} NethCityLaw14. It was difficult to know without speaking Polish in this case whether the interpreter fully understood, but it was clearly more difficult for them to explain a procedural consequence in Polish than the lawyer could in Dutch. Also, in NethCityPol15 where whether the suspect had ‘stolen a wallet’ had to be explained by the interrogating officer before the interpreter was able to relay the question to the suspect in Romanian.

\textsuperscript{340} NethCityLaw34.

\textsuperscript{341} NethCityLaw16.

\textsuperscript{342} NethCityPol28.
influence on your ability to drive? which was interpreted as: ‘He just wants to know about your health, do you have any diseases? These were significant details which could have had an impact upon the advice given by the lawyer.

Inaccurate interpretations could also undermine the relationship between the lawyer and suspect. For example, the lawyer in the Russian case above asked whether the suspect had seen any signs that the victim was kept at the property by force. The interpreter relayed this as, ‘Were there any actions on your side to keep her there by force?’ This implies blame that the lawyer did not attribute. The lawyer also asked whether the suspect had any questions, ‘because this is everything on his side’, which the interpreter relayed as ‘if you do not have any further questions, then we can wrap up for today’, which altered the emphasis and may have prevented the suspect from asking anything further. The lawyer also said that the suspect could call him and they could try to communicate in English, despite the suspect saying that her English was not good. The interpreter translated this as: ‘The lawyer says that you should call him, even though you speak broken English, and for this reason we probably will not get very far. But you should still call him.’ The lawyer clearly did not intend to judge the suspect’s English, but it could have come across this way from the interpretation.

Two Dutch lawyers who had understanding of the foreign language also recalled occasions when they had had to correct the interpreter. One explained,

‘I had to interfere several times to correct the translation, because I thought that it was inaccurate, and the interests of my client could have been harmed by these inaccuracies.’

Interestingly, they did not think this was due to poor interpretation, because the interpreter spoke otherwise good Italian, but rather because the interpreter lacked contextual knowledge and because he had to conduct it over the telephone. This provides another example of the limitation of telephone interpretation.

7. Arrangements for Translation of Documents

As we set out in the introduction to this chapter, the EU Directive on the right to interpretation and translation places emphasis on the need to ensure that essential documents are translated in criminal proceedings, which include, for the purposes of police detention: a decision depriving the suspect of their liberty; a charge; and such materials as are relevant for the person to have knowledge of the case against them. If a translation is not available, documents must be orally translated, presumably by the interpreter already assisting the suspect, so long as this does not
prejudice the fairness of the proceedings. The Directive makes a presumption about the provision of documents, which may not be borne out in practice, but where documents are made available to suspects during detention, it imposes a requirement that in the four jurisdictions in our study may need considerable attention. This is particularly so in jurisdictions where telephone interpretation is the norm, since satisfying the alternative of oral translation may be equally problematic.

In all jurisdictions, the processing of suspects took place orally, with few documents handed to the suspect at all. As a result, we rarely observed any translation of documents during our observations in the four jurisdictions. Of the documents that suspects did receive, few were translated. This was especially surprising in the Netherlands and France, as suspects there are routinely required to verify written records of their interrogation.

With regard to the notification of rights, all jurisdictions purported to have some form of a Letter of Rights, but we only saw this used in England and Wales. NethCity police told us that written information about rights was available in different languages, although we never saw this handed to any suspects, foreign or local. One NethTown officer thought that a pamphlet explaining the rights, which could be available in different languages, would be very useful, so clearly they had never seen it. In EngCity there was a poster issued by the Legal Services Commission, which was headlined "You need a solicitor!" in large bold capitals. Underneath it stated, in 11 different languages, presumably the most common,

'If you have been arrested, you have the right to free advice from an independent defence solicitor. Advice is available at any time. Ask the police to contact a defence solicitor for you.'

Likewise, a Dutch officer told us that there was a poster on the wall with standard phrases in English, French and German for the official detention which some assistant prosecutors could use, although one officer said that the poster was never referred to because the language in it was very formal. Such documents and posters can be very useful for suspects with limited comprehension of the local language, since whilst they are waiting for an interpreter, they provide some basic

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347 Art. 7.
349 See Chapter 5 for detailed consideration.
351 For further details see Chapter 5, section 3.1.
352 NethCity:Pol1.
353 NethCity:Pol5.
354 NethTown:Pol11.
information about the procedure and rights that a suspect holds. For some suspects they are even more significant since, as set out above, many suspects with limited comprehension may not receive assistance from an interpreter. Written information in their language explaining the right to a lawyer may, therefore, be critical to obtaining assistance in the police station, and to enable the suspect to challenge a decision not to engage an interpreter.

With regard to procedural documents, we did not observe translations being made available in any jurisdiction in the study. The rules regarding detention, which are given to suspects in England and Wales, and the Netherlands, were only available in the national language. The Neth-City police explained that they tried to communicate these, sometimes with hand and sign language, but most of them have been in police detention numerous times, they know what the rules are.\(^{555}\) Equally, orders on the prolongation of detention which were given to suspects in the Netherlands were not translated. The assistant prosecutor was sometimes observed to provide a short translated summary of the reasons for the prolongation of detention, either directly, or through a telephone interpreter, but this did not happen systematically. The SARI in Scotland, relating to the right to a lawyer, which must be signed by the suspect, was only available in English. We observed arresting officers reading this out to suspects, with interpreters communicating what the officer said. On some occasions the officer put the SARI on the desk so that the interpreter could orally translate it whilst the officer slowly read it out.

Likewise a form used in England and Wales regarding the tape-recording of interviews was only available in English, but a lawyer told us that this was not a problem as an interpreter present in the interrogation could orally translate its contents.\(^{557}\)

Records of interrogation in the Netherlands and France were a summary of the interrogation produced by the interrogating officer and formulated in the local language. As a result, they did not reflect the interpretation that took place, nor the difficulties experienced when police officers tried to interpret themselves. In one case we were able to read the summary and saw that the suspect’s responses were transcribed in the interrogation record in formal and accurate Dutch.\(^{558}\) By doing so, the difficulty the suspect had in expressing himself during the interrogation was disguised, as well as his own way of giving his account. Only in the case of the Chinese suspects, where the police attempted to interrogate each without an interpreter, did the record reveal the difficulties, presumably because the police could barely communicate with the suspects.\(^{556}\)

From our observations in the Netherlands it seemed that these interrogation summaries were either orally translated, using the interpreter engaged on the tele-

\(^{555}\) NethCityPol17.
\(^{557}\) EngCityLaw5.
\(^{558}\) NethCityPol12.
\(^{556}\) NethCityPol18.
phone, or by the officer if they attempted to speak a common language, or suspects were simply asked by officers to sign them. This occurred in one case despite the prior use of a Romanian interpreter.\textsuperscript{300} In the case involving a vulnerable Serbian child,\textsuperscript{301} the interrogating officer printed off the record and gave it to the suspect’s brother to read, since the suspect could not read Dutch, but he declined to do so for reasons unknown. Another suspect was asked if he wished to read the record before signing it, which he declined to do because he said he trusted the police to record the interrogation correctly, which indicated a failure to comprehend his rights that the police did not correct.\textsuperscript{302} Had he wished to read it, it is not clear how this would have been arranged. In a case where the officer attempted to orally translate into English,\textsuperscript{303} they struggled so much that the researcher took over. As with other instances where the researcher was relied upon, it is not known how effective the communication would have been without this assistance.

In England and Wales, the record of interrogation is routinely electronically recorded,\textsuperscript{304} in which circumstance the interpreter need not make a contemporaneous note of it since this will be translated later. We are unaware of the procedure in France or Scotland since there was no guidance on how interrogation involving an interpreter should be recorded, and we did not observe interrogations with interpreters.

We saw only three cases involving translation, which made it difficult to ascertain when and how police officers and lawyers identified the need. The first concerned a European Arrest Warrant (EAW) in Scotland.\textsuperscript{305} The duty officer consulted the Standard Operating Procedures on the computer in the custody area, which indicated that the EAW be given to the suspect in both English and their native language, therefore requiring it to be translated into Romanian. This was then actioned by the officer.

The second, in NethCity, involved officers deliberating as to whether they needed to engage a Romanian interpreter in order to issue a summons to the suspects.\textsuperscript{306} They were reluctant to do so given that they had to drive back to their local town, and still had work to do on the case. They thought that involving an interpreter would take more time, despite the fact that telephone interpreters could be found in only a few minutes. They concluded that the summons should be issued together with a Romanian translation and that therefore an interpreter would not be required. It was not clear how this would be arranged, nor how it could be done more speedily than by instructing an interpreter. Nevertheless, it would have been

\begin{itemize}
  \item NethCityPol1.
  \item NethCityPol2.
  \item NethCityPol4.
  \item NethCityPol7.
  \item See Chapter 8, section 3.2 for further details.
  \item NethCityPol11.
\end{itemize}
more satisfactory for the suspect to be given a written record of the summons, although this did not seem to be a consideration that the officers took into account.

The third case was the only observation of a lawyer where translation was identified as necessary.\textsuperscript{260} The lawyer gave a paper to the suspect that they handed to all suspects outlining time limits for detention, apologizing that it was in Dutch. Given that a Romanian interpreter had been engaged for the consultation and interrogation, the document was fairly useless for the suspect. The lawyer seemed to be following their usual routine irrespective of the language difficulty. Had an interpreter been present in person they could at least have assisted with translating the form, which demonstrates another deficiency with telephone interpretation.

Some Dutch lawyers complained about the limited translation of documents. One referred to the police interrogation record and complained that because this is written in Dutch there was no way for a suspect or lawyer to verify what happened at the interrogation and whether it was accurate.\textsuperscript{268} By contrast, another lawyer thought that the interpreter would read through the record with the suspect to verify that it was correct, although this could only happen if an interpreter was present.\textsuperscript{269} A third explained that in order for the suspect to be able to read the case file they would need to pay for it themselves, and many could not afford this.\textsuperscript{270} A French lawyer\textsuperscript{271} observed that there were wider problems with people who speak French but who cannot read French and who are asked to sign documents that they cannot understand. Some suspects thought that they could simply refuse to sign the PV of notification of rights and that it would make the detention void:

'The majority of people don't really understand why they are in garde à vue. I have to read them the PV of notification of rights to tell the suspects why they are in garde à vue.'

8. Conclusions

The importance of interpretation and translation during police detention cannot be underestimated. Without the ability to communicate, all rights are rendered obsolete as they cannot be understood or exercised. While all jurisdictions we observed had a procedure in place for the arrangement of interpreters, this was almost entirely controlled at the discretion of the police. A significant problem highlighted by our research was the lack of any system in the four jurisdictions to identify the need for interpretation. This meant that across the observed sites, interpretation was

\textsuperscript{260} NethCityLaw20.
\textsuperscript{268} NethTownLaw7. They also observed that this is a problem for the whole criminal procedure, not just during police detention.
\textsuperscript{269} NethTownPol3.
\textsuperscript{270} NethTownLaw3. The EU Directive requires essential documents to be translated free of charge.
\textsuperscript{271} FramCityLaw4.
not necessarily treated as the right of a suspect, but rather as a means to facilitate police inquiries. The emphasis seemed to be placed on the suspect's ability to understand what was being said to them, but not necessarily the suspect's need to express and explain themselves in response. Wider considerations also need to be taken into account with foreign suspects, such as comprehension of procedures that are utterly unfamiliar, and religious and cultural practices. Two examples in particular illustrate this: a case in Scotland where a female Afghan suspect refused to talk to any male, including the on-call doctor, and a case in the Netherlands where the suspect asked the lawyer whether he would have to stay in detention longer if he did not sign the interrogation record. The examples reveal how suspects may hold presumptions drawn from experiences in other jurisdictions where the culture or adherence to procedure may be very different. The need to explain clearly the process and purpose of procedures, as well as the rights suspects have pertaining to them, is therefore even more critical with foreign suspects.

While many British officers told us that they would instruct an interpreter where they were unsure, many Dutch officers told us they would only instruct an interpreter where the suspect had no command of the local language. We saw on a number of occasions how this resulted in a lack of comprehension and communication. Repeatedly police officers and lawyers in the Netherlands, and France in the few cases we observed, seemed to be insufficiently aware of the risk to the investigation that poor communication could engender and, more importantly, of denying the suspect the right to an effective defence. The instruction of an interpreter should be seen as an essential tool to aid communication rather than a hindrance to the investigation or relationship between client and lawyer. We saw a number of good practices in operation that officers had developed to assist them, such as asking a suspect to repeat back what they had been told, or to read from the Letter of Rights. In order to comply with the EU Directive on the right to interpretation and translation, Member States must have arrangements in place that ascertain whether the suspect can understand the local language and identify the need for an interpreter. Such an assessment would be assisted by clear guidance for both police officers and lawyers on when to engage an interpreter, and the importance of this service, providing case examples and practical suggestions for identifying the correct language. Likewise, identifying the correct language spoken by a suspect is critical to their ability to communicate. The language identification posters used in EngCity and ScotCity are a simple and quick measure to aid this enquiry and should be available in all police stations.

On many occasions, Dutch and French police officers and lawyers thought that they could adequately converse with the suspect in another language. Not only did they often have inadequate comprehension of legal terminology in another language, but also, by electing to interpret in their own case, they distracted themselves.

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ScotCityPol122.
NethTewnLaw10.
from their primary function, and confused their relationship with the suspect. The EU Directive requires the use of independent interpreters during evidential proceedings, which will demand a change of practice in these jurisdictions. Conversely, their ability to communicate conversationally in the suspect's language prior to a formal procedure could be helpful to understand a suspect's needs. Having standard phrases in written form for officers to use upon arrest, as suggested by one Dutch officer, written letters of procedures and rights, or using the telephone interpreting service from the place of arrest (which was seen in England, Scotland and France) would aid suspects' understanding of what is happening where there is currently no way of communicating this.

In some instances, officers resorted to interpreters that they knew, not necessarily because they could guarantee a better quality of service but because they thought the interpreter would assist the investigation more than others from a professional agency. Where an interpreter is engaged to facilitate communication, this will only be effective where the interpreter is suitably qualified to undertake the role. A significant amount of trust is placed in interpreters to interpret accurately. In order to do so they must be required to equip themselves with the necessary skills. This means not only proficiency in language, but in the process of interpretation and the professional role of an interpreter, as an independent and impartial actor in the proceedings. Moreover, the interpreter must be qualified in legal interpretation, with a specific module devoted to criminal law and procedure (during police custody as well as court), in order to ensure that the interpreter is familiar with technical concepts and terminology. In jurisdictions where accreditation is not necessary, there is a risk of poor quality interpretation being provided. A specialist, national or local register of independent and accredited legal interpreters will ensure that only those suitably qualified to carry out legal interpretation services can be utilized. Using a specialist agency to facilitate the instruction of an interpreter also prevents bias creeping into the decision making process of police officers. As a minimum, ensuring all interpreters are suitably qualified is essential, and is required by the EU Directive, yet research has revealed that sufficient legal interpreting skills and structures are not yet in place amongst the Member States of the EU.

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374 Which must include understanding the importance of the confidentiality of the lawyer-client consultation (especially where the same interpreter is then used in interrogation).

375 Where the agency undertakes its own rigorous assessment and accreditation process, such as Global Language Services in Scotland, or even better, a professional body, operating minimum qualifications and a code of conduct, such as the NRPSI in England and Wales, it can be held to account for the provision of professional, legal interpreters.

376 DG Interpretation 2009 observes that "Low-calibre legal interpreting may put justice in jeopardy during police investigations or trial and post-trial proceedings" and makes useful recommendations for minimum EU standards for legal interpreters.

Cape et al. 2007; Hertog 2008; Blackstock 2012. EULITA aims to establish mechanisms to resolve these problems. For information, see the website <www.eulita.eu/> (last visited 16 October 2013).
We observed useful techniques for mitigating the delay in arrival of interpreters, such as contacting the police station ahead of bringing in a suspect, so that an interpreter could be arranged; or where an arrest is planned, organizing the interpreter in advance. However, ensuring local provision of interpreters can reduce delay to a minimum, as evidenced in France and Scotland. Keeping statistics on the demand for interpretation and range of languages could also assist in ensuring relevant recruitment from within the local supply. Moreover, an efficient service that does not impact upon the ability of the police to conduct the investigation nor the lawyer to advise, may lead more practitioners to engage an interpreter rather than attempt to speak in a foreign language with the suspect themselves. However, we saw a substantial recourse to remote interpretation by telephone in the Netherlands for all stages of detention. In England, the telephone was used for the notification of rights and the accusation against the suspect, but for all other procedures, and in Scotland, the interpreter attended in person.\textsuperscript{77} While telephone interpretation is acceptable in the EU Directive, the fairness of the proceedings must still be safeguarded. To this end, there are clear advantages to arranging interpretation in person. Not least, the interpreter can better control the process and therefore ensure more effective communication.\textsuperscript{78} The criteria for providing face-to-face interpretation should take into account the ability of the suspect to communicate effectively. Furthermore, where telephone interpretation is used, the technology must be adequate. This should entail, as in EngTown, two receivers, or a properly functioning speaker system. Video conferencing would be a far preferable option to the use of telephone, so that interpreters are better able to make use of visual cues. This is being used more frequently in England,\textsuperscript{79} but may still be a poor replacement for face-to-face interpretation.\textsuperscript{80}

With regard to the operation of interpretation, our observations were largely confined to the Netherlands. There we saw very little facilitation of the interpreter in the procedure, be it consultation or interrogation. This meant that there were often lengthy passages of speech without breaks for interpretation, no mechanisms for interruption by the interpreter to clarify details, and where it was possible for our researchers to follow the languages spoken, clear omissions, discrepancies, and

\textsuperscript{77} We were told that this is also the procedure in France, though we did not see an interpreter and the report of the Contrôleur général des locaux de privation de liberté 2013 contradicts this.

\textsuperscript{78} Braun & Taylor 2011. We clearly saw the need for face-to-face interpretation in the case of a vulnerable suspect who simply could not communicate without the assistance of visual cues, in NetCity?o9.

\textsuperscript{79} See Office for Criminal Justice Reform 2008, para. 9.4, which expresses caution, and the need for: high quality equipment; trained staff to use the new technology; consideration of the cost implications both of the initial outlay and on-going maintenance of the equipment; interpreters who are trained and comfortable with video-link interpreting; a suitable environment (e.g. a special room) for use of such equipment; and other practicalities such as meeting legal requirements on signing, witness statements, security of data, and confidentiality.

\textsuperscript{80} Braun & Taylor 2011.
inappropriate responses. In only one Dutch case did we see the interpreter introduce themselves, explain their independence from the police and request short sentences, which they would interrupt if necessary, to ensure no loss of information. A standard agreement for the process of interpretation should exist in all jurisdictions where interpreters are engaged, irrespective of the system in place. Lawyers and police officers must appreciate that the interpreter is there to assist them communicate with the suspect and that in order to do so, they should always ensure effective communication and control of the process. Where they are unfamiliar with how this should be done, training should be undertaken with interpreters to understand each other’s role better. Likewise, interpreters must themselves create the appropriate conditions for providing interpretation, setting proper ground rules and enforcing these throughout the procedure. The Standard Operating Procedure that was in place in EngCity and EngTown is a useful guide as to how this should be done.

With regard to translation, the cases we observed highlighted the importance of written information explaining the system and the rights available to foreign suspects, in a language that they can understand, and the provision of these in a way that can assist in their decision whether to exercise their rights. Letters of Rights in multiple languages were available in each jurisdiction, though as we set out in Chapter 5, the contents of these varied widely. However, other procedural documents were not translated. Where these can be defined as essential to the proceedings, this will have to be done, in order to comply with the EU Directive. Of particular concern was the process in the Netherlands and France of requiring the suspect to sign the interrogation summary. With no translation, and interpretation only by telephone, the ability of the suspect to sign such a record as accurate in the Netherlands was extremely limited. The most effective way of ensuring an accurate record would be to audio record the interrogation, and thereafter provide a translated transcript.

With the EU Directive on the right to interpretation and translation already in force, protocols, training, and quality standards are immediately necessary in all jurisdictions to orientate interpretation and translation as a right of a suspect that can be appropriately identified, and effectively facilitated during police detention.
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THE RIGHT TO INFORMATION ON RIGHTS

1. Introduction

It cannot be presumed that suspects know their rights at the moment they are confronted with a criminal investigation. Especially in situations where they are deprived of their liberty during arrest or police custody, suspects might find themselves in a stressful situation unaware of their rights or without knowledge of how to invoke them. Provision of information about rights is therefore a prerequisite to accessing them. When suspects are not informed of their rights at an early stage in police custody, the protective value of those rights will be ineffective in practice.

In 2009-10 a research project was conducted on the way that suspects in EU Member States were informed of their rights, and of the nature and cause of the accusation at the start of the police investigation in criminal proceedings. The research identified a number of problems connected to the provision of information to suspects on their rights. The investigative authorities mostly treated their duty to inform suspects of their rights as a formality, requesting a signature to confirm that they had fulfilled their duty without further explanation, and without giving sufficient time to the suspect to understand fully the meaning of what they were told. Written information was usually provided upon arrival at the police station before the interrogation started, but it might also be given at a later stage. The language used in the written information was often very formal, using legal terminology that was hard, or impossible, for lay people to comprehend. In many countries suspects were not allowed to keep a copy of this written information. Often the information was not available in the language a foreign suspect could understand. Timing was

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1 See Cape et al. 2010, p. 556.
2 The project ‘EU-wide Letter of Rights in Criminal Proceedings: Towards Best Practice’ was supported by the German Federal Ministry of Justice and funded by the EU. See for the publication of the research results Spronken 2010. See for preceding research where also the right to information was addressed, Spronken & Attinger 2005 and Spronken et al. 2009.
also an issue. Sometimes the information was provided orally at the start of the interrogation and recorded afterwards. This did not allow suspects any time to consider their position or to think about how to answer questions regarding their rights and it was also too late for suspects to exercise these rights effectively, by, for instance, seeking legal advice prior to interrogation.3

Obviously there is a degree of tension between procedural safeguards in law and their application in practice. This is especially evident in a situation where there is a duty on the police to provide suspects with information on rights that may, in their perception, slow down or hinder their investigation or search for the truth. The effectiveness and observance of these rights then depends to a large extent on the attitude and training of the investigative authorities and on the existence of procedural and institutional enforcement mechanisms that are designed to put these rights into practice.

1.1. The EU Directive on the Right to Information in Criminal Proceedings

The EU Directive on the right to information in criminal proceedings4 takes into account the shortcomings that were identified in the aforementioned research and acknowledges the importance of practical enforcement mechanisms in order to provide suspects with timely information about procedural rights, especially in the investigative phase. Although the transposition date of the Directive is 2 June 2014 and this Directive had not been implemented in the four jurisdictions of the project during the research, it contains normative and practical guidelines against which the empirical findings can be assessed.

Article 2 stipulates that the Directive applies from the time that persons are made aware by the competent authorities that they are suspected or accused of having committed a criminal offence, thus applying the autonomous notion of ‘criminal charge’ as formulated by the ECtHR in its jurisprudence.5 The Directive is applicable even before suspects are arrested and deprived of their liberty. It requires Member States to ensure that suspects or accused persons are provided promptly, orally or in writing, in simple and accessible language and taking into account any particular needs of vulnerable suspects, with information on at least:

5. The ECtHR has defined ‘charge’, for the purposes of Art. 6 para. 1, as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, a definition that also corresponds to the test whether ‘the situation of the [person] has been substantially affected’: see ECtHR 19 February 2009, Šidelnik v. Ukraine, No. 15404/03, para. 57 and ECtHR 18 February 2010, Zaicherko v. Russia, No. 39660/02, para. 42.
- the right to access to a lawyer, whether this is free and what the conditions for
  free legal advice are;
- the right to be informed of the accusation;
- the right to interpretation and translation; and
- the right to remain silent.⁴

Promptly means 'at the latest before the first official interview of the suspect or
accused person by the police or by another competent authority'.⁷ Every suspect
who is arrested or detained must, in addition, be promptly (at the latest before the
first official interview) provided with a Letter of Rights and given an opportunity to
read it and keep it in their possession throughout the time that they are deprived of
their liberty.⁸ The Letter of Rights should, in addition to the previously mentioned
rights, contain information on:

- the right of access to the materials of the case;
- the right to contact consular authorities;
- the right of access to urgent medical assistance; and
- the maximum period that suspects may be deprived of their liberty before
  being brought before a judicial authority.

Also basic information should be provided on how:

- to challenge the lawfulness of the arrest;
- obtain a review of the detention; or
- make a request for provisional release.

The Directive also stipulates that the Letter of Rights should be drafted in simple
and accessible language and an indicative model Letter of Rights is set out in an
Annex.⁹ This model was inspired by Notice of Entitlements used in England and
Wales, which is very straightforward and which uses simple language.¹⁰ Member
States should also ensure that suspects are informed of their rights in a language
they understand. If there is no written Letter of Rights available in the appropriate
language, they should be informed orally in a language that they do understand

⁴ Art. 3.
⁵ Recital 19.
⁶ Art. 4.
⁷ Art. 4(4) and Annex 1 to the Directive.
⁸ Also the EU model designed in Sprokken 2010, p. 74-78 is based on the England and Wales
Letter of Rights. See for the England and Wales Letter of Rights Sprokken 2010, Annex 1,
p. 103.
and a translation of the Letter of Rights should be given to them without undue delay.\footnote{Art. 4(5).}

1.2. The Structure and Content of this Chapter

In this chapter we analyse how suspects are informed of their rights by the police when they are arrested and detained in police custody and the provision of information concerning the criminal offence that they are suspected of and the reasons for arrest. The right of access to the materials of the case (disclosure) will be dealt with in Chapter 7 where we discuss suspects' strategy during interrogation. The amount of disclosure that is given in the phase of police interrogation is also crucial for lawyers who have to advise suspects on these matters.\footnote{See Chapter 6, section 6 for the consequences of (lack of) disclosure and access to the case file for the position and role of the lawyer.}

Although the right to information on rights does not cease to apply in the subsequent proceedings, here we only address the initial phase of contact between a suspect and the police. Our empirical research did not cover the actual arrest of a person before being brought to the police station or situations where suspects were questioned without being taken to the police station.\footnote{The right to information may already apply in these situations. See Chapter 1, section 2.5.1.} The analysis in this chapter relies on the fieldwork in which we observed whether and how suspects are informed of their rights upon arrival at the police station, before the start of the first interrogation. As has been set out in Chapter 2, we were able to observe this in the Netherlands, Scotland, and England and Wales.\footnote{Chapter 2, section 7.} In France we were allowed to accompany lawyers to the police station and to attend both the lawyer-client consultation and the subsequent interrogation(s). We were not admitted to observe the 'check in' procedure of the police when suspects were informed of their rights when they arrived at the police station.

In all jurisdictions, interviews with police officers and lawyers gave us additional insights into how information on rights and access to case related information was provided and perceived in practice.

2. Information on Rights at Arrest and Detention

2.1. The (Statutory) Regulation of Information on Rights in the Four Jurisdictions

The regulations governing the right to be informed about rights varied considerably in the four jurisdictions during the time we conducted our study. Before analysing the empirical data it is useful to recapitulate briefly on what was set out in Chapter
3 regarding regulation of the provision of information on arrest in the four jurisdictions distinguishing between whether the information must be given orally, or in writing, or both.

Although there are different moments in each jurisdiction when suspects are cautioned on their right to silence, common to all four jurisdictions is a requirement that suspects be orally informed of their right to silence and their right to consult a lawyer free of charge prior to the first interrogation.

In England and Wales the oral information must include, in addition, that the right to consult a lawyer may be exercised at any stage during the period of custody and also during interrogations, that the consultation is in private, that the person may require that a third person will be informed of their detention, and that they have the right to consult the Codes of Practice. These rights apply to everyone. Others are dependent on the police, assessing someone as vulnerable, or as having insufficient language ability. When a juvenile or other vulnerable person is arrested, the rights should be explained in the presence of an appropriate adult. The role of the appropriate adult is to protect and help the juvenile or otherwise vulnerable arrested person and it may be a parent, relative, guardian or social worker.

In France, the oral information to be provided to an arrested person must include, in addition to the right to silence and the right to legal assistance before and during police interrogation, the right to have a relative or employer informed of their detention and that they have the right to a medical examination. They must also be told of the reason for their arrest – the nature of the offence they are suspected of committing and the date when it took place. These are all rights that must be given to everyone. Then, there are rights that will depend on the discretion/vigilance of the police. If the police consider the suspect needs a sign language interpreter this must be arranged. If a foreign language interpreter is needed, this must be organized and the suspect must have their rights interpreted.

In the Netherlands, suspects must be cautioned in respect of their right to silence and informed of the right to consult a lawyer prior to the first police interrogation and when this is free of charge. Where the arrested person is a juvenile, they must be informed that they have a right to have a lawyer present during the interrogation. Apart from these rights, there was no obligation to provide suspects with information on how to exercise these rights, nor to provide information about

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25 For example in England and Wales, the requirement is that a suspect be cautioned when they are arrested, and also at the commencement of an interrogation, and when they are charged. Also in the Netherlands the caution should be given at arrest, but also before a suspect is asked questions in the street, and at the commencement of an interrogation.

26 See Chapter 3, section 24.6 for England and Wales, section 3.4.6 for France, section 4.4.6 for the Netherlands and section 5.4.6 for Scotland.

27 Due to a learning disability or mental illness.

28 See Chapter 3, section 24.3 and Cape 2011, p. 38-60.

29 In case of misdemeanours where no prison sentence is possible adults have to pay to consult a lawyer.
other rights. However, in some situations juveniles cannot waive their right to a lawyer without first having spoken to a lawyer. This also applies in France in respect of juveniles under 15 years of age, who are considered not to be able to make an informed decision on the waiver of their right to legal advice.

In Scotland, detained and arrested persons are notified of different rights depending on their status. Arrested persons must be told of their right to have a lawyer or third person informed of their detention. Persons held under section 14 detention must, additionally be notified of their right to a lawyer, their right to remain silent, and that they have a right to a private consultation with a lawyer during police questioning. An appropriate adult scheme is in place where the arrested person is a juvenile or otherwise vulnerable.

Although standardized written information was available in France, the Netherlands and Scotland, the only jurisdiction out of the four where there is a legal requirement to provide standard written information to suspects (who may keep this information in their possession) and to record an acknowledgment of receipt, was England and Wales. This information must be set out in a Letter of Rights (referred to as the ‘Notice of Entitlements’) at the same time that suspects are informed orally of their rights. This Letter of Rights provides not only more information on the arrangements for obtaining legal advice and the caution on the right to silence, but also information on additional rights such as the right to a copy of the custody record, the right to interpretation, and the right to information on detention conditions. Table 1 below sets out the level of provision of the rights that have to be communicated to the suspect upon detention. We have to be aware that there may be more rights applicable at this stage, without a formal duty on the police to inform suspects about these rights, for example the right on consular assistance that is only mentioned in the England and Wales Letter of Rights. On the other hand, practices may be different: for instance in the Netherlands there is a Letter of Rights that is sometimes given to suspects, although there is no formal requirement to do this.

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20 See Chapter 3, section 4.6.
21 See Chapter 3, section 5.43.
22 See 15 and 17 CP (Scotland) Act.
23 S. 15A CP (Scotland) Act. The right to remain silent is not expressed in statute.
24 See Chapter 3, section 5.45.
25 See section 3 below.
26 S. 3.2 PACE Code of Practice C.
27 S. 3 Notes 3A and 3B PACE Code of Practice C.
28 For the reference to the text of the England and Wales Letter of Rights, see section 3.1 below.
Table 1: Formal Regulations on Information on Rights During Detention

<table>
<thead>
<tr>
<th></th>
<th>England &amp; Wales</th>
<th>France</th>
<th>Netherlands</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to silence</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Right to consult a lawyer</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>When free of charge</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>During interrogation</td>
<td>X</td>
<td>X</td>
<td>Only juveniles</td>
<td>X</td>
</tr>
<tr>
<td>At any stage</td>
<td>X</td>
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<td></td>
<td></td>
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<tr>
<td>Private consultation</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Limited in time</td>
<td>No time</td>
<td>30 min</td>
<td>30 min</td>
<td>No time</td>
</tr>
<tr>
<td></td>
<td>limit</td>
<td></td>
<td></td>
<td>limit</td>
</tr>
<tr>
<td>Have a lawyer informed of detention</td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Information third person</td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Medical examination</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Consult Code of Practice</td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>Appropriate adult</td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Written information/Letter of Rights</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2.2. The Process of Informing Suspects of their Rights

There was a striking difference in the four jurisdictions in the way that provision of information on rights by the police to suspects was organized. England and Wales and Scotland, have a highly regulated structure, with strict recording procedures; in marked contrast to this, France and the Netherlands have far less detailed regulations or instructions for the police on how to inform suspects of their rights, as well as fewer provisions for scrutinizing or verifying compliance.

The so called 'booking in' process of suspects at the police station in England and Wales, during which they were informed of their rights, was the most sophisticated of the four jurisdictions we studied. This is probably due to the fact that in England and Wales, the procedure for informing suspects of their rights has been in force the longest (since 1986). Therefore, the process of provision of rights has had

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29 At the time when the fieldwork was conducted.
30 Previous to the first interrogation and during interrogation.
31 This includes information on whether this is dependent on a means test or nature of the offence.
32 Here are meant time limits to the consultation previous to the first police interrogation. Consultations with lawyers after the interrogation or in between interrogations at the police station are not limited in time.
33 See s.3 Code of Practice C.

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time to develop, and has become entrenched and accepted in daily police practice. Upon arrival at the police station suspects must be brought before a custody officer in the so-called 'custody suite', a dedicated room equipped with a counter and computer, that enables the custody officer to look up things and register suspects at the time they are brought in. In their presence, and in case of a juvenile or vulnerable suspect in the presence of an appropriate adult who has to help the suspect to understand what is said and make decisions, a very structured process is followed guided by (normally, computer-based) checklists, crib sheets and a written notice of entitlement (Letter of Rights).

The first task of the custody officer is to decide whether or not a suspect should be detained. The other key role of the custody officer during the detention period of suspects at the police station is to inform them of their rights, ensure that these rights are respected, and protect the suspect’s well-being. The custody officer must be an officer of the rank of sergeant who is not involved in the criminal investigation and has a special role within the police service: the responsibility for effectively implementing the relevant procedural rules. The custody officer must perform a risk assessment regarding whether the detainee is likely to present specific risks to custody staff or to themselves, and to assess whether medical assistance is needed. All actions and events during the detention period must be recorded in a custody record, usually in electronic form, which can be used to verify whether procedural rules have been complied with. The custody record is designed to make the detention process transparent and open to scrutiny, and suspects, appropriate adults and lawyers must be given access to the custody record whilst at the police station. The booking-in process is normally captured on CCTV, which should be available if any disputes subsequently arise. The fact that the complete process is recorded is, in itself, likely to be an incentive for the police to act in accordance with the rules.

An impression of how the booking-in process is conducted in England and Wales may be gained from the following fieldwork notes of one of the researchers:

Custody officer: Suspect (S) comes in with police officer (PO).

Custody officer (CO): Sorry for the waiting.

S: It is ok.

34 See Cape & Young 2008.
35 See section 5 below for the description of the role of the appropriate adult.
36 See section 3.1 below.
37 According to s. 37 PACE 1984 detention may only be authorised if there is not sufficient evidence to charge the arrested person with a criminal offence and the custody officer believes that detention is necessary to secure or preserve evidence or to obtain evidence by questioning.
38 See s. 2 Code of Practice C.
39 Closed-Circuit Television.
CO: You understand why you are here?
S: Yes.
CO goes through questions showing on the computer in a soft and friendly voice.
CO: You are here for interview.... Do you class yourself as white British?
S: Yes...
Questions follow: Do you require help with reading and writing?
Do you have any injuries?
Do you have medical conditions?
Do you have any mental health problems?
S answers no to all of these
CO: Have you ever harmed yourself?
S replies that yes, he cut his wrists and overdosed two years ago because of family problems.
CO: How are you feeling now?
S: Fine
CO: Have you consumed alcohol/ taken any drugs or solvents within the last 24 hours?
Are you dependent on alcohol?
Dependent on drugs?
Dependent on solvents?
Dependent on any other substance?
Do you wish to see or be contacted by an independent Drug/alcohol Referral Scheme Worker?
S says no to all of these questions
CO: Do you have any allergies, specific dietary needs or religious dietary needs?
S: Penicillin
CO: Are there any other issues that might affect you whilst you are in custody or anyone else that depends on you who might be affected by your detention?
S: No
Then follows the list of rights and entitlements:
CO: Do you want to speak to a solicitor? It's free of charge. Or you can speak to one on the phone?
S: No, don't need one, not worth it.
CO: Do you want to inform family?
S: Yes my mother but she probably knows already...
CO calls straight away, the mother did know already....
In general we saw custody officers in England and Wales perform their task in a polite, professional and friendly way, attempting to put the suspect at ease, and making extra efforts if the suspect did not seem to understand what they were told or asked.

The booking-in procedure in Scotland is similarly structured to that in England and Wales. Suspects are brought before a custody officer, also referred to as a duty officer, who has the same role and position as in England and Wales and who reads out the suspect’s rights from a green laminated A4 sheet that contains information on welfare, such as access to food, writing materials, medical assistance, communication with relatives or friends and on the right to consult a lawyer. In the police stations we observed, the green sheet was also displayed on the walls of the custody bar or ‘charge bar’ and in the interview rooms in ScotTown. A copy of this sheet was, however, not given to the arrested person, nor was it displayed in cells and the police in fact did not refer to these sheets. Police officers told us that there used to be forms in the cells as well, but because detainees used the paper to cover the spy hole of their cell, cover the smoke detectors or stuffed the paper down the toilet, it was not handed out any more.

It is important to note in this context that there are two variations of ‘arrest’ in Scotland: common law arrest and the so-called section 14 detention or statutory detention. Common law arrest is used when the police have sufficient evidence to charge the person without the need to interrogate them. In that situation a decision to charge is taken and the suspect can be held at the police station until the next available court day if the police do not believe it is safe to release the suspect pending their appearance in court. Suspects will be booked in at the charge bar and be informed on their rights by the custody officer as described above. Section 14 detention is applied when the police need to conduct further investigations including to interrogate suspects before being able to take a decision to charge them. In this situation suspects are booked in by the custody officer asked whether or not they want a lawyer and then given the common law caution indicating that they are not obliged to answer any questions but that anything they do say may be noted, may be audio and visually recorded and may be used in evidence. Subsequently

40 Notice of Rights and Entitlements.
41 EngTownPol1.
42 See Chapter 3, section 2.3.
43 Literally it says ‘You have the right to intimation with your law agent.’
44 ScotCityPol21 and ScotTownPol19.
45 S. 14 of the CP (Scotland) Act.
46 See Chapter 3, section 5.3.2.
they are informed again of their right to have legal assistance by the arresting officers who are present at the charge bar. The way that this should be done and recorded is set out in a separate form, the Solicitor Access Recording Form (SARF).\textsuperscript{47} The SARF procedure was introduced in Scotland after the \textit{Saizuz} and \textit{Caider} cases resulted in new legislation on the right of access to a lawyer.\textsuperscript{48}

As a consequence, suspects who are held under common law arrest will be informed of their general rights whilst detained at the police station, but are not informed of the right to silence.\textsuperscript{49}

As in England and Wales, the booking-in process in Scotland is recorded on CCTV in order to ensure compliance, as the following field note extract of a conversation between a Scottish custody officer and our researcher illustrates:

‘When a suspect “... is brought in drunk, he’s swearing at you ... you really sometimes need to talk to them in the language they understand ...” He says being polite with them just won’t work in that kind of situation; but custody staff and officers nevertheless have to treat them in a courteous manner since they know everything is being recorded. There have been instances in the past where a suspect has put in a complaint the next day about the way he was treated on the way to the cell, after being processed. An inspector reviews the footage of that particular moment but will also look at the preceding footage, when he was being processed. On one occasion, where such a complaint was made, even though the complaint was found to be unjustified, the custody team member who processed him was disciplined for using “inappropriate” language.’\textsuperscript{50}

In France and the Netherlands, the implications of \textit{Saizuz} regarding the information that should be provided to suspects once arrested and detained in police custody have, so far, led to relatively minor amendments to the procedures that were already in place when a person was arrested and detained at the police station previous to the \textit{Saizuz} judgment.

According to the French regulations after \textit{Saizuz}, suspects must be informed of the rights to which they are entitled during the GAV, namely: the right to have a relative or their employer informed; the right to be examined by a doctor; the right to be assisted by a lawyer; and the right (after having provided details of their identity) to make a statement, reply to questions or to remain silent.\textsuperscript{51} This information is provided orally and must be noted in a police record, the record of notification, which the suspect must be asked to sign. There is no dedicated police officer with the task of booking-in suspects (such as the custody officer in England and Wales and Scotland), nor is the process audio- or video-recorded. Rights are notified orally when suspects are arrested. When they arrive at the police station the police officers

\textsuperscript{47} See Chapter 3, section 5.4.3.
\textsuperscript{48} See Chapter 3, section 5.4.5.
\textsuperscript{49} ScotCityPol13.
\textsuperscript{50} ScotCityPol11.
\textsuperscript{51} Art. 63-I CPP.
who are investigating the offence, the officier de police judiciaire (OPJ) or agents de police judiciaire (APJ) (lower grade officers who work under the supervision of the OPJ) write up the record of notification and ask suspects to sign it. Suspects do not receive a copy of this document, but lawyers we observed were able to check this document when they were visiting their clients at the police station. We were not able to observe how the booking-in procedure worked in practice. From the observations with French lawyers, it appeared that lawyers do sometimes obtain copies of the record of notification of rights and the medical certificate before they speak to their client, but not always. As from May 2013 (after our fieldwork) a French Letter of Rights was available online to be used in various situations such as ‘normal’ arrests, the arrest of a juvenile, arrest for offences related to terrorism, and arrests relating to organized crime or drugs offences. In our fieldwork we did not observe any Letter of Rights being provided to suspects before or when interviewed.

In the Netherlands, before Salárez there already existed a procedure requiring arrested persons to be taken before an assistant prosecutor immediately when they arrived at the police station. The assistant prosecutor is required to assess the legality of the arrest and whether it is necessary to detain the suspect in police custody for questioning. The assistant prosecutor often also puts questions to the suspect, including as to whether they admit to the crime. This hearing was originally the responsibility of the prosecutor, but it has been delegated to assistant prosecutors who act on behalf of the prosecutor. Nearly all senior police officers are assistant prosecutors and they fulfil this role in rotation. In their day-to-day work they are involved in the (management of) criminal investigations within their police district. After the Salárez judgment, assistant prosecutors were given the additional task, when suspects are taken before them, of informing the suspect of their right to consult a lawyer. This obligation is set out in the Regulation on Legal Assistance during Police Interrogation, which was introduced by the Board of Procurators-General (the heads of the prosecution service) on 15 February 2010. According to this regulation, it is the task of the arresting police officers or the police officers who investigate the case, to inform suspects about their right to legal assistance and when this assistance can be obtained free of charge. The suspect’s request to speak to a lawyer or waiver of the right to a lawyer should be recorded by these police officers.

52 FranTowLaw2; FranTowLaw4; FranTowLaw5.
53 See Chapter 2, section 7.2.
54 FranTowLaw1; FranTowLaw4.
55 See Formulaires de notification de garde à vue. See for the English version of these letters of rights, Notices of Rights for Persons Placed in Police Custody.
56 Arts. 55-55a CCP.
57 Arts. 154-159 CCP.
58 They have to obtain a certificate and need three years of experience in an executive position within the police organisation; Regeling hulpofficieren van justitie 2008, Steri 2008, 141.
officers. Assistant prosecutors are required to verify that this procedure has been carried out properly when the suspect is taken before them.

This procedure was not always adhered to in practice. In the police district covering NethCity, it was decided that, in order to avoid misunderstandings, only assistant prosecutors (and not the arresting or investigating officers) would be required to inform suspects of their right to consult a lawyer. A number of reasons were given by NethCity police for deviating from the normal procedure. Firstly, the circumstances of an arrest may be emotional, and there may be a conflict between the arresting officer and the suspect; the assistant prosecutor, on the other hand, is a neutral figure. Secondly, suspects are calmer when they arrive at the station, and they are then more likely to understand their right to a lawyer. Thirdly, there is no interpreter on the street, and many suspects do not understand Dutch. Fourthly, it is difficult for the assistant prosecutor to control what has been said to the suspect on the street, and finally, it is easier to train 30 assistant prosecutors to inform suspects about their right to a lawyer than 200 police officers on the street.\(^{40}\)

Assistant prosecutors must record the results of the hearing of the suspect (proces-verbal van overgeleiding). All records are added to the file. Copies of these records are not given to suspects immediately, but at a later phase when (or if) they are brought before the investigating judge, if the detention is extended or when the legality of the detention has to be assessed (normally at the end of three days of police detention). A Letter of Rights is available in two versions, one for adults and a second version for juvenile suspects. These set out information on the right to silence and the right to a lawyer, but there is no consistent practice, nor a requirement in any regulation, in giving the Letter of Rights to suspects.\(^{41}\) At the police station in NethCity they were normally handed out, but in the NethTown they were not handed out at all.\(^{42}\)

In contrast to England and Wales and Scotland, there was no designated location for booking-in suspects and bringing them before the assistant prosecutor in the research sites in the Netherlands. Arrangements varied between police stations. During our fieldwork in NethTown, the assistant prosecutor came to the room where the arrested person was searched and where his belongings were secured.\(^{43}\) In the police office in NethCity, the assistant prosecutor went to the cell where the suspect was detained because there was no appropriate room elsewhere to hear the suspect. At both research sites the assistant prosecutors did not record their findings on the spot, but did this later at their own desk. We observed that there were discrepancies between what was noted in the record and what actually happened during the hearing of the suspect.\(^{44}\) There are no checks on this procedure and so these discrepancies were not picked up. The records did not need to be signed by

\(^{40}\) NethCityPol3.
\(^{41}\) See You Have Been Arrested (Adults), You Have Been Arrested (Juveniles).
\(^{42}\) NethTownPol1; NethTownPol2; NethTownLaw4; NethTownPol17.
\(^{43}\) NethTownPol21.
\(^{44}\) NethCityPol7.
the suspects, nor was the appearance before the assistant prosecutor video-recorded. As lawyers were either present, nor able to inspect the record, they were also unable to provide any verification or correction. There were no official protocols or guidelines on how assistant prosecutors should fulfill their tasks and sometimes, where suspects were drunk or appeared to be aggressive, the 'hearing' was conducted through the small cell window. The following examples, taken from the researcher's fieldnotes, illustrate the way that assistant prosecutors performed their role.

In the first example the suspect, who did not speak Dutch and was very drunk so that he could not stand by himself, had first been asked to empty his pockets and was subjected to a superficial search, before being taken to his cell. This revealed that he had around 300 Euro on him. A few minutes later the assistant prosecutor came to 'officially detain him' and addressed him in English, without assistance of an interpreter.

Assistant prosecutor (AP) comes into the cell, and seeing that the suspect (S) appears to be sleeping (his face to the pillow), says 'Hello' in a very loud voice. S does not react.
AP says 'Hello' even louder. The suspect raises his head and asks: 'May I go home now?' The assistant prosecutor says no, he cannot go home, he will have to stay longer. S does not react and puts his head back on the pillow.

AP: 'Now you must listen to me.'
S raises his head again.
AP: 'I am an officer of justice. I am here to tell you about your rights. Do you understand?'
S mumbles a 'yeah.'
AP: 'Do you know why you were arrested?'
S: 'Because...hmm...I am...drunk?'
AP: 'You did not comply with the order of police. Did you know that this is a crime in the Netherlands?'
S: 'I can't remember anything... Can I please go home?'
AP: 'You have to pay first. I am here to give you your rights.' He informs him about the right to silence. Because of his rather poor English, the AP says 'you are not obliged to ask questions', instead of 'answer' questions. About the right to consult with a lawyer, the AP starts to explain that 'in the Netherlands, you can have a lawyer for free before police asks questions. This is a new rule...'. He goes on to explain that there was a *Sedatus* decision of the 'European Union' court, etc. S does not seem able to follow this.
AP: 'Do you want to speak with a lawyer?'

There is a manual for assistant prosecutors, containing statutes, jurisprudence and regulations, but this manual does not have the status of a formal regulation but is used by the police as guidance for their practice: Hoekendijk 2013.
S: ‘No, I just want to be released.’

AP then tells S that he has an opportunity to ‘pay and go home’: does he agree to do that? S seems to hesitate. He asks how much would he have to pay?

AP: ‘It depends on the decision of the officer of justice.’

S then tells him that he does not know how much money he has. AP tells him that they found about 300 Euro on him; S seems surprised that it was so much, but says – ‘This is all I have.’ 16

In a second example, several police officers together with the assistant prosecutor had gathered in front of the cell where the suspect was detained and had been agitated and banging on the cell door. One police officer opened the small window of the cell because he was reluctant to enter.

S talks with the AP calmly though, because he believes in the beginning that the police came to take a complaint from him. AP talks with him very succinctly: he says that S is arrested for causing bodily harm. S tries to explain how this happened, but the AP cuts him short saying ‘you should tell this soon to the interrogating officer, I am here to take a short reaction from you.’ He tells S that he is not obliged to answer questions; and that he is now detained for six hours, which may be prolonged to three days and asks whether he is using any medication. S responds ‘no.’ The AP tells S that he can make use of a lawyer, and that he recommends him to do so because he is not likely to be released before the morning. S agrees. The AP, however, apparently forgets to ask S whether he has a lawyer of his choice. This is probably because he wishes to finish the conversation as soon as possible. AP then says ‘good bye’ and closes the window. The moment the window is closed, S re-commences banging on the door.

In the record, the assistant prosecutor subsequently wrote that ‘the suspect wants to be visited by a duty lawyer’. 17

In a third example, a consultation was conducted by way of video conference because the assistant prosecutor was located in a different city from that where the suspect was brought in. S did not object to the video conference.

AP begins very formally: he presents himself using his full name, and says that he is ‘the representative of justice’ whose role is to check whether the detention of the suspect S was legal, and that in relation to this he is going to pose a few questions. He says that S is not obliged to answer any questions, and asks whether S understands it.

S responds ‘yes.’

AP asks S whether he knows why he was arrested.

S says that he has no idea. He was stopped on the scooter, and then the police decided to arrest him.

AP asks whether this was a ‘normal’ police check.

16 NethCityPoi7.
17 NethCityPoi7.
S responds 'yes.'

AP asks S whether he has any ID with him.

S starts looking in his pockets, and responds 'No.'

AP explains that this was the reason why he was arrested; and that he has to stay at the police station until his identity can be established.

AP tells S that he has the right to a lawyer...

S interrupts him saying that 'this is really not needed.'

AP tells him that it is his obligation to explain the right to a lawyer, so S should listen to him: he is going to explain further. AP tells S that he has the right to call a lawyer, but this would be at his own expense. He adds that if S waives the right to a lawyer, he will be released immediately after his identity is established. If he asks for a lawyer then he would have to be transferred to another city for the night, and will be released only next morning.

S responds that he wants to be released immediately.

AP asks S whether he has any questions to put to him.

S says that he has no questions, and thus the session is finished.68

The research revealed that, in contrast to the way in which custody officers in England and Wales and Scotland inform suspects of their rights, in a procedure that is explicitly designed to do only this, the hearing by the assistant prosecutor in the Netherlands had a mixed and rather blurred character: it was partly an interrogation on the facts,69 partly an opportunity for information on rights and the nature of the offence to be provided, and it could also be used to ‘solve’ the case by means of a penal order (as the first example demonstrates).70 Because there was no prescribed or standardised procedure, police officers and assistant prosecutors each had their own approach to informing suspects of their rights, and there was very little training on how this should be done.71

In conclusion it can be said that the question of who has responsibility for informing suspects of their rights can make a significant difference to the way in which the task is performed. Custody officers in England and Wales, and Scotland, have, at least in theory, a clearly defined role and, because they are not involved in the investigation of the case, are more independent in fulfilling their tasks. However, the right to a lawyer in Scotland was delivered by the arresting officers, which is difficult to understand since the custody officer is in charge of rights and welfare during detention. In the Netherlands, we have seen that assistant prosecutors had

68 NethCityPo125.
69 What has to be kept in mind is that the record of the assistant prosecutor may be used in evidence in the Netherlands.
70 And we have seen many other occasions where this happened; NethCityPo17; NethCityPo125; NethCityPo130.
71 See for similar findings Rietveld 2013.
several responsibilities and tasks and very easily mixed the information they should provide to suspects with questions that had an interrogative purpose.\textsuperscript{72} Because they normally participate in the police investigation, they tended to speed up the process, for instance by telling suspects that they would be detained for a longer period of time if they chose to consult a lawyer.\textsuperscript{73}

2.3. **Voluntary Attenders**

The observations in the previous paragraphs concerned the provision of information on rights to those who had been arrested or detained at the police station. As regards persons who attended the police station voluntarily, we observed that in general in England and Wales, the Netherlands and Scotland, they were informed of their right to a lawyer and of their right to silence. In England and Wales this was done at the beginning of the interrogation. In the Netherlands we saw that although the police are not obliged to do this, they do inform suspects when they invite them to attend the police station, that they may consult a lawyer before doing so. For example, when a man was invited for an interrogation, the letter (which appeared to be a standard letter), stated that he was asked to appear at the police station, where he would be interrogated about 'sexual crimes, committed in X'. The letter also stated that he had a right to consult with a lawyer 'at his own cost'. The 'invitation' also mentioned that if he did not attend, he could be arrested at any time.\textsuperscript{74} What must be noted is that, according to the current case-law in the Netherlands, voluntary attenders are considered to be able to consult a lawyer themselves before coming to the police station. The police are not obliged to inform them of their right to legal assistance prior to the interrogation, even in the case of juveniles. Suspects attending as volunteers do not have a right to consult a lawyer free of charge at the police station, which would be the case if they were arrested.\textsuperscript{75} Suspects are, however, always cautioned on their right to silence at the start of the interrogation. In Scotland the procedure to inform suspects of their rights prior to the interrogation does not differ, whether they attend voluntarily or are arrested. In both situations they are booked in at the custody bar and read their rights.\textsuperscript{76}

2.4. **Language Used**

The aim of providing information to suspects on their rights is to ensure that the meaning and consequences of these rights can be understood by them, even when they are young, have mental disabilities, or have poor reading ability. Recital 38 of

\textsuperscript{72} NethCityPo11.

\textsuperscript{73} NethTownPo121; interview with a senior police officer in NethCityPo131. This is corroborated by the research of Verhoovan & Stevens 2013, p. 161 & 231.

\textsuperscript{74} NethCityPo121.

\textsuperscript{75} HR 9 November 2010, NJ 2010, 615; HR 12 June 2012, NJ 2012, 404.

\textsuperscript{76} See section 2.6 below.
the EU Directive on the right to information in criminal proceedings stipulates that it is important that the information about rights is given in a simple and accessible language so as to be easily understood by a lay person without any knowledge of criminal procedural law. This applies to the oral information as well as the written information that must be provided.

2.5. Oral Information

We observed significant differences in all jurisdictions in those cases where we were able to observe how suspects were informed orally of their rights. Despite the applicable procedures that had to be followed as described in section 2.1, most police officers that were in charge of informing suspects had developed their own style of delivering the information. One of the interviewed English custody officers said:

“I think it’s important that the legal facts and [the] things we must say, [that] that message gets across. But I think everyone is likely to have their own style of doing that. I find the robotic way that some colleagues deal with people can be very counter-productive. We can all stare at the screen and ask questions like a robot and click “yes” or “no”, but you’re not looking at the person and engaging with them and the computer can be a barrier and can get in the way. I tend to use my knowledge of the person if they’ve been in before, or from what the officer has told me, or how they present themselves to me. I’ll adapt my style to achieve the process in the best way possible, not always the fastest. You have to get over their shyness. It doesn’t always work, but I feel like I can make a judgment and if they’re a person that needs extra explanation then I’ll do it. But if I can be quicker, then I hope they know, and not go into too much detail, and that’s a personal call. It’s very important that those things that are legislative and required, have to be done.”

Some police officers were very short and formal in notifying suspects of their rights, apparently not really interested in whether the information had been understood, whereas others spent more time with suspects and explained things in more detail. There were custody officers who had a very meticulous approach and asked every single question that they are supposed to ask, whilst others took a more relaxed and informal approach, as the following observation in England and Wales illustrates (where the mother of the juvenile suspect was present as the appropriate adult):

The custody officer then proceeds to beck the suspect in, methodically, un hurried, asking the odd comment to risk assessment questions like “is it a stupid question this one, but we have to ask everyone this. Are you feeling OK today?” After he’s com-

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78 England and Wales, the Netherlands and Scotland.
79 EnglCityPol2, See also EnglCityLaw4, EnglCityPol2.
80 NethTownPol8.
Police officers were often asked by suspects whether they need a lawyer. Police officers found it difficult to know how to deal with these kinds of questions. Some police officers told suspects that they could not advise them, but others insisted that it was important to speak to a lawyer, especially in the case of serious alleged offences, such as a person in the Netherlands who was arrested on suspicion of punching and raping his girlfriend. He refused legal assistance, despite the insistence of the assistant prosecutor:

AP: ‘You have the right to legal assistance…’
S: ‘No, not needed.’
AP: ‘But you can have it.’
S: ‘Not necessary.’
AP: ‘It is free of charge.’
S does not respond.
AP: ‘I will leave you a brochure [Letter of Rights]. Maybe you will change your mind…’
S: ‘Am I going to be interrogated now?’
AP: ‘No, only tomorrow.’

Sometimes the prescription in information sheets or guidelines was very formal. For example, in the Netherlands, assistant prosecutors should, according to the guidelines, start by explaining their position and what the task of an assistant prosecutor is. They were often not able to do this in a way that could be readily understood by suspects, explaining their position as the ‘auxiliary officer of justice’ or ‘the representative of justice’. Such alien descriptions were puzzling to the suspect, who was then less likely to pay attention to the caution and to the important questions that follow, such as whether they wanted to consult a lawyer. In Scotland,
the ACPOS Manual of Guidance on Solicitor Access 2011 elaborates extensively on how information should be provided to arrested persons in order to ensure a consistent approach, and to facilitate suspects’ understanding of their rights and options. However, it is excessively detailed in its regulation and does not take into account the day-to-day practice in a police station. In practice therefore, it was experienced as inhibiting rather than aiding the process.

2.6. The SARF Procedure

Our research revealed that the prescribed procedure and language in the Solicitor Access Recording Form in Scotland (SARF) proved to be very problematic and frustrating for police officers who had to inform suspects of their rights, as well as for suspects who had to be processed according to this form. In the booking-in process in Scotland suspects who were detained under the section 14 of Criminal Procedure (Scotland) Act 1995 were first informed of their right to silence. Furthermore, a standard pre-interview review of rights was also provided, which all officers were required to follow exactly in every case. However, this did not re-deliver the rights but confirmed that they were notified earlier. Then the SARF form had to be read out. This form was introduced in Scotland after the Salihiz and Cudler cases and is designed to inform the suspect of their right to a lawyer and to record the suspect’s decision in regard to their right to access a solicitor, including any decision to waive this right and any change of decision. A template version of the SARF is included in the ACPOS Manual of Guidance on Solicitor Access 2011 version 1.2. The ACPOS Manual required the SARF to be read out verbatim to the suspect by the investigating officer at the custody desk and suspects had to sign next to each question to confirm that it was read out to them, and to confirm their answer.

In order to understand the criticism of the SARF procedure the form is reproduced below:

To be read verbatim to the suspect (As per Section 4.2 of ACPOS Manual of Guidance on Solicitor Access):

I am now going to tell you about some rights you have as a suspect. Please listen carefully.

You have the right to have intimation sent to a solicitor (which is another word for a lawyer) that you have attended on a voluntary basis/have been detained/ or have been

89 A so-called 'Form 567:1A' and 'Form 567:1B' (CP (Scotland) Act Statement to be completed by officer detaining suspect under section 14) has to be completed, see Annex 15.
90 See Annex 14.
91 Chapter 3, sections 5.4.3 & 5.4.5.
arrested at this police station. This means that we will tell a solicitor that you have been
detained/arrested/or have attended at this police station if you want us to. Do you understand?
(Yes/No)

You have the right for a private consultation with a solicitor before being questioned
by the police. This means that you can speak with a solicitor without anyone else being
present. Do you understand?
(Yes/No)

You also have the right to a private consultation with a solicitor during police
questioning. Do you understand?
(Yes/No)

Any solicitor contacted will be independent of the police. Any advice they give you
will be independent too. You can speak to the solicitor by phone and this can be
arranged quickly and you can ask for a solicitor to attend here. Legal Aid will be made
available to you if you wish.

'I have told you about your rights to have a solicitor told about your detention/arrest/
attendance at this police station and to have a private consultation with a solicitor
before and during police questioning. I am going to ask you some questions about
your rights. It is important that you listen to these questions and give me answers to
them. Even if you choose not to take up any of these rights just now you can change
your mind at any time. If you say no to taking up any of these rights I will ask you to
sign this form to confirm this. The decisions are about whether you want a solicitor
told about detention/arrest/attendance at this police station or if you want to speak to
a solicitor and decisions for you to make. I cannot advise you whether you should take
up these rights.'

'Do you wish me to intimate to a solicitor that you have attended voluntarily/been
detained/been arrested at this police station?'
(Yes/No)

if the answer is yes:

'Do you wish me to contact any particular solicitor or firm of solicitors? If you have no
preference or a particular solicitor cannot be contacted another solicitor will be
contacted for you.'

(name of Solicitor/firm)  (No preference)

if the answer is no:

Rights read over by: (name)

Corroborated by:

Suspects name:

'Do you wish a private consultation with a solicitor before being questioned by the
police?'
(Yes/No)

if the answer is yes:
The Right to Information on Rights

‘Do you wish me to contact any particular solicitor or firm of solicitors? If you have no preference or a particular solicitor cannot be contacted another solicitor will be contacted for you.’

(name of Solicitor/firm) (No preference)

‘In the first instance you will be provided with the opportunity to speak with the solicitor by telephone to instruct them and seek advice. I will ask you after you have spoken with a solicitor by telephone if you wish a private consultation with a solicitor at any other stage, including during police interview.’

if the answer is no:
Rights read over by: (name)
Corroborated by:
Suspect’s name:
The following question is to be read to the suspect in either of the following circumstances:
- Following the initial private consultation between the suspect and a solicitor OR
- When the suspect has waived their right to an initial private consultation with a solicitor

‘Do you want to have a private consultation with a solicitor at any other time during police questioning?’

if the answer is yes:

‘Do you wish me to contact any particular solicitor or firm of solicitors? If you have no preference or a particular solicitor cannot be contacted another solicitor will be contacted for you.’

(name of Solicitor/firm) (No preference)

if the answer is no:
Rights read over by: (name)
Corroborated by:
Suspect’s name:

Without exception, Scottish police officers we interviewed and observed were frustrated and dissatisfied with the SARP procedure, for a number of reasons.

First, officers noted that the SARP was overly complicated, longwinded and expressed in language that most suspects (and some officers) could not comprehend, such as the suspect’s right to ‘have intimation sent to a solicitor’. The questions were also long, making them difficult to understand. The question ‘Do you want to have a private consultation with a solicitor at any other time during police questioning?’ is very difficult to answer. As a lawyer told us:
They're being asked that question at an inappropriate time, because the person doesn't know at that stage. The suspect may say, "no" when in fact they don't know yet what direction the interview will go in. Also the police thought the question was problematic for suspects: 'What are they supposed to say? Yeah I want one after six minutes into the interview?'

The second criticism expressed by lawyers was that the form does not tell suspects that the solicitor can actually be present during the interview. Indeed the information ‘You also have the right to a private consultation with a solicitor during police questioning’ and the question ‘Do you want to have a private consultation with a solicitor at any other time during police questioning?’ do not state clearly that the lawyer may be present in the interrogation room with the suspect.

Third, the issue that caused the greatest irritation was that the form was overly repetitive. The first part of the SARP form asked suspects if they understand their rights, and the second part asked them whether they want to exercise them. The legal reasoning may be different, but to the suspect it seemed to be the same question, asked twice. We saw during our observations that in the first part, after the question ‘do you understand?’ suspects usually (and unsurprisingly) went on to answer whether they wanted a lawyer. The SARP then required suspects to be asked again if they want legal assistance, in three different ways, even if they initially waived their right or had requested a lawyer in response to a previous question. For suspects who had been detained several times before and were familiar with their legal rights, the requirement to read out the entire form verbatim was a real source of frustration. As one detainee told the officer: 'I feel as if we have just gone through this procedure already and now we're doing it again.' More experienced suspects thought that they were being treated as idiots, and many became agitated when they were asked for the third time if they wanted legal assistance. The response of one detainee was typical: 'Ooh for f**k's sake, I just want to go home man.' Some police officers were concerned that repetition of the question as to whether the suspect wanted a solicitor led to an expectation that they should request one, and another officer suggested that it would be simpler to ask the suspect if they do not want a lawyer. Nearly all police officers and lawyers were of the

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53 ScotTownLaw1.
54 ScotTownPol10.
55 ScotCity2Law3; jScotCity2Law4. We have seen examples of police officers who explain this to suspects, ScotTownPol12.
56 ScotCityPol8.
57 ScotTownPol2.
58 ScotCityPol1.
59 ScotTownPol11.
60 ScotTownPol13.
61 ScotCityPol3; jScotTownPol1.
opinion that the SARF form should be simplified.\textsuperscript{102} One of the police officers suggested:

'It should be as a detained person, you have the right to speak to a solicitor. Do you wish to speak to a solicitor, yes or no? If no, it should be recorded on the form or on camera in an electronic system. No need for the person to sign against every question. The whole thing is recorded by CCTV. If they say yes, we will try to contact their solicitor. Ask them: if that person is not available, do you wish to speak to another qualified solicitor? Straightforward, yes or no. That would be the form.'

It is difficult for officers to administer rights effectively if they are required to do so using instruments that are hard to comprehend, overly bureaucratic or inefficient. One police officer said: 'The general consensus, I believe, is that it's the proverbial sledgehammer to crack a nut. Something could and should have been done and it's gone to the ridiculous stage.'\textsuperscript{103}

Although we observed that there were officers who did not know how to conduct the SARF process effectively,\textsuperscript{104} police officers were generally observed to be reasonably diligent in the administration of suspects' rights, despite their frustration as regards the SARF form. Many of the custody sergeants were time-served police officers who believed in the value of due process rights and so made a real effort to administer notification of these rights effectively.\textsuperscript{105} The presence of CCTV throughout the custody area was also a factor in compliance, although most officers saw the cameras as protecting them, rather than suspects. Where suspects had difficulties in understanding the procedure, especially those detained for the first time, some officers would try to explain more simply what was going to happen. Both in our observations and interviews with them, it was the younger and less experienced police officers who were less positive about the rights of suspects, and particularly the right to a lawyer which, in their view, invariably led to the suspect making 'no comment' during interrogation.\textsuperscript{106}

3. Written Information

As well as being orally provided with information about their rights, we observed suspects being provided with written information on their rights in two ways: by a Letter of Rights in England and Wales and in the Netherlands, and by posters on the walls in and near custody areas in England and Wales and Scotland.

\textsuperscript{102} ScotCityPol5; ScotCityPol8; ScotTownPol8.
\textsuperscript{103} ScotTownPol1.
\textsuperscript{104} ScotTownPol21; ScotTownPol32; ScotCity2Law3.
\textsuperscript{105} ScotTownPol12; ScotTownPol15.
\textsuperscript{106} ScotCityPol1; ScotTownPol1; ScotTownPol18.
3.1. **Letter of Rights**

As set out in section 2.1 above, in England and Wales it was a standard part of the booking-in process for suspects to be offered a Letter of Rights or Notice of Entitlements, a booklet to read and take with them to their cell.\(^{007}\) This Letter of Rights is formulated in simple and straightforward language and, equally important, in an inviting tone. The first page contains three sentences preceded by the text in bold: ‘Remember your rights’ followed by:

1. Tell the police if you want a solicitor to help you while you are at the police station. It is free.
2. Tell the police if you want someone to be told that you are at the police station. It is free.
3. Tell the police if you want to look at their rule-book called the Codes of Practice.

More details about rights are set out in the following six pages of the booklet under the headings ‘Getting a solicitor to help you’, ‘Telling someone you are at the police station’, ‘Looking at the Codes of Practice’, ‘Getting details of your time at the police station’, ‘How you should be cared for’, ‘Keeping in touch’, ‘Your Cell’, ‘Clothes’, ‘Food and drink’, ‘Exercise’, ‘If you are unwell’, ‘How long can you be detained’, ‘When the police question you’, ‘People who need help’, ‘Getting an interpreter to help you’, ‘People who are not British’ and an explanation of when exceptions to the rights apply. The information is given in accessible and reassuring language, such as:

‘When the police ask you questions you can ask for a solicitor to be in the room with you’ and ‘If you ask to speak to a solicitor it does not make it look like you have done anything wrong.’

The only difficult part in the Letter of Rights was the information on the right to silence that preceded all other information and was formulated in the standard form of words for the caution.\(^{008}\) It was not ‘translated’ into easy understandable language, probably because of the difficulty in doing this without losing the essence of the legal implications of the caution. It reads as follows:

‘If you are asked questions about a suspected offence, you do not have to say anything. However, it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.’

\(^{007}\) See Notice of Rights and Entitlements.

\(^{008}\) S. 10.1 Code of Practice C.
In England and Wales, however, the information on the right to silence was not
given orally by the custody officer during the booking-in process, but at the start of
each interrogation. The way in which the caution was administered to suspects
before the interrogation starts will be elaborated further in Chapter 8, section 4.2, in
which we analyse the explanation and understanding of the right to silence. Never-
theless, the informative value of the caution in the Letter of Rights at the moment
when this was given to suspects when they were booked in seemed to be relatively
low, especially for those suspects who had not been arrested and interrogated
before. It was a general finding in all jurisdictions that inexperienced suspects were
particularly likely to waive their right to a lawyer. An English police officer esti-
minated that about 60 per cent of suspects ask for a lawyer and that those arrested
and detained for the first time are less likely to do so. It is questionable whether
such suspects, who therefore do not have a consultation with a lawyer before the
interrogation, will be able to grasp the meaning of the caution from the text in the
Letter of Rights and will be able to decide before the start of their interrogation
whether or not to invoke their right to silence. To understand the England and
Wales caution is difficult enough, even with the help of a lawyer during a pre-
interrogation consultation. Nor will unrepresented suspects have time to effect-
ively consider their position after the caution is explained to them for the first time at
the beginning of the interrogation.

In the Netherlands, the Letter of Rights informing suspects of their right to a
lawyer was occasionally handed out in the police station in NethCity. In
NethTown, the police were vaguely aware of its existence but we never observed it
being given to suspects. Police officers confirmed to us that they knew that there
were pamphlets with regard to some rights, but that they were almost never given
to suspects. If we look at the text of the Dutch Letter of Rights (there is one for
adults and one for juveniles) we can see that regarding the use of accessible lan-
guage, inspiration has been sought from the Letter of Rights used in England and
Wales. The text starts in bold letters 'You have been arrested and taken to the police
station. What are your rights?' and then under the heading 'Know your rights' the
text reads:

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108 iEngCityPol1; iEngTownPol3; iEngCityLaw1; iEngCityLaw2; iEngCity2Law1; iEngLaw2;
iNethCityPol1; iNethCityPol3.
109 iEngTownPol5. Our research revealed that in the Scottish and Dutch sample roughly 50 per
cent of the suspects asked for a lawyer and in the English sample 19 per cent, that sample was
however significantly smaller than for the other two jurisdictions (28 for England and Wales,
94 for the Netherlands and 102 for Scotland).
110 See Chapter 8, section 4.2
111 See for the text You Have Been Arrested (Adults), You Have Been Arrested (Juveniles).
112 iNethCityPol18; iNethCityPol21.
113 iNethTownPol2b. This was confirmed by the lawyers we interviewed, iNethTownLaw1;
iNethTownLaw3.
114 iNethTownPol1; iNethTownPol2.
The police have the right to ask you questions. This is called police questioning.
You have the right
- to not answer if you do not want to; to remain silent
- to talk to a lawyer before the questioning.

It is essential that you know with which situation you are dealing. After you have finished reading this leaflet, you must make a choice, except when it concerns a very serious offence. Therefore read this leaflet carefully.

The text continues, explaining the right to a lawyer under the following headings: ‘Know your situation’, ‘What does the lawyer do before the questioning’, ‘What happens further’, ‘If you yourself may choose’ and ‘Questions?’

Interestingly, the Letter of Rights for juveniles starts off with the same text but after the second bullet point, where it sets out the right to talk to a lawyer, it states ‘If you ask for a lawyer, this does not mean you are guilty.’ This sentence does not appear in the Letter of Rights for adults. Except for the initial text, the juvenile Letter of Rights uses rather complicated language in explaining what situations a lawyer will be assigned and when suspects may choose or have to pay for the consultation with a lawyer themselves.

As mentioned above, in France there was as from May 2013, so after our fieldwork, a Letter of Rights available online. We do not know whether this was available during our fieldwork. We did not observe it being handed out to suspects. The French Letter of Rights uses rather formal language such as: ‘As soon your custodial period begins and, in the event that the said period is extended, from the start of the extension, you may ask to be assisted by the lawyer of your choice’, and ‘You may ask that your chosen or appointed lawyer be present at your hearings and face-to-face encounters [...]’, probably leading the arrested person to puzzle over what a ‘face-to-face encounter’ may mean. The right to remain silent is preceded by the ‘right’ to speak: ‘During the hearings, once you have stated your identity, you may choose to make statements, respond to the questions asked of you, or remain silent.’

Another feature of the French Letter of Rights is that there exist seven variations for different situations, such as a normal arrest, an arrest of a juvenile, when the arrest is terrorism related or for organized crime or drugs offences.

This sentence is not clear from the outset. Suspects have to read further to learn that in case of a serious offence a lawyer will come for consultation and they may only waive their right to a lawyer after having spoken to one.

Comparable with the England and Wales version: ‘If you ask to speak to a solicitor it does not make it look like you have done anything wrong.’

The so called A, B and C categories, see Chapter 5, section 4.4.5 and You Have Been Arrested (Juveniles).

See Notice of Rights.

See Formulaires de notification de garde à vue. See for the English version of these letters of rights, Notice of Rights.
In Scotland there was no Letter of Rights at the time of our research, but such a Letter was introduced in July 2013.\textsuperscript{121}

3.2. Posters on the Wall

In England and Wales, and Scotland, suspects were also made aware of their rights by posters on walls in the custody area. We did not see this in the Netherlands and France. In the EngCity police, in the holding area where suspects were seated on a bench before they were booked in, on the wall facing the bench was a single full-sized poster\textsuperscript{122} with the headline ‘You need a solicitor!’ in big bold capitals, with a smaller paragraph underneath stating ‘If you have been arrested, you have the right to free advice from an independent defence solicitor. Advice is available at any time. Ask the police to contact a defence solicitor for you.’ An A4 sized version of the same poster, with the aforementioned paragraph written in 11 languages was on the wall next to the custody desk.

We also observed a poster in the Scottish police stations in our research, placed on the wall next to the custody bar, with a section stating: ‘If you so desire, a message will be sent to a relative or a friend …’ and another section entitled ‘Communication with law agent’ which begins ‘If you so desire, intimation will be sent to your law agent, with whom you will be allowed a private interview prior to your appearance in Court …’ and, two paragraphs later, ‘You are not obliged to make a statement in relation to the charge against you, but if you desire to so do you can inform the Officer on Duty. You are entitled to have the benefit of legal advice before such a statement is made […] and any statement may be used in evidence.’\textsuperscript{123}

Nevertheless a Scottish policeman admitted that ‘there is a big amount of information displayed on the posters and it takes a bit of reading. It’s impractical, it should be displayed within the area where they are being detained.’\textsuperscript{124}

4. Information Concerning the Accusation and the Reasons for Arrest or Detention

Article 6 of the Directive on the right to information requires that Member States ensure that suspected and accused persons are provided with information about the criminal act they are suspected or accused of having committed. This information must be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. ‘Promptly’, according to recital 28 of the Directive, means ‘at the latest before their

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\textsuperscript{121} See Letter of Rights for Scotland.
\textsuperscript{122} Issued by the Legal Services Commission and the Criminal Defence Service.
\textsuperscript{123} ScotCityPoli.
\textsuperscript{124} ScotTownPoli; ScotTownPoli II.
first official interview by the police’. With regard to the level of detail of the information that must be provided, recital 28 specifies:

'[a] description of the facts, including, where known, time and place, relating to the criminal act [...] and the possible legal classification of the alleged offence should be given in sufficient detail.'

In addition suspects who are detained must be informed of the reasons for their arrest. The Directive does not mention any time limit regarding the provision of information on the reasons for arrest. However, Article 5(2) ECHR provides that the information on the reasons for arrest and the accusation should be provided to the suspect without delay, and it is logical to assume that the right to be informed of the reasons for arrest applies at the moment that suspects are deprived of their liberty.

4.1. Regulation in the Four Jurisdictions

In the four jurisdictions in the research, the regulations regarding information on the reasons for arrest and the suspected offence differed considerably.

In England and Wales, statute provides that a person must be informed of the fact of, and reason for, arrest on being arrested or as soon as practicable afterwards. An arrest is unlawful if this is not complied with. On being detained at a police station, a suspect must be informed of the grounds for detention.

In France, the police must inform suspects immediately that they are in GAV, and of the nature and date of the offence in respect of which they are detained. The suspect must be asked to sign in order to confirm that they have been given this information. This information is to be provided orally, and recorded in writing on the custody record.

During the period of the research there was no obligation in the domestic law of the Netherlands requiring the police to provide suspects with information about the charge and/or the reasons for arrest, although ECHR jurisprudence does have direct application in Dutch Law. However, the Regulation of the Public Prosecutor’s Office concerning access to translation and interpretation for suspects who

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125 Art. 6(2).
126 See also Spronken 2010, p. 46.
129 Art. 63-1 CPP.
130 Arts. 92-95 of the Constitution.
do not speak the language of the proceedings provided that suspects who were brought to the police station must:

'as soon as possible - and in any case during the appearance before the assistant public prosecutor - be provided with brief information about the reasons for arrest and the criminal offence(s) they are suspected of [...]. If the suspect is detained for a longer time, then the information about the suspicion and the manner in which it was given to the suspect should be included in the record regarding taking the suspect into police custody'.

In Scotland, at the time when the police detain or arrest a person they must inform them of the suspicion and of the general nature of the suspected offence, and of the reason for the detention. This later be recorded in the custody record. Upon attendance at the police station, the custody sergeant was obliged to inform the suspect of the grounds for detention (i.e. whether they have been arrested or statutorily detained), but not the nature of the offence for which they were suspected, nor why detention was necessary.

4.2. Information on the Accusation and Reasons for Arrest or Detention in Practice

We were able to observe how suspects were informed of the accusation, and the reasons for arrest and detention, upon arrival at the police station in England and Wales, and in the Netherlands. However, we were not able to do so in Scotland, because this information was given at the time of arrest or detention, so before suspects arrived at the police station, and not in France because we were not permitted to observe the process of 'booking-in' suspects at the police station when this information is required to be given. It must be noted, however, that we were not able to observe what information was given to suspects at the time of arrest in England and Wales and in the Netherlands.

4.2.1. England and Wales

Research conducted in England and Wales in the 1990s suggested that the information provided to suspects regarding the reasons for detention consisted of little more than reciting one or both of the statutory grounds for detention without charge, namely that detention was necessary to secure or preserve evidence, or to obtain evidence by questioning. This was confirmed in what we observed. Nor-
nally, when the suspect was brought before the custody officer by the arresting officer, the latter informed the custody officer, in the presence of the suspect (so not addressing the suspect directly), of the alleged offence, and the custody officer subsequently informed the suspect of the grounds for detention in the limited manner found in the earlier research. The following observation of our researcher is illustrative:

Arresting officer tells custody officer that the suspect was stopped and searched outside a pub and found to have a small bag of cocaine hidden inside one of his socks. ‘...and we’ve brought him back to further prompt and effective investigation.’ The custody officer says to suspect, in a friendly manner, ‘Okay, so just after the grounds for arrest were given [outside the pub] you said [to the arresting officer] ‘Yeah, it’s definitely cocaine.’ Are you happy to sign for that?’ The suspect says ‘Yes’ and does so.

The custody officer then asks the arresting officer whether the suspect has been any trouble. The arresting officer says ‘No’. The custody officer then turns to the suspect and says, ‘It says here on your record that you’re no trouble...’. The suspect replies, ‘If you done it and you’re caught, you might as well admit it...’ The custody officer then says he’s going to authorise detention on the grounds of 1) securing evidence, and 2) obtaining suspect’s account in interview.

As regards the level of detail of the suspected offence that is given, the following observations of the account of the allegation provided by the arresting officer are typical:

A man, X, had contacted the police and reported that on 5 July three people with colds had visited his address, they’d poured bleach all over his walls, caused other damage to the property and since then he’s reported being harassed on several occasions. The suspect is one of the three.

Suspect was caught walking out of a local Tesco’s with 5 Blu-ray DVD’s in between a magazine, worth approximately £80.

Sometimes, no reasons for detention were given to the suspect, or the suspect was merely told something like, ‘We have to keep you here for the time being’, and the custody officer would then continue to read out the suspect’s rights after being briefed by the arresting officer regarding the suspected offence.

134 EngCityPol9; EngCityPol12; EngCityPol14; EngCityPol19.
135 EngCityPol11.
136 EngCityPol12.
137 EngCityPol19.
138 EngCityPol9; EngCityPol12; EngCityPol14; EngCityPol19.
4.2.2. The Netherlands

In the Netherlands, it is the duty of the assistant prosecutor to inform suspects of the criminal offence they are suspected of when they are brought before them upon arrival at the police station. We observed that this was normally done.

However, we did not observe suspects being informed of the reasons for their arrest or the grounds for their detention. The grounds for initial police detention (i.e., the first six hours, which may be extended to 15 hours) are the need to identify the suspect (where identity is not clear) and/or the interests of the investigation. The latter can include a range of activities such as interrogating the suspect, confrontation with witnesses and other investigative acts such as taking hair or DNA samples, taking photographs, etcetera.130

The level of detail provided to suspects regarding the alleged offence was very low, and only a brief description was given, such as ‘stalking your ex-wife’,143 ‘causing bodily harm’,144 or ‘you did not comply with the order of the police. Did you know this is a crime in the Netherlands?’145 Assistant prosecutors would often first ask the suspect whether they knew why they had been arrested.146 Whilst suspects were generally given brief information about the nature of the suspected offence they would often subsequently tell their lawyer, during the lawyer-client consultation, that they did not have a clue why they had been arrested,147 or that they had been told of various accusations that changed all the time.148 For example, in one case the suspect told his lawyer in detail what had happened after he was arrested:

He tells the lawyer that he was ‘informed’ by the police about a suspicion three times, and all three times it concerned three different offences: burglary; theft with violence; and theft and embezzlement. The police had also told him that it concerned an iPhone. He was arrested in X district, first taken to the district police station in X, then to a central station in X - and then they left for a police station in Y. He was asking himself why Y, because he has never lived in Y - but only in Z and W. He further said that he had never had an iPhone in his possession.149

Suspects often told the police that they did not understand the allegation. A suspect who was asked by the interrogating police officer what his reaction was to the fact that he had been arrested responded that he had no idea why he had been arrested:

130 Art. 61 CCP.
140 NethCityPol12.
141 NethCityPol13.
142 NethCityPol17.
143 NethCityPol7; NethCityPol25.
144 NethCityLaw3; NethCityLaw7.
145 NethCityLaw10; NethTownLaw10; NethCityPol27.
146 NethTownLaw10.
He said that there was a lady who had come to give him a number of articles from the Criminal Code, and explained very vaguely that it had to do with having, selling, etc. drugs (particularly hemp). But he did not understand this accusation, because he was not involved in drugs—he only smoked a joint once in a while.\textsuperscript{147}

One of the problems that we have observed is that the assistant prosecutors who are required to inform suspects of the suspected offence were often not aware themselves of the details and the relevant facts regarding the suspected offence. For instance, on one occasion the assistant prosecutor told the suspect that he was suspected of ‘dealing’, without providing any details of the suspicion. He did not know anything about the case because this was all the investigating officer had told him. When the suspect said, ‘But I have not done anything...’ the assistant prosecutor interrupted him, saying that this was what the police suspected, adding that it was not his task to hear what happened.\textsuperscript{148}

We observed that the police sometimes did not provide full information to suspects for strategic reasons. For example, in one case the police, for ‘tactical reasons’, did not inform the suspect of their suspicion that he had been involved in numerous offences.\textsuperscript{149} The researcher learned this from a conversation that she observed between the officer and the assistant prosecutor:

P: ‘Why did you instruct officer X to call you first, before getting the lawyer from the front entrance?’

AP: ‘Because we found drugs, money, fake money and a safe in S’s house.’

P: ‘And the lawyer is not aware of that?’

AP: ‘No, not yet. He thinks S is arrested just for threatening police officers.’

P: ‘Aha, okay, and why would you inform the lawyer now about this?’

AP: ‘Because now we will not only interrogate S about the threat, but also about the other evidence, probably leading to other crimes. In light of 	extit{Salduz}, this is easier. Otherwise we will have to stop the interrogation, call the lawyer regarding the other suspected offences, wait, and then continue the investigation. This way, the lawyer can consult with his client about everything all at once and the investigative officers can interrogate S about everything.’\textsuperscript{150}

5. **Vulnerable Suspects**

In all jurisdictions where we were able to observe, the police were well aware of the difficulties as regards informing young or otherwise vulnerable suspects of their
rights. As a Dutch police officer put it, when he was asked whether suspects understood their rights:

Not everyone, because not everyone has an idea, or ability to understand this. Yes, then you must explain it well. And particularly in respect of minors this is quite difficult to explain this well because yes, especially if you come across something like this for the first time, then you don’t understand any of it. Then you are already in panic that you sit here, let alone you understand what has happened. And in these cases when they are completely incapable [of understanding what the right to a lawyer means] then ... this is what yeah the little book is for. [The “Letter of Rights”]... There is quite enough information [in the Letter or Rights] to get and to give to the suspect. 151

As we have set out in section 2.1 above, in the Netherlands and France there were no additional safeguards to secure adequate provision of information to suspects who are vulnerable or juvenile. The only extra safeguard in the Netherlands was that (some) juveniles and vulnerable suspects cannot waive their right to a lawyer in certain situations in which a consultation with a lawyer before an interrogation is compulsory. 152 Although in the Netherlands a juvenile could choose between consulting a lawyer or their parent or guardian (trusted person), the position of the latter cannot be equated to that of the appropriate adult in England and Wales and Scotland. In the Netherlands the parent or guardian is supposed to have the same position as the lawyer and the suspect has to make a choice between speaking to a lawyer or speaking to their parent or guardian. 153

In France juveniles are not considered able to give informed consent when they are under 15 years old. The law states, therefore, that that they should not be able to waive their right to a lawyer or a doctor themselves, but their parent or guardian should be present and make these decisions for them. 154 One French lawyer told us that with regard to adult vulnerable suspects, there is not really a provision in the law to protect their rights during the GAV:

I’ve seen memos from colleagues where they clearly state that the suspect is not in a [fit] state to be interviewed. The law doesn’t say that police officers can ask for a lawyer to be present. It’s for the suspect to decide whether or not they want one. Police officers should be able to say in some cases if they think the suspect should have a lawyer. The law doesn’t say it, so they don’t do it. It would be weird for police officers to ring the coordinator to say: "He doesn’t want a lawyer, but I think he should have one." It would be weird for police to ask for a lawyer to come! The law doesn’t say, but for an adult under legal supervision, the supervisor should be able to say whether or not a lawyer is needed. I never had such a case but I realise that it’s not in the law. At

151 See Chapter 3, section 4.6.
152 See Chapter 3, section 4.4.5.
153 See Chapter 3, section 4.7.
154 See Chapter 3, section 4.4.4.

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court, the legal supervisor or guardian can say whether or not a lawyer is required, so why would it be different for the GAV?\[155\]

As this remark makes clear, the position of juveniles and vulnerable suspects during the GAV have not yet been considered in any depth in France.

In England and Wales, and Scotland, extra protection was provided by the presence of an appropriate adult when the information concerning rights is administered to the suspect. Appropriate adults are normally parents, guardians or social workers and are independent of the police.\[156\] The appropriate adult’s task is to look after the suspect’s welfare, to advise the arrested person, to observe whether communications are being conducted properly and to facilitate communication with the police.\[157\] With juveniles under 18 years in England and Wales and 17 years in Scotland there should always be an appropriate adult present. In most instances this will be their parents or carer\[158\] and they are required to consider whether legal advice from a solicitor is required.\[159\] Juveniles attended by parents and carers are less likely to request a lawyer than those attended by social and voluntary services. This is likely to be because the latter are more aware of the importance of legal advice.\[160\] In the case of adult vulnerable suspects it was the police who must assess their ability to understand what they are told. On the question of how police officers assessed whether an appropriate adult was needed, a Scottish police officer told us ‘Constant judgment basis; when you get a blank stare, you know full well that their intelligence level will not allow them to understand what you have asked of them.’\[161\]

There was a mixed picture from our observations as to the effectiveness of appropriate adults in safeguarding the rights of vulnerable suspects in England and Wales, and in Scotland. A Scottish lawyer told us that sometimes appropriate adults were very good and are able to explain to the suspect what the caution entails, but in other cases that he had observed, they were rather ineffective.\[162\]

In England and Wales we observed a 14 year old juvenile who, in the presence of an appropriate adult from social services, was given a careful explanation of the detention procedure by the custody officer, and was given a breakdown of what would happen in the police station, but who seemed extremely upset and bewildered throughout. It was obvious to the researcher that the explanation was given too quickly and that the juvenile seemed incapable of taking anything in. Nevertheless, there was no interruption or explanation by the appropriate adult. The police told

\[155\] iFranCityLaw9.
\[156\] S. I.7 Code of Practice C.
\[157\] S. 11.17 Code of Practice C. See also Home Office 2013.
\[158\] Medford, Gudjonsson & Pearse 2003; Pierpoint 2008.
\[159\] S. 6.5A Code of Practice C.
\[160\] Kemp, Ploos van Amstel & Balme 2011, p. 38.
\[161\] iScotCityPol8.
\[162\] iScotCityLaw1. The same was expressed by other lawyers: iScotTownLaw1; iScotTownLaw2.
us later on that this often happened when the appropriate adult came from social services: "They just hang there and never say anything."  
An English lawyer made the following observation:

‘Appropriate adults have different responsibilities to me. Mine is to provide legal advice, theirs is to provide personal support and assistance. There’s a problem with it, insofar as it’s provided by a voluntary organisation, who are unable to provide cover late at night and sometimes at weekends, so I’ve had experiences where juveniles have been bailed time and time again awaiting interview, simply because there’s no appropriate adult available. However, it can be that a family member will act as an appropriate adult. But certain family members don’t want to come to the station to act as an appropriate adult. But the appropriate adults do a good job. However, sometimes they overstep the mark and try to give legal advice, which in my opinion is not okay, since they are just not qualified.”

A similar remark was made by a Scottish police officer who told us that the danger of having a parent as appropriate adult is that they can get emotionally involved. Therefore, according to him, a risk assessment of the relative needs to be done beforehand. In particular, if the case involves a sexual offence, the duty officer will need to assess whether involving a relative is a sensible option. The same police officer said that one in three suspects brought in to the police station suffers from a learning difficulty, a mental health issue, and/or an addiction to drugs or alcohol, which itself can lead to issues around vulnerability. Usually, where a suspect was thought to require an appropriate adult, the police would call out an appropriate adult first and then the doctor, who would assess whether or not the suspect is fit for interview.

6. Obstacles to the Effective Communication of Rights

A range of factors can undermine the administration of suspects’ rights. These include the various ways in which rights are explained to suspects; the commitment of police officers to ensuring that suspects understand their rights; the (lack of) procedures that are designed to support the police role, or indeed procedures that have proved to be counter-productive such as the SARF procedure in Scotland. More generally, we witnessed other factors that, in practice, also hampered the police in communicating the information to suspects. Firstly, most suspects wanted to be released from custody as soon as possible, and listening to information about their rights or making a decision about whether or not they want a lawyer, was not their first concern. Second, a significant proportion of arrested and detained persons were drunk or under the influence of drugs and simply not able to take in the

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363 EngTownPol6.
364 ScotCity2Law2.
365 ScotCityPol11, also corroborated by what Scottish lawyers told us: ScotCity2Law3; ScotCity2Law4.
information that was provided to them. Finally, there were translation issues when rights had to be communicated to suspects who were not able to speak the same language as the police.

6.1. *The Wish to Be Released as Soon as Possible*

A general finding of fieldwork throughout the four jurisdictions was that most suspects wanted to get out of the police station as soon as possible, and this was also the main reason for refusal of legal assistance. The following example from a Scottish police station concerns a suspect who was suspected of having written offensive letters to his neighbour and was brought in for a handwriting comparison to be made:

> When he arrived at the change but he seemed very eager to go home as soon as possible and he remained this way during the intake and the SARP procedure. When informed about his right to a solicitor the suspect said:
> 
> Suspect: ‘Do I need one?’
> 
> Custody Officer: ‘It is up to you.’
> 
> Suspect: ‘Is it just for the letter thing?’
> 
> Custody Officer: ‘Yes, we’re anticipating that you’re not here for long.’
> 
> Suspect: ‘Then, no I don’t want one.’

That concluded the processing by the custody officer and it was clear that the suspect was not happy that he then had to be SARP’d as well. During the SARP the suspect was very dismissive and reluctant to cooperate [he made a dismissive waving gesture with his hand], saying: ‘I don’t need a lawyer; I just want to go home.’

Police officers told us that often when they were informing suspects of their rights, especially first time detainees, they might ask whether it takes longer if they want to have a lawyer. Most police officers felt that they could not answer that question, because often it would not make any difference. However, in serious or complicated cases, or where the suspect was intoxicated, suspects would normally not be dealt with immediately in any event. Police felt that to be fair to suspects they would say to them that it would take some time.

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365 EngCityPol11; NethCityPol13; NethCityLaw2; ScoTownPol13. See also Chapter 6, section 3: The suspect’s decision to request legal advice.
366 ScoTownPol13.
367 iEngCityPol13; iNethCityPol2; iNethCityPol15.
6.2. *Drunk and Intoxicated Suspects*

We observed many cases where it was difficult for the police to communicate with suspects and to explain their legal rights to them, because the suspect was drunk or under the influence of drugs when arrested. This was especially so in England and Wales and in Scotland, although these situations also occurred frequently in the Netherlands. The following example is illustrative:

The suspect kept pleading to the duty officer that he just wanted to go home, but was told by the officer multiple times that he would be kept at the police station to sleep off the alcohol and he would then be released.

S: 'I just want to go home. Just drop me off at the street please, I can't go to a cell.'

DO: 'I can't do that mate. You'll be kept here until you're sober.'

S: 'So, when I am sober, can I then leave?'

DO: 'I am not going to lie to you. You have to stay here, but when you're sober you can leave yes.'

DO: 'Do you want a lawyer?'

S: 'Do I need one?'

DO: 'You'll probably go out later, you can talk to one if you want then.'

S: 'I don't need a lawyer.'

6.3. *Interpretation and Translation Issues*

The problems faced when informing suspects of their rights, who do not speak or understand the language are described and discussed in Chapter 4. As regards informing suspects with written information we observed in all jurisdictions, that the processing of suspects took place orally with few documents handed to the suspect at all. It was not always the case that the information was available in the proper language. The Letter of Rights in England and Wales is available online in 54 languages and the website provides audio versions that suspects may listen to if they cannot read. The Dutch Letter of Rights is translated into eight languages, although we did not observe any case in the Netherlands where the Letter of Rights was provided in a foreign language. The French Letter of Rights is available online in 16 languages and we have been told that foreign suspects were shown a copy of the pro-forma in the language they understand and given just enough time to

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SectTownPolD.

See Chapter 4, section 4.1.


See Notice of Rights and Entitlements.

See Formulaire de notification de garde à vue.

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read it. They then had to sign to say that they had read it, but were not permitted to keep it. French-speaking suspects were read their rights at the time of arrest and are later asked to sign in order to verify that this had been done. However, they were not asked to read the Letter of Rights, nor were they given a copy to keep with them.  

7. **Perceptions of Police and Lawyers as to the Effectiveness of the Provision of Information on Rights**

Almost all lawyers we interviewed were of the opinion that although in general suspects were informed of their rights, they did not really know what these meant or entailed. A French lawyer told us:

> 'When I ask suspects whether they’ve had their rights notified, they say yes. When I ask whether they’ve been asked to sign a paper, they say yes. That’s how rights are notified. Do they understand their rights? Not really, it’s a very agitated time. Arrests are never very gentle. Some of them follow the police without problems but some arrests require some force to be used by the police. So, they don’t really notify the rights during the arrest. Maybe it happens like in the films where they say: “You’ve got the right to remain silent” whilst pinning them to the ground. When your arm is being twisted behind your back, I’m not sure your brain works properly.'

Or as a Dutch lawyer said:

> 'No, most suspects do not know what their rights are. This can be for two reasons, and it is mostly a combination of the two. Firstly, police may not find it important that suspects should know what their rights are. So the explanation of the rights can be done in a very cursory way. Also, a suspect is often not in the position to oversee all the facts and circumstances [after arrest]. So, it is very important that there is now a right to speak with a lawyer before the first interrogation. Because I have experienced very often during my police station duty that people completely did not realise what had happened to them. So then I had to explain to them every step from the very beginning, and sometimes twice. And my impression is that the police do not invest any effort in this.'

Police officers were more positive in this respect although they acknowledged that it might be difficult for a suspect who is arrested for the first time to understand their rights, as the following observations made by police officers in interviews demonstrate:

> 'I think that most suspects know what their rights are. This depends of course if you have a “first offender”, a minor or a seasoned criminal. Or there are seasoned criminals...'

174 Confirmed by our French researcher on 19 August 2013.

175 iFrnlaw2.

176 iNethTownLaw3.
also among minors. They would always name a particular lawyer. With minors I
usually take time to explain their rights in simpler language and in more detail. For
example, I would not say “consultation assistance” – because they would not under-
stand it – but “a talk with a lawyer.”

The rights can be hard to understand for anybody, so I won’t read out verbatim the bits
on rights, I will explain it in layman’s terms reasonably simply, I don’t think it’s that
difficult. I think some of the risk assessment that comes up on the computer is not
entirely straightforward though, and I think that some of their answers could well be
swayed by some of the wordings of the questions [...] overall I think the rights ones
are relatively straightforward in that legal advice means that you can speak to a lawyer
and it’s free and it’s an independent lawyer and you can speak in private and you can
let somebody know that you’re here and I can let you make that call. Suspects are
informed of this right.

A lot of people scream and shout that they do, but often they don’t – quite simple –
know that they have a right to a solicitor and need to have someone told that they are
in custody. Often they are wound up because they believe they are innocent, so they
are not interested to listen – I’m the bad person who’s brought them in and so the last
person to listen to and they don’t bother listening, they are not interested. [...] Many
repeat offenders – 85 per cent know though their rights on being detained or
arrested.

Both lawyers and police were of the opinion that it makes a difference whether the
suspect is ‘experienced’ (that is, have previous experience of being arrested or
detained) or inexperienced. As a police officer said with regard to the Notice of
Entitlements:

‘... most of our regulars just leave it on the desk, they know it anyway. The first timers,
they might take it off to the cell, read it, might say: ‘I never know I could make a phone
call!'...”

A possible explanation for the difference in perception between lawyers and the
police may lie in what they considered to be ‘knowing their rights’. Certainly those
police officers who really made an effort to explain the rights of the suspect prop-
erly, had the perception that this was also understood by the suspect. As will be set
out more in detail in Chapter 8, section 4.2, there is, however, a distinction between
knowledge of a right and understanding its implications. Lawyers were more con-
cerned with the latter. The Letter of Rights in England and Wales mentioned that
anything a suspect says may be given in evidence, but neither the Netherlands’
Letter of Rights for adults, nor the French Letter of Rights set out the evidential
consequences of giving statements to the police. Only the Dutch juvenile Letter of
Rights said that everything the suspect says will be officially recorded and that the

177 HNorthCityPol2; HNorthCityPol1.
178 HEngCityPol3.
179 HScotCityPol7.
180 HEngCityPol11.
records may be given to the public prosecutor and the court, without spelling out that this information may be used against the suspect in evidence. We did not observe the police providing such information to suspects orally.

8. Conclusions

We started this chapter by stressing the importance of suspects knowing and understanding their rights at an early stage of detention in a police station in order to ensure that the protective value of those rights will be effective in practice. We have seen very different approaches and procedures in relation to how the notification of rights is administered by the police in the jurisdictions in our study. However, there were also common difficulties that the police faced in each jurisdiction in adequately informing suspects of their rights. These included time constraints, the fact that some suspects were not really interested in their rights or in being informed of them (often because, understandably, they had other concerns), the fact that some arrested persons were drunk or under the influence of drugs, and difficulties with interpretation facilities where suspects did not understand the language.

There were also gaps in the legal regulation of the information on rights provided to suspects, when compared with the requirements of the EU Directive on the right to information.181

- In none of the jurisdictions in our study did the law require that information should be provided on how to have detention reviewed; that suspects should be informed that they have a right to translation of (certain) documents; or that suspects should be informed of the accusation in the detail required by recital 28 of the Directive.182
- Only in England and Wales were suspects informed in the Letter of Rights of the maximum period that they may be deprived of their liberty, before being brought before a judicial authority.
- In the Netherlands and France suspects were not informed of the reasons why their arrest or detention was necessary.
- In all four jurisdictions in the study, foreign suspects had the right to inform their consulate or embassy of their detention, but only in England and Wales were they informed of this right in the Letter of Rights.
- The same applies to the right to interpretation, which was mentioned only in the England and Wales Letter of Rights.
- Only in England and Wales and France was information provided on medical assistance: in England and Wales in the Letter of Rights, and in France orally.

181 See section 2.1 above.
182 See section 4 above.
- Only in England and Wales were suspects provided with a Letter of Rights to keep in their cell. In the Netherlands, as this was not required, there was no consistent practice to hand out a Letter of Rights to suspects.

### Table 2: Legal requirements re information provided on suspects’ rights compared with requirements of the EU Directive

<table>
<thead>
<tr>
<th>Requirement</th>
<th>England &amp; Wales</th>
<th>France</th>
<th>Netherlands</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to a lawyer and when this is free</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Right remain silent</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Right to interpretation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to access to materials of the case</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to translation of documents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to information on the accusation</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Details of the accusation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maximum period of detention</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to have detention reviewed</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to make request for release</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to contact consular authority</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Information third person</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Medical assistance</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Letter of Rights</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The fieldwork and observations enable us to draw the following general conclusions regarding the right of suspects to be informed of their rights.

First, notification of rights was not always adequately or clearly provided for in legislation, nor were these requirements set out in sufficient detail to ensure compliance. As a result, police officers responsible for administering suspects’ rights enjoyed a great deal of discretion, and in some instances, suspects were denied information for ‘tactical’ reasons. A standard Letter of Rights was not always handed over to suspects, even when such a Letter of Rights was available.

It is important to have clear procedures on how rights should be administered together with a designated space or room within police stations where suspects can be informed of their rights, and adequate mechanisms to check whether the legal requirements have been complied with. In this respect, of the jurisdictions we observed, the booking-in procedure in England and Wales demonstrated best practice.

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X means there was a regulation or legal provision at the time when the fieldwork was conducted.
It is important that notification of rights is provided by a police officer or official who is independent of those officers investigating the case who, as we saw in the Netherlands, may have competing interests. CCTV surveillance of the booking-in process may also help to ensure compliance with the rules, even if any omissions in the provision of rights can only be assessed by a judicial authority at a later date. There is always a danger that the provision of rights becomes a routine that has to be got through, a set of boxes to be ticked, but we have seen good examples in England and Wales of custody officers making real efforts to inform suspects as effectively as possible. We also observed examples of this in the Netherlands but (not doubt because of the lack of training and the absence of legal regulation and guidelines) whether or not information was provided to suspects in an understandable way, depended almost entirely on the personal approach of the assistant prosecutor concerned. As regards Scotland, our research indicates that the SARF procedure was not well designed for practical application and led to much frustration on the part both of police officers and of suspects. This undermines the process of communication, and is very demanding for police officers who may be strongly motivated to provide rights adequately and effectively, but who are bound by prescriptions and formats that are counterproductive.

We also observed that the language used in the provision of information matters, whether it concerns oral or written information. It proves to be very difficult to explain rights and procedures in a form that lay people can understand, and it is even more difficult to do this when the arrested person is under stress, as most suspects are. Again England and Wales provided an example of good practice. The information that was given was straightforward and the Notice of Entitlements or Letter of Rights was written in an accessible language, available in many languages and even in the form of an audio-recording. We think it is important that police officers are provided with formats and examples of how they can explain rights and procedures in ways such as those employed in England and Wales and, in addition, that they be given training on how to use these texts in different circumstances.

Timing is also an important issue. We have seen in all jurisdictions that suspects are not only told what their rights are, but also that they have to decide immediately whether, for instance, they want to consult a lawyer or waive that right. They are given written information, but are normally given insufficient time to read it, preventing them from asking for additional information and from making an informed decision. Inexperienced suspects are potentially in a disadvantaged position compared to those who have previous experience of arrest and detention, and who possibly can consider beforehand whether they wish to waive their right to a lawyer or exercise their right to silence. It would be better if suspects were allowed some time to consider their position after being informed of their rights, and after having read through the Letter of Rights, instead of being asked immediately whether they wish, for example, to exercise their right to a lawyer. This aspect was not considered in any of the jurisdictions we observed, although suspects in
England and Wales and Scotland are informed that they can exercise their right to a lawyer at any time during their detention. In this respect an interesting finding during the pilot training in the Netherlands, 384 was that Belgian police officers who participated in the training, told us that in Belgium it is not possible to waive the right to consult a lawyer without first speaking to a lawyer. Because there is always some time available while waiting for the lawyer to come to the police station after the suspect has been brought in, suspects are handed over the Letter of Rights after the rights have been read to them and are put in a separate cell or room to wait for the lawyer. During this time they can read the Letter of Rights and consider their position, or ask questions if something is not clear to them. The lawyer who attends the police station will then also be in a better position to answer questions and explain their role to the suspect.

In England and Wales, there was a timing issue concerning the provision of information on the right to silence, 385 which operated to the detriment of unrepresented suspects: because they did not have the benefit of advice from a lawyer before the interrogation started and the right to silence was not explained until they were in the interrogation, unrepresented suspects did not have time to consider properly whether to exercise their right to silence or what the consequences of their decision might be. Although they were provided with a Letter of Rights before the interrogation started, this was probably not enough to ensure that any decision was fully informed.

All three aspects mentioned above: procedure, language and timing are crucial because the ECHR has set out very clearly that a waiver of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that suspects are fully aware of their rights of defence and can appreciate, as far as possible, the consequence of their conduct. 386 Our research reveals that it is highly questionable whether all suspects who waive their rights are aware of the consequences, because sometimes they do not understand their rights, or are under time pressure to decide whether or not they want the advice of a lawyer. In this respect a quote of a Scottish lawyer is illustrative:

"There’s a big problem about waiver. There was supposed to have been, months ago, a Letter of Rights given to suspects. That hasn’t happened yet. My view is that the SR&R process 387 is inadequate. It doesn’t tell them about legal aid; it doesn’t tell them there can be advice by telephone. It doesn’t tell them, actually, that the solicitor can be present at interview, which is a big one, I think. And it’s kind of skipped over by the police. There’s some interesting things about the actual timing of the SR&R procedure, when the form is actually signed by the suspect, and there’s no attempt at all by the

384 See the Training Framework in Annex 1.
385 See section 3.1 above.
387 As it was at that moment when the lawyer was interviewed. It has been changed afterwards and some aspects the lawyer mentioned were amended later.
police, because they're not required ... to check what it is that they understand, what it is that they're giving up. In the [police] guidelines, it says that if there's any vulnerability at all, special care should be taken. But there's nothing on SARF to indicate this, so the police don't actually take special care; they just go through the form, regardless of the suspect's understanding of English, regardless of any vulnerabilities. The SARF process is inadequate, which is in turn having a knock-on effect in relation to waiver. The level of waiver is far too high.
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You Have Been Arrested (Juveniles)
THE ORGANIZATION OF CUSTODIAL LEGAL ADVICE AND ASSISTANCE

1. Introduction

The right to legal assistance is recognized as an essential guarantee of the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) and it is now also legislated for in the European Union (EU) Directive on the right of access to a lawyer in criminal proceedings and of the right to communicate upon arrest. However, providing suspects with a statutory right to legal assistance whilst detained in police custody does not guarantee that suspects will receive legal advice, nor that they will receive effective legal advice. As set out in Chapter 3, whilst all four jurisdictions in our study make statutory provision for suspects to receive legal assistance, the nature of these provisions differs significantly. Suspects in all four jurisdictions are entitled to confidential legal advice prior to police interrogation, but the lawyer-client consultation is limited to 30 minutes in France and the Netherlands. The lawyer may be present during the police interrogation of the suspect in France, Scotland and England and Wales, and in some cases in the Netherlands, but there may be limitations on the interventions they may make (as in the Netherlands and France), or lawyers may choose to provide telephone advice rather than attending the police station (as in Scotland).

The potential benefits of suspects receiving legal advice and assistance are recognized by the jurisprudence of the European Court of Human Rights (ECHR)

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1 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 283/29 August 2013.

2 By law in France and through prosecution guidelines in the Netherlands.

3 Juvenile suspects may have either a lawyer or a trusted adult present during the police interrogation.
and the EU Directive on the right of access to a lawyer.\textsuperscript{4} The Directive provides that Member States must ensure that suspects are able to have a private and confidential meeting with a lawyer prior to police interrogation, and that the lawyer may be present during interrogation. Many suspects will not know the name of a lawyer, or how to contact them. The Directive requires Member States to make information available to suspects to facilitate them in obtaining a lawyer. It also requires Member States to make the necessary arrangements to ensure that suspects are in a position to effectively exercise their right of access to a lawyer.

As well as advising the suspect on their defence case, the lawyer's role is seen as important in ensuring the legality of the procedure,\textsuperscript{5} and in enabling suspects to understand and to exercise their other rights.\textsuperscript{6} The EU Directive recognizes this and requires suspects to have access to a lawyer as soon as possible in order that they may exercise their rights of defence practically and effectively.\textsuperscript{7} It is not anticipated that the lawyer's role in interrogation should be passive; the Directive states that suspects have the right for their lawyer to be present and to participate effectively when the suspect is questioned. As set out in Chapter 7, this is not currently the case in all jurisdictions. It is likely that some Member States will have to make more generous provision for the role that the lawyer is permitted to play during the interrogation of the suspect, but under the Directive national differences may continue to exist provided they do not interfere with the effective implementation of the rights under the Directive. For example, the lawyer's participation in the police interrogation may be regulated by the Member State, provided that this does not 'prejudice the effective exercise and essence of the right concerned'.\textsuperscript{8}

If lawyers are to advise the suspect effectively, be able to verify the legality of the detention and begin building the defence, they will require information about the charges and the reasons for the suspect's detention. The amount of information that the police are required to disclose varies across jurisdictions,\textsuperscript{9} and in practice, more information is disclosed to lawyers than to suspects. Article 5 of the Directive on the right to information in criminal proceedings requires that Member States ensure that this information is provided promptly and in sufficient detail 'as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence'.\textsuperscript{10} Article 7 goes on to require that suspects or their lawyers are given access to case material that is essential to the effective challenge of the

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\textsuperscript{4} See Chapter 1, section 2.5.4.
\textsuperscript{5} See ECHR 12 July 1984, Cun v. Austria (B 79); ECHR 4 March 2003, Ocalan v. Turkey, No. 63486/00 and Chapter 1, section 2.3.5.
\textsuperscript{6} The ECHR has stated that the principle of equality of arms requires the suspect at the police station to be afforded the complete range of interventions inherent to legal assistance. ECHR 13 October 2009, Lagman v. Turkey, No. 7377/03. See Chapter 1, section 2.3.5.
\textsuperscript{7} Art. 5 EU Directive on the right of access to a lawyer.
\textsuperscript{8} Art. 3 para. 3(b).
\textsuperscript{9} See Chapter 3, sections 2.4.4, 3.4.4, 4.4.4 & 5.4.4.
\textsuperscript{10} Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, O.J. 1.6.2012 (L142). See Chapter 1, section 2.5.3.
lawfulness of the detention and to the fairness of the proceedings and to prepare the defence.\textsuperscript{13}

In addition to a robust legal framework, effective custodial legal advice also depends on the availability of an independent and competent legal profession. Police station work is different from the work traditionally carried out by most criminal lawyers, such as advising clients in the office and representing them at court. The workflow is unpredictable, which makes it difficult for lawyers to incorporate it into their working day (and night). It is also requires a different set of skills from the other types of work carried out by most criminal lawyers. At the police station, as well as advising the suspect, lawyers must negotiate with the police to obtain information and they may come into conflict with officers in, for example, seeking to challenge aspects of the detention or interrogation procedure.

For these reasons, when the suspect's statutory right to legal assistance was first introduced in England and Wales, solicitors were unprepared for the new role they were required to undertake and in particular, for the disruptive nature of police station advice work. Many lawyers preferred, therefore, to delegate police station advice work to unqualified and inexperienced staff, leaving solicitors free to carry out their court and office work. Suspects suffered as a result. They were attended by individuals with no formal training, and with little knowledge of criminal law or evidence. As a result they did not receive anything that might properly be termed 'legal advice'.\textsuperscript{12} This was addressed in England and Wales by the introduction of a training requirement for all police station advisers (qualified solicitors and their 'representatives'), which improved the quality of police station advice work considerably.\textsuperscript{13}

It will be for the legal profession in each jurisdiction to ensure the availability of lawyers to provide custodial legal advice to suspects promptly and effectively, as required by the Directive.\textsuperscript{14} In order to guarantee the quality of legal assistance, this will include ensuring that levels of competence are set and that proper training is available. Different modes of delivery are possible under the Directive, as in England and Wales, and both qualified lawyers and individuals accredited by an authorized body to provide legal advice and assistance are included in the Directive under the term 'lawyer'.

In this chapter we look at the organization of the provision of legal advice and assistance to suspects. This includes the arrangements in place to inform suspects of their right to legal assistance and to contact a lawyer or legal representative if requested; the facilities provided for consultations; the suspect's decision to request

\begin{itemize}
\item \textsuperscript{13} Art. 8 requires Member States to put in place a procedure to challenge the refusal to provide this information.
\item \textsuperscript{12} McCurrie & Hodgson 1993.
\item \textsuperscript{13} Bridges & Choong 1988.
\item \textsuperscript{14} Arguably, since the Member State has obligations under the Directive, and can influence the delivery of legal assistance, the State or state institutions also have a role in ensuring the availability of lawyers.
\end{itemize}
a lawyer; who provides legal assistance; the lawyer’s decision whether to provide telephone advice or to attend the suspect in person; the provision of information relating to the charges (or suspected offence) on which the suspect is held; and the police perceptions of the suspect’s right to a lawyer. In setting out our observations, we are able to offer an account of practice that reveals some of the constraints within which police, prosecutors and lawyers must work, as well as the ways that they chose to interpret legal duties and responsibilities. These practices affect the delivery and the effectiveness of the suspect’s right to legal assistance.

2. Arrangements for Providing Legal Advice and Assistance

2.1. England and Wales

In England and Wales the police may detain a suspect for 24 hours for questioning, or to secure or obtain evidence, and this may be extended to 36 hours for more serious (indictable) offences. Legal advice is free at the point of delivery for all suspects in England and Wales, other than for minor offences, when telephone-only advice is covered by legal aid (see below). In non-minor cases, suspects may request a particular lawyer to attend, or ask for the duty solicitor. Lawyers are permitted to consult in private with their client (without a statutory time limitation) and to be present during interrogation. Consultations usually took place in a small consultation room, or an interview room. Sometimes there was a shortage of space and the lawyer and suspect would need to move to another room, as custody staff juggled consultations and interrogations. Lawyers did not express any concerns about the confidentiality of consultations. Statistics suggest that around half of suspects request a lawyer.

Since October 2007, lawyers have received a fixed fee for police station advice work, which includes travel and waiting time, as well as advice work. The fee for cases that involve attendance at the police station, varies depending on the geographical location of the law firm (ranging from £138 to £301 (£160 to £350). Although generally, criminal defence lawyers are dissatisfied with the level of fees, the lawyers that we observed and interviewed were mostly employees of law firms, and since legal aid fees are paid to the firm, rather than to the individual lawyer, did not express strong views on legal aid remuneration for police station work. Requests for legal assistance are routed through the Defence Solicitor Call Centre (DSCC). Contact with a nominated solicitor will be attempted up to three times over two hours and, if unsuccessful, the request will be passed to the duty solicitor. Police officers were generally satisfied with the arrangements for contact-

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Kemp et al. 2012 found that adult suspects were held on average for 9 hours and in the case of juvenile suspects, 7.5 hours.

And to 96 hours in total on the authority of a magistrates' court.

See also Chapter 8, section 5.2.2.
ing lawyers. However, some officers noted that waiting for a lawyer could sometimes cause delays.\textsuperscript{18} This would happen, for instance, in the evening hours or during weekends, when firms had fewer staff available to attend police stations. According to one officer, often only one duty lawyer was available to attend during the weekends, resulting in a situation where, during particularly busy periods, there would be four or five calls, which inevitably caused delays in attendance.\textsuperscript{19}

Unlike in the Netherlands and France, suspects in England and Wales often request a particular law firm (there is much greater specialism within the profession), making it easier to respect the apparent choice of lawyer.\textsuperscript{20} Firms are generally well prepared for police station work and are able to attend quickly. For many firms, being available to attend the police station at short notice is made possible by the employment of accredited police station representatives.\textsuperscript{21} These representatives are not solicitors, but individuals who are accredited to provide police station advice. The accreditation process requires them to demonstrate competence in criminal law and procedure and in the role of defending the client, and to submit a portfolio recording observations of solicitors providing police station advice and reflections on their own cases carried out during their probationary period.\textsuperscript{22} Once accredited (and during the 12 months when they may work as a probationer), these advisors are eligible to receive payment through the legal aid scheme.

Most criminal defence firms operating in EngTown and EngCity had staff available to attend police stations at any time, or they employed independent agents to cover out of hours work, or if all staff members were busy.\textsuperscript{23} The firms we observed in EngTown routinely employed agents for most or all of their police station work. Where this is the practice, it might be questioned whether the suspect’s choice of a lawyer is really respected, given that independent agents are not employees of the firm.

Since April 2008, for suspects detained in respect of defined (minor) offences in respect of which no interview is conducted, the Criminal Defence Service (CDS) provides telephone advice (known as CDS Direct).\textsuperscript{24} If held in connection with such an offence, suspects are always referred, via the DSCC, to CDS Direct even when they have requested a named solicitor. This comment from a lawyer in EngCity about the CDS Direct scheme was typical:

\textsuperscript{18} ifEngCityPol2; ifEngCityPol8.
\textsuperscript{19} ifEngTownPol45.
\textsuperscript{20} We were not able to assess if this was also the case in Scotland.
\textsuperscript{21} See Chapter 3, section 2.4.5.
\textsuperscript{22} Their competence is assessed through a written examination and a critical incidents test which simulates a police interrogation. For details, see the police station representatives accreditation scheme, available at <http://www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page> (last visited 2 October 2013).
\textsuperscript{23} These agents were accredited police station representatives, as described below in section 4.
\textsuperscript{24} See Chapter 3, section 2.4.5.
'Clients hate CDS. It's basically a call centre doing out legal advice and they're following scripts in front of them...sometimes the CDS will back down because the client refuses to speak to them. CDS will then refer it back to the DSCC [Duty Solicitor Call Control] who'll then contact us.'

Lawyers generally thought that the arrangements for contacting them worked well and that the flat fee payment was sufficient to make it worthwhile to attend the police station.

In contrast to the Netherlands and France, where the police are not obliged to wait more than two hours for the lawyer to arrive, the risk of the police starting an interrogation before a lawyer arrives did not seem to be an issue in England and Wales. Suspects were normally interviewed towards the end of the custody period. Legal advisors would be informed about an arrested suspect at the very beginning of police custody and, in theory, be called again once the police were ready to interview. Lawyers reported that this did not always happen, requiring them to make additional enquiries with officers about planned interview times.25

Some lawyers also expressed concern that the initial telephone call with the suspect could be overheard.26 Another mentioned delays of several hours before being able to speak with the client, custody officers claiming that they had no information yet, or that suspects were unavailable because they were being fingerprinted or photographed or even having body samples taken.27

2.2. France

Suspects in France may be detained for 24 hours, with provision for a 24 hour extension. Detainees suspected of committing certain categories of offence (organized crime, terrorism, drugs trafficking) may be detained for up to 96 hours on the authority of the juge des libertés et de la détention.28 Since the 2011 reform in France, suspects are entitled to legal assistance throughout their detention period. This means they may have a private consultation (lasting a maximum of 30 minutes) before the suspect is interrogated by the police and also have a lawyer present during interrogation – although the lawyer is not permitted to intervene or to ask questions until the end of the interrogation.29 If detention is extended for a second 24-hour period, suspects may have a second consultation of 30 minutes with their lawyer. Lawyers told us that they usually found 30 minutes to be sufficient and the police were often not strict in requiring them to stick to this limit.30 Suspects may

25 ifEngCityLaw2.
26 ifEngCityLaw1.
27 ifEngCityLaw2.
28 This is a judge who is neither prosecutor nor investigating judge (juge d'instruction), and so has no role in the case investigation, but whose role is to authorize (or not) acts that have a significant impact on the rights and liberties of the suspect or accused.
29 This is in many respects similar to the situation in the Netherlands, see section 2.3 below.
30 The lawyer-client consultation in each jurisdiction is discussed in Chapter 7, sections 2 & 3.
request a named or duty lawyer but, in stark contrast to the position in England and Wales and the Netherlands, if they waive their right at the outset they cannot change their mind unless detention is extended – at which point they will be asked again if they require a lawyer.\textsuperscript{31}

There are various systems in place for co-ordinating requests for legal assistance. Some areas organize a centralized system of co-ordination, with a single telephone number that the police call when suspects indicate that they would like a lawyer. Smaller areas are unlikely to be able to afford a co-ordinator system, as the government covers only part of the cost. In our research, FranTown did not have a co-ordinator; the police simply called whoever was listed on the duty rota for that day. FranCity had an established co-ordination system in place and co-ordinators (usually experienced criminal lawyers) were paid a fixed fee. Since lawyers were permitted to be present during the interrogation, the rate of pay for lawyers providing legal assistance has risen from 61 to a maximum of 300 Euros, but there is no premium paid for night time duty.\textsuperscript{32} Travel expenses are not reimbursed.\textsuperscript{33}

In FranCity, there were sufficient duty lawyers to whom to allocate work taking into account different needs, such as those of juveniles and foreigners, an arrangement that was not possible in the smaller area of FranTown. According to the co-ordinator in FranCity, the advantage of this system was that co-ordinators could assign cases to those with the appropriate specialism and it avoided the police being able to choose which lawyers deal with which cases; that is, it ensured maximum independence.\textsuperscript{34} However, another lawyer in FranCity told us that despite these arrangements, this did not always work in practice. Some of those acting as co-ordinators, and some attending suspects, were insufficiently experienced in criminal law.\textsuperscript{35} In FranTown, there was no scope to select lawyers in this way as there were fewer lawyers than in FranCity: all of the lawyers in the local Bar area were obliged to sign up for the duty rota for garde à vue (GAV). Those with no real experience of criminal law might pass the work on to more experienced colleagues, but this was not always the case, as discussed below.

Some lawyers have an established clientele and so may be called as a named lawyer. The advantage in such cases was that the lawyer already had some background on the suspect, and in cases where they had been called by the family of the suspect, they were able to obtain from them information on the arrest or house search that the police would not provide to them.\textsuperscript{36} Using a lawyer that was already

\textsuperscript{31} See further Chapter 3, section 3.6.
\textsuperscript{32} See also Chapter 3, section 3.9.
\textsuperscript{33} \textit{if} FranCity\textit{2}.
\textsuperscript{34} \textit{if} FranCityLaw\textit{1}. This is what we observed in FranTown, discussed below.
\textsuperscript{35} When we asked Polô in FranCity\textit{2}, in respect of a case of suspected large-scale fraud, whether the lawyer had access to the record of the house search, he explained that the lawyer was in fact present at the search. The suspect was held in GAV at his house, so the legal consultation also took place there. We did not observe any cases where this happened.
known to the suspect could also be advantageous for the police investigation, as a lawyer explained:

'I assisted a client as chosen lawyer at court. He is schizophrenic and ... he is acquitted because of his mental state. He is later placed in GAV for another assault. The police officers in GAV don’t know that he is schizophrenic and the first interview goes badly: he refuses to answer questions and gets angry, so he is taken back to his cell. His family then called me because they have been informed of the GAV. I called the police station and informed them of the schizophrenia. I also told them that I would be present for the next interview. The next interview goes much better because police officers are then aware that he is schizophrenic and that there’s already been an acquittal because of that.'

However, this was unusual. In most instances, it will be the duty lawyer who will attend a suspect at the police station. The French legal profession is not yet fully adapted to the provision of custodial legal advice and most lawyers would be unlikely to be available to attend the police station or gendarmerie unless they are the duty lawyer for that day. This also had the result that suspects would receive discontinuous representation. Where the GAV was extended for a second 24-hour period, there was no guarantee that the suspect would continue to be represented by the same lawyer. In our observations, it was the next day’s duty lawyer who took over the case.

Facilities for lawyer-client consultations were poor. Police offices and even cells were used, with little guarantee of confidentiality, because there is an officer on the other side of the door and conversations could easily be overheard. Lawyers were often asked to use very small rooms, in poor condition, but they recognized that this simply reflected the poor conditions in police stations, including police officers’ own offices.

In the 2013 Report, the Contrôleur général des lieux de privation de liberté reported that lawyers described relations with the police as good overall, but lawyers’ ability to carry out their role was often difficult. Simultaneous interrogations required

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36 [Footnote: This was also the observation of the Contrôleur général des lieux de privation de liberté 2013, p. 198. This body, the National Inspectorate for Places of Deprivation of Liberty, ensures that the fundamental rights of detained people are respected in all places where they are deprived of their liberty (prisons, psychiatric hospitals, police or customs custody centres, immigration detention centres and even vehicles used to transport people who are detained) by carrying out regular checks of such places. The observations in the 2013 Report are based on visits to 73 police stations (p. 322). Almost all were spot check visits (p. 326), not agreed beforehand and they lasted on average two days (p. 325). 42 were visits to police stations, 29 to gendarmeries and 2 to the facilities of national divisions (officers who are not restricted to operations within a defined geographical region). Suspects were spoken to individually and in groups (p. 328).]

37 [Footnote: Contrôleur général des lieux de privation de liberté 2013 also noted the generally poor conditions in which lawyer-suspect consultations took place, p. 198.]

38 [Footnote: For a brief description of this inspectorate, see footnote 38 above.]
several lawyers to attend at once, which could be difficult in small areas (such as
FranTown); some interrogations began before the end of the two hour period
allowed for the lawyer to attend; and others were cancelled without the lawyer
being informed.\(^{40}\)

In our own research, one lawyer estimated that 80 per cent of the GAV cases
go well, but that in some instances there are difficulties, such as the police not
informing lawyers properly that they have been requested – for example, leaving a
message on the office answerphone at 6.00 am, so that the two hour delay has
already passed by the time the lawyer arrives at work.\(^{41}\) This highlights the
importance of a central number through which requests for legal assistance can be
coordinated. The other side to this was presented by a police officer we interviewed.
He explained that it was easier to contact a duty lawyer, but that the police
sometimes struggled to make contact with named lawyers:

> 'If it's a chosen lawyer, we simply look in the yellow pages if the suspect doesn't know
their lawyer's number. We do our best to contact them but it's not easy because when
we arrest somebody at 6.00 am, there aren't many lawyers who are present to pick up
the phone at their offices. So, we show that we have really tried to contact them by
ringing several times, leaving a message if they have a voicemail. We have to show
that we did everything we could.'\(^{42}\)

Lawyers did not generally follow the case through to trial. In Scotland, the adviser
attending the police station (and the adviser's firm in the case of England and
Wales) is likely to continue to represent the suspect throughout her case.\(^{43}\) In France
and the Netherlands, there is not this continuity. The police station is a discrete part
of the case, dealt with by duty lawyers for the most part. Only those suspected of
the most serious offences (for example, those suspected of involvement in organized
crime) or suspects who have previous experience of being arrested, are likely to
have their own named lawyer.

2.3. The Netherlands

Suspects in the Netherlands may be detained for six hours initially,\(^{44}\) but this can be
extended ultimately up to 72 hours. Since the so-called Sudduz reform of 2010, suspects detained in police custody have a right to meet with a lawyer for 30 minutes
prior to the first police interrogation. This is mandatory for persons suspected of

\(^{40}\) Contrôleur général des lieux de privation de liberté 2013, p. 198.
\(^{41}\) FrFranTownLaw4.
\(^{42}\) FrFranCity2012. In Contrôleur général des lieux de privation de liberté 2013, officers complained that lawyers (and doctors) were hard to contact at night and weekends, p. 197.
\(^{43}\) In Scotland and in England and Wales, the criminal legal aid contract requires that this is
normally done.
\(^{44}\) The night hours, i.e. the time between midnight and 9.00 am.
\(^{45}\) See Chapter 3, section 4.4.5.
serious crimes and for juveniles. Juveniles may also have either a lawyer or a 'trusted person' present during the interrogation – but not both. Like in France, the lawyer may not intervene or ask questions until the end of the interrogation. The suspect must be told of their right to a lawyer immediately upon detention. Again, as in France, the police are obliged to wait for up to two hours for the lawyer to arrive and the first consultation is free of charge for persons suspected of more serious offences (punishable by more than a maximum of four years imprisonment), corresponding to about two-thirds of arrested suspects. In our research, this period was usually respected as officers feared that evidence might otherwise be excluded. If detention is prolonged for three days (inverzettingsdealing), legal assistance is offered to all suspects and is free of charge. A recent study suggests that slightly more than half of arrested suspects request a lawyer in the first six hours of detention.

In the Netherlands at the time of the research, lawyers were paid 85 Euro for the first consultation before the first interrogation, and 170 Euro or another 85 Euro for the second consultation (depending on whether the first consultation has taken place). There was a 50 per cent uplift for attendance at weekends. The payment for attending interrogations was 113 Euro (or 226 Euro in case of more serious offences), irrespective of the number and duration of interrogations.

Suspects can ask for a duty lawyer, or a named, 'own' lawyer. Various types of police station duty lawyer scheme are operated by the Legal Aid Board in each of the five judicial regions of the country. For example, in some areas, there is a centralized system of referrals, but in NethCity and NethTown, the police called lawyers directly. Interestingly, whilst this was a preferred option for many officers we spoke to in Scotland, who found this procedure simpler, it caused a lot of resentment with Dutch officers, who felt that finding a lawyer available to attend took too much of their time, and that it was not their role to 'chase lawyers down'.

In NethTown, consultations usually took place in a specially designated room; in NethCity a room also occasionally used for interrogations was available for lawyer-client consultations. However, lawyers were sometimes asked to meet with suspects in unused cells, which were also under CCTV surveillance. This did not seem to be done with the purpose of monitoring the lawyer-client consultation, but

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40 In this way, a lawyer can explain the benefits of legal assistance to the suspect, ensuring that any decision to waive is an informed decision.
47 In a sample from the Verhoeven & Stevens study, the number of such offences was 70 per cent. See Verhoeven & Stevens 2013, p. 261.
49 See further Chapter 3, section 4.
50 Verhoeven & Stevens 2013, p. 263.
51 iNethCity:Pol12; iNethTown:Pol1.
52 iNethTown:Pol4.
it did sometimes raise questions from suspects concerning whether it was safe for them to talk with a lawyer in such a cell.

When suspects requested legal assistance, police officers were reasonably diligent in contacting lawyers. However, the mechanisms employed were at times inefficient because of other practices. Dutch lawyers had their mobile telephones removed from them on entering the police station (an interesting demonstration of the lack of professional trust in lawyers) and so were unaware of calls requesting that they attend suspects, including suspects in the same station where they were currently working.

Duty lawyers were supposed to respond to calls from police between 7:00 am and 8:00 pm of the duty day. However, the police were entitled to call lawyers outside of these hours in respect of serious cases or where there was an urgent need to interrogate a suspect. Sometimes, however, duty lawyers were unreachable in the evening before eight o’clock, which was a great source of irritation for the police. Police officers also often complained that lawyers named by suspects were unavailable to attend at short notice, which placed an additional burden on the police to find another lawyer for the suspect.

Unlike English and Welsh lawyers who, as a profession, have had almost 30 years’ experience of providing custodial legal advice to suspects before and during police interrogation, Dutch lawyers have not yet developed structures to enable them to respond to police station referrals effectively. Similar to Scotland, many lawyers who attended police stations in the Netherlands were individual practitioners – even those lawyers who were part of criminal defence firms usually held their own practice within the firm – and thus there were few possibilities for them to delegate tasks to others. Many of these lawyers had a heavy court work load and so it was problematic for many of them to accommodate police station visits into their work schedules (particularly outside of the duty days).

In both sites, lawyers told us that there were many criminal lawyers competing for work. They were only able to act as duty lawyer a few times a year and, as a result, some lawyers considered that the duty scheme was not a fruitful source of work for them. However, this was not the experience of all lawyers. Others considered the duty lawyer scheme as a useful means of topping up their income with a steady stream of work and criminal cases.

The financial aspect of this form of criminal defence work was important for all lawyers. For example, one lawyer remarked that ‘unfortunately’ detention had not been prolonged in any of the cases he had attended, so he would not be eligible

53 See Inschrijvingsvoorwaarden advocaten 2013, Art. 1(e).
54 NedCityLaw15; NedTownPol423.
55 E.g. [NedCityPol2; NedTownPol4].
56 Custodial legal advice has been possible from the moment when detention is extended beyond 6 or 15 hours, since 1974, but pre-interrogation advice and assistance during (some) interrogations is much more recent. See Chapter 3, section 4.4.5.
for additional payment. Some lawyers were proactive in finding clients, asking officers in the detention block if there were any new suspects – even though this is officially not permitted. The desire to maximize income was in conflict with the need to ensure good quality legal representation. Anecdotally, some firms accepted as many police station cases as possible, without any concern for capacity or necessary expertise, in order to build their client base. For instance, one lawyer explained to us that some firms have all members of their staff, including civil lawyers, on the duty list, and that they ‘have a policy not to refuse any clients … no matter whether they have time to do it or not’.

Yet, despite the large number of lawyers available, there was only one lawyer on duty each day in both sites. If there was a very busy period, this became difficult to manage, as lawyers needed to be able to respond to any one of numerous police stations within two hours. Finding a replacement was not always possible, particularly during evenings and weekends. One lawyer explained that on one especially busy day over a weekend, he had ten call-outs several of them involving juveniles, where consultation with a lawyer is mandatory. Because of the volume and the tight response time, he could spend no more than five minutes with each client. This may be exceptional, but even with half these numbers, effective engagement with the suspect and their case is limited. This is in many ways worse than no assistance at all, as the suspect is deemed to have had the benefit of advice, but in reality has had very little.

2.4. Scotland

In Scotland, suspects detained under section 14 Criminal Procedure (Scotland) Act 1995 may be detained for up to 12 hours (increased from six hours after Cadder) which may be extended by a custody review officer by up to a further 12 hours in exceptional circumstances. Suspects detained under this provision are entitled to a lawyer of their choice throughout their detention, including during interrogation. This can be provided through legal aid, but this is means-tested. In contrast to France and the Netherlands, the lawyer-client consultation is not time-limited by statute, nor is the lawyer’s role during interrogation restricted to that of observer. Common law arrest is used where there is sufficient evidence to charge and so no interrogation is needed. In these cases, the suspects are entitled simply to have a

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57 NethCityLaw5.
58 See NethCityLaw2; NethTownLaw6.
59 NethTownLaw6.
60 NethCityLaw5.
62 See Chapter 3, section 5.3.2. In our observations, s.14 detention was generally used for offences deemed to have a ‘domestic element’; there was no requirement of gravity however – it included charges such as breach of the peace. See generally Chapter 3, sections 5.3.1. & 5.3.2.
lawyer informed of their detention (the right to intimation).\textsuperscript{83} This ensures that the suspects will have their lawyer present to represent them at court. However, whilst the initial detention period is relatively short, once charged, a suspect can be detained until the next court hearing, which might be several days if there is a weekend or bank holiday. The Criminal Justice (Scotland) Bill proposes limitations on the time that can be spent in custody post charge.

For those detained under section 14, all requests for legal assistance must be channelled through the Scottish Legal Aid Board (SLAB). If the lawyer requested cannot attend or does not respond, a SLAB lawyer will advise the suspect.\textsuperscript{84} There is a specialist criminal bar and police station duty rota (which is mandatory for lawyers doing legal aid work), as well as the Public Defence Solicitor’s Office (PDSO). PDSO lawyers were generally content with their salary, but private practitioners were paid relatively little for police station advice: £15 for telephone advice and the police station attendance fee was subsumed into the court fee other than in solemn cases. Subsequent to our research, out-of-hours fees are now paid to private practitioners and PDSO lawyers who attend the police station.\textsuperscript{85}

The police were generally positive about the arrangement for contacting a lawyer as it saved them time: most officers in ScotCity told us that it was efficient and generally took around 30 minutes for lawyers to then make contact with the suspect. Some officers thought it would be simpler and quicker to contact the lawyer directly, as they do for the duty lawyer when suspects are subject to common law arrest, and lawyers thought that officers in one area did contact lawyers directly.

In contrast to the views of the police, lawyers were critical of the arrangements as being a cumbersome procedure, and some feared that it was part of a broader agenda to move the independent bar out of police station advice work altogether and assign it to a form of public defender system.\textsuperscript{86} SLAB lawyers also expressed concern to us that calls to suspects were not confidential, particularly in more serious cases.\textsuperscript{87} In one case we observed, once the lawyer had finished speaking to the client, he asked to speak to the police again.\textsuperscript{88} The officer was immediately on the line - 'too quickly' in the lawyer's view. Concerned that the call had been overheard by the police, the lawyer asked the officer directly if the call was really in private; the officer assured him that it was.

In ScotCity, confidential lawyer-client consultations did not take place in an ordinary office or interview rooms, but in a more prison-like room with a glass wall

\textsuperscript{83} This was the full extent of the right to legal assistance in all cases prior to Calder.

\textsuperscript{84} Over the two-year period from July 2011 to June 2013, SLAB provided advice in 15,539 calls and referred on 29,320 cases to a named solicitor. Of those suspects requiring the personal attendance of a lawyer. See 5LAB 2013.

\textsuperscript{85} For further information regarding legal aid remuneration see Chapter 3 section 5.9.

\textsuperscript{86} E.g. ScotCity2Law1.

\textsuperscript{87} ScotCity2Law1.

\textsuperscript{88} ScotCity2Law3.
separating the lawyer and client and a door which was locked on the suspect’s side. Thus there was an emphasis on security, and the police explained that this arrangement prevented anything being passed between lawyer and suspect.

The Solicitor Access Recording Form (SARF) notifies suspects of their right to inform a solicitor of their detention (the right to intimation), to consult with a lawyer before police interrogation and again during the interrogation. In section 14 cases, the SARF applies and must be administered by the arresting officer; in common law arrest cases, there is no SARF, just the right of intimation, and this can be done by a civilian Police and Community Support Officer (PCSO). The involvement of different officers and the failure to incorporate the SARF within the Prisoner Profile Recording System (the centralized system of computerized case records), meant that the smooth running of the detention process relied on the relevant people ensuring they completed the correct paperwork, and that they left a copy of it at the police station. One officer explained that if the arresting officer does not deposit a copy of the SARF at the station, but keeps it with the rest of the paperwork while continuing the investigation, there is no central record of case information to relay to the lawyer when they call the police station, and the information is not transmitted to the procurator fiscal with the other case documents. We found quite often that SARFs were not placed in the appropriate tray in custody, when it would have been simple enough to photocopy the form.

The SARF deserves special mention as it is central to the provision of legal assistance in Scotland.\textsuperscript{70} The form is lengthy, is usually read out verbatim and each question is followed by another, asking whether or not the suspect understands. This form and the procedure for its administration were a source of complaint by officers (and indeed suspects) for a number of reasons. The text of the form was expressed in language that most suspects (and some officers) could not understand - for example, it mentions the suspect’s right to ‘intimation’. As an officer put it, when explaining why she might paraphrase parts of the form: ‘some are not everyday words, they’re “dictionary” words’.\textsuperscript{71} The form is also repetitious. It requires suspects to be asked if they want legal assistance in several different ways, leading the more experienced suspects to become irritated at, as they saw it, being treated as idiots, and leading some to become aggressive as a result. Many suspects became very agitated when the right to legal assistance was mentioned for the third time. The response of one detainee was typical: ‘Ooh for fuck’s sake, I just want to go home man!’\textsuperscript{72} Some police officers were concerned that repetition of the question as to whether the suspect wanted a solicitor led to an expectation that they should request one,\textsuperscript{73} and at least one officer suggested that it would be simpler to ask the suspect if they do not want a lawyer.

\textsuperscript{70} See Chapter 3, section 5.
\textsuperscript{71} See also the discussion in Chapter 3, section 5.4.3 and Chapter 5, section 2.6.
\textsuperscript{72} ScotCityPolZ.
\textsuperscript{73} ScotTownPol13.
\textsuperscript{74} E.g. ScotTownPol1; ScotTownPol3.
Just under half of the suspects we observed requested a lawyer. However, this was not a representative sample of cases, as we did not observe those held on the more serious charges.

3. The Suspect’s Decision to Request Legal Advice

There are many factors that might influence a suspect’s decision to request a lawyer at the police station. Some may not think legal assistance worthwhile in relatively minor cases, or if the offence is going to be admitted. Others may not be aware of the real nature of the right: in France, the Contrôleur général des lieux de privation de liberté 2013 report noted that suspects did not always realize that the right to legal advice and assistance meant the right to have a lawyer present with them at the police station or gendarmerie. Nor did they realize that they did not necessarily have to pay for this – perhaps unsurprisingly, as this was not generally explained to them.

The suspect’s prior experience of custody is also relevant to their decision whether to request a lawyer, but in often contradictory ways. Those with little or no experience of police custody are more likely to underestimate the importance of a lawyer, or fail to understand the extent of the right, resulting in a refusal to seek legal assistance. But in other instances, where the right is perhaps better understood, it is because suspects have no experience of police detention that they are more likely to seek the additional support offered by the presence of a lawyer. Similarly, some experienced suspects will always ask for a lawyer (to learn more information about the case, to negotiate bail), but others will feel that they know the procedure and are confident making an admission and being bailed.

In England and Wales, we observed that one of the principal benefits of having a lawyer present is to obtain information on the allegations facing the suspect, as the police are more likely to disclose evidence to the lawyer than to the suspect. The suspect’s perceived need or desire for more case-related information will therefore also influence their decision whether to request a lawyer. For many of those with prior experience of police custody in England and Wales, this was their principal motivation for requesting legal advice. Armed with better knowledge of the accusation, suspects were then able to decide whether to answer questions and to assess their chances of bail.

In line with earlier studies, it was clear from our research that the overriding concern of most suspects is to be released from custody. For this reason, some

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74 The Contrôleur général des lieux de privation de liberté 2013 report (p. 197) notes that police officers told them that some suspects thought that it was not worth calling a lawyer, they could manage on their own – a scepticism shared and reinforced by the police and some lawyers in our own research.
75 Contrôleur général des lieux de privation de liberté 2013, p. 195.
76 There was also some evidence of this in France.
77 For earlier studies with similar conclusions see: Skinns 2009; Skinns 2011; Kemp 2013.
waive the right to a lawyer because they fear (or are persuaded) that requesting a lawyer will delay matters and prolong detention. The way in which the police inform suspects of their right to custodial legal advice, therefore, is crucial to the suspect’s decision whether or not to take up that right.73 We observed and were told about many instances in which the police sought to dissuade the suspect from requesting a lawyer. Lawyers’ accounts to us in interviews of police officers telling the suspect that this would be ‘a quick in and out interview’ after which the suspect would be released – and that therefore a request for a lawyer would delay things and require the suspect to spend more time in custody – was a familiar one across all jurisdictions.74

For example, in a case in the Netherlands, a female suspect arrested for shoplifting was not sure whether she needed to speak with a lawyer. She maintained her innocence, and wished to be released as soon as possible because she had a child waiting for her at home. When she asked the officer whether she needed legal advice, he told her that ‘if this was what she was going to say, she probably did not need a lawyer’, to which she agreed.75 In another typical example in Scotland, we observed an officer who did not disabuse a suspect of his belief that contacting a lawyer would ‘take all night’, which resulted in him waiving his right to a lawyer.76

3.1. England and Wales

In England and Wales, only one third of the observed suspects requested a lawyer (9 out of 28 in the police station observation sample). This appears to be a small and to some extent unrepresentative sample, as other recent studies have reported much higher rates of legal advice. Thus, Kemp found in her sample that 54-59 per cent of suspects requested a solicitor at the police station.77 In Kemp’s study, those refusing a lawyer said that they ‘did not need a solicitor’ because they either felt that there was nothing they needed to know, or they were guilty and were going to confess, or on the contrary, they felt they had done nothing wrong.78 Similarly, in the study by Skinns, 60 per cent of detainees requested legal advice.79 Some of the most common reasons for refusing to request a lawyer were the suspect’s perceptions that asking for a lawyer would cause delays and that if they were innocent they did not need a

73 See also Chapter 5, section 2.
74 This was less evident in Scotland, but this is perhaps because lawyers tend not to attend the police station in any event.
75 Nett(own)Pol31.
76 ScottownPol111. The average time suspects who request legal advice spend in custody has decreased by a quarter, from 4 hours and 55 minutes prior to the SLAB contact line being established in July 2011, to 4 hours and 45 minutes in February 2012. SLAB 2012.
77 Kemp & Balmer 2008. In their study of 36,000 custody records over 44 police stations in 4 police areas, Plasunno, Kemp & Balmer 2011 found that 45 per cent of suspects requested a lawyer, but only 35 per cent received legal advice and assistance.
79 Skinns 2009.
solicitor. She also found that the seriousness of the offence for which they were being detained was significant - suspects were more likely to request a lawyer in more serious cases.

Our own research findings were also that suspects' prime motivation was to be released from police custody. Those familiar with police detention procedures, many of whom also had problems of alcohol and drug addiction, were especially concerned to avoid anything that might keep them in police custody longer than absolutely necessary. Their decision on whether to ask to consult a solicitor often depended on their perception of how long the detention process was going to take and, in particular whether or not they were likely to get bail. In the words of one police officer, "If it's black and white, most of the regulars... won't get a solicitor, they know the score already, they want to get out of here as quick as possible..."

'Repeat' suspects appeared to weigh the likelihood of longer detention against the need to know what evidence the police had against them (disclosure is only provided to a lawyer) and the chances of getting bail (which suspects believed to increase where the lawyer is present). As one lawyer noted, commenting on the decision of a 'repeat' suspect to request a lawyer:

"These kinds of clients want us there as a safeguard; if we hadn't been there, the officers wouldn't have provided disclosure; if we hadn't had our consultation be wouldn't have known what evidence they've got, how strong their case is, and so only with that information could he decide to opt for a 'no comment' interview."

The perceived seriousness of the alleged offence seems to play a role in this decision - suspects are more likely to request a lawyer in more serious cases.

Although we did not observe the police dissuading suspects from seeking legal advice, some lawyers, particularly in EngTown, reported that police sometimes persuaded suspects who have initially requested a lawyer to change their mind, under the pretext that waiting for a lawyer would cause further delay. In these instances, the suspect had already experienced delay - not from waiting for a lawyer to arrive, but because of the time spent by the police in preparing for the interview. As a lawyer in EngTown explained:

"The problem we have in this town compared to other places is that certain people are discouraged from getting legal advice. I hear that anecdotally and from clients. This is not a recent thing - it's an inherent flaw in the police station culture. We have freedom of information requests on police station requests and ours here is 10-15 per cent lower than average. I think there is a sense by the police that if lawyers are involved the suspect is less likely to make an admission. There may be a perception on the officer's behalf that they will be kept waiting if a lawyer is involved and this is passed on to the

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85 EngCityRep11.
86 EngCityLaw2
87 EngTownLawRep2, EngTownLaw1 but also EngCityLaw2.
detainee. It’s the arresting officer, but also the custody officer who may not understand their role in safeguarding suspects’ rights. They adopt the officer’s interests over those of the suspect’s perhaps.\textsuperscript{58}

Lawyers also told us that suspects had been told that they would be more likely to be bailed if they admitted the offence. In short: ‘What we find is that people who are unrepresented will admit to offences where the evidence may not be complete.’\textsuperscript{59}

3.2. France

Lawyers told us that suspects often did not understand the full extent of their right to legal assistance.

I’m not certain they’re always informed of this right. They are told they have the right to legal assistance, but they don’t know what it implies. I’m almost certain of that because I often ask them whether they would like me to stay after the consultation, for the interviews, and they’re often surprised that it is possible. They understand they’ll be able to speak with a lawyer for half an hour but they’re not necessarily aware that we can attend interviews too. I don’t think that’s explained to them. They are told that they can be assisted by a lawyer, but they’re not told that we can come to interviews and that they can have a second consultation after the first 24 hours.\textsuperscript{60}

As discussed below, the relationships between police and lawyers can have an impact on how helpful the police will be to lawyers in terms of the provision of information, negotiating bail or allowing extended client consultations. In France, there is an additional factor to consider: suspects may be placed in GAV by either the police or the gendarmerie. There appeared to be a different approach between the two in terms of attitudes to suspects and lawyers. For example, we were told repeatedly by lawyers that the gendarmerie were much more forthcoming with disclosure of evidence and allowed longer, and multiple, consultations. Lawyers explained to us how the differences in culture between the police and the gendarmerie also resulted in more suspects waiving their right to a lawyer in the gendarmerie. Because the gendarmerie treat the suspect with more dignity and respect (addressing them as Monsieur or Madame and using the polite vous rather than the familiar tu):

... suspects waive their right to a lawyer more easily in the gendarmerie because they don’t feel as much hostility, because gendarmes have a better relationship and the cells are cleaner. When the suspect is asked whether or not he wants a lawyer, it’s rare for them to say yes. Whereas in police zones, they exercise all their rights: ‘Do you want a
Police and lawyers estimated that between a third and half of suspects asked for a lawyer. One officer suggested that, like suspects in England and Wales, disclosure is a factor in suspects’ decisions to request a lawyer— as well as the lawyer’s limited role and whether it is the suspect’s first experience of detention:

Interviewer: Why do you think some people decide to waive their right to a lawyer?

Officer: Because they’ve decided to explain themselves. They ask us what the lawyer will be able to do. So we explain that the lawyer will be present, that she won’t be able to intervene during the interview but that at the end of the interview, she’ll be able to ask you questions. They ask us whether the lawyer will be able to see the file and we say ‘no’. Some of them think the lawyer is not really useful during the interviews because they can’t access the file, so they prefer not to call one. Others say: ‘I’m going to tell you the truth, so I don’t need a lawyer for that.’

Interviewer: Do you feel that more people ask for a lawyer since the reform or did it remain stable?

Police: I don’t feel like it’s changed much. Those who are there for the first time often liked to have a consultation with a lawyer. It reassured them, the lawyer explained to them how the system works.

The police are, of course, hugely influential in the suspect’s decision to request a lawyer. Research in England and Wales post-PACE, and in the first years of custodial legal advice in France, revealed that officers persuaded suspects to waive their right to legal advice by telling them that it would delay things, that they did not need a lawyer, or by not telling them that advice was free. Officers we interviewed said that they did not think a lawyer was always necessary, and that they would dissuade a suspect from having a lawyer in a minor case:

... it can happen that people are in GAV for shoplifting and in those cases, we tell them that they can have a lawyer but we advise them not to take one. We tell them that if they don’t take a lawyer, we can start the interview immediately and if for example it’s 10.00 am, there’s a chance I’ll be able to speak to the public prosecutor before noon and then free the suspect afterwards.

In contrast, this officer thought it was better to have a lawyer present in the more serious cases, as it protects the police as well as the suspect.

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1. iFranTownLaw.
2. The Report of the Contrôleur général des lieux de privation de liberté 2013 noted that less than half of suspects requested a lawyer.
3. iFranCity2Poi2.
4. Re England and Wales see e.g. Sanders et al. 1989; McConville, Sanders & Long 1991; McConville & Hodgson 1993. Re France, see Hodgson 2005.
5. iFranCity2Poi1.
These observations were mirrored in the responses of lawyers too. Lawyers reported in France, as elsewhere, that the police told suspects that requesting a lawyer would delay the investigation and so result in them staying longer in detention – even though this is ultimately a decision for the public prosecutor (albeit based on police information). The police’s motivation, the lawyers believed, was to obtain a confession: “The tradition to put pressure on suspects in GAV still exists in France to get admissions, because they want to get out of there.”

This can be exploited by officers:

[The pressure to confess] still exists. You might know that there is a two-hour delay for the lawyer to arrive. That allows the police to tell the suspect: ‘If you want a lawyer, it’s going to take two hours for her to arrive, so the GAV will last longer and often she’s late anyway.’ Often, this allows them to bypass the lawyer.

Whilst suspects are entitled to a lawyer during detention in GAV, if they give a statement whilst attending as a volunteer (audition libre) they have no such right. One lawyer explained that the police use this as a way of circumventing the right to a lawyer if the suspect appeared ready to speak. This lawyer’s experience was that he attended fewer suspects at the police station since the reform – mainly because motoring offences do not result in GAV anymore, but are dealt with by auditio libre and so no lawyer intervenes. Similarly, in the Netherlands, some lawyers and one police officer told the researchers that since the Saldez reform a greater number of suspects were no longer arrested, but simply ‘invited’ to the police station, in which case officers were not obliged to organize access to a lawyer for them. There was no suggestion, however, that this was done deliberately to encourage a confession.

3.3. The Netherlands

In the Netherlands, in around half of the cases observed (49 out of 94), suspects requested legal advice. This generally corresponds to the findings of other research completed in 2013, which found that some 50 per cent of suspects arrested by police received legal advice before the first interrogation. Where suspects declined to speak with a lawyer, most gave no reason and the police did not enquire further. Where suspects did explain their decision to waive the right, the two most common reasons were that asking for a lawyer would cause delay, and that it was not necessary – because they had nothing to hide, they thought that they knew what

96 E.g. iLaw4 FranTow.
97 iFranTowLaw3.
98 iFranTownLaw2.
99 iFranTownLaw4. He had been told this by three or four clients with different profiles and relating to different offices, giving the claims more credibility.
100 This includes cases where legal advice was mandatory.
101 Verhoeven & Stevens 2013. This is based on a sample consisting of randomly selected case files in six regions of the country, comprising data about 221 suspects in total.
was at stake, or because they were going to confess. Often, suspects waived the right to a lawyer in relatively minor cases, where their involvement was uncontested, for instance in cases of shoplifting captured on CCTV – especially if they were arrested in the evening and wished to be released the same day.

On the other hand, in certain categories of cases – such as, for example, robberies, burglaries or drug offences – suspects systematically asked for a lawyer. This may be because of the gravity and potential complexity of the charges; or as some police officers believed, because some suspects who had prior experience of the criminal justice system would always request a lawyer on principle.

Those who are detained more often and who have a specific anti-police mindset, they ask for a lawyer to slow down the investigation or to put up resistance to it. Not that they wish to discuss anything on the substance with a lawyer. More like: ‘Call me a lawyer, I have nothing to lose anyway.’

When suspects detained in respect of less serious cases requested a lawyer, the police sometimes tried, explicitly or implicitly, to dissuade them from exercising this right, typically emphasizing that asking for a lawyer would significantly prolong the period of detention. In one case observed for instance, an older police officer was observed to persuade a suspect, the evidence against whom was overwhelming, to confess and to waive her right to legal advice before the official interrogation started, in order to help his younger colleagues to ‘process’ the case faster.

In more serious offences though, officers were less likely to try to dissuade suspects from consulting a lawyer, and some claimed that they would encourage suspects to engage a lawyer.

Dutch lawyers also spoke of police tactics to try to dissuade suspects from seeking legal advice:

‘The police try to manipulate suspects to waive their right to a lawyer. And they do it because the culture of the police is focused on obtaining a confession.’

In NethCity, at the time of the fieldwork, an experiment was taking place with accelerated case disposal. Where there was enough evidence or when the offence was admitted, the objective was to obtain a suspect’s statement and then dispose of the case within the initial period of police detention, usually by requiring the suspect to pay a fine. Lawyers were largely excluded from this process because they were not

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102 This was also found in Verhoeven & Stevens 2013: the more complex the case the more likely a lawyer was to be requested.
103 NethCityPol5; NethCityPol6; NethTownPol4.
104 NethCityPol1.
105 NethCityPol5; NethCityPol1; NethTownPol1.
106 If possible, the contribution was linked to a particular fieldworker.
107 If NethCityLaw7.
informed by the police that the suspect would be offered an accelerated case disposal, and neither were they informed about the conditions for such an offer. Suspects were sometimes 'nudged' to waive the right to a lawyer altogether in such cases by the suggestion that 'they could pay a fine and be released'. For example, in several cases observed, which were eligible for pre-trial case disposal, suspects who were arrested at night were told that requesting a lawyer would cause delay, and that if they agreed to pay a fine they would not be interrogated and would be released from custody sooner. This was deemed mutually convenient: suspects would not have to spend a night in detention, and police would not have to interrogate them the next morning.

3.4. Scotland

During our observations at the police station, 47 per cent of suspects requested a lawyer. As with other jurisdictions, it was sometimes unclear to suspects whether they should request a lawyer. The police should not advise the suspect one way or another, but officers told us that they would steer suspects towards requesting a lawyer when they thought it was in their best interests. We also observed this.

   Officer: Do you want me to send intimation to a solicitor about your detention here at the station?
   Suspect: What?
   Officer: Anybody arrested at the police station has the right to have a lawyer informed about that arrest. You can have a duty solicitor informed if you don’t have a lawyer, but what will happen to you is that you’ll stay here to sober up and in the morning you’ll be released on an undertaking.
   Officer: You’ll be interviewed in the morning for some other allegations against you but after that you’ll be released on an undertaking to appear at [the local] sheriff’s court in four weeks. You can contact a lawyer before than yourself.
   Suspect: Is there any advantage in you contacting a lawyer? I don’t know any.
   Officer: You’re not going to court for another four weeks so you can contact a lawyer before that yourself, but if you want me to I can contact one for you just now.
   Suspect: But what’s the use? I don’t know any.
   Officer: I can contact the solicitor that is on duty just now. Do you want me to do that?
   Suspect: Aye [yes].

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108 NethCityPol6; NethCityPol17.
Officer: Okay, I will do that for you then.  

More frequently, the police told the suspect that they could arrange to see a lawyer before court, but did not go on to say that they could also contact a lawyer to speak to the suspect whilst at the police station and during interrogation.

Police: Do you want a lawyer?
Suspect: Do I need one?
Police: You’ll probably go out later, you can talk to one if you want then.
Suspect: I don’t need a lawyer.

In a similar case:

Police: Do you want a lawyer informed that you are here?
Suspect: Do I need one?
Police: You’ll be detained until you sober up.
Suspect: Then, no I don’t want one.

We also observed cases where the conversation was very brief.

Police: Mate, do you want a lawyer notified that you’re here at the police station?
Suspect: A lawyer’s hopeless mate.

Some suspects asked for a lawyer to be notified, but declined to have a consultation as they thought it would delay things. In the following case, the suspect asked for a named solicitor to be informed of her detention.

Police: Do you want a private consultation with your solicitor?
Suspect: Yes... Then again, won’t that take all night?
Police: I’ll contact SLAB and they will contact [named lawyer] for you.
Suspect: Just let it go then, because otherwise it will take too long.

As noted above, the SARF was experienced as problematic by the officers administering it and by suspects. Many suspects we observed in Scotland were also drunk.

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110 ScoTOWNPol25.
111 This, of course, reflects the law as it was prior to Calder.
112 ScoTOWNPol8.
113 ScoTOWNPol11. Also, very similar was ScoTOWNPol13.
114 ScoTOWNPol8.
115 ScoTOWNPol11.
when brought into the police station, which made the process even more difficult, as this extract from the field notes illustrates.

Walking past the charge bar on the way to kitchen a drunk suspect is being SARF’d for a s14’d alleged assault. He keeps saying ‘I want my lawyer’ but is unable to comprehend the meaning of the SARF questions, some of the words (e.g. ‘intimate’, ‘solicitor’) are just too difficult for him to understand. The arresting officer is getting impatient. Another officer is watching what’s going on, comes over to me and comments ‘... it’s hard, really hard. It’s hard enough understanding the questions yourself, it’s impossible reading them out to someone who’s had a ballyful ...’

4. Providing Legal Advice: Who Attends

Jurisdictions differed in terms of the arrangements for providing legal advice and assistance. In Scotland, police station legal advice and assistance is provided exclusively by solicitors, with no formal training requirement for police station work. In England and Wales, legal advice and assistance at police stations may be provided by solicitors or accredited representatives – both of which must have obtained the police station accreditation qualification. In France, whilst only qualified lawyers are permitted to provide (and be paid for) police station legal advice and assistance, there appeared to be no requirement for criminal law expertise. In the Netherlands, the requirement is just one day of training and attendance at several consultations with experienced lawyers.

Most of the lawyers we observed in England and Wales were accredited representatives. Some were employed within a firm of solicitors and others operated as an independent agency, but in all instances, they dealt with the bulk of the police station advice work for the firms we observed in both sites. There is a requirement in the criminal legal aid contract for solicitors to undertake a certain number of police station advice cases each year, but there were other reasons why a solicitor, rather than a representative, may attend a police station. For example, if the person was regarded as a ‘prestige’ client, a solicitor would attend in order to protect the firm’s reputation. In this way, there were greater efforts to ensure continuous representation by a single individual (rather than just the firm) for some clients. Firms with a legal aid contract must also participate in the duty lawyer scheme. Both solicitors and accredited representatives may act as duty lawyers, as well as attending the police station as ‘named lawyers’ requested by a client.

In France, we observed lawyers who had been qualified for only one or two months (one of whom had not studied criminal law), as well as lawyers who did not

\[15\] ScoCityPoli14.

\[16\] ScoCityPoli14.

\[17\] ScoCityPoli14.

\[18\] Whilst all lawyers or legal representatives attending in Scotland and England and Wales were criminal specialists, crime made up less than a third of the work of 48 per cent of Dutch lawyers we observed.
practise any criminal law outside of their duty lawyer work.\textsuperscript{119} Limited training for criminal duty lawyer work (at both court and the police station) was provided locally. One lawyer, for example, was very recently qualified and had no criminal law experience. He was undertaking police station advice work because he found it interesting to be involved so early in the process and had a growing interest in criminal work.\textsuperscript{120}

Although Dutch lawyers are required to handle at least ten criminal cases per year to be registered on a duty list,\textsuperscript{121} in both sites in the Netherlands many lawyers who were not criminal law specialists were registered on the duty list. For example, when a non-criminal specialist we observed was called out to suspects held for offences of assault and public order, he did not know in what ways he might assist them. He told the researcher: 'Perhaps a specialized criminal lawyer would know? But anyway, well, I get paid for these cases...'. He did not explain the various ways in which he might be of assistance to the suspect, stating simply: 'I am here because it must be so.'\textsuperscript{122}

We observed several cases in the Netherlands where suspects had requested a named lawyer, but were allocated the duty lawyer. Sometimes this was because the named lawyer was based in another city some distance away, but other times it seemed that it was simply more convenient for the police. Suspects were never asked if they wanted a duty lawyer in the absence of their 'preferred' lawyer, with the result that suspects often did not trust lawyers 'imposed on them', as they saw it, by the authorities.

In Scotland, advice is provided by qualified lawyers in private practice or working through SLAB or the PDSO. According to SLAB figures, around one third of suspects are advised by SLAB and two thirds request a named solicitor.\textsuperscript{123} During the six months from 4 July 2011 to 2 January 2012, SLAB report that of the 1,006 suspects requiring the personal attendance of a lawyer, 51 per cent were attended by a private duty solicitor, 19 per cent by a solicitor from the PDSO, 15 per cent by a private named solicitor and 14 per cent by a solicitor from the SLAB.\textsuperscript{124}

5. **Providing Legal Advice: Telephone Advice or Face-to-Face?**

Legal assistance is most effectively provided in person, through a private consultation and presence during the police interrogation, but in some instances it will be provided by telephone only. In some instances this is through the lawyer's own

\textsuperscript{119} Of the five lawyers we observed, only one was a criminal lawyer.
\textsuperscript{120} Fran Townlaw.
\textsuperscript{121} See Inschrijvingsvoorwaarden advocaten 2013, Art. 6(a).
\textsuperscript{122} NethCityLaw3.
\textsuperscript{123} See section 2.4 above.
\textsuperscript{124} SLAB 2012. There are likely to be more private names solicitor cases, as these were just those that SLAB was aware of.
choice, but in others (typically cases considered to be minor), it is because legal aid is available only for telephone advice, not for personal attendance at the station.

Research in England and Wales has shown that suspects are seriously disadvantaged by receiving only telephone advice, rather than lawyers attending the station (and the interview) in person.\textsuperscript{123} The nature of the advice that can be dispensed by telephone is very limited. The police will tend to disclose as little as possible and the nature or gravity of the suspected offence(s) may be more serious than first thought. It is also very difficult to assess the mental and emotional state of a suspect (and so their ability to get their account across in interrogation) without having a face-to-face meeting.\textsuperscript{126}

The suspect is seriously disadvantaged by having to face the police alone. It is very difficult to make a fully informed choice about the best way to proceed without the lawyer meeting face-to-face and going through the suspect's version of events and circumstances. For suspects exercising their right to silence, in this and earlier research it was clear that many benefitted from the lawyer's presence in interrogation. For those answering questions, it was often helpful to go through the issues first with the lawyer - not to rehearse a false account, but to get a clear picture of events and an idea of what to expect so that the version in interrogation was what the suspect wanted to say. Whilst it is standard for officers to explain the purpose of interrogations as to 'get the suspect's side of the story' or to 'find out the truth', in many instances questioning is designed to obtain an admission, and the suspect will often be destabilized in the course of this.\textsuperscript{127} In short, the presence of a lawyer can assist suspects in the exercise of their legal rights and enable them to better articulate their version of events.

This is perhaps of even greater importance for suspects who the law classes as vulnerable - children and young people and those with learning disabilities or mental health issues. In England and Wales, where detention is not for the purpose of interrogation (for example, in excess alcohol cases, or arrest pursuant to a warrant), legal aid is not available for a lawyer to attend the suspect at the police station. Instead, suspects are entitled only to telephone advice, provided by CDS Direct. However, even in these cases, a lawyer might be of benefit to the suspect by ensuring that they understand the detention process, that they are able to exercise their rights, and by gathering information needed for any court appearance. Much will, of course, hinge on how such cases are defined and there is always the risk that 'minor' comes to be defined more broadly over time.

\textsuperscript{123} McConville & Hodgson 1993; McConville \textit{et al.} 1994.
\textsuperscript{126} There are also more likely to be concerns about the confidentiality of a telephone consultation, than a meeting in person.
\textsuperscript{127} For an empirical account of the police construction of the prosecution case in England and Wales, see McConville, Sanders & Leng 1991. For a discussion of 'the truth' understood as a confession, see the empirical findings from France in Hodgson 2005.
5.1. England and Wales

In all cases observed in England and Wales, with the exception of CDS Direct cases, lawyers and accredited representatives provided advice to clients in person. When notified of a client in police custody, lawyers would usually speak to them on the telephone in order to find out whether there were any immediate concerns, and to let the suspect know that they would attend in person when the police were ready for interview. Lawyers observed by researchers based in law firms always attended the police station following a request for advice; telephone-only advice was never an option. As one lawyer put it: ‘Once we’ve been instructed, I’m attending as far as I’m concerned and that’s that.’ The only exceptions would be where the client did not want the lawyer to attend, or was not prepared to wait.

However, telephone-only advice may be the suspect’s only option in some instances. CDS Direct is a telephone legal advice service, available for those suspected of minor offences where no interrogation is going to take place, and who are therefore not eligible for legal aid covering personal attendance of a lawyer at the police station. At the time of the fieldwork, this service was provided by two criminal law firms contracted by the Legal Services Commission. It appeared that the most common types of offences dealt with by CDS Direct were drunk-driving and minor public order offences involving alcohol consumption. CDS Direct was also called to advise suspects detained for purposes other than interrogation, for example, for breach of bail, or arrest on a court warrant, or to take samples in drink-driving cases. Only about one-quarter of calls to CDS Direct appeared to result in legal advice being given. In the remainder of cases, suspects either refused to speak with a CDS Direct lawyer (often when they realized that the CDS Direct lawyer would not arrange for them to speak to their own lawyer), or they had already gone to court by the time the CDS advisors made contact with the police station, or they were referred to a solicitor because the case was too serious for CDS Direct to deal with.

Lawyers employed by CDS Direct followed pre-written scripts for each type of offence. This was designed to ensure that the information provided to the suspect was comprehensive, but the researcher noted that this may have made some lawyer-client consultations seem impersonal and hurried. The impersonal nature of CDS Direct advice was probably further reinforced by the fact that it was given by telephone, and because CDS Direct advisors had to go through the same scripts repeatedly, sometimes several times a day. In addition, concerns for the privacy

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128 EngCityLaw1.
129 From January 2013, three firms were contracted.
130 EngCityLaw2.
131 EngCityLaw2.
132 EngCityLaw2.
of CDS Direct advice were often raised, because the telephone that suspects were using was located at the custody desk.133

5.2. France

Lawyers we interviewed said that attendance was mandatory if they were acting as duty lawyer, and when requested as a named lawyer they preferred to attend in person if at all possible. As our observations were based on accompanying lawyers, our sample was limited to cases where lawyers did attend. When we accompanied duty lawyers, they attended all requests in person. There were no instances of telephone-only advice.

5.3. The Netherlands

In the Netherlands, most lawyers in our sample attended the police station in person, although their role was limited to the consultation with the suspect, as they were not normally permitted to be present during the interrogation.

In the Netherlands, telephone advice appears to be provided only rarely. The norm is personal attendance by a lawyer. There are, however, a number of situations where telephone advice may be provided. Firstly, persons detained in respect of very minor offences may, according to the existing regulations, receive legal advice by telephone.134 Secondly, sometimes the police allowed suspects to speak with their lawyer in addition to a personal consultation. This was not treated as the right of a suspect, but as a ‘privilege’ given to them by the police (sometimes in the hope that a suspect would give up the decision to remain silent after having spoken with a lawyer).135 Thirdly, there was anecdotal evidence that some lawyers were trying to advise clients on the telephone instead of attending in person.136 It was not clear, however, whether they succeeded in doing this.

Because telephone advice was not the ‘regular’ way of assisting clients at police stations, police in the Dutch sites were not used to organizing the provision of such advice. As a result, facilities were sometimes lacking, which may have occasionally led to breaches of lawyer-client confidentiality. For example, in one case observed (involving an alleged failure to obey a police order), the telephone consultation took place within the hearing of a police officer, who stood behind the open door of the room where the telephone call took place. The officer did not move away, even after the suspect explicitly requested him to do so, because the officer

133 For research on CDS Direct, see also Bridges & Cape 2008.
134 The so-called category C offences. See Aanwijzing rechtshulpstand politieoverhoor 15 February 2010, Steri 2010, 4003 (Regulation on Legal Assistance at Police Stations). Such advice would also be at the expense of the suspect.
135 NethCityPol18; NethTownPol2; NethCityPol23.
136 NethTownPol4; NethTownPol5.
believed that the suspect could use the telephone to make some form of unauthorized contact.\textsuperscript{137}

At the time when the fieldwork was conducted in the Netherlands, proposals were being discussed regarding the expansion of the provision of advice by telephone or video-link in respect of a greater range of offences. Experiments with 'video-consultation' had been conducted in some regions of the country, which were positively evaluated by the government.\textsuperscript{138} Furthermore, in the period after the fieldwork had been finalized, the Dutch Bar published a report in which it suggested, \textit{inter alia}, that the provision of advice by such mechanisms should be expanded.\textsuperscript{139} Lawyers' responses to these proposals was mixed. Most of the lawyers we interviewed spoke negatively about telephone advice in general, particularly because they did not trust that their conversations with clients would remain confidential:

\begin{quote}
[Telephone advice is] second best, because I am not sure whether or not it would be listened to. Of course the information obtained in this way cannot be used in the case file, but it is still being used. I would be very sceptical about it - I would not ask for many details from my client, but rather tell him to remain silent. I am against telephone advice because in my view it is not reliable.\textsuperscript{140}
\end{quote}

Other lawyers thought that telephone advice was unsuitable in situations where the suspect did not know the lawyer, particularly because it was felt that many suspects mistakenly believed that duty lawyers worked for the police.\textsuperscript{141}

The only positive view of telephone advice was from one lawyer, who told us that he believed the provision of telephone advice could be a good solution to lawyers' problem of availability to attend the police station.\textsuperscript{142} However, putting in place arrangements to delegate work to other lawyers would arguably provide a better solution to the problem of capacity.

\section*{5.4. Scotland}

The most significant feature of custodial legal advice in Scotland is that it is provided almost entirely by telephone. Official statistics show that over the two-year period from July 2011 to June 2013, telephone advice was provided to suspects in 44,859 cases. In the same period, suspects were attended by a lawyer in 7,042 cases (one eighth of the total cases dealt with).\textsuperscript{143} This is what we observed at the police stations in the study and at SLAB, and it was confirmed both by police officers and

\begin{footnotes}
\footnotetext{137}{NethTownPo38.}
\footnotetext{138}{Ministerie van Veiligheid en Justitie 2012, p. 19-20.}
\footnotetext{139}{Commissie Innovatie Strafrechtadvocatuur 2012.}
\footnotetext{140}{\textit{NethCityLaw2}; \textit{NethCityLaw3} among others.}
\footnotetext{141}{\textit{NethCityLaw3}.}
\footnotetext{142}{Of these 7,042, SLAB attended in 802 cases, FDHO in 821 cases, the duty lawyer in 3,230 cases and a named lawyer in 2,189 cases. See SLAB 2013.}
\end{footnotes}
lawyers in our interviews with them. The law allows for personal attendance at the police station in order to advise suspects, but lawyers prefer to provide advice and assistance by telephone. This is of real concern given what we know about the significance of the police interrogation and the vulnerability of those detained. In Scotland, this was exacerbated by the brevity of the telephone consultations we observed, most of which lasted only a few minutes.

The explanation generally put forward by both police and lawyers for the provision of telephone advice rather than personal attendance, is linked to the right to silence and the operation of the corroboration rule. The corroboration rule requires that all evidence must be corrobated by a second evidential source; thus, a single piece of evidence or confessions alone are never enough to convict an accused. For this reason, lawyers told us that the advice to most suspects is to remain silent. The primary objective is to prevent the suspect providing any corroboration to evidence gathered so far. However, this is a long way from the professional ideal of personal service. It fails to grasp the importance of individualized advice, tailored to the specific suspect, case and evidence. It also fails to take account of the importance of seeing the suspect, noting their physical and emotional state and, of course, being present during the police interrogation. In preferring telephone advice, the focus is on the consultation rather than the possibility of being present in interrogation:

To advise somebody to remain silent is, to my mind, just as well done over the phone as it is face to face. At the end of the day, when we first see the accused it's through a screen anyway and you're actually speaking to them via an intercom-system and apart from actually seeing a person, you're still speaking to them via a phone line and it really doesn't make a huge deal of difference in my opinion. 144

Furthermore, it underestimates the difficulty of remaining silent in the face of police questioning. 145 Critics often assume that silence is an easy strategy to employ. In practice, suspects find it extremely difficult; they worry that it will make them look guilty and that they find it difficult not to respond to police accusations that they refute. 146 Lawyers identified the vulnerability of suspects as a reason for advising silence, but not always as a reason to attend the police station in person to ensure that this strategy in interrogation is maintained. Adopting this as a uniform strategy also ignores the fact that some suspects will wish to (and may be best advised to) respond to questions and to admit their involvement.

144 ScotTownLaw2.
145 See further Chapter 8, section 4.3.
146 See McConville & Hodgson 1993. In our own research, in England and Wales in particular, suspects who had been detained and questioned before were more likely to be able to maintain a posture of silence than those who had no experience of police custody. This was more difficult in the Netherlands, where the police continued to pressure silent suspects to speak.
Scottish lawyers we spoke to who had experience of attending the police station in person, including being present in interrogations, recognized the value of their presence. For example, one lawyer told us that his presence helped suspects maintain their strategy of silence, or keep to their account without being persuaded to adopt the police version.\(^{147}\) He described the persistent questioning of officers that would be difficult to stand up to, especially for a suspect who was being interrogated for the first time. Another lawyer we interviewed also appeared to be more willing to attend the station – saying that he attended about once a week, usually for vulnerable suspects or very serious cases (compared with around five telephone consultations a week).\(^{148}\) He also made a distinction, however, between first time and vulnerable suspects and repeat offenders, for whom:

> if you say to them on the telephone not to make any comment, they tend to grasp that very quickly and I am not sure if [attending] would make a difference in their case.

Some lawyers demonstrated conflicting approaches – recognizing the benefits of their presence, whilst preferring not to attend unless the case was serious.\(^{149}\) This highlights the need for a more sustained programme of professional training on the value of the lawyer’s role.

We observed the provision of telephone advice by SLAB, but we were unable to observe lawyers providing advice and assistance at the police station. The police suggested a number of reasons why lawyers might attend in person rather than providing telephone advice: the suspect has certain personality traits that might require a face-to-face consultation; the sensitivity of the case; the lawyer’s previous knowledge of the suspect; the desire to provide a more personal touch – especially if the client is paying privately; but most commonly, because of the gravity of the offence. One officer also told us that where a person is detained over the weekend, a lawyer might pop into the station on a Sunday ‘to show his face’ (that is, as something of a ‘public relations’ exercise), where the client was due to appear in court on Monday morning. We did see one or two cases where the lawyer attended the station in person at the specific request of the suspect. Some lawyers appeared to attend in person more often than the others: in ScotTown, for instance, we observed one particular lawyer attending his clients in custody on a regular basis.\(^{150}\)

An experienced criminal lawyer, told us that he favoured telephone advice because it was too inconvenient to attend the police station, especially in the early hours of the morning. He had only attended in person on:

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\(^{147}\) ScotCityLaw2.

\(^{148}\) ScotTownLaw2.

\(^{149}\) Eg. ScotTownLaw.

\(^{150}\) Whilst private practitioners may provide telephone advice, PDSO lawyers must attend in person.
Remuneration is also a factor influencing lawyers' decision whether or not to attend suspects at the police station. In Scotland, payment for police station advice in summary cases was initially subsumed within the fixed court fee, providing little incentive for attendance.\(^{151}\)

Some lawyers in Scotland felt that they were not well remunerated, receiving around £15 for providing telephone advice. For some lawyers, it was not worth their time to fill in the claim form. PDO lawyers, on the other hand, considered the payment regime to be fair, but they are salaried lawyers, so in a different financial position.

6. Disclosure and Legal Advice

The amount of case-related information and evidence that lawyers are given before advising their clients at police stations varied enormously across the four jurisdictions. All lawyers were agreed, however, that the more limited the disclosure, the more limited the advice they could provide to their clients.

6.1. England and Wales

In England and Wales, lawyers were provided with much better levels of disclosure than in the other three jurisdictions in our study, although evidence was also sometimes held back for strategic reasons – to place the suspect under pressure in the interview. In EngTown, we observed police officers failing to disclose some evidence until during the interrogation. When this happened, the legal advisers were quick to respond; they intervened during the interrogation and had a second consultation with their client as a result.\(^{152}\)

In most instances, the investigating officer would provide the lawyer with an overview of the evidence, sometimes allowing the lawyer to view CCTV footage or see photographs. Some disclosure was provided in writing and some was taped-recorded and a copy given to the lawyer. Lawyers did not have to ask for this – disclosure is a standard part of the procedure – although they would sometimes ask to be shown any CCTV footage mentioned and some would ask if the suspect had made any ‘significant comments’. Legal advisers considered good relations important in ensuring that the police provided maximum disclosure rather than just the bare minimum.

\(^{151}\) ScotTownLaw2.
\(^{152}\) See further Chapter 3, section 5.9.
\(^{153}\) EngTownLaw1.

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Interestingly, some officers in England and Wales were very forthright about the lack of evidence in some cases, telling advisers that the case was ‘just rubbish’. This was generally where the lawyer and officer enjoyed a good working relationship.

The conversation during disclosure sometimes revealed that there had been some prior discussion between the police and suspect. For example, in one case, the police officer told the lawyer that the suspect would probably deny the offence. The adviser did not ask why the police thought that this was likely, nor whether the police had already questioned the suspect.

In some instances in England and Wales, lawyers pressed officers for more information on the basis that they could not advise their client if they did not know the extent of the evidence. The underlying suggestion was that silence would be advised if the suspect did not know the nature of the evidence they were to respond to. For example, the lawyer in one case we observed was effective in using this strategy to press for more information in a serious sexual offence case. The police claimed that they did not have information about the alleged victims, as it was stored in the suspect’s computer. The adviser pressed the officer, explaining: ‘I cannot advise my client if I do not know what is coming out [in evidence].’ The officer eventually relented and provided the information the lawyer had requested.

Although disclosure was more complete in England and Wales than the other jurisdictions we observed, we also saw examples where suspects were advised on the strategy to adopt in interrogation in quite strong terms, despite the adviser not having been able to assess the strength of the evidence. The adviser in these instances simply accepted at face value what they were told by the police. However, once in interrogation, the evidence sometimes turned out to be rather different (either weaker or stronger than thought).

6.2. France

In France, some initial disclosure was made to the co-ordinator in FranCity, but lawyers attending the station complained of receiving little case-related information from the police.

We barely know what crime they’ve committed, we don’t know the circumstances of the arrest or what happened. For example, if they’re arrested for stealing, it’s very wide, we don’t know what exactly they’re being suspected of... Some investigators tell us a bit more about what happened, but it’s a very small minority (less than one in ten).\(^{156}\)

\(^{154}\) EngTownLaw3.  
\(^{155}\) EngTownLaw9.  
\(^{156}\) FranCityLaw2.
Another lawyer also confirmed that he never received any information about the evidence.\textsuperscript{157} It was the practice of some lawyers in FranCity systematically to endorse the custody record, noting the lack of access to the dossier.\textsuperscript{158} The police are not obliged to provide lawyers with access to the case file, but these endorsements were a form of protest and a way for lawyers to register their discontent with the legal position. It also highlighted the limitations of what lawyers could achieve with little or no case-related information on which to base any advice. However, others in FranCity thought this was a waste of time—the procedure is clear and such behaviour, in the view of one lawyer, serves only to antagonize the police and so ultimately is counter-productive.\textsuperscript{159}

In general, little written information was disclosed, but where officers and lawyers had a good working relationship, more information would be provided verbally. Sometimes this was the result of the lawyer deducing what evidence existed from the questions that were asked during interrogation.

At the end of the first interview, we start to understand. In between two interviews, I sometimes ask questions: ‘You talked about this, so there must have been this.’ By deduction and by experience, I can tell, so I ask questions and they regularly reply but they don’t tell you everything. That’s the idea in the inquisitorial garde à Vue.\textsuperscript{160}

We observed precisely this strategy in several cases in FranTown; experienced lawyers were able to deduce what evidence the police had, by the nature of their questions. For example in one case in FranTown, the lawyer noted that the police appeared to have used telephone-tapping and surveillance: ‘They know who you are in contact with and where you go.’\textsuperscript{161}

Not all lawyers experienced problems obtaining case-related information. One lawyer in FranCity told us that he had not had any problems getting initial information from the police and that the gendarmes were even more forthcoming.\textsuperscript{162} The different experience in dealing with police and gendarmes was confirmed by lawyers in both sites. The gendarmes were described as more helpful in setting out the basic facts of the case (as well as in taking more detailed notes during interrogation and generally being more rigorous in their handling of the case).\textsuperscript{163} In one case we observed, the senior gendarme checked that the lawyer was clear about the facts of the case and gave her the notification of rights and the first statement made by the suspect.\textsuperscript{164} The lawyer was also allowed a second consultation with the client, lasting 20 minutes.

\textsuperscript{157} iFranCityLaw3.
\textsuperscript{158} iFranCityLaw1.
\textsuperscript{159} iFranCityLaw5.
\textsuperscript{160} iFranTownLaw1.
\textsuperscript{161} iFranTownLaw2.
\textsuperscript{162} iFranCityLaw1.
\textsuperscript{163} Eg, iFranCityLaw2; iFranCityLaw3.
\textsuperscript{164} iFranTownLaw2.
As in other jurisdictions, lawyers believed that lack of disclosure on the part of the police indicated a weak case. This in turn affected the advice that they gave their clients. When the police withhold information on the charges, this may slow down the investigation because it may result in the suspect being less co-operative. When we asked one lawyer in FranCity if he ever received information about the evidence the police had gathered, such as witness statements, he replied:

'It never happened to me. They keep it as a surprise element. If we could have more elements, we could convince the suspect that he should change his statement because it's in contradiction with the evidence. We shouldn't encourage the suspect to lie but if we knew there's nothing in the file, we could encourage them to give their version. It would avoid the police bluffing. They sometimes say in interview they have certain evidence, but I doubt it.'

Other lawyers also agreed that fuller disclosure might just as likely result in advice to make an admission:

However, not all lawyers argued for more information. Some were concerned that fuller disclosure would require lawyers to play a more onerous role, for which they were ill-prepared:

If we ever get access to the file, the Bar will have to be careful and make sure that lawyers do their work properly from the very start instead of sending young lawyers in GAV. We must get it right from the start.

Another lawyer agreed that the demand for a greater role in the GAV was ill-conceived as it would carry with it much greater responsibility, which presumably they felt lawyers were in no real position to take on.

6.3. The Netherlands

Before attending the police station, lawyers in NethCity lawyers were usually faxed through a notification form containing limited information about the nature of the offence. They were typically told how many suspects were in custody, the offence(s) of which they were suspected, the time at which they were arrested, and the name of the arresting officer. In NethTown, at the time of the fieldwork, the notification form was not being faxed through to lawyer's firms anymore, because police believed that this was in breach of the law concerning the protection of personal data. On some occasions in NethCity, we found that notification forms were not given to the lawyer. For example, in one instance, the lawyer was told at the station

365 iFranCityLaw2.
366 E.g. iFranTownLaw5.
367 iFranCityLaw4.
368 iFranCityLaw6.
369 See iNethTownLaw4; iNethTownLaw7.
that there were more suspects to be seen and he agreed to do so with no notification form and no conversation with the assistant prosecutor who is responsible for completing the form. This made for an almost comical consultation with the suspect, who claimed to have no idea why he had been arrested in a café while sitting quietly with his friends and family, despite the lawyer’s questions concerning what the case might be about.\textsuperscript{170} If a procedure, such as extending the period of detention, was to be employed, the grounds for this were stated very generally. Thus the notice might state, ‘to interrogate the suspect further; to confront the suspect with witnesses; to investigate the co-suspect’.

Sometimes, albeit rarely, lawyers were given more information on, for example, where and how the alleged offence had been committed, whether there were witnesses (but not who they were or what they said), whether there was CCTV footage (but the footage was never shown), and what the next investigative steps were going to be. In one case, for example, an assistant prosecutor told the lawyer that a quantity of ecstasy pills had been found in the suspect’s car, that his girlfriend was with him when he was arrested and that she was going to be interviewed, and that the suspect’s house would be searched.\textsuperscript{171} However, this level of disclosure appeared to be the exception. The amount of information given to a lawyer depended, in part, on the officer concerned (some officers never disclosed anything, whilst others did) and in part on the perceived strength of evidence (the stronger the evidence, the more likely it was to be disclosed).

The police appeared to approach disclosure with the primary purpose of persuading the lawyer to advise their client that there was no point in denying the offence. One interviewed officer, for example, said that he was willing to disclose evidential information to a lawyer only where it would strongly incriminate the suspect: for example, if a gun was found in the house of someone suspected of an armed robbery, or stolen property was found on a suspect arrested for theft. He would not, however, disclose information that ‘could be used to build up pressure during the interrogation’, for instance, the content of tapped telephone conversations.\textsuperscript{172}

Lawyers doubted the value of information that was disclosed only in general terms, such as information that there were witness statements against the suspect, without any detail as to who had made the statements or what was in them.

It was difficult for lawyers to obtain disclosure from the police because, when visiting their clients, they usually did not have access to the investigating officer(s) dealing with the case. It was not common practice for a lawyer to ask an investigating officer to come down to the custody suite to speak to them, and it was unclear how such a request would be received, and whether it would be complied with.

\textsuperscript{170} NethCityLaw1.
\textsuperscript{171} NethCityLaw2.
\textsuperscript{172} NethCityPol3.
For these reasons, most lawyers did not ask for more information from the police. Yet some lawyers with considerable experience were proactive in seeking information, however minimal the information that was then provided, because it helped them in determining what the advice to their client should be. One lawyer, for example, was able to find out, by talking with three different officers, that the main suspect in the armed robbery case, for which his client was arrested, was his brother, and that there was little evidence to link her client to the alleged offence.  

6.4. Scotland

As most advice was provided by telephone, this was also how disclosure was obtained in the cases we observed. Lawyers’ experience was mixed, but most said that they received inadequate information.

There are some officers that will be quite happy to talk to you about it all day, but generally speaking that’s an unusual person. Classic example; received a phone call on Saturday night. Client appeared as a ‘custody’ at [nearby police station] on Tuesday. The sergeant told me the man had been arrested and charged with a breach of bail... That’s what I was told... it turned out that in fact that man was facing five charges, one of which was the breach of bail – but the other offences were more serious. Quite often you don’t get the required information. Unless you make an effort to ask them, you won’t get it... I think it is maybe ignorance rather than a deliberate attempt to hide information, because it makes no difference. Perhaps they don’t understand that that sort of information can be important and should be imparted to the lawyer.  

A SLAB lawyer we spoke to considered that the police could be ‘rather deceitful’ in disclosing any evidence on the telephone initially, disguising the type of offence. For example, one lawyer described a case where, on the telephone, the police described the suspect as being held on suspicion of domestic assault. In fact he was being held on suspicion of domestic assault and murder.

Many lawyers said that lack of disclosure was an important reason for advising silence; they were given no useful information about the evidence until the case reached court. As in other jurisdictions, Scottish lawyers told us that when the police had strong evidence they were willing to disclose it, but that when it was weak disclosure was limited or non-existent.

Never have the police given me adequate information where I would feel confident that I can give informed advice to the client. That is why I usually advise ‘no comment’ in this situation.  

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173 NorthCityLaw13.
174 ScotTownLaw1.
175 ScotCity2Law3.
176 ScotCityLaw1.
Whilst lawyers attending the suspect in person in the other jurisdictions in our study would often ask their clients for their account, Scottish lawyers providing telephone-only advice were sometimes reluctant to ask the suspect to provide information about the case, as they were concerned that the telephone conversation was not private. The result was that lawyers were limited in the advice that they could offer suspects, especially as most custodial legal advice in Scotland was provided only by telephone, so lawyers could not then try to acquire more information at the police station.

The police, on the other hand, told us that they did provide lawyers with information about the evidence in a case, but often they did not have a great deal of information to disclose. One officer told us that he disclosed the majority of evidence to the lawyer, perhaps holding back some forensics, depending on the case, whilst another said that he would sometimes disclose only the briefest outline, simply because that is all the he normally had at that stage. Underlining the fact that disclosure was treated as the right of the lawyer rather than of the suspect, he went on to say that:

We won't give the suspect information prior to interview. They have a solicitor now, so we will give them any information in interview... We shouldn't give the lawyer any information that they can give to the suspect and use against the victim.

One officer did not consider that even the lawyer was entitled to information about the case. He said that the lawyer would be told what the suspect was being detained for by the duty officer in charge of custody. However, 'under no circumstances has he a right to ask to speak to the detaining or the arresting officers'.

7. **Perceptions of the Right to a Lawyer**

Typically, the police considered that lawyers were unnecessary in minor cases and that their presence caused delays and 'hindered investigations' by encouraging suspects to exercise their rights. However, some officers, often those with more experience, saw the right to legal advice in less adversarial terms. They recognized the benefits of lawyers being present – it encouraged procedures to be followed properly, suspects were often more co-operative, and bail or early case disposal could be negotiated more easily. Across all jurisdictions, the presence of a lawyer in more serious cases was also more likely to be regarded as useful by officers. It was seen as a protection for the police, a guarantee that the process of detention and interrogation had been conducted properly and so could not be challenged later.

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177 ScotCityPol3.
178 ScotCityPol5.
179 ScotCityPol8.
7.1. **England and Wales**

There was generally more acceptance of the presence of lawyers at the police station in England and Wales than in the other three jurisdictions in our study and many, although not all, officers thought that lawyers have an important role to play at the police station. Suspects' exercise of their right to silence was also less contested than it had been prior to the introduction of legislation allowing adverse inferences from silence.

However, there were officers who considered that the procedural rights of suspects, and disclosure to the defence in particular, tipped the balance away from the prosecution in favour of the accused. This was, in many ways, a sceptical attitude to the adversarial process itself:

> ... we'll have a lawyer come in to give a suspect legal advice ... and all of a sudden you end up with a 'no comment' interview. Now that's not the suspect saying 'I don't want to tell you', that's the legal adviser telling that person 'don't say anything because we don't know what they know'. But we share with the defence, we will make disclosures with the defence legal adviser at the time and tell them what we know, but we won't get told the other side of that coin, so the process is frustrating right from the very beginning.\(^{180}\)

Many officers were of the opinion that the lawyer's presence complicated their work, rather than facilitating it.\(^ {181}\) They noted, in particular, that things may take longer when a lawyer was present,\(^ {182}\) and that they felt freer in interrogations without a lawyer present.\(^ {183}\) It should be noted, however, that most of the officers interviewed in England and Wales dealt with relatively minor cases, so-called routine crimes, where speed of investigation was often the overriding concern. It was in these cases in particular that any delays resulting from the lawyer's involvement were acutely felt. It is likely that delays resulting from the involvement of a lawyer would be less of an issue for officers investigating more serious offences, in which a variety of other factors have an impact on the length of the investigation.

On the other hand, a number of officers expressed more positive views about the lawyer's role at the police station, both in terms of keeping police 'up to the mark' and facilitating their work.\(^ {184}\) One officer noted that the lawyer's presence may cause the police to investigate more thoroughly, for instance, by obtaining CCTV footage before proceeding to an interview in shoplifting cases.\(^ {185}\) Other
benefits mentioned by the police were that lawyers could persuade their clients to accept a caution and thus save investigation time, and that they could persuade ‘difficult’ suspects to comply with the custody and interview procedure.\textsuperscript{186}

Most lawyers noted that there were two kinds of officers: those who accepted that lawyers had a legitimate role to play, and those who ‘hated having lawyers there’,\textsuperscript{187} because they considered that the lawyer’s presence hindered the investigation. Lawyers felt that the latter group of officers tried to dissuade suspects from obtaining legal advice by suggesting that requesting a lawyer would lead to a longer time in custody.\textsuperscript{188} There was a general belief amongst lawyers that younger police officers were more likely to be hostile towards them. Older officers, on the other hand, tended to adopt a more co-operative attitude towards lawyers:

Younger officers tend to have an ‘Us and Them’ attitude. The older and more experienced officers cooperate and just get on with the job at hand. The younger ones can be awkward and play games, claim that you’ve come out just to get your fee. There are good ones and bad ones and this is usually affected by age and experience.\textsuperscript{189}

This belief was confirmed in our interviews with police officers.\textsuperscript{190} Of the officers we interviewed, those with greater experience tended to accept the role of the lawyer at the police station,\textsuperscript{191} whereas younger officers described the lawyer’s role as being in opposition to that of the police.\textsuperscript{192}

7.2. France

French police thought that suspects detained for the first time were more likely to ask for a lawyer,\textsuperscript{193} but that those who have been to the station before ‘know the system, so they don’t want a lawyer because that means that they will have to wait for her for interviews and they don’t necessarily want that’. For French police, the material conditions of the GAV presented the greatest difficulty, rather than the role played by the defence lawyer.\textsuperscript{194} When asked how the 2011 reform had affected the police, one officer replied:

\textsuperscript{186} EngCityPol5, EngCityLaw2.
\textsuperscript{187} EngCityLaw2; EngCityLaw3; EngTownLaw1; EngTownLaw2; EngTownLaw5
\textsuperscript{188} EngCityLaw4.
\textsuperscript{189} E.g., EngCityPol1 said that it is younger officers who tend to behave more cautiously with lawyers.
\textsuperscript{190} E.g., EngCityPol1; EngCityPol2; EngCityPo6; EngTownPol1; EngTownPol6.
\textsuperscript{191} E.g., EngCityPol2; EngCityPo7; EngTownPol5. However, some older officers have expressed similar views. See e.g., EngCityPo5; EngTownPol2.
\textsuperscript{192} FranCity2Pol12.
\textsuperscript{193} The paucity of resources invested in police stations has been documented elsewhere. See Hodgson 2005.
Issues of material organization. Police stations are not always designed for it. When you have to organize a confrontation between three people who each have a lawyer, you need space specifically designed for it. We’re far from it. So, it’s more material difficulties than anything else.

He also thought that it had complicated and lengthened procedures:

Personally, I think it really complicated things and we’re wasting time because we have a lot of rights to manage. It’s not been thought out properly... We deal with “normal” offences, not organized crime. It’s more difficult in 48 hours. We automatically waste time because we are supposed to wait for the lawyer, to take the suspect to a doctor if she asks for it, to wait for the interpreter if there’s one. It’s very time-consuming, so I think that the GAV could have been extended a bit.

Another officer told us that he did not think it had made a great deal of difference in ordinary cases.

It’s an additional constraint for us because we have to wait for the lawyer before each interview. The lawyer’s presence during the interviews doesn’t change anything. The juveniles have to be filmed, they’re filmed whether there’s a lawyer or not... I’m not saying that there aren’t some moments of tension where we might speak a bit louder but the lawyer’s presence doesn’t change anything... Maybe in more sensitive cases, it’s different, such as organized financial crime, murders or rapes. But at my level, assaults and frauds, it doesn’t change anything.

He did go on to acknowledge that a lawyer might have more of an impact in more serious cases.

The last serious offence I dealt with was a rape on a vulnerable victim but the suspect didn’t ask for a lawyer. It could really have had a massive impact in this case. We are much more careful with a serious offence. We know there will be the Cour d’assises afterwards so we have to be very rigorous because it’s so serious... [suspects] don’t ask for a lawyer than before the reform. We don’t encourage them to take a lawyer in small cases. In serious cases, we prefer it if there’s a lawyer. It’s a guarantee for us as well as for them. Even if it’s an additional pressure, in the sense that we’re not allowed to make any mistakes, we prefer it if there’s a lawyer present.

Another officer did not think that lawyers could be very useful without access to the case file and any attempt to play a more active role during interrogation would be resisted.

#Footnotes
95 iFramCity2Pol4.
96 iFramCity2Pol4.
97 iFramCityPol2 also expressed this view.
98 iFramCity2Pol1.
99 iFramCity2Pol1.
"To be honest, they're not very useful. I think if they had access to the file they could coach their client and tell them what they should say. Since they don't have access to the file and they can't intervene during the interviews, I don't feel they're very useful ... it doesn't change anything because with most lawyers there's no problem they don't intervene, so they don't bother us and they're not very useful for their clients... Some of them try to intervene. It can go as far as an incident because they're always trying to interrupt, we have to tell them repeatedly to stop intervening in the middle of the interview. It can be a bit complicated sometimes and it can go as far as a report to the bistro [the head of the local Bar] when we've told the lawyer several times to stop intervening." 200

One officer we spoke to viewed the right to legal assistance as a positive thing, although interestingly, he recognized some of the limitations, such as lack of criminal law expertise, that we observed during the fieldwork.

"Duty lawyers are sometimes not criminal lawyers, so they don't always understand the investigation. It's a bit difficult for them. It's a bit complicated for them to ask questions or make comments. Lawyers try to facilitate things. They try to make sure that it goes as quickly as possible. They also ensure that their client is well-behaved in interview, if there's any problem in this regard. We often have lawyers who put them straight.

I never had any problem with a lawyer. I would even say that most of the time they do all they can so that things go quickly. They're here, they do what they're allowed to do by law. They're more likely to calm things down if there's any problem which is rare anyway... For more serious cases, they often ask questions at the end which are often useful." 200

7.3. The Netherlands

It transpired from interviews that police officers' attitudes to suspects' right to a lawyer were ambivalent. On the one hand, it was said to be a 'good right of the suspect' 202 or even a 'fundamental right'. 203 On the other hand, these same officers believed that this new right had simply resulted in making their work more difficult. They claimed, in particular, that legal assistance leads to delays in investigations; generates additional administrative work; and may cause suspects to be less willing to co-operate with the investigation (that is, to give consent for certain investigative measures to be undertaken) or to confess. 204 In short, lawyers' presence was seen by most police officers as an obstacle to successful investigations. As one senior officer noted:

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200 [Footnotes]
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This is corroborated by the findings of Verhoeven & Sievers 2013, p. 148-149 (Breda); p. 182-184 (Utrecht) and p. 214-216 (Groningen).
'And if you then also have a lawyer... Do we then still get a chance to solve cases? 
Because this is why we are here, eh? We must also get a chance to solve cases.\textsuperscript{205}'

Some officers felt inconvenienced by the presence of a lawyer, and believed that more suspects have started to exercise their right to remain silent since the right to meet with a lawyer before the first interrogation was introduced.\textsuperscript{206}

In the Netherlands, rules and procedures were generally followed as part of a wider culture of compliance with the prosecutor’s office regulations. Thus, the provisions on the right to legal assistance were complied with where the existing regulations were reasonably clear. However, where regulations were ambiguous or where officers were not sure about them, considerations of convenience were sometimes given priority over suspects’ rights in the officers’ reasoning.

For instance, we observed an officer who was not sure whether the regulations permitted him to interrogate a 15-year-old suspect without the presence of a lawyer or a ‘trusted person’.\textsuperscript{207} In this case, a juvenile was suspected, together with his mother, of assaulting his stepfather. The suspect had initially asked for a lawyer to be present at the interrogation, but after a consultation with the lawyer he changed his mind, and asked for his mother to attend. The lawyer was unaware of her status as a co-suspect. Predictably, the officer decided that the suspect’s mother could not attend, because she was a co-suspect in the case. The officer told neither the lawyer nor the suspect of this, preventing either the lawyer attending, or an alternative ‘trusted person’ coming to the station to be present during interrogation. Despite her initial doubts about whether the child could remain unassisted during the interrogation, the officer decided to interrogate him. When she asked the assistant prosecutor to validate her decision, he responded that it was correct, and that ‘it was the lawyer’s problem that he did not want to attend’. On another occasion in NethCity, an exchange was observed between three officers about how long they should wait for a lawyer’s arrival before interrogating a suspect, where the latter had initially refused to speak with a lawyer, but had then changed his mind. All officers agreed that the two-hour waiting time should start from the moment of official detention (as in the ‘standard’ situation described in regulations), not from the moment that the suspect requested to speak with a lawyer.\textsuperscript{208}

A general opinion was expressed by some officers that suspects in the Netherlands had sufficient or ‘too many’ rights, and that there were at the expense of victim’s rights. Within police discourse, justice was clearly associated with the rights of victims, but not of suspects. As one officer remarked:

\textsuperscript{205} iNethCityPol13.
\textsuperscript{206} iNethCityPol12, iNethCityPol14.
\textsuperscript{207} Under the existing regulations, 15 year old suspects could waive the right to have both the lawyer and the ‘trusted person’ present. In this case, however, the suspect did not explicitly waive the right of presence of a ‘trusted person’, as explained below.
\textsuperscript{208} NethCityPol2.
"New regulations] should not result in creating more regulations around the suspect. According to me, our suspects have more than enough rights... and... obligations. If you give the rights of suspects such a high priority, you should give the same priority to the rights of victims."\textsuperscript{209}

Some police officers doubted whether, in less serious cases, access to a lawyer in police custody has any added value:

"What I think the lawyer actually does, I think that in 90 per cent of cases it is actually very little. Unless a suspect doubts whether he should or should not confess, then a lawyer can give advice. But this is only in very specific cases – for example, a fatal car accident... But in the other 90 per cent of cases, definitely in simple cases like shoplifting, a suspect would already know whether he would make a statement at the interrogation or not."\textsuperscript{210}

As noted above, this resulted in police officers nudging suspects towards waiving their right to legal assistance, especially in less serious cases, or accepting the waiver of the right to legal advice too easily, without questioning the reasons for the waiver.

Whilst considering the right to legal advice to be broadly positive, some Dutch lawyers expressed the same view as the police – that in minor cases it may be of little value and simply delays the release of the suspect.\textsuperscript{211} One lawyer described himself as being "present simply because the law allowed it"; he had little sense of having a proactive role.\textsuperscript{212} Another lawyer, although in the researcher’s opinion a more effective legal advisor in practice, also described his presence as simply "because this is the new rule".\textsuperscript{213} Some lawyers thought that the audio or video-recording of interrogations was more important than the presence of a lawyer during interrogation.\textsuperscript{214}

7.4. Scotland

Officers in Scotland differed in their assessment of the suspect’s right to legal advice, but most regarded it as problematic in one way or another. Many objected to the laborious process of informing suspects of the right through the SARP rather than to the right itself. As one officer put it: "It’s too complex, too confusing, too time-consuming".\textsuperscript{215} They also objected to the practical inconvenience of accommodating lawyers and legal consultations that slowed down the whole detention

\textsuperscript{209} NethCityPol3.
\textsuperscript{210} NethCityPol5. Compare the view of NethCityPol1 in section 3.2 above.
\textsuperscript{211} NethCityLaw2; NethCityLaw3.
\textsuperscript{212} NethCityLaw3.
\textsuperscript{213} NethCityLaw3.
\textsuperscript{214} NethCityLaw3; NethTownLaw1; NethTownLaw4.
\textsuperscript{215} ScotCityPol16. See also Chapter 5, section 2.6.
process. The resulting delays were seen to benefit the suspect, as well as making more work for the police:

Pro-SARF: interviews could be taken very shortly after the crime (20 minutes), leaving no time to think about or to concoct anything. Now it takes only that time to go through the SARF. They get cooling off time, time to think and it prolongs their stay in here.\textsuperscript{216}

Others regarded the right to a lawyer as part of a raft of measures within the criminal justice system, which were seen to favour the accused too much. The right was also unpopular because police officers believed that lawyers consistently advised suspects to remain silent.\textsuperscript{217} As one officer pithily put it: 'Solicitors should have a voice-mail: just say "no comment"!'\textsuperscript{218} Some officers we observed doubted whether it made any sense to interview suspects who have spoken with a lawyer, because it was going to be a 'no comment' interview anyway,\textsuperscript{219} and such interviews did not have any evidentiary value. They regretted that in Scotland no law on adverse inferences was in place, in contrast to the position in England and Wales.

Scottish lawyers we spoke to were aware of such police attitudes. They thought that the police resented the lawyer's ability to be critical of police procedures, as well as the possible delays that calling a lawyer might entail.\textsuperscript{220} And whilst there was recognition that the police sometimes tried to put suspects off requesting a lawyer, there was also an acknowledgement that officers were 'more tuned in nowadays to making sure that the suspect actually understands his rights'.\textsuperscript{221}

Officers were also critical of lawyers for not attending the police station, or named lawyers not being available to provide even telephone advice at night.

In the middle of the night, the lawyer's not available and the suspect feels their solicitor should be there: they don't want to speak to somebody on a mobile... It's a waste of time you wait for the suspect to sober up or wait for the lawyer to provide assistance which is always 'say nothing, no comment'.\textsuperscript{222}

Officers in Scotland saw legal advice as being for the sole benefit of the suspect. Younger officers in particular did not recognize any system benefit in terms of offering a process guarantee that might also work to their advantage. They had not been given any training in this area and so had little sense of the wider context of

\textsuperscript{216} ScotTownPol8.
\textsuperscript{217} ScotCityPol2; ScotCityPol7; ScotCityPol8; ScotTownPol5.
\textsuperscript{218} ScotCityPol3.
\textsuperscript{219} 60 per cent of suspects we observed answered all questions. The police were observed to use persuasion tactics in only 13 per cent of the interrogations observed. This contrasts with our findings in France and the Netherlands, where it was rare for a suspect to remain silent.
\textsuperscript{220} ScotCityLaw1.
\textsuperscript{221} ScotTownLaw1.
\textsuperscript{222} ScotCityPol5.
suspects' rights and how they might also strengthen the integrity of the procedure. More experienced officers were more positive about suspects' rights (and claimed to nudge suspects towards seeking legal advice), but victims were seen to be the losers overall.

8. Conclusions

In this chapter we have examined the arrangements for the provision of custodial legal advice in the four jurisdictions. Each jurisdiction was, in theory, compliant with the ECHR and the Directive on the right of access to a lawyer, which require that suspects in police custody are provided with access to a lawyer ‘without undue delay’ upon their arrest.223 In each jurisdiction, there was a system in place to enable suspects in police custody to obtain legal advice in custody free of charge, within a reasonable time from the moment of arrest, as well as to choose their own lawyer (with the exception of France). Thus, on the surface all these jurisdictions made provision for the right of access to a lawyer in ways that were ‘practical and effective’ and not ‘theoretical and illusory’.224

In practice, however, the extent to which the right to legal assistance is ‘practical and effective’ depends on a number of factors identified in this chapter. Firstly, it depends on whether police officers have ‘bought into’ the value of the right to legal advice. Where this is not the case, this may lead to the use of strategies aimed at discouraging suspects from exercising their right to legal advice. Most commonly, police officers told suspects that if they ask for a lawyer, their detention would last longer. We have observed this strategy being used to some extent in all four jurisdictions in our study. It is particularly effective in discouraging suspects from requesting legal advice, as the primary concern of most suspects is to be released from custody as soon as possible. This consideration played a significant role in the suspect’s decision to waive the right to a lawyer in all four jurisdictions. Other strategies included telling suspects that they did not need a lawyer because the case was not serious, or interrogating the suspect as a volunteer, avoiding the rights afforded to those formally arrested and detained for interrogation.

In all four jurisdictions, some or most police officers perceived the right to legal advice as hindering their work. This occurs for various reasons: coordination with lawyers creates demands on officers’ time; the length of the lawyer-client consultation determines when an interrogation can be started; and suspects may be less willing to talk as a result of the lawyer’s advice. A minority of officers, notably only those in England and Wales (where the right to custodial legal advice has existed for almost 30 years), appeared to believe that the benefits of the right to legal advice, including benefits for their own work, may outweigh the potential inconveniences.

223 See article 362(c).
224 See ECHR 13 October 2009, Djanan v. Turkey, No. 7377/03, para. 32.
The lack of appreciation of the right to legal advice by police officers was identified as a training issue to be further discussed in the Training Framework.\textsuperscript{226}

Another important factor determining whether the right to legal advice is 'practical and effective' is the organization of the legal profession. In the Netherlands and Scotland, where the right to custodial legal advice before the first interrogation has been introduced only recently, the legal profession did not yet seem to be prepared for the timely attendance of suspects at the police station. In the French research sites, where pre-interrogation consultation from the start of detention has been in place for over a decade, but the right to have a lawyer present during interrogation has only recently been introduced, there appeared to be a shortage of specialized criminal lawyers to undertake police station work. Thus, a majority of lawyers providing advice in GAV were generalists not specialized in criminal law. In the Dutch sites, by contrast, there was a sufficient number of specialized lawyers available, but many non-specialists were admitted on the police station rota scheme, and few lawyers were available to attend during anti-social hours. In Scotland, as in the Netherlands, there seemed to be enough specialized criminal lawyers. However they were dispersed amongst individual practices or small firms, which had few staff available to attend police stations.

Many French, Dutch and Scottish lawyers who provided police station advice had busy legal practices with a constant influx of court cases. Balancing custodial legal advice with court work is difficult. From the police perspective, in the minority of cases where lawyers attended the station in person, this might be after a delay of a few hours, resulting in the prolonging of the custody period as well as requiring officers to remain at the police station, sometimes for several hours after the end of an already long 12 hour shift. From the lawyer's perspective, lawyers were sometimes called to the station, only to be left waiting for several hours before they were able to consult with their client or attend the interrogation. Returning home at 4.00 am in the middle of a working week is difficult to manage and lawyers have yet to accommodate these new and unpredictable working hours into their workload planning.

Moreover, both in France and in the Netherlands, the provision of police station legal advice was often seen as a one-off transaction; that is, lawyers who attended suspects often did not continue to represent them in court. This was for a variety of reasons, including the way in which police station duty schemes were organized: lack of interest or expertise of some (generalist) lawyers to continue dealing with the case; unavailability of suspects' own lawyers to attend police stations at short notice, resulting in a situation where a suspect was attended by a duty lawyer, but the case was then overtaken by the own lawyer. Such lack of continuity may result in sub-standard assistance, as the incoming lawyer often did not know in sufficient detail what had happened at the police custody stage (and would thus be less prepared, for instance, to challenge any irregularities, if they had taken place).

\textsuperscript{226} See Annex I.
In England and Wales, by contrast to the other three countries, criminal defence lawyers were organized in larger firms, and police station work was mainly delegated to appropriately qualified legal representatives. This relieved staff engaged in court work from the burden of long shifts at the police station, whilst ensuring continuity of representation within the same firm. If police station work is delegated responsibly, using trained and experienced staff, this can be a viable option for the other jurisdictions. The employment of unqualified and untrained personnel (typically former police officers and in-house clerks), as was the case in England and Wales before the current accreditation requirements, is to be avoided.

Where there are no appropriate organizational structures in place to provide legal advice, or if remuneration for police station work is insufficient, lawyers may be inclined to refrain from attending suspects detained at the police station in person, but to provide advice by telephone. Ideally, the telephone should only be used to provide advice where it is impossible to ensure attendance in person, or where there is clearly no need for a lawyer to attend, for example, because a suspect will not be interviewed. Lawyers in France, the Netherlands, and England and Wales tended to attend suspects in person. They described numerous disadvantages of relying only on telephone advice, such as the difficulty of building trust with the client, learning their client’s psychological reactions, obtaining disclosure from the police and engaging with the release decision, as well as the risk that telephone conversations are not confidential. Despite these drawbacks, however, lawyers in Scotland have provided telephone-only advice by default, and they rarely attended their clients at police stations in person. Lawyers justified this by claiming that often there is no need to attend where they advise clients to remain silent (which they did in the vast majority of cases), because silence has no negative consequences for the suspect in the Scottish procedural system. In reality, however, this reluctance to attend police stations was caused by a number of factors, most importantly the unavailability (or unwillingness) of a sufficient number of lawyers to attend, especially during anti-social hours, as well as low remuneration for police station work.227

The amount of information disclosed to lawyers before the lawyer-client consultation, regarding the grounds for suspicion, the circumstances of arrest, and the case details, is another crucial factor that determines the effectiveness of the right of access to a lawyer. In none of the four studied jurisdictions was there a formal right to such disclosure, and in three jurisdictions (France, the Netherlands and Scotland) it was also not provided in practice. The lack of disclosure of evidence to lawyers was detrimental to the effectiveness of legal advice and to the suspect’s position in a number of ways. For example, where lawyers are not given any details about the strength and nature of the evidence, and the reasons for and the circumstances of arrest, it is difficult for them to argue in favour of their client’s release or to advise suspects in relation to possible out-of-court sanctions or settlement. Furthermore, often lawyers have no other choice than to advise suspects to remain silent in the

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227 The structure of payments has changed since our fieldwork was conducted.
hope of obtaining more disclosure, even though keeping silent may not be in the best interests of the client, and may have an impact on the length of the suspect's detention. The absence of disclosure also affects the lawyer's ability to gather information from the client and to provide concrete and useful advice. This, along with other issues concerning the actual delivery of legal advice in police custody, is further discussed in Chapter 7.
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DELIVERING CUSTODIAL LEGAL ADVICE

1. Introduction

The European Union (EU) Directive on the right of access to a lawyer makes provision for suspects to have a private and confidential consultation with a lawyer prior to police interrogation.\(^1\) Access must be granted in a time and manner that permits the suspect to exercise their rights of defence practically and effectively.\(^2\) In this chapter, we look at how advice is provided to suspects in practice during these pre-interrogation consultations. From our observations in all four jurisdictions, we detail the nature of lawyer-client consultations – how long is spent with the suspect, how information is gathered and the scope of the advice that is provided.

Whilst the legal regime is crucial in determining the parameters of what lawyers can do, the extent to which police officers 'buy into' suspects' rights is also important. It is the police, after all, who are the gatekeepers to suspects' rights and who, therefore, are crucial in ensuring that they are understood by suspects and are implemented effectively. If the lawyer's role in the provision of custodial legal advice is not understood by officers, or is not regarded as legitimate, the police have little incentive to ensure the effective promotion of the right of access to a lawyer. We have seen in Chapter 6 that this might lead officers to omit to inform suspects that legal assistance is free, or that a duty lawyer is readily available; or they may provide only minimal case-related information. Or, worse still, officers may act to undermine suspects' rights by utilizing rights-avoidance strategies – such as telling suspects that they do not need a lawyer, or that involving a lawyer will prolong...

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\(^1\) Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. 6.11.2013 (L 294), transposition date 27 November 2016, Art. 3 para. 2, Art. 4. The Directive is discussed more fully in Chapter 1, section 2.54 and in the introduction to Chapter 6.

\(^2\) Directive on the right of access to a lawyer Art. 3 para. 1.
detention. Therefore, in this chapter we also examine the different ways that police and lawyers conceive of the lawyer’s role in providing custodial legal advice. We conclude with a discussion of the nature of police-lawyer relationships, and how these appear to influence the behaviour of police and lawyers during the custody period.

2. The Lawyer-Client Consultation: Assembling Information

2.1. When Does the Consultation Take Place and for How Long?

In some countries, the duration of the lawyer-client consultation is limited. In France and the Netherlands it is 30 minutes; in England and Wales, and Scotland there is no limitation.

Thirty minutes is a short period of time given that the lawyer has often never met the suspect before and knows little about the case. As well as biographical information, the lawyer needs to find out the circumstances of the arrest and detention, and anything that the suspect has already said to the police. They need to explain their own role, the rights of the suspect and the implications of either responding to police questions or exercising the right to silence. And finally, a strategy during interrogation needs to be discussed and agreed upon. This might include exercising the right to silence, answering all questions, or preparing a statement. Research has demonstrated that it is very difficult to remain silent and suspects need to be warned of this and prepared for possible police strategies to make them respond to questions. Where suspects intend to answer all questions, it can be very helpful to run through the suspect’s account to ensure that it is coherent, and so that they are not thrown off balance in the disorientating atmosphere of the interrogation room. We observed some lawyers in England and Wales (where consultation time is not limited to 30 minutes) employing this strategy to good effect, enabling clients to be more confident in the articulation of their explanation during interrogation.

The legal limitation of 30 minutes in some countries is described as a constraint by lawyers, but in all four of the jurisdictions we observed most consulta-

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tions did not take even this long. Scottish lawyers generally took less than 15 minutes to speak to the suspect (on the telephone); French lawyers took around 20 minutes; in the Netherlands the average time taken was 21 minutes, and in England and Wales, 26 minutes.10

In the Netherlands, in most instances we observed, consultations lasted around 15 minutes.11 Longer consultations were usually because this was the first time that the suspect had been arrested or because there were other reasons why the suspect needed more attention,12 the case was especially complex, or there were no other suspects to be attended upon by the lawyer.13

In England and Wales too, some lawyers regarded it as a virtue that they were able to keep their consultations short and most lasted under 30 minutes.14 For example, a lawyer in EngCity told us:

I'm known for keeping my consultations short. The average time is probably around 15 to 20 minutes ... this one yesterday was long because she needed to hear all the 'ins and outs' [detais on the advantages and disadvantages]. With these wet behind the ears [inexperienced] clients they need the full explanation.15

In complex cases, advisers were prepared to spend longer. For example, in one case in EngTown the lawyer spent nearly an hour and a half in consultation in a serious sexual offence case.16 In France, most consultations took around 20 minutes but one was as short as five minutes.

In all cases that we observed in England and Wales, France and Scotland where the suspect received legal advice, and in more than three-quarters of such cases in the Netherlands, there was a consultation before the first interrogation.17

In the context of minimal disclosure of evidence by the police, second consultations were raised as being very important by several lawyers in FranTown.18

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9 Verhoeven & Stevens (2013) rarely saw consultations that lasted more than 30 minutes, p. 308.
10 There was often a second consultation in England and Wales, after the interrogation and before any subsequent interrogations. Skinn (2011) found that lawyers often spent around one hour with suspects, spread over two consultations.
11 The occasional longer consultation pulled up the average (or mean).
12 E.g., suspects who appeared to be emotionally unstable.
13 One should also not discount the possibility that some consultations may have lasted longer because of the researcher's presence.
14 Compare the similar findings of McCornville & Hodgson 1983.
15 EngCityLaw7.
16 EngTownLaw8.
17 We observed one instance in France (FranTownLaw2) where the suspect was advised the night before by a different lawyer. The police were not prepared to allow a second consultation with the new duty lawyer who attended the interrogation.
18 This is permitted if the GAV is extended for a second 24 hours.
"For us, the second consultation is extremely important because there have been some interviews and we’re starting to understand what’s going on, so it’s important to be able to discuss with the client again." 19

Although the law in France allows only one 30-minute consultation within the first 24 hour detention period, some officers (especially gendarmes) were happy to permit a second consultation before a second interrogation, and even a third consultation after this.20 On the other hand, we observed a case where the garde à vue (GAV) had been extended, allowing for a second consultation, but the lawyer did not take up this opportunity to speak with the suspect. Second consultations were observed in around two fifths of cases in England and Wales and one sixth of cases in the Netherlands. This occurred in two of the ten cases we observed in France (one fifth); and in Scotland, there was insufficient data on this for any clear findings.

Lawyers must also determine when the consultation will take place, which is often a choice between conducting it as early as possible during the detention period, or waiting until immediately before interrogation.21 This was determined in part by fee structures and also by practicalities. Where the law allows only a 30-minute consultation,22 lawyers do not have the luxury of several consultations – one at the outset to explain to the suspect what will happen, check on the procedures and to gather any relevant information, for example, and then a further consultation prior to interrogation.

In all cases of personal attendance we observed, lawyers chose to attend the police station and meet with the suspect just prior to interrogation, rather than at the start of the detention period.23 This is perhaps a pragmatic decision where contact is limited to a 30-minute consultation, but it also underlines lawyer’s interrogation focused understanding of their role, rather than a broader approach to ensuring the proper conduct of detention for example, or the preparation of the defence case.24 This is in stark contrast to the many aspects of custodial legal advice envisaged by the ECtHR in Deyman v. Turkey25. There is no legal constraint on lawyers in England and Wales preventing them from consulting with suspects at the outset

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19 FranTownLaw5.
20 FranTownLaw2.
21 During our observations in France, an immediate lawyer-client consultation was not possible in several cases because the suspect had been taken to the doctor, or was present during a search of her house. In the Netherlands, consultations were sometimes delayed whilst the suspect was transferred to a station with appropriate facilities. These situations resulted in a delay of two to three hours.
22 As already noted, this was not a strictly a legal constraint in the Netherlands, but a prosecutorial guideline. Lawyers appeared to accept this limitation and we observed no attempts to challenge it.
23 This was also observed (in relation to England and Wales) by Kemp 2013, p. 196.
24 The report of the Contrôleur général des lieux de privation de liberté 2013 is critical of this practice in France, as it leaves suspect without any legal assistance during the first hours of the GAV.
25 ECtHR 13 October 2009, Deyman v. Turkey, No. 7377/03, see paras. 30-34.
of detention and again prior to interrogation. However, this was not the practice. This was not the result of any constraints on what the lawyer was permitted to do – it was the lawyers’ choice, perhaps influenced by the system of fixed-fee legal aid remuneration. Dutch lawyers, for their part, appeared to accept the constraints on their role imposed by the prosecutor’s guidelines. They did not argue for longer, or for additional consultations with suspects.

One lawyer in Scotland reported that when he was called to the station, it was not always possible to carry out an immediate consultation as he was then kept waiting for several hours before he could see the suspect:

“You’re just hanging around until they allow you a private consultation. It’s like you’re at the police station putting them out. Despite that you’ve got a job to do, they’re then outside the door tapping saying ‘time’s running out’ even though they have left you waiting for hours.”

In France and the Netherlands, lawyers were informed of the request for legal assistance at the outset, but when this occurred at night, they attended in the morning when the police were ready to interrogate. In France, lawyers encountered some difficulties when, even during the day, the police were often unwilling to accommodate the lawyer’s desire to delay consultation until just prior to interrogation. Our sample of cases was relatively small, but the degree of co-operation on this appeared to depend on personal relationships between police and lawyers. This was important in France, as lawyers could then go on to be present during the interrogation, unlike in the Netherlands. In England and Wales too, lawyers would keep in touch with police until they were ready to question the suspect. In France and England and Wales, this saved travel to and from the station, which was more efficient in both time and money, given the fixed fee structure in place. During the day, however, lawyers in the Netherlands were expected to attend suspects within two hours after having been notified by the police, and they mostly adhered to this time.

2.2. Gathering Information from the Suspect

Across all jurisdictions, lawyers would invariably begin the consultation by asking suspects if they knew the reason for their arrest, why they were being detained and whether they had been told of their rights – although it was less common for them to verify that those rights were understood. They also enquired about previ-

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26 ScotCity2.
27 E.g. FranTownLaw 2.
28 See also discussion in Chapter 6, section 2.1.
30 This happened in 95 per cent of cases in the Netherlands; 60.5 per cent of cases in England and Wales; and 100 per cent of cases in France and in Scotland.
ous convictions to determine how familiar clients were with detention procedures. For their part, lawyers told suspects of any evidence disclosed to them by the police, before then asking the suspect for their account.

Lawyers in England and Wales usually began by telling the suspect what the police had said about the case, before then asking questions to establish the suspect's account and, in particular, the extent to which it either supported or differed from that of the police. We observed lawyers in both research sites going through the circumstances of the arrest, asking the suspect detailed questions in order to elicit their story, and stopping them at points to clarify certain details. This was an effective way of enabling the suspect to see the whole event more clearly and so to provide a more coherent account in interrogation.

In the cases we observed in France, lawyers would typically begin the consultation by asking the suspect: 'Do you know why you are here?' or to tell their story. In one instance, the lawyer went on to ask questions directed at culpability: 'Are you guilty?' as well as asking that the suspect 'tell the lawyer the truth' as she was 'there to help him'. Facts would be probed and inconsistencies pointed out, along with a pointer to how the suspect's story might be viewed by the police. One lawyer also told us that he would ask suspects for 'their version of the facts' but then:

"We have to dig deep to know if their story is plausible. If they lie, we have to make them face their contradictions. I explain to them that I’d rather know the truth to advise them properly. That’s what the consultation is for: to reassure them, to explain what will happen, to make sure that their story is coherent. We prepare them for the interview."

The lack of disclosure by the police in France and the Netherlands (compared with England and Wales) resulted in lawyers depending on the suspect to provide them with crucial information about the case, which then formed the basis of any advice concerning the approach to adopt during interrogation. In France, this created a real tension in the lawyer’s role as suspects were sometimes (understandably) wary of the lawyer (who they had usually just met for the first time), and did not tell them everything – in which case, the lawyer learned the details of the case during interrogation.

Where the police (or more likely the gendarmes) allowed a second consultation after interrogation, this enabled the lawyer to advise more specifically on what information the police appeared to have, based on the questions they asked, as well as how the suspect should respond to questions (for example, keeping answers short, behaving less aggressively, explaining that they had a stable lifestyle with a job and family).

31 FranTownLaw1.
32 FranCityLaw2.
33 See discussion in Chapter 6, section 6.2.
In the Netherlands, lawyers are in a different position from England and Wales and Franco, in that they cannot be present in the interrogation, save in some limited circumstances. The consultation, therefore, constitutes the entirety of the assistance they may provide to the suspect. We saw a range of approaches to lawyering during these pre-interrogation consultations. The most common, 'standard' approach was for lawyers to ask suspects to tell them 'what you told the police' or 'what you said in the interrogation'. One lawyer we observed explained that this was a deliberate strategy - never to ask the suspect what happened - because he was not interested in 'the truth'. He told us:

'It is the task of the police to know the truth. I am here to make sure that my clients do not assist the police in that if this is not going to help their case."

In general, most lawyers relied on what little information the police provided and delivered fairly standardized advice. However, at their worst, a minority of lawyers relied entirely on the account of suspects, did not read the police notification of detention beforehand, did not follow up on matters raised by the suspect, and failed to provide their own contact details to suspects.

We also saw examples of good practice in gathering information from the suspect, explaining the process and preparing the suspect for interrogation. One lawyer skillfully elicited what suspects wanted to say. He provided clear explanations of procedure; he was proactive in checking if suspects needed relatives to be informed; he provided his contact details and explained that he would be available at court if necessary. He also asked suspects about their presentation before the assistant prosecutor - when this happened and what was said - providing an opportunity to learn of any procedural breaches as well as case details.

Similarly, another lawyer spent about 20 minutes establishing the facts from the suspect in a burglary case. He ascertained a detailed account of the circumstances of the suspect's arrest, whether he was asked any questions by the police, and what he said in response to them. He also found out what kind of evidence the police may have had against the suspect by posing questions about what was seized from the suspect, whether any samples had been taken, whether he had been asked permission for a house search, etc. These are examples of best practice, demonstrating what can be achieved. They are not representative of most lawyers we observed, who tended to gather much less detailed information.

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34 NethCityLaw2.
35 E.g., NethCityLaw4.
36 NethCityLaw6. Interestingly, he appeared to question the suspect in a way that avoided any inadvertent admissions. Although the Dutch lawyer's role would not be compromised by admissions from the suspect, it is perhaps easier to allow the suspect to tell a single version of events to the lawyer and then again in interrogation.
37 NethTownLaw14.
2.3. **Taking Notes During the Consultation**

Lawyers were not consistent in the record they made of the consultation with the suspect. In some instances, notes were brief and appeared to be for the lawyer’s own records. In others, a more detailed account was recorded. This was often when the suspect was already a client of the firm, or expected to become one, as the consultation formed the beginning of the client’s instructions in the case. In England and Wales, most advisers took detailed notes to pass on to the lawyer who would represent the suspect at court. In France, most lawyers jotted down some notes, but as a different lawyer would represent the suspect at court, these were just for their own record. In the Netherlands too, the lawyer sometimes made detailed notes of what the suspect said, but this was not the usual practice for many lawyers – possibly because the consultation was seen as a discrete piece of legal work. As non-criminal specialists, as in France, many Dutch lawyers did not expect to go on to represent the suspect at court and so would not need to rely on their notes at a later date. The lawyers we observed at SLAB in Scotland made notes, but we were unable to follow cases through, so it is unclear whether these were passed to the lawyer who appeared at court.

Note taking is an important part of preparing the accused’s defence, but it seems that the discontinuous representation institutionalized through the duty lawyer arrangements in some countries results in the initial consultation being something of a lost opportunity. Lawyers are unlikely to see this first point of contact as part of active defence building if they do not connect it with representing the accused at court.

2.4. **Explaining the Role of the Lawyer**

Lawyers in all jurisdictions often told the suspect that the lawyer-client consultation, and anything that the suspect said to the lawyer, was confidential. This is an important part of gaining the suspect’s trust and is guaranteed under the EU Directive on the right of access to a lawyer. However, in England and Wales, there is an additional aspect to the lawyer’s role: if the suspect makes admissions to the lawyer, this will pose professional ethical constraints on how the lawyer may represent the client subsequently. In the Netherlands, lawyers are not ‘officers of the court’ and are not placed under this ethical constraint. Dutch lawyers are able to ask suspects to tell them everything, without concern that their role or advice might later be compromised. In England and Wales, however, this distinction is important but was sometimes unclear in the explanations offered to suspects between confidential

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28 Discussed in Chapter 6, section 2.
29 In England and Wales, as an officer of the court, the lawyer may not knowingly deceive the court; in the Netherlands, for example, lawyers are not ethically constrained in this way.
advise on the one hand, and the consequences of making admissions to the lawyer on the other.

In England and Wales, the lawyer's professional code of conduct stipulates that the lawyer should not knowingly mislead the court. This places obvious constraints on the representation of a client who has made admissions to their lawyer, especially where that same lawyer, or firm of lawyers, will go on to represent them at court. This was very rarely explained to suspects, and the advice lawyers gave in this respect was confused and sometimes contradictory. Without a full explanation, it is difficult for suspects to make sense of how they should respond and what the consequences of making admissions to their legal adviser might be. When the code of conduct was mentioned (directly or indirectly), it was typically in these terms: 'If you tell me the truth now and then you say something different later on, I can't act on your behalf any further ...'. Despite saying this, the same advisers asked suspects questions likely to lead to incriminating answers ('Did you hit him?', 'Was the knife yours?', 'Was the cannabis yours?', 'The more truth you tell me, the better the chances you've got later on'), and when their client answered truthfully, they commented later: 'That client was a bit too honest for his own good.'

Other lawyers did not ask such direct questions, but neither did they warn of the dangers of admissions. They routinely gave the suspect all of the information that they had learned from the police and then asked the suspect: 'Now let's have your version – tell me your story.' We observed cases where suspects made admissions without appearing to realize that this would then limit their response in interrogation, unless they were prepared to change lawyer. For example, in response to the standard question asking the suspect what had happened with the police, a suspect explained how the police came to arrest him while he was breaking in to a house. He then asked the lawyer: 'Can I deny it?', to which the lawyer replied: 'Not now you've told me what happened.' The lawyer explained that if the suspect intended to deny his involvement during interrogation, he would need to get another solicitor or waive his right to a lawyer, as he could no longer continue representing him.

In some cases we observed, lawyers used the disclosure of evidence discussion with the police as an opportunity to discuss what might then happen after the interrogation of the suspect – the range of charges that might be brought, whether the suspect would be bailed, whether a caution might be offered and whether there were offences to be 'taken into consideration' rather than being charged separately. This was then incorporated into the consultation discussion with the suspect. This might be to the suspect's advantage, but we saw some examples where this ap-

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40 See specifically Criminal Procedure Rules 2011, para. 3.1.
41 EngCityLaw10.
42 EngCityLaw14.
43 EngCityLaw10.
44 Eg, EngTownLaw4; EngTownLaw8.
45 EngCityLaw9.
peared to push the lawyer, and so the suspect, towards adopting the police view on case disposition. Disclosure sometimes consisted of the police showing the lawyer the evidence, but more often it was an oral account of what the police claimed to have. CCTV evidence and photographs were often not shown and the lawyer had to rely on the police account of reports and statements. The combination of incomplete disclosure and a seemingly attractive offer regarding case disposal can result in suspects being encouraged towards a particular case outcome, such as a caution, without any proper evaluation of the evidence having taken place.

The following example demonstrates how advice can be experienced by suspects in contradictory ways, as well as the dangers in relying unquestioningly on the police account of events. The lawyer asked the officer in charge: 'What do you want to do with [the suspect] today?', to which the officer replied that the suspect had no previous convictions and so was 'cautionable'. Once in the consultation, the adviser pointed out all the evidence against the suspect, including CCTV footage that the lawyer had not viewed. His advice to the client was: 'The more truth you tell me the better the chances you've got later on.' The nature of his advice was further complicated when he added: 'Everything you tell me is confidential. I've got nothing to do with the police.' To some suspects, this might be confusing and suggest that the suspect can make an admission to the lawyer, whilst denying the charges in interview. He then went on to explain what might happen if the suspect denied the charges and the case went to court. Finally, he said: 'I have to tell you, you're cautionable... to get a caution you have to say "yeah, it was me."' Given that he did not know the strength of the evidence, but had only the officer's account of things, this strong encouragement towards an admission was a risky strategy. At this point, the suspect made an admission. There was some discussion of other options, but the adviser continued to guide the suspect:

'If you don't say anything, you're going to get a record and there's lots of problems with that. It'll make it hard to find a job... from what you've told me there's a 99.9% chance you'll get a caution if you tell them what happened... Now you have to decide between a prepared statement and an answer interview...'

The suspect was left somewhat bewildered and anxious, unsure which option to go for. Having encouraged the suspect to tell 'the truth' and having emphasized the confidential nature of the interview, the adviser explained: 'You've admitted it to me now... that means if you deny it later on I can't represent you, or you'll have to get another lawyer...'. The adviser appeared to construct the consultation towards

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46 EngCityLaw13 was an example of a lawyer asking to view the CCTV footage. This was not without its difficulties though, as there were problems locating a computer on which to view the film.

47 EngCityLaw6

48 This means that the suspect was eligible for a caution if he admitted the offence.

49 It should be noted that this advice is misleading, as whilst a caution does not count as a conviction, it does go on the suspect's criminal record.
obtaining an admission and so a caution. In fact, the adviser did not know the strength of the evidence and ultimately the officer raised the possibility of the CPS charging the suspect, because the case was relatively serious, involving a breach of trust. Furthermore, during interrogation, it emerged that the police had important evidence against the suspect that they had failed to disclose.

2.5. Explaining the Detention Procedure

Having gathered information from the suspect, some lawyers also went on to tell the suspect what the likely procedure would be in terms of the interrogation, the length of detention and the final outcome of the case, as well as reminding them of their right to silence. In England and Wales, advisers always explained the police caution in conjunction with the right to silence, which was again explained by officers at the start of each interrogation. Lawyers also told suspects what they had learned from the police disclosure and, as noted in the previous chapter, this is the reason why many ‘repeat’ suspects in England and Wales request a lawyer.

In the Netherlands, lawyers focused discussion on establishing the suspect’s story and preparing for interrogation. Little was said about the detention procedure as a whole. This was also true in the cases we observed in Scotland.

When interviewed by us, French lawyers described explaining to the suspect their legal rights and the procedure that would follow, as an important function of the consultation. In the stress of arrest and detention, they found that suspects often did not realize how long they could be detained and would have little knowledge of procedures involving the public prosecutor or the juge d'instruction. This was confirmed in our observations: suspects had little understanding of the legal framework of the GAV and even less of the procedures to follow. Although they had signed the notification of rights form, suspects were not aware that their rights had been notified to them and so had no understanding of these rights.30

Some lawyers explained the basic procedure and we observed several lawyers go on to explain how suspects should behave during interrogation in order that they could get their version across to the police, as well as what would happen after interrogation and the GAV. The possibility of a rapid trial procedure or a guilty plea agreement was also mentioned by most lawyers — even when suspects had not made any admissions to the lawyer, or had indicated that they had not committed the offence. However, inexperienced lawyers were unable to place the GAV within the wider procedural context and did not explain to suspects the various steps that would follow. For example, one lawyer we observed had no experience of criminal law work. The suspect was under investigation for a serious sexual offence; an

30 In at least one instance, the rights notification document had not been prepared when the lawyer requested it. It was clear that this is often not written up at the time claimed on the official paperwork.
instruction would be mandatory and a remand in custody was almost certain, but
the lawyer failed to explain any of this to the suspect.\textsuperscript{51}

2.6. Requesting an Interpreter

We did not see a large number of cases involving foreign nationals, but of those we
did observe, lawyers were not proactive in representing the interests of their clients
by ensuring the presence of an interpreter.\textsuperscript{52} Dutch lawyers advised the suspect to
request an interpreter, but did not themselves make representations to the police. In
cases we observed in France, no attempt was made to have an interpreter appointed
for suspects whose French was clearly very poor. The lawyer asked the suspect if
they understood what the lawyer had said; if the suspect said that they did, the
lawyer made no attempt to verify this. In one case observed it was clear that the
suspect was not able to follow all that the lawyer said. The lawyer told the police
that the suspect ‘struggled a bit to understand French’, but that it would be fine so
long as the officer spoke slowly.\textsuperscript{53}

3. Advising the Suspect whether to Answer Questions

Deciding whether or not to answer police questions is one of the most important
decisions for the suspect. It may determine how long the suspect spends in custody,
what offence they are charged with, whether they are offered a more informal mode
of case disposition (such as an out-of-court disposal), or whether they are released
without charge. In around one fifth of cases we observed in the Netherlands the
lawyer advised the suspect to remain silent, around a quarter in England and
Wales, and in Scotland in all cases in which we observed advice being given, the
advice was to remain silent. None of the cases observed in France involved advice
to remain silent; rather, suspects were often told that it was in their interests to
answer questions.

Advice on how to respond to police questions cannot be divorced from the
interrogation context, which differs in each jurisdiction. The amount of time the
suspect has to consult with the lawyer; whether or not the lawyer may be present
during interrogation; whether the interrogation is audio or video recorded; and
whether the suspect is cautioned and the nature of the caution, are all important
variables.

In England and Wales, the lawyer may play an active role during interro-
gation, which is tape-recorded. Suspects are reminded of the caution at the start of
interrogation and adverse inferences may be drawn from the exercise of silence.
The suspect may stop the interrogation to consult with the lawyer, and the pre-interro-

\textsuperscript{51} FranTownLaw5.
\textsuperscript{52} See the discussion in Chapter 4, section 4.
\textsuperscript{53} FranTownLaw1.
gation consultation is not time-limited. In Scotland, there is also no time limitation on the lawyer-client consultation, the lawyer may be present during interrogation and the suspect is cautioned at the start of the interrogation, after confirming any waiver of legal advice.54 Only some interrogations are tape or video-recorded. In France, the lawyer can be present during the interrogation of the suspect, but must remain passive and has only a maximum of 30 minutes to consult with the client beforehand. Interrogations may be video recorded, but most are recorded by the police in the form of a statement. The suspect in France is told of the right to silence at the start of detention, along with their other rights, but is not reminded of the right at the start of interrogation. And finally, in the Netherlands, lawyers also have a guideline maximum 30-minute consultation, but are not normally permitted to be present during interrogations. The suspect must be cautioned at the start of the first interrogation, but interrogations are generally not tape-recorded.

England and Wales was the only jurisdiction in our study that permits adverse inferences to be drawn from a suspect’s ‘silence’ during police interrogation. Ensuring that suspects understood the circumstances in which inferences could be drawn was therefore an important feature of most lawyer-client consultations. The nature and implications of the right to silence vary according to jurisdiction, and they are also understood differently. This relates in part to the differences in the lawyer’s role within the criminal process, as discussed above in relation to the ethical position of lawyers representing suspects who want to explicitly lie to the court.55 In the Netherlands, for example, one lawyer explained to suspects that they had a right to silence, which also meant that they were entitled to lie to the police (though not to the judge).56 Another lawyer also made no distinction between denials of guilt and exercising the right to silence.57 In Scotland, the corroboration rule is a determining factor in advising silence, ensuring that the suspect does not contribute to the police case against them.

The primary concern of the vast majority of suspects in our research appeared to be securing their release from police custody as soon as possible.58 This was especially so in Scotland and in England and Wales, where a high proportion of suspects were drug and/or alcohol dependent. It was often quite difficult for advisers to go through the evidence in the case and discuss the options, when the suspect’s focus was not on the interrogation, but on getting out of the station.

A minority of suspects already know that they will remain silent, even before speaking with their lawyer – for example, if they have decided to wait until they have full access to the case file. Most suspects, however, do not remain silent and

54 The suspect is asked to confirm that they have waived the right to a lawyer, but they are not asked if they would like to change their mind.
55 See the discussion above at section 2.4.
56 NethCityLaw2. This is misleading. The accused is permitted to lie to the judge in the Netherlands.
57 NethCityLaw6.
58 This has also been noted by other research, e.g. Skinns 2009 & 2011.
even those who intend to often find it a difficult strategy to maintain in practice. Scotland appears to be the exception to this. One lawyer told us:

'I tell them the reason why they have the right to silence is to make sure not to incriminate themselves and I give them examples. Most people do understand, it's not a difficult concept and they understand that it is not in their interest to speak ... a very high percentage follows my instruction ... to advise someone to remain silent and they speak is quite rare.'

In England and Wales, advisers generally told suspects that if they had an explanation or 'a story to tell' that it was in their interests to answer questions and to 'tell the truth'. If the adviser thought that the suspect was unlikely to be able to cope with the interrogation process, or was unable to present their version in a clear and coherent manner, they often suggested making a prepared statement to read out at the start of interrogation. If the suspect was unsure of how to respond or told the lawyer that they had committed the offence, they were often advised to respond with 'no comment'. Suspects who admitted the offence were also advised to give their account if the evidence appeared strong and especially if this might result in a caution. Lawyers thought that suspects understood that they were not obliged to answer questions, but that most suspects did not appreciate the consequences that might follow from this.

Lawyers in France had different views on the wisdom of remaining silent. One lawyer told us that he always warned suspects that exercising the right to silence would lengthen the GAV, and that he would almost never advise suspects to do so, other than in the most serious offences. Another described it as a 'dangerous' right to use, believing it does not serve the interests of the suspect to remain silent. This was the view of many lawyers who told us that, in practice, there was no right to silence, as silent suspects are presumed guilty. These lawyers rarely advised silence, other than where there was an important information deficit from the police - for example, drug quantities in a drug dealing case. Exceptionally, another lawyer told us that the first thing he would tell a suspect was to remain silent rather than to lie. This served as a preventive measure in the absence of any knowledge of the evidence in the case. And whilst silence is not well received by the courts, the lawyer told us, a lie would always work against the suspect later; silence is rarely exercised and even then, suspects end up answering some questions.
we observed, silence was mentioned only sometimes, and the lawyer always advised against it.\textsuperscript{69}

In determining whether or not to answer police questions, there was no consistent approach to advising suspects even within each jurisdiction. Most advisers we observed had stock phrases and ways of setting out their advice to suspects. This was especially the case in England and Wales – presumably the result of the standard training required of solicitors and legal representatives in order to be an accredited police station legal adviser.\textsuperscript{67}

We identified three broad approaches adopted by lawyers when advising suspects prior to interrogation.

3.1. Directive Approach by the Lawyer

In some instances, lawyers were quite directive in their advice. If this was advice to answer questions it was often when the lawyer had a clear sense of the evidence and the suspect was confident in their account of what had happened. For example, in a case of assault, the lawyer asked the client quite detailed questions to elicit the sequence of events and noted down possible defence witnesses who would be willing to testify.\textsuperscript{68} He concluded by advising the suspect that he ‘has a clear story to tell’ so he should continue to tell it and then ‘just wait’. This approach was somewhat exceptional in the Dutch cases we observed, as lawyers were given almost no information about the case and many lawyers failed to gather sufficient detail from the suspect.

In a similar case in EngCity, the lawyer established during disclosure that the police had very little evidence relating to a charge of theft. The suspect had a clear account of how the items came to be in his home, which looked unlikely to be contradicted by the police. The adviser told the suspect: ‘My initial thoughts are that we should do a prepared statement and leave it at that.’ He wrote the statement then read it back to the suspect to ensure that he was happy with it. The adviser then instructed him that once it has been read out, the suspect should respond to any further comments with ‘no comment’.

In EngTown, a lawyer, advising suspects in two cases, advised them to answer police questions and to explain what happened as best they could, despite some differences between the police and the suspect’s account.\textsuperscript{70} The lawyer was confident that the suspects (both juveniles) would be offered either a reprimand or a final warning (out-of-court disposals) if they co-operated and that this was therefore in their best interests.

\textsuperscript{66} E.g. FranTownLaw2: FranTownLaw3.

\textsuperscript{67} See <www.lawsociety.org.uk/accreditation/specialist-schemes/criminal-litigation/ > (last visited 14 October 2013).

\textsuperscript{68} NethCityLaw2.

\textsuperscript{69} EngCityLaw8.

\textsuperscript{70} EngTownLaw2: EngTownLaw4.
'If you say nothing, the police have to prove you were there and you did it ... if you speak and admit that you did it, it is only a common assault and the outcome will just be a reprimand... My advice would be to give your account as you gave it to me... I'm not here to tell you what to do but to tell you the choices that you have.71

In both cases the suspect answered all police questions.

Equally, directive advice to remain silent was given when the police had either little evidence, or the suspect had been interviewed before and had nothing further to add. In a case in EngTown the lawyer advised a suspect who had been previously interrogated by the police:

"You have already spoken a lot. You have already had two interviews, more or less nine hours' worth, this means you do not have any more to say... If they want more information, they will have to look for it themselves. You have given them enough... I do not see how it would help you to say anything at this stage... I think you need to ignore the questions of the officer."72

Sometimes lawyers warned suspects that it could be very difficult to stick to a 'no comment' response and they tried to prepare suspects with a few trial questions.

Directive advice was also given when the lawyer thought it likely that the suspect would find it difficult to maintain their version of events. In one case of assault where the facts were unclear, an issue of self-defence was raised. The suspect was very emotional and it seemed likely that he would find it difficult to give a clear account and that he would be vulnerable to being knocked off course by police questions. For this reason the lawyer strongly advised the suspect to remain silent - which he did.

A similar approach was adopted in a case we observed in the Netherlands where the suspect provided a clear account, but risked being drawn into giving an account of the nature of his involvement with his co-suspect. The lawyer re-iterated the suspect's version in clear and simple terms:

"You must deny your involvement in the case. You should say that nothing ever happened, you have never heard of any burglary... You must be strong."73

In another Dutch case, there were clear problems with the suspect's mental state and his ability to form the requisite mens rea for the offence.74 He also appeared to be highly suggestible. The lawyer spent 45 minutes with the suspect, finding out precisely what had happened and explaining in strong terms how the suspect must stick to his story and tell the police what he told the lawyer. This was one of several cases we observed where the suspect's vulnerability made it all the more concerning.
that he had no lawyer present during interrogation to ensure that he was able to put his case clearly and that unfair pressure was not applied.

We observed a rather different approach taken by one Dutch lawyer who was generally directive in his advice, but who formed a view of the case and the client's strategy on the basis of no information from the police and very little from the client. He quickly concluded how things might be best presented, and instructed the suspect to act accordingly. For example, in one case in which he provided advice, he knew nothing of the evidence from the police (having neither read the notification form, nor asked the officers); the suspect knew only that he was suspected of theft, but did not know of what; and there was a clear medical issue raised by the suspect, which the lawyer simply skimmed over.

He then told the suspect:

‘You should say: “I don’t know anything, I must go. You must have proof in order to keep me here.” You must say: “I did not do anything.”’

This was a surprising strategy, given how little the lawyer knew of the evidence and of the suspect's account. He would not be present in interview, so would be unable to modify this advice once the evidence emerged. In another case, he had a better idea of the client's story and again instructed him to make clear and firm denials. His advice was generally based on a ten-minute consultation, he took no notes, and did not inform the client how he could be contacted.

A lawyer in FranCity told us that he would advise juveniles to tell the truth, as lies would be regarded very badly once before the judge. Yet, he went on to tell us of a case where a juvenile suspect continued to lie and the case was then dropped for insufficient evidence! Generally, lawyers in France said that they would advise suspects to answer questions – remaining silent would mean a longer detention and more interrogations, and was likely to work against them later on. This approach was confirmed in our observations.

In the consultations we observed in France, lawyers tended to give directive, but generic advice. They explained to the suspect that they knew almost nothing about the case; that the suspect would be interviewed by the police; and that they could be silent, but that this was not advisable. The consultation was as much about gathering information as giving advice. Suspects would also be asked whether they had previous convictions and to fill in any basic gaps in the evidence (‘Where did you find the guns?’, ‘Who was the other passenger in the car?’). It was less common for the lawyer to advise the suspect on how they should respond in interrogation, or to warn them that the lawyer was obliged to remain passive.

However, in one case that we observed, during a second consultation, the lawyer was very clear in her advice as to how the suspect should behave during
interrogation. She told him to stop being aggressive; to keep his answers short, so that he did not give too much away; and to answer yes or know and not hesitate to say if he did not know the answer to a question.

Lawyers in Scotland were the most likely to routinely advise silence. The lack of disclosure of case-related information together with the right to silence, and the corroboration rule, made it the obvious strategy for lawyers in most instances.

"On virtually all occasions, I advise suspects to make no comment. I can't remember not doing that. My argument is that I can't give informed advice on the basis of the information the police give me in advance of the interview. Until we have a PACE procedure in Scotland, until the suspect knows what the allegations are and what evidence there is in advance of the interview, not under the pressure of the interview, my advice will always be to make no comment."

We observed a lawyer in Scotland advising a suspect with learning difficulties in very clear terms. The nature of the suspected offence was unclear - the suspect was accused of having invited a young child to go to the park with him. The suspect did not make any admissions and did not seem to understand the suspected offences in respect of which he was being held, yet he indicated that he wanted to plead guilty. He seemed reluctant to remain silent, because the police were being nice. The lawyer was emphatic in his advice:

"This wee girl has given one source of evidence. The police need support for this and want the second source to come from you. Not only are you not going to admit it, you're not going to answer any of the questions they put to you. The way you'll go about this is by answering no comment to all of their questions. It's vital that you understand this. This will prevent it from going to court. I'm going to take you through this. You'll be with the appropriate adult and two policemen in the interview room. They'll ask you your name, your date of birth and your address. You should answer this. After that, they'll say, we're going to ask you some questions. You're not bound to answer them. This means you don't have to answer them... The police will do everything they can to make you say something. You're not in a position to be second guessing. Even if you think it's safe to answer a question, don't do it. Don't ever deviate from this. It's called exercising your right to silence."

3.2. Setting Out the Options - the Lawyer Advises

In some instances, advice was given in a less directive way, but the lawyer recommended a particular course of action nonetheless. This typified the approach of one lawyer we observed in EngCity. For example, in a case where the suspect was about

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77 FranTownLaw2.
78 It is also a more realistic strategy in Scotland where the police did not appear to put pressure on suspects to speak, in contrast to, e.g., the Netherlands.
79 ScotCityLaw2.
80 ScotCity2Law3.
to be questioned concerning a number of burglaries, some of which he had already admitted on arrest, the conversation was as follows:

Lawyer: They want to interview you in a minute. There’s three options: one, tell them [what you did]; two, no comment; three, a prepared statement. Now, they’ve got you on last night’s one... I’ve told you what the evidence is... My advice is to say yes to the other ones you told me about for tic’s [offences taken into consideration].

The suspect agreed to make a prepared statement. In another case, the same lawyer again did not shy away from asking the suspect direct questions that might lead him to incriminate himself, before then setting out the options, together with his own recommendation:

Was it your ecstasy?... So technically you’re guilty. As I’ve said though, technically the burden of proof is on them, so I’m advising you to say ‘no comment.’ Your options are you can say it was you or you can do ‘no comment.’ I wouldn’t advise the first because it’s all over then.

This approach was not adopted by French or Dutch lawyers. Lawyers felt constrained to check basic facts and provide basic information about the suspect’s rights and the likely length of detention. As one French lawyer put it: ‘We’re really there to be at their side and explain how the system works.’

### 3.3 Setting out the Options – the Suspect Decides

Whilst some lawyers advise silence when there is insufficient information about the strength of the evidence against the suspect, for others, this is not a reason to advise silence. Some lawyers felt that they should not be too prescriptive if they lacked any substantial information about the evidence held by the police. In a public order case in the Netherlands, for example, the lawyer knew only what the suspect had told him. He did not know if there were other witnesses, how dark it was when the incident took place, or what the complainant was likely to say. He set out the options for the suspect, but in a way that did not enable him to make a clear and informed decision. He advised the suspect that he could remain silent, but that this may result in him remaining longer in detention. If the suspect thought that there were unlikely to be other witnesses, this would be the best approach, and ‘let the police do their job.’ On the other hand, police promises of a speedy release if the suspect confessed were not to be believed, because this decision was not in the

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81 EngCityLaw3.
82 EngCityLaw10.
83 FranTrowdLaw1.
84 See also McConville & Hodgson 1993, who found that some lawyers advised silence because they lacked case-related information.
85 NethCityLaw2.
hands of the police. Ultimately, the lawyer advised that the suspect "should think for himself" and act strategically depending on what he thought the complainant was likely to say. The lawyer then continued:

Lawyer: To confess is always possible, but the consequences are irreversible. Lying is also possible... This presents a difficult dilemma for you, doesn’t it?

Suspect: Hmm, yeah...

Lawyer: It’s a tactical game, you should play it out well.

Suspect: (Looking confused) Yeah, I see...

Lawyer: There are various interrogation techniques the police are going to use... They know how to make people talk. (The researcher observed that the suspect was further confused by this. He was silent, and his facial expression was passive and anxious.)

The lawyer went on to caution the client to read the record of interrogation carefully and note any errors on it before signing.

The lawyer later told the researcher that he thought the suspect should remain silent. When asked why he did not say this explicitly to the client, the lawyer said that he was conscious this would mean a longer detention period, which the suspect was anxious to avoid. He also felt it was difficult to be directive without knowledge of the evidence. It later emerged that the suspect confessed in interrogation.

Sometimes the suspect knew what they intended to do in interrogation without any advice from the lawyer. In this example, the lawyer in EngCity was explaining the evidence to the suspect who was in a very poor physical state. His face was swollen, his hair matted and he was continually sniffing:

Suspect: Just get me out of here!

Lawyer: I'll do my best. I can't promise, I won't lie to you...

Suspect: I'll just go 'no comment'.

Lawyer: Why?

Suspect: cos I didn't do it.

Lawyer: My advice would be to say that if you've got a defence then you should give it now. But it's your choice. Just so you know, the court can draw inferences if you don't say anything today. You understand that?

Suspect: Yes.

Lawyer: OK, no comment it is. Let's crack on with the interview.60

As with many suspects, he was primarily concerned with getting out of the police station. In this case, as in others we observed, it was difficult for the lawyer to

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60 EngCityLaw4.
engage the attention of the suspect and although he had been arrested several times before, it was not clear that the suspect fully appreciated the consequences of exercising his right to silence. Another case in EngCity was very similar.\(^{57}\) The suspect, a heroin addict, had a swollen face, slurred speech (he had not yet been given medication), and a huge gash to his leg. The lawyer told the suspect that he could admit the offences, make no comment or prepare a statement. He went on to set out the incriminating evidence.

**Suspect:** You tell them.

**Lawyer:** So you want me to do a prepared statement?

**Suspect:** Yes.

**Lawyer:** You need to understand what’s going to happen now in the interview. Two officers are going to come in here, they’ll stick a tape on, ask your name and address. I’ll* tell them there’s a prepared statement and will say it’s going to be a no comment interview...[he explains the caution and the importance of making no comment]. Any questions?

**Suspect:** Just get me the fuck out of here.

Sometimes the choice was presented in quite stark terms, as in this example of a suspected assault from EngTown. The suspect provided a detailed account of what took place, which did not match the injuries described by the victim. The lawyer took seriously the suspect’s version of events and told him: ‘If it was assault, I would advise you not to say anything ... if your story is true, it is in your interest to speak and tell the truth.’\(^{58}\) This was similar to the approach of a French lawyer we spoke to:

‘Generally, I first ask them to tell me what happened, to give me their version of the facts. I try to dig a bit deeper to find out how solid their version is. I tell them that if it’s the truth, they should speak in the interview to tell their version. But if there are some elements that are incoherent, I remind them that it is risky to lie. I remind them that we don’t know what evidence the police have. It’s up to them to decide whether or not to tell the truth. We can’t plead for them in interview, it’s their statement.’\(^{59}\)

A lawyer in EngCity described his role in the following terms:

‘I listen to what they say and then advise, depending on what they tell me. It’ll depend on the honesty of the client, how much he’s disclosed etc. I’ll usually say, “I’m not here

\(^{57}\) EngCityLaw3

\(^{58}\) EngTownLaw3

\(^{59}\) FranCityLaw2
to tell you what to say in interview, only to advise. I'll tell them about the pros and cons, I'll remind them about their right to silence.\textsuperscript{90}

As noted above, French lawyers tended to make statements rather than to give tailored advice. When advice was offered, this was directive - suspects were not presented with options.

Across all jurisdictions, lawyers treated differently those who already had experience of detention and police interrogation. These 'repeat' suspects were considered knowledgeable of the system and not in need of advice in the same degree of detail as first-time suspects. Whilst it is true that such suspects will be familiar with the legal procedures of detention, such an approach appears to subscribe to a 'one size fits all' model of advice. Suspects may be familiar with the consequences of silence, for example, but whether they should exercise it will depend on a variety of factors including the facts of the individual case, the state of the suspect, what evidence the police have and what has already happened before the lawyer arrives. The approach of the lawyer may differ, but all suspects, even experienced ones, will be in need of individualized legal advice, specific to the circumstances in which they find themselves. Otherwise, significant factors may be overlooked through an over-routinized model of legal advice provision.\textsuperscript{91}

4. Assisting the Suspect Beyond Interrogation

In all four jurisdictions, we observed that the role of the lawyer is heavily centred on advice and assistance around the police interrogation of the suspect. The lawyer's role beyond this is less clearly defined. Other than in England and Wales, we saw few examples of lawyers attempting to negotiate over charge, bail and non-trial based options for case disposition. Several factors account for this: there is a dedicated custody officer in England and Wales, responsible for the suspect's welfare and administering the suspect's rights, as well as serving as a central point of contact; and lawyers advising suspects at the police station in England and Wales are very likely to continue representing the suspect at court, incentivizing lawyers to see the defence role in more holistic terms. But the lawyer's own approach to the defence role is also important, as already noted. We observed some lawyers in the other three jurisdictions pushing at the boundaries of custodial legal advice, providing assistance to their clients beyond the police interrogation, but most opted for a more passive and restricted role.

In England and Wales, lawyers often took suspects' concerns up directly with the custody officer - ensuring that medication was available, or a friend or relative contacted. In the Netherlands, there is no such dedicated officer to act as a point of contact for dealing with queries and concerns relating to the suspect's detention.

\textsuperscript{90} EngCityLaw1.
\textsuperscript{91} See further Hodgson 1992; McConville & Hodgson 1993.
Instead, lawyers had to ascertain which officer was dealing with the case and try to find where they were in the police station. This very practical difference acts as a barrier to direct discussions and negotiations between lawyers and police. Dutch lawyers were prepared to instruct suspects which officer they should speak to about a concern over having a cigarette, contacting a friend, or receiving a meal, but only occasionally were lawyers prepared to do this themselves. In one case, for example, the lawyer contacted the client’s girlfriend as requested, but quite possibly because he could then also inform her that she should volunteer as a witness in the case.\textsuperscript{92} Even legal procedural issues were often left to the client, such as asking the assistant prosecutor to clarify the grounds of detention.

We observed the same approach in France. In one case, for example, the lawyer advised the suspect to ask his wife to bring documents to court in order to demonstrate his employment record, so that this could be taken into account in the sentence. The lawyer refused, however, to contact the wife himself to ask her to do so. Instead, he told the suspect (a non-native speaker who was not very articulate) to ask the police to ring the wife at the end of GAV.\textsuperscript{93}

Some lawyers showed disregard for their clients’ needs, promising to sort things out, find out the names of officers, or contact relatives, but never in fact doing so. In some instances, the lawyer appeared to lack the confidence to assert the needs of the client. For example, in a Dutch case observed, when the suspect broke down in tears during the consultation, the lawyer called the police and suggested they organize the suspect’s medication and call a doctor, but he did not go as far as to pass on his concerns that the suspect might well harm himself.\textsuperscript{94}

In the Netherlands, because lawyers are, in general, not permitted to be present during the interrogation of the suspect, they would leave the station immediately after the lawyer-client consultation. In England and Wales, because lawyers were present throughout the interrogation, they would often then discuss bail arrangements and the charges to be brought. This might involve some discussion and negotiation if the lawyer and the particular officer had a good working relationship. The scope of this discussion also included case disposition. For example, at the end of one interrogation we observed the lawyer checking with the officer that they were still planning to administer a final warning to the suspect.\textsuperscript{95} In another case, the lawyer persuaded the police that they did not need to carry out an identity procedure, but should simply release the suspect without charge.\textsuperscript{96} The case was very weak and he successfully persuaded the officers that it was simply a false accusation.

In England and Wales, it was usually the case that the suspect would choose to be represented at court by the same firm, incentivizing advisers to follow up on bail

\textsuperscript{92} NetCityLaw2.
\textsuperscript{93} FranTownLaw5.
\textsuperscript{94} NetCityLaw9.
\textsuperscript{95} EngTownLaw3.
\textsuperscript{96} EngTownLaw7.
decisions and track the progress of the case. This did not happen in the Netherlands, where police station attendance as a duty lawyer was usually seen as a discrete task, not necessarily leading to the suspect becoming a continuing client of that lawyer or that firm.\textsuperscript{75}

This was also the case in France, and lawyers regretted this lost opportunity in terms of defence building:

"Unfortunately, we don't plead at court the cases we see in CAV. It’s a shame because we could tell the court what really happened. If the suspect cries, the police don't write it down."\textsuperscript{76}

This discontinuity in representation in France also limited the benefit of custodial legal advice in other ways. For example, the lawyer may only request a copy of the video-tape of the interrogation (for juveniles and serious crimes) if they dispute the police summary provided. The lawyer in court is not the lawyer present during interrogation, and so has no way of knowing the accuracy of the summary in order to then challenge it.

One potentially important role of the defence lawyer is to ensure that the suspect’s detention is being conducted lawfully - that there are legal grounds for detention, that any relevant safeguards have been put in place, and so on. However, in practice, lawyers found it difficult to challenge the lawfulness of police detention, and seemed unwilling to do so. This may be for a number of reasons.

In the Netherlands, the lawyer is given very little case related information and other than in the case of juvenile suspects, cannot be present during the police interrogation of the suspect. Coupled with the low levels of professional trust between lawyers and the police, and the outsider status of lawyers at the police station, this makes engagement with legal procedural issues difficult.\textsuperscript{77} The lawyer has little opportunity to advise the suspect and very little information on which to base this advice. In practice, a 30-minute consultation is the only opportunity the lawyer has to gain case-related information and counter the pressures that the suspect will encounter during detention.\textsuperscript{100} When the researcher asked one lawyer whether he thought a particular suspect’s detention was justified, he replied that he would never be able to know this the police may have some evidence against him, but they would not tell the lawyer or possibly even the suspect. The only point at which the lawyer will get a better picture of the case is if pre-trial detention is requested and the case is brought before the investigating judge.\textsuperscript{101}

\textsuperscript{75} We were unable to follow cases through, but this was how many lawyers treated the cases they handled.

\textsuperscript{76} #FranCityLaw3.

\textsuperscript{77} For a development of this perspective re France, see Hodgson 2002.

\textsuperscript{100} As noted earlier, this is not a legal time limit - lawyers could challenge this if they chose.

\textsuperscript{101} NethCityLaw2.
Lawyers in France appear to be in a stronger position than in the Netherlands, in that they are present during interrogations, but like the Dutch lawyers, they also receive little disclosure of the evidence against the suspect and their status is very much as outsiders. The responsibility for the criminal investigation, including the detention and questioning of suspects, lies with the French prosecutor. The recent reforms to some extent signal a sharing of this responsibility, casting the lawyer as an additional safeguard, but it may take time to effect a change in the existing professional cultures. Lawyers in FranTown adopted an approach of working alongside the police, but lawyers in FranCity were slightly more confrontational, and there were many instances of files being endorsed with complaints and challenges to the detention procedure.

In England and Wales, although there was greater police disclosure and a more established role for lawyers, the view of legal advisers was that it was extremely difficult to challenge the detention of suspects. One lawyer explained: ‘PACE is so ambiguous, the police are covered... It’s very rare there’ll be grounds for us to challenge them.’ If officers failed to provide suspects with information on their rights, as provided by the law, one adviser told us: ‘I won’t haul them up over it. I’ll let them dig their own grave, it may come in handy later on.’ Most advisers wrote down details of the procedure and noted any breaches, presumably anticipating that this might be used in court. However, it was not clear that this ever amounted to anything – the lawyer we spoke to all reported that they had never seen a successful challenge on procedural grounds, and had almost never been successful in preventing the extension of detention. Their view was that this was because of the attitude of the courts:

‘I’ve never been involved with a challenge that’s gone to court. There’s a line coming out of Crown Court these days of ‘don’t make a fuss, get on with it’ kind of thing. They don’t want the court’s time wasted, they’re not going to let people off on those sorts of technicalities.’

5. Lawyers’ Perspectives on Their Own Role

Our research suggests a number of factors that operate to shape the lawyer’s role in advising suspects in police custody. In addition to poor remuneration, lawyers are also constrained in different ways by the legal space in which they operate and

103 See Chapter 3, section 3.4.1.
104 See the account in Hodgson 2005.
105 Although this is what we were told, we have no evidence that lawyers tried and failed.
106 EngCityLaw1.
107 EngCityLaw4.
108 EngCityLaw2. Lawyers are increasingly expected to co-operate with the processing of criminal cases. See for example the Criminal Procedure Rules 2011 para. 3.1 discussed above.
109 The overwhelming majority of criminal defence work is legally aided.
their knowledge of the evidence in the suspect’s case. And, as with many other aspects of police custody, the suspect’s own prior experience of police detention and interrogation informed lawyers’ understanding of their role in different cases: ‘repeat’ clients are not seen to have the same needs as those detained and interrogated for the first time.

However, just as police attitudes to suspects’ rights can help to make them more or less effective in practice, the way in which lawyers perceive their own role is also crucial in how they approach the provision of custodial legal advice. Research has shown that there is often a gap between lawyers’ own discourse of the importance of defence rights on the one hand, and on the other, lawyers’ own ability (and indeed willingness) to make those rights effective.\textsuperscript{110} In this section we explore lawyers’ perspectives on their own role – how they understand the nature and scope of the criminal defence lawyer’s role in advising suspects, the factors that shape and constrain that role, and the extent to which lawyers themselves act to limit the nature of the advice and assistance they provide.

5.1. New and ‘Repeat’ Suspects

Across all jurisdictions, lawyers considered their role to be more demanding in relation to suspects who had no prior experience of being in police custody. ‘Repeat’ suspects, on the other hand, knew the basic procedures and tended to be less anxious. One lawyer in England and Wales reflected on a recent attendance with a ‘repeat’ suspect:

‘These kinds of clients want us there as a safeguard; if we hadn’t have been there, the officers wouldn’t have provided disclosure. If we hadn’t had our consultation he wouldn’t have known what evidence they’ve got, how strong their case is, and so only with that information could he decide to opt for a “no comment” interview.’\textsuperscript{111}

This was echoed by another lawyer:

‘Most seasoned clients know the police station inside out. They know how it works, what to do. They usually only want us down there for two reasons: to know, one, what the evidence is and how good it is; two, their chances of bail. They’ve got more chances of finding out if we’re there.’\textsuperscript{112}

This view was universal across all four jurisdictions.\textsuperscript{113} A Dutch lawyer explained:

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\textsuperscript{110} See also Newman 2012, confirming the findings of McConville \textit{et al.} 1994. Newman’s research underlines the differences between what lawyers say they do and what they actually do in day-to-day practice.

\textsuperscript{111} EngCityLaw2.

\textsuperscript{112} EngCityLaw6.

\textsuperscript{113} It was also the view of the police as well as lawyers, discussed below.
"I find it very good that suspects before the first interrogation can be consulted. Of course you have clients who do not need this so much, they themselves know that they will remain silent until the lawyer gets access to the case file. But you also have people who do not know at all what to do, or with whom you must "print" in their brain that they have the right to remain silent. For these people, it is very important to meet with a lawyer before the first interrogation."\textsuperscript{714} And a French lawyer explained in very similar terms:

"You have to distinguish first-time offenders and those who are used to GAV. Repeat offenders know the GAV from the inside, they know more than us. The first-time offenders are lost, they don’t understand our role at all. They need more explanation and a lot of reassurance.\textsuperscript{715}

5.2. Lawyers Ensure Procedural Compliance

Across all four jurisdictions, the lawyer’s role was most commonly characterized as ensuring that procedures were followed and that suspects were properly treated. Lawyers told us that they thought their presence ensured that the police behaved more respectfully in interrogation and complied with legal procedures.\textsuperscript{716} They also believed that it provided important psychological support: it gave suspects more confidence in interrogation and resulted in them feeling less pressured.\textsuperscript{717} Where interrogations were not audio or video recorded, as is normally the case in France and the Netherlands, lawyers emphasized the value of their presence in ensuring that the interrogation is conducted properly and in preventing improper police behaviour.\textsuperscript{118} Lawyers can also verify the accuracy of the interrogation transcription - which sometimes does not reflect what was actually said. The police will sometimes sum up what the suspect has said, omitting small, but important, details, or ‘embarrassing’ comments such as allegations of police violence.

One French lawyer summed up his role, and the implications it has for representing the suspect, as follows:

"We are defenders but mostly we guarantee the integrity of the process. It’s important that the suspect understands this. They shouldn’t expect us to plead in the interview room, to intervene as much as we can or to suggest answers to police questions. The law doesn’t provide for this. We are there to ask the right questions if they haven’t been asked or to raise problems that happened during the GAV. But nothing else, especially since we don’t have access to the file. It’s difficult to build a defence line, to

\textsuperscript{714} iNhlsTownLaw4.
\textsuperscript{715} iNhlsCityLaw3.
\textsuperscript{716} This was also one of the main findings of Stevens & Verhoeven 2010.
\textsuperscript{717} iEngTownLaw3; iEngCityLaw2.
\textsuperscript{118} iFrntCityLaw1; iFrntCityLaw2; iFrntCityLaw4.
say that a story is not credible. If it’s completely incoherent, we can tell them that the police won’t believe them but if they deny everything, I just tell them to say this.\textsuperscript{119}

Other lawyers defined their role as ‘providing information to suspects’,\textsuperscript{120} reminding suspects about their right to remain silent,\textsuperscript{121} or acting as the ‘external control of the procedure’.\textsuperscript{122}

5.3. Lawyers Unable to Make a Difference

Most lawyers in France were positive about the fact that they now have a greater presence in the GAV but, like Dutch lawyers, they felt that they were of limited use because they had no access to the case file and because their role was limited during interrogation. Dutch lawyers were not permitted to be present during most interrogations; French lawyers were allowed to be present, but were required to adopt a passive role and were only permitted to make any comments at the conclusion, once the officers had asked all their questions.

For some French lawyers, a weak and ineffectual role served only to legitimize the procedure and was in many ways worse than having no lawyer at all. The comment of one lawyer was typical of several we interviewed, who believed that lawyers could make no useful contribution, because they could not intervene, only observe:

> ‘We’re just allowed to breathe and that’s it, sometimes we even fall asleep. I’m not sure it’s very useful... in terms of defence rights, it’s useless we are just decorative, like a vase on the table.’\textsuperscript{123}

This passive role was also frustrating for suspects, and some lawyers had to explain very clearly to suspects that the lawyer could not intervene during the interrogation, because they were often annoyed that the lawyer did not say anything:

> I just wanted to whisper a quick question to [my client] because I needed some clarification to maybe ask questions at the end of the interview. I was immediately told off by the officer who said: ‘What are you doing?’ I said I was just asking a question to my client. ‘You’re not allowed to’, the officer said, implying that if I wanted to ask something to my client I should do it in front of him and loudly.\textsuperscript{124}

Dutch lawyers were also aware that their role in police custody was very limited. As one lawyer in NethTown told the researcher, the fact that lawyers now had the

\textsuperscript{119} ifFranCityLaw2.

\textsuperscript{120} NethCityLaw3; NethTownLaw7.

\textsuperscript{121} NethTownLaw4; NethTownLaw5.

\textsuperscript{122} NethTownLaw3. This control is very limited in practice, however.

\textsuperscript{123} ifFranCityLaw3.

\textsuperscript{124} ifFranCityLaw4.
ability to meet with the suspect before the first interrogation, in her view, did not change anything in her role. That was because lawyers were still not given access to the case file. In this lawyer’s words:

‘[It] is only when a suspect is presented to the investigative judge [i.e. at the end of police detention when a lawyer is given access to the case file] that I can do something’.

Another lawyer interviewed in NethTown, said:

‘I think that it is very difficult to make a difference at this stage in terms of the suspect’s legal position. To say that a lawyer has much influence on the legal position of the client would be an overestimation. That is because the police have almost full control in the first three days of detention, and also because they have found someone who is clearly against them [i.e. a suspect], and they believe that this person is in their power.’

5.A. Lawyers as Moral Support

Because the opportunity for active intervention was limited in France and the Netherlands, some lawyers believed that the core of their role lay in ensuring the welfare of the suspect rather than giving legal advice or deciding on the defence strategy. One lawyer, for instance, when asked to describe her role during police custody, said that it was:

‘A little bit of everything... Bring clothes, call relatives... I think that at this stage your task is broader [than purely legal questions]. You are the only one who is a real friend of the suspect. You are the only link for the suspect with the outer world... Of course, you control that the procedures were followed and rules applied, but you should do more, in my view. I ask clients if I should call someone for them... to call relatives, ensure that your client has got medication, try to put the client at ease, those kinds of things...’

The importance of psychological support was also expressed by a lawyer from EngCity.

‘In terms of the client, depending on who they are, in general they will feel a lot more confident [when I am there], it may be the first person they meet who they don’t have to feel hostile towards or who feel hostile towards them. I have often heard from police officers that a suspect may be violent etc. but they are a puppy dog to us because we

125 NethTownLaw6.
126 NethTownLaw3.
127 Eg, NethTownLaw3; NethCityLaw2.
128 NethCityLaw2. We very rarely observed lawyers doing these kinds of things for their clients.
Several French lawyers believed that the constraints on the disclosure of evidence and the lawyer’s inability to intervene during interrogation made their role in consultation all the more important, ‘to explain clearly what they can and cannot do and what is in their best interest’. However, they disliked the very passive nature of the role assigned to them and characterized it not in terms of law and procedure, but as that of moral support, a reassurance to the client; as more like being a social worker, again focusing on the provision of reassurance rather than legal advice; and as smoothing out the relationship between the suspect and police.

5.5. **Lawyers Empathizing with Police Role**

Although some lawyers in France saw their role as in opposition to that of the police, many did not. For example, one lawyer told us that her role was not automatically to oppose the police, but to make sure that investigations were properly conducted and ‘to help the case progress’. In interviews and observations in all countries, it was clear that the lawyer’s attitude to the police is an important factor. Those who treat officers as colleagues rather than adversaries, are more likely to obtain better disclosure and have longer in consultation if they need it. Several lawyers showed an appreciation of the difficulties of the police job, given the tension present in police custody and the police conditions of work. A French lawyer told us of an assault that had taken place on a suspect in police custody:

> "The reality is that this suspect had spent the night urinating against the wall. They don’t have cleaning staff in the police stations, so the [junior officers] have to clean it themselves... So, at the end of their duty period, [junior officers] are often on the verge of a nervous breakdown when it doesn’t go well. It can explain some misconduct."

Another lawyer expressed empathy with the police role, and thought that officers saw lawyers in excessively oppositional terms.

> "... you can feel all the difficulty for them where they believe we’re here to make sure the client doesn’t talk and doesn’t admit anything. I think it’s a lack of knowledge of our work. They’ve got this image of the organized crime lawyer who is there to cover..."

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129 ifEngCityLaw1.
130 ifEngCityLaw2.
131 ifEngCityLaw3.
132 ifEngCityLaw4.
133 ifEngCityLaw5.
134 ifEngCityLaw6.
135 The poor working conditions and resourcing of police and gendarmes is a longstanding issue. See also Hodgson 2005.
136 ifEngCityLaw2.
up for her client at all costs, without realizing that we're also there to make cases progress. If our client is guilty and the elements of the case demonstrate it, it's in her interest to speak and to cooperate. Our work is to encourage progress in this aspect and not to obstruct the investigation continuously.\textsuperscript{137}

5.6. \textit{The Importance of Good Working Relationships with the Police}

Several lawyers emphasized the importance of building a good professional relationship with the police, without appearing to be too friendly.

'I try to make a conscious effort to befriend police officers. Of course, it does not mean that I trust all of them... And you should not appear too friendly, because your client may think there is something wrong with this lawyer. But I explain to my clients that I stay friends with the police for their own benefit, in order to get information. For example, the arresting officers. They know much more than most police officers think they know... [for example, your client tells you that he has never been arrested before, and you learn from the arresting officers that he has been here three times last week... This is important for your future strategy.\textsuperscript{138}

Although examining the custody record and obtaining disclosure from the officer dealing with a case were both standard practice in England and Wales, lawyers considered it important to cultivate good working relationships with the police in order to gain maximum information about the case and to open up possibilities for negotiation on case disposal. Relationships depended on personal histories and approaches. In EngTown, for example, legal advisers and police knew each other and appeared to know what to expect from their respective roles. In one case, for example, officers agreed to time the subsequent interrogation in order to enable the lawyer to attend. However, there was also an awareness of their different objectives:

They can drip feed the disclosure to make things more difficult. But if that happens we might say, 'I'm sure my client won't be saying anything during interview and then we'll have to consult afterwards so there may be a need for a further interview.' It's a game of cat and mouse. We put pressure back on them to perform.\textsuperscript{139}

The whole period of police detention and interrogation takes place on police territory. This requires lawyers to be professional, but also confident of their own legal authority. One lawyer underlined the importance of not being intimidated by the police, but also not being unnecessarily confrontational:

'When you're in the police station you're on hostile territory, you have to be firm, you've got to stamp your authority on the situation... with CID, building relations

\textsuperscript{137} IfYouCityLaw4.
\textsuperscript{138} jNethCityLaw3.
\textsuperscript{139} EngCityLaw1.
with them is more effective, and isn't hard as you often have to sit there in the station for hours anyway.\textsuperscript{140}

This was echoed by a French lawyer, speaking of the 30-minute limit on consultations in France:

`... when you have good relationships with investigators, they let you have five more minutes … it’s the same at court, if you arrive on a Friday afternoon just after closing time to give some papers, if you are a pain, clerks are not going to make an effort. When you’re nice to them and respect their work, they’ll be happy to help, even if it’s slightly after closing time.`\textsuperscript{141}

This latitude also extended to interrogations, although in a way that was mutually beneficial to police and suspect:

`I could see the client was digging his own grave but I could feel that if I pushed her a bit, she was going to admit what was demonstrated in the file. The investigator had shown us: there were tape-recordings, witnesses who had seen her, her prints. We suspended the interview, I saw my client, although I’m not supposed to. I told her: “Stop it, you’re digging your own grave.” We sorted things out and it was much better for the client, things were square, straightforward. That’s because the investigator knew me. I think the way you do your job matters a lot.”\textsuperscript{142}

French lawyers often mentioned the importance of having a good working relationship with police officers, but not becoming too cosy with them, not to drink coffee with them etc. – in short, to maintain a professional distance. This was also the view of those we spoke to in ScotCity. Most French lawyers we observed maintained this professional distance, but we did see some examples of slightly less than professional behaviour. One lawyer, for example, discussed the day’s cases with the police and told them: “I’ve only got arseholes today, they won’t admit to anything.”\textsuperscript{143}

5.7. **Lawyers Asserting Suspects’ Rights**

Other lawyers adopted a more proactive stance, describing their role as representing the interests of their client – even when this conflicted directly with police expectations. A lawyer in Scotland explained that it was sometimes hard for the police to understand the lawyer’s role:

`... the average police officer doesn’t really seem to understand that the defence solicitor has a specific role: to advise a person on their rights and to protect their rights as far as possible. The police officer has a different role and very often the officer will`

\textsuperscript{140} EngCityLaw1.  
\textsuperscript{141} FranTownLaw4.  
\textsuperscript{142} Ibidem.  
\textsuperscript{143} FranTownLaw2.
take you aside and say (for example): “We knew your client punched this man, but we think it was in self-defence, so it’s probably best for him to tell us that.” But, what they don’t understand is that for that man to admit contact of any kind with the victim would mean coronerisation for that case to proceed and they don’t seem to understand that we have a totally different role and for me that I have to advise my client of this.”

Another lawyer in Scotland expressed this view more starkly:

‘The police don’t want defence lawyers there. The role of lawyer at interview is a tangible democratic function being dispensed. The police don’t want lawyers telling them they can’t do something.’

Similarly a lawyer from England and Wales described their role as being ‘to advance the client’s rights during arrest and detention’.

For some lawyers, the assertion of suspects’ rights was part of a wider role in assuring procedural fairness. But for others, it was also driven by a mistrust of the police. Suspects were aware of the kind of rights avoidance strategies that the police might employ. For instance, in consultations in the Netherlands, many lawyers warned their clients that ‘police officers were not their friends’, told them about the tricks that the police use to obtain a confession, and instructed them to read the interrogation record carefully, because officers tended to misrepresent things. One lawyer told us:

‘No, I don’t trust the police. I have read so many police records that were not correct... I worked for 10 years as a prosecutor and then I thought all police officers were honest, until I saw a police officer openly lying to the court.’

Many Dutch lawyers also routinely warned suspects not to believe the police when they told suspects that they would be released immediately if they co-operated, explaining that this was not the decision of the police in any case, but that of the public prosecutor or their assistant.

Interestingly, despite the underlying lack of trust, most Dutch lawyers, when asked about their relationship with the police, said that it was generally good, or that it was ‘good most of the time’. Most lawyers noted that officers who have been openly hostile to them were a clear minority, and that these were either younger officers, or officers with a ‘crime fighter’ mentality.

144 ScotTownLaw1.
145 ScotCityLaw1.
146 EngCityLaw2.
147 NethCityLaw3.
148 NethCityLaw2.
5.8. The Importance of Lawyers' Own Professional Ideology

Although legal procedures, and professional and financial arrangements, militated against effective legal assistance in the Netherlands (and to some extent in France), this was unproblematic for some lawyers we observed, as they had no expectation of providing anything more than the briefest of legal advice.\footnote{The absence of Scotland in this critical discussion does not reflect that their performance was flawless, but rather, the fact that we saw very few legal advice sessions in Scotland.} For example, we observed one lawyer who spent little of the consultation period ascertaining legally relevant facts or explaining the procedure to the client. He used the time to fill out the duty form and to discuss the case in very broad terms. There was no expectation of any role beyond the consultation (which was sometimes as short as eight minutes), underlined by the fact he routinely took no notes during the consultation and did not pass on his contact details unless requested.\footnote{NethCityLaw4.} We observed French lawyers with little or no experience of criminal law practice who failed to explain the procedure to the suspect, and who were unsure how they might ‘advise’ the client beyond explaining the limitations of their own role in interrogation and the guilty plea procedure.

At the same time, other lawyers we observed in the Netherlands were committed to providing the best advice they could with the limited time and information available. One lawyer, for instance, was particularly pro-active in finding out information about the case from the police, and took an interventionist approach during the interrogation.\footnote{NethCityLaw13.} Similarly, another was also observed to intervene actively in an interrogation.\footnote{NethTownLaw4.} One lawyer told us in interview that on several occasions he had sought to be admitted to the interrogations of his adult clients, sometimes with success.\footnote{NethTownLaw6.} And we observed a small number of lawyers who systematically managed to spend more than 30 minutes in consultation with their clients.\footnote{NethTownLaw2; NethTownLaw7; NethCityLaw2.} In France too, we observed cases where lawyers were successful in negotiating longer or additional consultations.\footnote{E.g. FranTownLaw2.} The ability of a minority of lawyers to provide much more effective legal assistance demonstrates the importance of the lawyer’s own professional ideology in shaping how they perform their role.

6. Police Perspectives on the Lawyer’s Role

There was no unified police perspective on the role of the criminal defence lawyer during police custody. It varied across and within jurisdictions. Views ranged from seeing lawyers as wholly antagonistic to the police investigation, through to having...
little role, or even being useful to the police - all of which mirror lawyers' own views of their role to a certain extent. However, very few officers shared the lawyers' view of their function as enhancing the integrity of the procedure and so working in tandem with the police’s own objectives. Most saw the lawyer as acting for the suspect in a broadly adversarial sense. The main difference was between those who thought this was destructive to the procedure and those who thought that in practice it achieved very little.

One officer in Eng.Town, having recognized that mistrust and negative attitudes towards lawyers do exist within the police, explained this by the officers' lack of understanding of the lawyer’s role:

‘Lawyers for the most part want what’s best for their client. Most officers don’t understand this approach and think that lawyers ruin good police work. They can dissuade people from obtaining legal advice, with good and bad intentions, which can impact whether or not someone sits down with a lawyer.’

6.1. Lawyers in Opposition to the Police

6.1.1. England and Wales

In England and Wales, police officers described the lawyer’s role in fairly positive terms, as ensuring procedures are followed and reassuring suspects, making them easier to deal with. However, some English officers did believe that the lawyer’s primary interest was to ‘get the client off’, and that therefore there was a certain element of antagonism in their relationship. In the words of one officer:

‘At the end of the day, their [lawyers'] main role is to get their client off, that’s the way I view it. They’re a defence lawyer, they’re there to either get your client off the prospective charge or to get the best that they can in the circumstances... As I said to you, I don’t feel particularly comfortable because I feel like I’m being scrutinized and suddenly all that experience I’ve got, I can feel like a little duck with my little feet going under the table because... I’ve got this person making me feel like I don’t actually know what I’m doing.’

Another officer disagreed fundamentally with the defence role.

‘It’s obstructing justice and that’s fine if that’s what they want to do but I do have a philosophical problem with defence solicitors because I think they mostly know that about 80% of people that get arrested are guilty. They get a lot of them off and I don’t

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136 iEngCityPol4. Compare this with the words of iFranCityLaw4 quoted above in section 5.5.
137 E.g. iEngTownPol6, iEngCityPol1, iEngCityPol4.
138 iEngCityPol5.
think it's an honourable profession at all, I think it's highly dishonourable. We have to accept it because of the system. 299

Some officers went as far as to assert that lawyers concocted stories for their clients:

'They should be there to observe the rights of the offender/suspect. I don't see why they have secret consultation. They shouldn't be giving them stories of how to get out of it or false explanations. So I think an officer, or independent officer, should sit in on the consultations, so if they concoct some kind of means or method or look for a technicality, well that's not justice, that's deceitful. You'd be amazed with some of the stories people come out with, which you know they haven't worked out on their own because they aren't bright enough ...' 300

It is striking how the police imagine lawyers in more adversarial terms than lawyers do themselves, and that in practice, lawyers are often insufficiently protective of their client's interests. 301

Some English officers showed a degree of mistrust towards defence lawyers, stemming either from the general antipathy to the lawyer's job (understood as 'getting off the guilty'), or from the belief that many lawyers concoct false defences. Two kinds of behaviour caused particular irritation to the police: being unnecessarily 'argumentative' and 'obstructive', and advising suspects to remain silent when the evidence against the suspect, in the officers' view, is overwhelming. Such behaviour was labelled by police officers as 'unprofessional':

'I think a number of different individuals that I have regularly had dealings with providing advice, there's only about three or four, that my heart sinks when they come in, as I have concerns as to whether they're going to give sensible advice. Some of them are unnecessarily obstructive or argumentative, but not to the extent that they breach the law, but just to the extent that I suspect they don't really know their job very well so they become that way.' 302

This contrasted with another officer, who told us:

'If by giving their account they [suspects] could incriminate themselves further or they don't think the police have got enough evidence anyway ... then they would advise to go "no comment". Then you look at that from the other side and you think, “That's good advice, really.”' 303

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299 iEngTownPol2.
300 iEngCityPol2. See also iEngTownPol5. This would amount to a serious breach of professional ethics in England & Wales. Interestingly, lawyers in England and Wales confirmed that such opinions were common amongst police officers (EngCityLaw2; EngTownPoll).
301 This is demonstrated in our own research and McConville et al. 1994.
302 iEngCityPol4.
303 iEngTownPol6.
6.1.2. France

French police tended to see the lawyer’s role as peripheral, not making a huge impact one way or the other. Earlier research has shown that the police accept the authority of the prosecutor over the procedure much more readily than any such role for the defence lawyer.\textsuperscript{104} They are accustomed to reporting to the prosecutor and do not, in general, accept the lawyer as having a legitimate role in checking on the exercise of police powers. This was very much the attitude of Dutch police also. Some French lawyers were surprised when they encountered this attitude, expressing shock that the police were unhappy to have lawyers attempting to check on what they are doing.\textsuperscript{105} For their part, police officers did not even mention the possibility of lawyers checking on procedural compliance; it did not seem to be relevant to them. Several lawyers in Fran\textsuperscript{town} thought that they were perceived by the police as ‘spoilsports’ and were regarded with suspicion. They believed this was because the police, mistakenly, assumed that lawyers would behave in a strongly adversarial manner, trying to get the case thrown out on a technicality. Once they realized that this was not the case, relations improved - albeit that, as one lawyer put it, ‘I think most of them see us as a necessary evil.’\textsuperscript{106}

Another lawyer we spoke to thought that the police still viewed lawyers as ‘the enemy’, but he considered that there was also less mistrust:

‘The reception of lawyers at police stations has changed. The presence of the lawyers has become more normal. There is still a bit of mistrust because they know the lawyer is going to ask questions and make comments on the procedure but we’re starting to be accepted.’\textsuperscript{107}

Similarly, another lawyer said:

‘It depends on the police officers. To be fair, we are there to destroy police procedures, we spend our time at court criticizing their work. So, the antagonism will always exist.’\textsuperscript{108}

And yet another thought:

‘... we get to know each other and we try to work together. It might change but at the moment we’re on their territory.’\textsuperscript{109}

\textsuperscript{104} Hodgson 2005.
\textsuperscript{105} Eg, ifromCityLaw4.
\textsuperscript{106} ifromTownLaw4.
\textsuperscript{107} ifromCityLaw2.
\textsuperscript{108} ifromCityLaw3.
\textsuperscript{109} ifromCityLaw8.
Lawyers also thought that a good officer with a strong case was often more positive about the lawyer's role. Lawyers were perceived as problematic when the case was weak:

'It's always the same: the bad police officer sees the lawyer as a negative element because she's not able to put as much pressure on the suspect. On the other hand, the good officer who has a strong file, almost doesn't need to hear the suspect. She doesn't need admissions. She doesn't perceive the lawyer like a spoilsport. She can be straightforward because she knows her file is strong.'

6.1.3. The Netherlands

Dutch officers expressed most strongly the view that the role of the lawyer was in direct opposition to police objectives. They understood the lawyer's function in highly adversarial terms, as someone who would employ all lawful means to protect the interests of their clients. They believed that the lawyer would strive to identify procedural violations committed by the police and raise them in court with a view to 'destroying' the case; or advise suspects to remain silent hoping that the evidence against them would be insufficient for a conviction.

There was also a clear lack of trust between police and lawyers in the Netherlands — governed in part by the professional standing and authority of each. The lack of trust towards lawyers by police was partly caused by officers' preoccupation with preserving the secrecy and the interests of the investigation. As one officer in NethCity put it: 'At this stage, no third party [including lawyers] should be given information about the investigation.'

The police strived to eliminate any risk that a suspect would hinder the investigation, however illusory that risk was, and a lawyer was often seen as a means through which a suspect could disturb the course of the investigation. Thus, for example, lawyers were required to surrender their mobile phones on entering the police station — for fear that they or the client might make some unauthorized contact.

A second reason for the police mistrust of lawyers was the negative view of criminal lawyers as a profession in general. During fieldwork, researchers often heard lawyers being called, in a half-joking manner, 'enemies' or 'opponents', whose only interest was to destroy the case carefully built up by the police or to earn money.

Lawyers were aware of the views which the police held of them:

'T find that there is a fundamental lack of trust from police towards lawyers. Police see us as a nuisance, they have to pick us up and bring us to the cell complex, and then we advise suspects to remain silent. The lack of trust is greater in some cases than in others - the police project the procedural behaviour of the suspect onto the lawyer: the less

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370 NethCityPol.3

371 NethCityPol.3

372 NethCityPol.25

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“cooperative” the suspect is, the less the police trust the lawyer. But I think that the presumption of the police is that we [lawyers] frustrate the investigation or that we try to persuade the suspect not to cooperate with it.\textsuperscript{75}

A further contributing factor in the Netherlands is the very limited amount of contact between police and lawyers. When attending clients at the police station, lawyers’ contact with officers is limited to detention officers and, occasionally, assistant prosecutors. Any communication between the investigating officer and lawyer is very rare, and relates to administrative matters (such as the lawyer’s attendance at interrogations), not to discussion of the substance of the case itself.

6.1.4. Scotland

In Scotland, officers generally accepted the role of the lawyer.

Their job is to uphold the rights of the accused. Most of them see professional. Sometimes they put on a show for their client ... we have a good working relationship with lawyers. I’ve never had a lawyer accusing me of withholding somebody’s rights.\textsuperscript{76}

[Lawyers] are there to facilitate the release of the person at the earliest opportunity. That’s their objective. Some of them are down to earth and they come to you saying, ‘I really wish I wouldn’t have to do that.’ Some others take a very aggressive stance towards the police, they’re being deliberately obstructive. Their job is not to tell the police what the procedure should be but to support the suspect.\textsuperscript{77}

Some officers in Scotland, however, thought that the recent changes allowing suspects in police custody to consult with a lawyer gave too many rights to suspects and not enough to victims.

Officer: The suspect should have a fair trial, but what about the victim? In domestic cases, if [the suspect] goes no comment, he can walk away.

Researcher: Do you think the rights of the suspect have gone too far?

Officer: To an extent, yes. There is too much emphasis on them understanding and on those forms... A colleague was at court recently and all the questioning was about SARF. If we’re asked to do something according to the law we do it... I feel a wee bit too much emphasis is put on the suspect and not enough on the victim.\textsuperscript{78}

This was echoed by another officer.

\textsuperscript{73} NorthtownLaw6.
\textsuperscript{74} ScotCityPol5.
\textsuperscript{75} ScotCityPol8.
\textsuperscript{76} ScotCityPol7.
'If the changes were brought to help victims to the same extent that it helps suspects, then it would be much better... But we bend over backwards for suspects who rarely deserve that. There is a debate around who decides if they're deserving or not: I don't know what the answer is. Many are not deserving; as soon as they're out, they re-offend and you have another victim to deal with'\textsuperscript{177}

6.2. **Lawyers and Advice to Remain Silent**

All police officers found silent suspects to be unhelpful, but some officers also thought that silence was not always in the suspect's interests. Scottish lawyers invariably advised silence and some officers were critical of this on the grounds that it did not help suspects, as it meant that information helpful to the defence case did not emerge\textsuperscript{178}. This was also the view of Dutch police officers\textsuperscript{179}. This again mirrors the views of lawyers who understand that the police perceive silence to be against the suspect's interests (even when it is not, as is often the case in Scotland), and themselves understand that in some instances, it is better to speak.

6.3. **'Lawyers Should Remain Passive'**

Many police officers considered that the lawyer should maintain a passive role and not become too involved in the procedure. This was most marked in relation to interrogation. One officer in Scotland, for example, made it clear that if lawyers chose to attend the interview, their role 'should then be passive'\textsuperscript{180}. Again, this sentiment was felt most strongly by Dutch officers. Many officers interviewed believed that lawyers should not be given a more meaningful role at the police custody stage. They did not agree that lawyers should be given more information about the evidence\textsuperscript{181}, or that they should be able to play a more active role in the interrogation\textsuperscript{182}. Dutch police gave effect to their beliefs by refusing to allow lawyers to engage more proactively, for example, by challenging questions in interrogation.

6.4. **'Lawyers Make No Real Difference'**

In contrast to Dutch officers' opposition to the lawyer's role at the investigative stage expressed above and, in particular, their ability to advise suspects to remain silent, some police officers in Scotland thought that there was little point to the lawyer's role as they mostly did not attend, and invariably advised suspects to make no comment.

\textsuperscript{177} ScotCityPol8.
\textsuperscript{178} ScotCityPol9.
\textsuperscript{179} E.g. NethCityPol1.
\textsuperscript{180} ScotTownPol8.
\textsuperscript{181} NethCityPol4.
\textsuperscript{182} NethCityPol3; NethCityPol2.
There isn’t much role played by them to be fair. They’re called three or four times in the night - they’re probably fed up with calls. Some are in there for a while for consultation, others for mere seconds. 99.9 per cent of the time the person will say that they’ve been advised by their lawyer to make no comment - though some then answer anyway. I feel like saying, ‘Well rather than have a lawyer just answer no comment anyway’. 183

This was also reflected in some of the comments made by French police officers.

‘The lawyer doesn’t have a very big role anyway. She can ask some questions but she’s not going to change anything actually. I don’t see the lawyer as my enemy. It’s not a fight’. 184

‘It’s an additional constraint for us because we have to wait for the lawyer before each interview. The lawyer’s presence during the interview doesn’t change anything. The juveniles have to be filmed. They’re filmed whether there’s a lawyer or not.’ 185

Duty lawyers do what they can. Sometimes, it’s just about being present, sometimes it’s a bit more. It depends. I’m not sure they’re very useful for minor offences, they don’t have much to do. For serious offences, I guess that the impact of the lawyer being present must be completely different’. 186

Another French officer also thought there was little that lawyers could do. Interestingly, he thought that if given disclosure, lawyers would ‘coach their client and tell them what to say’. When asked if he did not trust lawyers, he responded:

‘No. It’s like any profession, there are good people in every profession, both in the police and with lawyers. It’s happened that we had phone-tapping where we heard a lawyer exclaiming a police station and saying to one of the main accomplices, “Be careful, your mate is in GAV, don’t come back.” We can hear it live on the tape. Of course, it’s a conversation with a lawyer, so we can’t use it’.

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For some officers it boiled down to the individual lawyer. As this officer from England and Wales explained, it was often a question of trust and building an individual relationship with a lawyer:

‘It’s a question of trust with the briefs [lawyers]... There are solicitors that I’ve dealt with who you speak to who will have a frank chat about it and will come to the conclusion that the person should give you an account. It does depend what they say to them because they literally don’t have much of a choice if they’re doing their job as they can tell them to give the account they give to the brief or go no comment really’. 188

183 FreCityPol7.
184 FreCityPol4.
185 FreCityPol1. In fact, we saw juveniles interrogated who were not filmed.
186 FreCityPol3.
187 Pol2FreCity2.
188 EngCityPol5.
6.5. **Lawyers as a Procedural Protection and Supporting the Suspect**

The Dutch police perceptions of the lawyer’s role reflected the professional mistrust of lawyers and the professional domination of the police at the initial detention stage. In the Netherlands, most police officers believed that the role of a lawyer was, and should be, limited to one of checking that procedures are followed by the police, and that the rights of the suspect are respected.\(^{180}\) They did not consider themselves accountable to the lawyer, nor obliged to provide information relating to the detention process. Like French police, they considered that the lawyer could check that procedures had been complied with by speaking to the suspect. One officer in NethCity described the role in the following terms:

‘A lawyer, he guards in this sense the process, that the procedures are followed. He also cannot do more in the beginning. He can only look: why is his client arrested? Are there enough facts and circumstances for the arrest? These he does not get from me, but the suspect himself must tell him... And how late was he arrested? Was he presented to the assistant prosecutor on time? And was his detention prolonged on time? Are the statutory terms adhered to? The lawyer cannot say more at this time.’\(^{190}\)

An officer in Scotland also described the lawyer’s role as being ‘to uphold the rights of the accused’. Another officer described the lawyer’s role in the following terms:

‘They are there to facilitate the release of the person at the earliest opportunity... Their job is not to tell the police what the procedure should be but to support the suspect.’\(^{191}\)

An officer in EngTown thought that lawyers were helpful in providing an additional procedural check:

‘I think it’s an important role. I think it makes sure that we do our job correctly and I’d be quite happy to have a solicitor for every suspect if that was the case because I know that if anything seems to be going awry, they’ll point it out to me and then will correct it. So we’ll make sure that everything is done correctly.’\(^{192}\)

6.6. **Lawyer Role in Facilitating the Process**

Some officers saw the lawyer’s role as being to discipline the suspect with the consequence, in some instances, of being helpful to the police. For example, this French police officer did not see the lawyer’s role as being proactive in any sense:

\(^{180}\) NethCityPol1; NethCityPol2; NethCityPol4.
\(^{190}\) NethCityPol1.
\(^{191}\) ScotCityPol8.
\(^{192}\) EngTownPol6.
"We clearly explain to [suspects] what the right to legal assistance implies and that it is really different from a defence. It's an assistance during a confidential consultation... Lawyers try to facilitate things, They try to make sure that it goes as quickly as possible. They also assure that their client is well-behaved in interview, if there's any problem in this regard. We often have lawyers who put them straight. I never had any problem with a lawyer. I would even say that most of the time they do all they can so that things go quickly... They're more likely to calm things down if there's any problem which is rare anyway... Often, there's an interview and they would ask questions at the end about the personal situation of the suspect. In these cases, their role is very limited. For more serious cases, they often ask questions at the end, which are often useful."

An officer in EngTown expressed a similar opinion:

"... where you're looking to take samples and do quite unpleasant things to people, I would always encourage suspects to take legal representation because the solicitor will then explain the procedures and it will aid the police and the suspect because he'll understand what's going on and also the legal implications of not co-operating with the requests that we make."

In England and Wales, some interviewed officers noted that often there was no apparent conflict between their own role and that of a lawyer, and that sometimes their roles may be complementary. One officer gave an example of cases where a suspect is eligible for caution:

"Other situations, it can assist you because the brief [lawyer] will just say to me while I'm doing the disclosure: "What's their previous?" [I would then respond]: "Well they've got this and this ..." [The lawyer would ask]: "Have they got that?" - "No." - "Likely to get a caution?" - "Probably." [Lawyers would then] advise their client, "Admit to that, you'll get a caution, done and dusted, you're gone." So it can work in our favour."

7. Conclusion

In this chapter, we have examined the lawyer's role during police custody in the four jurisdictions, as well as the views of the police and of the lawyers themselves as to what this role entails. We have discovered significant differences between the jurisdictions rooted in their systems of criminal procedure, regulation of police station legal advice, payment arrangements and the professional cultures of lawyers and police. Thus, for example, in England and Wales lawyers enjoy the broadest role at the stage of police detention, due to the permissive regulations and the practice of disclosure of evidence to lawyers before the first suspect interrogation. The role is enhanced by a high degree of criminal law specialization, relatively active
defence culture, and professional acceptance of lawyers by the police. However, the introduction of fixed payment schemes in England and Wales has placed limitations on the lawyers’ custodial role. For instance, English lawyers are often unable to perform multiple visits to their clients in custody, which may prevent lawyers from following up on bail decisions.

From the four jurisdiction studied, the Netherlands has the most restrictive regulation of the lawyer’s role during police custody. In the Netherlands, lawyers’ participation at the police detention stage is often limited to a 30-minute consultation with the suspect before the first interrogation, and no evidence is disclosed to lawyers by the police. This is augmented by the lack of criminal specialization among the lawyers providing police station advice, the low level of investment in and passivity at the police custody stage demonstrated by some lawyers, and the lack of professional trust between the lawyers and the police. In practice, however, it is in Scotland that lawyers’ interventions during police custody are often the most transient. In Scotland, lawyers often choose to advise suspects by telephone and not attend the police station at all during the period of police custody. This is notwithstanding the fact that the official regulations place no limitations on lawyers’ ability to visit their clients or to attend interrogations.

France, in its turn, takes the middle place among the four jurisdictions studied, as far as the extent of the lawyer’s role in police custody is concerned. The regulation of the lawyer’s role is more permissive than in the Netherlands – notably, unlike in the Netherlands, French lawyers are allowed to attend all suspect interrogations – but less so than in England and Wales, as the number of possible visits of a suspect in GAV is limited. Like in the Netherlands, there is no disclosure procedure, and most lawyers assisting suspects in GAV are not specialized criminal lawyers. Like many Dutch lawyers, French lawyers seemed to be generally passive during the GAV. However, many appeared to accept the requirement to be passive less readily than the Dutch lawyers. Some lawyers, for instance, regularly attached reports about the lack of disclosure of information by the police to their written submissions to the court. French police officers demonstrated a certain apprehension towards lawyers, stemming from the fact that the police were not used to forms of oversight other than the supervision by a prosecutor. However, there were also early signs of greater acceptance of lawyers by the police in the French sites, which were generally missing in the Dutch jurisdiction.

We have also observed a number of similarities in the four jurisdictions. In every jurisdiction, the ‘core’ of the lawyer’s role in police custody was to gather the information about the suspicion and evidence (from the client, or from both the client and the police), and to advise the client about the upcoming interrogation. In other words, in each of the studied jurisdictions, the lawyers’ role in police custody was interrogation-centred. For example, in all jurisdictions lawyers generally attended their clients not immediately at the start of detention, but closer in time to the moment when the suspect would be interrogated. Rarely did lawyers visit clients in custody for any purpose other than to discuss the upcoming interrogation.
They did not seek actively to verify or to challenge the lawfulness of the detention, nor begin any case-building. They simply responded to police behaviour. Thus, in each of the jurisdictions studied, the lawyer’s custodial role appeared to be narrower than envisaged by the *Dayanan* judgment, according to which suspects are entitled to a ‘whole range of services specifically associated with legal assistance’ from the very outset of police custody, which may include ‘discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention’.

In all jurisdictions, lawyers adopted similar strategies to obtaining the relevant facts from their clients and to provide advice. The amount of prior disclosure of the evidence by the police had a direct bearing on the lawyer’s ability to gather information from their clients, and to preventing the latter from incriminating themselves. That is, where little or no information was given in disclosure, lawyers were often unable to win sufficient trust from the client, and generally avoided asking ‘probing’, that is, potentially self-incriminating, questions. Lawyers’ approaches to giving advice ranged from providing generic information about the rights and interrogation procedure, to setting out options for the interrogation and letting the suspect decide, to being directive and insistent on one particular option. The choice between these options depended in part on the lawyer’s individual style and in part on the amount of the disclosure given to the lawyer by the police. For example, where no such disclosure was provided, lawyers tended to give generic, one-size-fits-all advice, the usefulness of which was naturally limited. However, the suspect’s characteristics seemed to be the most important factor. Thus, in every studied jurisdiction, lawyers adopted a different approach to advising first-timers than ‘repeat’ suspects. In particular, lawyers tended to provide more information and to be more explicit in their advice when faced with the first-timers, whilst they have often adopted a more hands-off approach when dealing with ‘repeat’ clients.

Another important theme discussed was the relationship between lawyers and the police, and the attitudes of police to lawyers advising clients in police custody. The level of lawyers’ acceptance as legitimate players in the police custody process varied, being the greatest in England and Wales and the lowest in the Netherlands. However, in all jurisdictions many police officers were not sufficiently aware of the lawyer’s role and ethical obligations. They presumed, for instance, that the lawyer’s objective was to avoid punishment of their clients at any cost, including by systematically advising clients to remain silent or directing false defences. In reality, however, most lawyers in our study did not advise suspects to remain silent,

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296 ECHR 15 October 2009, *Dayanan v. Turkey*, No. 7577/03, para. 32.
297 This was more of a concern in England and Wales and in Scotland, where admissions had clear consequences on the lawyer’s professional ethical position.
298 With the exception of Scotland, where lawyers have systematically advised suspects to remain silent, because they believed that exercising silence had no adverse (procedural) consequences for suspects, and because such advice enabled them to refrain from attending
did not propose false defences to their clients (which would moreover constitute a breach of lawyer’s ethics in all studied jurisdictions). This underscores the need for training aimed to increase awareness of the lawyers’ role by police officers, discussed further in the Training Framework.
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POLICE INTERROGAION AND THE RIGHT TO SILENCE

1. Introduction

In this chapter we focus on police interrogation and examine, in particular, how the right to legal assistance and the right to silence operate in the context of interrogation of suspects by the police. The EU Directive on the right of access to a lawyer,\(^1\) reflecting ECHR case-law,\(^2\) requires Member States to ensure that suspects and accused persons have a right to have their lawyer present and to participate effectively when questioned.\(^3\) The EU Directive on the right to information\(^4\) requires Member States to ensure that suspects or accused persons are 'provided promptly' with information concerning, \textit{inter alia}, the right to remain silent\(^5\) and this must also be included in the 'Letter of Rights' which must also be provided promptly.\(^6\) It does not, however, require that a suspect be reminded of their right to silence at the beginning of, or during, an interrogation. The ECHR, on the other hand, has held that information about the privilege against self-incrimination and the right to silence must be given when the right arises.\(^7\) The ECHR has also articulated the

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\(^1\) Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ, 6.11.2013 (L 294), transposition date 27 November 2016.


\(^3\) Art. 3(3)(b).


\(^5\) Art. 3(1)(e).

\(^6\) Arts. 4(1) & (2). See further Chapter 3.

relationship between the right to legal assistance and the right to silence at the investigatory stage of the criminal process the suspect, says the court, is in a particularly vulnerable position, and 'this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, amongst other things, to help ensure respect for the right of an accused not to incriminate himself'.

In this context, it is important to understand how the right to legal assistance and the right to silence are given effect during the course of police interrogations since interrogation is a central feature of crime investigation in all four jurisdictions. Although we were not able to measure the proportion of persons arrested in the research sites who were interrogated by the police we can assume, with some degree of confidence, that of those arrested (or, in the case of Scotland, detained under section 14 of the Criminal Procedure (Scotland) Act 1995) and held in police custody, the majority were interrogated. In England and Wales, one of the two conditions which must be satisfied in order for an arrested person to be detained without charge is that detention is necessary to 'obtain evidence by questioning him'. Similarly, in France, one of the conditions for holding a suspect in custody (GAV) is 'to allow the execution of investigations in the presence of, or with the participation of the person'. In the Netherlands, the law provides that 'a suspect will be interrogated during the initial police detention'. In Scotland, the rationale for detention under section 14 of the Criminal Procedure (Scotland) Act 1995 is to facilitate the carrying out of investigations into the offence, and the section is headed 'Detention and questioning at police station'. Thus in seeking to understand how the right to legal assistance and the right to silence are given effect in practice, interrogations are an important locus for the enquiry.

The analysis in this chapter relies on data from a number of sources. In England and Wales, France and the Netherlands, researchers were granted access to police interrogations of suspects and thus were able to collect data during the course of their observations. In Scotland, this was not possible (except in two cases) because permission was not forthcoming, but some data on the conduct of interrogations was obtained by seeking information from the officers who conducted them. In addition, in all countries, data were obtained from formal interviews with police officers and lawyers, and from informal conversations carried out during the periods that researchers were attached to police stations or to law firms or duty lawyers.

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4 ECHR 27 November 2008, Salahiz v. Turkey, No. 36691/02, para. 54. See also ECHR 24 September 2009, Peshechurinikov v. Russia, No. 7025/04, para. 69.
5 S. 37(2) FACE.
10 Art. 6(2) CPP.
11 Art. 6(1) CPP.
12 See further Chapter 2, section 8.
2. Police Interrogation in the Four Jurisdictions

Before examining the empirical data, it is necessary to consider two important contextual issues which will aid understanding and interpretation of the data in respect of the four jurisdictions: the purposes and functions of interrogation in the criminal justice process; and approaches to regulation of police interrogation, and the consequences of breach of such regulation.

2.1. The Purposes and Functions of Police Interrogation

In England and Wales, as noted earlier, the law provides that the police are permitted to detain an arrested person in order to obtain evidence by questioning them, and `interview' is defined as 'the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences'.16 The police National Investigative Interviewing Strategy (NIIS) states that the aim of investigative interviewing is `to obtain accurate and reliable accounts from ... suspects about matters under police investigation'.17 This suggests that police interrogation is intended to be a neutral process, which is reinforced by the requirement in the Code of Practice issued under section 23(1) of the Criminal Procedure and Investigations Act, 1996, that a police investigator `should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect'. However, research conducted in the late 1980s and early 1990s suggested that police interrogation is characterized by `dealings', `trading' and `bargaining', and is used as an `instrument for creating evidence' of use to the prosecution.18 The use of interrogation to provide evidence for the prosecution is also hinted at in the NIIS, which states that `[a]n effective interview of a suspect will commit them to an account of events that may include an admission... The value of a properly obtained admission [is that it] can prove the mens rea of the offence, beyond doubt'.19

Moreover, case law suggests that whilst oppression must not be used, and a suspect must not be offered an inducement to confess, pursuing an interrogation with a view to eliciting admissions is permissible even in circumstances where the suspect wishes to exercise their right to silence.20 The provisions which enable inferences to be drawn from the `silence' of a suspect in interrogation21 also provide

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16 Para. 11.1 A PACE Code of Practice C.
17 ACPO/NPIA 2009, para. 1.4.
19 ACPO/NPIA 2009, para. 1.3.
21 See Chapter 3, section 2.4.6.
an incentive to the police to ensure that they put questions regarding the suspected
offence to the suspect.\(^{29}\)

Whilst there is some ambiguity in the 'official' characterization of police
interrogation as a neutral process it is clear, in accordance with the common law
tradition, that the function of interrogation is evidentiary; to produce material that
may be used as evidence. There is no dossier system in England and Wales, and it is
for the defence or the prosecution to decide whether to adduce evidence of an inter-
rogation at trial. There is no requirement that either do so, but where an accused
pleads not guilty, the prosecution will normally call the officer(s) who conducted
the interrogation to give evidence of what was said during the course of the inter-
rogation and, if it is relevant, they may produce the record of the interrogation.
Specifically, a confession made by an accused during the course of an interrogation
may be given in evidence against him or her\(^{30}\) and, provided that the standard of
proof is satisfied, is sufficient for conviction.\(^{21}\) Furthermore, evidence of the inter-
rogation may be used by the prosecution to demonstrate that the accused failed to
inform the police of facts that they rely on in their defence at trial (which could
result in adverse inferences being drawn).\(^{22}\)

The position in Scotland regarding the purpose of interrogation is similar to
that in England and Wales. Section 14 detention\(^{23}\) was introduced following the
recommendations of the Thomson Committee in 1975, which recognized that the
police were unofficially conducting interrogations, and that this should be regulated
by law.\(^{24}\) Therefore, a major purpose of detention under section 14 is to enable
the police to investigate, including by interrogating the suspect. The function of inter-
rogation is, as in England and Wales, to secure material that may be used as
evidence,\(^{25}\) and whilst the police are obliged to conduct interrogations fairly, they
are under no obligation to 'show their hand' to the suspect in advance.\(^{26}\) In contrast
to the position in England and Wales, there is no provision in Scottish law for

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\(^{29}\) Because a court is more likely to decide that it is reasonable to expect that the suspect would
have told the police about facts that they rely on in their defence at court if, in the inter-
rogation, they were prompted by questions relevant to those facts.

\(^{30}\) S. 78(1) PACE. 'Confession' is widely defined to include any statement wholly or partly
adverse to the person who made it, whether made to a person in authority or not and
whether made in words or otherwise (s. 82(1)).

\(^{21}\) Research from the 1990s showed that more than half of suspects provide some form
of admission in interrogations, and in research conducted in the 1980s it was concluded that 'to
obtain a written confession from a suspect is tantamount to securing his conviction'. See

\(^{22}\) S. 34 of the Criminal Justice and Public Order Act 1994. See further Chapter 3, section 2.2.

\(^{23}\) S. 14 of the Criminal Procedure (Scotland) Act 1995.

\(^{24}\) Thomson 1975, para 5.14.

\(^{25}\) It is legitimate for the police 'to question a detained suspect, against whom they have a
reasonable suspicion, for the purpose of obtaining evidence which will provide a sufficient
basis on which to charge him/her or which will remove the original suspicion on which
he/she has been arrested' (Carlway 2011, para 6.28).

\(^{26}\) ACPOS 2011, para 14.1.4.
inferences to be drawn from ‘silence’ of the suspect during interrogation, and the corroboration rule means that an accused cannot be convicted on evidence of confession alone.27

In France and the Netherlands, the purpose of police interrogation is characterized as being a search for the truth, a key element of the inquisitorial tradition.28 It implies, as in England and Wales, that interrogation is approached in a neutral fashion, but differs from the common law approach in that the product of interrogation forms part of the dossier or case materials all of which will be seen, and may be taken into account, by the court in determining guilt, irrespective of the opinions of or strategies adopted by the prosecution or the accused. In both countries, the right to silence is enshrined in law, and there is no formal provision enabling adverse inferences to be drawn from silence.

In France the GAV is governed by the CPP, and the GAV is defined as a measure of restraint determined by a police officer under the control of the procureur, by which a person against whom there exists one or more plausible reasons to suspect that he or she has committed or has attempted to commit an offence punishable by a custodial sentence is detained at the disposition of the police.29 The Conseil Constitutionnel has recognized that many trials rely almost exclusively on evidence obtained in the GAV - hence its ruling on the need for reform. Research has also demonstrated that the dominant strategy of the police is to seek a confession, which is often equated with seeking ‘the truth’.30

In the Netherlands, as in the other jurisdictions in the study, interrogation is seen as an important, and possibly the most important, investigative strategy.31 Previous research has demonstrated that the nature and extent of police investigations is heavily dependent on whether the suspect has confessed, and a confession sometimes means that no further investigation takes place, or that it is limited in scope.32 A ‘standard interrogation method’ (SIM) has been developed, endorsed by

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27 For interpretation of the corroboration rule, see Smith v. Lee 1967 1 C. 73, and Fix v. HM Advocate 1998 SCCR 113, and see generally Hope 2010. When enacted, the Criminal Procedure (Scotland) Bill will abolish the corroboration rule.

28 In the Netherlands, the ‘truth-finding’ objective is implied in the law, and is explicitly stated in the relevant literature. See, for example, Van Amelsvoort et al. 2007, p. 25-26, describing the purpose of police interrogations as ‘truth-finding’, in relation to suspect interrogations by police, see also Cleiren & Veepelen 2011 for commentary on Art. 29 CPP, explaining the difference between ‘interrogating’ (verhoren) and ‘hearing’ (horen) suspects and Nassy 2001, para. 211.2.2. The CPP uses the term ‘interrogation’ in respect of police questioning, and provides for measures aimed to force suspects to submit to such questioning. This leads Dutch authors to conclude that in the context of police interrogation a suspect is an ‘object of investigation’.

29 Art. 62(2) CPP.

30 Hodgsen 2005.

31 See, for example, Stevens & Verhoeven 2011; De Poot et al. 2004; and Van den Bult & Kademaker 1992. For a similar conclusion drawn by researchers in England and Wales, see McConville, Sanders & Leng 1991, p. 57.

the National Police Academy, which entails the use of ‘soft pressure’ on suspects who are not ready to tell ‘the truth’; although, of course, inevitably this is dependent on what the officers conducting interrogation perceive to be ‘the truth’. The SIM approach encourages the tactical use of information already known to the police to build up emotional and cognitive pressure on the suspect, and legitimates the rewarding of a suspect’s willingness to speak.\footnote{35}

2.2. The Regulation of Police Interrogation and the Consequences of Breach

The approach to regulation of police interrogation differs significantly as between the four jurisdictions. The most highly regulated approach is that found in England and Wales, where interrogation is governed by the Police and Criminal Evidence Act 1984 (PACE), and Codes of Practice issued by the Home Secretary\footnote{35} under the authority of the Act and approved by Parliament. Where a decision has been made to arrest a person, interrogation (the term ‘interview’ is used in the Codes of Practice) must normally take place in a dedicated interrogation room in a police station and must normally be electronically recorded.\footnote{37} An assessment must be made of whether the suspect is fit to be interviewed,\footnote{38} they must not be required to stand during the interview,\footnote{39} and juveniles and suspects who are, or who may be, mentally ill or vulnerable, must normally be interviewed in the presence of an ‘appropriate adult’.\footnote{40} The minimum age of criminal responsibility is 10 years, and suspects under 17 years are treated as juveniles.\footnote{41} An interview should not normally last for longer than two hours without a break, and in any period of 24 hours a suspect must be allowed a continuous, uninterrupted, period of at least eight hours’ rest, normally at night.\footnote{42} Interrogation must cease when the custody officer

\footnote{35}{Described in Van Amelsvoort et al. 2007.}
\footnote{34}{Designed to ensure that pressure exerted does not breach the limitations imposed by Art. 29 CCP.}
\footnote{35}{For example, a Dutch police interrogation manual suggests that the officer might say to the suspect, ‘If you respond to my questions then we will be done quickly’. See Van Amelsvoort et al. 2007, p. 63.}
\footnote{36}{The equivalent of a minister of the interior.}
\footnote{37}{Para. 11.1 & 12.4 PACE Code of Practice C, and see section 3.2 below.}
\footnote{38}{Para. 12.3 PACE Code of Practice C.}
\footnote{39}{Para. 12.6 PACE Code of Practice C.}
\footnote{40}{Para. 11.15 PACE Code of Practice C.}
\footnote{41}{See Chapter 3, section 2.3.3, and note that as a result of a decision of the High Court in 2013, suspects who have attained the age of 17 years, but are under 18 years are, for most purposes, now treated as juveniles.}
\footnote{42}{Para. 12.8 & 12.2 PACE Code of Practice C.}
reasonably believes that there is sufficient evidence to provide a realistic prospect of conviction.\textsuperscript{43}

However, the regulations are less clear about how far police interrogators can place pressure on suspects. They do explicitly prohibit the use of oppression, and the use of inducements to confess.\textsuperscript{44} Oppression is defined as including torture, inhuman or degrading treatment, and the use or threat of violence.\textsuperscript{45} However, whilst the meaning of oppression is clear in relation to extreme conduct,\textsuperscript{46} it is less clear in the case of more marginal conduct.\textsuperscript{47} Deliberate misrepresentation by the police, during interrogation, as to the existence of evidence is likely to result in exclusion of the interrogation evidence at trial,\textsuperscript{48} but the police are permitted some latitude in ‘tricking’ or misleading the suspect.\textsuperscript{49}

The major remedy for breach of the provisions regulating interrogation is exclusion of evidence at trial, although this will only be relevant if the accused pleads not guilty to any charge arising from the interrogation. Exclusion of evidence is not automatic and, in practice, will depend upon the nature and seriousness of the breach. If the accused alleges that a confession was obtained by oppression or in circumstances likely to render it unreliable, evidence of the confession must be excluded unless the prosecution can prove beyond reasonable doubt that it was not so obtained.\textsuperscript{50} A court also has discretion to exclude evidence of an interrogation if, having regard to the circumstances, admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted.\textsuperscript{51} Failure to caution a suspect in the interrogation (that is, failure to inform the suspect of their right to silence) will normally result in exclusion of the evidence, as will failure to contemporaneously record an interrogation, and the improper offering of inducements. However, minor breaches such as failure to observe the requirements as to breaks in interview will not normally result in exclusion.\textsuperscript{52}

Interrogations in France are regulated by the Criminal Procedure Code (CPP), and in principle they are supervised by the procureur. However, whilst the procureur

\textsuperscript{43} Para. 11.6 PACE Code of Practice C, although in practice officers have considerable latitude in determining whether this condition has been met. See Cape 2011, paras. 7.69-7.73.

\textsuperscript{44} Para. 11.5 PACE Code of Practice C. In respect of inducements, the officer must not, except in answer to a direct question, indicate what action will be taken in the event that the suspect answers, or does not answer, questions. The officer must not offer an out-of-court disposal in order to obtain a confession (R v. Commissioner of Police for the Metropolis ex p U; R v. Durham Constabulary ex p R [2003] EWHC 2186 (Ch)).

\textsuperscript{45} S. 76(7) PACE.

\textsuperscript{46} See, for example, R v. Paris, Abdullahi and Miller (1992) 97 Cr App R 99.

\textsuperscript{47} ‘Hectoring and bullying’ has been found to go beyond what is permissible (R v. Bates [1991] Crim LR 118), whereas questioning that was rude and discourteous has not (R v. Emmerson (1991) 92 Cr App R 284).

\textsuperscript{48} R v. Mason [1987] 3 All ER 481.

\textsuperscript{49} See Cape 2011, para. 7.64.

\textsuperscript{50} S. 79(2) PACE. For relevant case-law, see Cape 2011, Chapter 13.

\textsuperscript{51} S. 78(1) PACE.

\textsuperscript{52} For relevant case-law, see Cape 2011, Chapter 13.
must be informed when a GAV commences, they are under no obligation to attend and previous research has found that they normally do not. Children under 10 may not be placed in GAV, and neither can those aged between 10 and 13 years, although they may be detained at a police station for the purposes of investigation of certain, more serious, offences if authorized by a judge. GAV is permissible in respect of children aged between 11 and 16 years, but on a more restricted basis than for adults. Suspects aged 17 and 18 years are treated as adults except that they may not leave police custody without a close family member. In cases involving minors, their parents or guardian must be notified immediately of the decision of the office de police judiciaire. There is no requirement that interrogation be conducted in specially designated interrogation rooms, and in practice they are normally conducted in a police office where other police officers may be present. Persons who are held in GAV must be asked to sign the procès-verbal, which records the reason why they were held in GAV, any interrogations that were conducted and other investigative action such as the conduct of searches. Refusal by the suspect to sign the document must be recorded. Certain details, such as the times of interrogations, and of rest periods, are recorded in a custody register which, again, the suspect must be asked to verify by signing it.

The use of interrogation techniques which are regarded as interfering with the search for the truth may, and normally should, result in a nullité. The Cour de Cassation has also held that breach of ECHR Article 6 rights, including breach of the right to legal assistance and of the right to silence, will result in a nullité. However, in practice, it may be difficult for a suspect to establish that an interrogation has been conducted unlawfully or in breach of procedural rights because there is normally no requirement to contemporaneously record interrogations, either electronically or in writing. Previous research has established that the use of pressure in interrogations is routine, and that tricks and lies are often used in an attempt to elicit confessions.

In the Netherlands, police interrogation is regulated by the Code of Criminal Procedure (CCP), and also by instructions issued by the Public Prosecutor’s Office, such as the Instruction on Lawyers and Police Interrogation, and the Instruction on Audio and Visual recording of Interrogations. However, compared to England and Wales, regulation of interrogations is relatively minimal, and there are none

53 Art. 63 CPP.
56 Art. 64 CPP.
58 C. Cass, 27 April 2011.
59 See section 3.2 below.
60 Hodgson 2003.
61 Aanwijzing rechtsbijstand politieverhoor 2010, and Aanwijzing audietief en audiovisueel registreren van verhoren 2010.
governing the duration or number of interrogations, nor the time of day that they can be carried out. There are no specific rules governing assessment of fitness of the suspect to be interrogated, but the practice of the police is to determine whether the suspect is *aansprakelijk* (that is, whether they can communicate meaningfully). A child suspect who is interrogated may request that a parent or ‘trusted person’ be present, but they cannot request both the attendance of a parent and a lawyer. This means that a parent may be present only if a child suspect waives their right to a lawyer. The ‘trusted person’ has the right to confidential communication with the suspect and the regulation for lawyers is, in this respect, also applicable to the ‘trusted person’.

They are required to be passive in the interrogation, and they have no right of access to the case file.

Article 29 of the CCP requires that the police may not do anything to obtain statements from a suspect against their free will, but it does not articulate further what forms of conduct are prohibited. The law does not define what behaviour is prohibited but the courts have used the term ‘improper pressure’ when interpreting Article 29 in a number of cases. The use, or threat, of physical force, as well as abuse of authority to intimidate a suspect, or the application of strong psychological pressure, is regarded as improper. Similarly, intentionally misleading a suspect about the existence of evidence or the circumstances of the suspected offence, are considered improper. However, provided these boundaries are not crossed, the use of emotional pressure or continuing to interrogate a suspect who wishes to exercise their right to silence, is permitted. Generally, the offer of inducements is not permitted, although in a controversial judgment, the Supreme Court found that promising the suspect that he could go home if he confessed was allowed (provided it was true), because on the facts of the case it was not made in such a way as to threaten the suspect with further deprivation of liberty.

The normal remedy where a suspect is interrogated without having been cautioned, or improper pressure is used, is the exclusion of the evidence so obtained. However, the Dutch courts have been quite conservative in the use of this remedy. For instance, where the court finds that an interrogation was conducted

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62 For a more detailed discussion, see Praksen & Sprootken 2007, p. 155-180.
63 Art. 490 CCP.
64 See Boksom et al. 2011, p. 55. In a well-known decision, the Supreme Court declared the so-called Zaandam Interrogation Tactic to be contrary to Art. 29 CCP. The Zaandam tactic included, *inter alia*, long and intensive interrogation, using different interrogation techniques (with the advice of a behavioral expert), including confronting the suspect with the pictures of the scene of crime, the victim and his own children. See HR 13 May 1997, NJ 1998, 152.
65 HR 22 September 198, NJ 1999, 104.
67 See Melai & Groenhausen, Artikel 29. For a detailed description of other prohibited methods, see Boksom et al. 2011, p. 55-56.
69 See Naeye 2001, para. 20.6.3.
70 See Cleiren & Verpelen 2011, p. 102; and Borgers & Stevens 2012, p. 209-211.
unlawfully, evidence will usually not be excluded unless the accused can prove that it harmed his interests, that is, that he or she made an incriminating statement as a direct result of such unlawfulness. If the accused repeats the statement later in the proceedings (for example, in a later, properly conducted, interrogation) the causal link is treated as having been broken.

In contrast to England and Wales in particular, there is very little statutory regulation of police interrogation in Scotland. The police are permitted to ask questions of a suspect which they consider relevant to the investigation of the suspected crime. The suspect has an absolute right not to answer any questions, or a particular question, other than providing their name, address, place and date of birth, and nationality. Where the suspect is a child, their parent or guardian should be contacted and asked to attend, and if they are mentally vulnerable, an appropriate adult should be called to the station. The point at which interrogation should cease is not regulated by statute, but case-law has established that it should cease when a police officer, carrying out his duty honestly and conscientiously, ought to be in a position to appreciate that the man whom he is in the process of questioning is under serious consideration as the perpetrator of the crime. However, it has been recognized that determining when interrogation should cease is difficult in practice, and that whilst interrogation should not be used to bolster the strength of the prosecution case through questioning where sufficient evidence already exists to charge the person, in practice ‘questioning undoubtedly occurs after this stage.

The extent to which the police are permitted to place pressure on a suspect in the course of an interrogation is also not regulated by law in specific terms. Evidence of an interrogation may be excluded if, in all the circumstances, there has been unfairness on the part of the police, and the use of deception may also have the same consequence.

3. Interrogation in Practice

3.1. Duration of Interrogations

The length of time for which a person can be interrogated is significant in that the longer an interrogation goes on, the more a suspect is likely to be susceptible to

71 Beggars & Stevens 2012, p. 199.
73 Although following the Carloway Review, and the reorganization of the police service, greater regulation is likely to be introduced.
74 The minimum age of criminal responsibility in Scotland was increased from eight to 12 years in 2010. See Chapter 3, section 5.3.3.
75 Chalmers v. HM Advocate [1954] JC 66, para. 82.
76 Carloway 2011, para. 6.2.18.
77 Jones v. Milne 1975 SLT 2.
pressure, for example, to forgo their right to silence. The temporal limits of interrogation depend on the overall limits on the length of police detention, which vary significantly across the four jurisdictions, but may also be the subject of specific regulation. Only England and Wales explicitly regulates the length of any particular interrogation, with a normal maximum of two hours, after which there must be a break. In the majority of observed cases, there was only one interrogation of a suspect, and the mean length of the first (and, therefore, normally the only) interrogation varied from 23.51 minutes in England and Wales, to 30.66 minutes in Scotland, and 50.33 minutes in the Netherlands. The maximum length of observed interrogations also varied significantly – 67 minutes in England and Wales, 165 minutes in Scotland, and 388 minutes in the Netherlands. We did not control for case seriousness, which may explain some of the difference, but it may also be explained by the police culture regarding interrogation in the Netherlands, and also by the fact that interrogations in the Netherlands (and in Scotland in less serious cases) were normally recorded in writing. In England and Wales, on the other hand, all of the interrogations observed were recorded electronically.

3.2. Recording of Interrogations

As was noted earlier, the record of police interrogation either forms part of the case file or dossier (Netherlands and France), or can be added in evidence in practice normally by the prosecution (England and Wales, and Scotland). For this reason, the prospects for a fair trial depend upon the record of an interrogation being complete and accurate. This is particularly so since an interrogation may be relied upon to provide evidence of mens rea or mental attitude, which is a key element of most (particularly serious) crimes in all four jurisdictions. In determining culpability, a nuanced understanding of how an accused accounted for their conduct – for example, whether it resulted from police questions and, if so, whether they were leading and/or closed questions – is necessary, particularly in respect of more serious offences. It is important, therefore, that a court has access to the precise form of words used by both the police and the accused.

In France and the Netherlands, the general rule is that interrogations should be recorded in writing by the officer conducting the interrogation. A written record of the interview is made by the officer, and the suspect is asked to sign the record in order to verify it as being a fair and accurate record. In France, as an exception to

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78 The length of interrogation is a significant factor in inducing false confessions. See generally, Gadjonsen 2003 and Lou 2008.
79 Para. 12.8 PACE Code of Practice C.
80 Although it should be noted that in the Netherlands, the interrogations were not necessarily continuous.
81 This is not explicitly provided for in the Netherlands CCP, but in practice suspects (and their lawyers) are normally given the opportunity to read the interrogation record and raise objections if they do not regard it as accurate, and this is reflected in the standard forms used.
the normal rule, interrogations in respect of serious offences (crimes), and interrogations of juveniles, must be recorded using audio-visual equipment. In the Netherlands, following criticism of the way in which written records are prepared, regulations have been introduced which require interrogations to be audio-visualy recorded in certain, generally more serious, cases. However, even in such cases the written record of the interrogation continues to be regarded as the primary evidence. This also appears to be the case in France, and a number of defence lawyers complained to us that they are only allowed access to the audio-visual recording if they contest the written record of the interview which, as one said, can be a 'risk', especially as the lawyer preparing the case for trial is unlikely to be the same as the duty lawyer who attended the police interrogation. In England and Wales, and Scotland (but see below), the general rule is that interrogations should be audio-recorded, and there is also provision for audio-visual recording in certain cases.

In England and Wales all interrogations in the research sample were either audio-recorded or audio-visualy recorded. Conversely, in the Netherlands, over 90 per cent of interrogations in the research sample were recorded in writing. In Scotland, only one-third of interrogations in the sample were audio-recorded, and two-thirds were recorded in writing. A major reason why the majority of interrogations in the Scottish sample were recorded in writing was that officers had to be trained in order to use audio-recording equipment, and it appeared that the majority of officers had not received this training (although we understand that

by the police. Art. 29(2) of the CCP requires that the written record be as close as possible to the words used by the suspect. However, in practice the record is often a logical summary rather than a verbatim record. See Cleiren & Verpelen 2011, p. 101.

Except in the case of suspected serious organized crime, although the procureur may require such an interrogation to be audio-visualy recorded.

Art. 64(1) CJP; 135(6).

Where a suspect is interrogated in respect of an offence punishable with 12 or more years' of imprisonment; where the victim died as a result of the alleged crime, or suffered serious bodily harm; sexual offences punishable with 8 years or more imprisonment, and certain cases involving vulnerable suspects.


FrauTownlaw5, 4FranceCityLaw7.

In England and Wales, this is governed by para. 3 PACE Code of Practice E. Audio-visual recording is governed by Code of Practice F, but is not mandatory.

That is, the police station sample in which an interrogation was conducted and the means of recording was known.
most CID officers, that is, detectives, were ‘tape-trained’). One Scottish officer expressed his frustration about this as follows:

'I think it depends who’s on shift, because you have to be trained to press “record”. It’s actually a special training course you have to go on to press record... It can be quite frustrating when there’s nobody there who is tape-trained. Then it’s done by paper and your notebook.'

However, the mode of recording was also dependent on the availability of recording equipment and the seriousness of the offence under investigation. Where a written record was made of an interrogation, it was recorded in the officer’s notebook. There is no requirement that the suspect be asked to read and verify the record. On being asked about this, one officer\(^9\) said that doing so was best practice, but went on to say that when he did ask suspects to read and verify the record they often refused to sign it and that, in any event, the courts were normally satisfied with the officer’s unverified account.

In the Netherlands and France, where written recording of interrogations is the norm, researchers observed how police officers approached the task.\(^9^2\) Practice varied, with some officers, in some interrogations, recording each question and answer verbatim, and others recording only a summary. Recording verbatim what was said by the suspect was sometimes, in effect, used as a form of pressure. For example, in one interview observed in France, in which the suspect swore at the officer, the gendarme responded: ‘I write everything you say. This will make a good impression on the procureur.’\(^9^3\) Subsequently, when the same suspect was interviewed again, the officer responded to the suspect’s bad language in exactly the same way, although the written record did not contain a verbatim account of everything that was said during the interrogation.

However, recording an interrogation verbatim was the exception rather than the rule, and the written records of interrogations often omitted important information. The researcher in the Netherlands noted that in interrogations where the officer applied pressure on the suspect in order to persuade him or her to answer questions, that part of the interrogation was not recorded. This is almost inevitable where an interrogation is being conducted by only one officer because at the time that the officer is exerting pressure they are concentrating on doing that rather than

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\(^{90}\) See the Guidance Notes on Tape/Visual Recording of Interviews, V1.0 (April 2009). A CID officer is an investigating officer normally working in plain clothes. The term is used in England and Wales, and in Scotland.

\(^{91}\) ScotTownPol5.

\(^{92}\) ScotCityPol6.


\(^{94}\) FranTownLaw2.
on recording what is said - typing up what is being said could both distract the officer and relieve the suspect from the pressure that they are trying to exert.\textsuperscript{44}

Officers would sometimes fail to record the questions put by them, with the result that the written account of the interrogation made it appear as if the suspect had given a spontaneous and coherent account which, amongst other things, may give the impression that the suspect was more capable, measured and articulate than they actually were. The following is an example taken from the researcher’s notes of an interrogation conducted in the Netherlands:

Officer BLI types at intervals, paraphrasing summarising what [the suspect] says and not always mentioning the questions. Thus, for example, the story of why [the suspect] ‘did it’ becomes one narrative, and not a somewhat chaotic set of [police] questions and remarks, and [the suspect’s] reactions as they actually were. Even if factually the record is accurate, it may create an impression of a suspect as being more intellectually apt, emotionally controlled, and logical than in fact they are.\textsuperscript{45}

In another case, an exchange involving nine questions and answers was reduced, in the written record, to the following:

I heard from the police that I was arrested and that I had to go with them, but I just continued to stand there. I was held tightly by mother, my friend G, and by a man, whose name I did not know. My mother then let me free, and then I went [with the police officer].\textsuperscript{46}

A further example comes from the field notes of the researcher observing an interrogation conducted in a French police station:

It quickly becomes clear that the police officer and the suspect had a conversation before the interview. The police officer says: ‘So, you told me that you wanted to change your story, is that right?’ The suspect agrees. The police officer carries on talking. He asks questions, but they sound like affirmations: ‘So, you lied to us before, didn’t you? And nobody ever threatened you, did they? It was because you had money problems, is that right?’ The suspect only replies by nodding or just saying ‘yes’.

The police officer then reformulates what has been said to type it up on the interview record. It reads as if the suspect has said: ‘I have lied previously but I have now decided to tell the truth.’\textsuperscript{47}

The researcher further noted that the prior conversation between the officer and the suspect must have been quite extensive, because the officer included in the record of the interrogation information that the suspect had not spoken of during the interrogation.

\textsuperscript{44} NethCityPol22.
\textsuperscript{45} NethCityPol11.
\textsuperscript{46} NethCityPol28.
\textsuperscript{47} FrantownLaw4.
Concern that interrogation records sometimes do not accurately reflect what was said during the interrogation may be mitigated by the requirement, in both France and the Netherlands (but not Scotland), that the suspect be given the opportunity to read and verify the written record. Suspects, and their lawyers when present, were often observed to do so carefully, and to ask for amendments to be made. Sometimes, such requests were acceded to, but not always. However, researchers observed many interrogations where the suspect, and sometimes their lawyer, did not read the interview record before signing it. In one case in the Netherlands, for example, the suspect had objected to part of the interview record that the officer read out to him, but subsequently did not read the interview record and therefore did not notice that the officer had not amended the record in response to his objection.\textsuperscript{98}

3.3. The Conduct of Interrogations

The interrogations observed in all four jurisdictions were conducted either by one or two police officers. The only exception was in England and Wales where one interrogation observed was conducted by a civilian.\textsuperscript{99} In all of the jurisdictions, except for France, interrogations were conducted in dedicated interrogation rooms which were often equipped with electronic recording facilities or, in the case of the Netherlands, facilities for making written recordings of interrogations. In France, interrogations were normally conducted in police offices which were often equipped with handcuffs fixed to the floor, although they were not used in most of the interrogations observed. The fact that interrogations were conducted in police offices meant that police officers not involved with the specific investigation were sometimes present.\textsuperscript{100} In one case observed, an officer not involved in the case, who was present in the office, intervened during the interrogation to tell the suspect to ‘stop telling lies’.\textsuperscript{101}

The police response to suspects who asserted their right to silence in interrogation is dealt with in section 4 below, but the purpose here is to give a brief account of the approach to police interrogation generally. Most of the data relates to England and Wales, and the Netherlands, where the researchers were able to gain access to police interrogations more readily than in the other two jurisdictions. However, it is worth noting that police officers in Scotland reported that they were reluctant to apply pressure to suspects for fear of an adverse response from the

\textsuperscript{98} NethTownPo119.

\textsuperscript{99} The Police Reform Act 2002 permits chief police officers to designate civilians as investigating officers. In practice, they tend to be used in investigations of less serious offences, and many of them are ex-police officers.

\textsuperscript{100} For concern about the danger of ‘contamination’ of evidence resulting from the conduct of interrogations in police offices, see Hodgson 2003, p. 150.

\textsuperscript{101} FranTownLaw2. This was also frequently observed in earlier research in France (see Hodgson 2005).
courts should the case come to trial, although interrogation techniques involving the application of pressure appear to be more readily employed in serious cases where interrogations are conducted by CID officers.102

In England and Wales, most interrogations observed were conducted by uniformed police officers investigating less serious offences. Whilst there is a standard model of police interview training, the PEACE model, it appeared that many officers observed either had not received the training or did not know how to apply it. Researchers noted that uniformed officers tended to ask a list of questions rather than preparing an interview ‘grid’, which was a method employed by specialist officers. Some officers appeared to be unfamiliar with the evidence203 and ‘out of their depth’. However, officers were observed to use a variety of mechanisms in order to maintain ‘dominance’ over the suspect. For example, half-way through one interview the officer, who appeared to believe that the suspect was not being forthcoming in her account, increased the intensity of the questioning, asking more pointed, accusatory questions, ending in phrases such as ‘... didn’t you?’ or ‘... isn’t that right?’104 A similar strategy was adopted by some officers in circumstances where the suspect was giving a ‘no comment’ interview (that is, not answering questions).102

In the Netherlands, on the other hand, whilst most interrogations observed also related to less serious offences, officers were generally observed to be more ready to apply pressure on suspects. The SIM approach to interrogation has similarities with the PEACE model (for example, use of an evidence matrix), but whilst most officers observed appeared not to have been trained in the SIM method, they did employ some of the SIM techniques; for example, seeking to win the trust of the suspect, confronting the suspect with ‘evidence’, appealing to the emotions of the suspect, and rewarding readiness to speak. Police officers appeared to be aware of the distinction between lawful and excessive pressure (the skill of applying pressure without overstepping the boundary was highly prized) and less experienced officers were coached in this respect by more experienced officers. In particular, Dutch officers were observed to be much more willing than their English counterparts to seek to undermine a suspect’s decision to exercise their right to silence (see further section 4.3 below).

4. The Right to Silence in Interrogations

We saw in Chapter 1 that the EU Directive on the right to information requires that suspects who have been arrested be promptly provided with information about their right to silence. In Chapter 7 we explored the way in which lawyers advise

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102 EcolTownPol17.
103 Note that the officer conducting an interrogation is not necessarily the officer who carried out the initial arrest.
104 EngCityLaw6.
105 EngCityLaw21; EngCityPol21.
their clients about whether to exercise the right to silence. Here, we examine a number of issues concerning the right to silence during police interrogations: notification of the right in the interrogation; suspects' understanding of the right; and strategies adopted by police interrogators when suspects wished to exercise their right to silence.

Before proceeding, it is worth noting the extent to which suspects did remain silent in the interrogations for which we have data. In England and Wales 10 per cent of suspects answered no police questions,\(^{106}\) and for the Netherlands and Scotland the figures were seven per cent and 16 per cent respectively. In France, no suspect remained silent\(^{107}\) and although the sample was small, the interviews conducted with police officers and lawyers suggested that this was typical.\(^{108}\) Given the law on inferences from silence in England and Wales, it might have been expected that suspects in this jurisdiction would have remained silent significantly less frequently than those in the other jurisdictions. There is a range of reasons which could explain why this was not the case, but given the number of cases in the sample, it was not possible to subject this to analysis. However, it is noteworthy that in all four jurisdictions the majority of suspects answered some or all of the questions put to them by the police.

4.1. Notification of the Right to Silence in Interrogations

At the beginning of this chapter we noted that the EU Directive and the ECHR jurisprudence differ in that the former does not explicitly require that notification of the right to silence be given in an interrogation, whereas the ECHR case law indicates that notification of the right to silence should be given at the time that the right arises. Since the right does apply during an interrogation, the ECHR approach suggests that notification should be given shortly before, or at the beginning of, an interrogation.

In England and Wales, regulations provide that a person who is arrested and detained by police must be cautioned at the commencement, and re-commencement, of any interrogation.\(^{109}\) The regulations set out a standard form of words for

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\(^{106}\) In research conducted in England and Wales in the late 1990s, 16 per cent of suspects answered no police questions. See Buckle, Street & Brown 2000.

\(^{107}\) The figures for England and Wales, the Netherlands, and Scotland, are derived from data relating to cases observed by researchers when based at police stations, and for France from interrogations observed where the researcher accompanied a lawyer at the police station.

\(^{108}\) For example, one police officer with 22 years' experience said that he could only remember one case where a suspect had remained silent (ifNanCityPol4), and another said that although some of his colleagues had experienced it, he personally had not, possibly because he only deals with less serious cases (ifNanCityPol1).

\(^{109}\) Para. 10.1 PACE Code of Practice C, which provides that where there are grounds to suspect a person of an offence, they must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if the suspect's answers or 'silence' may be given in evidence.
the caution, although case-law permits variation in the wording providing the sense of the caution is preserved. The fact of giving the caution must be recorded in the record of the interrogation or in the officer's note-book. Similarly, in the Netherlands, the obligation to inform suspects of their right to silence is provided for by the CCP. Suspects must be informed of the right at the commencement, although not at the re-commencement of an interrogation, but there is no standard form of words or requirement to explain it. The fact of giving the caution must be recorded in the interrogation record. In Scotland, whilst the requirement to caution a suspect is not governed by statute or regulations, the common law requires a caution to be given at the beginning of an interrogation and a common form of words is issued by police forces. France differs from the other jurisdictions in that whilst the law provides that a person must be notified of their right to silence immediately after placement in a GAV, there is no requirement to inform, or remind, the suspect of the right during an interrogation. As with Scotland and the Netherlands, French law does not provide for a standard form of words for the caution.

Not surprisingly, in the interrogations observed, or in respect of which we had other data, the national patterns followed the legal obligations regarding the giving of a caution. Thus in England and Wales, and Scotland, a caution was given at the beginning of the interrogation in all cases in the sample. In the Netherlands, a caution was given in the vast majority of cases, although three interrogations were

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110 You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence' (Code C, para. 10.5). Note that regulations provide for a different form of caution to be given in circumstances where inferences may not be drawn from silence (where, exceptionally, the police are permitted to interrogate a suspect who has requested legal assistance but has not received it, and where, exceptionally, the police are permitted to answer questions after charge; see Code C, Annex C).


112 Para. 10.13 PACE Code of Practice C.

113 Art. 20(2) CCP.

114 Unless the interrogation is continued by another officer, or if the interrogation is continued after a long gap (HR 26 June 1979, N] 1979, 567).

115 Interrogation is defined as 'questions that are put to a person who is considered to be a suspect, regarding his or her involvement in the alleged criminal offence (HR 2 October 1979, N] 1980, 243).

116 Tange v. HM Advocate, 1982 JC 103.

117 Art. 63.1 CPP.

118 In the police stations observed in England and Wales, a 'crib sheet' was taped to the desk in interrogation rooms, which included the caution to be administered. A 'crib sheet', the ACPO Pre-interview Review of Rights, is also used in Scotland.
observed where no caution was given.\textsuperscript{119} In France, on the other hand, in none of the interrogations observed was the suspect informed of their right to silence.

4.2. Explanation and Understanding of the Right to Silence

The EU Directive on the right to information requires that information about the right to silence be provided in ‘simple and accessible’ language.\textsuperscript{120} However, whether a suspect understands the right, and the implications of exercising or not exercising it, depends not only on whether they are informed of it in simple and accessible language, but also on a range of other factors including both the legal and \textit{de facto} consequences of silence, and also their own understanding of what the consequences might be. WHo\textsuperscript{121} interview suspects, we sought to obtain insights into the extent to which suspects understand the right to silence by examining whether, and how, the right to silence was explained to suspects by the police, and also by interviews with police officers and defence lawyers. In considering this, it must be remembered that whilst in France, the Netherlands and Scotland, the right to silence is said to be absolute,\textsuperscript{122} in England and Wales the law provides that adverse inferences can be drawn where a suspect fails, without reasonable cause, to inform the police in interview of facts on which they subsequently rely at trial.\textsuperscript{122} Therefore, in principle, the consequences of exercising the right to silence in England and Wales are inherently more complex, and more difficult to understand.

Given the nature of the law on inferences from silence in England and Wales, a police officer conducting an interrogation is required not only to caution a suspect but, if the suspect appears not to understand it, to explain it in their own words.\textsuperscript{123} The ‘crib sheet’ used in the police stations observed in England (referred to earlier), after setting out the caution, includes the following (set out in bold letters):

\begin{quote}
Explain the caution to interviewee.
Check understanding by asking 3 questions -
\begin{itemize}
  \item Do you have to answer my questions?
  \item What happens if you fail to mention…?
  \item What may happen to those tapes?
\end{itemize}
\end{quote}

\textsuperscript{119} It should be noted that a caution is not required, and is often not given, where a suspect appears before an assistant prosecutor, even though the assistant prosecutor asks the suspect to respond to the accusation.
\textsuperscript{120} Arts. 3(1) & 4(4).
\textsuperscript{121} Although there are exceptions in some of the jurisdictions. For example, in the Netherlands, partial ‘silence’ (i.e. refusal to answer some questions but not others) may be used as evidence of guilt where the situation calls for an explanation and/or where there is other evidence implicating the accused (HR 3 June 1997, NJ 1997, 584).
\textsuperscript{122} See Chapter 3, section 2.4.6.
\textsuperscript{123} PACE Code of Practice C, Note for Guidance 10D.
Therefore, the officer is prompted not only to explain the caution, but also to check the suspect's understanding of it. In the interrogations observed in England and Wales an explanation of the caution was always given, although the manner and style of doing so varied. Some officers followed the crib sheet closely, keeping the explanation brief and pithy, for example, '... if you say something later on in court you haven't mentioned now, they [the court] may wonder why you didn't tell us now.' However, many officers took greater care in explaining the caution, reading it out in full and then splitting it into three parts, providing an explanation of each part and asking the suspect if they understood that part. If the suspect gave affirmative answers to each part, the officer would then omit the three questions in the crib sheet.

In the Netherlands, where there is no standard form of words for the caution, the officers in the observed interrogations normally simply said, 'You are not obliged to respond to questions', or something similarly brief, and normally provided no explanation. Suspects were generally not told that silence would not be used against them in court, and neither were they informed that everything they did say could be used. In the minority of cases where the officer did provide some explanation of the right to silence, he or she normally emphasized the negative consequences; for example, that detention would last longer, or that the prosecutor or judge would not look favourably on a suspect who refuses to answer questions. In fact, some officers said that they regarded it as their duty to inform suspects of such consequences, but did not consider themselves obliged to inform suspects of the possible benefits of remaining silent.

A problem that appeared to be specific to England and Wales was the fact that some police officers did not appear to understand the caution themselves. This was commented upon by a number of defence lawyers, but also by police officers, as the following comments (from a police officer and a lawyer respectively) illustrate.

'... sometimes the issue comes when [a police officer] doesn't fully understand the issue or know how to explain it, especially the middle part of the caution, which can be where the breakdown is. If you understand it yourself then you can explain it. I've done a couple of interview courses and I really know how to explain the caution properly and you see and pick up on people's bad habits. When I did the course again I had the ability to take it in.'

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124 EngCityPol17.
125 EngCityPol9; EngCityPol11; EngCityPol14; EngCityPol19.
126 NethCityPol7; NethCityPol25. See also the discussion of lawyers explanations of the consequences of silence, during the lawyer-client consultation, in Chapter 7.
127 #NethTownPol15.
128 See NethCityPol14. Some officers did recognize that remaining silent could benefit a suspect. Thus one officer said: 'I think if a suspect wishes to avoid conviction, it is always better for him to remain silent.' See NethCityPol17.
129 #EngCityPol7.
Chapter 8

The police don’t really understand the right to silence and will see it as a bit of a game and will try to undermine the decision to be silent and get them to answer questions.130

Related to this issue is whether lawyers in England and Wales see it as their duty, or as being in the interests of their client, to correct any explanation given by the police officer in an interrogation. A common view was that it was not the role of the lawyer to intervene in these circumstances. As one lawyer explained:

‘Is it my obligation to help the police in their search for an answer as to whether they’re satisfied that the person understands the rights they’ve been given? In a word, no, because if the officer explains the caution inadequately, that’s not a bad thing for me, because that means the interview is potentially inadmissible, and the officer has to be satisfied that the arrested person understands the caution, and it’s certainly not my role to assist a policeman in making an interview admissible when it potentially isn’t.’131

As to whether suspects understand the right to silence, there was some disagreement amongst lawyers, and police officers, both between the four jurisdictions and within them. Some said that they thought that many suspects did not understand the right, whereas others thought that they mostly did. Reflecting the former view, one English police officer made the following comment:

‘You’re quite often dealing with people with very low I.Q.s. You can explain it all day long and they still won’t get it, so the explanation has to be as simple as possible.’132

One common theme was a perception that suspects who had previous experience of being arrested and detained were more likely to know their rights than those for whom it was a new experience. This point was made by lawyers across the jurisdictions, and also by some police officers. As one French police officer said:

‘When they’ve got pre-cons [previous convictions], most of them certainly know their rights, because it’s not their first time in GAV. Otherwise, people either knew their rights from the media or the CPI informs them of the rights they can exercise.’133

However, there is an important distinction to be made between knowledge of rights and understanding of them; a distinction recognized by a French lawyer who

130 *EngTownLaw1.*
131 *EngCity2Law1.* This approach is almost certainly mistaken, since the general approach of the courts to procedural errors made in the presence of a lawyer is that they will not lead to exclusion of evidence of the interview (see Cape 2011, p. 296).
132 *EngCityPd5.*
133 *FrAncCity2Pd1.*
commented, 'They know about the right to silence, but I don’t think they really understand it.' And an English lawyer reflected:

'It’s hard to know what they think. We advise on what the caution means and ask them to repeat it back to us, but it’s hard to know if they actually understand it. I think they know they don’t have to answer questions, but I don’t think they know the influence of this.'

The distinction between knowledge and understanding is important in England and Wales because the law permits adverse inferences to be drawn from silence but even in France and the Netherlands where, formally, exercise of the right to silence does not have evidential consequences, lawyers (and police officers) were well aware that in practice, remaining silent could have adverse consequences for the suspect; it may be taken as an indication of guilt, it may lead to detention being prolonged, and prosecutors and judges may draw adverse conclusions from the fact of silence under interrogation. This is illustrated by comments made by an English lawyer and a French lawyer:

'Suspects don't always understand this right and I have to go over it repeatedly. I don’t know if it is a British thing, or a human thing. It is assumed that needing a lawyer and remaining silent are both indications of guilt; so it can be quite hard to explain that it might be in their interest and they should maintain silence throughout the interview, which is hard.'

But the right to remain silent, it’s a bit tricky because it follows you all the way. If you remain silent in GAV and you manage to hold on – because I think, it’s difficult to hold on – you’re going to be criticised for it until the end of the procedure. [The judge will take the view] “if you’re not guilty, why didn’t you cooperate with the investigators?”

In fact, one French lawyer went so far as to say that the right to silence does not exist in practice, and another described it as 'a fake right ... because it turns against you.' Ironically, it may be that the low level of reliance of suspects on their right to silence may, in part, be explained by the fact that at some level they do understand that exercising it can have adverse consequences for them. However, this probably does not provide a satisfactory explanation of the rate of remaining silent in Scotland which, although higher than in the other jurisdictions in our research, is still - at 16 per cent in our sample - fairly low. Scottish lawyers interviewed did not express the same reservations about the right to silence as their

134  #EngCityLaw3.
135  #EngCityLaw1.
136  #EngTownLaw1.
137  #FranTownLaw1.
138  #FranTownLaw3.
139  #FranTownLaw5.
counterparts in England and Wales, and France, and none of them referred to the possible adverse consequences of remaining silent that were noted above.

4.3. The Right to Silence and Interrogation Strategies

We sought to explore how police officers dealt with suspects who had decided, or were inclined, not to answer questions in the police interrogation. In England and Wales, and the Netherlands, we were able to observe interrogations in which the suspect indicated that they intended to rely on their right to silence. In France, none of the suspects observed in interrogations sought to remain silent and in Scotland, as noted earlier, we were generally not able to observe interrogations. The observational data was supplemented by interviews with police officers in all four jurisdictions. We found a marked difference between the police approach to 'silence' in police interrogations in the Netherlands compared to the other three jurisdictions.

In England and Wales we observed no case where the officer conducting the interrogation made any serious attempt to persuade a 'silent' suspect to speak. The normal response of the officer was to continue to ask questions, but not to exert any pressure on the suspect to answer them. The following exchange between the officer and the suspect, noted by the researcher, was typical:

[The officer] then commences with the questions. The first couple receive a 'no comment' response. Officer: 'You're giving no comment answers. That's fine, you're perfectly entitled to do that. Are there any questions I can ask you today which aren't going to get a no comment answer?' Suspect: 'No comment'. The officer then continued to put questions, but the suspect did not answer any of them. 160

A common approach by suspects who exercised their right to silence was to say 'no comment' rather than to simply remain silent and, as the following example shows, this was often encouraged by their lawyer:

Once the preliminaries are out of the way, the officer says: 'So tell me what happened...'. There's a long silence. The officer then asks, 'Can I infer you're going to remain silent for all the questions?' Silence [from the suspect]. Officer: 'Tell me what you did on the night of the 16th.' At this point, the lawyer cuts in: '[Name of suspect], you can stay silent if you like, it's your right, but it may move things on a bit quicker if you say "no comment".' The suspect then puts their head on their arms on the desk and responds to all subsequent questions with 'no comment'. 161

Most of the Scottish police officers interviewed reported that they took a similar approach: continuing to ask questions of the suspect, but making no serious attempt to persuade them to answer. The following was typical:

160 EngCityLaw4.
161 EngCityPol8.
'Well, it’s my job to put the questions to the person to give them a chance to answer the allegations that are being made against them, so that’s what I do. If they say nothing, then it’s my job to continue on and to give them that opportunity. If they don’t want to take it, that’s fair. At least I’ve done my job properly... Yeah, I would ask them the questions that I needed to ask them and maybe go back and ask it a second time just to see if it would get a different response the second time, but if they’re hell-bent on just not saying anything, then it doesn’t matter how many times you ask them, they’re just not going to say anything.'

However, some officers hinted that a different, more assertive, approach is sometimes adopted. One officer indicated that he may try to find a way of inducing a suspect to answer questions, although he was conscious of the limits in seeking to do so:

'Unfortunately, at the moment we have to accept the “no comment” interview. If you thought it was going to be a “no comment” interview, you can certainly approach it from a different way and see whether you would get the person to come back at you. But as for asking the same question over and over again, that wouldn’t be acceptable. If you ask the question a dozen times and get an answer in the end, it wouldn’t be a legally acceptable admission.'

A CID officer indicated, without elaborating, that CID officers do have strategies that they use when faced with silence, which ‘are more elaborate and complex’, although he said that, nevertheless, they have to accept a ‘no comment’ answer. Overall, the impression gained is that police officers in Scotland do not try to exert significant pressure on suspects, but this should be approached with some caution given that we have to rely on what police officers say about what they do and also because, given that the majority of interrogations are not electronically recorded and are conducted in the absence of a lawyer, there is no way of verifying what is said or done during an interrogation.

The position in France, where we also largely had to rely on what police officers say is their practice, appears to be similar to that in Scotland. Police officers interviewed generally said that they did not care whether a suspect wished to remain silent and that, in fact, it helped them by speeding up their work. As one officer said:

'It’s their loss. The GAV is shorter, it’s less work for us... I tell them: “Okay, it’s your right. I’ll finish earlier tonight, we will all save time.” It doesn’t bother me at all.'

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142 ScotCityPol1.
143 ScotTownPol3.
144 Broadly, the lawyers interviewed in Scotland appeared to support the view that the police generally do not exert significant pressure on suspects to speak although, as noted, lawyers would rarely have first-hand knowledge of this since they rarely attend police interrogations.
145 FranCity2Po12.
However, we noted earlier that few suspects appear to remain silent under interrogation, and that some French lawyers interviewed tended to be sceptical that the right to silence was a ‘real’ right. Previous research has found that the French police often exert significant psychological pressure on suspects to speak.\textsuperscript{146} We did not find evidence of this, but there were some indications from the police interviews that some form of pressure may be applied to a suspect who remains silent. Whilst the officer quoted above, and others, indicated that silence would result in a shorter period of detention in GAV, this was contradicted by others. One officer, for example, said:

‘Sometimes, we have to extend the GAV [where the suspect remains silent]. The magistrat says “Keep him another night, we’ll see if he still remains silent tomorrow morning.” In that case, we wait until the next morning and we try again to ask one or two questions, but not more.’\textsuperscript{147}

Another officer (who had earlier said that silence may work to the advantage of the police because it saved time) gave a more direct indication of the kind of pressure that may be applied to a suspect who was refusing to answer police questions:

‘I’m not saying that if they say they want to remain silent, we just let it go. We wait for a few hours, waiting for the stress of the arrest to come down or the alcohol. Some people still don’t want to speak. It happens in particular in big cases of shoplifting, for those who are regular criminals. We leave the case on the side and every time we have new elements, we will ask new questions. In interview, we ask them: “Do you want to speak? Yes/no.” It’s like banging on a wall sometimes.’\textsuperscript{148}

In contrast to the other three jurisdictions, in the Netherlands we observed, and police officers told us about, a variety of tactics in police interrogations designed to persuade silent suspects to speak, and on some occasions these amounted to a conscious, substantial and prolonged strategy aimed at undermining the suspect’s exercise of their right to silence. Officers were very conscious of the fact that they had three days during which a suspect could be detained and interrogated, and that this could be used to their advantage in persuading a suspect to talk. As one said, ‘...we have three days, so why hurry?’\textsuperscript{149}

In one case, in which the suspect, a therapist, was suspected of indecent assault, the interrogation was conducted over a number of days.\textsuperscript{150} During the first day, the two interrogating officers used a variety of tactics including trying to find an ‘opening’ (asking why a ‘good professional’ would refuse to confirm that a particular person was his patient). At the beginning of the interrogation on the
second day, a similar tactic was adopted, in which the suspect was asked what he thought of the interrogation on the first day. The officers went on to ask the suspect why he was remaining silent, asking him if he was angry, and suggesting that they were trying to give him the opportunity to put his ‘side of the story’. The suspect continued to assert his right to silence, and in a perceptive comment said:

'I resort to my right to silence... I say: “right to silence”, and this is my right. But you continue posing questions. You have taken my right away from the very first second...’

The researcher discovered that in a subsequent interview, which she observed on videotape, the suspect had finally ‘told everything’ to the police. As the researcher noted, the officer seemed proud that he had been able to ‘crack’ the suspect.

This case illustrates three of the tactics adopted by the police in the Netherlands: asking a suspect why they remain silent, telling them that they are giving them the opportunity to tell their side of the story, and trying to persuade them to start talking by asking seemingly innocuous questions. Other tactics which were either observed, or which officers talked about using, included telling the suspect that co-suspects had confessed and had implicated them, provoking a suspect into speaking (for example, by suggesting that they are a coward), undermining advice from the suspect’s lawyer, suggesting that silence would result in prolonged detention, and suggesting that silence would result in a higher sentence.

5. **Lawyers’ Attendance at Police Interrogations**

The EU Directive on the right of access to a lawyer provides that every suspect has a right to have their lawyer present when they are interrogated by the police. This is in accordance with the jurisprudence of the ECHR, which has held that the presence of a lawyer serves to ensure that the suspect does not incriminate themselves involuntarily and that their right to silence is respected, in particular by preventing coercion or oppression. We sought to discover whether lawyers did attend police interrogations in cases where suspects had sought legal assistance, and the factors influencing lawyers’ decisions whether or not to attend them.

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131 NethTownPol2; NethCityPol27.
132 NethCityPol27; NethTownPol12; NethTownPol10; NethTownPol13; NethTownPol14; NethTownPol12; NethCityPol11.
133 iNethCityPol11.
134 See further Chapter 1, section 2.3.
5.1. Attendance at Interrogations in the Four Jurisdictions

In England and Wales, the right of a suspect to have their lawyer present during interrogations was introduced by PACE more than 25 years ago. PACE provides that "a person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time", and this has always been interpreted to mean that a suspect has a right to have their lawyer present in police interviews.

In all cases observed (in the law firm sample) in England and Wales, where the lawyer attended the police station to provide advice and assistance to a client they also attended the police interrogation of their client. Our findings differ from those of earlier research, which found that lawyers did not always attend interrogations, but this is partly explained by the fact that the data for our study is derived from observations by researchers based at law firms that offered a specialist criminal defence service. The lawyers interviewed stated that they would "always attend" the interrogation, or would not attend only on "very rare" occasions; for example, in minor cases where a suspect may choose to be interviewed without a lawyer because waiting for the lawyer would result in them spending longer in custody. One lawyer explained this as follows:

"Let's say I'm at a police station dealing with a case, and one comes in for shoplifting at Primark and I can't get there for four or five hours. I would take disclosure over the 'phone. I would give him [the client] the opportunity to wait six hours for me to attend, or to go into interview after receiving my advice. But that is very rare."

Lawyers in the law firms observed, who were generally employees of the firm, did not have much discretion as to whether to attend interrogations since attendance was the firms' policy.

In France, as in England and Wales, the lawyers observed generally attended all interrogations of suspects who had requested a lawyer in GAV. The only exceptions were those cases where the suspect changed their mind about their lawyer attending following a consultation with the lawyer. Even then, in FranCity, the local Bar coordinators told us that they would normally send a lawyer to the

156 S. 58 PACE.
157 And is specifically provided for (subject to limited exceptions) by para. 6.8 PACE Code of Practice C.
158 For previous research see Brown 1989, p. 29-31; Brown, Ellis & Larcumbe 1992, p. 96; Bucke & Brown 1997, p. 32-33. Another relevant factor is that the criminal legal aid contract now in force normally requires lawyers to attend interrogations in cases that they have accepted.
159 11ngCityLaw2.
160 Bar Coordinators were responsible for administering police station legal advice. For more detail, see Chapter 6, section 2.2. In FranTown, there was no bar co-ordinator.
Police station to ensure that the suspect had not been influenced by the police to change their mind.\textsuperscript{181}

By contrast with these two jurisdictions, in the cases observed in the Netherlands and Scotland lawyers rarely attended police interrogations of their clients. In the Netherlands, a lawyer was present only in nine out of 97 observed interrogations.\textsuperscript{182} This was partly because of the restrictive regulations: only juvenile suspects are explicitly provided with the right to legal assistance during interrogations.\textsuperscript{183} However, even in the cases involving juvenile suspects, lawyers often did not attend the interrogations. In seventeen observed interrogations involving juvenile suspects, a lawyer was present in only eight of them. In the remainder, normally a 'trusted person', that is, the suspect's parent or another relative, was present.\textsuperscript{184} In one case observed in NethCity, involving a 15-year-old suspect, neither a lawyer nor a 'trusted person' was present at the interrogation.\textsuperscript{185} Similar findings have been reported by Verhoeven & Stevens in research undertaken in 2013.\textsuperscript{186} In their sample of cases involving serious alleged offences,\textsuperscript{187} the lawyer attended the interrogation in two-thirds of cases where they had given pre-interview advice. In the case of less serious offences, the interrogation attendance rate was one-third.\textsuperscript{188} On the other hand, lawyers in the Netherlands were sometimes allowed to attend interrogations of adult suspects even though this was not expressly provided for by the regulations in force.\textsuperscript{189}

In Scotland, we were unable to follow cases after the booking-in procedure, and thus we could not estimate the rate of lawyers' attendance at interrogations in

\textsuperscript{181} iFranCityLaw10; iFranCityLaw5.

\textsuperscript{182} Calculated on the basis of the police station and the law firm sample.

\textsuperscript{183} Aanwijing rechtsbijstand politieverhoor 2010. See further Chapter 3, section 4.4.5.

\textsuperscript{184} Under the current regulations, juvenile suspects may choose between a lawyer or a 'trusted person' to be present at their interrogations. A juvenile suspect may also waive the right to have either present, although it is arguable whether it is appropriate for young suspects to be able to waive this right. See Chapter 3, sections 4.5.5 & 4.6.

\textsuperscript{185} NethCityPol24.

\textsuperscript{186} Verhoeven & Stevens 2013, p. 266-268.

\textsuperscript{187} That is, so-called A-category cases, which are punishable with a prison sentence of twelve years or more, or sexual offences punishable with a prison sentence of eight years or more, and certain other offences. In those cases, suspects can only waive their right to legal assistance before the first police interrogation after a consultation with a lawyer. See Aanwijing rechtsbijstand politieverhoor 2010.

\textsuperscript{188} That is, so-called B-category cases, which are offences in respect of which the suspect may be placed in pre-trial detention, usually punishable with a maximum prison sentence of four years. In these cases, suspects may waive their right to legal assistance before the interrogation without a prior consultation with a lawyer. See Aanwijing rechtsbijstand politieverhoor 2010.

\textsuperscript{189} We observed one such interrogation, and lawyers told us in interviews that they were sometimes allowed to attend adult interrogations. See, for example, iNethTownLaw7; NethCityPol15; and NethTownLaw6.
our sample. However, we were told by police officers\textsuperscript{170} and by lawyers\textsuperscript{171} in the Scottish sites that lawyers rarely attended police interrogations, preferring instead to speak to clients over the telephone prior to an interrogation.

5.2. Factors Influencing Lawyers’ Attendance at Interrogations

In principle, the decision whether a lawyer should attend the interrogation is for the suspect to take, because the right to legal assistance during interrogation is that of the suspect.\textsuperscript{172} However, in practice, the decision of the suspect is only one factor in a range of influences which may, in a particular case, be more important than the suspect’s wishes. Here we examine a number of them: factors relating to the suspect or the suspected offence; organizational factors concerning the delivery of legal assistance; organizational factors relating to police investigations; and the professional cultures of lawyers.\textsuperscript{173}

5.2.1. Seriousness of the Offence and Suspects’ Vulnerability

Previous research has found that the seriousness of the suspected offence, and the characteristics of the suspect (in particular, whether they are a child or otherwise vulnerable, or whether they have previous experience of arrest and detention), are important factors in determining whether a lawyer attends interrogations. A recent Dutch study found that the seriousness of the suspected offence was a strong factor predicting the lawyer’s attendance at interrogations\textsuperscript{174} and earlier studies in England and Wales also demonstrated the significance of such factors.\textsuperscript{175}

In the present study, we were not able to control for those variables. However, some Dutch and Scottish lawyers interviewed told us that they would take into account the seriousness of the offence and/or the suspect’s vulnerability when deciding whether to attend an interrogation. One lawyer in NethTown, for example, suggested that if a case was less serious he would try to persuade the client to waive the right to have a lawyer present at interrogation.\textsuperscript{176} Likewise, Scottish lawyers said that they would ‘make an effort to attend a police station’ if suspects were young or

\textsuperscript{170} See for example: ScotTownPoll1, ScotTownPoll2, ScotCityPoll5.
\textsuperscript{171} ScotCityLaw1, ScotCityLaw2.
\textsuperscript{172} The EU Directive on the right of access to a lawyer, Art. 3(3)(b) states the Member States must ensure that ‘the suspect or accused person has the right for his lawyer to be present and participate effectively when he is questioned. This also follows from the ECHR since the right to legal assistance is a right enjoyed by the suspect.
\textsuperscript{173} In the Netherlands, of course, in most cases the wishes of the suspect are irrelevant since the law does not provide for a right to have a lawyer present in police interrogations.
\textsuperscript{174} Verhoeven & Stevens 2013.
\textsuperscript{175} Brown, Ellis & Larcombe 1992, p. 31; Bucke & Brown 1997, p. 33. See also Skinner 2011 regarding the relevance of such factors in determining whether suspects request legal assistance.
\textsuperscript{176} NethTownLaw2.
vulnerable, or if the charges were serious, but otherwise they would only provide advice by telephone.\textsuperscript{177}

5.2.2. Organization of Delivery of Legal Advice and Remuneration

The organizational arrangements for delivering legal assistance, including remuneration for police station advice and assistance, were perhaps the most important factors determining attendance at interrogations.\textsuperscript{178} In England and Wales, law firms providing legal advice and assistance at police stations were required to have a contract with the Legal Services Commission,\textsuperscript{179} and were generally paid a fixed fee the level of which depended upon the geographical location of the firm providing the service (ranging from £138 to £301 (€160 to €350). Telephone advice was paid at the rate of about £31 (€36).\textsuperscript{180} Thus there was a financial incentive to attend the police station in person, and the contract required that once a case had been accepted, the lawyer must normally attend all police interrogations of the client.\textsuperscript{181} In France, lawyers participating in a GAV were paid about €60 for a 30-minute consultation before the first interrogation, and €300 for attendance at an interrogation.\textsuperscript{182} Thus, as in England and Wales, there was a financial incentive to attend police interrogations. In the Netherlands, however, lawyers were paid only slightly more, and sometimes less, for attending an interrogation than for the initial 30-minute consultation, whilst an interrogation could sometimes last several hours.\textsuperscript{183} Many Dutch lawyers interviewed stressed that attendance at interrogations was financially unattractive for them: attending an interrogation lasting several hours for a fee of little more than €100 was a recurrent complaint made to the researchers. In Scotland, remuneration arrangements changed during the period of the fieldwork. Initially, lawyers were not paid a separate fee for police station legal advice, and the fee was merged with the fixed fee for the entire case. Subsequently, an out-of-hours police station fee was introduced. A separate fee was paid in respect of ‘solemn’ (that is, more serious) police station cases.

\textsuperscript{177} ScotTownLaw1; ScotTownLaw2
\textsuperscript{178} See Chapter 6, section 2.
\textsuperscript{179} The Legal Services Commission was replaced by the Legal Aid Agency in April 2013.
\textsuperscript{180} There is also provision for the lawyer to be paid on an hourly basis if the work done on a particular case equates to about three times the fixed fee. See the Criminal Legal Aid (Remuneration) Regulations 2013, SI No. 435.
\textsuperscript{182} Art. 2 of Decree N 2011-810 of 6 July 2011 concerning payment for the lawyer’s intervention during GAV and detention by border police, JORF n°0156 du 7 juillet 2011, p. 11783.
\textsuperscript{183} At the time of the fieldwork, this was €85 for the first consultation before the first interrogation, and €170 or another €85 for the second consultation (depending on whether the first consultation has taken place). These amounts were 1.5 times higher for attendance at weekends. The payment for attending interrogations was €113 (or €226 in case of more serious offences), irrespective of the number and duration of interrogations.
The way in which duty lawyer schemes were organized also had an impact on lawyers’ attendance at interrogations. In England and Wales, a panel scheme operated during office hours, under which the Defence Solicitor Call Centre would contact a duty lawyer who, generally, was under an obligation to accept a case. Outside of office hours a rota scheme generally operated, and although there may only be one duty lawyer on call for a particular station, there was provision for back-up from the duty lawyer panel in the case of excess demand. Similarly, in France, it was normally the case that several lawyers were available to attend police stations at any given time, and duty lawyers were obliged to attend if requested. As one lawyer in FranTown put it: ‘When we are duty lawyers, we have to attend’. Lawyers were obliged to report their attendance at an interrogation to the Bar co-ordinator as a condition of receiving the full police station attendance fee. If they were unable to attend the interrogation, they had to inform the Bar co-ordinator, who would then arrange for another lawyer to attend. The scheme in the Netherlands was not dissimilar to the rota scheme in England and Wales, but duty lawyers seemed to prefer to deal with most or all of the requests personally rather than refer them to another duty lawyer if they could not attend the interrogation.

Researchers noted on at least two occasions that the duty lawyer did not attend interrogations of their clients, even though they were children, because they were dealing with other suspects at the same time, but made no arrangements for another lawyer to attend. In Scotland, under the duty lawyer scheme run by the Scottish Legal Aid Board (SLAB), four firms were available for duty work in any given week, and were assigned cases in turn. However, the firms involved were often very small, with only one or two solicitors undertaking police station legal advice. Often, these solicitors were unable to attend a police station in person due to other professional or personal commitments, especially if contacted outside of office hours.

5.2.3. Organization of Police Interrogations

A further factor that influenced whether lawyers attended interrogations was the way in which the police organized the timing of them. In the Netherlands, regulations provide for a waiting period to facilitate the lawyer’s attendance at interrogations (as opposed to the pre-interview consultation), and in England and Wales, regulations provide (subject to exceptions) that the police should normally wait for the lawyer’s arrival before starting an interrogation. However, other than in

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184 If FranTownLaw5.
185 This was probably a combination of the lawyer’s financial interest and the difficulty of finding another lawyer available and willing to attend a police station at short notice.
186 See NethCityLaw13.
187 Aanwijzing rechtshulp politieverhoor 2010.
188 Para. 6.8 PACE Code of Practice C, and Note for Guidance 6A.
England and Wales and in FranTown, we found that in arranging and conducting interrogations the police often took no account of other demands on the lawyer's time (nor the remuneration arrangements). Two examples can be given of the circumstances where such problems often appeared to arise. The first involves suspects arrested in the evening, but interrogated the following morning. In these circumstances, both in the Netherlands and in France, lawyers were supposed to attend on the suspect on the evening of the arrest. However, in both of the Dutch research sites, and in FranCity, suspects were not normally interrogated during the late evening or at night, which meant that the lawyer would have to attend again the following morning. In FranCity, lawyers reported that this sometimes resulted in several interrogations taking place at the same time in the morning, at which time the lawyers who had advised the suspect the previous evening were often unable to attend. As the Bar co-ordinator in FranCity explained:

"That's crazy. From 6.00 pm, there is no interview, but the next morning, around 6.30-7.00 am, the investigating officers who do the interviews start their shift, and they all want a lawyer at the same time, all at 9.00 am... The law does not provide for another two-hour delay before the start of the interview... [T]his means that we would need to be there immediately when they call for the interview... But there are only ten duty lawyers and sometimes we cannot send somebody immediately."

This problem was exacerbated by the fact, as reported by some of the lawyers in FranCity, that some suspects, having waited until the morning to be interrogated, changed their mind about wanting the lawyer present when told that waiting for the lawyer would cause further delay. Lawyers were also concerned that this would discredit them in the eyes of their clients. In the words of one lawyer in FranCity:

In FranTown, we observed one case where police agreed to wait before commencing an interrogation in order to allow the lawyer to have lunch, and another case where a lawyer negotiated with the police the starting time for the second interrogation. See FranTownLaw1 and FranTownLaw2. If such negotiations were indeed more typical for FranTown than for FranCity, as our limited data seem to suggest, this may be due to the more informal procedures and relationships between police officers and lawyers in FranTown, which was a much smaller site than FranCity.

For instance, in FranCity, according to a report from a Bar co-ordinator made available to the researcher, lawyers complained to the co-ordinator that an interrogation was commenced or conducted without a lawyer 15 times in 2012 (out of 44 complaints related to the organization of G.A.V.).

1 FranCityLaw1.
2 FranCityLaw1.
'It does not look good for the legal profession because the suspect will say: "I asked for a lawyer but she didn’t turn up!", especially since we don’t know what the police tell them: "You see, we told you she wouldn’t turn up."'\(^{193}\)

The second example was where a suspect was interrogated more than once during the period of police custody, which was frequently the case in France and in the Netherlands. In the Netherlands, regulations provided for a waiting period of one hour in such circumstances.\(^{194}\) In FranCity, there was an informal agreement between the Bar and the police that the latter would wait one hour before proceeding with a second or subsequent interrogation, but some lawyers believed that this agreement was not always adhered to. As one lawyer in FranCity noted:

'What also happens is that then the police do not wait for the lawyer. They have to wait for two hours, but if there is a second interview, they don’t wait for the lawyer’s return. They are decent enough to wait half an hour, but even if you are stuck in traffic they won’t wait much longer. They mention it on the file [and start the interrogation].'\(^{195}\)

The same lawyer then went on to suggest that sometimes refusal by the police to wait for the lawyer could be a deliberate tactic designed to keep the lawyer away. Whilst we have no data to confirm this for FranCity, we observed one case in NetlCity where the decision to interrogate without a lawyer may have been made because the police believed that the suspect was going to confess, and feared that he may change his mind if he spoke to the lawyer. In this case, a 17 year-old suspected of complicity in a aggravated robbery denied his guilt in the course of three interrogations conducted during two days in the presence of a lawyer. In the evening of the second day, however, he informed the investigating officers that he wished to be interviewed again (which may have implied that he now wanted to confess). His lawyer was unable to attend that evening, the interrogation proceeded in his absence, and the suspect confessed.\(^{196}\)

These examples demonstrate the need for detailed regulations to ensure compliance with suspects’ right to legal assistance in interrogations, particularly in those jurisdictions where the right to legal assistance during interrogation is relatively new. They also demonstrate the necessity for a more flexible approach, and possibly, revision of certain working practices by the police to facilitate lawyers’ participation in interrogations.

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193 FranCityLaw7
194 Aanwijzing rechtsbijstand politieverhoor 2010.
195 FranCityLaw3. For a similar view expressed in the Netherlands, see NetlTownLaw4.
196 NetlCityPol21.
5.3. The Attitudes of Lawyers to Attendance at Interrogations

Whilst the right to legal assistance in interrogations is a right of the suspect, lawyers have a significant degree of influence in respect of the decision. In fact, some lawyers perceived it to be their decision. This was openly acknowledged by one Scottish lawyer:

'I take it that the decision [to attend an interrogation] is mine. If the client ends up not being happy, it would be up to the client to contact somebody else.'

A Dutch lawyer expressed the same opinion more subtly:

'If I would then attend every interrogation, this is a question... Sometimes I tell my clients that it makes no sense for me to be present.'

In this context, the attitude of lawyers regarding the perceived value of their attendance at police interrogations is likely to have a significant effect on the extent to which they do attend interrogations. We found that lawyers in France, the Netherlands and Scotland gave a variety, and sometimes contradictory, reasons why their attendance at interrogations was not necessary.

Many Scottish lawyers believed that their presence at interrogations was rendered unnecessary if they advised their client to remain silent in the interrogation (which they frequently did). Remaining silent did not, in the lawyers' view, harm the position of the suspect because, under Scottish law, no inference could be drawn from such silence. This approach may be questioned for a number of reasons. Firstly, not all suspects are able to remain silent without the lawyer's support during the interrogation, and we saw at the beginning of section 4 above that the majority of suspects on which we had data did not exercise their right to silence. Secondly, even if adverse inferences are not permitted by law, as was noted in section 4.2 above silence may nevertheless have adverse consequences for the accused.

The attitudes of Dutch lawyers to attending interrogations varied. One Dutch lawyer, in an interesting contrast to the views of Scottish lawyers, said that he would not regard attendance as being necessary if the suspect was going to 'tell his story'. Whilst some specialist defence lawyers believed that it was important for...
them to attend in every case, however minor, others said that they found attending interrogations uninteresting, insufficiently challenging, time-consuming and of little value, particularly in less serious cases. Some lawyers interviewed doubted whether attendance of the lawyer had any value, especially as compared to audio-visual recording of interrogations, because lawyers could ‘do nothing’ at the interrogation anyway. Such attitudes were powerfully expressed by a lawyer writing in a legal web journal:

‘I already imagine myself sitting there the whole morning, quietly in the corner, sipping on a cup of bad machine-made police coffee. And then I don’t even mention the undoubtedly shameful remuneration that I will receive for it. This is not what I spent six years studying law for...’

I will take my name off the duty list if people can expect that their lawyer would check whether their statement about a stolen jar of peanut butter was taken properly. In very serious cases, I see the value of attending interrogations, but even then a good audio-visual recording should in principle be sufficient.

Similar sentiments were expressed by lawyers in Scotland. For instance, one Scottish lawyer said that he did not believe that a lawyer’s presence at the interrogation make any difference, because ‘everything is tape-recorded anyway’.

It might be concluded that some of the reasons given for non-attendance at interrogations were rationalizations for decisions that were based on the needs of the lawyer rather than those of the suspect. A number of lawyers, particularly in the Netherlands and Scotland, made it clear that their professional and personal needs took priority over those of their clients. A Scottish lawyer, for example, said that he would take into account whether he was ‘in a situation that he can go’ because ‘he works alone, and has a family’. Similarly, during our observations in the Netherlands, a lawyer in NethCity refused to attend an interrogation of a child suspect, despite the child’s father’s request, because it took place at the end of the working day. Another lawyer observed in NethTown told the researcher that she would attend interrogations of child suspects if they took place during the day, but not in the evening.

Returning to the point made at the beginning of this section, that lawyers are well-placed to exert influence over their clients’ decisions, we observed some lawyers in the Netherlands effectively manipulating their clients into waiving their

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201 For example, iNethTownLaw4.
202 iNethCityLaw1; iNethTownLaw2.
203 For similar findings, see Verhoeven & Stevens 2013, p. 136-137, p. 194-195, and p. 227.
204 See Nan 2010.
205 See Nan 2011.
206 iScotTownLaw2. In fact, all interrogations are not tape recorded.
207 iScotTownLaw1.
208 NethCityLaw1.
209 NethTownLaw4.
210 NethTownLaw11.
right to have a lawyer present at the interrogation. A lawyer in NethCity, for example, informed a juvenile suspect that he had a right to call his father, and asked if he wanted his father present. He did not, however, tell the suspect that he had a right to have the lawyer present at the interrogation.\(^{210}\) In another case, the same lawyer led a 15-year-old suspect into ‘choosing’ to have his mother present at the interrogation (rather than the lawyer), even though the suspect did not appear to want either parent to be present:

`Lawyer: ‘You have the right to have a lawyer or one of your parents present at the interrogation. Do you want one of your parents to be present?’

Suspect (hesitantly, visibly afraid of his parents’ reaction): ‘No... My parents, better not.’

Lawyer: ‘You should think carefully, you are suspected of a criminal offence.’

Suspect (hesitantly): ‘Well, my mother has to come to pick me up anyway...’`

### 6. The Role of Lawyers in Interrogations

The EU Directive on the right of access to a lawyer refers to the right of a suspect to have their lawyer present in interrogations and to ‘participate effectively’,\(^{211}\) but it does not articulate the role any further.\(^{212}\) The Directive accords with, but does not develop, ECHR case law which suggests that the mere presence of a lawyer at an interrogation is not sufficient to render legal assistance ‘practical and effective’, and that a lawyer must be able to actively participate in the interrogation.\(^{213}\) For the purposes of this section, the key question is what is meant by ‘active’ or ‘effective’ participation by the lawyer. Having regard to general principles, we suggest that it implies that a lawyer should be able to use the powers and resources normally available to a defence lawyer in criminal proceedings in order to protect their client from self-incrimination, safeguard their right to remain silent, preserve equality of arms and, ultimately, to ensure a fair trial. In doing so, lawyers should loyally respect the interests of their client.\(^{214}\) In practice, the lawyers’ role in interrogations may entail: advising clients on their legal position; seeking to ensure that their client’s decisions, especially as to whether to exercise their right to silence, are

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\(^{210}\) NethCityLaw8.

\(^{211}\) Art. 3(3)(b).

\(^{212}\) Other than to state that such participation ‘shall be in accordance with procedures in national law, provided these procedures do not prejudice the effective exercise and essence of the right concerned’.

\(^{213}\) See Chapter 1, section 2.5.4.

\(^{214}\) See generally the UN Basic Principles on the Role of Lawyers, which set out the duties of lawyers in broad terms: to advise clients as to their legal rights and obligations; to assist clients in every appropriate way; to seek to uphold human rights and fundamental freedoms; and to loyally respect the interests of their clients (Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September 1990, Principles 13-15).
respected; providing 'moral' support to their client; challenging unfair or unlawful questioning; ensuring, where appropriate, that the client's version of events is articulated; and ensuring that the record of the interrogation is sufficient and accurate.

Of the four jurisdictions in the study, only in England and Wales was the role of the lawyer set out in regulations, and in France and the Netherlands significant restrictions were placed upon lawyers acting for a suspect at the investigative stage. Here, we examine the ways in which the role of the lawyer in interrogation is regulated, and our findings regarding intervention by lawyers, the factors (in addition to regulation) that appeared to influence the conduct of lawyers in interrogations, and the effects of the presence of lawyers in interrogations.

6.1. Lawyers' Role in Interrogations in Practice in the Four Jurisdictions

6.1.1. England and Wales

In England and Wales, the role of the defence lawyer in interrogations is set out in guidance contained in PACE Code of Practice C, as follows:

The solicitor's only role in the police station is to protect and advance the legal rights of their client... The solicitor may intervene in an interrogation in order to seek clarification, challenge an improper question to their client or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice.215

The code also provides that a solicitor may only be removed from an interrogation if their conduct is such that the interviewer is unable properly to put questions to the suspect, and a decision to eject a solicitor can only be made by a relatively senior officer, and not the officer conducting the interrogation.216

In the observed interrogations, the lawyer intervened217 in almost all of them, and in three interrogations they intervened more than ten times.218 This level of intervention was significantly greater than that found in research conducted in the early years following the introduction of the right to legal assistance, when lawyers were found to be generally passive,219 but was in line with the trend registered in more recent studies.220 This increase may partly be attributed to the police station accreditation process, part of which tests lawyers' skills in intervening in interroga-

215 PACE Code of Practice C, Note for Guidance 6D.
216 Para. 6.9.6.11 PACE Code of Practice C.
217 By 'intervene' we mean an intervention for one or more of the purposes set out in the description of the role of the lawyer set out at the beginning of s. 6.
218 We observed 40 suspect interrogations in EngCity and EngTown where a lawyer was present.
219 See, for example, McConville & Hodgson 1993, McConville et al. 1994, p. 102-117.
tions. Most interventions involved the lawyer in giving advice to their client, for example, prompting them to respond or not to respond to particular questions, to check that the client understood the question, or to offer them support. Lawyers also intervened to provide information favourable to the client, and to challenge irrelevant questions, or questions prompting answers that were outside of the client’s knowledge.

For example, in one case in EngTown, where the suspect had been arrested for suspected theft from a number of motor vehicles, apparently captured on CCTV, the officer asked him about his accomplices. The lawyer intervened to tell his client that he did not have to answer this question and could reply ‘no comment’. The client did so, and when the officer persisted with this line of questioning, the lawyer interrupted to tell his client that he did not have to answer the questions. In another example from EngTown, which involved suspicion of fraud, the lawyer repeatedly intervened in the interview, asking the officer to show her the evidence that the officer appeared to be relying on, advising her client to explain particular aspects of the case, prompting her to provide more explanation, and intervening when the officer asked a question in an ‘abusive’ manner.

Despite the attenuation of the right to silence in England and Wales, lawyers still felt able to advise clients to remain silent in interviews as a way of securing disclosure from the police. As one lawyer, faced with an inexperienced officer’s unwillingness to disclose information prior to interview, said:

“This is stupid because I then get my client to say no comment until the police officer reveals the information in the interview, and then I stop the interview to consult with my client. Experienced police officers don’t do that.”

However, the lawyers in England and Wales appeared to intervene less often, or less assertively, when it involved challenging the behaviour of the police. In one case, a lawyer in EngCity did not intervene when an officer failed to inform the suspect that he had the right to consult with the solicitor at any time during the interview. In another EngTown case, when the officer asked the suspect whether she wanted to tell him what she and her lawyer were talking about during a private consultation – a rather blatant attempt to undermine lawyer/client privilege – the lawyer did not challenge the officer, but instead gave a silent sign to the suspect to

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221 Part of the police station accreditation process is the so-called ‘critical incidents’ test, where a candidate police station representative must react during simulated audio-recorded police interviews.

222 EngTownLaw6.

223 EngTownLaw12.

224 See Chapter 3, section 2.4.6.

225 EngTownLaw12.

226 For a more detailed analysis, and the possible reason for such non-interventionist behavior, see below section 4.2.2.

227 EngCityLaw19.
respond by saying ‘no’. In yet another case in EngTown, a lawyer did not intervene where, in a sexual assault case, the police officer attempted to put pressure on a juvenile suspect by posing the same questions repeatedly. In this case, the researcher noted that the suspect was ‘looking at his lawyer, obviously destabilized’, and the lawyer ‘looked back at him to calm him down’, but did not challenge the officer’s line of questioning.

In the fieldwork conducted in England and Wales we did not encounter any occasion when the police interrogator objected to an intervention by a defence lawyer. That is not to say that all English officers have a positive attitude to the presence of a lawyer. Some officers noted that they felt constrained or even slightly intimidated by the presence of a lawyer. Others said that they had issues with certain lawyers who were too ‘assertive’ or ‘adversarial’. However, the power dynamics underlying these negative sentiments was markedly different than in the other observed jurisdictions. This may be because, after more than 25 years of a right to legal assistance at police stations, police officers have grown used to the presence of lawyers at interrogations. Furthermore, as noted above, the regulations are quite clear about the circumstances in which a lawyer may intervene. There was greater acceptance among the English police officers, than among the French, Dutch and Scottish officers, that lawyers do have a legitimate role to play in the investigative process, and that this role may sometimes involve advising suspects to remain silent or challenging the questions posed to their clients.

6.1.2. Netherlands and France

The Netherlands and France are dealt with here together because there are similar restrictions on interventions by lawyers in interrogations in both countries, and because we found a similar picture with regard to interventions.

In the Netherlands, the role of the lawyer in interrogations is set out in a (temporary) instruction issued by the Public Prosecutor’s Office. According to this instruction, the lawyer’s role is to ensure that no excessive pressure is used by police in respect of a child suspect (excessive pressure being interpreted very narrowly) to ensure that the suspect understands the questions put to them by the police, and to ensure that the interrogation is correctly recorded. The instruction further suggests that the lawyer should be passive, and should refrain from disrupting the course of the interrogation, with the threat of being removed from the

228 EngTownLaw.3
229 EngTownLaw.9
230 EngCityPolD; EngCityPolH; cf. EngCityPolI (talking about younger officers).
231 EngCityPolD, EngCityPol2; EngTownPol1.
233 EngCityPol5.
234 Aanwijzing rechtshulpstand politie en hoor 2010.
235 See section 2.2 above.
interrogation room if they default. In France, the CPP provides that the lawyer must not intervene during an interrogation at all.236 However, at the end of an interrogation, the lawyer is permitted to put questions to the suspect and to make observations, and if their request to do so is refused by the officer, to attach them in writing to the interrogation record.237 The lawyer’s role is further marginalized by the wide authority granted to the interrogating officer, ‘in case of any difficulty’ caused by the lawyer’s presence, to stop the interrogation and to request the Bar co-ordinator to appoint another lawyer.238

In this context, it is not surprising that we found French and Dutch lawyers to be less interventionist than their English and Welsh counterparts. In the seven observed interrogations in France the lawyer hardly ever intervened, except at the end when they were invited by the officer to put questions to the suspect. Even then, the lawyers rarely asked any questions.239 We observed no case in France where the lawyer challenged questions put by the officer, even indirectly. On the contrary, all interventions that we observed in France were of a non-confrontational nature and were aimed at assisting the officer with their investigation, although in some cases this was presumably done with the suspect’s interests in mind. For example, in one case in FranTow, the lawyer intervened to tell the suspect to stop behaving aggressively because it was not in his interests.240 In another case, the same lawyer acted directly contrary to their client’s interests, effectively taking up the role of the police officer, by urging the police officer to interrogate the suspect in French, although his French was clearly insufficient. The lawyer helped the officer to re-formulate the questions in simple French, and urged the suspect to sign the interrogation record despite his unwillingness to do so, claiming that ‘it does not change anything, because he did not confess’.241

Generally, however, the lawyers observed in France remained passive even where intervention in the interests of their client was called for. In one interrogation, the lawyer remained silent when the interrogating officer, on numerous occasions, implied that the lawyer would agree with his opinion that it was in the best interests of the suspect to confess. In this case, the researcher noted:

‘The [officer] repeated this on several occasions, encouraging the suspect to admit [the offence], calling the lawyer as witness to what he was saying: “I’m saying this in the presence of your lawyer,” “your lawyer will confirm what I’m saying,” [and] “your story doesn’t convince me and it won’t convince the prosecutor, you can ask your lawyer”.242

236 Art 63-4-3 CPP.
237 Ibidem.
238 Ibidem.
239 For an analysis of the reasons why lawyers did not intervene, see section 6.2.2 below.
240 FranTowLaw2.
241 Ibidem.
242 FranTowLaw1.
Lawyers observed in FranTown failed to intervene when their clients were asked questions about offences other than those for which they had been arrested – questions that resulted in admissions, where a suspect became very emotional during the interview and suggested that he wished to commit suicide (the interview was stopped by the officer, but not by the lawyer); and where the police told the suspect that if he did not admit the offence, his detention would be prolonged.

Similarly, in the Netherlands, in most observed interrogations conducted in the presence of a lawyer (seven out of nine), the lawyers remained passive, making no intervention. In one case in NethCity, for example, a lawyer remained silent where the suspect was pressurized by the officers to admit that he had had sex with a minor, *inter alia*, by suggesting several times that perhaps it was consensual, and trying to break the suspect’s emotional resistance by appealing to his feelings for his young daughter. Likewise, in a case observed in NethTown, the lawyer did not intervene when the following was put to her client by the police:

> “How come the person on CCTV [the suspect in respect of two robberies] was wearing a cap like yours? How do you think a judge would look at it? Why don’t you respond? What are you afraid of? There is clear evidence that you were involved. Are you afraid to implicate someone? The case is not over for you yet, this is a serious allegation. We are going to send the interrogation record to the court. This is your chance to give a statement...”

By contrast, in two observed interrogations – one in NethCity and one in NethTown – the lawyers assumed a more active role, and intervened where unfair questions were put to their clients. For instance, in the case observed in NethTown, the lawyer intervened when the officer was asking suggestive questions, which implied, *inter alia*, that the suspect was a co-perpetrator of the offence, although he had been denying any involvement throughout the interview. In the NethCity case, the lawyer intervened on numerous occasions, challenging confusing and repetitive questions posed to the suspect, prompting them not to respond to certain questions, telling the officer that the suspect did not wish to sign the interrogation record, and responding to the client’s question about when he would be released (pre-empting the risk that the officer would influence the suspect by suggesting that if he admitted the offence he may be released more quickly).

However, such interventions were exceptional in both France and the Netherlands. Both French and Dutch lawyers generally said that they preferred to be ‘discreet’ and cautious about openly intervening. As one lawyer interviewed in NethTown said:

243 FranTownLaw4.
244 *Ibidem*.
245 FranTownLaw1.
246 NethTownPoll.
247 NethTownPollII.
248 NethCityLaw13.
'If a client [is not sure of an answer and] looks at me, then I would say “right to silence” and he would also say “right to silence”. Or if a client says it in a low voice, then I may say: “I have heard him saying that he wants to use his right to silence.” I have not yet tried to push until the very end, because it was not necessary, but I could say things during an interrogation several times. Yes, sometimes you try to communicate with a client with body language – with a gentle kick under the table or something – but this is not always possible.240

Similar sentiments were expressed by French lawyers. Other, relatively ‘safe’, ways of intervening mentioned by both Dutch and French lawyers involved trying to clear up misunderstandings between the suspect and the officer,250 or by adding information that may be favourable to the suspect, but also useful for the police.251

It was noted earlier that lawyers in the Netherlands and France are permitted to intervene at the end of the interview, particularly in relation to the interrogation record, and we observed many cases when they did so.252 In fact some lawyers considered the verification of the interrogation record to be their primary function.253 Despite the fact that this form of intervention is provided for, some lawyers reported that sometimes they were not allowed to make comments on the record.254 In any event, police officers were under no obligation to accept the lawyer’s representations, or even register the fact that they had been made. Thus, we observed on several occasions, both in France and in the Netherlands, that the lawyer’s representations were simply rejected by the interrogating officers.

6.1.3. Scotland

In Scotland, there were no regulations on the role of the lawyer in police interrogation in existence during the period of our study. Some guidance on the lawyer’s role during interrogation could be derived from temporary guidelines issued by the Lord Advocate,255 and also from the manual for police forces adopted by the Association of Chief Police Officers in Scotland (ACPOS).256 These documents indicated an active role for lawyers, entailing advising the client, including advice

240 iNethTownLaw3, iNethTownLaw4, iFranTownLaw2, iFranTownLaw3, iNethTownLaw6
250 iNethTownLaw6, iNethTownLaw3, iFranTownLaw2, iFranCityLaw2, and others
251 See for example, iNethTownLaw6.
252 Although also some instances when they did not do so, even though the circumstances indicated that they should have done so. See section 5.2 above.
253 iNethTownLaw6, iNethTownLaw3, iFranCityLaw2, and others
254 Lord Advocate’s Guidelines on Access to a Solicitor to Suspects, issued on 9 July 2010 pending the decision in the Calder case of the UK Supreme Court. The judgement in Calder was pronounced on 26 October 2010. The Guidelines were officially superseded by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, but the Act does not indicate what the lawyer’s role is during interview.
255 ACPOS 2011.
not to respond to certain questions, seeking to ensure that the client understands questions put to them and that they are allowed to answer them, and objecting to oppressive questioning or other improper behaviour by the police during interrogation. It was unclear, however, to what extent these guidelines were known to, and followed by, police officers or known to lawyers who provided custodial legal advice.

For the reasons set out in Chapter 2, section 7.4, we were generally unable to observe interrogations in Scottish police stations. There appeared to be no uniform view on the role of the lawyer in interrogations amongst police officers, nor amongst lawyers. Any latitude given to lawyers to intervene appeared to depend upon the attitude of the officer conducting an interrogation. As a lawyer in ScotCity said:

"Police attitudes towards my presence at the police station differ. Some think criminal defence solicitors are as bad as their client. Then some are really nice and you can chat away and they realise you're just doing your job like them. It will tell in the interview as well, and [by] what information they will give you at the start. It will also show when your client starts to talk and you say "Right, I think it is time for another private consultation", on how easy those officers are."  

Overall, Scottish lawyers appeared to believe that their role in interrogations had recently been enhanced, but that it was not as broad as, for instance, in England and Wales, as the following comments from lawyers indicate:

"Police allow you to be more active nowadays. I've had a recent experience where I interrupted the interview. In the past I wouldn't and wasn't allowed. Now, the solicitor has a more (pro)active role. I did it because the [vulnerable] suspect didn't understand his right to silence and I asked them to stop the interview and they allowed that. I spoke to him and the interview commenced again, and because he didn't make any comment I was satisfied that he understood his right to silence."  

I take the view that your role as a solicitor is now more active than it was [before], but it's still not proper to tap your client on the shoulder and tell him to ask for a private consultation. I would, however, be inclined to speak up in a situation where the police were "interrogating" the person, which sometimes happens. It's appropriate to interfere there."  

6.2. Factors that Influence the Lawyer's Role During Interrogations

In all of the jurisdictions in the study we observed individual differences amongst lawyers. Some lawyers intervened more frequently, because they appeared to be more assertive or argumentative by nature. Others tended to intervene less, because

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288 ScotCityLaw2.  
289 ScotTownLaw2.  
290 ScotTownLaw1.
they appeared to prefer a non-confrontational approach, or were unsure of their ground. Whilst individual characteristics are important, it was apparent that the approach of lawyers in interrogations was also influenced by external factors. Here, we attempt to assess these external factors by reference to the attitudes of the police, and to the professional cultures of lawyers.

6.2.1. The Attitudes of the Police

In both the Netherlands and in France, police officers were not accustomed to outside scrutiny of interrogations. Interrogations were rarely audio- or video-recorded, nor were they normally attended by anyone other than the suspect and the interrogating officers. It is, therefore, not surprising that the Dutch and French officers were reluctant to accept a new participant in what they saw as their own ‘game’. Even where a lawyer remained silent throughout the interview, Dutch officers feared that their presence would ‘have a negative impact on the exercise of interrogation techniques, building of pressure, and overcoming silence’. As one senior investigating officer in NethTown commented:

'It is not pleasant to have a lawyer sit next to the suspect in the interrogation, because it’s easier to build up the pressure when he is not there. No matter what your feelings are towards building the pressure, it is used and there is nothing wrong with it. Even though a lawyer’s role is passive, it does have an effect.'

Predictably, Dutch police officers were extremely reluctant to allow lawyers to actively participate in the interrogation:

'I have no problem with the lawyer at the interview. The rule is, he cannot chip in during the interrogation. If he does, I immediately stop the interview and have the suspect taken back to his cell.'

Similar findings were reported in a Dutch research study conducted in 2010. According to that study, police officers expressed irritation when lawyers tried to make ‘unauthorized’ contact with the suspect, and thus ‘disturb’ the interrogation, by making noises such as coughing, fidgeting or squeezing a plastic coffee cup.

Similarly, in France, with the exception of posing questions at the end of an interrogation, interventions by the lawyer during interrogations were generally not tolerated. A typical reaction by French police officers to a lawyer’s attempt to intervene is represented by the following comment:

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261 In Scotland, there was not sufficient data concerning officers’ experiences of lawyers’ attendance at interrogations to carry out an analysis, because lawyers rarely attended them.

262 InNethCityPd5.

263 InNethTownPd1.

264 InNethTownPd3.

265 Stevens & Verhoeven 2010, p. 77-78.
I had one [lawyer] once who interrupted me to ask me to reformulate my question. It was almost like "Objection, your Honour, the question is biased". He told me that I had to modify my question. I let you guess what my reaction was!! The interview restarted but he did not intervene again or it would have been an incident report.\textsuperscript{565}

Of course, in both countries, the degree to which lawyers were able to intervene depended on the individual officers, a fact which was noted by the lawyers interviewed. Not every intervention was immediately rejected, and not every officer insisted that lawyers should keep silent throughout the interrogation. For instance, in two cases we observed in NethTown and in NethCity, the officers did not object to interventions, and they agreed to reformulate questions following a remark by the lawyer.\textsuperscript{567} However, in the view of the lawyer involved in the NethCity case, such 'leniency' was rather exceptional. More typical was the case observed in NethTown, where a lawyer tried to intervene at the beginning of the interrogation to remind the suspect about the right to silence, and whose intervention was cut short by the officer. The lawyer did not intervene again, even when considerable pressure was put on the suspect to confess.\textsuperscript{568}

The police in France and the Netherlands used a number of tactics to marginalize the effects of the lawyer's presence. For example, in the Netherlands, if an interrogation was audio-visualy recorded, the lawyer was sometimes required to go to the adjacent operator control room. The lawyer could see and hear what was going on in the interrogation room on a TV screen, but it was technically impossible for them to intervene in the interrogation directly, or to advise their client. The effects were noted by a lawyer who was involved in such a case:

The interrogating officers did not know that I was present in the operator room. Then at some point the interrogation went on a wrong foot. The suspect was asked something on the basis of the record made earlier by the police which was not accurate. I wanted to intervene. So I had to find someone to call the officer on his mobile phone to say that a lawyer wanted to say something. It was so awkward.\textsuperscript{569}

In both Dutch sites, where lawyers were physically present in the interrogation room they were often placed in such a position that prevented any eye contact between them and the suspect. The suspect and the interrogating officer(s) sat at the table facing each other, and the lawyer sat in the corner behind or at the side of the suspect, at some distance from him. Placing the lawyer at a distance from the table was aimed to symbolically remove the lawyer from what was meant to be an exclusive 'conversation' between the suspect and the officer(s).

\textsuperscript{565} IfAtiyah and Fidler, 1993, NethCityLaw13; NethTownLaw13.
\textsuperscript{566} Including asking the suspect whether he has committed the crime, suggesting that he was telling a 'bullshit story' and asking him: 'If you were a police officer, what would you make out of this case?' (saying that the evidence against him was overwhelming).
\textsuperscript{567} NethTownLaw14.
Another technique used was for the officer to articulate their view of the ‘ground rules’ in the interrogation room at the outset. Thus, for example, many interrogations in the Netherlands conducted in the presence of a lawyer would start with a remark from the interrogating officer that the lawyer ‘cannot interrupt the interrogation’ and ‘cannot make contact with the suspect.”270 As one lawyer interviewed in NethTown said, ‘In 80 per cent of cases the police would say at the beginning that I cannot say anything and that I should just sit still in the corner.”271 It appeared that this tactic was rather effective in deterring lawyers from intervening:

‘Before the interrogation, lawyers will be informed about procedure and the requirement to be passive. I have not heard complaints from detectives [about lawyers trying to intervene]. In the beginning they might have tried to intervene, but they know what their role is, what is allowed, and what they can do during the interrogation.”272

A third tactic commonly employed in the Netherlands was for the officer to reprimand the lawyer for intervening, or threaten them with removal from the interrogation room due to their ‘obstructionist’ behaviour. Dutch lawyers reported being cut short when trying to speak up during the interrogation ‘because it was not allowed’ (where a lawyer tried to correct a suspect, who wished to invoke their ‘confidentiality right’, confusing it with the ‘right to silence’), or being threatened with removal from the interrogation room if they intervened again.273

In France, police officers are entitled by law to stop an interrogation if, in their opinion, a lawyer obstructs the interrogation, and to submit a so-called ‘incident report’ to the local Bar coordinator with a view to another lawyer being appointed.274 Both police officers and lawyers in France noted that ‘incident reports’, or threats to submit them, were rather common.275 In the words of one police officer:

“Some [lawyers] try to intervene. It can go as far as an incident [report] because they’re always trying to interrupt, we have to tell them repeatedly to stop intervening in the middle of the interview. It can be a bit complicated sometimes and it can go as far as a report to the Bar when we’ve told the lawyer several times to stop intervening.”276

Most of the tactics used by the police in France and the Netherlands to control or ‘marginalize’ defence lawyers were also used by the police in England and Wales in the period following the introduction of the right to custodial legal advice.277 In our

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270 NethTownPol2; NethTownPol2
271 NethTownLaw3. See also NethTownLaw7.
272 NethTownPol2.
273 NethTownLaw6; NethTownLaw7; NethTownLaw4; also see the example from NethTown mentioned above.
274 See section 4.2.1 above.
275 See, in particular, the interview with a Bar coordinator in FranCity, FranCityLaw7.
276 FranCityPol2.
research in England and Wales, we did not observe such tactics being used, and we were told in interviews that tactics aimed at undermining the lawyer’s ability to participate effectively in the interrogation were very uncommon.

### 6.2.2. Professional Cultures

In England and Wales, following criticism of the passive role played by many lawyers in providing advice and assistance at police stations in the early years following the introduction of the right to legal advice at police stations, the Law Society devoted significant resources to developing and articulating a more ‘active’ role, which was reinforced by the introduction of the police station accreditation scheme. In addition, as noted in section 6.1.1 above, the role of the lawyer in police interviews, reflecting this ‘active’ role, was set out in PACE Code of Practice C. In the Netherlands and France, the lawyers’ professional associations encourage their members to assume a more active role during police interrogation than that envisaged in the domestic regulations. The guidelines adopted by the Dutch Bar, for instance, call on lawyers to adopt ‘in principle, restrained, but not passive’ conduct during police interrogations. The guidelines also suggest that lawyers should intervene with a view to ensuring that the suspect’s choice of strategy is respected, or that no procedural mistakes are made during the interrogation, and ‘whenever the lawyer finds it necessary’. The French guidelines note that lawyers should be entitled to intervene, for example, to remind the suspect to remain silent and to ask the police to reformulate a question that the suspect appears not to understand. In Scotland there was no official guidance on the role of the lawyer in providing advice and assistance at police stations during the period that the fieldwork was conducted, although it is anticipated that the Law Society of Scotland will be publishing guidelines in the near future.

Despite the professional guidelines in the Netherlands and France, many Dutch and French lawyers appeared to acquiesce in the passive role prescribed by the official regulations. One lawyer in NethTown, for instance, described one interrogation where she believed that the questioning of a juvenile suspect was improper: the officers posed questions in such a way that the suspect appeared to the lawyer not to know what he was saying anymore. However, the lawyer felt that she ‘should not do anything about it’ because in her view the role of the lawyer was

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278 Which had been identified by a number of research projects examining custodial legal advice.

279 See, for example, Ede & Shepherd 2003, Ede & Edwards 2002, and the police station accreditation resource ‘kit’ published as Shepherd 1996. See also Cape 2011. For the accreditation scheme see Chapter 3, section 2.9.


281 Art. 7 of the Protocol (best practice) raadman bij politieverhoor.

282 Guidance was issued by the NGO JUSTICE. See JUSTICE 2010.
Police Interrogation and the Right to Silence

to intervene only when the police used 'excessive' pressure. Some lawyers in both France and the Netherlands advised their clients that they would 'only observe' the interrogation, and would not participate in it. Some lawyers took a particularly detached approach. A lawyer in FranCity believed that his advisory role ended at the lawyer-client consultation when he informed the suspect about the right to silence:

'The right to silence is rarely used... But it's up to the suspect. It's not for me to say "be quiet!" I'm not allowed to intervene anyway unless the procedure is not respected. If the suspect decides to answer questions, I can't interrupt them. That's why the consultation before the interview is important, to explain clearly what they can and cannot do and what is in their best interest.'

Another reason why lawyers were reluctant to intervene was their desire to maintain a good working relationship with the police. This was observed in England and Wales, and also to some extent in France. For instance, many of the lawyers interviewed in England and Wales said that they would exercise caution when intervening, and that they would try to avoid direct confrontation with interrogating officers:

'[Police officers] might start asking tricky questions. I'll let them run for a couple of questions and I then might haul them up... But if that happens, and there's an opportunity, I might have a word with them outside and say "This is nothing personal, but please explain why you're following this line of questioning..."'.

I'm always nice and friendly, whereas someone like EngCityLaw3 will be a bit more hands on, a bit more direct... If there is an officer who's got an attitude, a bit off-hand, I will play along. I'll just make a note of the same and then when I go back to the office, I'll share it with the others.'

When asked about why they would choose a more subtle approach, some lawyers responded that this helped them to maintain a 'friendly' relationship with the police, which in its turn enabled them to secure better disclosure. As the same lawyer quoted above explained:

'I've found it pays to be nice. Simple example. Me and another legal representative, from another firm, were jointly representing a client and she, the other representative, can be quite lively, argumentative. We had disclosure from the officer, she left the

283 NethTownLaw6.
284 FranCityLaw2.
285 No similar phenomenon was observed in the Netherlands, probably because in the observed sites in the Netherlands lawyers did not habitually attend police stations, and had not built up relationships with individual officers to the same extent as they had in England and Wales and in France.
286 EngCityLawRep1.
287 EngCityLaw5.
room, and then the officer said to me "Oh, there's one other bit of information...I'll tell you about it but not her, she's a right pain...".

We see here that the lack of police disclosure regarding the evidence, and the dependency of defence lawyers on the police in securing disclosure, emerges as an important factor that informs both their relationship with the police, and their approach to police interrogations. Lack of disclosure is not only cited by some lawyers as a reason not to attend interrogations, but also to explain their passivity when they do attend (which in France and the Netherlands is also linked to the restrictions on lawyers in intervening in interrogations). Where a lawyer has not been given disclosure in advance of an interrogation, not only does this restrict their ability to advise their client prior to the interrogation, but it may also inhibit them in the interrogation. Asking questions about the evidence during an interrogation may risk adverse consequences for the client, as two French lawyers observed:

If we ask questions of the police [in the interrogation], it won't be well received... I don't ask questions on a file I don't know! In our profession, we're told not to ask questions unless we know the answer. I don't want to ask a question where my client might incriminate herself with her answer. I can't take such a risk.

Real progress would be for us to have access to the file. It's very good that we can make comments or ask questions at the end of the interview, but it's very risky for us because we have no certainty and we can only make suppositions.

The wider implications of the lack of disclosure for the role of the lawyer in interrogations was summed up by a lawyer in the Netherlands:

I cannot have any meaningful role at the interrogation. I cannot say anything. I can only intervene when the interrogator uses "illegal pressure", but these are extreme situations, and this practically never happens... during the interrogation I am more interested in learning about the facts and what the police know, rather than in monitoring whether the questions posed are fair. In any case, sometimes it is difficult to know whether the questions are fair, because a lawyer has no knowledge of the case file.

This view was reflected in the views expressed by a French lawyer, who said that the lack of access to the case file meant that in interrogations, the defence lawyer could only play the role of 'spectator'. However, he was optimistic that this would change:

288 See further, regarding disclosure, Chapter 6, section 6.
289 cf. FranCityLaw5.
290 cf. FranTownLaw5.
'It's really progress that we can attend police interviews. Even if we still don't have access to the whole file, we still have an important role. It's progress and I think in the end we'll have access to the full file. Once we've got our foot in the door, it'll go further.'

Although the lawyers observed in England and Wales were more interventionist than those in France and the Netherlands, it is important to note that they worked for specialist criminal defence firms and were 'repeat players'. They often attended the same police station several times a week, and dealt with the same officers repeatedly. Maintaining good relationships with these officers was important for them, not only in order to obtain better disclosure, but also because they depended on the police to facilitate their work by, for example, informing them about the detainee's status or the planned interview time. Thus, there was a risk, although we did not observe it directly, that in striving to maintain cordial relationships with the police some lawyers may, perhaps unconsciously, substitute the client's interests with considerations of their own interests. In the most extreme cases, being too amiable with the police could lead to a confusion of professional roles. For example, one lawyer observed in FranTown justified her friendly attitude towards the police by saying that as a result she was allowed to play a more active role in her client's interrogations than other lawyers. However, as the following extract from her interview demonstrates, the danger was that this was at the expense of colluding with the police in obtaining confessions:

'The investigators with whom I usually work know I'm not confrontational. If I need to ask a question to my client, if we need to suspend the interview for a few minutes... That's already happened to me: I could see the client was digging her own grave but I could feel that if I pushed her a bit, she was going to admit what was demonstrated in the file. The investigator had shown us: there were tape-recordings, witnesses who had seen her, her prints... We suspended the interview, I saw my client, although I'm not supposed to. I told her: "Stop it, you're digging your own grave." We sorted things out and it was much better for the client, things were sorted [square, straight]. That's because the investigator knew me.'

6.3. The Effects of the Lawyer's Presence in Interrogations

Our research was not designed to ascertain whether and how interrogations conducted in the presence of a lawyer might differ from interrogations held in the absence of a lawyer. However, the data we collected does enable us to draw tena-
tive conclusions about the impact of the presence of lawyers in police interrogations.

Lawyers in all jurisdictions were of the opinion that police officers were less likely to act oppressively or unfairly towards suspects, and more likely to adhere to the procedural rules, when lawyers were present. In the words of one lawyer interviewed in FranTown:

'I think police officers act with less violence [in the presence of a lawyer]... It's obvious that investigators don't scream at suspects in the same way when we're present. It also allows us to make sure that everything is done within the rules... I think they're a bit more methodical and so are we as a result. For example, the record of notification of rights was sometimes done right at the end of the garde à vue, I'm sure they might do it in advance now, because they know we might ask for it. It's better because it allows the suspect who might not have understood the verbal notification to read it.'

Similar views were expressed by lawyers in England and Wales. For instance, one lawyer said that in their view the presence of a lawyer 'makes a huge difference', because when a lawyer is not present the police tend to exaggerate the evidence that they have against the suspect, which may result in unnecessary admissions. In a similar vein, another lawyer said that in his view, his presence 'has a big effect on how they [police] do their work - they're more careful and perform their role properly'. Dutch lawyers also believed that the 'police behave very differently, and in a more correct manner towards the suspect, where a lawyer is present'.

One Dutch lawyer gave the following example:

'A couple of years ago, I visited a very young boy... The interrogating officer was an old raving man who started off posing questions in an angry tone: "Are you going to tell me now? What have you done?" And then I know that because I was present at the interrogation, he had greatly moderated his tone of questioning...'

Further support for the claim that police officers do behave differently if a lawyer is present may be found in the testimony of police officers themselves. Some officers in England and Wales said that they felt 'freer' in interrogations without a lawyer. When asked to specify what 'freer' meant, one officer in EngCity said that she felt that a lawyer might 'haul her up' on a legal issue that she is unaware of, and thus she has to be more careful in formulating questions. Likewise, another English police officer admitted that in the presence of a lawyer he felt 'uncomfortable because ... they're writing down what I'm saying, they're making sure that I've

294 FranTownLaw5.
295 EngCityLaw2.
296 EngTownLaw1.
297 NethTownLaw6.
298 NethCityLaw2.
299 EngCityPd14.
gone through everything properly. It transpires from these statements that, besides making officers feel uneasy, the presence of a lawyer may encourage them to comply with the law and procedural rules, and reflect on their approach to questioning.

The presence of a lawyer in a police interrogation may also contribute to the efficiency and effectiveness of the investigation. Assuming that the goal of interrogations is to obtain a truthful and comprehensive account from the suspect, and not only to gather incriminating evidence against them, the participation of the lawyer may contribute to achieving this goal in a number of ways. For example, the lawyer may identify and challenge confusing and speculative questions, which are counter-productive in obtaining an accurate statement from a suspect, and may help to clarify the suspect’s answers. In one case observed in EngTown involving domestic violence, for example, the lawyer’s interventions were instrumental in obtaining a coherent account from a highly emotional suspect. In another case observed in EngCity the lawyer, observing that the interview started on the ‘wrong foot’ because the suspect was overly cautious with her answers, facilitated the process by explaining to his client that she had nothing to lose by answering the questions more fully.

In other cases observed in England and Wales, lawyers were able to cast the facts of the case in a different light, and plant a doubt in the officer’s mind as to whether their client was the actual suspect, to add exculpatory information, and to introduce information that was relevant to mitigation. Furthermore, the lawyer may help to ensure the suspect’s co-operation with the interview process, particularly in the case of ‘difficult’ suspects. In the words of one police officer in EngCity:

‘If you’ve got an angry prisoner and you’re in there on your own, there’s a chance that the prisoner may become angry, whereas if you’ve got a solicitor there who’s already propped him for the interview and says, “Look, don’t get wound up... just sit back and relax” and things like that... and the solicitor can also “read” the defendant or suspect and think “Oh, he’s getting a little bit angry - let’s have a break, let him calm down.”... If you’ve got a solicitor there, you can see he knows that that’s going to be a trigger question.’

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300 Steven & Verhoeven’s study demonstrated that the presence of a lawyer at the interview appears to be associated with the diminished use of coercion by police during such interview (Steven & Verhoeven 2010).
301 Earlier studies in England and Wales stressed the benefits of the presence of a lawyer for the police in that they facilitated communication and encouraged suspects to comply with the interview procedures. See Brown 1997, p. 115-118.
302 EngCityLaw15.
303 EngCityLaw6.
304 EngTownLaw17.
305 EngCityLaw9; EngTownLaw3; EngTownLaw15.
306 EngTownPol5.
Interestingly, it was in England and Wales where police officers were most inclined to acknowledge the benefits of lawyers' attendance at interrogations. Possibly, this was partly because the police in England and Wales have had experience of lawyers attending police interrogations over many years. The attitudes to the presence of lawyers expressed by police officers in England and Wales in our study were markedly more positive than those found in research conducted in that jurisdiction in the 1980s.\textsuperscript{308} The positive attitudes of police officers towards defence lawyers may also result from the fact that lawyers in England and Wales play a more active role in police interrogations. Lawyers are able to act in ways that are not necessarily contrary to police objectives. Thus, it may be that the concerns expressed by some Dutch police officers in our study – namely that the lawyer's attendance at suspect interrogations is detrimental to the objectives of such interrogation – are unfounded.

One may speculate, however, that the possible positive effects of the presence of a lawyer in deterring improper police conduct would decline if lawyers remain passive. Although interviewing officers may initially be more careful in resorting to exerting pressure, they may revert to their former behaviour patterns once they get used to the lawyer's presence and see that lawyers rarely challenge them. In the study by Stevens & Verhoeven, for example, one senior officer suggested that when lawyers initially started to attend interrogations they were more cautious when exerting pressure on suspects, but that with time they would adopt their old behaviour, knowing that "these are always the same lawyers" and "it takes some getting used to" their presence.\textsuperscript{309}

Passivity on the part of lawyers may even encourage oppressive or improper conduct instead of deterring it. As one lawyer interviewed in EngCity put it:

"In terms of the officers, there may be two reactions. One type of officer is naturally more guarded when you are there, [but you] get [the second type of] officers who believe that they can push the suspect as hard as they like because they have legal representation and believe that we will tell them when they are going too hard on the client."\textsuperscript{310}

7. Conclusions

In this chapter we have examined how two rights, the right of a suspect to be notified of the right to silence and the right to legal assistance, operate in the context

\textsuperscript{308} For a review of the research see Brown 1997.

\textsuperscript{309} Stevens & Verhoeven 2010, p. 105.

\textsuperscript{310} EngCityLaw. In a notorious case in England and Wales, in which the Court of Appeal overturned a conviction because the police had acted oppressively in obtaining a confession, the court observed that ‘the solicitor who sat in on the interview, seems to have done that and little else ...’. We can only assume that in the present case the officers took the view that unless and until the solicitor intervened, they could not be criticized for going too far (R v. Paris, Adbullahi and Miller (1993) 97 Cr App R 99).
of police interrogations. There is clearly an interrelationship between the two rights at the interrogation stage. Jurisprudence of the ECtHR has stressed the importance of the right to legal assistance, including during police interrogation, in protecting suspects' privilege against self-incrimination and the right to silence. These are rights that 'belong' to the suspect and, if they are to be effective rights, suspects must know and understand those rights, and laws, regulations, systems and processes must be in place to ensure that suspects are able to exercise them. Moreover, the key facilitators of those rights, police officers and lawyers, must not only know and understand those rights but, particularly having regard to the vulnerable position of suspects in police detention (they are deprived of their liberty, are dependent on those responsible for their custody, and may be particularly vulnerable because of their age or physical or mental condition or circumstances), must seek to ensure that suspects understand them and accord the rights the respect that is implied by the fact that they are internationally recognized as key components of the right to fair trial.

The EU Directive on the right to information requires that suspects be promptly informed of the right to remain silent, both orally and in writing (notification must be included in the 'letter of rights'), that they be given the opportunity to read the Letter of Rights, and that they be allowed to keep it in their possession throughout the time that they are deprived of their liberty. However, whilst ECtHR case-law suggests that notification of the right to silence be given when the right arises, the Directive does not require that notification of the right to silence be given, or repeated, immediately before or at the beginning of an interrogation. The information must be provided in 'simple and accessible' language. There is no explicit obligation in the Directive for a procedure to be adopted to ensure that suspects understand the information provided, but it does encourage the relevant authorities to 'pay particular attention' those who cannot understand the content or meaning of the information, 'for example because of their youth or their mental or physical condition'.

In England and Wales, the Netherlands and Scotland, the law requires suspects to be notified of the right to silence at the commencement of an interrogation, although only in England and Wales is there a requirement for a suspect to be reminded of their right to silence when an interrupted interrogation is re-commenced. In France, information about the right to silence must be given immediately after placement in a GAV, but there is no requirement that a suspect be reminded of the right at the beginning of an interrogation, which may take place many hours after the notice was given. This is not contrary to the provisions of the EU Directive (provided that the right is set out in a letter of rights that the suspect is allowed to

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311 EU Directive on the right to information, recital 26. See also recitals 37 and 38 which refer to the need to draft a Letter of Rights in 'simple and non-technical language so as to be easily understood by a lay person without any knowledge of criminal procedural law', and also to the importance of training.
keep), but arguably it does not comply with the standards established by ECHR case-law. Whilst the fact that suspects are not informed of their right to silence at the beginning of interrogations in France may not be the primary reason why none of the suspects that we observed did exercise their right to silence, nevertheless both ECHR case-law and good practice suggests that suspects should be reminded of the right at the time when they have to decide whether they are going to take advantage of it.

The requirement in the EU Directive that suspects be notified of their rights in ‘simple and accessible’ language is directed at trying to ensure that suspects not only know what their rights are, but also understand them. There was common agreement across the jurisdictions that ‘repeat’ suspects ‘knew their rights’ whereas those who had not previously been arrested often did not. However, there is an important distinction between knowledge of rights and understanding of them and the implications of exercising (or not exercising) them. England and Wales differs from the other three jurisdictions in that the wording of the notification of the right to silence (the caution) is prescribed by regulations. In Scotland, a standard wording has been issued by the police, but in France and the Netherlands there was no standard caution. Furthermore, England and Wales was the only jurisdiction in which we observed a procedure for seeking to ensure that suspects understood the caution. In part, this may be explained by the fact that in England and Wales the right to silence, although technically still in existence, has largely been abrogated, and the law on inferences from silence is complex.\footnote{Although it should be noted that the wording of the caution was set out in PACE Code of Practice C prior to introduction of the legislation that abrogated the right to silence.} Nevertheless, the police observed in England and Wales often appeared to make a genuine attempt to ensure that suspects understood the right. This contrasted starkly with the practice of many police officers observed in the Netherlands, where generally no attempt was made to explain the caution to suspects, and in those cases where an explanation was provided emphasis was normally placed on the negative consequences for the suspect of remaining silent.

The different approaches to notifying and explaining the right to silence were reflected to a large extent in the police response to a suspect’s silence in interrogation. This is not regulated by the EU Directive, although the fact that the ECHR has described the right to silence, together with the right against self-incrimination, as ‘generally recognized international standards which lie at the heart of the notion of a fair procedure’\footnote{ECtHR 25 February 1993, Fonteyn v. France, No. 10828/84, paras. 41-44.} strongly implies that the right should be respected by the police. We found that the police in England and Wales generally did not try to undermine a suspect’s decision to remain silent. Whilst, faced with a silent suspect, the police interrogators often did continue to ask questions, we did not detect that in doing so that they made any serious attempt to persuade the suspect to speak (although account must be taken of the fact that our observed sample tended to involve less
serious suspected offences, and interviews were largely conducted by uniformed officers). Rather, the reason for asking questions was to give the opportunity to the suspect to respond to them and, thereby, increase the chance of adverse inferences being drawn at trial.\textsuperscript{34}

However, whilst the law on inferences from silence in England and Wales (which is unique amongst the four jurisdictions) may explain the approach of police officers in that jurisdiction to interrogation of suspects who exercised their right to silence it does not help us to understand the difference in approach between officers in Scotland, who appeared to approach the issue in a similar way to their English and Welsh counterparts,\textsuperscript{23,25} and officers in the Netherlands (and, to an extent, officers in France) who, as we have seen, appeared to be more willing to use a range of strategies to persuade suspects to answer their questions. Whilst we cannot draw definite conclusions, an explanation of the differences may lie in the way in which interrogations are regulated and recorded, and cultural attitudes regarding the purpose of interrogation. In Scotland, the maximum length of police detention is relatively short, and historically cross-examination by the police has been judicially discouraged.\textsuperscript{26} Whilst more recent case-law permits the police more latitude, the officers interviewed appeared to be conscious of the risk of judicial disapproval if they exerted much pressure. In the Netherlands and France, by contrast, police interrogation is characterized as a search for the essential truth, in accordance with their inquisitorial tradition; although in most cases judicial supervision of interrogations is ‘light touch’ or non-existent. The maximum period of police detention is relatively lengthy, particularly in the Netherlands, and the fact that interrogations are not normally electronically recorded means that the full extent of any pressure applied to the suspect in persuading them to speak may not be apparent after the event. Furthermore, although this was not the subject of the study, there were some indications that the courts in the Netherlands and France not only condone police strategies designed to persuade suspects to speak, but also themselves draw adverse conclusions from exercise of the right to silence.

This would suggest that whilst the requirement of the EU Directive that suspects be informed of their right to silence represents an important step towards ensuring that the right to silence is effective at the police investigation stage, it does not go far enough. The ECHR has held that waiver of the right to legal assistance

\textsuperscript{34} The law provides that inferences can be drawn from an accused’s failure to mention in interview a fact relied upon in their defence being a fact which, in the circumstances existing at the time, they could reasonably have been expected to mention (s. 54(1) Criminal Justice and Public Order Act 1994). If an accused has been prompted to mention a fact by reason of a question put to them by the police, a court is more likely to conclude that it would be reasonable to expect them to have mentioned it. See further Chapter 3, section 24.6.

\textsuperscript{23} Although, as we noted earlier, we were largely reliant on what police officers told us, and there was some suggestion that ‘tactics’ were used in more serious cases.

\textsuperscript{24} Even if interrogation is carried ‘to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded’ (Chalmers v. HM Advocate 1954 JC 66, para. 78).
should be ‘knowing and intelligent’ and that ‘it must be shown that [the suspect] could reasonably have foreseen what the consequences of his conduct would be’. If the right to silence is to be an effective right, a similar approach should be adopted. This would require police officers to explain the right in a neutral fashion, and would suggest the adoption of a procedure for verifying that suspects understand it. Furthermore, it is somewhat incongruous that a suspect who wishes to exercise a right that is characterized by the ECtHR as a ‘generally recognized international standard’ may be subjected to sustained pressure to persuade them to waive it. If the right to silence is to be accorded the status in practice that it is given in principle, this would require substantial change in the way that police interrogators, especially in France and the Netherlands, are trained and supervised. The introduction of electronic recording of interrogations, which has been routinely used in England and Wales for more than two decades, would mean that the issue is no longer largely hidden from judicial scrutiny.

The EU Directive on the right of access to a lawyer, reflecting ECtHR case-law, provides that suspects must be entitled to have their lawyer present when they are interrogated. This has long been reflected in the law of England and Wales, and legal provision for the right to the presence of a lawyer has been more recently introduced in France and Scotland. Of the four jurisdictions in the study, the Netherlands is the exception, there being no general legal right of suspects to have their lawyer present in police interrogations. Clearly, in this respect, the law in the Netherlands is not compliant with ECtHR standards, and a general right to have a lawyer present in police interrogations should be introduced without delay. If no action is taken, the law in the Netherlands will also not be compliant with the EU Directive on the right of access to a lawyer when it comes into force.

However, legal provision for a right to attendance of a lawyer at police interrogations does not necessarily translate directly into practice. We found that whilst lawyers in England and Wales, and France, attended all or most interrogations of suspects who had requested legal assistance, this was not the case in the Netherlands (even in those cases where a right to attendance of a lawyer did apply) nor in Scotland. Those differences would seem to be explained by a range of interconnected factors: legal and practical arrangements relating to attendance of lawyers at interrogations; legal regulation of the role of lawyers during interrogations; legal aid provisions; and the attitudes of lawyers.

Whilst in England and Wales, and in Scotland, there are no explicit limitations on the period of time that the police have to wait for a lawyer to attend on a suspect

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317 ECtHR 24 September 2009, Pisichalnikov v. Russia, No. 7025/04, para. 76. See also ECtHR 31 March 2009, Plaska v. Poland, No. 20310/02, and ECtHR 1 April 2010, Pavlenko v. Russia, No. 42371/02, para. 102.

318 Although, as noted in section 5.1 above, our research methodology was such that these findings cannot necessarily be generalized.
at a police station, there is a two hour time limit in both the Netherlands and France. It can be argued that such a time limit is contrary to ECHR case-law and to the EU Directive since it can have the effect of denying a suspect their right to legal assistance, and those jurisdictions should introduce a requirement that the police offer the suspect an opportunity to instruct a different lawyer before proceeding with an interrogation, as is the case in England and Wales. However, whilst the time limit did appear to have some impact on the attendance of lawyers at interrogations in France (particularly where a suspect arrested in the evening or at night was interrogated the following day), it was not a major factor in preventing Dutch or French lawyers in our research sample from attending interrogations.

More important was a range of legal and practical factors, including the ways in which duty lawyer schemes were organized and administered, the extent to which the police were prepared to provide disclosure to the lawyer, and the right of lawyers to intervene in police interrogations (and the response of the police to any interventions), and remuneration. It is important to stress that none of these appeared to be determinative factors in respect of attendance of lawyers at interrogations; rather it was the way in which the various factors interacted and interrelated. For example, lawyers in our Scottish sample tended not to attend the police station in person (and, therefore, generally did not attend interrogations of their clients) even though there were no legal limitations on their right to intervene. In both France and the Netherlands there were (similar) limitations on the right of lawyers to intervene, and yet in our sample lawyers in France did attend interrogations whereas in the Netherlands they often appeared reluctant to attend even in those cases where their clients had a right to have a lawyer present. On the other hand, the obligations of lawyers under the duty lawyer schemes appeared to be more effective in ensuring lawyers' attendance in France compared to the Netherlands. This suggests that close attention needs to be paid to detailed legal and practical provisions in order for the right to legal assistance in police interrogations to be effective.

Finally, an important factor in respect of both attendance at, and the role played by lawyers in, police interrogations was the professional culture of lawyers who act for suspects at the investigative stage of the criminal process (see Chapter 7, section 5). Professional cultures, of course, do not develop in a vacuum and there is

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319 In England and Wales, there is provision in Code of Practice C to proceed with an interrogation without the attendance of a lawyer in certain circumstances, although authority to proceed with an interrogation must normally be granted by a senior officer not connected with the investigations. See Chapter 3, section 2.1.5.

320 The EU Directive on the right of access to a lawyer provides that the must be able to participate effectively when assisting clients at interrogations. However, this is qualified by the statement that 'such participation shall be in accordance with procedures in national law, provided these procedures do not prejudice the effective exercise and assurance of the rights concerned (art. 33(h)). Given the rationale for legal assistance in police interrogations, it can be argued that the limitations in France and the Netherlands are contrary to ECHR jurisprudence and, prospectively, to the provisions of the EU Directive.
an important interrelationship between the attitudes of lawyers and the kinds of factors identified above. The attitudes of lawyers in our samples in France, the Netherlands and Scotland to the significance of, and their role in, police interrogations resonate with the kinds of attitudes that were evident in the early years following introduction of the right to custodial legal advice in England and Wales. Experience in England and Wales suggests that bar associations, in co-operation with governments, the police and the judiciary, have an important role to play in developing an appropriate professional culture that recognizes custodial legal advice and assistance as a fundamental element of the right to fair trial.
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CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

In adopting the **Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings in 2009**, the Council of the European Union (EU) made a commitment to strengthening the procedural rights of suspected and accused persons. The European Commission, Parliament and Council recognized that procedural rights are essential to safeguarding the right to fair trial, and that EU action in this area would enhance citizens’ confidence that the EU and Member States will protect and guarantee their rights. Moreover, the adoption of minimum standards would advance the cause of mutual recognition as the cornerstone of judicial co-operation across the EU. In view of the importance and complexity of the issues involved in the Roadmap, the Council decided to adopt a step-by-step approach to the introduction of legislation, and each Directive has been preceded by an impact assessment, and adopted only following extensive discussions and negotiations between the EU institutions and Member States.

The Council was right to recognize the complexity of legislating on an EU-wide basis in this area. Approaches to criminal procedure generally, and procedural rights of suspected and accused persons in particular, are informed by a complex array of interrelated historical, legal and cultural factors and influences, and are also often closely bound up with perceptions of national identity. A simple distinction between jurisdictions that have an inquisitorial tradition and those that have a common law, adversarial, tradition does little to assist in an understanding of how criminal procedure, and procedural rights, are regulated or, less still, how they work in practice across different jurisdictions.

The research which forms the subject-matter of this book was conceived within the context of the EU Roadmap. We set out to explore how the procedural...
rights of suspected and accused persons which were to form the subject-matter of the first three Directives under the Roadmap - the right to interpretation and translation, the right to information, the right of access to a lawyer, and the right to silence2 - operated in practice in four EU jurisdictions. The jurisdictions – England and Wales, France, the Netherlands, and Scotland – do cover the inquisitorial-adversarial divide but they each have distinctive and different approaches to criminal procedure and procedural rights. None of the Directives was in force during the period in which the research was conducted. The Directive on the right to interpretation and translation had been adopted in October 2010, before the project started, but the date for transposition was 27 October 2013, shortly before publication of this book.3 The Directive on the right to information was adopted in May 2012, whilst the fieldwork was being conducted, and the transposition date is June 2014.4 The Directive on the right of access to a lawyer, having proved quite controversial, had a lengthy gestation period. The final text was not approved by the European Parliament until September 2013,5 with adoption following, on 7 October 2013,6 after completion of the fieldwork, and will not have to be transposed into national law until 2016.7 This being the case, our objective is not to judge, in a pejorative sense, whether the laws and procedures of the jurisdictions in our study comply with the standards set by the Directives. Rather, one of our aims has been to examine how the rights work in practice in order to enable us to assess what more will have to be done in the four jurisdictions in order to comply with those standards when they are in force.

However, as is evident from the account provided in Chapter 1, the standards set in the EU Directives have not been developed in a vacuum. Rather, they reflect and build upon provisions of the European Convention on Human Rights (ECHR), particularly Articles 5, 6 and 8, and the jurisprudence of the European Court of Human Rights (ECtHR). The judgment of the ECtHR that has arguably had the greatest impact on the procedural rights of suspects at the investigatory stage of the

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2 The right to silence is not included as a substantive right, but the Directive on the right to information provides that suspected and accused persons must be informed of the right (Arts. 3 & 4).
7 Note that the UK has not opted in to the Directive on the right of access to a lawyer.
criminal process is that of *Sulhuz v. Turkey*,\(^8\) concerning the right to legal assistance. Its influence has been so significant that in some jurisdictions the right to legal assistance and associated rights have been dubbed the 'Sulhuz rights'. Therefore, in analysing our research data we have not only taken into account the prospective EU standards, but also the standards set by the ECtHR which, of course, are already applicable to signatories of the Convention (which include the four jurisdictions in the study).\(^9\)

A key principle of the ECtHR jurisprudence regarding procedural rights is that they must be ‘practical and effective’ and not merely ‘theoretical and illusory’,\(^10\) and that the accused must be able to exercise ‘effective participation’ in criminal processes.\(^11\) It was argued (by two of the authors of the current study) in *Effective Criminal Defence in Europe,*\(^12\) that in order for access to criminal defence to be effective, there is a need for:

- a constitutional and legislative structure that adequately provides for criminal defence rights;
- regulations and procedures that enable those rights to be ‘practical and effective’; and
- a consistent level of competence amongst legal professionals, underpinned by appropriate professional cultures.

This has informed our approach to the question of whether the procedural rights covered by the EU Directives are ‘practical and effective’ in the four jurisdictions in the study. Therefore, in addition to examining relevant constitutional and/or legislative provisions, we have scrutinised the regulations and procedures for putting those rights into practice, and also - by means of the fieldwork – the actions, attitudes and cultures of the two sets of professionals who have primary responsibility for ensuring that the rights are implemented and respected, that is, police officers and lawyers.

In our view, the EU Roadmap of procedural rights, and the legislative programme encompassed by it, represents a significant advance in the development of a fair, rational approach to procedural rights in the EU which has the capacity, as envisaged by the EU Institutions, to safeguard the fairness of the trial process, enhance the confidence of citizens, and support the fundamental policy of mutual recognition. The European Court of Justice will, no doubt, play a significant role in

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\(^8\)  [ECtHR 27 November 2008, *Sulhuz v. Turkey*, No. 36391/02.](#)

\(^9\)  England and Wales, and Scotland, are not separate signatory states, but they are constituent jurisdictions of the United Kingdom, which is a signatory.

\(^10\)  *Airey v. Ireland* (1979) 2 EHRR 305; *Artico v. Italy* (1981) 3 EHRR 1; *ECtHR 9 October 2008, Mihaljev v. Russia*, No. 62936/00, para. 209; and *ECtHR 24 September 2009, Pshelchatikov v. Russia*, No. 7025/04, para. 66.


\(^12\)  Cape *et al.*, 2010.
judging compliance with the Directives in cases where preliminary rulings on their interpretation are requested. Another mechanism for assuring compliance at state level is the review by the European Commission which it is required to present to the European Parliament and to the Council (one year after the relevant transposition date), on the extent to which Member States have taken the necessary measures in order to comply with the Directives, and the possibility of infraction proceedings where they have not. Our findings suggest that formal incorporation into law of procedural rights, without effective action in respect of the other two components identified above (regulations and procedures, and professional competence and cultures), presents a danger that the interests of suspects and accused persons, and ultimately the prospects of fair trial, may not only not be enhanced but may even be damaged. For example, because laws and procedures are in place in respect of the duty of the police to notify suspects of their rights, a court may wrongly assume that a particular accused person understood the notification and made an informed decision in waiving them. Similarly, a court may rely on a confession without examining its veracity or reliability on the basis that the accused had exercised their right to consult a lawyer, even though that consultation was limited to a brief telephone conversation.

In Chapters 4 to 8 we set out our conclusions drawn from analysis of the data gathered during the project on how the four procedural rights 'work' in practice in the four jurisdictions in the study. Taken together, they provide an important body of knowledge about how procedural rights were delivered in the four jurisdictions during the period that the fieldwork was carried out. We believe, however, that their utility goes beyond simply providing an historical account of the position during the period of the fieldwork. The analyses disclose both common problems, and also some 'best-practice' solutions, which can be used to inform strategies for improving procedural rights in the jurisdictions in the study and in other jurisdictions in Europe. In this chapter we draw some broader conclusions about the implementation of procedural rights, and seek to identify the kinds of factors that need to be taken into account in ensuring that procedural rights are effectively implemented and entrenched so that they become routinized and commonplace – an accepted part of everyday practice – especially for police officers and lawyers. We then set out a number of recommendations based on the conclusions drawn in respect of the four procedural rights. Taken together, we hope that they will assist Member States as they prepare to implement the EU Directives, will inform assessment of whether they have been effectively implemented, and will be of use beyond the EU to international bodies, states and NGOs who are concerned with improving fair trial rights and access to justice.

13 See Spronken 2011.
14 For example, the findings and conclusions should be of interest to those considering the implementation of the United Nations Principles and Guidelines on Access to Legal Aid in
2. A Suspect-Focused Perspective

The rights set out in the EU Directives are rights of suspected and accused persons. That the EU planned to legislate to strengthen the procedural rights of suspected and accused persons was clear from the resolution on the Roadmap adopted by Council of the EU. It is also clear from the wording of the Directives themselves. The Directive on the right to interpretation and translation provides that Member States must ensure that 'suspected or accused persons who do not understand or speak the language...are provided, without delay, with interpretation', and that they have a right to challenge a decision that they do not need interpretation. The Directive on the right to information provides that the Directive 'lays down rules concerning the right to information of suspects or accused persons'. The objective of the Directive on the right of access to a lawyer is to lay down minimum rules concerning 'the rights of suspects and accused persons...to have access to a lawyer'. This, of course, is not a novel approach. Under Article 6 ECHR 'everyone is entitled to a fair and public hearing' and the procedural rights set out in Article 6(3) are expressed as minimum rights of '[e]veryone charged with a criminal offence'.

It may seem unnecessary to labour the point that procedural rights are rights that belong to or are possessed by persons who are suspected or accused of crime. It is surely a trite observation. However, the research indicates that the rights which were the subject of the study are sometimes not defined by law, and often not implemented in practice, in a way that gives recognition to the fact that they are suspects’ rights, and that it is for suspects (rather than lawyers, prosecutors or police officers) to determine whether or not they wish to exercise them. This can be illustrated using a number of examples from our research.

The laws and regulations on interpretation for suspects in police detention are not always expressed as rights of the suspect. At the time that the fieldwork was carried out, in none of the jurisdictions in the study did the law explicitly provide for a right of suspects to interpretation during the investigative stage. Regulations or guidance in England and Wales, and the Netherlands, did provide for interpretation, but were not expressed in terms of it being a right of the suspect, and the decision on whether an interpreter was needed was firmly in the hands of the police or prosecutor. Police officers in England and Wales, and Scotland, said that they


35 See footnote 1.
36 Art. 2 Directive on the right to interpretation and translation.
37 Art. 1 Directive on the right to information.
38 Art. 1 Directive on the right of access to a lawyer.
39 Although in England and Wales, amendments to Code of Practice C designed to implement the Directive on interpretation and translation were implemented in October 2013, and in the Netherlands amendments to like effect had been made to the CCP, although they are not yet in force. See Chapter 3, section 4.4.9.
would err on the side of caution in determining whether an interpreter was needed, and defence lawyers tended to confirm that they did so in practice. In the Netherlands, on the other hand, it appeared that police officers tended to approach the issue in terms of the investigative needs or convenience of the police, rather than in terms of it being a right of the suspect. A number of Dutch police officers told us that they would try to converse with a suspect in the suspect's own language, or in a third language, and we observed that they did so even though the officer was not proficient in that language. French lawyers told us that French police often adopted a similar approach. There also appeared to be a tendency for lawyers in these two jurisdictions to co-operate with the police in this approach, and we even observed one case where the lawyer, rather than insist that an interpreter be called in, assisted the police officer to reformulate questions in a more simple form in the hope that this might be understood by the suspect.

A second example concerns the right to consult a lawyer. Both ECHR jurisprudence and the EU Directive on the right of access to a lawyer are quite clear that a suspect has the right of access to a lawyer both before and during police interrogation. In all four jurisdictions the law now provides for a right of access to a lawyer prior to interrogation, although the Netherlands has still to introduce legislation to comply with the right to have a lawyer present in interrogations.\(^{20}\) The restrictions in France and the Netherlands regarding maximum waiting-time for lawyers to attend the police station, on lawyer-client consultation times, and on what lawyers can do in police interrogations are also antithetical to a suspect's right to legal assistance. A suspect may be deprived of their right to effective legal assistance for reasons that are completely outside of their control.

For the right of access to a lawyer to be effective as a right of the suspect, it is necessary for suspects to know of the right, to understand the implications of exercising or not exercising it, to have time to consider whether they should exercise it, and to know how to exercise it (and since they are in custody, to be assisted to do so). In England and Wales, where a statutory right to legal assistance has existed for nearly three decades, we observed some good procedures and practices in this respect and, although by no means a universal practice, observed some custody officers positively encouraging suspects to exercise the right.\(^{21}\) However, across the other three jurisdictions we saw procedures and practices that did not ensure that suspects knew and understood their right, and on occasions observed that they were positively discouraged from exercising it.\(^{22}\) A particular concern of many suspects is to get out of detention as soon as possible and some police officers, aware of this, emphasized the delay that could ensue from a request for legal

\(^{20}\) Currently, this right is limited to certain, restricted, circumstances, and is not of general application.

\(^{21}\) A practice that we also observed, to a limited extent, in Scotland.

\(^{22}\) Many such practices were also found by researchers in England and Wales in the first decade following the introduction of the right to legal assistance. See, for example, Brown 1997 which refers to much of the research conducted during this period.
assistance. Whilst the potential for delay arising from a request to consult a lawyer is sometimes exaggerated (since the length of detention is determined by perceived investigative need and, particularly in more serious cases, by whether the suspect is kept in custody pending their first court appearance), some officers argue that they should be honest in explaining the possible impact of requesting legal assistance. In England and Wales, in recognition of this dilemma for police officers, a revision to regulations in 2012 prohibited officers from indicating to a suspect, except in response to a direct question, that the period of detention might be reduced if they waive their right to consult a lawyer. This, of course, does not entirely resolve the problem, but does indicate to police officers that they must not use the prospect of delay as a tactic in dissuading suspects from exercising their right.

The approach to the right of access to a lawyer that is implied by the restrictions imposed in respect of the delivery of legal advice and assistance in France and the Netherlands, and the perceptions and practices of many police officers, is that it is, at best, a necessary inconvenience that must not be allowed to interfere with the investigative process. However, it was not only the legal restrictions and practices of the police that undermined the right of access to a lawyer as a right of the suspect. Whilst in England and Wales the business model adopted by the law firms observed and the terms of the criminal legal aid contract, and in England and Wales and in France the organization of the duty lawyer schemes, normally ensured that a lawyer would attend a client at the police station within a reasonable period of time, in the Netherlands and Scotland factors relating to the organization of the delivery of legal assistance and to the personal interests of the lawyers concerned meant that suspects were often effectively denied their right to consult a lawyer and to the presence of the lawyer in police interrogations. Furthermore, even where lawyers did attend upon their clients in person, they often appeared to be primarily focused on giving advice in respect of the interrogation, and did little in relation to other needs of their clients such as providing advice regarding other investigative actions, taking appropriate action regarding their welfare, enquiring about the conditions in which they were held, or making representations about pre-trial release.

Other examples of legal, procedural and organizational failures to treat suspects' procedural rights as rights of the suspect could be given, and a further example relating to the right to silence is dealt with in section 3.1 below. There we argue that strategies adopted by some police officers to persuade suspects to speak in interrogations not only do not accord appropriate respect to the right to silence as a right of the suspect, but positively undermine it. It is important to recognize that the approach to suspects' rights was by no means always negative. As we noted earlier, the right of access to a lawyer has existed in England and Wales since 1986

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23 PACE Code of Practice C, Note for Guidance 6ZA.
24 In Scotland, legal assistance was normally limited, by the lawyers, to advice over the telephone, and in the Netherlands we observed that some lawyers would not attend the police interrogations of their clients even in those cases where there was a right to attend.
and, particularly in the following decade, many refinements to the law, regulations and procedures were made in an attempt to improve the efficacy of the right.\textsuperscript{25} Significant efforts had been made in France, Scotland, and the Netherlands to respond to the newly-instituted right to legal assistance in a relatively short period of time. However, the ECHR effectively places responsibility on state authorities to observe and facilitate procedural rights, and the EU Directives require Member States to ensure that the rights covered by them are effective. Whilst private lawyers are not state authorities, given the significance of state funding in the provision of legal aid, states can exert a great deal of influence in the way that legally-aided services are delivered. Our research demonstrates that at present the procedural rights of suspects are often treated as subordinate, and sometimes even contrary, to other systemic, organizational and personal objectives and interests. We suggest that there needs to be a change of focus, concentrating on procedural rights as being the rights of suspects, if the EU Directives are to achieve the aims established by the EU Roadmap on procedural rights.

3. Compliance with EU Directives in the Four Jurisdictions

It was noted at the beginning of the chapter that the three EU Directives adopted so far were not in force during the period of the research. The Directives are based, to a large extent, on the relevant provisions of the ECHR, and take into account relevant jurisprudence of the ECHR. However, in some areas the Directives develop the standards found in the case-law of the ECHR and, given the objective of establishing common minimum standards that are effective in practice, many of the provisions of the Directives are concerned with the mechanisms by which the rights are to be given effect. Each of the Directives requires Member States to 'bring into force the laws, regulations and administrative provisions' by the respective transposition dates,\textsuperscript{26} but as was observed earlier, effective implementation requires detailed attention to be paid to processes and procedures, and also to professional cultures and attitudes. In Chapters 4 to 8 we have sought to identify where current law and practice falls short of the requirements of the Directives, and in this section we suggest some of the more significant changes that will be necessary in order that the four jurisdictions in the study comply with the Directives' requirements, together with some examples of procedures and processes already adopted which may be useful in considering what actions are necessary and appropriate.

\textsuperscript{25} Such refinements were often in response to research findings, and during that decade much of the research was funded, directly or indirectly, by government departments. Unfortunately, this is no longer the case.

\textsuperscript{26} Art. 9 Directive on the right to interpretation and translation; Art. 11 Directive on the right to information; and Art. 15 Directive on the right of access to a lawyer.
3.1. The Right to Interpretation and Translation

Article 2(1) of the EU Directive on the right to interpretation and translation requires Member States to ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the proceedings and whether they need the assistance of an interpreter. This obligation is not as straightforward as it sounds. We found, for example, that police officers (frequently in the absence of a clear procedure or protocol) often made a distinction between the level of understanding needed at the stage when a suspect was ‘booked in’ at a police station and notified of their rights, and the level of speaking ability and understanding needed for the purposes of interrogation. In relation to the former, we observed some good practices, such as the multi-lingual posters displayed in custody offices in England and Wales, and Scotland, which could be used to identify the relevant language, and the multi-lingual notices of rights also displayed, and the multi-language translations of the Letter of Rights that were available via the internet. However, in none of the four jurisdictions did there appear to be a formal protocol, or guidance, either on how such resources (where they were available) should be used in order to determine language ability, nor on the level of ability needed at different stages of the detention and investigation process.

Determining whether a suspect needs an interpreter can be a difficult task. There is no simple test that could be administered quickly, and by a non-linguist, and it may be difficult to distinguish between the language ability needed to understand the notification of rights compared to that needed to engage meaningfully in an interrogation. It may also be difficult to assess whether a suspect has a sufficient understanding of ‘the language of the proceedings’, as opposed to a sufficient ability to ‘get by’ for the purposes of everyday life, and some suspects may not want to co-operate in the process of determining whether they need an interpreter or, conversely, may be too ready to indicate that they do understand.27 As a result, it is probably not possible to formulate a precisely worded regulation or guidance, but on the other hand it is necessary to guard against the kind of ‘making do’ strategies that we observed in France and the Netherlands. In England and Wales and Scotland, such difficulties are catered for by placing responsibility on an officer (the custody officer), who has specific responsibility for the treatment and care of suspects in custody,28 to determine whether a suspect can understand English, or whether there is doubt about their ability to do so, and to call an interpreter if they cannot ‘establish effective communication’ with the suspect.29 Further, a suspect must not be interrogated in the absence of an interpreter if the suspect has difficulty

27 For a more detailed exploration of such issues see Trochuel 2006, Chapter 12.
28 See section 4 below, and Chapter 3, sections 2.4.9 & 5.4.9.
understanding English, the interviewer cannot speak the suspect’s own language, and the suspect wants an interpreter present. It is also worth noting that in England and Wales, and Scotland, custody offices are routinely subject to CCTV surveillance and interrogations are routinely electronically recorded. In France and the Netherlands, where this is not the case, one problem is that it may be difficult, if not impossible, for a suspect’s language ability and level of understanding to be subsequently assessed when the only record available is a written record made by a police officer. Whilst the mechanisms adopted in England and Wales, and Scotland, are not fool-proof, their general tenor is that the police should err on the side of caution where there is doubt about the suspect’s language ability, which is generally what officers in those jurisdictions appeared to do.

Article 5 of the EU Directive on the right to interpretation and translation provides that Member States must take concrete measures to ensure sufficient quality of interpretation and translation, and should endeavour to establish a register or registers of appropriately qualified interpreters and translators. Interpretation and translation must be of sufficient quality to ensure that the suspect has knowledge of the case against them and is able to exercise their right of defence. The general view of both police officers and lawyers across the four jurisdictions was that the standard of interpretation was generally good, although some recognized that, since they did not speak the relevant language, they were not well-placed to make a judgment, and some were concerned (particularly where interpretation was provided by telephone, and sometimes by an interpreter who was not based in the same country) about their lack of knowledge of legal terminology and procedure. In England and Wales, the Netherlands and Scotland, regulations or procedures were in place that were designed to ensure that only registered or accredited interpreters were used, although it was not possible for us to assess whether in practice this was always the case. Arranging the prompt personal attendance of an interpreter, particularly in respect of less frequently encountered languages, proved to be a significant problem in some of the research sites, leading to delay in proceeding with interrogations, and consideration needs to be given as to how this might be improved.

We were able to gather very little data on translation, as opposed to interpretation. The Directive on the right to information provides that the Letter of Rights should be written in a language that the suspect understands, but that if a suitable translation is not available a suspect may, as a temporary measure, be orally informed of the contents of the letter in a language that they understand. As noted ear-

31 Arts. 2(8) & 3(9) Directive on interpretation and translation.
lier, in England and Wales, and in Scotland, this information was available in multiple languages. However, although it was not something that we examined in our research, when the EU Directive on the right to information comes into force, Member States will have to consider how translation of the case materials which are required to be given to the suspect under Article 7 of that Directive is to be provided whilst the suspect is in police detention.

Finally, in respect of interpretation and translation, Article 6 of the EU Directive on the right to interpretation and translation provides that Member States should request those responsible for training 'to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication'. In conducting the research, we did not come across any police officer, or lawyer, who said that they had received any training in respect of communicating with suspects through an interpreter. As a consequence, we observed interrogations and consultations where there was no attempt by the police officer or lawyer to establish any ground rules concerning the interpretation, resulting in the loss of some communication with the suspect. Clearly States will have to consider how they are to implement this obligation under Article 6.30

3.2. The Right to Information

The EU Directive on the right to information encompasses a number of information requirements: the right to information about procedural rights, the right to information about the criminal offence of which a person is suspected or accused, and the right to certain case materials. In relation to the first of these, Member States must ensure that suspected or accused persons are promptly informed of specified procedural rights, orally and in writing. The obligation is to provide the information in simple and accessible language, which is designed to ensure that suspected and accused persons understand their rights and are able, in respect of those rights for which waiver is possible, to make an informed choice about whether to exercise them. It is argued in Chapter 5 that procedure, language and timing are crucial elements in ensuring that the right to information about rights is effective. We found that the most effective procedure for informing suspects of their rights, and the clearest Letter of Rights, were to be found in England and Wales. It is also noteworthy that in England and Wales, regulations clearly specify when notification of rights is to be given, and provide for a standard Letter of Rights. In Scotland there was a particular problem with the form of notification regarding the right to legal assistance, the SARP procedure, which police officers found to be almost unworkable in practice. In the Netherlands responsibility for notification of rights was, to an extent, divided between arresting officers and assistant prosecutors, and we found that formal procedures were not always adhered to. In France and the Netherlands, there was no provision for a dedicated officer to book in suspects at

30 See further the Training Framework.
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Police stations, and whilst a standard Letter of Rights appeared to be available in France, it was often not used and, as was the case in Scotland, suspects were not given a copy of it to keep with them. Furthermore, the Letters of Rights in France, the Netherlands and Scotland did not include information about the right to interpretation nor, in France and the Netherlands, information regarding the right to inform a foreign suspect's consulate or embassy. In none of the four jurisdictions did the Letter of Rights include information about the length of, or the right to review, detention, nor the right to translation. Clearly in planning the transposition of the Directive into national laws, these issues will have to be addressed.

One particular feature that we found to be common across jurisdictions was the different approaches adopted by police officers to providing information about rights to suspects who had previous experience of arrest and detention of their rights, compared to the approach taken to informing 'inexperienced' suspects. There was a common view, amongst lawyers as well as police officers, that 'repeat' suspects 'know their rights' and, indeed, we observed many 'repeat' suspects who made it clear that they did not want to be bothered with being informed about their rights. As a result, the process of notifying such suspects of their rights was often brief and partial. We argue in Chapter 8 that there is an important distinction to be made between knowledge of rights and understanding of them, which was understood by some police officers and lawyers, but not by others. It is interesting to note that whilst in general terms police officers sought to maintain control over suspects, faced with a suspect who, by their actions or what they said, made it clear that they did not want to be bothered with being informed of their rights, some officers adjusted their behaviour to comply with the suspect's apparent wishes. This is something that could, and should, be addressed by training.

The second element of the Directive on the right to information is the right of a suspect to be promptly informed of the criminal act of which they are suspected in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. Recital 26 of the Directive states that the information should include a description of the facts relating to the suspected offence including, where known, the time and place, and should be provided to the suspect before the first official interrogation of the suspect by the police (subject to any prejudice that it might cause in the case of an on-going investigation). Whilst in

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34 As is required by the Art. 4(1) of the Directive on the right to information.
35 Although this has since been added to the new Letter of Rights in Scotland.
36 Note that Recital 26 of the EU Directive on the right to information states that particular attention should be paid to persons who cannot understand the content or meaning of the information, but the Directive does not state that the provision of information can be omitted if the police believe that a suspect already knows their rights.
37 There is also a danger in seeing suspects' rights, and their understanding of them, as static: A suspect's needs will be different each time that they are detained, as the offence and circumstances of the arrest may differ. See the discussion in Hodgson 1992.
38 Art. 6(1) Directive on the right to information.
England and Wales the police were observed to routinely provide at least some information relating to the suspected offence to the lawyer acting for a suspect (but not to unrepresented suspects), this generally did not happen in the other three jurisdictions. The impact of this on the attitudes and role of defence lawyers is explored in section 5 below, but we note here that in transposing this provision into national laws (which will also require action in England and Wales in respect of disclosure to unrepresented suspects, and of the extent of the information), careful attention will need to be paid to both regulation of the process and training so that police officers have a clear understanding of their disclosure obligations.

The third element of the Directive concerns the obligation under Article 7 to provide access to case documents in possession of the competent authorities which are essential to effectively challenging the lawfulness of the arrest or detention, and to material which is necessary to safeguard the fairness of the proceedings and to prepare the defence. Recital 30 of the Directive provides that such documents and materials should be made available at the latest before a competent authority is called up to decide the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention. This may mean that case materials have to be provided at a very early stage because the right to challenge the lawfulness of detention arises from the moment that a person is deprived of their liberty. Whilst we did observe some cases, particularly in England and Wales, where the police permitted defence lawyers to view CCTV material before an interrogation, this kind of disclosure was not generally the case across the jurisdictions. This aspect of the Directive is open to differing interpretations – for example, as to what amounts to a challenge to the lawfulness of an arrest or detention, and as to what documents are essential to enable an effective challenge to be made – and again will require careful regulation if the provision is to be applied in a rational and consistent manner both within and across jurisdictions.39

3.3. The Right of Access to a Lawyer

As noted earlier, the EU Directive on the right of access to a lawyer has been the most controversial of the three Directives adopted so far, despite the fact that its provisions largely reflect ECHR jurisprudence, which already applies to EU Member States.40 One reason for the controversy was that whilst it is commonly accepted

39 Note that this has been the subject of legislation in the Netherlands, which provides that the right of access to case materials may apply even before a suspect is detained, although detailed regulation is still awaited (see Chapter 3, section 4.4.4). It has not been the subject of legislation in the other three jurisdictions.

40 And also reflects wider international standards such as those expressed in the Art 14(3) of the International Covenant on Civil and Political Rights; the UN Basic Principles on the Role of Lawyers, principles 1 and 6; the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 3; and many regional human rights conventions and
that persons accused of criminal offences have a right to legal assistance at the trial stage of the criminal process, it was argued that prosecutorial oversight of police investigations, which is characteristic of the inquisitorial tradition, rendered legal assistance (particularly during interrogations) unnecessary. Whilst, in the context of ECHR case-law and the EU Directive, this view is no longer sustainable, the introduction of the right to effective legal assistance at the investigative stage will require a significant cultural shift in some jurisdictions. As a result, transposition of the Directive into national laws will require careful planning and implementation, accompanied by training of relevant criminal justice personnel so that they know and understand the provisions, and are clear about their respective roles at the investigative stage of the criminal process.

The EU Directive gives suspected persons the right of access to a lawyer before they are questioned by the police or other law enforcement or judicial authorities, whilst certain specified investigative acts are carried out, and during any interrogation. Furthermore, the suspected person must be able to exercise their rights of defence practically and effectively, and the lawyer must be able to ‘participate effectively’ during the questioning of their client. For the right of access to a lawyer to be effective in practice, in compliance with the Directive, a number of provisions (in addition to effective notification of the right to the suspect – section 3.2 above) must be put in place.

First, the right of access to a lawyer by suspected persons must be clearly governed by law. Of the four jurisdictions in the study, England and Wales, France and Scotland have laws which satisfy this requirement, but whilst the Netherlands has legislative provision for a right of access to a lawyer prior to interrogation, as noted earlier, this does not generally extend to a right to presence of the lawyer during interrogations. Clearly, the Netherlands should have introduced such a legal provision in response to the ECHR case-law, and will have to do so in order to comply with the Directive.

Second, Article 9 of the Directive requires that in relation to any waiver of the right to a lawyer, the suspect must be provided with clear and sufficient information in simple and understandable language about the content of the right and the possible consequences of waiving it, and any waiver must be given voluntarily and unequivocally. Furthermore, any waiver, and the circumstances under which it is given, must be recorded, and a waiver must be revocable at any stage of the proceedings. In our study, the most developed procedure governing the decision-making process was found in England and Wales where, in contrast to the other jurisdictions, regulations provide that a suspect must be explicitly told that they can

charters, and also the constitutions of many countries. Note that the United Kingdom has not opted-in to this Directive.

41 Art. 3 Directive on the right of access to a lawyer, and see further Chapter 1, section 2.5.4.
consult with a lawyer at any time, and also require that a suspect who has waived their right be reminded of the right at the beginning of any interrogation and that the interrogation can be delayed if they then wish to exercise it. Furthermore, where a suspect waives their right of access to a lawyer, they must be informed that the right includes a right to consult with a lawyer by telephone, and if they continue to waive the right, must be asked the reason why, such reason being recorded in the custody record. Where, conversely, a suspect who requested legal advice subsequently changes their mind, they may only be interrogated in the absence of contact with a lawyer if the suspect confirms their change of mind in the custody record, and proceeding with the interrogation is authorized by a senior officer.

Such provisions were largely absent in the other jurisdictions in the study, but it is suggested that this is the kind of detailed regulation that will be necessary in order to ensure compliance with the provisions of the Directive. Even in England and Wales, an amendment will be necessary to comply with the requirement of the Directive that a suspect must be informed of the possible consequences of waiving their right to legal assistance. Although not included in our research, it should be noted that in Belgium the requirement of ensuring that a waiver of the right to a lawyer is fully informed has been met by a rule that a waiver is not valid unless a suspect has received advice from a lawyer on the issue of waiver.

Third, the right to consult a lawyer can only be effective if schemes exist, and lawyers and law firms (or public defenders in jurisdictions where they exist) are organized, to ensure that lawyers are willing and able (and motivated) to provide legal advice and assistance, and to attend police stations, at short notice. This is dealt with more fully in section 6 below, but lawyers’ ability to ensure that suspects can exercise their right ‘practically and effectively’ will be limited if regulations do not ensure that their effective participation is facilitated by the police. Most

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42 PACE Code of Practice C, para. 6.1, and the Notice of Entitlements states that if the suspect does change their mind, they should inform the custody officer who will make the necessary arrangements.

43 PACE Code of Practice C, para. 11.2.

44 PACE Code of Practice C, para. 6.5.

45 PACE Code of Practice C, para. 66(6). This is subject to provisions that allow access to a lawyer to be delayed in certain, limited, circumstances which, in turn, will need to be reviewed to ensure that they comply with the derogation provision in Art. 8 of the Directive.

46 Although not completely absent in the Netherlands, the law provides that a juvenile can only waive their right to a lawyer if they have been offered a lawyer to provide advice as to waiver. In Scotland, if adopted, the Criminal Justice Bill will introduce mandatory legal assistance for suspects under the age of 16 years.

47 This differs from the position in the Netherlands since it applies to all suspects. Such a procedure was rejected as mandatory by the majority of the UK Supreme Court in McGowan v. B [2011] UKSC 54, although the court did consider this would be useful in cases of vulnerable suspects.

48 Of the jurisdictions in the study, England and Wales, and Scotland, have public defender schemes although in both jurisdictions the majority of suspects are advised by lawyers in private practice.
obviously, this requires an obligation on the police to contact the relevant lawyer or duty lawyer scheme without delay when a suspect exercises their right to consult a lawyer. Whilst approaches to regulation of this process varied amongst the jurisdictions in the study, generally the initial contact by police did not seem to be problematic. Of greater concern were the limitations in France and the Netherlands on the maximum period that the police have to wait for a lawyer to attend before proceeding with an interrogation (and sometimes planning interrogations without regard to whether the lawyer would be able to attend), the time limit on lawyer-client consultations, and the restrictions on what lawyers can do during interrogations.

In respect of the first of these restrictions, it has already been determined by the ECHR that an interrogation cannot proceed where a suspect has exercised their right to consult a lawyer but has not been given the opportunity to do so. The imposition of a time limit deprives a suspect of their right to consult a lawyer, which is permitted under the Directive only in limited, urgent, circumstances. An alternative approach which is likely to be compliant with both ECHR jurisprudence and the Directive, was found in England and Wales where regulations do not impose a maximum time limit, but provide that the custody officer should try to ascertain when the lawyer can attend and relate this to the timing of the interrogation. There are provisions which enable an interrogation to proceed in the absence of legal advice, but the police should first normally offer to contact another lawyer, and proceeding with an interrogation requires the approval of a senior officer. Similarly, the time limit on the length of a lawyer-client consultation, and restrictions on the number of consultations, without reference to the nature and complexity of the case, is also likely to contravene the Directive. Recital 23 of the Directive does state that Member States can make practical arrangements concerning the duration and frequency of consultations, but these must take into account the circumstances of the case, ‘notably the complexity of the case and the procedural steps applicable’, and must not ‘prejudice the effective exercise and essence of the right to the suspect … to meet with his lawyer’. Therefore, a standard time limit which makes no reference to the particular circumstances of a case is not in compliance.

With regard to restrictions on interventions by lawyers in interrogations, the Directive does state that the lawyers’ participation ‘shall be in accordance with procedures in national law’. However, such procedures must not ‘prejudice the effective exercise and essence of the right’. Recital 25 provides that ‘the lawyer may, inter alia, in accordance with such rules, ask questions, request clarification and make statements’. This is a rather restrictive approach to the role of the lawyer

49 Although research in the Netherlands by Verhoeven & Stevens 2013 suggests that in practice the restriction on waiting time did not cause significant problems.
50 ECHR 24 September 2009, Paschenbrucker v. Austria, No. 7025/04, para. 79.
51 Art. 3(c) Directive on the right of access to a lawyer.
52 PACE Code of Practice C, para. 66, and Note for Guidance 6A.
53 Art. 3(5)(b) Directive on the right of access to a lawyer.
in interrogations (although it does not suggest that such interventions can be limited to the end of an interrogation), and given the ECHR’s rationale for the right to legal assistance during interrogations, the lawyer should additionally at least be able to intervene to protect their client’s right to silence and to protect them against unlawful or unfair conduct on the part of the police. Arguably, given that such procedures must not prejudice the essence of the right, the lawyer should also be able to intervene in order to give their client confidential legal advice. In England and Wales, intervention by a lawyer in interrogation is governed by regulations, and these explicitly provide that a lawyer may intervene in order to ‘challenge an improper question or the manner in which it is put, advise their client not to reply to particular questions, or if they wish to give their client further legal advice’. Furthermore, the Court of Appeal in England and Wales has made the point in a number of cases that lack of intervention by the lawyer may not only have the effect of placing even greater, inappropriate, pressure on the suspect, but may also encourage the police in the belief that they can continue to act oppressively. This suggests that Member States must give careful consideration to regulation of the role of the lawyer in police interrogations. If they do not, there is a danger that the right to a lawyer may do a disservice to both the procedural rights of suspects and the prospects of a fair trial.

3.4. The Right to Silence

The EU Directive on the right to information includes the obligation to inform suspects of their right to silence, both orally and in writing, but the right is not treated substantively in any of the Directives issued to date. Notification must be given to suspects promptly, but there is no provision that it be given, or repeated, immediately before, or during, interrogations. Nevertheless, with the exception of France, a caution (notifying the suspect of the right to silence) was given at the beginning of interrogations, and it is suggested that this should be regarded as best-practice which accords with the approach of the ECHR – that notification of a right should be given when the right arises.

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55 PACE Code of Practice C, Note for Guidance 60.


57 Note that the EC commissioned a study in 2013 to assess the impact of various options for ways to strengthen the rights in criminal proceedings of suspects or accused persons to be presumed innocent. Details of the study, which were carried out by the Centre for Strategy and Evaluation Services, can be obtained at <www.cses.co.uk/surveys/presumption-of-innocence/> (last visited 17 October 2013).

58 ECHR 17 December 1996, Sanders v. United Kingdom, No. 19187/91; ECHR 19 February 2009, šabančik v. Ukraine, No. 16404/03; and ECHR 18 February 2010, Žiženko v. Russia, No. 39660/02.
In England and Wales a standard wording for the caution is set out in regulations, and in Scotland a standard wording has been issued by police forces. In France, although we were not able to observe the booking in process, officers said that they used the wording in the legislation (that the suspect can speak, make a statement, or say nothing). There is no standard wording for the caution in the Netherlands. We found significant variation in the way that the police approached the task of informing suspects of their right to silence and of ensuring that they understood its meaning, and the implications of speaking or not speaking in interrogations. The two extremes are represented by England and Wales on the one hand, and the Netherlands on the other. In England and Wales, there was a standard process for explaining the caution and for seeking to ensure that the suspect understood it, and whilst practice varied (especially as between 'repeat' and 'inexperienced' suspects) the police officers observed generally followed the standard procedure. In the Netherlands, on the other hand, the caution was not normally explained, but when it was, police officers often stressed the negative consequences of remaining silent. We would propose that the wording of the caution be set out in regulations, and that official guidance should be issued to police officers on how to explain it in neutral terms (including the legal consequences of speaking or remaining silent), and how to verify that it has been understood.

It was the treatment of 'silent' suspects in interrogation where the differences between jurisdictions were most stark. In England and Wales, whilst interrogating officers would normally continue with their questions, in the interrogations observed they did not apply any significant pressure on suspects to waive their right to silence. In the Netherlands, by contrast, police officers appeared to regard persuading suspects to speak to be a central part of their function. There was some suggestion from interviews with lawyers that this was also the case in France, although we did not observe such conduct.

The ECHR, whilst holding that the right to silence is not absolute, has described the right, together with the right not to incriminate oneself, as 'generally recognized international standards which lie at the heart of the notion of a fair procedure'. The right of a person not to incriminate themselves 'presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'. There may be a thin line between persuasion and coercion, and it appeared that many police officers observed in the Netherlands were finely tuned to this distinction. We suggest that in considering what actions to take to transpose the EU Directives into national laws, Member States should consider whether it would be appropriate to regulate, or at least to provide for police officers to be given guidance on, the extent to which it is legitimate to persuade suspects to waive their right to silence. The relevance of such regulation or guidance is not

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limited to the right to silence itself. If a police officer is encouraged to believe that it is acceptable to subject a suspect to significant pressure to waive their right to silence, how are they to distinguish between pressure which is acceptable for this purpose and pressure, for example, to persuade a suspect to waive their right to legal assistance or, indeed, any other procedural right?

4. The Importance of Clear and Detailed Regulations and Procedures, Accompanied by Effective Verification Procedures

We noted in section 1 above the importance of procedural rights being governed by detailed regulation, accompanied by formal procedures, to ensure that procedural rights are effective. The investigative stage of the criminal process is characterized by unpredictability (in terms of when arrests are made, and the nature and seriousness of the offences suspected), the speed with which investigations are required to be conducted (taking into account relevant time constraints), the need for co-ordination between a range of state officials and others, and a range of organizational and other pressures and imperatives. In this context, the procedural rights of suspects are susceptible to being marginalized unless they are clearly regulated and entrenched in workable procedures and processes, aided by clear and understandable forms and protocols, and effective verification mechanisms. Our research indicates a number of areas that require consideration, and we give examples of some of them here.

The police have an extensive range of functions and responsibilities when suspects enter police detention. An assessment should be made of: the need for, and legality of, detention; the particular needs and vulnerabilities of the suspect (for example, the special needs of children, of suspects with mental disorders or vulnerabilities, of those with significant medical conditions, and of foreign suspects who may be unfamiliar with criminal justice processes); the need for interpretation and/or translation; and any risks posed by the suspect. The suspect must be notified of their procedural rights, which may need to be explained so that they understand them. And actions need to be taken, such as contacting a lawyer or an interpreter. Such responsibilities need to be carried out promptly and in a consistent manner, and actions taken and decisions made (both by the police and by the suspect) must be recorded in a transparent and verifiable way. This suggests the need for suspects to be booked in at the police station by a dedicated officer of some seniority, who is independent of the investigation, is appropriately trained (in respect of the relevant law and skills relevant to the process), and who is both responsible and accountable for the treatment of suspects and the decisions and actions taken in respect of them. Ideally, the process should be conducted in a dedicated room, or space, within the police station, which is furnished with the necessary equipment, forms and other resources associated with the tasks that have to be performed.

Examples of best practice in this respect were found in England and Wales, and in Scotland. In the former jurisdiction, legislation provides that chief officers of
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Police must appoint a sufficient number of custody officers who are of the rank of sergeant or above, and who must not be involved in the investigation of an offence for which a suspect for whom they are responsible is in police detention. The responsibilities of custody officers are also set out in legislation and, in particular, they are responsible for determining whether a suspect should be detained, for deciding whether there is sufficient evidence to charge the person with a criminal offence, and for deciding what action should then be taken, including whether a suspect who has been charged with a criminal offence should be released or kept in custody pending their first court appearance. The custody officer is under a statutory duty to ensure that all persons who are in police detention are treated in accordance with the law, and that all matters that are required to be recorded are recorded in the custody record relating to the suspect concerned. In addition, the detailed duties and obligations of custody officers are set out in regulations.\(^{43}\)

The right to information about procedural rights requires that suspects are given specified information, both orally and in writing, and the requirement in the Directive on the right to information that the information be provided in simple and accessible language is directed at ensuring that suspects not only understand the information, but are able to assess it so that they can make an informed, or 'knowing and intelligent', decision about exercise of their rights. In order to ensure that this is done in a consistent manner, and does not simply depend upon the knowledge, understanding and communication skills of the officer providing the information, there is a need for regulations to specify in detail when and how the information is to be provided, for there to be a standard Letter of Rights (which is expressed in simple and accessible language), and a requirement that the suspect be allowed to keep the letter throughout their detention. The caution regarding the right to silence should be similarly regulated, including a requirement to inform suspects of both the (lawful) consequences of answering police questions (for example, how such answers may be used in the criminal proceedings), and the consequences of exercising the right (see section 3.4 above).

Given the complexity of the information being provided, and the circumstances in which it is given (the suspect is deprived of their liberty, and their intellectual capacity or powers of concentration may be adversely affected by the circumstances and implications of their arrest and detention), regulations should ensure that suspects are given time to consider the information and the opportunity to ask questions about it. This was problematic in all the jurisdictions that were observed. Suspects were asked to decide whether they wanted to exercise their rights immediately, without any time being provided to enable them to consider their decision and its possible consequences. Regulations or protocols should also deal with the process of explaining the rights and the mechanisms by which understanding, or the level of understanding, is verified. In this regard it should be noted

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43 See PACE 1984 Part IV, and PACE Code of Practice C.
42 ECHR 21 September 2009, Fishelevskiy v. Russia, No. 7025/04, para. 76.
that simply asking a suspect whether they understand the information is unlikely to elicit a meaningful response. A more effective mechanism observed in some cases in the research is for the suspect to be asked to explain back to the officer the effect or implications of the information that they have been given. It might be countered that such a process could result in many suspects being unable to do so, but we would suggest that this provides an important indication as to their level of understanding for the police, and for the court should a challenge to the police procedure be made by the defence at trial.

As noted in section 3.1 above, the process of determining the need for interpretation, determining the relevant language, and promptly securing the services of an appropriately qualified interpreter, is one that causes some difficulty in practice. Whilst the availability of remote interpretation (for example, by telephone) can be effective in delivering notification of rights, consideration needs to be given to the technological resources necessary to ensure that it is effective (for example, a system that allows for three-way communication between the suspect, the interpreter, and the police officer). It is generally agreed that remote interpretation is not adequate for the purposes of interrogation. Therefore regulations, procedures and facilities need to be in place so that police officers know what is required of them in assessing the need for interpretation, that they must call in an interpreter where interpretation is needed, and understand when remote interpretation is acceptable and when it is not.

Finally, regulations and formal procedures are necessary to ensure effective verification of information given, actions taken and decisions made (both by the suspect and the police). Self-certification by the police, that is, a record made by a police officer that they have given certain information or have taken certain action, is not only a weak form of verification but can also be used to cover up breaches of procedure. It would be difficult, for example, for a suspect to establish in subsequent court proceedings that they had not been given information concerning their rights if the police record showed, falsely, that they had been given it. Similarly, an obligation on police officers to ask the suspect to sign a record is a weak method of verifying that information has been given or, more importantly, understood, or that a suspect had waived a right, such as the right to legal assistance. For these reasons, consideration should be given to other forms of verification, for example, CCTV surveillance of custody offices, electronic recording of interrogations, or the approach adopted in Belgium (and in certain cases in the Netherlands) of requiring waiver of the right to legal assistance, in effect, to be verified by a lawyer.

5. Occupational Cultures and Mutual Understanding of Roles

Our research uncovered what may be described as a dysfunctional cycle. There is no particular starting point, but for our purposes, we will start with police disclosure of information regarding the suspected offence. Police officers are reluctant or unwilling to provide information about the suspected offence to the suspect or their
lawyer in advance of interrogation because they believe that they may use it to concoct a story to be given in the interrogation, and that it will defeat the element of surprise which could otherwise be used to obtain useful inconsistencies in the suspect’s ‘story’ or to secure a confession. Having no useful information to work with, lawyers are inclined to advise their clients to exercise their right to silence. Alternatively, or in addition, they see little point in attending the interrogation because, taking into account the restrictions on their ability to intervene, they think that there is little that they can usefully do. As a result, police officers regard the role of the lawyer as wholly negative, because all they do is advise their clients to remain silent or help them concoct a story, and they often cannot even be bothered to turn up. This reinforces police distrust of lawyers, justifying them in providing no disclosure, and if lawyers do attend the interrogation, justifying their marginalization. As a result, lawyers distrust the police, and either do not try to obtain disclosure, or treat it with scepticism if they are given it.

This, of course, is a caricature. Our research did not find such attitudes and beliefs amongst all police officers and all lawyers that we observed and interviewed in all of the four jurisdictions. However, the dysfunctional cycle does illustrate some important strands in our research findings. Only in England and Wales did we find that the police routinely provided disclosure to defence lawyers, but even there lawyers believed that it was often partial disclosure and took this into account in advising their clients. Furthermore, there is a well-established police strategy of ‘phased’ or ‘managed’ disclosure, used in relatively serious cases, under which information is released on an incremental basis as part of an interrogation strategy. In the other jurisdictions, disclosure prior to the interrogation was rarely given or, if it was given, was extremely limited in extent. As we have seen, lawyers in France and the Netherlands were subjected to severe limitations on what they were permitted to do in interrogations, and as a result of this and the lack of disclosure, many of them were sceptical of the utility of their attendance at interrogations. Lawyers in the Netherlands and Scotland were inclined to advise their clients to exercise their right to silence, partly as a result of the lack of disclosure, but also because it justified (in their view) non-attendance at interrogations, which they often did not want to attend. Many police officers interviewed, especially in France and the Netherlands, held negative attitudes towards both the right to legal assistance and to defence lawyers, and were generally unwilling to tolerate their active presence in interrogations.

If procedural rights for suspects, and particularly the right of access to a lawyer, are to be effective, attention needs to be given to how to turn this dysfunctional

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*Phased or managed disclosure involves a process whereby limited disclosure is provided prior to the first interrogation, and the extent of subsequent disclosure is determined by reference to what the suspect said in the previous interrogation (see Cape 2011, p. 135 for a description of the phased disclosure strategy). Phased disclosure was not used in any of the cases that we observed, primarily because our sample largely consisted of ‘routine’ rather than serious cases.*
cycle into a functional, virtuous, cycle. In order to do so, governments, police authorities, bar associations, prosecutors and the judiciary all have a significant role to play.

An important starting point is recognition of the fact that the investigative stage of the criminal process, as both the ECHR and the EU have recognized, represents a key element in ensuring a fair trial. The ultimate outcome of a case is often, if not normally, determined by what happens at the investigative stage and, therefore, if that has not been conducted fairly, the prospects for a fair trial are poor. This being the case, both police officers and lawyers have legitimate roles at the investigative stage, the performance of which will determine whether procedural rights are respected, and a fair trial is achieved. This does not mean that their objectives in particular cases are the same, and in some respects, there will inevitably be tensions between them. However, once it is recognized that they both have legitimate, and essential, functions at this stage of the criminal process, then it follows that not only must each respect the legitimacy of the other, but that work must be done to work out how conflicts and tensions can be appropriately managed and, to the extent possible, resolved.

The police in France, the Netherlands and Scotland have until recently been able to carry out their investigative work with little involvement by lawyers and in the latter two jurisdictions in particular, they rarely encounter a lawyer in interrogations. This is likely to change as the legal changes ‘bed down’ in France and Scotland, and when the Netherlands government recognizes its responsibility to give effect to ECHR jurisprudence and, at the latest, when the EU Directive on the right to legal assistance comes into force. The police in all four jurisdictions will also be affected by transposition of the EU Directive on the right to information into national laws, especially the requirements to provide information about the suspected offence and case materials. This will require a significant adjustment on their part, and has the potential to play an important role in shifting the dysfunctional cycle in a more productive direction. Since the obligations apply both in respect of unrepresented suspects as well as those who have a lawyer, their introduction should prompt a re-examination of the relationship between the police and suspects (and their lawyers), which may possibly develop into a reconsideration of the purpose and regulation of police interrogations. If information has to be disclosed in advance of interrogation, suspects will have time to think about its meaning and implications, which in turn may affect their stance in the interrogation; the police will be less able to use the element of surprise as an interrogation strategy.

However, it should not be expected that the process of adjustment will be smooth and comfortable. In the early years following the introduction of the right to custodial advice in England and Wales, there were many conflicts between lawyers

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64 Although, as noted earlier, the UK has not opted-in to the Directive on the right of access to a lawyer, there has been no suggestion by the government that the long-established right to consult a lawyer in England and Wales will be removed.
and the police as the latter adopted a number of strategies in an attempt to limit the impact of lawyers, and as lawyers explored the boundaries of their new found role. In the research, we saw some evidence of this emerging in France and the Netherlands. No doubt, police officers will want to limit the extent of pre-interrogation disclosure as much as possible, which is likely to lead to challenges by lawyers both at police stations and also at the trial stage. Many police officers are likely to feel that their ability to ‘do their job’ is being challenged and undermined by these new procedural rights; rights that they do not necessarily believe in, or towards which they are positively hostile. In this context, those responsible for policing, both in government and police managers, will need to consider how to facilitate and manage this cultural shift. This will require clear and workable regulation and guidance, and effective training, but it will also require an examination of organizational pressures and imperatives so that police officers do not have to choose between respecting procedural rights and fulfilling institutional and professional obligations.

Lawyers in England and Wales have had many years to adjust to the introduction of procedural rights and, in particular, to the right of suspects in police detention to consult a lawyer. That process was not a smooth one. Research carried out in the first decade following introduction of the right showed that lawyers often decided whether to attend police stations by reference to inappropriate criteria, that many law firms sent untrained and unqualified representatives to give advice to clients at police stations, and that lawyers and their representatives were often passive. In our research we found that many lawyers in Scotland and the Netherlands were reluctant to advise their clients in person at police stations, and reluctant to attend police interrogations of their clients. Lawyers in France and the Netherlands were, of course, prevented from playing a full role in police interrogations, although notably this was not an explanation for the absence of lawyers at interrogations in Scotland, nor in the Netherlands in cases involving juveniles.

What was most striking was what might be described as a lack of imagination as to what the role of the lawyer is, or could be. Many lawyers focused on the interrogation and if, in their view, they could not play a meaningful role in that, there was little else for them to do. Whilst, as we argued earlier, the restrictions in France and the Netherlands on what lawyers are permitted to do in interrogations should be reconsidered, lawyers should not undervalue the positive impact that their presence can have for suspects even if the restrictions are not removed. Both ECHR jurisprudence and the EU Directive on the right to legal assistance suggest that lawyers have other important functions, outside of interrogations, at the investigative stage. As the ECHR observed in Dayan v. Turkey:

45 See, for example, McConville, Sanders & Leng 1991; McConville et al. 1994; and McConville & Hodgson 1993. For a recent account that suggests that some of these problems persist, see Newman 2013.

46 In their research in the Netherlands, Stevens & Verhoeven 2010 found that the mere presence of a lawyer in an interrogation did reduce police pressure on the suspect.
[A]n accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned... Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.\footnote{ECtHR 13 October 2009, Doğan v. Turkey, No. 7377/03, para. 32.}

Police officers are generally not trained to, and are often not very good at, identifying vulnerabilities such as those relating to age, language or mental health. Lawyers, whose focus should be on their clients' interests, are often in a better position to do so. Suspects are vulnerable to suggestions that remaining silent will prolong their detention, or that confessing will shorten it. Whilst in some cases such suggestions may be true, lawyers can explain to clients the implications of their decisions and can also help to ensure that the decisions of their clients are respected by the police. In many cases, interrogation is not the only investigative strategy, and clients need advice, for example about identification procedures, re-enactments, and searches. All of the countries in the study have laws governing out-of-court disposals of one kind or another, or guilty plea or expedited hearing procedures – procedures which appear to be increasing across EU Member States – and suspects are entitled to, and would benefit from, advice about these, especially those where their consent is required.

We suggest, therefore, that lawyers also need assistance in adjusting to newly-introduced procedural rights, both in terms of the construction of their role and also in terms of the forms of organization that will enable them to deliver custodial legal advice when and where it is needed. Bar associations have an important role to play both in articulating the role of the lawyer in providing custodial legal advice, and in establishing appropriate standards in respect of that role. They can also work to secure official recognition of that role, and help to educate others, including police officers, prosecutors and judges, about the role of defence lawyers and its implications.

In England and Wales, the Law Society responded to the kinds of tensions between police officers and lawyers described above by persuading the government to incorporate a detailed description of the lawyer's role into the regulations governing the detention of suspects.\footnote{PACE Code of Practice C, Note for Guidance 6D.} That meant, for example, that both police officers and lawyers could be clear about the circumstances in which a lawyer could intervene in an interrogation. Following criticism of the use of unqualified representatives and the passivity of lawyers at police stations the Law Society, under some pressure from the legal aid authority, developed an accreditation scheme in co-

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operation with that authority. This was initially confined to unqualified representatives, but was subsequently extended to all lawyers providing legally-aided police station advice. In order to be able to assess the competence of candidates for accreditation, the Law Society had to develop a detailed account of the role and functions of lawyers advising clients at police stations, which was not only relevant in helping lawyers to understand the full extent of their role, but which also meant that the police, prosecutors and judges could understand what that role entailed. Furthermore, it also provided a basis for training lawyers in the knowledge and skills necessary for police station advice and assistance.

Whilst the use of representatives to provide police station legal advice is not permitted in France, the Netherlands and Scotland, we found evidence that many lawyers were unsure of their role, and often lacked the training and experience that would enable them to fulfil it competently. Bar associations can play a significant part in catering for these needs.

6. Legal Aid and Duty Lawyer Schemes

Although the EU Roadmap of procedural rights initially envisaged that a directive would cover both the right to consult a lawyer and the right to legal aid, in the event a right to legal aid was not included in the Directive on the right of access to a lawyer, and it is anticipated that legal aid will be the subject of a separate measure. It is, perhaps, self-evident that remuneration is an important consideration in determining the effectiveness of the right to legal assistance and, given that a significant proportion of suspects in all jurisdictions are relatively poor, legal aid is a significant element of remuneration for custodial legal advice. Since the research concentrated on the four rights covered by the first three EU Directives, we did not focus on legal aid. However, we did gather some data on it which enables us to briefly address some issues.

When the right of suspects in police detention to consult a lawyer was first introduced in Scotland, legal aid remuneration for most police station work was absorbed into the fee that the solicitor could claim for the court stage of the case (known as subsumption). As a result, in most cases solicitors earned no extra fee for advising a client at the police station. This arrangement was changed in October 2011, shortly before commencement of our fieldwork, but it is noteworthy that in the cases observed in Scotland, solicitors in private practice rarely attended the

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69 Research on the accreditation scheme showed that it resulted in an improvement in the quality of representation, both on the part of representatives and the lawyers who supervised them. See Chapter 2, section 2.1.
70 See Shepherd 1996.
71 For guidelines issued by the Dutch Bar, see Chapter 3, section 4.10.
72 SLAB 2011.
police station in person. Solicitors who worked for the public defender service (PDSO), by contrast, were much more inclined to do so. In the Netherlands, legal aid regulations provided for the payment of fixed fees for consultations and a separate fixed fee for attendance at police interrogations, but in both cases the fee was the same irrespective of the length of the consultation or interrogation, and in the case of the latter, irrespective of the number of consultations or the number of interrogations. Many Dutch lawyers felt that the remuneration provisions meant that attendance at interrogations was financially unattractive and, as we have seen, lawyers often did not attend interrogations even in those cases where the right to the presence of a lawyer applied. A fixed fee system also applied in France, although in our (relatively small) sample the attendance rate at interrogations was much higher than in the Netherlands and Scotland. A fixed fee system also operates in England and Wales, which had the highest level of attendance at police stations of the four jurisdictions, although there is provision for payment of a higher, hourly-based, fee in exceptional cases.

So fee level and fee structure are important determinants of lawyers' attendance at police stations, but they are not the only operative factors. In France, for example, attendance is also affected by the terms of the duty lawyer scheme, which involves an expectation that the lawyer will attend in person. In England and Wales, the contracts under which legal aid lawyers operate include clauses setting out the circumstances in which personal attendance, and attendance at interrogations, is expected. We did not attempt to obtain more detailed data on the relationship between fee level and structure and the amount of work carried out by lawyers, but there is some existing evidence that because lawyers have a large degree of discretion in the amount of work that they do in any particular case, they will adjust what they do to the level of fee available. Therefore, if the level of fee is fixed too low, the likely consequence is that lawyers will tend to do the minimum. If the right of access to a lawyer, including the right to have a lawyer present at police interrogations, is to be effective in ensuring that suspects who wish to exercise their right are able to do so, then consideration must be given to structuring legal aid remuneration in a way that encourages lawyers to attend.

Another important factor in ensuring the availability of lawyers to deliver legal advice and assistance to suspects who wish to exercise their right to consult a lawyer is the existence, and structure, of duty lawyer schemes. This is important because many suspects, especially 'inexperienced' suspects, will not have previously consulted a lawyer, but also because many law firms are relatively small, and lack the personnel and resources to ensure that lawyers are available at short notice both in and outside of normal office hours. Duty lawyer schemes operated in all of the

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53 It should also be noted that police station legal assistance was means-tested, but it appears that lawyers often do not seek a contribution from the client even where it is payable. The means test for police station legal assistance is to be abolished by the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013.

54 Tata 2007, and see further Chapter 2, section 2.
jurisdictions in the study, but their effectiveness in ensuring that lawyers were available who were willing and able to attend police stations at short notice varied. In the Netherlands, the effectiveness of the duty lawyer scheme was adversely affected by the fact that under the scheme, only one lawyer is on duty at any particular time, making it difficult for the duty lawyer to adequately deal with cases during busy periods. The schemes that appeared to be most effective in ensuring the availability of the duty lawyer were those in the French research sites, and the scheme in England and Wales. One problem with the French scheme, however, was lack of continuity representation. If a suspect was detained beyond the period during which a particular lawyer was on duty, the lawyer who was then on duty would take over the case. This could mean that a suspect was advised by more than one lawyer (from more than one law firm) during their period of detention, and since the duty lawyer scheme was organized on a discrete basis, the police station duty lawyer was unlikely to also represent the suspect in court if proceedings continued. In England and Wales, the duty lawyer scheme has provision for back-up lawyers to be available at busy times, and the legal aid contract normally requires that once a law firm starts acting for a suspect, they must continue to represent them in any ensuing court proceedings. This does not necessarily mean that the suspect will be represented by the same lawyer throughout the proceedings, since the contract is between the legal aid authority and the law firm, and not an individual lawyer. Nevertheless, it makes it more likely that the lawyer who acted at the police station will work for the same firm as, and communicate with, the lawyer who represents the person at court.

7. Training

Training is only briefly considered here because the book includes a Training Framework which addresses the training needs identified by the research, the different approaches to meeting those training needs, and which also includes a training syllabus.

The changing legal environment, in which the procedural rights of suspects are increasingly recognized, has a significant impact on the work of both police officers and lawyers. An obvious training need is that of keeping abreast of legal changes governing procedural rights. However, our research indicates that effective implementation of such laws requires not only that police officers and lawyers understand the way in which procedural rights are regulated, and their purpose and value, but also their own roles and the roles of each other. Both are key 'gatekeepers' (in the case of the former, literally so) to procedural rights, and since they both have a significant degree of control over the way in which they perform their functions, their level of commitment to procedural rights can make a difference to whether they are effectively implemented. Appropriately structured training can help police officers and lawyers to understand why procedural rights are important, and how a focus on the suspect's experience and perspective can contribute to a
realization of the objective of a fair trial. Effective implementation also requires a range of skills, for example, identifying vulnerabilities, conveying information in a way that suspects are likely to understand, communicating through interpreters, conducting consultations and interrogations fairly and effectively, and giving good advice in an appropriate way, which could all be improved by training. Furthermore, the new procedural rights regime will mean that police officers and lawyers will interact more frequently than in the past and training, particularly joint-training, can help to ensure that such interactions are positive and constructive.

8. Recommendations

In Chapters 4 to 8 we include a number of recommendations based upon our analysis of the research data relating to the four procedural rights that were the subject of the study: the right to interpretation and translation, the right to information, the right of access to a lawyer, and the right to silence. Here, we set out what we regard as the most important of those recommendations, which are directed at ensuring that those procedural rights are effective in practice, and identify some best-practice examples that we encountered in our research. Where appropriate, reference should be made to the relevant chapter to assist with understanding why the recommendation has been made, and to learn more about the examples given.

8.1. Interpretation and Translation

8.1.1.

Laws or regulations are needed in all jurisdictions which identify interpretation and translation as rights of the suspect which are intended to enable them to understand and communicate. In particular, France and Scotland should introduce a right to interpretation applicable in all stages of police detention. Regulations or protocols should be introduced that establish a procedure by which the need for interpretation or translation is to be determined, and to ensure that interpretation is available at the earliest stage of detention, and not just during interrogation.

Techniques for identifying the level of language ability in cases where suspects have some knowledge of the language of the proceedings include asking them to read from the Letter of Rights in the local language. See, for example, the procedure adopted by some police officers in England and Wales.

8.1.2.

A mechanism should be in place to ensure that, where a need for interpretation has been identified, the correct language is identified.

One effective mechanism is a language identification card or poster, which should be placed prominently to enable suspects to make use of it; contain as many languages as possible; and explain in clear language that the suspect should point to
the language in respect of which they require interpretation. See, for example, the language identification posters used in England and Wales, and Scotland.

8.1.3.

Police officers and lawyers should receive appropriate training to ensure that they understand what the right to interpretation and translation consists of, their obligations in respect of those rights, and how to ensure that procedures involving interpreters are effective. Such training should include the need for police officers to provide sufficient initial information concerning the case to the interpreter so that they understand the context of the case prior to providing interpretation, an understanding of the respective roles of the participants, ground rules for the conduct of the relevant procedure, and the need to ensure full communication taking into account the particular challenges of communicating effectively via an interpreter.

See, for example, the Police Scotland Standard Operating Procedure which, although not designed as a training resource, could be used for training purposes.

8.1.4.

An obligation should be introduced (in those jurisdictions where it does not exist) requiring police officers and lawyers to use interpreters and translators who are appropriately qualified and/or accredited. Interpreters who provide interpretation services at police stations should receive specific training on law and processes concerning police detention, the procedural rights of suspects, the importance of the confidentiality of lawyer-client consultations (especially where the same interpreter also interprets in the interrogation), and relevant legal terminology. A short guide covering these issues, to be provided to interpreters, could also be developed in each jurisdiction.

The police in England and Wales, and Scotland, are normally required to use interpreters who are included in the relevant register or directory. The UK Institute of Linguists Diploma in Public Service Interpreting includes modules on knowledge of police powers, criminal offences, and court processes.

8.2. The Right to Information

8.2.1.

Regulations or protocols should be introduced to ensure (in those jurisdictions where this is not the case) that a police officer is designated to 'book in' suspects at police stations, be responsible for informing suspects of their procedural rights, and for providing them with the Letter of Rights. The designated officer should be of sufficient seniority, be independent of the investigation regarding the suspect concerned, and should be appropriately trained. Consideration should be given to establishing CCTV surveillance of the booking-in process.
In England and Wales, and Scotland, the booking-in procedure is the responsibility of a 'custody officer' whose duties are set out in legislation and regulations. CCTV surveillance of the area where suspects are booked-in is standard practice in England and Wales, and Scotland.

8.2.2.

Arrangements should be made for notification of rights to be carried out in a room or area that enables this to be done in an efficient and effective way, and which is conducive to enabling suspects to understand their procedural rights. The designated room or area should be equipped with posters containing information on suspects' rights, a language identification poster, relevant forms and protocols, supplies of the Letter of Rights, and computer facilities. An internet connected computer would enable the Letter of Rights to be downloaded in the appropriate language (where relevant), or to be contained in an audio-file which can be listened to by those suspects who cannot read.

In England and Wales, and Scotland, the booking-in procedure must be carried out in an area of police stations that is dedicated for this purpose, and which are equipped with appropriate poster, forms and computer facilities.

8.2.3.

Regulations and procedures should be adopted, and training given to relevant police officers, in order to ensure that suspects: are given sufficient time to understand the information that they are given; are enabled to make informed decisions concerning their procedural rights; and that inappropriate 'short-cuts' are not made in respect of suspects with prior experience of arrest and detention. In addition, verification procedures should be introduced to ensure, as far as possible, that suspects understand their rights and the implications of exercising or waiving them, and in a way that ensures that the process is transparent.

In England and Wales a verification procedure is standard practice in respect of explaining the caution, although not in respect of other rights.

8.2.4.

Consideration should be given to legislation requiring that some or all of the procedural rights, and particularly the right to legal assistance, can only be validly waived if the suspect is offered access to a lawyer to advise on the relevant right, and the consequences of exercising or not exercising it. Such an obligation would also give suspects time to consider the information given to them about their rights, so that they may ask the lawyer about any aspect of them.
In the Netherlands, a juvenile can only waive their right to legal assistance if they are offered access to a lawyer to advise them on the consequences of waiver. In Belgium, this is the case for all suspects.\textsuperscript{75}

8.2.5.
Legislation should be introduced requiring relevant police officers, at the latest before the first interrogation, to inform suspects about the criminal offence(s) of which they are suspected in sufficient detail, including a description of the facts and (where known) the time and place where they allegedly occurred, and the possible legal classification of the alleged offence.

8.2.6.
Legislation should be introduced requiring police officers or other competent authorities, upon arrest, to inform suspects of the reasons for arrest.

8.3. The Right of Access to a Lawyer (other than During Police Interrogation)

8.3.1.
Laws or regulations should be amended in France and the Netherlands so that the two-hour waiting time for lawyers to attend the police station, and the 30-minute time limit for lawyer-client consultations, are abolished.

In England and Wales, and Scotland, there is no standard maximum waiting time for lawyers, or maximum limit on the length of lawyer-client consultations. In England and Wales, the procedure for proceeding with an interrogation in the absence of access to a lawyer, where the suspect has requested legal advice, is governed by regulations.

8.3.2.
Police officers should receive appropriate training in order to raise their awareness of the law governing the right of access to a lawyer, the value and benefits of the right in ensuring a fair trial process, and of the role of lawyers (including the positive role that they can play in respect of police investigations).

\textsuperscript{75} Belgium was not a jurisdiction included in the research, but information concerning the law in Belgium was obtained in the pilot training conducted in Maastricht. According to Art. 2bis para. 1 of the Law on Pre-trial Detention a suspect (who is indigent) is entitled to a free consultation with a lawyer prior to the first police interrogation. Where the lawyer does not attend the police station within two hours of contact being made with them, a waiver of the right of access to a lawyer may only be accepted if the suspect has a confidential telephone consultation with the duty lawyer. Juveniles cannot waive their right to a lawyer.
8.3.3.

Laws and regulations should be introduced to require police officers to promptly provide case-related information in accordance with the EU Directive on the right to information. Police officers should receive appropriate training to ensure that they understand their obligations regarding disclosure of information, and the impact of inadequate disclosure on the role of lawyers.

In the Netherlands, legislation has been introduced imposing an obligation on the police to disclose case-related information as from the time that a suspect is made aware of a criminal charge against them and no later than before the first police interrogation. Detailed regulations are to be issued setting out the documents that have to be provided, and by whom, and the circumstances in which derogation is permitted.

8.3.4.

Appropriate laws, regulations, organizational structures, and procedures should be introduced to ensure the timely provision of legal advice and assistance to suspects in police custody, by lawyers with sufficient knowledge and skills to provide effective advice and assistance, and which take account of suspects’ wishes. Specific provisions should include: appropriate selection criteria for duty lawyers; mechanisms for ensuring that sufficient lawyers are available to promptly provide advice and assistance; a centralized system for contacting duty lawyers and for allocating cases; and rules ensuring continuity of legal assistance.

In England and Wales, lawyers providing legally-aided advice and assistance to suspects in police custody must pass a test designed to assess both a good knowledge of relevant law and procedure, and competence in providing effective legal advice and assistance. Legal aid contracts include requirements regarding the timely provision of legal advice and assistance, and continuity of representation. The duty lawyer schemes in England and Wales, and France, include mechanisms to ensure that sufficient numbers of duty lawyers are available, at any particular time, to attend police stations in person within a reasonable time.

8.3.5.

Regulations, contractual provisions and/or guidelines should be introduced to ensure that lawyers make the decision as to whether to attend upon a suspect in person (as opposed to attendance by means of the telephone) in accordance with appropriate criteria. In addition, laws or regulations should make clear that the right to legal assistance is not limited to speaking to a lawyer on the telephone.

In England and Wales the legal aid contract provides that once they have accepted a case, the lawyer must normally attend the police station in person to advise their client, to attend identification parades (and similar procedures), and where the client complains of serious police maltreatment.
8.3.6.

The relevant authorities should ensure that remuneration is adequate to attract sufficient, well-qualified, and experienced lawyers who are willing and able to provide legal advice and assistance to suspects in police detention who have insufficient means to pay privately. The authorities should also ensure that the structure of remuneration is such that lawyers are incentivised to attend police stations in person, and also to attend police interrogations, where this is appropriate by reference to the circumstances of the suspect and/or the seriousness or complexity of the suspected offence.

8.3.7.

Lawyers should receive appropriate training regarding the right of access to a lawyer in order to raise awareness of, and develop skills in respect of, the law governing the right to legal assistance, their role in advising and assisting suspects in police detention, and their professional and ethical obligations. In particular, training should promote a broader understanding of the lawyer’s role, an ‘active’ role which is not simply interrogation-focused, and which extends to providing advice and assistance regarding the suspect’s welfare, the detention conditions, and pretrial release. Training should also be designed to ensure that lawyers do not take inappropriate ‘short-cuts’ in respect of suspects with prior experience of police arrest and detention.

8.4. Police Interrogation and the Right to Silence

8.4.1.

The law in France should be amended so that the obligation to inform suspects of their right to silence (the caution) is extended to the beginning of police interrogations, and the relevant law or regulation should include a clear requirement to remind suspects of the caution on the re-commencement of interrogations (where they are interrupted or where there is more than one interrogation).

In England and Wales, and the Netherlands, regulations specifically require the officer conducting an interrogation to caution the suspect, or to remind them of the caution, on the re-commencement of an interrogation.

8.4.2.

Regulations should be introduced in France, the Netherlands and Scotland providing a standard wording for the caution, which both informs suspects of the legal consequences of speaking or providing a statement in interrogations, and of remaining silent. In addition, regulations or a protocol should provide for procedures to be adopted by the police in explaining the caution, and for verifying that suspects understand the caution.
In England and Wales the wording of the caution is set out in regulations, and official guidance provides that if the suspect does not appear to understand it, the officer should explain it in their own words. The officer is accountable for the explanation that they give since interrogations are routinely electronically recorded.

8.4.3.

Regulations should be introduced (in jurisdictions where they do not exist) prohibiting the police from seeking to undermine a suspect’s decision to exercise their right to silence. This should be accompanied by training designed to ensure that police officers understand the status and importance of the right to silence in ensuring a fair trial process. Consideration should also be given to adopting appropriate measures designed to ensure that prosecutors and judges do not draw inappropriate conclusions from a suspect’s decision to exercise their right to silence.

8.4.4.

The law in the Netherlands should be amended by the introduction of a general right of suspects to the presence of lawyer during police interrogations. Regulations, contractual provisions and/or guidelines should be introduced in the Netherlands and Scotland to ensure that lawyers make the decision as to whether to attend police interrogations in accordance with appropriate criteria and which stress that attendance is normally required.

In England and Wales the legal aid contract provides that once they have accepted a case, the lawyer must normally attend all police interrogations of their client.

8.4.5.

The restrictions in France and the Netherlands governing interventions by lawyers during interrogations should be removed.

8.4.6.

Bar associations, together with the responsible authorities, should work together in developing an appropriate account of the role of lawyers in interrogations which fully takes into account the requirement in the EU Directive on the right of access to a lawyer that lawyers be able to participate effectively in interrogations. Police officers should receive training regarding the role of lawyers in interrogations, and lawyers should receive training including on the skills necessary to actively advise and assist their clients during interrogations.

In England and Wales, an account of the role of the lawyer in police interrogations was set out in official guidance following consultation with the Law Society. The Law Society in England and Wales, and the Dutch Bar Association, have articulated in some detail the role of the lawyer at the police station.
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Training Framework on the Provisions of Suspects’ Rights
PREFACE

This Training Framework is based on the empirical study of the procedural rights of suspects in four European Union (EU) jurisdictions – England and Wales, France, the Netherlands and Scotland – conducted in 2011-2013. The study focused on three of the procedural rights set out in the EU Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings: the right to interpretation and translation; the right to information and the letter of rights; and the right of access to a lawyer before and during police interrogation, as well as the right to silence. The results were published in the book, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions.*

The objective of the training framework is to enhance the knowledge, understanding and skills of criminal justice practitioners – police officers and defence lawyers – in respect of the procedural rights of suspects in police detention. It seeks to do this by orientating the framework around the requirements of EU law on procedural rights, as set out in the EU Directives referred to above, and by suggesting appropriate training strategies. The framework incorporates best-practice identified during the observational stage of the research study, and is designed to be applicable across EU Member States.

Since training courses for police officers and lawyers rarely focus exclusively on the procedural rights of suspects, the training framework is not intended to provide a model for stand-alone training. Building on the findings of the research, and the pilot training programme carried out as part of the research project, the training framework is designed as a tool to be used in the planning of training programmes on the procedural aspects of police custody, for both police officers and lawyers. In this regard, it highlights the procedural rights to be addressed through training, and the training methods that may be suitable for ensuring their delivery is effective in practice.

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1 Blackstock et al. 2014.
The research study and development of the training framework was carried out by the Universities of Maastricht, Warwick and the West of England, together with JUSTICE. Avon and Somerset Police and the Open Society Justice Initiative were also collaborators on the project.

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Jodie Blackstock
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Jacqueline Hodgson
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Taru Sprouken
Miet Vanderhallen
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BIOGRAPHIES

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Jodie Blackstock is an employed barrister at JUSTICE, in the role of Director of Criminal and EU Justice Policy. JUSTICE is a policy and law reform organisation focusing on human rights, access to justice and the rule of law. It is also the UK section of the International Commission of Jurists. Her position involves briefing on the impact of EU legislation in the criminal justice sphere, conducting research into the effectiveness of criminal justice procedures across the EU, as well as domestic law reform, training practitioners in legal developments and intervening in cases in the public interest. Recent projects include the European Commission funded, European Arrest Warrants: Ensuring an Effective Defence. Recent case interventions have included appeals to the UK Supreme Court in relation to the right of access to a lawyer (2010), positive obligations upon deaths in the control of the State (2011) and the rights of children of extraditees in preventing extradition (2012). She regularly gives or contributes to lectures and seminars on criminal and human rights law, most recently for the European Academy of Law, the European Criminal Bar Association and the European Parliament.

Ed Cape
Ed Cape is Professor of Criminal Law and Practice at the University of the West of England, Bristol, UK. A former criminal defence lawyer, he has a special interest in criminal justice, criminal procedure, police powers, defence lawyers and access to justice. He is the author of a leading practitioner text, Defending Suspects at Police Stations (6th edition, 2011), and is a contributing author of the leading practitioner text, Blackstone’s Criminal Practice (2013, published annually). His research-based publications include Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work (2005), Evaluation of the Public Defender Service in England and Wales (2007), Suspects in Europe: Procedural rights at the Investigative Stage of the Criminal Process in the European Union (2007), Effective Criminal Defence in Europe (2010), and Effective Criminal Defence in Eastern Europe (2012). Ed is also the co-editor of

Jacqueline Hodgson
Jacqueline Hodgson is Professor of Law at the University of Warwick, UK. She has researched and written on issues within French, English/Welsh and comparative criminal justice, on the role of the criminal defence lawyer, the right to silence, the process of investigation and prosecution, terrorism, miscarriages of justice and suspects' rights. Much of her work draws upon her own externally funded empirical research and she held a British Academy/Leverhulme Senior Research Fellowship from 2009-2010. Key publications include Custodial Legal Advice and The Right to Silence (1993) Standing Accused (1994), Criminal Injustice (2000) French Criminal Justice (2005) The Investigation and Prosecution of Terrorist Offences in France (2006) Suspects in Europe (2007) The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (2009). She has advised the Parliamentary Select Committees, EU impact assessment studies and her research has been relied on by the Special Immigration Appeals Commission and in European Arrest Warrant proceedings. She is currently involved in a comparative empirical study of the safeguards in place for juvenile suspects during police interrogation funded by a European Commission.

Anna Ogorodova
Anna Ogorodova is PhD researcher at the University of Maastricht, Faculty of Law. She also teaches courses related to criminal procedure and human rights. Her research interests include police custody, suspect interrogations, and the role of defence lawyers therein, studied from a comparative, legal and empirical perspective. She has presented and published internationally on these topics. Previously she worked as Associate Legal Officer at the Open Society Justice Initiative (of the Open Society Institute). In this capacity, she provided technical assistance to governments and NGOs on the issues related to reforming their national criminal justice systems. She also served as international consultant on criminal justice and legal aid reforms.

Taru Spronken
Taru Spronken is Professor of Criminal Law and Criminal Procedure at Maastricht University, she has been a criminal defence lawyer for more than 30 years and substitute Judge in the Court of Appeal of Den Bosch. She is specialised in criminal procedure and human rights and has brought numerous cases to the European Court of Human rights. As from September 2013 she has been appointed Advocate
General at the Supreme Court in the Netherlands and has remained part time professor at Maastricht University.
In her research she focuses on the implications of EU cooperation in criminal matters for procedural rights and has acted on numerous occasions as expert for the European Commission. She has published extensively on criminal defence rights and human rights (i.a. with E. Cape, Z. Namoradze, R. Smith (Eds.) Effective Criminal Defence in Europe (2010); EU-wide Letter of Rights in Criminal Proceedings: Towards Best Practice (2010); with Chen Weidong (Eds.), Three Approaches to Combating Torture in China (2012)).

Miet Vanderhallen
In 2007 Miet Vanderhallen finished her PhD The working alliance in police interviewing. Currently, she works as an assistant professor psychology and law at Antwerp University and as an assistant professor criminology at Maastricht University. Besides, she is an affiliated senior researcher at KULeuven. She teaches psychology and law, criminology, and methods of empirical research at the faculty of law. Her main research interest concerns investigative interviewing. She is particularly interested in research regarding building rapport and research on the (evidential) value of suspects’ statements. She is currently involved in various (international) studies on legal advice at the police station. In addition to her research activities, she takes part in investigative interview training programs at the national police academy on criminal investigation and regional police academies. Her latest projects address supervision of interviewers at police stations as well as joint training for interviewers and lawyers. Miet Vanderhallen published several (inter)national articles and book chapters on investigative interviewing.
INTRODUCTION TO THE TRAINING FRAMEWORK

The training framework, drawn from empirical evidence of best practice together with two pilot training workshops, complements training programmes for police officers and lawyers. It aims to equip them with the knowledge, understanding and skills necessary for the effective delivery of suspects’ procedural rights during police detention.

The European Union (EU), in the Stockholm Programme,\(^1\) prioritized the establishment of minimum standards regarding procedural safeguards for suspected and accused persons in criminal proceedings. The Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings was adopted in 2009.\(^2\) Under the Roadmap, EU Institutions were tasked with adopting legislative measures for the protection of the right to interpretation and translation, the right to information, the right of access to a lawyer, third parties and consular assistance, the right to legal aid, and rights for vulnerable suspects, and also to consider how to deal with excessive pre-trial detention. The first three measures have been agreed between the Council and European Parliament in the form of Directives that must be implemented in each Member State of the EU no later than the transposition date set out in each Directive.\(^3\) The rights set out in the

\(^1\) The Stockholm Programme, An Open and Secure Europe Serving and Protecting Citizens, OJ. 4.05.2010 (C 115), 1.


Directives are informed by existing standards under the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). However, they go further by including detailed provisions designed to ensure that the rights are implemented in practice and, to an extent in a uniform way across the EU. Furthermore, the enforcement mechanisms regarding EU Directives are stronger than those that apply in respect of the ECHR. Therefore, EU Member States must ensure that their laws and procedures give practical effect to the rights provided for in the Directives.

1. The Purpose of the Training Framework

Compliance with the provisions of the EU Directives requires not only the existence of an appropriate legislative and regulatory framework, but also that criminal justice officials and practitioners responsible for the delivery of procedural rights sufficiently understand and actively facilitate them. Whilst procedures and protocols are important mechanisms in ensuring respect for procedural rights, they need to be complemented by training which addresses not only the relevant legislation, regulations, procedures and protocols, but which also contributes to an understanding of the purpose of the rights, and helps to develop the skills necessary to effectively deliver and facilitate them. This is particularly important where, as with the EU Directives, the changes present challenges to existing practices and attitudes. For example, whilst a lecture may inform lawyers of the legislative provisions that have been introduced to give effect to the EU Directive on interpretation and translation, and may also provide them with contextual information regarding relevant ECHR jurisprudence, it is not an effective mechanism for equipping lawyers with the understanding and skills necessary to ensure that their clients are able to benefit from the right in practice. Effective training would include the provision of information, but would also focus on enabling lawyers to put that knowledge into practice. Thus training would include exercises directed at raising awareness of the importance of, and developing the skills necessary for, identification of the need for interpretation, understanding the issues raised by communication via an interpreter, and liaising with the police and the interpreter.

The training framework was devised as part of the research study Procedural rights of suspects in police detention in the EU: empirical investigation and promoting best practice, which examined the procedural rights of suspects in police detention in four EU jurisdictions: England and Wales, France, the Netherlands and Scotland.

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4 See Art. 53 ECHR and the comparison between the binding nature of EU human rights provision and the ECHR by the ECJ, Case C-617/10 Akkagera v. Akkerberg Fransson, not yet published.
5 Funded by the European Commission under agreement number JUST/2010/JPEN/AC./IS7830-CE-0428607/00-12, and published as Blackstock et al. 2014.
6 Note that although England and Wales, and Scotland, are both parts of the United Kingdom, they constitute two separate, and distinctive, criminal justice jurisdictions.
The procedural rights examined in the research study were the right to interpretation and translation, the right to information, the right of access to a lawyer, and the right to silence. The objectives of the research were, firstly, to provide empirical evidence of how suspects’ rights were delivered in a range of EU jurisdictions and, secondly, to provide research-based best practice approaches to the provision of training designed to ensure the effective implementation of those rights. Under the Directives, Member States are required to request those responsible for training criminal justice officials to provide appropriate training, and this training framework is intended for dissemination amongst those organizations which provide relevant training courses, including bar associations. When conducting our research we did not find, in any of the four jurisdictions, training courses or modules that were specifically focused on procedural safeguards for suspects in police stations. This is understandable since training courses, both for the police and lawyers, normally have a wider focus. Based on our research, and on the pilot training that we conducted, we concluded that we could most usefully devise a training framework that could be used to inform the planning of, and be incorporated into, training programmes relating to the police detention stage of criminal proceedings. The training framework is not, therefore, intended as a model for stand-alone training courses in suspects’ procedural rights.

The objective of the training framework is to enhance the knowledge, understanding and skills of criminal justice practitioners - police officers and defence lawyers - in respect of the procedural rights of suspects in police detention. It seeks to do this by orientating the framework around the requirements of EU law on procedural rights, as set out in the Directives referred to above, and by suggesting appropriate training strategies. The framework highlights best-practice identified during the observational stage of our research in the four jurisdictions that were the subject of the study, and is designed to be applicable across EU Member States. It may also be relevant beyond EU jurisdictions, particularly in the context of the UN Basic Principles on the Role of Lawyers and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. The training framework focuses on the roles of police officers and criminal defence lawyers in the delivery of procedural safeguards at police stations, since these are the primary actors who control, and are therefore able to ensure, the effective delivery of these rights at this stage of criminal proceedings.

7 Art. 6 Directive on the right to interpretation and translation; Art. 9 Directive on the right to information. The Directive on the right of access to a lawyer does not include such a provision.
8 See section 2 below.
In essence, the primary objectives of the training framework are:

i) to foster professional cultures based on respect for and active advancement of the procedural rights of suspects in police detention;

ii) to address the practical challenges to the effective implementation of suspects' rights by suggesting training approaches designed to overcome those challenges;

iii) to promote the use of best practices in safeguarding the rights of suspects in police detention.

By engaging practitioners through training in the development of appropriate professional cultures, and by the entrenchment of practices based on respect for the right of suspects to effective criminal defence, it will be possible to improve the delivery and protection of those rights.

2. Content of the Training Framework

The training framework was developed in the context of training needs that were identified in the *Procedural rights of suspects in police detention in the EU* research, and reference should be made to the findings of the research, published as *Inside Police Custody: An empirical account of suspects' rights in four jurisdictions*,\(^{11}\) as appropriate.

*Chapter 2* Developing the training framework sets out the process by which the framework was developed, which included pilot training programmes conducted in England and the Netherlands.

*Chapter 3* Training approaches: indicators for successful training explores different approaches to training, making reference to other relevant research findings (some of which were used in the pilot training described in section 2), thus placing them in a more theoretical context, and provides guidance on how they may be used in practice.

*Chapter 4* The training syllabus sets out a suggested syllabus for training on the rights of suspects in police detention, which is based on the issues identified for the purposes of the pilot training, and on the full analysis of the research data that was subsequently carried out. As indicated above, the training syllabus is not intended to provide a prescriptive structure for training dedicated to the four procedural rights which were the subject of the research study. Rather, it is designed as a resource for those responsible for police and lawyer training, which may be useful in the determination of training needs, planning training programmes, and in devising appropriate approaches to delivering that training.

The *Annex to the training framework*, *Pilot training materials*, includes the materials used in the pilot training, which may be adapted by training providers for their own courses. We have included these to demonstrate the value of involving

\(^{11}\) Blackstock et al. 2014.
training delegates in practical exercises, and they show the detailed scenarios that we used to challenge and inform the delegates.
DEVELOPING THE TRAINING FRAMEWORK

1. Introduction

In developing the training framework two pilot training days were held, one in England and one in the Netherlands, which were designed to introduce the delegates to some of the research findings in relation to which a training need had been identified and to test out a range of approaches to addressing those training needs. The training day in England was held on 18 April 2013, and was attended by six police officers and five lawyers from England, and three lawyers from Scotland.\(^1\) In addition, four experts were invited to observe and to provide feedback: a senior police officer, an academic with long experience in training and assessing lawyers in relation to advising and assisting suspects at police stations, a senior lawyer with long experience in acting for suspected and accused persons in criminal proceedings, and a global expert on legal aid and access to justice who works for an international NGO. The training day in the Netherlands was conducted the following week, on 23 April 2013, and was attended by four police officers and five lawyers from the Netherlands, and six police officers from Belgium. The group of experts consisted of an experienced judge, a professor from the Dutch police academy, a prosecutor-general involved in developing Salduz guidelines for the Belgian police, and a professor of psychology and law with expertise in interrogation training for police officers.

The programme for each training day was almost identical, but in England the session on the right to silence and interrogation involved a role-play exercise, whereas in the Netherlands this was replaced by an exercise using a video-recording of an interrogation. The role-play in the session on disclosure and consultation also differed slightly. In England, a police officer was required to play the role of a lawyer in a lawyer-client consultation in order to experience the lawyer’s role, and in particular the impact of partial disclosure upon the lawyer’s ability to advise the

\(^1\) Police officers from Scotland were invited but, in the event, none were able to attend.
client. In the Netherlands, only lawyers played the part of the lawyer, having been given only partial disclosure. Delegates were asked to provide feedback at the end of the training days, and in addition the expert observers contributed to an analysis and evaluation of the pilot training. See the Annex Pilot training materials for the training day programmes and the exercises used.

2. The Objectives of the Pilot Training

Bearing in mind the purpose and objectives of the training framework set out in section 1 above, the pilot training had a number of objectives.

Testing whether training is a relevant response - As explained in more detail in section 2.3 below, preliminary analysis of the research data identified a number of problems with effective implementation of the procedural rights of suspects arrested and detained by the police. For example, the research found that the approach of police officers to informing suspects of their rights differed significantly as between 'experienced' suspects and those who had little or no previous experience of arrest and detention. Whilst the research found that officers were often careful and thorough in informing inexperienced suspects of their procedural rights, experienced suspects were often not fully informed of them and/or were assumed to know (and understand) what they were. An objective of the pilot was to identify whether such procedural failures were amenable to training, and whether training could result in officers approaching their obligations in a different, more effective, way.

Testing different approaches to training - Training can have a variety of functions, including conveying relevant information, developing relevant skills that enable that information to be applied appropriately in a given situation, developing an understanding of the needs of others, and developing an understanding and appreciation of the roles of other criminal justice actors. For example, effective implementation of the right to interpretation requires both police officers and lawyers to know what the relevant legal provisions are, to be able to assess whether a particular suspect requires the services of an interpreter, to know how to secure access to an appropriate interpreter, to understand the needs of a suspect who does not have sufficient knowledge of the language of the proceedings, and to appreciate the role of the interpreter and to enable them to perform it. The purpose of the pilot training was to assess the different approaches to fulfilling some of the key training needs identified by the research.

Assessing the utility of joint training - Whilst police officers and lawyers perform important functions in relation to persons who are suspected of committing a criminal offence, those functions differ in significant ways, and may be perceived as

\(^{2}\) See section 2.3.2 below.

\(^{3}\) The omission to inform 'experienced' suspects of their procedural rights is described as a failure since the EU Directive on the right to information makes no exceptions in respect of such suspects, and also because the fact that a suspect knows, or says they know, their rights does not mean that they understand them and their implications.
being in conflict. For example there is common agreement that the role of a lawyer in acting for a client in police detention is to advise and assist in the client's best interests. Although there are some differences between different jurisdictions, broadly the role of a police officer is to investigate an alleged offence and whether a particular suspect committed it, including by interrogating the suspect. Advice by a lawyer to a client to exercise their right to silence is likely to be regarded as inimical to the objectives of the police officer, but on the other hand, the failure of the police officer to disclose any information about the evidence to the lawyer may lead the lawyer to conclude that advising silence is the only appropriate advice that they can give to the client. One of the objectives of the pilot training was to assess whether joint training might result in a better appreciation of the role of the other, and lead to behavioural changes on the part of police officers and/or lawyers which, in turn, might result in more effective delivery of procedural rights.

Assessing the utility of cross-jurisdictional training – As noted above, the jurisdictions in the study are at different stages of development in respect of the procedural guarantees covered by the EU Directives. For example, in England and Wales, suspects have had a right to consult with a lawyer and to the presence of the lawyer during police interrogations since 1986, whereas in Scotland this right was not introduced until 2010. One consequence of this is that in England and Wales the role of the lawyer at the police station has been developed over more than two decades, and is incorporated into a police station accreditation scheme, whereas in Scotland the role of the lawyer at the investigative stage is relatively under-developed. Thus an objective of the pilot was to assess whether joint training for lawyers and police officers from different jurisdictions might assist in developing common understandings of procedural rights, and in communicating best practice.

3. Training Issues Arising from the Research

For the purposes of the pilot training, initial analysis of the research data was used to identify a number of issues that might usefully be addressed by training. The issues were grouped around activities which must occur during police detention in any jurisdiction, and were identified as follows:

- Arrival at the police station – police identification of the need for interpretation and/or translation; and notification to the suspect of their procedural rights.
- Disclosure of information and the lawyer-client consultation – police decision-making on what information to provide to the suspect and/or their lawyer, and the conduct of the lawyer-client consultation, including the consequences of the decision regarding disclosure and arrangements for police interrogation.
- The right to silence and the role of the lawyer in police interrogation – understanding the rationale for and meaning of the right to silence, and understanding the role of the lawyer in police interrogations.
3.1. Arrival at the Police Station

The EU Directive on the right to interpretation and translation requires Member States to ensure that a procedure or mechanism is in place to ascertain whether a suspect speaks and understands the language of the proceedings and whether they need the assistance of an interpreter.\(^4\) In none of the jurisdictions in the study was a formal procedure or mechanism in place in the research sites to determine whether a suspect requires an interpreter, and suspects were not orally informed of their right to an interpreter (although in England and Wales the Notice of Rights and Entitlements that is given to suspects states that if the suspect does not speak or understand English the police will arrange for someone who speaks their language to help them). The procedure adopted was reliant on the discretion exercised by the custody officer (or assistant prosecutor in the Netherlands), and in England and Wales and Scotland, the process was aided by a language identification card or poster (and in the former, by the availability of the Notice of Rights and Entitlements in 54 languages on the Home Office website).\(^5\) The research found that officers in these three jurisdictions approached the identification of need for an interpreter in different ways, that the process was normally very informal and approximate and that, in the Netherlands in particular, the approach was often informed by what was convenient for the police rather than what the needs of the suspect were.\(^6\)

In respect of notification to suspects of their procedural rights, the EU Directive on the right to information requires Member States to ensure that suspects are promptly informed, orally or in writing, of: the right of access to a lawyer; any entitlement to free legal advice; the right to be informed of the accusation; the right to interpretation and translation; and the right to remain silent.\(^7\) In addition, the Directive requires that suspects who are arrested or detained are promptly provided with a written Letter of Rights setting out these rights, and other rights such as the right of access to case materials.\(^8\) The laws and procedures regarding the right to information differed as between the jurisdictions. In particular, there were significant differences with regard to the complexity of the language used, the extent to which the rights were explained, and the procedures for and the extent to which police officers verified whether the suspect understood the notification. One common feature, however, was that the process of notifying rights to ‘experienced’

\(^4\) Art. 2(4) Directive on the right to interpretation and translation.
\(^6\) ibidem. In addition, there is an audio file of the Notice for use if a suspect is blind or cannot read.
\(^7\) For further information on the research findings, see Blackstock et al. 2014, Chapter 4.
\(^8\) Art. 3(1) Directive on the right to information.
\(^9\) Art. 4 Directive on the right to information.
suspects was more perfunctory than in the case of suspects who had little or no previous experience of arrest and detention.\footnote{For further information on the research findings, see Blackstock \textit{et al.} 2014, Chapter 5.}

In the pilot training, these issues were addressed using two different types of exercise.

The first exercise sought to address the problems identified by the research in relation to identification of the need for interpretation. It comprised a group discussion, involving both police officers and lawyers, which was designed: (a) to prompt participants to think about how they identify the need for interpretation and to share ideas about appropriate approaches to the task; and (b) to prompt consideration of interpretation as a right of the suspect rather than merely a convenience for the police.

The second exercise concerned the process of notification of rights to suspects, and for this purpose, participants were divided into groups of three or four, comprising both police officers and lawyers. The exercise consisted of two separate role plays, one involving notification of rights to a suspect who did not understand complex language, and a second involving an ‘experienced’ suspect who was not interested in being notified of their rights. In each case, the suspect was played by a person who was not participating in the pilot training, and who had been given instructions on how to play the part. Feedback on the role plays was provided by the other participants in each group, followed by a group feedback session involving all participants. The objectives of the exercise were: (a) to develop an awareness of the importance of the process of notification of rights; (b) to enable participants to identify and understand different approaches to notification of rights and how this may affect suspects’ understanding of their rights; and (c) to prompt participants to consider how suspects may perceive their rights and, in particular, to consider what approaches are appropriate for different kinds of suspect (in particular, suspects who may lack intellectual capacity, and suspects who appear to know their rights).

3.2. Disclosure of Information and the Lawyer-Client Consultation

The EU Directive on the right to information requires Member States to ensure that suspects and accused persons who are arrested and detained are: (a) promptly informed of the reason for their arrest and detention, and provided with information about the criminal act of which they are suspected or accused; (b) given access to documents which are essential to effectively challenging the lawfulness of their arrest or detention; and (c) given access to all material evidence in the possession of the competent authorities no later than on submission of the merits of the accusation to the judgment of a court.\footnote{Arts. 6 and 7 Directive on the right to information.} In respect of (a), Recital 28 of the Directive states that information about the suspected criminal act should be given promptly and at
the latest before the first official interview of the suspect by the police, and should include a description of the facts and, where known, the time and place of the alleged offence, and the possible legal classification of the alleged offence. The information should normally be given in sufficient detail to safeguard the fairness of the proceedings and to allow for an effective exercise of the rights of the defence.

Preliminary analysis of the research data found that while suspects were normally informed of the reasons for arrest and the criminal offence they were suspected of (although often in a perfunctory form), the amount of evidential information given to the suspect varied depending upon a number of factors, including whether the suspect was legally represented, and the perceived strength of existing incriminating evidence. Broadly, the police adopted a strategic approach to the disclosure of information about the evidence prior to the first interrogation, and extensive disclosure was only likely where the suspect was represented and the police thought that the evidence was strong. Often, the information provided was extremely limited. Lawyers felt that they could not adequately perform their function in the absence of disclosure from the police, and said that when faced with minimal disclosure they were more likely to advise their client to exercise their right to silence in interrogation. Despite this, lawyers often took little concerted action to obtain disclosure from the police prior to the interrogation, although in some jurisdictions they were inhibited in doing so by difficulties in speaking to the officer(s) dealing with the case. The major exception to this picture was England and Wales where, in the case of represented suspects, the officer in the case routinely provided some disclosure prior to the first interrogation (although the strategic approach to disclosure referred to above was still evident). With regard to lawyer-client consultations, the approach in Scotland differed from that in the other jurisdictions in that almost all consultations were by telephone rather than in person. In France and the Netherlands, lawyer-client consultations were limited to 30 minutes, but most consultations in all of the jurisdictions took significantly less time than this.\footnote{For further information on the research findings, see Blackstock et al. 2014, Chapters 6 and 7.}

In the pilot training, we therefore focussed on the issue of police disclosure and its impact upon legal advice, rather than how suspects are informed of the reasons for arrest. The issues were explored using two exercises, one concerned with disclosure and the other with the lawyer-client consultation.

In the first exercise, lawyers and police officers were divided into separate groups. Each was provided with the same case scenario. The police groups were asked to discuss what information they would disclose to the defence lawyer, and the lawyer groups were asked to discuss what information they would want from the police to enable them to advise the client. In a plenary session, the police and lawyer groups shared the outcomes of their discussions with the whole group, leading to a discussion of the different approaches taken by the police and lawyer groups. The objectives of this exercise were: (a) to prompt participants to consider the purpose of disclosure from their perspective (that is, police officers or lawyers);
(b) to prompt participants to consider the relationship between disclosure and the role of the lawyer in advising a client prior to interrogation; and (c) to enable participants to understand the impact of minimal disclosure on the capacity of the lawyer to advise a client.

The second exercise entailed two role-plays. In the first, in England, a police officer participant was asked to play the role of a lawyer who was required to advise a suspect on the basis of the information that the police agreed to disclose in the first exercise (concerning disclosure). This was so that they could experience the lawyer's role, and in particular the impact of partial disclosure upon the lawyer's ability to advise the client. In the Netherlands, a lawyer participant conducted this role. In the second exercise, a lawyer advised the suspect, but this time on the basis of having had full disclosure from the police. The suspect was played by a non-participant who was given instructions on how to reveal information to their 'lawyer' according to the trust and confidence they felt in them. Following the role-plays, the whole group assessed the two consultations and, in particular, considered the impact of the level of disclosure on the advice given to the client. The objectives of the exercise were: (a) to identify differences in attitude to disclosure as between police and lawyer participants; (b) to promote understanding of the role of the lawyer in providing advice to a client prior to a police interrogation; and (c) to prompt participants to think about the impact of the level of police disclosure on the nature and scope of advice that could be given by the lawyer, in particular, with regard to advice regarding the right to silence.

3.3. The Right to Silence and the Role of the Lawyer in Police Interrogations

The EU Directive on the right to information requires that a suspect be notified of the right to silence promptly, but does not specifically require that the suspect be given notice, or be reminded, of the right to silence at the commencement of an interrogation. ECHR case-law, on the other hand, requires that notification of the right to silence be given when the right arises. Whilst the EU Directive states that notification must be provided in 'simple and accessible' language, there is no requirement that the police take action to verify that a suspect understands the notification. With regard to the right of access to a lawyer, the EU Directive does provide that a suspect has a right to have their lawyer present during police interrogations, but does not articulate the role of the lawyer. The EU has not sought to regulate the conduct of police interrogations, and whilst the ECHR prohibits torture and inhuman or degrading treatment, the case-law of the ECHR does not establish clear parameters for the application of pressure by the police during interrogations.

With regard to the right to silence, the law in England and Wales, the Netherlands and Scotland, requires notification of the right to silence to be given at the commencement of an interrogation, but regulation of the way in which notification is to be given varies between the jurisdictions. In France, notification of the right to silence must be given when a suspect is detained, but does not have to be
given during an interrogation. Preliminary analysis of the research data showed that in England and Wales, the interrogating officer routinely read out the caution (which briefly states the legal implications of silence) in a standard format and asked questions to check the suspect's understanding of the caution. However, it was commonly agreed that the law on inferences from silence is complex, and that it was beyond the understanding of many suspects. In the Netherlands, by contrast, there was no standard format for notification of the right to silence, officers normally gave 'minimal' notice of the right, and did not normally provide an explanation. In these exceptional cases where an explanation was provided, the officer normally emphasized the negative consequences of the suspect remaining silent. Furthermore, many instances were observed where the officer sought to undermine a suspect's decision to remain silent. In Scotland, an absolute right to silence exists, and a caution in a standard format was read from a template, but officers did seek to verify the suspect's understanding of the caution. In relation to the role of the lawyer during interrogation, the position in the four jurisdictions differed significantly. In England and Wales the circumstances in which the lawyer may intervene are set out in a Code of Practice, and lawyers were observed to be quite pro-active in interrogations. In France and the Netherlands, there are significant limitations on the ability of lawyers to intervene, and lawyers reported that the police tended to discourage intervention.\footnote{For further information on the research findings, see Bladstock \textit{et al.} 2014, Chapter 8.}

Two exercises were devised to explore these issues. In the first, whole group, exercise participants were asked to respond to and discuss a number of questions about the right of access to a lawyer, the role of the lawyer, and the right to silence. The objectives of this exercise were to: (a) prompt participants to think about the meaning and implications of the right of access to a lawyer and the right to silence; (b) give the opportunity to participants to identify and explore the differences in perceptions of the two rights as between the police and lawyer participants; and (c) prompt participants to consider the extent to which it is legitimate, if at all, for the police to seek to undermine the two rights.

The second exercise took a different form in the pilot training in England and in the Netherlands. In England, the participants were first divided into the two professional groups, and asked to identify five reasons why a defence lawyer should be able to intervene in the course of a police interrogation, and to write these up on a wall poster so that they could be viewed by all participants. The participants were then provided with a transcript of an interrogation (taken from a case in respect of which the Court of Appeal of England and Wales determined the interrogation to have been oppressive), and were asked to identify whether and when they would have expected the lawyer to have intervened, the basis of any intervention, and how the interview should then have proceeded. The exercise in the Netherlands pilot was conducted along similar lines, but in this case participants were shown an audio-visual recording of an interrogation rather than being provided with a tran-
script. The objectives of this exercise were: (a) to prompt participants to consider in what circumstances a lawyer should be permitted to, and should, intervene in a police interrogation, and to compare the perceptions of the police and lawyers; (b) to explore participants’ perceptions of the legitimacy of police interrogation tactics; and (c) using an example from a real case, to explore the acceptable parameters of police interrogation methods, and of the legitimacy of interventions by lawyers.

4. Developing the Training Framework Syllabus

The pilot training days were evaluated by the participants, and also by the expert observers, and their evaluations have been taken into account in developing both the training framework generally, and the training syllabus in particular. Whilst the participants in the pilot training programme were enthusiastic about the benefits of the pilot training programme, including the value of joint training and cross-jurisdictional training, they were acutely aware of the constraints of time and resources in their organizations and, particularly in the case of lawyers, the constraints resulting from the structure of the legal profession and the financing of legal aid work. They were also conscious of the fact that whilst the pilot training was specifically concerned with the four rights which were the subject of the research project, in practice suspects’ procedural rights are likely to form part of training courses that have wider objectives.

The pilot training programme was, as noted earlier, based on preliminary analysis of the research data. Further analysis of the data has confirmed the importance of the issues covered in the pilot training, but it has also indicated a range of other training needs. The full training framework syllabus derived from the research is set out in section 4 below. The pilot training programme also enabled a number of different approaches to satisfying the training needs identified to be tested. The different training methods, together with feedback from the participants in the pilot training on those methods, are explored more fully in section 3 below, and are placed in the context of existing research evidence regarding training methodologies.
TRAINING APPROACHES: INDICATORS FOR SUCCESSFUL TRAINING

1. Introduction

The objectives of this section are to place the approaches used in the pilot training in a broader, more theoretical context, and to provide guidance on how they may be used in practice.

A systematic approach to understanding the effectiveness of different police training methods is still in its infancy. This is reflected in the American National Research Council's Report on Fairness and Effectiveness in Policing and in the call by the Campbell Collaboration for a systematic review of the impact of training programs in reducing the use of force by the police. The literature referred to in this section focuses on suspects' rights and interrogation from a predominantly police perspective since research on the training of lawyers in this regard is almost non-existent. It also includes reference to wider literature since studies of police interrogation training are also relatively rare. Therefore, studies which offer an understanding of training approaches concerning the interviewing of children, and victims and witnesses, are included with a view to creating a baseline for developing a successful approach to training which is relevant to both police officers and lawyers.

The training methods used in the pilot training are described and analysed by reference to existing research evidence, and academic literature, on interrogation and to the feedback from participants and experts in the pilot training. Although the pilot training was not subjected to academically rigorous evaluation, it was possible to draw some broad conclusions from the feedback of participants and the expert observers.

It should be noted that, given the costs of training and follow-up, and resource constraints, a train-the-trainers strategy should be considered in respect of training.

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1 Skogan & Frydl 2004.
2 See <www.campbellcollaboration.org> (last visited 21 October 2013).
regarding the procedural rights of suspects. Although we did not pilot it in our study, research on the training of clinicians found a train-the-trainers strategy was found to significantly improve the competence levels of participants compared to a standard training strategy.  

2. The Importance of Training

The need for training on procedural rights in the context of interrogation has been considered in a number of previous studies. Walsh and Milne examined the impact of the PEACE model of training on private fraud investigators and found that it led to some improvement in interrogation skills. The improvement occurred, in particular, in relation to the notification of rights given to suspects, since following their training most investigators used a memory-aide which helped to ensure that they complied with relevant legal requirements. With regard to overall performance, following training there were fewer legal breaches by investigators and coercive tactics were not used. However, Walsh and Milne found that PEACE training did not improve the professionalism of investigators more generally. In particular, the ‘explain and engage’ phase of the training was shown not to be effective. For example, only in a minority of interrogations was the administering of a caution validated, and the investigator rarely established the suspect’s understanding of the caution. This phase of the interrogation tended to be performed as a mechanical exercise rather than being a meaningful engagement with the suspect. The same was also found in respect of the decision of the suspect whether to seek legal assistance. In 30 per cent of cases where a suspect did not seek legal assistance, the investigator failed to explore the reasons why the suspect waived their right. Furthermore, the right to be informed about the accusation was also often violated, which followed from the failure of officers to adequately explain the purpose of the interrogation. These findings confirmed those in an earlier evaluation of PEACE training, which found that the performance of PEACE-trained officers did not significantly differ from that of police officers who had not received PEACE training.  

Martino et al. 2010.
4 The PEACE training model was developed in England and Wales following the implementation of the Police and Criminal Evidence Act 1984, in order to train police officers in a new ethical approach to investigative interviewing. PEACE stands for Planning and preparation, Engage and explain, Account, Closure, and Evaluation. See, for example, Williamson, Milne & Savage 2009, Chapter 2.
5 Walsh & Milne 2008.
6 The memory aid consisted of a laminated written document detailing the suspect’s right. This supported earlier findings by Clarke & Milne 2001.
7 These findings were consistent with those reported in Bull & Soukara 2010.
8 Clarke, Milne & Bull 2011.
Walsh and Milne also found shortcomings in the planning of interrogations, which was directly related to the level of pre-interrogation disclosure provided by the police. Pre-interrogation disclosure has an impact on the ability of lawyers to communicate with and advise their client during the pre-interrogation consultation, yet the disclosure strategy adopted by police interrogators only took into account their own interrogation objectives. It is also worth noting that research has shown that the vast majority of police officers receive no training on how to interpret and use forensic evidence, which affects both interrogation planning and the conduct of interrogations.9

With regard to lawyers, research has found that the time taken by lawyers in consulting with their clients prior to interrogation is limited where they have not received specific training.10 Research has also shown that the approach by police officers to conducting interrogations does not differ according to whether or not a lawyer is present,11 and has demonstrated the need for training in order that interventions by lawyers during police interrogation are effective.12 The significance of the training needs of lawyers in protecting the procedural rights of their clients takes on added significance given the imbalance in the amount of training between police officers and lawyers. Whilst in many jurisdictions police officers receive training on the interrogation of suspects, training for lawyers on their role in police interrogations is relatively rare.

Therefore, training for police officers and lawyers is needed to improve standards in respect of: (a) the effective notification of rights to ensure suspects are aware of and understand their rights; (b) pre-interview disclosure; and (c) the interrogation of suspects by the police, and the role of lawyers in police interrogations. Despite the concerns raised regarding the quality of interrogations of suspects, relatively little research has been carried out in relation to the content, structure and efficacy of such training.13 Research findings emphasize the need for training that goes beyond general principles, and engages trainees in exercises that are designed to improve their practice.

Pilot training: participants' perspective

According to the participants, a rights-based approach, in which the focus is on the rights of the suspect and their experience of the arrest and detention process, provides an important counterweight to training that is directed at knowledge of the law and/or procedural compliance, and helps to develop an understanding and appreciation of the purpose of those rights. The participants informed us that whilst most receive training on the procedural aspects of police detention, and in particu-
lar all police officers are trained in how to conduct interrogations, they receive very little guidance on the rights of suspects.

3. Training Effectiveness

As explained in section 2.2 above, the pilot training was set up to test whether training is a relevant response to the identified training needs, to test different approaches to training, and to assess the utility of joint and cross-jurisdictional training. Here, we consider the latter two objectives, and in doing so we take into account the literature on interrogation training, as well as the perspectives of the participants in the pilot training. The participants confirmed that in their view, if training is to be effective, attention must be paid to the objectives of training in respect of any particular issue, so that the training methods adopted, and the use of joint training or cross-jurisdictional training, are appropriately aligned to the purpose of the training.

The development of the pilot training was based on a number of basic training principles, some of which have previously been tested in the context of police interrogation. In the remainder of this section, the most important basic principles are dealt with by reference to four themes: participants, content of the training, format of the training, and structure of the training.

3.1. Participants

With regard to the number and type of participants in training courses, several issues need to be addressed: group size, joint training, and cross-jurisdictional training.

Group size

Given the use of role-plays within skills training and the necessity of providing feedback, group size must be addressed. Research on the effects of group size on training in interrogation is scarce. However, the limited number of studies in this field show that small groups (up to eight participants) allow for more interaction between the trainer and trainees, which enables higher levels of training performance.

Pilot training: participants’ perspective

Participants preferred to conduct role-plays and to provide, and be given, feedback in a small group rather than a large group since this facilitated communication.

Joint training

Literature on joint training in interrogation, in terms of both training practice and research, is limited. This is surprising given the fact that various occupational groups such as police, lawyers, public prosecutors, interpreters, etc. are involved in the interrogation of suspects.

In training in negotiation skills, tasks are usually assigned to both sides of a negotiation dyad, and positive results on negotiation outcomes have been observed in integrative negotiations, where co-ordination and co-operation are, to a certain extent, required. Integrative negotiation refers to a negotiation strategy which is aimed at reaching the best possible deal for both sides. Hence, it can be called a win-win negotiation which, whilst both parties may have divergent interests and may be reluctant to co-operate, requires mutual information exchange. Both parties thus have incentives both to co-operate and to compete. This description of negotiation can also be applied to the interrogation of suspects, where the police on the one hand, and the suspect and their lawyer on the other hand, have competing interests but also need to co-operate.

One study of joint training concerned criminal justice and mental health professionals. Relations between these two groups can be problematic, but effective screening of mentally ill defendants requires co-operation between them. The study found that both groups of professionals were in favour of joint training. The authors of the study suggested, as a starting point for joint training, that similarities in values between the two professional cultures, as well as common concerns, should be addressed.

In relation to police interrogation, both police officers and lawyers have responsibilities with regard to the notification and protection of suspect's procedural rights. Both studies suggest that joint training concerning the approach to interrogation could be productive.

Pilot training: participants' perspective

Participants agreed that joint training for police officers and lawyers could help to develop a mutual understanding of their respective roles and, whilst role-conflicts and professional tensions may be inherent, could enable such conflicts and tensions to be dealt with more constructively. One expert in Bristol observed that skills-based training of the kind offered in the pilot was very expensive to facilitate, but that the costs could be reduced through joint training. No participant had previously taken part in joint training and most found it a helpful exercise in developing greater familiarity with, and respect for, the professional role that the other had to undertake. Some suggested the value of an ice-breaker session to foster open communication between the two professions.

Zerres et al. 2013.
Hean et al. 2011.
If mutual understanding is to be improved, exploration of the respective roles of police officers and lawyers should be in-depth, and conducted in an environment where open discussion and analysis between the two groups is possible. This is particularly relevant in a period of transition, for example, following the introduction of the right of access to a lawyer in police interrogations in countries such as Scotland, Belgium, France and the Netherlands. Some participants considered it necessary to hold at least introductory knowledge-based training within each professional group prior to more skills-based joint training, since this would allow for initial exploration of the regulatory framework in a way that was directly relevant to those undergoing training. Participants suggested that other relevant criminal justice personnel, such as public prosecutors, should also be involved in joint training since currently their training focuses on the law rather than on, for example, the skills needed to effectively communicate rights to suspects.

**Cross-jurisdictional training**

Existing literature on interrogation does not address cross-jurisdictional training. Not only is there a variety of legislative frameworks across different jurisdictions, but the underlying legal traditions are also significantly different. In the context of the EU principle of mutual recognition, and the legislation under the Roadmap of procedural rights, cross-jurisdictional training is becoming increasingly important.

**Pilot training: participants’ perspective**

Training that involves participants from different jurisdictions can be useful in developing mutual understanding, in enabling participants to reflect on their own practice and procedures, and in promoting best-practice. However, it is necessary to seek jurisdictions where there is some similarity in the procedure and professional culture, or to at least bear significant differences in mind in the development of training exercises, as otherwise the practical benefit of discussing the delivery of rights in widely differing contexts may be weakened. It was observed that cross-jurisdictional training on the implementation of the EU directives would enable an exchange of views on practical problems and best practice solutions, which are likely to be common to all Member States. This could then be followed up by more in-depth national training that focuses on national procedures.

**3.2. Content**

The provision of exemplars of good practice is considered to be a key factor in successful training.\(^7\) By means of a modelling process, one study found that even in the case of older police officers (defined in the study as those over 40 years), their

\(^7\) Powell & Steinberg 2012.
performance significantly improved when they were offered the opportunity to observe ‘good’ performances by others.\(^{18}\)

**Pilot training: participants’ perspective**

Participants thought that the use of different types of exercise was helpful in revealing the impact of procedures upon suspects. In particular they found the use of real transcript material in Bristol, and real or simulated video material in the Netherlands, in the session on police interrogations was an interesting and useful approach which highlighted how interrogation techniques affected the suspect. However, participants emphasized the importance of such material reflecting ‘normal’, commonly encountered, situations. Interestingly, in both pilot training days, police officers intervened before lawyers did to identify where undue pressure was being placed on the suspect. This demonstrated how lawyers receive far less training on how to assess the application of pressure and other interrogation techniques used by the police, as well as how to respond to them.

The police participants felt that the interview transcript used in Bristol involved circumstances that were too exceptional, and that a case involving a less obvious application of pressure would be preferable in order to enable participants to appreciate the impact on suspects of more subtle forms of pressure. They also felt that an audio or visual recording would have been easier to engage with, enabling them to see and/or hear the emotional responses of the suspect. It was also observed that the training material should reflect the kinds of crimes officers taking part in the training actually encounter; exercises involving serious crimes would not be appropriate for non-specialist police officers.

### 3.3. Format

It is commonly accepted that hands-on exercises, and immediate feedback, are crucial for training to be successful.\(^{19}\) Therefore, training programmes should include sufficient practical exercises together with a facility for feedback to be given.

**Role-plays**

Role-play constitutes one of the least expensive forms of incorporating practical exercises into training. Many training programmes systematically rely on role-play exercises that are designed to consolidate learning.\(^{20}\) Police officers who have taken part in training involving role-play reported that the technique was the most useful.

\(^{18}\) Callahan, Kiker & Cross 2003.


\(^{20}\) Lamb et al. 2000.
element in the training, although they often did have some initial apprehensions about engaging in simulated exercises.\textsuperscript{21}

One important consideration in designing role-play exercises is whether those taking part should consist only of participants in the training, or whether one party should be played by a non-participant. Powell has suggested that role-play exercises in which participants are required to act the parts of interviewer and interviewee are less effective than role-play exercises in which actors or researchers play the role of the interviewee.\textsuperscript{22} A further variable is whether the actor receives training in the role that they play. Research on training in the interviewing of children has demonstrated that role-play exercises where the interviewee is played by an actor who has been trained to play the role of the child is more effective than exercises using untrained actors.\textsuperscript{23}

The question of whether role-play exercises prompt authentic interactions was examined by Stokoe.\textsuperscript{24} This study demonstrated that whilst police officers commenced role-play interrogations and real interrogations in a similar way, for example, by identifying the persons present, the interactions in role-play interrogations were more elaborate or exaggerated in comparison to real life practice. With regard to notification of the right of access to a lawyer, the process took longer in role-plays compared to real interrogations, because in the former officers asked the suspect about their understanding of the right, which officers did not do in real interrogations. Stokoe’s research also found that where actors played the part of the suspect, they sometimes confronted the police officers with scenarios that were unlikely to occur in real interviews.\textsuperscript{25}

Therefore, the evidence suggests that role-play can be a useful training technique, but that consideration must be given to whether actors should be used, to whether they should receive training in the role they are to play, and also to trying to ensure that interviewee’s reactions reflect ‘real-life’ encounters. It also suggests that consideration should be given to other techniques designed to improve skills, such as using audio-visual recordings of real suspect interrogations.\textsuperscript{26} Studies of training using this technique have shown that they can contribute to significant improvement in performance.\textsuperscript{27}

\textit{Pilot training: participants’ perspective}

The participants and experts emphasized that training which involves the practical application of legal and professional obligations and responsibilities enables police

\textsuperscript{21} Powell & Wright 2008.
\textsuperscript{22} Powell 2002.
\textsuperscript{23} Powell, Fisher, & Hughes-Scholes 2006.
\textsuperscript{24} Stokoe 2013.
\textsuperscript{25} Stokoe 2012; Stokoe 2013.
\textsuperscript{26} Powell 2002.
\textsuperscript{27} Dominica et al. 2008.
officers and lawyers to develop their skills so that they are more effective. They found the role-play exercises to be the most valuable method of demonstrating the issues that we sought to highlight, because the impact was felt by them directly rather than through the analysis of a written or visually recorded example. For example, in Bristol, the exercise which involved a police officer playing the part of a lawyer in consultation with a client, followed by a lawyer playing the part of the lawyer, was particularly well received as it clearly demonstrated good and bad practice. Furthermore, by linking this exercise to the previous disclosure decisions made by police officer participants, it enabled the officers to understand the difficulties experienced by lawyers who had been given little information in advising clients. It demonstrated to the police officers that a lawyer with little information may well feel that they have little alternative but to advise their client to remain silent, whereas a lawyer with full disclosure could properly explore the case with the suspect, test their account and, where appropriate, advise them to give an account during the interrogation. Officers were, therefore, more aware of the impact of their disclosure decisions, which led them to re-evaluate their approach to disclosure.

With regard to the format of the role-play exercises, some participants suggested that they should be conducted in a separate room, with the other participants observing via CCTV. This, they believed, would enhance the quality and credibility of the role-play by increasing the ‘intimacy’ of the interaction. Some participants also thought that using actors to play the part of the suspect would enhance this. The exercise also highlighted the need to provide detailed and realistic instructions to the participants, in order for them to fully engage in the process. Where time allows, instructions affording different outcomes are also useful to explore in more depth the impact of a particular technique.

Feedback

It is commonly recognized that expert feedback, that is, feedback from people who are experts in the subject or skill concerned, is a core element of successful training programmes.\(^28\) Research on training regarding the interviewing of victims found that post-training expert feedback significantly increased the quality of subsequent interviews.\(^29\)

A second form of feedback is that provided by peers. In clinical training, group feedback was found to be an effective mechanism which enabled trainees to learn from their peers.\(^30\) Participation in group feedback encourages a culture of critical reflection on colleagues’ performance (as well as the trainee’s own performance), and also helps to develop the skill of providing constructive feedback to colleagues. The findings of research on the effectiveness of individual versus collective

\(^{28}\) Powell & Steinberg 2012.

\(^{29}\) Cyt et al. 2012.

feedback in role-play exercises and ‘real interview’ exercises are rather equivocal. Some studies report a small but positive effect from individual feedback,\textsuperscript{31} whereas others did not find significant differences between individual and group feedback.\textsuperscript{32} Since collective feedback is less time-consuming and resource-intensive than individual feedback, a collective feedback technique is appropriate for training police officers and lawyers. However, in order to enhance its effectiveness, collective feedback requires some instructions for the participants in order to ensure that they both provide and receive feedback in a constructive manner.

\textit{Pilot training: participants’ perspective}

Participants emphasized the need for sufficient time to be given in the training programme to allow thorough, detailed, feedback to be given. The experts also observed that where group participants are watching a role-play exercise, it would be helpful to give observers instructions that frame what they should be identifying and analysing.

\section{3.4. Structure of Training}

With regard to the structure of training programmes, two interconnected elements are identified in the literature: the distribution of training over time, and follow-up supervision.

\textit{Distribution of training over time}

One of the main factors that distinguishes effective training programmes from those that are ineffective is the distribution of training over time; that is, training programmes in which the primary training event is supplemented by further training events such as refresher training and/or by incorporating training into subsequent practice.\textsuperscript{33} Unfortunately, as with the techniques of providing exemplars of good practice and expert feedback (two other core elements of effective training) this element is often missing in current training programs.\textsuperscript{34} Research has found that where these elements are not incorporated into a training programme, the effectiveness of training declines.\textsuperscript{35} If a training program is to result in positive change in

\textsuperscript{31} Dominicent \textit{et al.} 2008; Smets 2012.
\textsuperscript{32} Lamb \textit{et al.} 2000. However, it should be noted that the experimental group (individual feedback) and the control group (no individual feedback) could not be directly compared because the experimental group was trained in interviewing victims whereas the control group received training in interviewing suspects.
\textsuperscript{33} Powell, Fisher & Wright 2005.
\textsuperscript{34} Powell & Steinberg, 2012; Snook \textit{et al.} 2012.
\textsuperscript{35} Powell, Fisher, & Hughes-Scholes 2008.
behaviour and skills, the distribution of training over time is necessary.\textsuperscript{36} This can be in the form of refresher training and/or appropriate supervision.\textsuperscript{37}

\textit{Follow-up supervision}

Research consistently demonstrates the importance of intensive training, followed by supervision that is incorporated into practice, in achieving successful and sustained improvement.\textsuperscript{38} Research on the process of notification of rights to suspects by the police has demonstrated the benefits of appropriate supervision following training.\textsuperscript{39} A workplace supervision strategy was found to be positively related to improved performance in the 'engage and explain' phases of PEACE model of interrogation. Moreover, supervision also 'appeared to provide some safeguards for suspects who did not have a legal advisor'. However, the cost and resources involved in workplace supervision mean that in practice training programmes often omit this element.\textsuperscript{40}

Despite the cost and resource implications of follow-up supervision, a strategy of providing expert feedback at the initial training event, together with follow-up supervision, has been recommended as an effective method for securing sustainable changes in attitudes and improvement in skills.\textsuperscript{41} This was echoed by the participants in the pilot training. However, if supervision is to be effective, it must be embedded in the organization concerned: it requires high level institutional commitment, including: identification of who is to conduct supervision; the provision of training for supervisors; and building supervision into supervisors’ job descriptions and the allocation of necessary time and resources for supervision to be carried out.

It is recommended that a supervision and follow-up strategy is developed for both police and lawyer training.

4. \textit{Conclusions}

The research on the procedural rights of suspects in police detention, reported in \textit{Inside police custody: An empirical account of suspects’ rights in four jurisdictions}, identified the need for training as a crucial element in ensuring that the procedural rights set out in the EU Directives are effective in practice. Some of the needs identified, such as those concerning the right to interpretation and translation, the notification of rights to the suspect, the pre-interview disclosure of evidence, the format of consultation between lawyer and client, the role of the lawyer during interrogation

\textsuperscript{36} Powell & Steinberg 2012.
\textsuperscript{37} See e.g. Clarke, Milne & Bull 2011; Crawshaw, Devlin & Williamson 1998; Rischke, Roberts & Price 2011; Snook et al. 2012.
\textsuperscript{38} Vanderhallen et al. 2013.
\textsuperscript{39} Clarke, Milne & Bull 2011.
\textsuperscript{40} Lamb et al. 2002; Powell, Fisher & Wright 2005.
\textsuperscript{41} See e.g. Clarke, Milne & Bull 2011; Crawshaw, Devlin & Williamson 1998; Powell, Fisher & Wright 2005; Price & Roberts 2011.
and the right to silence, were addressed in a pilot training held in England and the Netherlands. Some of the mechanisms for delivering effective training that have been identified in this training framework – for example, expert feedback, refresher training and follow-up supervision – may, in view of their resource and organizational implications, be difficult to achieve especially for small-scale organizations such as many law firms. However, the training framework provides examples of a number of training strategies that can be incorporated into existing training programmes, or which may form the basis of new training programmes designed to give effect to the EU Directives. These include training the trainer, joint training and cross-jurisdictional training approaches. With regard to the content and format of training, role-play can be an effective technique although ideally it should be conducted using actors, and supplemented with discussion of ‘real life’ interrogations during subsequent supervision sessions.\(^4\)

\(^4\) See Powell 2002.

\(^5\) Future research in this field should focus on providing a more precise understanding of the barriers to effective implementation of suspects’ procedural rights, from the perspective of both police officers and lawyers, and of the types of training strategies that are both effective in overcoming those barriers and are cost-efficient. See Powell & Steinberg 2012.
THE TRAINING SYLLABUS

1. Introduction to Syllabus

This syllabus aims to complement training programmes for police officers and lawyers in police custody procedures. It is not intended to be prescriptive nor to provide a stand-alone training module. Rather, it is offered as a resource which can be used in, and incorporated into, training programmes designed to improve the knowledge and skills of police officers and lawyers who deal with suspects in police detention. Each of the rights identified provides an important safeguard for suspects during the detention stage and the syllabus should therefore be considered as a whole, rather than priority being given to particular rights to the exclusion of others. The syllabus identifies elements for police officers and lawyers to consider in the exercise of their roles during police detention, providing practical examples or explanations where these are considered helpful.

The training syllabus has been compiled using the data gathered during the course of the Inside Police Custody research. It should be read in conjunction with the research findings and conclusions, which identify the issues and problems in implementing the rights of suspects in police detention, and which explain why a training need has been identified.

The syllabus is organized around, and informed by, the four procedural safeguards covered by the EU Directives enacted in accordance with the EU Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings: the right to interpretation and translation, the right to information, the right of access to a lawyer, and the right to silence. Whilst the Directives will require most, if not all, Member States to change their laws and regulations to a

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1. Blackstock et al. 2014
2. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings OJ. 412.2009 (C 295), 1, and see section 1 above.
greater or lesser extent, the areas suggested for training could be introduced irrespective of the need for legal changes since they focus on the necessary knowledge and skills of individual criminal justice practitioners.

The training mechanisms used to deliver the syllabus will be instrumental in its effectiveness; as illustrated in sections 2 and 3, there are a number of approaches that can be adopted, such as group discussion, role-plays, case examples, and observational exercises. Providing joint and cross-jurisdictional training can also enhance the understanding of rights.

The objective of the training syllabus is to establish a familiarity amongst police officers and lawyers with procedural safeguards in the fulfilment of their roles during police detention, so that rights delivery becomes an accepted procedural practice. Moreover, the suggested syllabus aims to ensure that procedural rights are delivered effectively, so that suspects may exercise, and receive the benefit of, their rights. In particular, the syllabus envisages a fully informed notification procedure, verification of understanding by suspects, and an enhanced role for lawyers in the protection of suspects’ interests during the police investigative stage.

2. Vulnerable Suspects

*Inside Police Custody* did not focus on the rights of vulnerable suspects as a distinct right. Nevertheless, the impact of police detention upon children and other vulnerable suspects was observed during the research. Each element of the syllabus below must be delivered with greater care and attention when a vulnerable suspect is taken into detention. Consideration must be given as early as possible to whether the suspect should, or may be, assisted by another person, such as an appropriate adult, who would be able to aid their level of understanding, their ability to communicate, and their ability to exercise their rights. More attention may need to be given to the notification of rights so that vulnerable suspects understand them, and more time may be needed to enable vulnerable suspects to decide whether to exercise their rights, for consultation with a lawyer, and for the interrogation process. In particular, the approach to interrogation with vulnerable suspects may need careful consideration so as to ensure questions are not confusing, misleading or oppressive.

3. Syllabus

3.1. Right to Interpretation and Translation

*Scope of the right*

The EU Directive on the right to interpretation and translation requires Member States to ensure that a procedure or mechanism is in place to ascertain, without delay, whether a suspect speaks and understands the language of the proceedings and whether they need the assistance of an interpreter. The right applies during
police questioning, and for the purposes of communication with the suspect’s lawyer in connection with any questioning or hearing, or for making other procedural applications. The right extends to appropriate assistance for hearing or speech impaired suspects. With respect to translation, all essential documents must be translated within a reasonable period of time. The relevant documents are: a decision depriving the suspect of their liberty; a charge or indictment; and such materials as are relevant for the person to have knowledge of the case against them. The interpretation and translation must be of sufficient quality to safeguard the fairness of the proceedings. The suspect may, however, submit a reasoned request for additional documents to be translated. A procedure must be in place to challenge a decision not to allow interpretation or translation of a document, or to complain about the quality of the translation. Legal professionals must also be trained in the process of communication with interpreters so as to ensure efficient and effective communication.

**Police Training Elements**

- Assessing the need for interpretation and/or translation from the point of arrest (for example, using telephone interpretation at the scene and organizing an interpreter for arrival at the police station and/or interrogation).
- Understanding of the enhanced vulnerability of suspects during detention where they cannot speak the language, and of the need to facilitate proper communication.
- Acknowledging that the role of the police officer is distinct from that of an interpreter, and that police officers should only converse in the foreign language if they are fluent in the legal terminology of that language (taking into account the fact that trying to communicate in another language may diminish their ability to carry out their professional duties), and not for formal procedures such as the delivery of rights or interrogation.
- Verifying accreditation of interpreters and identifying poor quality interpretation, and the need to replace the interpreter when necessary.
- Assessing the need for multiple interpreters in multiple suspect cases, to maintain confidentiality.
- Verifying that a lawyer conversing in the foreign language has sufficient skill where the lawyer opts to speak that language, and engagement of an interpreter when necessary.
- Facilitating the efficient provision of interpretation where the need is identified, to ensure that the suspect is able to follow all communications regarding their treatment during the detention and investigation.
- Arranging face-to-face rather than remote interpretation as standard practice, unless there is urgency, in order to enable effective communication.
Lawyer Training Elements

- Understanding of the enhanced vulnerability of suspects during detention where they cannot speak the language, and of the need to facilitate proper communication.
- Acknowledgement that the role of a lawyer is distinct from that of an interpreter and that lawyers should only converse in the foreign language if they are fluent in the legal terminology of that language (taking into account the fact that trying to communicate in another language may diminish their ability to carry out their professional duties), and not during lawyer-client consultation.
- Challenging the decision of police officers to communicate in the suspect’s language, and engaging an interpreter where necessary.
- Verifying accreditation of interpreters and identifying poor quality interpretation, and the need to replace the interpreter where necessary.
- Assessing the need for separate interpretation for lawyer-client consultations on a case-by-case basis, to protect confidentiality (for example, where there are multiple suspects, or particularly emotive circumstances in the case).
- Facilitating efficient provision of interpretation where the need is identified, to ensure that the suspect is able to follow all communications regarding their treatment during the detention and investigation.
- Demanding face-to-face interpretation rather than remote interpretation where this is necessary to enable effective communication.

3.2. Right to Information

Scope of right

The EU directive on the right to information contains three aspects. Firstly, all suspects must be promptly provided with information concerning at least the following rights, as they apply under national law: access to a lawyer, advice free of charge, information about the accusation, interpretation and translation, and the right to silence. The information must be provided either orally or in writing and in simple and accessible language, taking into account any particular need of vulnerable suspects. A suspect must additionally be promptly provided with a written letter of rights setting out the rights detailed above, which they must be entitled to keep throughout detention. Further information concerning additional rights whilst detained must also be recorded in the letter of rights (as they apply under national law): access to the materials in the case; contact with consular officials and a third person; urgent medical assistance; how long the deprivation of liberty can last; and the ability to challenge detention. The letter must be available in a language which the person understands. Where this is not available, the rights must be explained through an interpreter and a letter of rights provided without undue delay. A letter of rights must also be provided in European Arrest Warrant cases.
Secondly, information about the criminal act suspected must be promptly provided and in such detail as is necessary to safeguard the fairness of the proceedings and to enable the effective exercise of the person’s right of defence. During initial detention the suspect must be informed of the reasons for arrest including the criminal act they are suspected of committing.

Thirdly, access must be given to materials free of charge. Where a person is arrested or detained, Member States must ensure that the documents related to the case in the possession of the prosecuting authorities are made available to the suspect. The relevant documents are those essential to enable effective challenge the detention in accordance with national law. More generally, access must be granted to all material evidence in the possession of the prosecution for or against the suspect in order to safeguard the fairness of the proceedings and in due time to allow an effective defence. The disclosure obligation is limited where it might lead to serious risk to life, the fundamental rights of another person, or if it is strictly necessary to safeguard an important public interest, such as prejudicing an ongoing investigation, or where it may seriously harm national security. Nevertheless, limiting access to material must not prejudice the right to a fair trial. The decision to limit disclosure must either be taken by a judge or be subject to judicial review. The suspect may challenge the failure to provide information.

Police Training Elements
- Understanding the importance of notifying suspects of their rights, at the earliest stage, and throughout the relevant stages of detention in order that those rights may be exercised.
- Taking the time to explain the rights to suspects in a way that they can understand, according to their personal characteristics and needs (identifying a vulnerability; ensuring a repeat offender is still properly informed of their rights, akin to the in-flight safety protocol adopted by commercial airlines), avoiding routinely providing standardized information, and verifying that they understand those rights by way of an effective mechanism; providing a letter of rights; and using any other written aids to assist in explaining the rights (it is not enough to simply ask if a suspect understands; for example, asking the suspect to repeat back the right and asking them why they wish to waive a right is good practice).
- Ensuring that the letter of rights and other required written information is disseminated to suspects in all cases.
- Explaining the right of access to a lawyer as a positive rather than negative right (for example, a lawyer will assist the suspect, not simply slow down the process) and providing sufficient information about the right for the suspect to make an informed decision.
- Affording the suspect sufficient time and assistance (through written aids, appropriate adult, interpreter or the officer’s knowledge) to exercise their rights in an informed manner.
Considering the amount of information to be provided to the suspect and their lawyer about why the suspect has been arrested and detained; and understanding how providing this information may further rather than hinder the investigation (for example, providing only very basic information about the suspected offence that has been committed is likely to result in the suspect exercising the right to silence; whereas providing some information about the evidence the police have of the suspect’s involvement may result in the suspect providing an explanation that furthers the investigation).

**Lawyer Training Elements**

- Ascertaining whether the suspect has been informed of their rights by the police and repeating the notification.
- Explaining the rights to suspects in a way that they can understand, according to their personal characteristics (identifying a vulnerability, ensuring a repeat offender is still properly informed of their rights, akin to the in-flight safety protocol adopted by commercial airlines), and verifying that they understand those rights by way of an effective mechanism (it is not enough to simply ask if a suspect understands; for example, asking the suspect to repeat back the right or asking them why they wish to waive a right is good practice).
- Seeking information from the police about the suspected offence and negotiating sufficient information to enable the lawyer to advise the suspect as to their defence, the defence strategy, and the strategy in interrogation.

**3.3. Right of Access to a Lawyer**

**Scope of right**

The EU Directive on the right of access to a lawyer requires that suspects have the right of access to a lawyer in such a time and manner so as to allow the suspect to exercise their rights of defence practically and effectively. They must be entitled to have access to a lawyer without undue delay and in particular from the deprivation of their liberty, and before they are questioned. The suspect has the right to meet in private, and confidentially communicate, with their lawyer. Where the suspect requests it, their lawyer can be present and participate effectively during questioning. Such participation shall be in accordance with procedures in national law, provided those procedures do not prejudice the effective exercise and essence of the right. The lawyer must also be entitled to attend investigative and evidence-gathering acts with the suspect such as identity parades, confrontations and experimental reconstructions of the scene of crime. Member States must make the necessary arrangements to ensure that suspects or those deprived of their liberty are in a position to effectively exercise their right of access to a lawyer and shall endeavour to make general information available to facilitate access. Certain limited derogations apply to the right in exceptional circumstances. In order to waive the right, the suspect
must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right and the possible consequences of waiver. The waiver must be given voluntarily and unequivocally, and may be revoked at any time.

**Police Training Elements**

- Understanding the importance of notifying suspects of their right to a lawyer, at the earliest stage, and throughout the relevant stages of detention in order that the right may be exercised (in that the suspect will have to make decisions about the case against them from the moment that they are arrested, and a lawyer can help them decide their defence strategy).
  
- Understanding the role of the defence lawyer at the police station and their value to the suspect (for example that a lawyer does not simply delay progress of the investigation), and in particular during interrogations.
  
- Facilitating the lawyer’s role – providing sufficient information to enable the lawyer to advise the suspect effectively; affording sufficient time for consultation between the suspect and their lawyer; allowing the lawyer to intervene where appropriate during interrogation (which may involve reminding the suspect of their right to silence, and objecting where inappropriate or oppressive questioning, or undue pressure, is used); affording the opportunity to lawyers to make representations regarding release from detention and charge, or in relation to any other procedure in the police station where the suspect may be adversely affected (such as identification parades).

**Lawyer Training Elements**

- Understanding the role of the lawyer and the significance of legal advice and assistance during police detention at each stage (advice, interrogation, other investigative acts, decision as to charge and as to release).
  
- Understanding the needs of suspects and any vulnerability (for example, the knowledge, demands and support needs of repeat or new suspects may differ; the impact of the desire for release upon the suspect’s decision-making; and the suspect’s ability to articulate their circumstances), and the need to test the suspect’s account and to discuss the implications of this in order to determine an appropriate defence, and interrogation, strategy.
  
- Enhancing the ability of the lawyer to effectively carry out their role: the timely provision of legal advice and assistance; the importance of advising in person; making the decision whether to attend interrogations; negotiating disclosure; ensuring confidentiality.
  
- Making effective use of the lawyer-consultation, particularly where time-limited – introducing and explaining their (independent and confidential) role; obtaining instructions; and advising on law and procedure.
  
- Considering the implications of procedural errors by police, and whether the lawyer should intervene.
- Developing skills related to advising during, and intervening in, interrogations (including identifying unfair, unlawful, or inappropriate questioning by police) and developing the role of the lawyer as an active defender rather than a passive observer.

3.4. **Right to Silence**

**Scope of right**

The EU Directive on the right to information requires that a suspect be notified of the right to silence promptly, but does not specifically require that the suspect be given notice, or be reminded, of the right to silence at the commencement of an interrogation. European Court of Human Rights (ECHR) case-law, on the other hand, requires that notification of the right to silence be given when the right arises. There is no uniform set of words in the Directive or ECHR case-law as to how the right must be delivered or whether it may be qualified. Nevertheless, the right is recognized as significant in ensuring the right to a fair trial, and breach of the right has resulted in findings by the ECHR that the right to a fair trial has been violated.

**Police Training Elements**

- Understanding the importance of the right to silence and the presumption of innocence to the suspect and of its impact upon the proceedings.
- Conducting interrogations in a way that does not undermine, or seek to undermine, the right to silence (for example, respecting the exercise of the right by not repeatedly asking the same question, and not seeking to undermine the value of the right to silence by suggesting that its exercise will have adverse consequences for the suspect).
- Dealing appropriately with repeat suspects by ensuring that they are effectively notified of their rights.

**Lawyer Training Elements**

- Understanding the value of the right to silence as a safeguard, and the procedural impact of exercising or not exercising it.
- Understanding the difficulty for suspects of maintaining silence in the face of questioning and intervening as appropriate to protect the exercise of the right.
- Using the right to silence as a negotiation tool in order to obtain sufficient disclosure from the police to enable appropriate advice to be given to the suspect as to: the interrogation strategy; the prospects of pre-trial release; and the availability of an out-of-court disposal.
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OVERVIEW ANNEXES PILOT TRAINING MATERIALS

1. Aims of the training day
2. Information for delegates
3. Information for expert group
4. Training day programme – England
5. Training materials – England (with alternatives for the Netherlands in parentheses)
ANNEX 1: AIMS OF THE TRAINING DAY

The organizations identified above are conducting a research project in four European jurisdictions examining four key procedural rights of suspects in police custody: the right to interpretation and translation; the right to information; the right of access to a lawyer; and the right to silence. An important part of the project is the production of training guidance designed for police and lawyer trainers – which uses the findings of the research to identify the areas whereby the problems in implementing the four rights may be improved by training. The training programme will be published and available across all 27 Member States of the EU.

During the training day we will present the findings of the research that have implications for training, conduct some exercises for participants to develop the best ways of providing training solutions to real practical problems, and give participants the opportunity to evaluate the various approaches. We will, in particular, cover: (1) arrival at the station, 'booking in', and informing suspects of their rights; (2) disclosure and consultation; and (3) interrogation.

The aims of the training day are as follows. (1) Delegates will have the opportunity to hear about how processes and problems that they encounter are dealt with in different jurisdictions and also understand the different perspectives between police and lawyers in the delivery of suspects’ rights. (2) Delegates will participate in developing practical approaches to training in respect of the four rights. (3) Dele-
Annex 1

gates will be helping to develop a major training programme that will be used by police forces and defence lawyers across the EU.
ANNEX 2: INFORMATION FOR DELEGATES

We are conducting a research project, funded by the European Union (EU), which is intended to contribute to the successful implementation of EU legislation on the procedural rights of suspects in police custody. The project is led by Maastricht University in the Netherlands, together with Avon and Somerset Constabulary, the Universities of Warwick and the West of England, and JUSTICE and the OSJI.

The objective of the research is to examine, in four jurisdictions - England and Wales, Scotland, the Netherlands, and France - the practical application of four rights on which the EU is legislating: the right to interpretation and translation; the right to information; the right of access to a lawyer; and the right to silence. The Directive on the right to interpretation and translation must be implemented in all Member States by October 2013, the Directive on the right to information in criminal proceedings must be implemented by June 2014, and the Directive on the right of access to a lawyer must be implemented by November 2016. The EU is currently considering what action to take, if any, concerning the right to silence. The EU legislation will have a direct impact on the work of both the police and defence lawyers.

An important part of the project is the production of training guidance designed for police and lawyer trainers - which uses the findings of the research to identify the areas whereby the problems in implementing the four rights may be improved by training. The training programme will be published and available across all 27 Member States of the EU.

In order to help us develop the training guidance, and to make it relevant to the needs of the police and defence lawyers across the EU, we are organizing two one-day events - one in Bristol, and the other in Maastricht. For the Bristol event we are inviting up to 10 police officers and 10 defence lawyers (5 from each jurisdiction). We are also inviting 5 experts to observe and offer their views.

During the day we will present the findings of the research that have implications for training, conduct some exercises for participants to develop the best ways of providing training solutions to real practical problems, and give participants the opportunity to evaluate the various approaches. We will, in particular, cover: (1) arrival at the station, 'booking in', and informing suspects of their rights; (2) disclosure and consultation; and (3) interrogation.

What will participants get out of it? First, they will have the opportunity to hear about how processes and problems that they encounter are dealt with in different jurisdictions and also understand the different perspectives between police and
lawyers in the delivery of suspects’ rights. Second, they will participate in developing practical approaches to training in respect of the four rights. And third, they will be helping to develop a major training programme that will be used by police forces and defence lawyers across the EU.
ANNEX 3: INFORMATION FOR EXPERT GROUP

The research project is briefly explained in the Information for Delegates. An important part of the project is the production of training guidance designed for police and lawyer trainers – which uses the findings of the research to identify the areas whereby the problems in implementing the four rights may be improved by training. The training programme will be published and available across all 27 Member States of the EU.

In order to help us develop the training guidance, and to make it relevant to the needs of the police and defence lawyers across the EU, we are organizing two one-day events – one in Bristol, and the other in Maastricht. For the Bristol event we are inviting up to 10 police officers and 10 defence lawyers (5 from each jurisdiction). We are also inviting 5 experts to observe and offer their views.

During the day we will present the findings of the research that have implications for training, conduct some exercises for participants to develop the best ways of providing training solutions to real practical problems, and give participants the opportunity to evaluate the various approaches. We will, in particular, cover: (1) arrival at the station, ‘booking in’, and informing suspects of their rights; (2) disclosure and consultation; and (3) interrogation.

The purpose of having expert observers is to help us devise the most appropriate guidance for police and lawyer trainers. We are asking the expert group to observe Sessions 1 to 3, rather than to participate in them, and using your own experience to assess whether the types of exercises involved are appropriate for wider use across the EU. It is important to note that the training day will only cover some of the areas covered by, and the issues raised by, the research, and that the training guidance that we devise will also cover other issues.

We will ask the expert group to contribute to the evaluation session for all participants, and also to contribute to the final evaluation session.
ANNEX 4: PROGRAMME OF THE TRAINING DAY

Inside Police Custody: Mechanisms for delivering procedural safeguards to suspects

Training Day Bristol Thursday 18 April 2013*

Programme

10.00 – 10.15 Introduction to the research
10.15 – 11.30 Session 1: Arrival at the police station: Identification of vulnerabilities, and Notification of rights
11.30 – 11.45 Break
11.45 – 12.00 Session 2: Disclosure and consultation
12.00 – 12.15 Lunch
12.15 – 13.30 Session 3: Right to silence and interrogation
13.30 – 13.45 Evaluation of training approaches by participants
13.45 – 14.00 Break
14.00 – 14.30 Evaluation by expert group

Each session will commence with an outline of the research findings relating to the subject of the session.

* The different exercises conducted in the Netherlands are identified within this example programme in parentheses.

Funded by the European Community

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ANNEX 5: TRAINING MATERIALS

Session 1: Arrival at the police station

1. Programme (10:15 – 11:30)

10:15 - 10:35: Explanation of research findings right to translation and interpretation (PowerPoint presentation)
10:35 - 10:45: Research findings on notification of rights
10:45 - 11:15: 2 times role play (2 x 10' role play + 10' feedback in small groups on the two role plays)
11:15 - 11:30: Group feedback by pilot trainers (based upon observations in small groups) supplemented by remarks from participants.

2. Round table discussion (integrated in PowerPoint presentation: interactive presentation of research findings)

Questions to be presented to the participants:
1. If the suspect does not understand English/Dutch, a language identification card can be used. Are you familiar with these cards? What do you think of them? How would you deal with illiterate people?
2. If the suspect has some knowledge of the language, how do you decide whether he/she has sufficient knowledge to be interrogated.
3. What extra precautions should be taken in the case of minors, people with mental disabilities, etc. Should an interpreter be allocated in any case of non-native speakers when they have an additional vulnerability?

Objectives:
- To prompt participants to think about how to identify the need for translation and interpretation and to create awareness of the pitfalls.
- To prompt participants to think about the purpose of the right to translation and interpretation (a right of the suspect rather than an aid to the police).

3. Role play

Organisation of the exercise:
Participants will be divided into small groups of 3-4 participants (mixed groups: lawyers and police). An expert will observe one of the groups. Within these small groups two of the participants will act as a police officer and notify the suspect of his/her rights. The notification will take place according to the participants’ national legislation.
The role of the suspect will be played by law students who will be provided with a scenario.

Participants will receive minimal information about the crime: burglary, yesterday (17 or 22 April) in Bristol/Maastricht. The suspect is brought to the police station by some colleagues who picked him up at home in the morning after a statement was taken from a witness.

Each role play takes 10 minutes at the most. The second role play starts immediately after the first, and feedback on both role plays will be provided afterwards. As an observer, participants are required to take notes in order to provide precise feedback.

Scenario:
Students are provided with two scenarios:
Scenario 1: a vulnerable person who doesn’t understand the legal language (low IQ).
Scenario 2: a regular suspect who wants to skip the notification.
Feedback in small groups proceeds as follows: the role players (police officer and suspect) explain their experience. Additionally, observers will point out strengths and weaknesses, referring to examples.

Group feedback:
Group feedback will be started by the pilot trainers who will reflect on their observations. Participants will be asked to add to or supplement these observations.

Objectives:
- To enable participants to experience the difficulties of adequately notifying the suspect of his/her rights.
- To prompt participants to think about how rights are perceived by suspects.
- To create awareness of the importance of the notification of rights (with regard to the further proceedings, for example, the evidential impact at court).
- To identify and understand any differences in working methods and how they can affect the effective communication of rights to the suspect.
- To address differences between suspects.
Session 2: Disclosure and consultation

Exercise 1 - Disclosure of information to lawyer

Organisation of the exercise
Lawyers and police officers in separate groups. Both groups to be given a scenario and decide through a 5 minute discussion (a) police - what to disclose to the solicitor and (b) solicitors - what they would need to advise their client adequately. Whole group to then discuss the levels of disclosure and identify the reasons for the difference in approach.

Objectives of the exercise
- To prompt participants to think about the purpose of disclosure and what impact it can have on the experience of the suspect in detention.
- To prompt participants to think about the purpose of the role of the lawyer during police detention.
- To show how this role is influenced and/or prevented by the level of disclosure provided.
- To identify and understand any differences in attitudes towards the role of the lawyer during police detention and any conflict between this and the purpose of police detention (i.e. to obtain an admission to support a charge/to further enquiries with the suspect secured/to give the suspect an opportunity to put their case forward).

Instructions to participants
Consider the following case information and decide (a) if you are a police officer, what you would disclose to the defence solicitor and (b) if you are a defence solicitor, what you would need to have disclosed in order to fully advise your client how to respond to interview:

Billy Jones (21) has been arrested on suspicion of burglary of a house on Posh Road, Bristol, on the 17th April at around 1 am. In the burglary items with an estimated value of £5,000 were stolen. These items include jewellery, laptop computer, and part of a home entertainment system. Entry was gained through climbing over the back garden fence and forcing the back door with a metal object. A size 9 footprint was left at the scene and fingerprints were lifted from the external glass on the door as well as a mirror in the lounge. The footprint is consistent with Billy Jones’ foot size and the external fingerprint matches his, but not the internal one.

Billy Jones was seen by Fred Smith (25), who has form for dwelling house burglary and other inquisitive crime, carrying a large, heavy bag two streets from the scene at 1.30 am. Billy Jones is known to Fred Smith as they were co-perpetrators on the last burglary Smith got two 1/2 years for. Jones was then a youth and was only sentenced to a referral order.
lowest community sentence for a juvenile) because the court believed he had been placed under pressure by Smith.

The house was fitted with external CCTV which has not yet been viewed. A search of Jones' property has taken place. A large sports bag was found and an expensive looking necklace. This has not yet been identified by the victims as theirs.

Exercise 2 - Consultation with client

Organisation of the exercise
Role-play with student playing suspect. Police officer to act as lawyer [or lawyer in the Netherlands] and conduct role-play using the information the police agreed in the last session to disclose to the lawyers. Ten minutes. Lawyer to then conduct role-play with full disclosure. Further ten minutes. Following the role-plays the group will discuss the different approaches to the role of the lawyer and implications of the differing levels of disclosure upon the outcome of the consultation. The group will be asked to list the purposes of the client-lawyer consultation during the discussion.

Objectives of the exercise
- To promote understanding of the purpose and role of the lawyer during police detention and the significance of the consultation for the suspect.
- To prompt participants to think about how the delivery of the role can impact upon the procedural rights of the suspect and the progression of police detention.
- To identify the impact the police have upon the delivery of the right to silence and the right of access to a lawyer.
- To identify any differences in attitude towards the purpose and value of the consultation between police and lawyer participants.

Instructions to participants
A volunteer officer will conduct a legal consultation as lawyer with Billy Jones on the information the police decided to disclose to the lawyers in Exercise 1. At the end of the consultation the officer 'lawyer' should advise Jones on whether to answer questions during interview.

A volunteer solicitor will then re-conduct the consultation with full disclosure. A discussion will then follow during which the purpose and role of the lawyer-client consultation will be considered.
Session 3: Right to silence and interrogation

Exercise 1 - The right to silence, and the right of access to a lawyer

Organisation of the exercise
Presentation to the whole group of major findings of the research regarding the right to silence. Discussion of a number of questions concerning the right to silence.

Objectives of the exercise
- To prompt participants to think about what the right to silence, and the right to consult a lawyer, mean.
- To prompt participants to think about whether, and if so to what extent, the police should be permitted to seek to undermine (a) the right to silence, and (b) the right of access to a lawyer.
- To identify any differences between police and lawyer participants in their understandings of the two rights.
- To identify, and to understand, any differences in attitudes and approaches as between the two rights (e.g. is there greater acceptance of the legitimacy of police actions that undermine the right to silence, compared to those that undermine the right of access to a lawyer?).

Questions to participants
- The European Court of Human Rights has held that a suspect who is interviewed by the police has a right to legal assistance. What is your understanding of the right of a suspect to the assistance of a lawyer?
- How far can, or should, the police go in trying to persuade a suspect not to consult a lawyer?
- The right to silence is an internationally accepted principle in criminal proceedings. What do you understand by the expression ‘the right to silence’?
- How far can, or should, the police go in trying to persuade a suspect to answer police questions?

Exercise 2 - The role of the defence lawyer in police interviews

Organisation of the exercise
Lawyers and police officers in separate groups. Groups to identify up to five reasons why a defence lawyer should be able to intervene in a police interview, and write up reasons on poster paper. Then participants read through the extract from the case of R v. Paris, Abdulaiin and Miller and answer the questions below, summarizing them on poster paper. Discussion of outcomes in plenary session.

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Objectives of the exercise

- Prompt participants to consider reasons why a defence lawyer may intervene in a police interview, and identify any agreement or differences between police and lawyer participants.
- Using an example from a real case, identify the respective perceptions of police and lawyer participants as to when intervention by the lawyer is legitimate.
- Determine the expectations of police and lawyer participants as to the legitimacy of police interview tactics, and the response of the defence lawyer to such tactics.

Instructions to participants

Task 1
Identify up to five reasons why a defence lawyer should be able to intervene in the course of a police interview, and write them up on poster paper.

Task 2
Read the extract from one of the interviews in the case of R v. Paris, Abdullahi and Miller (see next page), and discuss the following questions.

The extract is from an interview of Stephen Miller who, together with a number of others, had been arrested on suspicion of murder. This interview followed a number of other interviews during which Miller had consistently denied involvement in the murder. He was in an emotional state, and crying during parts of the interview. Miller’s lawyer was present during the interview.

1. Would you have expected the defence lawyer to have intervened during this part of the interview?
2. If so, what would be the basis for intervention?
3. How, if at all, should the interview proceed from here?

Summarize the outcome of the discussion on poster paper.

[In Maastricht, Task 2 was conducted slightly differently. Visually recorded fragments were shown of two different exercises: (a) from training videos showing role-plays involving best practice and (b) from real visually-recorded interrogations. Participants were asked to follow their usual practice and could press the 'stop' button: (a) when they saw something they would not have done; (b) when they would have done something differently (police officers), or (b) when they would have intervened (lawyers). Group feedback then followed on any intervention made.]

Miller: I wasn’t there.

DC Greenwood: How can you ever...

Miller: I wasn’t there.

DC Greenwood: How you... I just don’t know how you can sit there. I...

Miller: I wasn’t...

DC Greenwood: Really don’t.

Miller: I was not there, I was not there.

DC Greenwood: Seeing that girl, your girlfriend, in that room that night like she was. I just don’t know how you can sit there and say it.

Miller: I wasn’t there.

DC Greenwood: You were there that night.

Miller: I was not there.

DC Greenwood: Together with all the others, you were there that night.

Miller: I was not there. I’ll tell you already...

DC Greenwood: And you sit there and say that.

Miller: They can lock me up for 50 billion years. I said I was not there.

DC Greenwood: ‘Cause you don’t wanna be there.

Miller: I was not there.

DC Greenwood: You don’t wanna be there because if...

Miller: I was not there.

DC Greenwood: As soon as you say that you’re there you know you’re involved.

Miller: I was not there.

DC Greenwood: You know you were involved in it.

Miller: I was not involved and I wasn’t there.

DC Greenwood: Yes you were there.

Miller: I was not there.

DC Greenwood: You were there, that’s why Leanne is come up now...
Miller: No.
DC Greenwood: 'Cause her conscience is...
Miller: I was not there.
DC Greenwood: She can't sleep at night...
Miller: No. I was not there.
DC Greenwood: To say you were there that night...
Miller: I was not there.
DC Greenwood: Looking over her body seeing what she was like...
Miller: I was not there.
DC Greenwood: With her head like she had and you have got the audacity to sit there and say nothing at all about it.
Miller: I was not there.
DC Greenwood: You know damn well you were there.
Miller: I was not there.
A peer-reviewed book series in which the common foundations of the legal systems of the Member States of the European Union are the central focus.

The *Ius Commune Europaeum* series includes horizontal comparative legal studies as well as studies on the effect of treaties within the national legal systems. All the classic fields of law are covered. The books are published in various European languages under the auspices of METRO, the Institute for Transnational Legal Research at the Maastricht University.

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ANNEX 2 DESK REVIEW OUTLINE

Purpose of the desk review

The purpose of the desk review in each jurisdiction included in the research study is to provide a critical, dynamic account of the system and processes using existing sources of information in order to provide a context against which data collected during the research study may be understood. The objective of drafting the desk review is two-fold: firstly, to serve as background information source about the laws, regulations, institutions and procedures relevant to the enforcement of suspects' procedural rights in the given jurisdiction; and secondly, to equip the country researchers with sufficient contextual knowledge to embark on the empirical work.

In addition to setting the normative framework for the empirical inquiry in the given jurisdiction (i.e. providing information about the content of the relevant laws and other regulations), the desk review should account for the existing empirical data relevant to the subject-matter of the project. This information may come from, e.g., the existing empirical research studies, official reports and statistics, media publications, etc. If possible and appropriate, you may also refer to your personal experiences with the criminal justice system to support your conclusions; however these examples should be clearly referenced as personal observations of the researcher (you should also mention the degree and nature of your familiarity with the criminal justice practice in the Introduction, see its section (c) below).

It is of particular importance for the project to provide the statistical information mentioned below in the desk review pro-forma. Where such statistics is not available from the published sources, you may need to generate and execute requests for such information to the relevant institutions. You should present the statistical information in the way explained in this pro-forma.

Structure and length of the desk review

The structure of the desk review report should follow the Outline of the Desk Review Report as set out below.

The questions included in the Extended Outline of the Desk Review (under the sub-headings marked by letters (a), (b), etc.) and numbers (1), (2), etc.) are the research questions that should guide/facilitate your literature search and analysis. We do not expect the desk review report to be presented in a form that includes an answer to each and every question in this particular order. I.e. in the process of writing the sub-headings can be merged, as many of them overlap. However, we expect that content-wise all of the research questions enumerated below should be
answered in the desk review, unless the question is irrelevant for the given jurisdiction or no information is available to answer the question.\textsuperscript{1}

The guideline length for the desk review is 10000-12000 words. Referencing should follow the style in *Effective Criminal Defence in Europe*.\textsuperscript{2}

\textsuperscript{1} If certain questions remain unanswered, you should explain why they could not be answered.

\textsuperscript{2} An example will be provided to you by the project team.
Outline of the Desk Review Report

1. Introduction
2. Regulation and practice of police detention
   2.1. The use of police detention: objectives and scale
   2.2. The police detention process
      2.2.1. The legal grounds and procedure of arrest and taking into police custody
      2.2.2. Procedures while in police detention
      2.2.3. The outcomes of police detention
   2.3. Police interrogations of suspects
      2.3.1. The role of suspect interrogations in the investigation process
      2.3.2. The legal regulation of suspect interrogations
      2.3.3. Interrogations of suspects in practice
3. The normative regulation of suspects' rights in police detention
   3.1. The legal sources of suspects' rights in police detention
   3.2. Legal regulation of the specific suspects' rights
      3.2.1. Right to interpretation and translation
      3.2.2. Right to information
      3.2.3. Right to legal assistance, legal aid and communication upon arrest
      3.2.4. Right to silence
4. Criminal defence and legal aid
   4.1. The criminal defence profession
   4.2. The normative framework of the criminal defence lawyers' role during the police detention stage
      4.2.1. The official regulation of the lawyers' role at police stations
      4.2.2. Professional regulation and culture of legal advice of suspects in police detention
   4.3. Police station legal advice
      4.3.1. The organization of police station legal advice
      4.3.2. Procedures pertaining to the provision of legal advice at police stations
      4.3.3. Professional standards and quality of police station legal assistance
4.4. Criminal legal aid
   4.4.1. The organization of criminal legal aid
   4.4.2. Scope and eligibility criteria for criminal legal aid in general
   4.4.2. The funding of police station legal advice
   4.4.3. Legal aid fees for work while the suspect is in police detention
   4.4.4. Legal professionals and criminal legal aid
## Research Questions Schedule

1. **Right to interpretation and translation**
   1a. **Right to interpretation**

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Subjects of the right (Art. 1 (2))</strong></td>
<td>- Do all persons detained and/or questioned in relation to a criminal offence who do not speak or understand the language of the proceedings receive the assistance of an interpreter?</td>
</tr>
</tbody>
</table>
| **Timing of access to an interpreter (Art. 2 (1))**         | - At which point of the proceedings are interpreters engaged?  
|                                                           | - How are interpreters contacted and appointed? Do the police use interpreters from the national registry of interpreters, if it exists?  
|                                                           | - Is there a 24/7 service of duty interpreters in place at the research locations?  
|                                                           | - Are interpreters available during night hours and on weekends/bank holidays?  
|                                                           | - How are the needs for interpretation from/into “rare” languages dealt with?  
|                                                           | - Are all proceedings or activities involving the suspect during his/her detention at police station interpreted?  
|                                                           | - Are all police interviews of suspects (fully) interpreted?  
| **Interpretation of legal advice (Arts 2 (2) & 5 (2))**     | - Are there interpreters available to translate communication between suspects and their legal counsel while the former are in police detention?  
|                                                           | - How is the need for interpretation of suspect-lawyer communication addressed whilst the suspect is in police detention? Do lawyers use interpreters from the register of certified interpreters, if such exists?  
<p>|                                                           | - How long does it take until an interpreter becomes available?  |</p>
<table>
<thead>
<tr>
<th>Determination of the need for interpretation (Arts 2 (4) &amp; (6))</th>
<th>Manner of provision (Art. 2 (5))</th>
<th>Costs of interpretation (Art. 4)</th>
</tr>
</thead>
</table>
| - There must be a procedure in place to ascertain whether suspects understand or speak the language of the proceedings and whether they need the assistance of the interpreter.  
- Suspects should be able to challenge the decision finding that there is no need for interpretation. | - Where appropriate, interpretation may be provided by phone, internet or videoconferencing, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings. | - Interpretation should be free of charge for the suspect irrespective of the outcome of the proceedings. |
| - How is the assessment of whether the suspect knows/understands the language of the proceedings made, and who determines the need for interpretation?  
- What happens if the suspect contends that he or she does not speak or understand the language of the proceedings, but the authorities believe otherwise?  
- Do suspects waive their right to interpretation and why?  
- Are the decisions not to engage an interpreter where the suspect contends that he does not speak or understand the language of the proceedings (well-) reasoned?  
- What happens if the suspect and/or his lawyer wish to challenge the decision not to engage an interpreter? | - Who takes a decision on whether an interpreter would attend in person or interpretation would be provided remotely, and based on which criteria?  
- Is the official regulation as to when interpretation must be provided in person, and when it may be provided by means of communication technology, if it exists, followed in practice?  
- Does it appear that remote interpretation is provided more often during weekends and/or unsociable hours?  
- Which communication technology means are used, and under which circumstances?  
- What happens if a suspect and/or his lawyer argue that interpretation should be (or should have been) provided in person instead of by means of communication technology? | - Is interpretation always free of charge for the suspect, irrespective of his financial status or the outcome of the proceedings? |
### Quality of interpretation (Arts. 2 (6), 5 (2) & (3))

- Interpretation should be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspects have knowledge of the case against them and are able to exercise their right of defence.
- There should be a register of independent interpreters who are appropriately qualified.
- Interpreters should be required to observe confidentiality of interpretation.

- Are non-accredited/certified interpreters being used, and if yes then what kind of persons [e.g. other police officers, relatives, etc.] and under which circumstances?
- Are judges/prosecutors/police officers trained to recognise inadequate interpretation (or sensitised to it in other ways)?
- Are there any signs of incomplete, inaccurate or otherwise inadequate interpretation? How do the authorities react, if at all, to these inaccuracies?
  - How do the lawyers react (if present), if at all?
  - Are the conditions of interpretation adequate? Do interpreters bring up those inadequacies? How do the authorities react?
  - Are there verifiable differences in terms of quality of interpretation depending on the language?
  - What procedures are there to ensure confidentiality of interpretation?
  - Do interpreters behave impartially? Do the police pressure the interpreter or try to undermine her or his independence?

### Record-keeping (Art. 7)

- The fact that the person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter must be recorded in respective procedural documents.

- How and where is the fact that a suspect was heard with the assistance of an interpreter recorded?
- Is the record pertaining to interpretation always accurate, i.e. reflects the actual provision of interpretation? What information is provided in the record?
- Do the suspect and the lawyer both have access to the record?
- Are the circumstances that may affect the quality of interpretation noted down?

### 1b. Right to translation of essential documents

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timing of access to translations (Art. 3 (1))</strong></td>
<td>Translations of which documents (e.g. the letter of rights, documents from the case file, arrest record, etc.) are made available to suspects at the stage of police detention, if any?</td>
</tr>
<tr>
<td>- Access to translated essential documents should be provided to suspects within a reasonable time.</td>
<td></td>
</tr>
</tbody>
</table>
### Manner of provision (Art. 3 (1) & (7))
- Translation provided to the suspects must be in written form.
- Exceptionally an oral translation or oral summary of oral documents may be provided instead of a written translation if this does not prejudice the fairness of the proceedings.

### Costs of translation (Art. 4)
- Translation shall be free of charge for suspects irrespective of the outcome of the proceedings.

### Right to information

#### I. Right to information about the procedural rights

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timing and manner of provision of information about the rights</strong> (Arts. 3 &amp; 8 (1) &amp; (2))</td>
<td></td>
</tr>
<tr>
<td>- Suspects must be informed about their procedural rights promptly (at the earliest possible moment in the proceedings).</td>
<td></td>
</tr>
<tr>
<td>- The information about procedural rights should be provided in simple and accessible language.</td>
<td></td>
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<tr>
<td>- Authorities should ensure that the suspect received the information and is fully aware of the rights.</td>
<td></td>
</tr>
<tr>
<td>- Where the notification of rights is made orally, it shall be recorded in such a manner as to allow verification of the content of the notification.</td>
<td></td>
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<tr>
<td>- Upon arrival to the police station, when, if at all, are suspects informed about the right to silence, and other procedural rights?</td>
<td></td>
</tr>
<tr>
<td>- How are suspects informed about their procedural rights? Orally or in writing? When does it happen? Who does it?</td>
<td></td>
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<tr>
<td>- What is the procedure, if any, to ensure that suspects received the information?</td>
<td></td>
</tr>
<tr>
<td>- Is the information provided in accessible language?</td>
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<tr>
<td>- Are suspects aware and do they understand their rights? If not, why not?</td>
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<tr>
<td>- Do authorities routinely verify whether suspects understood their rights and if yes then how (does this go further than asking “Did you understand your rights?”)?</td>
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<tr>
<td>- Is the information about procedural rights repeated before every interrogation or other procedural act with the participation of the suspect?</td>
<td></td>
</tr>
<tr>
<td>- How and where is the information that a suspect was informed about the rights recorded?</td>
<td></td>
</tr>
</tbody>
</table>
### Content of the information about the rights (Art. 3(2))
- Suspects must be informed, as a minimum, about the following rights: right to access to a lawyer where necessary free of charge; right to translation and interpretation; right to be informed about the charge and where necessary access to case files; right to be brought promptly before the court if a suspected person is arrested.

### Letter of Rights (Art. 4)
- Arrested suspects must be promptly provided with the information about their procedural rights in writing (Letter of Rights).
- They should be given the opportunity to read the Letter of Rights and keep it in their possession.
- The Letter of Rights should be drafted in a simple language and should include information at least about the four abovementioned procedural rights.
- Suspects who do not understand the language of the proceedings should receive the Letter of Rights in the language that they understand. If the Letter of Rights is not available in the appropriate language, suspect should be informed about the rights orally and the Letter of Rights should be given to her without delay.
- The information in the Letter of Rights should also be conveyed to children orally in a manner adapted to the child’s age, level or maturity and intellectual and emotional capacities.

- Which procedural rights are suspects informed about?
- Are all relevant procedural rights (i.e. rights that suspects have under national or applicable international law), or at least the four rights mentioned in the left column, covered?
- Are suspects informed about the right to silence?
- What happens if the authorities fail to inform suspects about one (or more) of the procedural rights?

### IIIb. Right to information about the charge and the reasons for arrest

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timing of provision of information about the charge (Art. 6)</strong></td>
<td>- When are suspects informed about the charge in detail (see <strong>Content of the</strong></td>
</tr>
<tr>
<td>Manner of provision of information about the charge (Arts. 6 (2) &amp; 8 (1))</td>
<td></td>
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<td>---------------------------------------------------------------</td>
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<tr>
<td>The information about the charge should be provided in detail and in a language that the suspect understands.</td>
<td></td>
</tr>
<tr>
<td>In case of a child the information should be provided in a manner adapted to his age, level of maturity, intellectual and emotional capacities.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Content of the information about the charge (Arts. 6 (1) &amp; (3))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suspects must be provided with sufficient information about the charge to ensure the fairness of the proceedings.</td>
</tr>
<tr>
<td>The information to be given shall include a description of the circumstances in which the offence was committed (time, place, degree of participation of the suspect); the nature and legal classification of the offence.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Ill. Right to access the case-file</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Scope and timing of disclosure (Arts. 7 (1) &amp; (3))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrested persons and their lawyers should receive access to those documents contained in the case file which are relevant for the determination of the lawfulness of the arrest or detention.</td>
</tr>
</tbody>
</table>

| - Are arrested suspects provided access to procedural documents which are relevant to the determination of lawfulness of their arrest (i.e., documents which substantiate the reasonable suspicion of having committed a crime and which record the arrest and detention procedure) at any time during police detention? How is such access provided, e.g., in writing, orally, etc.? |
- Access should be provided free of charge.
- Access to the case file should be provided in good time to allow the suspect and his lawyer to prepare his defence or challenge pre-trial decisions.
- If yes, which documents/information (including orally) are suspects and/or lawyers provided with routinely? Does this appear to depend on the attitude of the suspect/lawyer, personal relationships, etc.? Is the disclosure automatic or prompted by a request from a suspect or his lawyer?
- Do suspects and their lawyers have an equal right of access to the case file?
- How and where, if at all, is the information about the provision of access to the case file to the suspect and his lawyer recorded?
- Are suspects and their lawyers given copies of the documents from the case file free of charge?

III. **Right to legal assistance and communication upon arrest**

IIIa. Right to access a lawyer

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope of the right (Arts. 2 (1) &amp; 10)</strong></td>
<td>- How often is the right of access to a lawyer exercised?</td>
</tr>
<tr>
<td>- Persons should have the right of access to a lawyer from the time that they are seen by the competent authorities that he is suspected of having committed a criminal offence.</td>
<td>- How is the right perceived by lawyers and police? [e.g. useful, as an obstacle to investigation, etc.]</td>
</tr>
<tr>
<td>- What happens if a suspect or his lawyer complains that the suspect did not receive the right to legal assistance at the outset of police detention?</td>
<td></td>
</tr>
<tr>
<td><strong>Timing of access to a lawyer (Art. 3 (1))</strong></td>
<td>- Are suspects granted the possibility to appoint a lawyer as soon as they are brought to the police station?</td>
</tr>
<tr>
<td>- Suspects should be granted access to a lawyer as soon as possible and in any event before the start of any questioning; from the outset of deprivation of liberty and/or upon carrying out any procedural acts with the participation of the suspect unless this would prejudice the acquisition of evidence.</td>
<td>- Are suspects interviewed without prior access to legal advice (and where the suspect did not waive the right to legal advice), and if yes why does this happen?</td>
</tr>
<tr>
<td>- How are lawyers contacted and appointed?</td>
<td>- How are lawyers contacted and appointed?</td>
</tr>
<tr>
<td>- How and where is the information about contacting and appointment of a lawyer recorded, if at all? What information does the record contain?</td>
<td>- If a lawyer first contacted by the police is not available to advise the suspect (or if the central number for duty lawyers is not responding), what do the police do?</td>
</tr>
<tr>
<td>- If yes, which documents/information (including orally) are suspects and/or lawyers provided with routinely? Does this appear to depend on the attitude of the suspect/lawyer, personal relationships, etc.? Is the disclosure automatic or prompted by a request from a suspect or his lawyer?</td>
<td></td>
</tr>
<tr>
<td>Obligation of the authorities to inform suspects about the right of access to a lawyer</td>
<td>- Is there a system of &quot;duty lawyers&quot; to provide legal advice in police custody at the research sites? - How does the police station legal advice assistance scheme operate in practice?</td>
</tr>
<tr>
<td>---</td>
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</tr>
<tr>
<td>- Authorities must inform the suspect about the right to access to a lawyer, free of charge where necessary, before any questioning or taking a statement.</td>
<td>- How are suspects informed about their right to a lawyer? - Are non-arrested suspects (voluntary attendees) also informed about the right to a lawyer? - Do responsible police officers appear knowledgeable about the procedure for informing suspects about their right of access to a lawyer and contacting a lawyer? Are they trained in the provision of information about legal advice? - Do the authorities discourage suspects from requesting legal advice in any way [e.g. by emphasising that they would remain longer in detention; that it is a minor case, etc.]? - How and where is the fact that a suspect was informed about the right of access to a lawyer recorded, if at all?</td>
</tr>
<tr>
<td>Right to choose a lawyer</td>
<td>- If suspects have the right to choose a lawyer to assist them during the police detention stage, do they always have the opportunity to receive assistance of a lawyer of their own choosing in practice? - If a different lawyer has been appointed than the one chosen by the suspect, is the reason for it recorded, and is the suspect informed about it? - What happens if a suspect or his lawyer complains that the suspect did not receive the assistance of a lawyer or her own choosing whilst in police detention?</td>
</tr>
<tr>
<td>- Everyone suspected of a criminal offence shall have the right to receive legal assistance of his own choosing, unless the freedom of choice is restricted by national regulations in cases where the assistance is provided free of charge for the suspect.</td>
<td></td>
</tr>
<tr>
<td>Manner of provision of access to legal advice (Art. 3 (2))</td>
<td>- How often do lawyers attend their clients personally at police station, and how often do they provide advice by phone/videconferencing? - Whose decision is this? That of the lawyer, the suspect or through financial constraint? - Based on which criteria is the decision to attend v. advice by phone or videconferencing made?</td>
</tr>
<tr>
<td>Access to a lawyer shall be granted in such a manner as to allow the suspect to exercise his rights of defence effectively.</td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Answer</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>What is the procedure for lawyer's access to the custody area? Is this access limited in time/period of the day?</td>
<td>- Do lawyers have the opportunity to visit their clients at police stations, for how long and during which time?</td>
</tr>
<tr>
<td>What happens if a suspect or his lawyer argues or complains that advice should be (have been) provided in person instead of by telecommunication means?</td>
<td>- Where do lawyers meet their clients? What facilities are available? Under what conditions can they meet? Are the meetings time-limited?</td>
</tr>
<tr>
<td>Do lawyers have the opportunity to visit their clients at police stations, for how long and during which time?</td>
<td>- What are the procedures in place to ensure confidentiality of lawyer-client meetings and of their correspondence, conversations, etc.?</td>
</tr>
<tr>
<td>Are lawyers present during the questioning of suspects by police? If not, why not?</td>
<td>- What happens if a lawyer wishes to meet with the suspect, but the suspect is not available because the police is undertaking certain actions on him (e.g., his fingerprints are being taken)?</td>
</tr>
<tr>
<td>Lawyers must be able to be present at any questioning of the suspect and to play an active role in the questioning, e.g. by requesting clarifications, asking questions and requesting a time-out to advise the suspect.</td>
<td>- Are lawyers allowed (unconditional) access to the facilities where their clients are detained?</td>
</tr>
<tr>
<td>Are lawyers allowed (unconditional) access to the facilities where their clients are detained?</td>
<td>- Do lawyers routinely attend the detention facilities where their clients are kept? If not, why not?</td>
</tr>
<tr>
<td>Lawyers should be able to inspect and to challenge the conditions of their clients' detention. To this end, they</td>
<td>- What is the role in respect of the determination of lawfulness of arrest (Art. 4 (d))?</td>
</tr>
</tbody>
</table>

**Lawyer-client communication (Arts. 4 (1) & (5) & 7)**
- Suspects shall have the right to meet with the lawyer representing him for an adequate duration and frequency to ensure effective exercise of the right to defence.
- The right to communication with a lawyer should not be limited in a general way.
- Meetings between the suspect and a lawyer must be confidential, as well as their correspondence, conversations and other forms of communication.

**Lawyer's role in relation to questioning (Art. 4 (2))**
- Lawyers must be able to be present at any questioning of the suspect and to play an active role in the questioning, e.g. by requesting clarifications, asking questions and requesting a time-out to advise the suspect.
- Are lawyers present during the questioning of suspects by police? If not, why not?
- How are lawyers notified by police about the upcoming interrogation?
- What role do lawyers play during the questioning? E.g., do they make remarks about the questions asked by police? Do they ask to break the interrogation to consult with the suspect? Are they limited to asking questions at the end? Is there any guidance on what acceptable behaviour is, and what kinds of interventions are considered sufficient to exclude the lawyer?
- What happens if a lawyer or a suspect complains that the lawyer was not admitted to participate in the interrogation, or that lawyer was not allowed to make an intervention during the interrogation and/or was asked to leave the interrogation room?
<table>
<thead>
<tr>
<th><strong>Waiver of the right of access to a lawyer (Art. 9)</strong></th>
<th><strong>Quality of legal assistance</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Without prejudice to national law that requires the mandatory presence of a lawyer, waiver of the right of access to legal assistance may be accepted only if the suspect is aware of the consequences of the waiver (e.g., by receiving prior legal advice or other comparable information), has the necessary capacity to understand these consequences and the waiver is given clearly and voluntarily. The waiver and the circumstances in any waiver may be subsequently revoked.</td>
<td>- There must be mechanisms to assess and to monitor the quality of legal assistance and to ensure that such assistance is provided by sufficiently competent lawyers.</td>
</tr>
<tr>
<td>- If national law provides for mandatory representation in certain categories of cases, is it followed in practice? - How are these provisions on the waiver of the right of access to a lawyer applied in practice? - Is there a procedure in place to provide the suspect with information regarding the consequences of the waiver [e.g., possibility to consult with the lawyer; information leaflet; etc] and/or to determine whether the suspect is aware of the consequences of the waiver [e.g., because (s)he has already been provided legal advice as a suspect on several occasions]? - Is there a procedure in place to determine whether the suspect has necessary capacity to understand those consequences, and whether the waiver was unequivocal and voluntary? - Does it happen that suspects whose capability to understand the consequences of the waiver is questionable [e.g., very young/inexperienced; suspects with mental or intellectual disabilities; under the influence of alcohol or drugs, etc.] waive the right of access to a lawyer, and such waiver is instantly accepted by police? - How do police officers understand their role in ensuring that the waiver of the right of access to a lawyer is well-informed and voluntary?</td>
<td>- What activities do lawyers routinely perform during the police detention stage? - How thorough are lawyers in providing assistance at police stations? E.g., do they take (detailed) notes, do they appear to devote sufficient time to clients, do they follow up on suspects’ complaints and requests, etc.? - Is there a perceptible difference in the quality of service provided by different lawyers? - Are lawyers who attend police stations specialised criminal lawyers and/or are they trained for this work (if yes, then how)?</td>
</tr>
</tbody>
</table>
### III. Right to communicate upon arrest

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
</table>
| **Arrested persons (Art. 5(1))** | - How are the legislative provisions on the right of arrested persons to communicate with third parties applied in practice?  
- How does the procedure for informing the suspects about this right and for facilitating communication operate, if it exists? |
| **Children (Art. 5(2))** | - How, when and by whom are third parties informed where a child is arrested in relation to a criminal offence? Who is normally informed [e.g. first relations than a social worker]?  
- How are these provisions applied in practice? |
| **Non-nationals (Art. 6)** | - How is the right of the foreign suspects to have their consular/diplomatic authorities notified about the fact of arrest and to communicate with those authorities applied in practice, if it exists under national law?  
- How does the procedure for informing non-nationals about their right to communicate with the consular and diplomatic authorities operate, if it exists? |

### IV. Right to silence

<table>
<thead>
<tr>
<th>Elements of the right</th>
<th>Questions</th>
</tr>
</thead>
</table>
| **Information about the right to silence ("caution")** | - Are all persons questioned in relation to a criminal offence informed about the right to silence? Are they informed about the legal consequences of remaining silent?  
- Is the standard caution, if it exists in the given jurisdiction, routinely given, and is it provided in the appropriate language?  
- Is the standard caution formulated in a simple and accessible way?  
- Do suspects appear to understand the caution? |
| - All persons questioned in relation to their possible involvement in a criminal offence must be "cautioned", i.e. informed about their right to silence and the consequences of using or not using the right. |
| Adverse inferences from silence and lawyers' advice to remain silent | - Whether the drawing of adverse inferences from an accused's silence infringes article 6 of the European Convention of Human Rights must be determined in the light of all the circumstances of the case, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation. For instance, it would be incompatible with the right to silence to base a conviction solely or mainly on an accused's silence. |
| - How often, if at all, do lawyers advice clients to remain silent? Why do they do so? |
| - Do lawyers advice about the adverse consequences of using the right to silence (e.g. suspects remain longer in detention; they lose the chance to settle the case before trial; etc.)? |
| - Do suspects appear to follow lawyers' advice to remain silent? |
| - Do police attempt to undermine lawyers' advice to remain silent by suggesting that the use of the right to silence may have negative consequences for the suspect? |
| Improper compulsion during questioning | - Authorities should not obtain evidence through methods of oppression or coercion in defiance of the will of the accused. |
| - What kind of pressure or tactics aimed to elicit self-incriminating evidence do police apply, if any? |
| - How do suspects react to these tactics? How do lawyers react to them? |
| - How are the provisions regarding the maximum duration of interrogations, breaks and times when suspect may not be interrogated, if they exist, applied in practice? |
| - Do the police interview suspects at night and for what offences? |
| Recording of Interrogations | - Recording of interrogations is a crucial safeguard against abuse of the right to silence. It is desirable that a verbatim written record of the interrogation was made. Furthermore, audio or audio-video recording of interrogations constitutes a guarantee against the use of improper compulsion during interrogation. |
| - How are the provisions regarding the written records and electronic recording of interrogations applied in practice? |
| - Are the written records interrogations verbatim, or prepared in the summary form (or else)? |
| - Is everything that occurs during the interrogation recorded in the interrogated record? If not, which information was not recorded? |
| - Are suspects and their lawyers allowed to read and to make remarks to the interrogation record? |
| - Do lawyers receive a copy of the recording/transcript/summary? |
| Interrogation of vulnerable suspects | - There should be special provisions in relation to interrogation of vulnerable suspects (juveniles, people |
| - How does the procedure to determine whether the suspect is fit to be interviewed operate in practice, if it exists? |
| - How are the additional safeguards related to the interrogations of |
| with intellectual disabilities, etc.) and suspects who are temporarily not fit to testify (e.g. under the influence of substances) aimed at the prevention of involuntary self-incrimination by these suspects. | vulnerable suspects (e.g. presence of an appropriate adult, electronic recording, etc.) applied, if they exist in national law?  
- Typically, who attends for each category of suspect?  
- How do the police decide who to contact?  
- Is there any procedure/system in place e.g. duty rota of social workers or a legal requirement within some professions e.g. social work, or local authority responsible for children’s welfare at the research sites? |

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1 This Research Questions Schedule was designed taking into account the texts of the EU Directive and draft Directives on suspects’ procedural rights that were available as at 1 October 2011. The purpose of the Research Questions Schedule was to ensure that all relevant issues relating to the four procedural rights under examination were dealt with comprehensively, particularly for the purposes of the observational elements of the research. This is an abbreviated version of the Research Questions Schedule that was actually prepared.
ANNEX 4  CASE LOG PRO-FORMA LAWYER OBSERVATIONS

CASE LOG PRO-FORMA LAWYER OBSERVATIONS

<table>
<thead>
<tr>
<th>Researcher(s):</th>
<th>Case ref #:</th>
<th>Country:</th>
</tr>
</thead>
</table>

I. LAW FIRM


II. GENERAL CASE INFORMATION


III. CASE DETAILS


IV. INITIAL CONTACT


37. First contact by: a. telephone b. in person 38. Legal assistance given: a. telephone b. video conference c. in person d. combination:

V. ATTENDANCE AT POLICE STATION

39. Arrival time: 40. Delay in attending police station: a. YES / NO b. If YES, reasons

550
41. Lawyer consults written records: a. YES / NO b. If NO, why:

42. Lawyer verified clients: a. special vulnerability YES / NO / NA b. medical condition YES / NO / NA c. language difficulties YES / NO / NA d. literacy difficulties YES / NO / NA

43. Lawyer checked attendance of: a. doctor YES / NO / NA b. appropriate adult YES / NO / NA c. other YES / NO / NA

44. Did lawyer ask for information about: a. suspected offence(s) YES / NO / NA b. existing evidence YES / NO / NA c. interrogation YES / NO / NA

45. Was the lawyer shown evidence: a. YES / NO b. If YES, specify

46. Lawyer recorded information obtained/given: YES / NO

### VI. FIRST CONSULTATION WITH CLIENT

47. Consultation before first interrogation: a. YES / NO b. If NO, reasons:

48. Consultation in private: YES / NO 49. Start time: 50. Duration:

51. Did lawyer check with client: a. special vulnerability YES / NO / NA b. medical condition YES / NO / NA c. language/literacy YES / NO / NA d. knowledge of reasons for arrest YES / NO e. whether informed about rights YES / NO f. whether understood rights YES / NO

52. Did lawyer explain his/her role: YES / NO 53. Did lawyer take client’s instructions: YES / NO

54. Did lawyer advise on client’s legal position: YES / NO

55. Did lawyer explain options for conduct in interrogation: a. YES / NO b. Did lawyer advise client on how to deal with interrogation: YES / NO

56. Did lawyer make a written record of consultation: YES / NO

### VII. RIGHT TO INTERPRETATION / TRANSLATION

57. Did lawyer explain the right to interpretation/translation: YES / NO / NA

58. Did lawyer check attendance of: a. interpreter/translator YES / NO / NA

59. Were client/lawyer communication interpreted: a. YES / NO / NA b. If YES, c. in person, d. telephone, e. video

60. Did lawyer arrange separate interpreter: a. YES / NO / NA b. If NO, reason:

61. Did lawyer make representations on interpretation/translation: a. YES / NO / NA b. If YES, c. nature of representations d. outcome:

### VIII. RIGHT TO LEGAL ASSISTANCE (LA) AND LEGAL AID

62. Did lawyer advise on right to legal aid: YES / NO / NA

63. Did lawyer assist in applying for legal aid: YES / NO / NA

64. Did lawyer advise on right to have lawyer present at interrogation: YES / NO / NA

65. Did lawyer advise on right to legal assistance in addition to during interrogation: YES / NO

### IX. RIGHT TO SILENCE

66. Was there a discussion of right to silence: YES / NO

67. Did lawyer explain implications of remaining silent: YES / NO

68. Did client choose to remain silent: YES / NO / UNCLEAR if YES, was this a. on advice of the lawyer
<table>
<thead>
<tr>
<th>Case Log Pro-Forma Lawyer Observations</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Question</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>69. Did lawyer advise client to remain silent? a. YES / NO b. reasons</td>
<td></td>
</tr>
<tr>
<td>70. Did lawyer advise client regarding the conduct of the interrogation: a. YES / NO b. If YES, what advice:</td>
<td></td>
</tr>
<tr>
<td>X. INTERROGATIONS</td>
<td></td>
</tr>
<tr>
<td>71. Was lawyer present in the first police interrogation: YES / NO / NA a. YES / NO / NA if NO, why:</td>
<td></td>
</tr>
<tr>
<td>72. If there was more than one interrogation, was the lawyer present in: a. ALL / SOME / NONE b. If SOME or NONE, why:</td>
<td></td>
</tr>
<tr>
<td>73. Did suspect follow lawyer's advice as to whether to remain silent or speak in the interrogation: a. YES / NO / NA b. If NO, did the lawyer intervene: YES / NO</td>
<td></td>
</tr>
<tr>
<td>74. Did suspect follow lawyer's advice generally: a. YES / NO b. If NO, did the lawyer intervene: YES / NO</td>
<td></td>
</tr>
<tr>
<td>75. Did client answer police questions: a. YES / NO b. If YES, ALL / SOME</td>
<td></td>
</tr>
<tr>
<td>76. Did client make a statement: a. YES / NO b. If YES: WRITTEN / ORAL</td>
<td></td>
</tr>
<tr>
<td>77. Did lawyer take a record of interrogation: a. YES / NO b. If YES: WRITING / AUDIO EQUIPMENT</td>
<td></td>
</tr>
<tr>
<td>78. Did lawyer intervene in interrogation: a. YES / NO b. Was intervention requested/initiated by: CLIENT / LAWYER</td>
<td></td>
</tr>
<tr>
<td>79. Did the lawyer or suspect seek to stop the interrogation: a. YES / NO b. If YES, why:</td>
<td></td>
</tr>
<tr>
<td>XI. CASE PROGRESSION</td>
<td></td>
</tr>
<tr>
<td>80. Was there more than one lawyer/client consultation: a. YES / NO b. If YES, how many</td>
<td></td>
</tr>
<tr>
<td>81. Duration of consultations after the first one:</td>
<td></td>
</tr>
<tr>
<td>82. When did these subsequent consultations take place:</td>
<td></td>
</tr>
<tr>
<td>83. In consultations after the first one, did lawyer: a. address procedural position changes YES / NO / NA b. advise the client about further police interrogations YES / NO / NA c. advise on further actions YES / NO / NA</td>
<td></td>
</tr>
<tr>
<td>84. Outcome of police detention known: a. YES / NO b. If YES, explain</td>
<td></td>
</tr>
<tr>
<td>85. Lawyer made representations to (negotiated with) police about outcome: a. YES / NO / NA b. If YES, explain</td>
<td></td>
</tr>
</tbody>
</table>

Remarks and Notes on the case, the case file and other records:
## ANNEX 5  CASE LOG PRO-FORMA POLICE STATION OBSERVATIONS

**CASE LOG PRO-FORMA POLICE STATION OBSERVATIONS**

<table>
<thead>
<tr>
<th>Researcher</th>
<th>Case ref N°:</th>
<th>Country</th>
</tr>
</thead>
</table>

### I. GENERAL

**NOTE:** IF ANY OF THE REQUESTED INFORMATION IS NOT AVAILABLE TO YOU, PLEASE LEAVE THE RESPECTIVE FIELD(S) BLANK

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>1. Town</td>
<td>2. Police station</td>
<td></td>
</tr>
<tr>
<td>3. Suspect</td>
<td>4. Local reference n°:</td>
<td></td>
</tr>
<tr>
<td>5. Nationality</td>
<td>6. Age</td>
<td>7. Gender:</td>
</tr>
<tr>
<td>8. Special vulnerability:</td>
<td>a. YES / NO</td>
<td>b. Which:</td>
</tr>
<tr>
<td>9. Medical condition:</td>
<td>a. YES / NO</td>
<td>b. Which:</td>
</tr>
<tr>
<td>10. Suspect speaks local language?:</td>
<td>a. YES / NO</td>
<td>11. If NO, which language speaks:</td>
</tr>
<tr>
<td>12. If YES to 10, fluency in local language:</td>
<td>poor</td>
<td>average</td>
</tr>
</tbody>
</table>

### II. ARREST

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>15. Arrest:</td>
<td>Date:</td>
<td>Time:</td>
</tr>
<tr>
<td>16. Brought to the station:</td>
<td>Date:</td>
<td>Time:</td>
</tr>
<tr>
<td>17. Reasons for arrest:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18. Detention:</td>
<td>Date:</td>
<td>Time:</td>
</tr>
<tr>
<td>19. Officer(s):</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### III. INVESTIGATION

<p>| | | |</p>
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>20. Investigation officer(s):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>21. First time suspected for this offence:</td>
<td>a. YES / NO</td>
<td></td>
</tr>
<tr>
<td>22. Evidence collected prior to interrogation:</td>
<td>a. YES / NO</td>
<td></td>
</tr>
<tr>
<td>24. Change in suspect status*: a. YES / NO b. Which:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### IV. PROCEDURAL RIGHTS

#### A. Right to information

<p>| | | |</p>
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>27. Informed about the suspected offence: YES / NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>28. About access to a lawyer: YES / NO</td>
<td>25. About legal aid: YES / NO</td>
<td></td>
</tr>
<tr>
<td>30. About access to interpreter: YES / NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>31. About right to silence: YES / NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>32. About right of contact: a. YES / NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>33. About access to relevant documents: YES / NO</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### B. Right to interpretation and translation

<p>| | | |</p>
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>34. Interpreter called: a. YES / NO / NA b. When: c. Result:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>36. Legal advice interpreted: YES / NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>37. Same interpreter as 35? a. YES / NO b. Name: c. Certified: YES / NO d. Experienced: YES / NO</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case Log Pro-Forma Police Station Observations</td>
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<td>---------------------------------------------</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Question</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>38. Procedural rights given</td>
<td>a. orally in appropriate language: YES/NO</td>
</tr>
<tr>
<td></td>
<td>b. in writing in appropriate language YES/NO</td>
</tr>
<tr>
<td>39. Interrogation</td>
<td>a. conducted in appropriate language: YES/NO</td>
</tr>
<tr>
<td></td>
<td>b. Interpreted YES/NO</td>
</tr>
<tr>
<td>40. Delays to procedure resulting from interpretation</td>
<td>a. YES/NO</td>
</tr>
<tr>
<td></td>
<td>b. How long:</td>
</tr>
<tr>
<td>41. Rating of interpretation quality</td>
<td>Rate:</td>
</tr>
<tr>
<td></td>
<td>poor</td>
</tr>
<tr>
<td>42. Written version of rights in appropriate language</td>
<td>YES/NO</td>
</tr>
<tr>
<td>43. Interpreter contact</td>
<td>a. In person b. Phone c. Video d. Combination</td>
</tr>
<tr>
<td>44. Translation of relevant documents</td>
<td>a. YES/NO/NA b. Orally: YES/NO c. In writing: YES/NO</td>
</tr>
<tr>
<td>C. Right of access to a lawyer</td>
<td></td>
</tr>
<tr>
<td>45. Information given</td>
<td>a. By whom:</td>
</tr>
<tr>
<td></td>
<td>b. When in procedure:</td>
</tr>
<tr>
<td></td>
<td>c. Orally: YES/NO d. Written: YES/NO e. Appropriate language: YES/NO</td>
</tr>
<tr>
<td>46. Was legal assistance mandatory</td>
<td>a. YES/NO b. Reason:</td>
</tr>
<tr>
<td>47. Did the suspect ask for a lawyer</td>
<td>a. YES/NO b. Reason:</td>
</tr>
<tr>
<td>48. Did suspect ask for specific lawyer</td>
<td>a. YES/NO b. Whom:</td>
</tr>
<tr>
<td>49. Did suspect refuse access to lawyer</td>
<td>a. YES/NO b. Reason:</td>
</tr>
<tr>
<td></td>
<td>c. Were implications explained:</td>
</tr>
<tr>
<td>50. Was this recorded</td>
<td>YES/NO</td>
</tr>
<tr>
<td>C2. Contacting lawyer</td>
<td></td>
</tr>
<tr>
<td>51. Lawyer contacted</td>
<td>a. YES/NO/NA b. By whom:</td>
</tr>
<tr>
<td>52. Suspect asked for a particular lawyer/firm</td>
<td>a. YES/NO b. Was this lawyer/firm contacted?: YES/NO</td>
</tr>
<tr>
<td></td>
<td>c. Did the lawyer/firm assist the suspect?: YES/NO d. Reason:</td>
</tr>
<tr>
<td>53. Delay in contacting lawyer</td>
<td>a. YES/NO b. How long:</td>
</tr>
<tr>
<td></td>
<td>c. Reason:</td>
</tr>
<tr>
<td>C3. Legal advice</td>
<td></td>
</tr>
<tr>
<td>54. Consultation with lawyer</td>
<td>a. Before first police interrogation: YES/NO</td>
</tr>
<tr>
<td></td>
<td>b. Length of consultation before first interrogation:</td>
</tr>
<tr>
<td></td>
<td>c. Total length of consultations (if more than one)</td>
</tr>
<tr>
<td>55. Lawyer:</td>
<td>a. name:</td>
</tr>
<tr>
<td></td>
<td>b. Did the suspect know lawyer: YES/NO</td>
</tr>
<tr>
<td>56. If no lawyer, reason:</td>
<td></td>
</tr>
<tr>
<td>57. If no consultation before first interrogation, reason:</td>
<td></td>
</tr>
<tr>
<td>58. Consultation method</td>
<td>a. In person: YES/NO</td>
</tr>
<tr>
<td></td>
<td>b. By telephone/video: YES/NO</td>
</tr>
<tr>
<td></td>
<td>c. Privacy respected: YES/NO</td>
</tr>
<tr>
<td>59. Lawyer:</td>
<td>a. Private (or independent) YES/NO b. Public defender YES/NO/NA</td>
</tr>
<tr>
<td>60. Duty lawyer:</td>
<td>YES/NO</td>
</tr>
<tr>
<td>61. Lawyer present at interrogation</td>
<td>a. YES/NO/NA</td>
</tr>
<tr>
<td></td>
<td>b. If yes, was the lawyer present throughout the interrogation: YES/NO</td>
</tr>
<tr>
<td></td>
<td>c. If more than one interrogation, was the lawyer present at all interrogations: YES/NO</td>
</tr>
<tr>
<td>62. Change in lawyer</td>
<td>a. YES/NO b. N° of times: c. Reason:</td>
</tr>
<tr>
<td></td>
<td>d. Name of new lawyer:</td>
</tr>
<tr>
<td>D. Right to silence**</td>
<td></td>
</tr>
<tr>
<td>63. Informed of the right to silence at beginning of interrogation**</td>
<td>a. YES/NO</td>
</tr>
<tr>
<td></td>
<td>b. If NO, informed at a later stage: YES/NO</td>
</tr>
<tr>
<td>64. a. Did the suspect appear to understand the caution: YES/NO</td>
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<tr>
<td>b. If NO, did the officer explain it to them? YES/NO</td>
<td></td>
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<tr>
<td>65. Did the suspect:</td>
<td>a. answer all questions</td>
</tr>
<tr>
<td></td>
<td>d. make an oral statement</td>
</tr>
<tr>
<td>66. Was the suspect persuaded to answer questions?</td>
<td>a. officer YES/NO</td>
</tr>
<tr>
<td></td>
<td>c. Any other person YES/NO/NA</td>
</tr>
<tr>
<td>67. If YES to 66, how exactly:</td>
<td></td>
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<tr>
<td>68. How did the suspect respond to the pressure:</td>
<td></td>
</tr>
<tr>
<td>69. How did the lawyer respond to the pressure:</td>
<td></td>
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### V. INTERROGATION

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<tbody>
<tr>
<td>70. First interrogation:</td>
<td>a. Date:</td>
</tr>
<tr>
<td>71. Others present:</td>
<td>a. YES/NO</td>
</tr>
<tr>
<td>72. Recorded:</td>
<td>a. YES/NO</td>
</tr>
<tr>
<td>74. Record:</td>
<td>a. Signed/approved by suspect: YES/NO</td>
</tr>
</tbody>
</table>

### VI. INFORMATION ABOUT THE CASE PROGRESS

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<table>
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<tr>
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<tbody>
<tr>
<td>75. Outcome of police detention known:</td>
<td>a. YES/NO</td>
</tr>
<tr>
<td>76. Lawyer made representations to (negotiated with) police about outcome:</td>
<td>a. YES/NO/NA</td>
</tr>
<tr>
<td></td>
<td>b. If YES, explain:</td>
</tr>
<tr>
<td>77. Overall time in police custody before charge (proceedings formally commenced):</td>
<td></td>
</tr>
</tbody>
</table>

Remarks and Notes on the case, the case file and other records:
ANNEX 6  POLICE INTERVIEW PRO-FORMA

Interview pro-forma – Police Officers

1. Thinking about suspects (i.e. persons arrested and/or detained at police stations on suspicion of having committed a criminal offence), what major changes have taken place in the past year or two? What do you think about those changes?

Right to information

2. Do you think that generally suspects know what their rights are? How do they get to know about them?

3. Do you ever provide a suspect or their lawyer with information from the case-file (evidential material obtained by the police)? How do you decide what information to give, and when to give it?

Right to interpretation and translation

4. How do you decide whether a suspect needs interpretation or translation?

5. What do you think about the current arrangements for providing interpretation at the police station?

Right to legal assistance

6. The European Court of Human Rights has held that a suspect has a right to consult a lawyer before being interviewed by police, and during the police interview. In your experience, are suspects always informed of this right? Do you think that vulnerable suspects (e.g. juveniles, mentally vulnerable, etc) are able to make an informed choice about whether to exercise the right to a lawyer?  

7. What is your opinion about the arrangements for providing access to a lawyer?

8. What is your opinion about the role played by defence lawyers during the police detention stage?

Right to silence

9. What is your opinion about the right to silence? How do you respond if a suspect indicates that they do not wish to answer questions in police interviews?

Children and vulnerable suspects

10. What arrangements are there for children and vulnerable suspects, and how do they work in practice?

---

1 For England and Wales there is no need to make reference to the ECHR as this has been the position since the Police and Criminal Evidence Act 1994 came into force. Replace the clause in brackets with "The law states..."
General attitude to suspects' rights

11. Do you think that suspects should be informed of their rights? What do you think about the rights that suspects now have?

Information about interviewee

12. How would you describe your status and role?

13. How many years' experience do you have as a police officer?

Date of interview:

Interviewee reference number:
ANNEX 7 LAWYER INTERVIEW PRO-FORMA

Interview pro-forma – Lawyers

1. Thinking about suspects (i.e. persons arrested and/or detained at police stations on suspicion of having committed a criminal offence), what major changes have taken place in the past year or two? What do you think about those changes?

Right to information

2. Do you think that generally suspects know what their rights are? How do they get to know about them?

3. In your experience, do the police generally provide sufficient information to you (a) about the reason(s) for your client’s arrest, and (b) about the evidential materials that they have?

Right to interpretation and translation

4. In your experience, how do the arrangements for identifying a suspect’s need for interpretation or translation work in practice? Have you ever had a situation where you think a client at the police station needs interpretation or translation, but this has not been identified by the police? If so, how have you dealt with this?

5. What do you think about the current arrangements for providing interpretation at the police station?

Right to legal assistance

6. [The European Court of Human Rights has held] that a suspect has a right to consult a lawyer before being interviewed by police, and during the police interview. In your experience, are suspects always informed of this right? Do you think that vulnerable suspects (e.g. juveniles, mentally vulnerable, etc) are able to make an informed choice about whether to exercise the right to a lawyer?

7. What is your opinion about the arrangements for providing access to a lawyer to suspects detained at police stations?

8. How do you decide whether to (a) attend on a client in person at the police station, and (b) whether to attend at the police interview?

9. Can you tell me what difference you think your presence makes at the police station?

10. In your experience, what is the police opinion of the role of the defence lawyer during the police detention stage?

Right to silence

---

1 For England and Wales there is no need to make reference to the ECHR as this has been the position since the Police and Criminal Evidence Act 1984 came into force. Replace the clause in brackets with ‘The law states...’.
11. In your experience, do suspects understand what is meant by the right to silence? How do you decide whether to advise a client to remain silent during a police interview?

*Children and vulnerable suspects*

12. What arrangements are there for children and vulnerable suspects, and how do they work in practice?

*Information about interviewee*

13. How would you describe your status and role?

14. How many years' experience do you have as a lawyer/legal adviser?

Date of interview:

Interviewee reference number:
## ANNEX 8  OVERVIEW OF THE COLLECTED DATA

### England

<table>
<thead>
<tr>
<th>Site</th>
<th>Interviews</th>
<th>Case Records</th>
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<tbody>
<tr>
<td></td>
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<td>0</td>
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<td>Town</td>
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<tr>
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### Scotland

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### Netherlands

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<td>Town</td>
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<tr>
<td>Totals</td>
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### Table to show the interview and case record data by Country

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<thead>
<tr>
<th>Country</th>
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<th>Case Records</th>
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</thead>
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<tr>
<td>Total</td>
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ANNEX 9  OVERVIEW OF THE DATA COLLECTION PERIODS
Please note that this language identification leaflet is constantly being updated and expanded. If you would like an up to date version to be sent to you, please contact us.

If you have a request for a particular language to be added to the list, please contact us.

Highland Office:
Fairways House, Fairways Business Park, Castle Heather, Inverness IV3 8AA
Tel: 01463 239839, Fax No. 01463 716001, Email: mail@globalinverness.com

Glasgow Office (Head Office):
Craig House, 64 Darnley Street, Glasgow. G41 2SE
Tel: 0845 230 3439 (local rate); 0141 428 3450 Fax: 0141 429 3450
Email: mail@globalglasgow.com, www.globalglasgow.com

Edinburgh Office:
Belgrave Business Centre, 45 Frederick Street, Edinburgh, EH2 1EP
Tel: 0131 624 1146, Fax: 0131 229 0115, Email: mail@globaledinburgh.com

Email: mail@globalglasgow.com
www.globalglasgow.com

If you are unsure about any issues related to translation or interpretation, feel free to contact us.
<table>
<thead>
<tr>
<th>Language</th>
<th>Please point at your language and we will call an interpreter for you.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afrikaans</td>
<td>Wyd met jou vir jou taal en omvat die volgende vir jou kennis.</td>
</tr>
<tr>
<td>English</td>
<td>I can speak English. Please point at your language and we will call an interpreter for you.</td>
</tr>
<tr>
<td>Arabic</td>
<td>Framebuffer</td>
</tr>
<tr>
<td>Albanian</td>
<td>Ky iroman greko me i zhip gurde hajj xhe do / bisephon mi giperri en ghe hu.</td>
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<tr>
<td>Azerbaijani</td>
<td>སྨ་སྐད་བོད་ཡིག་དང་། ཐོག་སྒམ།</td>
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<td>Croatian</td>
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<td>Czech</td>
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<tr>
<td>Dutch</td>
<td>/Wij zijn uw taal en wij zullen een tolk-volunteer voor U beschermen.</td>
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<td>Estonian</td>
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<tr>
<td>Urdu</td>
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<tr>
<td>Vietnamese</td>
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</tbody>
</table>
Interpreters introduction Sheet

My Name is ........................................... and I am the (Language) Interpreter for today.

I'll interpret everything that is said by everyone present. If you do not want me to interpret, please do not say it.

I am completely impartial and not on anybody's side.

Please do not try to engage me in conversation, as I am here to interpret between the parties involved.

Please be assured that anything discussed in this interview I will not discuss outside of this investigation.

If I was involved in the disclosure interview between you and your solicitor, anything that was discussed in that meeting will remain confidential to that meeting.

If I need to clarify something I will have to stop you and ask.

It would help me if you could speak to each other directly.

Please allow me to complete the interpretation to each of you before you speak again.
ANNEX 12  NOTES FOR THE GUIDANCE OF ACCUSED PERSONS (SCOTLAND)

FOOD:
You will be provided with three meals per day.
Drinking water will be supplied to you on request.

WRITING MATERIALS:
Writing materials will be supplied to you on request and letters, which should be in unsealed envelopes, will be sent with the least possible delay.

COMMUNICATION AND FRIENDS:
If you so desire, a message will be sent to a relative or friend.
If you are of foreign nationality you may send a message to the Consular Officer of your country.

COMMUNICATION WITH LAW AGENT:
If you so desire, intimation will be sent to your law agent, with whom you will be allowed a private interview prior to your appearance in Court.
If you wish to call witnesses for your defence in Court and have difficulty in arranging this, reasonable facilities for helping you will be given.
Your are not obliged to make a statement in relation to the charge against you, but if you desire to do so you can inform the Officer on Duty. You are entitled to have the benefit of legal advice before such a statement is made and any such statement will be taken down and may be used in evidence.

MEDICAL ASSISTANCE:
If you require the services of a doctor you should ask for one to be called. You will then be seen by a Police Doctor.

INTERIM LIBERATION:
If your case is one in which liberation can be granted, the Officer in Charge of the police station will advise you as to the procedure. If you are not granted interim liberation, you will be informed of the reasons why.

TOILET FACILITIES:
On occasion when a cell is occupied by three or more persons, should you so require, you will be permitted to use private toilet facilities.

INDEPENDENT CUSTODY VISITING SCHEME:
Independent Custody Visitors are members of the public who make unannounced visits to selected Police Officers to check on the treatment of detained people and find out if their rights have been explained and granted.
You may be asked if you agree to an interview with the Independent Custody Visitor. If asked, it will be your choice whether you wish to see them.

If you do not understand any of the above Notes, the Officer on Duty will explain them to you.
ANNEX 13
SOLICITOR ACCESS - Provision of Rights Flowchart (Scotland)

The flowchart outlines the process for solicitor access during interviews. It begins with informing the suspect of their rights as per SARF A (as per Sect. 4.2 of ACPOS Manual of Guidance). If the suspect wishes consultation, this should be facilitated. If the suspect changes their mind at any point and wishes access to a solicitor, this must be facilitated. The flowchart also highlights the importance of maintaining the suspect's rights and ensuring that any consultation or access to a solicitor is provided as per the ACPOS Manual of Guidance.

Remember:
- If the suspect has waived their rights, changes their mind at interview or at any other point, their rights must be afforded.
- The allowing of suspects' rights can only be carried out in exceptional and compelling circumstances (see Sect. 3.3.2 of ACPOS Manual of Guidance).
- Proceeding to interview without allowing solicitor access may render the product of the interview inadmissible.

The exercising of rights is a matter for the suspect only. Police officers and staff must make no attempts to sway the suspect's decision either way (see Sect. 9.1 of the ACPOS Manual of Guidance).
ANNEX 14 ACPOS PRE-INTERVIEW REVIEW OF RIGHTS (SCOTLAND)

To be read to suspect(s) prior to administering the common law caution in advance of interview(s) at a police office. If the interview is being recorded in a notebook, PDA similar device following should be recorded verbatim. If the interview is audio/visually recorded it will be read out whilst the recording device is operating.

About (time and data) you attended at this police station on a voluntary basis/under detention/under arrest in relation to (crime/offence). Is that correct?

You had your rights in relation to access to a solicitor explained to you. You were asked if you understood each of these rights and you confirmed that you did. Is that correct?

You were then asked if you wished to take up these rights and your answers were recorded on a form which I have here. You were asked:

"Do you wish me to intimate to a solicitor that you have attended voluntarily/been detained/been arrested at this police station?"

Your answer to this was (YES/NO). Is that correct?

If NO: You then signed the form to confirm that your answer was no. Is that correct? Is that your signature?

You were then asked,

"Do you wish a private consultation with a solicitor before being questioned by the police?"

Your answer to this was (YES/NO). Is that correct?

If NO: You then signed the form to confirm that your answer was no. Is that correct? Is that your signature?

You were then asked,

"Do you want to have a private consultation with a solicitor at any other time during police questioning?"

Your answer to this was (YES/NO). Is that correct?
If NO: You then signed the form to confirm that your answer was no. Is that correct? Is that your signature?

(NB: Interviewing Officers, if the suspect waived their right to consult with a solicitor and changes their mind you must ensure that you a consultation with a solicitor is secured unless exceptional circumstances prevail – see ACPOS Solicitor Access Manual of Guidance Section 3)

COMMON LAW CAUTION

I am now going to ask you questions about (crime/offence). You are not obliged to answer any questions but anything you do say may be noted, may be audio and visually recorded and may be used in evidence. Do you understand that?
ANNEX 15 POLICE STATEMENT FORM S14 DETENTION (SCOTLAND)

RESTRICTED - WHEN COMPLETED

‘_____’ Division Ref.No ___________ PF Ref. No ___________

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995
STATEMENT TO BE COMPLETED BY OFFICER DETAINING SUSPECT
UNDER SECTION 14

In terms of the Criminal Procedure (Scotland) Act 1995, Section 14
(identification of detaining officer) __________________________________________
detained (name of suspect) __________________________________________________
of (address of suspect) _____________________________________________________
at (time) (a) __________ on (date) __________ at (place detention commenced)

Has the suspect been detained on the same grounds in pursuance of any other enactment? YES/NO
If yes, quote statute and section _____________________________________________

Previous detention commenced at (time) __________ on (date) __________ and
concluded at (time) __________ on (date) __________.
Note cumulative detention time must exceed 6 hours.

At the time (a) the above-named was so detained, I informed him/her that I was detaining him/her
under Section 14 of the Criminal Procedure (Scotland) Act 1995 because (state circumstances giving rise
to suspicion)

__________________________________________________________________________

I suspected that he/she had committed an offence punishable by imprisonment, namely (state
general nature of the offence) ________________________________________________
that the reason for his/her detention was to enable further investigations to be carried out and that
he/she was under no obligation to answer any question other than to give his/her name and
address, date of birth, place of birth and nationality. When detained, the above-named declined to
comment/stated

__________________________________________________________________________

(If statement lengthy, use separate sheet(s), each sheet to be signed by detainee and officers
concerned.)

I thereafter took the above-named to (police station or other premises) and time his/her arrival at __________, Time __________
Signature of Officer Detaining __________________________ Corroborating Officer
PROCEDURE ON DETENTION UNDER SECTION 14
Detention accepted/rejected by station or other officer: Signature ________________________________
Name ____________________ Number ____________________ Time ____________________
(If detention is accepted, complete the form as appropriate. If detention is rejected, proceed either to release or arrest suspect and complete Forms B and C.)

STATEMENT TO DETAINEE BY STATION OR OTHER OFFICER Time ____________________
It has been reported to me that you have been detained under Section 14 of the Criminal Procedure (Scotland) Act 1995. I must inform you that you are under no obligations to answer any questions other than to give me your name and address, date of birth, place of birth and nationality.
What is your name? ____________________
What is your address? ____________________
What is your date of birth? ____________________
What is your place of birth? ____________________
What is your nationality? ____________________
The above-named declined to comment/stated ____________________________________________

(If statement lengthy, use separate sheet(s), each sheet to be signed by detainee and officers concerned.)

Signature of Station or Other Officer ____________________
Corroborating Officer ____________________

RESTRICTED - WHEN COMPLETED
DETAINEE NOT UNDER 16 YEARS OF AGE (ADULT)

Name of detainee __________________________

INFORMATION TO SOLICITOR AND OTHER NAMED PERSON
You are entitled to have information of your detention and of the police station or other premises or place where you are being detained sent to a solicitor and to one other person reasonably named by you.
(If solicitor not named offer intimation to duty solicitor)

Do you wish to have such intimation sent to a solicitor? YES/NO Time
Name and address of named/duty solicitor ____________________________
Name of person giving intimation ____________________________
If no contact or more than one contact made with solicitor note reason ____________________________

Do you wish to have intimation sent to one other person other than a solicitor? YES/NO Time
If yes give name and address of person named ____________________________
Name of person giving intimation ____________________________ Time: ____________________________
If no contact or more than one contact made with such a person note reason ____________________________

If some delay in sending intimation to a solicitor or other person is necessary in the interest of the investigation, the prevention of crime, or the apprehension of offenders, specify the reason for such delay ____________________________

You may now be questioned and searched, your fingerprints, biological samples and other impressions may be taken. You must be taken elsewhere for these procedures to be completed. Time: ____________________________

Signature of Station or Other Officer ____________________________
Corroborating officer ____________________________

MOVEMENT OF DETAINEE
The detainee was thereafter moved to (other police station, premises or place) ____________________________
For the purpose of ____________________________ Time: ____________________________
Subsequent movements of the detainee to be recorded in the detaining officer’s notebook.

RELEASE FROM DETENTION
You are being released from detention and are now free to leave the premises. Time: ____________________________
Reason for release – Grounds for detention no longer exist/Suspect has been detained for a period of 6 hours.
ARREST
Up to now you have been detained under Section 14 of the Criminal Procedure (Scotland) Act 1995. You are now under arrest. Time ________________

FURTHER DETENTION UNDER ANOTHER ENACTMENT
Up to now you have been detained under Section 14 of the Criminal Procedure (Scotland) Act 1995. You are now to be detained under (specify statute and section) ________________________________

Signature of Station or Other Officer ________________________________
Corroborating Officer ________________________________
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