

Transforming Legal Aid: Access to Criminal Defence Services

Vicky Kemp

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A report by

Dr Vicky Kemp

Legal Services Research Centre

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Executive Summary

Policy background

With legal aid costs increasing significantly over recent years the previous Government and Legal Services Commission (LSC) had embarked on a programme of transforming the legal aid system. The intention of the reform programme was to control rising costs and to provide a sustainable legal aid scheme for the future. With the formation of the new Government in May 2010, reform of legal aid remains high on its agenda. Indeed, an internal policy assessment into legal aid is currently being undertaken with a view to developing proposals for reform of legal aid, on which views will be sought in the autumn (Ministry of Justice, 2010). With legal aid reform having the potential to change the organisation of criminal defence services, the LSC had asked the Legal Service Research Centre (LSRC) to undertake a survey of users in the criminal justice system. Over 1,000 people were interviewed and asked about their choice and use of a solicitor. Interim findings were published by the LSRC in November 2008 (see Kemp and Balmer, 2008). These findings have helped to highlight potential barriers to legal advice. With a paucity of research having been undertaken recently into criminal legal aid, further research has been conducted in order to examine access to criminal defence services within the changing context of the wider criminal justice system.

*Methods*¹

Multiple methods have been adopted in this study in order to examine legal aid and the work of criminal defence solicitors from different perspectives. In addition to the survey of users in the criminal process, in-depth interviews have been carried out with 24 defence solicitors. The LSRC has also undertaken small-scale exploratory studies of police stations and magistrates' courts. While it has been useful to refer to some of the issues raised during these observations, due to the small-scale exploratory nature of this work the problems identified are not presented as *findings* but as matters requiring further empirical investigation.

¹ The Appendix provides in-depth information on the methodology.

Key findings and recommendations

The report comprises four main sections. Sections One and Two examine the take-up of legal advice and representation in police stations and magistrates' courts. In the third section are explored implications for allowing people the right to choose their own solicitor. The potential for financial incentives changing solicitors' case management decisions are considered in the fourth section. Set out below are key findings and recommendations arising out of each section.

1. Access to legal advice in the police station

From survey respondents reporting on their use of a solicitor in the police station it seems that the take-up of legal advice has increased over recent years. In the mid-1990s, for example, 40% of people were found to have requested legal advice compared to 54% of police station respondents in this study. While it has been interesting to consider the interplay of factors associated with requests for legal advice, a comprehensive study of police custody records is required in order to provide a comparison with previous Home Office studies.

It is satisfying to note that more suspects seem to request a solicitor in the police station, although it is interesting to reflect on why so many still decline despite having access to free and independent legal advice. When asked, the majority of those interviewed who declined legal advice simply said they did not need a solicitor while others said they were concerned that having legal advice would delay their time spent in custody. There were complaints from solicitors in some areas that the police were using delays as a way of discouraging suspects from having legal advice. When observing police custody suites, and arising out of informal discussions with police officers and custody staff, it was noted that recent initiatives seem to have had implications for changing the police investigation process. In addition, with the introduction of fixed fees, it seems that legal advisers are spending less time waiting around in police stations. In three out of eight police stations observed, legal advisers had been excluded from the custody suite and were instead directed to a separate waiting area. Such changes have implications for working practices between the police, Crown prosecutors and defence solicitors at the pre-charge stage.

Recommendations

1.1 The take-up of legal advice in police stations requires analysis of a large sample of custody records. The LSRC is therefore currently undertaking this work with a sample of around 30,000 electronic police custody records being examined in four police force areas. Also taken into account will be the take-up of legal advice by vulnerable suspects.

1.2 Further research is required from the users' perspective to examine the extent to which suspects detained in custody are able to make informed decisions. Such decisions include whether or not to have a solicitor and how those without legal advice respond to police questions.

1.3 With recent changes in the police investigative process, research could usefully examine inter-professional relationships and consider how practitioners could work together more effectively. The adoption of a systematic approach could assist by examining the criminal process from various different perspectives including users, the police, the Crown Prosecution Service (CPS) and defence solicitors. Such an approach could also seek to improve efficiencies as well as reduce costs in the charging process.

2. Legal representation in magistrates' courts

When applying for legal aid in magistrates' courts, defendants have to pass both the 'interests of justice' test and a means test. Of those interviewed, 82% reported having a solicitor.² While the majority of respondents were represented in court, potential obstacles to legal representation were identified. For example, there were indications from solicitors interviewed in this study that the administrative requirements of the means test could be too onerous for some people and this could have the unintended consequence of restricting access for eligible applicants, particularly those who are vulnerable. With courts under pressure to deal with minor cases quickly, there were also early indications in a small number of courts that by not encouraging defendants to see a solicitor, court staff were instead making their own informal judgements about the seriousness of the offence which effectively by-pass the 'interests of justice' test.

² A screening question was included in the survey so that those whose cases were unlikely to pass the 'interests of justice' test were excluded.

While the focus of magistrates' court hearings is on the defendant, the process is complex and there is a tendency for legal jargon to be spoken in court. It is unlikely that defendants fully understand what is happening to them, although three-quarters of the respondents at court said that they knew, or thought they knew, what was happening. Not surprisingly, those with a solicitor seemed to understand more what was happening when compared to those who were unrepresented.

Recommendations

2.1 The extent to which defendants are legally-represented in court requires analysis of a large sample of court cases. While the 'interests of justice' test and the means test are intended to target finite resources at those who most need them, it is important to ensure that those who are eligible, particularly the vulnerable, are able to access publicly funded legal representation. Analysis of court cases would also help to identify the trajectory and duration of cases.

2.2 Research could usefully examine whether an emphasis on dealing with minor cases quickly in court is changing attitudes towards the positive involvement of defence solicitors. It would also be useful for research to explore whether the involvement of solicitors early on in the charging process could help to avoid unnecessary adjournments at the first court hearing.

2.3 While most defendants are represented in court, it is important to consider the experience of those who are without a solicitor. In particular, it would be useful to explore the extent to which unrepresented defendants understand what is happening in the court process and whether or not they were able to make informed decisions about having legal representation and also as to their plea.

3. Examining 'client choice' of a solicitor

The clients' freedom to choose their own solicitor has been upheld as a right in the delivery of criminal defence services for over twenty years. However, the concept of 'client choice' is not straightforward. On the one hand, the right of clients to choose their own independent solicitor is intended to give them trust and confidence, not only in their legal adviser but also in the criminal process. On the other hand, when clients are being dealt with in a complex

criminal justice system, questions arise about the extent to which they are actually able to make informed decisions when choosing and using a solicitor. Of particular concern were the perceptions held by a number of survey respondents over the lack of independence of their solicitor, particularly when commenting on the police station duty solicitor.

By upholding the right of clients to choose their own solicitor, defence solicitors interviewed argue that this encourages competition between local solicitors' firms which helps to enhance the quality of criminal legal services. The issue of ethnicity in relation to people's choice and use of a solicitor is also explored. With only English speaking respondents included in this study, however, there were limitations when exploring the extent to which language and culture is important to people when choosing a solicitor.

Recommendations

3.1 Research should explore the extent to which having the choice of a solicitor helps to encourage people to have trust and confidence, not only in their solicitor but also in the wider criminal process.

3.2 There were concerns raised by users in this study over the perceived lack of independence of some solicitors, particularly police duty solicitors. Research is needed in order to examine from the users' perspective why such misconceptions over the independence of duty solicitor might arise, and also how these could be addressed.

3.3 It would be useful for research to explore the contention put forward by solicitors that allowing people the right to choose their own solicitor helps to increase quality by encouraging local competition between solicitors' firms.

3.4 This survey of users in the criminal process has helped to highlight people whose first language is not English as being particularly vulnerable. However, with the survey including only those who can speak English, very little is known about the experience of those who rely entirely on the services of an interpreter. It would be informative if the survey could be carried out with a sample of people who require an interpreter in the criminal process.

4. Legal aid reform and financial incentives

Criminal defence solicitors had formerly been paid for legal aid work undertaken at an hourly rate. With concerns that the structure of legal aid remuneration could encourage some solicitors to spend more time on cases than was necessary, this financial arrangement was to change in 1993, when standard fees were introduced for legally-aided magistrates' court work. While standard fees allow for a graded response to case costs, with higher costs being paid for more complex and time-consuming work, a system of fixed fees was brought in for police station legal advice in January 2008. With the 'swings and roundabouts' principle of fixed fees there were concerns raised by solicitors in this study that the new fee could impact negatively on quality by reducing the time and effort legal advisers spend on cases. Some also suggested that there were solicitors who might 'cherry pick' the more straightforward and profitable cases. Research into fixed fees in Scotland found that changes in legal aid remuneration altered solicitors' case management decisions. While the Scottish research examined summary cases being dealt with in court, rather than in the police station, it was found that fixed payments reduced the amount of client contact and preparation time, as well as influencing changes in pleading decisions.

When solicitors were interviewed in this study in 2008, proposals to pilot Best Value Tendering (BVT) had been announced by the previous Government. While these plans have been withdrawn, it is interesting to reflect on some of the concerns raised by defence solicitors interviewed in this study, particularly over issues such as quality, profitability and sustainability when anticipating the then likely consequences of BVT.

When considering legal aid reform, it is important to reflect that solicitors do not act in isolation. Indeed, their working practices often depend on interactions with other practitioners. By adopting a 'whole-systems' approach, those interactions can be examined to see how these can be managed more effectively through the criminal process: from arrest through to case disposal, either in the police station, magistrates' court or Crown Court.

Recommendations

4.1 Research could usefully explore the extent to which changes in remuneration, both through fixed fees and tendering processes, could impact on solicitors' decision-making and working practices.

4.2 While reforms of criminal legal aid have impacted on solicitors' practices, so too have other criminal justice initiatives which have changed the way practitioners' work together. The adoption of a 'whole-systems' approach could examine interactions between key decision-makers as well as identifying the experience of users in the criminal process. Such an evidence base could then assist policy-makers and practitioners when considering future reforms aiming not only to maximise efficiency and reduce costs but at the same time to improve the effectiveness of the criminal process.

Conclusion

The criminal justice system is complex and necessarily bureaucratic. This study has helped to illuminate the importance of listening to the voice of users in the criminal process. It has been informative to examine what factors are important to people when choosing and using a solicitor. Similarly, it has been useful to explore the reasons why people decline legal advice. Within a complex adversarial system of justice, it would be helpful to explore further the experience of those being dealt with in the police station and in court. In particular it would be useful to consider the extent to which people understand what is happening in the criminal process and the basis on which they are able to make informed decisions. It has also been helpful from a users' perspective to identify potential barriers to legal advice, although such issues require further exploration.

While this study has focused on criminal legal aid reforms, it is evident that defence solicitors do not work in isolation. On the contrary, their effectiveness in the criminal process is dependent on their interactions with other practitioners. The LSRC is suggesting an evaluation in order to examine the potential effectiveness of involving defence solicitors early on in the criminal process. In particular, it would be interesting to examine whether early liaison between the police, CPS and defence solicitors helps to deal with cases more effectively and efficiently both in police stations and at court.

With very little research having been undertaken recently into issues concerning access to criminal defence services it is perhaps not surprising that most recommendations in this report are concerned with the need for further research. Such research is also required in the current economic climate, particularly as it is anticipated that cuts to criminal legal aid

funding will be implemented in the not too distant future. By adopting a ‘whole-systems’ approach, research which assists policy-makers and practitioners in improving the processing of cases could achieve not only a reduction in the legal aid spend, but also cost-savings for other criminal justice agencies.

The LSRC is currently examining police electronic custody records in order to ascertain the extent to which legal advice is requested in police stations. Early findings indicate variations in the proportion of suspects requesting legal advice at different police stations. It is intended that further work will be undertaken in order to explore what factors might influence such differences in the take-up rate for legal advice. In addition to examining police attitudes and culture towards legal advice, for example, it will also include consideration of the attitudes and experience of those brought into custody as well as the organisation and practices of local defence practitioners. In order to provide guidance and oversee this work the LSRC will be setting up a Criminal Research Advisory Group. It is intended that the new evidence base will assist in improving the efficiency and effectiveness of the criminal process, at the same time as seeking to achieve cost-savings.

Introduction and Methods

Background

This study is concerned with criminal legal aid and the work of criminal defence solicitors. The original intention was to focus on recent changes in criminal legal aid and their implications both for users and for defence solicitors.³ However, as very little research has been conducted into criminal legal aid in recent years, this study also seeks to bring up to date our knowledge of the take-up of legal advice and representation in police stations and magistrates' courts. In order to determine a users' perspective on criminal defence services, the LSRC has interviewed over 1,000 people drawn into the criminal justice system. Respondents were asked whether they had understood what was happening to them in the criminal process and whether or not they had received legal advice in the police station or in court. They were also asked about their choice and use of a solicitor. The perspective of users in the criminal process has helped the LSRC to assess the take-up of legal advice and representation.

Through analysis of the surveys undertaken in police stations and magistrates' courts, we identified a number of problems likely to create barriers to legal advice and representation, particularly for vulnerable respondents.⁴ In order to explore these issues in greater detail, in-depth interviews were conducted with 24 defence solicitors. In addition to seeking solicitors' views about potential obstacles to legal advice and representation, the LSRC also asked them about the extent to which they felt people in the criminal process understood what was happening to them and about people's choice and use of a solicitor. Solicitors were also asked for their views on the criminal legal aid reforms.

³ By 'users', we mean those who have been drawn into the criminal process either as suspects in the police station or defendants appearing in court. The term 'users' rather than 'clients' is used here because this study focuses not only on those who have a solicitor but also those who do not. The term 'solicitor' is used when commenting on legal representation in both police stations and magistrates' courts. While only solicitors were interviewed as part of this study, when commenting on police station work the term 'legal adviser' is also used as suitably qualified staff, including paralegals, accredited police station representatives and trainee solicitors, can also provide legal advice.

⁴ Findings from the two surveys carried out in police stations and magistrates' courts have been published by the LSRC (see Kemp and Balmer, 2008). Because of long delays in gaining access to two women's prisons, the findings from the Prison Sample could not be included in the Interim Report.

A number of important problems were identified in interviews with users and criminal defence solicitors. These problems have the potential to restrict access to legal advice and representation. Unfortunately, a review of the literature was unable to pursue them any further, as very little empirical research has been undertaken into criminal legal advice and the work of defence solicitors in recent years. Given the gaps in our knowledge, the LSRC previously undertook a detailed study of the multi-agency processing of cases in Youth Courts (see Kemp, 2008). The LSRC have also carried out exploratory observations of both magistrates' courts and police custody suites. While it has been useful to refer to some of the issues raised during these observations, it is important to stress the small-scale exploratory nature of this work. Accordingly, the problems identified in the course of these observations are not presented as *findings* but as matters requiring further empirical investigation.

Legal aid reform

When considering implications for legal aid reform, it is important to recognise that the organisation of criminal defence services is based on a 'judicare' private practice model.⁵ This means that instead of employing solicitors on a salary, the Legal Services Commission (LSC) pays them for work undertaken on a case-by-case basis. Up until the early 1990s, solicitors were remunerated for time spent on cases at hourly rates. Following concern over the rising cost of legal aid, the structure of legal aid remuneration was altered in order to achieve cost-savings. With savings in mind, standard fees were introduced in 1993 to cover magistrates' court work. Since 2001, it has also been the LSC's policy to contract only with those criminal defence firms which meet certain quality requirements. This policy notwithstanding, spending on legal aid continued to rise. In 1997, for example, the overall cost for legal aid was £1.5 billion, and this increased to over £2 billion by 2004. While the legal aid budget increased overall, the criminal budget was the cause of this expansion.⁶

⁵ A 'judicare' model comprises solicitors in private practice being remunerated for work undertaken on a case-by-case basis. There are exceptions with some services provided under a 'staff' model. These include a small number of law centres providing criminal legal aid services, and four Public Defender Offices which are currently managed by the Legal Services Commission.

⁶ Costs under criminal legal aid from 1997 to 2004 increased by 37%, while the amount spent on civil legal aid reduced by 24%.

There was concern within the previous administration that, unless there were imposed tighter controls over spending, legal aid costs would continue to increase. In July 2005, the Government published the report, *A fairer deal for legal aid*, which provided an analysis of legal aid and the need for reform (Department for Constitutional Affairs, 2005). Lord Carter of Coles was then appointed to carry out a review of criminal legal aid. A year later, his report, *Legal Aid: A market-based approach* (Carter, 2006), was published. This included a number of recommendations for the reform of criminal legal aid. Following consultations on the proposed changes,⁷ the final report, *Legal aid reform: the way ahead* (Department for Constitutional Affairs and the Legal Services Commission, 2006b), was published in November 2006.

As a result of Lord Carter's report, several changes have been made to criminal legal aid. These include the introduction of fixed fees for police station legal advice. The reforms have also seen expansion of what is now the Defence Solicitor Call Centre⁸ and CDS Direct, which is a telephone-only legal advice line for people detained in police stations for minor offences. The reform of legal aid has included the re-introduction of means-testing for magistrates' court work in 2008 and for Crown Court work in 2010. The LSC also consulted on proposals to introduce Best Value Tendering and this new form of procurement was to be piloted in two areas from January 2010 (LSC, 2009a and 2009b). However, the then Government decided not to proceed with the proposed pilot arrangements and instead announced its intention to develop more ambitious tendering processes (Ministry of Justice, 2009). Further change had been announced following a review into the delivery and governance of legal aid by Sir Ian Magee (Magee, 2010). Based on Magee's recommendations, the then Labour Government proposed that the LSC should become an Executive Agency of the Ministry of Justice. With the formation of the new Government in May 2010, legal aid reform remains high on its agenda. Indeed, a review of legal aid is currently being undertaken, which is likely to include examination of issues concerning both the delivery and governance of legal aid (Ministry of Justice, 2010).

⁷ The consultation document was entitled *Legal Aid: A sustainable future* (Department of Constitutional Affairs and the Legal Services Commission, 2006a).

⁸ The Call Centre now deals with all calls received from the police to inform them that a suspect has requested legal advice.

Despite major changes to criminal legal aid in England and Wales, there has been little research to assess the likely impact of such changes on the organisation and practices of defence solicitors. Neither is it known to what extent the reforms might have impacted on people seeking legal advice and representation. Indeed, as noted above, it is disappointing to record that over the past fifteen years there has been little empirical research into the take-up of legal advice and representation in police stations and magistrates' courts.⁹ The aim of this study, therefore, is to provide a framework within which questions about legal aid and the work of criminal defence solicitors can be explored at this time of change.

It is interesting to reflect that criminal legal aid has received so little attention from academics over recent years. By contrast, in the 1980s and early 1990s, the Home Office reported regularly on the take-up of legal advice in police stations. The last published study was based on 1995/96 police custody records (see Bucke and Brown, 1997). Similarly, both before and after the 1984 Police and Criminal Evidence Act, a series of research studies looked at suspects' detention at police stations. An important exception to this generalisation is a recent small-scale study by Skinns (2009a, 2009b and 2010), which helps to identify the changing context within which police station legal advice is delivered. It helps to highlight some of the pressures on both the police and defence solicitors which might prevent people from accessing legal advice.

So far as the processing of cases in magistrates' courts is concerned, the impact of recent initiatives designed to reduce delays has been investigated (see National Audit Office, 2006, and Department for Constitutional Affairs, 2007). These investigations, however, do not take into account a range of factors influencing the way in which agencies collaborate when processing cases in court. In Kemp's (2008) study, a 'whole-systems' approach was adopted when examining inefficiencies and delay within the multi-agency processing of cases in Youth Courts. That study helped to highlight the importance of understanding interactions between different legal agencies, particularly between prosecutors and defence solicitors, when they seek to deal with cases more efficiently and effectively in court.

Further recent changes in the magistrates' courts have escaped academic attention. Although, for example, means-testing was re-introduced in the magistrates' courts in 2008,

⁹ There are exceptions, and those studies are acknowledged in this report.

no research has examined the impact of the change on defendants accessing legal representation. It is reassuring to note that most defendants are now represented at court, although it is also important to examine whether the administrative requirements of the new means test have created difficulties for people accessing legal aid.

Changes in criminal legal aid payments are intended to control costs by moving towards a system based on fixed fees instead of hourly rates. Research into standard fees had shown that such changes can alter solicitors' case-management decisions (see Bevan 1996). Despite this finding, there has been no research into ways in which fixed fees might have changed solicitors' decision-making in relation to police station legal advice in England and Wales.

As legal aid reforms have the potential to transform the structure of remuneration, it is useful to investigate the impact of such changes on solicitors' case-management decisions. It is important to consider what impact the introduction of fixed fees for police station legal advice might have had on solicitors' decision-making and the delivery of a quality service. Research into Scottish fixed fees, introduced for summary court cases, found that changes in remuneration influenced changes in the organisation and practices of criminal solicitors (see Stephen and Tata, 2006). In particular, such changes were found to minimise the time spent with clients and on case preparation as well as influencing changes in pleading decisions. Accordingly, it is interesting to reflect on how changes in remuneration, both positive and negative, could impact on issues of quality in relation to the use of fixed fees for police station legal advice in England and Wales.

To predict the impact of legal aid reform, it is important to understand the current organisation and practices of criminal defence solicitors. The last detailed study into criminal defence services was undertaken by McConville et al. (1994) in the early 1990s. Many of the issues identified in that study still resonate today. There were complaints at that time, for instance, that the influence of managerialism and bureaucratisation had encouraged the 'mass and rapid' processing of defendants, particularly in urban areas (McConville et al., 1994). Since the early 1990s, however, there have been radical changes to the criminal law and procedure, as well as to the organisation and practices of criminal lawyers. In addition, the

influence of managerialism¹⁰ is now dominant within the criminal justice system. It is important to examine the effects of managerialism within an adversarial system of justice, particularly in relation to interactions between key decision-makers. Any assessment of the implications for legal aid reform depends critically on the interactions between police, Crown prosecutors and defence solicitors.

It is also important to recognise that in the current economic climate legal aid reform is likely to involve cost-savings which will have implications for the way in which criminal defence services are delivered. Within this context the Law Society recognises the imperative for change when stating in its access to justice review:

As it stands, the current legal aid system is completely unsustainable. It is not delivering genuine access to justice for the public, the government is not satisfied with it and the legal profession is forced increasingly to turn its back on the system. A radical rethink is required to prevent an already fragmented and disillusioned supplier base either from disappearing or becoming ineffective. If solicitors cannot be properly paid for their work, it is the government's obligation to find new ways of delivering the same high standard of access to justice at a lower cost (Law Society, 2010:3).

Research could usefully explore interactions between key decision-makers as well as identifying the experience of users in the criminal process. Such an evidence base could then assist policy-makers and practitioners when considering future reforms aiming not only to maximise efficiency and reduce costs but at the same time to improve the effectiveness of the criminal process.

¹⁰ The influence of New Managerialism under the previous Government's modernisation agenda requires improvements in the quality and efficiency of public services with the aim of securing the 'best quality and value for money for the taxpayer' (Cabinet Office, 1999). Accordingly, comprehensive spending reviews, public service agreements and strategic business plans have been introduced with specified aims, objectives, performance measures, efficiency targets and clearly-defined outcomes intended to make the criminal justice system more effective and efficient (Cabinet Office, 1999; McLaughlin and Muncie, 2000).

Methods

The Legal Services Research Centre (LSRC) undertook this study at the request of the Legal Services Commission (LSC). The research took place in two stages. The first stage consisted of structured interviews conducted by Ipsos Mori with a sample of 1,142 users in the criminal justice system. The sample included 212 respondents interviewed in police stations and 767 in magistrates' courts located in six different areas. With the LSC requesting that the research study examines whether there were differences between the responses provided by White British and BME respondents, four of the six areas selected had a relatively high BME population.¹¹ Interviews were also undertaken in two prisons with a sample of 163 women prisoners.

The second stage involved in-depth interviews with 24 criminal defence solicitors, 21 of whom were based in the six areas while the other three were practitioner representatives from the Law Society, the Black Solicitors' Network, and the Society for Asian Lawyers. As noted above, this study has also included exploratory observation of magistrates' courts and police custody suites. This involved observation of magistrates' courts proceedings and also observations and informal discussions with police officers and custody staff in a number of police stations. A detailed account of the methods used is included in the Appendix.

Structure of the report

The report is in four main sections. The first section examines legal advice in the police station and the second examines legal representation in court. In both of these sections the take-up of legal advice and representation, as reported by survey respondents, is examined. Also examined are potential barriers to legal advice and representation, particularly in relation to vulnerable suspects and defendants. The third section explores the idea of allowing 'client choice' of a solicitor. This idea is explored both from the perspective of users in the criminal justice system and also from that of criminal defence solicitors. While both users and defence solicitors uphold the concept of 'client choice' as being important, the study also identified contradictions and ambiguities that raise questions about the extent to which 'client choice' operates in practice. The fourth section examines the potential for

¹¹ This approach was successful as 51% of the police station respondents and 41% of the court respondents are members of Black and minority ethnic groups.

changes in the structure of legal aid remuneration to impact on solicitors' case management decisions. Finally, the report suggests that a 'whole-systems' approach should be adopted when wider reforms of the criminal justice system are considered.

Section One: Access to legal advice in the police station

1.1 Introduction

It was in 1977 that Government announced the establishment of a Royal Commission on Criminal Procedure to consider the investigation of offences in the light of police powers and duties as well as that of the rights and duties of suspects. The Royal Commission's recommendations (Royal Commission on Criminal Procedure, 1981) were influential in shaping the Police and Criminal Evidence (PACE) Act 1984. That Act established basic safeguards for those detained at police stations, including the right to free and independent legal advice. One of the intentions of PACE was to increase the number of suspects who requested legal advice. Prior to PACE, estimates of detainees requesting legal advice ranged from 3% to 20% (see Softley et al., 1980; Bottomley et al., 1989; Brown, 1991). The legislation had the desired effect, with the take-up of legal advice slowly increasing from 25% in 1987 (Brown, 1989), to 32% in the early 1990s (Brown et al., 1992) and to 40% in 1995/96 (Bucke and Brown, 1997).¹² As suggested below, requests for advice seem to be increasing although various factors are found to influence the take-up of legal advice.

Although over 1,000 respondents were interviewed in this study, it is not possible to make a comparison with previous Home Office studies in the 1980s and 1990s. This is not only because too few respondents took part in the present study to allow for a comparison (particularly when breaking the data down by subgroups such as ethnicity and the police station where their interview took place) but also because different methods have been used.¹³ Nevertheless, it is useful to consider the interplay of factors associated with requests for legal advice particularly as there has been no comprehensive study of police custody records since the mid-1990s. The findings are also considered in relation to the points raised in interviews with defence solicitors, observation of police custody suites, and a review of the literature.

¹² Although 40% requested legal advice in the mid-1990s, it was reported that just 34% actually received advice (Bucke and Brown, 1997).

¹³ Respondents in the present study were asked to comment on their use of legal advice, whereas in previous Home Office studies data extracted from police custody records had been used. Phillips and Brown's study (examining 4,250 records) was published in 1998 and was based on 1993/94 custody records. Although Bucke and Brown's study (examining 12,500 records), had been published a year earlier, in 1997, it was based on later custody records in 1995/96.

It should be noted that the LSRC is currently pursuing its enquiry into police station legal advice. A programme of work includes a detailed examination of around 30,000 electronic police custody records in four police force areas.¹⁴ This robust sample can then be compared with the findings from the previous Home Office studies. The research will also include observation of police custody areas.

Here, in this part of the report, requests for legal advice and factors influencing the take-up of such advice are examined. Questions concerning access to legal advice by people who are vulnerable are also considered. Next, potential barriers to legal advice are explored. In the final section, inter-professional relationships and implications for legal advice are explored.

1.2 Factors influencing the take-up of legal advice

Previous Home Office reports revealed how the take-up of legal advice varies by police stations, personal characteristics of detainees, and type of offence. In a study of ten police stations, for example, while on average 37% of detainees requested a solicitor, this ranged from 22% at one police station to 51% in another (Phillips and Brown, 1998). The ethnicity, age and sex of detainees were also found to influence requests for legal advice (see Bucke and Brown, 1997). With respect to ethnicity, Afro-Caribbean and Asian suspects were more likely to request legal advice (46% and 44% respectively), than White suspects (36%).¹⁵ The take-up of legal advice for juveniles had traditionally been lower than that of adults, although examination of the latest custody records in 1995 and 1996 suggests that this might no longer be the case, with 41% of requests from juveniles and 39% from adults. Female suspects requested legal advice at a lower rate than their male counterparts (34% compared to 40%) (see Bucke and Brown, 1997). The type of offence also predicted requests for a solicitor; suspects facing serious charges were more likely to request advice from a solicitor (see Phillips and Brown, 1998).

¹⁴ The LSRC has received the support of the Ministry of Justice, the Home Office and the Association of Chief Police Officers in accessing police electronic custody records.

¹⁵ Although these differences might be due to mistrust of the police by members of ethnic minority groups, some differences might have been due to the kinds of offences being dealt with (see also Phillips and Brown, 1998).

1.2a *Requests for legal advice*

In the present study, the analysis of respondents' reported take-up of legal advice in the police station requires examination of three separate datasets. The first (main) dataset, referred to as the 'Court Sample', comprises 767 cases of respondents who were interviewed by Ipsos Mori at court and were also able to comment on their experience at the police station in relation to the same offence. In this section, however, only those respondents who were interviewed by the police are included.¹⁶ This gives a sub-set of 642 respondents, a large enough number to allow for the responses to be broken down by police station. The second dataset, known as the 'Police Station Sample', comprises 212 cases of respondents who were interviewed by Ipsos Mori at the police station.¹⁷ The third dataset comprises interviews with 163 female prisoners, the 'Prison Sample', 149 of whom had been interviewed by the police.¹⁸

When examining the take-up of legal advice in the police station, the responses from the Police Station Sample are the most relevant. However, only 36% of that sample had been interviewed by the police at the time of the research interview. Accordingly, while 54% of the Police Station Sample said they had requested a solicitor, it is not known what percentage of them actually received legal advice. It is to be anticipated that a higher proportion of respondents interviewed at court would have requested a solicitor, because all of them had been prosecuted. Set out in Table 1 below are the details of those requesting and receiving legal advice in the police station. The findings suggest that there continues to be an upward trend in the take-up of legal advice, although there also continues to be variation between police stations.¹⁹

¹⁶ It was not known for certain if all 767 respondents had been arrested and detained by the police in the relation to the offence being dealt with at court. Accordingly, only those who said they had been interviewed by the police in relation to that offence were included when considering requests for legal advice.

¹⁷ Problems were encountered when interviewing at Bristol and Cardiff police stations. The interviewer had difficulties at Bristol as the custody officers were providing, on average, only two suspects per day for research interviews. After four days and with eight interviews achieved, it was decided to abandon interviewing in Bristol. There were also difficulties in securing interviews at Cardiff. As only a few interviews had been secured in the first few days, it was agreed with the police that the fieldwork should be transferred to Swansea. Overall, 35 interviews were achieved in Wales – 11 in Cardiff and 24 in Swansea.

¹⁸ With fewer respondents in the police station and prisons datasets, it is not possible to analyse the responses by police area and ethnicity.

¹⁹ Respondents also commented on the type of legal advice received. As noted in the Interim Report, while overall 86% reported receiving face-to-face advice, this varied depending on the police station involved (see Kemp and Balmer, 2008:13). It is perhaps not surprising that in the Prison Sample the vast majority of respondents (97%) reported receiving face-to-face legal advice.

Table 1: Requests for legal advice at the police station (Court Sample)²⁰

<i>Police Areas</i>	<i>Advice requested</i>		<i>Advice received</i>	
		<i>%</i>		<i>%</i>
Birmingham		51		50
Bradford		45		45
Bristol		59		55
Bethnal Green		75		75
Brixton		63		58
Cardiff		79		71
<i>Average</i>		62		59
Base		400		380

However, it should be noted that so far as Cardiff is concerned, the vast majority of research interviews took place in the magistrates' court cells. As most of the Cardiff respondents had been remanded in custody, a higher request rate for legal advice in the police station was expected.²¹

In an analysis of responses from the larger Court Sample, the type of offence was found to influence the take-up of legal advice. As we noted in the Interim Report, the proportion of suspects requesting legal advice increased in line with offence seriousness.²² With respect to gender, fewer females than males requested a solicitor (56% compared to 63%), and fewer females than males actually received advice if requested (85% compared to 96%). As all respondents in the all-female Prison Sample had been sentenced to custody, it is not surprising that a higher proportion of respondents requested legal advice when compared with the Court and the Police Station Samples.

Based on the Court Sample of respondents commenting on their use of a legal adviser in the police station, multilevel binary logistic regression models were used to examine the extent to which ethnicity influenced respondents' choice of a solicitor. Also included in the model was the seriousness of the offence and geographical area as a random effect. There was evidence of clustering by area, and some areas evidently had particularly high or low

²⁰ Respondents were interviewed during February to April 2008.

²¹ It was not known until the fieldwork had been completed that the fieldworker had chosen to conduct most of the interviews in the court cells. As reported in the methods section, in the other areas there were either no or very few interviews taking place in the cells. With the Prison Sample, it is not surprising that of those interviewed by the police, (83%) said they had requested legal advice at the police station and nearly all of them (97%) had received it.

²² See Kemp and Balmer, 2008:25, Figure 9.

levels of use of legal advisers in the police stations. Similarly, the seriousness of the offence had a significant impact, with increased use of legal advisers in police stations for ‘serious’ offences. In the police station, binary ethnicity had a significant impact on use of legal adviser with BME respondents more likely to request legal advice. Using ethnicity based on five categories²³, this impact was seen to be predominantly due to an increased use of legal adviser among Mixed Ethnicity and Black respondents, who were significantly more likely to request legal advice than White British respondents. Asian respondents were slightly more likely than White British respondents not to request legal advice, though this effect was far from significant.²⁴

In the Court Sample of 767 respondents, approximately 1 in 12 reported having a physical or sensory impairment or long-term illness and 65 reported mental ill health and/or learning disability. It was only those who had been interviewed in the police station who were then asked about their use of legal advice, which was 46 respondents reporting a physical, sensory or long-term ill health problem and 51 reporting mental ill health and/or a learning disability. Of these, just over half and just over two-thirds of them respectively requested a solicitor.²⁵

There seems to be little difference in the type of legal adviser requested at the police station by either the Police or Court Samples, with around 4 in 10 persons using the duty solicitor.²⁶ In the Prison Sample, half of the respondents reported using the duty solicitor. With respondents in the Prison Sample having been sentenced to custody it could be anticipated that through their previous experience of the criminal justice system, they had

²³ The five categories used were Black, Asian, Mixed-ethnicity, White British and Other.

²⁴ The issue of language is also important to examine as a factor influencing people’s request for legal advice. While language could be included in the model there were only a small number of respondents who were commenting on their use of a legal adviser in the police station whose first language was not English. In addition, and critically, the survey does not include those who do not speak English. The extent to which ethnicity and first language influence people’s take-up of legal advice will be explored further in the LSRC’s study of police electronic custody records.

²⁵ The lower rate of legal advice for people with physical or sensory impairment and long-standing illness in the police station is possibly a matter for concern. However, the number of such respondents in the present study is small.

²⁶ Four out of 10 people in the Police Station Sample used the duty solicitor, and 4 out of 10 people in the Court Sample said that they had taken advice from the duty solicitor at the police station. There were too few female respondents in the Police Station and Court Samples for comparisons to be meaningful.

come to rely on a particular solicitor. However, this was not the case as fewer respondents in the Prison Sample had a previous conviction when compared to the Court Sample.²⁷

Wide variations were found within the Court Sample with respect to the take-up of the duty solicitor at the police station.²⁸ The highest percentage of those using the duty solicitor at a police station were interviewed at Camberwell Green magistrates' court (68%). Those interviewed at Thames and Bristol magistrates' courts had the next-highest use of the duty solicitor (at 40% and 39% respectively), while the lowest percentages were found at Cardiff and Bradford (24% and 25% respectively).²⁹ The close proximity of London boroughs and the availability of transport could help to explain the higher use of the duty solicitor at the two London police stations. In particular, it could be that suspects are more likely to find themselves being dealt with at different police stations when compared to suspects being dealt with outside the Capital. As such, it is presumably more difficult for clients to build up a relationship with one particular solicitor, hence we see a greater reliance on the duty solicitor. However, while this provides a plausible explanation it would be useful to explore with a larger sample the range of factors which can influence people's choice of a solicitor.

1.2b Access to legal advice for vulnerable suspects

Three main types of detainees were described by the solicitors interviewed for this research study as particularly vulnerable: those with mental illness and/or learning disabilities, children and young people, and those with limited receptive and expressive English. Certain procedures are available for vulnerable suspects, to safeguard their legal rights. For those with mental illness and/or learning disabilities, and for children and young people, there is an 'appropriate adult' scheme, whereby the police are required to involve a third party. Interpreters are also to be made available for those who require them. Although defence solicitors endorsed the importance of those safeguards for vulnerable suspects, they also registered concern about their limitations.

²⁷ When discounting the offence for which they had been sentenced, 50% of the Prison Sample reported having a previous conviction compared to 58% in the police station and 64% in the Court Sample. No significant difference was found between the proportions who had previously been sentenced to custody: 37% in the Police Station Sample, 38% in the Prison Sample, and 39% in the Court Sample.

²⁸ It is not known which police stations had been involved with respondents in the Prison Sample.

²⁹ As noted above, with research interviews mainly taking place in the court cells this is likely to account for a lower reliance of the duty solicitor in Cardiff.

1.2b(i) Mental illness and/or learning disability

While there is a distinct difference between a person having a mental illness and a learning disability, the two can become confused by practitioners in the criminal justice system. When dealing with vulnerable suspects, the police are required to appoint an ‘appropriate adult’. While Youth Offending Teams³⁰ have a duty to ensure that an appropriate adult is provided for children and young people under the age of 17, there is no such duty currently placed on any statutory authority with regard to vulnerable adults.³¹ Social workers or volunteers from the local appropriate adult volunteer network tend to be the primary ‘appropriate adult’ for vulnerable adults. Independent of the police, their role is to look after the detainee’s welfare, to explain police procedures, to provide detainees with information about their rights and to ensure that these are safeguarded, and to facilitate communication with the police.³² Solicitors in the present study generally felt that the appropriate adult scheme was helpful, although suggestions were made as to how it could be improved. One solicitor, for example, suggested that there should be a separate panel of appropriate adults who are trained to deal with mental illness.

The Government appointed Lord Bradley to carry out a review of people with mental health problems or learning disabilities in the criminal justice system (Bradley, 2009). It was noted in that review that studies into the use of appropriate adults in police stations have concluded that provision is very inconsistent. In particular, while the needs of a suspect have to be identified in order to request an appropriate adult, it was found that these were often missed. Even when the need for an appropriate adult was identified, there was noted to be a current shortage of individuals who can perform the role effectively (see Bradley, 2009). Accordingly, the report makes the two following recommendations:

³⁰ YOTs are based on multi-agency teams working together. These were set up early in 2000 to replace the former Youth Justice Teams, which mainly comprised social workers.

³¹ Young people tend to have one of their parents as an appropriate adult, but in circumstances where parents are unavailable or considered by the police to be unfit for the duty the young people may be assigned a social worker or, as a last resort, a volunteer sourced from the local appropriate adult volunteer network.

³² In short, an appropriate adult is there to support, assist and advise vulnerable detainees. They have a role to play in ensuring that a detained person understands what is happening to them and why. They are also required to ensure that the police are acting properly, fairly and with respect for their rights (see the Guidance for Appropriate Adults at Home Office, 2003).

- *A review of the role of Appropriate Adults in police stations should be undertaken and should aim to improve the consistency, availability and expertise of this role.*
- *Appropriate Adults should receive training to ensure the most effective support for individuals with mental health problems or learning disabilities (Bradley, 2009:43).*

Solicitors in the present study expressed concerns about suspects who had mental health problems but were not identified.³³ Indeed, one solicitor complained that it was sometimes criminal defence practitioners who alerted the police to the vulnerability of some suspects. He said, *'I have found that unless the solicitor declares the person has a mental illness the police often assume that they are being awkward or argumentative'* (GR1).³⁴ While this interviewee accepted that notes now marked on the police computer helped to identify people who had been diagnosed with mental illness, he still believed that people who had not yet been diagnosed or who did not have a solicitor were less likely to be identified as vulnerable and in need of protection. Another solicitor was concerned that people with less visible disabilities or undiagnosed disabilities, particularly learning disabilities, were difficult to identify and that they were likely to be too embarrassed to admit that they had a problem. Accordingly, if this was not brought to the custody officer's attention, he said, *'The relevant steps to protect them aren't taken and they are then very vulnerable'* (CH6).

The Bradley Report (2009) found widespread concern among stakeholders about the current assessment of detainees. In addition, it was noted that,

Screening services in police stations need to be more consistent, and include better availability of information about a detainee's previous contact with services ... If a mental health need is identified, the challenge for the police is to decide whether or not a criminal justice outcome should be pursued, and if diversion to health and social services is more appropriate (Bradley, 2009:39)

³³ Case law has highlighted the way in which defence solicitors are often required to not only accurately and efficiently identify these vulnerabilities with limited training, but also assess what additional measures may be necessary to ensure a fair trial for their client (see *C v Sevenoaks Youth Court* [2009] Arch. Rev. 2010, 3, 4).

³⁴ For reasons of confidentiality the name and location of defence solicitors interviewed in this study have been replaced with a coded reference and comments are referred to in the masculine even though this also includes references from female solicitors.

There are difficulties for the police, however, if health or social services do not accept a referral. This was the situation in one case observed during the LSRC's exploratory study of police custody suites. In this case, concerned about the mental health needs of a suspect, the custody sergeant requested an assessment by an emergency social worker. The suspect was in her early 20s and had been arrested for harassing the emergency services. The offence involved her making several '999' calls and requesting an ambulance because she said she had taken a drug overdose. The suspect was seen to exhibit unusual behaviour in custody. This included repeatedly removing her clothes and putting them back on again, cuddling a soft toy and, at one point, she started spraying toilet water around her cell. The emergency social worker who attended said the suspect was known to him and that she did not have mental health needs. He advised the police not to request an appropriate adult but instead to prosecute as he felt that a court fine would help to quieten her down. She did not have a legal adviser but during the police interview she kept shouting and so the police requested the duty solicitor to attend. The duty solicitor managed to persuade the police to take no action and she was released (1:25.9.09).³⁵

The Bradley Report (2009) recommends that all custody suites should have access to liaison and diversion services and that,

*These services would include improved screening and identification of individuals with mental health problems or learning disabilities, providing information to police and prosecutors to facilitate the earliest possible diversion of offenders with mental disorders from the criminal justice system, and signposting to local health and social care services as appropriate (Bradley, 2009:53).*³⁶

1.2b(ii) Children and young people

When children and young people are detained at a police station they can either have their parents or a guardian as an appropriate adult or they may be assigned a practitioner working in the local Youth Offending Team (YOT) or a volunteer sourced from the local appropriate

³⁵ This code numerically identifies the police station and the date the case was observed.

³⁶ Also included are recommendations for liaison and diversion services providing information and advice services to all relevant staff, including solicitors and appropriate adults. It also recommends that mental health awareness and learning disabilities should be a key component in the police training programme (Bradley, 2009:53).

adult volunteer network. Research studies have found that YOT workers acting as appropriate adults strongly encourage the detainee to obtain legal advice, and many volunteer schemes have adopted a policy of requesting legal advice as a matter of course (Brookman and Pierpoint 2003). Because those interviewed in this study were aged 17 years and upwards, it was not possible to consider the take-up of legal advice by younger detainees. However, in a detailed study of youth court cases in one county area, Kemp (2008) found that of 107 young defendants who had been dealt with at court in 2005, just over half (55%) were found to have used a solicitor at the police station.³⁷ Also in Kemp's (2008) study, most appropriate adults were found to be either the parent or guardian of the suspect, even though research suggests that relatives of the accused are not always suitable to act in this role.

That was the finding of Gudjonsson (1993), who found that when relatives acted as appropriate adults their objectivity could be overridden by their emotions. In some cases, for instance, parents tried to bully their child into a confession prior to a police interview, even though the child repeatedly asserted that he had had nothing to do with the offence. Gudjonsson (1993) also suspected that some relatives acting as appropriate adults were unsuitable on account of a mental illness or a learning disability, so that allowing them to continue in that role could undermine the prosecution. Indeed, in such cases Gudjonsson found that, once in Court, the defendant's confession statement was ruled inadmissible because of the unsuitability of the appropriate adult.

Appropriate adults are intended to advise vulnerable suspects as to their legal rights; however, one solicitor in the present study was concerned that some suspects were now proceeding without legal advice. He said, '*I often have cases now where I've been asked to attend for an interview but once they get a parent or an appropriate adult they have gone ahead without us*' (PA4). Accordingly, this solicitor suggested that legal protections for young suspects needed to be improved.

An issue concerning appropriate adults, which arose on a few occasions when observing police custody suites, was whether it was the young suspect or the appropriate adult who decided whether or not to have a solicitor. In one case, a custody sergeant said that a 15 year-old had said that he wanted a solicitor but then changed his mind when the appropriate adult

³⁷ In all of these cases the defendants had been prosecuted.

said this was not necessary. The suspect signed the custody record to indicate that he had refused legal advice. The custody sergeant subsequently received a formal complaint because he had accepted instructions from the appropriate adult rather than from the suspect (4:8.12.09). However, it can be difficult for sergeants to get an informed decision from young suspects about whether or not they want a solicitor. Indeed, it is unlikely that many children understand the implications of exercising their legal rights in the police station, so they are more likely to rely on the advice of their appropriate adult. This happened in one case when a 12 year-old was being reprimanded for shoplifting. He was asked by the custody sergeant if he wanted a solicitor but instead of replying he looked somewhat bemused. The custody sergeant said, '*You do know what a solicitor is don't you?*', and the young suspect replied, '*No*'. His mother then intervened saying that he did not want a solicitor (3:5.11.09).

As Skinns' (2009b) study has found, appropriate adult schemes do not always provide a service outside office hours. This means that children and young people, as well as vulnerable adults, may be needlessly detained overnight, so that a scheme set up to protect vulnerable suspects may sometimes have the unintended consequence of prolonging their period of detention. After being detained overnight pending the arrival of an appropriate adult, suspects might decide to proceed without legal advice if they believe that the solicitor's attendance will create further delays. Because of this, one solicitor argued that legal protections needed to be tightened up. Academics have come to a similar conclusion after examining the role of appropriate adults, particularly with respect to juvenile suspects (see Pierpoint, 2006 and Sanders, Young and Burton, 2010).

1.2b (iii) Language difficulties

People with little or no understanding of English were also recognised as vulnerable suspects. As one solicitor remarked, '*When a foreign national is arrested by the police, everything is utterly alien to them, including the language*' (ED6). The vulnerability of respondents whose first language was not English was emphasised in the Interim Report: they were found to have less understanding of what was happening than those whose first language was English. They were also less likely to have a solicitor at the police station (45% compared to 60%).³⁸

³⁸ It was also found that within each of the five ethnic groups, the suspect's first language only had an impact for Asian respondents, where 54% of those with English as a first language used a solicitor compared to 32% of those with a first language other than English. The language effect, therefore, might be another factor which meant that fewer Asian respondents requested a solicitor in this study (see Kemp and Balmer, 2008:p.24).

When first brought into the police station, those suspects with little or no English have their rights translated over the telephone through the services of ‘Language-Line’.³⁹ This telephone facility provides a three-way conversation between the police, the suspect and an interpreter. While Language-Line is described by solicitors as providing a convenient way to inform people of their rights, some solicitors were not convinced that suspects understood what those rights meant in practice. This was the opinion of one such solicitor:

There are lots of misconceptions, particularly as we now have a lot of Eastern Europeans being locked up. They are totally confused about their legal rights. They also think we are solicitors who have been instructed by the police. It’s causing a massive problem, particularly as they don’t understand English (JA4).

If required to do so, the police are obliged to obtain an interpreter when the suspect is to be interviewed. One solicitor, who could speak both Punjabi and Urdu, raised concerns about the quality of some interpreters because they tended to translate the actual words rather than the meaning. He said:

I tell them you need to translate the message - what he is trying to convey - and not word for word what he is saying. Everyone has their own style but I think if I didn’t understand the language there would be lots of mistakes. But many a time I have had to jump in and correct them. I have even asked for a different interpreter, but not very often (KE4).

Solicitors who do not speak the foreign language evidently do not understand what is being said between the interpreter and their client. Even so, two of the solicitors remarked that they were sometimes dissatisfied because their client seemed to say quite a lot in response to a question but the interpreter’s response was either ‘Yes’ or ‘No’.

³⁹ In the present study, 10 respondents in the Court Sample and 3 in the Police Station Sample said that their first language was not English and that they required an interpreter. In addition, 69 people who were approached in the Court Sample, and a further 41 in the Police Station Sample, were unable to take part because they could not speak English.

Some of the solicitors were also concerned about the interpreters' independence and about confidentiality. For some solicitors it was important to have a different interpreter from the one appointed by the police. As a Cardiff solicitor told us, '*Of course you have to get an independent interpreter, because of the issues concerning witnesses and evidential problems. If we use the police interpreter then they are not bound by confidentiality and that can cause difficulties*' (MI1). Those concerns were further explained when a London solicitor said:

Everything an interpreter witnesses in the presence of the client and the solicitor should be covered by privilege but this isn't always the case. I dealt with a murder case where unbeknown to me our interpreter was also assisting the police. He was translating documents and ended up as a prosecution witness. No one told me that could happen so I think there is a lack of transparency concerning interpreters. I think there should be a protocol in London, like there seems to be in the provinces, whereby the police and the defence have their own interpreter, otherwise it gets very messy (GO5).

It can be expensive if both the police and defence solicitors have to have their own interpreters at the police station. However, for the same interpreter to be used by both it seems that there need to be stringent quality controls to ensure both independence and confidentiality.⁴⁰ In relation to privileged conversations between the solicitor and his client, for instance, a court has ruled that these discussions are confidential.⁴¹ However, from evidence gathered by the present study, there appears to be a grey area. If only one interpreter is to be involved in the police investigative process, a solicitor argued that it is important to ensure that issues of independence and confidentiality are addressed in the interpreters' training, accreditation and supervision procedures. At present, it is recommended that every interpreter working in the police station should be selected from the National Register of Public Service Interpreters (NRPSI). These interpreters have a minimum standard of training and an obligation to abide by a code of conduct, and they may be subject to disciplinary proceedings. However, police stations may also have their own interpreter database on which interpreters can apply to be listed, subject to police vetting

⁴⁰ The Association of Chief Police Officers is currently drafting clear guidance on the use of shared interpreters between the police and defence solicitors.

⁴¹ See *Imam Bozkurt v Thames Magistrates Court* [2001] EWHC Admin 400 QBD.

procedures. The problem with the police database system, as one solicitor told us, is no safeguards are in place to ensure that interpreters maintain high standards of conduct; they are overseen only by the police.

A final point raised by a number of solicitors is the need for the police to better co-ordinate the attendance of the defence solicitor with the appropriate adult and/or interpreter, as time can be wasted in delay at the police station, particularly if the suspect speaks an unusual language or dialect. This point was raised by solicitors in Bradford, Birmingham and Cardiff. As one solicitor in Cardiff noted:

I had a gentleman who spoke a particular dialect and we had to get an interpreter from Birmingham, which took some time (MI1).⁴²

This may also be a problem for the police, as they too need to wait several hours until an interpreter arrives at the police station.

1.3 Potential barriers to legal advice

It is satisfying to note that growing numbers of people have requested and received legal advice in recent years. In the mid-1990s, as noted above, Bucke and Brown (1997) found that of over 12,000 cases almost 40% had requested legal advice and 34% had received such advice. In the present study, 54% of 212 respondents interviewed in the police station said they had requested legal advice.⁴³ Skinns (2009a) also suggests that there has been an increase in the take-up of legal advice over recent years. At two police stations, she found that of 883 detainees 60% had requested legal advice, although only 48% received such

⁴² While solicitors complain that they can be kept waiting at the police station because of waiting for an interpreter or appropriate adult, there have also been complaints that interviews are delayed because of the late arrival of legal advisers. Indeed, in Skinns' study (2010), because some legal advisers tended to arrive late, she notes that the policy of some appropriate adults, particularly from Social Services, is not to attend the police station until the legal adviser has arrived so they are not kept waiting.

⁴³ Of 642 respondents who had been interviewed by the police in the Court Sample, 62% reported requesting legal advice and 59% having received such advice. It is not surprising that more respondents in the Court Sample reported requesting legal advice in the police station as these respondents had all been prosecuted. The Police Station Sample also includes those who received a caution or who had no action taken against them, and these people were less likely to have requested a solicitor.

advice. This meant that of all those requesting legal advice, 20% later proceeded without a solicitor.⁴⁴

While the request rate for legal advice seems to have increased, there remains a sizeable proportion of suspects who do not seek legal advice. Both the National Audit Office (2009) and the Public Accounts Committee (2010) raised concerns about the low take up of legal advice, which was estimated to be around half of suspects in police stations. The LSC was also criticised for failing to monitor the views of legal aid users on the services provided, including the reasons why people decline legal advice. In response, the LSC commented on the research currently being undertaken by the LSRC and further work which would be carried out in this important area (see Treasury, 2010).⁴⁵ In this section, we examine two key factors with the potential to create barriers to legal advice. The main reason cited by respondents in the present study for their decisions not to seek legal advice was their own perception that they did not need a solicitor. It is useful, therefore, to consider the extent to which people understand their legal rights and are able to make informed decisions about requesting legal advice. The second reason that respondents gave for rejecting offers of legal advice was that they were concerned about delays. The main explanation as to why people did not use a solicitor in the police station, as suggested by the solicitors interviewed in this study, was that there are long delays in the police investigative process. Associated with long delays, some solicitors also suspected that it was a police tactic to discourage suspects from taking legal advice by blaming any delays on their solicitor.

Because solicitors had complained that ‘police ploys’ were being used to dissuade suspects from requesting legal advice, the LSRC has undertaken a small-scale exploratory study of eight police custody suites.⁴⁶

⁴⁴ It is not known why those who requested advice did not receive it. While some suspects might have changed their minds about receiving legal advice, others could have been released before receiving such advice. With more staff and police cells than traditional police stations, Skinns believes this will have led to an increase in requests for legal advice (see Skinns, 2009a).

⁴⁵ This includes work currently being undertaken into police electronic custody records. The LSRC will also address concerns raised about the effect of advice on the future conduct of cases. This will include examining the potential for improved liaison between the police, CPS and defence solicitors in police stations helping to deal with cases more quickly and efficiently in court.

⁴⁶ As noted in the methods section, three of the eight police custody suites were observed for one day only.

1.3a *Understanding legal rights and the criminal law*

As free and independent legal advice is available for suspects detained at the police station, it is perhaps surprising that so many people decide not to have a solicitor. As one solicitor put it, ‘*It’s a no brainer – of course you will say I need a legal adviser to protect my legal rights*’ (GO5). But, as this solicitor and others have acknowledged, there are several reasons why suspects decide not to take legal advice. As noted below, some suspects prefer to forego legal advice if they believe that it will prolong their detention. In this section, we explore suspects’ understanding of their legal rights and the extent to which they are able to make informed decisions about requests for legal advice in view of the complexity of the criminal law and procedure.

Respondents at the police station were asked if they understood what was happening but, as we noted in our Interim Report, a third of them said that they did not understand fully.⁴⁷ There was a similar finding for respondents in the Prison Sample. Of 149 respondents who had been interviewed by the police in relation to the offence for which they had been imprisoned, just over a third said they did not fully understand what was happening. While those who said that they did understand were more likely to have a solicitor, this is not always the case. Those with a better understanding of the police investigative process, for instance, might decide not to have legal advice when they are being dealt with for minor offences or if they assume they will not be interviewed by the police. On the other hand, those with less understanding, such as those whose first language was not English, for example, were found to be less likely to have a solicitor.

We wanted to pursue the question to what extent respondents actually understood that they are entitled to free and independent legal advice. It was difficult to phrase questions dealing with this issue in the Police Station interviews because many respondents were still being dealt with by the police. If respondents had been asked explicitly if they understood that they could see a solicitor, at no cost to themselves, those who had rejected legal advice might then have changed their minds. Had this occurred, it is likely that the police would then have halted these research interviews as they might be said to interfere with the investigative process. However, previous research findings have suggested that many suspects do not understand their legal rights in the police station. Indeed, research studies

⁴⁷ See Kemp and Balmer, 2008:15.

have found that the way in which custody officers present suspects with their legal rights can influence differences in the take-up of legal advice between police stations (see Sanders et al., 1989; Brown, Ellis and Larcombe, 1992). It was noted in both these studies that custody officers could influence suspects' decisions regarding legal advice by delivering their rights too quickly, incomprehensibly or incompletely.

The extent to which people understood their legal rights was also raised by some of the defence solicitors in the present study. In particular, while they accepted that the police would routinely advise people of their rights they expressed concern that many detainees did not understand that this entitled them to free and independent legal advice. As one solicitor explained:

They have no idea of what is going to happen to them even though I have often been standing there with them [in the custody suite]. The custody sergeant is rattling off their rights at a furious pace because he has got to do lots of them in a day. They explain their rights but for most of them it goes straight over their head. They just want to get out and go home (HA3).

In another area, a solicitor commented:

Their rights could be stressed a little more. Quite often, they are advised of their right to see a solicitor and they are also entitled to read the Codes of Practice, but it is glossed over. I don't think they understand that they do have a right to see a solicitor (MI1).

The LSRC observed custody sergeants booking suspects into police custody during the exploratory study of police stations. There is a script which custody sergeants tend to use when reading suspects their rights. While generally the sergeants went through suspects' legal rights at what seemed to be a reasonable pace, there were two who read them out quite quickly. Regardless of the speed at which suspects are read their rights, the booking-in process is protracted and it is not clear to what extent suspects understand that they were entitled to free and independent legal advice. There were occasions where suspects asked the custody sergeant if they needed legal advice. Apart from on two occasions where suspects were encouraged to have legal advice, the response of sergeants was generally passive and

non-committal. But, as noted by custody sergeants when asked about their response, they explained that it was not their role to recommend suspects to have legal advice and that their training required them to be passive.⁴⁸

While such neutrality is perhaps understandable from a police point of view, this is in contrast to the LSC's advice to suspects in police stations. Indeed, on the latest LSC poster it is stated in bold letters, 'You Need a Solicitor'. However, it seems that such encouragement for suspects to seek legal advice is only effective if it also has the support of the police. On one occasion, for example, the new poster was displayed prominently in the custody suite. The suspect had his back to the poster when he asked the custody sergeant if he needed legal advice. Instead of pointing to the poster the custody sergeant said that it was his decision and he could not advise him either way.⁴⁹ Conversely, when sergeants were asked if they would have a solicitor if brought into police custody, all said that they would, even for minor matters.

Although some suspects do not understand that they have the right to free legal advice, there are others who do understand this right but who then refuse legal advice. In the present study, those who had decided not to have legal advice at the police station were asked to explain their decision, and the majority - almost two-thirds in both the Police Station and Court Samples - said this was because they 'did not need one' (Kemp and Balmer, 2008:40).⁵⁰

There were similar findings in Bucke and Brown's (1997) study, with 71% of respondents who did not have legal advice saying they did not need a solicitor, even though most of them had been arrested for serious and moderately serious offences. In view of the complexities of criminal law, evidence and procedure, as well as implications for sentencing discounts, the question arises as to whether suspects are in a position to make informed decisions about accessing legal advice.

⁴⁸ Some sergeants also said that they were aware that their response was captured on CCTV.

⁴⁹ This case was observed on 10 December 2009.

⁵⁰ Only 25 respondents in the Prison Sample explained why they did not have a solicitor in the police station. The main reason, given by almost half of them, was that they 'did not need one'.

Commenting on these complexities, a solicitor in the present study said:

I think that most detainees need a solicitor there to explain the legal terminology which is being used, the caution, why they are at the police station, to examine the evidence and to see that their detention is regularly reviewed (ER5).

Within an adversarial system of justice, the legal issues involved in determining whether or not an offence has been committed are often complex. From their knowledge of criminal law and procedure, as well as sentencing discounts, legal advisers are able to examine the prosecution evidence, take their client's instructions and then advise them of what to say, or not to say, in the police interview. When examining police disclosure, for instance, legal advisers know that most criminal offences require both a mental (*mens rea*) and a physical element (*actus reus*) to prove a crime. It is often difficult for the prosecution to prove that the mental element existed (generally an intent to commit or a dishonest state of mind) if there is no outward indication of it. If the police do not have enough evidence to prove the mental element, the legal adviser is likely to advise their client to say nothing in interview rather than risk giving the police oral evidence from which intent or dishonesty could be evinced. Without legal advice, therefore, it is anticipated that many suspects do not understand the complexities of the criminal law and the legal elements required in order to make a case. This then puts suspects at a disadvantage in the police interview, as they are unlikely to know what to say in response to police questions without incriminating themselves, even if, on their own version of events, no offence had been committed.

To the lay-person, whether or not an offence has been committed can be informed by moral rather than legal judgements. For this reason, some suspects decide not to have legal advice because they are 'innocent'. Indeed, in the Police Station Sample, of those who said they did not need legal advice, almost a third said it was because they had done nothing wrong. There were also a number of respondents who said they did not need legal advice

because they were guilty.⁵¹ It is unlikely that these respondents would have understood the legal complexities involved in the criminal law and, on their version of events, a legal adviser might have been able to put forward a defence. In order to examine these complexities further, set out below are the legal elements required for an offence of theft, and these elements are then explored in relation to a hypothetical case of shoplifting.⁵²

The 1968 Theft Act

The Theft Act of 1968 states that a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. It is not sufficient for an offence of theft to have been committed if someone walks out of a shop holding on to an item which has not been paid for. The person needs to act both dishonestly and with the intent to permanently deprive the store of the item. No offence has been committed, for instance, if a mother in a shop suddenly remembers that she has to pick up her child from the nursery and quickly leaves the shop holding on to an item which has not been paid for. It can subsequently become an offence if she later recalls having taken the item and then decides to keep it, as she then acts both dishonestly and intends to permanently deprive the store of the item. If she does not recall taking the item, or having done so she goes back to the shop and either returns the item or pays for it, then no offence is committed. In this example, it becomes very difficult to prove that the mother has a dishonest intent and the desire permanently to deprive if there are no outward indications, such as deliberately concealing the item or failing to present her bags for inspection upon request when leaving the shop. In order to prosecute in such a situation the police may rely on questioning around the issue such as 'did you leave the store with the item'. To answer 'yes' implies that she was aware of leaving the store with the unpaid item thus indicating that she knew what she was doing and was therefore dishonest. This could then provide sufficient evidence for the case to be prosecuted even though, on her version of events, there was no mental intent to steal.

⁵¹ Fifty-nine respondents in the Police Station Sample explained why they did not request legal advice. Eighteen said it was because they were innocent and 10 said that it was because they were guilty. While a higher proportion of respondents in the Court Sample explained why they did not request a legal adviser in the police station, it is anticipated that a number of those who said they were innocent were subsequently not prosecuted. Accordingly, of the 152 respondents who said why they did not request legal advice at the police station, 14% said it was because they were innocent and 38% because they were guilty. In Bucke and Brown's (1997) study, of those not requesting legal advice, 11% said this was because they were innocent. There were similar findings in Skinns' (2009b) study.

⁵² While the offence of 'shoplifting' has been explored here, other examples could also be used which deal with offences such as criminal damage, handling stolen goods, violence and sexual offences.

The early involvement of legal advisers, therefore, could lead to cost-savings if weak cases are effectively challenged in the police station rather than at court. On the other hand, if legal advisers are not involved in the police station and cases are prosecuted, these can become both time-consuming and expensive if the evidence is challenged in court, particularly if it proceeds to trial. Such challenges by the defence at court can also be made on the basis that the prosecution have failed to adhere to procedural requirements. That was the situation for one solicitor in the present study who said:

I've had quite a few cases recently where we were not called to the police station. The case went to court where we found that they hadn't crossed all the 'T's' or dotted all the 'I's'. These cases can be kicked out of court if they haven't been effectively investigated. If we are not there to close the gaps early on, then this approach by the police can be counter-productive (MI1).

It is because of the complexities that many defence solicitors felt that the legal rights of suspects at the police station should be strengthened. One solicitor, for example, argued that requests for legal advice should be given precedence and that there should be a stringent means of enforcing people's rights to have a solicitor. Solicitors generally felt that the current arrangements, which relied on the police advising suspects of their legal rights, were no longer appropriate. Instead, one solicitor argued, '*Suspects' legal rights should be explained to them by someone other than the police. I think it should be an independent advisory body and that it should almost be compulsory for them to make clear to suspects what their rights are*' (MA1).

Despite numerous research studies having examined the take-up of legal advice in police stations during the 1980s and early 1990s, there has been very little research which has examined the extent to which suspects are able to make informed decisions about whether or not to have legal advice.⁵³ In the present study, for both solicitors and police officers, delay

⁵³ See Brown (1997) and Sanders and Young (2010) for a summary of the research.

in the police investigative process is said to be the main reason why people decide not to have a solicitor.⁵⁴

1.3b *Delays at the police station*

Delays in the police investigative process are known to discourage suspects from requesting legal advice. Indeed, while many suspects want a lawyer, their desire to get out of the station quickly is a stronger influence on their decisions (Sanders et al., 1989; Brown et al., 1992; Dixon, 1992; Skinns, 2009b).⁵⁵ When solicitors were asked to explain why suspects declined legal advice, they cited delays as the main reason. Moreover, some solicitors criticised the police for using delays to discourage suspects from taking legal advice.

The LSRC had not planned to include an exploratory study of police custody suites. However, because of a number of complaints made by solicitors about the police use of delays, it was appropriate to investigate the police perspective on the cause of delays in the police station. By involving the police, it was also intended to elicit their support in addressing the problems that had been identified. It is also helpful to examine the ways in which delays create barriers to legal advice from multiple perspectives.

1.3b(i) Delays: a users' perspective

The main reason given by respondents for not wanting a solicitor was that they 'did not need one'. However, one in five respondents in both the Court and Police Station Samples said they did not have a solicitor because they were concerned about delays (see Kemp and Balmer, 2009:41).⁵⁶ While delays were not cited as the main reason for respondents not having a solicitor in the present study, a substantially greater number of respondents reported such concerns than had been found in earlier studies. In the mid-1990s, for example, Bucke and Brown (1997) identified just 4% of respondents who said that they did not have legal advice because they were concerned about delays, but this had increased in the present study to 20% in the Police Station Sample and 16% of respondents in the Court Sample.

⁵⁴ Dixon (1992) and Brown et al. (1992) also found that suspects refused legal advice because they thought having a solicitor would delay their time in custody.

⁵⁵ See also Brown (1997) and Sanders and Young (2010) for a summary of the research.

⁵⁶ At 83%, the majority of female respondents in the Prison Sample received legal advice at the police station. Most of those who did not have a solicitor said they did not need one, and only one respondent said this was because she was concerned about delays. However, a recent report by the Fawcett Society (2009) considered the needs of women offenders and raised concerns that extensive delays in gaining access to legal advice deterred women from having a solicitor.

Whether the time taken for suspects to receive legal advice has increased over recent years is not known for certain, although there are indications that this is the case. In 1987, from a random sample of 100 cases, Irving and Mackenzie (1989) found that on average detainees waited one and a half hours for legal advice. Twenty years later, based on a sample of 466 cases at one police station, Skinns (2009b) found that the waiting time had more than doubled to three and three-quarter hours, despite nearly half of first contacts taking place over the telephone. This longer timescale, Skinns (2009b) notes, was in part due to the practice of some solicitors not to speak to their clients over the telephone but to delay consulting with them until they arrived at the station in time for the police interview. Although this minimises the waiting time for the solicitor, it can reinforce the client's perception that solicitors are the cause of delays.⁵⁷

Respondents who requested a solicitor in this study were asked if they were satisfied with the length of time they had to wait to have contact with their legal adviser. There was less satisfaction in the Police Station Sample than there was in the Court Sample: 38% of the former, but only 28% of the latter, said that they were dissatisfied with the length of time it took for them to see their legal adviser (see Kemp and Balmer, 2008:14). In the Prison Sample, 30% of respondents said they were dissatisfied.

With the exception of Skinns (2010), no recent research has examined the time spent by suspects in police custody. Skinns (2010) identified that the average time spent by suspects in one police station was 9:07 hours and 10:42 hours in the other. When the LSRC observed suspects in police custody suites, there were some who appeared to be resigned to the fact that it was going to be some time before they were released. There were others who seemed to be frustrated that they were going to be held for many hours. In one case, a custody sergeant said to a disgruntled suspect, '*Come on. You help us and you will be out of here quickly*'. The suspect replied, '*But it won't be quick, will it?*' (4:25.11.09).⁵⁸

⁵⁷ While Skinns' (2009b) study suggests that the waiting time for legal advisers might have increased, there is a lack of research in this area which means it is not possible to determine with any confidence the average time taken for suspects to receive legal advice.

⁵⁸ The LSRC will determine the average time spent by suspects in custody and the time spent waiting for legal advice when we analyse the electronic police custody records.

1.3 b (ii) *Delays: a defence perspective*

For all of the defence solicitors in the present study, delays in the police station were the main reason why suspects did not have legal advice. Where there were long delays in the investigative process, solicitors were concerned that some police officers would unfairly blame them for such delays. This was the view of one solicitor who said,

We come across this a lot. The police should be saying, It won't take any longer [to have a solicitor], because normally we are waiting for the police; it is rarely the other way round and they are waiting for us. Nine times out of ten we go there, or we are ringing or waiting for the police to be ready for interview. But if you speak to a client, they perceive it that if they ask for a solicitor they will be there for ages (KE4).

Some of the solicitors complained about police officers using the threat of delays as a way of putting pressure on suspects to proceed without a solicitor.⁵⁹ For example, one told us that *'I have clients who say that when in transit to the station the police say that it is only going to be a quick interview and they will be in and out fast if they don't have a solicitor'* (MI1).⁶⁰ Another solicitor said he had overheard detainees being told, *'You can wait for a solicitor if you want but it will take three hours for him to get here and you might as well go on and get it dealt with'* (DA2). In a similar vein, another solicitor commented on how long delays in the police investigative process could encourage suspects to proceed without a solicitor, particularly if they felt that this would increase the time spent in detention. As he put it:

They are kept in the police station for several hours. It is difficult for us to speak to them but we do make contact ... They are kept in the dark about the state of the investigation. Then, all of a sudden, they are told it is time to be interviewed but your solicitor isn't here. When they ask how long it will take for their solicitor to arrive they are told an hour and the police then say to them, "You don't really want them, do you?" (RI2).

⁵⁹ Not all solicitors complained of such police practices. Indeed, while all solicitors in one area said that the police would use such ploys, only one or two solicitors in four of the other areas did so. There were no such complaints in the remaining area.

⁶⁰ There were similar findings in Irving and Mackenzie's (1989) study, where detainees' perceptions of legal advice were found to be influenced by informal discussions taking place outside the police stations.

Complaints were also heard from two solicitors that the police could play down the seriousness of an offence in order to encourage suspects to deal with the matter quickly and without a solicitor. While it is understandable that suspects under detention are anxious for matters to be sorted out as quickly as possible, they are unlikely to be aware of the possible consequences of not having legal advice. As a solicitor explained, citing a particular case:

We have clients on serious offences where the police say, 'You don't need a solicitor as we can get it over and done with'. We have a boy at the moment who was told by the police in the car on the way to a station that he didn't need a brief because if he coughed [admitted it], they would give him a caution and it would all be sorted out. It is arson and he is now in the Crown Court. Whether you call it an inducement or an out-and-out lie, it is outrageous and it is getting worse. Certainly some police stations are worse than others (DA2).

When suspects are held over long periods of time it is not surprising if they become stressed. As a consequence, they are more likely to co-operate with the police and may forego legal advice if they believe that this will facilitate their early release. Another 'police tactic', according to two solicitors, was to take an unduly long time when investigating an offence so that the delay encouraged suspects not to seek legal advice. It was acknowledged that such actions were outside the control of custody sergeants. A solicitor explained that,

Custody sergeants can't sit behind their desk and actively manage custody suites. If the defence lawyer isn't there pushing for things to happen quickly, police officers now tend to go awol [absent without leave]. They are not under any pressure. They might be in the canteen and it can take them two hours to write up their notes ... The LSC would have something to say about it if it was us – it's not a good use of their time (GO5).

Nevertheless, although some defence solicitors interviewed for this study are critical of the police for taking time when investigating cases they are unlikely to be aware of what is happening 'behind the scenes' during the police investigation. Considered later on in this

sub-section is the potential for changes in the charging process to increase delays as a result of the implementation of the Statutory Charging Initiative.⁶¹

Recent legal aid reforms are reported to have impacted on solicitors' working practices in police stations. These have included the expansion of the Duty Solicitor Call Centre to include all requests for legal advice.⁶² With the intervention of the Call Centre, instead of the police contacting solicitors direct, solicitors now have to make contact with the police.⁶³ Such contact can be delayed, leading to solicitors' complaints that they are not always able to get through to the police as the telephone is frequently engaged or calls go unanswered. This problem was summarised by one solicitor, who said,

We are supposed to ring the police but it's ridiculous. We try to ring them but they are engaged. It can be really difficult to get hold of the police now, whereas before they would call us direct and it was no problem (MI5).⁶⁴

With the introduction of fixed fees, and also through contractual arrangements between the LSC and criminal defence solicitors, legal advisers are encouraged to use their time efficiently and to spend no more time than is necessary on cases. Instead of trying to speak to their client over the telephone as soon as they had been informed of a request for legal advice, a number of solicitors said that now they would not speak to them until just before the police interview.⁶⁵ With waiting time now incorporated into the fixed fee instead of being paid separately, solicitors also acknowledged that this discouraged them from waiting in police custody suites for a charging decision to be made.⁶⁶ As defence legal advisers were becoming less visible in police stations, some complained that this was leading to the re-

⁶¹ The Statutory Charging Initiative transferred responsibility for charging decisions in all but minor offences from the police to the CPS.

⁶² The Call Centre was expanded in January 2008 to include all requests for legal advice and it was re-named the 'Defence Solicitor Call Centre' (DSCC).

⁶³ When a suspect now requests legal advice the police are required to notify the Call Centre. The Call Centre then contacts the solicitors' firm and advises that legal advice has been requested. The legal adviser is then required to contact the police direct.

⁶⁴ The problem of unanswered police custody telephones is explored below.

⁶⁵ There are limitations for solicitors advising their clients over the telephone as few police stations seem to have facilities for confidential telephone conversations. In the present study, only one police station had a private room in which a confidential call between solicitors and their clients could take place.

⁶⁶ The new fee arrangements were introduced in January 2008. Instead of payment at an hourly rate there is now a single fee per case which incorporates both travel and waiting time. It is not known if fixed fees have had the effect of solicitors deploying more junior staff when carrying out police station work. This was a conclusion drawn by some police officers, who said that it was now unusual to see a solicitor attend the police station.

emergence of ‘police ploys’ designed to discourage suspects from requesting legal advice, as one solicitor put it:

The new arrangements are giving the police a golden opportunity to go back to the sort of things they were doing in the 1980s, just before PACE ... I’m surprised. I thought we had left all that behind us 20 years ago (DE2).

However, the police also raised concerns over long delays in the investigative process.

1.3b(iii) Delays: a police perspective

As defence solicitors tended to blame the police for delays at the police station, it was anticipated that the police, in turn, would blame solicitors. But, as noted below, apart from a small number of complaints regarding the late arrival of some duty solicitors, this was not what was found. Instead, the officers at three police stations acknowledged that it was their fault that defence solicitors could be delayed when trying to contact their clients. For the police, the delays in the charging process following implementation of the Statutory Charging Initiative were mainly attributable to the CPS.

a) Defence solicitors and delays

There were two police stations where the police complained of the late arrival of some duty solicitors. In one of those stations, a custody sergeant said that he had put through a request for the duty solicitor but he was subsequently contacted by the solicitor who said it would be some time before he could attend; he was currently dealing with a Crown Court case and his partner was busy dealing with cases in the magistrates’ court. The custody sergeant was annoyed by this; he thought it wrong that solicitors on the duty rota were sometimes unavailable when on call (8:16.12.09).⁶⁷

In the other police station where complaints were heard, one case was observed with a long delay before the duty solicitor’s arrival. The case involved a 16 year-old; a request for legal advice had been put through to the Call Centre at 8 a.m. The duty solicitor

⁶⁷ Defence solicitors used to be paid a ‘standby fee’ when acting as duty solicitors but this fee was abolished when fixed fees were introduced. If solicitors are not regularly called out to police stations, it is not surprising if they carry out other work while on duty.

subsequently contacted the police and said he would attend in time for the police interview at 9 a.m. He later called to say he had been delayed and would attend by 9.45 a.m. When he failed to attend by 9.45 a.m., the police made repeated enquiries when trying to establish his estimated time of arrival. He eventually turned up at the police station at 11.50 a.m. Not surprisingly, with such a long delay, the suspect had changed his mind about wanting legal advice (1:26.9.09).⁶⁸

There can also be long delays for suspects awaiting legal advice if the duty solicitor is already dealing with three or more cases. Indeed, two custody sergeants said they thought that delays were caused mainly by duty solicitors taking on too many cases. In order to avoid these delays, the duty solicitor scheme operates a 'back-up' system which deploys additional solicitors as required. However, observed later was one of the custody sergeants booking a suspect into custody and it seemed that he was unaware of the back-up system. The suspect had been arrested for robbery. When asked if he wanted legal advice, he enquired of the custody sergeant if the duty solicitor was available. He was told that the duty solicitor was in the police station but that he was dealing with four cases already. Appreciating that he would have to wait for a long time, the suspect said that he would decline legal advice (4:25.11.09). Unwittingly, the custody sergeant had discouraged him from requesting legal advice and so no call was put through to the Call Centre.

b) Difficulties encountered by defence solicitors when providing legal advice

Section 58 (4) of the Police and Criminal Evidence Act (PACE) 1984 requires legal advice to be provided as soon as practicable after the request has been made. While recognising the importance of this legislative requirement, the police at three stations acknowledged that a lack of resources meant they were not always able to facilitate contact between solicitors and their clients. This included their admission that they did not always answer the custody telephone. At two police stations, senior officers accepted that custody staff could be so busy at times that the custody telephones went unanswered. At a third police station, a custody officer said that when they were busy the custody telephones would be switched on to 'silent' mode. However, it was not through unanswered telephones alone that solicitors could have

⁶⁸ Police Inspectors are required to interview those who request legal advice but then change their mind. In this case, the Inspector managed to persuade the suspect to wait a little longer, and so in this case the legal advice was eventually received.

problems in trying to contact their clients. In these three police stations, officers also acknowledged that there could be delays if custody staff were too busy to facilitate telephone conversations between solicitors and their clients.⁶⁹ It was also due to a lack of resources in these three police stations that, as officers conceded, solicitors could be left waiting in the front office for a member of staff to escort them to the custody suite.⁷⁰

It was not only the custody sergeants who were sometimes too busy to answer custody telephones; custody staff, too, could be reluctant to answer the phone. At four police stations, custody staff had complained about what they considered to be solicitors' 'inappropriate' use of the custody telephones. This was mainly because solicitors had called custody suites in order to find out the outcome of cases, including the bail details if their clients were to return to the police station or were charged to court. The police seemed to resent those calls, which often required them to contact other police departments.

When police custody suites were observed, it was not always possible to monitor the extent to which the police were answering the custody telephone.⁷¹ However, at one police station, the one with the highest percentage of unanswered telephone calls from CDS Direct, it was possible to observe the extent to which the custody telephone was answered. The custody telephones used by defence solicitors in this station were located on the custody desk next to the custody sergeants. While it was evident that the custody sergeants were sometimes too busy to answer these telephones that was not always the case; the telephones could often be left ringing. On one occasion a police detective who was waiting in the custody area was distracted by the constant ringing of the telephone. He answered the call, which was an enquiry about the date and time of a court hearing. It took the detective 10 minutes to deal with this enquiry as it required him to liaise with a different police department. When he had dealt with the enquiry, he turned to the custody sergeants and said, '*Now I know why you don't always answer the phone*' (4:18.12.09).

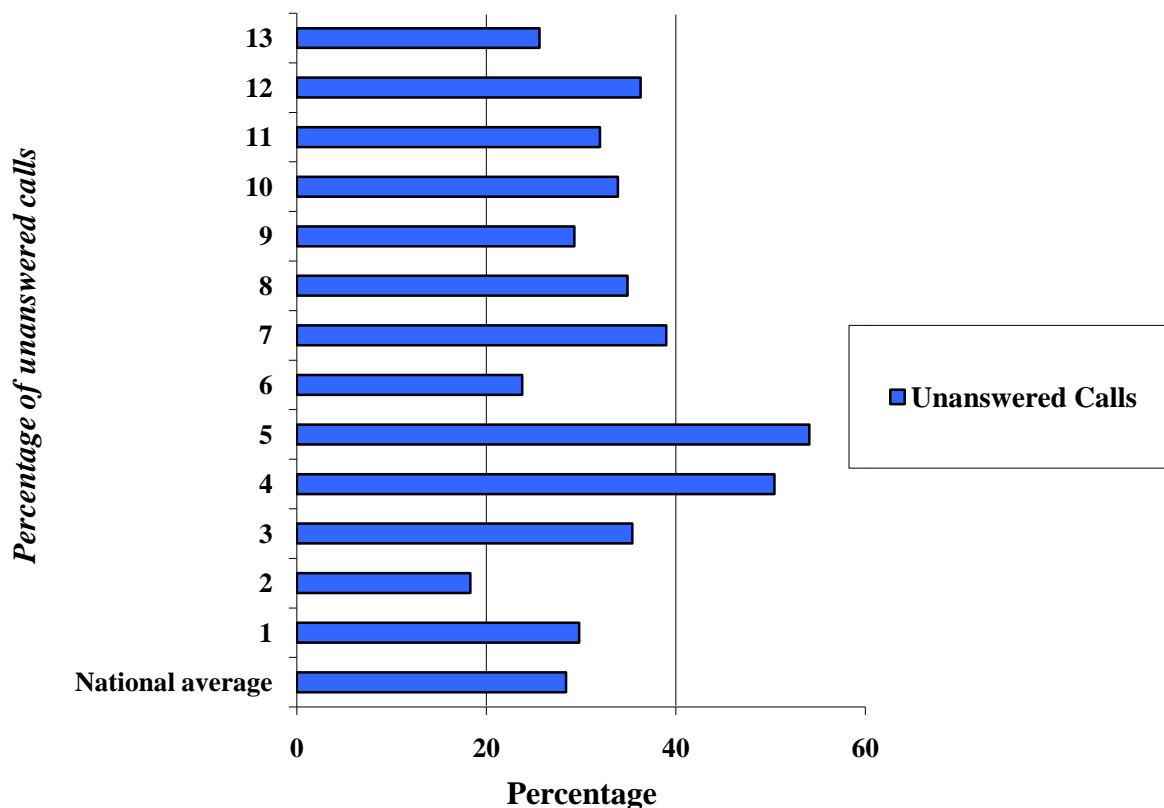
⁶⁹ A custody officer has to be available to escort a suspect to and from his cell when facilitating a telephone call to his solicitor.

⁷⁰ At two of the eight police stations, senior officers gave the researcher their mobile numbers so that she was not kept waiting in the front office.

⁷¹ This was usually because there were numerous telephones in the custody office and it was not possible to tell which ones were used by defence solicitors. At one station the custody telephone used by solicitors was in an adjoining office, out of sight of the researcher.

Now that CDS Direct provides telephone legal advice, the LSC holds statistics on the number of calls which are not answered by the police at individual police stations. Set out in Figure 1 is the percentage of unanswered telephone calls made by CDS Direct nationally to police stations (from April to November 2009), and also to the thirteen police stations included the present study.⁷²

Figure 1: Percentage of unanswered telephone calls from CDS Direct to Police Custody Suites from April to November 2009



It is disappointing to note that more than 1 in 4 of the calls made by CDS Direct nationally to the police were either engaged or not answered. In addition, only three police stations in the present study had the percentage of unanswered telephone calls that was lower than the national average. The greatest percentage of unanswered calls occurred in the two London police stations (4 and 5 in Figure 1). Indeed, these two police stations have the highest proportion of unanswered calls than any other police stations in England and Wales.⁷³

⁷² The first eight police stations are those which were observed by the LSRC. The other five police stations are those where the survey of users took place – one police station was included in both samples.

⁷³ This only includes comparison with police stations where there was a volume of at least 100 CDS Direct calls made during the period April to November 2009.

However, it should be noted that it was because of the high volume of unanswered calls that the police invited the LSRC to include these police stations in the present study.

It is not known if suspects are aware of the difficulties that their legal advisers can experience when trying to contact the police. If suspects are unaware, it could be that they blame their legal adviser for delays. This might have been the situation in one of the cases observed.⁷⁴ When the suspect was asked if he wanted a solicitor he replied, ‘*No, they take too long and are unreliable*’. He continued, ‘*When I was here last I asked for solicitor and he didn’t turn up until I was being released.*’ (4:11.11.09). It seems, therefore, that the suspect’s previous experience of delay was enough to discourage him from taking legal advice on this occasion.

Police officers at two of the stations acknowledged that their problems in facilitating contact and access for legal advisers were likely to be in breach of PACE. In spite of this, they said that they did not expect the problems to be resolved without the allocation of additional resources, which they thought highly unlikely in the current economic climate. Nevertheless, both the police and the LSC are working to address some of the problems. In the London area, for instance, police stations are drawing up of a template of relevant telephone numbers which is intended to direct general enquiries away from the custody office. The police also said that they were prepared to consider new ways of working with defence solicitors so as to reduce delays and facilitate early access to clients.

c) Delays and the Statutory Charging Initiative

For the police in the eight stations observed, the CPS was said to be the main cause of delay at the police station.⁷⁵ It is as a result of the Statutory Charging Initiative that the CPS has become more involved in the investigative process, with responsibility for charging in all but

⁷⁴ This was observed at the police station with the highest percentage of unanswered telephone calls.

⁷⁵ The police in seven police stations said that the CPS was the main cause of delays, although no such complaint was made at the first police station observed. In the first police station, however, civilian staff were responsible for booking suspects in to custody while this task was carried out by custody sergeants in the other seven areas. While custody sergeants liaised with police officers investigating cases, this was not the role of the civilian staff. The LSRC later spoke to a senior police officer at the first police station observed and he said that in his opinion since the Statutory Charging Initiative the CPS had become the main cause of delays in the police investigative process (1:19.1.10).

minor cases.⁷⁶ When that initiative was first implemented, it had the effect of bringing the police and Crown prosecutors together. However, it now seems that the effect has been reversed, as there was found to be only one police station where Crown prosecutors continued to be based. In the other seven police stations, it seemed that police contact with the CPS was at a distance, generally by telephone, either with the local CPS office or through CPS Direct, which provides the police with an out-of-hours telephone service.⁷⁷ Despite the significance of the Statutory Charging Initiative, no research has examined its impact on the charging process or on the relationship between the police and Crown prosecutors.⁷⁸

We need to be cautious before accepting police complaints that the CPS is the main cause of delays. This is because the transfer of the decision to charge, from the police to the CPS, is likely to be resented by some officers. We should also bear in mind that the CPS has not been given the opportunity to respond to comments made by the police in the present study. Furthermore, it has been extremely difficult in a small-scale exploratory study to grasp the implications of recent changes in the police investigative process.⁷⁹ An added complication has been that while police stations have implemented national initiatives they have also incorporated local variations. Accordingly, while it is useful to examine some of the comments made by officers on the Statutory Charging Initiative as a possible cause of delay in police stations, further investigation is needed.

The Statutory Charging initiative is intended to improve prosecution decision-making with the setting up of the new 'Prosecution Team'. The team is required to build 'robust cases', to ensure the correct charge from the outset, to weed out non-viable cases, and to ensure that the remaining cases are trial-ready at the point of charge (CPS, 2006). In relation to charging decisions, the Code for Crown Prosecutors also requires there is sufficient

⁷⁶ This was a key recommendation arising out of Lord Justice Auld's (2001) review of the criminal courts. National roll-out of the Statutory Charging Initiative was completed in April 2006 (CPS, 2006).

⁷⁷ In the two London police stations there is also CPS London, which seems to provide a back-up service for local CPS offices.

⁷⁸ Kemp (2008) briefly considered implications for the Statutory Charging Initiative when considering the processing of cases in the Youth Courts.

⁷⁹ In addition to the Statutory Charging Initiative there has also been introduced into six police stations observed new streamlined procedures. These new procedures are designed to improve police decision-making and case management in relation to minor offences.

evidence to provide a ‘realistic prospect of conviction’ (CPS, 2004).⁸⁰ While these changes are intended to improve the quality of prosecution decisions, it seems that the evidential standards required by the CPS are seen by the police as a major cause of delay.

In addition, there were complaints made by a number of police officers that the CPS were requiring the ‘overbuild’ of case files. That is, that the CPS wanted all possible evidence to be gathered, including every relevant witness statement when, in the view of the police, one or two would provide sufficient evidence to prosecute. The police also complained that the CPS wanted CCTV evidence whenever it was available. Their concerns were summarised by one custody sergeant in relation to shoplifting:

The CPS want too much evidence. They want CCTV with everything – it’s ridiculous. If someone is seen by a store detective walking out of a shop with an unpaid item then that statement should be enough. If the offence is admitted, why do we need CCTV evidence? We want quick ‘in and out’ cases but we aren’t getting them anymore (7:11.12.09).

Custody sergeants in a further two police stations lamented that there were no longer quick ‘in and out’ cases, taking an hour or two to deal with. One sergeant said that instead of suspects being detained on average for six hours they were now held for closer to nine hours, a local increase of fifty per cent.

It seems that the evidential standards required by the CPS not only add to delays but that it also takes up more police resources while cases are investigated at the pre-charge stage. Indeed, there were concerns raised that CPS requirements for building case files was taking police officers off the beat and instead into police stations. In one police station, for example, a beat manager complained that he had been confined to the police station for three weeks preparing case files instead of managing his officers on the beat (3:4.12.09).⁸¹

⁸⁰ The Code also requires prosecutors to take into account what the defence case may be, and how this is likely to affect the prospects of conviction (CPS, 2004). Implications for this evidential requirement is explored below when consider inter-professional relationships between the police and the CPS.

⁸¹ The new streamlined procedures are intended to address problems relating to the ‘overbuild’ of case files. However, in areas where the new streamlined procedures had been introduced there were complaints concerning the overbuild of case files.

A number of police officers complained that the charging process had become too bureaucratic and that the system needed to be simplified. This was the view of one police detective:

It is in everyone's interest to have a quick guilty plea. We need to go straight to court if the evidence is strong, they have received legal advice, and the offence is admitted. It is better for offenders because they would get out of the station quicker. The system needs simplifying (2:4.11.09).

While the early involvement of the CPS is intended to improve the quality of prosecution decision-making, two police officers suggested that the early involvement of defence solicitors could assist the police and the CPS to deal with cases more quickly and efficiently.

The other major police criticism of the CPS arose in cases where there could be long delays before a decision whether or not to charge. Indeed, at four police stations the police complained that some CPS decisions were taking 3 hours and longer.⁸² The police officers detained waiting for CPS decisions were often those who would otherwise be on the beat. Concerns were also raised over what some police officers described as the CPS sometimes requiring 'spurious' enquiries to be undertaken. In three different areas, for instance, police officers had complained that the CPS required identification evidence when, in their view, the question of identity was not in doubt. Some officers felt that prosecutors required the police to gather additional evidence as this delayed the charging decision until after their shift had ended. That was the view of one custody sergeant who said:

The CPS can ask for a lot of evidence. They can be pedantic and want to cover the case from every angle. I know it depends on the individual prosecutor but there are some who want to put a spanner in the works so they don't have to make a decision (8:16.12.09).

In two police stations, officers complained about the time it took to get an appointment with the CPS to examine sexual offences. Indeed, officers in two different areas complained

⁸² At one police station, a custody sergeant read out to the researcher the following entry on a custody record, 'The police officer has been on hold [on the telephone] to the CPS for nearly 3 hours. Still waiting for CPS advice' (2:3.11.09).

that they had to wait for over three months before they could get an appointment with the CPS to examine a rape allegation.

A number of custody sergeants were concerned that long delays occasioned by the higher evidential standards required by the CPS were in a breach of PACE. Indeed, two of the sergeants felt that delays brought about what they considered the 'administrative convenience' of the CPS were an abuse of process. Both sergeants said they had preferred it when defence solicitors were more involved in custody suites as they were in a position to challenge the CPS over unacceptable delays.

With the formation of the new administration, the Home Secretary has announced that the power to charge people suspected of low-level offences will be returned to the police (Greenwood, 2010). With further changes intended in the charging process, it would be useful to review working practices in the investigative process from the perspective of the police, the CPS and defence solicitors. Such a review could usefully explore how practitioners can work together more effectively in improving the charging process by reducing delays and dealing with cases more efficiently.

1.4 Inter-professional relationships and legal advice

When considering implications for legal advice in the police investigative process, it is important to consider not only the inter-professional relationships between the police and defence solicitors but also those between the police and the CPS.

1.4a Inter-professional relationships: police and defence solicitors

Various studies have examined police culture and its implications for inter-professional relationships with defence solicitors, including its impact on legal advice (see McConville et al., 1994; Reiner, 1992; Smith and Gray, 1983; Skinns, 2009b). However, with the exception of Skinns (2009b), no recent research study has examined this issue. With numerous changes in the working practices of both the police and defence solicitors in train, it would be useful for more research to be undertaken in this important area.

In the present study, several solicitors made positive remarks about their relationship with the police. Such remarks highlight the need for mutual respect and understanding in the police investigative process. As one solicitor explained:

A good police officer will prefer to have someone with a serious charge represented. They know that the interview isn't then going to be challenged in court, which could weaken the case. An intelligent officer won't have a problem with us (DA2).

Another solicitor commented on the efficiencies which solicitors could help the police to achieve:

I think the more experienced officers perceive us as less of a threat and more as helping to facilitate them dealing with cases quickly. A good custody sergeant should never dread a defence solicitor coming in because it will actively help them manage their cases (GO5).

However, there were also negative comments from some solicitors, about their relations with the police. As Skinns (2009b) found, tension can arise at flashpoints such as the disclosure of evidence, because this has the potential to create conflict between the police and

the solicitors. This was the comment from one solicitor interviewed in this study about his experience with a police officer:

I'm dealing with a case at the moment with an officer who has just transferred from the Met [Metropolitan Police] ... When we are in the interview he starts commenting on lots of things he hasn't disclosed. I said we need to stop the interview and he refused. I said you have to stop the interview because my client needs advice. His approach meant that instead of a four-hour interview it took eight hours – all because he wanted to play silly buggers (DA2).

Where tensions arise, legal advisers are at a disadvantage because the police dominate the investigative process. This is not only because police have the right of detention but also because negotiations with legal advisers takes place on police territory and at police convenience. Police custody is an environment into which legal advisers are invited and from which they can be ejected if the police consider that they have misbehaved (see Sanders and Young, 2007; Sanders, Young and Burton, 2010 and Skinns, 2009b).

From the LSRC's observations, it appears that recent reforms impacting on both the police and defence legal advisers have influenced changes in the police custody environment. It was noted above, for instance, that the introduction of fixed fees, and also the LSC's contract with defence solicitors, seems to have reduced the presence of defence legal advisers in custody suites, as they no longer wait for a charging decision to be made following the police interview.⁸³

The presence of defence legal advisers in custody suites can be useful in providing an exchange of information that can assist the police investigation. It can also act as a restraining influence on police practices. In one police station, for instance, two custody sergeants complained that the presence of defence solicitors in custody areas made it awkward for them because, as one sergeant explained, *'We have a particular sense of humour when dealing with detainees, which means we can say inappropriate things. The problem*

⁸³ There were also comments made by some custody officers that legal advisers had become less visible in police stations. It would be useful to explore further the current practice of defence practitioners in relation to providing legal advice in police stations.

was that the solicitors could then challenge us on it' (6:10.12.09). In another police station, two defence solicitors complained about 'inappropriate' comments, when overhearing custody officers discouraging suspects from having legal advice.

At each of these police stations, defence legal advisers have now been banned from waiting in the police custody suite. Instead, they are escorted to a separate waiting room apart from the suite. At both these stations, custody sergeants said that this move was justified by the misbehaviour of a single solicitor. Rather than deal with that behaviour, the sanction of exclusion was then applied to all solicitors. A third police station was observed at which legal advisers have been banned from the custody suite. In this station, a custody sergeant explained that said that all non-police personnel had been excluded because the custody suite was too small. If defence legal advisers are becoming less visible in police custody suites, and excluded from some, we need to find out if this has had an impact on changing police culture, including police attitudes towards legal advice. While the influence of defence legal advisers in the police investigative process appears to be diminishing, the CPS, on the other hand, is becoming more dominant.

1.4b Inter-professional relationships: police and Crown prosecutors

Two issues are explored here where inter-professional relationships between the police and Crown prosecutors may impact on legal advice. The first issue concerns the police use of cautions, the second issue concerns CPS decision-making in light of the higher evidential standards that are now required.

1.4b(i) Cautioning decisions

While the CPS is responsible for charging decisions in all but minor cases, it is the police who decide whether or not to impose a simple caution.⁸⁴ Before a caution can be recorded, the police have to ensure that there is sufficient evidence to prosecute and that the suspect both admits the offence and consents to be cautioned. Previous studies found that these preconditions were often ignored and that some suspects were cautioned precisely because there was insufficient evidence to prosecute (Sanders, 1988; McConville et al., 1991).

⁸⁴ It is the CPS which is responsible for imposing the new 'conditional cautions'.

It was evident from discussions with the police officers that some officers resented the CPS take-over of most charging decisions. While the police were responsible for charging decisions in relation to minor matters, it irked some police officers that they were obliged to refer all offences involving an allegation of domestic violence to the CPS. That obligation included common assaults, a minor matter usually dealt with by the police alone. While denying that it was police practice to caution offenders instead, one police officer pointed out that they could avoid CPS referrals by doing so. There were also indications that the police were continuing to use cautions because there was insufficient evidence to prosecute. During a conversation with one custody sergeant, he was asked if the police would impose a caution for a serious offence in cases where there was insufficient evidence. He replied, '*Yes of course – at least that way we have something on them*' (2:16.11.09).

As it seems that different evidential standards are being used by the police and the CPS, there is potential for confusion as to which cases might be acceptable for a caution. There were two cases observed at different police stations, each involving an offence of 'theft by finding' - one of a bicycle (3:4.12.09) and the other of monies (4:8.12.09). In both cases, the police officers told the custody sergeants that the CPS would not prosecute because no-one had reported the items as missing, and the officers wanted to know if they could instead impose a caution. Without legal advice, each suspect accepted a caution. Had a solicitor been involved, it is likely that the suspects would have been advised not to accept the caution. This is based on the assumption that the solicitor would have been aware that without the items having been reported as missing, the CPS was unlikely to charge.

In another case observed, a police officer put a suspect under pressure when encouraging him to accept a caution. This case involved an offence under Section 4 of the Public Order Act 1986. The suspect had not received legal advice and he was taken up to the custody desk for a caution to be administered. When the custody sergeant asked if he was prepared to accept a caution he replied, '*No. To be honest with you, I don't think I've done anything wrong. It was a bit of shouting; that's all*' (4:8.12.09). The suspect was concerned that a caution could impede his employment prospects, as he wanted to work with children. The police officer assured him that a caution would not make a difference but that a conviction would. The suspect was also told that if he did not accept a caution he would be prosecuted not only for the Section 4 offence but also for an assault. After some time during which the

suspect was encouraged to accept a caution, he declined saying that he would rather take his chance in court. After he had left the custody suite, the police officer turned to the custody sergeant and said, *'Fair play to him. There isn't enough for an assault and CPS will probably drop the Section 4'* (4:8.12.09).

1.4b(ii) CPS decision-making: taking into account the defence case

As reported above, when the CPS make charging decisions they are required to take into account what the defence case might be, and how this could affect the prospects of a conviction (CPS, 2004). The police were concerned that some prosecutors were not prepared to pursue charges if a reasonable defence was raised. It also concerned them that a more experienced offender would soon realise that by raising a plausible defence they were less likely to be prosecuted. One custody sergeant complained that some solicitors had cottoned on to this by suggesting a range of possible defences to clients, from which, as he put it, *'unless they are stupid they simply choose one'* (5:24.11.09).

At one of the police stations, a custody sergeant was annoyed that the CPS had decided not to prosecute because a possible defence had been raised, even though, in his view, it was unlikely to be accepted in court. The case involved domestic burglary, and a footprint had been found on a windowsill where entry had been gained. The police removed shoes from the suspect's house and one was found to be a match for the footprint. When the suspect was interviewed, he said that this shoe had been stolen some time previously but had recently and mysteriously been returned to him. This defence was accepted by the CPS and no further action was taken (3:4.12.09). Similar concerns were raised by a custody sergeant at another police station: *'The CPS get it wrong. They don't charge where there is sufficient evidence. Instead they anticipate whether they will get a conviction. You get offenders selecting a suitable defence and the CPS won't then pursue it. We are acting as judge and jury and it is wrong'* (7:11.12.09).

With radical changes taking place in the way the police and the CPS work together, research could usefully investigate the implications for their inter-professional relationship, including their attitudes to legal advice. It would also be interesting to explore the potential advantages of involving defence solicitors earlier on in the police investigative process, once a request for legal advice has been made. In addition, while many solicitors commented

positively on the useful discussions they used to have with custody sergeants prior to charge, there is currently no opportunity for them to speak to Crown prosecutors at the pre-charge stage. By examining the evidence at an early stage, it could be helpful for defence solicitors to assist the CPS in their attempts to build ‘robust’ cases, by ensuring the correct charge from the outset and by weeding out non-viable cases (CPS, 2006). Such liaison could also help the prosecution to identify appropriate cases for fast-tracking as ‘quick guilty pleas’.

Recommendations

1.1 The take-up of legal advice in police stations requires analysis of a large sample of custody records. The LSRC is therefore currently undertaking this work with a sample of around 30,000 electronic police custody records being examined in four police force areas. Also taken into account will be the take-up of legal advice by vulnerable suspects.

1.2 Further research is required from the users’ perspective to examine the extent to which suspects detained in custody are able to make informed decisions. Such decisions include whether or not to have a solicitor and how those without legal advice respond to police questions.

1.3 With recent changes in the police investigative process, research could usefully examine inter-professional relationships and consider how practitioners could work together more effectively. The adoption of a systematic approach could assist by examining the criminal process from various different perspectives including users, the police, CPS and defence solicitors. Such an approach could also seek to improve efficiencies as well as reduce costs in the charging process.

Section Two: Legal representation in magistrates' courts

2.1 Introduction

Although suspects are entitled to free and independent legal advice at the police station, this is not the case at the magistrates' court. There, in order to be eligible for legal aid a defendant has to pass both the 'interests of justice' test and a means test. The 'interests of justice' test was first introduced in the 1960s, following consideration by a Committee chaired by the then Mr Justice Widgery. The Committee concluded that there should be no automatic right to legal aid in magistrates' courts; instead, it was recommended that legal aid should be granted on a discretionary basis when the 'interests of justice' required. Such 'interests' include offence seriousness, case complexity, and the reputation and/or the vulnerability of the defendant.⁸⁵

The Widgery Committee also recommended that courts should have the discretion to order a defendant to make a contribution towards their legal aid costs at the end of the case. By the time cases ended, however, it was impossible to recoup monies from most of those who had been sentenced to imprisonment and so the burden of contributions fell disproportionately upon those who had been acquitted. In the early 1980s a means test was introduced, requiring contributions from those whose finances were over a certain limit. However, with the high costs involved in administering the scheme, and also with the Lord Chancellor's Department (now the Ministry of Justice) having the legal aid accounts qualified by the National Audit Office, the means test was abolished in 2001.⁸⁶ After an increase in the legal aid fund from £1.5 billion to £2 billion between 1997 and 2004, the Government re-introduced a means test for magistrates' court cases on the basis that those who could afford to pay ought to pay their legal costs. The new scheme was introduced in all magistrates' courts in October 2006.

In this section of the report, first examined is the extent to which respondents reported using a solicitor when being dealt with in the magistrates' court. Also considered are the

⁸⁵ Also known as the 'Widgery Criteria'.

⁸⁶ By 1986, it was found that fewer than 3% of orders required contributions. While those contributions raised £1.8 million annually, the scheme cost £800,000 a year to administer. In addition, the legal aid accounts were qualified by the National Audit Office each year from 1990/91 to 1998/99 (National Audit Office, 2000). See Goriely (1996) for a brief description of criminal legal aid.

implications when ethnicity influences a defendant's choice of solicitor. Next examined are the implications for both the 'interests of justice' test and the means test when potential barriers to legal representation are created. Finally considered are the implications for unrepresented defendants appearing in court.

2.2 Legal representation in magistrates' courts

When users in magistrates' courts were interviewed a screening question was included in order to exclude defendants who were being dealt with for very minor matters. This was because these cases were thought unlikely to pass the 'interests of justice' test and the defendants were likely to be unrepresented.⁸⁷ Of 1,023 people whom the Ipsos Mori interviewers approached in court, one-third were excluded because they were being dealt with for one of the specified minor matters.⁸⁸ Of a total of 767 respondents interviewed in the magistrates' courts - the Court Sample - 82% said that they were using a solicitor. Of those, 3 in 10 reported using the duty solicitor and 7 out of 10 reported using their own solicitor.⁸⁹ Nearly all of those using their own solicitor were publicly funded, although a few said they were paying privately. The responses of all represented respondents in this study, whether they were publicly funded or paying privately, are included in the analysis.

The number and percentage of respondents who reported being represented in court are set out in Table 2 below. Also included is the percentage who were represented in relation to whether the offence was categorised as either 'minor' or 'medium'.⁹⁰ While the proportion of respondents represented in four of the courts is fairly consistent - between 81 and 84% - it is higher in Cardiff and lower in Bradford magistrates' courts. As reported in the first section on dealing with legal advice in the police station, most Cardiff interviews took place in the court cells and so it is not surprising that a higher proportion of defendants were represented. It is not clear why the proportion of people represented in Bradford magistrates' court was lower than in the other areas. Slightly more defendants were being dealt with for minor

⁸⁷ These offences include minor road traffic offences, being drunk and disorderly, dropping litter, consuming alcohol in a public place, having an unlicensed television set, prostitution/soliciting, vagrancy, and stealing electricity.

⁸⁸ That is, 767 were found to be eligible and 256 ineligible.

⁸⁹ The court duty solicitor is usually available for defendants only at their first hearing.

⁹⁰ The 'serious' category is not included as all but one of the defendants being dealt with for a serious offence were represented.

offences in Bradford than in the other areas but the differences were small.⁹¹ Prior experience as a defendant also seems not to offer an explanation. In the six areas of the study, Bradford respondents had the second highest proportion of those with a previous conviction.⁹²

Table 2: The number and proportion of respondents represented in magistrates' courts and representation based on offence seriousness

<i>Courts</i>	<i>Represented</i>	<i>Represented</i>	<i>Represented</i>	<i>Represented</i>
	<i>N</i>	<i>%</i>	<i>Minor</i>	<i>Medium</i>
			<i>%</i>	<i>%</i>
Birmingham	87	81	71	91
Bradford	84	64	56	71
Bristol	101	83	79	85
Camberwell	99	84	77	94
Thames	148	84	79	86
Cardiff	106	98	98	99
ALL	625	82	75	88

As in the police station, the extent to which ethnicity and language might influence respondents' choice of a solicitor was examined through a multilevel binary logistic regression model based on the Court Sample. Also included in the model was the seriousness of the offence and geographical area as a random effect. The seriousness of the offence was seen to have a significant impact, with increased solicitor use in courts for 'medium' and particularly for 'serious' offences when compared to minor offences. In court, for binary ethnicity, BME respondents were slightly less likely to have a solicitor, though this difference was clearly non-significant. Similarly, while there was some variation in solicitor use in court using ethnicity based on five categories⁹³, none of the differences reached significance. Interestingly, where the first language was not English, this was seen to have a significant impact, with respondents whose first language was not English being significantly less likely to use a solicitor in court when compared to those who spoke English. Those who were not able to speak English without the assistance of an interpreter were not included in the

⁹¹ In Bradford, 60% of defendants were being dealt with for minor offences. The range of minor offences in four of the other areas was between 51% and 59%. In the remaining area, 40% of defendants were being dealt with for minor matters.

⁹² There were 71% of respondents in Bradford who reported having a previous conviction, compared to between 44% and 68% in the four other areas. With the majority of interviews taking place in the court cells, it is not surprising that at 89% the highest rate of previous convictions was to be found in Cardiff.

⁹³ The five categories used were Black, Asian, Mixed-ethnicity, White British and Other.

LSRC's survey, although it would be of concern if they too were found to be less likely to have a solicitor in court. The extent to which those who have an interpreter in court might be less likely to have a solicitor is explored later on in this section when considering the administrative requirements of the means test in courts as a potential barrier to legal advice.

With reference to the role of ethnicity in relation to a respondent's choice of solicitor, we noted previously (Kemp and Balmer, 2008:29) that more BME than White British respondents were choosing solicitors with a BME background (at 36% versus 18%). In the four areas where there is a higher BME population it seems that more BME respondents were choosing BME solicitors. The local availability of BME solicitors is likely to influence people's choice of a solicitor. Accordingly, the extent to which BME clients choose BME solicitors was further explored by examining supplier data held by the LSC. In the six areas surveyed by the present study, a total of 532 criminal defence work suppliers were identified. In addition, the LSRC received survey data from 311 (58%) of these firms, which made it possible to ascertain the ethnic background of their defence solicitors. Overall, 143 (46%) of the suppliers had White British managerial control, 135 (43%) suppliers had BME majority managerial control, and 33 (11%) suppliers shared control. Not surprisingly, there were more BME managed firms reported in the areas with a high BME population: Birmingham, Bradford, Camberwell Green and Thames, and only one or two firms in Cardiff and Bristol. In addition, when considering the London area more generally, most firms are BME or shared majority managerial control (61% BME/shared versus 39% White British).⁹⁴

While there are indications that ethnicity might have an impact on respondents' choice of a solicitor (both in court and in the police station), there are relatively few respondents when breaking down into the five ethnic groups and also by geographical area. Accordingly, a statistical analysis to establish implications for ethnicity needs to be based on a larger, and systematic, sample of cases. The issue of ethnicity influencing people's choice and use of a solicitor is explored further in the next section.

There are similar problems with sample sizes when examining implications for age and gender in relation to the take-up of legal representation in court. While a similar percentage of females reported using a solicitor in court when compared to males, there were fewer

⁹⁴ The London area examined was that overseen by the London Criminal Justice Board.

female than male respondents interviewed in the Police Station and Court Samples.⁹⁵ Similarly, so far as young defendants are concerned, only those aged 17 years and older were included in this study. It is generally known that there is a high level of representation for defendants in Youth Courts. In the LSRC's Youth Court study of 166 young defendants dealt with in court, 92% were legally represented (see Kemp 2008).⁹⁶ It would be interesting to explore further implications for gender and age in relation to the take-up of legal representation in court in a larger sample of cases.

So far as the use of the duty solicitor is concerned, 29% of respondents in the Court Sample reported using the duty solicitor, compared to 41% using the duty solicitor in the police station. However, as noted in the Interim Report, a proportion of those who used the duty solicitor at the police station would later be using them as their 'own' solicitor in court.⁹⁷ In addition, because the court's duty solicitor is usually available only at the first hearing, those respondents interviewed at a second or subsequent hearing would have had their 'own' solicitor even if they had initially used the court's duty solicitor.⁹⁸ It could be for this reason that few women in the Prison Sample reported using the court's duty solicitor. Indeed, only 10% said that their solicitor was the duty solicitor, although it is likely that a higher proportion would have used the duty solicitor at their first hearing.⁹⁹ Differences in the use of duty solicitors were found between the different courts. The highest use of the duty solicitor was in the Birmingham and Thames magistrates' courts (at 39% and 38% respectively) and the lowest in the Bradford and Cardiff magistrates' courts (at 16% and 19%).¹⁰⁰

⁹⁵ All of those interviewed in the Prison Sample had been sentenced to custody, and so it is not surprising that all reported using a solicitor in court.

⁹⁶ Of those who were unrepresented in court in that study, most were being dealt with for minor offences which did not meet the 'interests of justice' test.

⁹⁷ See Kemp and Balmer, 2008:33.

⁹⁸ The court's duty solicitor tends to only be available at the first hearing, either to represent defendants pleading guilty or to advise and perhaps also to make bail applications on behalf of those in custody.

⁹⁹ As noted in the previous section, half of respondents in the Prison Sample reported using the duty solicitor in the police station.

¹⁰⁰ As noted above, the conduct of interviews in the Court cells might help to explain why defendants in Cardiff had less resort to the duty solicitor. At Bristol and Camberwell magistrates' courts, just under a third of those facing charges used the duty solicitor.

2.3 Potential barriers to legal representation in court

When applying for legal aid in magistrates' courts both the 'interests of justice' test and a means test is applied. The 'interests of justice' test is used to help determine which defendants require the services of a lawyer, and the means test determines whether the legal services are funded by the State or the individual. However, with the discretionary nature of the 'interests of justice' test, and with the administrative requirements of the means test, it seems that unintended consequences have the potential to create obstacles to legal representation, particularly for vulnerable defendants. The LSRC observed other potential obstacles to legal representation when observing magistrates' courts proceedings. These include early indications in a small number of courts that pressure to deal with minor cases quickly could be leading to defendants being discouraged from having legal representation.¹⁰¹ Also arising out of court observations are questions concerning the extent to which defendants understand what is happening to them in court and whether they are able to make informed decisions about legal representation.

2.3a *The 'interests of justice' test*

The 'interests of justice' test is concerned mainly with offence seriousness. However, it also takes case complexity and the reputation and/or vulnerability of defendants into consideration. Research into the 'interests of justice' test has tended to focus on the examination of legal aid application forms (Young, Moloney and Sanders, 1992; Wall, 1996; Wilcox and Young, 2005). This has helped to highlight the discretionary nature of criminal legal aid in magistrates' courts and also the positive attitudes of court staff towards legal representation.

Because of the discretionary basis on which the 'interests of justice' test is determined, the rate at which criminal legal aid is granted may vary between different areas. In view of concern over the high grant rate in some areas, the Government has commissioned research from time to time to examine application of the 'interests of justice' test. The first such study

¹⁰¹ The LSRC has been observing magistrates' courts over the past four years. First observed were proceedings in Youth Courts during 2006 (see Kemp, 2008). Having identified inefficiencies and delays in the Youth Courts studied, the LSRC extended observations to Adult Courts in 2007 to see whether the issues identified were pervasive in the criminal justice system. Further observations of magistrates' courts were carried out during 2008 and 2009 (details of these exploratory observations are contained in the Appendix). The LSRC has also commissioned a small-scale study of two magistrates' courts which had adopted the 'streamlined process' when dealing with minor cases quickly (see Souza and Kemp, 2009).

was undertaken at the request of the then Legal Aid Board, when the researchers were asked to investigate apparent inconsistencies in the determination of legal aid applications (see Young, Moloney and Sanders, 1992).¹⁰² After the means test had been abolished in 2001, concern continued to be felt about variations in the grant-rate of legal aid in the magistrates' courts. Accordingly, the Legal Services Commission (which replaced the Legal Aid Board in 2000) appointed researchers, one of whom was involved in the earlier research, to undertake a similar study in order to build on the earlier findings (see Wilcox and Young, 2005 and Young and Wilcox, 2007). In both of these studies, consideration of how the 'interests of justice' test was applied involved examination of legal aid application forms.

In the 1992 study, the national figures showed that the grant rates across England and Wales varied from 35 to 100%, and averaged 91%. The researchers analysed a sample of 200 legal aid applications in six courts, three with a low grant-rate and three with a high grant-rate. Analysis of that data showed that variation between the courts was not due to application practices by solicitors or differing sentencing practices of the courts. While a number of factors might have contributed to the disparate approaches adopted, Young argued that the most plausible explanation for the overall high grant rate in the magistrates' courts was due to court clerks, who were then responsible for the grant of legal aid, perceiving the widespread involvement of defence solicitors in summary cases as generally serving the interest of court clerks (Young, 1996).¹⁰³

Following the abolition of the means test in 2001, the grant-rate of legal aid in magistrates' court cases increased. On examining data provided by the LSC over a six-month period in 2004, the 2005 study found considerably less variation in grant rates across the courts (75-100%) when compared to the 1992 study, with a median of 96% (Wilcox and Young, 2005). As in 1992, most decisions were found to turn primarily on the seriousness of the offence charged and the punitive bite of the likely sentence. However, in the earlier study the researchers had been concerned about the open-ended nature of the process which

¹⁰² Having analysed 1990 data, the Legal Aid Board was concerned about the grant rate of legal aid based on 384 courts. There were eight courts identified which refused at least a quarter of the applications made to them. At the other extreme, there were 97 courts which refused fewer than 1 in 20 applications (see Young, Moloney and Sanders, 1992).

¹⁰³ This was also the finding of McConville et al. (1994). In particular, it was suggested that the widespread involvement of defence solicitors relieves legal advisers of the responsibility of assisting unrepresented defendants. It also allows much of the processing of summary cases to be conducted by the prosecution and defence outside of the courtroom through negotiation and compromise.

allowed irrelevant considerations, such as the personal views and idiosyncrasies of court clerks, to come into play (Young, Moloney and Sanders, 1992). By 2005, the context within which decisions were made was found to have changed and, as such, decision-making norms at work were found to be more defensible in terms of the Widgery criteria. While 7% of cases in the 1992 study resulted in a custodial sentence, for instance, this had risen to 22% of cases in the 2005 study. In addition, procedural and evidential innovations were seen to have added to the legal complexity of summary justice which had made the case for granting legal aid more difficult to resist (see Young and Wilcox, 2007). On that basis, the researchers concluded that patterns of decision-making were largely defensible in terms of the ‘Widgery’ criteria and associated case-law.

With the discretion permitted to them when applying the ‘interests of justice’ test, decision-makers have continued to adopt a positive attitude towards the grant of criminal legal aid. Indeed, court staff generally perceive the involvement of defence solicitors as helpful when dealing with cases quickly and efficiently (Carlen, 1976; Young, Moloney and Sanders, 1992; McConville et al., 1994; Goriely, 1996). However, with courts now being under increasing pressure to deal with minor cases quickly, it seems that attitudes towards the involvement of defence solicitors could be becoming less positive in some courts. This might be because solicitors who are instructed at the first hearing tend to apply for an adjournment so that they can prepare the case for court. In addition, with courts under pressure to deal with a higher volume of cases at the first hearing it is not surprising if some staff in the ‘quick guilty plea’ courts, no longer view the involvement of defence solicitors as positive, particularly if they are seen to apply for adjournments as a matter of routine. The implications for dealing with ‘quick guilty plea’ cases without legal representation are considered further below when investigating the court experiences of unrepresented defendants.

2.3b *Means testing*

With the cost of the legal aid scheme rising from £1.5 billion in 1997 to £2 billion in 2004, the Government was concerned that abolition of the means test had led to a rise in the number of successful legal aid applications.¹⁰⁴ In order to ensure that finite resources were better targeted at those in most need, it was suggested that legal aid should be restricted and that

¹⁰⁴ Several factors were found to contribute to increases in legal aid costs (see Cape and Moorhead, 2005).

those who could afford to do so should pay their own costs if convicted. Accordingly, a means test was re-introduced in October 2006.¹⁰⁵ With the means test achieving annual savings of £35 million during the first two years of operation as forecast, in 2010 the then Government also introduced a means test in the Crown Court (Ministry of Justice and Legal Services Commission, 2008).¹⁰⁶

Responses to the Government's consultation on Crown Court means testing by solicitors' representative bodies criticised some aspects of means testing as it was already operating in the magistrates' courts. Solicitors expressed concerns over the eligibility thresholds, the impact on clients with mental health difficulties, the increased administrative burden on themselves, and delays caused by evidential requirements (see the Criminal Law Solicitors' Association, 2009 and the Law Society, 2009). Similar concerns were raised by the solicitors in the present study. Indeed, solicitors said that they considered the means test to be the main barrier to legal representation, particularly for vulnerable defendants.

A number of solicitors in the present study said that the financial threshold for legal aid was set too low and that many of those who were financially ineligible for legal aid were unable to afford to pay privately for a solicitor. This was also predicted by Kenway (2006), when the financial thresholds to be included in the means test were announced.¹⁰⁷ In the present study, 10% of the respondents said they did not have a solicitor because they could not afford one. Solicitors complained that clients who had previously received legal aid but were now found to be ineligible were refusing to pay privately for a solicitor. In one case, a solicitor said, *'I told a chap the other week that you are not going to get legal aid now because you are earning £500 a week. He said he didn't have to pay before and he wasn't going to start now so he went ahead unrepresented'* (MI1). Bearing in mind both the defendants whose finances are above the threshold but who cannot afford to pay and the

¹⁰⁵ Provision for re-introducing the means test was included in the Criminal Defence Services Act 2006. The Act also transfers the power to grant criminal legal aid from the courts to the LSC.

¹⁰⁶ The Crown Court means testing scheme was piloted in five courts from January 2010, before being rolled out nationally between April and June 2010.

¹⁰⁷ After completing an initial means test, a full means test is required if the adjusted annual income is calculated as more than £12,475 and less than £22,325. In Souza and Kemp's (2009) small-scale study of two magistrates' courts it was found that of 21 respondents who were represented, just under half had completed the means test and, of those, half were on an income of less than £12,475 and almost one-third had an income between £12,475 and less than £22,325. However, an important safeguard is provided as those who are refused legal aid can make an application for review on the grounds of hardship.

defendants who are above the threshold but refuse to pay, solicitors felt that the means test had led to an increase in the number of unrepresented defendants in court.¹⁰⁸

While the means test is intended to restrict eligibility for legal aid in magistrates' courts, some solicitors complained that colleagues would seek to avoid the means test by advising clients facing 'either-way' offences to elect for their case to be heard in the Crown Court.¹⁰⁹ Indeed, one solicitor confirmed that this was his practice in what he considered to be 'appropriate' cases. Such an approach, however, can have significant cost implications not only for the Legal Aid Fund but also for the criminal justice system more generally, as it is far more expensive for cases to be heard in the higher court. While defendants risk a harsher penalty in the Crown Court, it seems that the priority for some is to avoid the means test in the magistrates' court.¹¹⁰ However, such tactics are likely to have become redundant as means testing has now been brought in to the Crown Court.

The means test requires an examination of defendants' (and their partners') means to determine whether they are eligible for legal aid. Some defendants, however, are 'passported' through the system.¹¹¹ They include those who are aged under 18 years, who simply have to provide evidence of their date of birth and tick the relevant section of the form. People on certain benefits are also 'passported'; after they have provided their national insurance number, the take-up of benefits is then checked with the Department for Work and Pensions.¹¹² In spite of the minimal amount of information required from applicants who are eligible to be 'passported', solicitors have complained that the bureaucratic requirements are still too rigorous. This was particularly the case in relation to the documentary evidence required from people who are self-employed.¹¹³ As one solicitor put it:

¹⁰⁸ While it is possible to identify whether or not the number of legal aid representation orders has decreased, there are no statistics available on the number of unrepresented defendants appearing in magistrates' courts.

¹⁰⁹ Triable-either-way offences include theft, handling stolen goods, burglary, some drug offences, and some offences involving violence against the person.

¹¹⁰ Magistrates' sentencing powers are restricted to a period of six months for any one offence. For more than one offence, where custody is intended to run consecutively, the maximum term that can be imposed by a magistrates' court is 65 weeks. Conversely, judges are constrained only by the maximum statutory penalty for particular types of offences and by the Sentencing Guidelines published by the Sentencing Guidelines Council.

¹¹¹ See the Legal Services Commission's website for details including an on-line eligibility calculator.

¹¹² The benefits include Income Support, Income-Based Job Seeker's Allowance or Guaranteed State Pension Credit and income-related Employment Support Allowance.

¹¹³ There is an important concession for self-employed defendants who have been remanded into custody by the court as they can self-certify that they are unable to produce the documentary evidence required.

Employed clients are okay, although it can take time to get their wage slips. But heaven forbid if you have someone who is self-employed ... I think the means test has had an impact because it has removed a significant number of people from accessing justice. Almost at a stroke, anyone who is self-employed is not going to get legal aid because they can't provide the documentary evidence (DE2).

Solicitors were also concerned that the bureaucratic requirements of the means test were too onerous when they were dealing with people who lead chaotic lives, have severe mental illness, or have little or no English. This was because a relatively simple matter such as supplying the national insurance number can be difficult if people have forgotten their number or if they do not have such a number. One solicitor told us:

For the means test they need their national insurance number but you'll find that many of them won't remember it; they don't even remember where they live. The trouble is, you help them but we don't then get paid for it if they have got the national insurance number wrong, or it comes back from the DWP that they are no longer getting Jobseekers Allowance. There are people who don't speak English, immigrants who don't have a national insurance number, and you can't get legal aid. There are others who could be comatose after having taken a drug overdose (ER5).

It seems that the administrative requirements of the means test could have the unintended consequence of restricting access to legal aid, particularly for vulnerable people. In particular, clients with severe mental health problems were raised by solicitors as a matter for concern.¹¹⁴ This was the situation described by one solicitor:

We had a case where the client was so dangerous and violent that she could not be given a writing implement and so she could not sign the form. We could not give her a pen because the people in the cells said she was dangerous. She was in custody for two weeks with no one doing anything, simply because she could not sign the legal aid form. Eventually, someone at the LSC made a sensible decision and said, "For God's sake just

¹¹⁴ However, it should be noted that those reporting mental illness or learning disabilities in this study were more likely to be legally represented. Of the 65 such respondents in the Court Sample, 91% were represented compared to 82% in the overall Court Sample.

grant it” – so we did. After she had been in custody for two weeks it was easier because she had no income. Access to justice for people with mental health problems is a very, very big issue (DE2).

The Law Society (2009) has raised similar concerns with regard to people suffering with severe mental illness. In particular, owing to strict requirements for evidence of means, clients have been left without representation or subject to delays because of their inability to understand the requirements of the means form or to provide coherent information or evidence in response to the evidence requirements. In response, the Ministry of Justice made a concession which allows another person to sign the application form on behalf of clients who are unable to do so themselves because of their mental state.¹¹⁵

It is also important to consider the role of the means test as a potential barrier to legal aid for defendants whose first language is not English. The vulnerability of these people was depicted in the Interim Report. In particular, of the 73 respondents in the Courts Sample whose first language was not English, 45% said they did not fully understand what was happening at court compared to 22% of those whose who spoke English as a first language.¹¹⁶ In addition, while 83% of those who spoke English as a first language were legally represented, only 67% of those whose first language was not English were legally represented.¹¹⁷ When asked why they did not have a solicitor in court, only two of the respondents whose first language was not English were able to give an explanation.¹¹⁸

Although it is not known if the means test presents an obstacle to legal representation for those whose first language is not English, we can learn from the experiences of those who require an interpreter at court. One problem arises if the police have failed to arrange for an interpreter to attend the hearing. A solicitor remarked, *‘We often come across these cases as duty solicitors in courts. They have an interpreter at the police station but when they are bailed to court the police often don’t notify the court of the need for an interpreter. That*

¹¹⁵ In addition, where solicitors are concerned about how to meet the legal aid application requirements because of their client’s specific mental health issues, they are encouraged to contact the National Courts Team at the earliest opportunity so that their concerns can be addressed and possible solutions identified.

¹¹⁶ See Kemp and Balmer, 2008:2.

¹¹⁷ See Kemp and Balmer, 2008:26.

¹¹⁸ There were also 69 people approached in the magistrates’ courts who could not take part in this study because they did not speak English.

happens quite often' (DE2).¹¹⁹ A second problem arises when the defendant cannot complete the legal aid form without the help of an interpreter. Although defendants are eligible to use the court duty solicitor at the first hearing, they are unlikely to be able to complete the legal aid application form if an interpreter is not in attendance.¹²⁰ On their next court appearance, they may be ineligible for the court duty solicitor as it is not their first hearing. They are thus unlikely to be legally represented.

The LSRC has observed two cases in which the defendants were using an interpreter but had no legal representation, even though the offence was serious enough for the court to consider a custodial sentence.¹²¹ This was unusual, as magistrates generally encouraged defendants to have a solicitor, particularly when they were at risk of imprisonment. It could be that the involvement of an interpreter was a distraction for these magistrates and that the issue of legal representation was then be overlooked.

While it has been interesting to consider the take-up of legal representation from comments made by people interviewed in the present study, a number of issues requiring further exploration have arisen. Based on a larger, and systematic, sample of cases it would be useful to explore implications for both the 'interests of justice' test and the means test on the grant of criminal legal aid. Since the reintroduction of means testing in October 2006, for example, there has been no independent review of its impact on defendants accessing criminal legal aid in the magistrates' courts.¹²² It would also be useful to review the administrative requirements under the means test and to ensure that they do not create unwanted obstacles to legal representation for vulnerable defendants.

¹¹⁹ The LSRC observed a few cases where the police had not arranged for an interpreter to attend at the first hearing.

¹²⁰ We noted in the Interim Report that at 47% a higher proportion of respondents whose first language was not English used the duty solicitor compared to 27% of those who spoke English as a first language (Kemp and Balmer, 2008:31).

¹²¹ In each of these cases (which were observed on 17 April 2007 and 1 May 2007) the magistrates had requested a pre-sentence report from the Probation Service covering 'all options', which includes custody.

¹²² A post-implementation review of means testing examined legal aid application forms. This did not consider those who, for whatever reason, had not applied for legal aid (Ministry of Justice, Legal Services Commission and H. M. Courts Service, 2007).

2.4 Unrepresented defendants in court

Previous research has shown that unrepresented defendants were at a disadvantage because they often had very little understanding of what was happening in court and they were often frightened, nervous and confused (Dell, 1971, Justice, 1971, Bottoms and McLean, 1976 and Astor, 1986). In the 1970s and 1980s, when that research on unrepresented defendants took place, however, most did not have a solicitor. In the mid-1970s, Bottoms and McLean (1976) found that 19% were represented.¹²³ With the implementation of the Legal Aid Act 1982, and the establishment of a national duty solicitor scheme, Astor (1986) refers to research conducted by Bridges and others in six magistrates' courts, where it was found that 38% of defendants were represented at the first hearing. In the present study, with 82% of respondents having a solicitor in court, it seems that the levels of representation have increased significantly over time.¹²⁴

It is interesting that, while the 'interests of justice' test has been based on the 'Widgery Criteria' for over four decades, eligibility for criminal legal aid in the magistrates' court has increased considerably. As noted above, there are wide discretionary powers for legal aid decision-makers when applying the 'interests of justice' test, as its interpretation has changed over the years from being restrictive to becoming far more inclusive (Young, 1996 and Wilcox and Young, 2005). Indeed, in the present study four out of five respondents reported being represented by a solicitor paid for out of public funds. However, as noted below, there are early indications in the present study that attitudes towards legal representation could be changing in some courts, and that this could discourage some defendants from having a solicitor.

2.4a *Quick guilty plea courts*

Changing attitudes towards legal representation were observed by the LSRC mainly, although not exclusively, in the 'quick guilty plea' courts. In recent years, various initiatives have been designed to speed up the processing of cases in court. The most recent is the 'Criminal Justice – 'Simple, Speedy, Summary' initiative, which is known colloquially as the 'CJ-SSS'

¹²³ Dell's (1971) study found that some unrepresented defendants had been sent to prison.

¹²⁴ However, it is anticipated that the type of cases dealt with by magistrates' court has increased in severity over time with an increase in the use of out-of-court disposals, such as cautions and fixed penalty notices. In addition, Bridges' study included all those appearing in court whereas, in this study, defendants being dealt with for minor offences, which were unlikely to have passed the interests of justice, test were excluded.

project.¹²⁵ The initiative was found to be effective in increasing the number of guilty pleas at the first hearing and also in increasing the proportion of contested cases being concluded after only two hearings (see Department for Constitutional Affairs, 2007). The ‘fast-tracking’ of less serious offences, also known as ‘quick guilty pleas’, is intended to put pressure on defendants to plead guilty at the first hearing (Sanders and Young, 2007).¹²⁶

It should be stressed that in the courts the LSRC observed a mostly positive attitude towards legal representation. Magistrates, District Judges, court clerks and ushers generally seemed to recognise the benefits of legal representation, and unrepresented defendants were encouraged to see a solicitor. However, there were occasions, albeit in a small number of courts, where it seemed that pressure to deal with cases quickly meant that court staff were not inclined to encourage defendants to see a solicitor.¹²⁷ Instead of court staff viewing solicitors positively in these courts, it seemed that staff associated solicitors’ involvement with adjournments and delays. By omitting to encourage defendants to see a solicitor, court staff effectively by-pass the ‘interests of justice’ test. Instead, staff seem to make their own informal judgements about the seriousness of the offence. In particular, there seems to be a perception that ‘simple’ and ‘summary’ cases are not so serious as to warrant legal representation.

The LSRC carried out their initial observations of the CJ-SSS initiative at an early stage in 2007. At that time, the ‘quick guilty plea’ courts tended to be presided over by District Judges. These courts were under considerable pressure to make progress at the first hearing. In some of them, this meant that unrepresented defendants were required to enter a plea before any adjournment for them to seek legal advice. In cases where the offence was admitted and there were no complicating factors, the defendant could then be sentenced. If,

¹²⁵ As part of the CJ-SSS there is also the ‘streamlined process’, which encourages minor cases to be dealt with more efficiently from arrest through to sentence. After the new arrangements had been piloted in five magistrates’ courts during 2006, they have now been rolled out into all magistrates’ courts.

¹²⁶ From the LSRC’s early observations of these new arrangements, a critical factor in helping to deal with cases quickly was the early production of the ‘Advance Information’ by the CPS, which sets out details of the prosecution case.

¹²⁷ These courts were observed as part of the exploratory study. The courts were not in the same six areas where the survey and interviews with defence solicitors took place. However, there were two solicitors in this study who observed staff in a ‘quick guilty plea’ court actively discouraging defendants from having a solicitor. One of the solicitors said, *‘I’ve seen ushers with a note saying, “Do not refer these clients to the duty solicitors” – I think it’s appalling’* (DE2).

however, the case had to be adjourned, particularly when the court required a pre-sentence report, the defendant was then usually advised to seek legal advice.

A requirement for unrepresented defendants to enter a plea at the first hearing can also circumvent application of the ‘interests of justice’ test as it avoids the involvement of defence solicitors at an early stage of the proceedings. In cases that are then sentenced at the first hearing, there has been no opportunity for the defence to examine the prosecution’s case. There is no opportunity for the defence to consider the defendant’s version of events - a perspective from which a defence might be raised.

Although the ‘CJ-SSS’ initiative was intended to deal with ‘summary’ cases, not all cases dealt with in the ‘quick guilty plea’ courts were minor. On the contrary, a number of them were ‘either-way’ offences, which were likely to pass the ‘interests of justice’ test as they could have been heard by either the magistrates’ court or the Crown Court. Some of the cases adjourned for a pre-sentence report involved offences serious enough for the pre-sentence report to consider ‘all options’, including custody. Some CJ-SSS cases were referred to the Crown Court because magistrates considered that their sentencing powers were insufficient.¹²⁸

Defendants were noted to be under pressure to enter a plea at the first hearing. Solicitors who were not instructed until the day of the hearing, and who had no time to examine the prosecution’s case or to take their client’s instructions, could ask for the case to be adjourned before a plea was entered. If the application was refused, then they could advise their client to plead ‘not guilty’ as that would obtain the required adjournment. Although such an approach helps the defence by securing the time needed to prepare the case, it can have negative consequences for the court, the prosecution, and the defendant. This is because a ‘not guilty’ plea will lead to the case being set down for trial, for which court time will be allocated. It will also lead to the prosecution being required to prepare a full file for the trial. If the plea is subsequently changed to one of ‘guilty’, the defendant could then lose credit against the sentence for not admitting the offence at the earliest possible opportunity.

¹²⁸ There were similar issues identified in Souza and Kemp’s study (2009) of summary cases. There were some cases adjourned for a pre-sentence report, for instance, some of which required ‘all options’ to be considered. In addition, of 21 represented defendants, 6 were committed to the Crown Court.

For unrepresented defendants whose case is likely to pass the ‘interests of justice’ test, it is inappropriate that they should be put under pressure to enter a plea before receiving legal advice. The unrepresented defendants are likely to be those who are inexperienced in the criminal process. As a solicitor put it, *‘You tend to find that people who are before the courts regularly, shoplifters and that kind of thing, always have a solicitor. I think it is people who aren’t familiar with the system who are less likely to instruct someone’* (CH6). When unrepresented defendants are under pressure to enter a plea, and when they have not taken legal advice, it is not surprising if a higher proportion of them plead ‘guilty’ when compared to those who have a solicitor. Indeed, in Souza and Kemp’s study (2009) of two magistrates’ courts, which were dealing with mainly minor matters, of 136 cases observed 40% of defendants were unrepresented.¹²⁹ Of those who did not have a solicitor, 86% pleaded guilty compared to 49% of those who were represented. In addition, 43% of the unrepresented defendants were convicted and sentenced at their hearing, compared to 18% of represented defendants (Souza and Kemp, 2009).¹³⁰

A key role of the defence solicitor is to advise defendants on their plea. Research has drawn attention to the passivity of most clients and their solicitors’ corresponding influence on their pleading decisions (see Bottoms and McLean, 1976; McConville et al, 1994; Goriely et al., 2001; Pleasence and Quirk, 2001). With defendants under pressure to enter a plea before taking legal advice, this can effectively undermine their legal protection. For those who plead guilty and who are then dealt with at that hearing, there is no opportunity to take advice as to the appropriate plea. In cases where a guilty plea is entered and the case is adjourned for sentence, a subsequently-instructed solicitor could apply for a ‘guilty’ plea to be vacated and the case to be listed for trial if they consider that there is potential for a defence. The court is not obliged to grant such applications, however. In one case that the LSRC observed, the solicitor informed the court clerk that the defendant had entered a plea of guilty to an offence of assault when he was unrepresented. After taking instructions, the solicitor had advised the court that there was a possible defence and requested that the plea be

¹²⁹ There were in total 201 cases observed and 48% of defendants were represented. However, these cases included a number of summary offences which were unlikely to have passed the ‘interests of justice’ test. When these cases were removed 136 cases were left.

¹³⁰ Of those pleading ‘not guilty’, this was 43% of those with a solicitor compared to 12% of defendants who were unrepresented.

vacated. The District Judge, who had heard the case when the plea of guilty was entered, said that he was satisfied that this was an appropriate plea and the application was refused.¹³¹

It was not only in the ‘quick guilty plea’ courts that the LSRC observed defendants being discouraged from having a solicitor. Indeed, in one case in the Youth Court, the defendant was unrepresented and the Chair of the magistrates asked why this was so. It was the prosecutor who intervened and advised that a solicitor was not needed because it was a first offence which could be dealt with only by way of a Referral Order.¹³² This case involved a 12-year-old boy who had been charged with an offence of theft. He pleaded ‘guilty’ and the circumstances of this case, as outlined by the prosecutor, involved his entering a shop and stealing two pairs of jeans. However, it is not only in relation to the plea that solicitors provide legal protections for those before the court. In this case, before passing sentence, the Chair asked him why he had taken the jeans. The boy explained that he had stolen them at the request of a couple of friends. The Chair then asked, *‘Why did they ask you to take the jeans? It’s because you have done it before and are known for it, aren’t you?’* Quickly realising his mistake, the Chair interjected, saying, *‘No, don’t answer that’*.¹³³

The LSRC had observed this Youth Court over four morning sessions and that was the only case where a defendant being dealt with for a non-summary offence was not encouraged to seek legal representation. However, from an informal discussion with the Youth Offending Team (YOT) officer, who regularly sits in the Youth Court, the LSRC learned that this was not an isolated instance. On the contrary, the YOT officer complained that it was becoming commonplace for first-time offenders whose cases were not so serious as to warrant a custodial sentence, to be unrepresented.

The duty solicitor is available in court for unrepresented defendants who seek legal advice. However, there are cases where defendants who need legal advice have not been able

¹³¹ This case was observed on 3 May 2007. The solicitor was overheard when complaining to the court clerk that this was the third time that it had happened with the same District Judge.

¹³² A Referral Order is mandatory in cases involving first-time offenders in the Youth Courts unless their offence is so minor as to warrant an Absolute Discharge or so serious that a custodial sentence would be considered.

¹³³ This case was observed at a Youth Court on 14 August 2008.

to obtain the services of the court's duty solicitor.¹³⁴ This occurred in one case which had been listed in the Adult Court. The case was to be adjourned because an interpreter was unavailable. The defendant did not have a solicitor in court, and when dealing with the matter the magistrates noted that he was aged 17 years so that his case had to be transferred to the Youth Court. It was to be listed in the Youth Court the following day, but in the meantime the magistrates had to decide whether or not to grant bail. Although the defendant had difficulty speaking English, he was able to tell the court that he had arranged accommodation for the next few days. However, without a solicitor he was unable to make a telephone call which could have provided the proof of his accommodation arrangements that the court required. In consequence, he was remanded in custody.¹³⁵

2.4b *Understanding in court*

It is important to determine the extent to which defendants understand what is happening when they are being dealt with by the court. In the present study, just over three-quarters of respondents in the Court Sample said that they knew - or thought they knew - what was happening (Kemp and Balmer, 2008:16).¹³⁶ There were similar findings in the Prison Sample with 73% saying that they knew, or thought they knew, what was happening at court.¹³⁷ To the solicitors, it was not surprising that more people understood what was happening in court because most defendants were represented and it was their solicitors' role to explain matters. As one solicitor remarked, '*People understand their legal rights at court because it is up to us, as practising solicitors, to let them know what is going on, to engage with them, and to advise them*' (LE3).

The defendants who were unrepresented had less understanding of what is happening when compared to those who have a solicitor. Indeed, of those with a solicitor just 5% said they had 'no idea' of what was happening, compared to 12% of respondents who were unrepresented. However, while there was less understanding on the part of those who were

¹³⁴ This situation is discussed above in relation to the experience of defendants who need an interpreter but for whom no arrangements have been made for an interpreter to attend the first hearing.

¹³⁵ This case was observed in an Adult Court on 29 May 2007.

¹³⁶ This is a higher proportion than those interviewed in the police station, where just over two-thirds knew, or thought they knew, what was happening.

¹³⁷ In the Prison Sample, 63% said that they knew, or thought they knew, what was happening in the police station.

not represented, it is interesting to note that just over two-thirds in the Court Sample who were not using a solicitor said that they did not need one.¹³⁸

Most respondents said they understood what was happening in court. However, from the LSRC's observations of court hearings it may be unlikely that defendants, particularly inexperienced defendants and those who are not legally represented, fully understand what is happening. This is because of the complexity of court process and the tendency for legal jargon to be spoken in court. There are two stock phrases used by the court, for example. One is in relation to a mode of trial decision when dealing with 'either-way' offences. The other arises during committal proceedings when the defendant is advised that they have 14 days in which to notify the prosecution and the Crown Court of their witness order requirements.¹³⁹ On both occasions, after defendants have been advised of the issues involved they are asked to indicate that they have understood what has been said. All defendants tend to indicate in the affirmative although the legal issues being dealt with in these two stock phrases are complex and are unlikely to be understood by those who do not have experience of the court process and/or a legal knowledge.

One of the solicitors queried the extent to which defendants understood what was happening in court. As he said:

In the magistrates' courts, things happen very quickly. As a defendant, you have a very short slot of time allocated. People get completely bamboozled by what is happening. Every other participant in the process knows exactly what is they are doing and what is happening. They almost talk in a form of legal shorthand. If you wander into court, even for solicitors who are first qualified, it is bewildering. The defendant walks in to the court and they have no idea of what is happening ... Most of them don't understand the impact of what they are saying and what effect it might have on the tribunal. They also don't understand legal definitions. I've seen unrepresented defendants telling the

¹³⁸ See page 41 of the Interim Report (Kemp and Balmer, 2008). There were similar findings in Souza and Kemp's study (2009) with the majority of unrepresented defendants saying they 'did not need' a solicitor. This was either because the offence was too minor (e.g. drink driving offence), or that they 'did not want to bother with the hassle'.

¹³⁹ It is unlikely that without assistance an unrepresented defendant would know what witnesses are required or how they can notify their requirements to the CPS and the Crown Court.

court what happened and being told they are guilty even though what they have said raises a possible defence (GO5).

The involvement of defence solicitors in court assists not only in examining the strength of the prosecution case and advising as to plea, as solicitors can also help to provide other safeguards. They can make representations for charges to be withdrawn if they believe that an alternative pre-court disposal, such as a caution, is appropriate.¹⁴⁰ Defence solicitors can also provide legal protection by checking the accuracy of administrative records. In one adult case observed by the LSRC, the defendant had had a conviction recorded in error on the Police National Computer, which led to his being remanded in custody for a month. As soon as his solicitor brought this mistake to the attention of the court, he was released on bail.¹⁴¹ In a different case, the defendant had pleaded guilty to driving whilst disqualified, which had occurred towards the end of the period of disqualification. He was fortunate to have a solicitor who queried the period of disqualification by requesting an Extract from the court file. This confirmed that an interim order had been imposed and that the disqualification had expired by the time of his arrest. Accordingly, the magistrates allowed the plea of 'guilty' to be removed from the court record.¹⁴²

While most defendants are represented in court, it would be useful to investigate the experience of those who are unrepresented. In addition, while the 'interests of justice' test and the means test are designed to limit access to legal aid in court, it would be of interest to explore the extent to which potentially eligible applicants are either being discouraged or simply unable to access the services of a defence solicitor. It would also be useful to investigate the extent to which people understand what is happening to them in court.

Recommendations

2.1 The extent to which defendants are legally-represented in court requires analysis of a large sample of court cases. While the 'interests of justice' test and the means test are intended to target finite resources at those who most need them, it is important to ensure that

¹⁴⁰ This can be particularly important in Youth Court. Indeed, in Kemp's study (2008) of 166 Youth Court cases, 22% of the cases were withdrawn after defence representations had been accepted for recording a reprimand or warning (similar to an adult caution) instead.

¹⁴¹ This case was observed on 30 March 2007.

¹⁴² This case was observed on 5 June 2007.

those who are eligible, particularly the vulnerable, are able to access publicly funded legal representation. Analysis of court cases would also help to identify the trajectory and duration of cases.

2.2 Research could usefully examine whether an emphasis on dealing with minor cases quickly in court is changing attitudes towards the positive involvement of defence solicitors. It would also be useful for research to explore whether the involvement of solicitors early on in the charging process could help to avoid unnecessary adjournments at the first court hearing.

2.3 Further research is required from the users' perspective. It is important to examine whether unrepresented defendants understand the court process and the extent to which they are able to make informed decisions, particularly in relation to having legal representation and also as to their plea.

Section Three: Examining ‘client choice’ of a solicitor

3.1 Introduction

The clients’ freedom to choose their own solicitor has been upheld as a right in the delivery of criminal defence services for over twenty years. Recent legal aid reforms have been criticised for effectively undermining this right (see Bridges and Cape, 2008). However, the concept of ‘client choice’ is not straightforward. On the one hand, the right of clients to choose their own independent solicitor is intended to give them trust and confidence in the criminal process. On the other hand, when clients are being dealt with in a complex criminal justice system, questions arise about the extent to which they are able to make informed decisions when choosing and using a solicitor.

In this section of the report the concept of ‘client choice’ is examined from the perspectives both of users and of defence solicitors. Users were asked what importance they placed on freedom to choose a solicitor. They were also asked what factors were important to them when choosing and using a solicitor. While users generally said that they wanted a ‘good solicitor’, they expressed concern lest some solicitors, particularly police duty solicitors, might not be independent. Defence solicitors themselves said that allowing people to choose their own solicitor was a fundamental right. In addition, it was said that allowing ‘client choice’ of a solicitor helped to enhance the quality of criminal legal services. With only a few users commenting on the importance of ethnicity when choosing a solicitor, solicitors’ comments on this issue are explored. In the final part of this section of the report, implications for criminal legal aid reform are examined, particularly in relation to CDS Direct, a police station telephone-only legal advice line that has been criticised by some academics and defence solicitors for restricting clients’ rights to choose their own solicitor (Bridges and Cape, 2008).

3.2 Users’ perspectives on ‘client choice’ and criminal defence services

Users in the criminal justice system have often been portrayed as passive spectators who lack understanding of the criminal process and whose wishes and expectations are then managed by their defence solicitor (Bottoms and McLean, 1976; Ericson and Barneck, 1982; McConville et al., 1994). Nevertheless, it was evident from the preliminary analyses that

most survey respondents valued the right to choose their own solicitor (Kemp and Balmer, 2008:35). Indeed, in the Court Sample, 85% said that having a choice of a solicitor was either ‘very’ or ‘fairly’ important.¹⁴³ In the Prison Sample, almost all respondents (97%) said that having a choice of solicitor was important. Survey respondents were asked two open-ended questions about their choice and use of a solicitor. The first question asked what factors were important when choosing a solicitor. The second question asked respondents why they had rated their solicitor as ‘good’, ‘okay/average’ or ‘not good’.

3.2a *Important factors when choosing a solicitor*

While some respondents mentioned just one factor that was important when choosing a solicitor, others commented on two, three or more factors. Their responses were broken down into five main categories: ‘good’, ‘outcome’, ‘relationship’, ‘recommendation’ and ‘other’.¹⁴⁴ In the main, however, the responses can be separated into two key categories of wanting a ‘good solicitor’ and/or a ‘good relationship’. The ‘good solicitor’ is someone who gives ‘good advice’, is ‘experienced’, ‘knowledgeable’, ‘reputable’, and ‘knows what they are doing’. Also included in the ‘good solicitor’ definition are solicitors who achieve good ‘outcomes’, that is, they are solicitors who will ‘get me off’, ‘get me bail’ or to ‘keep me out of prison’. Similarly, when respondents said that having a ‘recommendation’ was important, this meant being recommended to a ‘good solicitor’.

In the second key category - namely, a ‘good relationship’ - many respondents place importance on being able to communicate well with their solicitor and for the solicitor to possess good interpersonal skills. Factors valued by clients include the need for the solicitor to be ‘friendly’ and ‘understanding’. They also prefer a solicitor who is ‘sympathetic’, who ‘listens’, and who ‘explains’ what is happening. ‘Trust’ and ‘honesty’ were also identified as important attributes of the relationship between solicitor and client.

As we show by the following quotations, respondents wanted both a ‘good solicitor’ and a ‘good relationship’ with their solicitor:

¹⁴³ Ninety-six per cent of those using their own solicitor, 89% of those using the duty solicitor, and 77% of those who did not have a solicitor said that having a choice was important. In the Police Station Sample, 88% of the respondents said that having a choice of solicitor was important.

¹⁴⁴ See Kemp and Balmer, 2008:37.

He must be good and willing to help you all he can. You need somebody you feel comfortable with and someone you can trust.

His advice is important. His knowledge of what goes on in the courts. His friendliness, helpfulness and professionalism are also important.

*You need to get along with your solicitor and be honest with one another. It is important that they do not judge me. I also think they should be quicker at getting to the police station.*¹⁴⁵

Defence solicitors were also asked what factors they felt were important to clients when choosing a solicitor. From the outset, the solicitors were keen to distinguish between the strategies of two types of clients: those who had been arrested for the first or second time, and those who were more experienced in the criminal justice system. The difference was summarised by one solicitor:

Some people are in a police station for the first time after years of a blameless life and they will tend to use the duty solicitor. They are then likely to stay with that solicitor because it is a familiar face. I think that over time established clients get to realise who gets good results and they will be looking at the end result. They also like the continuity of the same solicitor (RI2).

Solicitors usually raised the same issues as clients when asked to identify factors that were important in choosing a solicitor. That is, they said clients wanted a good solicitor, someone who could ‘get them off’ and who was able to communicate well with them. For solicitors, the ability to communicate well with their clients was important as they have to take instructions, often in stressful circumstances. Indeed, solicitors commented on needing a good rapport with their client so that they could obtain sufficient information in order to advise them properly. As one solicitor put it:

¹⁴⁵ As highlighted in this comment, some respondents also commented on the need for an ‘efficient’ solicitor.

We require our clients to tell us the most intimate of details. They sometimes have to tell us things they wouldn't even tell their partner. If the trust isn't there, then they won't come forward with the information which is necessary for us to represent them (GR1).

There have been similar findings where the client's evaluation of their solicitor was not simply based on the outcome of their case. Indeed, in the study of legally-aided clients and their solicitors by Sommerlad and Wall (1999), it was found that clients judged their solicitors not only on their legal skills but also on a variety of interpersonal criteria. In their evaluation of the Scottish Public Defence Solicitors' Office pilot project, Tata et al. (2004) found that clients made judgements about their solicitors primarily on the basis on an assessment of how good they were at 'listening to them', 'believing in them', 'explaining the process', 'being accessible' and 'standing up' for them.

3.2b *Important factors when using a solicitor*

Respondents were asked if they rated their solicitor as 'good', 'okay/average', or 'not good'. We noted in the Interim Report that very few respondents said their solicitor was 'not good'.¹⁴⁶ Indeed, only 2% of those using their own solicitor and 7% of those using the duty solicitor said they were 'not good'. In the Prison Sample, it is perhaps not surprising that more respondents were dissatisfied with their solicitor. However, at 28% it is of concern that so many women who were using their own solicitor in the Prison Sample rated them as 'not good'. Of those using the duty solicitor, one-third said they were 'not good'. Overall, in the three samples, 68% had rated their solicitor as 'good', 24% as 'okay/average' and 8% as 'not good'.

In order to ascertain what clients expected when using a solicitor, the LSRC asked them to comment on why they had rated their solicitor as 'good', 'okay/average' or 'not good'. Those who rated their solicitor as 'good' or 'okay/average' responded in much the same way as they had to the question about what factors were important to them when choosing a solicitor. That is, they wanted a 'good solicitor' and/or a 'good relationship'.

¹⁴⁶ See Kemp and Balmer, 2008:48.

But what did clients mean when they described their solicitor as ‘not good’? While more women prisoners rated their solicitor as ‘not good’, it was evident from many comments that this was because they were dissatisfied with the outcome of their case. The following comments were made by members of the Prison Sample:¹⁴⁷

He was not very helpful. I was sentenced for something I hadn't done.

They filled me with false hopes about what the sentence would be. They were not very professional.

They gave me false information by saying if I pleaded guilty I would not go to prison. They did not present the truth.

I ended up here [in prison] so that means they could have been better.

Several respondents emphasised the need for their solicitor to be independent of the police and/or the prosecution agencies. There were others who complained about their solicitor’s lack of independence. Such misconceptions are perhaps not surprising, as we noted in the Interim Report that almost a quarter of respondents in the Court Sample assumed that the duty solicitor was employed directly by the police (Kemp and Balmer, 2008:44). However, such misconceptions have the potential to undermine people’s trust and confidence in the criminal process and so this important issue is further explored in the next sub-section.

3.2c Perceptions over the lack of independence of defence solicitors

Several respondents placed importance on trust and confidence in their solicitor. Those who lacked trust or confidence in their solicitor were concerned about their independence from the police:

I need to trust [my solicitor]. You need to know they are not working with the police.

¹⁴⁷ A number of negative comments in the Prison Sample were made about the perceived lack of independence of legal advisers. These comments are examined further below.

They need to know how the police work and not be afraid to stand up to them. You have to feel that they are there for you and doing their best to help you. You don't want them complying with the police.

They need to act confidentially and work to the best of their ability for me. You don't want them to have any collaboration with the police which could jeopardise or influence the outcome.

They also expressed concern about the independence of duty solicitors:

I don't trust the duty solicitor as they could be the police in disguise. The duty can be there to catch me out on the charges.

I always use my own solicitor as the duty is as bad as the police. The duty works for the police.

You need to know the history of the solicitor. They need to be truly independent and not connected to the police or the courts.

I need a solicitor who is independent and impartial. They have to be a hundred per cent on your side.

The duty solicitors collaborate with the police even though they should act confidentially.

In explaining why they had rated their solicitor as 'not good', some of the respondents raised concerns about their solicitor's perceived lack of independence:

They work for the police. They try to get information from me so they can tell the police. I don't believe in them.

I had only seen the solicitor for the first time and I didn't know what he would be like. He was siding with the CPS and wasn't on my side.

I had the duty solicitor and they try to scare you. They give poor advice compared to my own solicitor. They tell the police what you have said.

He was totally incompetent and did not advise me at all. He was friendly with the police so there was possible collaboration between them.

When he came to the police station he was too friendly with the police and not neutral enough.

Respondents were asked questions about the independence of defence solicitors. They were presented with five different statements, to which they were asked to comment if the statement was ‘true’, ‘false’ or they were ‘not sure’.¹⁴⁸ As shown in Figure 22 in the Interim Report (Kemp and Balmer, 2008:44), 23% of the respondents in the Court Sample thought the statement that the duty solicitor was employed directly by the police was true, 41% thought it was false and the remaining 36% were ‘not sure’.¹⁴⁹ In the Prison Sample, 40% of the respondents said that it was true that the duty solicitor was employed directly by the police, 29% said it was false, and 31% were not sure. A smaller percentage of the all-female Prison Sample than of the mixed Courts Sample believed that the duty solicitor was independent of the police, namely 37% versus 49%.¹⁵⁰

As shown in Table 3 below, there were differences found in the percentage of respondents who thought the duty solicitor was employed directly by the police when based on their previous experience of the criminal process. In particular, it was those who had experience of the criminal process who were more likely to agree that ‘the duty solicitor was employed directly by the police’.

¹⁴⁸ The five statements were ‘the duty solicitor is employed directly by the police’, ‘the duty solicitor is employed directly by the government’, ‘the duty solicitor is employed directly by the courts’, ‘the duty solicitor is independent’, and ‘the duty solicitor is employed on a rota with a number of solicitors’.

¹⁴⁹ In the Police Station Sample, 24% of the respondents thought the duty solicitor was employed directly by the police.

¹⁵⁰ In the Prison Sample 33% said this statement was false, compared to 19% in the Court Sample.

Table 3: The percentage of respondents commenting on whether the police station duty solicitor was employed directly by the police, by previous convictions

Employed by the police	<i>Court Sample</i>		<i>Prison Sample</i>	
	No Convictions %	Convictions %	No convictions %	Convictions %
True	21	24	35	46
False	34	45	29	30

Criminal defence solicitors are independent of the police and prosecution agencies, so it is perhaps surprising to find that such misconceptions over the lack of independence are more likely to be expressed by respondents who are experienced in the criminal justice system. On the other hand, those experienced in the criminal process might be more critical of the quality of service provided by police station duty solicitors, which could call into question their lack of independence when compared to that provided by a suspect’s own nominated solicitor. While research had previously found that duty solicitors provided a poor service when compared to that provided by nominated solicitors (see Sanders, Young and Burton, 2010), the introduction of an accreditation scheme has subsequently helped to improve the quality of legal advice in police stations (Bridges and Choongh, 1998).¹⁵¹

It is perhaps not surprising that some respondents in the Prison Sample felt let down by their legal adviser as they received a custodial sentence. However, they are likely to perceive the criminal process as unfair if, having used the police station duty solicitor, they are subsequently advised by fellow prisoners that they used the ‘police solicitor’. Indeed, it is likely to be distressing for people who are sent to prison if they believe that their case was compromised by the lack of independence on the part of their solicitor. These findings suggest that more needs to be done to educate the public that defence solicitors, including police station duty solicitors, are formally independent of the police and the prosecution agencies. With the introduction of fixed fees for police station legal advice in 2008, it would also be useful to re-examine the quality of legal advice provided by different advisers in police stations.

¹⁵¹ The accreditation scheme applies to all legal advisers and this has helped to improve the quality of criminal defence services provided in police stations (Bridges and Choongh, 1998).

It was also found that ethnicity predicted respondents' perceptions of the independence of duty solicitors. Set out in Table 4 are differences in responses from BME and White British respondents.

Table 4: The percentage of respondents commenting on whether the police station duty solicitor was employed directly by the police, by ethnicity

Employed by the police	<i>Court Sample</i>		<i>Prison Sample</i>	
	BME %	White British %	BME %	White British %
True	26	21	51	33
False	35	44	20	35

While BME respondents were more likely to perceive the duty solicitor as not being independent of the police, it is interesting that more BME respondents reported that they had used the duty solicitor. In the Police Station Sample, for example, 45% of BME respondents had chosen the duty solicitor compared to 30% of White British respondents. In the Court Sample, 44% of BME respondents reported using a duty solicitor in the police station compared to 37% of White British respondents.¹⁵² While half of respondents in the Prison Sample reported using the duty solicitor, this was higher for BME respondents at 64% compared to 43% of White British respondents.

Given the complexity of the criminal justice system in general, and the organisation of criminal defence services in particular, it is unsurprising that some people misunderstand the independence of defence solicitors, particularly in relation to the duty solicitors. Previous research has also found that criminal clients lack understanding of what is happening in the criminal process and are essentially passive participants in the criminal justice system (Bottoms and McClean, 1976; McConville et al, 1994). It is evident from the comments of several respondents in this study, however, that while they might lack understanding of the criminal process, they consider it important to have confidence and trust in their solicitor.

¹⁵² In addition, 54% of those whose first language was not English said they used the duty solicitor compared to 40% of others (see Kemp and Balmer, 2008:29).

Defence solicitors also acknowledged that there was a common misconception among suspects in the police station over the lack of independence of duty solicitors. One solicitor, for example, told us, *'Because a lot of people perceive that the duty solicitor is the police solicitor they won't ask for the duty solicitor but wait until they are released to get someone they know is neutral and independent'* (DA2). Some solicitors added that they would try to reassure people that the duty solicitor was independent of the police. As one explained:

If you are the duty solicitor, one of the barriers you have got to overcome is reassuring your client that you don't have any affiliation to the police and that you are not there for the police. That's a huge problem. The police are perceived as the enemy and they say that they will arrange a solicitor. Straightaway there is then a distrust of the duty solicitor ... So part of the problem is that the police are offering the service so there's a general view that they are part of the police (ER5).

The final point is of interest because it suggests that misperceptions of the duty solicitor as a 'police solicitor' are, in part, due to the police responsibility for advising suspects of their legal rights. This might lead to some confusion if suspects believe that the duty solicitor 'arranged' by the police is actually a 'police solicitor'.

Despite the assumption that offenders' evaluation of their treatment in the criminal process depended on the sentence they received, we now have extensive evidence suggesting that the key factor is the fairness of the processes with respect to both procedural and distributive justice (see Casper, Tyler and Fisher, 1988 and Tyler and Huo, 2002, Tyler, 2003).¹⁵³ Where the client has 'trust and confidence' in their solicitor, therefore, it is likely to encourage them to experience the process as being fair and thus to be more accepting of the legitimacy of the criminal process. On the other hand, without such trust and confidence some clients question the independence of their solicitor which, for them, can call into

¹⁵³ Concepts of procedural justice (which focuses on the processes involved) and distributive justice (which concentrates on the sentence) are important in underpinning the legitimacy of the criminal justice system. After examining police officers' and judges' decision-making in America, Tyler and Huo (2002) argued that the public were more likely to accept the decisions of legal authorities over the outcome of their case, even if those decisions were unfavourable, so long as they trusted the motives of the authorities and experienced the procedure as fair.

question the authority and legitimacy of the criminal justice system.¹⁵⁴ The LSRC would be interested in pursuing the implications of allowing ‘client choice’ of solicitor in encouraging people’s confidence and trust, not only in their legal adviser but also in the criminal process as a whole.

3.3 Defence solicitors’ views on the importance of ‘client choice’

All of the defence solicitors whom we interviewed believed that the client’s right to choose their solicitor was very important. Among other things, they said that ‘client choice’ was ‘absolutely vital’, ‘crucial’, a ‘fundamental right’, and the ‘cornerstone of a civilised society’. The following two comments help to illustrate the importance solicitors attach to allowing ‘client choice’ of a solicitor:

I think choice is vital so far as criminal cases are concerned. If you have the right to a fair trial then I think you have the right to an independent solicitor of your own choice (BI1).

Allowing clients the right to choose their own solicitor is very important. This is because people need to have faith in the system. If you don’t have that, then the system breaks down (RI2).

The reason why choice was so important was further expounded upon by another:

Allowing clients the right to choose their solicitor is important – where would they be without it? If people have a solicitor foisted on them how are they expected to gain trust and confidence in their abilities? How do they expect the solicitor to be motivated? You can’t get this unless it’s a matter of choice. It would be a bit like an arranged marriage which someone doesn’t want (GR1).

¹⁵⁴ This was found to be the case in Scotland when the Public Defence Solicitors’ Office (PDSO) was first piloted and some defendants in court were denied their choice of a solicitor. Having a solicitor effectively ‘forced’ on them had the potential to undermine the client’s trust not only in their solicitor but also in the criminal process (Tata et al., 2004).

Many respondents spoke of the need to have confidence and trust in their solicitor and this was endorsed by the defence solicitors, one of whom told us that:

It comes down to confidence. If you have someone who is appointed to you then you won't know whether they will do the best job for you because you haven't chosen them. What confidence would you have that they would do the job to the best of their ability? (JA4).

Defence solicitors believed that the solicitor and client relationship depended on a single legal adviser for continuity. From the early 1990s, however, McConville et al. (1994) found a 'discontinuity of representation' as some defence solicitors, particularly in the urban conurbations, managed a high volume of cases, each of which involved more than one legal adviser. Thus it was found that the profession's rhetoric of 'continuous representation' was not always delivered in practice. In the present study, most of the respondents using their own solicitor said it was important to them to see the same solicitor for the duration of their case.¹⁵⁵ However, that was not always possible. Only one in three of the respondents in the Police Station Sample and one in two of those in the Court sample said that they had spoken to the same solicitor at successive consultations.¹⁵⁶ At 57%, a higher percentage of respondents in the Prison Sample said they had used the same solicitor, but is unlikely that so many clients would have been seen by a single legal adviser from the time of their arrest at the police station and for the duration of the case. Nevertheless, it is interesting that most respondents in the Prison Sample felt that they had been seen by a single legal adviser and thus that there had been continuity in their relationship with their solicitor.

For some solicitors, the importance of the 'solicitor-and-client' relationship meant that if trust had broken down between them, then it was preferable that their clients could change to another solicitor. As one solicitor put it,

¹⁵⁵ As we noted in the Interim Report, 66% of the Police Station Sample and 88% of the Court Sample said that having the same solicitor was important (Kemp and Balmer, 2008:47). In the Prison Sample, 90% said that having the same solicitor was important.

¹⁵⁶ See Kemp and Balmer, 2008:47.

It is a fundamental right of any individual to choose who he wants to represent them. If the client is uncomfortable with the representation then I think they should be able to move to a solicitor they feel comfortable with (CH6).

Another solicitor evidently agreed with this comment when he said,

If we have clients who are not happy with us we will never object to them transferring to another solicitor. If your client has no trust in you then it is better that he goes elsewhere (HA3).

Solicitors said that the client's right to choose their own solicitor enhanced the quality of criminal defence services.

3.3a. 'Client choice' - helping to facilitate a quality service?

In the opinion of defence solicitors, a client's right to choose their solicitor helped to improve the quality of the service by encouraging competition between local firms. Such competition meant that solicitors had to work hard, not only in order to retain existing clients but also to attract new ones through recommendations. As one solicitor put it, '*We get good recommendations because we are committed*' (AD2). Another solicitor commented on the importance of allowing client choice in enhancing quality:

We are in an age where choice is being upheld as a guarantee of quality. You get this with GPs. One thing which keeps this firm going is that clients can still choose us and know that we will make a difference. We have built up a business based on that. We have also built up information systems on clients so that it is easier for us to work efficiently and effectively by spending less time on the cases (GO5).

Solicitors also spoke of the efficiencies that were to be gained by retaining their own clients. Instead of having to take full details every time a client was arrested, for example, solicitors could draw on their existing knowledge and the details contained in their case-files. This was especially helpful in complex cases, where previous pre-sentence, medical and/or welfare reports were often on file. Solicitors also commented on the importance of personal relationships that they could develop with clients. This was important because clients were

often anxious and needed reassurance, not least those who were mentally ill. A solicitor told us that he had a client with severe mental health problems, and where it had previously required one-and-a-half-hours to take instructions it now took him only ten minutes. This solicitor also told us how he was able to avoid an extremely difficult situation because of the relationship he had built up with his client:

You can have some clients where if you haven't got their trust it can be dangerous. I had one client who brought razor blades into court and he threatened to slash me if I upset him. I could deal with him but if he had someone new then it could be a real problem both for him and the solicitor. That is an extreme case, but with most clients it is about trust. They will often be dealing with a solicitor they know quite well and we will also know them. We can then access information from their file, from reports and other workers in the firm. Over time we build up a bank of knowledge (DE2).

While allowing that 'client choice' of a solicitor was extremely important, solicitors also suggested that clients were not always in a position to assess whether their solicitor was good or not good. Although one solicitor who spoke to us recognised that clients could be manipulated, he felt that they were sufficiently discerning about the quality of service provided:

There are some solicitors who can 'talk the talk'. That is, they can say the right words in order to impress their clients. Having said that you can't tell clients you can 'get them off' or 'sort it out' without delivering. When you go into court you have to do your best to get them bail. You have to have success and get good results. You also have to show the client that you care. They will soon find out if you are not interested. I think the important thing is to have the knowledge and to be really committed and really care about your client. If you haven't got that, then I would say get out of this job (AD2).

For two colleagues, however, the concept of allowing 'client choice' was so important that it was preferable that clients were permitted to exercise their right to choose a poor solicitor. One solicitor, for instance, told us, '*I think it is important that people have choice. That isn't to say that I would necessarily agree with that choice. If they choose Mr X, who I know to be a charlatan and an awful lawyer, instead of me, whom I know to be competent*

and okay, that is their privilege' (MA6). Such a statement helps to highlight some of the ambiguities involved in the concept of 'client choice'. If, as we noted above, most people are not in a position to make an informed choice of solicitor, it seems inappropriate that freedom of choice allows them to select a poor one.¹⁵⁷ Instead of making an informed decision, however, we noted in the Interim Report that the most respondents said that their initial choice of a solicitor had been based on a personal recommendation (Kemp and Balmer, 2008:47).¹⁵⁸

While all the solicitors in this study strongly supported people's right to choose their own solicitor, such a commitment can be undermined if solicitors seek to reject certain clients, particularly the vulnerable whose cases can be complex and time-consuming. The potential for such a conflict between the beliefs and actions of defence solicitors is explored further in the next section when the introduction of fixed fees for legal advice at the police station is examined.

3.3b *Ethnicity and choosing and using a solicitor*

Users were asked to say whether they thought issues of ethnicity were important when choosing a solicitor. When asked what factors were important to them when choosing a solicitor, only seven out of 1,142 respondents referred to ethnicity. The following two comments highlight the kind of issues raised:

I would prefer a Black British solicitor. Someone who is Caribbean, the same ethnic background as me.

I want someone who understands my ethnic background [Hinduism] and uses words I can understand. I don't want waffle.

¹⁵⁷ As noted in the Introduction, the LSC has a policy since 2001 of contracting only with criminal defence firms meeting certain quality requirements.

¹⁵⁸ The importance of people relying on recommendations when choosing a solicitor was noted in McConville et al.'s (1994) study of criminal defence solicitors in the early 1990s. At that time, they found that it was standard at the outset of a career for defence solicitors to gather new clients through the duty solicitor scheme. Once they had started, their principal source of clients was through recommendations from 'family and friends' and from repeat clients.

Users were also asked if their solicitor had spoken to them in a language other than English. Of 36 people who answered affirmatively, only four had a language other than English as their first language.¹⁵⁹ In the Prison Sample, 13 respondents said that English was not their first language and five reported that their solicitor had spoken to them in a language other than English. When responding to the two open-ended questions regarding the choice and use of a solicitor, only three users in total referred to the importance of language. Their comments included:

I want someone from the same ethnic background as me. I sometimes need someone to interpret for me.

I want someone to stick up for me. They also have to listen to me and speak in French.

Although few survey respondents commented on the importance of ethnicity or language in the choice of solicitor, we have referred earlier to what appears to be a trend in some localities for BME respondents to choose BME solicitors.¹⁶⁰ This might suggest that culture is important to some respondents when choosing and using a solicitor. It is important to reflect, however, that only those who were able to communicate in English were interviewed as part of this study, which excludes those for whom language can be an important barrier in accessing legal advice.¹⁶¹ Further research needs to ascertain the views of users who need to rely on interpreters in the criminal process. Lacking their views at first hand, the LSRC asked defence solicitors about this important issue.

There was a mixed response from White solicitors when asked if ethnicity was important in relation to ‘client choice’ of a solicitor. As one solicitor put it,

I don't think ethnicity is particularly important. If you are good enough and treat people in the right way it doesn't matter whether they are White or Black, young or old, this or

¹⁵⁹ As seventeen of these respondents were interviewed in Cardiff, it might be inferred that their solicitors spoke with them in Welsh. See Kemp and Balmer, 2008:39.

¹⁶⁰ See also Kemp and Balmer (2008:39).

¹⁶¹ Forty-one people in the Police Station Sample and 69 in the Court Sample were approached but could not be interviewed because they needed the services of an interpreter. There were no respondents in the Prison Sample who could not be interviewed because of language difficulties because the Prison Service selected for interview only those who spoke English.

that. If you are good at what you do, treat your clients well, and you are reliable and trustworthy then I think you can do a good job for anybody (ED6).

On the other hand, there were other White solicitors who thought that the ethnic background of solicitors was important to clients. As someone who took this view remarked,

We have a young Black solicitor and clients really like him. They can definitely identify with him rather than with me. So ethnicity does play a part. I wish we had some more solicitors with different backgrounds but there aren't that many around (MI5).

Yet others thought that ethnicity did not matter in their own practice while acknowledging that it might be an important issue for other firms. As a member of this group told us,

I don't think it makes a difference in my practice. We have White and Black solicitors and we also have a mix of clients. There are BME firms in [this city], I can think of one in particular, who have Afro-Caribbean solicitors and the balance of their clients tends to be heavily Black. I don't think ethnicity is important but if you look at the client base then you can see that it is obviously something which is important to those clients (DE2).

In addition to ethnicity, some solicitors observed that language might be important to clients when choosing a solicitor. Indeed, several defence solicitors said that being able to speak different languages was an advantage for some firms when attracting clients. Five of the White solicitors said they had members of staff who could speak to clients in their own languages. One Birmingham solicitor had a trainee who spoke Urdu, while a London firm in a locality with a significant Turkish Cypriot community had Turkish-speaking lawyers.

The four Asian solicitors who took part in the present study had people in the firm who could speak other languages and this was important to them in attracting clients. The benefit of being able to communicate with clients in their own language is summarised in the following comment:

We get a number of clients who will want to come to us because we can speak their language and we can explain things to them without the use of an interpreter. I speak

Punjabi and Urdu and I have some clients who can't speak English at all ... You do get good work because you speak the language and you understand a lot of the issues they come out with as well because there are a lot of cultural issues, one would argue, domestic issues for example and so on and so on. Therefore you will understand the cultural issues more so that will attract clients to a certain extent (KE4).

Firms under BME management have appeared quite recently as part of the organisation of criminal defence services. Indeed, McConville et al. (1994) documented the early involvement of BME solicitors, particularly in the inner-city areas. At that time, the legal world was dominated by White middle-class lawyers, but inner-city firms were beginning to employ Black and Asian solicitors and clerks in order to extend their client base. When offices were set up in predominantly Black or Asian communities, it was found that legal staff who could speak languages such as Urdu and Gujarati were engaging with a previously-untapped source of work. It was by establishing links in those communities that BME solicitors were able to set up as partners in their own practices.

Both the BME interviewees and also the representatives of the Black Solicitors' Network and the Society for Asian Lawyers, feared that the legal aid reforms could impact disproportionately on BME-managed firms. In particular, they felt that the progress made during recent years in increasing both the number and status of BME solicitors could be undermined. A representative from the BSN explained that a number of BME solicitors had set up their own practices because they were not being offered partnerships in other firms. By setting up their own firms, BME solicitors were then acting as partners in local firms. However, with particular reference to the changes in London, he pointed out:

With some of the smaller firms closing, the older-established firms are taking on BME solicitors at partnership level but the younger ones aren't coming through. So you have the same problem and it is like we are moving backwards. I think that in order to protect BME firms the Government needs to provide support for smaller businesses (MP).

While the previous administration's proposals for Best Value Tendering were withdrawn in December 2009, it is useful to explore in the next section solicitors' comments on the potential impact of new procurement arrangements on BME-managed firms.

3.4 'Client choice' and reform of criminal legal aid

Solicitors complained, and some were clearly annoyed, that the recent introduction of CDS Direct, the police station telephone-only legal advice line, had denied some clients the right to choose their own solicitor.¹⁶² As one solicitor told us, *'To me it is completely wrong. It is a restriction on the right of the client to choose their solicitor'* (ER5). In order to get around the scheme, this solicitor said he was prepared to provide *pro bono* services. He said, *'We will give advice to clients even if CDS Direct are involved even though we won't get paid. You do it as a loss-leader in the hope of keeping the client, because you need every client you can get'* (ER5). Solicitors were also concerned that CDS Direct interfered in the relationship between solicitor and client:

The purpose of CDS Direct is to take away the connection between the client and their solicitor. If my client wants to see a lawyer, we want to deal with them as soon as they have been arrested (AD2).

Another solicitor was concerned that the referral of suspects to CDS Direct sends a message to their clients that they are no longer entitled to have a solicitor of their choice. As she explained,

I do occasionally get clients who have been locked up and they go to court with a different solicitor, perhaps the duty solicitor. I ask them why they didn't instruct us and they will say that they didn't get to speak to us at the police station. Indirectly, therefore, this might impact on client choice. If they ask for us, but they are then told they are getting CDS Direct, they might think they can't have us (PA4).

Not all solicitors were critical of CDS Direct, however. Some solicitors said that the service had not really impacted on their work. In addition, a few solicitors commented on the benefits of CDS Direct dealing with cases of excess alcohol, particularly in the early hours of the morning. As one solicitor succinctly put it:

¹⁶² CDS Direct is a police station telephone-only legal advice service which was piloted by the LSC in 2005 and rolled out nationally in January 2008. Suspects referred to CDS Direct include those who have been detained for non-imprisonable offences, those arrested for failing to appear in court, those detained in relation to a breach of bail conditions, and those arrested on suspicion of driving with excess alcohol.

CDS Direct works all right. It is sometimes better because it stops us getting woken up in the night with cases they can deal with, such as drink-driving (MI1).

Support for CDS Direct has been voiced by two leading criminal defence lawyers. After having examined a sample of nine CDS Direct cases, Keogh and Edwards said they were impressed. While recognising the small number of cases, Edwards commented cautiously on the quality of the scheme when saying:

If they are a true sample, they are truly impressive and working at a standard far above anything that private practice would, or indeed for the fee, could do'. In addition, he said, 'On the basis of this sample, I would be strongly opposed to the return of this work to mainstream practice (reported in Legal Action, 2009).

By utilising advances in technology, therefore, it seems that CDS Direct is providing a cost-effective way of extending access to legal advice for those being dealt with in the police station for minor matters. In addition, while some solicitors were initially hostile to CDS Direct because they were denied access to their own clients, it seems that over time some of them have come to accept the role that the new scheme plays in the delivery of criminal defence solicitors' advice.¹⁶³

However, academics have been critical of CDS Direct for denying clients the right to choose their own solicitor, restricting access to face-to-face legal advice and for the lack of privacy often surrounding legal advice provided over the telephone (see Bridges and Cape, 2008; Pattenden and Skinns, 2010). While some solicitors seem to be content with CDS Direct providing telephone-only legal advice for very minor matters, academics are concerned with the potential of the scheme to expand access to legal advice for suspects at the police station (Bridges and Cape, 2010; Pattenden and Skinns, 2010). The critical issue for both defence solicitors and academics, therefore, is the scheme's potential to extend telephone-only legal advice to people being dealt with for more serious offences.

¹⁶³ Solicitors also commented on Best Value Tendering (BVT) as also having the potential to restrict client choice. Solicitors' views on BVT are explored further in the next section.

While the effect of CDS Direct is to deny suspects being dealt with for minor matters the right to choose their own publicly funded solicitor, questions arise about the extent to which telephone-only legal advice could be used more widely in relation to criminal offences. It is not known in what proportion of cases telephone-only legal advice is provided, although it seems that the majority of cases involve face-to-face advice. In the present study, for instance, of 375 respondents in the Court Sample who said they had requested and received legal advice, 86% said they had received face-to-face advice.¹⁶⁴ It is perhaps not surprising that the majority of cases involve face-to-face legal advice as there are limitations when providing telephone-only legal advice in police stations. As noted in Section One, a major drawback in police stations is the lack of facilities in which to provide a confidential telephone conversation between the suspect and their legal adviser (see also Pattenden and Skinns, 2010). When advising over the telephone, legal advisers are also limited as they are not able to examine the strength of the prosecution case. An investigation into police station legal advice, therefore, could usefully examine what facilities are required for providing confidential telephone-only legal advice and the extent to which such advice could be effectively deployed.

It has been interesting to investigate the concept of ‘client choice’ of solicitor. One of the most important issues that we have identified is the extent to which having a choice of a solicitor can help to increase people’s trust and confidence, not only in their legal adviser but also in the criminal process. As highlighted in this study, allowing people the right to choose their own solicitor has influenced the way in which solicitors’ firms market themselves. An important question for further enquiry will be the extent to which trust and confidence depend on the user’s right to choose their own solicitor, or upon other factors such as the competency of the legal adviser.

¹⁶⁴ However, when the data-set was split by area we found wide variations in the use of telephone-only advice (see Kemp and Balmer, 2008:13). In the Prison Sample of 119 respondents who commented on receiving legal advice in the police station, it is perhaps not surprising that only 3% said they received telephone-only advice only as these respondents were being dealt with for offences which led to a sentence of imprisonment. When examining individual police electronic custody records, the LSRC will report on how the legal advice was received. In Skinns’ study of police custody records in two police stations it was found overall that 81.3% of suspects received face-to-face advice (28.6% both telephone and face-to-face advice and 52.7% face-to-face advice only) and 18.7% of legal advice was telephone only advice (see Pattenden and Skinns, 2010).

Recommendations

3.1 Research should explore the extent to which having the choice of a solicitor helps to encourage people to have trust and confidence, not only in their solicitor but also in the wider criminal process.

3.2 There were concerns raised by users in this study over the perceived lack of independence of some solicitors, particularly police duty solicitors. It is important that clients have trust and confidence in their legal adviser. Research could usefully examine from the users' perspective why misconceptions might arise over the independence of duty solicitors and how these can be addressed.

3.3 It would be useful for research to explore the contention put forward by solicitors that allowing people the right to choose their own solicitor helps to increase quality by encouraging local competition between solicitors' firms.

3.4 This survey of users' in the criminal process has helped to highlight people whose first language is not English as being particularly vulnerable. However, with the survey including only those who can speak English, very little is known about the experience of those who rely on the services of an interpreter. It would be informative if the survey could be carried out with a sample of people who require an interpreter in the criminal process.

Section Four: Legal aid reform and financial incentives

4.1 Introduction

In this section of the report, the likely impact of changes in legal aid remuneration on the organisation and practices of criminal defence solicitors is assessed. The findings are compared with those in McConville et al.'s (1994) study. Although it is now sixteen years since that study was published, many of the issues identified in it are still relevant. Nevertheless, it is useful to examine the changing context within which criminal defence services are now delivered.

When considering the potential for changes in remuneration to alter solicitors' case management decisions, it is useful to explore implications following the introduction of fixed fees. Such fees were introduced in England and Wales in January 2008 to deal with police station legal advice. As no research has investigated the impact of these fees on solicitors' decision-making, it is useful to briefly examine some research findings from Scotland. However, it should be noted that the Scottish fixed fees are paid for summary court cases rather than legal advice provided in police stations. Solicitors' comments in relation to fixed fees for police station legal advice are then evaluated. Next, examined are the previous administration's proposals to introduce Best Value Tendering (BVT), even though those proposals have since been withdrawn. Finally, after considering solicitors' comments on legal aid reform, it is important to note that defence solicitors do not act in isolation; their engagement in the criminal process involves interactions with other practitioners. The adoption of a whole-systems approach can help to identify how agencies might work together more effectively. This approach could also result in whole-systems efficiencies and cost-savings within the wider criminal justice system.

4.2 The organisation of criminal defence services

The majority of solicitors' firms that provide criminal defence services are still predominantly small. McConville et al. (1994) had found that most criminal defence work was undertaken by small businesses, usually organised around two or three solicitors acting in partnership or on their own. Although McConville et al. (1994) estimated that between 6,000 and 7,000 separate solicitors' offices undertook criminal legal aid each year, by 2006 there were approximately 2,200 firms claiming for criminal defence work. However, nearly

90% of the work was carried out by just 50% of the criminal practices (Carter, 2006). In 2009, using data held on 898 criminal firms, the LSRC found that 80% of the firms operated with four partners or fewer, 50% operated with two partners and 25% operated with only one partner.¹⁶⁵

Solicitors taking part in the present study were asked about the organisation of criminal defence services. A number of them referred to criminal defence work as a ‘cottage industry’. They expressed concern that some of smaller firms would not be in a position to adjust to the legal aid reforms. They also expressed anxiety over what they described as the current low level of remuneration, and they were worried that further legal aid cut-backs could make criminal defence work unsustainable in the future.

It is important to bear in mind that since 1986, when the Police and Criminal Evidence Act 1984 came into force, criminal defence solicitors have been required to provide a 24-hour service for police station work. As their clients are frequently suspected drug dealers, burglars and robbers, they seldom attract public sympathy for their important work. Nevertheless, their day-to-day activities involve work for some of the poorest and most vulnerable people in society. That work can also be extremely stressful, as the clients’ reputations, livelihoods, and even liberty may be at stake.

Solicitors in the present study observed that the status of criminal defence work had gone down in recent years. Their work had been accorded a higher status than the work done by solicitors in salaried positions, not least those working for the CPS, but that was no longer felt to be the case. A solicitor who felt that with a declining status defence solicitors were also losing good quality workers told us:

When I went in to this profession fifteen years ago, legal advisers in private practice were getting paid more than those in the public sector. We didn’t get pensions or flexi-time but you got paid more if you worked very hard. I now see the CPS advertising for senior jobs at £50k to £75k per year. Adverts for lawyers in the Metropolitan Police

¹⁶⁵ The LSRC holds data on the diversity of criminal defence firms by incorporating diversity monitoring forms into the Community Legal Services/Criminal Defence Service database questionnaire. Because those data rely on information provided by solicitors, they do not cover every criminal defence firm.

have a starting salary of £38,000 to £42,000, plus benefits. If you are senior criminal defence lawyer then you are lucky if you get that as a basic. Even if you did, you are also expected to join the out-of-hours rota, which you don't get paid for (GO5).

However, although solicitors were concerned by what they perceived as a decline in their status, their complaints over the low level of legal aid remuneration appeared to identify the most important problem. Indeed, they said that they were not paid adequately for the services they provided and they felt that this would have a detrimental impact on the quality of service. A particular problem, identified by several interviewees, was that with the low status and remuneration of criminal legal aid they were unable to attract or retain trainees.¹⁶⁶ One solicitor said, *'Two of my last five trainees have gone off to join the CPS as they can get better terms and conditions'* (GO5). Another solicitor said that trainees who had previously been attracted to criminal defence work were now going into other criminal agencies. He told us:

It's so hard to recruit now because low-level people are transferring out [of criminal defence services] and they going in to the Government, the CPS or the Courts Service because they get better pay, a pension, and flexi-time. These are things that private practice can't offer (CHI6).

Similarly, McConville et al. (1994) reported comments about the low status and remuneration of criminal solicitors, particularly when compared to other areas of law. Indeed, McConville et al. (1994) observed a tendency for lawyers to be associated with their clients, so that the association with poverty and crime gave criminal lawyers low status within the professional hierarchy. In addition, compared to most other areas of law, the rewards for criminal work were less as it was considered routine work which was intellectually undemanding. Nevertheless, McConville et al. (1994) found that money, not status, was at the centre of the solicitor's self-image as a professional and that many criminal defence solicitors were disillusioned about their position within the profession. This was the view of one interviewee in that study who said, *'I would like it not to be regarded as a*

¹⁶⁶ The LSC has sought to encourage new solicitors into legal aid work by awarding Training Contract Grants to organisations committed to legal aid work. The first Grants were awarded in 2002. Since then, the LSC has invested £18m in the scheme, and this has enabled 750 legal aid solicitors to benefit from a Training Contract Grant (LSC, 2009c).

second-class job, second-class part of the profession. I am afraid to say until proper recompense is made it will remain that' (McConville et al., 1994:24).

The question of remuneration was the one which most vexed defence solicitors, as they depend on the State to pay their fees and to determine their levels of remuneration. Similar concern over remuneration was expressed at the time of McConville et al.'s (1994) study, although criminal legal aid solicitors were not then 'poorly paid' or 'scratching round to make a living'. Rather *'there [was] a tension between the profitability of criminal work and the greater profitability of other types of work, especially in commercial fields'* (McConville et al., 1994:25).¹⁶⁷ The problem was summarised by a solicitor in the McConville et al. study (1994), who said:

... it is particularly difficult when you have got competent people that could make far more cash in other areas of work and when you realise that other areas, other avenues of work are available to you, you reach the stage, 'Why should we be subsidising this sort of work'; we enjoy it, we feel a certain amount of social commitment, but on the other hand you have to live (cited in McConville et al., 1994:25).

A similar view was expressed by a solicitor in the present study, in commenting on the need for parity with other criminal justice practitioners:

If you spend time qualifying as a solicitor you want to do something which is going to be financially rewarding. People have always gone into crime because of the level of job satisfaction rather than the salary, but there has to be a stage where you say enough is enough and the solicitor who is going to the police station at 3 am should be being paid as much as the custody sergeant who is standing behind the desk. They are both equally important jobs in ensuring justice is done and people are treated fairly (CH6).

The organisation of criminal legal aid defence services, based on a 'judicare' model and provided predominantly by private practice solicitors, continues to be a problem in terms of both status and remuneration. When asked about the criminal legal aid reforms, however,

¹⁶⁷ This was also claimed by a solicitor in the present study. He said that his firm was linked to a commercial practice but the commercial trainees objected to spending six months on criminal cases.

only a small number of solicitors said that the reforms were unnecessary and that the system should return to paying for work undertaken at an hourly rate; as one of that number put it, *'I think they should abandon the reforms and go back to where we were 10 years ago ... I prefer to get paid for the work I do'* (MI1). In the main, however, most solicitors accepted that change was necessary, although no one spoke in support of Best Value Tendering. While there were no alternative suggestions as to how legal aid could be reformed, it was evident that solicitors felt demoralised about the future of criminal legal aid services.

A major concern for solicitors was that the previous Government intended criminal legal aid reform to be a cost-cutting exercise. One solicitor said, *'I accept completely that there was a need for reform but the cutbacks have gone too far'* (HA3). Others said that reductions in legal aid spending had already encouraged changes in the organisation of criminal defence services, including the withdrawal of some firms from criminal legal aid provision. This was the view of one solicitor, *'There are loads of firms that have either gone out of business already or they are merging'* (ED6). However, other solicitors felt that the organisation of criminal defence work needed to change. A few suggested that the LSC should adopt a general practice (GP) model of funding. While they accepted that this would lead to a reduction in the number of firms, they felt that a reduction in numbers could be beneficial if there was then an investment in those firms that remained. This was the view of one interviewee:

We need help the same way that GPs need help. They get interest-free grants and loans which help to build their practices. We are now so tied into the system that to say it is a free enterprise is laughable. So I think we should be treated like doctors. You only need five substantial firms in [this city]. So why not work with them and build proper premises. You need to encourage firms to invest in the business and give them the financial incentive to do so (RI2).

Because BME-managed firms tend to set up small niche practices, the BME solicitors in the present study expressed concern at their financial vulnerability during a time of change. As one BME solicitor explained:

We are in an ethnic minority area and people come to us because we are local and know what is going on. I won't be in business if I'm not making any money and it is getting more difficult ... I've had a constant investment over the past five years and I was overdrawn by £50,000 last year. Luckily I was able to get help (JA4).

Concerns raised by BME solicitors are further examined when later considering solicitors' comments on Best Value Tendering. Meanwhile, though, solicitors' views on the likely implications of fixed fees upon their case-management decisions are explored.

4.3 Solicitors' decision-making and the influence of fixed fees

Fixed fees are calculated on a 'swings and roundabouts' principle, with the 'swings' intended as the majority of relatively straightforward cases that require less work than the minority. The 'roundabouts' are the more complex and unusual cases that require greater time and attention. The profit gained under the 'swings' is then intended to compensate solicitors for dealing with the more time-consuming 'roundabouts'.¹⁶⁸ Fixed fees were implemented in England and Wales in January 2008 to cover police station legal advice.¹⁶⁹

With no research in England and Wales having examined the impact of fixed fees on solicitors' case-management decisions, presented are research findings from Scotland which explored the impact of fixed payments for summary court cases (Stephen and Tata, 2006; Tata, 2007).¹⁷⁰ It should be noted, however, that not only are fixed fees used for different types of legal aid work in Scotland and England and Wales, there are also differences between the criminal justice models adopted by the two jurisdictions.¹⁷¹ Nevertheless, this analysis is useful as it draws attention to the discretion solicitors enjoy when managing cases in the criminal process.

¹⁶⁸ While, on a case-by-case basis, the system of payment is not proportional to the work undertaken, it was expected that over the longer term the gains and losses would cancel each other out.

¹⁶⁹ Also introduced at that time was the 'litigator graduated fee' to cover Crown Court preparation work. While this is not a fixed fee, it does not separately cover travel and waiting time. This can cause difficulties for defendants remanded in custody, for whom a journey of many miles might be required but is not always made.

¹⁷⁰ While it would have been informative to examine critiques of Stephens and Tata's work (2006), there have been no critical responses to it.

¹⁷¹ While fixed fees are used in Scotland for summary court cases, in England and Wales a graded system of standard fees continues to be used for court cases. In addition, there is no Scottish equivalent to the Police and Criminal Evidence Act and so very little legal aid is spent on police station legal advice.

4.3a Fixed fees for court cases in Scotland

Fixed fees were first introduced into Scotland in June 1999 to deal with summary cases in both the Sheriff and District Courts.¹⁷² Examined here are the Scottish research findings on the impact of fixed fees upon solicitors' case management decisions and upon quality.

4.3a(i) Changes in client contact

Following the introduction of fixed fees in Scotland, there was a decline in the time spent on client care and support (Stephen and Tata, 2006). One solicitor remarked on:

The whole way in which you prepared a case before, which involved you keeping your client informed and making sure your clients kept coming to see you. The interest in that happening is not nearly as pressing (cited in Stephen and Tata, 2006, Appendix D:19).

Another one asserted that he spent far less time with clients under fixed fees: *'If somebody who may get the jail, whose life may be ruined deserves half an hour of my time, they're going to get 3 minutes of my time'* (Stephen and Tata, 2006:Appendix D:19).

It cannot be assumed, however, that a reduction in the amount of client contact was detrimental in all cases. For Tata (2007), the amount of 'client care' can depend on both the circumstances of individual cases and the perspective taken. From a client-centred perspective, for example, Tata (2007) notes that any reductions in client contact could be seen as 'deleterious', while viewed from a 'bureaucratic-efficiency' perspective a lot of client contact could be dismissed as unnecessary. Indeed, when solicitors had been paid for work undertaken at an hourly rate, Scottish Legal Aid Board (SLAB) officials were reported as saying that much of the time taken with clients was a 'superfluous luxury' (Tata, 2007).

Evidently, more client contact is required in cases involving vulnerable defendants or those where complex and sensitive issues are involved. While some solicitors might decide not to allocate the additional time required to these cases, those who do so can consider themselves penalised by the fixed fee. That was the view of one practitioner, who felt that

¹⁷² The Sheriff's Courts hear both solemn (trial by a jury) and summary (non-jury-triable) cases while the District Courts hear summary cases only. Unlike defendants in England and Wales, the defendant in Scotland has no right to elect for jury trial.

they should be paid more in cases where the client needed extra care. Describing the circumstances of one case, he said that:

you would think in a way that's where you should be getting paid more because she's more difficult to deal with, and custody of her children depended on the outcome of that case. And she also had a father in the background who's also a manic depressive who was causing all sorts of trouble with bail orders and things. It was a nightmare of a case. You get quite a few like that (cited in Stephen and Tata, 2006:38).

While Tata (2007) notes that what constitutes 'need' is highly contestable and can be deployed to justify different claims about quality, a reasonable minimum level of contact is required for the provision of a quality service.

4.3b(ii) Changes to pleading decisions

The decision whether to plead 'guilty' or 'not guilty' belongs technically to the client. However, research has consistently highlighted the passivity of most clients, making them dependent on their legal adviser when deciding how to plead (Bottoms and McLean, 1976; McConville et al, 1994; Goriely et al., 2001; Pleasence and Quirk, 2001). Indeed, McConville et al. (1994) found that the client's dependence meant that they submitted uncritically to the advice they were given, and many were content to be processed by way of a guilty plea.

In Scotland, although the purpose of fixed fees was to encourage early guilty pleas, the financial incentive was subverted as fixed payments were made only in cases where there had been an initial 'not guilty' plea. Indeed, with a much reduced payment for clients pleading 'guilty' at the first hearing, solicitors were financially discouraged from disposing of cases quickly (Stephen and Tata, 2006). In a 2008 policy review, the fixed fee was amended so that a fee of £515 is now payable in all summary cases disposed of by the Sheriff and District Courts. The change is intended to encourage solicitors to deal with cases by way of a guilty plea at the earliest opportunity.¹⁷³ Not surprisingly the change has had the desired effect of increasing the number of guilty pleas entered at the first hearing (see Scottish Executive,

¹⁷³ For details of changes in legal aid, and other reforms intended to speed up the processing of cases in court, see the Scottish Executive (2007 and 2009) and SLAB (2008).

2009). In this way, the Scottish research reveals that changes in remuneration can alter solicitors' case management decisions and prompts us to ask what implications this might have for quality.

4.3a(iii) *Implications for quality*

On the impact of fixed fees upon case management decisions, Tata (2007) points out that such change is not necessarily to the detriment of clients. In the context of 'ethical indeterminacy', he argues that case-management changes leading to a reduction in client contact and influencing decisions on how to plead can be in the best interests of clients.¹⁷⁴ However, the Scottish research called attention to cases in which fixed fees had had a negative impact on quality. One solicitor said that:

*The most economic use of fixed fees is simply to plead everybody not guilty; apply for legal aid; get legal aid granted; then plead them all guilty in the intermediate diet. The cynical view. That's it. Do nothing. Do no preparation between times, make sure your client turns up at the intermediate diet and plead them all guilty then. That way you're getting £500 for doing nothing (cited in Stephen and Tata, 2006:79).*¹⁷⁵

If the impact of fixed fees was to encourage some solicitors to do little or nothing, then this could substantially undermine the quality of criminal defence work. Indeed, both prosecution and defence lawyers in the Scottish study were said to have 'hinted at or suggested' that there was a greater risk of miscarriages of justice as a result of the introduction of fixed fees. That was the opinion of one solicitor who told researchers, '*I have no doubt that there have been miscarriages of justice because of poor preparation; no doubt whatsoever*' (cited in Stephen and Tata, 2006:83). Miscarriages of justice might arise if solicitors believe that the funding is insufficient to enable them to prepare cases properly. That was the view of one solicitor, who said:

¹⁷⁴ In their evaluation of the Scottish PDSO, Goriely et al. (2001) considered the extent to which summary legal aid incentivised solicitors to encourage initial pleas of not guilty. When considering the complexity of the decision, they argue that it gives rise to ethical indeterminacy. This is where ethical practitioners may genuinely differ over the correct course of action, so that '*Without a clear right or wrong answer, there is scope for the financial incentives under which solicitors operate to influence their approach*' (Goriely et al., 2001:3).

¹⁷⁵ The intermediate diet is held after the first hearing. It is a hearing in cases where a 'not guilty' plea has been entered and the case is proceeding to trial.

The likelihood is that because corners are being cut, because the defence do not have the funding available to carry out full and thorough investigation, there may be a greater number of cases in which points are missed which result in advice being given to plead guilty where perhaps the better advice might have been to proceed to trial or that perhaps witnesses are not brought to trial and there is likely to be a number of people convicted who would not otherwise have been convicted (cited in Stephen and Tata, 2006, Appendix A:15).

4.3b Fixed fees for police station legal advice in England and Wales

In England and Wales, legal aid solicitors were formerly paid for the time they spent on cases based on an hourly rate. This structure of legal aid funding, however, was criticised for encouraging inefficiency as some solicitors were said to carry out more work on cases than was necessary in order to maximise profits.¹⁷⁶ This arrangement changed in 1993, when standard fees were introduced for legally-aided magistrates' court work. Contrary to fixed fees, in the standard-fee scheme solicitors are paid a higher fee for more complex and time-consuming cases. In this staged approach, the fee can be paid at a lower or higher rate, depending on the work involved. For more complex and time-consuming cases costs could also be paid on a fee-per-item basis.¹⁷⁷ While payment under standard fees continues for magistrates' court work, in his review of criminal legal aid Lord Carter (2006) recommended the use of fixed fees for police station legal advice. These fixed payments were implemented in January 2008.

In the present study, the two main concerns raised by solicitors about the impact of fixed fees for police station legal advice resonate with the Scottish research findings. First, they complained that the single fee did not allow discretion for the payment of a higher fee when they took on complex and time-consuming cases. Second, they were concerned that fixed fees would incentivise other solicitors to carry out the minimum amount of work on cases, which could compromise the quality of service. A third complaint raised by solicitors about fixed fees for police station work was that a few, more unscrupulous solicitors would seek to

¹⁷⁶ Bevan (1996) explores what he describes as 'supplier-induced' demand in the structure of criminal legal aid remuneration. See Cape and Moorhead (2005), who provide a critique of the 'supplier-induced' demand thesis.

¹⁷⁷ By 1994, 77% of bills were lower standard-fee claims, 9% were higher standard-fee claims, and 6% were above the upper limit of the higher standard fee and so paid on a non-standard basis (Gray, Fenn and Rickman, 1996).

‘cherry-pick’ the more profitable cases, leaving colleagues to deal with the more time-consuming and costlier cases.

4.3b(i) Fixed fees and exceptional cases

While most solicitors accepted that the fixed payment was fair for the majority of cases, they complained that no exception was allowed for more complex cases. Indeed, some said it was wrong that fixed payments did not allow for additional payments in relation to cases such as murder. One told us, *‘I don’t see how you can represent a shoplifter or a murderer for the same price. It doesn’t make sense to me’* (MI5). However, it seems that those solicitors were unaware of the provision for ‘exceptional cases’ in respect of which they could be remunerated for work undertaken beyond the fixed fee threshold.¹⁷⁸ While acknowledging that exceptional payments could be made, an interviewee said that they did not always apply to time-consuming cases. In particular, he said, *‘There is no enhancement if they don’t speak English properly. This means we spend more time explaining things to them’* (JA4).

4.3b(ii) Implications for quality

Following the introduction of fixed fees, solicitors were seriously concerned that the new arrangements would encourage less work to be carried out on cases and that this could undermine quality. As one solicitor put it, *‘You now get £250 whether you do 5 minutes on a case or 5 hours. There’s no incentive to do the 5 hours. There is your conscience but that doesn’t keep the bank manager happy’* (MI1). A practitioner from a representative body illustrated this problem when he said:

I worry about solicitors shortening the process at the police station. I’ve come across a number of incidents recently. There was one case where a solicitor spent about 7 minutes with a client [before the police interview] and it turned out to be a murder case with four-and-a-half hours of interviews. I don’t know how she could spend that time with her client and then go in to a detailed interview. There was another case involving three rapes where the solicitor left the police station after the first interview. Even the police were surprised at that (JL).

¹⁷⁸ The LSC receives around 200 ‘exceptional case’ claims nationally each month.

Because the fixed fee created an incentive to deal with clients quickly, some solicitors acknowledged that it could discourage them from spending more time on cases. Some solicitors feared that the impact could be borne disproportionately by clients who were vulnerable. As one solicitor said:

The problem is when you have someone who is vulnerable, psychiatrically unbalanced, and we go in and say: "Give me a ring if they charge you", and then we leave. We really should be spending time with them to make sure they are okay and understand what is happening but we don't get paid for it (MI1).

There is also likely to be a problem with fixed fees when solicitors are dealing with vulnerable clients, because they can be kept waiting for appropriate adults, interpreters, and health and/or social welfare practitioners.

For some solicitors, the fixed fee meant that it was economic to reduce the time spent on cases. As to implications for quality, a practitioners' representative told us, '*I don't think solicitors are providing the level of service they used to, because that's the only way they can survive and be economic (JL).*' Others resented the incentive to change their behaviour in order to increase profits. As one solicitor said, '*If you are efficient and don't waste any time, you can make money. But really, I didn't come into this profession to make money*' (AD2).¹⁷⁹

4.3b (iii) The potential for cherry picking

There were indications that fixed fees had encouraged solicitors to 'cherry-pick' the more straightforward and profitable cases, or that they could be incentivised to 'cherry-pick' cases in the future. This might have its greatest impact on cases involving vulnerable suspects. It seemed that at least one solicitor was likely to become more discerning about the type of cases he would accept in the future:

On the more serious cases we can spend eight or nine hours in the police station and you then get a massive black hole where we just don't get paid. So basically, I ask myself why I should spend all this time for nothing. ... On a different day and a different climate

¹⁷⁹As noted below, there is also evidence of fixed fees in Scotland impacting negatively on quality.

we would probably turn some cases away because we are still getting paid the same (JA4).

While none of our solicitor interviewees said they were actively ‘cherry-picking’ cases, they feared that colleagues were seeking to pass cases on:

We are getting things like ‘this person wants to transfer to you’.¹⁸⁰ These can be cases which require a lot of work... Such as those who have a mental health problem. There are less scrupulous firms inventing a conflict so they don’t have to deal with the case. They still get their fixed fee but they are able to hand the case over to someone else so it becomes their problem (DA2).

As in the previous section, when the concept of ‘client choice’ of solicitor was discussed, it was found that although the solicitors in this study strongly upheld the client’s right to choose their own solicitor that right was undermined by solicitors who rejected the less profitable cases. It would be unfair under a system of fixed fees if some solicitors were able to manipulate caseloads by rejecting the more complex cases, which then either left suspects for other solicitors to take up or even left vulnerable suspects without a solicitor at all. It is important therefore to investigate the potential for fixed police-station fees to encourage ‘cherry picking’.

In view of anticipated changes to remuneration in England and Wales following the previous Government’s review of legal aid, it has been useful to consider solicitors’ comments on fixed fees. It has also been helpful to examine a study that has considered the impact of fixed payments on solicitors’ case management decisions for summary court cases in Scotland. Some of these experiences bear on solicitors’ views of the proposal to introduce Best Value Tendering.

¹⁸⁰ People entitled to criminal legal aid can transfer to another solicitor in certain circumstances. If a solicitor taking on a case later finds there is a conflict of interest, for example, legal aid will be transferred to a different solicitor.

4.4 Solicitors' responses to Best Value Tendering

With the previous administration's plans to pilot Best Value Tendering (BVT) being withdrawn, the solicitors' comments on BVT in the present study might be redundant. However, no detailed plans for BVT had been published before the solicitors were interviewed.¹⁸¹ While Carter (2006) recommended BVT for the procurement of criminal legal aid services, solicitors voiced anxieties about the outcome. With an internal policy assessment of legal aid currently being undertaken, it is useful to explore some of the solicitors' concerns about the proposed BVT arrangements.

Concern over the likely impact of BVT was expressed by over half of the solicitors in the present study. Their main worry was that the previous Government intended to make a substantial reduction in the number of legal aid providers. That in turn would restrict the client's choice of a solicitor, as one solicitor said: *'I totally and utterly disagree with BVT because client choice would then be drastically reduced'* (LE3).

It was evident that underlying solicitors' concerns over BVT was anxiety about the financial implications for their practices. As one interviewee told us, *'It is more of a funding issue than one of client choice'* (CH6). Solicitors were concerned that the current organisation of criminal defence practices - based mainly on small firms - would have difficulty in complying with the requirements under competitive tendering. The LSRC was told that:

To some extent you are talking about a cottage industry. People don't have the resources to prepare for BVT. I think it will be a disaster because you will have a lot of good people who will be closed down overnight' (ED6).

Other solicitors were worried that a number of firms had already withdrawn from providing criminal legal aid; they felt that BVT would further reduce the number of practices. One solicitor told us that, *'BVT would be disastrous and it would force out more firms'* (MI7), and another said, *'If they were to proceed with BVT it would be the death-knell for a lot of firms'* (GR3).

¹⁸¹ The consultation document for BVT was published in March 2009 and the then Government's response was published in July 2009 (Legal Services Commission, 2009a and 2009b respectively).

However, noted above when discussing the organisation of criminal defence solicitors, not all solicitors were agreed that a reduction in the number of firms would be a disaster. On the contrary, some practitioners believed that too many firms were currently providing criminal legal aid services. This was the view of one solicitor, who told us: *'Ten years ago there were twice as many firms to choose from here. Perhaps having fewer firms isn't necessarily a bad thing'* (DA2). In relation specifically to BVT, another solicitor said:

There should be a reduction in the number of practitioners, absolutely correct, but there should be a simple method of achieving it. It is a publicly funded monopoly. It should reflect funding companies who are going to build a stable structure for the future (GR1).

Many solicitors were concerned that the level of funding under BVT would be insufficient to provide for a quality service. Without sufficient funding, it was felt that good-quality firms would withdraw from providing criminal legal aid. One solicitor, who recognised the inevitability of BVT, said that:

We need to find a realistic method of getting there ... We are pragmatists and we know there is a finite budget and there is little we can do about it. But there will be a lot of good solicitors who will get fed up and give up. I fear at the end of the road I think you won't have a number of good firms offering a good service (B11).

Of concern was that, under price competition, solicitors putting in a realistic bid in order to provide a quality service could be undercut by others. Such concerns were expressed in relation both to unscrupulous solicitors and to those who were naïve about providing a quality service within too low a budget. This was the concern raised by one solicitor:

BVT means we are being asked to compete against each other for the work that is out there. Obviously the only way we can do that is on cost. If you are already running on costs that you can't live on then how can you under-cut yourself? Certain naive firms will do it for 75 percent of the costs they are doing now by cutting their own throats. But how long can they keep the practice going without the funding necessary to do it? (GR3).

It was also anticipated that BVT requirement to manage a high volume of cases at speed could undermine quality. As one solicitor said:

You will be left with the 'pile them high and sell them cheap' practitioners because they are the only ones who will fit the model. BVT is incompatible with providing a good service (ED6).

It was also felt that by requiring solicitors to deal with cases quickly and with a minimum amount of preparation, BVT could undermine adversarial principles. This was the concern of one solicitor, who told us:

I hope BVT doesn't discourage solicitors to do trials. It would be very open to manipulation. You have to be cautious because otherwise you could undermine the whole reason for being here (PA4).

Black and minority ethnic solicitors, in particular, were concerned lest the introduction of BVT impacted disproportionately on BME firms. They argued that because of the more recent establishment of BME-managed firms, they would not be in a position to compete with the larger and longer-established firms managed by White solicitors. Indeed, the solicitors' general perception of BVT was that the previous Government intended to contract with a smaller number of solicitors' firms and that this would strongly advantage the larger and longer-established firms. One interviewee summarised the potential disadvantage for BME-managed firms in this way:

You started to get the first Asian solicitors coming through around 15 years ago. We haven't had the time to get a massive volume of clients like the established firms which are managed by White solicitors. With BVT we feel like the rug is now being pulled from under us because the future market will be based on volume and that is with the White middle-class firms and not the new ethnic minority firms. If they had given us 30 years to compete, then we would have achieved an equal client base. We feel aggrieved because we haven't had the time yet to expand (KE4).

Research has highlighted the importance of maintaining and encouraging diversity in the criminal justice system. When examining the concept of a ‘fair hearing’ from the perspective of ethnic minority defendants and witnesses in court, for example, Shute et al. (2005) concluded that reflecting diversity in the criminal process is important. They also found that ethnic minority defendants wanted to see more court staff from the ethnic minorities, including clerks, judges, magistrates and ushers. Emphasising the importance of procedural justice, they noted that:

Among Black defendants and lawyers in particular there was a belief that the authority and legitimacy of the courts, and confidence in them would be strengthened if more personnel from ethnic minorities were seen to be playing a part in dispensing justice in the criminal court (Shute et al., 2005:131).

While the issues concerning ethnicity in relation to client choice of a solicitor are complex, the importance of reflecting diversity in the criminal process is acknowledged in the legal aid reforms. In particular, when setting out his proposals for legal aid reform, and for BVT in particular, Carter stated that:

Changes to the current arrangements for the procurement of legal aid services should recognise the needs of all groups and ensure that there is an appropriate, high quality and diverse supplier base (Carter, 2006:109).¹⁸²

As BVT was intended to introduce a new way of procuring criminal legal aid services, it is perhaps not surprising that many solicitors were anxious about the impact this could have not only on their profitability but also on their continued existence in this line of work. Similar anxieties were expressed in the early 1990s, also a time of legal aid reform (McConville et al., 1994). A major concern for solicitors then as now was that cut-backs in criminal legal aid would have an adverse impact on quality. In response to the Royal Commission on Criminal Justice (1993), which was set up in 1991, the Law Society articulated concerns that are as relevant to defence solicitors today as they were almost two decades ago:

¹⁸² The previous Government’s proposed reforms are considered further in the next section.

Faced with a remuneration system under which providing a thorough and professional services to clients will frequently lead to payment which falls well short of the proper amount for the work done ... many conscientious practitioners will feel they have no choice but to abandon criminal work. For those who remain, the pressures to reduce preparation ... will be exacerbated by the additional pressure to take more clients arising from the reduction in the number of practitioners doing the work. It seems inevitable that this must have a detrimental impact on the standard of work in the criminal field (Law Society, 1992:6).

Although plans to pilot BVT have now been withdrawn, the previous administration announced its intention to introduce more ambitious tendering processes in the future. While the aim was then to ‘reduce the overall costs for criminal legal aid’, the then Government also recognised that changes in procurement can also increase ‘the opportunities for innovation and efficiency’ which could ‘enable suppliers to be profitable and sustainable’ (Ministry of Justice, 2009). With the new Government being committed to reduce the budget deficit, an internal policy assessment of legal aid is currently being undertaken. Views on the proposals arising out of this assessment for legal aid reform will be sought in the autumn of 2010 (Ministry of Justice, 2010).

4.5 Criminal legal aid reform: adopting a ‘whole-systems’ approach

When thinking about implications for criminal legal aid reform, it is useful to ask how changes in the structure of remuneration might help to facilitate ‘innovation and efficiency’ within the wider criminal justice system. It is important to reflect that solicitors do not act in isolation, and their working practices can be dependent on interactions with other practitioners. In police stations, for example, the effective and efficient processing of cases can be improved through increased co-operation and co-ordination between the police, the CPS and defence legal advisers. By adopting a ‘whole-systems’ approach, we can examine those interactions and ask how they could be managed more effectively in police stations and magistrates’ courts in order to improve efficiencies and achieve cost savings.

Kemp (2008) adopted a ‘whole-systems’ approach when examining the multi-agency processing of cases in the Youth Courts. A key issue identified by that study of inefficiency and delay was the decision-making process between prosecutors and defence solicitors. As

the first opportunity that defence solicitors had to liaise with the CPS was at the first hearing, those early discussions had limitations.¹⁸³ Accordingly, in cases where plea-negotiations could avoid the need for a trial, those negotiations were being held on the day of the trial. Although the negotiations were often successful in avoiding a trial, it was obviously inefficient for them to take place at such a late stage in the proceedings.¹⁸⁴

A ‘whole-systems’ approach was adopted by the Scottish Executive (2009) for a review of summary justice. In the Scottish review, while legal aid is recognised as a key determinant of change, so too are other factors. The review covers the processing of cases from arrest through to case disposal. It examines the potential for using alternatives to prosecution so that a substantial number of minor offences can be removed from the summary courts. For cases that are prosecuted, the review seeks to deal with them more quickly in court by means of improvements in disclosure and, as noted above, the use of fixed fees intended to encourage more cases to be dealt with at the first hearing. The review is also examining ways of encouraging early liaison between the prosecutor fiscal and the defence solicitors.

The adoption of a ‘whole-systems’ approach in England and Wales could usefully examine interactions between key decision-makers in addition to identifying the experience of users in the criminal process within what has become an extremely complex and bureaucratic system. Such an evidence base could then usefully assist policy-makers and practitioners in considering future reforms aiming not only to maximise efficiency and reduce costs but at the same time to improve the effectiveness of the criminal process.

Recommendations

4.1 Research could usefully explore the extent to which changes in remuneration, both through fixed fees and tendering processes, could impact on solicitors’ decision-making and working practices.

¹⁸³ Limitations were identified for prosecutors in court, who generally had too many files to be able to concentrate on a particular case. However, it was also found that the prosecutor who was responsible for making decisions on cases was seldom the prosecutor in court. While the defence could write in to the CPS to make representations in cases, these generally went unanswered.

¹⁸⁴ Having examined the terms of plea bargains reached between defence and prosecution solicitors in Scotland under fixed fees, Stephens et al. (2008) concluded that the role of defence solicitors had been under-researched in the literature on the economics of plea-bargaining.

4.2 While criminal legal aid reforms have impacted on solicitors' practices, so too have other criminal justice initiatives, which have changed the way practitioners' work together. Within what has become an extremely complex and bureaucratic system, the adoption of a 'whole-systems' approach could examine interactions between key decision-makers as well as identifying the experience of users in the criminal process. Such an evidence base could then usefully assist policy-makers and practitioners in considering future reforms aiming not only to maximise efficiency and reduce costs but at the same time to improve the effectiveness of the criminal process.

Conclusion

The criminal justice system is complex and necessarily bureaucratic. This study has helped to illuminate the importance of listening to the voice of users in the criminal process. It has been informative to examine what factors are important to people when choosing and using a solicitor. Similarly, it has been useful to explore the reasons why people decline legal advice. Within a complex adversarial system of justice, it would be helpful to explore further the experience of those being dealt with in the police station and in court. In particular it would be useful to consider the extent to which people understand what is happening in the criminal process and the basis on which they are able to make informed decisions. It has also been helpful from a users' perspective to identify potential barriers to legal advice, although such issues require further exploration.

While this study has focused on criminal legal aid reforms, it is evident that defence solicitors do not work in isolation. On the contrary, their effectiveness in the criminal process is dependent on their interactions with other practitioners. The LSRC is suggesting an evaluation in order to examine the potential effectiveness of involving defence solicitors early on in the criminal process. In particular, it would be interesting to examine whether early liaison between the police, CPS and defence solicitors helps to deal with cases more effectively and efficiently both in police stations and at court.

With very little research having been undertaken recently into issues concerning access to criminal defence services it is perhaps not surprising that most recommendations in this report are concerned with the need for further research. Such research is also required in the

current economic climate, particularly as it is anticipated that cuts to criminal legal aid funding will be implemented in the not too distant future. By adopting a ‘whole-systems’ approach, research which assists policy-makers and practitioners in improving the processing of cases could achieve not only a reduction in the legal aid spend but also cost-savings for other criminal justice agencies.

The LSRC is currently examining police electronic custody records in order to ascertain the extent to which legal advice is requested in police stations. Early findings indicate variations in the proportion of suspects requesting legal advice at different police stations. It is intended that further work will be undertaken in order to explore what factors might influence such differences in the take-up rate for legal advice. In addition to examining police attitudes and culture towards legal advice, for example, it will also include consideration of the attitudes and experience of those brought into custody as well as the organisation and practices of local defence practitioners. In order to provide guidance and oversee this work the LSRC will be setting up a Criminal Research Advisory Group. It is intended that the new evidence base will assist in improving the efficiency and effectiveness of the criminal process, at the same time as seeking to achieve cost-savings.

Appendix

Methods

Multiple methods were adopted in this study in order to examine legal aid and the work of criminal defence solicitors from different perspectives. These included four different elements to the fieldwork. First, a survey was conducted of over 1,000 people who had been drawn into the criminal justice system. Second, in-depth interviews were carried out with 24 criminal defence solicitors. The third and fourth elements included observation of magistrates' courts and police stations.

1. Interviews with users in the criminal justice system

When asking people about their choice and use of a solicitor, the LSRC wanted to achieve around 1,000 face-to-face interviews with people who had experience in the criminal justice system. With a large number of interviews it would be possible to break down the responses on the basis of demographics including age, gender and ethnicity. In order to explore geographical differences in the take-up of legal advice and representation, the LSRC decided to interview respondents in six different areas. To achieve a sufficient volume of interviews areas were selected with high populations. The LSRC also wanted to consider whether there were any differences in the take-up and use of criminal lawyers by Black and Minority Ethnic (BME) clients. Accordingly, four of the areas chosen were on the basis that there was a relatively high BME population. The six areas include Bradford, Birmingham, Bristol, Cardiff and the London Boroughs of Tower Hamlets and Lambeth.¹⁸⁵ The survey was conducted in the main police station and magistrates' court in those six areas. With women being under-represented in the criminal justice system, it was decided that interviews would also be held in two women's prisons in order to increase the number of female respondents.¹⁸⁶

Following a tendering process the interviewing of users in the criminal justice system was contracted out to Ipsos Mori in December 2007. The LSRC had undertaken preparatory

¹⁸⁵ The interviews in Tower Hamlets took place in Bethnal Green police station and Thames magistrates' courts. In Lambeth, the interviews took place in Brixton police station and Camberwell Green magistrates' court.

¹⁸⁶ As anticipated, females only accounted for around one in ten of respondents in both the police station and magistrates' courts samples.

work in drawing up the draft questionnaire which involved observations and interviews with suspects and defendants in police custody and in magistrates' courts. The survey included questions about respondents' choice and use of a solicitor, including why those without a solicitor declined legal advice. They were also asked whether they understood what was happening when being dealt within the criminal process. Ipsos Mori and the LSRC worked together in finalising the questionnaire. With interviews taking place in police stations and magistrates' courts, the length of the interview was kept short to around 20 minutes.

Ipsos Mori were initially contracted to undertake 120 fieldworker days in total. This was to include 100 fieldworker days in police stations and magistrates' courts and 20 days in two prisons. The questionnaire was piloted and the interviews took place in police stations and magistrates' courts from February to April 2008. With fewer interviews being achieved in police stations, an additional 20 fieldworker shifts were allocated to be used in magistrates' courts. There were overall 212 interviews achieved in police stations and 767 in magistrates' courts. Following analysis of these two datasets an Interim Report was published by the LSRC in November 2008 (see Kemp and Balmer, 2008). Thereafter, in two women's prisons over 20 fieldworker days achieved 163 interviews during December 2008. In total, therefore, this study has involved interviews with 1,142 users in the criminal justice system.

1.a Negotiating access to sites

A particular difficulty in this study was gaining access to the research sites. The LSRC approached the Association of Chief Police Officers who gave their support for interviewing in police custody suites. Access was then negotiated separately with senior officers in each police force area and also in each police station.¹⁸⁷ There were also sensitive issues to deal with in the magistrates' courts, particularly when needing to ensure that the interviews did not disrupt court proceedings. The LSRC first agreed access nationally with H. M. Courts Service and separate negotiations then took place with the Justices' Clerk in each area. There were three private security firms, SERCO, GLS and Reliance, who gave their permission for interviews to be carried out in the six court cells. There were long delays when negotiating access to two women's prisons. Having first successfully applied to the Research Committee at H. M. Prisons Service for approval to approach two prisons, a number of prisons then

¹⁸⁷ It was also necessary to negotiate access in London through the Strategic Research Unit at the Metropolitan Police.

approached were unable to assist this research study because of managing a high volume of prisoners. Eventually access was agreed with two women’s prisons.

1.b Details of interviews undertaken

It was estimated that around 10 interviews would be achieved each interviewer day. With 100 days to be used in police stations and magistrates’ courts, it was anticipated that this would achieve 1,000 interviews. Ipsos Mori monitored the average number of interviews achieved each day in police stations and magistrates’ courts and it soon became apparent that more interviews were taking place in magistrates’ courts than in police stations. Accordingly, while the allocation of 50 interviewer days to police stations remained (44 shifts in total were used) the 20 additional interviewer days were allocated to the magistrates’ courts, where 76 interviewer days in total were involved. Set out in Table A is the total number of interviews achieved at each police station and magistrates’ courts, the number of shifts undertaken and the average number of interviews achieved.¹⁸⁸

Table A: Details of interviews undertaken at police stations and magistrates’ courts

<i>Areas</i>	<i>Number of interviews</i>	<i>Number of shifts</i>	<i>Average number of interviews</i>
<i>Police stations</i>			
Birmingham	39	9	4.3
Bradford	52	8	6.5
Bristol	8	4	2
Bethnal Green	37	8	4.6
Brixton	41	8	5.1
Cardiff/Swansea	35	7	5
<i>Total</i>	212	44	4.8
<i>Magistrates’ courts</i>			
Birmingham	108	13	8
Bradford	132	12	11
Bristol	123	12	10.3
Thames	177	13	13.6
Camberwell Green	118	13	9.1
Cardiff	109	13	8.4
<i>Total</i>	767	76	10

¹⁸⁸ The detail in relation to the interviews undertaken in police stations and magistrates’ courts was supplied in a technical report by Ipsos Mori.

So far as interviews in Cardiff police station were concerned, it should be noted that these had to move to Swansea police station. This was because the Ipsos Mori fieldworker reported difficulties with the Cardiff police station staff being able to assist fieldworkers in carrying out the interviews. Another police station in Cardiff was sought, but at the suggestion of the police it was agreed that the interviews would be transferred to Swansea police station.¹⁸⁹ There were also difficulties reported by the Ipsos Mori fieldworker in Bristol with custody staff not having the time to assist with the survey. With only an average of two interviews a day, it was decided that the survey should be abandoned in Bristol police station after four shifts.

The remaining 20 shifts were split evenly between the two prisons. The LSRC requested that only women who had recently been sentenced to a term of imprisonment for a criminal offence were invited to participate in this study. A total of 163 women were interviewed, 97 in one prison and 66 in the other.

1.c The timing of the research interviews

When interviewers were based in police stations the fieldworkers could take the opportunity to interview respondents at any time after they had been given their legal rights and had decided whether or not to have a solicitor. If possible, fieldworkers were asked to interview respondents after they had been interviewed by the police, as it was more likely that they would have had contact with their solicitor. In seeking to maximise the number of interviews achieved, however, it was important that fieldworkers were flexible and responded to police requests to interview at convenient times. Overall, when interviewed as part of this study, 64 percent of respondents had not been interviewed by the police.

The fieldworkers also had flexibility when approaching defendants waiting at court although it is not known how many respondents had been dealt with at the time of the interview or were still waiting for their hearing. Apart from in Camberwell Green magistrates' court, when interviewing in courts some of the interviews took place in the court custody suite.¹⁹⁰ In Thames magistrates' courts, 36% of cases took place in the custody area,

¹⁸⁹ There were a total of 11 interviews held with suspects at Cardiff and 24 in Swansea police station.

¹⁹⁰ While access to the custody suites in Camberwell Green magistrates' courts had been negotiated, the fieldworkers were refused access to people remanded in custody.

27% in Birmingham, 23% in Bradford, 28% in Bristol and 92% in Cardiff. It was not known until the end of the fieldwork that such a high proportion of respondents had been interviewed in the court cells in Cardiff. When interviewing respondents in prison, the LSRC requested that the women invited to participate had recently been sentenced to a term of imprisonment for a criminal offence.

1.d Response rates

When people were approached to take part in this survey there were a number of reasons why interviews could not always take place. There were three main categories of people who were unable to take part in the survey. The first category comprised those who were deemed ‘ineligible’ after responding to screening questions. This included those who were aged under 17 years and those being dealt with for very minor matters.¹⁹¹ Also included in the ‘ineligible’ category were those who had already been interviewed by Ipsos Mori. In the magistrates’ courts also excluded were those who were approached to take part but who were not a defendant. The second category comprised those who ‘unable’ to take part in the survey. This included those where custody officers (in police stations and magistrates’ courts) had made an assessment that some people were not suitable for an interview. It also included 69 people in the magistrates’ courts and 41 in police stations who were approached for an interview but were unable to speak English. In the third category were those who ‘refused’ to take part in the survey. People approached to take part in the survey were informed that their participation was voluntary. Of those who refused to take part, this included those who were too upset or distressed as well as those who were too busy and in a rush.

After each shift, fieldworkers were required to complete a tally sheet which noted how many people were approached and how many were ineligible, unable or refused to take part in the survey. While the majority of tally sheets were submitted this did not include all.¹⁹² From the tally sheet submitted, set out in Table B below is the total number of people who were approached, the reasons why they did not take part and the total number of people

¹⁹¹ Very minor matters, such as not having a television licence, dropping litter and minor motoring offences such as no driving licence or insurance were not included as it was unlikely that these would involve a solicitor.

¹⁹² It should be noted that there were no tally sheets submitted by the fieldworker in Bristol police station because the interviewer was unable to obtain sufficient information from custody officers about the number of suspects approached and the reasons for refusal.

interviewed. Overall, a total of 455 suspects were approached for an interview in police stations and 1,566 in magistrates' court.

In the two prisons a letter was circulated to those who were eligible asking if they were prepared to take part in the survey. For those indicating a willingness to take part, prison staff facilitated interviews with Ipsos Mori interviewers. There was no provision made in the Prison Sample to include people who did not speak English.

All interviews were converted by Ipsos Mori into three SPSS datasets which were then analysed by the LSRC.¹⁹³

Table B: Details of the total number of people approached for interview, the reasons why some did not take part and the total number of those interviewed¹⁹⁴

<i>Area</i>	<i>Total approached</i>	<i>Ineligible</i>	<i>Unable</i>	<i>Refused</i>	<i>Total interviewed</i>
<i>Police stations</i>					
Birmingham	63	10	15	4	34
Bradford	143	14	32	45	52
Bristol	-	-	-	-	-
Bethnal Green	102	23	31	11	37
Brixton	77	14	8	14	41
Cardiff/Swansea	70	21	5	13	31
<i>Total</i>	455	82	91	87	195
<i>Magistrates' courts</i>					
Birmingham	261	94	32	40	95
Bradford	319	124	28	48	119
Bristol	322	140	10	83	89
Thames	264	56	2	30	176
Camberwell Green	196	53	11	25	107
Cardiff	204	74	11	9	110
<i>Total</i>	1566	541	94	235	696

2. Interviews with criminal defence solicitors

Defence solicitors were interviewed in order to ascertain their views on people's choice and use of a solicitor. Solicitors were also asked what they considered to be potential obstacles to legal advice and representation, as well as their views on legal aid reform. When selecting defence solicitors for interview, the intention was to include those who were practising in the

¹⁹³ The identity of respondents was coded as no names were taken for reasons of confidentiality.

¹⁹⁴ Not all interviews are accounted for in Table B as some tally sheets were missing.

six areas where the users were surveyed. While the solicitors' firms in each area were to be randomly selected we wanted to ensure that this also included a proportion of BME managed firms. Diversity data was matched to duty solicitors, using the LSRC supplier diversity data from the 2007 RIS (Resource Information Service) questionnaire.¹⁹⁵ Where organisations could be identified as having majority BME or split control, the order was randomised to produce a BME/split control contact list for each region. The order of organisations with White majority control or missing diversity data were also randomised to produce a White/unknown control contact list. The intention was to contact organisations on each list in order (for each region), until the required number of organisations was reached. Diversity data was matched for 54.6% of organisations. The selected firms were then approached and invited to take part in this study. If the solicitors' firm refused to take part, then the next randomly selected firm was contacted. A number of firms declined to take part in this study and eventually 21 solicitors were interviewed in the six areas.¹⁹⁶ While having selected BME managed firms to participate, it was sometimes White British solicitors who came forward for the interview.¹⁹⁷

In addition to solicitors' interviewed in the six areas, there were also interviews conducted with three representatives from practitioner bodies: The Law Society, the Black Solicitors' Network and the Society for Asian lawyers. While their comments on legal aid reform have been extremely useful in informing the analysis of this study, little reference has been made to their specific comments in this report. Indeed, apart from where specifically mentioned on a few occasions, the comments of 'defence solicitors' in this study refer to those made by the 21 solicitors interviewed in the six areas. This is because the views of representatives from practitioner bodies could be criticised for '*towing the party line*' and for comments such as, '*they would say that wouldn't they?*' This is not intended to devalue their contribution to this study. On the contrary, the representatives from the practitioner bodies are experienced practitioners who are knowledgeable not only about criminal legal aid but also about the legal aid reforms.

¹⁹⁵ The LSRC holds data on the diversity of criminal defence firms through incorporating diversity monitoring forms into the Community Legal Services/Criminal Defence Service database questionnaire.

¹⁹⁶ There were four solicitors interviewed in Cardiff, Bristol and Lambeth and three solicitors in each of the other three areas.

¹⁹⁷ There were 13 respondents who were White British, four Asian, three Irish and one Afro-Caribbean. All but three of the solicitors were male.

A topic guide was prepared to assist in the in-depth interviewing of defence solicitors. This had been informed from the issues arising out of the users' survey and also from a review of the literature. Most of the interviews took place during the summer and autumn of 2008. The average length of the interviews was one hour and, with permission, these were taped and fully transcribed. To assist in the interpretation of the data, the interviews were entered into the statistical software package NVivo.¹⁹⁸ In interpreting the data, a grounded theory approach was adopted which requires coding of the data and critical analysis of the emerging themes.

3. Observations in magistrates' courts

The LSRC had undertaken a study of the processing of cases in Youth Courts (see Kemp, 2008). The study adopted a 'whole-systems' overview of inter-agency co-operation and efficiency and a number of issues found to create inefficiency and delay were identified. The study involved an examination of 2005 case files and also observations of Youth Courts during 2006. Having identified inefficiencies and delay in the Youth Courts studied, the LSC asked the LSRC to extend observations into magistrates' courts so that they could examine whether the issues identified were pervasive in the criminal justice system. With the Government having recently piloted new arrangements under the 'CJ-SSS' initiative, in order to speed up the processing of minor cases in court (see Department for Constitutional Affairs, 2006), the LSRC decided to observe the five courts which piloted these new arrangements.

The LSRC observed half-day proceedings in the five Adult Courts CJ-SSS courts.¹⁹⁹ The observations took place from February to June 2007. This involved observing four sessions at two courts and the number of sessions at the other three courts varied from ten, eleven and seventeen sessions. The LSRC made detailed fieldwork notes of the cases observed and also relevant comments made between practitioners in court. A report commenting on these findings was submitted to the LSC in September 2007 (Kemp and Bajorek, unpublished). The LSRC has carried out further observations of magistrates' courts. This included 12 court sessions at two London courts which had piloted the CJ-SSS

¹⁹⁸ NVivo is a computer analysis tool which provides a non-numerical approach to structuring data. The software has been developed to meet the needs of sociologists carrying out a grounded theory approach. In particular, when analysing the data and allowing for substantive concepts to emerge, the data is clustered and hierarchies of related concepts are created so 'sub-sets' can be manipulated and analysed at any one time.

¹⁹⁹ This included two London courts, one in the Midlands and two in Cumbria.

arrangements and also observation of four court sessions at one city Youth Court based in Yorkshire and Humberside.²⁰⁰

There can be limitations when observing court proceedings. While the fieldworkers asked the permission of the court clerk to observe and make notes of the proceedings, not all the information required for research purposes was discussed in open court. There were occasions, for instance, where details of the offences being dealt with were not mentioned in court. It was also not known on many occasions whether the hearing observed was the first, second or subsequent hearing. Accordingly, the LSRC carried out a small-scale exploratory study which was intended to assess the feasibility of collecting data from hearings in the magistrates' courts through observations and surveys of defendants. The observations took place over a six-week period (from December 2008 to February 2009) at two magistrates' courts and included a survey of 58 defendants (see Souza and Kemp, 2009). The study was intended to inform the research questions and methods to be adopted in a large-scale study of magistrates' courts.

4. Observations in police stations

Analysis of interviews with defence solicitors highlighted delays in the police investigative process as being the main obstacle to people receiving legal advice in the police station. There were complaints from solicitors, although not in all areas, that some police officers would use such delays to put suspects under pressure to proceed without a solicitor. With such complaints being made by defence solicitors it seemed appropriate to include observations of police stations. Accordingly, the present study was extended to include a small-scale exploratory study of police stations so that potential obstacles to legal advice could be examined from a police perspective.

There were eight police custody suites observed. Two in the City of London, one in the Greater London area, one in the South West, two in the East Midlands and two in the North West. Three police stations were observed during the period of one day only, three stations over two days, one station over three days and there were five days of observations taking place at another police station. When approaching these police stations, the LSRC used the LSC's contacts with senior police officers who were members of the local Criminal Justice

²⁰⁰ Details of the observations are contained in fieldwork notes.

Board. All the senior police officers approached were supportive and welcomed the research study. Indeed, it was acknowledged by senior officers in some police stations that by highlighting some of the problems experienced in police stations that the research study could assist policy-makers in seeking to address some of the issues raised.

When carrying out observations, the researcher was based with the custody sergeants who were responsible for booking suspects in to the custody suite. In all but one police station the booking in process was undertaken by custody sergeants. There was one police station observed where civilian staff were undertaking this, under the supervision of a custody sergeant. Other civilianised members of staff in the custody suite included gaolers and detention officers. When observing the custody process, the researcher would ask questions about access to legal advice and custody sergeants, other custody staff and investigating police officers would sometimes volunteer information. When citing comments made, these are put into quotation marks which suggests they are reported verbatim. This was not always the case as comments could sometimes be recorded five minutes later. If the comment recorded was a good representation of the remark which was made it is placed in quotation marks. Where only the gist of comments was recorded then these are reported as such and not placed in quotation marks.

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