



Kemp, Vicky (2013) "No time for a solicitor": implications for delays on the take-up of legal advice. *Criminal Law Review* (3). pp. 184-202. ISSN 0011-135X

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“No time for a solicitor”: Implications for delays on the take-up of legal advice

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Police detention; duration; PACE; legal advice.

Summary

In a recent statistical analysis of police custody records we found variations between police stations both in the take-up of legal advice and also in the average length of time people were held in custody. To further explore unobserved factors which might impact on such variations a qualitative study has been undertaken of four large police stations. While there were found to be factors in common between police stations which related to delays, there were other factors which were specific to one or two stations only. There were also found to be implications for delays creating potential barriers to legal advice. Such factors raise questions about the extent to which PACE continues to provide sufficient legal safeguards for those held in police custody.

Introduction

Having conducted a statistical analysis of over 30,000 police custody records drawn from 44 police stations in four police force areas, we published our findings in relation to the take-up of legal advice and the average length of time people were held in police custody.¹ With

¹ P. Pleasence, V. Kemp and N. J. Balmer, “The Justice Lottery? Police Station Advice 25 Years on From PACE” [2011] *Crim. L. R.* 1; V. Kemp, P. Pleasence and N. J. Balmer “Children, Young People and Requests for Police Station Legal Advice: 25 years on from PACE”, (2011) 11(1) *Youth Justice* 28; V. Kemp, N. J. Balmer and P. Pleasence, “Whose Time is it Anyway? Factors Associated with Duration in Police Custody” [2012] *Crim. L. R.* 10.

variations found between police stations, the aim of this qualitative study was to explore some of the unobserved factors which might influence request rates for legal advice in the main station in the four police force areas. A key issue highlighted has been the potential impact of delays on discouraging suspects from having legal advice. Examined in this article are some of the potential causes of delays and the way in which such delays can undermine access to legal advice.

By way of background, it is helpful to highlight provisions within the Police and Criminal Evidence (PACE) Act 1984 which are intended to limit the time people are held in police custody and provide access to legal advice. Next set out are some of the issues identified as causing delays which were found to be common across the four police stations. When concentrating more specifically on factors found to impact on variations between police stations four key issues are explored. The first concerns the attitude of custody sergeants towards legal advice, and the second examines the arrangements within these four police stations for providing access to legal advice. The third issue considers the role and remit of police review teams and the final issue explores the potential for the police to use the threat of delays as a ploy to discourage legal advice.

There are limitations when conducting research within such a secure and complex environment as police custody. The pre-charge process is also multidimensional and it was only possible to observe interactions taking place at the front desk of police custody suites. Other interactions, particularly those taking place over the telephone and out of sight of the custody suite, could not be observed. In addition, this study is predominantly based on the perceptions of custody sergeants, and while their perspective is important, not least because they facilitate access to legal advice, it does not take into account the views of other

practitioners.² Arising out of this study a contradictory and confusing picture emerges. Nevertheless, it raises important issues concerning the day-to-day routine practices taking place in large police stations, some of which appear to be contrary to PACE.

Background

The PACE Act, implemented in 1986, arose out of Royal Commission into Criminal Procedure.³ A principal aim of PACE was to rule out the unnecessarily lengthy detention of suspects in police custody. In seeking to restrict the time suspects can be detained, for example, PACE provides that the police generally have 24 hours within which to hold them without charge.⁴ Once detained, and to help ensure that they are not held for longer than necessary, PACE requires an inspector to carry out regular reviews of detention.⁵ In a similar vein, when authorising detention, PACE requires custody sergeants to determine whether they have sufficient evidence to charge and, if not, they may authorise the detention of suspects for such a period of time as is necessary to gather evidence.⁶ PACE also provides access to free and independent legal advice. This includes suspects being able to consult privately with a solicitor ‘at any time’ and, ‘as soon as practicable’ following a request, subject to certain exceptions.⁷ In cases where a suspect requested legal advice but later

² In other studies I have examined police station legal advice from the perspective of users and defence practitioners: V. Kemp and N. J. Balmer, *Criminal Defence Services: Users' Perspectives: Interim Report* (2008); V. Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010); V. Kemp, *Bridewell Legal Advice Study: Interim Report* (2012) (all available on the LSRC's website at: <http://www.justice.gov.uk/publications/research-and-analysis/lsrc/research-publications>) [Accessed December 11, 2012].

³ Royal Commission on Criminal Procedure, *Report* (1989) Cm. 8092.

⁴ PACE s.42(1). The police can hold a suspect for up to 36 hours but only on the authorisation of a superintendent.

⁵ PACE s.40(3)(b)-(c). The first review is to be carried out not later than six hours after the detention was first authorised, the second review not later than nine hours after the first review and subsequent reviews must be at intervals of no more than 12 hours.

⁶ PACE s.37(1).

⁷ PACE s.58(1) and PACE Code C para. 3.1. In this article the term ‘solicitor’ and ‘legal adviser’ is used interchangeably as suitably qualified staff, including paralegals, accredited police station representatives and trainee solicitors can also provide police station legal advice.

changed their mind, PACE requires an inspector to make enquiries about the reasons why and to decide whether the interview can go ahead without a solicitor.⁸

A number of research studies examined the effect of these provisions following implementation of PACE.⁹ A range of factors were seen to have an effect on delays and the take-up of legal advice, including the type and seriousness of the offence, the personal characteristics of detainees, the reason for detention and the time of arrival at the police station. There were similar findings arising out of our statistical analysis of police custody records.¹⁰ However, the extant research also highlighted unobserved factors which were relevant, including police attitudes towards legal advice and the use of police ploys, designed to discourage suspects from having legal advice'.¹¹ The aim of this qualitative study was to explore some of the unobserved factors which could impact on delays and the take-up of legal advice within these four police stations.

A review of the literature highlights the lack of attention given to this important topic by academics over recent years.¹² Indeed, prior to our analysis of police electronic custody records it had been around fifteen years since the last large-scale studies were undertaken.¹³ Since that time there have been important changes within the pre-charge process which have

⁸ PACE Code C para. 6.6(d).

⁹ M. Maguire, "Effects of the PACE Provisions on Detention and Questioning" (1988) 28(1) *British Journal of Criminology* 19; K. Bottomley, C. Coleman, D. Dixon, M. Gill and D. Wall, "The Detention of Suspects in Police Custody" (1991) 31(4) *British Journal of Criminology* 347; 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); T. Bucke and D. Brown, *In Police Custody: Police Powers and Suspects Rights Under the Revised PACE Codes of Practice* (London: HMSO, 1997) (HORS 174); C. Phillips and D. Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (London: HMSO, 1998) (HORS 185).

¹⁰ Kemp et al., "Whose Time is it Anyway? Factors Associated with Duration in Police Custody" [2012] *Crim. L. R.* p. 736.

¹¹ See Sanders et al., *Advice and Assistance in Police Stations and the 24-Hour Duty Solicitor Scheme* (1989); D. Dixon, K. Bottomley, C. Coleman, M. Gill and D. Wall, "Safeguarding the Rights of Suspects in Police Custody" (1990) (1) *Policing and Society*, 115; D. Brown, T. Ellis and K. Larcombe, *Changing the Code: Police Detention under the Revised PACE Codes of Practice* (London: HMSO, 1992) (HORS 129).

¹² In addition to our own recent research studies see L. Skynns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Abingdon: Willan, 2011).

¹³ Bucke and Brown, *In Police Custody: Police Powers and Suspects Rights Under the Revised PACE Codes of Practice* (1997) and Phillips and Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (1998).

not been the subject of empirical research. These include the Statutory Charging Initiative which, from the mid-2000's, brought the Crown Prosecution Service (CPS) into pre-charge decision-making and reforms to the structure of legal aid remuneration.

A study of four police stations: methods

This study involved an examination of the main police station in four police force areas; one in South Western England, two in the East Midlands and one in South Eastern England.¹⁴ The volume of cases managed at these four police stations over a two month period was high, ranging from around 1,500 to 2,500 cases.¹⁵ The methods adopted included observation of police custody suites and in-depth interviews with fifty custody sergeants. There were eighteen days spent in total observing police custody suites and carrying out the interviews: five days and 12, 13 and 10 interviews in Police Stations A, B and C respectively and three days and 15 interviews in Police Station D.¹⁶ The study was carried out during October to December 2010. To assist in the interpretation of the data, all the interviews and fieldwork notes were entered into the statistical software package NVivo.¹⁷

Delays and the take-up of legal advice

From our statistical analysis of over 30,000 police custody records there appears to have been an increase in request rates for legal advice, rising from 40 per cent in 1995/96 to 45 per cent

¹⁴ The police force areas chosen were those where there had been a positive response to our request for gaining access to police electronic custody records.

¹⁵ Over a two-month period in 2009 the volume of cases varied from 1,973 in Police Station A, 2,665 in B, 1,522 in C and 2,215 cases in Police Station D.

¹⁶ When the custody suites were observed all custody sergeants on duty were asked if they would participate in this study. While no custody sergeants refused to participate there were some on duty who could not be interviewed because they were too busy.

¹⁷NVivo is a computer analysis tool which assists with managing and interpreting qualitative data.

based on 2009 records.¹⁸ During the first detention period only, we found that 42 per cent of suspects requested legal advice.¹⁹ It also seems that suspects are being held in custody longer, rising from an average of six hours and 40 minutes in 1994/95 to eight hours and 55 minutes in our study.²⁰ Variations were found between police stations in the take-up of legal advice, ranging from 28 per cent in one police station to 60 per cent in another.²¹ The average length of time suspects were held in custody was also seen to vary, with an average custody duration overall in 2009 of almost nine hours, but varying from an average of seven hours in one police station and almost 12 hours in another.

In relation to the four large police stations examined in this study, set out in Table 1 is the average request rate for legal advice found across all detention periods and also the request rate and average time suspects spent in custody during the first detention period only.

Table 1: The proportion of suspects requesting legal advice and the average time spent in police custody

<i>Main police station</i>	<i>Overall requests for legal advice</i> %	<i>Requests at first detention</i> %	<i>Average time in custody at first detention</i> <i>(hours)</i>
Station A	47	44	10.00
Station B	42	38	7.50
Station C	51	47	10.11
Station D	64	60	11.45

¹⁸ Bucke and Brown, *In Police Custody: Police Powers and Suspects Rights Under the Revised PACE Codes of Practice* (1997) and Pleasence et al., “The Justice Lottery? Police Station Advice 25 Years on From PACE” [2011] Crim. L. R. 1.

¹⁹ It is important to examine the request rate during the first detention period because it is this time which other research studies have examined when considering the length of time people are held in custody. The majority of cases will conclude during the first detention period but some investigations will be ongoing and suspects can be bailed to return back to the police station on second and subsequent occasions.

²⁰ Phillips and Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (1998) and Kemp et al., “Whose Time is it Anyway? Factors Associated with Duration in Police Custody” [2012] Crim. L. R. p. 736. However, there were differences in data collection methods which could account for some of this difference.

²¹ This was based on requests during the first detention period in police stations dealing with more than 500 detentions. Previous research has also found variations in requests for legal advice (see Phillips and Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes study* (1998) p. 60).

In interview custody sergeants were asked what factors they found most influenced delays in the pre-charge process. Their responses are explored first in relation to prosecution related issues and then those pertaining to the defence.²²

Prosecution related factors leading to delays

When asked what they considered to be the main cause of delays in the pre-charge process, custody sergeants said that this was because of the police investigation. Respondents commented on delays being due to certain tasks which might need to be undertaken, as well as on the physical and/or mental health of the suspect.²³ This response from was typical of comments made by others when this custody sergeant said, “You find that delays are usually due to the taking of statements, checking out the CCTV, carrying out searches and with people being unsuitable [to interview] through drink and drugs” (C:BE).²⁴ Interestingly, the majority of custody sergeants complained about what they considered to be the long-windedness of the pre-charge process. In short, as this officer put it, “The police investigation is too long. They faff about and can take all day” (A:SE). There was a similar sentiment expressed by a custody sergeant from another station when he said:

“The system is a complete failure. I’m amazed by this but the process is slowed down by our internal systems. From the time of the arrest to the interview, even for simple matters, it can be six or more hours. I don’t get it ... It is on the police side, it is rubbish, absolute rubbish” (D:SD).

²² There were other factors, such as the involvement of appropriate adults and interpreters, as well as the need for a medical intervention, which could also cause delays. However, such issues are not explored here as they were not raised by respondents as having implications for the take-up of legal advice.

²³ What was explored here were the delays during a person’s first period of detention and so delays occurring as a result of obtaining of medical reports, DNA or other forensic evidence were not examined.

²⁴ For reasons of confidentiality the name of custody sergeants have been replaced with a coded reference, with the first letter identifying the police station involved. In addition, while 48 out of the 50 custody sergeants interviewed were male, comments are referred to in the masculine even though references might also relate to two female participants.

There were particular problems identified with delays in Police Station D, which are explored in more detail below when examining the role of the police review teams.

Another main cause of delay was said to be due to the involvement of the Crown Prosecution Service (CPS) in some charging decisions. As noted above, it was around six years ago that the Statutory Charging Initiative brought the CPS into working more closely with the police at this pre-charge stage.²⁵ While these arrangements are intended to help improve the quality of prosecution decisions, most custody sergeants were critical of the CPS for being one of the main causes of delays. In particular, while it was acknowledged that there would be delays as cases were handed over to the CPS once the evidence had been gathered, two-third of respondents said that some of the delays were unnecessary, particularly when dealing with moderately serious but straightforward matters.²⁶ The following comment from one custody sergeant helps to summarise a number of issues raised by respondents:

“Sometimes for some really straightforward jobs it can take for ages. The ones on CPS Direct at night are the worst. It’s like they try and find an excuse not to make a decision. If you mention CCTV they say they can’t make a decision without seeing it. If there are any witness statements outstanding it’s the same. It’s hard work” (B:UT).

There were also criticisms about the length of time that both the police and suspects could be kept waiting for a charging decision from the CPS. Bearing in mind that cases are generally not referred to the CPS until after the police investigation has been completed, which can be many hours following an arrest, comment was made by respondents that they would then have to wait another “three to four hours or even longer” (B:PI) for the CPS to

²⁵ National roll-out of the Statutory Charging Initiative was completed in April 2006 (see CPS, *First Phrase of Statutory Charging Goes Live a Year Ahead of Schedule* (2006) Press Release April 3, 2006 (available at: http://www.cps.gov.uk/news/press_releases/118_06/) [Accessed October 1, 2012].

²⁶ The CPS charging standards have subsequently been changed with fewer cases now having to be referred on to the CPS (see CPS, *The Director’s Guidance on Charging 2011 – fourth edition* (2011) (available at: http://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_4.html) [Accessed October 1, 2012].

make a decision.²⁷ Some thought it was wrong that suspects could be detained for longer because of these administrative arrangements. As this custody sergeant put it, “The system is incredibly inefficient. Is it right to keep someone in custody for an extra five hours just because you are waiting for a decision from the CPS? I would say not” (C:DM).²⁸

There are important issues which arise following the involvement of the CPS in pre-charge decision-making, both regarding the potential for creating delays and also in relation to the quality of decisions made. Despite this there has been no empirical research on the involvement of the CPS in pre-charge decision-making.

The PACE requirement for inspectors to carry out a review of detention was intended to help regulate the time people are held in custody. However, by the time of the first review (not later than six hours following detention), there were instances observed where custody sergeants were unable to contact the investigating officers in order to get an update on progress. A number of custody sergeants complained about this lack of progress, with one respondent saying, “You will be lucky to get any update off them [the police] by the time of the first PACE review. They come back later with a thick file, even if it is a straightforward shoplifting and the offence has been admitted” (D:JL).²⁹

PACE also seeks to curtail the length of time suspects can be held by the police by requiring that they are charged as soon as there is sufficient evidence to do so and to only hold them in custody for so long as it “is necessary to secure or preserve evidence”.³⁰ However, despite such safeguards custody sergeants are rarely in a position to determine whether there is such evidence, unless an officer volunteers to pass on that information.

²⁷ Once the police decided to refer a case on there can be delays as the paperwork has to be completed before it can be electronically transferred to the CPS.

²⁸ Similar issues were raised by custody sergeants in an earlier study involving police station legal advice (see Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 50-54).

²⁹ From our analysis of the police custody records we noted that the detention reviews appeared to have little or no impact on release times with people being released at multiple points throughout the detention period (Kemp et al., “Whose Time is it Anyway? Factors Associated with Duration in Police Custody” [2012] *Crim. L. R.* p. 748).

³⁰ PACE s.37(1) and 37(2).

There had also been some confusion over the evidential test which was to be applied, with Cape querying whether it was one of having ‘sufficient evidence to charge’, or the higher test of having ‘sufficient evidence to give a realistic prospect of conviction’.³¹

With the CPS now involved in some charging decisions, it is the higher test which custody sergeants said was required. Indeed, in order to facilitate the involvement of the CPS prior to charge, PACE was revised so that the continued detention of suspects could be authorised after custody sergeants determined that there was sufficient evidence to charge in order to obtain CPS advice.³² It seems likely, therefore, that changes under the Statutory Charging Initiative have led to cases being prepared more thoroughly prior to charge, but that this has also increased the average length of time suspects are held in custody.³³ With the consequent delays it is important to question whether the right balance has been struck between the liberty and security of the citizen and the investigative needs of the police.³⁴

Defence related factors leading to delays

When asked what they considered to be the main causes of delays, rarely did custody sergeants mention the defence. However, when asked about the potential for legal advisers to cause delays there were complaints made over some solicitors ‘stacking’ cases, which could then lead to delays. The following comment helps to describe such practices:

“You get the problem of solicitors taking on too many cases and that causes delays. It isn’t uncommon on a busy weekend for some solicitors to have taken on six or seven cases. You then have officers ready to go but they can’t because the solicitor is dealing with another client” (D:VD).

³¹The higher test is used by the CPS when reviewing cases charged by the police. See E. Cape, “Detention without charge: what does “sufficient evidence to charge” mean” [1999] Crim. L. R. p. 874.

³² PACE s.37(7) as amended by the Police and Justice Act 2006, s.11.

³³ There were similar findings in Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 50-54.

³⁴ This was a question posed by Cape [1999] p. 874 when he examined the charge threshold following implementation of PACE but prior to the involvement of the CPS in pre-charge decision-making.

While complaints were generally made about cases involving the duty solicitor, there were also concerns raised over some firms not providing sufficient cover when dealing with their own clients, particularly out-of-office hours. If legal advisers were not available in time for the police interview, it was pointed out that this could lead to suspects changing their mind about having a solicitor. This was how one respondent put it:

“There’s a problem if you get two or three cases ready to go at the same time and you then have to wait for the solicitor to become available. I can speak to the detainee and ask if they want another solicitor but they usually refuse saying they just want it over with so they can get out of custody” (D:PE).

For a couple of custody sergeants, the practice of solicitors ‘stacking’ cases had only started to become a problem following the introduction of fixed fees.³⁵ This was the comment from one respondent when complaining about the effect of such practices:

“Since solicitors are paid one fee per client I’ve had to speak to them because they can sometimes take on five or six prisoners on the same day and this can cause massive problems in custody. You can end up with upwards of eight officers waiting around for the one solicitor to be ready. I think solicitors are more interested in their financial gain rather than what is in the best interest of their client” (A:XT).

To some extent, such complaints could be said to be due to the adversarial relationships the police have with legal advisers. However, with changes in the way solicitors are paid for providing legal advice in police stations, this could have had a detrimental impact on quality by reducing the number of staff available out-of-office hours.³⁶

While it can be annoying for the police to have to wait for a solicitor to attend in time for a pre-arranged interview, there was little sympathy expressed for the difficulties which

³⁵ Instead of being paid for the time spent on cases, including waiting time, from 2008 defence practitioners have been paid a fixed fee for providing police station legal advice. For further details of fixed fees and the potential impact on police station legal advice see Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 110-117 and Kemp, *Bridewell Legal Advice Study: Interim Report* (2012) pp. 41-42.

³⁶ This issue was further explored in Kemp, *Bridewell Legal Advice Study: Interim Report* (2012), pp. 41-42.

defence solicitors can encounter. With the payment of a fixed fee for each case referred, for example, it is unlikely that solicitors would restrict themselves to just one or two cases so that they were available to attend an interview at the behest of the police. With suspects often having to wait for many hours in a cell before the police are ready to conduct an interview, it is unfortunate that if during the last 30 minutes or so it is their solicitor who is then blamed for causing the delay. In addition, it was pointed out that legal advisers failed to arrive in time because the police had omitted to tell them the time of the interview. As this respondent explained:

“The officers could do more to get the solicitor there on time. Sometimes they turn up and say they are ready to go but they haven’t told the solicitor. They then have to ring them and wait 45 minutes for them to arrive. Whose fault is that? It isn’t the solicitor’s fault as he wasn’t told to attend” (C:JM).

There were also said by custody sergeants to be cases where legal advisers attended on time at the station to be told that the interview had been brought forward and that their client had been interviewed without a solicitor present.³⁷ The potential for police ploys to discourage legal advice are examined further below.

Factors found to influence variations between police stations

When considering the possible relationship between legal advice and delays, as shown in Table 1 above, it seems that as the number of requests for legal advice increases so too does the average custody duration. To some extent this is to be expected because people tend to have a solicitor in more serious and complex cases which then take longer to deal with.³⁸ However, when examining differences between police stations in the time taken, depending

³⁷ Dixon et al. (1990) p. 128, noted that solicitors would frequently complain that on arrival at the station they would be informed by police officers that their client had changed their mind about having legal advice

³⁸ Phillips and Brown (1998) p. 110 found that on average suspects with a solicitor were held in custody for nine hours compared to five-and-a-half hours for those without legal advice.

on whether or not legal advice was requested, this relationship was not as straightforward as it might first appear. In addition to requests for legal advice, and the proportion of suspects who actually receive such advice, set out in Table 2 is the average time suspects spent overall in custody during the first detention period and also the time spent depending on whether or not legal advice was requested.³⁹

Table 2: The proportion of suspects requesting and receiving legal advice, the average time spent in custody and differences in time depending on whether or not legal advice was requested during the first detention period only

<i>Main police station</i>	<i>Requests for legal advice %</i>	<i>Advice received %</i>	<i>Overall duration</i>	<i>Duration w/o legal advice</i>	<i>Duration with legal advice</i>
Station A	44	33	10.00	8.00	12.30
Station B	38	34	7.50	6.15	10.25
Station C	47	43	10.11	8.30	12.05
Station D	60	30	11.45	9.50	13.05

When considering differences between police stations it is interesting to note that in Police Station B, which has the lowest request rate for legal advice and the shortest overall duration (at almost eight hours), there is a difference of over four hours in cases depending on whether or not legal advice was requested. Conversely, in Police Station D, which has the highest request rate of legal advice and also the longest overall custody duration (at almost twelve hours), there was the least difference in the time taken in cases with or without legal advice, at just over three hours. A detailed analysis of custody sergeants' interviews and fieldwork notes helped to identify four key factors which could, in part, help to explain some of these variations.

³⁹ Data relating to whether or not requests actually resulted in legal consultation were obtained from a subsample of 2,781 detentions spread across 15 larger police stations in the four areas. In relation to these four police stations there were 266, 256, 216 and 296 records relating to suspects who had requested legal advice in Police Stations A, B, C and D respectively.

Custody sergeants' attitudes towards legal advice

Research has previously identified how custody sergeants can seek to deter suspects from having legal advice by going through their legal rights incompletely and/or incomprehensibly.⁴⁰ However, in order to monitor activity within police custody suites there is now a requirement for these sites to be monitored by CCTV cameras and microphones. Custody sergeants are well aware of this surveillance, as one respondent put it when asked if he would either encourage or discourage a suspect from having legal advice, “We have something like 21 cameras and 17 pieces of recording equipment here. It is my job to inform people that they are entitled to legal advice and not to influence them either for or against” (B:FX). Nevertheless, particularly when dealing with suspects who were confused or unsure about what to do, custody sergeants were seen to have discretion to either encourage or discourage the take-up of legal advice.

There were limitations in this study when seeking to observe the extent to which custody sergeants could influence the take-up of legal advice. This was because there was a maximum of five days spent in each of the custody suites and during that time interviews had to be conducted with custody sergeants. While a number of issues arose when observing the four custody suites, these were further examined in a subsequent study of Police Station B.⁴¹ In the meantime, it was possible to explore with custody sergeants in interview what potential they had to influence requests for legal advice.

Custody sergeants were asked if they would encourage a suspect to have legal advice but most responded that they were not allowed to as PACE requires them to be impartial when reading suspects their legal rights. In order to try and elicit a response, they were then asked if they would encourage legal advice in cases where a suspect had been arrested for a

⁴⁰ Sanders et al., *Advice and Assistance in Police Stations and the 24-Hour Duty Solicitor Scheme* (1989) p. 59; Dixon et al., “Safeguarding the Rights of Suspects in Police Custody” (1990) and S. Choongh, *Policing as Social Discipline* (Oxford: Clarendon, 1997).

⁴¹ See further Kemp, *Bridewell Legal Advice Study: Interim Report* (2012), pp. 28-33.

very serious offence, such as rape or murder. The majority said that they would, although most qualified this when saying that such ‘encouragement’ would be no more than reiterating to suspects their legal rights. This response was typical of a number of comments made:

“Occasionally I have encouraged someone to have legal advice. It is usually when they have been arrested for the first time and it is for a relatively serious offence, like a rape or that sort of thing. If they tell me that they have done nothing wrong then I will explain that they are entitled to legal advice and that it is free. I can’t advise them anymore than that” (C:SC).

While the majority of custody sergeants were keen to stress the need for ‘impartiality’, there were two respondents (from the same station) who accepted that they would actively encourage a suspect to have legal advice in certain circumstances. As one respondent put it:

“I do try and encourage someone to have legal advice, particularly if they are up for rape. If they say they are alright without a solicitor I’ll tell them it is free and if convicted they can go to jail for a long time. If I have someone who is unsure about what to do then I take that as a ‘yes’ and tick the box for legal advice” (A:ES).

The other custody sergeant highlighted the pressure they were under to act impartially when he said, “If I have someone for a serious offence, such as murder or rape, then I will encourage them to have legal advice. I know when I’m doing it that this is completely unlawful” (A:UI).

There were just a small number of custody sergeants who said that under no circumstances would they encourage a suspect to have legal advice although they did point out that it was their duty to clearly inform suspects of their legal rights. When asked if he would encourage legal advice when a suspect had been arrested for an offence of rape or murder, for example, this respondent replied, “We have had quite a lot in for murder related

issues recently and I would never try to influence them to have legal advice” (C:JM). He went on to comment on a recent case when he said:

“I had a lad in the other day from [the Eastern Bloc] who was in for murder. He had an interpreter but said he didn’t want a solicitor while he was being interviewed. It was only when he was charged and remanded that he then said he wanted legal advice” (C:JM).

There was a similar comment from a custody sergeant in another police station when he responded to the question of whether he would encourage a suspect being dealt with for a very serious offence to have legal advice:

“No, absolutely not. It’s my job to tell them about legal advice, inform them of their rights and do my level best to ensure they understand. They might be in here for mass murder and I won’t influence them one way or another. As long as I’m happy they understand their rights and have made an informed decision, that’s what counts” (A:BN).

This custody sergeant makes an important point when emphasising the need for suspects to *understand* their rights and to make *informed* decisions. From observations, however, there appeared to be many suspects who were unable to make an informed decision, particularly as they seemed to be unaware of how a solicitor could assist them in the police station.⁴²

When arrested for very serious offences it could be anticipated that the vast majority of suspects would request a solicitor, but this is not always the case. From our analysis of over 30,000 police custody records we found that around one quarter of those arrested for rape and homicide offences did not request legal advice. It seems unfortunate, therefore, that custody sergeants feel inhibited from encouraging suspects to have legal advice, particularly

⁴² For a discussion on the extent to which suspects understand their legal rights and the criminal law, and also why some suspects reject legal advice see Kemp and Balmer, *Criminal Defence Services: Users' Perspectives: Interim Report* (2008) pp. 40-41 and Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 35-41.

when being dealt with for very serious offences.⁴³ Indeed, there can be serious consequences later in court if confession evidence obtained without sufficient legal safeguards is successfully challenged and the evidence is then ruled to be inadmissible.⁴⁴

Access to legal advice

There were differences in the way that access to legal advice was arranged in the four police stations and this had implications for the take-up of legal advice. Explored first of all are some of the differences found between the police stations for providing access to legal advice, and next examined is the extent to which legal advice requested was actually received.

Arrangements for providing access to legal advice

Solicitors in Police Stations A and B had effectively been barred from entering into the police custody suite, which meant they were not visible when suspects were being booked into custody. As discussed below, this seemed to help reinforce among detainees a common perception that waiting for legal advisers would cause a delay. Having little or no access to the custody suite, legal advisers in these two stations had to rely more on making telephone contact with their client.⁴⁵ However, a problem noted in all four stations was that the telephones were not always answered, particularly at busy periods of time.⁴⁶

⁴³ PACE does provide protections for vulnerable suspects brought into custody by requiring them to have an appropriate adult. For a discussion of access to legal advice and vulnerable suspects see Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 25-33.

⁴⁴ See A. Sanders, R. Young and M. Burton, *Criminal Justice (4th edition)* (Oxford: Oxford University Press, 2010) pp. 700-708 for a discussion of trial remedies when dealing with evidence deemed to be obtained in the course of rule-breaking by the police and other officials.

⁴⁵ Such calls were also necessary when checking up on progress in cases and also if legal advisers wanted to make representations to custody sergeants in relation to bail and/or outcome decisions.

⁴⁶ This problem is likely to increase as police budget cuts are reducing the number of custody staff. In Police Station D there was a member of staff who was responsible for answering the custody telephone, which helped to alleviate this problem. There were noted to be similar issues with custody telephones not always being answered in other police stations (see Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 47-50).

In Police Station C there appeared to be a more positive approach adopted towards legal advice as those who declined legal advice were advised that they could speak to a solicitor over the telephone. This offer is a PACE requirement but it was only in this station where suspects were routinely seen to be offered this facility.⁴⁷ Solicitors were also allowed to enter into the custody suite in Police Station C, although this was generally restricted to the time of the police interview. Within a secure environment the police need to control access to the custody suite but this was seen to inhibit solicitors' access to their clients. In one case observed, a suspect had been interviewed by the police and his solicitor advised him that he was to be cautioned. He was later told by the police that he was to be charged and so he asked to speak to his solicitor. When the custody sergeant was advised that the solicitor was waiting at the front desk, instead of allowing him into the custody suite the suspect was charged and told that he could get legal advice on his way out of the station.⁴⁸

Legal advisers had a waiting room based in the custody suite in Police Station D, which meant that they were highly visible to suspects when being booked into custody. This is likely to be the main factor which led to this station having a relatively high request rate for legal advice. In particular, their presence within the custody suite is likely to reassure those being detained that having a solicitor will not cause delays.⁴⁹ While this might be the perception, as considered below, there were also concerns raised by custody sergeants over unduly long delays in this police station.

Despite there being differences in the arrangements for providing access to legal advice, a common practice identified across the four police stations was for legal advisers to

⁴⁷ See PACE Code of Practice para. 6.5. While there were times where custody sergeants in the other police stations would invite a suspect to speak to a solicitor over the telephone if they had refused legal advice, this was not seen to be routine practice.

⁴⁸ This incident was recorded in fieldwork notes dated 18 November 2010.

⁴⁹ While the presence of solicitors in the custody suite might help to reassure suspects that legal advisers were readily available, it was not necessarily those present who were chosen to provide legal advice.

wait until the time of the police interview before seeing their client.⁵⁰ This meant that they were accepting of the police timetable, even in cases where custody sergeants had complained about there being unduly long delays. In addition, with suspects having to wait a long time before speaking to their legal adviser, this raises questions about the extent to which the arrangements adhere to the PACE requirement for advice to be provided ‘at any time’ and ‘as soon as practicable’ following a request.

Requests for legal advice resulting in a legal consultation

It was anticipated that the different arrangements in the police stations for providing access to legal advice would have implications for the take-up of such advice. The extent to which those who requested legal advice actually received such advice could not be downloaded electronically from the custody records and so it had to be gathered manually from a sub-sample of custody records.⁵¹ As shown in Table 2 above, around one-third of suspects received legal advice, although with a higher proportion doing so in Police Station C (at 43 per cent).

Examined below in relation to Police Stations A and B is the extent to which police ploys might have persuaded some suspects to change their mind about having legal advice. Helping to explain the lower attrition rate in Police Station C could be the practice of custody sergeants seeking to encourage suspects who refused legal advice to speak to a solicitor over the telephone. Although, another possible explanation arises due to the way in which legal consultations are recorded on custody records.⁵² Accordingly, the higher proportion of suspects receiving legal advice in Police Station C could be due to the data collectors

⁵⁰ Research evidence suggests that the practice of solicitors to first make contact with their client at the time of the police interview is quite common following the introduction of fixed fees (see Sanders et al., *Criminal Justice* (2010:239) and L. Skinnis, (2009) ““Let’s get it over with”: early findings on the factors affecting detainees’ access to custodial legal advice” (2009) 19(1) *Policing and Society*.

⁵¹ See footnote 39 above.

⁵² When the police extracted data from the sub-sample of custody records they could have assumed that legal advice was *received* in all cases where contact had been made between a solicitor and their client.

assuming that legal advice was received in *all* cases which involved an early telephone conversation between a solicitor and their client. In Police Station D, less than one-third (30%) of suspects received legal advice and examined next is the extent to which long delays could encourage some to change their mind about having legal advice.

Police review teams and the potential for delays

It was the Statutory Charging Initiative which required the police to set up review teams in order to liaise with the CPS and improve prosecution decision-making. However, the role and remit of these teams could vary between stations.⁵³ In three stations the arrangements were seen to be fairly similar in that there was a single review team which provided support to front-line officers. This generally involved taking over the preparation of cases handed over by the police, which included conducting interviews and liaising with custody sergeants over disposal decisions.⁵⁴ Importantly, in these three stations custody sergeants continued to be responsible for charging decisions which did not have to be referred on to the CPS. There was a great emphasis placed on the police reviewing the evidence in Police Station D, which led to two separate teams being set up. It was the police review teams, rather than custody sergeants, who were responsible for charging decisions which did not involve the CPS.⁵⁵

All respondents in Police Station D were critical of the police review teams for being a major cause of delays, particularly when dealing with relatively straightforward matters. Custody sergeants described how the first of these teams was responsible for carrying out an early review of the evidence and deciding whether or not a case should be pursued. If it was decided that action should be taken the case was then passed on to the second team who took

⁵³ The potential significance of these review teams on delays in the pre-charge process had not been anticipated and so no specific questions were put to custody sergeants about this issue.

⁵⁴ This also included liaising with the CPS as and when required.

⁵⁵ Custody sergeants in Police Station D said that they were only required to make charging decisions when the review teams were not on duty, which was during the early hours of the morning.

over responsibility for investigating the case, including conducting interviews with suspects. When referring to delays arising out of these arrangements the following comment by one custody sergeant helps to summarise a number of issues raised:

“It isn’t the police investigations which lead to the delays but the review work. We have supervisors having to review the reviews. It sounds like a laugh but it is true... It was a straightforward process but now it involves a gatekeeper, followed by an interview, followed by another gatekeeper, possibly another interview and, if required it goes on to the CPS. These reviews can take another four or five hours before you get a decision” (D:JM).

With complaints being made about the long-windedness of the review process, one custody sergeant complained that this undermined police efforts to deal with cases more quickly under the ‘streamlined process’.⁵⁶ He said:

“We have this expedited process but officers are always complaining about the bureaucracy involved. They have to generate statements, crime reports and other things which can lead to an unnecessary amount of paperwork. When they’ve booked someone into custody they go off and write up the file for a review. This seems to be shorthand for them disappearing for four hours or more” (D:JL).

The following comment from another custody sergeant provides an example of how there can be long delays even for relatively minor matters:

“If you are dealing with a bog standard shoplifting case it should be no different now to what it was before but it has become overcomplicated. We had a shoplifter in the other day who had stolen £2.50 worth of goods. You would think a custody sergeant could make a decision on that because with his record it was going to be a caution. I went off at the end of my shift and when I came back on duty the next day he was still sat in his cell. Why, for such a low-value offence? I don’t get it. He was later cautioned” (D:JM).

⁵⁶ The ‘streamlined process’ arose out of the Statutory Charging Initiative and the aim is to deal with straightforward cases more efficiently from arrest through to sentence.

While Police Station D was found to have a high request rate for legal advice, it is likely that the involvement of the two police review teams had created a more protracted process which led to suspects being detained for longer on average than was found in the other police stations. While it appears that the close proximity of legal advisers in the custody suite was likely to have encouraged a higher request rate for legal advice, it is perhaps not surprising if some suspects subsequently changed their mind about having legal advice in the hope that this would help to expedite matters. This was the view of one custody sergeant who said, “It can get to the point where someone in their cell is continually asking for an update and they are getting frustrated. I think there are occasions where they try to speed things up by changing their mind about having a solicitor” (D:SE). While police support for the two review teams in Police Station D was intended to help improve the quality of prosecution decision-making, the arrangements also led to suspects being held in custody over long periods of time.

Suspects’ perceptions of delays and police ploys

When observing suspects as they were booked into custody it was evident from comments made that there was a perception that having a solicitor would lead to delays and thereby extend their time in custody. Not surprisingly, such concerns led to some suspects rejecting legal advice. For example, when asked by custody sergeants the reason why legal advice was refused responses observed included, “I’ve no time for a solicitor” or “Let’s get on with it”.⁵⁷ With solicitors being absent from custody suites in Police Stations A and B they were not in a position to challenge any concerns a suspect might have about legal advice causing delays. Interestingly, in an earlier study I interviewed defence solicitors in Police Station A who were

⁵⁷ These observations were recorded in the fieldwork diary on 11 October 2010 and 2 November 2010 respectively. For similar findings see Skynns (2009) ““Let’s get it over with”: early findings on the factors affecting detainees’ access to custodial legal advice” (2009) 19(1) *Policing and Society*.

then allowed into the custody suite. At that time there were complaints made by a couple of solicitors that they had overheard the police telling suspects that if they wanted a solicitor they would have to wait for a long time.⁵⁸ While the solicitors had then been able to challenge such inappropriate comments, their subsequent exclusion meant that this was no longer the case. It is important, therefore, to consider further the extent to which the police might use delays as a way of discouraging suspects from having legal advice.

When examining the potential use of police ploys designed to discourage the take up of legal advice, Brown has been critical of researchers for adopting a wide definition of ‘ploys’ which include cases where there were seen to be ‘influences on decisions regarding legal advice’ but not ‘active discouragement’.⁵⁹ It is this more restricted categorisation of ‘active discouragement’ which has been used in this study when examining the potential use of police ploys.

There were said to be three opportunities that the police have for using the threat of delays as a ploy to discourage suspects from having legal advice. The first opportunity was said to arise following an arrest, when during informal conversations on the way to the station the suspect could be told that they would spend longer in custody if they asked for a solicitor.⁶⁰ The potential for police ploys to be used at this early stage was commented on by custody sergeants from all four police stations. In Police Station D, for example, this custody sergeant said:

⁵⁸ See Kemp, *Transforming Legal Aid: Access to Criminal Defence Services* (2010) pp. 43-46). Similar ploys had been identified by Sanders et al., *Advice and Assistance in Police Stations and the 24-Hour Duty Solicitor Scheme* (1989) and B. Irving and I. McKenzie, *Police Interrogation: the effects of the Police and Criminal Evidence Act 1984* (London: Police Foundation, 1989).

⁵⁹ See D. Brown, *PACE Ten Years On: A Review of the Research* (London: HMSO, 1997) (HORS 155) pp. 98-101.

⁶⁰ Such ploys were also identified by Sanders et al., *Advice and Assistance in Police Stations and the 24-Hour Duty Solicitor Scheme* (1989) and Skinns, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (2011) p. 117.

“I make it very clear that people are entitled to legal advice and that it shouldn’t make much difference to the time they are here. It would be naive to think that when someone is arrested that the officer doesn’t tell them that they are ready to go and that having a solicitor will hold things up. I expect that sort of thing does happen” (D:VN).

When being booked into custody suspects could make reference to earlier conversations in which legal advice had been discussed. On one occasion, for instance, when asked why he had declined legal advice this suspect replied, “I don’t want to have to wait for a solicitor” and turning to the arresting officer he said, “We are ready to go now aren’t we?”⁶¹ In another station, this custody sergeant said, “When they come into custody it seems that the cop has already told them that they are ready for the interview. We ask if they want a solicitor but they generally say they won’t bother because they just want to get out” (B:VS).

It was only in Police Stations A and B that custody sergeants referred to police ploys being used once a suspect was brought into custody. The second opportunity these custody sergeants referred to of the police trying to discourage a suspect from having legal advice was when they were being booked into custody and the police said they were ready to go ahead with the interview. As this custody sergeant put it, “If the officers are ready to interview straight away, a suspect who has been in custody before will know that if they ask for a solicitor they will then have to wait for them to get to the station” (A:UT). Suspects wanting to be dealt with quickly, therefore, were likely to feel under pressure not to have legal advice.⁶² While there was inevitably a delay in getting a solicitor to attend at the police station, a small number of custody sergeants said that the police would use this as a ploy to discourage suspects from having legal advice. This was the comment from one custody sergeant who said:

⁶¹ This observation was recorded on 18 November 2010.

⁶² Sanders et al., *Criminal Justice* (2010) p. 235 noted that comments such as ‘You will have to wait in the cells until a solicitor gets here’, were a dire threat to suspects for whom the length of detention was of greater concern than whether or not they were charged.

“There are some cops who will do anything they can to try and get a prisoner in quickly and avoid them having a solicitor. They will often say, ‘If you don’t want a brief I’ll take you in for an interview now’. Unfortunately, I think that is quite common” (B:FX).

The extent to which such pressure might be used as a ploy to discourage legal advice was further explored in a later study of legal advice at Police Station B.⁶³

The third opportunity for the police to use the threat of delays to try and discourage legal advice was said to be just before the police interview. As noted above, there were times where the late arrival of a solicitor could delay the interview and this could then encourage suspects to change their mind about having legal advice. However, custody sergeants in Police Stations A and B acknowledged that police officers could blame the solicitor for delays so as to encourage the suspect to change their mind about having legal advice. For some respondents, pressure coming from the police to decline legal advice because of delays was unintentional. This was what one respondent had to say, “I don’t think the police try to do anything unlawful but sometimes they have a chat with them [the suspect] and say they are ready for the interview but their solicitor hasn’t arrived. They can then change their mind because they don’t want to have to wait for another 40 minutes for their solicitor to get here” (B:IH).

While a custody sergeant in another station said that police ploys were not used in order to discourage legal advice, he later seemed to unwittingly hint at such practices when commenting on why he felt suspects changed their mind about having legal advice:

“To be honest, I don’t know why they change their mind. The inspector has to get involved and ask them questions ... it is normally when they [the investigating officers] are in the cells with them that they then say they don’t want a solicitor” (A:PK).

⁶³ See Kemp, *Bridewell Legal Advice Study: Interim Report* (2012) p. 32.

In the same station, an experienced custody sergeant acknowledged that the investigating officers could actively discourage suspects from having legal advice. When commenting on one particular case he said:

“The solicitor arrived in time for the interview but the two detectives were nowhere to be seen. I found out that they visited the suspect in his cell and he then changed his mind about having a solicitor because he said he didn’t want to wait anymore. The detectives went straight to the inspector who confirmed that he had changed his mind. This was completely without my knowledge – I was furious” (A:ES).

There was a similar situation described by custody sergeants in Police Station B. When commenting on the potential for such police ploys this respondent said:

“We caught a DC [detective constable] trying to persuade a detainee not to have a solicitor. He came out of the cells and said he didn’t want one [a solicitor] but the inspector got wind of it and said you are having a solicitor. We took a decision as a group then that we wouldn’t let officers take detainees to or from the cells. I’m not saying that every shift is the same but that was the decision on ours” (B:VS).

To try and protect suspects from police pressure being used to discourage legal advice, PACE requires that an inspector has to get involved in cases where someone changes their mind about having a solicitor. However, as custody sergeants pointed out, there were inspectors who were more robust than others when not allowing suspects to change their mind. Accordingly, one custody sergeant suggested the following change which he felt could help to increase protections for detainees:

“If someone wants to change their mind I don’t see any reason why we can’t pick up the phone and get them to speak to their solicitor. It will only take five minutes. He has to speak to an inspector so he might as well speak to a solicitor. I know they [the solicitor] will say that they are on the way and 25 minutes later they will be here” (B:QT).

This suggestion is important because it provides an opportunity for a solicitor to speak to their client over the telephone and to address any concerns they might have about their involvement causing a delay. It could also help to reduce the opportunity for police ploys to be used at this stage to discourage the take-up of legal advice.⁶⁴

Discussion

The findings arising out of this study have helped to identify unobserved factors which can impact on delays and the take-up of legal advice. Some factors have been found to be common across the four stations, including the long-windedness of the police investigation and due to the involvement of the CPS in pre-charge decision-making. Factors found to influence variations between police stations include differences in the role and remit of police review teams and also in the arrangements for providing access to legal advice. There was also seen to be a common perception among suspects that having a solicitor would lead to delays. Helping to counteract such a view in one police station was the visibility of solicitors in the custody suite, which seemed to have an effect on increasing requests for legal advice. On the other hand, in two police stations where solicitors had been excluded from waiting around in the custody suite, there was evidence of police ploys using the threat of delays to discourage suspects from having legal advice.

An important issue arising out of recent research into police station legal advice is the extent to which suspects held in custody are able to judge whether or not they need a solicitor, particularly if they are in custody for the first time and/or have been arrested for serious offences. The criminal law and procedure is extremely complex and within an

⁶⁴ I raised this issue at a national custody forum on 30 November 2010. It seems that this might have helped bring about a change in PACE (revised Code of Practice s. 6.6(d)) as this now requires inspectors to make contact with the solicitor involved when considering a suspect's change of mind about having legal advice (see Home Office, (2012) *Revised Code of Practice for the detention, treatment and questioning of persons by police officers* (available at: <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-g-2012?view=Binary> [Accessed October 1, 2012]).

adversarial system of justice understanding one's legal rights, and the consequences of decisions made, may be beyond the comprehension of many suspects. Once brought into custody it is the police who are responsible for reading out to suspects their legal rights, but PACE requires them to be impartial so they are unable to influence the decisions made. In practice, particularly when dealing with suspects confused or unsure about what to do, the way in which those rights are presented means that custody sergeants can be either encouraging or discouraging of legal advice. One way of improving access to legal advice would be for custody sergeants to point out to suspects who decline to consult with a solicitor in person that the right includes the opportunity to speak to a legal adviser over the telephone. This is a PACE requirement but it was only in one police station where this was seen to be routine practice.

To help protect the legal rights of those held in police custody PACE provides access to free and independent legal advice, which is to be provided 'as soon as practicable' once requested. However, since the introduction of fixed fees for police station legal advice it seems that solicitors are tending to concentrate on the offence rather than on the wider issues concerning their clients' detention. This means that they are tending to get involved in cases at the time of the police interview, which can be many hours after a request for legal advice has been made. Having received a request for legal advice, solicitors could be more challenging of the police timetable, particularly in cases involving unnecessary and/or unduly long delays. With the police being put under pressure to conduct their investigations expeditiously this would not only help to improve efficiencies but it could also lead to their clients' earlier release from custody. Such interventions, therefore, could have a positive effect on the take-up of legal advice, particularly with suspects currently perceiving solicitors to be the main cause of delays.

With concerns raised by custody sergeants in all four police stations over long delays in the pre-charge process this study raises questions about the extent to which PACE provides sufficient legal protections for those held in custody. In particular, it seems that within a 24-hour period of detention, PACE safeguards intended to restrict the length of time suspects can be held in custody are ineffective. With the involvement of police review teams and the CPS in pre-charge decision-making, cases are now being prepared to a higher evidential standard, but with consequent delays. Accordingly, it is important to question whether the right balance has been struck between the administrative and investigative needs of the prosecution and the liberty of those held in police custody.