

CHAPTER 1

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Role of the defence lawyer

1.1 The trial, especially jury trial, has traditionally been regarded as the crowning glory of our adversarial criminal justice system. The emphasis placed on the trial justified the view that advising at police stations was relatively unimportant, not requiring the skills or deserving the knowledge and experience expected of courtroom lawyers. In reality, however, what happens at the police station is often more important than what occurs in the courtroom in terms of determining the outcome of the case. Most cases are won or lost at the police station rather than at court. Confessions, sometimes false, are obtained from suspects, evidence is gathered, deals are done, and decisions are made which will inevitably influence the course of subsequent events. The Court of Appeal has described police interrogation and the trial as being ‘part of a continuous process in which the suspect is engaged from the beginning’.¹ In a leading case in 2008, the European Court of Human Rights explained the importance of the investigative stage in the following terms:

... the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial [and at] the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence.²

1.2 Defending at police stations is not easy. Clients may be vulnerable, nervous, apprehensive, resentful, angry, rude or all of these things. Police officers may be unco-operative, secretive, difficult, dismissive or aggressive. The lawyer is on police territory, subject to a police agenda, and may be regarded as someone who will interfere with both the investigation and the course of justice. On top of this, it may be late at night or in the early hours of the morning, and the lawyer is alone, unsupported by professional colleagues.

1.3 It is essential that lawyers working in this environment are clear about their role, are confident in their knowledge of relevant law and procedure, and possess the skills necessary to be effective. The importance of the lawyer’s role is underlined by two Court of Appeal decisions. In the first, *R v Paris, Abdullahi and Miller*,³ Stephen Miller and his two co-defendants were found guilty of murder largely because of Miller’s false confession, made as a result of considerable and illegitimate pressure from the police. As the then Lord Chief Justice Taylor said at the successful appeal, ‘Short of physical violence, it was hard to conceive of a more hostile approach by officers to a suspect’. The defendant, during most of the interviews, was

1 *R v Howell* [2003] EWCA Crim 1; (2005) 1 Cr App R 1; [2003] Crim LR 405.

2 *Salduz v Turkey* (2008) 49 EHRR 421, at para 54. This principle has, in effect, also been accepted by the United Nations. See *Basic principles on the role of lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on 7 September 1990 and welcomed by the General Assembly in Resolution 45/121 of 14 December 1990. For the domestic implications of *Salduz*, see *Cadder v HM Advocate* [2010] UKSC 43.

3 (1993) 97 Cr App R 99; [1994] Crim LR 361.

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accompanied by his solicitor and the Court of Appeal was unimpressed: '[T]he solicitor who sat in on the interviews seemed to have done that and little else. It seemed that his presence might actually have rendered a disservice since the officers might have taken the view that unless and until the solicitor intervened, they could not be criticised for going too far'. The fact that an inactive lawyer can do the client a disservice is also shown by a second case, that of *R v Dunn*,⁴ in which it was held that the presence of a lawyer may nullify the otherwise adverse effects for the prosecution of a breach of the Police and Criminal Evidence Act 1984 (PACE) or the Codes of Practice since, in the view of the court, the presence of the lawyer was sufficient to protect the suspect's interests.⁵

- 1.4 It is for these reasons that this book is called *Defending suspects at police stations*. The proper role of the defence lawyer is not, as some would have it, merely that of an observer.⁶ If that were the case, the lawyer could be replaced by a video camera. Neither is it to maintain some kind of balance between police and suspect – it is unlikely that the defence will ever have the powers and resources to match those of the police. Nor is the defence lawyer's function merely, as the Court of Appeal has sometimes implied,⁷ that of a provider of legal information. Rather, the role of the lawyer is to act in best interests of their client, to protect and advance the client's legal rights and, in so doing, to seek to ensure a fair and just criminal process. In our adversarial system, in which the police actively pursue the interests of the prosecution, the defence lawyer must actively pursue the interests of the suspect. To the extent that the lawyer does not do so, the lawyer will, as the Lord Chief Justice indicated in the case of *Paris*, be doing a disservice to the client – but will also be doing a disservice to the cause of justice.

Objectives of the defence lawyer

Introduction

- 1.5 The defence lawyer, as with any other lawyer, is under a duty to act in good faith and do their best for each client.⁸ This means that the lawyer must treat the interests of the client as paramount, provided that this does not conflict with the lawyer's professional conduct obligations or the public

4 (1990) 91 Cr App R 237; [1990] Crim LR 572.

5 It is not suggested that the lawyer in this case acted anything other than properly, since she denied that the disputed confession, which the police said was made in her presence, took place at all. For a further discussion of this case, see para 13.32 below.

6 For evidence, from the 1990s, that lawyers frequently took a passive role in police interviews, see M McConville and J Hodgson, *Custodial legal advice and the right to silence*, Royal Commission on Criminal Justice (RCCJ) Research Study No 16 (HMSO, London, 1993); J Baldwin, *The conduct of police investigations: records of interview; the defence lawyer's role and standards of supervision*, RCCJ Research Studies Nos 2, 3 and 4 (HMSO, London, 1992); and M McConville et al, *Standing accused* (Clarendon Press, Oxford, 1994).

7 See eg *R v Alladice* (1988) 87 Cr App R 380; [1988] Crim LR 608, and *R v Dunford* (1990) 91 Cr App R 150; [1991] Crim LR 370.

8 *SRA code of conduct 2011*, Principle 4.

interest in the administration of justice. While, for example, a client may be advised in strong terms of the advantages of admitting an offence to the police, whether the client does so is a matter for the client, and the lawyer should not apply any undue pressure to accept their advice.⁹ After all, it is the client who has to live with the consequences. If the lawyer feels strongly that the decision of the client is contrary to the advice given, one safeguard is for the lawyer to put the advice in writing and ask the client to read it and sign it. Acting in the client's best interests also involves trying to secure the best possible outcome for the client. This may include advising the client in such a way as to avoid disclosing information or evidence to the police which would be detrimental to the client's interests; trying to persuade the police or prosecutor not to charge; seeking to minimise the length of detention; trying to secure bail; and ensuring that relevant mitigating factors are put forward. The specific objectives of the defence lawyer are summarised below.

Securing information

- 1.6 The lawyer should seek to obtain as much relevant information from the police as possible. The police well understand the power of information and, more particularly, the utility of withholding information. It will usually be impossible to advise a client adequately in the absence of information, particularly about the evidence in the hands of the police, but also in relation to the circumstances of the arrest and detention. This takes on added significance in the context of the 'inference from silence' provisions of the Criminal Justice and Public Order Act (CJPOA) 1994, particularly since the Court of Appeal has held that failure of the police to supply information will not necessarily render a decision not to answer police questions reasonable. See further chapters 4 and 5.

Advising in private

- 1.7 Giving advice to the client in private is of paramount importance, and is a basic right under PACE s58 and the Terrorism Act (TA) 2000 Sch 8 para 7. Police tactics that have the effect of undermining this right should be firmly resisted.¹⁰ See further paras 2.149–2.150 below.

Advising on matters arising during the period of detention

- 1.8 In most cases the need for advice is unlikely to be confined to the initial consultation with the client, whether on the telephone or in person. Matters may arise throughout the period that the client is in police custody on which they may want or need advice. In particular, advice should not stop when the client enters the police interview or after the lawyer has left the police station. As PACE s58 makes clear, the suspect is entitled to legal

9 See the *Public defender service code of conduct* (Ministry of Justice, London, 2014) para 2.2 which, although only directly applicable to Public Defender Service (PDS) lawyers, includes principles that are relevant to all defence lawyers.

10 It has been held that this right is capable of enforcement by way of an action for breach of statutory duty (*R v Roques* September 1997 *Legal Action* 23).

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advice ‘at any time’. Furthermore, the lawyer should not wait until the client asks for advice. There are many occasions when the lawyer should take the initiative.

Presence at police interviews

- 1.9 Police interviews are crucial, both to the police and to the client. There are relatively few occasions when a lawyer would be justified in not attending them. The fact that they are electronically recorded is certainly no justification for absence. The fact that the client is intending not to answer questions is an important indication that the lawyer’s presence is required. See further chapter 7.

Safeguarding the client’s rights

- 1.10 Securing police observance of the rights of a suspect under PACE, the TA 2000 and the Codes of Practice is not necessarily an easy task since, in particular, PACE and the TA 2000 provide no mechanisms for enforcement that can be put into effect at the police station. However, the duty to safeguard a client’s rights follows directly from the general duty to act in the client’s best interests. If the defence lawyer does not take appropriate action, no one else will.

Acting ethically

- 1.11 High ethical standards are important for the defence lawyer, particularly in view of the nature of the work. One aspect of this principle is that the lawyer should do nothing that will compromise the interests of their client. The lawyer is under a professional duty to keep the affairs of the client confidential, and under a duty to pass on to the client all material information regardless of the source of that information. This means that the lawyer must not pass on information about the client to the police unless authorised to do so by the client, and must pass on relevant information to the client even if the police have given the lawyer the information ‘in confidence’. See further paras 1.16 and 4.30 below. The principle of acting ethically also means that the lawyer must not compromise themselves in relation to the client. The lawyer must be clear, for example, about the difference between pointing out the weaknesses of a client’s version of events and helping the client to concoct a story. The former is perfectly proper; the latter probably illegal. The lawyer must always remember that an act performed with intent to impede the apprehension or prosecution of a person who has committed a ‘relevant offence’ is itself a serious criminal offence.¹¹ Finally, the lawyer must take care to avoid acting for more than one client where there is a conflict of interests. See further para 5.42 below.

11 Criminal Law Act 1967 s4; and see further para 5.37 below. For an example of the difficulties that a lawyer can get into by asserting facts to the police that may not be true, see *R v Williams* [2002] EWCA Crim 2208.

Dealing with the client

General approach

- 1.12 Specific information about dealing with a client at the police station is given throughout this book, but some general points about the lawyer/client relationship are considered here. As noted earlier, the client may be in a variety of emotional states, which will require an approach that is both empathetic and inspires confidence. Empathy may be demonstrated by being willing to listen to what the client has to say even if it does not appear directly relevant to the issues. This is not to say that the lawyer should allow the client to ramble on indefinitely, but it will usually be appropriate to allow the client the time and the opportunity to express how and what they are feeling. In any case, this will then allow the consultation to proceed in a calmer and more constructive fashion. At the same time, the lawyer must also take appropriate action to ensure their own safety. See further para 5.8 below.
- 1.13 If the lawyer is to be effective, they will need to be able to inspire confidence in their skills and abilities. An adequate knowledge of the law governing police detention is a pre-requisite, but is not, in itself, sufficient. While some might argue that a casual approach, both in dress and manner, means that the lawyer will be ‘closer’ to the client, in the context of the police station this is often likely to be counter-productive. A lawyer who looks professional and acts professionally, whose demeanour is calm, and who is willing to stand up to the police where necessary, is likely to inspire much greater confidence than one who is casual, uses ‘street’ language or who is easily knocked off-course by confrontation with the police. This is especially important since the police will often be competing with the lawyer in terms of status. If the police are successful, it will be easier for them to influence the suspect in the direction they want, which may entail encouraging the suspect to ignore the lawyer’s advice.

Client care rule

- 1.14 The lawyer should be aware of the Solicitors’ Regulation Authority’s (SRA) client care rules.¹² Although certain aspects of the rules are not applicable at the police station, generally the rules may be suitably adapted to police station advice. In order to comply with the rules the lawyer should:
- tell the client their name and status;
 - identify clearly the client’s objectives in relation to the work to be done for them;
 - give the client a clear explanation of the issues involved and the options available to them;
 - tell the client the likely cost and how it will be met – usually, that advice is provided free under the police station advice and assistance scheme;
 - keep the client informed of progress;

12 SRA code of conduct 2011, chapter 1.

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- when the client is to be released from police custody, agree with them the next steps to be taken and inform them of any continuing consequences and write to them confirming the position.
- 1.15 The lawyer should, where appropriate, confirm relevant information in writing once the client has been released from police custody. If the lawyer, or their firm, continues to act for the client in respect of criminal proceedings resulting from the period in the police station, the client care requirements should be followed in full.

Client confidentiality and privilege

- 1.16 There are a number of important issues regarding the confidentiality of communications between a defence lawyer and their client:
- 1) The first concerns the professional duty of a solicitor not to disclose communications between them and their client, and the related question of whether the lawyer can ever be required to divulge such information.
 - 2) The second concerns the power of the police to obtain material which may be privileged.
 - 3) The third issue, which concerns whether the police can listen to communications between a lawyer and client, is dealt with at paras 2.136–2.139 below.
- 1.17 In relation to the first issue, it is important to distinguish between the duty of confidentiality, which is an obligation governed by the *SRA code of conduct 2011*, chapter 4, and legal professional privilege, which is an evidential rule governing the question whether a lawyer can be required to divulge information which is otherwise confidential. As noted at para 1.11 above, solicitors and their staff are under a professional duty to keep their clients', and former clients', affairs confidential. No information that has been communicated to the lawyer by or on behalf of a client, including the client's address, may be disclosed to anyone outside the firm without the client's agreement. The duty continues to apply even after the solicitor/client relationship comes to an end. For problems that may arise where the solicitor/client relationship may be terminated while the lawyer is at the police station, see para 5.38 below.
- 1.18 The duty of confidentiality is overridden where disclosure is permitted or required by law, which may include the following.
- 1) where disclosure is necessary to prevent the client or a third party committing a criminal act which the solicitor reasonably believes is likely to result in serious bodily harm;
 - 2) in exceptional circumstances involving children where the client is a child and discloses continuing sexual or other physical abuse but refuses to allow disclosure of such information, or where the client is an adult and discloses abuse of a child by them or another adult and refuses to allow disclosure of such information;
 - 3) where disclosure is required by statute, eg under the Proceeds of Crime Act (POCA) 2002, or the Money Laundering Regulations (for guidance

on the duties of solicitors in respect of reporting terrorism see the Law Society's *Anti-terrorism* practice note, 2016¹³;

- 4) where a court orders confidential information to be disclosed, or issues a warrant which authorises the seizure of confidential information.¹⁴

1.19 Quite separately from the professional duty of confidentiality, the law recognises that certain communications between a lawyer and their client, or with a third party, should be protected from enforced disclosure, and this is contained within rules concerning legal professional privilege. In some respects these rules cover a narrower range of communications than the duty of confidentiality. Whereas the confidentiality rule covers all confidential information about a client's affairs, legal professional privilege is confined to communications between a lawyer and the client which are made for the purpose of enabling the client to obtain or the lawyer to give legal advice. If a communication is privileged, neither the police nor a court can force either the lawyer or client to divulge the communication.¹⁵ The client, but not the lawyer, can expressly waive privilege and thus allow its disclosure, but it is important to note that privilege can be waived by implication – that is, disclosure of some privileged material may result in other material losing its privileged status. If privilege is lost in this way, a court could order disclosure of such material. For a discussion of this in relation to disclosure of legal advice given to a client, see para 5.103 below.

1.20 It follows from the above that the police can never directly force a lawyer to disclose to them information that is covered by legal professional privilege and, in view of the duty of confidentiality, a lawyer must never (subject to the exceptions noted above) volunteer confidential information without their client's consent. However, the police will sometimes seek to persuade a lawyer, possibly in forceful terms, to supply information and/or hand over documents that the lawyer has obtained while acting for a client. If the client consents then, of course, the information can be given or the documents handed over. If the client does not consent, the lawyer should consider the following questions:

- 1) **Is the information or are the documents covered by the duty of confidentiality?** If the information or documents have been received from the client, they almost certainly will be unless an exception applies (see above). The lawyer should insist on the police obtaining a witness summons or subpoena unless the lawyer has strong prima facie evidence that they have been used by the client to perpetrate a fraud or other crime.

13 Available at www.lawsociety.org.uk/support-services/advice/practice-notes/anti-terrorism.

14 These exceptions, and others, were set out in more detail in *Solicitors' code of conduct 2007* Guidance to Rule 4 – Confidentiality and disclosure. They do not appear in the *SRA code of conduct 2011*, but the principles should continue to apply.

15 See *R v Derby Magistrates' Court ex p B and Another* [1995] 4 All ER 526; and *R v Crown Court at Manchester ex p Rogers* [1999] 4 All ER 35; [1999] Crim LR 743. Legal professional privilege also covers communications between a lawyer or client and a third party (eg, a potential witness or expert) where the dominant purpose is preparation for pending or contemplated litigation.

- 2) **Will I commit an offence if I do not give the information or documents to the police?** Generally, a lawyer will not be committing an offence merely by refusing to hand over information or documents that they believe to be covered by the duty of confidentiality. It is highly unlikely that a court would conclude that a lawyer is guilty of wilfully obstructing a constable in such circumstances. There are provisions in the TA 2000 which make it an offence not to disclose to the police a belief or suspicion that a person has committed an offence under the TA 2000 ss15–18 (offences relating to terrorist property), where that belief or suspicion is based on information obtained in the course of a trade, profession, business or employment (TA 2000 s19(1) and (2)). Other non-disclosure offences are to be found in the TA 2000 ss21A and 38B. Generally, however, disclosure is not required where the information is obtained in circumstances that are covered by legal professional privilege.¹⁶ There are a number of provisions in the Proceeds of Crime Act (POCA) 2002 which impose extensive disclosure obligations in relation to the proceeds of crime. In particular, the POCA 2002 s328(1) makes it an offence for a person to enter into or become concerned in an arrangement which the person knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person. ‘Criminal property’ is widely defined to include property that itself constitutes a person’s benefit from criminal conduct or which represents such a benefit, wholly or partly and whether directly or indirectly. However, it was held in *Bowman v Fels*¹⁷ that section 328 was not intended to cover or affect the ordinary conduct of litigation by legal professionals, and that even if this conclusion was incorrect, that it did not override the duty of confidentiality or legal professional privilege. Therefore, provided the information is obtained in, or documents are created for the purposes of, the proper conduct of the case, the lawyer will not commit an offence under the POCA 2002 by failing to disclose them.
- 3) **Do the police have the power to seize documents in my possession?** This may arise in respect of documents in the lawyer’s possession while still at the police station, or in respect of documents retained elsewhere, such as in the lawyer’s office. Unless the lawyer is arrested, the police have no power to seize documents or other material from them whilst they are at the police station.¹⁸ With regard to documents or other material held elsewhere, if such documents or material have been created in the course of a lawyer/client relationship, or have been passed to the lawyer by a client in connection with the matter on which legal advice is sought, they are likely to amount to legally privileged material (unless held with the intention of furthering a criminal purpose) or special procedure material. In this case, the power of the police to search for or require production of such material is circumscribed by PACE Part II, and generally the police would have to obtain a production order or a search warrant.

16 TA 2000 s19(5) and (6). See also the Law Society’s *Anti-terrorism* practice note.

17 [2005] EWCA Civ 226; [2005] 1 WLR 3083; [2005] 4 All ER 609; [2005] 2 Cr App R 19.

18 For the application of these principles to a statement prepared for the purposes of a police interview, see para 5.160 below.

Dealing with the police

1.21 Many, although by no means all, police officers have a negative attitude towards defence lawyers. This largely results from their ‘crime control’ values. Their job, as they see it, is to control crime. The best way to control crime is to catch criminals. Anyone, or anything, that interferes with that mission is on the side of the criminal against the police. An important aspect of the police perspective is the need to demand deference from, and to be in control of, those people who they see as ‘police property’.¹⁹ By acting for, and speaking on behalf of, such people defence lawyers challenge this perspective. The objectives of investigative interviewing have been described by the police as obtaining: ‘accurate and reliable accounts from ... suspects about matters under police investigation’.²⁰ However, the evidence demonstrates that the police are often more interested in securing proof than in discovering truth, and the involvement of Crown prosecutors in crime investigation and charge decisions demonstrates the fact that the police are acting on behalf of the prosecution. Seen from this standpoint, unless defence lawyers can be harnessed to the values of the police, they are bound to interfere with these crime control objectives.²¹ Furthermore, the police have developed strategies such as phased (or managed) disclosure and intelligence-led investigation which have the effect, if not the purpose, of making the work of defence lawyers more difficult.

1.22 The defence lawyer, having recognised why the police act as they do towards them, needs to develop strategies for dealing with such conduct.²² This may, on occasion, require personal qualities of courage and perseverance. The words of the then Lord Chief Justice, Lord Taylor, in *R v Paris, Abdullahi and Miller*²³ should be borne in mind by all defence lawyers acting at the police station. Having commented on the fact that the lawyer in that case appeared to have done little in the police interview, he went on to say:

Guidelines for solicitors published by the Law Society provided that a solicitor might need to intervene if the questions were oppressive, threatening or insulting; that a solicitor should intervene if the officer was not asking questions but only making comments or if the questions were improperly put; and that the solicitor should advise the suspect of his right to remain silent if improprieties remained uncorrected or continued. A solicitor fulfilling

19 Being ‘in control’ is very important for the police and much of their behaviour can be understood in these terms. See S Choongh, *Policing as social discipline* (Clarendon, Oxford, 1997).

20 College of Policing, *Authorised professional practice: investigative interviewing*, Principle 1, available at www.app.college.police.uk/app-content/investigations/investigative-interviewing.

21 For a study carried out not long after PACE was introduced, see M McConville, A Sanders and R Leng, *The case for the prosecution* (Routledge, London, 1991). For more recent studies, see L Skinnis, *Police custody: governance, legitimacy and reform of the criminal justice process* (Willan, Abingdon, 2011); and J Blackstock, E Cape, J Hodgson, A Ogorodova and T Spronken, *Inside police custody: an empirical account of suspects’ rights in four jurisdictions* (Intersentia, Cambridge, 2014).

22 For more detailed guidance, see E Shepherd, *Police station skills for legal advisers: practical reference* (3rd edn, Law Society, 2004).

23 (1993) 97 Cr App R 99; [1994] Crim LR 361.

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the exacting duty of assisting a suspect during interviews should follow the guidelines and discharge his function responsibly and courageously. Otherwise his presence might actually render a disservice.

The defence lawyer should need no further endorsement of the legitimacy of and necessity for a proactive and interventionist role.

- 1.23 One matter of general importance is the extent to which defence lawyers can expect the police to respect the confidentiality of consultations with their clients. There is evidence that the police do sometimes place listening devices in cells and consultation rooms and record telephone conversations. For this reason, lawyers should always be aware of the possibility that conversations with their clients may be listened to by the police and, in particular, should never assume that a telephone conversation with a client in a police station is private. Lawyers should also warn clients of the possibility that any conversation that they have in their cell may be ‘bugged’.²⁴ For the use of covert surveillance in respect of lawyer/client consultations see para 2.138 below.

Preparing for the defence lawyer’s role

Organisation by the firm

- 1.24 Effective and efficient organisation is essential for firms providing a service to those detained at the police station because:
- police station work is both individually and organisationally demanding;
 - it is unpredictable – clients are often arrested at inconvenient times and frequently in the middle of the night;
 - it is required by the Law Society’s legal practice quality standard (Lexcel) and, for contracted firms, by the Legal Aid Agency’s (LAA) Standard Crime Contract Specifications (SCC) 2017, which governs the provision of criminal legal aid services;
 - it may well make the difference between the work being profitable and unprofitable.

In order to satisfy these various requirements, any firm that provides legal advice at the police station must develop structures and procedures to cater for the following.

Availability 24 hours per day

- 1.25 Systems are necessary to ensure that a lawyer is available and can be contacted at any time of the day or night in order to deal with police station calls, including back-up arrangements to cater for busy periods.

Full record-keeping

- 1.26 Systems are necessary to ensure that all relevant information, from first contact onwards, is recorded in an accessible and retrievable form. This

²⁴ See *R v Ali* (1991) *Times* 19 February; *R v Bailey* [1993] 3 All ER 513; [1993] Crim LR 681; *R v Stephen Roberts* [1997] Crim LR 222; and *R v Mason* [2002] Crim LR 841.

will necessitate appropriate training of all staff, including relevant administrative staff, and the use of pro-formas and checklists (see appendix 3).

Prompt allocation of cases to appropriately qualified staff

- 1.27 This will involve having systems to ensure that:
- cases are allocated without delay;
 - cases are allocated to appropriate staff having regard to the actual or potential seriousness of the case, and the status and experience of the staff member;
 - duty solicitor cases are allocated to staff who are appropriately qualified.

Appropriate supervision

- 1.28 Police station lawyers, especially those with less experience, should have prompt access to a more experienced lawyer who can be consulted in respect of difficult or complex issues that arise whilst advising a client at the police station. In addition, a system should be in place to ensure that police station lawyers routinely discuss their cases, or a selection of them, with a supervising lawyer. This should involve face-to-face discussion, providing the lawyer with an opportunity to reflect on the way in which they dealt with specific cases, and to provide an opportunity to take any necessary remedial action.

Appropriate training

- 1.29 The need for relevant training is self-evident, and mechanisms should be in place for planning and delivering training for all staff engaged in police station work. Training should cover not only substantive law, procedure and evidence, but also appropriate skills.

File and case management

- 1.30 Good file and case management systems are necessary for what is, in many firms, high volume work. Particular attention should be paid to systems that:
- enable files, in particular the most recent, to be retrieved quickly where an existing client has been arrested;
 - enable conflict of interests checks to be made without undue delay;
 - ensure that information obtained at the police station is available to the court advocate as soon as the client appears in court;
 - ensure that information resulting from police station attendance is placed in any subsequent court file.

Arrangements with doctors, interpreters, etc

- 1.31 Firms should ensure that police station lawyers have up-to-date information on the availability of doctors, interpreters, etc. Firms should consider making suitable arrangements with such professionals in order to ensure their availability at short notice.

Personal organisation

- 1.32 In addition to the firm being organised appropriately for police station work, the individual lawyer needs to be organised as well. A number of matters are relevant here.

Expertise and skills

- 1.33 As noted above, firms are responsible for ensuring that all staff are appropriately trained so that they have the necessary knowledge, expertise and skills to do their job well. It is also the responsibility of individual police station lawyers to ensure that they are adequately prepared for defending clients at police stations.

Comprehensive and legible notes

- 1.34 The importance of comprehensive and legible note-taking cannot be overstated. The defence lawyer, and all staff involved in any way with a police station case – such as the person who takes the initial telephone message – must take a contemporaneous note of what is said and done, the date and time, and the initials or signature of the note-maker. This will be made easier by the use of a standard police station form. There are a number of reasons why comprehensive record-keeping is important.

- It helps to ensure that all work done in respect of a particular case can be included in a claim for work done (where an itemised claim can be made).
 - It facilitates the passing of a case from one lawyer to another. The second lawyer will be able to see, at a glance, what has been done and said before the handover. If it is in the form of a standard case form, it will also ensure that the second lawyer is aware of such important details as the review times and when the detention time limit expires.
 - Events that occur at the police station may be relevant at trial, and the police station lawyer may have to give evidence. For example, in *R v Samuel*²⁵ the defendant's lawyer was able to give evidence of the times that he had contacted the police station in order to try to gain access to his client and of the conversations that took place, and this was crucial in persuading the court that evidence of the police interviews should have been excluded at trial.
- 1.35 All events must be noted and all conversations with the police and other people recorded, even if they appear insignificant at the time. Indeed, it may be appropriate on occasions to record that nothing was said or done. In *R v Dunn*²⁶ the lawyer gave evidence that there had been no confession by her client at the end of the police interview, as was alleged by the police (although apparently she was disbelieved by the jury). Thus, in police interviews, the time that the interview ended and the time that the parties left the interview room should be recorded, and the content of any conversation – or the fact that there was no conversation – also noted.

25 [1988] QB 615; [1988] 2 All ER 135; (1998) 87 Cr App R 232; [1988] Crim LR 299.

26 (1990) Cr App R 237; [1990] Crim LR 572, discussed at para 13.23 below.

1.36 Guidance concerning what information should be sought is given in subsequent chapters, and in the checklists in appendix 3, but the following lists the kind of information that should be carefully recorded:

- the time and place of all relevant conversations and events;
- the physical and mental state of the client;
- the general conduct of the police and the ‘atmosphere’ in which the investigation is being conducted;
- anything the police allege has been said by the client before attendance by the lawyer;
- anything the police assert has been said to the client by them, for example, a request to account for an object, substance or mark, etc, and what reply, if any, was made;
- information given by the police to the lawyer;
- requests for information made to the police by the lawyer;
- any request for information to be recorded in the custody record, and any representations made to the custody officer;
- information given to the lawyer by the client;
- the client’s apparent understanding of the significance of the allegation, the caution, and the significance of their reply or failure to reply;
- advice given by the lawyer to the client, and the reasons for that advice;
- the wording of any caution or special warning, or explanation of any caution or special warning given, and any response by the client;
- what was said during the course of a police interview;
- anything said at the time of charge/report for summons.

Police station toolkit

1.37 Lawyers who do police station work should have a ‘toolkit’ – hard copy or electronic – which is easily available and ready to hand for whenever they are called out to a police station. This toolkit should contain the following.

Sources of reference

1.38 An up-to-date version of PACE and the Codes of Practice is essential (versions that were current at the time of publication can be found in appendices 1 and 2 below). A reference resource containing at least common crimes and defences should also be included. The following should be readily available (or the current version of these codes and circulars where they have been revised since the date of publication of this book):

- Director’s guidance on charging;
- Code for crown prosecutors;
- Ministry of Justice guidance Simple cautions for adult offenders;
- Code of practice for adult conditional cautions; and
- Director’s guidance on adult conditional cautions.²⁷

27 Current versions of the *Code for crown prosecutors* and the *Director’s guidance* are available via www.cps.gov.uk/prosecution_policy_and_guidance.html.

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- 1.39 Even if a lawyer uses a laptop or tablet to record relevant information, notepaper may be needed to write a letter to a client to whom access is being denied, to make written representations or a written record of oral representations, or to make a formal complaint. It is important always to keep a copy of any letter or written representation made, since it may be needed for future reference or for evidential purposes. This may be done by taking a photograph or using a scanning application.

Identification

- 1.40 A form of identification is useful, particularly if the lawyer is attending at a police station where they are not known. Non-solicitors doing police station work should carry a letter of authorisation from the firm or solicitor on whose behalf they attend the police station. The contents of such a letter must be taken into account if the police are considering excluding a representative from the police station (Code C para 6.13; Code H para 6.15; and see para 4.6 below). In duty solicitor cases, staff undertaking police station advice must carry an identification card as specified by the LAA.²⁸

Standard case forms

- 1.41 A standard police station form²⁹ has a number of functions. A standard police station form:
- acts as a checklist, both helping to ensure that relevant information has been obtained, and prompting the lawyer in relation to events that are coming up, such as review times, or expiry of custody time limits;
 - enables efficient transfer to another lawyer;
 - provides a readily available source of information for use at any subsequent trial;
 - makes the process of billing quicker since all the relevant information is contained in one document; and
 - helps satisfy the requirements of the SCC 2017.
- 1.42 When completed, the standard case form should be placed in the case file as soon as it is opened. Other standard forms, and checklists (such as an identification procedure checklist (see appendix 3)), should also be included.

Mobile telephone, laptop and other electronic devices

- 1.43 The Law Society and the then Association of Chief Police Officers (ACPO) issued joint guidance on lawyers taking mobile telephones, laptops and

²⁸ SCC 2017 para 6.63.

²⁹ The police station attendance form used by the PDS is available as a download at www.legalaidreform.org/police-station-legal-advice/other-police-station-legal-advice-resources/item/download/139_21bc5062ea0a903ee13e017da4a341ba.

other electronic devices into police stations.³⁰ The main provisions of the guidance are as follows:

- lawyers must disclose to the custody officer what electronic communication or recording devices they have in their possession if required to do so by the custody officer;
- the presumption is that lawyers should be allowed to retain and use such devices, unless there is a good reason why they should not be allowed to do so;
- surrender of such devices will only be required where there are reasonable grounds to believe that surrender is necessary to prevent unauthorised communications being made by or on behalf of a detainee, and the lawyer must be informed of the reasons for any such decision;
- where the lawyer is permitted to retain such a device, they must agree that they will not allow any detainee to have access to the device, nor use the device to communicate with anyone on behalf of the detainee, and to report any breach of this condition to the custody officer as soon as practicable after the breach took place.

Useful addresses and telephone numbers

- 1.44 The toolkit should include a list of addresses and telephone numbers, such as those for police stations in the area; the social services duty team; and other lawyers in the firm. The list should also include details of appropriate doctors, experts and interpreters.

Qualification for police station advice

Police station qualification for solicitors

- 1.45 The Law Society operates a Criminal Litigation Accreditation Scheme (CLAS),³¹ consisting of a Police Station Qualification (PSQ) and a Magistrates' Court Qualification (MCQ). The LAA does not require solicitors who conduct publicly funded own-solicitor cases to have gained the PSQ.³² However, in duty solicitor cases a solicitor who is not a duty solicitor and who does not have the PSQ cannot accept the initial call from the Defence Solicitor Call Centre (DSCC), provide initial telephone advice or attend the police station to give advice in person.³³

30 Mobile telephones and laptops being taken into custody suites by solicitors (August 2011), available at www.policestationreps.com/Docs/LegalUpdates/ACPO%20Mobile%20Phones.pdf. Although ACPO has been replaced by the National Police Chiefs' Council, the College of Policing confirms that the guidance is still in force (see www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/?s=laptops#detainee-risk-assessment-while-outside-custody, under the heading 'Interview').

31 Details of the CLAS can be obtained at www.lawsociety.org.uk/support-services/accreditation/criminal-litigation. The Law Society is reviewing the scheme and will be relaunching it in 2017.

32 SCC 2017 para 9.28.

33 SCC 2017 para 9.28.

Accreditation for representatives

- 1.46 Non-solicitors who provide police station advice must be registered with the LAA in order for their work to be paid for out of public funds. This is the case in respect of both own-solicitor and duty solicitor work.³⁴ Following registration, and before obtaining accreditation, they are known as probationary representatives. Once they have obtained accreditation, they are known as accredited representatives.³⁵ The accreditation scheme for non-solicitors is operated by the SRA, and consists of three assessments: (a) a portfolio of police station cases; (b) a written test; and (c) a critical incidents test.³⁶
- 1.47 There are a number of limitations and restrictions that apply to representatives. Accredited and probationary representatives are treated as solicitors for the purposes of the PACE Codes, but they can be excluded from a police station in certain circumstances that do not apply to solicitors (Code C paras 6.12–6.14; Code D para 2.6; and see para 4.4 below). Code C para 6.12 and Code H para 6.13 do not include in the definition of ‘solicitor’ a representative who is neither a probationary nor an accredited representative, and it is unclear whether the police are required to permit access to a suspect by such a person who has been sent to the police station on behalf of a solicitor in a privately funded case.
- 1.48 In publicly funded cases the SCC 2017 imposes a number of restrictions and obligations. A probationary representative may only provide advice and assistance on behalf of a provider (that is, the firm that has a contract with the LAA) at which their supervising solicitor is based, cannot accept the initial call or provide advice or assistance in duty solicitor cases, and cannot provide advice and assistance in respect of an indictable-only case.³⁷ The provider is responsible for the standard of work of representatives employed by them, and also for those representatives who are not directly employed under a contract of employment, and in the case of the latter there are certain restrictions on claiming for travel time.³⁸ Before attending a police station the representative must have the telephone number of their supervising solicitor and must be able to contact them, or another solicitor in the firm with sufficient experience of police station work, in case the representative needs guidance.³⁹ Once a case has been concluded, the representative must provide a written report to the conducting solicitor no later than the next working day.⁴⁰ A representative must not be employed as a special constable, nor in any other capacity that may cause a conflict of interest with their work as a representative.⁴¹

34 SCC 2017 paras 9.26 and 9.27.

35 SCC 2017 para 1.2.

36 Details of the accreditation scheme can be obtained at www.sra.org.uk/solicitors/accreditation/police-station-representatives-accreditation.page.

37 SCC 2017 paras 9.28, 9.34 and 9.35.

38 SCC 2017 paras 9.29 and 9.30.

39 SCC 2017 para 9.31.

40 SCC 2017 para 9.32.

41 SCC 2017 para 9.36.

The Duty Solicitor Scheme

1.49 The police station Duty Solicitor Scheme is regulated by the SCC 2017. A duty solicitor is defined as a person who has previously been a member of a Scheme under the Duty Solicitor Arrangements 2008 or an earlier version of those Arrangements, or has been accredited under parts one and two of stage one of the Law Society's CLAS and has undertaken the PSQ (see para 1.48 above).⁴² As with accredited representatives, duty solicitors must not be special constables.⁴³ Detailed rules regarding the operation of the scheme are set out in the SCC 2017 section 6). The obligation to participate in the scheme is imposed on providers who have a contract with the LAA rather than on individual duty solicitors,⁴⁴ and duty slots on rota schemes and places on duty solicitor panels are allocated to providers rather than to individual duty solicitors.⁴⁵ It is for the LAA to determine whether and where rota and panel schemes should operate, and also to allocate slots on rota schemes.⁴⁶

1.50 Obligations under the SCC 2017 concerning taking duty calls, accepting cases, and attendance at the police station are set out in the relevant sections of chapter 3. Once a request for the duty solicitor has been accepted, the provider must normally continue to act for the suspect until the end of the investigation.⁴⁷ A duty solicitor case can only be handed back to the DSCC before the end of the investigation if:

- the duty solicitor is unable to continue to act personally and there is no other suitable person in the organisation who is able to act and it is not possible to instruct an agent;
- the client removes or rescinds their instructions;
- there is legitimate concern about breach of the professional code of conduct; or
- the provider confirms that the provider will not claim remuneration in respect of the case.⁴⁸

Where a case is handed back to the DSCC the reasons must be clearly recorded on the case file.⁴⁹

Legal aid

Introduction

1.51 Those people who are entitled to legal advice and assistance in connection with criminal investigations – which includes those who are arrested and held in custody by police (see para 2.123 below); HM Revenue and Customs

42 SCC 2017 para 1.2.

43 SCC 2017 para 6.2.

44 SCC 2017 para 6.1.

45 SCC 2017 para 6.6.

46 SCC 2017 paras 6.51-6.53.

47 SCC 2017 para 9.51.

48 SCC 2017 para 9.52.

49 SCC 2017 para 9.53.

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(HMRC) officers (see para 1.62 below); volunteers (see para 2.154 below); persons being interviewed in connection with a service offence (see para 1.68 below); and those detained under the TA 2000 Sch 7 (see para 2.123 below) – are entitled to legal aid to pay for that advice and assistance without reference to their financial resources.

- 1.52 The provision of legally-aided advice and assistance is governed by the terms of the LAA's SCC 2017. The contract (together with certain provisions of Code C and Code H) imposes significant limitations and conditions both on the right to legal advice at police stations, and on the ability of lawyers to provide it. Reference is made to relevant parts of the contract throughout the book, but three important features are dealt with here: (a) the provisions regarding who initial instructions can be received from in legal aid cases; (b) the Criminal Defence Direct (CDD) scheme; and (c) the 'sufficient benefit' test.

Who instructions can be received from

- 1.53 Where a suspect who is held in police custody requests legal advice to be paid for by public funds, the police are required to contact the Defence Solicitor Call Centre (DSCC) (Code C NfG 6B).⁵⁰ The DSCC determines whether the case is covered by the Criminal Defence Direct scheme (see para 1.55 below), and if it is not the DSCC then refers the request to the solicitor requested or to the duty solicitor. Generally, payment under the SCC 2017 can only be claimed if the instructions are initially received from the DSCC.⁵¹ However, this rule does not apply where:

- a suspect attends a police station by prior agreement with the police and requests the solicitor to represent them, although the solicitor must inform the DSCC within 48 hours of the first attendance at the police station, and must actually represent them at the police station; or
- instructions are received from a member of the suspect's immediate family or a third party of similar status, although the solicitor must report the matter by telephone, fax or email to the DSCC prior to telephoning or attending the client; or
- the solicitor is already at the police station when a suspect requests advice from them, as own-solicitor or duty solicitor, although the solicitor must report the matter to the DSCC within 48 hours of receiving instructions.⁵²

The Criminal Defence Direct scheme

- 1.54 The Criminal Defence Direct (CDD) scheme (formerly, CDS Direct) was introduced nationally in 2008. Cases that fall within the scope of CDD are excluded from the scope of the SCC 2017, so that a claim for work carried

50 Although the LAA appears to accept that the police may pass a request directly to the nominated solicitor, or a duty solicitor, if they are already at the police station since SCC 2017, para 9.20(c) provides that the solicitor may claim payment for work done in such circumstances provided that they inform the DSCC within 48 hours of receiving the instructions.

51 SCC 2017 para 9.18.

52 SCC 2017 para 9.20.

out in respect of such cases cannot be made other than in the exceptional circumstances set out in the contract. As noted above, when contacted by the police the DSCC determines whether the case is within the scope of the CDD scheme. If it is, the DSCC will refer the request to CDD to provide advice.

1.55 Cases that fall within the scope of CDD are those where the suspect:

- is detained in respect of a non-imprisonable offence;
- was arrested on a bench warrant for failing to appear and is being held for production before a court, except where the solicitor has clear documentary evidence that would result in the suspect being released from custody (in which case payment for attendance may be allowed provided that the reason is recorded on file);
- was arrested on suspicion of: driving with excess alcohol and was taken to the police station to provide a specimen (Road Traffic Act (RTA) 1988 s5); failure to provide a specimen (RTA 1988 ss6, 7 and 7A); driving while unfit/drunk in charge of a motor vehicle (RTA 1988 s4);
- is detained in relation to breach of police or court bail conditions.⁵³

However, a claim for payment may be made in respect of such cases if the sufficient benefit test is satisfied (see para 1.57 below) and one of the following exceptions applies:

- an interview or an identification procedure is to be held;
- the suspect is eligible for assistance from an appropriate adult (see paras 11.14 and 11.67 below);
- the suspect is unable to communicate over the telephone;
- the suspect complains of serious maltreatment by the police;
- the investigation includes another alleged offence which is not within the scope of the CDD scheme;
- the solicitor or representative is already at the same police station (in which case the claim cannot exceed the police station telephone advice fixed fee);
- the advice relates to an indictable offence; or
- the request is a 'special request'.⁵⁴

A 'special request' is a request identified to the lawyer as such by the DSCC. Special requests may include, for example, requests where CDD considers that, because of a conflict of interest, the request should be dealt with by a duty or own solicitor, or considers that advocacy assistance is required, or considers that one of the other exceptions specified above applies.⁵⁵

1.56 If any of the exceptional circumstances apply, the solicitor must endorse the file with the reasons for attendance.⁵⁶ In addition, a case is not treated as a CDD case if CDD is unable to provide telephone advice, but this does not apply if the reason for this is that the suspect refused to accept advice from them.⁵⁷ Where CDD refers a case to the suspect's own solicitor (for example, because they are informed that the police do intend to interview

53 SCC 2017 para 9.9.

54 SCC 2017 para 9.10.

55 SCC 2017 para 1.2.

56 SCC 2017 para 9.11.

57 SCC 2017 para 9.12.

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the suspect, or discover that the suspect is eligible for assistance from an appropriate adult) it ceases to be a CDD case, and the normal rules apply.⁵⁸ Although it is not specifically provided for in the SCC 2017, the definition of ‘special request’ implies that this is also the case where CDD refer the case to a duty solicitor.

The sufficient benefit test

- 1.57 Advice and assistance may only be claimed for under the SCC 2017 if there is sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out.⁵⁹ The sufficient benefit test is automatically satisfied for the purposes of initial advice in respect of a person who has a right to legal advice or who is a volunteer under PACE or the equivalent legislation applying to the armed forces in the case of military investigations. After initial advice has been given, the solicitor must consider whether, and what, further work is justified by reference to there being ‘sufficient benefit’ for the client.⁶⁰ The contract states that the test is satisfied where further legal advice is given to a client immediately following charge. However, it goes on to state that attendance upon the client thereafter while fingerprints, photographs and swabs are taken will not meet the sufficient benefit test except where the client requires further assistance owing to their particular circumstances, in which case the relevant factors must be noted on file. It also, in effect, provides that the test would be satisfied where the lawyer remains at the police station in order to make representations about bail, again provided that this justification is noted on file.⁶¹

Who does this book apply to?

Introduction

- 1.58 This book is primarily concerned with advising a person who has been arrested on suspicion of a criminal offence and is being held in custody in a police station or other authorised place of detention. The detention and treatment of a suspects in these circumstances is governed by PACE and Codes of Practice C–F. One of the key definitions in PACE is that concerning ‘police detention’. A person is in police detention for the purposes of PACE if the person:
- has been taken to a police station after being arrested for an offence or under the TA 2000 s41; or
 - is arrested at a police station after attending voluntarily or accompanying a constable to it and they are detained there or detained elsewhere in the charge of a constable (PACE s118(2)).

58 SCC 2017 para 9.13.

59 SCC 2017 para 3.10.

60 SCC 2017 para 3.16.

61 SCC 2017 para 9.16.

A person is treated as being in police detention if they are in the custody of a designated civilian officer by virtue of the Police Reform Act (PRA) 2002.⁶² A person who is at court after being charged is not in police detention (PACE s118(2)).

- 1.59 Many of the procedures and police powers in PACE relate only to persons in police detention. However, the right of intimation under PACE s56 (see para 2.118 below) and the right to consult a solicitor under PACE s58 (see para 2.121 below) apply to any person arrested and held in custody at a police station or other premises whether or not the arrest was for an offence. Furthermore, a volunteer (see para 2.154 below) is always entitled to legal advice. Code C applies to people in custody at a police station in England and Wales whether or not they have been arrested,⁶³ and it also applies to persons removed to a police station as a place of safety under Mental Health Act (MHA) 1983 ss135 and 136. However, Code C section 15 (review and extension of detention) applies only to persons in police detention. Code C does not directly govern the treatment of volunteers, but the code should be regarded as establishing minimum standards governing their treatment (see Code C NfG 1A). Persons who are designated civilian officers under PRA 2002 (see para 2.52 below), and those who are accredited under PRA 2002 s41, must have regard to any relevant provision of the PACE Codes in the exercise or performance of their powers (PACE s67(9A)). For the application of Code C where a person is being investigated by others charged with the duty of investigating offences or charging offenders, see below.

Persons detained or arrested under the Terrorism Act 2000

- 1.60 A person who is at a port or border area may be detained for examination by an examining officer (which includes a police constable, immigration officer or designated customs officer) who believes that their presence at that place is connected with entering or leaving the country, to enable the officer to determine whether the person is or has been concerned in the commission, preparation or instigation of acts of terrorism (TA 2000 s53 and Sch 7 para 2). Detention for examination under these provisions may be for up to six hours beginning with the time when the examination began (TA 2000 Sch 7 para 6A). The treatment of a person so detained is governed by the TA 2000 Sch 8 Part 1. The person is not treated as being in police detention for the purposes of PACE and the PACE Codes of Practice do not apply to them. There is a separate code of practice for examining

62 PRA 2002 Sch 4 paras 22, 34(1) or para 35(3) (PACE s118(2A)).

63 Code C para 1.10, subject to certain exceptions set out in Code C para 1.12. It was held in *Williamson v Chief Constable of West Midlands Police* [2004] 1 WLR 14 that Code C did not apply to a person detained at a police station following arrest for breach of the peace because such a person was not arrested for an offence, and was therefore not in police detention. However, Code C para 1.10 states that the Code applies to people in custody at police stations 'whether or not they have been arrested'.

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officers issued under the TA 2000 Sch 14 para 6.⁶⁴ The detainee is entitled to have a person informed of their detention (TA 2000 Sch 8 para 6). They are also entitled to consult a solicitor, normally in person, and where they have requested a solicitor they should not normally be questioned until they have consulted the solicitor (TA 2000 Sch 8 paras 7 and 7A). A person detained for examination under Schedule 7 is entitled to legal aid.

- 1.61 A person may be arrested under the TA 2000 s41(1) on suspicion of being a terrorist (see para 2.29 below). A person arrested under section 41 must be taken to a police station designated by the secretary of state for these purposes (see para 2.56 below). The person is not treated as having been arrested for an offence, but is treated as being in police detention for the purposes of PACE (s118(2)(a)). Code H applies up until the time when a person so detained is charged, released without charge, or transferred to prison (Code H para 1.2). Code C applies if and when the person is charged. Code D does apply to persons arrested under the TA 2000 s41, except for those provisions relating to photographs, fingerprints, skin impressions, body samples and impressions of people. PACE Code E does not apply, but there is a separate code of practice governing the audio recording of interviews issued under the TA 2000 Sch 8 para 3(1).⁶⁵ There are special provisions concerning the length of detention without charge, and review of detention (see paras 2.80 and 2.93 below). A person detained under these provisions has the right to have someone informed of their detention (TA 2000 Sch 8 para 6), and the right to consult a solicitor (TA 2000 Sch 8 para 7), but these rights may be delayed on the authority of a superintendent or above (TA 2000 Sch 8 para 8; and see para 2.148 below). In certain circumstances, the police may insist that consultation with a solicitor is carried out in the sight and hearing of a police officer (see para 2.139 below). A person arrested and detained under TA 2000 s41(1) and Sch 8 is entitled to legal aid.

Persons arrested and detained by HM Revenue and Customs

- 1.62 PACE s114(2) provides that any provision of PACE relating to the investigation of offences or detention may, by order and with appropriate modifications, be applied to investigations conducted by HMRC officers or to person detained by HMRC officers. Most of the relevant provisions of PACE are applied to such investigations by the Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2015 ('the 2015 Order').⁶⁶ HMRC officers have a variety of powers of arrest under the Customs and Excise Acts⁶⁷ and have powers of detention under PACE s37. A person is in HMRC detention for the purposes of PACE if they have

64 Terrorism Act 2000 (Code of Practice for Examining Officers and Review Officers) Order 2014 SI No 1838. The code of practice is available at www.gov.uk/government/publications/code-of-practice-for-examining-officers-and-review-officers-under-schedule-7-to-the-terrorism-act-2000.

65 Terrorism Act 2000 (Code of Practice on Audio Recording of Interviews) (No 2) Order 2001 SI No189.

66 SI No 1783.

67 As defined in the Customs and Excise Management Act 1979 s1(1).

been taken to a HMRC office after having been arrested for an offence, or is arrested at an HMRC office after attending voluntarily or accompanying an officer to it and is detained there, or elsewhere, in the charge of an officer. A person in HMRC detention is entitled to consult a solicitor under PACE s58 (and to legal aid), and is entitled to have a friend or relative informed of their arrest and detention under PACE s56.

1.63 The PACE Codes of Practice are specifically applied to HMRC officers by the 2015 Order art 3 and Sch 1.⁶⁸ However, it has been held that they do not apply where a person is interviewed under the Value Added Tax Act 1994 s60.⁶⁹ They also do not apply to the civil investigation of tax fraud procedure.⁷⁰ By virtue of the Borders, Citizenship and Immigration Act 2009 s22, the PACE Codes also apply to criminal investigations conducted by designated customs officials relating to a general customs matter or customs revenue matter as they apply to relevant investigations conducted by HMRC officers.

Persons arrested by the National Crime Agency

1.64 The Director General of the National Crime Agency (NCA) has the power to designate a member of the NCA staff as a person having the powers of a constable, HMRC officer, and/or an immigration officer (Crime and Courts Act (CCA) 2013 s10 and Sch 5). Where a person is designated as having the powers of a constable, they have all the common law and statutory powers of a constable (CCA 2013 Sch 5, para 11), and PACE applies to them and to the exercise of their powers.⁷¹ For this purpose PACE is subject to the modifications set out in Schedule 1 to the 2014 Order. The most important modifications are as follows.

- References to ‘police officer’ and ‘officer’ are normally to be treated as references to a ‘designated person’ under the CCA 2013. One consequence of this is that CCA 2013 designated persons are governed by the PACE Codes of Practice when exercising their powers as police constables.
- Where authorisation is required for a search under PACE s18, reference to an inspector is replaced by reference to a grade 3 officer.
- References to ‘police station’, eg, in relation to voluntary attendance (PACE s29), and fingerprints and samples (PACE s63) are to be treated as references to a ‘NCA office’.
- ‘NCA office’ means a place for the time being occupied by the NCA.

68 And see *R v Sanusi* [1992] Crim LR 43; *R v Weerddesteyn* [1995] Crim LR 239; and *R v Okafor* [1994] 3 All ER 741; (1994) 99 Cr App R 97; [1994] Crim LR 221.

69 *Khan v Revenue and Customs* [2006] EWCA Civ 89.

70 See HMRC, Code of Practice 9: HM Revenue & Customs investigations where we suspect tax fraud (2014) available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/494808/COP9_06_14.pdf.

71 Crime and Courts Act 2013 (Application and Modification of Certain Enactments) Order 2014 SI No 1704 (the 2014 Order), art 3, applied by virtue of the CCA 2013 Sch 8 part 4.

Persons investigated by others having a duty to investigate crime

- 1.65 The provisions of PACE relating to investigation and detention apply only to police officers (and, subject to amendments, Revenue and Customs officers, designated NCA staff and to investigations under the Armed Forces Act 2006). However, any person who is ‘charged with the duty of investigating offences or charging offenders’ must, in the discharge of that duty, have regard to any relevant provisions of the Codes of Practice (PACE s67(9)). This could include officers of the Department for Work and Pensions (DWP), the Serious Fraud Office,⁷² or certain local government officers such as trading standards officers⁷³ and environmental health officers, provided in each case that they do in fact have a duty of investigating offences. Thus, it has been held that Department of Trade and Industry (now the Department of Business, Innovation and Skills (BIS)) inspectors appointed under Companies Act 1985 ss432 and 442 were not investigating officers within section 67(9).⁷⁴ A similar conclusion was drawn in respect of local tax inspectors.⁷⁵ Prison officers have been treated as persons charged with a duty of investigating offences, but not always.⁷⁶
- 1.66 It has been held that the Codes apply to commercial investigators interviewing an employee,⁷⁷ store detectives⁷⁸ and investigators employed by the Federation Against Copyright Theft (FACT),⁷⁹ although in each case it is a question of fact whether the relevant personnel are charged with the duty of investigating offences. A senior line manager who interviewed an employee concerning suspicions that he was defrauding the company was treated, on the facts, as not having a duty to investigate offences.⁸⁰
- 1.67 Where a person is interviewed by an official to whom PACE s67(9) applies, they are not covered by the police station advice and assistance scheme unless they are being held in custody at a police station or the interview is conducted in the presence of a police constable although they will, subject to financial eligibility, qualify for assistance under the means-tested legal advice and assistance scheme.⁸¹

72 *R v Director of the Serious Fraud Office ex p Saunders* [1988] Crim LR 837; and *R v Gill* [2003] EWCA Crim 2256.

73 *Dudley MBC v Debenhams* (1994) 159 JP 18; (1994) *Times* 16 August; and *R v Tiplady* (1995) 159 JP 548; (1994) *Times* 23 February.

74 *R v Seelig and Spens* [1991] 4 All ER 429; (1991) 94 Cr App R 17.

75 *R v Doncaster* [2008] EWCA Crim 5.

76 A prison officer was so treated in *R v Devani* [2008] 1 Cr App R 65, but not in *R v Martin Taylor* [2001] EWCA Crim 2922.

77 *R v Twaites and Brown* (1990) 92 Cr App R 106; [1990] Crim LR 863.

78 *R v Bayliss* (1993) 98 Cr App R 235; [1994] Crim LR 687.

79 *Joy v Federation Against Copyright Theft Ltd* [1993] Crim LR 588. See also *Halawa v Federation Against Copyright Theft* [1995] 1 Cr App R 21; [1995] Crim LR 409. The RSPCA has accepted that its officers should comply with the Codes. See *RSPCA v Eager* [1995] Crim LR 59, also reported as *Stilgoe v Eager* (1994) *Times* 27 January.

80 *R v Welcher* [2007] EWCA Crim 480.

81 SCC 2017 paras 9.54 and 9.113–9.140.

Service personnel

- 1.68 There is an important distinction between investigations conducted by Ministry of Defence police officers and those conducted by service police officers. Ministry of Defence police officers are ‘constables’⁸² and PACE and the Codes apply to them in the normal way. In respect of investigations by service police officers, PACE s113(1) provides that the secretary of state may, by order, make provisions in relation to the investigation of ‘service offences’⁸³ which are equivalent to the provisions of PACE Part V (the questioning and treatment of suspects). The Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009⁸⁴ applies, with modifications, most of the PACE Part V provisions. A person arrested and held in custody is entitled to consult a legal adviser,⁸⁵ although this may be delayed for up to 36 hours in similar circumstances as those that apply under PACE (see para 2.142 below) where the person is in custody in respect of a serious service offence.⁸⁶ The ordinary PACE Codes of Practice do not apply, but dedicated Codes have been issued under PACE s113(2) and (3).⁸⁷ A services person at a services establishment or elsewhere in the UK assisting with an investigation by the service police of an offence that cannot be dealt with summarily or suspected of a serious service offence is entitled to legal advice under the police station scheme.⁸⁸

Immigration detainees

- 1.69 Where a person has been arrested for an immigration offence, PACE and the Codes of Practice will apply as normal, as will entitlement to advice and assistance under the police station scheme and the duty solicitor scheme. However, the SCC 2017 imposes restrictions. Advice and assistance may only be given under the police station scheme up to the point that the immigration authorities take over conduct of the investigation and it has been confirmed that no criminal offence or charge is being pursued. However, it may continue to be provided if the person remains in detention and requires advice in respect of a criminal offence (including an immigration offence).⁸⁹ See further chapter 12.

82 Ministry of Defence Act 1987 2(1).

83 Defined by the Armed Forces Act 2006 s50(2).

84 SI No 1922.

85 The definition of ‘legal adviser’ in art 2(1) of the 2009 Order excludes non-solicitors or barristers.

86 Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009 SI No 1922 art 9. A ‘serious service offence’ is defined by Art 2(1) to include offences that are equivalent to indictable offences, other service offences that may not be dealt with at a summary hearing by a commanding officer, and certain other specified service offences.

87 Available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/410011/20150319_SPCOP_Final_March_2015.pdf.

88 SCC 2017 paras 9.57-9.60.

89 SCC 2017 paras 9.61-9.66.

European Arrest Warrant

- 1.70 Where a person has been arrested under a European Arrest Warrant under powers granted by the Extradition Act (EA) 2003 Part 4, they must be taken before an appropriate judge as soon as is practicable (EA 2003 s4(3)), and may be held in custody at a police station until they are so produced. While at a police station, the person is not in police detention (see para 1.61 above), but is covered by dedicated EA 2003 Codes of Practice B, C and D.⁹⁰

PACE and the Codes of Practice

- 1.71 PACE has been amended by numerous subsequent statutes, and the version in appendix 1 contains all amendments up to the date of publication. The PACE Codes of Practice are issued by the secretary of state under the authority of PACE ss66 and 67. The versions of the Codes of Practice current at the date of publication are as follows:

- Code A – in force from 19 March 2015⁹¹
- Code B – in force from 27 October 2013⁹²
- Code C – in force from 23 February 2017⁹³
- Code D – in force from 23 February 2017⁹⁴
- Code E – in force from 2 February 2016⁹⁵
- Code F – in force from 27 October 2013⁹⁶
- Code G – in force from 12 November 2012⁹⁷
- Code H – in force from 23 February 2017.⁹⁸

Code A does not apply to stop and search under the TA 2000, which is governed by a separate code of practice.⁹⁹ However, it does apply to powers under the Terrorism Prevention and Investigations Measures (TPIM) Act 2011 Sch 5 to search persons without them being arrested. Code B includes powers to enter and search premises for the purposes of serving, monitoring and enforcing terrorism prevention and investigation measures. For the applicability of Codes C and H in respect of a person arrested under the TA 2000 s41(1) on suspicion of being a terrorist, see para 1.61 above.

90 Extradition Act 2003 (Police Powers: Codes of Practice) Order 2003 SI No 3336. The codes are available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/117675/extradition-codes-of-practice.pdf.

91 SI 2015 No 418.

92 SI 2013 No 2685.

93 SI 2017 No 103.

94 SI 2017 No 103.

95 SI 2016 No 35.

96 SI 2013 No 2685.

97 SI 2012 No 1798.

98 SI 2017 No 103.

99 Issued under Terrorism Act 2000 (Codes of Practice for the Exercise of Stop and Search Powers) Order 2012 (SI No 1794). The code is available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/97944/stop-search-code-of-practice.pdf.

- 1.72 A failure by a police officer or other person required to have regard to provisions of the codes does not, of itself, render them liable to criminal or civil proceedings (PACE s67(10)). However, to the extent that they are relevant, the codes are admissible in evidence in criminal or civil proceedings (PACE s67(11)). See further chapter 13.