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**Negotiated Disclosure:
An examination of strategic information management by
the police at custodial interrogation**

by

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degree of Doctor of Philosophy in Law

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Finally, and most importantly, I would like to mention my precious daughter Sophie, for whom this work is dedicated. Her pride in this achievement makes all the effort worthwhile.

DECLARATION

I declare that this thesis is entirely my own work, except where stated, and confirm that it has not been submitted for a degree at any other university.

References to gender throughout this thesis are intended to be non-specific, with the exception of those fieldwork cases identified accordingly.

Paul J. King
New Scotland Yard

ABSTRACT

This thesis considers the impact of substantially attenuating a suspect's right to silence on the relative positions of the police and defence in custodial interviews. The main hypothesis argues that these provisions have had a significant, unforeseen impact on the working dynamic between police officers and legal advisers. Interview strategies have developed, which seek to reinforce advantages to the police associated with control of pre-interview evidential disclosure. A second hypothesis postulates that introduction of the inference provisions has influenced suspect behaviour during custodial interrogation, leading to a reduced reliance upon the exercise of silence.

The study drew upon data collected from in-depth, tape-recorded interviews with police officers involved at various stages of the investigative process, representing a wide variety of roles and experience. Full transcripts of the interviews were prepared and then subjected to a close-grained, qualitative analysis in which various themes were identified.

The findings reveal, *inter alia*, that pre-interview disclosure has assumed increased significance, and can be instrumental to the interrogation outcome. Police officers are accorded considerable discretion in the management of police-suspect relations, which is evident in the emergence of control strategies for case-related information. Greater openness has flowed from the development of better-trained lawyers, and was manifest in the increased emphasis by police officers on truth-seeking during interview. Evidence emerged of controlled disclosure being used as a mechanism for securing or *negotiating* the co-operation of an interviewee. The extent of disclosure varied according to a number of factors, although, in serious or complex cases, non-disclosure formed the basis for the strategy. The incremental release of information has been shown to have an unsettling effect on interviewees and can undermine the legal adviser's presence. The police claim fewer no-comment interviews and improved content from the use of these tactics – findings that are echoed in recent studies by the Home Office and in Northern Ireland. The research therefore indicates that there is evidence to support both hypotheses.

TABLE OF ABBREVIATIONS

A.C.	Appeal Cases (Law Reports)
ACC	Assistant Chief Constable
ACPO	Association of Chief Police Officers
All E.R.	All England Law Reports
CID	Criminal Investigation Department
C.J.	Lord Chief Justice
CJPOA	Criminal Justice & Public Order Act 1994
CLRC	Criminal Law Revision Committee
Cr. App.R.	Criminal Appeals Review
Crim. L.R.	Criminal Law Review
DPP	Director of Public Prosecutions
DR	European Commission Decisions & Reports
DTI	Department of Trade & Industry
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights 1950
EHRR	European Human Rights Reports
Eur Comm HR	European Commission on Human Rights
EWHC	England & Wales High Court
H.C.	House of Commons.
HMIC	Her Majesty's Inspectorate of Constabulary
HOWG	Home Office Working Group on the Right to Silence
HRA	Human Rights Act 1998
ISQ	Interview Schedule Questionnaire
L.J.	Lord Justice
PACE	Police & Criminal Evidence Act 1984
PRG	Police Research Group
Q.B.	Queen's Bench (Law Reports)
QC	Queen's Counsel
RCCP	Royal Commission on Criminal Procedure
RCCJ	Royal Commission on Criminal Justice
SIO	Senior Investigating Officer
UKHL	United Kingdom, House of Lords
WL	Westlaw UK

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1. INTRODUCTION

Aims of the research

The primary intention of this thesis is to examine police strategies concerning the nature, extent and timing of pre-charge disclosure of prosecution material. It explores the circumstances in which the police exercise control of information and the functional benefits derived, in particular, the consequential effects on custodial interrogation. The main hypothesis is that legislation,¹ which substantially attenuates a suspect's right to silence, has had a significant, unforeseen impact on the working dynamic between police officers and legal advisers. The resulting change has led to the development of interviewing tactics, which seek to reinforce advantages to the police associated with control of pre-interview evidential disclosure. A second hypothesis postulates that the introduction of these provisions has influenced suspect behaviour during custodial interrogation leading to a reduced reliance upon the exercise of silence.

In particular, this study seeks to identify the manner in which present legislation and police procedures provide officers with discretion and flexibility in the way they *negotiate with* and *manage* suspects during the early stages of an investigation. The profound effects of this strategy on the posture of a suspect are uncovered, revealing how it can successfully undermine the authority of a legal adviser, leaving the police free to act as *dominant persuaders*. As a corollary this study reveals how custody officers express embedded police values and thus

¹ Criminal Justice & Public Order Act 1994, ss.34-37.

demonstrate clear partiality, in a fashion designed to facilitate colleagues and weaken the suspect's overall position.

This study will explore the phenomenon of pre-charge disclosure as first the suspect, then later his legal adviser, encounter, and interact with, the police officers. As the suspect passes through each stage of the custodial process, evidential control is exercised in a manner calculated to maximise the tactical advantage accruing from information deficit experienced by the suspect and his legal adviser.

The process and effects of information management will be examined in a number of ways which include *inter alia*, setting out and exploring the legal framework that exists to constrain police officers in the suspect encounter; considering the range of measures available to the police to maintain their strategic advantage; and seeking to establish the consequential reliance on silence by suspects in the face of police questioning.

The working relationship between the police and defence lawyers is also considered, particularly in light of recent opinion expressed by senior police officers.² In describing the culture of the criminal trial as a 'tactical game played between lawyers', they warn of its 'debilitating' effects on the criminal justice system (ACPO, 2002: 1-2). The views of police management may be seen as an expression of the continuing tension that exists between the *crime control* and *due*

² On January 10th, 2002, the Association of Chief Police Officers (ACPO) launched the 'Search for Truth' initiative, to promote change in the criminal justice system. The ACPO initiative was supportive of the Government's comprehensive modernisation programme based on Lord Justice Auld's 'Review of Criminal Courts' (2001).

process lobbies.³ The macro debates concerning the criminal justice system continue to be played out on one level, while on another, micro discussions between police and defence lawyers remain over issues such as disclosure.

Many informed observers regard custodial interrogation as the principal investigative strategy employed by the police and of central importance in the determination of criminal cases.⁴ Indeed, some commentators have argued that police questioning is less concerned with ‘truth-seeking’, acting instead as a mechanism for providing proof of the suspect’s presumed guilt. This theory is explored and set against police perceptions of the purpose and objective of suspect interviews to complete the picture. The reader is also introduced to the rights and safeguards afforded to citizens facing custodial interrogation, chief among these being the right to silence. The debate that has accompanied the use of this right is considered against a background of empirical knowledge, legal sources and contemporary domestic and European human rights legislation. In particular, measures attenuating a defendant’s right to silence, introduced in the Criminal Justice & Public Order Act 1994 (CJPOA), are examined in detail.

Chapter 3 develops this theme further, leading into an area of the debate that, by its previous absence, has assumed increased significance. The unforeseen consequences of the inference provisions, arising from the CJPOA, have resulted in a highly significant shift in the dynamic between police, defence lawyers and suspects. Demands for increased pre-interview disclosure of the prosecution case

³ See chapter 2 below, for a discussion of Packer’s portrayal of the ideological dichotomy present in the criminal justice system.

have led to the emergence of a strategic police response, characterised by forms of *negotiated disclosure*. Four key stages in the disclosure process are explored, starting with the initial contact between suspect and police, leading through the arrest and subsequent detention process at the police station, to the interaction with legal advisers and the interview itself. Evidence emerges from this study to suggest that every stage of this interaction, although bounded by a legal framework, is effectively negotiated by police officers who are able to draw on the limits of discretion available to them.

Chapter 4 describes the research method of the present study, outlining its objectives, strengths and weaknesses, focusing particularly on the key moments within each stage. A total of 45 semi-structured interviews were conducted with police officers from a medium-sized force in the Midlands. The sample was divided into a group of case officers, who routinely arrest and interview suspects, and a group of custody officers who are responsible for all aspects of the detention of a suspect at a police station. Full, typed transcriptions of the interviews were prepared to establish a database of research material, which could be subjected to a close-grained analysis at later dates. Coding frames for each group were developed which supported both qualitative and quantitative interpretation.

Chapters 5 to 8 map out the key stages in the disclosure process. Chapter 5 describes the context in which disclosure occurs prior to, and at the point of, arrest, including the initial questioning of a suspect, searches of persons, premises or vehicles, and any unsolicited comments made outside the realms of a formal

⁴ See McConville & Baldwin (1981, chapter 7) for a full discussion of the importance of confession evidence.

interview. Following the chronological theme, the venue in chapter 6 moves to the police station and the formal process of detention. Changes in the custody suite environment are explored as they impact upon the role and decision-making of custody officers. The competing demands these officers face are examined and their decision-making scrutinised, exploring the collegial ties that lead to collaboration with investigating officers in protecting and advancing perceived benefits accruing from management of prosecution evidence.

Chapter 7 introduces the role played by the legal adviser, focusing on contact with the police from the initial request for legal representation through to the negotiations for disclosure of prosecution material prior to interview. The final stage of the process concerns the interview itself. In chapter 8, the reader discovers the policing agenda, learning of the various motivational factors at play during custodial interrogation. The strategic importance of disclosure is also underlined and reviewed in responding to the exercise of silence by suspects.

The research findings are summarised in the final chapter, which revisits in general terms the points raised earlier in the thesis. The picture to emerge was one in which a minority of officers, mainly those engaged in the investigation of serious or complex crime, employed strategic control of evidence to achieve a tactical advantage during the interview scenario. In denying the suspect and his legal adviser access to certain elements of the prosecution case, the officers argue that guilty suspects are less able to construct defences and fabricate alibis. This strategy relied upon, and received support from, custody officers who collaborated in maintaining effective control of prosecution evidence during the detention process.

Changes in the law, which introduced the silence provisions, meant that legal advisers were demanding greater pre-interview disclosure. A majority of officers in the study were generally complying with these requests, often unaware of the potential impact on the forthcoming interview. Respondents felt they encountered the right to silence less frequently following the introduction of the inference provisions, with some officers in the sample having no personal experience of its exercise by a suspect.

2. POLICE INTERROGATION & THE RIGHT TO SILENCE

The provisions introduced in Part III of the Criminal Justice & Public Order Act 1994 (CJPOA) had important implications for suspects who remained silent during police interviews or at trial.¹ From that point on, the failure of a suspect to mention, when questioned, facts which they later relied upon in their defence at court, or a failure to testify at court, could leave the defendant open to an appropriate inference² being drawn by the court. The 1994 Act followed a ‘long-running and heated debate’,³ and promised to tackle the ruthless exploitation of the right to silence by criminals.⁴ The key elements of the debate and the resulting legislation are discussed in this chapter, which begins by charting the general changes in the style of custodial interrogation and the legal environment that surrounds it.

The nature of police interrogation

The police service has traditionally measured the success of an interview by the information obtained from it. ‘In the case of interviews with suspects, this generally meant that the only important aspect was whether an admission was obtained.’⁵ In the light of high profile miscarriages of justice, which exposed the devastating effects⁶ of oppressive and unreliable interview techniques, this is now widely accepted as a poor measure of quality.

¹ The provisions relating to ss.34-37 CJPOA were introduced at midnight on 10th April 1995.

² As Bucke *et al* (2000: 1) note, although not specified in the legislation, this is likely to be adverse to the defendant.

³ *Ibid.*

⁴ Michael Howard M.P., the Home Secretary of the day, promised to address the ‘misnomer’ of the right to silence, calling for a ‘halt to this charade’ in his speech to the Conservative Party Annual Conference at Blackpool, 6th October 1993.

⁵ Police Central Planning & Training Unit (1994: 5).

⁶ Milne & Bull (1999: 2).

Academic observers have, nevertheless, recognised the importance of custodial interrogation to the investigative process. As Baldwin (1994: 66) notes, ‘the interviewing of suspects is regarded by informed observers as a critical – perhaps the most critical – stage in the processing of almost all criminal cases’. Indeed, McConville *et al* (1991: 56) described suspect interviews as ‘the principal investigative strategy employed by the police’.

Although commentators have identified other functional benefits to the police accruing from custodial interrogation, such as intelligence gathering and the identification of criminal habits (Ashworth, 1998: 128), opinion is widespread that obtaining a confession remains the primary objective of this encounter (McConville and Hodgson, 1993: 111; Toney, 2001: 40). Confession evidence can be of enormous benefit to the police, potentially reducing the amount of investigative work required while increasing the likelihood of conviction (Cape, 1999: 261; Baldwin and McConville,⁷ 1980: 19; Bryan, 1997: 223). As Walkley (1987: 8) comments, ‘the importance of the confession in everyday criminal occurrences cannot be overstated.’ The Royal Commission on Criminal Procedure (RCCP)⁸ also recognised the importance of reliable evidence gained through police interviews, noting: ‘there can be no adequate substitute for police questioning in the investigation and, ultimately in the prosecution of crime.’⁹

⁷ Baldwin and McConville’s study revealed that in over 90 per cent of cases in the Birmingham sample and 76 per cent in London, a written confession to the police preceded a guilty plea at court.

⁸ 1981, Cmnd 8092.

⁹ *Ibid.* at para. 4.1.

The significant advantages of obtaining of a confession may, it is argued, have led the police into routinely adopting dubious practices. McConville *et al* (1991: 56) note that, ‘shielded from external scrutiny, police interrogation has historically been viewed with deep suspicion, and accusations of torture, third-degree, trickery and blandishments of various kinds have been levelled against the police with more or less credibility at frequent intervals’. Davies (1999: *xi*) remarks how, until recently, in UK police forces the interviewing of suspects was ‘characterised by the use of deception, intimidation and, on occasion, physical violence, in order to achieve what was termed *psychological ascendancy* over the interviewee.’¹⁰

Legal regulation and policing practice

In the face of similar criticisms by the RCCP, the Government’s response was to implement an exhaustive regulatory framework, which revised and codified police powers and suspects’ rights in relation to stop and search, searches of premises and detention and questioning.¹¹ The Police & Criminal Evidence Act 1984 (PACE) was designed to improve the reliability of investigative practices while at the same time increasing police accountability (Ashworth, 1998: 93). The Act afforded a consistency in police powers which had hitherto been an ‘uncertain patchwork of common law, Acts of Parliament, and local legislation’ (Dixon, 1992: 516).

PACE provides legal authority (subject to the prerequisite of reasonable suspicion) to stop and search for a variety of reasons;¹² it gives powers of entry onto premises

¹⁰ Davies, G in the Series Preface for Milne & Bull (1999).

¹¹ Leng (1994b: 173) notes that, as a consequence of the introduction of PACE, it is now virtually impossible to fabricate a confession in formal interview and have it admitted as evidence.

¹² PACE, ss.1-3.

for the purposes of search and seizure of evidence,¹³ and codifies powers of arrest. PACE also empowers police officers to detain a suspect at a police station in order to secure or preserve evidence relating to an offence, or to obtain such evidence by questioning.¹⁴ Detention without charge under PACE is limited in most cases to 24 hours, although where the offence is serious this time period can be extended by up to 12 hours.¹⁵ Detention beyond this point is only possible with the authority of a Magistrates' warrant.¹⁶ Although the PACE Codes regulate the circumstances under which questioning can take place, the police are still able to exercise a degree of discretion in the process, as will become apparent later.¹⁷

PACE research has been a preoccupation of both academics and police alike,¹⁸ although opinion is divided upon the effectiveness of the Act in terms of modifying police behaviour. As Dixon (1997: 152) reports, one body of research has concluded that PACE fundamentally changed criminal investigation, shifting it towards a supposedly American model of *due process*¹⁹ (McKenzie and Gallagher, 1989: 11, 136-7). The newly created role of custody officer was regarded as successful in supervising custody procedures and safeguarding the rights and entitlements of detained persons. They had taken a 'firm grip on the management of the cell block and CID officers had submitted to the new formalities about

¹³ Ibid., ss.17-19 and 32.

¹⁴ The powers of detention under s.37(2) PACE are dependent on satisfying the principle of 'necessity'.

¹⁵ This applies only to *serious arrestable offences* as defined by s.116 PACE.

¹⁶ Warrants of further detention, see ss.43 and 44 PACE.

¹⁷ See chapters 6 and 8 below, for a full discussion of police powers and the discretion afforded to officers.

¹⁸ Dixon (1992: 516).

¹⁹ See Packer's two-dimensional model, below, which he uses to portray the ideological dichotomy that underlies this discussion.

access to prisoners and the other regulations governing interrogations.’²⁰ In the context of detention and questioning, PACE was presented as a ‘sea-change’ in policing, creating a climate of strict adherence to the new rules. As Williamson (1990: 1, 6) commented, ‘The new legislation is succeeding in its intention of making the questioning of suspects less coercive and more a process of enquiry than purely one of persuasion to confess’. As much of the research supporting the new ‘professionalism’ was produced by police officers, the validity of its findings was open to question and the methodology subjected to close scrutiny by critics.²¹ In particular, Irving and McKenzie, who provided an academic backing for the police assessments of PACE, were accused of either being ‘badly misled’ by respondents or having conducted research at an ‘unusual’ police station (Sanders *et al*, 1989: 142). The political dimension that accompanied these findings should not be overlooked, however, as these accounts of PACE were to contribute to the right to silence debate and, in particular, the police support for its abolition.

The studies described above, which seek to present PACE as the catalyst for increased police professionalism, can be contrasted with a significant body of opinion associated with what Dixon labels the ‘Warwick School’.²² McConville *et al* (1991) were foremost in providing a comprehensive criticism of PACE, arguing that legislation alone has had a limited impact on police behaviour (p.193). Instead they suggest that working practices and a dominant culture, rather than external sources such as legislation, govern police activity. This is demonstrated by the

²⁰ Irving and McKenzie (1989: 117).

²¹ Williamson later acknowledged that his methodology was flawed (Moston *et al*, 1993).

²² Dixon referred collectively to a number of academics including Mike McConville, whom he describes as having been a ‘focus of the group at Warwick’, Roger Leng and Andrew Sanders.

notional independence of the custody officer, whose decision-making at times reflects the needs of the investigation (see chapter 6, below). The requirement for reasonable suspicion is unable, they argue, to control other aspects of policing such as stop and search or arrest decisions, leaving it dominated by *crime control* values both in the street and in the police station (Dixon, 1992: 522). The regulatory system that PACE provides does not cover all aspects of the suspect's encounter with the police, leaving scope for the system to be modified or exploited for particular ends, as illustrated later in the account of 'phased disclosure'.²³ McConville *et al* claim that PACE has been easily absorbed by the police (1991: 189), the basic message from their research being the 'non-impact of PACE on police procedures' (*ibid.*). The law is used as a resource, they argue, rather than a controlling and directing device and pervades all police decision-making (1991: 17).

Although Dixon concedes that many of McConville *et al*'s empirical results are similar to those of his own research (Dixon *et al*, 1990; Bottomley *et al*, 1991), he draws a distinctly less pessimistic interpretation of the findings.²⁴ He comments how 'many of the custody officers whom we encountered had considerable personal qualities: they were committed to their work and were concerned that detained suspects should be treated fairly' (1992: 534). For Dixon, PACE provides an example of how rules can contribute to a change in policing (*ibid.* p.536), although cultural influences have modified its effects.

²³ See chapters 7 and 8 below.

²⁴ Dixon (1992: 522) applied the label 'New Left Pessimists' to McConville *et al*.

The effectiveness or otherwise of PACE, as discussed above, became a central issue for the Royal Commission on Criminal Justice (RCCJ). Their findings were critical of police methods²⁵ and led to the introduction of a national training package for basic interviewing skills known as *Investigative Interviewing*.²⁶ The techniques endorsed in this package sought to shift the emphasis in custodial interrogation away from securing a confession to one of establishing the facts of an incident under investigation.²⁷ Truth-seeking in this respect, presents police interrogators with a different problem to that of simply obtaining an admission of guilt. The suspect interview becomes part of a wider investigative process, which can no longer be generally considered in isolation. Demands for greater corroborative evidence²⁸ also act to test the veracity of confessions and, accordingly, the integrity of investigators, encouraging ‘criminal investigations quite independent of the words of the suspect’ (Mansfield, 1993). As will become clear in chapter 8 below, police interviewing now relies on increased planning and preparation, improved engagement with the suspect and detailed evaluation of information obtained. Nonetheless, critics warn of various police tactics of deception supplanting the routine use of bullying and physical violence (Toney, 2001: 42). In particular, they point to the intentional withholding of evidence, during custodial interrogation, as a means of securing an admission from a suspect

²⁵ Cm 2263, p.54 at paras. 21-24.

²⁶ The availability of this package to police forces was announced in Home Office Circular 22/1992.

²⁷ Police Central Planning & Training Unit (1992: 1); See also Williamson, T. (1993) in which he reports a majority of Metropolitan Police detectives view ‘searching for the truth’ as a major aim of interviews with suspects.

²⁸ The Royal Commissions on Criminal Procedure (1981) and Criminal Justice (1993) both addressed the issue of uncorroborated confessions, but resisted calls for supporting evidence. The RCCJ was divided on this point however, with the majority recommending that where a confession is credible and has passed the tests laid down by PACE (ss.76 & 78), the jury should be able to consider it even in the absence of other evidence (RCCJ, *Report* p.68, para. 87).

(McConville & Hodgson, 1993: 46). This issue, central to the present study, is discussed in the next chapter.

Regulation of interviews

As indicated above, present police powers of detention and interview are embodied in PACE and its accompanying Codes of Practice.²⁹ When introduced, the Act provided far-reaching and comprehensive powers for the police, set against new rights for suspects. Before PACE, police powers and the rights of suspects in police stations had been largely governed by the *Judges' Rules*,³⁰ a set of guidelines initially formulated by judges of the King's Bench Division in 1912.³¹ Their introduction had resulted from considerable confusion over the admissibility and reliability of police confession evidence (Wood & Crawford, 1989: 7). The judiciary, for its part, still contested the notion of custodial interrogation as an acceptable investigative strategy (McConville *et al*, 1994: 73). From their establishment in the early nineteenth century, professional police forces took many years to acquire a sense of legitimacy in the face of hostility and opposition from various sections of society.³² The passage of the Summary Jurisdiction Act 1848 handed the police responsibility for the investigation of criminal offences, having separated it from the judicial function within the magistracy. Practices evolved of police officers taking arrested suspects to a station for interview before presentation to magistrates, although as Dixon (1995: 151) points out, no provision was made in law for this 'enormously significant' change in practice.

²⁹ PACE, s.66.

³⁰ Sanders & Young (2000: 188).

³¹ Revisions of the Judges' Rules occurred in 1918, 1930 and 1964.

³² McConville *et al*, (1994: 73).

The emphasis of the Judges' Rules was on non-compulsion. The Rules espoused non-coercive relationships between police and citizens, where evidence, particularly from confessions, had to be the product of a voluntary act on the part of the accused. Judicial practice, which reflected the rules, developed to exclude material that had been obtained through oppression or inducements (McConville *et al*, 1994: 72-73; Sanders and Young, 2000: 705). Over the years however, the Rules were transformed, with the final version (introduced in 1964) no longer purporting to discourage questioning but merely to regulate it (Sanders and Young, 2000: 246).³³

The Judges' Rules provided that a suspect could only be questioned following a clear warning of his right to remain silent and that any comments made by him could be taken down in writing and later used in evidence.³⁴ The application of these words of *caution*³⁵ underlined the principle of the *right to silence*,³⁶ which was preserved by PACE in the Code of Practice relating to the detention, treatment and questioning of persons by police officers.³⁷ Paragraph 10.1 of that Code reaffirms that a person reasonably suspected of an offence *must* be cautioned before any questions are put to him regarding his involvement or suspected involvement

³³ The position was cemented with the introduction of the Police & Criminal Evidence Act 1984 (PACE), which made interrogation a legitimate purpose of detention - See s.37(2) PACE.

³⁴ The Judges' Rules offered clarification on the manner and circumstances in which written statements could be taken from suspects (often referred to by the police as 'voluntary statements'). Overall, they served to protect both the suspect and the police, offering an accused the right to remain silent in the face of questioning while acting as guidance for the police on the admissibility of confession evidence. For a full discussion on the history of detention for questioning in England, see Dixon (1997: 126-141).

³⁵ The Summary Jurisdiction Act 1848 introduced the earliest type of caution. A suspect would be warned that 'he did not have to answer the charge but that anything he said would be taken down in writing and might be given in evidence at his trial'.

³⁶ The origin of the right to silence has been traced by commentators to the abolition in the seventeenth century of the courts of Star Chamber and High Commission (See Wood & Crawford, 1989: 6; Easton, 1991: 1-3).

in an offence, if his answers or silence may be given to a court in a prosecution.³⁸

PACE defined the terms of the caution, which were modified when the Codes of Practice became effective.³⁹ Despite the change to the wording of the caution, the message to suspects remained the same – that they retained the choice of whether to respond to an accusation or not.⁴⁰

As a general principle, the police are free to ask questions of any person they choose, although there is no obligation in law to reply.⁴¹ A suspect under interrogation may decline to answer questions altogether, or may decline to give particular pieces of information in his answers to questions (Leng, 1993: 1). Similarly, a person charged with a criminal offence may refuse to give evidence or answer particular questions at trial. The introduction of the inference provisions in sections 34-37 of the CJPOA do not alter a suspect's rights in these respects, but could lead to adverse inferences being drawn as a consequence of silence. As a result, the wording of the caution was changed to its present form:

*'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'*⁴²

³⁷ Code of Practice C.

³⁸ Code C, para. 10.1, does not make the caution a pre-condition of admissibility, but where a caution is omitted the question becomes a matter of discretion under s.78 PACE.

³⁹ PACE was introduced at midnight on 31st December 1985.

⁴⁰ Suspects were informed in the following terms: 'You do not have to say anything unless you wish to do so, but what you say may be given in evidence'.

⁴¹ Lord Parker, commenting in *Rice v Connolly* [1966] 2 Q.B. 414, emphasised the boundaries between the legal and moral duty of a citizen to assist the police.

⁴² Code C, para. 10.4.

The debate leading to changes in the law

Government policy on the issue of the right to silence can be traced back to the publication in 1972 of the Criminal Law Revision Committee's (CLRC) Eleventh Report entitled 'Evidence (General)'.⁴³ Its recommendations, outlined in a draft Criminal Evidence Bill, included provisions for abolishing the cautions contained in the Judges' Rules and the drawing of inferences from silence. The proposals met with considerable criticism from both lawyers and academics,⁴⁴ and many commentators considered the issue closed; yet, as Leng (2001: 109) notes, their political potential for harnessing a campaign to crack down on crime was not diminished by time.

The issue was next considered in 1978 by the RCCP, in light of reaction to the CLRC report. Based on detailed submissions to the Commission, and having reviewed the research evidence available, the majority of members recommended the right to silence should remain unaltered. The debate was re-kindled in July 1987 by the Home Secretary of the day, Douglas Hurd, in delivering his annual lecture to the Police Foundation.⁴⁵ He declared that a further review of the issue was now necessary:

'Is it really in the interests of justice, for example, that experienced criminals should be able to refuse to answer all police questions secure in the knowledge that a jury will never hear of it? Does the present law really protect the innocent whose interests will generally lie in answering questions frankly? Is it really unthinkable that the jury should be allowed to know about the defendant's silence and, in the light of other facts brought to light

⁴³ Cmnd 4991.

⁴⁴ McConville (1987: 1169) argued they legitimised the dilution of the highest threshold of evidence (beyond reasonable doubt) into the lowest (a bare *prima facie* case) and represented 'a significant shift *within* the prosecution's burden to adduce evidence' (emphasis retained). He maintained the thrust of the CLRC proposals was to 'excite prejudice against the defendant rather than facilitate the admissibility of relevant evidence'.

⁴⁵ Lecture, Police Foundation, 30th July 1987.

during a trial, be able to draw its own conclusions? I shall not seek to provide answers now. But I think these are questions which informed public opinion might take a little time to address over the coming months - without preconceptions or prejudice.'

Reform of the right to silence effectively became Government policy, and enjoyed support from its traditional advocates.⁴⁶ Once again hostile responses followed from practising and academic lawyers, and from the civil liberties lobby. Williams⁴⁷ (1987: 1107) in reply, commented that this 'entrenched opposition' was responsible for persuading the Government, by the end of 1987, to re-consider any planned changes. The following year, the Lord Chief Justice, Lord Lane, gave a clear indication of where the views of senior judiciary lay over the issue of suspects exercising their right to silence. Speaking in the case of *Alladice*⁴⁸ he was critical of the role played by legal advisers in advising silence in the face of police questioning:

*'In many cases a detainee who would have otherwise have answered proper questioning by the police would be advised to remain silent. Weeks later at his trial, such a person not infrequently produced an explanation, or defence to the charge the truthfulness of which the police had had no chance to check ... Despite the fact that the explanation or defence could, if true, have been disclosed at the outset and despite the advantage which the defendant had gained by those tactics, no comment might be made to the jury to that effect. The jury might put two and two together, but ... the balance of fairness between prosecution and defence could not be maintained unless proper comment was permitted on the defendant's silence in such circumstances. It was high time that such comments should be permitted together with the necessary alteration to the words of caution.'*⁴⁹

⁴⁶ The Commissioner of the Metropolitan Police at the time, Sir Peter Imbert, added his voice to the debate when speaking later that year on the effects of the recently implemented Police & Criminal Evidence Act 1984. He argued that the 'balance of justice could and should be improved by the removal of the so-called right of silence', adding that it would be the 'most important step the legislators could take to control and reduce crime' 15th September 1987.

⁴⁷ Glanville Williams was a member of the CLRC, whose eleventh report published in 1972 recommended curtailing a suspect's right to silence.

⁴⁸ *R. v Alladice* [1988] Crim. L.R. 608.

⁴⁹ *The Times*, 11th May 1988 (Court of Appeal: Lord Lane CJ, Rose and Hazan LJ).

Less than a week later Mr Hurd announced the setting up of a Home Office Working Group (HOWG), the aim of which was not to consider whether change was needed, but the 'precise form of the change in the law, which would best achieve our purposes.'⁵⁰ Even before the HOWG could report however, the law was substantially modified in Northern Ireland by the Criminal Evidence (Northern Ireland) Order 1988, in response to an upsurge in terrorist violence (Leng, 1993: 4). When published in July 1989, the HOWG report broadly followed the original CLRC recommendations in curtailing a suspect's right to silence.⁵¹

Events of the day overtook the proposals and they were finally shelved. Zander (1994: 144) describes the atmosphere at the time of publication as being 'increasing soured' following the high profile IRA miscarriage of justice cases of the *Guildford Four*, the *Maguires* and the *Birmingham Six*. 'In the light of the concerns aroused by those cases, it probably did not seem a propitious time to abolish the right to silence.'⁵²

On the day the convictions of the *Birmingham Six* were quashed at the Court of Appeal,⁵³ Kenneth Baker, the Home Secretary at the time, announced the establishment of the Runciman Commission (RCCJ):

'The aim of such a review' he commented '...will be to minimise as far as possible, the possibility of such events happening again.'

⁵⁰ Parliamentary Debates (Hansard), Commons, 6th ser., vol. 133, written answers, cols 465-6, 18th May 1988.

⁵¹ For a full discussion of the report see Zuckerman, A. (1990) *Trial by Unfair Means – The report of the Working Group on the Right to Silence* Crim. L.R. 855.

⁵² Zander, *Ibid*.

⁵³ 14th March 1991.

Within its terms of reference, the Commission was asked to consider the 'opportunities available for an accused person to state his position on the matters charged, and the extent to which the courts might draw adverse inferences from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position.'⁵⁴ Two of the research studies commissioned by the RCCJ specifically covered aspects of the right to silence.⁵⁵ The research findings and recommendations largely contradicted those of the police service⁵⁶ who had been lobbying hard for change. In July 1993 the Commission report was published,⁵⁷ its members deciding by a majority of 9 - 2 to retain the right to silence unchanged.

The Government decided to reject the Royal Commission's advice however, and went ahead with a package of measures tackling public fears over rising crime (Card & Ward, 1994: 2), which included proposals to modify the right to silence thereby allowing adverse inferences to be drawn. Reaction was strong from commentators. Zander (1994: 145) described the actions as 'verging on the unconstitutional'. Elsewhere, some areas of public opinion were equally critical of this alliance of the police and Home Secretary. Violent confrontations between police and demonstrators marred the passage of the Criminal Justice & Public Order Bill through Parliament. The Act received Royal Assent in November 1994 and its provisions were introduced in three parts over the following months.

⁵⁴ Cm 2263, p.50, para. 4; Bridges and McConville (1994: 6), described the wording of this statement as 'somewhat disingenuous'.

⁵⁵ Research Study 10: *The right to silence in police interrogation: a study of some of the issues underlying the debate* by Roger Leng; Research Study 16: *Custodial legal advice and the right to silence* by Mike McConville and Jacqueline Hodgson.

⁵⁶ Association of Chief Police Officers (ACPO) Survey (1993), unpublished.

As Bucke *et al* (2000: 1) note, at one level, the debate that accompanied these developments revolved around the potential effect of a change in the law in terms of securing convictions of the guilty. At another, it was concerned with more fundamental questions about the implications of change for one of the central tenets of the adversarial system i.e. the prosecution burden to prove its case beyond reasonable doubt.

Much of the debate centred on the suspect's position during interrogation. The police considered that a suspect's use of the right to silence restricted their ability to conduct effective interviews and obtain evidence through questioning.⁵⁸ They believed that professional criminals and terrorist suspects in particular, were hiding behind silence and exploiting weaknesses in the judicial process (ACPO, 1993: 3). This, the police claimed, was having a profound impact on the criminal justice system, decreasing the likelihood of prosecution and increasing the chances of acquittal. A number of factors, they argued, had contributed to an increased reliance on the exercise of silence by interviewees, including greater access to legal advice, a heightened awareness of rights and entitlements, and an increased propensity to exercise them. Research evidence suggested that, leading up to the introduction of the CJPOA provisions, suspects were increasingly reliant on silence during police interviews.⁵⁹ Studies also indicated the use of silence to be

⁵⁷ July 1993.

⁵⁸ Bucke *et al* (2000: 2).

⁵⁹ There are a number of difficulties associated with establishing a reliable figure for the exercise of silence. Methodological disparity exists between studies, in particular the definition applied to 'silence'. The resulting estimates reveal a significant variation between studies making valid judgments difficult. However, taking all the main studies into account, the average figure recorded for total silence in the face of police questioning is just 3.6 per cent of cases. The highest estimates: Moston *et al* (1992), 8 per cent; and ACPO (1993), 10 per cent, both involve officer-completed questionnaires. Of those studies which included partial silence or selective answering of questions in their criteria,

more prevalent among those suspects who were either legally represented,⁶⁰ facing more serious criminal accusations,⁶¹ or who had a previous offending history.⁶²

Supporters of reform also believed that additional safeguards provided by PACE, such as the routine tape-recording of police interviews,⁶³ detention time-limits, the provision of *appropriate adults*⁶⁴ for juvenile or mentally disordered offenders, and strict rules governing the use of oppressive interview techniques,⁶⁵ meant suspects were adequately protected and no longer needed to seek refuge in the right to silence. Jeffery (1988: 474), writing before the current provisions were introduced, articulated this position effectively:

Williamson (1990), McConville & Hodgson (1993), Baldwin (1992a) and ACPO (1993), all record overall levels in excess of 20 per cent. Leng's study (1993), recorded the lowest level at just 5.5 per cent but drew only on cases which might have been significant under the present regime of the CJPOA, as opposed to all refusals, however trivial. When compared against earlier studies: Zander (1979), 4 per cent; Baldwin & McConville (1980), 3.8 and 6.5 per cent; and Mitchell (1983), 4.3 per cent, the figures appear to indicate an increase over time.

⁶⁰ On average, there was a three-fold increase in the incidence of silence for represented suspects over non-represented suspects. The ACPO study (1993: 3), reported that 57 per cent of suspects who received legal advice exercised their right to silence, compared with 13 per cent who did not. Several other studies reported estimates of silence for legally represented suspects in excess of 30 per cent. Moston *et al* (1992) recorded the largest differential, with almost one in three represented suspects electing silence compared with less than 5 per cent of those unrepresented.

⁶¹ The results of studies examining the relationship between the seriousness of offence and the exercise of silence suggest, on the whole, a greater inclination to remain silent when being interviewed for more serious matters. Irving & McKenzie's (1989) findings reveal the greatest degree of significance, with suspects interviewed for *serious arrestable offences* nearly five times more likely to exercise silence.

⁶² The ACPO study (1993: 2) reported that suspects with five or more convictions were 3 ½ times more likely to exercise silence than those without convictions, concluding that 'familiarity with the judicial procedures encourages suspects to use any means to thwart the process of law.' Other studies reveal a significant increase in the exercise of silence by suspects with previous criminal convictions over those with no prior convictions. The two samples in Williamson's study (1990), from the Metropolitan Police and West Yorkshire Police areas, show broadly similar increases, 59.1 per cent and 76.8 per cent respectively. In the later study of Moston *et al* (1992), the increase is more pronounced, with more than twice the number of previously convicted suspects remaining silent.

⁶³ Tape recording of interviews is not required in respect of persons arrested under s.12(1)(a) of the Prevention of Terrorism (Temporary Provisions) Act 1984 or an interview with a person being questioned in respect of an offence where there are reasonable grounds for suspecting that it is connected to terrorism or was committed in furtherance of the objectives of an organisation engaged in terrorism. Furthermore, a custody officer can authorise an officer not to tape record an interview where it is reasonably practicable not to do so because of non-availability of a suitable room or recorder and there are reasonable grounds not to delay the interview accordingly; or where it is clear from the outset that no prosecution will ensue. Code E, para. 3.2-3.

⁶⁴ Code C, para. 1.7, defines the term 'appropriate adult' in the case of a juvenile as (i) his parent or guardian (or, if he is in care, the care authority or voluntary organisation); (ii) a social worker; or (iii) failing either of the above, another responsible adult aged 18 or over who is not a police officer or employed by the police. In the case of a person who is mentally disordered or mentally handicapped: (i) a relative, guardian or other person responsible for his care or custody; (ii) someone who has experience of dealing with mentally disordered or mentally handicapped persons but is not a police officer or employed by the police (such as an approved social worker as defined by the Mental Health Act 1983 or a specialist social worker); or (iii) failing either of the above, another responsible adult aged 18 or over who is not a police officer or employed by the police.

'In the interests of society, those who set out to break the law with the intention of exploiting its weaknesses, should no longer be permitted to hide behind the shield provided by the right to silence. At the moment, the criminal law is only effective in dealing with the compliant, the weak, the spontaneous wrong-doers, who comprise the vast majority of cases and admit their guilt. Hardened criminals and others acting on advice, take the protection offered to them and must surely laugh at the foolishness of such a law.'

The police argued that the legal system which gave rise to the right to silence had gone, with the rules which protected the ignorant and illiterate defendants of the late seventeenth century no longer appropriate for today's experienced criminal using skilled legal assistance.⁶⁶ In contrast, opponents of change regarded the right to silence as an important safeguard for the suspect against the risk of false or improper confessions. As discussed earlier, both Royal Commissions addressing the subject had argued against abrogation of the right. In rejecting the earlier CLRC proposals, the Philips Commission (RCCP, 1981) recognised the coercive effect of police interrogation and expressed concern over the potential conduct of police officers and the way suspects would be likely to respond:

*'It might put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the allegations against them ... This in our view might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements.'*⁶⁷

Their concerns were shared by members of the Runciman Commission (RCCJ, 1993), who pointed to the increased risk of miscarriages of justice:

⁶⁵ Section 76 PACE provides circumstances in which a confession may be excluded if it was obtained by oppression or as a consequence of anything said or done which was likely to render it unreliable. Furthermore, s.78 PACE sets out the grounds on which a court can exclude any evidence (including a confession) that has been unfairly obtained.

⁶⁶ Sir Robert Mark (1973: 10).

⁶⁷ Op. cit. n.8, at para. 4.50.

*'The majority of us, however, believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent.'*⁶⁸

They dismissed the argument that the criminal justice system was open to abuse by experienced professional criminals, commenting that those who wished to remain silent 'are likely to continue to do so and will justify their silence by stating at trial that their solicitors have advised them to say nothing at least until the allegations against them have been fully disclosed.'⁶⁹

The Runciman Commission was critical of police methods, in particular where the suspect was less experienced or more vulnerable. 'There are too many cases of improper pressure being brought to bear on suspects in police custody, even where the safeguards of PACE and the Codes of Practice have been supposedly in force, for the majority to regard this with equanimity.'⁷⁰ This view was shared by McConville & Bridges (1993: 20) who suggested that, because of the low prosecution rate⁷¹ of those detained, 'the criminal justice system routinely places significant numbers of innocent persons at risk, in terms of arrest and questioning.'⁷²

⁶⁸ Op. cit. n.25, at p.54 para. 22.

⁶⁹ Ibid. p.54 para. 22.

⁷⁰ Ibid. p.55 para. 23.

⁷¹ Research demonstrated that one half of arrests did not result in prosecution.

⁷² Although critics may well disagree with their interpretation of the empirical evidence, it must be recognised that a proportion of all persons arrested are exonerated as a result of police enquiries. It follows therefore, according to this position, that some innocent persons potentially face the prospect of being misinterpreted, misquoted or even mistreated in custodial interrogation scenarios, in the absence of true protection afforded by the right to silence. The likelihood of this occurring has, of course, to be weighed against the safeguards afforded by routine tape-recording of interviews and the increased presence of legal advisers.

The risks associated with the coercive atmosphere of a police interview room are well documented. The psychological effects of incarceration and isolation can combine to place those most vulnerable in jeopardy of incriminating themselves falsely. The police have to be alive to the risks of unreliable evidence, as recognised in the Codes of Practice:

*'It is important to bear in mind that, although juveniles or persons who are mentally disordered are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information which is unreliable, misleading or self-incriminating. Special care should therefore always be exercised in questioning such a person, and the appropriate adult should always be involved, if there is any doubt about the person's age, mental state or capacity. Because of the risk of unreliable evidence it is important to obtain corroboration of any facts admitted whenever possible.'*⁷³

Commentators suggested that police control of the interview agenda, pre-interview disclosure and interview terminology are all tactics used for manipulating a suspect's decision making.⁷⁴ Zuckerman (1989), believed this concentration of efforts on suspects to confess is due, in part, to the scarcity of resources and the low prospect of discovering further evidence by investigation. This concentration inevitably carries with it the risk of police malpractice such as *verballing*,⁷⁵ although such activity within police stations has largely been eradicated through the introduction of tape-recorded interviews. Opportunities still continue however, as confessions made outside the police station are still admissible under s.76(1) PACE, despite the general absence of safeguards such as tape-recording for these exchanges. Unsolicited confessions of this kind from suspects *en route* to the

⁷³ Code C, para. 11B.

⁷⁴ See Baldwin (1994: 74-75) for a full discussion of police control of the interview.

⁷⁵ Constructing a false confession or incriminating statement.

police station were a regular feature of the experiences of officers interviewed in the present study. The RCCP in considering the practicalities of using tape recorders to monitor these exchanges decided against this move on grounds of cost, overwhelming operational difficulties and the likelihood of poor recording quality.⁷⁶

The debate also touched on more fundamental issues concerning the nature of the adversarial system itself. The right to silence derives from the principle that the state must justify its right to punish one of its citizens, and in the process be capable of proving guilt, independently of the accused. Its supporters regard it as an essential part of the rights and freedoms to which every individual in society is entitled. These rights also include that of a *fair trial*, guaranteed today by the European Convention on Human Rights⁷⁷ (ECHR) and incorporated into United Kingdom law by the Human Rights Act 1998. At the heart of the adversarial system of criminal justice is the belief that an accused person is *innocent until proved guilty*. This presumption of innocence is a precept guaranteed by human rights legislation⁷⁸ and is complemented by an obligation on the part of the prosecution to bear the burden of proof. As McConville & Bridges (1993: 19) argue, these principles combine to guard against two kinds of mistake - conviction of the innocent and acquittal of the guilty:

'The presumption of innocence and the burden of proof necessarily imply that the conviction of the innocent is regarded as the greater wrong and point to the need consciously to balance the system towards protecting the accused

⁷⁶ Op. cit. n.8, at para. 4.20.

⁷⁷ Article 6(1) of the Convention for Protection of Human Rights and Fundamental Freedoms, Council of Europe: Rome 4th November 1950.

⁷⁸ See Article 6(2) of the above.

against possibly false conviction, even at the expense of acquitting some who are or might be guilty.'

The onus lies with the prosecution therefore, to prove guilt and not the defence to prove innocence, as Professor Zander, a member of the RCCJ, argued:

*'It stands at the very centre of the criminal justice system because it reflects the presumption of innocence and the burden of proof on the prosecution. It reflects the essential principle that the defendant should not be penalised or be put under any pressure to assist the prosecution in convicting him. Fortunately for the system many defendants are perfectly ready to make a confession and do in the end plead guilty, so there's no problem. But if in the first instance he is silent and ultimately maintains that silence, the system is required to prove him guilty beyond all reasonable doubt, and if he chooses to be silent, the principle is he should not be penalised for that silence.'*⁷⁹

Zander's view may be contrasted with a substantial body of opinion, traditionally associated with the police, which favoured abolishing the right to silence. A central assertion supporting this case is that an innocent person will always protest their innocence, and that it follows that anyone who chooses to rely upon the right to silence is, accordingly, guilty.⁸⁰ This line of argument is based on the psychological assumption that the normal response from an innocent person when accused of a crime is to deny it. The police asserted that, if isolated from positive influences to be silent such as the *caution* (as it existed before the introduction of the inference provisions) and access to legal advice, the most likely explanation for continued silence during questioning would be guilt. This view was shared by members of the CLRC who felt it 'natural to expect an innocent person who is being interrogated to mention a fact which will exculpate him.'⁸¹ Williams (1987: 1107),

⁷⁹ *The Independent*, June 28 1993.

⁸⁰ This argument is rejected by opponents of reform on the grounds that guilt must be proved beyond all reasonable doubt and not just suspected or assumed. There may be many innocent reasons why a person, subjected to police interrogation, refuses to answer questions, as the CLRC conceded (1972, para. 35). For a discussion of these reasons see chapter 8 below.

⁸¹ *Op. cit.* n.43, at para. 37.

suggested that any person faced with a criminal charge would ‘vigorously repel the accusation, bringing out any facts inconsistent with the allegation of guilt’; sharing the view declared by Dumont:

‘If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.’⁸²

Although in broad terms the debate is characterised by those supporting the right to silence on the one hand, and the reformist case on the other, not all commentators on this subject have taken such an unequivocal position. Indeed, many of those opposed to the recommendations mooted by the CLRC were prepared to compromise the right to silence in exchange for other safeguards such as tape-recording of interviews. Greer (1990), offers a useful description of the utilitarian and libertarian positions on this debate as a four-fold typology, which he labels: *Utilitarian Abolitionism, Exchange Abolitionism, Symbolic Retentionism* and *Instrumental Retentionism*.

Utilitarian Abolitionism: This position is characterised by the abolition of the right to silence, and no replacement safeguards for defendants. It rests on Benthamite ideas of rectitude, through a system of flexible guidelines as opposed to fixed rules. The right to silence is seen by utilitarians as making no contribution to this quest for an accurate outcome. Greer argues that the main weakness of the utilitarian abolitionist case is the absence of empirical evidence to support its ‘dubious’ contentions.

⁸² Lewis (1990) writes that this and other famous passages often cited as being from Bentham’s ‘Treatise on Evidence’, are in fact from the English translation of Dumont’s *Traite*, the *Treatise on Judicial Evidence* of 1824/5.

Exchange Abolitionism: The defect exposed in the case for utilitarian abolitionism, led to the exchange abolitionist's need for concrete data. They argue the case for abolishing the right to silence in exchange for other defendant's rights. The basic assumption of exchange abolitionism is that, provided other legitimate interests are adequately protected, only the guilty will hide behind silence during police questioning. It recognises the need for protecting the interests of the accused, but sees the right to silence as unnecessary. Various safeguards, guaranteed in exchange for the right to silence, include: tape-recording of interviews, provision of free legal advice, and inadmissibility of evidence gained *en route* to police stations i.e. not under controlled conditions, except if repeated on tape.

Galligan (1988: 86), supports this concept of reducing the risk of false confessions through the introduction of stringent interview conditions:

'A duty to answer questions in an environment which is strictly controlled and recorded, and where the suspect is guaranteed the presence of a solicitor, followed at a later stage by the careful judicial scrutiny of both the statements made and the explanations for any refusal to answer, would seem to be a sound approach to ensuring reliability.'

This notion of procedural fairness is extended by Zuckerman to the criminal trial which, he argued, should be regulated by the basic principles of truth seeking, protection of the innocent from wrongful conviction, and the application of minimum standards to all suspects, innocent and guilty alike.⁸³ The main weakness Greer finds in the exchange abolitionist's argument is the failure to acknowledge

⁸³ Zuckerman (1989) Ch. 1.

any motives for exercising silence other than withholding guilt. He also dismisses the claims that professional criminals and terrorists are the real beneficiaries of the right to silence, on the grounds of insufficient empirical evidence.

Symbolic Retentionism: Greer (1990: 724) opens with the suggestion that the debate is at least as much about its symbolic as its practical value. The right to silence represents a 'touchstone' for measuring against broader criminal justice commitments. Police hostility to the right to silence, he argues, is based on a reaction to PACE which implicitly criticised previous police activities and levels of professionalism.

'The right of silence provides the territory upon which the police seek to regain the political ground lost in PACE. The debate is, in short, essentially about police autonomy and professionalism as much as it is about the rights of defendants and suspects.'

Symbolic retentionists want to see police powers kept within proper limits.

Instrumental Retentionism: The principle of instrumental retentionism is that abolishing the right to silence would make it easier for the prosecution to establish guilt, but will, as a consequence, increase the chances of miscarriages of justice. Instrumental retentionists specify two criteria before removal of the right to silence can be justified:

- i. Prove the case that the right to silence does not protect the innocent, or is being abused excessively by the guilty; and
- ii. Replace it with something equally effective in safeguarding against wrongful conviction.

Some instrumental retentionists have regarded exchange abolitionism as a persuasive argument if the criminal justice system moved more towards an inquisitorial model.⁸⁴ Instrumental retentionism stresses the burden on the prosecution to prove the case. Greer (1990: 726), expressed a fear that inferences from silence would have their greatest effect where prosecution evidence is weakest e.g. where it relies on the uncorroborated evidence of witnesses, and emphasises the importance to the prosecution case of interrogation evidence:

'Police investigations tend to be organised around the interrogation of suspects and the police expect to be able to obtain a great deal of information from it. Indeed one of the reasons the police object to the right of silence is that its exercise tends to prolong police inquiries.'

In Greer's view, even the presence of a solicitor in all interviews would not make the case for removing the right to silence any stronger. He argued that in the absence of full police disclosure, a solicitor might need to advise silence to avoid damaging remarks. Greer also reserves criticism for the role played by some legal advisers, particularly the unqualified *runners*, who at times, effectively act as facilitators between the police and their clients, speeding up proceedings by advising a confession and guilty plea. The right to silence should be strengthened he concluded, due to its steady erosion over the years: 'It is a key component of an accusatorial process and fulfils both a symbolic function in defining the limits of state power *vis-à-vis* the citizen and offers the innocent suspect at least the possibility of protection against wrongful conviction' (1990: 729).

⁸⁴ In fact, Greer (1990: 729) comments that the right to silence 'may not deserve a prominent place, or a place at all, in an inquisitorial system'.

Evaluating the arguments

Whilst empirical research can provide a real world understanding of the issues and inform the debate accordingly, it is also open to interpretation that supports a particular opinion. For example, silence is regarded by some, as having an effect on only a ‘small minority’ of cases,⁸⁵ whereas others consider its use by ‘professional criminals’ as exploiting a weakness in the judicial process.⁸⁶ Clearly, the extent to which suspects exercise their right to silence is a key question, and particularly the effects of this action on the outcome of the prosecution case. Nevertheless, many of the issues raised are founded on political beliefs about the fundamental principles of the criminal justice system, including the right to a fair trial, the presumption of innocence and the burden of proof. Such beliefs are generally immune to changes in the law, and reflect the ideological dichotomy that underlies this discussion. These tensions were portrayed by the American writer, Herbert L. Packer, who developed two models for use in demonstrating the struggle to achieve respect for the rule of law, while maintaining civil rights and liberties. His representation of the system is a particularly useful foundation on which to examine the arguments of those engaged in this debate.

The first, which he called the *Due Process* model, was based on the principle that protecting the interests of the individual from unjustified punishment and curtailment of civil liberties outweighs the wider interests of the community in the apprehension and prosecution of offenders. This distinctly *Libertarian* model acknowledged the fallibility of human institutions such as the police and courts,

⁸⁵ Leng (1993: 79).

⁸⁶ Association of Chief Police Officers (1993: 2).

and stressed the need for checks and safeguards through a formal, adjudicative, adversarial fact-finding process. To this end, the right to silence formed an essential part of these precautions, provided it is instrumentally effective in protecting the innocent. In essence, this model reflects the low level of trust in the judicial machinery of the state.

Packer's second model, labelled *Crime Control*, emphasised more *Utilitarian* beliefs; that the interests of citizens were best served through the repression of criminal conduct, and by the ability of the police to distinguish genuine offenders from those innocently under suspicion. With the police acting as arbiters of guilt or innocence, the court process would be left to operate on administrative rather than judicial lines. In the context of the criminal justice system, the right to silence is seen as having no useful role to perform. In this view of contemporary society, the steady increase in a defendant's rights and entitlements during police interrogation has effectively rendered the right to silence anachronistic. With the police displaying increased levels of integrity, only those who professionally engage in crime would have anything to fear from a more rational, fairer system, free of unnecessary procedural safeguards. Packer used an analogy to characterise the competing models; if the *Due Process* model was likened to an obstacle course, the *Crime Control* model in comparison would be a conveyor belt.

Many of the issues dividing the two sides appear irreconcilable. The two positions are essentially political and are characterised by a mutual mistrust. Because of this, it cannot be assumed that either position is likely to be modified in response to

research evidence or changes in the real world.⁸⁷ Weighing up the strengths of each side is extremely difficult. Both can appeal to notions of fairness, whether it be the right of society to punish a citizen on behalf of the victim, or of an accused to expect guilt to be fairly proved without being compelled to assist. Most commentators agree that it is better to acquit a guilty person than to convict an innocent one,⁸⁸ yet this debate essentially hangs on the degree to which the criminal justice system compensates in favour of the defendant to ensure this situation prevails.

Greer's four-fold typology touches on an area largely ignored by commentators in this debate. In his description of *exchange abolitionism*, where safeguards such as the right to silence are given up in exchange for other guarantees, Greer applied his analysis to the macro political debate over whether the right to silence should be modified or abolished. After attenuation of the right, a similar analysis can be applied at the micro level to explain the significant change in behaviour of the police, legal advisers and suspects, characterised in a form of *negotiated disclosure*, as discussed in chapter 3 below.

The following section examines, in detail, the measures attenuating a defendant's right to silence introduced in the CJPOA. The legislation was accompanied by changes to the PACE Codes, which took account of the effects on police powers and procedures.

⁸⁷ The police have long been accused of fabricating admissions and circumventing procedures, whilst they in turn have accused many defence lawyers of corruption and fabrication of defences on behalf of clients. See Mark's (1973: 10-12) discussion of this topic.

The CJPOA provisions

The CJPOA defines four sets of circumstances in which courts are allowed to draw inferences, as appropriate, from a person's exercise of the right to silence.

- *where a suspect fails, on being questioned under caution or being charged with the offence, to mention any fact relied on in his defence, being a fact which in the circumstances existing at the time he could have reasonably been expected to mention – s.34(1);*
- *where the accused chooses not to give evidence or, having been sworn, without good cause refuses to answer any question – s.35(3);*
- *where an arrested person fails or refuses to account for his possession of objects, substances or marks when requested to do so – ss.36(1), 36(3);*
- *where an arrested person fails or refuses to account for his presence at a particular place, when requested to do so – s.37(1).*

Inferences may serve several purposes,⁸⁹ but are generally used by a court⁹⁰ or jury in determining whether the accused is guilty of the offence charged.⁹¹ Under these circumstances, a court or jury may draw such inferences from the failure outlined above as appear proper, provided that a number of pre-requisites have been met.⁹²

There must firstly, be proceedings against a person for an offence and the failure to mention any fact must be one relied upon in his defence in those proceedings. The questioning has to be directed to trying to discover whether or by whom the alleged offence has been committed. In addition, the failure to mention such a fact must be in circumstances where the accused could reasonably have been expected to mention it when questioned or charged. Nevertheless, s.34(1) permits the

⁸⁸ See McConville & Bridges (1993: 19); Galligan (1988: 71).

⁸⁹ See s.34(2) which defines the purposes for an inference to be drawn under ss.34, 36 and 37 of the Act.

⁹⁰ This usually refers to a Magistrates' court, but could include cases heard on appeal at Crown Court.

⁹¹ CJPOA, s.34(2)(d).

drawing of inferences from the failure of the accused to mention any fact at any time before he was charged with the offence, when questioned by a constable⁹³ or on being charged with the offence or officially informed that he might be prosecuted for it.⁹⁴ The suspect *does not* have to be under arrest at the time of questioning for this section to have effect, and renders, therefore, any conversation after caution subject to these provisions.

Even if the necessary pre-conditions of s.34(1) are not satisfied, *proper* inferences can still be drawn under the common law principle established in the case of *R. v Christie*.⁹⁵ These can apply if a suspect fails to respond to accusations, where such a response may reasonably be expected, in such special circumstances as to amount in law to an acceptance of the accusation made (Card and Ward, 1994: 156). These circumstances can apply where the parties are regarded as on 'equal terms', although there are obvious limitations on how far this principle can be extended. As Cape (1995: 123) explains, failure to answer questions (not under caution) put by a police officer, or someone in a similar position, is unlikely to lead to adverse inferences being drawn at trial. Nevertheless, s.34(5) states that it does not 'prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or preclude the drawing of any inference from any such

⁹² The Lord Chief Justice, Lord Bingham of Cornhill, in delivering the judgment in *R. v Argent* [1997] 2 Cr. App.R. 27, described six formal conditions to be met before inferences under s.34 could apply.

⁹³ CJPOA, s.34(1)(a).

⁹⁴ *Ibid.* at s.34(1)(b).

⁹⁵ [1914] A.C. 545.

silence or other reaction of the accused which could properly be drawn apart from this section.’

Inferences under s.35(3) can be drawn where the accused chooses not to give evidence at trial or, having been sworn, without good cause refuses to answer any question.⁹⁶ Certain pre-conditions must be satisfied before the effects of an accused’s silence at court can apply. The accused must have attained the age of 10 years at the time of the trial⁹⁷ and there must be a *prima facie* case for him to answer.⁹⁸ The court must also be satisfied that the accused knows he has the opportunity to give evidence and the consequences if he chooses not to. Inferences may not be drawn in circumstances where the accused’s guilt is not in issue,⁹⁹ or it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence.¹⁰⁰ The accused is still not rendered compellable to give evidence on his own behalf, and is accordingly, not guilty of contempt of court by reason of a failure to do so.¹⁰¹

Sections 36 and 37 make provision for the drawing of inferences where the accused person fails or refuses to account for objects, substances, marks, or his presence at a particular place. In each case the suspect must be under arrest at the time of questioning in order to satisfy the conditions of these sections.

⁹⁶ A defendant cannot prevent the operation of inferences under s.34 by not giving evidence as he can be said to ‘rely upon’ facts in his defence by other means such as examination of a witness for the defence by counsel or even by counsel eliciting facts from a prosecution witness during cross-examination - See *R. v Bowers* [1998] Crim. L.R. 817.

⁹⁷ The original age of 14 years under s.35(1) Criminal Justice & Public Order Act 1994 was reduced to 10 years by s.35(a) Crime & Disorder Act 1998.

⁹⁸ CJPOA, s.35(2).

⁹⁹ *Ibid.* at s.35(1)(a).

¹⁰⁰ *Ibid.* at s.35(1)(b).

Section 36(1) provides that proper inferences may be drawn in circumstances where an arrested person fails or refuses to account for his possession, or the presence of, any object, substance or mark, on him or his clothing or at the place in which he was at the time of his arrest, where the police reasonably believe the presence of the object, substance or mark may be attributable to his participation in the commission of an offence.

A number of important points arise out this section. The arrest referred to in s.36(1)(a) must be lawful, otherwise any inferences drawn under this section may be lost, although the arrest does not have to be for the offence in which the constable reasonably suspects the object, substance or mark may be attributable to.

The expression *in his possession* has not been defined by the Act, although it has been suggested that the phrase is similar to *has with him* as used in s.1 Prevention of Crimes Act 1953 in relation to the carrying of offensive weapons. Insofar as s.1 is concerned, a person does not have to be carrying the article in question but must have a close physical link and be capable of making it immediately available. For example, *possession* may extend, for the purposes of s.36, to the glove compartment of a vehicle. The expression *object, substance or mark* is also undefined by the Act.

The provision under s.37(1) is similar to s.36 above, but relates to the arrested person's presence at or near a place at about the time the offence for which he was arrested is alleged to have been committed. Where the police reasonably believe

¹⁰¹ s.35(4) replaced s.1(b) of the Criminal Evidence Act 1898 which along with ss.1(c) and 1(d) were repealed by the

that the suspect's presence at that place and time may be attributable to his participation in the commission of the offence, *and* he fails or refuses to account for his presence, proper inferences may be drawn.¹⁰²

The points highlighted above in relation to the arrest in s.36, also apply to the drawing of inferences under s.37. The salient words *fails or refuses*, common to both sections, have been the subject of recent debate. The National Crime Faculty offered their interpretation of the phrase, in guidance to officers, issued in August 1996.¹⁰³ They considered an *unsatisfactory answer* as amounting to a failure or refusal, and described the terms as follows:

'Words ... said in response to the question, (so that there is an answer), but those words do not amount to an account or explanation. So a reply which is silly and flippant, does not amount to an explanation.'

They continued:

'... a reply which never gets beyond the too vague stage, even with further questions, does not amount to an explanation ... we are not talking about an unsatisfactory explanation, (an account the interviewer does not believe or think should be accepted), but a reply which is so meagre it does not begin to be an account at all'

The constable making the request under s.36(1)(c) for the arrested person to account for the presence of the object, substance or mark, or under s.37(1)(c) in relation to his presence at or near a place, *does not* have to be the same constable who effected the arrest. However, the officer arresting in s.37(1) *has* to be the

Criminal Justice & Public Order Act 1994.

¹⁰² It is worth noting that the 'reasonable belief' held by the constable in relation to the suspect's presence is not limited to the officer making the arrest. It is sufficient for another constable investigating the offence to have such a belief for this provision to have effect – See s.37(1)(b).

¹⁰³ National Crime Faculty, 'Investigative Interviewing Bulletin No. 5', August 1996. p.3.

same officer who found the suspect at the *place*. Card & Ward (1994: 178) raise concerns over the timing of such questions, and whether in fact the arrested person can be legitimately held to account in the above terms by the arresting officer, (or any officer), prior to arrival at the police station. PACE Code C, para. 11.1 states:

'Following a decision to arrest a suspect he must not be interviewed about the relevant offence except at a police station or other authorised place of detention unless the consequent delay would be likely:

- *to lead to interference with or harm to evidence connected with an offence or interference with or physical harm to other people; or*
- *to lead to the alerting of other people suspected of having committed an offence but not yet arrested for it; or*
- *to hinder the recovery of property obtained in consequence of the commission of an offence.*

Interviewing in any of these circumstances shall cease once the relevant risk has been averted or the necessary questions have been put in order to attempt to avert that risk.'

By definition an interview is 'the questioning of a person regarding his involvement or suspected involvement in a criminal offence.'¹⁰⁴ The police have adopted the view that questioning as described under s.36(1) could be construed as an interview and should be conducted at the police station and not the scene of the arrest to avoid possible exclusion of evidence not covered by Code C, 11.1 above.¹⁰⁵

¹⁰⁴ Code C, para. 11.1A.

¹⁰⁵ Association of Chief Police Officers (1993: 6).

At the commencement of an interview carried out in a police station, the interviewing officer must put any significant statement or silence¹⁰⁶ which occurred before his arrival at the police station to the suspect, who should be asked to confirm or deny the earlier statement or silence and whether they wish to add anything.¹⁰⁷

Code C, para. 10.5B and Code E, para. 4.3D describe the conditions that must be met to ensure that an inference can be drawn where a suspect fails or refuses to answer certain questions:

The interviewing officer must first tell him in ordinary language

- (a) *what offence he is investigating;*
- (b) *what fact he is asking the suspect to account for;*
- (c) *that he believes this fact may be due to the suspect's taking part in the commission of the offence in question;*
- (d) *that a court may draw a proper inference if he fails or refuses to account for the fact about which he is being questioned;*
- (e) *that a record is being made of the interview and that it may be given in evidence if he is brought to trial.*¹⁰⁸

The Codes of Practice require that the information covered in elements (a) and (e) of the *special warning* above are given to a suspect at the commencement of the

¹⁰⁶ A significant statement or silence is one which appears capable of being used in evidence against the suspect (Code C, para. 11.2A).

¹⁰⁷ Ibid.

¹⁰⁸ Corre (1995) suggests that this reference to a *record* being made of the interview implies it would be made at a police station and, therefore, provides clarification on the point raised by Card & Ward above.

interview. The remaining three elements must be given for each fact for which an inference is likely to be drawn at court.

Although a suspect is under no legal compulsion to speak, he is nevertheless exposed to an underlying sanction through the risk of adverse inferences at trial. How real that risk is, and how influential any inference drawn might ultimately be, are questions which are difficult to answer in the absence of empirical research into the decision making of magistrates and juries. In the light of changes to the wording of the caution¹⁰⁹ its symbolic importance, in terms of protecting the suspect, has probably diminished, leaving it to serve now as more of an instrumental threat to the suspect, than safeguard.

Conclusion

The inference provisions of the CJPOA have far-reaching implications for suspects who choose to remain silent during police interviews, or who refuse to testify at court. They were introduced in the face of strong opposition from lawyers and academics, yet enjoyed the support of the police and some quarters of the senior judiciary. The attenuation of a suspect's right to silence had been the subject of a debate spanning more than two decades, which turned on the potential benefits of securing convictions of the guilty against the increased risks to innocent – especially vulnerable – suspects.

Advocates of the right to silence regard it as an essential part of the rights and freedoms of an individual, alongside the presumption of innocence and the burden

of proof. They argue that the use of silence by a suspect should not be interpreted in terms of guilt, as it represents a fundamental protection against abuse and the risk of false or improper confessions. Opponents consider the right to silence an anachronism in today's society, where suspects are afforded adequate procedural safeguards and protections. They argue the response of an innocent person is to deny an accusation, and that only criminals exploit the use of silence. Both sides rely on notions of procedural fairness and, as a consequence, many of the issues appear irreconcilable.

Police powers of arrest and detention were strengthened following the introduction of PACE, but this was balanced with increased safeguards for suspects. The effectiveness, or otherwise, of PACE has been the subject of competing claims about the extent to which police behaviour has changed as a result. Changes in the style of police interrogation have resulted from the introduction of interview training and the rigorous exclusion of evidence unfairly obtained through oppression.

Inferences can be drawn where a suspect fails or refuses to mention any fact relied upon in his later defence at court, which, at the time, he could reasonably have been expected to mention. A failure to give evidence or answer specific questions at trial draws similar risks of inferences, as does the failure or refusal to account for his possession of objects, substances or marks when requested, or to account for his presence at a particular place.

¹⁰⁹ The caution was amended to include the risk of inferences introduced under the Criminal Justice & Public Order Act 1994.

In the view of those framing the legislation, abrogating the right to silence promised to prevent guilty suspects, who previously hid behind silence, from exploiting weakness in the criminal justice system. Whether or not any of these intended benefits materialised, the reform did have a major impact on the relative positions of the police and defence in the interview encounter and on the question of pre-interview disclosure of prosecution evidence. In the next chapter, these matters are considered, in detail, against a background of domestic and European appellate caselaw.

3. THE PROCESS OF DISCLOSURE

This chapter examines the influence of the silence provisions, embodied in the Criminal Justice & Public Order Act 1994 (CJPOA), on the dealings of defence lawyers and their clients with the police. It looks at the impact of the provisions on pre-interview disclosure of the prosecution case, and the consequential effect upon custodial interrogation. The development, by the police, of control strategies for disclosure is also examined against a background of legal obligations and developing appellate caselaw. Finally, the chapter explores the potential application of human rights' legislation establishing fair trial guarantees, and focuses on judicial pronouncements on the subject flowing from the European Court.¹

Unforeseen consequences of the CJPOA provisions

The introduction of the silence provisions² brought unexpected consequences for both legal advisers and the police. The possibility of inferences being drawn from the failure or refusal of a client to answer police questions meant that legal advisers had to be alive to this fact when counselling silence. It was vital, therefore, that defence lawyers obtain as much detail of the case as possible on which to base their advice to clients. There is no legal requirement, at present, on the police to disclose evidence in advance of interviews, despite the recommendations included in the Runciman Commission.³ Requests for such information had previously been resisted by the police, who were unwilling to

¹ European Court of Human Rights, Strasbourg.

² CJPOA, ss.34-37.

relinquish what they considered a tactical advantage. Nevertheless, legal advisers argued that, without sufficient pre-interview disclosure by the police, it would not be *reasonable* to expect a suspect to mention a fact that he later intended to rely upon in his defence.⁴ They interpreted s.34 CJPOA as requiring the police to provide at least *prima facie* evidence of the case against their client, and the issue became a source of tension between the police and legal profession (Bucke *et al*, 2000: 22). Police attempts to hold back information led to some interviews being played out as a ‘cat and mouse’⁵ game, punctuated by a series of private consultations between the legal adviser and client, as new information was released by the police in the course of questioning. Indeed, one of the strategies recommended to lawyers for dealing with non-disclosure by the police is to inform the officer that the interview will be stopped whenever evidence not previously disclosed is introduced (Cape, 1999: 145; Ede & Shepherd, 2000: 359).

Evidence from the present study suggests that many officers, anxious to prevent such interruptions, were willing to release extensive details of the case, in advance, to legal advisers to maintain the free flow of interviews.⁶ This position had even been recommended to officers during interview training courses.⁷ Thus, by providing far greater information than has previously been the case, a

³ Royal Commission on Criminal Justice (Cm 2263), Recommendation 63, Chapter 3, par.54. See chapter 7 below, for a full discussion of the Commission’s recommendation.

⁴ Cape (1997: 394) outlines the factors considered by the Court of Appeal, which could amount to reasonable justification for not telling the police about relevant facts during questioning. He describes the factors to be considered under three broad headings: Factors relating to the accused; Factors concerning the investigation; and Legal advice. See also comments of Rose L.J. in *R. v Roble* [1997] Crim. L.R. 449.

⁵ See Toney (2001: 43) and Cape (1999: 14).

⁶ See comments of respondents D/CON-05 and P/CON-08 in chapter 7 below, which accord with the findings of Bucke *et al* (2000: 24).

⁷ *Ibid.* Respondent P/CON-13.

significant shift has occurred in the police/legal adviser dynamic.⁸ As Bridges & Choongh (1998: 59) note, 'this change would appear to be a direct consequence of the limitations on the right to silence, as the police now anticipate that non-disclosure will become grounds for advice to suspects to remain silent.' Lawyers attending police stations to offer advice now expect, in most cases, to receive a factual briefing from the investigating officer of evidence gathered, police suspicions held and proposed areas of questioning before interviewing commences. This is borne out by respondents in the present study.⁹ The amount of information the police were prepared to release varied according to a number of factors including the seriousness of the offence being investigated, the strength of available evidence and the experience of the police officer concerned.

Many respondents, with less police service, had no personal experience of conducting interviews where a *disclosure briefing* with the legal adviser did not preface the interrogation.¹⁰ Some officers felt they were obliged to provide full disclosure of evidence, in some cases allowing legal advisers to read from witness statements direct. Other officers gave extensive details in the belief that this generally secured the co-operation of the suspect and his legal adviser. A significant proportion of officers appeared to have resigned themselves to the inevitability of providing pre-interview disclosure as a means of preventing a *no-comment* interview. A small number were reticent to release any information which might benefit the suspect during interrogation and resisted moves towards fuller disclosure.

⁸ Bridges & Choongh (1998: xi) describe how this has 'transformed the culture of police-legal adviser relations'.

⁹ These results accord with the findings from Bucke *et al* (2000: 23) and Bridges & Choongh (1998: 59).

Negotiation skills

Police discretion to provide pre-interview disclosure has been largely undermined by the likelihood of a suspect's non-cooperation and the *principled* negotiating position adopted by legal advisers. Shepherd (1996: 5), describes how such skills can establish a respectful working relationship through assertiveness, recognising the effects of decisions on others, and by being constructive not destructive. 'Principled negotiators see the process of working to persuade or influence the other person as not about drawing blood.'¹¹ Evidence emerged from the present study, which indicates that the disclosure process is subject to a degree of negotiation on both sides. It is also clear that ongoing formal training in the legal profession, coupled with the intellectual leadership offered by academic lawyers such as Ede¹² and Cape¹³ in their practitioners guides, has encouraged legal advisers to develop strategies for dealing with negative or unhelpful police behaviour towards them. Indeed, Cape (1999: 13) advocates the use of negotiation¹⁴ and assertiveness as developed in the Law Society's training kit, *Police Station Skills for Legal Advisers*.¹⁵ Police officers also recognise the advantages of establishing a negotiating position, which allows them to release sufficient evidence to secure the involvement of the suspect in the interview,¹⁶ whilst still retaining the tactical advantage of being able to challenge a suspect's

¹⁰ Op. cit. n.6, Respondent P/CON-06.

¹¹ Shepherd (1996: 6).

¹² *Active Defence* (2000).

¹³ *Defending suspects at police stations* (1999).

¹⁴ See comments of Cape in chapter 7, below.

¹⁵ Shepherd (1996).

account with key evidence, where necessary. The responses of the following detectives illustrate this pragmatic approach to pre-interview disclosure:

D/CON-10: *“You’d be struggling to conduct an interview without [giving some disclosure] because they’ll probably say, ‘Right, say nothing’, which isn’t going to help me because I would sooner get that person talking. So I would tell them the least information possible, just to get the person talking.”*

D/CON-03: *“Some people say it’s best to tell them everything ... I prefer to break it up in stages, because what may be discussed in one interview in relation to that evidence ... may affect what they say in the next interview about the other part.”*

(Researcher): *“Do you think what you say to the solicitor in your disclosure briefing can affect what happens in the interview then?”*

Reply: *“Absolutely ... if you get a ‘no comment’ interview straight off, you know you haven’t told him enough.”*

D/CON-02: *“I can give [certain solicitors] a little bit more because I know he’s going to go in there and that’s going to help me a bit more; and then they’ll be another one and I’ll think, ‘Well, tell him nothing’.”*

(Researcher): *“You make your judgement on how you think they’re going to respond?”*

Reply: *“Do their job, yes.”*

These officers may have been effectively ‘forced’ to the negotiating table as a consequence of the more assertive or principled stance adopted by defence lawyers.¹⁷ Advisers are encouraged to actively defend their clients, with Ede & Shepherd (2000: 338) advocating the systematic questioning of the investigating officer to investigate the police case and prosecution evidence. They conclude that ‘blocking’ tactics, i.e. failing to provide an adequate response, by the investigating officer, is a sure sign that the topic is of material significance (ibid. 347). As Jackson (2001: 169) points out, ‘much would seem to depend on the attitudes of

¹⁶ Dixon *et al* (1990: 134) suggest that reliance on the right to silence is one of the few tools, which a suspect can use as a tactic in the negotiating process concerning, *inter alia*, bail, charges, other offences and other suspects.

individual police officers whether they give disclosure or not.’ He concludes that the ‘lack of duty of disclosure, however, serves to illustrate how dependent the interview regime is on a level of co-operation between the police and solicitors’ (ibid. 170). Nevertheless, many respondents in the present study were well aware of the potential outcome of failing to secure a degree of co-operation.

D/SGT-02: “The solicitor’s in a position where he can make the enquiry damn difficult. He could be obstructive during interview; could keep interrupting the interview – he’s entitled to; he could disrupt the interview, say ‘I wish to confer with my client’, and the client would do likewise ... If the solicitor is aware that you’re being fair and you’ve told him in general the enquiry and the evidence, then that person would be satisfied that the police are being what they should be, being fair and doing the job, so it could speed the process. It would make it a lot easier, the enquiry.”

Entering into negotiations with the defence lawyer does inevitably carry some risks for the interviewing officer and, as the following respondents illustrate, can leave them facing a dilemma over what and how much information to release:

P/CON-02: “It’s basically trying to give as much information as you feel is relevant for the situation, but not actually giving the solicitor enough to go in and obviously come out with his client knowing that he can get away with what he’s done before even being interviewed.”

P/CON-06: “In some circumstances, if you give them very little information they can then advise their clients to go ‘no-comment’, which sometimes has its benefits, and sometimes doesn’t, because you can’t get information out of them. But if you tell them everything they sometimes have the time to think up a story to avoid the evidence you’ve got, or they will be perfectly honest with you and say, ‘Yes, that is what happened’. It’s hard to know what the right thing to do is sometimes.”

Despite the almost *routine* provision of disclosure in most cases, research suggests that the police are still, on occasions, reluctant to divulge aspects of the case,

¹⁷ It is interesting to note the analogous reference made by Dixon *et al* (1990: 134), who suggest that many interrogations are better considered as a process of negotiation (albeit between parties with unequal power) than of simple adversary relations.

which can lead to the counselling of silence by legal advisers.¹⁸ Cape (1999: 145), suggests that persistence on the part of the defence lawyer, coupled with the threatened non-cooperation of the client, can act to persuade a reluctant officer to part with information. Bridges & Choongh (1998: 69), found the most frequently cited reason among advisers for counselling silence was insufficient or weak evidence (69 per cent) and non-disclosure of evidence by the police (50 per cent). In the event of disclosure, Cape (1999: 146) sounds a cautionary note to defence lawyers concerning the completeness of this information. He warns of the dangers associated with officers exaggerating the strength of evidence to encourage a confession, or of situations where the strength of the case is underplayed by the police to lull the suspect into a false sense of security so he becomes careless in his responses.¹⁹

The previous chapter highlighted the importance of custodial interrogation in the investigative process and in the determination of criminal cases. Recent research indicates that the majority of suspects (67 per cent) arrested by the police are subsequently interviewed whilst in custody.²⁰ Within that group, at least half go on to confess their guilt when questioned by officers (Bucke & Brown, 1997: 33). Confession evidence saves police investigative time and increases the likelihood of conviction. In some cases, the admission is the sole determining factor in

¹⁸ Ede & Shepherd (2000: 248) also warn lawyers of the dangers arising from police officers summarising the available prosecution evidence. Referring to advance information, they describe how the police edit and compress the evidence in order to present a brief account with contents inherently supportive to the prosecution. They highlight the 'obvious risks' of deletion of essential contextual information as well as the many forms of anomaly found in testimony.

¹⁹ The use of this technique was similarly described by Cherryman and Bull (2000: 201-202). Evidence from the present study indicates that, on occasions, police officers take advantage of the disclosure briefing to present an impression of the strength of the police case, which may not reflect the evidence in their possession. See, in particular, the comments of respondent D/CON-07 in chapter 7, below.

²⁰ See Bucke *et al* (2000: 21).

whether a prosecution will commence or not. As the police put it: *no cough – no job*.

Although empirical evidence suggests that fewer suspects are electing to exercise silence during interview following the introduction of the inference provisions, no corresponding increase has occurred in the frequency of confessions. Bucke & Brown's observational study (1997: 34) revealed similar rates to earlier research pre-dating the changes in the right to silence (see Sanders *et al*, 1989; Phillips and Brown, 1997). Indeed, Bucke *et al* (2000: 35) describe this development as an increase in the 'flannel factor', where officers welcome the opportunity to test the veracity of a suspect's account provided during interrogation, to strengthen the prosecution case by exposing inaccuracies in the story. The research findings do not make clear to what extent investigations benefited from opportunities to test suspect's accounts, however, previous research found that where suspects do offer a defence, the police were generally unable to break the account down in the majority of cases - Leng (1993: 62) recording a success rate of just 5 per cent.²¹

Such is the significance for the police of interrogation, in terms of evidence gained and exerting control over suspects, that both are potentially threatened by the emergence of more assertive legal advisers, who are able to secure a greater awareness of the case facing their clients. As Bucke and Brown (1997: 34) note, legal advice is seen as an important influence on whether confessions are made,

²¹ Leng's findings were consistent with those of Moston *et al* (1992a) and Baldwin (1992a).

with lower rates reported among those suspects who receive such advice.²² Thus, the police seek to rely on controlling the disclosure of evidence to the suspect as a means of reducing the number of guilty suspects who are able to construct credible alibis and defences, whilst re-asserting a degree of control in their dealings with defence lawyers.²³

Management of information is seen as not only an important part of a police officer's job, but also an essential part of their 'prosecuting armoury'.²⁴ As McConville & Hodgson (1993: 42) suggest, 'so far as the police are concerned, their case is assisted, not harmed, by keeping suspects and their advisers in the dark.' The effects of information control on both the suspect and legal adviser were reported by the above authors in their research study for the Runciman Commission.²⁵ They found it could unsettle an un-cooperative suspect to the point of an admission (1993: 46). Where information was gradually released over the course of an interrogation or series of interrogations, suspects may 'delude themselves into thinking there is no evidence against them or none that will convince a court.' This strategy also provided other functional benefits for the police in 'undercutting the authority of the legal adviser and breaking any bond that has developed between them ... [i]t may convince the adviser of the suspect's guilt and of the need for a full confession' (1993: 48).

²² Bucke & Brown found that 47 per cent of suspects receiving legal advice made admissions compared to 66 per cent of those receiving no advice.

²³ *Op. cit.* n.6, D/SGT-06 and D/CON-10.

²⁴ Walkley, J. (1987) quoted in McConville & Hodgson (1993: 42).

²⁵ Research Study 16, *Custodial legal advice and the right to silence* by Mike McConville and Jacqueline Hodgson.

The benefits accruing from this style of interview have been recognised by a number of respondents in this study, who were versed in its application.²⁶ Known in the host force as *phased disclosure*, it is reserved for more serious offences in the main, providing what the police argue is a mechanism for officers to obtain an account from suspects which is uncontaminated with facts or evidence provided beforehand, that may alter their account.

The development of phased disclosure

No official account exists of phased disclosure or its purposes,²⁷ but the strategy appears to have developed in response *firstly*, to an increasing emphasis on disclosure briefings as described above with the perceived loss of tactical advantage;²⁸ and *secondly*, to a review of how evidence was presented in interviews conducted by Northumbria Police, following the decision in the case of *R. v Heron*.²⁹

George Heron stood trial at Leeds Crown Court charged with the murder of seven-year old Nikki Allan. During the proceedings, evidence of a confession made by Heron was excluded by the trial judge, Mr Justice Mitchell, on the basis that it had been obtained in contravention of s.76(2) Police & Criminal Evidence Act 1984 (PACE). The interviews had been conducted by the Senior Investigating Officer

²⁶ 9 of the 30 respondents (30 per cent) had personal experience of employing this strategy.

²⁷ The Association of Chief Police Officers (ACPO) are in the process of establishing a working group, led by John Burbeck, Chief Constable of Warwickshire Constabulary, to develop a new national interview strategy for the police service to cater for legislative change.

²⁸ Evidence cited from respondents in Chapter 7 (Attitudes to legal advisers) indicates that 'phased disclosure', in a somewhat less systematic form, existed prior to the Criminal Justice & Public Order Act. Nevertheless, the continued and increasing involvement of defence lawyers appears to have significantly altered the dynamics of suspect interviews, leading directly to the emergence of the strategy described in this thesis.

²⁹ Leeds Crown Court, 22nd November 1993: unreported.

(SIO) himself with his deputy, in a 'persuasive interrogation' style.³⁰ In the view of the judge, evidence linking Heron to the crime had been deliberately misrepresented by the interviewing officers, leading Heron to believe (falsely) that he had been seen with the child minutes before she died. The confession that followed was therefore ruled inadmissible. The jury went on to acquit Heron of the charge.

The *Heron* case, as with *R. v Paris*,³¹ coincided with the introduction of the PEACE³² model of investigative interviewing, although the interviews had been conducted before the new training package had been introduced. In light of the decision in *Heron*, an enquiry was carried out into the conduct of the interviews and appropriate recommendations made.³³ Northumbria Police also participated in a project team based at the Police Staff College at Bramshill, which helped to formulate strategies for SIOs. The project team received from police officers numerous reports of legal advisers demanding greater disclosure following the introduction of the CJPOA inference provisions. They looked at the legal obligations regarding pre-interview disclosure, concluding it was a matter for the police to determine the appropriate level of information to release as part of the planning and preparation of an interview.

³⁰ Northumbria Police (1994) at para. 6.

³¹ [1993] 97 Cr. App.R. 99.

³² The mnemonic 'PEACE' refers to a structured interviewing style, which covers the various stages of the process from preparation to evaluation. See chapter 8 below, which deals specifically with the issue of investigative interviewing.

³³ These recommendations included that only those officers who have received training based on the PEACE model be permitted to participate in such interviews in serious crime cases; that SIOs and their deputies not participate personally in interviews with suspects (Northumbria Police 1994, at para. 9).

As a response therefore, officers in Northumbria began implementing the strategy described in this study from the end of 1995 onwards. Northumbria Police presented this strategy to other forces, including the host of this research, during 1998. No official policy or training package exists for this strategy but its success, as the police see it, relies upon careful control of relevant information. Officers have to consider this process from two perspectives: firstly, what the suspect himself is likely to be aware of: and secondly, what information the legal adviser can elicit from other police officers, official records and the client.

The key stages in the process begin at the point of arrest, which may include initial questioning of a suspect, searches of persons, premises or vehicles, and any unsolicited comments made outside the realms of a formal interview. Official records that accompany these procedures may or may not include pertinent detail in justification. Where interviewing officers decide to employ phased disclosure, a process of *tracking back* to the arresting officers may occur to identify the nature and extent of disclosure at the initial contact, usually taking the form of a debriefing between officers. It also covers the arrival and booking-in procedure at the police station. Where interviewing officers are involved in the arrest themselves, information control is more complete and may be subject to a degree of pre-planning. Custody officers may be apprised of the evidence justifying arrest and necessitating the use of detention facilities even before the arrest is made. The circumstances of the arrest, usually written on the custody record in the force hosting this study, are instead recorded in the pocket book of the arresting officer or custody sergeant to prevent their exposure to the legal adviser. The custody record will only contain limited grounds, such as the offence description and date

etc. The conversation between arresting officer and custody sergeant may occur in an area of the custody suite not subject to video-taping to avoid a permanent record, which, in itself, may be the subject of advance disclosure in the event of a prosecution.³⁴

Officers using this strategy control the request for legal advice, ensuring that only agreed details are released. Upon arrival of the adviser, a pre-prepared disclosure briefing sheet is either read out or handed over, in some cases by dedicated *disclosure officers* who themselves play no part in the interview. At every stage of this interaction the legal framework that bounds it is effectively *negotiated* by officers, who are aware of the limits of discretion available to them.

Other forms of control operate during interrogation to support and complement this strategy. The police are able to determine the interview agenda, deciding what topics to discuss, when and for how long (Baldwin, 1994: 74-75). Maximising the use of custodial conditions is a further persuasive tactic, which McConville & Hodgson (1993: 125) suggest allows the police to impose their authority over suspects and, on occasions, legal advisers too. Even the layout of the interview room itself is used to place the suspect at a disadvantage. Positioned remotely in the room, away from immediate eye contact with his legal adviser, the suspect is directly confronted by the interviewer with the attendant pressure this brings. Helping to inhibit the persuasive effects of these measures is one of the key

³⁴ The Criminal Procedure & Investigations Act 1996 creates a statutory requirement for the prosecution to disclose 'unused material' gathered during the police investigation. The custody office video recording, unless being used for evidential purposes, is generally included in the list of material available to the defence if required. For a full discussion of the Act, see Leng & Taylor (1996) '*Blackstone's Guide to the Criminal Procedure and Investigations Act 1996*'.

elements of the legal adviser's role.³⁵ In such circumstances, suspects draw strength from the adviser's presence, helping to come between themselves and the police. Often the advice considered most appropriate in the circumstances is to withdraw co-operation, sheltering instead behind the exercise of silence.

Legal duties regarding police disclosure

The police are legally obliged to provide suspects, and accordingly their legal advisers, with relevant information and evidence as specified by s.28(3) PACE (information to be given on arrest), s.37(5) PACE (duties of custody officer before charge) and Code D, para. 2.0 (first description of a suspect as given by an identification witness). There are also a number of areas, implicit within PACE and the Codes of Practice, which have been utilised by lawyers to extend the bounds of disclosure beyond the aforementioned obligations. These common law developments are discussed in more detail below.

The pre-PACE House of Lords decision in *Christie v Leachinsky*³⁶ established that a person being arrested must in ordinary circumstances be informed of the true ground of his arrest at the time he is taken into custody or, if special circumstances exist which excuse this, as soon thereafter as it is reasonably practicable to inform him. This does not require technical or precise language to be used provided the person being arrested knows in substance why he is under arrest.³⁷ This

³⁵ Code C, para. 6D describes the solicitor's only role in the police station as protecting and advancing the legal rights of his client.

³⁶ [1947] AC 573, HL.

³⁷ *Ibid.* at 587 and 600. In *R. v Telfer*, [1976] Crim. L.R. 562, it was held that the statement 'I am arresting you on suspicion of burglary' was insufficient detail to identify the specific offence he was suspected of.

requirement is maintained in PACE under s.28(3),³⁸ but the Act places no similar obligation on the police to inform the suspect of the evidence justifying his arrest. As Levenson *et al* (1996: 137) point out, ‘the information which must be given need not include the information on which the suspicion must be based, but one reason for the requirement is to give the person an opportunity to present a convincing denial.’ English & Card (1991: 50-51) suggest the provision of this information gives the suspect an opportunity to give information themselves which would avoid the arrest, a view shared by Lidstone & Palmer (1996: 288), who note the purpose of the rule in *Christie v Leachinsky* is to challenge the arrester’s reasonable suspicion and enable a legal argument to take place about the authority for the arrest. In line with this principle, PACE provides that an officer may *de-arrest* a person before arriving at a police station if the officer is satisfied that there are no grounds for keeping him under arrest,³⁹ although how the officer reaches that conclusion could be problematic. As officers are constrained by Code C, para. 11.1, prohibiting the interviewing of an arrested person outside of a police station except in specified circumstances,⁴⁰ they would usually have to take account of information received outside the context of an interview.⁴¹ In other words, fresh information from witnesses which would negate the suspect’s involvement or make the arrest unnecessary or undesirable.⁴² Although respondents in the present study were not asked to comment specifically on the

³⁸ See also Article 6(3) of the European Convention on Human Rights.

³⁹ PACE, s.30(7).

⁴⁰ See ‘Questioning of a detained person after arrest’ in chapter 5, below.

⁴¹ Code C, para. 11.1A defines an interview as ‘the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences which, by virtue of paragraph 10.1 of Code C, is required to be carried out under caution’.

issues arising from the common law precedent established in *Christie v Leachinsky*, the predominant view in the sample was that the barest formal statement is all that is required at the point of arrest.

Once the arrested person has arrived at the police station, custody officers have a duty when authorising detention to inform the person of the grounds for such detention⁴³ (except where the person is incapable of understanding what is said to him or is violent or likely to be so, or in urgent need of medical attention). This notification is accompanied by a similar written entry in the detained person's custody record, which is made in his presence.⁴⁴ However, in cases where the police consider information management an issue, this exchange is likely to reveal little substance of the evidence in their possession at the time. As chapter 6 uncovers, in such circumstances, custody officers were found to actively collaborate with case officer colleagues in a strategy of non-disclosure to the suspect and his legal adviser.

Despite the specific obligations imposed on the police regarding disclosure, appellate caselaw has indicated a willingness on the part of courts to extend disclosure beyond that explicitly referred to in PACE and the Codes of Practice. In the case of the *Director of Public Prosecutions v Ara*,⁴⁵ the respondent's solicitor had been denied access to a copy of the custody record and taped interview

⁴² From the author's experience, the decision to de-arrest a suspect is one which occurs extremely infrequently and usually only follows the withdrawal of a complaint from the aggrieved party e.g. an assault arising from a public order situation, or where a witness has failed to make a positive street identification of the suspect.

⁴³ PACE, s.37(5).

⁴⁴ Ibid. s.37(4).

⁴⁵ [2001] EWHC Admin 493; [2001] 4 All E.R. 559; [2002] Crim.L.R. 295.

relating to his client. At the time of the request, Ara had not been charged and the solicitor had not been present during the earlier interview. The request for copies of the interview tapes was declined on the grounds that the relevant Code of Practice (Code E, para. 4.16) dealt with matters subsequent to charge. The case was contested at the magistrates' court on the grounds of abuse of process, as in the absence of the above disclosure no appropriate advice could be offered by the solicitor. The justices took a similar view and stayed the proceedings against Ara on these grounds. In delivering his judgment Rose L.J., appears to have extended the disclosure duties by reasoning from the case of *R. v Director of Public Prosecutions ex parte Lee*,⁴⁶ in which Kennedy L.J. said by reference to the Criminal Procedure & Investigations Act:

*'The 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage.'*⁴⁷

In dismissing the appeal, Rose L.J. found the justices were fully entitled to conclude that proceedings should be stayed as an abuse of process, but added the following cautionary note:

'I make it clear that this does not mean that there is a general obligation on the police to disclose material prior to charge. That would, in many cases, be impracticable and, in some cases, (for example where there is an ongoing investigation) highly undesirable, as well as being outwith the

⁴⁶ [1999] 2 All E.R. 737.

⁴⁷ [2001] EWHC Admin 493 at para. 16.

*contemplation of the legislation, the code or anything to be implied therefrom.*⁴⁸

His Lordship's comments, while seeking to underline the limitations on pre-charge disclosure, could provide scope for such disclosure in certain cases. A strategy of non-disclosure by the police may, as a consequence, be considered by a court as amounting to an abuse of process. As Toney (2001: 46) notes, 'English courts now seem prepared to acknowledge that Article 6 applies at custodial interrogation', and quotes from the judgment of Buxton L.J. in *R. v Stratford Justices ex parte Imbert*:⁴⁹

'I, of course, accept that Article 6, although it speaks of the right to a fair trial, is concerned also with the fairness of pre-trial proceedings, including not only disclosure but also investigation and the obtaining of evidence.'

Irrespective of the legal obligations falling to the police to disclose details of evidence, advisers are still able to gather information about the details of an allegation and, in some cases, the evidence justifying the arrest of their clients by inspecting the contents of custody records.⁵⁰ However, the picture emerging from the present research indicates that even this source is under threat. In developing the control strategies discussed above (*phased disclosure*), the police now routinely restrict entries in such records to the legal minimum, thereby ensuring that their tactical advantage is not eroded further.⁵¹

⁴⁸ Ibid. at para. 25.

⁴⁹ [1999] 2 Cr. App.R. 276.

⁵⁰ Code C, para. 2.4.

⁵¹ An Assistant Chief Constable from the force hosting this research issued a recent instruction (October 2001) to custody officers to cease recording the circumstances of an arrest on the custody record. From that point on only limited grounds would be recorded – see chapter 8, below.

The working relationship between police officers and legal advisers has in the past been characterised by negative attitudes and suspicion. The present study did find evidence of this view prevailing among some officers, yet a significant majority of the police officers interviewed described their working relationship with legal advisers in favourable terms. Even though the vast majority of officers claimed to remain unaffected by their contact with legal advisers in terms of decision-making and disclosure of evidence (*see chapter 7 below*), some did acknowledge that they benefit from a less adversarial atmosphere founded on greater dialogue and mutual trust. It was also clear that one consequence of improved relations with legal advisers was a bilateral exchange of information. In this respect, disclosure becomes a means by which negotiation occurs.

With more legal advisers present at interviews, the police have less opportunity to strike a deal with the suspect through the use of bail.⁵² Left with fewer bargaining chips on the table, the police make use of the managed disclosure of evidence to effectively negotiate a suspect's *co-operation* i.e. his participation in the interview itself. Whilst the aim of phased disclosure remains one of obtaining a suspect's version of events, unfettered by facts and evidence that may alter their story, there is an ever-present risk of *no-comment* responses. What emerges is a process where officers tailor the release of information to ensure a suspect's co-operation without 'showing all their cards' at once. Legal advisers, once aware of the full extent of a police case, may consider it in their client's best interests to withdraw co-operation, whereas others may be convinced of the need for a confession at that

⁵² See Cape (1999: 373) for a discussion of the police 'offer' of bail when seeking confessions from suspects. The ability of the police to use bail as a bargaining tool was also diminished by changes allowing custody officers to impose

point. Pre-interrogation disclosure is an imprecise science, with many factors at work in this process. Even among the officers who employ phased disclosure on a frequent basis there is inconsistency of application. Some officers described how they provided notice of areas of questioning in advance, stressing that suspects were not *ambushed* with details in the interview. Others, however, chose to retain the element of surprise and would challenge a suspect's account with evidence withheld from the legal adviser.

It was apparent that inexperienced officers felt uneasy in their dealings with defence lawyers, often intimidated by the interaction and unable to exercise the control of information to the same extent of mature colleagues. Nevertheless, the police believe that phased disclosure represents a mechanism by which they can regain an element of control in their dealings with legal advisers, but only to the extent that legal precedent will allow. That picture is likely to change as a consequence of caselaw arising out of domestic and European human rights legislation.

Caselaw regarding disclosure

Defence lawyers have argued that insufficient disclosure should make evidence of the accused's silence inadmissible.⁵³ This is based on the belief that it is *reasonable* for a suspect to remain silent until he knows the basis upon which the allegation is made against him. Section 34(1) CJPOA provides that, for inferences to take effect from a defendant's failure to mention a fact relied on in his defence,

conditions on bail after charge (s.38 PACE), such as curfews and prohibiting contact with witnesses, reducing the need to remand a suspect in police custody to the next available court.

it is for the court or jury to determine whether if, in the circumstances existing at the time, the defendant could have *reasonably* been expected to mention it when questioned. Judicial interpretation of the expression *in the circumstances* was provided in *R. v Argent*,⁵⁴ where Lord Bingham C.J. explained that matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice received⁵⁵ are all part of the relevant circumstances to be considered by a court. The test of *reasonableness* was a subjective one and could include that the defendant was tired, ill, frightened, drunk, drugged, unable to understand what was going on, suspicious of the police, afraid that his answer would not be fairly recorded, worried about committing himself without legal advice or acting upon legal advice.⁵⁶

The Court of Appeal was asked to examine Argent's conviction on the grounds that he had remained silent on the advice of his solicitor. He had been identified by two witnesses at an identification parade and was named by another as responsible for stabbing a man to death outside a nightclub. At trial, his solicitor argued that Argent was of low intelligence, and that the police had failed to make a full disclosure of the evidence available to them prior to interview. It was on this basis that Argent had followed his advice to remain silent. In rejecting the appeal, Lord Bingham C.J. recognised that although the police 'may have made more

⁵³ See *R. v Argent*, below. A court may refuse to allow evidence if, having regard to all the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings (s.78(1) PACE).

⁵⁴ [1997] 2 Cr. App.R. 27.

⁵⁵ *Ibid.* at p.33.

⁵⁶ *Ibid.*

limited disclosure than is normal in such circumstances',⁵⁷ they were under no obligation to make any disclosure beforehand. His Lordship considered that the police 'may well have had reasons for limiting the disclosure which they made', noting that at the time Argent was interviewed, the firm to which his solicitor belonged had been advising him for a period of three months. The material given to Argent and his solicitor by the police made it plain that several witnesses had identified him as the person responsible for the stabbing. His Lordship did not consider the case as particularly complex in which to respond, contrasting it with cases of 'fraud or conspiracy which depend on a complex web of interlocking facts.' The Appeal Court could find no grounds for criticising the trial judge's decision to leave the issue of inferences to the jury when considering the reasonableness, or otherwise, of the accused's conduct.⁵⁸ The conviction was allowed to stand.

Toney (2001: 53) in considering the issue has interpreted Lord Bingham's remarks as supporting the view that the level of police disclosure is dependent upon the factual complexity of a given case. In describing such an approach as 'futile', Toney argues that 'disclosure requirements cannot be tailored to fit factual circumstances, which are infinitely varied.'⁵⁹ Such an ad hoc procedure, he maintains, would be 'capricious, arbitrary and wholly unworkable.'

The question of whether the inference provisions under s.34 CJPOA created an obligation of absolute disclosure on the part of the police was examined in *R. v*

⁵⁷ Ibid. at p.35.

⁵⁸ See also *R. v Kavanagh* (Appeal Court, 7th February 1997, unreported).

Imran & Hussain,⁶⁰ where the Appeal Court upheld the conviction repeating the words of the original trial judge:

'It is totally wrong to submit that a defendant should be prevented from lying by being presented with the whole of the evidence against him prior to the interview.'

Whilst the Court did state that the police were under a duty not to actively mislead the suspect, they rejected the argument put forward by the defence concerning disclosure, commenting that:

*'To hold that the police have to play a form of cricket under one rigorous set of rules whereas the suspect can play under no rules whatever seems to us to lack reality.'*⁶¹

Further judicial interpretation on the subject of police disclosure is found in *R. v Condron & Condron*.⁶² The Condrons were arrested for being concerned in the supply of a Class A controlled drug (heroin) and, following a medical examination at the police station, were declared fit for interview by the police surgeon. Their solicitor considered that the pair were themselves still suffering from drug withdrawal symptoms, and concerned about their physical and mental state, advised them not to answer any questions in relation to the offences. At the ensuing trial, the jury was permitted to draw proper inferences from the silence and the pair were convicted. In the appeal that followed, the issue of a lawyer's advice was raised. The solicitor's concern for the welfare of his clients was not considered as justification for silence in the circumstances, in the light of the

⁵⁹ Toney (2001: 53).

⁶⁰ [1997] Crim. L.R. 754.

⁶¹ Smith Bernal Transcript at p. 2.

⁶² [1997] 1 Cr. App.R. 185.

police surgeon's examination. Counsel for the appellants, Antony Shaw QC, sought to have the Appeal Court rule that wherever a solicitor advised his client not to answer police questions, the *no-comment* interview should be excluded because a refusal under those circumstances would be reasonable. He later withdrew from this position recognising that it would effectively render s.34 'wholly nugatory', at least in any case where the defendant had a competent solicitor, since this would be the advice that such a solicitor would be bound to give.⁶³ The appeal was dismissed and the convictions upheld.

Similarly in *R. v Roble*,⁶⁴ the defendant argued that evidence of the police interviews, in which he made no comment, be excluded on the grounds that he had followed the advice of his solicitor. In dismissing the appeal, Rose L.J. held that 'what is crucial ... is not the correctness of the solicitor's advice, but the reasonableness of the appellant's conduct in all the circumstances which the jury found to exist, including the giving of that advice.' His Lordship considered that in some situations the advice to remain silent may readily be understood: 'Good reason may well arise if, for example, the interviewing officer has disclosed to the solicitor little or nothing of the nature of the case against the defendant, so that the solicitor cannot usefully advise his client, or where the nature of the offence, or the material in the hands of the police is so complex, or relates to matters so long ago, that no sensible immediate response is feasible.'⁶⁵ Cape (1997: 395), in

⁶³ [1997] 1 Cr. App.R. 191; Archbold News (1996) Issue 10, p.3.

⁶⁴ [1997] Crim. L.R. 449.

⁶⁵ Ibid. at 449-450.

considering the issue in the light of these cases, describes the Court of Appeal decisions as ‘giving mixed messages’:

‘On the one hand it is saying that lack of disclosure can amount to good reason for legal advice not to answer police questions but, on the other hand, the court reserves the right to carry out a post mortem on this advice.’

Cape concludes that the defence lawyer, faced with a decision to make at the police station over whether to advise a suspect to answer questions or not, ‘cannot know whether the court will regard this as a *good* reason or not’ (1997: 396).

Disclosure and human rights

The effect of the silence provisions have also been considered by the European Court of Human Rights (ECtHR), with regard to the application of fair trial guarantees. Article 6 of the European Convention on Human Rights⁶⁶ (ECHR) seeks to protect the rights of a suspect to a fair trial by ensuring, *inter alia*, that everyone charged with a criminal offence is presumed innocent until proved guilty - *Article 6(2)*, and is informed promptly, and in detail, of the nature and cause of the accusation against him - *Article 6(3)(a)*. Effect is given to this Convention in the United Kingdom by the passage of the Human Rights Act 1998 (HRA). The HRA does not make decisions of the ECtHR binding in domestic law, but judgments and decisions from Strasbourg must be taken into account.⁶⁷ The ECtHR has put the principles enshrined in Article 6 to the test, providing caselaw and interpretation on a number of points arising from *disclosure* of prosecution evidence, the *right to silence* and the concept of *equality of arms*.

⁶⁶ Convention for Protection of Human Rights and Fundamental Freedoms, Rome 4th November 1950.

⁶⁷ Human Rights Act, s.2(1). See Starmer (1999) for a full discussion of European human rights’ law.

Disclosure

The additional protections, enumerated in Article 6(3) above, apply only to persons subject to a *criminal charge*, which as Toney (2001: 44) concedes, ‘seem to preclude its application to pre-charge procedures such as custodial interrogation.’ Yet, Toney suggests that the Article 6 guarantees are applicable to the silence provisions contained in the CJPOA when due regard is given to of the key term *charge*. In domestic law, it describes the formal process of notifying an individual of an allegation that he has committed a criminal offence. Charges are read over to an accused person by the police and at the commencement of hearings in court. The point of charge at the police station takes on particular significance as it marks the stage at which questioning *must* stop in relation to the offence alleged, other than to prevent or minimise harm or loss to some other person or to the public, or for the purpose of clearing up an ambiguity in a previous answer or statement.⁶⁸

However, in *Deweere v Belgium*,⁶⁹ the ECtHR appears to have developed an autonomous interpretation, which does not necessarily accord with definitions in domestic law. The European Court considered that, for the purposes of Article 6, charging refers to the point a person is *substantially affected* by the proceedings taken against him. Commentators have interpreted this point as the date when ‘he becomes aware that *immediate consideration* is being given to the possibility of prosecution’.⁷⁰ The ECtHR has recently affirmed the *substantially affected*

⁶⁸ Code C, para. 16.5.

⁶⁹ (1990) 2 EHRR 439 at para. 34.

⁷⁰ Lord Lester of Herne Hill and Pannick, D. (eds.) (1999) *Human Rights Law and Practice*, cited in Toney (2001: 44).

doctrine in the case of *Heaney and McGuinness v Ireland*.⁷¹ Both men were subjected to custodial interrogation after their arrest for terrorist-related offences but refused to answer police questions. The Court considered that, at that stage of the investigation, they were *charged* in the sense that Article 6(2) applies above. Likewise, in the case of *Magee v United Kingdom*,⁷² the ECtHR concluded that the application of Article 6 might extend to pre-trial proceedings.

The application of ECtHR caselaw in respect of pre-interview disclosure relies, in part, on determining how this interpretation of the term ‘charge’ should be apply in the context of English procedure. It is arguable that arrest by the police would constitute such notification that immediate consideration is being given to the possibility of prosecution. Support for this interpretation of Article 6 is also found in *Murray v United Kingdom*,⁷³ where the ECtHR was asked to consider the application of terrorist legislation in Northern Ireland, which formally denied access to a solicitor during interview. The trial judge, sitting alone in a Diplock⁷⁴ Court, drew adverse inferences from Murray’s silence during interview and Murray was subsequently convicted. The ECtHR, in its findings,⁷⁵ considered it fundamentally unfair to deny access to a solicitor and allow inferences to count against the person at trial. The court also noted that ‘it has not been disputed by

⁷¹ (2001) 33 EHRR 12 at para. 42; [2001] Crim. L.R. 481.

⁷² (2001) 31 EHRR 35 at para. 41; [2000] Crim. L.R. 681.

⁷³ (1996) 22 EHRR 29. See also *Condrón v United Kingdom* (2001) 31 EHRR 1.

⁷⁴ Diplock Courts only deal with scheduled offences (including: murder, manslaughter, armed robbery, firearms and explosives offences) and operate without the use of juries. The trial judge, sitting alone, decides upon the guilt or innocence of defendants. Introduced by Lord Diplock, as a response to the intimidation of jurors by paramilitary organisations, these courts are unique as the judge’s reasoning is on record and provides an opportunity to monitor how the silence provisions were interpreted in the province under the Criminal Evidence (Northern Ireland) Order 1988.

⁷⁵ Starmer (1999: 305) notes that in the case of *Murray*, the European Court ‘carefully confined its judgment to the facts of the case, emphasising that it was not its role to examine whether, in general, the drawing of inferences was compatible with the notion of a fair hearing under Article 6’.

the Government that Article 6 applies even at the stage of the preliminary investigation into an offence by the police.⁷⁶

If courts in the United Kingdom were to accept this interpretation of the term *charge*, the effect on custodial interrogation could be highly significant. In order to comply with the requirements of Article 6(3)(a), a suspect would have to be furnished with extensive details of the nature and cause of the allegation against him before interviewing could commence. Existing police strategies of non-disclosure might, under the circumstances, be rendered in violation of this Article.

Right to silence

In addition to the caselaw outlined, above in *Murray v United Kingdom*, the ECtHR examined the issue of the right to silence in *Saunders v United Kingdom*,⁷⁷ which involved powers of compulsory questioning. In 1986, as Chairman of Guinness plc, Ernest Saunders was involved in a take-over battle with the Argyll Group for the Distillers Company plc. Department of Trade & Industry (DTI) Inspectors were appointed to investigate rumours and allegations of misconduct on the part of Guinness in its successful take-over bid. The allegations centred on a substantial increase in the quoted Guinness share price, achieved through an unlawful share support operation. In the first six months of 1987, Saunders was interviewed in the presence of his legal advisers on nine occasions by the Inspectors. Under the terms of the 1985 Companies Act,⁷⁸ he was required to answer the questions put to him. Failure to do so could lead to a determination by

⁷⁶ Op. cit. n.73, at para. 62.

⁷⁷ (1997) 23 EHRR 313.

⁷⁸ See ss.432(2) and 436(3).

a court that he was in contempt, punishable with a fine or up to two years imprisonment. The evidence obtained in these interviews was passed to the police who launched their own investigation using this material. Saunders was subsequently charged with false accounting, theft and conspiracy.

During the trial that followed, prosecutors sought to use transcripts of the statements made by Saunders to the DTI Inspectors. He was subsequently convicted and sentenced to five years imprisonment.⁷⁹ An application was lodged with the European Commission on Human Rights (Eur Comm HR), which, in its report on the merits of the application, found by a majority of fourteen votes to one that the use of compulsory powers to compel statements damaging to Saunder's case was in violation of Article 6(1) of the Convention.⁸⁰ This view was reinforced by the ECtHR, who subsequently held that his right to a fair trial *had* been breached by the admission in evidence at his trial of his statements to inspectors (An appeal against conviction had been lodged by Saunders and three others,⁸¹ but was subsequently dismissed in the Court of Appeal⁸² and, most recently, in the House of Lords⁸³).

Equality of arms

The minimum requirements necessary for a fair trial are set out in Article 6(1), but other guarantees have been read into the Convention to ensure these rights are fair

⁷⁹ Later reduced to 2 ½ years on appeal.

⁸⁰ *The Independent*, 30 September 1994.

⁸¹ Jack Lyons, Anthony Parns and Gerald Ronson.

⁸² [2002] 2 Cr. App. R. 15.

⁸³ *R. v Lyons* [2002] UKHL 4; In upholding the convictions, the House of Lords ruled that a Convention (ECHR) duty could not take precedence over an express and applicable provision of domestic statutory law. When judging the safety of old convictions, the Court of Appeal, while applying contemporary standards of fairness, had to proceed by reference to the law that was applicable at the date of the trial (reported in *The Times*, 15 November 2002).

and effective (Starmer, 1999: 121). These include the principle of *equality of arms*, which requires that the accused be allowed to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.⁸⁴ Toney (2001: 47), likens this principle to a lens, ‘through which the procedural fairness in any criminal proceeding can be ascertained.’

As Toney (2001: 49) goes on to note, Convention authority requiring the disclosure of evidence by the prosecution can be found as early as *Jespers v Belgium*.⁸⁵ In noting the significant imbalance in resources between the prosecution and defence, the Eur Comm HR held that equality of arms could be achieved in criminal proceedings only if: (a) the authorities were under a duty to ‘gather evidence in favour of the accused as well as evidence against him’⁸⁶ and (b) the defence had access to relevant material before trial⁸⁷ (Starmer, 1999: 248). This position was re-stated in *Edwards v United Kingdom*,⁸⁸ where the ECtHR held that ‘material evidence for or against the accused’ must be disclosed by the prosecution.

In line with the interpretation of *criminal charge* as it relates to Article 6(3)(a) above, commentators have sought to attribute the Convention guarantees, arising from the equality of arms principle, to disclosure of information in advance of custodial interrogation.⁸⁹ Their analysis of the current position indicates that

⁸⁴ See *Kaufman v Belgium* (1986) DR 50 p.98; *Dombo Beheer BV v Netherlands* (1994) EHRR 213 at para. 33.

⁸⁵ (1978) 5 EHRR 305.

⁸⁶ *Ibid.* at para. 55.

⁸⁷ Note 106 at para. 56.

⁸⁸ (1993) 15 EHRR 417 at para. 36.

⁸⁹ See Toney (2001: 47-49) for a full discussion of this position.

English law does not provide procedural guarantees sufficient to ensure compliance with Article 6. However, the European Court has not made any express or implied acknowledgement that such guarantees extend to the routine provision of pre-interrogation disclosure. In the absence of such a ruling, the police continue to employ methods of strategic information control to affect an advantage in the interview encounter with suspects.

Conclusion

The introduction of inference provisions has significantly altered the posture of both police and defence during custodial interrogation. Although the silence of a suspect during questioning could now be the subject of comment at court, the potential benefits for the police appear to have been outweighed by the need to disclose far more of their case before interviewing commences. Demands of this kind from defence lawyers have weakened the tactical advantage for the police associated with information control. In response to these developments, the police introduced control strategies designed to encourage an account from a suspect free from the influences of early police disclosure. They range from complete non-disclosure of the case at one level, to a form of negotiation at another, where officers attempt to secure the co-operation of a suspect through the release of sufficient facts to satisfy the legal adviser's demands, whilst retaining whatever advantage is gained by withholding some key elements of the case.

The legal obligations on the police regarding pre-interview disclosure are limited, although appellate caselaw has indicated a greater willingness by courts to extend disclosure beyond the explicit requirements of PACE and the Codes of Practice. In

applying the inference provisions, the courts have considered a number of circumstances are relevant in determining whether an accused's conduct was reasonable in failing to mention a fact later relied upon in his defence. These may include the physical and mental condition of the suspect, in addition to any legal advice received. Whilst the police are under a duty not to actively mislead the suspect, courts have concluded that they are under no obligation to provide absolute disclosure. Some commentators have suggested that strategies of non-disclosure adopted by the police, violate fair trial guarantees established by Article 6 of the ECHR. Human rights' caselaw has been interpreted in that fashion with regard to the principle of equality of arms.

4. RESEARCH METHODOLOGY

The research question

This study addresses a number of questions, principally the relationship between pre-charge disclosure of prosecution evidence and the position adopted by a suspect in the face of police questioning. It seeks to provide an understanding of the complex processes by which information is exchanged, shared and generated, involving custody officers, case officers, suspects and their legal advisers. It examines the forms that disclosure takes; the part it plays in the overall investigation strategy of the police; and the consequential use of silence by suspects.

From the outset it was considered impractical to include suspects and/or their legal advisers in the respondent samples. It was likely, with suspects in particular, that any interview conducted by the researcher would have been fruitless, as a result of the ethical and potential legal requirement to identify myself as a serving police officer. Furthermore, the interviewing of a suspect in custody for research purposes may be equally regarded as exploitation, since some respondents may feel they are under some legal obligation to assist while in detention. The decision to exclude lawyers from the sample came as a result of concerns raised by some officers using phased disclosure. These officers felt that publicising the use of this strategy may lead to legal advisers adopting measures to undermine its effectiveness. For these reasons, therefore, suspects and legal advisers were excluded from the respondent samples, although the author recognises the potential enhancement their involvement would have brought to this study.

Consequently, the research is based on interviews with serving police officers from a medium-sized force in the Midlands. Two samples of respondents¹ were used: 30 officers taken from a variety of roles to comprise the *case officer* group; and 15 uniform sergeants who were all full-time *custody officers*. It begins by examining the interaction between police officers and suspects leading up to, and following arrest. The focus of attention moves from the place of arrest to the suspect's arrival at the police station and the formal process of police detention. The competing demands faced by custody officers are examined and their decision-making scrutinised to provide an understanding of how they exercise discretion in the highly regulated area of prisoner processing. The environment of the custody suite is examined, as is the role and responsibilities of the custody officer. The study seeks to identify what information is provided to the custody officer and suspect and what the minimum legal requirements are for disclosure. It also explores the consequential effects of managed disclosure on the custody officer's independence and wider supervisory responsibilities.

The involvement of legal representation for the suspect follows, with a particular focus upon relevant disclosure by the police at the point of initial contact, arrival at the police station and prior to the interview itself. Various police strategies relating to interview preparation and planning are examined, focusing in particular

¹ The respondents were numbered in order of interview, within each group, with case officers denoted by a prefix to identify both their role (i.e. 'P' = Uniformed, 'D' = Detective) and rank ('CON' = Constable, 'SGT' = Sergeant). For example, the second uniformed police constable in the sample is identified as P/CON-02, whereas the fourth detective sergeant is denoted D/SGT-04. Custody officers, as uniformed police sergeants, are simply identified with the prefix 'CUST'.

on decisions concerning the control of information and responses to the exercise of silence.

Research method used

The method of data collection chosen for this study was semi-structured interviewing, utilising an interview schedule questionnaire (ISQ). The use of open-ended questions allowed officers to answer unconstrained and in their own terms. As Denscombe (1998: 101) notes, 'the advantage of open questions is that the information gathered by way of the responses is more likely to reflect the full richness and complexity of the views held by the respondent.'

The questionnaire captured a number of types of information about the respondents, enabling both qualitative and quantitative analysis to be conducted. This included facts about the respondents themselves such as age, sex, rank, length of service etc. as well as an insight into the respondent's knowledge of, behaviour or attitude towards, particular issues.

A separate interview schedule was prepared for each sample group,² which contained a clear list of issues to be addressed, following a logical sequence from the point of arrest to final disposal. However, the flexibility required in semi-structured interviews allowed questioning to develop further in some topic areas, dependent on the level of knowledge or experience demonstrated by the respondent. Minor changes were made to both ISQs after the first few cases to improve the logical flow of questioning. Separate coding frames were developed

for each sample group in line with the four identified stages of disclosure: arrest, detention, legal representation and interview.³ Responses for the case officer sample were divided into 48 categories in total, whilst those for custody officers formed 22 categories.

The case officer sample

The primary objective in selecting the case officer sample was to ensure that the most important areas of police work, involving interviewing suspects, were represented with different levels of experience also being present. Thus respondents were chosen to include detectives in CID, traffic officers and probationary officers. Because the present study focuses in particular on the practice known as *phased disclosure*, officers were selected from specialist units⁴ dealing with serious and organised crime, which utilised this technique. As a consequence, the case officer sample reflects the range of police activities involving interviewing but would not be statistically representative of the force as a whole. Table 4.1 below illustrates the breakdown of the officer population in terms of rank, gender, ethnic background and role, and how this compares with the case officer sample.

The extent of coverage in this research is limited to what could be realistically achieved by the author alone. The force chosen for this study has a population size of just over 2000 officers of all ranks, stationed at 24 sites including the police

² See Appendix A (*Case Officer*) and Appendix B (*Custody Officer*) interview schedules.

³ The coding frames for custody officers only covered the detention process and interaction with the legal adviser.

headquarters. It is a non-metropolitan force, serving a population of just over one million in a mix of both urban and rural communities. Manufacturing industry, primarily in the hosiery sector, dominate employment in the urban centres. Over 40 per cent of the inhabitants in the largest urban centre served by this force are visible ethnic minorities, which compares with less than 5 per cent of serving officers. It is a member of a family of police forces in the region, all of whom are similar in composition and policing demands faced.

Table 4.1: Breakdown of Case Officer Sample by Rank, Gender, Ethnicity and Role

Rank	Population	Sample
Constable	1679 (86%)	24 (80%)
Sergeant	263 (14%)	6 (20%)
Gender		
Male	1597 (82%)	25 (83%)
Female	345 (18%)	5 (17%)
Ethnicity		
White	1852 (95%)	25 (83%)
Other	90 (5%)	5 (17%)
Role		
Uniform	1696 (87%)	13 (44%)
Detective	246 (13%)	17 (56%)

Although the entire population size of the force exceeds 2000 officers,⁵ for the purposes of this research the figure does not include ranks other than constable or

⁴ Officers were selected from a major crime unit (who predominantly deal with homicides and other serious crimes), a covert operations unit (who target large-scale drugs traffickers) and a special enquiries section (who deal with sensitive matters such as internal corruption).

⁵ n = 2072.

sergeant, who almost exclusively represent those officers conducting suspect interviews. As a result, the sample is drawn from a population of 1942 officers.

The breakdown of the sample compares favourably with the population in many respects, although it is recognised that the proportion of detective officers participating in this study is much higher than for the population as a whole. Nevertheless, it is more representative of the numbers of actual interviews conducted and practices observed by the researcher in custody suites. Many uniform officers interview infrequently, whereas their detective colleagues generally carry a heavy caseload and conduct interviews with suspects on a regular basis. A total of 30 officers formed the arresting/interviewing (*case*) sample, drawn from 11 of the 24 sites around the force.

The degree of experience varied tremendously within the sample group, from just 14 months service for the most junior officer up to 25 years for the longest serving. The total length of police service in the sample was 334 years, which averaged out to just over 11 years per officer. The roles performed by the sample group were as varied as their length of service. The majority (17) were detectives, working in the Criminal Investigation Department (CID), Special Branch, National Crime Squad or other specialist units, while others performed uniformed duties patrolling on foot, in panda cars or instant response vehicles.

The custody officer sample

Within this force there are 5 main designated custody sites. These centres are staffed with up to 7 custody officers each, providing 24-hour cover. Additional custody facilities are available on a part-time basis in rural areas with patrol

sergeants performing the custody officer role when required. The 15 officers selected for this study were, however, all dedicated custody sergeants drawn from 4 of the 5 main sites. Together they represent almost 50 per cent of the total custody officer establishment for the force of 33 sergeants. It is policy in the force to only use substantive⁶ sergeants who have completed their 12-month probationary period before allowing them to perform custody duties and this, in part, accounts for the greater average length of service for the custody officer sample. Of the 15 officers in the sample group, the average service was over 17 years. The longest serving officer had 27 years experience whilst the shortest, 7 years. The group total amounted to 261 years. The composition of the sample group was representative of the custody officer population as a whole, which at the time of conducting the research comprised exclusively white, male officers.

Sampling techniques

The sampling technique varied in the selection of officers for the two groups. The role performed by custody officers in terms of their legal responsibility remains constant, irrespective of which custody centre they work at or their level of experience. The performance of their duties is governed by the Police & Criminal Evidence Act 1984 (PACE) and its accompanying Codes of Practice. For this reason, cases were selected on a random basis, with the availability of staff being the sole determining factor. On occasions the shift pattern performed by custody staff provided overlapping periods where two officers were on duty at the same time, enabling both to be separately interviewed. The selection of 15 out of a total

⁶ The term 'substantive' is used to describe officers who have received promotion and excludes therefore, constables acting in the rank of sergeant.

establishment of 33 custody officers⁷ is likely to provide a fair representative of this group as a whole.

A sampling frame, in the form of an intranet-based address book of all officers in the force was used to identify those officers who worked in specialist units where it was known that phased disclosure was utilised. The address book also contained details of other officers, such as probationary constables, detectives in CID and traffic officers, who could also offer a particular perspective on suspect interviewing. It is important to stress, however, that the selection of the case officer sample was not predicted at the start of the research and was in part informed by the responses of officers in the early cases. Certain factors, such as the officer's gender or degree of experience, became potentially significant as the research developed. Areas of interest and new paths to follow were generated during the *investigation* of the topic area, making it neither possible nor desirable to identify exactly who or what was to be included prior to the start of the process.

The timing of interviews was based around the availability of the sample group. Only 2 of the 45 officers in the combined samples were off-duty at the time their interview was conducted and the difficulties in scheduling appointments with officers was not inconsiderable. On numerous occasions, officers were forced to break appointments at short notice due to operational commitments. Delays were also experienced in waiting for officers to become available for interview,

⁷ Correct at the time of writing.

particularly in busy custody suites. Fieldwork took place over 7 months between May and November 1999.

With the custody officer sample in particular, *blocks* of interviewing occurred where all 15 cases in the group were interviewed within a three-week period, before resuming the interviews with the case officer sample. By concentrating on one particular group, the researcher's interviewing style improved and the interviews themselves yielded greater content.

With the exception of the off-duty officers, all interviews were conducted in police buildings. In the initial stages consideration was given to making use of the tape-recording machines found in interview rooms, but a decision was made to reject this option because it limited the interviewing opportunities to police stations where the equipment was available. It was decided, therefore, to settle for use of a portable tape-recorder with a separate good-quality microphone. Dedicated interview rooms were preferred, where available, to ensure the highest recording quality. Nevertheless, on occasions the clarity of recordings was affected by background noise or poor acoustics, which led to problems for the typist in transcription. The duration of interviews with the case officer sample varied between 45 minutes and an hour, whereas the custody sample was closer to 30 minutes on average.

Why method chosen

The decision to employ this particular research methodology was based on a number of factors, chief among these being access to the data sources. Being a serving police officer removes many of the potential hurdles to access, such as

security within police buildings and confidentiality of information received. Yet, the immediate challenge in this study was securing consent from a chief officer to conduct the research at the outset. An Assistant Chief Constable from the force concerned initially refused the request on the grounds of perceived lack of potential benefit to the force itself. The police service as a whole, it was argued, had previously opened itself up to potential criticism through research studies with little or no resulting gain for the organisation. Attitudes were changing among forces towards research, which would require greater justification before authorisation could be granted.

In response to this initial position the author made contact with the Home Office Policing & Reducing Crime Unit, formerly called the Police Research Group (PRG), to discuss the viability and feasibility of the research. A leading academic within the PRG⁸ provided valuable support and reinforced the argument for conducting this research with the chief officer concerned, leading to permission being finally granted almost 12 months after the first request. The revised methodology placed more emphasis on the collection of qualitative rather than quantitative data, reflecting the benefits of unrestricted access to officers and the need for greater depth of information in the subject area.

The decision to limit the sample size to 45 officers in total was, as mentioned previously, influenced by the time and resources available to the researcher.

⁸ My thanks go to Jane Hirst of the Police Research Group for her intervention on my behalf.

Professionally typed transcripts, essential for the proper analysis of responses, were prepared for all interviews.

Extent of data representativeness

It is difficult to determine the extent to which the findings can be extrapolated to other officers in the force concerned, particularly within the case officer sample.

The responses of the custody officer group, being a majority of the total establishment, can be taken with a relatively high degree of certainty to reflect those of all custody staff, whereas the purposive sampling technique used with the case officer group, may limit the extent to which the data are representative of the wider population. It should be borne in mind however that this research was never intended to provide a complete picture of activity in this field, but instead to focus on a strategic response to silence employed by certain officers based on careful management and control of prosecution evidence at the pre-charge stage.

Extent of data validity

The question of whether respondents are being open and honest is vital in assessing the validity of the research findings and is directly linked to the issue of access. It is important to recognise the potential bias the author's position as a supervisor in that organisation may have on other officers. Whilst there is an expectation of greater candour from respondents to a colleague, there also exists an inherent disadvantage as an *insider*. Concerns surrounding certain behaviour or practices capable of sanction within the organisation, such as breaches of PACE, may potentially inhibit the responses of officers, leaving them more circumspect in their replies. Furthermore, an assumed level of knowledge on the part of the

interviewer by the interviewee can also potentially degrade the content and completeness of responses given.

Great care was taken over the preparation of suitable questions to ensure they were appropriate for the issues being investigated. Very few respondents showed any signs of reservation in the answers they provided or difficulty in understanding the relevance of the questions posed. Some of the officers in the group were more insightful than their colleagues, providing considered responses that were rich with personal experience.

The presence of an audio tape-recorder during the interview presented no difficulty for the respondents, who generally appeared comfortable under recorded conditions. Only one officer who was approached refused to be interviewed for the purposes of this research on the grounds that he did not wish to see the perceived advantage of employing phased disclosure lost or undermined through exposure and publication in a research study. He was prepared to talk explicitly outside of a formal interview setting about his use of this strategy, but was not prepared to participate in this study.

Extent of data reliability

Very few of the questions posed to respondents required them to draw upon their specific knowledge of an event; instead their views or attitudes were sought towards certain issues or their behaviour under particular conditions. This being so, the accuracy of answers supplied by respondents did not necessarily rely on memory or other perceptions that may preclude getting at the truth. Whether the same findings would be produced if the research method were repeated is more

difficult to say. Personal knowledge of most of the respondents played a significant part in the selection process, seeking to produce the best results possible under the circumstances.

In retrospect, the methods could have been improved by introducing an extensive pilot study to refine the interview schedule before applying it to the sample groups. This weakness in the methodology is recognised but has hopefully not constrained the quality of the findings to a large extent. Similarly, the semi-structured nature of the interviews led, in some cases, to certain questions not being asked of every respondent. On occasions, the conversation drifted away from a subject area resulting in some aspects being missed. The need to balance the flexibility of a semi-structured style with greater interview control is recognised by the author to ensure a more even response.

The limitations of the current research methodology are recognised by the author, particularly in terms of the representativeness of the case officer sample. Yet, it should be recognised that this study was never intended to illuminate the complete picture, but was aimed at providing *shafts of light* into the subject area of custodial interrogation and how strategic management of information impacts on that process. To this end, it is not possible to say how broad that beam of light is. The author also recognises the difficulties associated with the methodology as an adequate means of testing the second hypothesis. The resultant findings are, as a consequence, impressionistic in nature and therefore not wholly reliable. Resource limitations prevented the inclusion of a full case study to compliment the views of the respondents.

The author has been at pains to maintain a critical distance and objectivity in the research throughout. The data provided results that have changed the author's initial understanding of the subject area and expectations, by a wide margin. In particular, the varying degree of preparation made by officers for interview, their attitude and response to the involvement of legal advisers in the interview process, and the relative lack of first-hand experience many officers had with suspects who exercised their right to silence.

5. ARRESTING OFFICER/SUSPECT INTERACTION

Chapter 3 explained how changes in the law to allow inferences from silence had transformed the culture of relations between the police and legal advisers. It described the various ways in which police officers interact with legal advisers in the management of information, ranging from the release of extensive detail at one level, through to negotiation and non-disclosure at another. In describing this phenomenon, a number of stages were identified at which strategic control over the release of evidence is exerted. In this chapter, the initial encounter between the police and suspect and further interactions before arrival at the police station are examined in detail, drawing upon interviews with police officers engaged in the arrest and questioning of suspects. What emerges is a series of key moments in which disclosure from either party can occur, either as a deliberate strategy or unintentional act. These moments include:

- questioning prior to arrest;
- searches of persons or vehicles;
- information given to the suspect upon arrest;
- questioning after arrest;
- unsolicited comments made by the detained person;
- searches of premises.

This research also uncovers how the law permits police officers wide discretion and flexibility in the way they *manage* and *negotiate with* suspects during the early stages of an investigation.

Questioning prior to arrest

Although the general common law principle applies that the police are free to ask questions of any person they choose,¹ much of the contact they have with a suspect is constrained by the Police & Criminal Evidence Act 1984 (PACE) and its accompanying Codes of Practice. Thus, whilst the police may ask questions of a general kind or about a specific offence, they must not attempt to ‘interview’ anyone believed to be a suspect unless they also comply with the provisions of PACE which regulate interviewing of suspects.

Questioning *prior* to arrest usually fulfils one of two main objectives. The first objective is to provide an evidential basis for suspicion in the officer’s mind to afford grounds for subsequent actions e.g. search or arrest. The second objective is to disprove that person’s involvement in an offence. Once grounds exist to suspect a person of an offence, he *must* be cautioned before any questions (or further questions) can be put to him about the offence to obtain evidence for use in court:

‘A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions which provide the grounds for suspicion) are put to him regarding his involvement or suspected involvement in that offence if his answers or his silence (i.e. failure or refusal to answer a question or to answer satisfactorily) may be given in evidence to a court in a prosecution. He therefore need not be cautioned if questions are put for other purposes, for example, solely to establish his identity or his ownership of any vehicle or to obtain information in accordance with any relevant statutory requirement (see paragraph 10.5c) or in furtherance of the proper and effective conduct of a search, (for example to determine the need to search in the exercise of powers of stop and search or to seek co-operation while carrying out a search) or to seek verification of a written record in accordance with paragraph 11.13’

(Code C, para. 10.1)

¹ See later reference to *Rice v Connolly* at n.2.

The caution shall be in the following terms:

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

Minor deviations do not constitute a breach of this requirement provided that the sense of the caution is preserved. [See Note 10C]
(Code C, para. 10.4)

Thus, the caution affords the suspect some degree of protection as he is under no legal obligation to provide responses to such questioning.² It also operates to put the suspect on notice that 'appropriate inferences' may be drawn at court³, where applicable.

The legislation clearly describes the actions required by an officer where 'grounds for suspicion' have been formed, but it does not define categorically the point at which any such grounds exist. This test is largely a subjective one, based on the officer's interpretation of surrounding information, although it should be nevertheless capable of later justification. In defining 'reasonable suspicion', Jordan (2000: 4) compared the term with 'voluntariness' and 'oppression' and described the concept as having 'an intentional degree of latitude in interpretation'. Similarly, Her Majesty's Inspector of Constabulary (HMIC) reported:

² Lord Parker commenting in *Rice v Connolly* [1966] 2 Q.B. 414, emphasised the boundaries between the legal and moral duty of citizens to assist the police: - 'It seems to me quite clear that though every citizen has a moral duty, or if you like a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority. In my judgment there is all the difference in the world between deliberately telling a false story, something which on no view a citizen has a right to do, and preserving silence or refusing to answer, something which he has every right to do'.

³ Inferences may be drawn by virtue of s.34 of the Criminal Justice & Public Order Act 1994 (CJPOA), where applicable. As a consequence, the caution is a necessary pre-condition of that process.

*'It is the officer alone who determines, at street level, reasonable suspicion which is a concept that has eluded academics and lawyers in more reflective surroundings.'*⁴

This gives officers discretion to continue questioning a person, not under caution, until they are satisfied that the person is not a suspect or until sufficient information and additional circumstances provide sufficient grounds for suspicion. With no clearly defined boundary, officers could conceivably question suspects beyond the point at which a caution should be administered which, given the circumstances, may constitute an 'interview' for the purposes of PACE. On the other hand, officers may choose to caution a suspect at an early stage of questioning in order to open up the possibility of inferences from unsatisfactory replies.⁵

The effect of administering a caution to a person is to alert them to the suspicions held by an officer. Indeed, by informing the suspect that they are under no obligation to answer any further questions, the officer has to recognise that the suspect may choose to exercise that very option. Furthermore, continued questioning to obtain additional information carries with it the possibility of inadvertently disclosing significant evidence to the suspect, such as knowledge of his movements, clothing or his possession of objects/marks. Where eyewitness evidence, for example, is limited to a description, with no possibility of a later formal identification, a suspect's awareness of such evidential limitations may be of material benefit to him in deciding whether to co-operate with the police by confirming his presence at a particular place.

⁴ HMIC (2000), 'Policing London' par. 3.52.

Police officers therefore, have to *negotiate* with the suspect to obtain as full an account as possible without at the same time disclosing significant information which may impact on subsequent interviews. This has to be achieved within a set of laws that are inherently unclear and consequently legitimise the exercise of discretion by the officer. They allow officers to employ investigative strategies that engage with these laws without breaking them. The law thereby, becomes an investigative resource. Clearly the present research provides an opportunity to identify and measure police awareness of such matters, given the effect of Code C, para. 10.1 above.

Searches of persons or vehicles

The exercise of stop & search powers under ss.1-3 of PACE by police officers is regulated by Code of Practice A, which specifies information that should be supplied to a person⁶ before he or his vehicle is searched. The officer must take reasonable steps to inform the person verbally of his name and police station; the object of the search; and the grounds for undertaking the search.⁷ The object of the search usually relates to what type of article the officer is actually searching for e.g. stolen property, drugs or offensive weapons, whereas the grounds have to include the officer's suspicions. The officer must, briefly but informatively, explain the reason for suspecting the person concerned, whether by reference to his behaviour or other circumstances.⁸

⁵ See chapter 2 above, for a discussion of the drawing of inferences under s.34(1) CJPOA.

⁶ The relevant person is either the person being searched or in charge of the vehicle at the time of the search.

⁷ Code A, para. 2.4.

⁸ Code A, para. 4.7.

There must be sufficient grounds to justify the search otherwise it would become unlawful, although officers are free to exercise discretion as to what information they supply. Code A, para. 2.6 provides that this information be recorded on a search record form, with a copy supplied to the suspect on the spot if requested, except in certain circumstances.⁹ The requirement to provide justification for the search to the suspect represents a key moment in terms of disclosure of evidence. Release of relevant information at this time could potentially alert the suspect to the strength or availability of prosecution evidence. As respondent D/SGT-06 below illustrates, interviewing officers face likely problems where such a conversation goes unrecorded in the arresting officer's notes, particularly where other evidence raises the significance of comments made by the suspect or police:

D/SGT-06: *“Officers are particularly poor at recording what conversations they’ve had with occupiers or persons stop/checked on the street, because they don’t see it as of evidential value so it doesn’t go in the book, which can become problematic later on if people are aware of things and they don’t put them in.”*

In practice, police officers secure *consent* from many people routinely searched, often referring to the encounter as a *voluntary search*. The use of this phrase can be problematic however, almost implying the person has chosen to be searched, whereas it is more likely to have been the compliant response to an officer's request. The use of such consent in these circumstances appears to fall outside the remit of PACE and has been described as an ‘alternative power’.¹⁰ Often the person concerned is unaware of the grounds and object of the search and the

⁹ An officer who has carried out a search must make a written record unless it is not practicable to do so, on account of the numbers to be searched or for some other operational reason, e.g. in situations involving public disorder (Code A, para. 4.1).

identity of the officers involved, and search records under these circumstances are rarely completed. This practice of consensual searches has attracted much criticism. McConville *et al* (1991: 93) argue that the concept of consent in stop/searches is a police construct,¹¹ a mechanism that allows searches based on discriminatory criteria to avoid the statutory accounting system i.e. search records. The citizen faces a 'Catch-22' in stop and search situations, they argue, through ignorance of their legal position or through fear of police power, when faced with the alternative to providing consent. Instead of persuading citizens of the reasonableness of police actions in conducting a search, the police are concerned to persuade the individual of the inevitability of the stop-search. Sanders & Young (2000: 106), also draw attention to the problems arising from the absence of statutory control associated with consensual searches. The Macpherson Report, on the inquiry into the death of black teenager Stephen Lawrence, commented on the use of consent and called for the recording of these 'non-statutory' stop/searches.¹²

The police see consensual searches in a different light however. For them the use of persuasion and tact are important skills of the trade, particularly in rural areas where police numbers are low and support is not as readily available. As they see it, securing the consent of the citizen enables them to confirm or remove suspicion without unnecessary administrative bureaucracy and without any actual violation of the legal restrictions imposed by PACE. Furthermore, the 'informality' of the encounter allows an officer to achieve his objective without recourse to an

¹⁰ McConville *et al* (1991: 93).

¹¹ For a discussion of constructing consent, see Dixon *et al* (1989: 185).

¹² Recommendation 61, Macpherson Report (1999).

escalation of the situation, i.e. the use of force in conducting the search. It is precisely this informality that, in many cases, allows officers to conduct searches without revealing the grounds that justify it.¹³

Information given to a suspect upon arrest

Section 28 of PACE determines the information that must be given to a person when he is arrested. It states that an arrest is not lawful unless the person is informed he is under arrest 'as soon as is practicable' after his arrest, regardless of whether the fact of the arrest is obvious. Section 28(3) provides that a person arrested must also be informed of the grounds for the arrest at the time of, or as soon as practicable after, the arrest. The arrested person must also be cautioned at this point if he has not been cautioned immediately prior to the arrest.¹⁴

Defining *grounds* for the purposes of this section did not appear to present many problems for the research sample of case officers.¹⁵ When asked to explain what they typically told a suspect at the point of arrest, 28 officers (93 per cent) in the sample confined their comments to the specific details of the offence and administering a caution as illustrated by these detectives:

D/CON-01: "I always try and keep it quite tight, because you've got to write it down in your pocket book, so you tend to try and make it as compact as possible, not because you're lazy, but because you can clearly turn round and say 'that was all that was said'. The second thing I suppose is, you're under certain guidelines not to go into an interview under PACE, so you always try and keep it as concise as possible. You don't want to start getting into a 'questions and answers' sort of situation."

¹³ For a full discussion of stop and search, see Sanders and Young (2000, chapter 2).

¹⁴ Code C, para. 10.3.

¹⁵ n = 30.

D/CON-03: “‘You’re under arrest’, or ‘I’m arresting you’ for whatever the offence and then followed by the caution ... [I]f it was Burglary, I would tell them ‘suspicion of burglary at’ whatever premises and probably the date. No more than that.”

D/CON-04: “I would just say ‘an allegation’s been made’ or ‘from enquiries that we’ve done we believe you to be the person responsible; we’ve got to arrest you and interview you on tape at a police station’, which is the reason for the arrest and then explain to them ‘come with us to the police station’. They’re booked in, given the opportunity for a solicitor, etc. and then we interview them after they’ve consulted one if they want to. So it would be procedure; I wouldn’t disclose any evidence or anything.”

D/CON-06: “Quite often I use an interview technique called ‘phased disclosure’, and I just tell them that they’ve been under arrest, what the offence is and the fact that really basically, an allegation has been made against them. I will not discuss any other things; witnesses, fingerprints, any forensic evidence, or why I believe it’s them. That will come out later in the process.”

D/SGT-04: “I’d give them enough to make them aware of what they were under arrest for and the reasons behind it, but not enough to perhaps alert them to what evidence I may have prior to interview, and disclosure for interview purposes.”

D/CON-09: “I’d give him enough information to make him aware of why he’s under arrest, and no more than that.”

Some officers do elaborate further though, revealing other information and evidence at the point of arrest as illustrated by the following respondents:

P/CON-05: “Obviously the grounds for the arrest; as much of the circumstances as I can give at the time, and I make things as clear to him as possible; because if you don’t, obviously it upsets them and the situation doesn’t get easier to deal with. So I’m as honest as I can be. Give them the caution as PACE states that you should do, and if they ask for any information, if it’s appropriate for me to give it them at that time I will give it him.”

D/CON-10: “If you’ve got some evidence that you don’t want them to know, then I wouldn’t tell them about that, that would come out at the last minute of my interview, so what I would say, for example, ‘there’s been a robbery at the Alliance and Leicester, I believe you’re involved’. If you’ve got something that you would need to say that’s been in the press, for

example, one I've just worked on whereby it was on video, I would say 'you're caught on video', because you're not going to lose anything by telling the suspect that because they could possibly know that; that's out in the open. Whereas if it was on fingerprint evidence, I wouldn't tell them that; I would say, 'I've got evidence to suggest you're involved'. So if there's something that's been out in the press, the media or for any reason they would know, I know that they would know that, then I would tell them that. But if it was something that they wouldn't know, then I wouldn't tell them."

The interview data suggest that disclosure at the point of arrest tends to be minimal, and is seen by the officers as *procedural* rather than an encounter where the suspect is challenged with the allegation facing him. Respondent D/CON-01 illustrates the strategic concerns, expressed by many in the sample, of self-protection insofar as they adopt practices of recording evidence as succinctly as possible. Where challenged in court, officers are able to confine their testimony to the record created at the time. Officers were also concerned to maintain and protect tactical advantages gained through the managed disclosure of relevant information. Respondent D/CON-06 describes the structured release of evidence as a *process*, designed not to give too much away as this may assist the suspect to create a defence. By contrast, with respondent D/CON-10, the officer's decision to divulge these matters rested on his perception of the suspect's prior knowledge of such facts, and the likelihood of early disclosure adversely affecting subsequent interviews.

It is not just evidential significance or procedural compliance that informs officers' decision-making however. As respondent P/CON-05 above illustrates, an officer may be willing to reveal more information in order to secure the suspect's later co-operation in interview. Establishing relationships with suspects and building up co-operative relations of trust are also, therefore, factors of

instrumental significance for officers. PACE does not preclude officers from revealing aspects of the prosecution case beyond that required by section 28(3).¹⁶

However, disclosing certain information at the point of arrest may invite the suspect into further comments with the obvious risk that the subsequent conversation falls within the meaning of an interview as defined by Code C, para.

11A:

'An interview is the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences. Questioning a person only to obtain information or his explanation of the facts or in the ordinary course of the officer's duties does not constitute an interview for the purpose of this code. Neither does questioning which is confined to the proper and effective conduct of a search.'

Provisions do exist within PACE for the interview of an arrested person before arrival at a police station and without the benefit of legal advice: an area which will be examined in more detail below.

Questioning of a detained person after arrest

Code C, para. 11.1 provides the circumstances in which urgent interviews can take place following a decision to arrest a suspect, other than at a police station or other authorised place of detention, if any consequent delay would be likely to lead to:

- interference with or harm to evidence connected with an offence or interference with or physical harm to other persons; or
- to lead to the alerting of other people suspected of having committed an offence but not yet arrested for it; or
- to hinder the recovery of property obtained in consequence of the commission of an offence.

¹⁶ The *grounds* have to be supplied to a person at the point of arrest in accordance with section 28, even where they are obvious. However, they need not exceed the type of offence and no requirement exists to reveal details of evidence or suspicion held.

An interview conducted in any of these circumstances must cease once the relevant risk has been averted or the necessary questions have been put in order to attempt to avert that risk.

Albeit that, in certain circumstances, PACE allows for suspects to be interviewed about the offence before arriving at a police station, no officers in the sample spoke of using this provision within the Act. They maintained instead that they would not enter into an interview with a suspect en route to the station and would try to discourage any unsolicited comments. Whilst it is likely that the circumstances justifying reliance upon Code C, para. 11.1 for urgent interviews are infrequent in practice, it has to be conceded that the research methodology might have led officers to ignore or play down the use of these provisions. Certainly officers presented themselves as guarded in talking to suspects away from recorded conditions. The response of one experienced detective¹⁷ to this question was to make an animated facial expression and reply 'no'. Off-tape he later commented 'that was a bit below the belt wasn't it'.¹⁸ In the circumstances, the veracity of this officer's initial reply could be called into question. Furthermore, it demonstrates the potential methodological disadvantage of being regarded as an *insider*, as previously discussed.¹⁹ The more standard response of officers can be seen in the following quotations:

¹⁷ Respondent D/CON-02.

¹⁸ This remark could be interpreted as implying that the question placed him in the difficult position of acknowledging a practice he almost certainly considered transgressed PACE and the Codes of Practice.

¹⁹ It could equally be argued that without being an 'insider' the research would not have benefited from the 'below the belt' response.

D/CON-03: *“I’ve had occasions when people have talked about it. You don’t want to obviously, get involved in that situation; they’re under caution, you have to remind them of that, tell them to shut up and leave it to the interview.”*

P/CON-06: *“Sometimes it’s happened, but mainly the times I’ve come across that if people, where they don’t know the system, what’s going to happen to them. Criminals you come across day in and day out, they know the situation, they know what’s going to happen to them, so a lot of the time they don’t want to talk.”*

D/CON-05: *“A few do [talk about the offence], especially those that are protesting their innocence, but I do tend to nip it in the bud.”*

D/SGT-06: *“To be honest, we go to great lengths to try and explain to them that it’s not the time and place for them to be making such comments ... If somebody was so insistent on making an admission, then I wouldn’t say, ‘No, don’t tell me’, but I would go to great lengths to explain to them the caution, make sure that they understood it, and the fact that it is not the time and place for an interview, and I won’t be asking any questions. But some people are insistent that they want to tell you things and you can’t stop them. I don’t think it’s in the interests of justice to stop them either.”*

Faced with unsolicited comments, 28 officers in the sample (93 per cent) said they would note some or all of the remarks for use evidentially, with almost half this number (42 per cent) offering these notes to the suspect to sign as correct upon arrival at the police station.²⁰ However, the sentiments expressed by the patrol officer in P/CON-04 below also illustrate the practical difficulties associated with recording evidence whilst an arrested person is under escort to the police station:

P/CON-04: *“It’s quite a common thing. But I will point out to people that talk on the way that it’s not a wise thing to talk about it in the back of the police car and that the opportunity to discuss it will be done normally on a tape recorded interview. It doesn’t really stop an awful lot of people if they want to discuss the case, but I will sit there and listen to them ... I won’t actually use any of what they say to me in the back of the police car actually in any form of evidence, simply because most people that talk on the way into the police station tend to want to discuss in so much detail*

²⁰ See Code C, para. 11.13 regarding recording practices for comments made by a suspected person that are outside the context of an interview.

that it's not practicable to record the things that they're saying ... It's just not practical to do so in a journey to the police station anyway."

Nevertheless, several officers in the sample freely admitted taking advantage of the ride back to the police station to create a rapport with the suspect as part of a strategy to avoid 'no-comment' interviews later, while still aware of the limitations this conversation can take without breaching the Codes of Practice.

D/SGT-05: *"If you've not met them before you try asking questions about the family. You're not talking about the offence. It puts them at ease and it gets a rapport going between you both."*

Some commentators have suggested that police officers routinely use this period as an opportunity for unrestrained interrogation away from any of the safeguards afforded by tape recording. Indeed the product of these practices was referred to as 'back seat confessions'.²¹ Macpherson (1999) described how '...such evidence came to be familiar, and indeed notorious, before the passing of the Police and Criminal Evidence Act. Evidence of this kind was said to be given by officers allegedly to *nail* suspects unjustly.'²² McConville *et al* (1991: 84) also made reference to the problem of unverified interviews with suspects away from recorded conditions, suggesting that the opportunities to fabricate statements, such as *en route* to the police station, are preserved by PACE, in a reference to Code C, para. 11.1 (urgent interviews) above.

Whilst the evidence from the present research does confirm that conversations about the offence occur during the ride to the police station, the picture drawn by

²¹ Macpherson Report (1999), par. 22.30.

²² *Ibid.*

this study is one indicating many other motivational factors at work, such as developing a relationship of trust, which previous literature has not addressed. These motivational factors are not proscribed by rules of evidence and overall, officers in the sample appeared to exhibit high levels of professionalism and integrity. They showed a clear understanding of the issues involved, refusing to be drawn by the suspect on aspects of their arrest and the grounds relied upon in justification of it. PACE does not prevent officers listening to the suspect where they discuss the offence, or talking about other things not connected with the offence for which they have been arrested. In effect therefore, the law is being negotiated by officers without offending the literal injunctions of PACE.²³

Although no firm conclusions can be drawn as to which party initiates any such dialogue, suspects appear to be motivated by a number of factors to engage arresting officers in conversation away from tape-recorded conditions. These include the need to protest their innocence, offering mitigation for their actions and, for some, the opportunity to establish the case against them. Nearly a third of the sample (8 officers) encountered questioning by suspects about the offence before arriving at the police station either *frequently* or *very frequently*, whereas 19 officers in the sample (63 per cent) described this as an *occasional* occurrence.

P/CON-02: "A lot of them try to, especially if they've had a few drinks; they sort of want to know what's happening, but you have to sort of distance yourself, and I try and talk about other things; ask them if they've done anything else in the past. Try to keep them talking so they're going to be talking in the interview and not sort of like alienate them and make them think that no-one cares. But obviously try and talk as little as possible about the actual offence."

²³ For a full discussion of 'informal interviews' and the proposals made by the Royal Commission on Criminal Justice on this subject, see Leng (1994b: 173-185).

D/CON-07: “Once they’ve actually been arrested it’s my experience that the majority of them do try and entice you into a conversation about the case. You just leave them, let them talk what they want to talk, and then note it ... if they’ve got a solicitor they can read the notes in your book and sign it when you’re interviewing as one of the correct procedures and leave it at that.”

D/CON-10: “I would say the majority of them [try and talk to you about the offence on the way back into the station] ... What I would try to say is, ‘Don’t say anything unless we’re on tape’, but if they are talking I would let them talk because they could let something out that would help you on interview. If they start asking me, I’d say, ‘Hang on, wait until we get there, and then we’ll sort it out correctly’, but if they’re talking I would let them talk away and I’d listen to them, and then just say, if they start asking questions, then I’d say, ‘just wait’.”

Searches of premises

A further aspect of disclosure to arrested persons concerns information given when searching premises or seizing property during such a search. Code B, paras. 5.4-5.8 requires that occupiers be given information about the purpose of the search and the grounds for undertaking it before the search begins.²⁴ A written notice in a standard format should be used for this purpose.²⁵

The occupier of the premises or the person having custody or control of property seized also has a right to request a record of what has been seized, which must be provided within a reasonable time.²⁶ These rights apply to the arrested person only if he was the occupier of the premises searched or the person having custody or control of the property seized at the time of the search. In practice, suspects often

²⁴ Code B, para. 5.4 (iii) provides that this information need not be given before the search commences where alerting the occupier would frustrate the object of the search or endanger the officers or other persons concerned.

²⁵ See Code B, para. 5.7.

²⁶ PACE, s.21(4).

accompany officers conducting searches of premises, although there is no legal requirement.

Furnishing a suspect with a notice detailing the grounds for searching and the opportunity to discover the identity of any items of property recovered during such searches must, on balance, contribute to their understanding of the prosecution case and alert them to areas of questioning they can expect to receive. Respondent D/SGT-05 below, provides an example of police concerns over a suspect's presence during a search of premises:

D/SGT-05: "I don't really like searching a house when the suspect's there, unless I've arrested him in the house and there's a particular reason I want to do it with him there, then I would do. But it gives you more pressure to do it quickly I think if you've got the suspect there, so I don't like doing that ... very rarely do I search somebody's house when the people are there.

...Obviously you've got to inform them of what offence they've been arrested for and what material you are searching for, so you've got to issue some amount of disclosure; but that will have to be limited again for what they've been arrested for."

Policy within police forces does provide officers with discretion concerning the presence of a suspect during a search, particularly where security is an issue. However, this has to be set against issues of police integrity, where officers are extremely reluctant to conduct searches in the absence of witnesses for fear of malicious complaints against them and lack of corroboration, even if that means the suspect has to accompany them.

Conclusion

When Police officers are confronted with a task, they draw on their training and experience to engage it in a rational and intelligent manner. They are generally

aware of the extent they can work within the law and how the law can work for them. This is best demonstrated in the officer's recognition of the limitations any conversation can take with an arrested person outside of the formal confines of PACE. Yet, they are also aware that PACE does not preclude preparatory measures such as creating the rapport needed for subsequent interviews to come. Some officers employed a deliberate strategy of exploiting opportunities presented by police procedure, such as the need to accompany the arrested person to the police station and subsequent delays incurred awaiting the custody officer in the holding area. These procedural opportunities allow for prolonged contact, in some cases, to be maintained by the arresting officer with the suspect outside of a formal interview scenario. This demands that the officer maintain a balancing act of acknowledging the need for a rapport whilst not engaging in conversation which would constitute an interview. In so doing the officer has to adopt a strategic position in order not to alert the suspect to the existence of certain evidence, which may impact on subsequent interviews.

The responses of the officers to questions concerning the initial encounter with the arrested person give rise to a number of important conclusions from the perspective of pre-charge disclosure of evidence. Police officers rarely record conversations held with persons stop/checked or the occupiers of premises being searched. When effecting an arrest, information supplied to the suspect is generally restricted to specifying the offence with no details of evidence provided at that point. In 90 per cent of the case officer sample however, respondents experienced questioning from the suspect about the grounds for their arrest before arriving at the police station. None of the sample admitted engaging the suspect in

conversation in response to this; instead the vast majority (93 per cent) noted any unsolicited comments for use later evidentially. The research also suggests, that although suspects do ask arresting officers for information about their case, they appear to be motivated by a number of factors, and are not limited to apprising themselves of the precise details of the allegation.

The officers themselves do not generally appear to be revealing more than is legally required of them, although it is unclear whether this is a deliberate strategy by all officers concerned. Some respondents spoke of revealing certain aspects of the case, which would already be known to the suspect and, as such, would not alter the position in terms of disclosure for interviews that follow. Others used the opportunity to create a rapport with the suspect, avoiding unnecessary discussion of the case.

Not all of the actions of police officers during the initial encounter with suspects may be deliberate but still serve the outcomes that the police wish to achieve. Engaging a suspect in conversation en route to the station or whilst delayed in the holding area may create a rapport which results in a potential change to the outcome of the investigation. The suspect, having regard to the manner in which he has been treated so far, may decide to talk to officers in the interviews that follow.

6. THE DETENTION PROCESS

The previous chapter described the context in which evidence, in the hands of the police, is disclosed prior to, and at the point of, arrest. In so doing, it explored the initial questioning of suspects and any unsolicited comments made outside the realms of a formal interview, to uncover the extent of disclosure. In this chapter, the theme of information management is developed to encompass the detention procedure and, in particular, the involvement of the custody officer as a part of this process. The impact of changes in the custody suite environment on the custody officer's role and decision-making are considered, as part of an examination of factors influencing the suspect's detention.

The arrival of a suspect at the police station is a pivotal moment in the disclosure process. Whatever suspicions the arresting officer holds, it is the custody officer who ultimately decides whether the investigative process continues any further using the detention facilities at the police station. The importance to the investigation of these facilities cannot be understated. As Sanders & Young (2000: 189) commented, the police station has become the 'primary site for criminal investigation'. The benefits to investigators accruing from incarceration of suspects are well documented.

In executing his duty, the custody officer has to mediate between the needs of his colleagues investigating an offence and the rights of the detained person. When set against an increased obligation to record activities in the custody suite through video and audio recording facilities, coupled with greater access to legal advice, the role of the custody officer has taken on far greater significance and

responsibility than may have been originally intended. Given the confrontational nature of the role and the degree of authority it occupies, critics have suggested it be more appropriately performed by an officer of higher rank than that of sergeant.¹ The present research aims to examine the custody officer role, how it is perceived, and how it impacts on pre-interview disclosure, in relationships with colleagues.

Changes in the custody suite environment

The Police and Criminal Evidence Act 1984 (PACE) gave effect to a number of recommendations arising out of the Royal Commission on Criminal Procedure² (RCCP) in respect of the detention and treatment of arrested persons. This led to changes being made to recording procedures and the rights of suspects. Chief Officers were responsible for providing *designated* police stations, in suitable numbers for the area policed, to hold suspects for periods in excess of six hours.³ *Custody officers* were created to replace *Charge Sergeants*, whose role had previously attracted criticism through a perceived shared identity of interests with the arresting officer, and an inability to provide the neutral and rigorous view that would constitute a genuine 'second opinion'.⁴

Each designated police station must have a custody officer available at all times, who must be at least of the rank of sergeant,⁵ but need not have any particular training in order to carry out their duties. If an appointed custody officer is not readily available, any officer who is not a sergeant can also perform the custody

¹ Certain reviewing functions can only currently be performed by officers of the rank of Inspector or above.

² 1981, Cmnd 8092.

³ PACE, ss.35(1) and 35(2).

⁴ McConville *et al* (1991: 40).

officer role.⁶ An arrested person can be detained for up to six hours at any *non-designated* police station,⁷ although the vast majority of cases are taken directly to designated stations. Many forces utilise custody officers on a permanent basis, with lengthy attachments, although some forces alternate the role with other supervisory functions. Brown *et al* (1992: 34) found no difference in the manner custody officers performed their duties despite the different arrangements within forces. PACE requires that custody officers remain independent of the investigation,⁸ and while performing the role of custody officer they must not become involved in the process of securing evidence from or about suspects, with certain exceptions.⁹

Other changes in the custody suite environment have occurred following the advent of PACE and custody officers. Police forces gradually introduced the routine tape-recording of suspect interviews in the latter part of the 1980s, thus replacing the practice of contemporaneous interview notes. The Philips Commission (RCCP) had earlier proposed a limited form of tape-recording of interviews within police stations but rejected video recording at that stage.¹⁰ With the introduction of a new Code of Practice on Tape Recording in 1988,¹¹ police

⁵ PACE, s.36(3).

⁶ *Ibid.* s.36(4).

⁷ *Ibid.* s.30(4).

⁸ *Ibid.* s.36(5).

⁹ Procedures under the Road Traffic Act 1988 (Driving with excess alcohol etc.) and duties involving the identification of a suspect such as fingerprinting are permitted.

¹⁰ *Op. cit.* n.2 at paras. 4.25-4.27 and 4.31.

¹¹ Code of Practice E, PACE s.60(1)(a), which supplemented the original Codes A-D.

forces moved quickly towards making this practice the norm. From 1st January 1992, tape-recording became mandatory for all indictable and either way cases.¹²

Although the video recording of interviews has remained largely unadopted,¹³ the practice of placing video cameras in the custody suite area and cell passages has been embraced by most forces. Its aims are two-fold; as a means of protecting staff from malicious allegations and raising levels of professionalism among officers concerned in the management of detained persons and other visitors to custody suites. In the force subject of the present research, all custody suites introduced video-recording facilities in the mid-1990s. Initially, custody officers manually operated the video recorder when required, but this was found to be unsatisfactory as, on occasions, custody officers omitted to record some incidents later subject of complaints against police. The operation was taken out of the control of custody staff with the introduction of 24-hour time-lapse videos, which combined both visual and audio recording. Custody staff and arresting officers alike are extremely conscious of this method of surveillance whilst dealing with detained persons.¹⁴

¹² Certain exceptions apply to terrorist-related offences and those under s.1 Official Secrets Act. In addition, where a suspect objects to the tape-recording of an interview, the officer may switch the recorder off and continue with a written record in accordance with section 11 of Code C. However, if the police officer reasonably considers that he may proceed to put questions to the suspect with the tape recorder on he may do so - but should bear in mind that recording against the wishes of the suspect may be the subject of comment at court (Code E, note 4G).

¹³ Extensive trials were conducted in the West Midlands Police from October 1989 onwards – See Baldwin (1992a) 'Video Taping Police Interviews with Suspects - an Evaluation'.

At the time of writing, the Home Office was about to launch new trials (commencing early 2002) of video recording equipment in custody suites. The inclusion of digital recording equipment in interview rooms is designed to 'provide courts with a more complete record of police interviews of suspects, thus reducing acquittals on the grounds of alleged non-verbal police intimidation' (HM Treasury, Capital Modernisation Fund website).

¹⁴ In the force hosting this research, the number of complaints against police for actions emanating in the custody suite reduced significantly following the introduction of 24-hour video-recording. The figures took account of complaints relating to breaches of the Codes of Practice, assaults and incivility. The total number of complaints dropped from 17 per annum in 1994 to just 3 during the whole of 1997. 1998 onwards has seen a steady increase in the figures across all three categories, returning to the 1994 level last year (2000), none of which were substantiated.

Police activity within the custody suite environment has been subjected to further scrutiny brought about through increased access to legal advice for suspects. The familiar presence of solicitors and other legal advisers in custody suites has significantly impacted on conditions of detention and the course some police investigations take. As McConville *et al* commented, the police have historically regarded solicitors as obstacles to gaining an admission by disrupting the rapport between police and detainee that is basic to many 'effective' interrogations. 'For the police, solicitors are outsiders who suppress the truth and whose mission is inconsistent with the pursuit of justice.'¹⁵ Before PACE, relatively few suspects were permitted access to legal advice. Studies gave estimates ranging from 3 to 20 per cent (Zander, 1972; Softley, 1980). The police were able to deny access where 'unreasonable delay or hindrance was caused to the processes of investigation or the administration of justice'.¹⁶ In effect, the police commanded absolute discretion over the provision of legal advice, arguing that without it 'there will be cases in which, for example, evidence may be lost and associates may escape apprehension.'¹⁷

The Philips Commission decided, having considered the 'balance between the interests of the community and those of the suspect' that the police should be able to deny access to legal advice only in exceptional circumstances. The mere fact a solicitor may advise his client not to speak could not be seen as justification for

¹⁵ McConville *et al* (1991: 47).

¹⁶ *Op. cit.* n.2 at para. 4.82.

¹⁷ *Ibid.*

refusal of access, nor where secrecy is desirable but not imperative.¹⁸ These recommendations were enacted in s.58 PACE and Code C, par. 6.

Whilst the police are, in exceptional circumstances,¹⁹ permitted to delay access to legal advice, they cannot deny it for the duration of the period of detention in the manner they enjoyed prior to PACE. Nevertheless, the police recognise the likely consequences of attempting to adduce evidence gained in the forced absence of a legal adviser, and accordingly this provision has become effectively redundant. Specific objections to individual legal advisers remains the only discretion the police can employ, and even in those circumstances the suspect must still be offered the services of an alternative solicitor before interviewing can be conducted.²⁰

PACE introduced the mandatory offering of independent legal advice, free of charge to the detainee.²¹ The effect of this change was measured in a number of studies, which showed a consequent increase in requests for legal advice to around 25 per cent of all cases (see Brown, 1989; Sanders et al., 1989). The notification of this right is one of the primary responsibilities of custody officers, who read aloud a notice setting out this right and others to the suspect, who in turn, is asked to sign the custody record in acknowledgement.²² Criticism of the manner in which this notification took place²³ led to minor changes in the Codes of Practice to reinforce the delivery of these rights. On 10th April 1995, a revision

¹⁸ Ibid. at para. 4.90.

¹⁹ Code C, Annex B describes the criteria which must be fulfilled before a person's access to legal advice or notification of arrest can be delayed under this section.

²⁰ Code C, para. 6.10.

²¹ Code C, para. 6.1.

²² Code C, para. 3.2.

to the Codes²⁴ introduced a requirement for the custody officer to seek any reasons from the detained persons for his decision to waive his right to legal advice.²⁵ A study conducted by Bucke & Brown (1997: 19), found the growing trend for legal advice was continuing, with a sample of custody records indicating a request rate among detainees of 40 per cent. Furthermore, solicitors – for the first time – had a right to inspect the custody record for their client upon arrival at the police station.²⁶ Prior to this change, solicitors were usually denied access to the custody record while their clients remained in police detention, forcing them to apply in writing for a copy after their release.²⁷

The role of the custody officer

The introduction of custody officers was one of the principal recommendations arising out of the Philips Commission. They have statutory responsibilities for the welfare and treatment of detained persons, as specified by PACE and its Codes of Practice. McConville *et al* (1991: 49), describe the custody officer as a ‘quasi-judicial figure [supposedly] not involved in the investigation of an offence for which [the suspect] is in police detention’.²⁸ As well as the legal responsibility they undertake²⁹ there is an organisational perspective to the position they occupy. Custody officers are by definition supervisors, usually of the rank of sergeant and drawn from the pool of uniform patrol officers. Within the ordinary context of policing they would have an additional responsibility for the development of staff

²³ See McConville *et al* (1991: 49).

²⁴ The revisions to the Codes of Practice coincided with the introduction of adverse inferences from silence and the present caution with the enactment of the Criminal Justice & Public Order Act 1994.

²⁵ Code C, para. 6.5.

²⁶ Code C, para. 2.4.

²⁷ Solicitors were still permitted to ask the custody officer for specific details from the custody record such as relevant timings and client details etc.

²⁸ McConville *et al* (1991: 41).

under their command, overseeing investigations and ensuring that established policies and procedures are adhered to. In the force subject of the present research, custody officers must be experienced sergeants, who have completed their probationary period of one year in the rank of sergeant. As such, these officers could reasonably be expected to have assimilated some of the primary functions of a supervisor i.e. to take charge readily and offer support and advice when required. An opportunity presents itself therefore, to examine the dual and potentially conflicting roles the custody officer occupies between that of objective evidential reviewer on the one hand, and supervisor on the other.

Table 6.1 below, lists some of the many responsibilities held by custody officers, and where applicable, the areas of discretion that can be exercised in the performance of their duties.

Table 6.1: Custody Officers – Main Areas of Responsibility and Discretion

Authorise detention (Code C, para. 3.4)

The custody officer, having authorised detention, is responsible for informing the detained person of the grounds for the detention and recording them on the custody record. However, s.37(2) PACE describes the grounds for detention as being ‘necessary to secure or preserve evidence of the offence or to obtain such evidence by questioning’. The grounds for detention are therefore, not the grounds for arrest and no requirement exists for the police to inform the detained person at that stage of the evidence that led to his arrest.

²⁹ See table 6.1 below for full details of the custody officer’s responsibilities.

Notification of rights (Code C, paras. 3.1, 3.2, 5.1, 6.1, 6.5)

• ***Right not to be held incommunicado s.56(1) PACE***

The literal meaning of incommunicado is 'deprived of means of communicating with others'. In reality a detained person can still have this right enforced, though not communicate directly himself with the person of his choice. PACE makes the custody officer responsible for the notification to a nominated person of the whereabouts of the detained person. It does not however, include divulging the reason for his arrest. Therefore officers may simply inform the nominated person that the detained person is in custody at a particular station without revealing details of the offence itself or grounds on which he or she is being held. Doing this prevents the detained person from talking directly to anyone outside the police station and in so doing reduces the possibility of unwanted disclosure of evidence to the detained person from the nominated person (where they are in possession of certain facts e.g. knowledge of evidence discovered during searches). Conversations held between the detained person and nominated person are likely to extend well beyond that which would have occurred if the police were notifying the person on his behalf. The discretion of the custody officer to allow the detained person to ring the nominated person himself will almost certainly depend on the views of the investigating officers. This right can of course be delayed in cases that satisfy Annex B of Code C and only where duly authorised by a Superintendent. The detained person is of course also entitled to a phone call in accordance with Code C, para. 5.6 although an Inspector can refuse this where Annex B applies. This provision extends to all arrestable offences not just serious ones.

• ***Right to legal advice s.58(1) PACE***

Although PACE provides for circumstances in which access to legal advice can be delayed (Code C, Annex B), in reality, the decision to delay access to all legal advisers is rarely if ever used. Specific solicitors or legal representatives may have attracted suspicion or concerns in the eyes of the police and representations made by officers to a Superintendent to prevent or delay them from acting for a detained person may, if grave enough, be acceded to. However, a detained person will certainly be offered the services of the duty solicitor scheme at that point before any questioning commences, as the police are conscious of the likely consequences of challenges to the admissibility of the product of interviews conducted in such circumstances.

The custody officer has no discretion in matters relating to the provision of legal advice. Even where a detained person changes his mind about taking legal advice having originally requested a solicitor it is for an Inspector to satisfy himself of the detained person's reasons having inquired into them (Code C, para. 6.6 d).

Maintenance of custody record – completeness and accuracy (Code C, paras. 2.3, 2.6)

There is a legal requirement to record certain information on the custody record but importantly no obligation to disclose facts such as evidence justifying arrest or information disclosed to the custody officer for authorisation of detention. The custody officer may record such matters at his discretion but where pre-interview disclosure is an issue, is likely to concede to objections from the investigating officer to the disclosure of such material.

Ascertaining and safekeeping of property (Code C, paras. 4.1, 4.2, 4.4)

The custody officer decides what property a suspect may retain, and can assist in developing the rapport between the interviewing officer and suspect by being seen to afford special treatment to that particular detainee.

Provisions relating to appropriate adults (Code C, paras. 1.4-1.7, 2.5, 3.7-3.14)

Although not apparent in the Codes, the custody officer has a degree of unwritten discretion when deciding whether to invoke the procedures that apply to mentally disordered persons. Many reported cases exist of mentally disordered suspects being interviewed in the absence of appropriate adults where Annex B of Code C did not apply. With juveniles however, no such discretion exists.

Conditions of detention (Code C, paras. 8.1-8.12, 9.2)

The custody officer is responsible for all aspects of the detained person's conditions of detention and has to ensure he is kept in proper circumstances and that the manner of his detention in no way acts as a means of eliciting a confession. However, as with the safekeeping of a suspect's property, the custody officer may have a degree of latitude in making a detainee's conditions more comfortable.

Disclosure of custody record (Code C, para. 2.4)

The Codes use the phrase *must be permitted*, which implies at the request of the solicitor – therefore a custody officer's discretion only extends to whether they make the offer as they cannot refuse a direct request.

Interviews (Code C, para. 12.1)

The custody officer has to decide whether or not to deliver a detained person into the custody of officers wishing to interview him or conduct further enquiries. The test should be whether enough evidence exists to charge the detained person and if a prosecution is likely to succeed (Code C, para. 16.1).

Visitors (Code C, para. 5.4)

The custody officer has discretion at Code C, para. 5.4 to allow visits to the detained person. These would usually only be permitted after charge to avoid hindering the investigation, and normally having consulted with the investigating officers. However, it can form part of an overall enhancing of the detainee's conditions.

Granting of bail and reviews of detention – post charge (Code C, paras. 15.1, 15.3)

The custody officer has to decide whether to grant bail on the basis of a number of factors, and if granted whether conditions are attached to such bail. Criticisms include the granting of bail in return for admitting offences, and illustrate the difficulties of maintaining objectivity in the face of demands for flexibility from colleagues.

Clearly there are subtle opportunities for discretion within the range of responsibilities held by a custody officer. The role itself is largely a construct of procedural rules and guidelines emanating from PACE and the Codes of Practice, yet the law remains flexible enough to allow police officers to negotiate some procedures to their advantage. Disclosure of information is just one of those areas, which the present research aims to explore. The detention process, as discussed above, is a pivotal stage in the control of information, with the custody officer himself playing one of the lead parts. A key factor in determining whether they are willing participants in this process is their perception of the custody officer role itself, and the degree of impartiality or objectivity they exercise in performing it. Their understanding of how PACE impacts on their wider responsibilities as supervisory police officers and whether the two types of responsibility can be

exercised compatibly is a question which will be considered by this study. To begin with, the custody officer sample was asked to comment on their notion of the role they undertake:

CUST-01: *“I’m there to ensure that people are legally booked in and that they are being detained legally; that they’re processed and dealt with properly while they’re here and that the correct decision is made with regard to their disposal. Running alongside that, is also a role of development of officers and ensuring that certainly those people younger in service, but, very often unfortunately, people older in service, do a sort of a decent and professional job ... ensure that people, while they are in custody, are processed properly.”*

CUST-03: *“Really your role is to run the show, just to make sure everything’s run smoothly ... you’re a safety net for making sure that for both sides. I know that’s probably the answer you’re supposed to give, but that’s the true answer. You’re making sure that the arrest’s lawful when you come in; you make sure people are dealt with fairly; sometimes you have to buck the officers up if they’re going a bit slow. And then I think one of the most important roles you’ve got, at the end of the day you’re making the decisions and what’s going to happen to somebody.”*

CUST-04: *“The primary function is being responsible for the welfare of detained persons; making certain that fair play is exercised by us. It’s a very formal role; any investigation where somebody gets arrested, the role of the custody sergeant, he’s there to make certain that nothing goes pear-shaped; that the rules are played by; that the person’s looked after properly; that they get what they’re entitled to, and that we don’t fall foul of the law when it comes to the potential court case.”*

CUST-07: *“The official line obviously is that we’re supposed to be completely and utterly independent and make sure that PACE is complied with, and we should get in no way involved in the investigation. That is a view that I hold very strongly and yet, at the same time, it can come quite strongly into conflict with your responsibility as a supervisory officer where you see an officer is not shall we say, dealing with a matter as well as he should be. Certain questions haven’t been asked; he’s not getting on with certain enquiries as he should or conducting some enquiries, so as a supervisory officer, yes you do offer them some advice, but basically I try and play it straight down the line, straight by the book. If someone isn’t dealing with it properly and isn’t pulling their finger out, then someone will walk. If someone hasn’t come in for the right reasons, then they won’t get through the door. So I feel very strongly that people should be lawfully arrested and should have their rights when they come in, but at the same time, if the evidence is quite obviously there that they should be charged, then that’s exactly what will happen, they’re remanded in custody. It’s a*

strictly by the book routine down here; it's the only and the safest way to play it."

CUST-11: *"You're responsible really for everything that happens in there when you're on duty."*

CUST-12: *"Responsibility for prisoners and a certain amount of supervision regarding the treatment and the charging and decision making process in relation to prisoners."*

The responses detailed in table 6.2 below, underline the enormous responsibility within the custody officer role for all aspects of a suspect's detention and treatment; predictably perhaps, since PACE pre-determines much of the role. A common theme however, was one of safeguarding their own and colleagues' position from falling foul of the procedural traps presented by PACE and the Codes, as illustrated by respondents CUST-04 and CUST-07 earlier. This sentiment was expressed by 60 per cent (9) of the group who considered the role included supervision of staff. Only 1 in 5 officers however, thought their remit as custody officers included the development of staff.

Table 6.2: Custody Officers – Perception of Role

Role	Number	Percentage
Responsible for detention and treatment	15	100
Development of staff	3	20
Supervision of staff	9	60
Decision making	13	86

Many officers in the sample wrestled with the concepts of impartiality and objectivity when faced with the custody officer role. What emerged was a picture of 'qualified impartiality' from the majority of the group, who recognised their affiliation and shared identity with colleagues. The responses that follow,

illustrate how this combines with policing experience to create a decision-making process based on subjectivity and embedded police values:

CUST-01: *“I try to ... but I think at the end of the day you’re a policeman so you perhaps have preconceptions about certain things ... in decision making, I sort of try to be as impartial as I can, which sometimes means you make controversial decisions that upset other officers ... I try to be as best as I can to make the most reasoned sort of decisions.”*

CUST-02: *“I’m impartial but with certain pressures from, shall we say, the investigation side to do the correct thing. I’m impartial in respect of PACE, but I think it would be wrong of any custody sergeant to say that he’s totally impartial and he’s not taking the side of the prosecution.”*

CUST-03: *“You try to be but I think you’ve got to remember at the bottom line, you are a police officer, you’ve just done ten years service on the streets before you got in there, and so you’re still a police officer; so I wouldn’t say you were totally independent, no.”*

CUST-04: *“To a degree, yes. You’ve got to be. I don’t think impartial is the right word, I think, objective is a better word. You’ve got to look at things objectively.”*

CUST-06: *“Oh yes. I’ve worked in total, sixteen, nearly seventeen months in the custody suite ... I’m currently not attached to a shift so I don’t have any affiliation to any officers, and I think the trouble that some custody sergeants have is that they can make, not being impartial, they can make decisions based on relationships with the shifts and the sergeants and the PCs, whereas I’m completely neutral, I don’t belong to a shift and so therefore I don’t really mind whether I upset them or not. You’re going to make decisions that are not going to be to the liking of other officers, but you’ve got to be fair and objective. If a detainee comes in and I really don’t like him, I try and put it to one side and think, ‘let’s just deal with this professionally’.”*

CUST-09: *“I think you’ve got to be impartial in most of it; I mean, you’re still a policeman, so I suppose you’ll never be 100 per cent impartial because it’s a bit of an ‘us and them’ really isn’t it; we’re policemen, but that doesn’t mean that I would deal with anybody other than by the rules. It’s certainly not worth risking any part of your job for, so they’re dealt with by the rules. I wouldn’t consider myself as impartial, I just deal with them in accordance with PACE.”*

CUST-11: *“As far as you can be, yes.”*

CUST-13: *“Over the years you learn to make the decisions which are impartial decisions, and you learn to detach yourself from the emotional side of somebody’s arrest and I think in time it becomes easier to become as*

impartial as you can possibly, but bearing in mind you're actually doing the same job as the people you come into contact with, that is police officers."

There appears to be an inherent conflict of interest facing custody officers when attempting to perform this role in an objective manner. They face potential discord with colleagues, solicitors and not least the detainees themselves in the discharge of their responsibilities, as illustrated below:

CUST-02: *"I think the conflict with solicitors is purely a cosmetic thing on the surface that will be said to you over the counter, as just happened to me, but when you speak to the solicitor away, he says, 'Well, I've got to say it anyway haven't I.'"*

CUST-07: *"You're constantly being torn between what youngsters want, what the prisoners want, what the Social Services want and what the solicitors want, and the appropriate adults. And then you get your supervisors of the custody suite wanting something else from you. As the old saying goes, 'it's impossible to please everyone all of the time?' and it's indeed best to try to please everybody, but at the same time if they don't like something and it's the way the job has to be run down here as far as I'm concerned. If it's the law that something has to be done, then it gets done. They can argue till they're blue in the face. We obviously have problems with people being brought in, not necessarily unlawfully sometimes, but erroneous. There tend to be minor breaches where the officer doesn't quite understand the powers of arrest concerned. I wouldn't say I've had necessarily problems with the officers themselves, but their supervisors; I've had one comment, 'What does it take to get a prisoner past you?' The problem is, if the arrest is unlawful, then it is unlawful. We obviously see the cold light of day in the custody suite, without the emotions out on the streets, and that's what we have to work to."*

CUST-09: *"You obviously find yourself in conflict with the police and the solicitors; people want people charging for things, you don't agree with it, you don't do it. Solicitors, they want their people releasing, again, you listen to what they say but you make the decision at the end of the day. Sometimes they don't like it. Sometimes the policemen don't like it, but it is your decision, that's what I get paid to do."*

CUST-13: *"Over the years the initial conflict came from senior supervisory officers who tried to impose their will and their views on you to try and get you to make decisions which were probably contrary to what you thought was correct. In some cases they were correct and that is a learning process. In some cases they were totally incorrect and I think they didn't fully understand; and in some cases, don't fully understand the requirements of the custody officer in terms of bail, keeping somebody in custody and*

wanting to allow things which you know were at variance with what you've been taught. It's a difficult situation to deal with when you're busy, but it's a decision you've got to take, you've got to be in charge, to a certain extent in control of all the decisions and all the things that go on around you, and take the decision that you think is correct based on what you're told."

CUST-14: "Uniform I don't have a problem with, they accept what's happening and give you as much information as you want, whereas CID seem to have a different agenda to what you want to go down. They have a different target and they'll change or give you what information they require for you to have to make their decisions, to be guided down their way instead of the way that should be impartial."

(Researcher): "Does it affect your ability to do your job then if they're not giving you the information you need?"

Reply: "It doesn't affect the job because you become wise to it after a while, so you have to dig deeper and ask for more information and not take it all on face value what they say; whereas with uniform you don't find the same problem. They're more open."

(Researcher): "Why are they more reluctant to tell you about the case do you think?"

Reply: "I think a lot of the time they wish to have a certain set of action, course of action, whether it's charge, bail or remand, and they perceive that it's their decision to make that, and therefore they give the information to you so you're led down that avenue."

CUST-15: "I've found that CID are very very sceptical about what they tell you, and with a view to that, you really have to start questioning and I've even said to somebody on tape 'hold on, I am part of the same team, please tell me the full truth of what's going on'."

(Researcher): "Why do you think they are withholding some of the information from you?"

Reply: "I don't know. Whether they treat it as their personal possession and they want total ownership over what's going on. I think you'd have to speak to the officers themselves as to why. In some cases I'm sure the grounds for their arrest are probably very very wafer thin and if they told you the full 'ins and outs' of it, probably wouldn't come in for the offence for which they've been arrested. Or you would strongly consider it and think about it more in depth and say 'hold on a minute, you're pushing the boat out too far'." (Sic)

(Researcher): "Could they be looking upon the custody officer as a sort of liability?"

Reply: "Yes, I wouldn't say a liability, I think they see us as a big hurdle to climb, or to jump over."

CUST-07: "Very rarely, in fact I'm pushed to think of an example at the minute, I very rarely find I have any problems with anyone to be honest, which is obviously quite beneficial to me."

The custody officer occupies a uniquely contradictory position. Whilst he can expect potentially conflictual contact with detainees and their legal representatives in all cases, much of the conflict he experiences emanates from police colleagues, as illustrated in the example of CID officers in CUST-14 and CUST-15 above.³⁰

The custody officer in CUST-15 went on to illustrate the pressure they face from senior officers to collaborate in interpreting legislation or procedures in favour of investigating officers. In this example, the officer was concerned about detaining a particular suspect beyond the period allowed for in the terms of a warrant of further detention issued by a magistrates' court:

"I said that if they hadn't got sufficient evidence to charge or he wasn't charged by ten o'clock he would be walking out. We wouldn't have the power to detain him. And in this instance the D/I (Detective Inspector) said to me, 'If you want to keep your stripes you won't be letting that man go'. And to be honest, still relatively new to custody sergeant, I went down once he'd told me that ... I understood where he was coming from, because he's got the pressures, he's got a man in for a serious offence, and it was a child as well which added more substance to it I think; and from that, I went downstairs and a D/S (Detective Sergeant) said to me, 'Hold on, just because it says that in black and white doesn't mean to say that is the way it goes' ... I went back upstairs and said, 'I'm still not happy', and the D/I said, 'If you want to do something about it, then I'll take you into the Superintendent', and everyone was shouting there, 'Don't go to see the Superintendent', but I thought 'I ain't happy, so I'll go in', and to be fair the Superintendent was as good as gold and he said, 'Right if you've got a problem, get onto the Clerk to the Court, it's a weekend'. And I phoned the Clerk to the Court and I was right, which was thankfully, there was like a big beat to my heart you know. But that's how conflict does happen, and sometimes you are very much on your own."

CUST-07 above was the only officer who encountered no conflict in performance of this role, whereas the remainder of the sample (14 officers) experienced conflict with other police officers. Respondents CUST-14 and CUST-15 are

³⁰ These findings appear to echo the results of earlier research conducted by Bottomley et al (1991: 102), in which over two-thirds of respondents from the city centre custody suite had experienced conflict with investigating officers over PACE procedures. Overall, including the outer city and rural sites, disagreements of that nature had been experienced by almost half the custody staff.

indicative of a particular problem that at times pervades the relationship between CID officers and their uniformed colleagues. The sample also revealed that more custody officers identified their fellow police officers as a source of problems in the custody suite rather than legal advisers or detainees themselves.

Table 6.3: Custody Officers – Conflicts in Custody Suite

Party	Number	Percentage
Police officers	14	93
Legal advisers	9	60
Appropriate adults/Social Services	1	7
Detained persons	3	20
No conflict	1	7

With so many of the sample experiencing conflict in their role as custody officers, particularly from colleagues, the question was raised about a future custody suite staffed by an independent agency, and whether it would provide a better alternative:

CUST-05: “I’ve thought about that in the past actually, and perhaps it might look better for prisoners if it’s not a police officer. However, if it is a civilian who’s doing it, he’s got to be highly qualified; he’s got to know that aspect of the law to make fair decisions.”

CUST-09: “I think it could be performed by an independent outside agency, but I don’t think they could do it any better. The only thing you would gain by it I suppose is the fact that the prisoner would think it was more of an independent person. I think you’ve got to have a certain knowledge - be a policeman really to do it - or a police background. We said this about other jobs; but we’re slowly handing everything over to other agencies. We said Group 4 would never cope, they’ve coped. They could do it, but not as well I don’t think, or certainly not better. They would get to our standard eventually of course.”

CUST-12: “I think it’s a primary police function bringing charges against people. I think a good custody officer is impartial; he’s got certain views; he’s got a knowledge of the law; he’s got knowledge of how the officers have

to work to get the results, to get a prisoner charged. He knows what enquiries they're going to make and he also has a gut feeling as well where, if it was somebody other than a police officer doing that job, it might not be aware of what the officers are having to do on the street to try and prove a case."

Despite the high levels of conflict experienced by officers in the sample, no one was convinced the role of custody officer could be better performed by an independent outside agency, although 3 officers felt it may be possible in time.

Over half the sample (53 per cent), were clear this would never be the case.³¹

Arrival of detained person with arresting officer

Upon arriving at the police station, responsibility lies with the custody officer to decide whether continued detention of the suspect is necessary. In doing so the custody officer must first consider whether sufficient evidence exists before him to justify a charge for the offence for which the person has been arrested.³² This decision must be made as soon as is practicable after the suspect's arrival at the station.³³ If the custody officer determines there is insufficient evidence to charge the person at that time, he must be released either with or without bail, unless he has reasonable grounds for believing that his detention without charge is *necessary* to secure or preserve evidence relating to an offence for which he is under arrest, or to obtain such evidence by questioning him.³⁴ Authorising detention in such circumstances³⁵ should depend on the custody officer applying the *necessity principle*, as was the view of the Philips Commission,³⁶ and that

³¹ For a further discussion of this subject, see Coleman *et al* (1993: 34-35).

³² PACE, s.37(1).

³³ *Ibid.* s.37(10).

³⁴ *Ibid.* s.37(2).

³⁵ *Ibid.* s.37(3).

³⁶ The Royal Commission on Criminal Procedure had expressed concern about the problem of lengthy detention in police stations, despite it applying in relatively few cases (95 per cent of suspects were dealt with within 24 hours). As a result, the

‘detention would last only so long as it applied’.³⁷ The Home Secretary of the day, Douglas Hurd, reinforced this principle in stating that detention had to be ‘*necessary - not desirable, convenient or a good idea but necessary*’.³⁸ However, necessity should be interpreted in light of the pre-PACE decision in *Holgate-Mohammed v Duke*,³⁹ where the House of Lords ruled that a greater likelihood of confession evidence was a legitimate reason for a suspect’s detention at the police station. As Sanders & Young (2000: 181) note, ‘this decision legitimised a police working rule which was then cemented into the fabric of PACE itself.’⁴⁰

In the event that detention is authorised in accordance with s.37(2) above, the custody officer is required to open a separate custody record as soon as practicable for each arrested person,⁴¹ which must document all aspects of the arrested person’s detention and treatment. The custody officer must also inform the detained person of his continuing right to legal advice,⁴² to have someone informed of his arrest⁴³ and to consult a copy of the Codes of Practice. The custody officer must supply a written notice to the detained person setting out this information.⁴⁴

commission recommendations included the introduction of a statutory criterion governing the lawfulness of detention, which became known as the ‘necessity principle’.

³⁷ Op. cit. n.2 ‘The Balance of Criminal Justice’ at p.6.

³⁸ House of Commons, *Hansard*. Standing Committee E, 16th February 1984, Col. 1229.

³⁹ [1984] 1 All ER 1054.

⁴⁰ For a further discussion of the issues surrounding the necessity of pre-charge detention, see Dixon *et al* (1990: 128-130); Bottomley *et al* (1991: 88-89) and McConville *et al* (1991: 41-45).

⁴¹ Code C, para. 2.1.

⁴² PACE, s.58(1).

⁴³ *Ibid.* s.56(1).

⁴⁴ Code C, paras. 3.1 and 3.2.

The custody officer is required to make informed decisions according to the relevant information available to him,⁴⁵ a process that must be recognised by the arresting officer. The need to satisfy the custody officer of the grounds for arrest and the necessity for continued detention, therefore, involves a degree of disclosure of the facts relating to the case, suspicions held by arresting and interviewing officers and what further enquiries are proposed. Although by virtue of s.37(4) a written record must be made of the grounds for detention, no such requirement exists for recording details of the evidence justifying the arrest and secured to date. The detained person must be informed by the custody officer of the grounds for detention, as outlined in s.37(2) above, and a written record made in his presence⁴⁶ except where he is incapable of understanding what is said to him; he is violent or likely to become violent; or he is in urgent need of medical attention.⁴⁷

The question of where the divulging of grounds/evidence to the custody officer by the arresting officer takes place is important, and particularly if the suspect is present. How much is documented on the custody record, and what degree of control the arresting officer has over this are equally relevant. If the detained person is legally represented, the custody record can be inspected upon the solicitor's arrival at the police station. Subsequent legal advice may be influenced where the contents of the custody record include specific reference to evidence gathered in the course of the police investigation, and intended for use in interviews to come. This study therefore, sought to identify the method of transfer

⁴⁵ Changes introduced to the Codes of Practice in April 1995 prohibit custody officers from putting questions to the detainee regarding his involvement in any offence (Code C, para. 3.4).

⁴⁶ PACE, s.37(5).

⁴⁷ Ibid. s.37(6).

of information between officers, what parties are present in the exchange, the extent of information given and recording practices adopted.

In the Force in which the research was conducted, the nature of the interactions between arresting officer, custody officer, suspect and legal adviser upon arrival at the station are partly governed by the physical arrangement of the custody suite. Each of the case officers interviewed explained how, on arrival at the police station, the detained person is placed in a holding area or 'chute' as it is known colloquially, where they remain until called before the custody officer.

D/CON-01: *"If the prisoner's okay, in the sense that he's not or she's not being abusive and violent, you go to a chute area, which is a holding area, which is all on camera and that's just before you go into a custody sergeant, and that's purely for the fact that you sometimes have just a volume of people being booked out of interview, booked into interview; people coming and going, being bailed; so you have to sit there and wait your turn."*

D/CON-02: *"You go to what we call the chute, or the waiting area by the custody suite, let the custody sergeant know that you're here, and you just wait for him then to deal with you in turn, and if it's full, you have to sit in the car before you can even move into the chute itself."*

D/CON-06: *"Initially you sit down in the chute waiting to be booked in, which can be five minutes or a couple of hours depending on how busy it is."*

The long delays in the holding area experienced by respondent D/CON-06 was echoed by many others in the sample. Some officers made use of this period awaiting the formal booking-in procedure to develop a rapport with the suspect:

D/CON-08: *"Sit in the chute and wait to book him in, which gives us a chance then, particularly if you're waiting for some time, just general chit chat, try and put him at ease a bit."*

P/CON-11: *"It depends which station you go to. You can find yourself sat with the prisoner for anything up to an hour, two hours, waiting to actually go into the custody sergeant and explain why you arrested the man in the first place. I tend to try and strike up a conversation with them at that stage;*

not so much about the offence, but just to get them talking to me. It could be about football, whatever they are willing to talk to me about I'll talk back to them. What I've found is then, when you go into interview, because you've already got him into talking mode, they find it easier to interview them afterwards because they're more willing to talk back to you."

There are many reasons why delays are caused in the custody suite. The increased accountability of the custody officer role means that their workload has to be properly managed to avoid breaches of PACE. The custody officer is the focal point in the custody suite environment, and the role demands he be fully apprised of all events or activities that affect detained persons in his custody. Meticulous records have to be maintained to account for these actions. With the advent of computerised custody systems and the growing amount of personal information required to conduct initial risk assessments of detainees, consequent delays are inevitable. But, despite the growing workload, the general principle remains that the custody officer has a duty to deal with persons in custody expeditiously (see Code C, 1.1 and 1.1A).⁴⁸ The police may seek to utilise this period of delay to develop bonds with the detainee for later use, but the act of waiting around for several hours may also, of itself, help to break down a suspect's resolve.

Whilst the detained person remains in the holding area in the company of an escorting police officer or civilian gaoler, the arresting officer meets with the custody officer in the custody suite area to explain, in detail, the reason and grounds for arrest away from the presence of the suspect. If the custody officer is satisfied with the circumstances of the arrest, and considers detention is necessary for any of the reasons given at s.37(2) PACE, the detained person is brought

⁴⁸ In the force where this research was conducted, it is usual practice for only one custody officer to be available at most sites. They are required to complete attachments of between 6 and 12 months.

before the custody officer where the reason and grounds for arrest are generally repeated in his presence:

P/CON-02: *“We arrive at the police station; the prisoner is put in a holding cell; the arresting officer would then go through to the custody sergeant and discuss the arrest and give him some background information, while the escorting officer ... would sit and wait in the holding cell before the custody sergeant is ready to bring the prisoner through.”*

P/CON-10: *“There’s going to be two of us obviously, so the arresting officer would go in and explain the circumstances to the custody officer whilst the suspect wasn’t there and then bring the suspect through and the normal booking-in procedure.”*

PACE does not appear to preclude arresting officers ‘briefing’ the custody officer away from the detained person, provided the matter is being dealt with expeditiously as highlighted above. This practice appears to be commonplace within this particular force, with 86 per cent of the case officer sample (26), describing this procedure as *always* or *nearly always* occurring, regardless of which custody suite they attended. It was characterised by the entire custody officer sample as ‘normal practice’. Indeed, some officers spoke of this procedure being taught on an in-house custody officer training course:

CUST-03: *“It’s something now that we actually train in this Force, when we went on the Custody Suite Course; that you get the details off the officer before you bring the offender in. We had someone from another Force with us and they don’t do that. They have to go straight in front of the custody officer straightaway and it’s all done from the start, in front of the custody officer.”*

(Researcher): *“What reasons did they give you on that training course for doing it the way you do now?”*

Reply: *“There may have been various reasons, but the ones that I can remember was the fact that you can know what’s happening, know what’s going on before you bring the prisoner through; get it right in your mind, make sure that you’re happy with it. It may be that the officer needs some advice; he might have brought someone in for something that’s non-arrestable and then you can say, ‘Right, well, I’m not going to authorise the search on that, however, you can re-arrest him on this’, and then you would advise the officer when we bring him through to the desk that you can re-arrest him on that and then you’d tell the prisoner that his detention is not*

authorised on his original arrest, however it would be on what he's subsequently arrested for. Again, it's the safety net, you're the goalkeeper."

CUST-10: *"To be honest, purely for the fact that's how I was taught on the custody officers' course. Plus the fact, and it has luckily only happened a couple of times, where if somebody comes in and I'm not going to authorise their detention, I think it's better to have a word with the police officer before that happens. But again, purely for personal reasons, in that I think it could be embarrassing to the police officer if he comes in and I say in front of the prisoner there and then, 'No, I'm not happy with those grounds, this chap's going to be released'."*

(Researcher): *"What reasons did they give you for doing that on the custody officer course?"*

Reply: *"To be honest with you, they said the phrase that they like to use, 'best practice nowadays', but I can't really think of any reason that it was given by the tutor to be honest. I can't really answer that. I'm not too sure why it was outlined if it was."*

Of the case officer sample, 19 officers (63 per cent) explained the reason for briefing the custody officer in this manner as to avoid disclosure of relevant material prior to the interview. Many of the remaining 11 officers (37 per cent) were unable to explain the rationale behind this practice beyond 'established procedure':

D/SGT-02: *"There might be certain issues that you don't want the suspect to know at that time. Obviously those issues will be brought to his attention at the time of interview; it could prejudice the enquiry, the subsequent interview that you're going to have with the suspect. He might prepare himself for a story."*

P/CON-02: *"I think it's just standard practice. It's nothing that's been ever said, 'this is how it's going to be done', it's just the way that I've been taught [by my Tutor Constable]."*

P/CON-03: *"To be honest with you, it's just the procedure that's been followed. Whether that's been explained to me I don't know; it's just a role that I've followed as in when I joined the job."*

P/CON-08: *"I think basically it's a time saver. He actually writes down the details and when you repeat them he checks that you've repeated the same details as you've already told him and he doesn't have to write it down and have the offender standing there for ten minutes while he writes it down."*

P/CON-10: *"I don't know. I suppose it depends on different sergeants. I would say most of the sergeants now do it that way. I suppose he wants to*

get a picture before the suspect comes in so that there's nothing embarrassing if he's going to refuse detention, then, it will probably get that sorted out before we actually do the spiel in front of the suspect, I suppose, I don't know."

The responses given by the custody officer sample were, on the whole, far greater in content and demonstrated both rational and intelligent justification in support of their actions. They provided a wider range of reasons for relying on briefings prior to authorising detention of the arrested person, than had the case officers, possibly due to their overriding responsibilities as supervisors.⁴⁹ Every officer in the sample included 'establishing grounds for detention' and 'avoiding disclosure to the suspect' in their reasoning, with 7 officers each giving further reasons of 'avoiding confusion' and 'presenting a professional image'. 'Avoiding a confrontation' was given by 5 in the sample, while 3 officers spoke of using this procedure to 'avoid an interview scenario' when the suspect is booked in as demonstrated by respondent CUST-05 below:

CUST-01: *"I prefer to do it, so that we can establish the grounds. The object, I would say for that is because, sometimes there may be confusion as to exactly what they've been arrested for, and the person may well be legally detained, but if the officers are a little confused, or the circumstances are somewhat confusing, then it gives the officer time to talk through the grounds and I can establish that there are legal grounds for the person to be there and so that when the person actually comes in, we present a more professional image as to why the person's there and there's no 'umming and arring'. Then I'm quite satisfied by then that the person should be there, and that really I've done that initial decision-making process in my own time. I'm not pressured by having somebody who, in a lot of cases as you well know, may be disruptive or whatever, and I've had the chance to make my decision that that person should be, I should book them in; and I can do that sort of peacefully on my own with just me and the officer there. So that's the way I do it.*

...There may well be - not in a lot of cases - but as, on some occasions obviously there may be grounds for their detention that we don't want to disclose to the person; certainly if we're talking about informants or, and various ways that we've gathered information about this person, that I need

⁴⁹ See table 6.4 below, for full details of the reasons enumerated by custody officers for briefings.

to know about but ... the detainee doesn't need to know about, so, but there are occasions, and obviously on those occasions I won't enter the full reasons in the custody record, or I'll make a pocket book entry or whatever. So again, there are reasons, ... I need to know the full grounds ... but on those occasions the detainee doesn't need to know the full grounds."

CUST-03: *"Sometimes they may come in with something that you're not sure it was even arrestable, so if you have a quiet word with the officer first you can have a quick look in your law books or the Internet, make sure you're happy, because quite often the officers don't give you the information you need straightaway and you have to pick it out from them or they give you too much, too little, and so you can sort all that out before you bring the prisoner in, and I think it looks more professional."*

CUST-04: *"There are times when I will want to know more information about the grounds for arrest than is necessarily going to be initially written in the custody record and is initially going to be told to the detained person. Obviously there's very good reasons for that. Very often to tell the detained person the full extent of the evidence against them at the outset could impede the investigation when it comes to the questioning side of things; because the purpose of questioning is to find out whether that person is telling the truth or not. When you start talking about 'phased disclosure' and things of that nature, occasionally there'll be things about the arrest and about the evidence against the detained person that I will want to know about that the investigating officer will not want the detained person to know about. Also it can save the embarrassment of the arresting officer as well because sometimes if he comes in and he says 'A, B, C, D' and I'll say, 'Hang on a minute, I don't think you've got grounds for arrest there'."*

CUST-05: *"There's no necessity for the officer initially to give me the circumstances in front of the detained person. I don't think that's beneficial because if he does and the detained person's there, it might entice him to make any comments or ask questions of the officer, which I don't think is appropriate, and it's not an interview situation."*

CUST-09: *"To be fair, because some officers don't get it right all the time in the way that they present the evidence to the custody sergeant; they ramble on about all manner of things. So you can discuss it with them first and then say to them, 'look, okay, the only thing I want to know when the prisoner comes in is the fact that he's been arrested for theft, and the circumstances are that the store detective witnessed him committing the theft and detained him outside'. Because some will go on forever about things that happened that are not really relevant. So if you get the facts before the chap comes in and then when the prisoner's there he just relates the relevant facts. Makes it look more professional I think when the prisoner comes in."*

CUST-13: *"The way that I've always gone about that procedure is to try wherever possible to speak to the officer first, so that if there's any information that we don't want to say in front of the prisoner, we get that perfectly clear for when the prisoner comes in. We don't want the prisoner*

to engage in a two-way conversation and we give him all our evidence and we have the interview in thirty seconds in front of the custody officer – that's not the way the job runs. The prisoner will come in; I personally like to get them into some sort of conversation; try and calm him down. Establish if he's juvenile. Establish whether he's got some sort of medical problem. I have changed my procedures slightly in that I used to ask the officer, this is what we were told to do, to get the officer to speak to the prisoner to establish the grounds for arrest. I don't think this is the right way to do it in a lot of circumstances, because it invites the interview situation which we want to avoid, and what I say now is to the prisoner, 'Do you understand why you're here? Why you've been arrested?' If he says 'No' I may ask the officer to explain it because I know that particular officer will explain it simply and easily in a way that's not going to invite a comment. Or I say to the prisoner, 'You understand why you've been arrested? Do you want it explaining?' and then I go on to try and get some rapport or contact with him to avoid the contact with the arresting officer who he's usually at variance anyway. The number of times the prisoner will come in and the person he hates more than anybody is the person who's just arrested him; I like to try and break that situation up."

CUST-14: *"Before the prisoner comes in I like to know what he's in for; I like to get the paperwork up to speed and the computer started. My idea is I like as little time with them at the front desk as possible. So the more I can get done prior to him coming in before me, less time I spend with the prisoner, so it's the quicker he's put in the cell; I'm not disturbed by what the prisoner's talking to me about and therefore the process is quicker, we've actually put them through the system and into the cell."*

It is worth commenting that the self-image of the police is also an important consideration in determining why briefings are conducted, and is one that goes beyond strategic issues such as disclosure of information.⁵⁰ Respondents CUST-01, CUST-03 and CUST-09 above, all place considerable emphasis on the need to present a professional image to avoid embarrassment. Greater access to legal advice and an overall increase in accountability on the part of custody officers may be among the driving factors behind this desire to present a competent image, and is borne out in the decision to conduct the briefing that precedes the formal booking-in procedure. The unpredictable nature of some detainees can present

⁵⁰ McKenzie *et al* (1990: 24) found many cases in which custody officers, unhappy with the circumstances of an arrest, appeared to expedite the processing of the arrested person and tried to ensure they would not be faced with such an unwelcome prisoner in the future by 'words of advice' to the arresting officer.

challenges in supervising the process. Advanced warning of potential problems through briefings can act to forewarn the custody officer, and as such, the decision to initiate these briefings is consistent with the need for control in the custody suite. With only one exception,⁵¹ the entire custody officer sample felt this decision was theirs to make; a view shared by two-thirds of the case officer group:

D/SGT-02: *“I will decide. I would go and speak to the custody sergeant.”*

P/CON-05: *“I would say that the custody sergeant has decided it is always done in that fashion, because it’s the custody sergeant who requests the arresting officer to go in first without the prisoner and give details; so it’s not the police officer who’s done the arrest’s idea to do it.”*

P/CON-06: *“It’s the way I’ve always had it done. I’ve always been asked to go through, tell the custody sergeant and then bring your prisoner through. Every single custody sergeant.”*

CUST-08: *“I’ve found, and it may be the fact that it’s been practice for some time, that it’s just common that that happens. I can’t ever think of a time where a police officer has brought a prisoner straight in; they’ve always come straight through, said, ‘I’ll be back in a minute’ to the other officer, and related the circumstances to me, so I would suggest It’s been done for some time and people have just got used to that happening.”*

CUST-09: *“I always do it, and to be fair they’ve got to know that I do it anyway; so they’ll say, ‘I’ll come in and tell you the score’.”*

One officer, an experienced Detective Sergeant, explained how on occasions it was to his advantage to present the grounds for arrest directly to the custody officer with the suspect present, avoiding the pre-briefing discussed above:

D/SGT-05: *“Again, it depends on my decision, or the arresting officer’s decision. Occasionally it’s in your favour to explain the full account in front of the suspect, because it’s then when you get a good reaction in front of the custody officer. You can get quite a good reaction from the prisoner, and if you stage-manage it correctly, it’s on video in front of the custody officer, which is occasionally better than being on tape because it’s videoed. You could use that in evidence.”*

⁵¹ The remaining officer felt that briefings occurred due to ‘established procedure’.

Another officer of similar experience gave a different view as to why he felt the suspect should be present on most occasions:

D/SGT-04: "It's more professional now. We should have nothing to hide from people who we're detaining, and they've got a right to know why they've been detained and what's been explained to the custody sergeant at the time. The only time I would speak to the custody sergeant without the detained person being present would be perhaps to enlighten them on a particular part of some evidence or information that would be sensitive should it be disclosed to the detained person, and I'm talking about potentially registered informants."

Table 6.4 below, summarises the reasons given by custody officers for conducting briefings out of the presence of the detainee. The demanding role of custody officer may require them to take positive steps to effectively manage the custody suite. Being briefed in this manner may be part of an overall strategy to cope with these demands, allowing custody officers to objectively review evidence and grounds for the arrest without the distractions offered by potentially aggressive, abusive or violent prisoners. Considerations such as the safety of others in the custody suite and preventing what may later constitute an interview from developing may also be paramount in the custody officer's mind. Nevertheless, collaborating with investigating officers in the control of information must seriously diminish the distinction between custodial and investigative functions so required by PACE.⁵²

Table 6.4: Custody Officers – Reason for Briefings

⁵² PACE, s.36(5).

Reason	Number	Percentage
Establish reason and grounds for arrest	15	100
Avoid disclosure of relevant information/evidence	15	100
Avoid confusion	7	46
Present a professional image	7	46
Avoid confrontation	5	33
Avoid interview scenario	3	20

When the detained person is finally brought before the custody officer to learn of the grounds for his detention, the custody officer, benefiting from a 'briefing' received from the arresting officer, is likely to have already decided upon a course of action without recourse to any comments offered by the suspect. What in effect takes place is the 'rubber-stamping' of the decision to authorise detention, made earlier in privacy, away from the suspect.

As mentioned earlier, detention should only be authorised at this point where it is deemed *necessary*, yet according to Sanders & Young (2000: 208), in every relevant piece of research, virtually all arresting officers were successful in having their suspects detained. McConville *et al* (1991: 55), commenting on this issue, describe the custody officer as expressing 'embedded police values through the automatic detention of suspects'. Similarly, McKenzie *et al* (1990: 23-24) noted that if the *necessity principle* was operating effectively as intended, the number of persons held without charge in police stations should have declined. They reported no such change in their findings and concluded that the authorisation of detention by custody officers had become a *de facto* rubber-stamping decision.⁵³

⁵³ See also, findings of Bottomley *et al* (1991: 116) and in Coleman *et al* (1993: 24).

This decision should be made on the basis of information supplied by the arresting officer, and reveals two interesting aspects of the relationship between them. Firstly, only a quarter of the officers in the sample (8) recognised the custody officer's need to authorise detention on the basis of *necessity* with the majority appearing to consider that the tacit authorisation of detention is implicit in providing the custody officer with sufficient grounds for arrest (see respondents D/CON-05, P/CON-08 and D/CON-11 below). The officers' actions would appear to give weight to the arguments proposed by Sanders and McConville above. Secondly, the amount of information given varies, with a minority of the sample (23 per cent) indicating they would reveal only the basic grounds unless questioned further by the custody officer:

D/CON-02: *"Just the basic grounds of the crime; the reason why I suspect that this person has done it. Keep it as simple as that; as long as the custody sergeant is satisfied that the grounds are there, that's all he needs."*

D/SGT-01: *"I may tell him what I think is sufficient for him to agree to authorise detention. If he wasn't satisfied with that amount of information then I may want to actually give him more and say 'look there is other facts'. But as long as he's satisfied that there's grounds for his detention, the less I tell him, the less chance of him inadvertently disclosing it to solicitor when making a phone call or something like that."*

D/CON-05: *"I tell the custody sergeant sufficient to warrant him keeping the person in."*

P/CON-08: *"Obviously what we need to tell the custody sergeant has to be sufficient so that he can justify the man's detention. We don't have to tell the custody sergeant about how many witnesses there are for example, or whether somebody's seen him do a particular thing, because that's not the custody sergeant's job. His job is just merely to make sure that the arrest is lawful; he's not involved in the investigation."*

The remaining 23 officers (77 per cent) said they would tell the custody officer everything he needed to know about the case:

D/CON-04: *“There’s nothing kept from the custody sergeant; you tell them what has happened, and what you’ve done to get to the point of arrest and why you’ve arrested them, etc. and he’ll decide whether there’s enough to actually book them in. Usually on the lower scale for a theft or something, the information isn’t quite right, then sometimes I’ve had prisoners refused and I’ve driven them home again, because there was insufficient to book them in. It’s all open to the custody sergeant. We wouldn’t keep anything back, (a) because it’s wrong, but (b) if it causes a problem later on, because you’ve got to think Crown Court all the time and any little tiny thing that you do that isn’t right, could get the whole thing thrown out.”*

P/CON-02: *“In my experience, the best thing to do is tell him everything. He can only come back at you if you try and keep things to yourself.”*

D/CON-11: *“Most times I’d hope that we’d give them sufficient evidence anyway, so that he could authorise detention, but if he doesn’t, he would ask some questions to make it okay in his own mind that he’s got the grounds for detention.”*

D/SGT-06: *“I personally tell him everything. They’ve obviously got a role under the Codes of Practice to ensure the safety and welfare of the prisoner whilst he’s detained; but they’re also supervisors within this organisation, so I think, like it or not, they’ve also got a management role. They’ve got to be impartial with regards to the prisoner, but they’re also part of that decision-making process; certainly as the day goes on where we’re looking at extensions, going to court or taking samples, non-intimate or intimate, from the prisoner. These people who work in the custody suites are highly trained in that area, so they’ve got a valid input to the investigators, so if you don’t tell them everything basically they can’t make it.”*

Some officers, notably D/SGT-01 above, appear to consider the custody officer as a potential *liability* when contemplating disclosure of material evidence. They are circumspect about releasing information that may undermine the strategy for interviews to follow. For their part, custody officers do run the risk of inadvertently revealing aspects of the police case, particularly when considering the inherent difficulty they face in liaising between case officers and solicitors.

Some officers took steps to reduce the possibility of inadvertent disclosure by including the *pre-briefing* of custody officers into the planned arrest operation. By approaching the custody officer beforehand, they may benefit from his advice and

assistance over procedural concerns, but also increase the likely effect of securing the custody officer's collaboration in controlling relevant disclosure. This degree of control can begin with an initial briefing prior to arrest and extend through to entries on the custody record and subsequent interaction with legal advisers. The following respondent illustrates the first phase of this process:

D/SGT-06: "I work in an environment where we don't react immediately to these offences. It's normally a planned operation as part of an ongoing investigation, so we have the unusual luxury that we can prepare for these by finding out who the custody sergeant is going to be on a particular day, give them a full briefing, so when you arrive at the police station you can cut down the time because people are aware of what you're doing and what your expectations are and what your role is going to be.

...There are situations where, for example, the last one we did, we got to the scene; a man had been kicked to death in a flat. From witnesses we'd identified the suspect so we were given the task of fetching the suspect in. So we've shot straight out and he was arrested within hours. So circumstances like that you've not had the opportunity to brief the custody sergeant, but in most murder investigations suspects are arrested well into the investigation, so you probably do it the day before with the custody sergeant, so you're not wasting valuable time on the morning.

...Obviously the custody sergeant has to be satisfied that the person has been lawfully arrested and there's a need to authorise his detention at that police station, either to obtain evidence by questioning, or to preserve some particular evidence. Now we're not asking him to make that decision before the prisoner arrives, because that's something he has to make at that time, and that time will be recorded. However, if he's got the information beforehand it allows him to make the informed decision when the prisoner's there; you're not having to waste time going through the evidence with the custody sergeant whilst the prisoner's been sitting in the police car or in the chute. Certainly, if there's forensic issues, you're going to want the prisoner out of his clothing as quick as you can and into a suit, so it cuts down valuable time with contamination or the drop off of materials from his clothing."

As part of this process the officers may want to avoid the conversation with the custody officer being recorded on the custody suite video. In these cases the custody officer is usually taken out of these surroundings to be briefed in private.⁵⁴

⁵⁴ It is interesting to note however, that video recordings do not form part of the custody record and consequently cannot be viewed by a solicitor upon arrival at the police station, unlike the written custody record (Code C, para. 2.1).

D/SGT-01: *“If it was something that I didn’t want disclosing, or I wouldn’t want it written down in the custody record, and if I didn’t want it going on the video, I would do it out of the way and I’d take the custody sergeant out of the immediate vicinity. Because, just thinking of disclosure, that ultimately is disclosable, so we may want to consider whether to hold that back or not from the video. Depends how serious it is.”*

D/SGT-06: *“It would take place anywhere really; probably not on camera at that time unless they wanted it to be; it would be recorded in my pocket book or the custody sergeant’s pocket book and wouldn’t go on the custody sheet. I’ve not got a problem with it going on video at all because everything that we disclose to a custody sergeant would come out during the course of the interview, so we’re not hiding anything. There’s nothing dishonest or contentious about what we’re doing, but we normally do it somewhere quiet so the custody sergeant can concentrate as opposed to performing the other tasks that he would have to do if you did it in the custody suite.”*

Within the custody officer sample little concern was raised over this practice, which had been experienced by one in three of those questioned. However, as CUST-12 illustrates below, control of information for the purposes of later disclosure is not the sole motive for consulting off-tape. Custody officers are well aware of the part played by video recordings in the scrutiny of their decisions:

CUST-09: *“Quite often it will take place in the custody suite, so that the majority of it is actually done on video. So if a solicitor wanted to view what the briefing was beforehand, then it would be on video. On the rare occasions it happens in relation to extremely sensitive issues, for example where informants and things like that have been involved; we are talking of something that may well come in the realms of sensitive material and for a very, very serious offence, again where we’re looking at possible intimidation later; that could be done in the police surgeon’s room or down in the kitchen, basically, somewhere away from, not only the camera’s view but also the eyes and ears of anyone else; it will be done purely between the officer who’s brought the person in, or the investigating officer at the time and the custody sergeant. Nobody else would be privy to that conversation and discussion.”*

(Researcher): *“How would they justify that to you as a custody officer; taking you away from where it can be recorded?”*

Reply: *“Basically, for those very reasons; the fact that the information that they’ve given to you they do not want disclosing to the defence because of the sensitive nature of it. As I say, it’s normally informants’ locations, that sort of thing, stuff that you couldn’t disclose at court unless on a judge’s authority.”*

CUST-10: *“I don’t really have that much problem over it. The purpose of the cameras and tapes in the custody suite protect all parties concerned, but I’d be making some written reference in my pocket book to, obviously not the identity of informants, but the fact that information is used. I don’t think they’re telling me anything that, because even in those circumstances they wouldn’t tell me everything; they’d be telling me sufficient for me to be able to feel satisfied with the detention. I don’t have too much of a problem with it.”*

CUST-12: *“It was something, not of a dishonest nature, but something that would be better off said not being disclosed; and it might have been advice on whether there was enough evidence to arrest for instance. Whether it’s a bit thin, we don’t want that sort of thing going on tape if there’s proceedings taken later on. So they might say, ‘Can I have a word with you?’ and we usually go down the back and have a cup of tea; we do it down there really to cover the job, to cover ourselves for unlawful arrest, that type of thing; and procedures have to be talked about. It might seem to an outsider that something untoward was going on and I accept that, but I think if anybody involved me in that type of unlawful activity I wouldn’t have any part in it, but it’s a case of professionalism.”*

Although the custody officer’s duties to enter information on the custody record at s.37(4), as outlined earlier, extend only to the grounds for detention, i.e. to secure/preserve evidence etc., it appears common practice to accompany this information with a summary of the evidence, as presented by the arresting officer, justifying the arrest. However, in cases where non-disclosure is, or is likely to become, a feature of interviews to follow, the custody record summary may omit certain evidential facts or contain no information of that nature at all, as illustrated in the quotations below. Appearing instead is a caption identifying the location of where this information can be found for later reference. Most commonly it is recorded in the arresting officer’s or custody officer’s pocket book, although some officers spoke of attaching a briefing sheet to the custody record, which did not form part of the record for the purposes of inspection by solicitors.

D/SGT-01: *“It’s just really in relation to disclosure to solicitors and to the suspect when interviewing. The first thing to remember is that anything that’s recorded on the custody sheet, more than likely the solicitor’s going to examine the custody sheet immediately; so if there’s something on there that*

you didn't want the suspect or a solicitor to know about, well your method of approaching the interview is ruined to start off with. So from the very moment of arrest, I'm conscious now, even before going to the arrest, what am I going to say; satisfy myself that I'm giving the legal requirement in relation to who I'm arresting, so he knows what he's been arrested for; we just lead it through, and then down to the briefing of solicitors, what information I may want to hold back. Not just to trick, but also to show that 'Yeah, this person has committed the offence and that the information has come from him' and not just recycling information that has been disclosed inadvertently by the police.

...On a serious matter we'd have a typed sheet that we'd give as a statement of facts for him (the custody officer), that he may want to append to his pocket book or something; but not something that's disclosable on the custody record."

D/CON-04: *"We tell him the grounds and the circumstances for the arrest and I'd ask him not to put it on the custody record and to put it in his pocket book, because when the solicitors come to the police station they would ask to see the custody record. That happens a lot, and certainly the cases I deal with; and the custody officers agree to do that, and we discuss what they'll write to make sure that it's accurate, and then they'll just write in the custody record 'sufficient grounds' and put where they've recorded those grounds, which is in their personal book.*

...There's no secret about it. The reasons for that are for later on when you're doing disclosure for their solicitors, because we don't disclose anything on the first interview at all. We'll just ask for an account. It's all done with the video on. There's no secret. And the solicitors we deal with they know that, and they're used to it now along with the rest of the procedures that we do."

D/SGT-05: *"Invariably he'll want to record the full facts in the custody record - it varies from custody officer to custody officer. Again, that's your experience between you and the custody officer on how you've got on with them before and whether you know if they're fully clued up about disclosure and what they're going to write about disclosure and the facts of the case. On one case in particular, about fingerprint evidence, I asked the custody officer to make a record in his pocket book."*

(Researcher): *"Did he agree to do that?"*

Reply: *"After some persuasion, yes."*

D/SGT-06: *"With the advent of the Criminal Justice and Public Order Act the solicitors or legal representatives now have a right to examine the custody sheet upon arrival at the police station, so it's not that we're hiding anything, but because we're spending a lot of time and effort in managing the interviewing of a suspect, quite clearly we wouldn't want to divulge any of the content of those interviews before the interviews have taken place. So, for example, if you were to record on the custody sheet, '(name) has been arrested on suspicion of murder'. The reason for this, 'seen by numerous eye witnesses and forensically matched to the victim', then quite clearly the solicitor would know that before the interviews take place.*

...Obviously, they have a chance to negate any forensic issues; they could put themselves at the scene; put themselves in contact with the suspect, and counter any evidence that was going to be introduced by any of the witnesses; they could say they were aware on different points; change their appearance; come up with a reason why witness 'A' would make a false statement in relation to them because of some previous history or feud or whatever. The way we structure the interviews is it's broken down into little segments so we can go through each piece in detail and you wouldn't want the solicitor or the suspect to know what your line of questioning was going to be.

...There's no requirement for the custody sergeant to record anything on the custody sheet other than the grounds of arrest. The grounds being the offence for which he's been arrested, the victim, the time, the day and the place, and that's all that's required. We insist that nothing else is put down. There's no need to record anything on the custody sheet other than the grounds, so no evidence would ever go on the custody sheet, certainly not for the prisoners I deal with."

In many cases, where the strategy of *phased disclosure* is not employed, custody officers continue to record much of the evidence related to them by the arresting officer:

P/CON-10: "He writes it down on the custody record everything that I'm telling him; the grounds, and then the suspect comes in; some sergeants would read it from the custody record that I told him, or some others would get me to explain it myself."

CUST-12: "Well, the vast majority will go in the custody record. The only time I put entries in my pocket book is if there is something specific that we don't want disclosing at this time, because obviously anything that's on the custody record is disclosable straightaway; and as soon as the Legal Reps come in, the first thing they do is read the custody record."

CUST-15: "We've had some training on this. Normally I would write the circumstances of the arrest, then it would depend on speaking to the officer and this is maybe the reason why I spoke to them beforehand is, because of 'phased disclosure' now, is that I would speak to them and then on to what they want written down on the custody record. So it really is, one is to protect my back I would say, I write a lot, I would write down the full circumstances of that arrest. If the officers, because of disclosure, as in the custody record can be seen by a solicitor, I might write 'the grounds for arrest are in my pocket book', then write the full grounds down in there. But obviously, bearing in mind disclosure then, my pocket book is not for disclosure to the solicitor."

The summary recorded by custody officers is largely presented in a standard format⁵⁵ as illustrated by respondents CUST-10 and CUST-13 below. Many of the elements required to support the decision to arrest will be included, including witness evidence. The majority of those custody officers asked, felt the summary acted as an aide-memoir for future reference, justifying actions taken. Some officers also used this summary to brief other custody officers in the hand-over procedure at the completion of their shift.

CUST-08: *“When I first started in here I looked at other peoples’ custody records, or certain custody officers that I would know are more competent, without being funny about other sergeants, but I would basically look, and you adapt your own style, but I would look at peoples’ records that have been in the custody office before me.”*

CUST-09: *“Just enough. I don’t record a great deal, just sufficient grounds for me to authorise his detention. Provided there’s enough there to say ‘the grounds are there and the right arrest’s been made’, that’s fine.”*

CUST-10: *“I try to be as brief as I can, although looking at other custody records, I think I put down more than other custody officers do. I just try to recap what the arresting officer’s reason for arrest is; I go through a steady format all the time, because it enables me to make sure I don’t miss anything out. I look at the circumstances; say there’s a shop theft, ‘detained person seen in store, seen to select items off display, conceal within clothing, left store making no attempt to pay, detained outside.’ That is my standard form for a shoplifter. Obviously the circumstances may vary slightly on individual cases, but that would be my general format.”*

CUST-13: *“Before I record anything I want the story; I want to establish that I know what the officer knows and the grounds. Sufficient grounds for someone who in six months time to look at that custody record and know that I have considered that the grounds for arrest are there, and the circumstances which will relate to the investigation without going into too much detail; the fact that they’ve received a complaint by ‘999’ phone call that the person responsible has been detained at a shop by a store detective on suspicion of theft. That is sufficient, or something even more brief than that would satisfy me that if I looked at that in six months time I’d know what I’d done.”*

⁵⁵ McKenzie *et al* (1990: 24) noted the training of custody officers instructed staff to use the words of the legislation in order to indicate the ‘grounds for detention’ on the custody record. Only minor variations of the wording taken from the legislation were noted in the records they examined.

Having recognised the significance of entries on the custody record, it is, perhaps, not surprising to note that the officers most conscious of the effects of unplanned disclosure are those who influence and check its contents,⁵⁶ although half of the officers in the sample overall, said they did not.

P/CON-11: *“Certainly over the past year I’ve started to actually look at the custody forms because I’d become aware that a lot of the defence solicitors are actually asking for copies of custody records; so I want to know exactly what’s been written down, and obviously if there’s a mistake or there’s something that I don’t agree with, I would say at the time, especially nowadays, because everything’s on video tape, and again, defence solicitors are asking for them.”*

P/CON-04: *“No, actually I don’t. When you’re booking someone into the custody sergeant, you’re standing on the other side of the counter. The custody sergeant has his own domain if you like, on the other side, and the majority of custody sergeants don’t like or don’t allow other people to go behind that side of the desk - which is fair enough for him to be able to operate and do his job properly; and so unless you’re good at reading writing upside down while he’s writing it, the only other way would be to ask the custody sergeant to see what he’s written, and I would say that’s something I don’t do. I tend to trust to the facts that I give him, that they are the facts that I recorded, but I feel fairly confident because there’s tape recording and video recording in the custody office, so there is that safety factor there anyway.”*

P/CON-06: *“No, I’ve never looked at the custody record”*

P/CON-13: *“Very rarely. As long as he’s happy for the detention and he’s wrote it, that’s fair enough.”*

The effect upon custody officers

The custody officer has a difficult role to perform. Every revision to the Codes of Practice brings with it a widening remit and new responsibilities for him to perform. As supervisory police officers they face added difficulty in trying to balance their detached role as ‘guardian of the suspect’s interests’⁵⁷ with that of educator, instinctively advising arresting or interviewing officers junior in rank.

⁵⁶ 76 per cent of officers, who regularly employed *phased disclosure*, later influenced or checked the contents of entries on the custody record relating to evidence supporting the arrest.

They must also recognise the conditions that constrain their meeting with these officers. PACE and the Codes of Practice place burdens on them to remain independent of the investigatory process, yet the perceived identity of interests with those officers using the custody suite inevitably leads to a loss or diminution of independence. Whether this is case specific or a general involvement is less clear, but with pre-interrogation disclosure in particular, it could be argued that the lack of any procedural framework – in the form of rules governing briefings between custody and case officers or recording practices for evidentially significant material – has facilitated their development. Much of the earlier research into the role of custody officers (McKenzie *et al*, 1990; Bottomley *et al*, 1991) fell short of suggesting that routine collusion occurs with their investigative colleagues. However, a clear picture has emerged from this study of a further relaxation of the strictness and independence with which it was envisaged that custody officers would perform their duties.⁵⁸ This point is further illustrated by several cases⁵⁹ in which, arguably, custody officers have become involved in the investigative process. In *Bailey* for example, the custody officer played an integral role in a staged deception with the investigating officers, resulting in the two suspects sharing a cell in which a listening device had been previously deployed. During the ensuing conversation, damaging admissions were made by the suspects, and were used in their subsequent conviction. The resulting appeal against the admission of this evidence was dismissed however, partly on the

⁵⁷ McConville *et al* (1991: 55).

⁵⁸ It should be noted however, that McConville *et al* (1991: 55) accused custody officers of ‘conniving’ with investigating officers in bending or breaking rules, if the resultant effect was to weaken the suspect’s position or give a further push to the emergent police case.

⁵⁹ See *R. v Bailey* [1993] 33 All E.R. 513; *R. v Roberts* [1997] 1 Cr. App.R. 217.

ground that the custody officer had not allowed the investigating officers to usurp his function within the meaning of s.36(5) PACE.

The custody officers in the present study appear to have reconciled their actions, in assisting the process of phased disclosure, by relying upon the argument that it is legitimate to pursue substantive justice, even where this is necessarily at the expense of procedural justice. As former Metropolitan Police Commissioner Sir Robert Mark commented, ‘When lawyers and policemen speak of justice they are not necessarily speaking of the same thing. The lawyer is often speaking of fair play according to the rules. The policeman is speaking of the establishment of the truth with which the system of criminal justice is not necessarily concerned.’⁶⁰ The legal environment that police officers work in has changed considerably since Sir Robert Mark’s days, yet where the law is flexible, officers will seek to secure an advantage. As illustrated in table 6.1 above, discretion exists within the remit of custody officers to accommodate their colleagues to the detriment of the suspect and is justified by them in many of the sentiments that follow:

CUST-04: “It’s not a case of aiding the investigating officer, it’s a case of making certain justice is served. It’s nothing to do with aiding the investigating officer. The whole purpose of the interviewing procedures is to try and test the truthfulness of what the person’s going to say. If it’s an innocent person, they’re going to come up with the right answers and they’re going to know the answers aren’t they, and they’re going to be genuine answers and truthful answers. There’s not going to be a problem. When somebody is guilty of what it is they’ve been brought in, they’re going to trip themselves up as they try to cover up and lie, and it’s just making certain that you don’t impede the investigation by blowing the whole of the evidence, ‘Oh yes, we must tell them all of the evidence all in one go’. And I think if even the custody officers were an outside agency they would have to know that these are the rules that we play to, regardless of anything. Yes, we’re responsible for the welfare of the detained person, but the reason that they’re in here is because we suspect that they’ve committed a criminal

⁶⁰ Sir Robert Mark (1973: 15-16).

offence and we're going to investigate that offence, and we're going to ask them questions and we've got to test what they're saying, whether it's truthful or not."

CUST-05: *"I'm not actually withholding evidence and I don't have to tell the detained person, give him all the grounds, as long as I'm satisfied there is sufficient to detain him; so I don't have to sort of disclose all that information."*

CUST-06: *"I don't see that there's a conflict of interest or conflict of impartiality at all. Certainly in my daily working as a custody officer I don't think I've ever come across it, and I don't feel I do, but I can see that others may think that you're not being impartial, that you're taking the side of the officers that have detained the person, but that isn't the case."*

CUST-07: *"The evidence doesn't change. The way you deal with the prisoner may, in relation to the evidence that you're given. Independent decision-making is important. Because an officer gets assaulted, it's quite easy to say, 'Oh bollocks!' like some people 'let's charge and remand him' and that's not independent. My role is to make sure that the prisoner gets what rights he's entitled to; that he's treated how it says, and then he gets charged on the evidence that is available or is potentially available to him. That's basically where the independent role comes in. If you deal with it any differently then you're not being a police officer and you're not being a custody sergeant. If you didn't have that conversation away from the prisoner, then there may be stuff that comes to your notice which is advantageous to the prisoner; there may be stuff that becomes detrimental to the prisoner. It's getting the whole view of everything and that's the whole point. It's making an informed decision, and if you decide to try and do everything in front of the prisoner you could well be getting out of the independent role and you've ended up going into an interview situation or stuff being disclosed that shouldn't, or him saying something that's detrimental; it's not being said in controlled circumstances."*

CUST-09: *"I don't have a problem with it. At the end of the day, we're after the truth aren't we? Find the truth in accordance with the rules, and I think that's fair. I have no problem with that."*

CUST-12: *"I think what I'm trying to do really is balance up the fairness if anything. I think everything is fair to the suspect and nothing is fair to the police officer, or very little. They're the rules that have been set down in stone and we'll have to comply with those rules, so really what I'm trying to do is make us fully aware of what our rights are, and those rights will sometimes involve me advising the officers on perhaps what they can and can't do. Solicitors sometimes actually want to read all the evidence, the statements, and I will say 'You haven't got to disclose those statements to him, but you'd probably be advised to tell him the contents of the statements'. Now why the solicitor needs to know all these intricate details before he goes into advise his client, in my mind, can be two reasons; one, as a genuine interest in the finer details of the case, and the other is to find a*

secure way around preparing him for an interview wrongfully, telling him what the prosecution case is before he's even questioned, and that's what I think is wrong. I try to give the officers back something and also preserve the interests of the officer legally and you've a risk of being sued for unlawful arrest, the Force."

CUST-13: *"We are not the investigating officer. We're not the disclosure officer. The existence of any information is a matter for the disclosure officer. We've got as much a duty to protect the rights of the police officer as we have the person detained. There's no PACE guide for the protection of the police officer."*

(Researcher): *"There's no conflict with the impartiality that you talked about on the one hand, and protecting information in the possession of the investigating officers on the other?"*

Reply: *"I don't think so. If someone wanted to challenge that, then obviously they're open to challenge it. Years ago there were no procedures laid down; gradually over the years we've acquired more procedures. We're not telling lies about somebody; we could well be protecting an informant, which I think is our duty to do that. I think that's a very important part of the job."*

As the writing up of this project was drawing to a close (November 2001), a highly significant development occurred in the Force hosting this research. The Assistant Chief Constable (ACC) having responsibility for the operation of custody suites, issued an instruction to all custody officers in the Force to cease recording the circumstances of an arrest on the custody record. From that point on, only limited grounds, e.g. theft from Tesco's, High Street on 22/10/01 would be recorded. No details were to be included of evidence justifying the arrest of the suspect. The ACC went to explain:

'This means that the interviewing officer can control the level of disclosure made to the solicitor and detainee from the outset, no matter the level of investigation. This may mean that some officers change their usual investigative practices and become more "phased disclosure" oriented'

Officers were reminded of the need to justify the custody officer's decision to authorise detention, and were instructed to record the circumstances in their pocket books, which the custody officer would subsequently sign. These facts

could then be disclosed on the prosecution file rather than in advance of the interview.

Conclusion

The arrival of the suspect at the police station and the subsequent detention process is a key moment from the perspective of disclosure, representing as it does, the point at which a second opinion is given to the actions of the arresting officer before detention is authorised. PACE and the Codes of Practice provide a regulatory framework for the procedure, defining the role and responsibilities of custody officer, in what could be called a *formal* model of the interaction. Contrasted with this model are the accounts provided by respondents from the both the *case* and *custody* officer groups, which illustrate how the police are able to negotiate the law without offending the literal injunctions of PACE. This is characterised in the strategies associated with non-disclosure of prosecution evidence, where officers have adapted existing procedures to safeguard and maximise their advantage over the suspect.

The environment in which detention and interrogation occurs has undergone many changes. PACE has significantly impacted on police accountability and provided increased rights and safeguards for suspects. The appointment of custody officers was intended to provide a critical review of the actions of colleagues, independently of the investigation. Yet, the picture emerging from the present study, in common with previous research,⁶¹ reveals how they exercise discretion in a manner indicative of partiality towards investigating officers, with many in the group recognising their affiliation and shared identity of interests.

The administrative responsibilities that accompany the custody officer role result in frequent procedural delays for officers using the custody suite. The use of holding areas for detainees allows custody officers to exercise greater control on movements within the custody suite. Such control is a vital ingredient in ensuring *professionalism* by all officers using the facilities. As a corollary, it allows the custody officer to meet with the arresting officer away from the detainee to discuss the grounds for arrest and continued detention. Where non-disclosure of evidence is an issue, this information is generally intentionally omitted from the custody record and is not revealed to the detainee when his detention is authorised.⁶² Although PACE does not preclude the use of such *briefings*, they demonstrate how custody officers actively assist colleagues by strategically collaborating in the control and recording of evidence, and its subsequent release to the suspect prior to interview. Respondents also described how the use of briefings act to forewarn custody officers of potential problems, and help to protect the professional self-image of the police by avoiding embarrassing situations.

It was evident, from the views of respondents, that providing the custody officer in these briefings with sufficient justification for the arrest, implies detention at the police station will follow. For the majority of the custody officer sample, the test for continued detention appeared to be based on the legality of the arrest as opposed to the principle of *necessity*. In effect, custody officers appeared to be providing little more than the *rubber stamping* of decisions taken by arresting

⁶¹ McConville *et al* (1991).

officers, and in so doing, were failing to represent a genuine review of the circumstances. Previous commentators on this subject (Bottomley *et al*, 1991: 88) have noted that pressure of work often makes it impracticable for custody officers to exercise their responsibility to assess the possibility of immediate charge, or the necessity of pre-charge detention, in the way the legislators envisaged.⁶³

Custody officers are by definition supervisors, and likely therefore to encounter conflict in reconciling the dual roles they occupy. There was a clear contrast in the agendas of case officers with those of custody officers, some of whom were regarded as a source of disclosure risk. Yet, many custody officers appear to have adopted a *facilitator* role, as described by McConville,⁶⁴ to exercise their discretion in a fashion designed to accommodate colleagues and weaken the suspect's position.

⁶² The instruction issued by the Assistant Chief Constable, which post-dated the fieldwork stage of this research, modified the application of this working arrangement to all cases.

⁶³ Bottomley *et al* (p.176-177) made it clear that workload pressures were not the sole reason for the development of these habits, and highlighted the pressure upon the role that derived from their relationship with fellow officers.

⁶⁴ See, McConville *et al* (1991: 40-55) for their discussion of the custody officer role.

7. INTERACTION WITH THE LEGAL ADVISER

The previous chapter described how police officers, employing strategies of non-disclosure, are successful in negotiating the regulatory code governing detention procedures at police stations. The collaboration and partiality of custody officers emerged as a pre-requisite for ensuring the effectiveness of this strategy. As defence lawyers begin the legal representation of the suspect, the need for custody officer co-operation with colleagues is extended. This chapter therefore, looks first at the nature of police interaction with legal advisers, the procedure associated with the adviser's arrival at the police station, revealing how the image or construct of the defence lawyer's role impacts upon the way officers perform their relative functions. It also examines the rationale behind the use of *phased disclosure* and the circumstances in which it is employed.

Studies have shown that the proportion of suspects receiving legal advice while in police custody has risen steadily following the introduction of the Police and Criminal Evidence Act 1984 (PACE) and revisions to the Codes of Practice.¹ Demand for custodial legal advice has also continued to grow since the introduction of the accreditation scheme for police station legal advisers in February 1995 (Bridges & Choongh, 1998: xii).² Indeed, as McConville *et al* (1994: 72) comment, 'increasingly ... the first point of contact criminal defence firms have with their clients has moved from the court to the police station

¹ See chapter 8 below for a discussion of research conducted by Bucke & Brown (1997).

² Bridges & Choongh reported a 13 per cent increase in the number of legal adviser cases recorded on claims to the Legal Aid Board.

immediately following arrest.' The importance of a solicitor's attendance at the police station, particularly for interview, is underlined by Cape (1999: 6):

'Police interviews are crucial, both to the police and the client. There are relatively few occasions when a lawyer would be justified in not attending them. The fact they are tape-recorded or video-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.'

The defence lawyer is under a duty to act in the best interests of his client,³ but concern has been raised in the past over the quality of legal advice given to suspects in custody, in particular the use of unqualified staff and the poor quality of the advice itself (see Dixon *et al*, 1990: 123-125). McConville and Hodgson's study (1993: 17 & 191), based on an observation of advice offered to 180 suspects in police detention, found that in three-quarters of the cases suspects who requested a solicitor were seen instead by a non-qualified representative. The term *legal representative* was itself found to cover a range of staff, including articled clerks, former police officers and others with no formal legal qualifications. These representatives generally lacked legal expertise and confidence in their dealings with the police, with whom they were prone to over-identify, particularly where the advisers were themselves former officers.⁴ Importantly, those staff offering advice, both qualified and unqualified, failed to gather information in sufficient quantity and quality as to effect the consequential provision of advice.⁵ Legal

³ Solicitors' Practice Rules 1990, r1.

⁴ McConville & Hodgson (1993: 33) described the 'close social contacts' that existed between solicitors' clerks and police officers, which spilled over into work settings. It became clear to McConville & Hodgson that some of the clerks cemented these relationships with 'information exchanges' about the case, which they consider had 'obvious benefits for the police but few for clients'.

⁵ McConville & Hodgson (1993: 90) found that in cases where advisers recommended silence in interview, the dominant reason in almost a half of cases was the adviser's lack of information.

advisers acted under a 'severe information deficit',⁶ from a failure to elicit details from the custody officer in the initial contact and reluctance on the part of case officers to release relevant information in their possession.

Criticism was also levelled at the 'non-adversarial' terms in which solicitors had effectively re-defined their role at police stations generally. McConville and Hodgson (1993) raised concerns about the legal notion of *equal terms* as it applied to the presence of an adviser during police interrogation. Rather than offering this position of equality through robust defence of their client's interests, the advisers' actions amounted to an administrative *watching brief*:⁷

*'Far from such individuals counteracting excessive police power, many of them, because of their 'law and order' ideologies, actually added to the imbalance of power against the suspect. Lacking any clear understanding of their role in the process, many advisers simply become part of the machine which confronts the suspect.'*⁸

Baldwin's study (1992b: 28-29) revealed further evidence of the non-interventionist role played by lawyers in suspect interviews. In two-thirds of cases, where a legal adviser was present, they said nothing at all during the interview.

Baldwin observed that:

*'When they did intervene, it was as likely to be to facilitate police questioning as to push their client's interests. In a few cases, indeed, they virtually played the role of a third interviewer.'*⁹

⁶ Ibid. at p.192.

⁷ This is a view endorsed by Coleman *et al* (1993: 28).

⁸ Ibid. n.6.

⁹ Baldwin (1992b: 28).

Baldwin found that interventions by legal representatives were ‘very much the exception’ with most doing little more than writing out detailed notes of what was taking place. His study revealed that once the interview had commenced there was minimal communication between the legal adviser and the suspect, describing the lawyer’s actions as that of a ‘neutral observer of the proceedings’.¹⁰

These studies have been brought up to date by the work of Bridges & Choongh (1998) concerning the effectiveness of the accreditation scheme for police station legal advisers. They found significant improvements in legal advisers’ performance in areas covering proactive information gathering from custody records and investigating officers; consultations with their clients; and legal adviser interventions during police interviews. They further noted that the scheme had ‘increased the self-confidence and standing of non-solicitor representatives, not least in the eyes of the police.’¹¹

The importance of the lawyer’s role, particularly during custodial interrogation, was emphasised in the case *R. v Paris*,¹² where Lord Chief Justice Taylor, commenting on a false confession resulting from considerable police pressure, said at the successful Appeal Court hearing:

‘Short of physical violence, it was hard to conceive of a more hostile approach by officers to a suspect.’¹³

¹⁰ Ibid. at p.35.

¹¹ Bridges & Choongh (1998: 143).

¹² [1993] 97 Cr. App.R. 99; the other appellants with Anthony Paris in the *Cardiff Three* were: Yusuf Abdullahi and Stephen Wayne Miller.

¹³ Ibid. at p.103.

The passive role played by the solicitor representing Miller also attracted criticism:

*'...the solicitor who sat in on the interviews seemed to have done that and little else ... we can only assume in the present case the officers took the view that unless and until the solicitor intervened, they could not be criticised for going too far.'*¹⁴

Recommendations made by the Royal Commission on Criminal Justice¹⁵ (RCCJ) led the Law Society to introduce the 'accreditation scheme', which was the subject of Bridges and Choongh's study above, and the publication of a set of police station training manuals for legal representatives,¹⁶ aimed at improving standards for advisers. The main text of the training manuals *Becoming Skilled* contained a set of guidelines for use in the context of custodial legal advice. It described the five aims of *skilled defence* as:

- To investigate the prosecution case – obtaining information to assist in the current and future conduct of your client's defence.
- To avoid your client giving evidence which strengthens the prosecution case – and so increase the likelihood of an acquittal if he or she is charged.
- To influence the police not to charge your client because:
 - their evidence is not strong enough;
 - they lack admission evidence from your client.
- To influence the police to accept your client is not guilty – requiring them to continue their investigations with respect to someone else.
- To create the most favourable position for your client if he or she is to be charged – so that he or she will:
 - be found not guilty; or
 - have mitigation if he or she pleads guilty.

¹⁴ Ibid. at p.107.

¹⁵ 1993, Cm 2263 at par.61, p.38.

¹⁶ Shepherd (1996) 'Police Station Skills for Legal Advisers'.

[*Becoming Skilled*, pp.2-3]

Significantly, in terms of disclosure, the manual describes how legal representatives can achieve these aims by basing their advice and action on the fullest possible understanding of:

- police suspicions concerning your client;
- police conduct towards your client from the moment of arrest to the present moment;
- the police investigation, including any interviewing of your client;
- information and evidence in the possession of the police;
- statements made by your client at, and following, arrest;
- the police view of your client's case in terms of possible or intended decisions;
- the police assessment of your client;
- your client in terms of his or her:
 - state of mind;
 - vulnerability;
 - version of events;
 - understanding of, and perceived liability for, the alleged offence;
 - legal position;
 - options and decisions concerning his or her response to police questioning.

Much of the legal adviser's understanding of the case against their client is based therefore, on information he is able to gather from a variety of sources including police officers coming into contact with the suspect as well as official documents such as the custody record.¹⁷ The evidence presented in chapter 6 suggests that

¹⁷ See Ede & Shepherd (2000: 326-7) for a discussion of the detailed analysis of custody records by police station legal advisers.

custody officers routinely record additional material on the custody record, in support of the arrest, beyond that required by s.37(2) PACE. The existence of such information and its availability may be of great value to legal advisers (see Cape, 1999: 127).¹⁸ However, where custody officers follow instructions or requests from colleagues not to enter information of this kind in custody records thereby preventing disclosure, they may, in some cases, be regarded as taking an active role in suppressing evidence.

As custody officers generally represent the first point of contact between the police and legal advisers, it is to be expected that working relationships between them will develop over time. The present study aims to examine whether this relationship acts to undermine strategies employed by interviewing officers to control the release of information, as a result of injudicious disclosure through over-familiarity or the adoption of an impartial stance.

Initial contact

All persons coming into police detention are permitted to consult, in private, with an independent solicitor, free of charge.¹⁹ As discussed earlier, this right may, in certain circumstances, be delayed but never denied altogether.²⁰ The notification of this and other rights and entitlements is given to the detainee by the custody officer at the point detention is authorised under s.37(2) PACE. The detainee may specify a particular solicitor of their choice, or in the absence of this, be offered

¹⁸ See Chapter 6 above for a discussion of entries made on custody records.

¹⁹ PACE, s.58(1); Code C, para. 6.1.

²⁰ Code C, para. 6.5 and Annex B.

the services of the duty solicitor. In the event that the detainee wishes to waive his right to free legal advice, the custody officer has to enquire into the reasons for this and document them on the custody record (Code C, para. 6.5).²¹

Requests for legal advice, as with all obligations falling to the custody officer, should be carried out as soon as practicable.²² In adhering to this responsibility, the present research found that 93 per cent of custody officers described the initial contact with the detainee's legal adviser generally being made by themselves or a civilian custody assistant on their behalf. Once the custody officer has made the initial request for the legal adviser's services, the detainee is able to talk to their adviser in the privacy of an enclosed booth (referred to as the PACE phone). For reasons of safety and security, the booth is normally located within the view of the custody officer and other police officers in the custody suite who are able to observe the suspect during the call. At some point during the initial telephone contact from the custody officer, the suspect's details and other information concerning the arrest are usually passed to the legal adviser. Asked what form that information took, the custody officer sample commented as follows:

CUST-01: "As little as possible on that occasion. I always work on that basis, because I don't know all the facts and I don't know exactly what the officers want to disclose, so I'll give the details of the person, what they've been arrested for. Sometimes, a lot of solicitors won't ask for anymore than that; occasionally they'll ask for some details and then I'll only give them the details that are on the custody record ... [A] lot of the time I do things myself because then I know what's been said, but certainly the instructions are passed. When I work with custody assistants, they just give out the details as per the custody record and nothing else, and if they ask any other questions it's just that they don't know anymore than that."

²¹ The revised Codes of Practice, introduced on 10th April 1995, place this additional requirement on the custody officer.

²² Code C, para. 1.1A.

CUST-03: *"It depends really. The solicitor will want the basic circumstances and I'll tend to give them the circumstances that I've got on the custody record, because the solicitor can come and view that when they come. Sometimes the solicitors will fish for a bit more and sometimes solicitors will get more off inexperienced officers than they want to give out. Inexperienced officers will probably divulge their hand much too much to a solicitor."*

CUST-04: *"I would refer to no more than was already recorded on the custody record. If there was anything extra that the officer was holding back for disclosure later on, then the solicitor certainly wouldn't be told that."*

CUST-05: *"I don't give any more information than is recorded on the custody record. If it's sensitive then I tell the solicitor that 'the arresting officer or the officer in the case will brief you fully'."*

CUST-09: *"Anything that I've been told really; everything that the solicitor wants to know. Obviously that solicitor has got a pro-forma that he goes through, and he goes through it: What time was he arrested? What time was he at the police station? Normally they go through it bit by bit; What's he been arrested for? What's the grounds for detention? Then they'll speak to the prisoner."*

(Researcher): *"Who decides what is divulged?"*

Reply: *"It's a bit of a question and answer thing. I think that they've got a pro-forma that they go through and I obviously decide what grounds I tell him and the reason for the arrest. There's very rarely any reason to hold anything back. I can't think of any examples where I've had to say 'I'm not telling you that'."*

CUST-10: *"The person's identity; address; time of arrest, time of arrival, detention authorised and reason for arrest. They may well ask me on the phone what are the circumstances, again, depending on the sensitivity of the enquiry, you will either disclose 'Proceeded to enter store, etc. etc.' or 'Well, I'll leave that one to the investigating officer to tell you'."*

(Researcher): *"How do you decide on when to tell the solicitor that additional information?"*

Reply: *"I think in consultation with the officer who's dealing with the case."*

CUST-15: *"It depends again. If it's a basic offence that there is no problem in being told the full circumstances, I will tell the full circumstances of the offence. If it's a major offence and we are going for 'phased disclosure', I will just say 'This person's been arrested for whatever'. I think there are some solicitors who will try and question you to the nth degree about it and I will say, 'I think you're going to have to take this up with the arresting officer and they will disclose to you as much as they feel you need to know at this stage'."*

The sample as a whole provided a near even split in terms of what they were prepared to release to the legal adviser during this initial contact. Just over half the group (8 officers) restricted themselves to details of the evidence as recorded on the custody record, illustrated by respondents CUST-01, CUST-03, CUST-04 and CUST-05 above. Some of the comments made by this group of officers reveal an awareness of information control and the risk of undermining colleagues' interview strategies through injudicious disclosure. The remaining 7 officers in the sample said they would release additional information in certain circumstances, as demonstrated in the responses of CUST-09 and CUST-10.

The legal profession has recognised the value of pre-interview disclosure as necessary in helping to provide appropriate advice to clients in custody. In *Becoming Skilled*, legal advisers are instructed that the telephone exchange with the custody officer should be treated as an interview which they must 'consciously manage ... to obtain information essential to the defence of his or her client. Police officers and legal advisers must know what can be reasonably requested and disclosed in these interviews.'²³ Bridges & Choongh's observational study found that in 80 per cent of cases the adviser asked for, or was told of, the circumstances of the arrest. However, they did observe that 'initial telephone conversations between the police and advisers were very short and it was rare for matters to be discussed in any great detail.'²⁴ These findings support those reported earlier by McConville & Hodgson in their study for the RCCJ:

²³ *Becoming Skilled*, p.30.

²⁴ Bridges & Choongh (1998: 93).

*'Our observations suggest strongly that advisers are given, at best, only outline information on the nature of the police suspicion - 'suspected burglary', 'shoplifting', 'possession of drugs', 'cheque card offences' - and nothing further about the basis of the police interest.'*²⁵

The findings suggest that legal advisers are failing to obtain information in sufficient detail as prescribed by *Becoming Skilled*, with the manual attaching an obligation to the police in providing this information:

*"...the [custody] officer fails in his or her duty as an impartial custodian of the custody record if he or she refuses arbitrarily to disclose information."*²⁶

This view was not shared by officers in the custody sample, as demonstrated by respondents CUST-05 and CUST-15 above, who spoke of directing legal advisers to interviewing officers where they felt unwilling or unable to supply the relevant detail being requested. Given the importance placed on the content of the initial telephone contact with the legal adviser by the custody officer, particularly where a strategy of controlled disclosure is employed, it is surprising to discover that none of the custody officers made a written record of what they divulged. Instead they relied upon the custody suite video-recording to capture the contents of this conversation:

CUST-06: *"At the end of the day it's all on video anyway, and if he wanted to get copies of the video then I suppose he could do"*

CUST-07: *"It's all on video. Everything we've said is actually video-recorded."*

CUST-09: *"Only the fact that 'Spoke to Mr. So and so, advised of detention'; you sometimes put 'advised of detention and circumstances', but*

²⁵ McConville & Hodgson (1993: 39-40).

²⁶ Ibid. at p.32.

normally you would just put on the custody record, if he wanted a solicitor, you'd obviously note that you'd rang the solicitor, and the detained person has spoken to him on the PACE phone."

(Researcher): *"Why isn't it recorded?"*

Reply: *"Is there a need? You can record lots of things. You can fill pages can't you; and you don't want to do that."*

CUST-13: *"Not directly. There's the video record. There is no written record of what's gone on."*

Arrival at the police station

There is no fixed procedure dictating what happens when the legal adviser arrives at the police station to see their client. As Bridges & Choongh (1998: 141) noted, 'much of the police station encounter, ranging from disclosure by the police through to the conduct of interviews, is governed less by clear-cut rules as by conventions, some of which must be negotiated *in situ*.' To begin with, the attitude of the custody officer towards legal advisers in general may influence the degree of access granted to the custody suite itself. Some custody officers expressed concern about the level of familiarity afforded to certain solicitors and legal representatives by colleagues, preferring instead a more restricted and controlled regime in relation to their presence in the custody suite.²⁷ The relationship with legal advisers is discussed in detail below.

Custody suites have, as previously discussed, undergone many environmental changes since the introduction of PACE, and are now subject to constant monitoring through video recording in most areas.²⁸ At the sites covered in the present study, legal advisers had either dedicated rooms or utilised interview

²⁷ See respondent CUST-14 below.

²⁸ The use of video-recording in custody suites does not typically encroach upon the privacy of detainees in their cells. However, a study of their use in cells is currently being conducted by the Metropolitan Police Service.

rooms for the purposes of consulting in private with their clients, away from the scrutiny of video cameras. The legal adviser would typically be escorted into the custody suite where he would be met by the custody officer, who is usually located behind a large counter. It follows, therefore, that most advisers initially consult the custody officer while examining the custody record, in preparation for seeing their client or speaking to the case officers. The value of careful examination of the custody record to the defence lawyer in providing information on the police view of the history of the case is underlined by Cape (1999: 73), who comments that ‘it will contain information that may be useful in negotiations with the police, for example, the grounds upon which detention was authorised.’

Becoming Skilled places a particular emphasis on the encounter with the custody officer as an opportunity to extend the information previously obtained in the initial telephone contact,²⁹ yet custody officers in the present study reported little or no additional information being divulged during this period of consultation:

CUST-01: “Nothing. I can’t think of anything that they generally ask because they’ve now got forms that they will fill out on this part of this new franchising sort of thing; they just take the information from the custody record. Having seen some of these forms, they go into, make sure that they’ve had meal breaks and things like that; about a three page form that they generally fill in, from which they take all that information from the custody record, so invariably there’s nothing for them to ask. As they’ve filled their form in they’ve gone through sort of all the ifs, buts and maybes off the custody record.”

CUST-02: “They will ask me whether the officers have obtained the statements and what outstanding enquiries are probably to be done. What I would say to them is that the evidence here is sufficient, the grounds for me to detain them here, but any other information they need to know regarding statements will come to them from the officer in the case.”

²⁹ ‘Becoming Skilled’, p.75.

CUST-03: *“Very little normally. If we’re not busy they’ll ask. But when we’re busy, quite often we’re busy, you throw them the custody record, you get the arresting officer to speak to them and so quite often you don’t have much dealing with them at all. If you’re quiet, you might have a chat to them.”*

(Researcher): *“Would it go any further than is written down in the custody record already?”*

Reply: *“Occasionally when you know them well; mentioning no names, you might say ‘He’s a lying little such and such’ and it’s quite good when you have a chat with solicitors like that, who just probably speak to you as they shouldn’t and probably vice versa really.”*

(Researcher): *“So would you say that the relationship you have with a solicitor can affect how much you talk about the case?”*

Reply: *“I’m sure it does, without really realising it.”*

CUST-08: *“Very rarely they ask for anything. All they ask for is ‘When you’re ready can I see my client for a private consultation?’ That’s normally all they ask.”*

CUST-09: *“Not a lot; they normally say, ‘Can I see the custody record?’ and you give it them.”*

CUST-10: *“Not a great deal usually. The practice here appears to be that they will look at the custody record, usually the front page in respect of times and reason for arrest, etc., and they will look at the content of what will have gone on the log for the detained person. They don’t usually ask you a great deal else about it but other than, they usually come to the police station because they’ve been told that at such a time the interview will be taking place, so they’ve come by arrangement with the investigating officers so they will usually be present anyway, and they will be briefed by them then. It’s not usually anything they ask the custody officer at that point in time.”*

This is an observation shared by McConville & Hodgson (1993: 41) in their Runciman Commission study, commenting that:

‘In practice, advisers rarely ask custody officers for details about the detention of a suspect. Exchanges with custody officers tend to be brief, if not perfunctory, and little information of any value is obtained by these conversations.’

Bridges and Choongh (1998: 95) also reported in similar terms, noting that legal advisers ‘very rarely’ sought to discuss the details of the case with the custody

officer,³⁰ concluding that ‘neither advisers nor the police view the adviser/custody officer consultations as a necessary or desirable part of the police station routine.’³¹

For the police, there is an overriding need for control of case-related information, which requires the active co-operation of custody officers and civilian assistants to ensure that the strategy remains un-compromised. This was recognised by most of the sample interviewed, and demonstrated in their responses. The working practices of custody staff accommodate the needs of their interviewing colleagues to ensure injudicious disclosure does not occur. From the responses above, it would appear that legal advisers have also altered their working practices away from the recommendations in *Becoming Skilled*, aware perhaps that probing the custody officer is less likely to achieve their investigative objectives. Custody officers themselves remain resolute, with over three-quarters of the sample saying they would consult the interviewing officer before divulging evidential information to legal advisers particularly in serious cases where the strategy of phased disclosure was to be employed. The issue would be discussed either at the point the suspect’s detention was authorised or following specific requests for information, as illustrated by these custody officers:

CUST-01: “If there are things that they want withheld we’ll have already had that discussion when they first came in. If something’s on the custody record then it’s in play anyway, because as soon as they come in they’re

³⁰ In only 30 (14 per cent) of the 215 observed cases was the legal adviser seen to ask the custody officer anything at all about the case or the client. In over half of the 30 cases (n = 17) in which the adviser did consult the custody officer, nothing about the case or client was actually learnt. In only 3 of the remaining 13 cases did the adviser manage to obtain substantial details about the case from talking to the custody officer.

³¹ Op. cit. n.24 at p.98.

going to read that anyway, so that decision has already been made as to what will be withheld and what won't be withheld."

CUST-03: *"It's not often where we've got stuff that we don't really want to divulge. It tends to be the more serious cases, or it tends to be with forensic evidence, but very often the solicitor won't know anything about that so they won't question you about it. If you don't tell them they won't know and they won't know to start fishing. It's very rare I've got into a case where a solicitor wants to know more than I'm prepared to give. It's only happened a couple of times"*

(Researcher): *"You said then 'We', the information that 'We've' got; do you feel yourself as part of this process of controlling information as a custody officer?"*

Reply: *"I suppose so, I've never really thought of it before, but in circumstances like that, yes, because at the end of the day, I'm a police officer and if somebody is guilty I want them to be prosecuted."*

CUST-15: *"Yes, always. Obviously, basic thefts, no. It's normally fairly straightforward, but on the major offences, then, or the more serious offences, I always speak to – it's mainly the CID again and I will say to them 'What do you want disclosing?'"*

Other custody officers relied on the contents of the custody record to define the parameters for the information they were prepared to release:

CUST-05: *"No. I don't give any more information than is recorded on the custody record. If it's sensitive then I tell the solicitor that 'The arresting officer or the officer in the case will brief you fully'."*

CUST-08: *"I wouldn't generate that conversation. I would suggest that if there is anything that the officer wouldn't like divulging, and I was making a phone call, that they would tell me personally, and if they didn't, then I would just say again, 'This is what they've been arrested for' from the custody record."*

The issue for some officers was related to their independence, choosing not to consult the case officer before releasing evidential information to legal advisers:

CUST-06: *"No, I don't. That's where the impartiality comes in."*

Relationship with legal advisers

The working relationship between police officers and defence lawyers has been the subject of many previous studies. McConville *et al* (1991: 47) commented that the police view solicitors as ‘obstacles to gaining an admission precisely because legal representatives bring strength and support to the suspect’. They highlighted an important aspect of the solicitor’s role in coming between the suspect and police ‘inhibiting the creation and development of that bond between detainee and officer which is basic to many *effective* interrogations.’ This theme is continued by Cape (1999: 12), describing the ‘negative attitude’ held by the police towards defence lawyers on the basis that their involvement with the suspect is ‘bound to interfere with the crime control activities of the police.’

McConville *et al* (1994: 30-31) commented how ironically, many solicitors had close social relationships with the police, with defence firms often employing former police officers as *clerks* or *runners*. They were able to extend their working links to social functions, which were ‘functional in creating or sustaining a co-operative working environment for firms when ever their staff were called to give advice to clients held at police stations.’ The present study also found evidence of favourable working relationships with legal advisers in the responses of almost three-quarters³² of the custody officer sample:

CUST-08: “Much to my surprise, it’s a lot better than I would have thought it would have been, because of stories that have been related to me over the past about problem solicitors, for want of a better phrase. But again, I have to say that I haven’t really, I can’t think of an example of any problems at all. I think we have a very good working relationship and very professional as well.”

³² 73 per cent (n = 11).

CUST-09: *“Fine, no problem with it. There’s obviously one or two who are perhaps not as friendly as others, but quite amicable really. They’ve got a job to do, we’ve got a job to do and we both know that.”*

CUST-13: *“On the whole a good working relationship. I don’t have any problems with any particular legal advisers or solicitors ... Some firms of solicitors I think are more professional and more switched on than others. I don’t want to name any particular firms but they tend to be more professional in the relationship towards the police in general. They tend to ask about things that have taken place, things that are going to take place, make representations, and I think a lot of solicitors I’ve come across make perfectly good arguments for what they’re trying to say, and we are often left in the position where we’ve got to say to the officers, ‘I think the solicitor is perfectly correct and I think we’ve got to take this particular course of action’, which I think is right, that’s what they’re there to do, to represent the person and I think we’ve got to appreciate that. Again, different levels of competency and different levels of knowledge of officers tend to show through, and you tend to speak on behalf of the officers who are not as professional or knowledgeable as some of the others, and there’s still an element of police, including the custody officer, versus the solicitors if you like.”*

On the other hand, some officers chose to maintain a *distance* between themselves and the legal adviser, exercising greater control over the degree of access to the custody suite advisers were permitted:

CUST-14: *“It varies from custody sergeant to custody sergeant. Some treat them as if they belong there and stay in the custody suite and have cups of tea; others like myself don’t allow them in the custody suite unless it’s necessary. The only time I allow them in is for representations after interview, otherwise they don’t come in the custody suite for various reasons.*

... Some are perceived as just after money and they do anything and turn out anybody for any old case for just money, when they come with fags and toys and key rings and things like that to keep them happy and use them again. And others just play it down the line, they’ll come, deal with it, and go; different companies have different ways.”

A key aspect of the relationship between custody officers and lawyers is the degree to which it influences police working practices. Whilst the vast majority³³ of officers expressed an opinion that they remained unaffected by their contact with legal advisers in terms of decision-making (see respondents CUST-01 & CUST-09 below), some did acknowledge that they benefit from a less adversarial atmosphere founded on greater dialogue and mutual trust, as demonstrated by respondent CUST-07:

CUST-01: *“Not in terms of the outcome, in terms of decision making, no. It may affect how it’s put over to that person. Say you’re talking about keeping their client in custody and they make representations, the fact it’s somebody I get on with or somebody I don’t, wouldn’t have any influence on whether I kept their client in custody. I make my decision based on the facts, but it may differ as to how I then answer their representations in terms of the fact if you’re friendly, but if you have a decent relationship with somebody you’ll perhaps talk in one tone, as opposed to somebody who you don’t know or who you are unsure about; you may talk in a different tone, but the actual content of what I’ve said will be exactly the same.”*

CUST-07: *“Yes, very much so. The speed at which things get done; because you’re more friendly you tend to talk more about things and the way you do things, and you can appreciate how each other works ... so because you’re slightly more friendly with some of them, they know how you’re thinking, they know how you’re going to act and they can better adjudge to their client what’s going to happen to them at any particular point. Or, even sometimes, whether the client can trust you, because some clients think, ‘Oh, he’s just a police officer and he can do whatever he wants’.”*

CUST-09: *“It’s the same as prisoners. If they come in and they’re fine and they’re good, you’ll probably reckon more to them than if they were right arseholes. It’s the same with solicitors; if they treat you half-decent, you treat them half-decent. You might give them a little bit more courtesy, make them some tea, something like that.”*

(Researcher): *“Does it affect any of the decisions that you make?”*

Reply: *“No, I wouldn’t say that.”*

³³ 13 officers from a sample size of 15.

The crucial question remains however, whether the outcome of a better working relationship is greater disclosure of case-related information, either by accident or design.

CUST-02: *“No, it wouldn’t, because you’ve got to be careful you’re not lured into a false sense of security with people.”*

CUST-04: *“To give more information to somebody that’s nice and chatty and pally-pally? No I don’t think so, because I think you’ve always got to be mindful of the fact that some of them are nice and chatty and pally-pally because they want to try and get as much information as possible. I think you’d be very naïve to think anything different ... From their point of view they’re playing a bit of a game, and you do have certain people come in and you know that from their point of view they are just doing what they have to do and they know full well that their client is as guilty as hell and is going to get found guilty and then get prosecuted, but they still have to be seen to be playing the game.”*

(Researcher): *“Would you say that you are in general, guarded, what you’re saying to them and how you tell them?”*

Reply: *“Oh yes, you’ve got to be guarded.”*

CUST-07: *“The friendlier you are with them? I suppose to a degree, you probably are, but that basically comes down to how much you respect and trust them as a legal adviser rather than as a friend ... If somebody’s going to give you a hard time, straight down the line and want to play it by the book, then fine; play everything absolutely down the line; they will get what they’re entitled to and nothing else.”*

CUST-13: *“I think the answer to that is becoming yes, although not all solicitors who have a good working relationship, do I disclose everything or more. I will have a good working relationship with a solicitor but still not tell him everything that I consider to be relevant. A lot of legal representatives and solicitors are ex-police anyway; they try to be and often are, as impartial as they can be. They, from previous experience would know, or expect to be told certain things; as a custody officer I don’t always tell them what they expect to hear, because I don’t think it’s our position to do that. They obviously likewise, don’t tell us everything. I think that’s a two-way thing based on a bartering of information. The solicitor can be helpful for the client and to us and still do his job properly. I think there are times when we are able to make an easier decision by talking to the solicitor, whether that be in front of the camera or whether it be off camera, and I can’t see that that’s a problem.”*

CUST-15: *“No. To be honest, it doesn’t matter who it is; most of them fully accept it. The grounds for which I’ve accepted detention, I’ve always said*

that it's up to the investigating officer now to fully brief [the solicitor] on what they want to know; I'll leave it to them."

A significant proportion (almost three-quarters) of the sample dismissed the assertion that greater disclosure was an inevitable consequence of improved relations with legal advisers, although respondent CUST-13 above, is indicative of a system that accommodates a mutual exchange of information.

Disclosure strategy

Defence lawyers recognise that they cannot advise a client, facing custodial interrogation, effectively without having a good idea of the evidence in the possession of the police.³⁴ Cape (1999: 130-131) concedes, however, that the police are under no legal obligation to provide pre-interview disclosure of their case,³⁵ underlining instead that much now relies on the attitudes of the police and the ability of the adviser: 'The information the lawyer is able to obtain will depend in part upon the officer s/he is dealing with, but also upon his or her own skills of negotiation.' This is a view shared by Ede & Shepherd (2000: 258), who suggest that 'such questioning to negotiate disclosure is fundamental to the skilful defence of the client.'

In 1993, the RCCJ considered the issue of pre-charge disclosure taking the view that:

'The police should see it as their duty to enable solicitors to advise their clients on the basis of the fullest appropriate information. We appreciate that not all information can be released in all cases, but if no information is

³⁴ Cape (1999: 130).

³⁵ See also Ede & Shepherd (2000: 214).

*given to the solicitor and the suspect is confused or unclear, as sometimes happens, about what he or she is supposed to have done then the solicitor may have little choice but to advise the suspect to say nothing in answer to police questions. It is therefore in the interests of the police to make available such information they can and in the interests of innocent suspects if it helps them to clear the matter up more quickly.*³⁶

The Commission gave expression to this view in Recommendation 63, which stated:

'Code C should be amended so as to encourage the police to inform the suspect's solicitor of at least the general nature of a case and the prima-facie evidence against the suspect.'

The recommendation was not implemented, and neither the Criminal Justice and Public Order Act 1994 (CJPOA) nor the revised Codes of Practice place any obligation on the police to disclose case-related information before charge.³⁷ Yet, the limitations on the right to silence have, as Bridges & Choongh describe above, 'transformed the culture of police-legal adviser relations', as the police are left to anticipate non-disclosure as 'legitimate' grounds for advice to suspects to remain silent. Legal advisers have, in effect, been able to *negotiate* disclosure of the police case on the basis that inadequate release of information would leave them no alternative but to counsel silence in interviews. Bucke *et al* (2000: 24) found this a common theme in their interviews with police officers and legal advisers as part of a study examining the impact of the CJPOA:

'In a way it's probably helped us because it's thrown the emphasis back on the police in that we obviously require a disclosure before we advise clients. We're not going to answer your questions, because it is on tape that you're

³⁶ Op. cit. n.15, at chapter 3, para. 53.

³⁷ The only exception to this rule relates to the first description given of a suspect by an eye-witness, which must be disclosed prior to any identification procedure – Code D, para. 2.0.

not prepared to disclose what your evidence is. Therefore how can we advise the clients in a proper manner?' So that straight away throws the emphasis back on the officer.' [Legal adviser]

The change of emphasis was commented on by many officers in the present study.

Once the adviser has spoken to the custody officer and viewed the custody record it appears to be general practice - as reported by the whole sample - for them to receive a *briefing* or *case narrative* by the case officer before seeing their client:

D/CON-02: *"The first thing they want to do is look at the custody record, which they do. They then tend to ask the investigating officer, whoever, for a bit of a briefing, what's it all about. And then they go and have a confidential chat with their client."*

P/CON-06: *"He reads the custody record and then we go off into the consultation room and then the circumstances are relayed to him, and he then has a private consultation with the detained person, and then if he's happy with that we go off for an interview. Sometimes they want a further consultation with yourself to clear a matter up, and then you go off to an interview."*

(Researcher): *"This consultation that goes on between you and the solicitor, who asks for that to happen?"*

Reply: *"It's just accepted it happens. It's just a thing that I was warned that you had to go and do. You had to go and tell the solicitor the circumstances and your evidence, and then they can speak to their client, and then you went to interview."*

Bridges & Choongh (1998: 101) also discovered a near 100 per cent rate for such consultations between legal advisers and case officers. When they compared their findings with McConville & Hodgson's earlier work from 1993,³⁸ they described the change as representing 'nothing short of a major transformation in police station practices of both advisers and the police.'³⁹ The change does not appear to

³⁸ McConville & Hodgson (1993: 43) reported that in 45 per cent (n = 20) of 44 cases observed, advisers made no effort to obtain relevant information about the case from the investigating officer.

³⁹ Op. cit. n.24 at p.101.

be limited to the extent of factual briefing received, as practitioners' guidebooks now advocate the systematic questioning of relevant police officers:

'You must engage in active defence - using every opportunity to achieve the primary aim of investigating the nature of the police case, prosecution evidence and the police investigation.

You must be prepared to interview each officer with whom you consult in order to:

- *test the police case - particularly their reconstruction of the offence and your client's role within this reconstruction;*
- *identify gaps, shortcomings and selectivity within the prosecution evidence and the police investigation.'*⁴⁰

Faced with determined legal advisers, some officers, wishing to avoid revealing further detail than they consider necessary, are described as resorting to *blocking tactics*, such as ignoring the question or asserting that sufficient disclosure has been given.⁴¹ Jackson (2001: 170), commentating on the effects of comparative legislation implemented in the Province,⁴² notes that a study in Northern Ireland by the Law Society found that 'a majority of solicitors considered that they received sufficient information from the police on which to advise their clients on silence.' Many officers in the present study believed they had no real option but to provide a factual briefing to the legal adviser, as characterised by respondent P/CON-06 above. Another relatively inexperienced officer, respondent P/CON-07, provides an interesting insight into the changing balance of power in these encounters, striking a parallel with a court cross-examination:

⁴⁰ Ede & Shepherd (2000: 332).

⁴¹ Ibid. at p.244.

⁴² Criminal Evidence (Northern Ireland) Order 1988, Article 3, 5 & 6.

(Researcher): *“Would you answer everything they asked?”*

Reply: *“I think up to now I’ve answered everything that they’ve asked, I’ve answered truthfully. I don’t think I’ve kept anything back from them.”*

Given that the sample were aware the circumstances of arrest were written on the custody record and accessible to the legal adviser, it is surprising to learn that almost half of those officers questioned did not check the contents of the record before the briefing commenced:

D/CON-03: *“No.”*

(Researcher): *“How would you know that the custody officer hasn’t written something down that you don’t want to disclose?”*

Reply: *“That’s a good point, yes, never thought about that.”*

P/CON-02: *“You have a quick look at the custody record but the custody record is basically what’s been said, what you’ve actually told the custody sergeant, so you already know what’s on the custody record.”*

P/CON-06: *“No, I’ve never looked at the custody record.”*

D/CON-05: *“I usually watch him write it when I’ve told him. I like to see what he’s actually written, and sometimes they want clarification of the points.”*

The recording practices among the sample for the *briefing*, held with the legal adviser, appear to vary according to personal preference. Nearly half the sample made no record at all of the conversation, with the remainder (16 officers) divided between the handing of a typed or written sheet to the solicitor (6), use of pocket books (6) and notes made on rough paper (4). By contrast, legal advisers were reported as maintaining comprehensive notes of the exchange.

The extent of disclosure

The case officer sample were asked to consider the composition of material routinely disclosed to advisers prior to interview:

D/CON-02: *“The basic question they want to know, what it’s all about. We tend to have the information on the custody sheet, but we’re missing the details. Probably exactly where the crime took place, and all I do tend to give them at most is the very basic details, unless they start asking questions, then I’ll decide as we go on whether I’m going to answer that one or not.”*

(Researcher): *“What sort of things would you take into account before any decision?”*

Reply: *“You haven’t got to tell them anything, but if you don’t give them enough information, and they go ‘no comment’, they can always turn round and say, ‘Well, we didn’t know enough about the case to answer those questions; we didn’t know where you was coming from’. I do try to give information. If I then don’t think it’s going to hurt, the fact that this took place at quarter past nine one morning, why keep it back if it isn’t going to hurt. I don’t lie. If they ask ‘Is there forensic or is there fingerprints?’ I will say there is forensic evidence to support this case. ‘Is that fingerprints?’ I will say, ‘There is forensic evidence to support this case’. That can help you sometimes. If you say ‘I’m not saying’ it can make them shut up; but if you say, ‘Yes, but I’m not telling you what it is, where it was found or anything like that’, that can tend to help you in the long run, because they know we’ve got something, don’t know what, but at the end of the day, if they go ‘no comment’ then you’ve always got what you were told.”*

D/CON-03: *“My briefings at the station tend to be verbal briefings. You explain circumstances of the arrest, what evidence there is. Obviously, you will disclose what you think is necessary, what is pertinent for them to know about. If there are any aspects of the evidence that you don’t want to disclose then you will not disclose it until the interview. You’ll obviously have to tell enough to the solicitors so he can adequately advise his client ... you don’t have to disclose anything you don’t want to.”*

D/SGT-02: *“There’s nothing that I would hold from the solicitor. It would be generalised, which would cover everything of the enquiry. Because I know that if I keep something from the solicitor when interviewing his client that I haven’t disclosed to him prior to his consultation, he would only cease the interview and wish to confer further. If I have forensic evidence I would say, ‘Yes, we have forensic evidence, and I’ll put the questions to your client, as long as you’re aware we also do have forensic evidence.’”*

(Researcher): *“What’s the reason behind not going into further detail?”*

Reply: *“Because having known some briefs and some solicitors and some legal reps, I don’t really trust them in the sense that they could sit down with their client and develop a story, so you go and interview the client and he’s already prepared with a ready made story; and nowadays we see more and more happening where the suspects sit there with a prepared statement to read out, and that’s it, they won’t say anything else apart from that. It’s more and more going that way; more like the American style.”*

P/CON-02: *"If there isn't enough information on the custody record they might ask you what proof you've got and it's up to yourselves to tell the solicitor what evidence you've got."*

(Researcher): *"How do you decide what to tell them?"*

Reply: *"You've got to make a judgement. Obviously you don't want to give everything away, what evidence that you've got, but you've got to give some indication that you have proof of the offence but don't tell them exactly what proof you've got."*

(Researcher): *"How much are they entitled to know from you?"*

Reply: *"Realistically they're allowed to know everything really, they should know. It's a very tricky situation as an interviewing officer, because obviously you don't want to give them so much information to the fact that they can then go in and devise a strategy to come into the interview and basically have answers for the questions before you've even asked them in the interview. The solicitors normally know what's going on and a lot of them are ex-police officers and, I wouldn't say they help, but they will advise the prisoner of the evidence that they've got and work out a strategy of trying to, something for the best for their client."*

P/CON-04: *"As an example, I dealt with a grievous bodily harm arrest three days ago and it's a relatively serious offence obviously, and I made the solicitor aware upon his arrival at the police station, so the suspect was represented by a solicitor. The solicitor arrived at the police station and five minutes after his arrival I sat with the solicitor in an interview room in the custody office and actually spoke to him about the statements of evidence that had been given to me relating to the case and actually went through with that solicitor the points which actually were against the suspect, indicating he was guilty of the offence."*

(Researcher): *"Did you actually show him the statements?"*

Reply: *"No. I never actually have shown the solicitor the actual statement, and in fact I personally have never been asked to do so. Solicitors are entitled to have advance disclosure on behalf of the suspect, but as far as I'm aware, not at that stage. It's a specific request that's made to the Crown Prosecution Service and there are various procedures anyway to do with first and second disclosures of evidence under the various guidelines."*

(Researcher): *"But you would basically provide the solicitor with as much information as they requested or was available to you perhaps at that stage?"*

Reply: *"Yes, well, I think it's only fair to the investigations that I do, that's the right thing to do. If you don't give the relevant evidence that might come up in interview and the solicitor's suddenly aware of it, and wasn't aware of it previously, there's nothing to stop him from asking for the interview to be terminated anyway, and then to simply have another discussion with the client, to discuss what's been said. As I say, it really is a bit of a time wasting exercise, not to give relevant information from the outset."*

P/CON-05: *"In past experience, I don't normally withhold a great deal. I try and tell them as much information as possible without shooting myself in the foot so to speak. Obviously too much information can give them a good*

defence, but I give them as much information as possible. It's hard to get a fine line between not enough information and too much."

D/CON-05: *"It's a personal thing; I think probably a lot of officers do different things. I like to be quite open with them. As far as I'm concerned, if you've got a fair deal of evidence against a suspect it's only fair that you tell the solicitor most of that because it then avoids these stop/start interviews."*

P/CON-08: *"We give the defence solicitor as much information as he needs so he can formulate the defence strategy for his prisoner. Basically, we tell them what the alleged offence is; we can reveal all the evidence if we want to; very often we will, because obviously it makes it easier if he admits it during the interview. On many occasions we can reveal the evidence to the solicitor, and if it's a prima-facie case, then rather than sitting through a 'no comment' interview he'll make a full and frank admission which saves time, reduces time in paperwork, etc. I don't think I've ever been in the situation where I've not told the solicitor something because I didn't want him to know, because there's no point ambushing a prisoner on the interview with something you haven't told the solicitor, because he'll just stop the interview. So there's just no point to that."*

P/CON-12: *"Nowadays I would be inclined to tell them everything. I've been on an investigative interview course and on that I was told that, yes, the solicitor should know about everything. If you keep it from them then it's not best practice."*

(Researcher): *"Including the forensic evidence?"*

Reply: *"I would say so, yes."*

(Researcher): *"So you're happy to tell the solicitor about the fact that there is forensic evidence and was it is?"*

Reply: *"I wouldn't be happy to tell him, no, but I would do."*

(Researcher): *"Is there anything that you wouldn't tell the solicitor?"*

Reply: *"Like I said before, witnesses, there could be come backs on the witnesses, that if we told them the names then the prisoner would obviously know who they were and could go round and sort of intimidate them, so no I wouldn't. I would just say that we've had information from a witness and if they did ask the names, I would say, 'No, that's confidential'."*

Table 7.1 below, provides a breakdown of responses by officers to requests for case-related information from legal advisers prior to interview. The research methodology of the present study does not extend to establishing what information is actually revealed to legal advisers and it is important to place this caveat on any of the findings drawn. Notwithstanding this, almost a quarter indicated they would

generally provide extensive details of the case before the interview commenced, as illustrated by respondents D/SGT-02 and P/CON-12 above. Nearly half the group said they would provide a summary or bare details, with the remainder employing a particular adversarial strategy of incremental release known as *phased disclosure*, the tactics of which are dealt with separately below.

Table 7.1: Interviewing Officers – Information Disclosed

Amount of Evidence Revealed	Number	Percentage
Complete or extensive details	7	23
Summary or bare details	14	47
Phased disclosure employed	9	30

The findings in the present study appear to be at variance with those of Bridges & Choongh, who described legal advisers being supplied, in all but three cases, with *extensive details* of the case against their client. They defined this term where the adviser was ‘told the nature of the offence, when and where it occurred, and, at least to some degree, about the evidence which led the police to arrest the client.’⁴³

The contrast between studies may be explained by the relatively recent introduction of phased disclosure, which post-dates the fieldwork stage of Bridges & Choongh’s research.⁴⁴ However, Ede & Shepherd (2000: 334) caution legal advisers against expecting high levels of initial disclosure, warning instead that:

‘You must assume that police officers will disclose voluntarily the minimum considered necessary for you to advise your client as to his or her legal

⁴³ Op. cit. n.39.

⁴⁴ Officers spoke of the strategy being introduced around the start of 1998. The fieldwork in Bridges & Choongh’s study commenced in August 1996 and ran for 12 months.

position ... you need to persuade or to influence the officer to adopt a course of action that recognises your perspective.'

Reasons for varying disclosure

Over 80 per cent of those officers questioned⁴⁵ in the present study said they varied the degree of disclosure made to the solicitor. Of the reasons given, seriousness of the offence was the most prevalent although other explanations including the source of the evidence; the strength of the case; time constraints; likely disposal of the suspect and the perceived integrity of the legal adviser were also given by the officers in the sample.

Table 7.2: Interviewing Officers – Reasons for Varying Disclosure

Reason	Number	Percentage
Seriousness of the offence	14	47
Source of evidence – Forensic/Informant-based	10	33
Strength of case	10	33
Time constraints	2	6
Perceived integrity of legal adviser	2	6
Likely disposal of the suspect	1	3
Not varied	5	17

Seriousness of the offence (14)

The gravity of the crime is one of the principal factors in determining whether officers employ the interviewing strategy of phased disclosure, discussed in detail below. The study revealed that where relatively minor offences were concerned, officers considered there to be little benefit in withholding evidence from the legal

⁴⁵ 3 officers in the sample were not questioned on this matter.

adviser. Consequently, seriousness makes phased disclosure more likely to be used.

P/CON-04: *“Simply based on the seriousness of the offence and probably to a certain extent I base it on how much I might think that the suspect is aware of his guilt or not.”*

P/CON-09: *“If it was an extremely complicated case I may seek advice from the supervisor with regards to partial disclosure, if we’re talking about a very serious arrestable offence or a matter which is not straightforward.”*

P/CON-11: *“If it’s like a public order offence or damage or something which happened on a Friday or Saturday night, I don’t see any point whatsoever in withholding what information you’ve got at that stage, you’re not going to gain anything. The solicitor’s going to look at it and he may well go in and advise his client, ‘Put your hands up’.”*

Strength of the case (10)

There appears to be a greater willingness on the part of officers to reveal aspects of the case where the evidence against the suspect seems overwhelming. In these circumstances, the evidential significance of a confession is reduced, as illustrated by the following respondents:

D/CON-02: *“There was a large fight, it ended up with a Section 18 wounding, but there were so many witnesses, medical evidence, forensic evidence and I virtually told the solicitor everything, because there’s no point in [withholding any of it]. ‘It’s there, it’s recorded, it’s black and white, I’m telling you what I’m going to speak to your client about and he can virtually say what he wants to because it doesn’t matter, we’ve got so much evidence against him’. All I’m going to do then is ask him to put his account. That would be, yes, if you’ve got a lot of information, a lot of evidence already.”*

(Researcher): *“In that particular example, were you confident that he would admit his part in the offence?”*

Reply: *“Yes. He did.”*

D/SGT-01: *“If there’s overwhelming evidence that this person has committed the offence ... there may be little point in holding back. If, say for example, there’s an assault on the person, he’s named by three or four witnesses to be responsible ... and all you’re perhaps doing is you’re giving the person an opportunity to put forward any possible defence that they may have; give their account of what’s happened and therefore there’s no real*

necessity to hold anything back and you're just giving them the opportunity to comment on the evidence as it is and in view of that decide whether you've got anything to charge them."

(Researcher): *"Does the interview in that case take on less importance do you think?"*

Reply: *"Yes. Because you've got stronger evidence anyway so you're not looking so much for an admission."*

D/CON-07: *"A lot of it would depend on the case, and how much I actually had. If I had a lot and it was absolutely cut and dried, and it was really a matter of record what the person said on interview, then I don't see the problem in divulging the evidence you have, because all you're doing is delaying the person anyway, which you could be criticised for, obstruction due process or something of that nature. If however, my evidence is weaker, I've got to start utilising the skills within interviewing to get that last little piece to ensure that we get the person charged and get them to court. So I would probably on that occasion then disclose a small amount in the hope that maybe the solicitor would turn round to their client and say, 'This is what we've got, they're obviously holding something back, I don't know what it is', and whatever they would advise them would give me an indication on interview how I can go on."*

(Researcher): *"So in weaker cases then it's a ... strategy to give them a false impression of the strength of your evidence?"*

Reply: *"Yes, I would say it's more of a plan. It is a systematic plan that you have ... You're allowed to withhold or give them as much as you choose to see fit. If it then works to the good of the prosecution case then fine. If it doesn't you've not lost anything."*

Sources of evidence – Forensic/Informant-based (10)

Protecting sensitive sources such as informants is a common reason offered by the sample group. Informant policy dictates that the police have a *duty of care* towards registered criminal informants in ensuring their anonymity. Personal details or even the true identity of some witnesses are withheld from the suspect in order to reduce the possibility of retaliation or intimidation. The police are equally keen to protect the methodology employed in gathering evidence from other sensitive sources such as surveillance or by technical means.

The precise nature of forensic evidence is usually closely guarded in the early stages of questioning, to prevent suspects' negating its potential value through the production of a fabricated story, accounting for the presence of such evidence at the crime scene.

P/CON-01: *"With regards to forensics, I will normally just say, 'Yes, we have forensics from the scene' and won't disclose where it was, or what was found."*

P/CON-11: *"I think the one thing I wouldn't tell them is obviously if there was an informant involved. I might say 'Yes, I'd had information' and I would leave it at that. I certainly wouldn't tell them specifically there was an informant involved, at that stage of the enquiry at all."*

P/CON-13: *"If there's a fingerprint found at the scene, or inside a vehicle, I will just say that there is forensic evidence, but I'm under no grounds to say what that evidence is."*

Perceived integrity of legal adviser (2)

Concern was expressed that legal advisers could concoct elaborate defences for their clients based on information provided in the disclosure briefing:

D/SGT-01: *"Some people that you deal with on a professional basis you're more trustworthy to. Although you may struggle to evidence why ... you find [some solicitors] more reputable and you can perhaps honestly disclose more information to them, and some of them you think 'Well, I'm not going to disclose that information to you because I question what they're going to do with it'." (sic)*

As long ago as 1973, former Metropolitan Police Commissioner Sir Robert Mark voiced similar fears:

'We see the same lawyers producing, off the peg, the same kind of defence for different clients. Prosecution witnesses suddenly and inexplicably change their minds. Defences are concocted far beyond the intellectual

*capacity of the accused ... all these are part of the stock in trade of a small minority of criminal lawyers.*⁴⁶

Work by McConville *et al* (1994: 96-97) into the operating practices of defence lawyers found little evidence of this, although examples did exist of legal advisers 'openly engaged in coaching' clients with their responses prior to interview.

Time constraints (2)

The decision to adopt the systematic release of prosecution evidence relies on the availability of sufficient time and resources. It appears that such use is normally reserved for cases where the offence or prevailing circumstances warrant it.

D/SGT-01: "A lot of it comes down to time and staffing etc. If it's a shoplifter or something like that, are you going to be adopting the slower method of phased disclosure? It's going to lengthen the time that the person's in custody, you know, property has been recovered."

Likely disposal of the suspect (1)

The final reason is related to *time constraints* above. Where it is apparent to the officers that a prosecution is unlikely, complete or extensive details are disclosed to facilitate an admission and early disposal.

D/SGT-01: "If it's a juvenile that's got no previous offending history, and it's likely that they're going to be cautioned, then in the circumstances, you might just put the whole of the information there and do it. You know, you're unlikely to be going to court with a prosecution case ... That's not a hard and fast rule."

Attitudes to legal advisers

Baldwin's research (1992b: 41) found evidence of legal advisers setting great store in 'fostering harmonious relations' with the police, who for their part

⁴⁶ Sir Robert Mark (1973: 11).

appeared 'stubbornly reluctant to view lawyers other than as hostile elements in an interview'. One of the aims of this study was to record present attitudes to legal advisers by officers⁴⁷ given that frequency of contact has risen as an inevitable consequence of the suspect's increased access to legal advice (Brown, 1997). The case officer sample was, therefore, asked to consider whether talking to lawyers in the context of pre-interview disclosure was potentially advantageous or problematic.

Over 50 per cent of those officers questioned⁴⁸ (15) considered it an advantage to create a good working relationship with the legal adviser, particularly where the legal adviser was, in effect, assisting to facilitate the co-operation of the suspect:

D/CON-02: "You can use a solicitor to get your message across to the arrested person that 'You're in trouble pal'."

P/CON-05: "It helps you by obviously being familiar with them, relaxes you more, the different character and whether they're stern and asking lots of questions. If you know that they're going to do that prior to interview, because you've already gathered the information to think that that's the type of person they are, then you're expecting it prior to interview."

D/SGT-03: "It may shorten the time their client may spend in custody, if they're aware of some of the facts and may advise them to say, 'Right, get on with it, this is what you've done'."

P/CON-09: "I personally have not experienced problems with solicitors, and by and large, speaking to them before hand, I won't say it builds a rapport, but it seems to make an interview go more smoothly."

⁴⁷ See chapter 8 below, which deals specifically with this point in the context of interviews.

⁴⁸ Of the 30 officers in the sample, 27 were questioned on this point.

Significantly, within the sample itself, the proportion of detective officers who felt the encounter to be potentially advantageous was almost twice that of their uniform colleagues as illustrated in table 7.3 below:

Table 7.3: Interviewing Officers – Attitudes on Talking with Lawyers

View Held	Detective	Uniform
Actual or potential advantage	10	5
Actual or potential disadvantage	2	5
Undecided or no opinion	2	3

One officer in four (7) took a contrary view, with some inexperienced officers describing nervousness in the overall encounter with solicitors:

D/CON-01: *“There are some very honest legal representations and there’s some very dishonest legal representations, and I suppose you could say that the same about the police. I’d say 99 per cent are good – No, that’s not even fair is it? I’d say 75 per cent of your legal representation is really good and honest, but the other 25 per cent are completely dishonest and make the stories up for the villains.”*

P/CON-02: *“It’s quite nerve racking in some ways because obviously this is something that they deal with, the interview process, on a regular basis, where it’s only obviously a part of our job. I suppose it’s something, that if you’re not careful, there’s obviously reputations of solicitors and legal advisers out there that can trip you up and you can lose, basically, the offence and charging the person that you know is guilty of an offence.”*

(Researcher): *“Have you had any training on how to handle solicitors at this stage?”*

Reply: *“No. During my initial training we had a two day package on methods of the ‘PEACE’ package of interviewing a person, but we had no training on how to deal with solicitors or even having a solicitor within the interview process.”*

P/CON-07: *“When I first started I was a bit apprehensive because I always thought that probably they’re trying to get the better of you in the interview, but now it doesn’t bother us.”*

(Researcher): *“Did you feel a bit intimidated perhaps?”*

Reply: *“I think I did do when I first started, but now I don’t.”*

P/CON-10: *"I'd rather not do it; I'd rather go in with the suspect being blind if you like, or cold."*

The changing attitude towards solicitors and other legal representatives stems, in part, from an acceptance or acknowledgement by officers of the continued and increasing involvement lawyers have in dealing with suspects held in police detention, becoming an almost permanent feature in police stations, particularly in light of inferences from silence and revisions to the Codes of Practice. The question remains therefore, has the increased presence of legal advisers altered the relationship and *balance of power* with police officers?

D/SGT-01: *"The solicitors had got the upper hand before, but now it's more of an even keel."*

P/CON-04: *"Yes, I would say it's changed. Certainly in the last couple of years I believe there's less friction between police and solicitors from my own experience, and I personally tend to communicate better with the solicitors than years before."*

(Researcher): *"Did these pre-interview disclosure briefings occur before the law on the right to silence was changed?"*

Reply: *"Hardly ever, from my personal experience. I would on occasions have a brief chat with a solicitor just to give a rough outline of why I'd arrested his client, or her client, but I wouldn't have gone into anything like the amount of detail that I do now, and for the last year or two."*

D/SGT-04: *"[Before the introduction of inferences from silence] they would have been told the bare minimum and the interview would probably have been like a hi-jack; each piece of evidence would be held back and it would have been a surprise during the interview. And more often than not, resulted in a 'no comment'."*

P/CON-09: *"Going back some years, the solicitor would turn up, they would have a chat with their client and then everybody would go to interview. They wouldn't ask you about what you were going to say, but there seems to be more of this nowadays. Certainly from my perspective, whenever a solicitor turns up they always ask to speak to the officer in the case for a start off. It would be useful to have some direct input about force policy, about exactly what should and shouldn't be said to a solicitor."*

Most of the officers in the sample (55 per cent) were unaware of local policies and procedures recommended for dealing with pre-charge disclosure and the encounter with legal advisers. Various documents reporting case law were circulating around custody suites in the force, but no specific guidelines had been published to date. The National Crime Faculty, based at the Police Staff College, Bramshill, have produced a guide to accompany the *Investigative Interviewing* training, covering aspects of pre-interview and pre-charge disclosure of information to defence solicitors and suspects.⁴⁹ Police training and in particular the investigative interviewing course, which utilises the PEACE model, is dealt with in the next chapter.

Some of the general principles concerning disclosure contained in the guide have been utilised by a proportion of the case officers in the sample as part of an interviewing strategy that embraces all aspects of police contact with the suspect and his legal adviser. A detailed examination of this strategy now follows.

Use of phased disclosure

Within the case officer sample, almost a third⁵⁰ had experience of using this strategy of incremental release of prosecution evidence. Its use is mainly confined to more serious and complex cases, which may explain why the only officers versed in its operation were detectives.⁵¹

⁴⁹ National Crime Faculty (January 2000). Previous editions were published in September 1996 and September 1998.

⁵⁰ 9 officers from a sample size of 30.

⁵¹ Within that group of officers, the majority had experience of serving on major incident teams dealing routinely with homicide offences.

Phased disclosure relies upon control of information from the initial point of contact with the suspect through to, and during, the interview itself. The functional benefits to the police of withholding information from a suspect before interview have been long recognised (Irving and Hilgendorf, 1980). McConville and Hodgson (1993: 46), commenting on the unsettling effect it has on the suspect (and suspect's legal adviser), found that:

'Those who have been involved in the commission of an offence may delude themselves into thinking that there is no evidence against them or none that will convince a court.'

Faced with a suspect determined to deny the offence or refuse to talk, the consequent slow release of evidence produced, in some cases, an admission of guilt.⁵² Moreover, this strategy was found to have 'profound effects on the posture' taken by a suspect and a 'dramatic effect on the atmosphere in the interrogation room, souring relationships between police and suspect and contributing to the interprofessional suspicion which surrounds much police-adviser dealings.'⁵³ Evidence of this consequential effect is uncovered in the present study.⁵⁴

The fact that investigating officers are generally uncomfortable about disclosing aspects of the prosecution case is, argue McConville and Hodgson, no accident but is embedded into the way the police seek control of the suspect and to become 'dominant persuaders'.⁵⁵ Walkley (1987: 22) argues the police case is not assisted, and is probably harmed, by open disclosure to a legal adviser and that officers

⁵² McConville & Hodgson (1993: 46).

⁵³ Ibid. at p.50.

⁵⁴ See respondent D/CON-11 below, who describes the reaction of some legal advisers.

should retain information until the moment the suspect has a decision to make i.e. whether to admit the offence in interview.

The starting point for safeguarding the tactical advantage of phased disclosure is normally the point of arrest, where, as was demonstrated in chapter 4 above, officers reveal little evidence to the suspect in justification of their actions. It is maintained upon their arrival at the police station when as we saw in chapter 5, the custody officer becomes an integral part of the overall strategy, modifying recording practices to exclude evidential material from the scrutiny of legal advisers. At this stage of the detention process, where the presence of a legal adviser is anticipated, officers are able to guarantee tactical integrity by controlling all aspects of contact with the adviser, as demonstrated in respondent

D/SGT-06:

“I would normally get myself or one of my team to contact the solicitor, just to ensure that the information passed to the solicitor over the phone is what we want to be saying, we don't say anymore, because the solicitor's obviously going to have many, many questions, and I think skilful solicitors will try and get as much information as they can from officers. They're doing a job at the end of the day; I've got no malice towards them either personally or professionally. I think some take advantage of officers' naivety sometimes.”

Upon arrival at the station, the legal adviser is introduced to dedicated *disclosure officers* whose role is to impart pre-determined information over a series of staged releases. These officers do not generally become involved in the interview process, instead their role is to isolate the interviewing officers from potential conflict with the legal adviser over the level of information disclosed.

⁵⁵ Op. cit. n.52 at p.44.

D/CON-04: *“There’s five of us on our team; we usually have two for interviewing officers and then we have two, what we call, ‘disclosure officers’. We’ll sit in our office and decide what’s going to be disclosed on the first interview and write out a disclosure, and we’ll call it ‘Disclosure 1 for prisoner Smith’. The disclosure officers will come and greet the solicitor at the door; bring him through to an interview room; sit down and make the first disclosure to him and explain the time of arrest, etc, if he wants to know that, and he can see the custody record if he wants to see that. And then he will have his prisoner with him for a private consultation for how ever long he likes.”*

D/SGT-04: *“You’re building up a rapport with them. It’s quite adversarial if you’re not careful. I mean, the ideal way is to have a disclosure officer separate to the interviewing officers who deal solely with the solicitor. That would then keep out the interviewing officers from any conflict that may occur during the interviews, so that their relationship with solicitors is purely on a business like footing, the confrontation is with the disclosure officer. That’s the ideal thing, obviously staffing doesn’t allow that. It’s good to get a good rapport. We’re only here to seek the truth.*

... At the end of each interview and prior to the following interview we’d debrief with the disclosure officer and then a discussion between the interviewing officers and the disclosure officer, for the strategy for the next interview.”

D/SGT-05: *“Recently we’ve used disclosure officers, not part of the interview team, as disclosure officers to the briefs, and they get given a bit of paper, and they stand there, wait for a challenge and say, ‘No, that’s all you’re going to get’ and they walk out.”*

(Researcher): *“What’s the reason for using a separate disclosure officer?”*

Reply: *“So you’re not bringing conflict between the interviewing officers and the solicitor prior to an interview, because you can get into an interview stage; I’ve tended to find now, you’re almost doing the interview in the disclosure room prior to getting the suspect out. You’ve almost concluded the interview without having a suspect there, which solicitors are quite clever at doing that. They’ve answered the points you’re raising, or they’ve answered anything to do with the burglary prior to the suspect being there, prior to them even speaking to the suspect; so you can see almost that the defence are building up the defence before speaking to the defendant.”*

The use of incremental evidence release was justified by officers on the basis that investigative interviewing is best served by allowing suspects an initial opportunity to provide their version of events, unfettered by facts and evidence that may alter their story.

D/SGT-06: *“The advantages of phased disclosure are that ... it’s ethical, so you’re not going to get criticised when you get to Crown Court, that you’ve not employed any unacceptable tactics and duress, or any inducement or anything of that nature, because it’s clear cut, and it encourages people to give an account. So on the basis that we try to obtain an ethical search for the truth, that’s the underlying principle behind it all, and it shows that the tactics that the police are employing are beyond reproach really, and the big thing at court these days is abuse of process, so you’re not going to get picked up on it or any abuse of process because everything you’ve done is by the book.”*

The decision to employ phased disclosure in an interview scenario is dependent on a number of factors, principally the seriousness of the offence, and is usually applied where a complex and extensive investigation has been undertaken. The need to introduce evidence gradually implies that the strategy is labour-intensive and time consuming, obvious disadvantages in time-critical situations. As McConville & Hodgson alluded to earlier, the use of this tactic can also result in a souring of relations between the police and legal adviser as illustrated below:

D/CON-11: *“Some solicitors don’t like it, but it’s quite time consuming and you have to completely believe in it to want to do it, because solicitors will say, ‘There’s no use using ‘phased disclosure’ because I’m telling you your first interview will be no comment if you don’t tell me anything’, and so if you don’t believe in it people say, ‘We won’t bother then, we’ll give you some evidence’, but you have to go through the first disclosure to get to the second and third phase, but that takes its time.”*

D/SGT-06: *“The disadvantages are that it’s very, very time consuming and labour intensive; for handling one suspect you’d probably have a Sergeant and 4 Constables, which is more than most night shifts probably put out. It’s normally over a three-day period, involving Superintendent’s extensions and a warrant of further detention from a Magistrates Court, which takes you up to the court’s time; there’s logistical problems and getting you to and from court; because you can’t rush it; you have to make a decision early on. Have you got the timescale to do phased disclosure? We’ve tried to rush it through and it’s just not worked because you run out of time, and also it’s not suited to every offence, if something’s clear cut whereby the suspect has been caught at the scene, there are a number of witnesses there and he knows what the witnesses are going to say, then it’s virtually*

pointless in doing phased disclosure; you might as well just go through it as you would have traditionally done it.”

It is clear therefore, particularly from the responses of D/SGT-06, that this strategy can only be effective where the suspect is unaware or unsure of the extent of evidence in the hands of the police prior to interview. The next chapter re-visits the subject of phased disclosure and examines the decisions over just *what* to disclose and *when* during the interview phase of the investigation.

Conclusion

Increased levels of access to legal advice, provided by better-trained lawyers, has acted to constrain the freedom of police officers in developing bonds with suspects considered necessary for effective interrogation. Evidence has emerged of lawyers actively defending the rights of clients through the adoption of a more interventionist and confrontational stance in their dealings with officers. Nevertheless, the research findings characterised relations between the police and legal advisers as overwhelmingly positive and professionally-based.

The study found it was common practice for legal advisers to receive a *case narrative* or *briefing* from the case officer, before meeting with their client, in which elements of the prosecution evidence would be released. Officers felt this information was likely to help form the basis of the solicitor's advice to the suspect. The willingness of officers to disclose information to the adviser varied according to a number of factors. Inexperienced officers generally withheld less information, often describing the encounter as *intimidating*, whilst some, more experienced, officers opted for greater candour with the legal adviser as a means

to convince them that an admission was in their client's best interest in the face of overwhelming evidence. In that respect, with the legal adviser acting as a *facilitator*, the majority of case officers felt the briefing beforehand was potentially beneficial. In other cases where more serious or complex allegations were involved, the strategy of *phased disclosure* was relied upon. Almost one-third of the group had personal experience of employing this tactic, all of whom were detectives. These officers did recognise however, that the use of phased disclosure made the legal adviser's task harder and could sour working relations. To this end, where resources were available, the interrogation and disclosure functions were separated to prevent conflict between interviewing officers and the adviser.

For the majority of the case officer sample, disclosure to legal advisers had become as formalised a process as certain aspects of the detention process described in the previous chapter. They recognised the legal advisers' need for the information and had adopted a pragmatic approach to the issue. They were acutely aware that, in the absence of a degree of disclosure, the suspect's co-operation would likely be withdrawn on the advice of the lawyer. For many of the group, the issue of disclosure centred on protecting key evidence, such as that forensically-based, while still releasing other aspects. Viewed in this light, disclosure becomes a finely balanced judgment to ensure the objectives of the interview are achieved.

8. THE INTERVIEW

Previous chapters have described the working practices that accompany police powers of arrest and detention of suspects. Procedures have been identified which illustrate how police officers ensure any tactical advantage for ensuing interviews is not diminished or undermined by the inadvertent disclosure of evidentially significant material to the suspect or his legal adviser. For this strategy to succeed, the active involvement and support of custody officers is essential. The picture emerging from this study is indicative of just such a conscious collaboration by many of the respondents in the custody officer sample. Given the statutory requirements placed upon these officers by s.36(5) of the Police & Criminal Evidence Act 1984 (PACE), their actions display, at best, a *qualified impartiality* in their performance of these obligations.

Nevertheless, police practices have been constrained by the involvement of better-trained and increasingly interventionist legal advisers, with officers routinely providing detailed briefings to defence lawyers before interviewing commences. These briefings serve both to satisfy the needs of the adviser, in terms of being able to adequately advise their clients, and to encourage the participation of the suspect. In this chapter, aspects of the interrogation process are examined to reveal the factors which impact on police practice, in particular, the emergence of strategic disclosure as a response to the exercise of silence by suspects.

Police interrogation has long attracted attention from commentators of the criminal justice system and has been the focus of many studies. The significance of confession evidence to the prosecution case has long been acknowledged, with

the police station remaining the primary site for questioning. Police officers recognise and continue to exploit the instrumental effects of incarceration. As McConville *et al* (1994: 72) argue, the police know that locking a person in a cell may constitute sufficient psychological pressure to secure an admission, 'at this point of the process suspects are at their most vulnerable and the prospects of obtaining a confession from them the greatest'.

In legislative terms, use of detention is dependent on the principle of *necessity*, as was outlined in chapter 6 above. However, studies have indicated that the custody officer's ability to form objective judgments relating to release or detention is seriously undermined by institutional and collegial ties with other officers, leaving detention for the purposes of obtaining evidence by questioning, for example, a routine response, displaced only by exceptional circumstances.¹ As Cape (1999: 52) notes, 'in practice custody officers rarely, if ever, refuse to authorise detention on the grounds that they are not satisfied that the s.37 [PACE] grounds are made out.'²

At the same time, it has been recognised that police interviews can elicit false confessions, particularly where oppressive techniques are adopted, as exhibited in the cases of the *Guildford Four*,³ *Birmingham Six*⁴ and the *Cardiff Three*.⁵ Even the presence of a legal adviser is no guarantee against the utterance of a false

¹ McConville *et al* (1991: 42-43).

² Section 37(2) PACE provides grounds for detention where it is necessary to secure or preserve evidence relating to the offence for which the person has been arrested, or to obtain such evidence by questioning - see chapter 6 above.

³ *R. v Richardson*, *The Times*, October 20, 1989; (1989) WL 651412.

⁴ *R. v McKenny* [1991] 93 Cr. App.R. 287.

confession, as was the case in *Miller* (part of the *Cardiff Three*), dealt with in chapter 6 above. The contemporaneous recording provisions, introduced by PACE, have been seen as helping to restore confidence in the integrity of interviewing officers, but research suggests that the police still regularly employ psychologically manipulative questioning techniques in order to draw suspects into making damaging admissions (Bryan, 1997: 229).

Standards of police questioning in general – and the quality of legal advice afforded to suspects in police custody – have been subjected to criticism in research⁶ conducted for the Royal Commission on Criminal Justice (RCCJ).⁷ Some police interviews were described as ‘simply feeble and aimless, scarcely matching the macho image of police interviewers as professional, skilled and forceful interrogators.’⁸ Officers were found to be ill-prepared and engaged in irrelevant, rambling or repetitious questioning.⁹ Evidence also emerged of an ‘over-ready assumption, on the part of some interviewing officers, of the suspect’s guilt and on occasion the exertion of undue pressure amounting to bullying or harassment.’¹⁰

⁵ *R. v Paris* [1993] 97 Cr. App.R. 99; [1994] Crim. L.R. 361.

⁶ McConville & Hodgson (1993) Research Study No. 16.

⁷ 1993, Cm 2263.

⁸ Baldwin (1994: 67).

⁹ Research conducted by Bryan (1997: 224-231) compared the official records of custodial interrogation in a sample of Crown Court cases taken before and after the introduction of contemporaneous recording provisions in PACE. The image presented in the pre-PACE encounters was one in which the police were seen to be self-possessed, dutiful, astute and effective questioners. However, this picture of police propriety and professionalism was not the same under the PACE regime, where officers appeared to lack the air of confidence and moral superiority exhibited by their pre-PACE colleagues. He concludes that the official accounts of custodial interrogations conducted in the pre-PACE era give a largely police-drawn picture of these encounters, in which suspects are depicted negatively while the police generally emerge in a positive light.

¹⁰ *Op. cit.* n.7 at p.12.

The police themselves submitted evidence to the Runciman Commission, acknowledging the publicly expressed concern over uncorroborated confessions, and stressed that questioning of a suspect is only a part, and a decreasingly important part, of the process of investigation. Baldwin (1993: 326) challenges this 'officially' held view of the police service however, suggesting it is 'evident in talking to the officers who do the bulk of the interviewing that interrogation continues to be regarded as a major preoccupation in almost any investigation.'

The present study, therefore, reviews developments in police interview training in the light of these criticisms and explores the changing purpose and objectives of custodial interrogation. It also examines the effects of such training and compares this with the transfer of skills from colleagues, helping to provide an understanding of the police response to developments in the relative positions adopted by suspect and legal adviser.

Purpose and objectives of the interview

The investigative interview model brought about a change in emphasis on the part of the police towards *ethical interviewing*,¹¹ which is reflected in the findings of the present study. Investigative interviewing was presented as an alternative to the traditional approach of the police, which had been focused more on *attaching criminality* to a person presumed to be guilty, rather than a *search for the truth*¹²

¹¹ Bridges & Choongh (1998: 17).

¹² It is interesting to note that the 'truth seeking' theme is the focus of much current debate within the criminal justice system. The recent ACPO 'Search for the truth' initiative is highly critical of the adversarial attitudes of both lawyers and the court process as a whole. See also the comments of Williamson (1991: 28), who writes that 'the search for truth is not what characterises a criminal trial and there is now a mis-match emerging between the developing inquisitorial style of pre-trial procedures and the accusatorial nature of criminal trials'.

(Shepherd, 1996: 14-15). Although the police national training package¹³ has sought to characterise the purpose of police questioning as a neutral collection of information, academic commentators have presented a rather different picture. Instead of a search for the truth, they argue, it is much more realistic to see interviews as mechanisms directed towards the construction of proof.¹⁴ Indeed, Baldwin (1993) suggests that constructing proof in this fashion is accepted as ‘part and parcel of the adversarial system’. Police interrogation is geared more towards establishing the intentions or *mens rea* of a suspect than the objective facts, which in many cases may not be in dispute (Sanders and Young, 2000: 248). Legislation is itself often framed in a manner that includes statutory defences, such as the principle of self-protection in assault cases. Interviewing officers recognise that, by having a clear understanding of the points to prove,¹⁵ questioning can act as a means to build a case against a suspect (Cape, 1994: 187).¹⁶ The need to establish specific elements of the offence, e.g. the *intention to permanently deprive* within the definition of theft under s.1 Theft Act 1968, creates an over-riding necessity to obtain evidence which may be relied on later to rebut a potential line of defence at trial. Thus, in the absence of a confession, the police may seek to secure evidence to indicate that the suspect lied during questioning about material facts, which, of itself, has the potential to impact upon any later defence and the outcome of the trial:

¹³ National Crime Faculty (2000: 17) *A Practical Guide to Investigative Interviewing*.

¹⁴ Baldwin (1993: 327); Cape (1999: 269).

¹⁵ The *Practical Guide to Investigative Interviewing* (2000: 40), does indeed make reference to offences and the ‘points to prove’, but stresses that ‘the need to cover these points should not dominate the interview by controlling the flow of information. Nor should they artificially constrain or distort the account of events given by an interviewee’.

¹⁶ Almost three-quarters (73 per cent) of respondents in the present study included recognition of points to prove as part of their planning and preparation for interviews.

D/SGT-01: *“It’s quite often provable lies that you’re working on, although lies alone don’t prove somebody’s guilty, but it strengthens the prosecution case.”*

D/CON-03: *“You know when somebody’s lying, and if you can prove the lies, you have the evidence.”*

D/CON-10: *“I would use [phased disclosure] if I thought with the information I’ve got I could prove he was going to lie on tape. Then you could say, ‘No, you’re lying there because ...’, and then you’ve got a fact there to prove that he’s lying. So then you move onto your next one, and again he gives you a pack of lies and you can say, ‘No, that’s wrong because ...’. At the beginning he thinks you’ve got nothing, and then he starts to think, ‘Hang on a minute, they’ve just come out with that’. I’d say you’re trying to, first of all, prove that they’re lying and lead them into giving you an account that then you can prove they’re lying; and secondly, getting the upper hand.”*

(Researcher): *“The inference being from showing that they’re lying is that they’re actually guilty?”*

Reply: *“Yes. By them lying you can disprove the story, because you’ve got facts there to back up that they’re lying, and then you know that you’ve got the right person again.”*

The comments of respondent D/CON-10 above could be interpreted as displaying a lack of objectivity in the manner interviews are approached. Indeed, such criticism has been levelled at the police in the past (Baldwin, 1993: 340), where it has been suggested that officers make crude assumptions of the suspect’s guilt from the outset. Such assumptions were regarded as unsurprising in the circumstances, since officers rely heavily on statements from complainants and other incriminating evidence, leaving it difficult for them to approach such matters with a genuinely open mind (ibid.).

Ostensibly, many respondents in the present study were less concerned with obtaining a confession, concentrating instead on establishing reliable facts about the incident under investigation. Almost half the group (46 per cent) used the phrase ‘truth seeking’ to describe the purpose of custodial interrogation along with

‘establishing the suspect’s account’ (36 per cent), ‘gathering evidence’ (20 per cent) and ‘identifying alibis’ (6 per cent).

D/CON-07: *“To secure evidence and obtain a conviction.”*

D/SGT-06: *“An ethical search for the truth, that’s all you can ever ask ... Our job now is to present the court with all the evidence available, not necessarily just prosecution points, but we gather evidence for the court, whether that would be for prosecution or defence, so we will just get everything that we possibly could, and not be blinkered by the fact that we’ve not had a confession, which I think historically is somewhere that we’ve gone wrong.”*

P/CON-12: *“To get the defendant’s side of the story and put questions to them as to the incident. Basically trying to get the truth”*

This position may have resulted from the adoption of an interviewing strategy, utilised by a number of detective officers, in more serious and complex cases. Phased disclosure was promoted on the basis that it provides an opportunity for the suspect to give his version of events, unfettered by competing accounts or other relevant information. There is, of course, a clear tactical advantage to be gained by keeping your adversary ‘in the dark’ about the known circumstances of the incident or alleged offence, yet respondents in this study considered its operation as ethically sound and in the spirit of truth-seeking, encouraging exculpatory comments from suspects. In so doing, this style of interviewing appears to challenge earlier criticisms of police interrogation techniques (McConville *et al* 1991, Baldwin 1994). However, this picture did not reflect the views of the group as a whole, with some respondents (13 per cent) more

characteristic of a police preoccupation with confession evidence, as suggested by a number of academic commentators:¹⁷

D/SGT-01: *“I suppose ultimately you are seeking to get an admission because, you suspect the person that you’re interviewing has committed that offence. Albeit you keep an open mind.”*

D/SGT-02: *“I hope to achieve that the person on interview admits the offence that I’ve put to him and perhaps admits loads more. That’s the aim of every interviewer at police stations when they’re interviewing suspects. It doesn’t happen all the time, and when it does it’s a damn good feeling.”*

D/CON-04: *“I’m hoping they’ll talk and that they’ll tell the truth, we can decide what to do next. Maybe they’ve not done it, but if they have there might be mitigating circumstances or whatever, but if they don’t talk our choice is limited about what we can do; but if they do tell the truth then we can make a more balanced decision on what the next procedure is, whether charge or bail or whatever.”*

P/CON-03: *“An outcome in relation to whether I could prove that that person is the offender, or whether there’s insufficient evidence in relation to the alleged offence.”*

D/CON-05: *“An admission.”*

Any conclusions drawn from the comments of respondents should be tempered by the limits imposed by the methodology employed in this study. Whilst officers say they are now engaged in a dispassionate search for the truth in their dealings with suspects, the methods used in this research cannot determine whether anything has actually changed. Thus, for example, an officer may be genuinely searching for ‘the truth’, but understand this as securing a confession from someone believed to be guilty. Baldwin (1993: 344) highlights the attendant dangers of officers proceeding in this way, arguing that ‘interviews can easily become self-confirmatory exchanges in which the interviewer’s preconceptions are reinforced,

¹⁷ McConville & Hodgson (1993: 115) estimated that in 83 per cent of observed cases the police objective was to secure a

no matter how the suspect responds.' He articulates this point further, stressing that officers' attitudes are 'conditioned by the knowledge that a confession can provide a convenient short-circuit to other proceedings.'¹⁸

Police officers are inevitably orientated towards the possibility of any subsequent criminal trial,¹⁹ and in that sense, Baldwin suggests one of the main purposes of the interview is to seek to limit, close down or pre-empt the future options available to the defendant. Whilst many views expressed by respondents in the present study accord with the objectives associated with truth-seeking,²⁰ there is evidence to generally support the argument that interrogations are conducted for the purposes of constructing proof, particularly in terms of dealing with suspects who exercise their right to silence.²¹

Interview strategy

As a consequence of the changing emphasis for interviews, the manner in which officers prepare and plan this encounter with the suspect takes on particular relevance to this study. The strategies they employ and any factors affecting this process are also considered. Central to this are the officer's perceived advantages or potential problems, especially when focusing on the use of information control and disclosure of evidence to legal advisers.

confession from someone they believed to be guilty. See also, Dixon *et al* (1990: 133).

¹⁸ Baldwin (1993: 334).

¹⁹ *Ibid.* at p.351.

²⁰ Among the qualities of a good interviewer listed by the sample, half the officers felt *effective listening* and *empathy* or *understanding of the suspects' position* were of particular importance. Forty per cent of the group included *good communication skills*, while only 5 officers (16 per cent) felt those qualities should include *quick wittedness* and *an ability to think on your feet*. On the basis of these responses, there is clear evidence that officers are concerned with gaining the suspect's trust in order to secure a truthful account.

Planning and preparation by officers

The principal areas of planning and preparation within the sample were ‘analysis of the available evidence’ and an understanding of the relevant legislation through ‘recognition of the points to prove’ during the course of the interview. Table 8.1 below, reveals how few interviews are conducted without prior planning and preparation.²²

Table 8.1: Interview Strategy – Planning and Preparation by Officers

Area of planning	Number	Percentage
Analysis of available evidence	19	63
Recognition of points to prove	22	73
Sample questions	3	10
Use of props	1	3
Generally unplanned	2	6
Not asked	1	3

The importance of planning and preparing interviews is reinforced in one of the guide books that accompanies the investigative interview training:

*“Some interviews are doomed to fail long before they begin because of the interviewer’s lack of planning and preparation.”*²³

²¹ See sub-heading ‘Strategies employed in response to the exercise of silence’ below, for comments made by respondents D/CON-01, D/SGT-01 and D/SGT-06.

²² The author recognises that methodological weakness may potentially undermine the accuracy of responses given to this question. It is unlikely that many officers will readily admit conducting interviews unplanned, particularly given the importance placed upon this by PEACE model training. For a full discussion of police interview techniques and officer competence however, see Baldwin (1993: 336). In his examination of taped interviews, Baldwin found a substantial minority of encounters to be ‘hit and miss affairs’, conducted in a ‘ham-fisted’ manner. In many cases, officers appeared to be unacquainted with even basic details of the investigation; they frequently made assumptions of guilt and exerted undue pressure upon suspects.

²³ Investigative Interviewing ‘A guide to interviewing’ (1992: 1).

The guide lists a number of areas which adequate planning for any interview must address:

- Understanding the purpose of the interview;
- Defining the objectives of the interview;
- Understanding and recognising the points to prove;
- Analysing what evidence is already available;
- Assessing what evidence is needed and where it can be obtained, whether from an interview or otherwise;
- Understanding PACE and the Codes of Practice;
- Designing flexible approaches.

A high proportion of the sample (63 per cent) included the routine collation of evidence from sources such as witness statements and exhibits as part of their planning process:

D/CON-04: "I read all the statements that we've got up to that point several times, until as I say, it's like an exam, I didn't need to read them anymore; so it might be ten times, it might take you two or three hours, but certainly before the first interview because, you've asked for his account, he may choose to admit the whole offence to you inside and out, so you need to know everything that there is available to know so you can interview him about it if he chooses to admit the offence. You've got to know everything before you do the first one. Speak to the arresting officers about how he was on the arrest or anything; if he was violent or pro-police or anti-police or friendly or whatever, and read their pocket books. Sometimes people make unsolicited comments in the car on the way, about 'I did it, and I'm sorry' and stuff; you've got to know that they said that, and when and where, and hopefully the officers have documented that and got them to sign their pocket book, etc. So it's two or three hours reading."

D/CON-10: "Basically, I go through all the evidence. If it was an offence that I was familiar with and I was happy with the points to prove, then generally I would have them in my head, but if it's something that I don't know, I would write down the points to prove and if I thought there was say, a couple of points that would be good evidence, I would make a note of those, just so as I don't miss them. And more or less have an outline of the offence, always have my dates and times, because there's nothing worse than saying, 'You did a burglary on, oh hang on a minute', you can't even remember the date, the address; I think you look more professional if you can say, and even if it means just a glance at your clipboard; I'd have a

clipboard there with the information on. So points to prove, the evidence you've got, any exhibits, and I'd always have my exhibit reference numbers, because again, I think there's nothing worse than saying, 'I've got an exhibit here' and then having to refer to a statement to get your exhibit number."

The majority of officers described the importance of knowing the legal defences that may be available to the suspect and identifying all the constituent elements of the alleged offence committed:

P/CON-04: *"I used to go into an interview and just go through the statement of complaint and take it from there. Now, only recently, I will actually make either a mental note or a written note of what points I'm looking to prove that the offence has been committed. And then I'll be looking at specific questions; it might only be three, or four or five specific questions that I really do want to ask the suspect to clarify the circumstances about the offence, so I'll plan those questions before the interview."*

P/CON-05: *"I read through the statements, gather as much evidence from the statements as I can, anything what's of interest to me. I would probably make separate notes from the statements, then I would look at the points to prove for the offence, or what the offence is if there's more than one. Go through the points to prove to ascertain if the whole offence has been used or whether the person's responsible for it or not."*

P/CON-06: *"I use the computer to print off the points to prove for the offence and then I look through the witness statements, I write down all the witnesses and what each one can say, the evidence that they can offer, and what important points I want to include in the interview."*

The present study found evidence of some officers approaching the interview generally unplanned, particularly where the offence is perceived to be less serious or is more familiar to the officer:

D/CON-08: *"For normal 'run of the mill' type offences, because you get to deal with them so often, things like points to prove you know anyway, those questions will automatically roll off the tongue at some stage. It might be you make a few notes of points you want to cover, but generally I would say it's just in my head."*

P/CON-10: “If it was just a bog standard one then I would just go in and do it, *ad lib* really.”

Factors affecting interview preparation

The seriousness of the offence is likely to have the greatest impact on the degree of preparation undertaken. The earlier examples illustrate how this can affect the officer’s approach to the interview, as reported by half of the officers in the sample:

Table 8.2: Interview Strategy – Factors affecting Preparation

Factor	Number	Percentage
Seriousness of offence	15	50
Strength of evidence	8	26
Knowledge of suspect/Anticipation of denials	6	20
Presence of legal adviser	1	3
Time available	3	10
Age of suspect	1	3
Familiarity with offence	2	6
No difference in preparation	2	6
Not asked	6	20

It generally follows that the more serious the offence being investigated the longer the suspect remains in police detention as greater time is spent in interviewing.²⁴

These examples echo that expectation of increased time available for the investigative process:

²⁴ Bucke & Brown (1997: 75) found that, overall, only one in ten suspects were interviewed on two or more occasions while in police custody. However, where serious offences were concerned, this figure rose to 19 per cent of suspects compared with just 6 per cent for minor offences.

D/SGT-01: *“If it’s something more serious you’re going to do a bit more planning aren’t you, more preparation. Perhaps you’d be afforded more time. Ideally you should be planning for every interview; the reality is, yes I do, but I think if it was something more serious, if I had a bit more time.*

...If you don’t have some sort of loose structure when you get into interview, it’s very easy to lose control. You go into an interview with an agenda, things you want to talk about and things you want to get from the interview, and if you’ve come out of the interview and you’ve not spoken about them or you’ve not done things you’ve lost the thread of the interview. I like to plan more and more and I think it’s important.”

P/CON-02: *“Obviously the more serious the offence the more sure that you have to be within the interview, but I’ve only dealt with thefts, possibly damage, which, they’re not minor offences, but compared to robberies and things like that which the CID would take over and who are more experienced and have further training within the interview process.”*

Personal knowledge of the suspect was listed by 20 per cent of officers as a factor affecting preparation. They tailored their preparations around what was known of the interviewee and the likelihood of an admission, based on their own or colleagues’ prior contact:

P/CON-02: *“You prepare in greater detail if the person you’re going to interview isn’t going to admit the offence. You know by the response they’ve made to yourselves whilst in custody if they’re going to plead guilty or not guilty during the interview. If you’re confident that they’re going to admit to the offence then the amount of research that you do wouldn’t be as much as if you felt the person was going to plead not guilty and deny the offence. Obviously if they’re going to deny the offence a lot more work is going to go in so you know exactly what to prove and how to counteract what they’re going to say.”*

The same officer spoke of the presence of a legal adviser, particularly one who takes an interventionist role in the interview, as possibly causing him to research the available evidence and legislation even more fully:

“If you feel the solicitor might hinder the interview and offer legal advice to the defendant, then yes, you need to make sure that you’re fully aware of every point that you need to prove, and basically background information within the offences.”

Several officers, described the planning and preparation of the interview as being influenced by the time available to them, and significantly, pressure from custody officers to commence the interview whilst a legal adviser is present and available:

P/CON-03: "Sometimes you feel that you're under pressure to go through the procedure and get into the interview. It depends, you've got more time if the solicitor's not readily available; if there's one already at the station, you're sort of under pressure to sort of get in there and carry out the process. If you're waiting for a solicitor, you've got more time to prepare and sometimes it's difficult when you've been given a hand-over and you've got to go through the information. If it's not a very clear hand-over it makes it difficult for you during the interview."

(Researcher): "So the decision as to how much you prepare then, is dictated almost by whether the solicitor is ready for the interview or not?"

Reply: "Well, it's time, and what pressures are put upon yourself as the interviewing officer."

(Researcher): "Are you not given enough time then?"

Reply: "In some cases, no I don't think you are. You're under pressure. It's a process really, and if there's a lot going on and depending on if it's a hand-over, how long that person's been in custody, you know the clock's ticking and you are under a certain amount of pressure."

(Researcher): "Who puts you under that pressure?"

Reply: "If the solicitor's already there, there's the pressure from them if they've got another appointment to go to, their availability and also it would be the custody sergeant because he is under pressure because the clock's ticking for him as well. So if he's under pressure then you're going to be under pressure, it's the knock on effect."

Perceived advantages in the interview process

McConville *et al* (1991: 78), commenting in their study of police suspects, are highly critical of the imbalance of power in favour of the police during the detention process, which manifests itself in oppressive environmental conditions and the manipulative use of administrative devices such as bail. They note that 'interrogation takes place in a social environment which increases the vulnerability of the suspect and maximises the authority and control of the police.' Although only reflecting a minority of the group, some officers in the present study highlighted the perceived advantages accrued through the support of an

interview partner, the absence of a legal adviser, lengthy incarceration and a room layout that leaves the suspect feeling exposed and vulnerable and the lawyer marginalised.²⁵

D/CON-02: *“For a start if there’s no legal representative or solicitor, because they’re on their own, not that it would make any difference to a lot of stuff that happens, but they’re on their own, that’s put them at a bit of a disadvantage, and advantage for me.”*

P/CON-07: *“Sometimes I think it depends on how long the person’s been here as well, and whether they’re starting to get a bit fed up with sitting around and doing nothing, or whether they’re quite quickly getting processed or whatever. Sometimes I think that can help.”*

D/CON-06: *“I like a clear and uninterrupted view of him, so I tend to put the table over in the corner and say, ‘There you are solicitor, something for you to lean on’, and so I can see his hand movements, his non-verbal communications, but I’m not sitting on top of him, you’ve got to give them space, so he doesn’t feel protected hiding behind the desk, twiddling with his fingers underneath, etc. Pick up on the nervous points when you hit him with a point you’re not happy with.”*

(Researcher): *“Are you trying to make him deliberately feel more vulnerable?”*

Reply: *“I wouldn’t say vulnerable, but I’m not giving him something to hide behind.”*

The more common perceived advantages include the possession of strong evidence, developing a good rapport with the suspect and, significantly in terms of the present research, control of information²⁶ and pre-charge disclosure to legal advisers as revealed in table 8.3:

Table 8.3: Interview Strategy – Perceived Advantages

²⁵ For a discussion of police tactics in interview, see Cape (1999: 270-272).

²⁶ Weaknesses in the methodology may help to explain why the results in Table 8.3 appear to undermine the main hypothesis regarding the perceived advantages of ‘information control’. In this respect, officers were asked to provide their own response as opposed to selecting from a range of answers.

Advantage	Number	Percentage
Strength of evidence	12	40
Information control	8	26
Interview partner	3	10
Room layout	5	16
Good treatment/Rapport	9	30
Knowledge of law and events	4	13
Absence of legal adviser	1	3
Period of incarceration	1	3
Not asked	3	10

The use of these strategies is directed towards securing the co-operation of the suspect in the interview, i.e. providing answers to questions or making admissions, through persuasion in one form or another. Developing a rapport with the suspect and enhancing the conditions of his detention by facilitating visits or particular dietary requirements, all contribute to forming the bond required for effective communication. The police also seek to utilise their control of information to affect and influence the decision-making of the suspect. Chapter 7 revealed the greater willingness on the part of the police to disclose aspects of the case where the evidence against the suspect appeared overwhelming. In these circumstances, controlled release of information is designed to alert the suspect to the evidential superiority of the police and the potential benefits accrued at court through early co-operation. Similarly, where information is deliberately withheld or released incrementally, this has an unsettling effect on suspects and increases vulnerability and susceptibility to persuasive policing tactics:

D/SGT-02: *“If you have overwhelming evidence it’s a wonderful feeling to interview somebody, because you know no matter what that person says, he’s not going anywhere, but to trial.”*

D/CON-05: *“Knowledge of what crime you’re investigating. Knowledge of the law hopefully, and most importantly, evidence gives you an tremendous advantage.”*

D/SGT-03: *“Being made aware of something that maybe the suspect doesn’t know you’re aware of, which sometimes becomes quite apparent during the course of the interview.”*

(Researcher): *“Can you give me an example of that?”*

Reply: *“Forensic evidence is the obvious choice. Witnesses, he or she may be aware of the existence of one or two witnesses, but there may be three or four others they may not be aware of.”*

D/CON-08: *“Hopefully, he’s not going to be very aware of what I or we know, so straightaway there’s an advantage. He’s going to know that we know, but he’s not going to know what we know and how much we know, if you understand all of that; which may put us at an advantage”*

D/SGT-05: *“There’s lots of non-evidential facts that give you advantage, the layout of the room; your interaction with the person beforehand; his knowledge and my knowledge, or his belief of my knowledge of the facts, and it is a bit of a game at the end of the day, it’s a bit of a theatre; everything around us gives the advantage, and my evidence, the evidence I’ve got behind me, keeping little props behind is great; keep a big pile of paper; a video tape on the table. All those things give you an advantage because it sets an air of ‘We know what we’re talking about because we’ve got all this here’. It’s got nothing to do with the case but it gives that belief.”*

Interview training

Deficiencies in police interviewing skills have attracted criticism in a number of studies (Baldwin 1992b, McConville *et al* 1991, McConville & Hodgson 1993), which point to *institutional* rather than *individual* shortcomings.²⁷ Interview techniques are founded in experience and continue to be acquired from longer-serving officers, whose influence appears to outweigh that of the training delivered in the investigative interview course. Indeed, Baldwin (1994: 67)

described police training as no panacea, offering no more than an amelioration of the general ineptitude exhibited in suspect interviewing.

The following respondents illustrate the dominant influence of peers over the effects of training in the formation of officers' interviewing style:

D/SGT-02: *"Nobody can teach you how to interview, although there are techniques that have been adopted by forces across the world, but nobody can actually tell you how to interview. That comes with practice; that comes with your own style. Obviously, there are things that you can pick up to develop your interviewing, but nobody can actually teach you."*

(Researcher): "Who do you pick these up from?"

Reply: "People that you join with; officers with more senior service than yourself; senior officers you've dealt with on an enquiry; from courses; reading articles in newspapers. It's a wide spectrum, but at the end of the day it's experience that teaches you; you become an interviewer, but nobody can actually teach you how to interview. You can develop your methods and a technique, but nobody can tell you what to say or how to say it. Everyone has their own individual style."

D/CON-04: *"Listening to other interviewers I think. I think everybody interviews in a different way and as you go through your career you'll pick up bits that you like and you'll keep hold of those, then use them the next time if it's suitable for you to use them. I've had some training."*

D/CON-07: *"A lot of the old interview techniques that I've been taught are no longer applicable to anything that we do. I think a lot of it is learnt from working with experienced officers. Certainly on major incidents working with senior detective officers who have done the grounding and a lot of work on that, you pick up a lot there. But the back-up support you have for interviewing is basically nil. You have to learn from your office, from your own colleagues."*

D/SGT-04: *"By sitting with a lot of detectives over the years, listening to the way they do it, picking out the goods bits, disregarding the bad bits."*

The views expressed by these respondents were common among the entire sample, and underline the influential effects of experience on junior colleagues.

²⁷ Op. cit. n.6 at p.197.

Nevertheless, many officers, including those most knowledgeable, recognised the benefits that had been accrued from interview training. Only one person in the case officer sample had not completed the course, described in Home Office Circular 22/1992 as a means of obtaining ‘accurate and reliable information from suspects, witnesses or victims in order to discover the truth about matters under police investigation.’ Based on the responses detailed earlier, this view appears to have translated into the commonly expressed ethos of the case officer sample,²⁸ although the present research cannot determine whether there has been a corresponding effect on practice. Many officers reported favourably on the effects of interview training, with almost one officer in three benefiting from the structured approach and planning that investigative interviewing offers. Several officers (10 per cent) felt their confidence had increased while others had developed improved communication skills (13 per cent).

D/SGT-01: “With regard to disclosure, a lot more confident now with regard to dealing with solicitors and having the knowledge of the stated cases, what you can and can’t do; puts you very much more in control. I can say now to solicitors ‘This is the information that I’m giving you at this time’ and not to be coerced by solicitors, into disclosing information that you don’t want to be disclosed.”

P/CON-05: “You learn to use the open questions, get a good structure of the interview so you can plan the interview prior to going in, rather than not knowing what you’re going to speak about; using key words. Using the first account of the suspect and work on that first account so you can go back to his first account and open him up a bit so to speak, get him talking.”

D/CON-05: “I think whenever you go on a course, be it a week, two weeks or whatever, there’s a lot of things that they try to teach you, but you don’t tend to walk away with everything that they teach you. The one thing that I learnt the most from it was to plan more; and I think if you pick something up from the course then that’s what the purpose is.”

²⁸ See officers’ perception of the purpose of an interview.

D/SGT-06: *“I think it focuses your mind on your bad points, the way that you communicate probably; the way you shuffle about and your mumbling; you get distracted, so yes, maybe, but I don’t think it’s changed it dramatically. It’s just my personal style may change at the time, but you go on these courses you pick up your bad points and then two weeks later you revert back to them.”*

D/CON-11: *“It certainly gives you a model to follow and it certainly makes you very aware of open and closed questions, body language, the effect of silence and things like that; so yes, it gives you a better insight into skills.”*

However, over 20 per cent of those officers questioned described no noticeable effect from the training undertaken, relying instead on their own understandings of the interrogation process:

D/CON-08: *“Not really. I think it’s quite a personal sort of thing, and depending on the job as to how you interview.”*

Presence of legal adviser – effects on interview and officer

The previous chapter revealed a working relationship between police officers and defence lawyers, which, contrary to popular belief, was based on a co-operative and professional acceptance by the police of staff called to give advice to suspects held at police stations. Nearly three-quarters of the case officer sample described favourable relations with legal advisers. These attitudes appear to be the product of increased exposure to legal advisers and a growing acceptance and acknowledgement of their role. They are reflected in the responses of officers to questions surrounding the effects of a legal adviser’s presence on both the style of interview conducted and its outcome.

Nearly two-thirds of officers stated that their interviewing style remained unaffected by a legal adviser’s presence, with some even welcoming their

involvement in the process as demonstrated by this group of experienced detectives:

D/SGT-02: *“No. Nowadays a solicitor being present on an interview, he’s almost like a part of the furniture. One feels quite naked not to have a member of the legal profession when you’re interviewing a suspect. And there are occasions when you yourself speak to the suspect and ask them why he doesn’t want legal representation, because at some point in the enquiry, depending again on the offence, he would need legal advice. So to be fair to the suspect you do mention it to the suspect that he ought to have some sort of legal advice.”*

D/CON-05: *“No, I tend to try to forget they’re there.”*

D/CON-09: *“Not one little bit. It used to because I always used to think that you had to be very much more meticulous with your interview and it would be a lot more disorientating with a solicitor, because they interrupt. Since I’ve come into the CID I’ve been more adventurous and bolder with my questioning which hasn’t been interrupted by solicitors, rather than the practice of being in uniform thinking that if I step out of line, or I say something that’s inappropriate they’ll jump on me.”*

There are however, positive incentives for the police to ensure that suspects, particularly those facing serious charges, receive legal assistance. The presence of an adviser is regarded firstly, as helping to negate or prevent potential accusations of misconduct arising from the interrogation once the case has reached court which might lead to the exclusion of evidence, and secondly, to discourage officers from resorting to unacceptable interview techniques, the like of which were demonstrated in *Miller*.²⁹ Several officers recognised these points, as demonstrated by the following respondent:

D/SGT-06: *“If I was to interview somebody without a solicitor, I’d perhaps push the boundaries of acceptable behaviour with regards to inducements or duress; you give people the nonsense lines that we’ve used for years about, ‘You know you’ll feel better if you tell me’ and ‘There’s other people*

²⁹ [1993] 97 Cr. App.R. 99; [1994] Crim. L.R. 361.

in the police station, you don't know what they're saying', 'It's important for you that you give closure to what's happened', and all them nonsense lines that we use. If the solicitor's there you wouldn't get away with it; and repeatedly asking the same question. We all know that you can grind people down by asking the same question 30 times. If the solicitor is not there maybe you'd get tempted to get into all the bad practice that we've stopped using. I'm very happy for solicitors to be there, and it looks better.'

Nevertheless, some officers reported feeling *intimidated* and *lacking confidence* in dealings with legal advisers generally, which transferred to the interview room as these respondents illustrate:

P/CON-02: *"It doesn't affect my interviewing style, but it would still make me a little nervous."*

P/CON-10: *"It used to when I was more inexperienced, and there was a solicitor there and I'd be sort of, my eyes would be darting over looking at them to see their sort of expression and that, and it sort of, I don't know, I found it quite uncomfortable if you like; but now I've got more experience, then no, it doesn't affect me."*

(Researcher): *"Did you feel intimidated by them in those early days?"*

Reply: *"Definitely. But not anymore."*

Other officers described the adviser's presence as having a 'formalising' effect on the interview in coming between the suspect and police. Significantly though, more than 60 per cent of officers questioned expressed no preference over the presence of a legal adviser when conducting interviews:

P/CON-04: *"I would say that while there's a solicitor present in an interview I would talk and act a lot more formally than if there wasn't a solicitor present."*

P/CON-07: *"If there's not a solicitor there I think you can be a bit more pushy in the questions you ask and how you go about it."*

(Researcher): *"So do you prefer to interview without a solicitor being present?"*

Reply: *"Yes."*

The group were also asked to consider whether a legal adviser's presence affects the outcome of the interview. About three-quarters of the sample (22 officers) believed this was *always* or *sometimes* the case, particularly where advice is given to exercise silence. Only 10 per cent of the group felt advisers had no effect, with the remainder undecided:

D/SGT-01: "It's very hard to say. I think that there are times where you think that the person's going to admit it, but because they've got a solicitor there they've perhaps not admitted it and you felt once or twice you've got them near to admitting it and then they have a consultation with the solicitor and it's a bit of strength for them and they keep 'stum'."

D/CON-08: "It can, yes ... Solicitors are sometimes obstructive, sometimes answer questions on behalf of their client, they sometimes challenge you over what you're saying because they don't agree with what you're saying, or you're being too oppressive or whatever. So that can affect the interview."

D/SGT-06: "I think, to be honest, it may do. If I was to interview the same person with a solicitor and without a solicitor, undoubtedly I've have a different result."

Use of information control and phased disclosure

Structure – fitting in with the PEACE model

The use of phased disclosure was introduced in the previous chapter, which discussed the controlled release of information and evidence to legal advisers after their request and subsequent attendance at the police station. The officers in the sample who utilised this strategy were agreed that its use and format were in keeping with the structure of the PEACE model as advocated in investigative interview training.

The PEACE model is as follows:

- Planning and preparation

- Engage and explain
- Account, clarification and challenge
- Closure
- Evaluate

Within the *account* phase are three distinct stages,³⁰ as illustrated by respondent D/SGT-06 below:

1. *The suspect's agenda (interviewee area)*

The suspect is given the opportunity to say what he wants in response to the allegation.

2. *The police agenda (interviewer area)*

The suspect is then informed and questioned about matters considered important by the investigating officer. It is often during this stage (and in the challenge phase that follows) that evidence, previously held back, is released to emphasise any discrepancies in the account provided by the suspect.

3. *Challenge*

The suspect is then confronted with anomalies or inconsistencies as identified by the investigating officer from the suspect's earlier responses.

D/SGT-06: *"There are three phases really and it runs along the lines of cognitive interview. They'll be the suspect's agenda, the police agenda and then a challenge ... because we know certain information and we are then going to ask the suspect to give his account, albeit that we probably know the information anyway; so that would confirm or give us further enquiries. The police agenda would be then to introduce certain aspects that we know that he's not told us, bits about previous history, what witnesses are saying,*

³⁰ See Ede & Shepherd (2000: 81); National Crime Faculty (2000: 53-68).

then we'll introduce all that, and then obviously the challenges come at the end, when we point out the bits of the key areas that we want to drive home."

D/CON-11: *"The first ever question we ever ask [is] 'Have you done this, yes or no?' You then decide where you interview's going. The first question is, 'Tell me what you were doing there, tell me where you were', an open question, hopefully they talk, and then they give you their account."*

Ede and Shepherd (2000: 81) noted that some police forces have adopted a three-step approach to interviewing suspects, the mechanics of which, described below, are echoed in the findings of the present study where this interview technique, otherwise known as phased disclosure, was employed by several officers:

- **Step 1:** There is no disclosure to the suspect or the suspect's legal adviser prior to interviewing. There is a relatively brief interview in which the suspect is invited to give his or her account, e.g. in response to a trigger such as, 'Give us your side of things?' The interview is then ended.
- **Step 2:** Evidence is disclosed, partially guided by what suspect has said.
- **Step 3:** The suspect is then interviewed, with the officers following the standard PEACE model in respect of the account phase.

The problematic consequences for legal advisers where this strategy is used by the police is evident from the recommendation put forward by Ede & Shepherd that 'under no circumstances whatsoever should you allow the police to engage in their *three-step* approach. You must never allow your client to be interviewed until such time as disclosure has been made, a process which requires you to interview the IO (investigating officer) systematically as an integral part of engaging in active defence of your client.'³¹ Ede & Shepherd suggest that legal advisers, facing the use of this strategy by the police, counsel silence to their client stating at the

³¹ Ede & Shepherd (2000: 339).

outset of the interview the reason for this being no disclosure of evidence. In response they hope the police will 'see sense and do not attempt to go further in implementing the *three-step* approach.'³²

The Central Planning and Training Unit (CPTU), in its guidebook for police to accompany the investigative interview training, took the following view on disclosure, suggesting that when dealing with suspects 'it is still important to let them know the basic plan of the interview. At first you may feel that all you want to tell them about is a few main topic areas. You are not restricted to these areas, nor to the areas considered during preparation.'³³

Deciding what information to release

Officers described phased disclosure as a means to obtain an account from a suspect, which is uncontaminated with facts or evidence that may alter their story. The decisions over what information to release and when, appear to be determined largely by the circumstances prevailing at the time. It is not possible to draw up all-encompassing guidelines to suit all circumstances and because of this, officers are left to decide upon particular tactics on a case-by-case basis. Some factors, such as the significance of certain witness evidence or time available, may determine the order of priorities:

D/SGT-06: "We'd have an interview strategy that would contain all the facts that we wanted to address. So we'd start out basically and simply by saying these are the 15 points that we want to interview about; some of those would be witnesses, some of those would be forensic issues and some

³² Ibid. at p.340.

³³ Police Central Planning and Training Unit (1992) 'A guide to interviewing' p.17.

of them would be details of the suspect's history, for example, he owns a car that we know was used on the job or previously lived in the house, something of that nature; and then we'd break that down. It may be that we'll do a couple of these points, if they're small issues, per interview; or may be that one key witness might take three or four interviews, so we'll break it down into what we think are manageable chunks and then we'll disclose it. We don't necessarily go for something that's going to last 45 minutes just because that's the length of the tape; it may be that we disclose one item that may take ten minutes and then we'll stop, disclose something else and move on. Or it may be that we disclose something that's going to take three or four tapes; it's just what we think is a manageable size."

What information is actually released - Initial or first disclosure

One area that remained consistent was the *initial* or *first disclosure*, which precedes the interviewing and forms part of the *suspect's agenda* stage described above. The legal adviser is given the bare details of the allegation, which includes no *prima facie* evidence. In essence, suspects are given an opportunity to answer broad open questions with no indication of what the police already know:

D/CON-04: *"That'll usually be, 'Your client's been arrested on suspicion of' whatever, and 'he'll be asked for an account of his movements between such and such a time and such and such a time'. A reasonable amount of hours before and after the offence has occurred, if we know the time. He'll be told no prima facie evidence will be given to him; he'll be subjected to that on the interview and there won't be any ambush type questions; he'll just be asked for his account."*

Planning for subsequent disclosure

At the completion of the first interview the investigation team meets to discuss the result of questioning and to decide upon what additional evidence is to be disclosed in light of suspect co-operation or otherwise:

D/CON-04: *"We will then plan the second disclosure, if there is to be a second disclosure, because obviously that might be questions born of the first interview; so after the first account, if he gives an account, we'll sit down again together as a team and say what we're going to disclose this time, perhaps include content from the first interview, and it might be some circumstantial evidence for example, because we'll go in stages, as to what*

has happened; like he was in the area really that day, or something like that, or seen wearing similar clothing earlier that day, or something like that.

... It may be we've got an idea in our minds what it's going to be, because he may go 'no comment', but there might be stuff that he's said on the first one that we need to clarify on the second tape if it's about the subject we want to talk about, but we'd plan it after the first interview's been done and the tapes are off and done, so we'd have a break.

... Usually there's a sergeant there, part of a member of the team, but sometimes there hasn't been so they'll be four DC's or three DC's who will sit down and discuss what we want to do next. The SIO (Senior Investigating Officer) will be aware of what we're doing and they're aware of the system that we use already, and they usually say, 'You do what you think and come back to us when it's finished' so I think they find it quite easy that we know what we're doing, or hope we do. They'll leave it with us. There's not usually a lot of interference or oversee provision, and we'll sit down and discuss it democratically what we're going to do and then sort the disclosure from that, so it can be DC level the decision's made."

D/CON-11: *"On the second disclosure they get what we're going to talk about and the contents of previous interviews, so we can bring up what's been said prior. The solicitors know that if we mention anything that's not been disclosed they'll stop the interview automatically, and we know that; we will never ever drop anything out that's not been disclosed to the solicitor."*

One aspect of this style of interrogation that challenges earlier criticisms of police information control³⁴ is the absence of *ambush* within the interview itself.³⁵

According to accounts, such as that demonstrated by respondent D/CON-11 above, suspects benefit from advanced notice of precisely what areas of questioning the police intend to pursue, other than on the initial interview where an unfettered account is invited. In managing the conversation with the suspect, officers review previous accounts offered, probe for further information and summarise what they have been told. In this sense, phased disclosure appears to be compatible with the principles of the PEACE model.

³⁴ Op. cit. n.6, at pp.43-50.

Use of monitoring officers

In determining the direction of subsequent interviews the police are able to remotely monitor the conversation (subject to the availability of equipment). Using this facility, interviewing officers can be supplemented in note taking and recognition of significant factors by one or more 'monitoring officers' simultaneously listening to the interview. There are no provisions within PACE or the Codes of Practice that govern the monitoring of interviews but guidelines have been issued by the Home Office.³⁶ Within the Force subject of this study, prior authority of an Inspector is required. In addition, signs are displayed in the interview rooms to alert suspects and legal advisers that interviews may be monitored by a third party, as signalled by a light, which illuminates whilst this is taking place. The monitoring equipment will not operate unless the tape machine is recording, thus allaying any fears of private consultations between legal adviser and client being overheard:

D/CON-04: "If there's a facility at the station we're in, and there is where we're sitting now, then the disclosure officers or another officer of the team would go and sit there and monitor and make notes, so the people sitting doing the interview don't have to make any notes, so they can concentrate on talking.

...We'll do the introduction to the interview as normal, saying who we are, where we are, caution, legal representative, etc, then we'll tell them that the interview is being remotely monitored, but not recorded,³⁷ and listened to by other officers, and usually name the officer who's listening to it, or tell them how they can tell if it's being monitored; because in the police station right now is a little red light next to the tape machine which comes on when it's being monitored, and we'll point that out to them, say 'When that red light is on somebody else is listening to it elsewhere in the station'."

³⁵ The police still highlight discrepancies in the suspect's account during the 'challenge' phase of the interview.

³⁶ Home Office Circular 50/1995.

³⁷ To clarify the officer's comments: the interview is tape-recorded by the interviewing officers but no *additional* recording is made by the monitoring officers.

D/CON-11: *“We operate very much as a team event; again, with the offences we’ve normally got a Senior Investigating Officer or a Deputy Senior Investigating Officer; we have a disclosure officer, a monitoring officer; the monitoring officer is one of the team who monitors the interview so that the officers doing the interview don’t have to remember everything that’s going on, and they write down. So there’s at least four people in consultation regarding what’s been said in previous interviews, what evidence we have, because sometimes the evidence is coming in as you’re interviewing anyway, and it’s very much a joint effort of what do we do next, what do we disclose next.”*

Effectiveness of phased disclosure

The National Crime Faculty (2000: 13) described the aim of all professional interviewers to ‘develop the interpersonal skills required to ask the right questions in such a way that a full and honest account is given. The task of all professional interviewers is to create a climate in which those being interviewed wish to tell the truth.’

The effectiveness of phased disclosure as an interview strategy must, as a consequence, ‘measure up’ to the requirements placed on interviewers in the above terms. A re-examination of the original objectives for interviews, as expressed by officers in the study, demonstrates that obtaining an account from the suspect, ideally truthful, is the goal of all but a few of the sample group. The shift away from *confession* to *account* means that, if silence is replaced by co-operation, the strategy can be regarded as a success in those terms, as illustrated below. Whether the accounts they provide are truthful is, of course, a matter of conjecture:

D/CON-04: *“I think it works because I think the days of ‘no comment’ have gone, because people usually talk, when you just ask them for an account, they usually take the opportunity to give an account; even if it’s wrong they still do it, I don’t know why. It makes the police procedure more lengthy because you’ve got breaks all the time for further disclosure and further*

private consultations, so it extends the time that they're in custody, but at the end of it they have had an opportunity to answer all questions about the evidence that we have, so by the end of the day they know what we know; but at the beginning of the day they know nothing; but it does work because they choose to give an account when perhaps before they wouldn't.

... I've dealt with prisoners for murder before and they would usually be 'no comment' ... We'd tell the brief what we had; he'd have a private consultation and then we'd have an interview, and he would go 'no comment' I would say more of the time, so it's sort of stopped that, or changed it."

D/CON-11: *"It is an absolute benefit, because most people when they're involved in murders and something like that, they want to give an account because it's a very serious and very stressful thing; and what it does is you tend to get closer to the truth because they don't know what we know, and then you can start from there. So I think as a truth-seeking mission, that's what we're after. It's advantageous to everybody, because there's no time to manipulate their defence."*

Exercise of the right to silence

This final section focuses on officers' experience of suspects who exercise their right to silence and the use of any particular tactics or wider strategies in response.

Officers' familiarity with relevant legislation is examined; in particular the requirements that must be fulfilled before adverse inferences can be drawn, and their perception of the benefits/disadvantages accrued since the introduction of the silence provisions. Also important is an understanding of how individual officers and the organisation as a whole have responded to changes in the law.

Drawing on the interview theme from the previous section, the question of suspect cooperation is visited further to identify whether, in the view of the sample, innocent explanations for silence exist and whether its exercise has diminished since the introduction of the Criminal Justice and Public Order Act 1994 (CJPOA).

The findings from the present study are compared with those from research conducted by Bucke *et al* (2000),³⁸ which is among the first to publish results of the effectiveness of the silence provisions. Reference is also made to a recent study by Jackson *et al* (2000), which focuses on comparative legislation³⁹ introduced several years earlier in Northern Ireland.⁴⁰

Experience of un-cooperative suspects

The degree of exposure to suspects who withdraw their co-operation in interviews varied tremendously in the sample, indeed, 2 officers had no personal experience of a *no-comment* interview while others had encountered this response on many occasions spanning several years. A somewhat predictable pattern emerged of relatively inexperienced officers having few interview encounters of this type, but when the results were examined from a gender perspective, a picture formed of female officers having experience of significantly fewer no-comment interviews.

Five women formed part of the case officer sample, with lengths of service ranging from 2 ½ to 17 years. The two officers who had never experienced a no-comment interview were among this group. The following table, from the sample overall, comprises officers who had relatively little exposure to interview encounters of this type. Most of the officers in this group are female, with some experiencing less than 1 no-comment interview per 100 conducted.

³⁸ Home Office Research Study 199.

³⁹ Criminal Evidence (Northern Ireland) Order 1988.

⁴⁰ Jackson's study was mainly court-based, using data compiled from evidence reports completed by law clerks at the close of trials conducted at Belfast Crown Court between 1990 and 1995. A selection of cases was then examined to evaluate the role of the legislation in the decisions reached by the judges.

Table 8.4: Right to Silence – Possible Gender Differences

Respondent	Gender	Police Service	Number of No-Comment Interviews
OIC-09	Female	2 ½ years	0 in 50 interviews
OIC-10	Male	12 years	2 in last 100 interviews
OIC-11	Male	3 ½ years	2 in 80-100 interviews
OIC-12	Female	4 years	0 in 150 interviews
OIC-15	Female	3 ½ years	1 in 100 interviews
OIC-25	Female	7 years	2/3 in 300-400 interviews
OIC-28	Male	3 years	1 in 50 interviews
OIC-29	Female	17 years	Numerous

Although the connection between gender and suspect inclination to exercise silence is tenuous, and, on the basis of the crude statistical analysis conducted above, not *significant*, respondent P/CON-07 below does offer a possible explanation for such a finding.

“I think sometimes a man might get more wound up with another man. I just talk to them normally; I don’t tend to get myself wound up with them. I think that if they see you’re not getting wound up then they’ll speak to you as much as normal.”

(Researcher): *“Would you say it’s less confrontational?”*

Reply: *“I think sometimes they probably have an idea in their mind that they’re going to be funny with you in the interview, but when they come out and see, ‘oh, it’s a woman that’s going to interview us’, then I think for some reason they calm down a bit.”*

Strategies employed in response to the exercise of silence

The principles of investigative interviewing⁴¹ remind police officers that in responding to a no-comment interview they should keep in mind that:

⁴¹ Home Office Circular 22/1992, paras. (d) & (e).

- They are not bound to accept the first answer given. Questioning is not unfair merely because it is persistent, and:
- Even when the right of silence is exercised by a suspect, the police still have a right to put questions.

The National Crime Faculty publication on investigative interviewing *A Practical Guide* recognises the difficulties faced by interviewers but is also unable to offer any particular strategy for police officers other than to reaffirm their right to continue questioning.⁴² In the absence of any particular conversational technique forming part of the training package, the case officer sample were asked to consider their own strategy in response to the exercise of silence.

Table 8.5: Right to Silence – Strategies in Response

Strategy	Number	Percentage
Carry on questioning	19	63
Discussion of unrelated matters/Change subject	6	20
Re-iterate caution	4	13
Challenge	1	3
Break bond with legal adviser	1	3
Incremental release of information	1	3
No strategy	4	13
Not asked	2	6

As table 8.5 illustrates, the majority of the group (63 per cent) relied on continued questioning to firstly, satisfy requirements for drawing inferences i.e. inviting a reply to a significant question, and secondly, in the hope that the suspect would be unable to maintain silence throughout the course of the interview:

D/SGT-02: *"I would deal with them exactly the same way; my method of interview would be the same as somebody who is talking to me. I would carry on regardless whether I get a 'yes' or 'no' or silence. I would ask questions systematically, as I would normally, but I would ignore or fail to register that I'd had a response. I would go onto the next question and the next question and so on.*

...There have been occasions when somebody has started off by saying 'no comment' and then absolute silence, and then ten to fifteen minutes into the interview, you've hit on a nerve and he's responded. Once he responds, that registers, and you know you're getting there, so you stay around the area where you got a response from and try and extract some more, and build a sort of communication level; and once they start talking that's it, you've won."

P/CON-05: *"In a 'no comment' interview, I go over the statements and if there's any facts I wish to put to them, I give them the opportunity to reply. I put the evidence I have to them. If they don't wish to reply, then I've given them the opportunity to give me an answer."*

D/CON-05: *"What I tend to do is, I usually say to them, 'I appreciate that you're exercising your right of silence, not speaking to me, and you're going to 'no comment', however, it won't stop me asking questions and I would then conduct the interview as if they were answering my questions and just be met with a barrage of 'no comments'; but I would still ask all the relevant questions to prove the offence."*

(Researcher): *"Do you get people who sometimes can't resist answering questions?"*

Reply: *"Yes. The more inexperienced ones that perhaps haven't been through the police system very often; I think there's something in-built in the human being that you want to speak and you can't resist it, and I've had a number where they've 'no commented', and then they just can't resist saying 'No, that's not true, or that's not right'."*

Officers also included *discussion of unrelated matters* in their list of responses as a means to break down the suspect's determination. By changing the subject they aim to develop or re-establish a rapport with the suspect leading to further probing on the intended subject area:

D/CON-07: *"Me personally, I start talking about something else. I start trying to entice them into a conversation without being oppressive and the*

⁴² National Crime Faculty (2000: 20).

only way you're going to do that is to talk to them about something else, or try and say, for arguments sake, you meet a lot of them over and over again, you might say, 'How's the family; are your kids alright?' or something else. Even if it's an angry response it's a response, and if you've got one response you might just get some of the others further down the line. But by having a dead pan nothing, and just going in and saying, 'Right, I'll ask you these pertinent questions or salient questions now' and then going out, you've not gained anything anyway, so you've got to try.'

Some officers in the group (13 per cent) remind the suspect of the consequences of remaining silent by reiterating the caution. This is designed to put additional pressure on the suspect and potentially undermine the advice given by a legal adviser where they are represented:

D/CON-02: *"If it's a full straightaway 'no comment', I tend to reiterate the caution and break it down, and tell them, 'Yes, you have got this right to remain silent, however it may harm your defence' and that's normally where you get a solicitor jumping in. I tend to keep going there and reiterating that 'it doesn't matter whether you answer this now or not', 'it's when it gets to court, you have got to stand there and say why didn't you answer that policeman's question then', 'You've got an answer now, why didn't you answer him, that's what you've got to put up with'. I will probably ask him a couple of times, probably re-word it in different ways. Sometimes it works, sometimes it doesn't. I don't tend to push it too much. Sometimes if they're talking and then there's one question they go 'no comment' and then they'll carry on talking again, that's a good indication when it gets to court, the magistrates get that."*

D/SGT-01: *"I often explain the caution again; 'This is your opportunity to give your version of the events and should you go to court and you later put forward a version of events, and should you go to court, the court might draw inferences'. It's really trying to put a bit of pressure on them."*

D/SGT-06: *"I think you've got to use the law haven't you and explain to them the caution really; the fact that an inference can be drawn, and I wouldn't go into case law because I think it's very dangerous for police officers, certainly who have a very limited understanding of case law as I have; I can quote the cases but I don't know them in depth, so I wouldn't start introducing case law into an interview, I think that's particularly dangerous, but what I'd impress on them was that the caution says that it's their right to remain silent, but an inference can be drawn, and all I'm doing is asking reasonable questions.*

...If I'm asking somebody where they were last night, that's a reasonable question, and I would labour the point that it's reasonable, and would

perhaps ask them a question, 'Do you think it's reasonable?' 'Is there any reason why you can't tell me, have you forgotten?' Have they fallen over? 'Are you ill or injured?' So you can ask a series of questions that are very difficult not to answer. So if somebody's asking you 'Did you kill him?' it's easy to say 'no comment', but if somebody starts saying, 'Well, I'm asking you, where were you last night, is that not a reasonable question, if you can't remember, tell me'. They're questions that I think are difficult not to answer, and certainly should it come to trial it looks like we've asked simple, reasonable questions."

Other responses offered by the case officer sample included *challenging the suspect* by asking him outright whether he proposes to answer any of the intended questions. Where it becomes obvious that the suspect is unlikely to co-operate, the interview is terminated having covered the requisite evidential matters. In addition, one officer spoke of breaking the bond between the suspect and legal adviser:

D/SGT-05: *"There's several tactics that's on the interaction; it can go anything along the line of, 'We've spent a lot of time investigating this offence, it's a very serious offence. A man at home, he's had his house raided', and on playing on that technique and "We've done a lot of work investigating this, we've spoken to a lot of people; we've now got evidence at one side, it's pointing at you; this evidence is telling me that you've done it, because of this, this and this, and you're not telling me anything about it. You're not telling me where you were; you're not telling me who it was, whatever, and I can't make an assessment on that. Is there a reason why you don't want to tell me?' 'Well, I've been advised by my solicitor to say 'no comment'" 'Yes, but, do you want to tell me; do you want to tell me, it's your decision, it's your interview. The evidence is stacked against you not your solicitor'.*

... It's to break the bond between him and the solicitor. We're the enemy to him, to the defendant. It's more difficult if we've not arrested him, if we've not had that initial interaction with him, to get on side with the defendant."

It was also clear that some officers (13 per cent) believed no particular strategy could be successfully applied in the face of a determined suspect exercising their right to silence on legal advice.

D/CON-04: *“I think once they’ve gone ‘no comment’ it usually stays that way, so I don’t think there is a tactic for that really, if that’s the advice they’ve had.”*

P/CON-08: *“What tactic can you use? We’re not allowed to use tactics anymore. It’s no good standing them up in the corner and beating their brains out; that stopped with ‘The Sweeney’ I’m afraid.”*

One particular detective, respondent D/CON-05, shared an interesting anecdote which serves to illustrate how the legal concept of the *right to silence* can translate into the interview scenario:

“I had the pleasure of interviewing a juvenile who was from a wealthy family; had his own solicitor. We sat in the interview room; I introduced everybody; I asked the suspect if he’d introduce himself, giving his name, age and date of birth, address. There was silence. So I assumed he didn’t want to speak to me, so I asked his father to acknowledge that his son was in fact being interviewed and to give his name, and there was silence. So I asked the solicitor if he’d be kind enough to say that his client was being interviewed and that his father was present because of his juvenile and there was silence. And it was absolutely bizarre; and I asked all the questions regarding the drugs and things that had been found, to complete silence and finished the interview to complete silence. And when I’d finished I said to the solicitor, ‘What the hell is going on?’ and he said, ‘My client couldn’t say anything for fear of incriminating his colleagues’; and I said, ‘Well, what happened to courtesy? Surely you could have at least have asked him to introduce himself, and you could have done as well, it’s outrageous’. But there we are, it was interesting, I had a nice conversation with myself.”

Innocent reasons for exercising silence

In its *Eleventh Report*,⁴³ the Criminal Law Revision Committee (CLRC) recognised that innocent reasons may exist to explain why a person, subjected to police interrogation, refuses to answer questions:

‘The accused may be shocked by the accusation and unable at first to remember some fact which could clear him. Again, to mention an exculpatory fact might reveal something embarrassing to the accused, such

⁴³ 1972, Cmnd 4991 at par. 35.

as that he was in the company of a prostitute. Or he may wish to protect a member of his family.'

Many of these reasons and others besides were provided by members of the case officer sample,⁴⁴ and are illustrated in these examples:

D/CON-01: *"He wanted to protect a member of his family, or the fact he'd been very badly treated before by the police."*

D/SGT-02: *"The reasons could vary. It could be total dislike of the police; total no faith in the police, thinking the police, if they say a single word, they're going to get charged or get sent to prison."*

P/CON-02: *"There might be personal reasons that they might not want to say something, they might not want to give. If it wasn't themselves, but they know who it was, if it was a family member or a friend, whether it was through loyalty or fear."*

Nevertheless, more than half of those officers questioned in the group felt the only explanation for silence was guilt. How this view of the majority affects their individual performance in the interview is difficult to assess. The principles of investigative interview rely on the interviewer improving their perceived trustworthiness in order to encourage the suspect to give a full and honest account.⁴⁵ The formation of that trust may prove more difficult for some officers judging by the views expressed in D/CON-05, P/CON-07 and P/CON-11 below:

D/CON-05: *"With the experience I've got, I'm perhaps a bit cynical in that respect. I can't think of a good reason why people wouldn't want to speak. As a personal thing, if I hadn't done something I was being accused of, then I would see you in hell before I admitted anything, but I would be very vociferous in my denials."*

⁴⁴ 13 officers out of a total of 28 questioned on this point felt that silence could be explained on occasions by innocent reasons.

⁴⁵ Op. cit. n.42, at p.13.

D/CON-06: “Yes, I can think of somebody that’s never been in custody before, it’s all new to them and they’re frightened, etc. and rather than say anything, they’ll say nothing. I personally have never had anybody like that and I honestly can’t recall having anybody that’s gone ‘no comment’ because they’re innocent. People that are innocent and genuinely innocent want to tell you, want to talk, in fact sometimes you have a problem just to make them shut up.”

P/CON-07: “I usually think that they’ve got something to hide.”

P/CON-11: “I think if a person’s innocent he will try his hardest to convince you of his innocence. I feel the people that go ‘no comment’ or have been advised to go ‘no comment’ may well have something to hide. I’m not always convinced that they’re as innocent as they’re trying to pretend to be. It makes you look harder; go back and speak to witnesses again and gather more evidence.”

Drawing inferences from silence – use of special warnings

Bucke *et al*’s study concentrated on the frequency of silence in police interviews and the outcome of using special warnings. They found that nearly 40 per cent of suspects exercising their right to silence were given special warnings, under the legislation, about the consequences of failure to account for incriminating circumstances. Relatively few suspects gave a satisfactory⁴⁶ account in response. Special warnings given under s.36 CJPOA (marks, objects or substances on person) resulted in satisfactory accounts on 19 per cent of occasions, whereas those given under s.37 (presence at or near scene) yielded a satisfactory return from just 13 per cent of suspects.

⁴⁶ The term *answer satisfactory* is used in Code of Practice C, paras. 10.5A and 10.5B as an additional clause to the salient words *failure* or *refusal* described in ss.34-37 Criminal Justice & Public Order Act 1994. Bucke *et al* (2000: 40) found, in the experience of legal advisers, that police officers did not understand what constituted a *satisfactory* or *unsatisfactory* account and applied their own subjective interpretations. Officers were described as including accounts that simply conflicted with the available evidence.

Similar proportions were reflected in the case officer sample of the present study, where of the 26 officers⁴⁷ who had experience of issuing special warnings under s.36 or s.37 of CJPOA, just 5 of the group (19 per cent) reported receiving a satisfactory account:

D/SGT-01: "They don't have enough effect to be honest. It doesn't tend to change it. I gave one last week, person arrested, it was a burglary at a factory premises; person unable to be identified seen in the grounds late at night. Person similarly described coming out of a garden at the back off; when interviewed he said that it wasn't him, he'd just come from his girlfriend's house; couldn't tell us who she was because he feared for her safety if he was to tell us; and I considered he failed or refused to account for his presence at or near the scene of the burglary. I gave him a special warning and he gave me a load of slobber back. I think items in people's possession might be a bit of a stronger case sometimes than at or near the scene."

D/CON-03: "The majority of the time nothing changes, because the suspect has adopted their style of answering questions and they don't want to go into it any further, don't want to answer it."

P/CON-04: "I've given the special warnings and they've still decided they didn't want to answer the question, and on the two occasions that I'm talking about, I made a special point of checking at court the outcome of the court case, and in fact in the end I wasn't required to give evidence on either of the cases myself. I think they either pleaded guilty or were found guilty of the relevant offence anyway; but I was interested to find out whether or not that warning and the inference was actually made an issue of in court, but because I wasn't there, I don't really know what the outcome was, whether he pleaded guilty before it even got into the court, or whether it was brought out at the court, the inference, and it helped to prosecute."

D/CON-07: "It doesn't faze them now ... It did initially. When it first came out there was a bit of surprise about it I think, curiosity. The actual understanding perhaps hadn't been put to them properly by their legal rep or solicitor, but now it's like the caution, they just take it or leave it. It's just another piece of verbal something that we spill out that they listen to."

⁴⁷ 4 officers (13 per cent) had never issued a special warning and a further 3 could not recall the response of the suspect.

D/SGT-05: "I've done it two or three times and it worked, mainly to do with stuff found at the bloke's house when doing section 18s."⁴⁸

P/CON-09: "In some cases it has [worked]. In other cases they've still said, 'no comment', but that is rarer these days."

As well as reporting their relative ineffectiveness, Bucke *et al* (2000: 39-40) found a degree of confusion among police officers about the giving of special warnings, highlighting a lack of training as the likely cause. Criticism was also levelled at the police by legal advisers for not understanding the use of special warnings and issuing them in inappropriate circumstances. These findings were echoed in the present study, where one in four officers demonstrated a poor understanding of the relevant legislation.⁴⁹

Have inferences from silence affected suspect behaviour?

Bucke *et al* (2000: 31) also revealed that the proportion of suspects who refused to answer some or all police questions fell from 23 per cent to 16 per cent.⁵⁰ In addition they found the proportion that gave complete 'no comment' interviews was reduced from 10 per cent to 6 per cent in a similar comparison. Jackson (2001: 157) suggests that the declining number of court cases, where silence has arisen, is indicative of the success of the legislation 'both in persuading more suspects to speak to the police and in persuading defendants to testify at trial.' This was supported in a series of interviews, which Jackson *et al* (2000)

⁴⁸ The term *section 18s* refers to s.18 Police & Criminal Evidence Act (PACE) 1984, which provides powers of entry and search without warrant of premises occupied or controlled by a person under arrest for an arrestable offence (see s.24 PACE for a full description of arrestable offences).

⁴⁹ 6 officers displayed a very good working knowledge of their application, whilst that of the remainder (12) was best described as *adequate*.

⁵⁰ The data from Bucke *et al's* work was collected between August 1995 and February 1996. This was compared against a study conducted by Phillips & Brown (1998) *Home Office Research Study 185*, the fieldwork stage of which, ran between September 1993 and March 1994. The inference provisions were introduced in April 1995.

conducted with solicitors who had experience of advising their clients at police stations in Northern Ireland. Most agreed that those suspected of non-terrorist related offences were now more co-operative with the police than before the introduction of inferences from silence, putting experienced criminals on the defensive.⁵¹ ‘Whereas before there had been a culture of say nothing, now suspects had to think more carefully’ (Jackson *et al*, 2000: 114).

Even though Bucke *et al* found the use of silence more prevalent among represented suspects,⁵² they conclude that ‘legal advisers are now more likely to counsel their clients to provide the police with an account if they can’.⁵³ This finds support from Bridges & Choongh, who discovered that almost three-quarters (73 per cent) of accredited legal advisers surveyed in their study indicated they advised suspects to remain silent less often following the introduction of the inference provisions.⁵⁴ The findings of these studies are reflected in the experience of officers in the present sample:

D/SGT-01: “I think in general the new caution means people do speak more and there’s less ‘no comment’ interviews. What it actually shows at court I don’t know.”

D/CON-04: “I think certainly for serious matters, which is all I do now, they would perhaps take the opportunity to give an account more than they would before, rather than go ‘no comment’, and when there is evidence against them they will perhaps come out with an account even if it’s wrong,

⁵¹ Jackson *et al* (2000: 114).

⁵² Although the figures for total or partial silence had fallen since the introduction of inferences from 39 per cent (Phillips & Brown’s study) to 22 per cent (Bucke *et al*’s study) for represented suspects, the figure for un-represented suspects was still significantly lower, falling in comparison from 12 to just 8 per cent of cases. Bucke *et al* (2000: 32).

⁵³ *Ibid.*

⁵⁴ Bridges & Choongh (1998: 69) found that, where silence was counselled, the most frequently cited circumstance was insufficient or weak evidence (69 per cent) and non-disclosure of evidence by the police (50 per cent).

and then present that to the court, so it's perhaps a broader picture of what the case is about because they've actually spoken."

D/CON-05: *"Yes, definitely. There's a marked increase in people that have stopped not commenting."*

P/CON-09: *"I've found these days that 'no comment' interviews seem to be rarer."*

Bucke *et al* sound a note of caution however, pointing out that the number of confessions arising from suspect interviews has remained unaltered at about 55 per cent.⁵⁵ Their findings reveal an increased willingness on the part of suspects to provide an account, but it does not necessarily translate into an admission of guilt.

The decision taken by the Assistant Chief Constable (ACC) of the research Force, to restrict custody record entries in all cases (see chapter 6 above), appears to reflect the view expressed by many officers who participated in this project that strategic management of evidence provides a tactical advantage during custodial interrogation. The basis on which the ACC's decision was made is not clear, but it is likely to find support among many of the officers interviewed for this research. The legal position has been stated in chapter 6 above, which indicated there was no obligation for such information to form part of the custody record, yet case law exists in *R. v Argent*⁵⁶ and *R. v Imran & Hussain*⁵⁷ to suggest the police should provide *appropriate information*.

⁵⁵ Bucke *et al* (2000: 34).

⁵⁶ [1997] 2 Cr. App.R. 27.

⁵⁷ [1997] Crim. L.R. 754.

Conclusion

Police interrogation remains a key component in determining the outcome of criminal cases. Previous research highlighted deficiencies in both the standard of police interviewing and the quality of legal advice afforded to suspects. A national training package called *investigative interviewing* was introduced to provide a change of emphasis away from being *confession centred* to one of obtaining accurate and reliable information from suspects. Commentators have sought to suggest that, far from being characterised as a neutral collection of information, the true picture of police questioning is rather different to that being presented. Instead of a search for the truth, they argue, it is more realistic to view interviews as mechanisms directed towards the construction of proof. The methodological limitations of the present study restrict the drawing of any firm conclusions on this subject, but there is evidence to suggest the development of investigative interviewing has, to some degree, altered the attitudes of officers in terms of the perceived purpose and objectives of suspect interviews. With the application of phased disclosure in particular, officers appear to consider the acquisition of a truthful account as of primary importance. Notwithstanding these findings, opinion expressed by the wider population of respondents was generally supportive of the argument that interrogations are conducted for the purposes of constructing a prosecution case. This was particularly true in terms of dealing with suspects who exercise their right to silence.

Considerable planning and preparation is now an integral part of the interview process. Investigative interviewing relies also on improved engagement with the suspect to elicit an account, followed up with a detailed evaluation of the

interrogation product. Factors such as the seriousness of the offence under investigation, evidence already secured, knowledge of suspect and time available, all impact upon the style and amount of interview preparation conducted. With only one exception, the entire case officer sample had received investigative interview training that, although favourably received by the majority, had been subjugated by peer group influence as the pervading style.

Police control of case-related information is included among the advantages given by respondents, and is seen as instrumental in securing the co-operation of a suspect in interview. They regard its use as consistent with the principles of investigative interviewing, a view rejected by one of the authors of the PEACE model. The interview process is broken down into three phases; the suspect's agenda, in which he is invited to give an account in relation to the incident or allegation being investigated; the police agenda, which introduces elements of the evidence not previously mentioned by the suspect; and the challenge, where inconsistencies in the account are raised and contested. Officers provide an *initial* or *first* disclosure, which generally excludes any prima facie evidence, and invite an account from the suspect. Subsequent disclosure is based on information obtained in previous interviews and taking account of priorities determined by investigating officers and the interview team. The effectiveness of this strategy is measured in terms of the information derived from interviews. Its use was regarded as a success by respondents, who reported fewer no-comment encounters with suspects. Other perceived advantages included strong prosecution evidence, the physical layout of the interview room and the presence of an interview partner.

A good rapport with the suspect was considered in particular as instrumental in securing their co-operation during interrogation.

The study found some members of the case officer sample had little or no personal experience of no-comment interviews with suspects, with almost a third of all those questioned, reporting 3 or less such encounters. Faced with the exercise of silence, the majority of officers had no discernible strategy in response. Many of the officers questioned recognised that innocent reasons may exist to explain the exercise of silence in the face of police questioning, however the majority felt silence was indicative of guilt. The presence of a legal adviser was also regarded as being of particular influence on the outcome of an interview.

Recent research has thrown doubt on the effectiveness of special warnings introduced with the CJPOA. Relatively few suspects receiving such a warning during the course of an interview gave a satisfactory account in response. Although fewer suspects were relying on silence following the introduction of adverse inferences, admissions were no more likely than in the past. These findings are echoed in the present study, where a significant majority of officers considered special warnings to be of little benefit, with many unfamiliar with and confused about the legislation governing their application.

9. FINDINGS & CONCLUSION

This thesis has considered the impact of legislation substantially attenuating a defendant's right to silence in the face of questioning by the police.¹ The principal hypothesis under examination asserts that the introduction of inference provisions has had significant, unforeseen consequences on the relative positions of the police and defence lawyers in interview. It is argued that the resulting change has led to the development and adoption, by police officers, of strategies that seek to reinforce advantages associated with the control of pre-interview disclosure of evidence. Secondly, it is argued that the introduction of these provisions has influenced suspect behaviour during custodial interrogation leading to a reduced reliance on the exercise of silence. This study presents findings, which have significant implications for the relevant law governing the detention and questioning of suspects,² and for published literature on the independence of custody officers in particular.

The operation of ss.34-37 of the Criminal Justice & Public Order Act 1994 (CJPOA), allows courts to draw inferences, where appropriate, from a defendant's silence in the face of police questioning or at trial.³ It is factually inaccurate to describe a suspect's right to silence as having been abolished by the CJPOA,⁴ notwithstanding that many commentators consider the impact of these provisions

¹ Sections 34-37, Criminal Justice & Public Order Act 1994.

² In addition to the CJPOA, these findings have ramifications for the operation of the Police & Criminal Evidence Act 1984, particularly in terms of custody officer independence and pre-interrogation disclosure of prosecution material.

³ Although undefined by the legislation, the nature of such an inference is likely to be adverse to the defendant's case.

⁴ Certain restrictions on a suspect's right to silence existed prior to the introduction of the CJPOA. For a full discussion on this subject, see Easton (1991) and Wood & Crawford (1989).

to the contrary. Nevertheless, the likely prejudice that silence attracts would seem to make it a less desirable option.

The debate that preceded their introduction spanned more than two decades, from the point where the Criminal Law Revision Committee first submitted reform proposals.⁵ Although rejected at the time, the ability of the right to silence to harness a wider debate on the criminal justice system as a whole was not diminished, and the debate among academic commentators and practitioners alike continued unabated. Supporters of the right considered it an important safeguard against the risk of false or improper confessions. The coercive effects of police interrogation was well recognised, they argued, and in an environment free from the protection afforded by the right to silence, the likelihood of improper police questioning would place the most vulnerable suspects in jeopardy of incriminating themselves falsely.

In contrast, a substantial body of opinion, traditionally associated with the police and senior judiciary, favoured abolishing the right to silence. They argued that professional criminals, in particular, were hiding behind silence and exploiting weaknesses in the judicial process. Such use of silence was having a profound impact on the criminal justice system, they suggested, restricting the ability of the police to conduct effective interviews and obtain evidence by questioning. Additional safeguards, such as improved access to legal advice and routine tape-recording of interviews, introduced by the Police & Criminal Evidence Act 1984

⁵ Cmnd. 4991.

(PACE), meant that suspects were now adequately protected, they claimed, and no longer needed to seek refuge in the anachronistic right to silence.

Reform of the right was considered, and rejected, by two Royal Commissions⁶ before concrete proposals, drawn up by a Home Office Working Group, came into force in April 1995. Introducing the silence provisions promised to deliver benefits to the criminal justice system by increasing the ease with which guilty defendants could be convicted. This position was, however, challenged by empirical evidence that suggested the number of defendants likely to be affected by the legislation was low.⁷ Research indicated that a minority of suspects relied upon silence when questioned by the police, from which a significantly smaller proportion went on to successfully contest the ensuing prosecution. From the police perspective, the impact of abrogating the right to silence would be felt in terms of reducing the incidence of no-comment interviews and correspondingly greater opportunities to hear, and test the veracity of, suspects' accounts. When change finally came, no one engaged in the debate could have predicted the consequences for police-defence lawyer interaction or the far-reaching effects on police interrogation, reported in the present research.

The possibility of inferences being drawn from the failure or refusal of a suspect to answer police questions meant that legal advice to suspects took on increased significance. Defence lawyers would have to be alive to the consequences for their client's case at trial of counselling silence during police interviews. It was vital,

⁶ Royal Commission on Criminal Procedure (1981); Royal Commission on Criminal Justice (1993).

therefore, from the lawyer's perspective, to obtain as much detail of the case on which to base advice to clients. From the police point of view, keeping the suspect in the dark as to the nature and strength of the evidence against him was regarded as a key tactical advantage. Legal advisers successfully argued that, in the absence of sufficient pre-interview disclosure of the prosecution evidence, they would have little option but to counsel silence to clients. Any intended use of the resultant no-comment interview at trial would be subject to a test of reasonableness in respect of the suspect's actions, in the light of non-disclosure by police officers. Although the legislation placed no obligation on the police to provide such disclosure, appellate caselaw indicated a greater willingness by courts to extend disclosure beyond the requirements of PACE and the Codes of Practice. Police control of the interview encounter was further threatened by the emergence of better-trained, more assertive legal advisers. Anxious to prevent possible criticism at court – and to avoid interviews being punctuated by a series of private consultations as details were gradually revealed – the police responded by releasing extensive details of the case to legal advisers.

Formalised briefings developed in which the police routinely provided legal advisers with a detailed case narrative before interviewing commenced. The briefing would typically include details of evidence already gathered and to be secured in the future, along with proposed areas of questioning. The present research indicates that some officers felt obliged to provide full disclosure of the facts, with others apparently resigned to the inevitability of providing this

⁷ See Leng (1993).

information in order to prevent no-comment interviews. A small number of officers were reticent to release anything that might benefit the suspect during interrogation, resisting moves towards fuller disclosure. Nevertheless, police discretion over the provision of pre-interview disclosure had been largely undermined by the likelihood of a suspect's non-cooperation in interview, and the increasingly interventionist role of defence lawyers.

Providing extensive details of the police case and intended lines of questioning, led some officers to examine the logic of an approach which appears to relinquish to the defence a key tactical advantage in the interrogation process. As a consequence, the police implemented a strategy based on initial non-disclosure, followed by a graduated release of evidence: the objective being to obtain a truthful account from a suspect, not necessarily a confession. This emphasis on 'truth-seeking' was entirely consistent with the principles of investigative interviewing and the PEACE model. Despite the intention of such an approach, previous research demonstrated that being kept 'in the dark' can unsettle an interviewee, undermine the presence of the legal adviser and, ultimately, influence the suspect's decision-making.⁸

No official account exists to describe the operation of 'phased disclosure',⁹ as it is called in this Force, with instruction being very much 'on the job'. Respondents versed in its use stressed the benefits of being able to obtain a suspect's version of

⁸ See McConville & Hodgson (1993).

⁹ The name of this strategy recently changed in this force to 'managed disclosure', underlining the emphasis placed on considering the timing of information release not necessarily the incremental nature of it. As several respondents indicated, in certain circumstances a single disclosure briefing may be all that is necessary to release sufficient information.

events, unfettered by facts and evidence that might alter their account. Use of this strategy varies between complete non-disclosure of material, beyond the legal obligations provided in PACE and the Codes of Practice, on the one hand, or by resort to informal negotiation with the legal adviser on the other. Conscious of the lawyer's need for information on which to base their advice, respondents described how they release sufficient detail to satisfy the legal adviser's demands, while still retaining the tactical advantage of challenging a suspect's account with key evidence. In effect, officers trade *co-operation* from the suspect in exchange for partial disclosure of prosecution material. The use of such tactics did not present the police with any real challenge, as they are no strangers to negotiation. Indeed, many commentators have drawn attention to the police use of bail as a bargaining tool for admissions from suspects in the past.¹⁰ Many deals are struck on the basis of a trusted relationship between officer and suspect, such action being described as a 'hallmark of good policing'.¹¹

Although use of phased disclosure was not widespread among respondents in the present study (less than a third of case officers having personal experience of its application), this proportion is likely to have increased since the fieldwork stage of this study. Recent feedback from respondents indicates that more officers have become conversant in the use of this strategy, and its application has been extended to circumstances beyond those reported in this research.¹² Further work

¹⁰ McConville *et al* (1991: 61).

¹¹ Sanders & Young (2000: 249).

¹² In light of the instruction issued by the Assistant Chief Constable in November 2001 (reported in chapter 6 above), uniformed officers have joined their detective colleagues in utilising phased disclosure, and now routinely consider the nature and timing of disclosure to legal representatives, and its impact on subsequent interviews.

in this field is required to extend the reporting of this strategy beyond that included in the present study, which only provides a snapshot of what could be regarded as an ‘embryonic’ stage in its development.

The study also revealed how disclosure to the suspect and legal adviser can occur at a number of stages, either by accident or design. It highlighted officers’ awareness of legal boundaries that accompany most policing tasks, and how they make the law work to their advantage. This was particularly true of the formalised detention process upon arrival of the suspect at the police station. Respondents described how they generally restrict the amount of information disclosed to suspects leading up to, and at the point of, arrest. As a consequence, officers did not appear to be revealing more of the grounds for arrest than is legally required of them, although it is less clear whether this is intentional or otherwise. Officers were aware of the formal confines of PACE, yet they were also conscious that PACE does not preclude preparatory measures such as developing the bond with the suspect considered by many commentators as necessary for effective communication. By exploiting procedural opportunities for prolonged contact with the suspect, officers were able to produce positive outcomes through the initial interaction.

The suspect’s arrival at the police station is a pivotal moment from the perspective of disclosure. The detention process represents the point at which a second opinion is given on the arresting officer’s actions. Respondents described a procedure in which the custody officer ratified the arrest and necessity for detention in consultation with the arresting officer, out of the presence and hearing

of the suspect. Once agreed, the circumstances of arrest (or a summarised version) would be repeated and witnessed by the suspect. Such a procedure was justified by respondents in terms of maintaining control, ensuring professionalism and protecting the integrity of evidence. Where phased disclosure was employed, the suspect would not be informed of the circumstances giving rise to his arrest and supporting details would be omitted from his custody record.¹³ Although not proscribed by PACE, the use of such briefings and recording procedures demonstrates how custody officers actively assist colleagues by collaborating in the strategic control of evidence. This accords with an earlier observation of Dixon *et al* (1990: 138), who commented that: ‘Custody officers have learnt to use some of their duties in ways which assist their colleagues, the investigating officers. In consequence, some rights are protected and some statutory procedures are carried out in a largely minimalist and routinized way’.

Although the evidence presented in this study suggests that custody officers exercise discretion in a manner indicative of partiality towards colleagues, conflictual contact does, nevertheless, occur. Custody officers face potential discord with other officers, solicitors and not least the detainees themselves in the discharge of their responsibilities. Whilst the majority of respondents within the custody sample recognised the objectivity required by the role, many officers acknowledged their overriding affiliation with colleagues, and an overall picture of ‘qualified impartiality’ emerged. Nevertheless, the responses provided by

¹³ Coleman *et al* (1993: 24), incorrectly describe the custody procedure at this stage, stating that PACE requires the custody officer to examine the evidence for detention in the presence of the suspect. In fact, PACE requires the custody officer to inform the detained person of the grounds for detention, i.e. a brief description of the alleged offence and why detention is necessary, as outlined by s.37(2), and a written record made in his presence – see chapter 6, above.

custody officers demonstrated both rational and intelligent justification in support of their actions taken and an active desire and commitment to discharge their responsibilities in a fair and even-handed manner. The administrative, organisational and legal burden accompanying the role has continued to grow with every revision to the Codes of Practice. Custody officers occupy a unique position in supervising the activities of colleagues and challenging decisions made by higher-ranking officers.¹⁴ Their working environment presents challenges both physical and moral, and the requisite degree of control they exercise contributes to the high levels of professionalism demonstrated in this study.

Actions taken by police, as outlined in the briefing and recording practices, do not appear to offend the literal injunctions of PACE and the Codes (what could be described as a *formal* model of the interaction with suspects). Nevertheless, discretion is exercised in a fashion deliberately designed to accommodate officers in the ensuing interviews by weakening the relative position of the suspect. PACE has become incorporated into police working rules and practices, McConville *et al* (1991: 185) suggest, and rather than constraining police behaviour, formal rules may function as a resource whose behaviour is governed by the extent they can ‘get away with it’.

Increased levels of access to legal advice, provided by better-trained, more interventionist legal advisers, have acted to constrain the freedom of police officers in the interview encounter. While evidence emerged of lawyers actively

¹⁴ See the example provided by respondent CUST-15 in chapter 6, above.

defending their clients through the adoption of a more confrontational stance, the research findings characterised relations between the police and legal advisers as overwhelmingly positive and professionally-based. Although the provision of briefings, as described above, was found to be commonplace among respondents, the level of disclosure appeared to be influenced by a number of factors. Inexperienced officers generally withheld less information, possibly through lack of confidence in their dealings with advisers, while experienced colleagues generally opted for greater candour as part of a wider strategy to secure the suspect's co-operation. The success of this strategy was dependent on convincing the adviser of his client's guilt and, in effect, co-opting him to take on a facilitating role. Evidence also emerged to draw a clear distinction between pre-planned and *ad hoc* arrests in the degree and timing of material disclosure. Planned operations utilised dedicated resources, not generally found in the circumstances of most arrests, to exercise a greater degree of control, including the briefing of custody staff prior to the arrest being made. Previous literature that attempted to explain police behaviour has failed to pick up on this important distinction.

Overall, the majority of respondents felt that meeting with the legal adviser in the terms described above was of benefit to the interview, although they recognised that the introduction of inferences from silence has significantly altered police-adviser relations. Disclosure briefings have taken on procedural significance (despite there being no legal basis or requirement for such meetings) and they are no longer treated as impromptu affairs. Accordingly, support for the primary hypothesis is found from these responses.

The complexity or seriousness of the offence emerged as the principal determining factors in the decision to employ phased disclosure. In such cases, measures are taken to ensure that the suspect, or his legal adviser, do not discover elements of the prosecution case outside that determined by the case officer. These measures include a conscious avoidance of discussion of the case with the suspect, outside the context of a formal interview, both at the point of arrest and during the detention process. Custody officers are warned in advance of the arrest, in order to agree the terms of detention and maintain the regime of non-disclosure in official records and in discussion with the suspect or his lawyer. The strategy also incorporates the use of dedicated ‘disclosure officers’, tasked with the release of agreed information to the defence; ‘monitoring officers’, who oversee the interviews and help to formulate subsequent disclosure; and the interviewing officers themselves. Interviews generally take the form of a three-stage process: the *suspect’s agenda*, in which no *prima facie* evidence is released and the suspect is given an opportunity to provide an account in response to the allegation; the *police agenda*, where the suspect is informed and questioned over particular areas, often spanning several interviews; and finally the *challenge* phase, where the suspect is confronted with anomalies or inconsistencies in his earlier responses. The format and structure of this approach was considered by respondents to be in keeping with that of the ‘PEACE’ model advocated in *investigative interview* training. The respondents with experience of this strategy recognised that its use made the lawyer’s task in providing legal advice harder, and that it could potentially sour working relations.

For the police, the success of this strategy is measured in terms of the information derived from interviews. In this sense respondents felt its use was effective, as they believed it resulted in fewer no-comment interviews.¹⁵ Indeed, some respondents in the case officer sample claimed to have little or no personal experience of such encounters, with almost a third of those questioned reporting 3 or less instances. The majority of case officers had no discernible strategy in response to silence, with many recognising that innocent reasons might exist to explain its exercise in the face of police questioning. For the vast majority, however, silence was considered to be indicative of guilt and not the natural reaction of an innocent party. Home Office research into the impact of the silence provisions¹⁶ supports the view that there are fewer no-comment interviews, with published figures indicating a reduction in the order of 30 per cent when compared to a similar study conducted prior to the introduction of the CJPOA.¹⁷ However, despite the reduction in the numbers of suspects exercising silence, the Home Office study found no consequential increase in the proportion of suspects providing admissions. Even if not amounting to a confession, the suspect's account was, nevertheless, regarded as useful to the police, providing avenues for further enquiry. This picture was reproduced in the views of respondents from the current study. Even though commentators had predicted that 'no comment'

¹⁵ Evidence from the present study also suggests that the use of controlled disclosure could in certain cases lead to an increase in non-cooperation by suspects, particularly during the initial stages of protracted interviewing (see respondent D/CON-10 in chapter 7 (Use of phased disclosure). However, the findings indicate that where this is the case suspects generally go on to provide an account (truthful or otherwise) in subsequent interviews, as more prosecution evidence is released. It should be borne in mind of course that, due to methodological constraints, the research findings are by definition impressionistic and cannot, therefore, be regarded as wholly reliable in the absence of other forms of empirical data collection.

¹⁶ Bucke *et al* (2000).

¹⁷ Phillips & Brown (1997). The fieldwork for this study was carried out between September 1993 and March 1994. Both studies included data collected from a number of police forces, including the host force for the present study.

interviews would be seen as a positive product in view of the possible inferences, the present research suggests that officers are clearly keener to exploit the evidential value of an inference from a lie, than an inference from silence.

In Northern Ireland, work conducted by Jackson *et al* (2000) has also contributed to the collective understanding of the effectiveness of legislation attenuating a suspect's right to silence. As Jackson (2001) reports, although the study did not carry out a quantitative examination of the issue, there was consensus among police officers and solicitors interviewed in the province, that the legislation¹⁸ had resulted in a greater willingness on the part of non-terrorist suspects to answer police questions.¹⁹ Another key theme to emerge in both Jackson's and Bucke *et al*'s studies was the increased likelihood of legal advisers recommending their clients answer police questions, as opposed to staying silent.²⁰ Notwithstanding the declared methodological weaknesses of the present study, further evidence has emerged from respondents which combines with conclusions drawn from research highlighted above to adequately support the second hypothesis.

At a broader level, this research exemplifies how the adversarial system is embedded in the working lives and regimes of police officers who come to see themselves in oppositional terms to the suspect and his legal adviser. This has a significant impact on investigative strategies, the form that questioning takes and policies governing the disclosure of evidence. The effect of this is to call into

¹⁸ Criminal Evidence (Northern Ireland) Order 1988.

¹⁹ Jackson (2001: 158).

²⁰ Bucke *et al* (2000: 25).

question those views or theories that attempt to depict or recast police officers as engaged in a dispassionate *search for the truth* or as having to adopt *ethical* interviewing styles. The characterisation of police interviewing as a mechanism for constructing proof is one which finds support on the basis of the evidence presented in this research, and in particular as a response to the exercise of silence. The development of investigative interviewing has, nevertheless, been successful in altering the attitudes and working practices of officers to a degree, but they may be more realistically seen as searching for the truth *as they see it* with their ethical understandings shaped accordingly. The adversarial system continues to pit one party against another and this oppositional relationship informs and makes sense of what police officers do.

At a theoretical level, the present study continues a research tradition that demonstrates the law is a resource rather than a constraint.²¹ The law is open-textured in nature: rather than handcuffing officers, reform of the law relating to silence and disclosure has provided a space for those who have to implement it in which they are able to negotiate their working lives. Without in any way breaking the law, police officers are permitted considerable discretion in the management of police-suspect relations including disclosure and the management of information. The opportunities afforded by the new legal arrangements may be differentially addressed by individual officers, but there is evidence that the police, *as an organization*, has been able to respond in more or less systematic ways. They have thus sought to make the law conform to police values and objectives rather than,

²¹ McConville *et al* (1991: 176-177).

as some predicted, the other way around. This study is, therefore, another illustration of the continuous interplay between law, rhetoric and reality.

APPENDIX A – ISQ CASE OFFICERS

1. Background Information

- 1.1 Age
- 1.2 Current role
- 1.3 How long have you been in that role
- 1.4 Total length of police service
- 1.5 This study is looking at your views and experiences in arresting and interviewing suspects. How would you describe your level of knowledge and familiarity in these areas

2. Typical Arrest

- 2.1 Taking the example of a typical arrest, what do you normally say to a suspect when an arrest is made
- 2.2 How do most suspects respond
- 2.3 Do you have to record what has been said - where/when/how
- 2.4 Do suspects ever talk to you about the offence on the way to the station
- 2.5 What normally happens – do you respond - why do they do this
- 2.6 Do you record it – where/when

3. Arrival at the Police Station

- 3.1 What happens when you arrive at the police station
- 3.2 Who do you have to see
- 3.3 What do you tell them
- 3.4 Who is present
- 3.5 Where is it recorded
- 3.6 Do you inspect the custody record – How do you know the Custody Officer hasn't written down something you didn't want disclosing
- 3.7 How do you decide what to tell the custody officer
- 3.8 What difference would it make if the prisoner hears this

4. Hand-over Prisoners

- 4.1 Talking now about handover prisoners - What information is passed on, and how
-Personal briefing/through supervisor

5. Legal Advisers

- 5.1 Where a prisoner you are dealing with wants a legal adviser present for interview, what normally happens when they arrive at the station
- 5.2 What does the solicitor usually ask you
- 5.3 How do you respond - Do you tell them anything about the case, if so, what
- 5.4 Do you vary the amount you tell a solicitor before the interview
- 5.5 How do you decide when to vary it
- 5.6 Can you give me some examples of when you would vary it
- 5.7 What wouldn't you tell the solicitor - why
- 5.8 Are you aware of any Force policy or national guidelines covering what to tell legal advisers - How did you become aware of this
- 5.9 How do you feel about talking to legal advisers before the interview - does it cause you problems or can it be an advantage – explain how
- 5.10 Do you think what you say to the solicitor in the disclosure briefing can effect what happens in the interview – How
- 5.11 Would you withhold information where the case is generally weaker
- 5.12 Do you record what is said between you and the legal adviser - If Yes - where, if No - why not
- 5.13 Has your relationship with solicitors changed since the changes to the law (inferences from silence etc.) - In what way
- 5.14 Do you treat all solicitors the same
- 5.15 Are there particular firms of solicitors whom you prefer not to deal with – why

6. Interviews

- 6.1 What do you see as the purpose of an interview – How do you see your role
- 6.2 What are you hoping to achieve in an interview - What makes it successful
- 6.3 What qualities do you think you need to be a good interviewer

- 6.4 How have you picked up your interviewing skills - Training (formal or informal), did it cover disclosure - Have you developed your own style, or has it come from other officers - What skills in particular did you pick up and what areas would you like to improve
- 6.5 Has this training changed the way you interview suspects, If yes - how, if No - why not
- 6.6 Do you prepare for the interview , If yes - how, if No - why not
- 6.7 What factors would make you prepare differently (seriousness of offence/strength of case/knowledge of suspect/presence of legal adviser) - How exactly
- 6.8 What sort of things give you an advantage in an interview - Control of information flow/element of surprise - What can be a disadvantage
- 6.9 Does the presence of a solicitor affect your interviewing style - How
- 6.10 Does their presence affect the outcome of the interview - How
- 6.11 Do you prefer to interview suspects without a solicitor being present – Why

7. Right to Silence

- 7.1 Have you had experience of interviewing a suspect who exercised his right to silence
- 7.2 What happens, typically
- 7.3 How do you usually deal with this in an interview - Do you have any particular tactics - Have you ever passed these on to other officers - perhaps dealing with same suspect
- 7.4 Do you think 'no comment' interviews are prompted by the solicitor or the suspect
- 7.5 Have you ever issued a special warning - What happened - How familiar are you with the law on drawing adverse inferences and when to give Special Warnings
- 7.6 What is your understanding of the term 'right to silence' - What does it include
- 7.7 What do you think was the intention of the law on inferences when it was introduced - Has it had that effect
- 7.8 Do you think this law has affected the way suspects behave in interviews - How
- 7.9 Have you changed as a result - If so, how-
- 7.10 What made you change (reflective/learned/taught response)
- 7.11 What has the Force done to help you deal with suspects who do not co-operate
- 7.12 Is it important for a suspect to speak in an interview - Why

-
- 7.13 Do you think there are innocent reasons for exercising silence in an interview - What are they
- 7.14 Generally speaking, has the importance attached to interviews changed since the introduction of adverse inferences, If Yes - in what way
- 7.15 What sort of person do you consider is a 'professional' criminal
- 7.16 Have you had much experience with 'professional' criminals
- 7.17 Do you deal with them in any particular way - How does it vary from other criminals
- 7.18 Do you think 'professional' criminals are exploiting the right to silence - How
- 7.19 Does the law on the right to silence go far enough - Does it need changing further

APPENDIX B – ISQ CUSTODY OFFICERS

1. Background Information

- 1.1 Age
- 1.2 Total length of police service
- 1.3 How long have you been in the role of Custody Officer

2. Role of the Custody Officer

- 2.1 How do you see your role in the custody office
- 2.2 Do you look upon yourself as impartial
- 2.3 Do you ever find yourself in conflict with anyone – who/why
- 2.4 When can decision making become difficult as a Custody Officer
- 2.5 Do you feel the role could be better performed by an independent outside agency

3. Police Detention Procedures

- 3.1 Taking the example of a typical arrest, can you talk me through what happens when the prisoner arrives at the station
- 3.2 What does the arresting officer say to you
- 3.3 What are you looking for - Sources of evidence/Grounds for suspicion/Lawful arrest/Is detention necessary
- 3.4 Where does this take place - Who is present
- 3.5 Is it recorded – If yes, where, if no, why not - How much is recorded
- 3.6 How do you decide what to record – legal requirements
- 3.7 What is the detained person told
- 3.8 (Is this something all other Custody Officers do at this station – What about other stations)
- 3.9 (Do you feel you are becoming involved in the investigation by withholding (?) details of the evidence from the detained person)
- 3.10 (Why do you do this)

4. Legal Representation

- 4.1 What happens if the detained person wants a solicitor - Who makes contact
- 4.2 What is usually divulged - Who decides what is divulged
- 4.3 Do you usually check to see what previous custody officers have already said
- 4.4 Is a record made of what is divulged - If Yes “Where”, if No “Why not”
- 4.5 What happens when the solicitor arrives to see their client
- 4.6 What do they usually ask you - How do you respond – Again do you record what has happened
- 4.7 Do you usually consult with the OIC before telling the legal adviser anything about the case
- 4.8 Are you aware of any Force policy or national guidelines covering this issue or disclosure generally

5. Relations with Legal Advisers

- 5.1 How would you describe the relationship between custody officers and legal advisers
- 5.2 Does it vary between certain firms of solicitors or individuals
- 5.3 Can it make a difference to how you do your job - Are you more inclined to discuss the case with them

6. Disposal Decisions

- 6.1 How do you decide on whether to charge a prisoner or not - What things do you take into account
- 6.2 Would the possibility of a court drawing adverse inferences from silence at the police station make any difference to your decision
- 6.3 How much weight would you give to them
- 6.4 Could they ever tip the balance

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