

# CDS Direct: Flying in the face of the evidence

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Ed Cape is Professor of Criminal Law and Practice and Director of the Centre for Legal Research at the University of the West of England, Bristol. The author of *Defending Suspects at Police Stations*, (5th edition) he is well known for his work on criminal justice law and policy. He has recently completed research on the investigative stage of the criminal process in the European Union, and is currently working with an international team on effective criminal defence rights in Europe. He has conducted research for the Legal Services Commission, most recently as part of the team that evaluated the Public Defender Service.

# CDS Direct: Flying in the face of the evidence

Lee Bridges and Ed Cape

## Preface

This deliberately detailed account of the introduction of two related schemes, Criminal Defence Service (CDS) Direct and the Defence Solicitor Call Centre (DSCC), for the delivery of legal advice to those arrested and detained by the police, provides an insight into a number of features of policy development and implementation that are becoming increasingly familiar in the current era. What commenced as a limited pilot project has been expanded to become a national scheme that affects all people arrested and detained by the police and all criminal defence lawyers who provide advice at police stations.

Yet the pilot project was never evaluated independently, and the evaluation that was carried out provided an inadequate basis for expanding the scheme. Evidence has been ignored or discounted as to the likely implications of changes which will build in long lines of communication and delay, which will break the link between suspects and 'their' lawyers, and which will require many of those who request legal advice to be asked about how they intend to pay. Spurious targets and measures of success – for example, measuring time taken by CDS Direct to respond to a call rather than the time taken to deliver legal advice – are established and calls for meaningful evaluation are refused. Whilst

police custody officers are asked for their views about whether the schemes are 'usable', no attempt is made to discover the views and experiences of suspects or their lawyers (LSC, 2006a).

Public consultation has been used to legitimise the new schemes, yet the process is shamelessly abused. Consultation periods are unreasonably short and, in the case of the consultation on the Police and Criminal Evidence codes, limited to the absolute minimum number of respondents permitted by the legislation. And, in any event, the views of those who oppose or question the proposals (that is, the overwhelming majority) are simply ignored. The parliamentary approval process for revising the codes is so arcane that it is difficult to identify the relevant committee that will actually consider the substance of the changes. However, that is of no consequence since, as the revisions were approved, the Legal Services Commission (LSC) changed the scheme so that what parliament had approved was immediately rendered meaningless. Yet the confidence of the Ministry of Justice and the LSC that they will not, or cannot, be challenged is such that all of this is placed in the public domain.

During most of the 1990s there was a real commitment by government and by the legal aid authorities to increase the take-up of the right to custodial legal advice and to improve the quality of the legal services provided. The government responded to academic research that revealed the factors that inhibited the demand for and delivery of legal advice and the Legal Aid Board (the predecessor of the LSC), taking the Law Society with it, responded to both the research and miscarriage of justice cases that demonstrated systemic failures in the provision of high quality legal advice. Whilst lip-service is still paid to quality, the principal objective now is not simply to contain costs, but also to provide a mechanism for preventing future increases in expenditure without regard to the real quality implications or to the significance of government policies, such as the Offences Brought to Justice Target, in driving up demand.

Indeed, the barely veiled underlying intent of the changes is to place a cap on any further expansion in the take-up of the

right to custodial legal advice, thereby effectively undermining the universal right of all suspects to consult with a solicitor of their choice established by parliament over 20 years ago in the wake of an earlier wave of serious miscarriages of justice. But to a government – and increasingly a LSC – that sees criminal justice solely in terms of its efficiency in delivering convictions, such a reversal in policy, in the face of the evidence, has become commonplace.

# Chapter 1

## The lessons of history

For over two decades people arrested and detained by the police in England and Wales had an almost unfettered right to consult a lawyer in person, and to have them present during police interviews. Although the legislation creating this right pre-dated the Human Rights Act 1998 by well over a decade, it anticipated the recognition that the right to a fair trial requires a fair investigative process. Admired and emulated in many jurisdictions, countries seeking to join the European Union over the past few years have been required to create similar rights as a condition of membership. However, at the beginning of 2008, the Legal Services Commission (LSC) introduced two schemes, CDS Direct<sup>1</sup> and the Defence Solicitor Call Centre (DSCC) which call into question the British government's and the LSC's commitment to this universal right to legal advice for those detained by the police. The former scheme limits both the right to legal advice in person and the right to a choice of lawyer in certain cases. Under the latter scheme, all requests for police station legal advice are routed to the DSCC. Neither the suspect themselves nor the police can make the initial contact directly with the suspect's nominated solicitor.

To understand fully the nature of the risk these schemes pose to suspects' rights, it is necessary to place them in the context of how the right to legal advice has developed. Unfortunately, those responsible for changes to the schemes, whether in the Home Office, the Ministry of Justice or the LSC, seem to be suffering from a collective amnesia regarding the lessons of history and the extensive research on custodial legal advice undertaken in the period following implementation of the relevant statutory provisions in the late 1980s.

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<sup>1</sup>The scheme is known as CDS Direct, CDS standing for Criminal Defence Service, which is one of two divisions of the Legal Services Commission (LSC), the other being the Community Legal Service, or CLS. The LSC has responsibility under the Access to Justice Act 1999 for the administration of legal aid in England and Wales.

Under the Police and Criminal Evidence Act 1984 (PACE) s.58, any person under arrest and held in custody in a police station or other premises is entitled, upon request, 'to consult a solicitor privately at any time'. In order to give effect to this new statutory right, the original codes of practice issued under PACE required the police custody officer to advise arrested persons, both orally and by way of a printed notice, of their right to consult either a named solicitor of their choice, one selected from a list held by the police or a duty solicitor. The arrested person was required to sign the custody record confirming that they had been advised of their right to legal advice and, where this was the case, that they did not seek to exercise this right. Where the arrested person did request legal advice from a named solicitor or one chosen from a list, the police were required to seek to contact the solicitor in question by telephone directly. But where the duty solicitor was asked for (or the named solicitor could not be contacted), the request would be channelled through a national telephone referral service set up for this purpose which maintained a record of the solicitor on duty in each locality at any given time. It would then be for the solicitor to decide how to respond to the request, in particular whether to advise the suspect over the telephone, to attend the police station to advise the suspect in person, or both.

The government at the time further provided that all legal advice in police stations, whether given over the telephone or in person and by a named solicitor (what came to be referred to as an 'own solicitor') or the duty solicitor, would be fully remunerated under legal aid at no cost to the suspect. The Law Society (then responsible for the administration of legal aid on behalf of the government) was given responsibility for establishing 24-hour duty solicitor schemes in each locality to ensure that legal advice would be available at all police stations to advise and assist suspects who did not name a solicitor or select one from a list.

### **A proper evaluation**

These provisions, along with many other aspects of PACE, were subject to a significant body of empirical research in the period

immediately following their implementation.<sup>2</sup> The national take-up rate for custodial legal advice, at around one-fifth of all arrested persons, was considerably higher than had been originally predicted by the Royal Commission on Criminal Procedure (RCCP, 1981), whose recommendations formed the basis of PACE, but was also shown to vary considerably from one area and police station to another. More importantly, a number of criticisms emerged of the ways in which both the police and the legal profession had gone about putting the section 58 right to legal advice into effect. A study commissioned by the Lord Chancellor's Department (a forerunner of the Ministry of Justice), based on observations in the custody suites of ten police stations, found that in two-fifths of the cases observed the police used one or more 'ploys' to dissuade suspects from exercising their right to legal advice. These included: reading suspects their rights too quickly, incomprehensibly, incompletely, or simply asking them to 'sign here, here and here'; telling them they would only be held in custody for a short time; telling them that the charge was not a serious one, or that they would not be charged or interviewed; or informing them that a request for legal advice would result in their being held for a long period and having 'to wait in the cells'. The research also noted that potential take-up of the right to legal advice might have been suppressed by the fact that the police were not obliged under the codes of practice to inform suspects that the service would be provided free under legal aid (Sanders et al., 1989).

For their part, solicitors were criticised for the ways in which they responded to requests for custodial legal advice. First, there were problems with solicitor availability to answer calls for legal advice, especially outside office hours, which even extended in some areas to duty solicitors.<sup>3</sup> Second, there was a high incidence of

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<sup>2</sup>For a summary of this research, see Brown, 1997, and Bridges and Choongh, 1998.

<sup>3</sup>Two types of duty solicitor schemes were set up: *rota schemes* in potentially busy areas where a named solicitor(s) would be on duty, either at all times or out of office hours, and would be paid a 'standby' fee in addition to any other legal aid fees payable for individual cases; and *panel schemes* where the duty solicitor telephone service would work through a list of approved duty solicitors for an area until such time that one was found to be available to respond to a request and the solicitor would be paid only the fees payable for the individual case.

cases in which the only advice offered to the suspect was over the telephone, even though in many police stations there were no facilities to ensure that such advice could be provided on a confidential basis. In the early days of the scheme, 'telephone-only' advice was provided in as many as a third of all requests for legal advice and the rate was even slightly higher where the police indicated that they intended to interview the suspect.<sup>4</sup> Telephone-only advice rates could be considerably higher in particular police stations (up to 80 per cent in one study) (Brown, Ellis and Larcombe, 1992), and even in the case of suspects detained in respect of the most serious offences, a fifth of requests for legal advice where a solicitor could be contacted resulted in the provision of telephone-only advice. It was thus apparent that decisions to provide advice by telephone rather than going to the police station to provide it in person were often made on the basis of considerations other than the needs of the client or the seriousness of the alleged offence.

Suspects themselves were clear that advice over the telephone was of much more limited value than that provided in person: 46 per cent of those who received telephone-only advice described it as worthless, compared to just eight per cent who were attended in person by a legal adviser at the police station (Sanders et al., 1989). A subsequent Home Office study pointed to a number of examples where suspects did not proceed with requests for solicitors when they realised that advice would be given over the telephone. As this study explained:

*Solicitors are often unable or not prepared to attend the station to provide advice and custody officers are therefore well aware that the only consultation that may take place is on the telephone within others' hearing. However, telephone consultation ... may sometimes occur simply because the suspect does not realise that he or she may ask to speak to the solicitor in person at the police station. The impression may be fostered either by what is said by*

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<sup>4</sup>Excluding cases where a solicitor attended with the suspect on a pre-arranged appointment. See Sanders et al., 1989. A subsequent study by the Home Office found a similar rate of telephone-only advice. See Brown, Ellis and Larcombe, 1992.

*custody officers or because custody officers fail to correct wrong conclusions drawn by the suspect. Examples of both situations were encountered during observation ... the belief that advice will be given only on the telephone may influence decisions about whether to ask for a solicitor.*

**(Brown, Ellis and Lacombe, 1992)**

It is significant that duty solicitors tended consistently to offer telephone-only advice more frequently (44 per cent of cases) than own solicitors (17 per cent), despite the fact that out-of-office-hours duty solicitors would actually have been remunerated more generously than own solicitors had they attended the suspect in person at the police station.

Two factors might have explained the higher rate of police station attendances by own solicitors. The first was the interest of these solicitors in maintaining the loyalty of established clients, so that even when such a client was arrested for a less serious offence the solicitor may have felt a professional obligation to attend in person so that the client would, if arrested on a more serious matter in future, again name them as their chosen solicitor.

The second factor was the greater flexibility own solicitors had in deploying other staff within their firms in responding to requests for custodial legal advice and in attending in person at the police station. As noted earlier, PACE s.58 specified the right of suspects 'to consult a *solicitor* in private at any time' (emphasis added) and initial Law Society guidelines indicated that this work should normally be carried out by a solicitor experienced in criminal law (Law Society, 1985). However, it soon became clear that, in implementing the new provisions for custodial legal advice, solicitors were in practice making considerable use of other staff who might not be qualified as solicitors or experienced or trained in criminal law. The Law Society eventually amended its professional guidance to allow for such delegation even without the solicitor first considering the appropriateness of doing so on an individual case basis:

*Solicitors organise their work in a variety of ways and it is acceptable for solicitors to give general authority to their clerks to undertake this work without the necessity of a decision by a solicitor in each case.*

**(Law Society, 1991)**

On the other hand, duty solicitors could only delegate to other 'representatives' where a local organising committee allowed this and had vetted the persons concerned as suitable for the role, and even then the duty solicitor was required personally to handle the initial request for legal advice and to undertake an assessment of whether attendance in person might be required and whether this could properly be delegated to another 'representative' within the firm.

The extent of the use of 'representatives' to provide custodial legal advice varied from one solicitors' firm and police station to another (and therefore, in the absence of national statistics on the matter, from one research study to another).<sup>5</sup> The earliest police station observation study for the Lord Chancellor's Department found that, overall, 30 per cent of police station attendances (55 per cent on behalf of own solicitors but only 13 per cent on behalf of duty solicitors) were undertaken by staff who were not solicitors (Sanders et al., 1989). A subsequent Home Office observational study, conducted in a smaller number of police stations and with fewer cases observed, indicated a lower rate of use of 'representatives', ranging from nine per cent to 16 per cent of cases involving the adviser's attendance at the police station (Brown, Ellis and Larcombe, 1992). By contrast, another study, using observers based inside mainly large solicitors' firms, found that as many as three-quarters of police station attendances were undertaken by non-solicitors, including one-fifth by former police officers employed within these firms, 15 per cent by trainee solicitors and 35 per cent by other non-solicitor staff such as legal clerks, secretaries or even out-of-work actors (McConville and Hodgson, 1992).

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<sup>5</sup> For a summary of the research findings in this respect, see Bridges and Hodgson, 1995.

## Using the evaluation to improve the service

These weaknesses in the initial implementation of the right to custodial legal advice were partially addressed during the 1990s, in particular following the recommendations of the Royal Commission on Criminal Justice in 1993 (RCCJ, 1993).<sup>6</sup> Indeed, even before this, the Home Office had undertaken a revision of the relevant PACE code of practice in order to ensure that suspects were better informed of their right to legal advice. Perhaps the most important change introduced at the time was a requirement to inform suspects that legal advice would be *free* of charge, that the consultation would be *private* and that the adviser would be *independent* of the police. This information was required to be given orally by the custody officer and in the form of an improved leaflet produced by the Law Society, and additionally in posters displayed prominently in custody areas of police stations. The police were also required to inform suspects that the right to legal advice was a continuing one which could be exercised at any point during their detention at the police station, and further reminders of the right to obtain legal advice were to be given prior to any police interview, identification parade, request to take a sample, or when the detention itself was subject to review under PACE. Finally, the revised code specifically stated that '[n]o police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice.'

At the same time, in order to discourage reliance on telephone advice especially among duty solicitors, the Legal Aid Board<sup>7</sup> introduced a set of specific criteria under which duty solicitors would be expected to attend a suspect in person (Legal Aid Board, 1992). These included situations where the suspect requested an attendance, where the offence was an arrestable one and the suspect was to be interviewed, where an identification parade was to be held, or where the suspect

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<sup>6</sup>See in particular pp.35-39 and Recommendations 56-69.

<sup>7</sup>Which had taken over responsibility for legal aid from the Law Society as a result of the Legal Aid Act 1988.

complained of serious maltreatment.<sup>8</sup> These criteria were not restrictive, in that duty solicitors (as well as own solicitors) retained a professional discretion to attend in person in other circumstances. They were designed to encourage attendance and, as will be seen, this contrasts with the way in which some of the criteria have now been adapted to serve as exceptions, allowing for an attendance at the police station to be paid for in circumstances where otherwise legal aid is restricted, for both duty and own solicitors, to the provision of telephone-only advice.

The impact of these changes was to significantly improve various aspects of the provision of custodial legal advice. First, take-up of the right to legal advice increased, so that nearly a third of all suspects requested such advice, compared to between a fifth and a quarter prior to implementation of the revised code of practice (Brown, Ellis and Larcombe, 1992). Request rates subsequently increased further to two-fifths of all detainees (Bucke and Brown, 1997). Home Office research also showed that the use of 'ploys'<sup>9</sup> by the police to discourage suspects from seeking legal advice, although not entirely eliminated, did decline, as did the impact of such tactics in influencing suspects' actual behaviour (Brown, Ellis and Larcombe, 1992). The incidence of advice provided only over the telephone also reduced to less than a fifth of cases in which suspects received legal advice while in police custody, a figure that has remained fairly constant until very recently (Phillips and Brown, 1998).<sup>10</sup> At the same time, the differential whereby duty solicitors provided telephone advice more frequently than own solicitors continued (ibid).

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<sup>8</sup>'Arrestable offence' had a specific meaning under PACE 1984 s.24 and, broadly, included offences that carried a maximum sentence of at least five years and certain other specific offences. Section 24 was amended in January 2006 so that the police now have the power of arrest in respect of all offences.

<sup>9</sup>A term with which the Home Office researchers disagreed.

<sup>10</sup>For example, in 2003-2004 the proportion of suspects receiving custodial legal advice on criminal matters who received such advice solely over the telephone was 20.7 per cent. See LSC, 2004: 54.

The other major improvement introduced jointly by the Law Society and the Legal Aid Board, following the report of the Royal Commission on Criminal Justice, was a national scheme for training and accrediting non-solicitor police station legal advisers.<sup>11</sup> This was backed by the Legal Aid Board requiring that such persons, whether acting on behalf of duty or own solicitors, should be registered under the scheme as a condition of their firms being remunerated under the legal aid scheme for police station advice cases on which they were deployed. As a result, several thousand existing and new personnel were accredited under the scheme during its first few years of operation, and the scheme was shown to have resulted in significant improvement in the quality of custodial legal advice as provided both by solicitors and their 'representatives', especially during police interviews (Bridges and Choongh, 1998). At the same time, the introduction of the accreditation scheme for non-solicitor police station representatives probably increased the incidence of their use in the provision of custodial legal advice, especially among larger firms and duty solicitors. The latter, whilst still required to consider a request for custodial legal advice personally before deciding to delegate it to a representative, were relieved of the requirement to obtain prior permission from local organising committees in order to use representatives once the national scheme for their accreditation had been introduced.

Many of the above measures were consolidated with the introduction of the General Criminal Contract for the provision of legally-aided criminal defence services introduced by the LSC in 2001. The contract quality assurance provisions extended to own solicitors the various criteria (previously contained in the duty solicitor arrangements) under which attending the suspect in person at the police station would normally be required. This marked a high point in the drive, which began in the late 1980s, by those responsible for the administration of legal aid (and to some extent by the Home Office) to increase the take-up of custodial legal advice, in line with the spirit of PACE s.58 provisions that it

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<sup>11</sup>The scheme is described in detail in Bridges and Choongh, 1998.

should be readily available to all suspects in police stations, and to improve the quality of the provision of such advice by increasing advisers' rates of attendances at police stations (given the limitations of telephone-only advice) and by ensuring that legal advisers were properly trained in their role in protecting suspects' rights throughout their period in detention.

## Chapter 2

# Restricting access to custodial legal advice – step-by-step

Subsequent changes have thrown the drive to extend the availability and quality of custodial legal advice into reverse, to the extent that it is arguable that the government and the LSC have signalled, for the first time, an intention to ‘cap’ the provision of custodial legal advice at its present levels (which, even now, is received by less than half of all arrested persons<sup>12</sup>) and effectively to undermine its availability as a universal right for all arrested persons.

### Step one – revision of the General Criminal Contract

The first step in this direction was taken with the revision of the General Criminal Contract in 2004, which specified for the first time that only telephone advice would be available under legal aid for certain classes of suspect. These were: those detained for non-imprisonable offences; those arrested on a bench warrant for failing to appear and being held for production before a court (unless the solicitor had clear documentary evidence that would lead to the client’s release); those arrested for driving with excess alcohol and taken to a police station to provide a specimen (failure to provide a specimen, driving whilst unfit/drunk in charge of a motor vehicle); and those detained in relation to breach of police or court bail conditions.

As indicated earlier, the revised General Criminal Contract now provided as exceptions in such cases many of the criteria that were previously introduced in order to encourage a greater rate of personal attendance and less reliance on telephone-only advice.<sup>13</sup> These exceptions were where: an interview or

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<sup>12</sup> Statistics are not routinely collected, but in the most recent years for which figures are available there were about 1.4 million arrests for notifiable offences (which do not cover all persons arrested or otherwise subject to questioning in police stations) and about 790,000 claims for police station legal advice and assistance.

<sup>13</sup> Strictly, they are not prohibitions in that the lawyer may still attend in person but they cannot be paid to do so under legal aid.

identification procedure was due to take place; the suspect was eligible for assistance from an appropriate adult; the suspect required an interpreter or was otherwise unable to communicate over the telephone; the investigation included another offence not included in the above list; or at the time of the request the legal adviser was already in the police station. In other words, solicitors were previously encouraged to attend in person in such circumstances (and could do so in other cases if they made a professional judgment that attendance was necessary), but now they would only be paid for doing so (in those cases to which the restrictions apply) if the exceptional conditions were satisfied.

### **Step two – pilot the CDS Direct scheme**

In October 2005, the LSC introduced a pilot CDS Direct scheme to provide telephone-only advice to suspects in police stations who had requested the duty solicitor. Whilst the proportion of police station advice cases where the suspect requested a duty solicitor (as opposed to an own solicitor) had increased, it still represented (and continues to represent) a minority of all requests for custodial legal advice. In such cases, the police would, as previously, refer requests for duty solicitors to the national telephone service, the Duty Solicitor Call Centre (DSCC, recently re-named the Defence Solicitor Call Centre). But the DSCC, rather than passing all such calls directly on to the duty solicitor, would instead refer those that appeared, from information available from the police, to be eligible only for telephone advice to CDS Direct instead.

### **Step three – fail to carry out an independent evaluation**

The new pilot scheme began operation at the end of October 2005 and was subject to an internal LSC evaluation after six months (LSC, 2006b). Unlike previous research on custodial legal advice, the evaluation was not carried out by independent researchers, did not involve any observations inside police stations (for example, to assess the conditions under which suspects obtained telephone advice and whether these met the requirement of privacy promised under PACE) or make any

attempt to gauge suspects' reactions to the new service.<sup>14</sup> During this period, 36,211 requests for custodial legal advice intended for duty solicitors were diverted to CDS Direct. However, the new service was only able to deal by telephone advice alone with 70 per cent of these cases, and in a further eight per cent CDS Direct, on giving telephone advice to the suspect, determined that conditions existed that required attendance at the police station and thus referred the case to a duty solicitor.

The remaining 22 per cent of cases were ones where the original request for advice had apparently been misdirected to CDS Direct and on examination were found to involve more serious offences or conditions where the legally-aided suspect was entitled to legal advice in person. These cases were also referred back to duty solicitors, without CDS Direct even attempting to provide telephone advice to the suspect. Whilst the LSC evaluation stated that no cost savings were attributed to this latter group of cases, no attempt was made to measure the extent of additional delay in suspects receiving advice that may have been caused by their cases being misdirected to CDS Direct, nor even whether some of the suspects may, as a result of the delay, have abandoned their request for advice altogether. This was a serious omission given that earlier research had established that delay in contacting a solicitor was a significant factor in suspects deciding to proceed without legal advice (Brown, 1997).

The evaluation also showed that no less than 22 per cent of telephone calls made by CDS Direct to police stations in order

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<sup>14</sup>The inadequacy and bias of the LSC's internal monitoring of the impact of these changes has persisted, as demonstrated in LSC, 2008. This shows that monitoring is focused primarily on cost savings, is heavily dependent on data supplied to the LSC by the actual providers of the new CDS Direct service (e.g. on their call handling and even the quality of advice offered), supplemented by a fairly perfunctory and poorly designed questionnaire addressed only to police custody officers and not to suspects. Most importantly, no attempt is made to measure overall delays that occur in suspects actually receiving advice through CDS Direct and other cases or the impact these may have on overall take-up of the right to custodial legal advice or suspects' withdrawals of requests for such advice.

to advise suspects went unanswered<sup>15</sup> and in a further 23 per cent of cases the police were 'not ready' to allow a suspect to be advised when telephone contact was made. As the evaluation report noted, such delay 'at worst case scenario, negates our client's ability to receive legal advice that has been requested' (LSC, 2006a).

### **Step four – rush the consultation on national implementation and ignore the results**

Notwithstanding these findings and the questions they raised about the effectiveness of CDS Direct in securing the provision of legal advice for those held in police custody, the LSC, encouraged by the recommendations of the Carter Review of Legal Aid Procurement (Carter, 2006), decided to push ahead. In March 2007 it issued a consultation paper, *Duty Solicitor Call Centre and CDS Direct Expansion*, proposing that all requests for publicly funded legal advice at police stations should be directed to the DSCC whose operatives would then determine whether to route the request to CDS Direct, the nominated solicitor or a duty solicitor. CDS Direct would 'deal with all publicly funded cases in circumstances where an attendance by the Duty Solicitor or the individual's own solicitor is not necessary' (LSC, 2007a). A solicitor nominated by the suspect, or a duty solicitor, would not be contacted unless attendance was 'necessary'. Although not directly proposed in the consultation paper, it was implied that attendance would be treated as not being necessary in those circumstances where already, under the general criminal contract, attendance was not paid for. The objectives of the proposals were stated as being to achieve greater value for money, to ensure that the LSC had greater control over legal aid expenditure under the forthcoming fixed fee regime, and to give the LSC 'complete management information on the number, location and nature of requests for publicly funded advice and areas for concern in police practices' (LSC, 2007a).

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<sup>15</sup>As will be seen, when the scheme was rolled out nationally in 2008, this continued to be a serious problem.

Despite the significance of the proposals and their implications for the right to custodial legal advice, the LSC gave only six weeks for responses. As the LSC itself admitted, 'the tone of the comments was largely negative' (LSC, 2007b: 2.4). Of the 135 responses, only seven were in favour of the proposals. Undeterred, the LSC announced in May 2007 that it would go ahead with the reform. The DSCC would expand to deal with all requests for publicly funded police station advice from 1 October 2007. CDS Direct would be introduced in three areas on 31 October 2007, and in the rest of England and Wales from January 2008 (LSC, 2007b: 4.3-4.6). The phased commencement of CDS Direct would 'provide an opportunity for the Police, CDS Direct and local providers and their representatives to raise any issues that were not identified within the consultation process' and would 'ensure that our working practices can be refined so that national implementation achieves the best possible outcome' (LSC, 2007b: 4.9).

This announcement met with what might be described as a furious response. Concern that the consultation process had been a sham was fuelled by the fact that the contracting procedure for the provision of CDS Direct had continued throughout the consultation period and, it appeared, a contract had been given to a firm that employed many ex-police officers and which, it was understood, employed few, if any, solicitors. Also, as the details of the schemes were assimilated, it became clear that whilst the CDS Direct scheme was limited to a relatively small number of less serious offences (and other grounds for arrest and detention), the DSCC scheme would require custody officers to ask all suspects who requested legal advice whether they intended to pay privately for that advice. The major concern here was that this could institutionalise one of the very 'ploys' that had been identified by research in the early 1990s as being a method by which suspects were deterred from exercising their right to legal advice.

### **Step five – hurry statutory changes through parliament**

It became apparent that PACE Code of Practice C (a statutory code governing the treatment of detained suspects) did not accurately reflect what custody officers would be required to do

under the new schemes. Given the fact that revisions to PACE codes have to be consulted upon, and have to go through the parliamentary procedure for approval of statutory instruments,<sup>16</sup> the commencement dates were put back to January 2008 (subsequently delayed further to February 2008) and the code revision process was initiated. On 24 September 2007, the Home Office sent the proposed revisions to the police and the organisations representing the legal professions, asking for a response by 17 October 2007, a period of just over three weeks. Whilst PACE s.67(4) provides that the Secretary of State must consult with 'such other persons as he thinks fit' in addition to those organisations, clearly he saw no need to consult with any other person or body.<sup>17</sup> Perhaps not surprisingly, despite a variety of concerns raised by the non-police consultees, both about the schemes and the way in which they had been interpreted in the draft revisions, the version laid before parliament for approval was almost identical to the original version consulted upon.

At this stage, the authors of the paper prepared a parliamentary briefing setting out their concerns. It is worth repeating some of them here since no changes were made during the parliamentary process so the version now in force<sup>18</sup> suffers from the same problems. As we shall see, however, even as parliament was approving the revisions, the LSC finally realised the folly of creating a scheme that involved requiring custody officers to ascertain whether a suspect intended to pay privately for legal advice, rendering the revised code out of date even before it was approved.

Under Code C, paragraph 6.1 the police are required, when suspects arrive at a police station, to inform them of their

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<sup>16</sup>PACE 1984 s.67.

<sup>17</sup> One of the authors, Ed Cape, did nevertheless respond, expressing concern about the two schemes and raising questions about their legality. See Home Office, 2007a.

<sup>18</sup>The revised Code C was introduced by the Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008, SI No. 167 and took effect on 1 February 2008. It is available at: <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/>

right 'at any time to consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available'. Police officers continue to be prohibited from doing or saying anything with the intention of dissuading a detainee from obtaining legal advice (paragraph 6.3). However, these requirements are directly contradicted by changes made to the Code C Notes for Guidance. In its previous version, Code C Note for Guidance 6B specified the following:

*A detainee who asks for legal advice should be given an opportunity to consult a specific solicitor or another solicitor from that solicitor's firm or the duty solicitor. If advice is not available by these means, or they do not want to consult the duty solicitor, the detainee should be given an opportunity to choose a solicitor from a list of those willing to provide legal advice. If this solicitor is unavailable, they may choose up to two alternatives. If these attempts are unsuccessful, the custody officer has discretion to allow further attempts until a solicitor has been contacted and agrees to provide legal advice. Apart from carrying out these duties, an officer must not advise the suspect about any particular firm of solicitors.*

Note for Guidance 6B is now replaced by a new Note for Guidance 6B2 which states:<sup>19</sup>

*A detainee who asks for legal advice **to be paid for by himself** should be given an opportunity to consult a specific solicitor or another solicitor from that solicitor's firm. If this solicitor is unavailable by these means, they may choose up to two alternatives. If these attempts are unsuccessful, the custody officer has discretion to allow further attempts until a solicitor has been contacted and has agreed to provide legal advice. Otherwise, **publicly funded legal advice** shall in the first instance be accessible by telephoning a call centre authorised by the Legal*

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<sup>19</sup>This version was applicable from 21 April 2008 when CDS Direct was rolled out throughout England and Wales.

Services Commission (LSC) to deal with calls from the police station. **The Defence Solicitors Call Centre will determine whether legal advice should be limited to telephone advice or whether a solicitor should attend.** Legal advice will be by telephone if the detainee is:

- detained for a non-imprisonable offence,
- arrested on a bench warrant for failing to appear and being held for production before the court (except where the solicitor has clear documentary evidence available that result in the client being released from custody),
- arrested on suspicion of driving with excess alcohol (failure to provide a specimen, driving whilst unfit/drunk in charge of a motor vehicle), or
- detained in relation to breach of police or court bail conditions.

An attendance by a solicitor for an offence suitable for telephone advice will depend on whether limited exceptions apply, such as:

- whether the police are going to carry out an interview or an identification procedure,
- whether the detainee is eligible for assistance from an appropriate adult,
- whether the detainee is unable to communicate over the telephone,
- whether the detainee alleges serious maltreatment by the police.

Apart from carrying out these duties, an officer must not advise the suspect about any particular firm of solicitors. (emphases added).

## Step six – issue confusing, ambiguous and factually incorrect guidance

A basic flaw with the revised version of Code C is that there is a drafting error, as a result of which at no stage are the police required to offer a suspect a choice of his or her own solicitor,

one chosen from a list, or the duty solicitor.<sup>20</sup> This matter may be covered by a revised Notice of Rights and Entitlements or a revised script for custody officers but it seems essential that the requirement to offer this choice is incorporated in the code itself if the new arrangements for contacting own solicitors through the DSCC are to work in the way intended and as outlined in documentation from the LSC. In particular, the flow chart attached to the Commission's own consultation on these arrangements (LSC, 2007a: Annex 1) specifically indicated that the police should record a suspect's preference for a particular lawyer and presumably pass this information on to the DSCC, so that they can attempt to identify and contact the firm concerned in appropriate cases.<sup>21</sup>

However, whether or not the police specifically advise suspects of their option to choose their own solicitor, in response to being told that they have a right to consult with a solicitor at any time and that 'free, independent legal advice' is available to them, many suspects will indeed request a solicitor already known to them. Yet, at this stage, according to Note for Guidance 6B2, the police are required to contradict their initial statement that legal advice is available free and inform the suspect that, should they request advice from a solicitor of their own choosing, this will only be available if they are prepared to pay for such advice themselves. No distinction is drawn in this respect within the note between cases that are restricted to telephone-only advice and those in which the suspect would normally be entitled to an attendance by a legal adviser at the police station. Indeed, if the police were to be required to make such a distinction, it would in effect involve them directly in determining, at least at first instance, what form of legal advice should be made available to the suspect (rather than

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<sup>20</sup> A suspect retains a right to choose in all cases other than in a legally-aided case covered by CDS Direct.

<sup>21</sup> The ambiguity is compounded, however, by the fact that the subsequent tender document issued by the LSC to bidders for CDS Direct contracts (see LSC, 2007c) did not list the identity of a solicitor nominated by a suspect as among the information to be obtained by the DSCC from the police or recorded on their electronic information system.

this decision resting with the DSCC and CDS Direct advisers) and in conveying the fact that only telephone advice is available in certain types of case to the suspect.

As approved by parliament, this aspect of Code C is at one and the same time confusing, highly ambiguous (and therefore open to misinterpretation by the police), factually incorrect and therefore misleading in terms of the right of suspects to receive advice from their own solicitors. This is because suspects will indeed continue to be entitled to receive advice free under legal aid from their own solicitor in the vast majority of cases that are not restricted to telephone-only advice.<sup>22</sup> Even in the latter type of cases, which are intended under the new arrangements to be diverted to CDS Direct, there is a possibility that solicitors might be willing to offer telephone advice on a *pro bono* basis, or at a reduced fee, especially to established clients. This possibility was raised by several solicitor respondents to the LSC's original consultation on expanding CDS Direct (LSC, 2007b: 3.16). In reply the LSC stated:

*Under the new system firms will continue to be able to provide advice to clients on a private fee paying (or pro bono) basis, it is only those clients who wish to receive publicly funded advice that will need to go via the Duty Solicitor Call Centre and CDS Direct system.*  
**(LSC, 2007b: 3.19)**

That response was, at best, disingenuous, since the suspect in the police station will neither be advised of the possibility of *pro bono* advice nor be given the opportunity of having contact made with their chosen solicitor to see whether such a service may be available to them.

In the event, these concerns were, at least as far as police involvement is concerned, rendered immaterial. As noted, whilst

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<sup>22</sup> Provided that the nominated solicitor is within a firm holding a General Criminal Contract from the LSC.

parliament was considering the revisions to Code C, the LSC changed its mind as to how the DSCC was to work.<sup>23</sup> Instead of the police finding out whether the suspect intends to pay privately and then contacting the nominated solicitor or the DSCC as appropriate, as the revised Code C states, the police would be required to route *all* requests for legal advice to the DSCC. The DSCC determines whether the case is covered by CDS Direct. If it is, they will then contact CDS Direct. If not, they will contact the nominated solicitor or, if appropriate, a duty solicitor. Where the case is referred to CDS Direct it is for them to speak to the suspect and ask them whether they intend to pay privately. If the answer is in the affirmative, the case is routed back to the DSCC who will contact the nominated solicitor. Thus, a matter of days before the DSCC was introduced, changes that had not been consulted upon, and of which parliament had not been informed, were introduced. Revision of Code C, which was considered sufficiently important to hold up the implementation of the schemes at the end of 2007, was suddenly deemed irrelevant.

The DSCC scheme was rolled out throughout England and Wales on 14 January 2008, and CDS Direct was introduced in three areas (Greater Manchester, West Midlands and West Yorkshire) on 1 February 2008 and nationally on 21 April 2008. The LSC explained the staged introduction of CDS Direct on the basis that it would 'allow the Commission and other stakeholders time to ensure that the process, particularly the own client elements, are tried and tested before the full national roll out ... This will ensure that our working practices can be refined so that national implementation achieves the best possible outcome' (LSC, 2007b: 4.9). The suggestion made to the LSC that this would not allow sufficient time for a proper evaluation to be conducted was rejected, as was a proposal that the period before full implementation be extended by three months to allow for research, already being

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<sup>23</sup>The decision was taken at such a late stage that the LSC had to issue an 'Urgent Notice' to police custody staff informing them of the revised procedure. On 9 January 2008 the LSC was still issuing guidance based on the scheme whereby the police would ask the suspect whether they intended to pay privately. See *Defence Solicitor Call Centre: Questions and Answers for Service Providers*, LSC, 9 January 2008.

conducted by the LSC's own research centre, to assess suspects' responses to the scheme.<sup>24</sup> In confirming that the national roll-out of CDS Direct would go ahead as planned, the LSC stated that its introduction in the first three areas 'went smoothly with no technical problems'.<sup>25</sup> What it did not mention was that there had been considerable problems in the first few weeks of operation of the DSCC, leading Carolyn Regan, the chief executive of the LSC to make a public apology.<sup>26</sup> She explained that call levels had been higher than expected, a problem which, of course, would not have occurred if all requests for 'own solicitors' did not have to go through the DSCC.<sup>27</sup>

However, cannot these difficulties simply be put down to teething problems? What is the problem with CDS Direct given that it is only a relatively few people, arrested and detained for relatively minor offences or on warrant (where a visit in person by a lawyer is unlikely to make any difference to the outcome), who will be limited to telephone-only advice by a CDS Direct adviser? After all, it is accepted by the most critical observers that, despite the fact that decisions to provide it in this way may be taken on the basis of inappropriate factors, telephone advice can be appropriate.<sup>28</sup>

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<sup>24</sup>This was proposed by Professor Michael Zander in a letter dated 22 February 2008 to Lord Hunt, the legal aid minister, and rejected out of hand in a reply dated 4 March 2008.

<sup>25</sup>LSC/CDS Direct web page, [http://www.legalservices.gov.uk/criminal/cds\\_direct.asp](http://www.legalservices.gov.uk/criminal/cds_direct.asp) accessed on 1 May 2008.

<sup>26</sup>'I would like to apologise for the difficulties some solicitors experienced following the expansion of the Defence Solicitor Call Centre (DSCC) to cover 'own client' work on 14 January.' Regan, 2008.

<sup>27</sup>The LSC Strategic Plan 2008-2011 mentions none of these difficulties but, by careful use of words, gives the impression that the DSCC scheme has produced benefits without actually claiming that it has done so. Under the heading 'What we have achieved so far' it states: 'Extension of the Defence Solicitor Call Centre to provide quicker advice, reduce the overall time clients are held in the police station and increase value for taxpayers' money.' The LSC has no evidence on speed of advice nor on time spent in police custody, but, on a careful reading of the sentence, it does not actually claim this.

<sup>28</sup>See, for example, Sanders and Young, 2007.

## Chapter 3

# The costs as well as the benefits

### The impact is universal

As is now clear, the DSCC scheme affects the way in which all people who ask for custodial legal advice are dealt with, even those who are not reliant on legal aid (a minority) and those who are, but who are not covered by the CDS Direct scheme (the majority). The Final Regulatory Impact Assessment, signed by the then legal aid minister, Vera Baird,<sup>29</sup> stated: 'For the majority of clients who are being detained for offences that are not restricted to telephone only advice this [DSCC and CDS Direct] will have no impact.'<sup>30</sup> This is simply untrue. All requests for legal advice are directed to the DSCC, and neither the police nor suspects can directly contact a nominated solicitor even if the suspect intends to pay privately.<sup>31</sup> If the case is not within the CDS Direct scheme, the DSCC must contact the nominated solicitor or duty solicitor, who will then have to contact the police. In a case covered by the CDS Direct scheme – for example, driving with excess alcohol – it is not until the CDS Direct adviser finds out, by speaking to the suspect, that they intend to pay privately that any attempt is made to contact the solicitor requested. However, the CDS Direct adviser cannot do this directly. They must refer the case back to the DSCC for this to be done (assuming that the details have been correctly recorded by the police and passed on to the DSCC). The nominated solicitor

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<sup>29</sup> The signed and dated copy does not appear to be available on the Ministry Of Justice website, but an unsigned, undated version is available on the LSC website at: [http://www.legalservices.gov.uk/docs/consultations/Final\\_RIA\\_DSCC\\_and\\_CDS-Direct.pdf](http://www.legalservices.gov.uk/docs/consultations/Final_RIA_DSCC_and_CDS-Direct.pdf)

<sup>30</sup> Final Regulatory Impact Assessment, para. 65.

<sup>31</sup> There are two exceptions to this that verge on the bizarre: where the solicitor is directly contacted by a relative or friend of the detained suspect; and where a suspect attends at a police station by appointment, accompanied by their lawyer. In these circumstances the lawyer can be paid under the legal aid scheme provided they inform the DSCC that they have been instructed to advise. So, for example, if a suspect arranges for a relative to instruct a lawyer rather than request legal advice themselves once they arrive at the police station, they can have direct access to their lawyer without the request being routed through the DSCC.

will then have to contact the police. This entails a minimum of six telephone calls before the privately paying suspect is able to speak to their lawyer.

The LSC is aware of considerable difficulties in that many telephone calls to police stations (or custody suites) go unanswered. In November 2007 a national newspaper published an article entitled: 'Legal advice helpline for suspect in chaos because police don't answer the phone'. In Bridewell police station in Nottingham, it was reported, the police answered the telephone less than 50 per cent of the time. An inspector who ran the custody suite was quoted as saying, 'On a busy Friday night, you are not going to get that phone answered because all your staff is concerned with is that stream of people walking in.' John Sirodcar, the LSC's head of direct services programme and responsible for the schemes, was reported as responding: 'People are not getting their rights because police are not answering the phones' (Condron, 2007).

Thus, before the schemes were introduced nationally, the LSC would appear to have been well aware of the problems. Given this, it is noteworthy that the LSC timeliness targets and evaluations (LSC, 2008) refer only to the speed of response to requests for legal advice. The LSC does not appear to know, or to want to know, the impact of the schemes on the actual time taken for suspects to receive advice. Yet speed of delivery of advice is crucial. In its Global Guide to Performance Indicators the Vera Institute of Justice makes this absolutely clear: 'The most vulnerable period for all defendants is the time immediately following arrest. The sooner advice is provided, the less physical, psychological, and legal injury the defendant will suffer... the measure should be the amount of time between arrest and the first face-to-face contact with a legal advisor' (Vera Institute of Justice, 2003).

When the police were responsible for contacting the lawyer directly, they were required to do so as soon as practicable (PACE s.58(3)), and when they did so, the lawyer could normally obtain details from the police about the client and reasons for detention and speak to the client if that was appropriate. Furthermore, the time between the request for legal advice and when the lawyer

was contacted by police was transparent since these details had to be recorded in the custody record. Although the recording requirements remain, the police can avoid responsibility for any delay once they have contacted DSCC. From the suspect's perspective, the causes of delay are irrelevant. Moreover, in the past, a suspect could directly ask the police to contact their lawyer, and would have been entitled to an explanation from the custody officer as to what had been done to implement their request. Now, the suspect might simply be told: 'We have contacted DSCC and that is all we are required to do.' As noted earlier, delay is a significant factor in suspects withdrawing requests for legal advice, and the likelihood of this might well be increased if the suspect is aware that they are effectively at the mercy of the efficiency (or otherwise) of a call centre and the willingness or ability of the police who are holding them to answer their telephones.

### **Impact on the vulnerable**

It was noted earlier that under the CDS Direct scheme there are various exceptions where a person is entitled to legally-aided advice from a solicitor in person even though they have been arrested for one of the reasons for which legally-aided advice is limited to the telephone. These include when the detained person is 'eligible' for assistance from an appropriate adult, which covers those under 17 years and those who are, or who may be, mentally disordered or otherwise mentally vulnerable. It should be noted that under PACE Codes C, D and H the question is not one of eligibility. Rather, if a detained person comes within these categories, the custody officer is obliged to identify and contact an appropriate adult and ask them to come to the police station (Code C, paragraph 3.15). Although there is no up-to-date evidence, research in the 1990s showed that the police are poor at identifying those who are or who may be mentally disordered or vulnerable. Research by Gudjonsson found that whilst the police assessed less than two per cent of suspects as being mentally disordered or handicapped, the true figure was probably nearer 20 per cent (Gudjonsson et al., 1993). The Home Office subsequently issued best practice guidance which stated that defence lawyers 'need to be diligent to make sure that "borderline" mentally vulnerable people ... are identified so that proper safeguards

under PACE Code C can be implemented.<sup>32</sup> A danger with CDS Direct is that if the police make an incorrect assessment, this is unlikely to be picked up by an adviser giving advice over the telephone. Even if it is picked up, CDS Direct will have to refer the case back to the DSCC, who will then have to contact the nominated solicitor or the duty solicitor so that they can advise in person. As with the privately paying suspect, this will entail a minimum of six telephone calls before the vulnerable suspect is able to speak to their lawyer,<sup>33</sup> and the scope for error and delay, and detriment to the suspect, is obvious.<sup>34</sup> Yet the LSC's response has simply been to state that '[u]nder the PACE Codes the police are responsible for allocating an appropriate adult where a client is assessed as vulnerable. If an appropriate adult is allocated, the case will not be handled by CDS Direct.'<sup>35</sup>

### Are the new services legal?

In addition to the practical problems resulting from the introduction of the two schemes, the question is also raised of their legality both by reference to the statutory right to consult a solicitor under PACE s.58 and by reference to the European Convention on Human Rights (ECHR) Article 6. Section 58 gives a right to 'consult a solicitor'. 'Solicitor' is defined for the purposes of the code as including an accredited or probationary representative, but historically this was directed at ensuring that where a representative attended a police station on behalf of a solicitor, they were treated no less favourably than a solicitor. It is not authority for asserting that an arrested person does not

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<sup>32</sup> *Mentally Disordered Offenders: Inter-Agency Working*, a best practice booklet issued with Home Office Circular 12/1995, p.31.

<sup>33</sup> Initial call from police to DSCC; DSCC to CDS Direct; CDS Direct to police/client; CDS Direct to DSCC; DSCC to nominated or duty solicitor; nominated or duty solicitor to police/client.

<sup>34</sup> There are similar concerns where a suspect has suffered from serious police maltreatment.

<sup>35</sup> Letter to the editor of *Legal Action* from John Sirodcar, in response to concerns expressed by one of the authors in an earlier article in that journal. See *Legal Action* 49, 2008.

have the right to consult with a solicitor as opposed to a legal representative. Furthermore, the term 'solicitor' is not defined in PACE itself to include a representative, and it is submitted that a code cannot be treated as authority for the proposition that the right to consult a solicitor can be satisfied by offering only a consultation with a representative. The Solicitors Act 1974 makes it clear that a solicitor is a person who has been admitted as such and whose name is on the roll, and that a person who does not satisfy those conditions must not pretend to be, or represent themselves as, a solicitor. Under the CDS Direct scheme most advice will be provided by representatives rather than solicitors. Although it is understood that the companies contracted to provide CDS Direct do employ solicitors, it is far from clear whether, were a suspect to insist on their right to consult with a solicitor, one would be available. If not, and this was to result from systemic factors, the LSC would be responsible for denying suspects their statutory right.

Further, section 58 gives a right to a person to consult a solicitor 'in private'. Whilst in many police stations facilities for private consultation are far from adequate,<sup>36</sup> they do exist and consultation can be delayed until a time when such facilities are available. It has long been recognised that private facilities for telephone consultation are often not available in police stations (Phillips and Brown, 1998) and it would seem that this continues to be the case. In a letter to one of the authors a Ministry of Justice official stated: 'The mere fact that some police stations may not presently have adequate facilities in this regard [ie., for private telephone consultations] should not, however, be a barrier to the expansion of CDS Direct ...'<sup>37</sup> This would seem to be a clear acceptance that the statutory right to legal advice in private is routinely breached, and yet the CDS Direct scheme is based on

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<sup>36</sup> Recognised by Home Office Circular 034/2007, *Safety of Solicitors and Accredited and Probationary Representatives Working in Custody Suites at Police Stations*.

<sup>37</sup> Letter from Imran Khan, Legal Aid Strategy Division, Ministry of Justice, to Ed Cape, 21 November 2007.

the notion that telephone advice is adequate in cases covered by the scheme.

The argument regarding compatibility with ECHR Article 6 is more complex, and the intention here is to give an outline of the issues. Article 6(3) provides that everyone 'charged with a criminal offence' has the right to 'defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. The European Court of Human Rights (ECtHR) has held that the rights in Article 6(3) are not limited to where a person has been charged, in the sense given to that term in England and Wales, but can extend to the investigative stage.<sup>38</sup> Therefore, the Article 6 right to legal assistance would apply in most circumstances where a person is arrested for an offence and detained by the police in England and Wales. A person paying privately clearly has a right to choose their lawyer. However, where a person does not have sufficient means to pay, Article 6(3) may be interpreted, and appears to be interpreted by the LSC, as meaning that if legal advice is funded by the state the suspect loses the right to choose.

This raises two questions. Although Article 6(3) refers to the person's inability to pay, it is arguable that the relevant issue is not ability to pay, but the need to depend upon state aid. It is understood that the 'script' for CDS Direct advisers requires them to ask, in cases covered by the scheme, whether the suspect intends to pay privately. In so doing, they are denying the opportunity of a suspect to choose their lawyer in circumstances where they could afford to pay a reduced fee which a solicitor is willing to accept, or where the solicitor is willing to provide the advice at no charge. The LSC has refused to accept the logic of this argument, insisting that if solicitors wish to provide services at a reduced rate or free, they must make potential clients aware of this in advance. However, by adopting this approach, the LSC may be preventing a suspect who

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<sup>38</sup> See: *Imbrioscia v Switzerland* (1994), 17 EHRR 441; *John Murray v United Kingdom* (1996), 22 EHRR 29; and *Ocalan v Turkey* (2003), 37 EHRR 10.

does not wish or need to rely on state assistance from exercising a choice.<sup>39</sup>

### **Will the new scheme realise the cost savings promised?**

A significant part of the rationale for introducing the DSCC and CDS Direct schemes is the scope for direct cost savings. The pilot demonstrated that where CDS Direct was able to 'close' a case without a referral back to the duty solicitor, the average cost per case was £22, compared with the £30 fee normally paid to duty and own solicitors for telephone advice. However, the latter fee was a standard one payable to solicitors for all telephone advice they provided to suspects throughout their period in custody and regardless of the nature of the charges against them. As CDS Direct only covers relatively minor cases, where the telephone advice likely to be given would be relatively straightforward and simple, it is not clear that this is a valid basis of comparison. Nevertheless, the total annual saving predicted from lower cost per telephone advice for duty solicitor cases alone was just £844,000.

Far greater savings were predicted from another presumed effect of introducing CDS Direct: substituting telephone-only advice from CDS Direct in cases where the duty (or own) solicitor might previously have exercised their professional judgment to attend the suspect in person. It is again a mark of the shift in the attitudes of the legal aid authorities from earlier periods, which emphasised upholding the rights of suspects to legal advice under PACE, towards seeking to obtain cost savings by encouraging greater use of telephone-only advice. Detailed analysis of figures covering just four months of CDS Direct operations showed that 65 per cent of all police station advice cases during this period resulted in

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<sup>39</sup> Whether a person who is reliant on state funding has the right to choose the lawyer appointed is unclear. There is a crucial difference between the two official versions of Article 6(3), with the English version, as noted in the text above, using the word 'or' between the second two limbs of the relevant sentence and the French version using the word 'et'. Early case law of the ECtHR indicates that the legally-aided client does not have the right to choose, although in *Pakelli v Germany* (1984), 6 EHRR 1 the court took the contrary view. See further Trechsel, 2005.

attendance rather than telephone-only advice, compared with over 75 per cent during the previous six months. On the basis of this shift to telephone advice over this relatively short period, the pilot evaluation predicted annual savings, from the continuation of CDS Direct for duty solicitor cases alone, of just under £5 million (LSC, 2006b: Appendix 1).<sup>40</sup>

However, there are reasons for doubting the validity of such large projected cost savings. During the first four months of the CDS pilot the overall volume of police station advice cases actually increased by nearly eight per cent compared to the previous six-month period, with virtually all of this increase attributable to a greater volume of telephone-only advice cases. In other words, the volume of police station attendances by legal advisers hardly changed at all between the two periods. It may, therefore, be the case that the introduction of CDS Direct actually increased the propensity of suspects arrested on relatively minor charges to seek legal advice over the telephone, rather than led to the substitution of attendance at police stations with telephone advice. If so, rather than leading to cost savings, the overall costs of the service would have increased.<sup>41</sup>

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<sup>40</sup> The projected savings have subsequently increased to £10 million per annum. See LSC, 2008: Appendix 1.

<sup>41</sup> Figures published in the LSC's annual reports for the relevant years also show no significant shift in the proportion of police station advice cases entailing an attendance by the legal adviser at the police station. Thus, in 2004-2005, before CDS Direct was introduced, there were 726,229 claims from solicitors paid for the provision of legal advice to criminal suspects at police stations, of which 575,814 (79 per cent) were for attendances by the legal adviser at the police station and 150,415 (21 per cent) for telephone advice only. In 2005-2006, the year in which CDS Direct was introduced, there were 751,977 claims from solicitors for police station advice in criminal cases, plus an estimated 21,000 cases 'closed' by CDS Direct without a further referral to a solicitor, representing an increase from the previous year of 6.4 per cent in the overall volume of police station advice cases. Interestingly, the proportion of police station advice cases entailing an attendance by the legal adviser in the latter year, at 617,362 or 80 per cent, was slightly higher than in the year prior to the introduction of CDS Direct. Unfortunately, the published data from the LSC for 2006-2007 does not provide a breakdown of the number of cases referred to CDS Direct in that year or of their outcomes.

On the other hand, information from the LSC about the operation of an expanded CDS Direct service is perhaps indicative of their determination to drive up cost savings through the conversion of cases in which a legal adviser attends the police station to telephone only advice. The final invitation to tender for CDS Direct issued by the LSC in September 2007 estimated that when the service was fully extended to cover both duty and own solicitor cases, it would handle an estimated 204,000 calls per annum (LSC, Invitation to Tender CDS Direct, September 2007). This compares with a total of just over 36,000 calls (inclusive of misdirected calls) received in the first six months of the CDS Direct pilot (LSC, 2006b), and with a weekly average of 1,227 calls received by CDS Direct during the period November 2006 to February 2007 (ibid: p.10) when the service covered only duty solicitor cases. These figures suggest an annual caseload of between 64,000 and 72,000 from duty solicitor referrals, and it is planned that this number will increase threefold once own solicitor cases are also included within the scope of CDS Direct. However, as duty solicitors are estimated to handle just under half of all police station advice cases at present, and as they have always had a propensity to rely on telephone-only advice more frequently than own solicitors, it is not clear how such a threefold expansion in CDS Direct case numbers is to be achieved unless a very considerable number of cases where own solicitors currently attend suspects at police stations are diverted into telephone-only advice.<sup>42</sup>

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<sup>42</sup>The same picture emerges from a comparison between the projected number of cases to be referred to the expanded CDS Direct, at 204,000 per annum, and the number of suspects recorded in the Legal Aid annual reports as receiving telephone advice only, which in 2005-2006 was 150,415. Of course, these figures may indicate that the LSC anticipates that up to a quarter of all calls to CDS Direct will be misdirected cases.

## Chapter 4

# Restricting eligibility to legal representation

A more fundamental reason for establishing the DSCC and expanding the scope of CDS Direct relates to the wider changes being introduced into the procurement of criminal legal aid under the Carter reforms. These involve the substitution of fixed fees for police station advice work (in place of hourly-based payments) as a precursor for the move toward competitive tendering for all criminal defence work.

One potential side-effect of these changes is that, in response to having to operate under a system of fixed fees per case, solicitors will seek to increase the volume of police station cases they handle as a means of maintaining or even increasing their income. Given that the number of arrests is going up,<sup>43</sup> and the fact that probably still less than half of all persons who are arrested currently request legal advice (including many who are arrested for the more serious offences which are not currently limited to telephone advice only), there is obviously considerable scope for growth in the overall volume of custodial legal advice.

In previous periods, such expansion may well have been viewed as a positive consequence of the introduction of fixed fees, encouraging solicitors to take on even more police station advice work. Under the current regime, this is not the way the prospect of more arrested persons exercising their statutory right to custodial legal advice is viewed. Rather, it is now seen as a

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<sup>43</sup>The number of arrests for notifiable offences increased by almost 12 per cent between 1999-2000 and 2005-2006. See *Arrests for Recorded Crime (Notifiable Offences) and the Operation of Certain Police Powers under PACE*, Ministry of Justice, October 2007. Furthermore, offences brought to justice (i.e., arrests followed by formal action such as charge, caution, etc.) increased by approximately 250,000 per annum between 2002 and 2007. See Home Office, 2007b. For research on what drives legal aid costs for police station advice, see Cape and Moorhead, 2005.

cause for alarm and as potentially undermining the cost controls implicit in a system of fixed fees and competitive tendering, as the Carter Report (2006) itself made clear at several points:

*All requests for advice – both duty and now own solicitor should be routed through the duty solicitor call centre. This is particularly important ... to protect against the potential of a small number of suppliers seeking to drive their volume of cases up in inappropriate matters ...*

(chapter 4 paragraph 25)

*If the duty solicitor call centre and CDS Direct are expanded in the way suggested this could provide a filter whereby the risk of some firms taking up cases to maximise fees would be reduced.*

(ibid: paragraph 27)

*The duty solicitor call centre and CDS Direct should be monitored closely by the Legal Services Commission. The monitoring should be on a monthly basis and at a local scheme level, and should look at volume of cases, and review their effectiveness and quality of service. **If this fails to control any increase in volume of work being undertaken in the police station, the DCA [Department of Constitutional Affairs, now the Ministry of Justice] and the Commission should consider options for restricting defendant eligibility** (emphasis added).*

(ibid: Recommendation 4.5).

This latter statement makes abundantly clear the true intent behind the changes being introduced in the provision of police station legal advice. It is a backdoor method of restricting the take-up of the statutory right of all arrested persons to receive legal advice whilst in police custody to current levels, and one which if it does not succeed will lead to demands for further changes to be made. The most obvious change would be to increase the range, and seriousness, of offences that are limited to telephone-only advice under the CDS Direct scheme. The history of criminal procedure generally, and of police powers under PACE in particular, is replete with examples of limiting criteria and conditions being

relaxed over time.<sup>44</sup> The writing here is already on the wall. Despite the fact that crime has been going down, arrests and 'offences brought to justice' have been going up in order to meet government targets. That the scope of the CDS Direct scheme will be expanded in the not-too-distant future is as near to being certain as to be certain.

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<sup>44</sup>For an analysis of this phenomenon in relation to police powers under PACE, see Cape, 2008.

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