

Digital legal rights: Exploring detainees' understanding of the right to a lawyer and potential barriers to accessing legal advice

Dr Vicky Kemp is a Principal Research Fellow in the School of Law, University of Nottingham.

Key words: Access to legal advice; Delay; Digital technology; Police detention

This study involved using an App to explore with detainees their understanding of the right to a lawyer and to identify what factors influence the take-up of legal advice. Also examined in this paper, from the users' perspective, are potential barriers to accessing legal advice. While PACE safeguards provide detainees with early access to confidential legal advice, some of these legal requirements are simply ignored. It is recommended that a review of PACE should be undertaken and that this takes into account how technology could be used to help address some of the issues arising.

1. Introduction

The Police and Criminal Evidence Act 1984 (PACE) provides detainees with an almost absolute right to free legal advice at any time. Despite this important safeguard, only around half of detainees' request, and about one third-receive, legal advice.¹ One of the main reasons for the low take-up of legal advice is that many people do not understand how a lawyer can assist them when being dealt with as a suspect by the police. Indeed, in a survey of over 1,000 people drawn into the criminal process, almost two-thirds said that they refused legal advice because they did not need a lawyer. Concerns that a lawyer would lead to long delays was the other main reason given as to why legal advice was declined.² There is also the potential for conflict as the police are responsible for investigating offences and also informing detainees of their legal rights, including the right to legal advice. Research has shown how both

¹ P. Pleasence, V. Kemp and N. J. Balmer, "The Justice Lottery? Police Station Advice 25 Years on From PACE" (2011), *Criminal Law Review* 3. This study was based on over 30,000 custody records drawn from 44 police stations in four police force areas in 2009.

² V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010, p. 37). Online report. <https://core.ac.uk/download/pdf/33573065.pdf> [Accessed 20 November 2019]. People were surveyed in three locations: police custody, magistrates' courts, and in two women's prisons.

police and defence-related factors can discourage people from having a lawyer, including police ploys and long delays.³

In seeking to notify suspects of their legal rights, and to help them make informed decisions, particularly over the waiver of legal advice, a prototype App was developed and tested with detainees in police custody in the summer of 2017.⁴ The App included a section on legal advice that set out the role of the lawyer and explained how having legal advice can assist people in police custody. Detainees were asked to press a button indicating whether or not they had requested legal advice. If 'no' was pressed they were asked to select the reason why from a list of four key factors found to discourage the take-up of legal advice, with additional information then being provided. For those declining legal advice because they could not afford a lawyer, for example, the response stated that legal advice is free.⁵ Going through the different options for declining legal advice with detainees helped to highlight the lack of understanding that many people have over their right to legal advice, particularly those who have little or no experience of being dealt with by the police. The findings raise important questions over the efficacy of PACE safeguards; highlighting gaps between the law in books compared to what is happening in practice on the ground. To help in addressing some of the issues raised, it was interesting to explore with detainees the potential for technology to help improve understanding of legal rights and to assist in providing early access to legal advice. By way of background, it is useful to first of all consider some of the issues arising out of the extant research in relation to PACE safeguards providing access to legal advice.

³ A. Sanders, L. Bridges, A. Mulvaney and G. Crozier, *Advice and Assistance in Police Stations and the 24-Hour Duty Solicitor Schemes*, London: Lord Chancellor's Department (1989); L. Skinns, *Police Custody*, Abingdon: Willan (2011); V. Kemp, "'No Time for a Solicitor': Implications for Delays on the Take-up of Legal Advice" (2013), *Criminal Law Review*, 3.

⁴ See A. Ferguson and R. Leo, *The Miranda App: Metaphor and Machine* (2017). Online report. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906554 [Accessed 20 November 2019] for a theoretical discussion on how an App can help to inform suspects of their legal rights.

⁵ See below for further details of the 'legal advice' section in the App.

2. Background

PACE provides all detainees with an unequivocal right “to consult a solicitor privately at any time” and “as soon as practicable”, following a request.⁶ PACE also requires a custody officer, who is independent of the police investigation, to be responsible for advising detainees of their right to legal advice. The legislation had the desired effect of increasing the take-up of legal advice, albeit slowly - rising from less than 10 per cent prior to implementation of PACE to around one-third by the mid-1990s,⁷ to almost half of detainees by 2009. By that time, it was noted that, while 45 per cent of detainees requested a lawyer, only 35 per cent went on to receive legal advice.⁸ It has also been noted that the take-up of legal advice can vary between police stations, with 2009 request rates ranging from 32 per cent in one police station to 62 per cent in another.⁹

There is the potential for conflict with the police having responsibility for investigating cases at the same time as requiring custody officers to inform detainees of their right to legal advice. In reality, while custody officers are required to be ‘independent’, they are serving police officers with both “institutional and collegial ties with other officers.”¹⁰ While custody officers are required to be neutral, neither encouraging nor discouraging of the take-up of legal advice, they can influence decisions, particularly when dealing with detainees who are confused and/or unsure about what to do.¹¹ Police ploys can also be used to discourage detainees from having a lawyer, with the main ploy identified to read out their rights incompletely or incomprehensibly.¹² More recently, with cameras and microphones being required in

⁶ PACE s.58(1) and PACE Code C para. 3.1.

⁷ T. Bucke and D. Brown, *In Police Custody: Police Powers and Suspects’ Rights under the Revised PACE Codes of Practice*, London: Home Office (1997); C. Phillips and D. Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (HORS 185), London: HMSO (1998).

⁸ Pleasence *et al.*, *The Justice Lottery?* (2011, p. 10).

⁹ Pleasence *et al.*, *The Justice Lottery* (2011, p. 8).

¹⁰ M. McConville, A. Sanders and R. Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality*, London: Routledge. (1991, p. 42).

¹¹ Kemp, *No Time for a Solicitor* (2013).

¹² Sanders *et al.*, *Advice and Assistance in Police Stations and the 24-Hour Duty Solicitor Schemes* (1989).

all custody suites, this has helped to discourage the overt use of police ploys, but observational research has shown that such ploys continue to be deployed.¹³

Recognising the potential for police ploys to be used to discourage detainees from having legal advice, Code C requires custody officers to offer to detainees who decline legal advice the opportunity of speaking to a lawyer over the telephone.¹⁴ Having observed over 20 custody suites over the past two decades, however, it was only in one area that the author observed detainees routinely being advised of this right.¹⁵

PACE also requires the police to deal with cases expeditiously,¹⁶ recognising that long delays can put pressure on detainees to refuse legal advice. Based on 2009 custody records, the average time that detainees were held in police custody was nine hours and 18 minutes. With average duration having increased, concerns were raised at that time over the efficacy of PACE safeguards in restricting the length of time that detainees are held in custody.¹⁷ When recognising that long delays can encourage detainees to change their mind about having legal advice, Code C requires an inspector to review this decision. It is only if the inspector is satisfied that the decision is freely made that authority should be given for the interview to go ahead without a lawyer.¹⁸ With police ploys being identified in a couple of custody suites, with investigating officers encouraging detainees to change their mind about having a lawyer just before the police interview, these findings were reported to the National Police Custody Forum in 2010, and Code C was subsequently revised.¹⁹ Inspectors now have to take reasonable efforts to talk to the lawyer involved to ascertain their expected time of arrival, and to inform them that the detainee has stated that they wish to change their mind and the reason why, if given.²⁰

¹³ V. Kemp, *Bridewell Legal Advice Study: Interim Report* (2012, p. 29). Online report. <http://eprints.nottingham.ac.uk/28246/1/Kemp%20BLAST%20Interim%20Report.pdf> [Accessed 21 November 2019].

¹⁴ Code C, para. 6.5.

¹⁵ Kemp, *No Time for a Solicitor* (2013, p. 195).

¹⁶ Code C, para. 1.1.

¹⁷ V. Kemp, N. Balmer and P. Pleasence, "Whose Time is it Anyway: Factors Associated with Duration in Police Custody" (2012), *Criminal Law Review*, 10.

¹⁸ Code C, para. 6.6.(d).

¹⁹ For further details see Kemp, *No Time for a Solicitor* (2013, p. 200).

²⁰ Code C, 6.6(d)(i).

PACE also has a fundamental right for detainees to consult privately with their lawyer at any time,²¹ which includes over the telephone. It has been noted how lawyers can have difficulties in trying to get through to busy custody suites, particularly as the custody telephones were not always answered.²² If the call is picked up, a lawyer will not be able to talk to their client if custody staff are too busy to facilitate a call (which often requires escorting a detainee from their cell to the custody telephone).²³ At the time PACE was implemented, it was recognised that it could be impracticable for the police to facilitate private telephone calls between lawyers and their clients due to the design and layout of the custody area and/or the location of telephones. While it was intended that, over time, custody suites would have arrangements in place to ensure that lawyers could talk confidentially to their clients over the telephone in order to comply with this fundamental right, this has not always found to be the case.²⁴

For lawyers, not only can they experience difficulties in trying to get through to busy custody suites over the telephone, they can also face physical barriers when trying to gain access to their clients in custody. As Cape points out, the defence have literally been designed out of many custody suites as they are increasingly being built or refurbished in a way that physically prevents them from speaking to custody officers.²⁵ Instead, in some areas, lawyers have to wait outside of the custody suite until the police are ready to admit them, which is usually at the time of the police interview.²⁶ In addition, from 2008, lawyers have been paid a fixed fee for police station work, instead of being paid for the time spent on cases.²⁷ It is important to

²¹ S.58(1).

²² Kemp, *Transforming Legal Aid* (2010, pp. 47-50).

²³ Kemp, *No Time for a Solicitor* (2013, pp. 195-196).

²⁴ R. Pattenden and L. Skinns, "Choice, Privacy and Publicly Funded Legal Advice at Police Stations" (2010) 73(3) *M.L.R.*

²⁵ E. Cape, "No Defence: The Erosion of PACE Rights" in *No Defence: Miscarriages of Justice, Lawyers and Poor Representation*, London: The Justice Gap (2013, p. 17).

²⁶ Kemp, *No Time for a Solicitor* (2013, p. 195).

²⁷ With geographical variations, the average fee paid is £181.50. The same fee is paid irrespective of the seriousness and/or complexity of the offence, and the number of police interviews involved. A higher 'escape fee' fee is payable when dealing with very serious and/or complex cases, but the threshold for this fee is seldom met. See V. Kemp, *Effective Police Station Legal Advice-Country Report 2: England and Wales* (2018b, p.21). Online report. <http://eprints.nottingham.ac.uk/51145/> [Accessed 16 July 2019].

note that payment of a higher fee incentivises lawyers to be present at the police interview, instead of providing telephone-only advice.²⁸ However, as Cape points out, a fixed fee rewards lawyers for doing the minimum amount of work for their clients rather than what is necessary to effectively defend them.²⁹ When the fixed fee was implemented, lawyers complained that it does not cover the cost to the firm of providing police station legal advice.³⁰ Subsequently, not only has the fee not increased to keep up with inflation, it has been reduced by 8.75 per cent, following cuts in legal aid spending in 2015. In response, it seems that some lawyers are concentrating their efforts on the police interview only, which means that they do not speak to their clients prior to arriving at the police station.³¹ As this can be many hours following a referral for legal advice, this is contrary to PACE, which requires legal advice to be available “as soon as practicable” following a request. It is also in breach of a contract requirement imposed on publicly-funded defence lawyers by the Legal Aid Agency to contact clients within 45 minutes of receiving a referral.³²

After first describing how the App was used to inform detainees of their right to legal advice, and setting out the methods adopted in this study, next explored are some of the factors found to influence the take-up of legal advice. Also examined are potential obstacles for detainees in accessing legal advice, including both police and defence-related factors. Finally, the potential for technology to inform people of their right to a lawyer, and to help improve access to legal advice, is explored.

3. The prototype App

The prototype App was designed to provide detainees with information on what happens in the criminal process when detained. This included information on the

²⁸ When dealing with minor non-recordable offences, telephone-only advice is provided by Criminal Defence Direct, funded by the Legal Aid Agency. The detainee is entitled to have a lawyer attend in person, however, if there is a police interview.

²⁹ Cape, *No Defence: The Erosion of PACE Rights* (2013, p. 17).

³⁰ Kemp, *Transforming Legal Aid* (2010, pp. 114-117).

³¹ Kemp, *No Time for a Solicitor* (2013); D. Newman, *Legal Aid Lawyers and the Quest for Justice*, Oxford: Hart (2013); V. Kemp, *Digital Legal Rights for Suspects: Users’ Perspectives and PACE Safeguards* (2018a). Online report. <http://eprints.nottingham.ac.uk/52777/> [Accessed 21 November 2019].

³² Legal Aid Agency, *Standard Crime Contract* (2017). Online report. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/676674/2017-scc-specification.pdf [Accessed 21 November 2019].

booking in process, police powers when conducting searches, and on case outcomes. A section on legal advice explained the role of the lawyer and how having legal advice can assist detainees in police custody. As noted above, when asked if legal advice was requested, if 'no' was pressed, there were set out four main reasons for refusal. When asked to select the main reason why, a text box appeared providing additional information. For those selecting that they do not need a lawyer, for example, it was pointed out that the law is complicated and that a lawyer can help, particularly in the police interview. For those not wanting to wait for a lawyer, it was stated that the police investigation is generally the main reason for the delay, and they are advised to speak to a lawyer over the telephone to help them make a decision. After considering the statements presented, respondents were asked if they wanted to change their mind about having legal advice. If 'yes' was pressed at any time, the intention was that the interview could not proceed until the detainee had spoken to a lawyer.

4. Methods

In this paper are explored findings arising when user-testing a prototype App and conducting semi-structured interviews with 100 detainees in two large custody suites.³³ For reasons of anonymity, the police force areas have not been named and the sites have been given the pseudonym of Garrick and Kingsley custody suites. The custody suites were observed and informal interviews were held with custody staff, including PACE inspectors, custody officers and detention officers. A semi-structured interview was also conducted with a local defence lawyer. Comments made by custody staff begin with the initial 'G' or 'K' (depending on whether these were made in Garrick or Kingsley custody suites), followed by the date when the comment was made. The initials of the lawyer are used, coded for reasons of anonymity. In addition, comments made by custody staff and the lawyer are referred to in the feminine, even though both female and male respondents were involved. While reference is made to 'lawyers'

³³ It was agreed that we would not approach detainees identified as vulnerable, being those under constant supervision. We had intended to approach young detainees but this was not possible, mainly due to requiring the consent of appropriate adults, who tended not to arrive at the station until the police were ready to conduct the interview.

or 'solicitors' in this paper, non-solicitors can also provide police station legal advice, including trainee solicitors, accredited or probationary representatives, and members of CILEX,³⁴ although all have to be trained to do this work.

Within the two custody suites observed, the police had recently centralised custody facilities, replacing smaller custody suites with two large purpose-built facilities, each having the capacity to hold in excess of 50 detainees. The author and Dr. Emma Oakley, a lecturer at the School of Law, University of Birmingham, were involved in user-testing the App over 16 days within a six-week period of time during the summer of 2017. Eight days were conducted at each site, with 46 interviews being achieved in Garrick and 54 in Kingsley custody suites. Adults only were interviewed, 78 males and 12 females. When referring to the research interviews with respondents, the prefix 'G' or 'K' is used to note the custody suite involved, followed by the number of the interview, recorded chronologically.

Reference is also made in this paper to a key finding arising out of a Freedom of Information request sent to all police force areas, asking for the request rate of legal advice for detainees. The findings arising out of this and other Freedom of Information Requests will be published in due course.

5. Factors found to influence the take-up of legal advice

The average request rate for legal advice for both Garrick and Kingsley custody suites was 53 per cent,³⁵ which is higher than the 45 per cent identified in the 2011 study.³⁶ More recently, following a Freedom of Information request, 19 police forces responded with data on legal advice. Based on 88,304 custody records, 56 per cent of detainees requested legal advice (during March and September) in 2017.³⁷ The request rate for legal advice varied between force areas (from 35 to 67 per cent), but the majority of

³⁴ CILEX is the Chartered Institute of Legal Executives, representing chartered legal executive lawyers, paralegals and other legal practitioners.

³⁵ This involved analysis of 2,922 electronic custody records held in August 2017: 1,294 in Garrick and 1,628 in Kingsley custody suites, respectively. The request rate for legal advice was 49 per cent at Garrick and 56 per cent at Kingsley. The request rates at the two sites were found to be different to those commented on in an earlier report, which had been based on a smaller sample of cases (Kemp, *Digital Legal Rights for Suspects* (2018a, p. 7)).

³⁶ Pleasence *et al.*, *The Justice Lottery* (2011, p. 10).

³⁷ Sylvia Wittmer assisted the author in carrying out the Freedom of Information request and Lesley Laver has undertaken a statistical analysis of the data.

forces reported that around half of detainees requested advice. Thus, we can see that requests for legal advice have remained relatively low over recent years and it is not yet known to what extent detainees requesting legal advice receive such advice.

When user-testing the App in the two custody suites, of 44 respondents who declined legal advice, and gave a response, 75 per cent (n=33) said that they did not need a lawyer. This included 13 participants who said they had "done nothing wrong", and three who said they were guilty. For the remaining 25 per cent (n=11), the refusal of legal advice was due to concerns that having a lawyer would lead to delays, and, thereby, extend their time in custody. When previously having undertaken a survey of people drawn into the criminal process, it was only possible to record the first response received when asking why legal advice was refused.³⁸ When using the App, having first noted the reason given for declining a lawyer, we were able to discuss this decision in more detail and this helped to provide a more nuanced understanding of some of the factors found to influence the take-up of legal advice.

Detainees' understanding of the need for legal advice

There were differences of opinion expressed by respondents as to when it is important to have a lawyer, highlighting some of the confusion arising over detainees' legal rights. While some said that a lawyer is only required if you are 'guilty', others thought that only the 'innocent' needed legal advice.³⁹ The following quotes help to highlight such contradictions:

"I haven't had a solicitor because I don't need one, I haven't done anything wrong. I can see why someone would want a solicitor if they were guilty, but not if they haven't done anything" (G.14).

"I don't want a solicitor because I'm guilty. If I wasn't guilty I'd have one" (K.44).

³⁸ Kemp, *Transforming Legal Aid* (2010).

³⁹ There were similar findings when surveying over 1,000 users in the criminal justice system (Kemp, *Transforming Legal Aid* (2010, pp. 38-39)).

For people who are not legally trained, the legal complexities involved means that many detainees do not always know if they are 'guilty' or 'not guilty' in law. In cases where they might consider themselves to be 'guilty,' for example, a defence might be raised based on their version of events. Contrariwise, for those who state their innocence, they could unwittingly describe the incident in a way that implies their guilt.⁴⁰ For those who refused legal advice because they "haven't done anything wrong", there were concerns raised over the negative connotation that can arise when requesting legal advice. As this respondent put it, "If you ask for a solicitor then it makes it look as if you've got something to hide. It makes it look as if you are guilty of something" (G.3).

If legal advice is declined, as noted above, Code C requires custody officers to offer to detainees the opportunity to speak to a lawyer over the telephone, but no detainees in this study were seen to be offered this right. In addition, and as explored further below, many respondents were not aware that they could speak to a lawyer over the telephone.

A small number of respondents said they declined legal advice because they could cope on their own. In a couple of cases, the respondents had been arrested on suspicion of domestic violence offences. One respondent said, "You know in your heart that you haven't done anything wrong. If it hasn't gone too far, you can fix it before things get worse. You don't need a solicitor" (K.81). The other remarked, "It's a false allegation. I know the facts and they have nothing on me and that'll come out in the interview. A solicitor can't do anything and I don't need one" (K.50).

There were other respondents who declined legal advice but said they would have a lawyer if they were taken to court. As these two respondents stated:

"I don't see the point of having a solicitor unless I'm being charged. I'll just go 'no comment' in the interview and I'll get a solicitor if they charge me" (G.14)

"I'll sort myself out with a solicitor if it goes to court" (K.66).

⁴⁰ See Kemp, *Transforming Legal Aid* (2010, p. 39).

While the first respondent said he would make 'no comment' in response to police questions, others were of the view that co-operating with the police was the best option. After having declined legal advice, for example, one respondent went on to say, "I know what they'd tell me to do and I'll tell the truth anyway" (K.50). By 'telling the truth', this can lead to people making incriminating comments. This was a concern raised by the lawyer involved in this study when she said:

"It's when they don't have a solicitor in the police station and the police don't have any evidence that they can get into trouble by saying something in the interview that ends up with them being in court" (IS).

While some respondents said that they would have a lawyer in court, there are some cases where having legal advice in the police station could have avoided prosecution.

Disclosure and the right to silence

It is for the prosecution to gather evidence when constructing a case against a suspect in an adversarial system of justice.⁴¹ As the lawyer interviewed in this study pointed out, however, if the police do not have any evidence, a suspect can unwittingly make an incriminating statement that can lead to a criminal sanction being imposed. Detainees have a right to silence, but this was modified by the Criminal Justice and Public Order Act 1994. The modified caution is complicated and most lay people do not fully understand what it means.⁴² To assist, Code C requires that the police provide information as follows:

"Before a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it, in order to allow for the effective exercise of the rights of the defence" (para. 11.1.A).

⁴¹ McConville *et al.*, *The Case for the Prosecution* (1991).

⁴² S. Fenner, G. Gudjonsson and I. Clare, "Understanding of the Police Caution (England and Wales) Among Suspects in Police Detention (2002)", 12 *J. Community & Applied Social Psychology* 83.

Despite this requirement, unrepresented respondents said that they had not been given any information by the police about the alleged offence prior to the interview.⁴³ This is perhaps not surprising when the College of Policing, in its guidance to police interviewers' states, "Unrepresented suspects should not be given a pre-interview briefing as they may not understand the evidential value of any material provided."⁴⁴ Even if suspects do not understand the information disclosed, it could encourage some to change their mind and have a lawyer. It is also interesting to reflect that the College of Policing assumes that unrepresented suspects are not always able to understand 'the evidential value' of the information disclosed, illustrating why it is important for detainees to have legal assistance when interviewed by the police.

Delays undermining the take-up of legal advice

While only eleven respondents mentioned delays as their first response when saying why legal advice was declined, long delays were the main reason, raised by most respondents at some point during the research interview, for declining legal advice. Indeed, having received many complaints from detainees over delays, we ascertained from the police that the average length of time that they were being held was over 17 hours in the two custody suites.⁴⁵ Such long delays were surprising, particularly as the average duration in 2009 was found to be just over nine hours.⁴⁶ This had implications for discouraging detainees from having legal advice, as this respondent remarked, "I don't want it to take longer because of waiting for my solicitor. It shouldn't be that people have to wait longer for a solicitor because it's uncomfortable inside a cell" (K.63). The following comments are from respondents who did not mention 'delays' when first saying why legal advice was declined, but went on to do so when saying:

⁴³ While some police officers presumably comply with this requirement, the author has not experienced this happening in any of the custody suites she has observed.

⁴⁴ College of Policing, *Authorised Professional Practice: Investigation – Investigative Interviewing* (2013, para. 6.1.4). Online report. <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing/> [Accessed 21 November 2019].

⁴⁵ Based on over 3,000 custody records in June 2017, the average duration in Garrick and Kingsley custody suites was 17 hours and 46 minutes, and 17 hours and 40 minutes, respectively.

⁴⁶ Kemp *et al.*, *Whose Time is it Anyway* (2012).

"I'd have a solicitor if it meant I'd be dealt with quickly, but that doesn't happen" (G.25).

"I think generally people don't ask for a solicitor because they don't want to be here. They think it will cause a delay. They just want to get out of here" (K.45).

"The last time I was here for 20 hours and it was all because the solicitor was delayed. If I hadn't asked for a one I'd have been out the same day. I don't need a solicitor because I know what's happening" (G.14).

A number of respondents said they would have had legal advice if it would help to reduce delays. As this respondent remarked, "The whole point of having a solicitor is to hurry things up. I just want to get out through the quickest route" (K.53). On the other hand, some respondents said they were told by the police that they would be dealt with more quickly if they declined legal advice. This respondent said, "They brought me in at 2am and I was told I'd be dealt with by 8am, so I didn't bother having a solicitor. It's now 12 hours later and I still haven't been interviewed" (K.66). The long delay did not encourage the respondent to change his mind and have a lawyer.

It was difficult to discuss with respondents decisions made over legal advice as we did not want to make them feel they had made the wrong decision, particularly if they were still waiting to be interviewed by the police. On the other hand, we did want to give people the opportunity to change their mind and have legal advice if the interview was still outstanding. There were some respondents who said they would change their mind, but only if we could assure them that having a lawyer would not lead to a delay. As this respondent put it:

"I'm very worried as I've been here since 10pm last night. I don't want a solicitor because that would mean I'd have to stay for longer. I'd have one if you can promise me it won't cause a delay" (G.26).

We did not know when the police interview was to be held and so we could not give such assurances, knowing that, if the interview was imminent, a request for legal

advice would cause a delay while waiting for the lawyer to attend. There were four respondents who did change their mind and said they wanted a lawyer, although in two cases a lawyer had already been requested; which again highlights the confusion that can arise for people who requested legal advice, but they had not spoken to a lawyer many hours later.

Only a couple of respondents complained that the police used delays as a ploy to discourage them from having a lawyer. One said, "When you get to the station you're told not to have a solicitor because you will be dealt with quickly and it puts you off. The process takes so long" (K.83). With such long delays in any event, a custody officer said that this discourages some detainees from having legal advice, particularly when they think the lawyer is causing the delay (K: 26.7.2017). It is interesting that, while it is the police investigation that takes a long time, there is a common perception among detainees that lawyers are the cause of long delays.⁴⁷ This was the situation for one respondent when changing his mind about having legal advice because he thought his lawyer was delaying the interview. He said, "It's the first time I've known solicitors not to work through the night. It used to be a 24-hour service" (K.47).⁴⁸ In the morning, when he still had not been interviewed, he went on to say:

"I initially asked for a solicitor but then changed my mind because it can sometimes delay the interview and then you're in here for longer. I told the police that if it comes to it and the interview is ready before the solicitor gets here, then I want the interview and not the solicitor... At 10.30 this morning, nothing had happened and so I said I didn't want one [a solicitor] and I was interviewed straight away" (K.47).

With the respondent having been interviewed so quickly after having declined legal advice, this convinced him that it was his lawyer who was causing the delay.

Type of offence impacting on legal advice

⁴⁷ Once the police are ready for the interview, however, there can be a delay while waiting for the lawyer to arrive at the station.

⁴⁸ Lawyers are available through the night, but most police investigators were not.

Most respondents said that they would probably have a lawyer if being dealt with for a serious offence. As this respondent remarked, "I'd only have a solicitor if I'd done something deadly serious" (K.45). Some respondents said that they declined legal advice because the offence was minor. As these three respondents put it:

"I was brought in for criminal damage and it will be quicker to get out of here without a solicitor. If the charges aren't much then I'm okay. If it was a more serious offence, I would probably have had a solicitor (K.66).

"I've had a solicitor in the past, but this is just a criminal damage" (K.31).

"I haven't done anything wrong and I've got nothing to hide. I would have had a solicitor if it was complicated, but it wasn't on this occasion" (G.18).

It was not appropriate to talk to people in custody about the alleged offence, due to this being such a difficult and stressful time, and also because, in many cases, the police investigation was ongoing. Nevertheless, when going through the options for refusing legal advice as set out in the App, it became evident in some cases that detainees were being dealt with for a minor offence. There were two respondents arrested for the first-time for an offence of shoplifting, for example (G.7 and G.8). In addition, when talking to custody staff, while it was accepted that fewer people are brought into custody for minor matters, there were complaints made that some people were detained unnecessarily. As this custody officer put it, "It wouldn't be so bad if we were only dealing with serious offences, but menial ones are brought into custody too" (K:21.7.17).

There were a small number of cases where respondents initially said they were being dealt with for a minor offence, but, later on, acknowledged it was more serious as it had arisen out of a domestic violence incident. For example, one respondent started off by saying:

"It was petty in my eyes and so I don't think having a solicitor will make any difference. I don't want to be waiting around for them to come in and tell me what I already know" (K.75).

When later going through the reasons for declining legal advice as set out in the App, it emerged that the case was more serious when he remarked:

“To me, it’s minor. I’ll plead guilty to the criminal damage, but not to anything else as she’s lying. I’m saying it’s minor, but in some respects it isn’t because she’s said I’ve hit her” (K.75).

In another case, the respondent was aware that he had been arrested for assaulting his partner, but he was confident in his own ability to sort out the case when saying:

“I don’t need a solicitor because she’s exaggerated what’s happened. I know how a solicitor can help me, but this has been blown up. If it was something more violent, or aggressive, then I’d need a solicitor, but it’s just gone a bit too far” (K.81).

These comments again are illustrative of the lack of understanding that some people have of the importance of having legal advice, not always recognising the legal implications of what is said, or not said, in the police interview.

Drug offences are another area where detainees can perceive the offence to be minor because of what they consider to be the small amount of drugs involved. In one case, for instance, a respondent said he had been arrested for cultivating cannabis, but he did not consider this to be a serious offence because, “I was only cultivating it for my own use” (G.84). He declined legal advice and, when later when looking at the reasons for not wanting a lawyer when going through the App, he commented on the minor nature of the offence in saying, “It isn’t really a harmful crime. It’s just a little plant so I’ll put my hands up and that’s it” (G.84). While respondents can be correct when saying that the offence is minor, it is interesting to reflect that the offence was serious enough to warrant detention; although this is not always the case.⁴⁹

⁴⁹ It has been noted how the police can arrest and detain suspects for minor offences and borderline criminal activity, although this has been less so over recent years. See Kemp, *Bridewell Legal Advice Study: Interim Report* (2012, pp. 35-40) and V. Kemp, *Bridewell Legal Advice Study: Final Report* (2013b, pp. 35-40). Online report.

6. Potential barriers to accessing legal advice

It was evident when talking to respondents who had requested legal advice that very few had spoken to their lawyer prior to the police interview. While most had requested legal advice when being booked into custody, it was many hours later before they were contacted by their lawyer. With such long delays, some were confused about whether their request for legal advice had been granted. As this respondent commented:

“I’ve been here for over 13 hours. I haven’t been interviewed and no one’s telling me anything. I said that I wanted to speak to the duty solicitor, but I haven’t seen anyone yet. I was told that it’s my right, but I don’t know where I stand because no one has spoken to me yet” (G.97).

When commenting on his uncertainty about whether he had a lawyer, this respondent said: “I asked for a solicitor when I was being fingerprinted, but I’m not sure whether they are getting me one or not” (K.63). For another respondent, having been held for a long time and not having spoken to his lawyer, he was under the impression that legal advice had been refused when he said:

“I asked to speak to a solicitor when I came in here, but they wouldn’t let me and I’ve been denied that right. This is my first time in custody and I’m not allowed a telephone call. I’ve been here for over 20 hours now and I can’t stand the thought of doing another 12 hours” (K.69).

The police had given the respondent a note stating that he was not allowed to make a telephone call but, as he had not spoken to a lawyer, he was under the mistaken impression that legal advice had been refused.

Inspectors’ review of legal advice

With the police being in a position to put pressure on detainees to change their mind about having legal advice, PACE requires an inspector to review these decisions. Code

<http://eprints.nottingham.ac.uk/27834/1/Kemp%20BLAST%20Final%20Report.pdf> [Accessed 21 November 2019].

C now requires inspectors to contact the lawyer involved when reviewing such decisions, but as the inspectors in both custody suites were not aware of this requirement, the lawyers were not contacted. The lawyer involved in this study, who regularly deals with cases in the custody suites, confirmed that this is the case and it is when calling through to custody suites that she finds out that her clients have been interviewed without legal advice. There were similar findings in a comparative study of police station legal advice in England and Wales, when lawyers said that the inspectors do not always contact them when their clients change their mind about having a lawyer.⁵⁰

It is of concern that detainees can be held for such a long time in police custody, particularly as PACE requires the police to deal with cases expeditiously. Following cuts to the policing budget having reduced the number of police officers available to conduct interviews, custody officers said there had been a reorganisation of the investigation in the two custody suites studied. Intended to help achieve efficiencies and cost savings for the police, there is a requirement for investigating officers, rather than the arresting officers, to conduct the first interview. With investigating officers not working overnight, and with too few officers available to conduct the number of interviews required, custody officers complained that the reorganisation was leading to long delays.⁵¹

Contacting a lawyer over the telephone

With a number of respondents in this study having been detained for many hours by the time of the research interview, they were seen to be under tremendous pressure. This was due to having to wait in a cell with little to distract them, not knowing what was happening in their case, and some being anxious about what was happening in the outside world.⁵² It is because of the pressure that detainees can be under when having to wait a long time in the cell that PACE requires the police to expedite cases

⁵⁰ Kemp, *Digital Legal Rights for Suspects* (2018a, p. 8).

⁵¹ Kemp, *Digital Legal Rights for Suspects* (2018a, p. 6). This important issue is also explored in a related paper, see V. Kemp, "Authorising and Reviewing Detention: PACE Safeguards in a Digital Age", *Criminal Law Review* (forthcoming).

⁵² Kemp, *Digital Legal Rights for Suspects* (2018a, pp. 11-14).

and to provide early access to legal advice. While a lawyer is unlikely to know what is happening during the early stages of the police investigation, a telephone call can help to reassure clients that their lawyer is involved. It can also provide a vital lifeline for detainees with caring and/or employment responsibilities, as the lawyer can pass on messages that do not relate to the police investigation. However, for reasons discussed below, it seems that the policy for some lawyers is not to contact their client until attending at the station in time for the police interview. Such an approach means that there can be many hours between detainees requesting and receiving legal advice.

When using the App to go through detainees' legal rights with respondents, a number said that they were not aware that they could speak to a lawyer over the telephone. Indeed, some were surprised that this was the case. A couple of respondents made the following comments:

"I'd have spoken to my lawyer over the phone if I'd know it was an option"
(G.9).

"It would have helped me to have known that I could have spoken to a solicitor over the phone last night. I would have had a solicitor if I could have spoken to them then. I don't know what to do, but I won't bother with a solicitor now"
(G.28).

If, having declined legal advice, detainees were offered the opportunity to speak to a lawyer over the telephone when declining legal advice, as required by Code C (para. 6.5), this would provide an early opportunity for them to speak to a lawyer. In practice, not only were detainees not offered this right, but it became apparent that some people were not allowed to talk to their lawyer over the telephone. In one case, for example, after the research interview, the respondent asked the detention officer if he could talk to his lawyer over the telephone. The detention officer refused this request, saying that he would have to wait until the police interview before speaking to his lawyer. The respondent pointed to the written notice of rights, provided by the

police, saying that he has a right to make this call. Still refusing the request, the detention officer replied, "It doesn't happen like this in practice." When the respondent persisted, he was told, "You'll have to take it up with the inspector" (K.41).

While the detention officer denied the detainee access to a lawyer prior to the police interview, it is important to comment on defence-related issues that can also undermine access to legal advice. With cuts to legal aid fees for police station work, for example, and with difficulties lawyers can encounter when trying to contact clients, particularly in busy custody suites,⁵³ it seems that some lawyers are not prepared to speak to their client until attending at the station in time for the police interview.⁵⁴ If this is a common occurrence, it is not surprising if detention officers perceive this situation to be the norm. Having said that, the lawyer in this study said she was "horrified and shocked" to hear that not all lawyers were complying with their contractual requirement to speak to their clients shortly after receiving a referral for legal advice.⁵⁵ As noted above, the requirement is for lawyers to contact clients within 45 minutes of receiving a referral, which is to be met in at least 80 per cent of cases and, if this requirement is not met, the lawyer is required to note the reason why not on the file.⁵⁶ With the Legal Aid Agency auditing case files, it would be interesting to know in what proportion of cases the requirement for early contact with clients is not being met. If, however, lawyers are noting on the case file that early contact was made in the case, but this only involved a telephone conversation with the police, and not their client, it would be helpful to examine a sample of custody records to ascertain the extent to which clients are not having early contact with their lawyer.

It was interesting to observe that a small number of respondents had been able to speak to their lawyer over the telephone. Their profile was similar, in that they were all prolific offenders, with extensive experience of being arrested and held in police

⁵³ The lawyer in this study commented on the difficult and time-consuming process that she often has to go through when trying to call through to her local police stations (Kemp, *Digital Legal Rights* (2018b, p. 8)).

⁵⁴ See Kemp, *Effective Police Station Legal Advice* (2018b, p.23).

⁵⁵ In the lawyer's firm, she said it is the practice of legal advisers to speak to clients over the telephone after receiving a referral, knowing that they will be disciplined if this is not the case.

⁵⁶ Legal Aid Agency, *Standard Crime Contract* (2017, paras 9.23-9.25).

custody. These respondents knew that they had a right to talk to their lawyer over the phone, and that the call would be accepted by their lawyer as they recognised the financial benefits of looking after 'regular' clients. There were similar findings in Newman's study, with lawyers being prepared to do a lot more work in cases involving clients coming from 'criminal families'.⁵⁷ If some detention officers do perceive it to be the norm that lawyers do not to speak to their clients until the police interview, there are evidently exceptions made for some detainees.

Another important factor found to undermine access to legal advice is the lack of privacy for detainees when having a telephone conversation with their lawyer. While this is a fundamental PACE requirement, in practice such calls take place either at the custody desk or in the corridor, which can be overheard by custody staff. A respondent complained about the lack of privacy when he said:

"They supervise the call so you can't have a private conversation. When I was talking to my solicitor, she [the detention officer] was right there in front of me. There's no privacy whatsoever" (K.71).

The lawyer in this study said that she can hear people speaking in the background when she talks to clients over the telephone at her local custody suites. This lack of privacy means that the lawyer has to tell her clients not to talk about the alleged offence, which undermines access to legal advice.

7. Technology and access to legal advice

Most respondents commented positively on the potential for an App to help improve detainees' understanding of their legal rights, particularly if used by children and young people, and those brought into custody for the first time. A few respondents felt that the App was an improvement on the written notice of rights. As these two respondents remarked:

⁵⁷ Newman, *Legal Aid Lawyers and the Quest for Justice* (2013).

"I think the App could help. It's certainly better than the little leaflets the police hand out ... I didn't even bother taking that into the cell with me" (G.3).

"The App is more useful than the paper leaflet the police give you. It's more in-depth, particularly for first-timers" (G.20).

There were also positive comments made about the potential for the App to assist detainees in better understanding their legal rights. As these two respondents put it:

"The App is good. It will help half the people who come in here, those who don't know what their rights are. I know my rights, not all of them, but the basic ones. Like having food and drink and a solicitor and stuff like that. It would be a good idea for people to learn about their rights a bit more" (K.48)

"I think the App would be very helpful, particularly for people who don't want a solicitor. Perhaps it would help to motivate them to ask for one" (K.61).

On the downside, when using the App in police custody, it had to contain a lot of information about the custody process, so the prototype was heavily text-based and not user-friendly. In due course, information will be presented in different formats so as to be more accessible and engaging, particularly for children and young people. As one respondent commented, "I like the App but it needs to have more videos and graphics" (G.3).

When using the App to explore detainees' legal rights with respondents, we discussed the potential for the App to help improve communication between lawyers and their clients in the future by using virtual connectivity. This idea was warmly received, with one respondent saying, "It would be good to have an iPad where you can have a video link and speak to your lawyer in private. He can explain what's going on" (K.75). In a similar vein, he continued:

"I've got a doctor's appointment where they use a video link and the doctor explains what's going on. You could do the same with your solicitor. It would be

good to get advice from him over the App, particularly if the police can't overhear what you're saying" (K.75).

A problem identified by the police when using the App is if vulnerable detainees used the tablet, which hosts the App, to self-harm. To get around this problem, it was suggested to respondents that the App could be displayed on a TV monitor embedded into their cell wall (with a toughened screen),⁵⁸ and they could speak to their lawyer in confidence via a secure virtual link.⁵⁹ While some respondents were sceptical that the police would allow this, it was thought to be the way forward. As these two respondents commented:

"The police want your rights to be confusing so you don't know what to do. They tell you your rights in a way that's difficult to understand. It's a tongue-twister isn't it? They play with words. If you had built in connectivity to speak to your solicitor straight away that would be brilliant" (K.51).

"The police miss the point about what's happening to you when you're brought into custody. An App would definitely help. If you could have a TV screen and a button which links you up with your solicitor then that would be amazing" (G.89).

The use of a video-link would also help to increase the visibility of lawyers, albeit virtually, but this could help in providing early access to lawyers, thereby increasing the take-up of legal advice.

8. Discussion

It has been helpful to use an App in police custody, not only to inform detainees of their legal rights, but also to discuss in more detail issues concerning access to legal advice. While it is encouraging that request rates for legal advice have continued to increase over recent years, to around 56 per cent on average, we have also identified

⁵⁸ Three police force areas have installed TV monitors into police cells on a trial basis.

⁵⁹ The initial contact would need to be made by the police through the Defence Solicitor Call Centre and the lawyer could then be connected to the TV monitor through a secure and confidential link.

potential barriers to people accessing such advice. Long delays are seen to be the main problem, with the average time detainees are having to wait in the two custody suites studied reaching almost 18 hours. With concerns over such long delays, and particularly with a common misconception among detainees that lawyers are the main cause of delays, some people are seen to change their mind and not have legal advice. There are important issues to address concerning people's lack of understanding of their right to legal advice, particularly those who do not have experience of being in custody. They need to understand not only how a lawyer can help them in the police station, particularly if deciding to waive legal advice, but also the implications of what is said, or not said, in the police interview.

Research has consistently shown how PACE safeguards are routinely breached in some police stations. In this study, we have seen that the police are not advising detainees when refusing legal advice that they can talk to a lawyer over the telephone, to help them come to a decision.⁶⁰ Also, in relation to the inspectors' undertaking a review of a detainees' decision not to have legal advice, we have seen that inspectors are not aware of the requirement to contact the lawyer involved. Most importantly, with PACE providing detainees with a *fundamental* right to have a *confidential* telephone conversation with their lawyer, it is not acceptable that this requirement is not complied with. Indeed, not all suspects are aware that they can speak to a lawyer over the telephone, and some are refused a request to do so. With the two custody suites studied being relatively new, there was the opportunity to facilitate confidential telephone calls between lawyers and their clients but, highlighting the dominance of the police, this fundamental PACE requirement is simply ignored. Instead, calls between lawyers and their clients take place in the custody area, which can be overheard by custody staff. It is not possible to continue user-testing an App in police custody as it is disingenuous to inform detainees of their legal rights only to find that these are not always available in practice.

⁶⁰ Code C, para. 6.5.

The effect of austerity measures can be seen to have had a negative impact on detainees accessing legal advice. Cuts to the policing budget has led to a reorganisation of the police investigation in the two areas studied, which has prioritised efficiencies and cost savings for the police but, an unintended consequence, is that this has increased the time detainees are held in police custody.⁶¹ Cuts to the legal aid budget have also had a negative impact on the quality of police station legal advice, with some lawyers focusing on the police interview only, and not contacting clients until they attend at the station.⁶² Contrary to PACE requirements, and also a legal aid contract requirement, this can leave clients not being able to access legal advice for many hours following a request.

When considering the significance of PACE safeguards, Zander points out that these provisions are law, and have to be followed, although the consequence of being in breach of the Act is not a criminal offence.⁶³ There have been no cases in which damages have been awarded against the police in a civil case for a breach of PACE. It seems that the only possible formal sanction to be taken against the police for a breach of the Act is disciplinary action against the officer responsible. For Zander, however, "such proceedings are as rare as hen's teeth."⁶⁴ It is not surprising that while the police are not complying with certain PACE requirements that are law in the two custody suites studied, that some Codes of Practice are also ignored, particularly if these do not fit in with police priorities. The Codes of Practice are not 'law', but they are rules that need to be followed and, if this is not the case, consequences may follow in cases before the court. While the police are failing to comply with some Code C requirements, such breaches are not being brought to the attention of the courts, which means that there is no effective challenge of the police when ignoring these safeguards.

⁶¹ Kemp, *Authorising and Reviewing Detention* (forthcoming).

⁶² Kemp, *Effective Police Station Legal Advice* (2018b).

⁶³ M. Zander, "If the PACE Codes are Not Law, Why Do They Have to be Followed?" (2012) 176 *Criminal Law and Justice Weekly* 714.

⁶⁴ *ibid*, 713.

With advances in technology, there is the potential for police custody to become a virtual site in which detainees should be able to have a virtual and confidential conversation with their lawyer at any time. At present, there were concerns raised by a number of respondents over the remoteness of lawyers in police custody, mainly because they are not visible. This remoteness discourages some detainees from having legal advice, particularly when they are also of the view that lawyers are the main cause of delays. It was surprising to note what difference it made to some detainees when asked if they would change their mind, and have a lawyer, if they could have a virtual conversation with them through a TV monitor in their cell. With such ease of access (which would need to be managed by custody officers), a number of respondents having declined legal advice said that they would change their mind and have a lawyer.

A video-link into police custody could also assist lawyers in challenging the police where there are breaches of PACE, particularly in cases with long delays. It would also assist the defence in engaging with the prosecution at the police investigative stage of proceedings. When considering how to ensure the quality of legal aid services in criminal processes, the United Nations Office on Drugs and Crime (UNODC) envisages such an approach when stating:

“Adversarial defence has an active role in the investigation, selection and presentation of the evidence on which the court will base its determination of guilt or innocence. It aims to achieve equality of arms for the accused, balancing the advantage of the State.”⁶⁵

Prompt access to legal advice and assistance is the key to guaranteeing a fair trial and the rule of law. Early intervention by the defence helps to ensure that rights are respected and this improves the efficiency and fairness of the criminal justice system. There is the potential for lawyers to have a more active role in cases if the police are required to conduct an early interview in cases, but this is not a role anticipated by

⁶⁵ UNODC, *Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes: Practical Guidance and Promising Practices*, United Nations: Vienna (2019, p. 15).

PACE. On the contrary, Code C states that, "The solicitor's only role in the police station is to protect and advance the legal rights of their client (Notes for Guidance 6D)." As Jackson observes, this is an inefficient approach which, "falls short of giving lawyers any full-blooded adversarial role that is reserved for the trial process."⁶⁶

It was when looking to the future, with the government proposing to introduce virtual courts, which would require pleas to be entered online, in order to be PACE compliant, and to maintain procedural safeguards, defence lawyers would have to be actively involved early on in cases.⁶⁷ By requiring a full-blooded adversarial role for lawyers in the police station, this would help to improve access to legal advice, but it could also lead to system efficiencies and cost savings. This could be achieved, for example, by avoiding weak and ill-considered cases going to court unnecessarily, to increase the number of early guilty pleas, and to reduce the number of trials, and/or the number of issues considered at trial.⁶⁸

It is important for researchers to continue examining this important topic, but questions arise when research findings continue to identify breaches of PACE and no action is taken. The author has reported her findings to policy makers and practitioners over the past decade, but many of the problems identified on the ground have not been addressed. With advances in technology, this provides an opportunity for policy makers to review PACE and to ensure that the safeguards intended in law are available in practice.

⁶⁶ J. Jackson, "Responses to Salduz: procedural tradition, change and the need for effective defence", 79(6) *Modern Law Review* (2016), p. 2011.

⁶⁷ The Prisons and Courts Bill 2016-17 set out the proposal for online courts, but this has been abandoned. Nevertheless, the government is proceeding with its digital court reform programme, including the introduction of online courts.

⁶⁸ Kemp, *Effective Police Station Legal Advice* (2018b).