

## **Self Help – Digital Legal Rights for Suspects**

**Paper prepared by Dr Vicky Kemp for the International Legal Aid Group Conference in Johannesburg, South Africa – June 2017.**

Not to be cited without permission

### **Introduction**

At the 2015 ILAG Conference, I was asked to consider the potential for technology to help improve effective police station legal advice. In that presentation, I commented on the article written by Horan and Maine (2014), *Criminal Jury Trials in 2030: A Law Odyssey*. They comment on ‘strategic foresight’ being a technique used by institutions to prepare for a technology-charged future which involves looking forward to see what things might look like, and to then come back to the present with new insights. Horan and Maine (2014) looked to the future when considering how criminal jury trials could operate in 2030 and a new insight discussed in their paper was jury members being handed a tablet on which to access information during the trial. Having applied strategic foresight when looking at police station legal advice, a number of insights were explored, including handing to suspects a tablet through which to provide digital information about their legal rights. Taking this idea forward, I have developed a prototype of an App, which has been tested with University students and is due shortly to be tested with suspects in custody.

In this paper, I first present research findings that highlight some of the perennial problems encountered in the criminal process in relation to suspects’ understanding of their legal rights and potential obstacles to exercising those rights. In seeking support for this project, next set out are details of the project steering group and the steps taken in designing the App and obtaining feedback when carrying out initial user-testing. There are then considered research findings that highlight problems arising when examining procedural safeguards from the perspective of children and young people and comment is made about how the App could help to address some of these issues.

Further development of the App is the fourth issue commented on, which is to include incorporating comprehension tests to check suspects’ understanding of their legal rights and the capture of personal information from which to conduct assessments and flag up when additional safeguards are required. Also considered is the way in which information could be delivered in different formats to communicate understanding to people of different ages and mental abilities – using videos, graphics and animation, for example. The potential for

gamification to be used as a way of encouraging children and young people to engage in better understanding their legal rights will also be explored.

In the final section are presented emerging findings arising out of a study where the potential for technology to help improve access to legal advice and the quality of such advice is examined. The opportunity will finally be taken to consider Next Steps in developing the App.

### ***Research findings***

The Police and Criminal Evidence Act 1984 (PACE) provides access to free and independent legal advice for suspects interviewed by the police in England and Wales. When questioned, suspects have a modified right of silence and a privilege against self-incrimination. While these safeguards are intended to help protect suspects from the abuse of police powers, the police are responsible for delivering these rights. Whether intentionally or not, research studies have consistently identified problems with the police failing to deliver to suspects' their legal rights in a way that enables them to make informed decisions. Sanders et al. (1989), for example, found police ploys being used, which included reading out to suspects their legal rights quickly and/or unintelligibly to discourage them from requesting legal advice. There are now increased safeguards with custody blocks being under observation from CCTV cameras and microphones. Nevertheless, similar problems were seen to arise with legal rights being read out quickly and/or in a routinised way with suspects not always grasping the meaning of such rights (Kemp, 2012).

It also seems that many suspects simply do not understand how a lawyer (or legal adviser accredited to provide legal advice) can help them in the criminal process. In a survey of over 1,000 suspects, for example, when asked why they rejected having a lawyer the majority said they 'did not need one'. For some this was because they guilty but others because they were innocent (Kemp, 2010). Another reason for rejecting legal advice arose out of concerns that having a lawyer will create delays. Indeed, there was a common perception among suspects that it was waiting for lawyers to arrive at the station which was the main cause of delays and which led them having to spend more time in custody (Skinns, 2009 and Kemp, 2013).

Such problems were seen to be exacerbated when dealing with young suspects and apart from the requirement for the mandatory involvement of an appropriate adult, there is no difference in the way children are treated when compared to adults. Indeed, the same script is

used to convey their legal rights and the same model of interrogation adopted, despite a different model being required when interviewing children as victims and witnesses. In addition, from the age of 10 to 17 years, a ‘one size fits all’ approach is adopted with not only the same information about legal rights being provided, but with young suspects being subject to the same safeguarding measures, despite their needs being very different. From the age of 10 years, PACE also requires children to make the decision about whether or not to have a lawyer, despite most not knowing what a lawyer is or how they can assist them in the criminal process (Kemp and Hodgson, 2016).

While a number of research studies examined the efficacy of legal rights for suspects both before and following implementation of PACE, from the mid-1990s, up until recently, there had been very little research undertaken into this important topic. A recent study, coordinated by Maastricht University, examined young suspects’ legal rights with a view to informing the legal rules and guidelines arising out of the EU Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016/800] (Vanderhallen et al., 2016). I was responsible for conducting the fieldwork in England and Wales but before examining some of the key findings arising out of that study in relation to young suspects’ legal rights, it is useful to consider development of the App and to then see how this could help to address some of the issues raised.

### ***Developing a police station App for suspects***

It was evident from the outset that an App does have the potential to replace the police delivering information to suspects about their legal rights. While this could lead to efficiencies and cost savings for the police, the App also has the potential to reduce the coercive pressure felt by suspects in the criminal process. By presenting information digitally, it can also help people better understand their rights, which could lead to an increase in the take-up of legal advice. Accordingly, the first task undertaken was to bring together a steering group of key stakeholders who could oversee the project, including the police. In seeking support for this project from national policy makers, it was essential that the chair was a well-known and well-respected figure within the criminal justice system. I was delighted, therefore, when Lord Carlile of Berriew CBE QC, a practising barrister and, up until recently, a Liberal Democrat peer, accepted my invitation to chair the group. Lord Carlile has been involved in a number of high profile initiatives aimed at promoting legal safeguards for children and young people, which includes chairing an Inquiry by Parliamentarians into the

operation and effectiveness of the youth justice system (Carlile, 2014). It was also a major boost to the project when Professor Michael Zander QC kindly agreed to be a member of the steering group.

The first meeting was held on 29 April 2016, with representatives attending from the National Police Chief's Council, Ministry of Justice, Home Office, the Law Society, Legal Aid Agency, Youth Justice Board, children's rights groups and academics. It was agreed that the University of Nottingham should create a prototype of the App and conduct initial user testing on children and young people, practitioners and suspects in police custody. If the App was found to have the potential to deliver to suspects their legal rights, it was agreed that the steering group would reconvene to consider proposals for a feasibility study to be undertaken.

Working with computer scientists in Horizon Digital Economy Research, at the University of Nottingham, we have now designed a prototype of the App. Initial user testing has taken place with a BAME youth group and University students. The feedback was positive in that the App was found to be helpful in imparting information about suspects' legal rights. However, a preference was expressed for more videos and graphics to be used instead of text boxes, which changes will be incorporated when funding is secured to develop the App.

The West Midlands Police have agreed that we can test out the App with suspects in police custody and this work is shortly to be undertaken. It will not be possible at this initial stage to hand the App over to suspects and instead a researcher will take them through information about what happens in the criminal process and about their legal rights. This will include going through a decision-tree to assist suspects when deciding whether to have legal advice. We will also interview suspects, prior to being released, so that we can ask questions about how they exercised their legal rights, how they were treated in custody, and the quality of decision-making in the criminal process. This feedback will assist in developing the App and to consider the potential for a mechanism to be incorporated through which complaints about procedural rights could be made independently of the police.

At this initial stage, information about legal rights on the prototype App reflects current practice, which includes describing what happens to suspects in the criminal process and setting out their legal rights based on the lengthy 'Notice of Rights' which is handed to all suspects. During the feasibility study, it is our intention to revise the App so that it sets out an educational approach to understanding legal rights and includes a comprehension test and

assessments to check understanding and vulnerability. An iterative process will be adopted in developing the App, which will include testing out the App and using feedback to inform refinements, for the revised App to be re-tested, and further refined.

### **App: Implications for enhancing young suspects' legal rights**

In the comparative study of procedural safeguards for young suspects, a number of issues arose (Kemp and Hodgson, 2016). It is useful to highlight some of the problems raised and to comment on how the App could help in addressing such issues.

#### *Delivering to suspects their legal rights*

- While young suspects acknowledged that the police do read out their legal rights, there was confusion about what their rights were. As one young person put it, "They say it so fast it goes straight over your head." Another commented, "When they go through and read it out so quickly I don't really understand what they're on about."

App: Replacing the human interface of the police reading out to suspects their legal rights with digital information (using hypertext, videos and graphics), will help to improve consistency. It will also assist young suspects' understanding of their rights and help them make more informed decisions, particularly if waiving the right to legal advice.

- The police are increasingly using voluntary interviews as an alternative to bringing young suspects into police custody but there seems to be some confusion over the status of these interviews and suspects' legal rights.

App: The police would be required to hand over the App to all suspects being interviewed under caution, whether held in custody or not. The mobile application of the App means that it could be used to inform suspects of their legal rights in voluntary interviews and if the police conduct street interviews using body-worn cameras to capture the evidence.

### *The take-up of legal advice*

- While the average request rate for legal advice is just under half (45%) and just over one-third of suspects (36%) receive advice, there are wide variations in take-up rates both between police stations and police force areas.

App: Using the App as a consistent and impartial way of informing suspects of their legal rights could help to reduce variations in the take-up of legal advice. The App could also set out what a lawyer is and how they can assist suspects in the criminal process.

- Children aged 10 to 13 years are the least likely of all age groups to request legal advice (39% compared to 45%). This lower rate is probably due to parents tending to take on the role of the appropriate adult with this younger age group and not knowing how a lawyer can assist them.

App: Comprehension assessments will test what young suspects understand about concepts underpinning their legal rights. Such as, 'what are rights', 'what is a lawyer' and 'how can a lawyer help'. At such a young age, it is unlikely that children will be able to understand such concepts and the App will be able to flag up the need for additional legal safeguards.

- Many suspects who refuse legal advice simply say that they 'do not need' a lawyer, even if being dealt with for very serious offences. For some this was because they were 'innocent' and others said they were 'guilty'.

App: The App could provide information on different types of offences and highlight through examples the complexity of the criminal law and evidence in determining guilt or innocence. The App could also remind suspects that a lawyer can assist when dealing with such complex legal issues.

### *Delays in the pre-charge process*

- There is a common perception among suspects that having a lawyer can cause a delay and this then discourages them from requesting legal advice.

App: The App will set out the processes involved following an arrest, including the delays caused by the police when gathering data (interviewing witnesses, gathering CCTV images etc.), which is the main cause of such delays. If the young suspect has

concerns that requesting legal advice will lead to a delay, they could be encouraged to discuss this with a lawyer over the telephone.

- Young suspects reported that the worst thing about custody was being held in a cell for a long time without any distractions.

App: After six hours, the police must review the detention of individuals and by making young suspects aware that the review is taking place they, or their lawyer, could make representations to try and secure their early release. The tablet hosting the App could also make available off-line games, reading material and/or music that could help to break the monotony for young suspects when being held in a cell for many hours.

### *The efficacy of safeguards in the police interview*

- In the interview, young suspects complained about the police using tactics intended to put pressure on them to confess, or at least respond to their questions. They said the police could play ‘mind games’ with them, which included twisting their words or trying to trip them up, or being told to ‘tell the truth’. Highlighting their short-term reasoning, some young suspects said they felt able to ‘take on’ the police in the interview.

App: Commenting on young suspects’ rights in the interview, they could be told that the police are not allowed to put them under any pressure to respond to their questions or to trick them into making a response. A video could usefully explain the criminal process and show how what is said, or not said, in the police interview could influence what happens later in court, and/or at trial.

- Young suspects did not always understand the police caution, although this is not surprising, as research has shown that most people find this difficult to understand (Fenner *et al.*, 2002). The police also seemed to be confused as they sometimes mislead young suspects telling them that ‘adverse inferences’ will always be drawn if they fail to mention something in the interview which they later rely on in court.

App: After explaining what the police caution means (which will involve the use of hypertext and videos), a comprehension test could require young suspects to explain in their own words the meaning of the caution. If they do not understand the caution the test could flag up that further information is required, which could include legal advice.

- Appropriate adults and legal advisers are intended to protect the legal rights of young suspects during the police interview to ensure that it is conducted fairly and the suspect is able to exercise their rights. There were some cases observed where this safeguard was not upheld due to the passivity of appropriate adults and/or lawyers failing to intervene and challenge inappropriate police practices.

App: The role of the appropriate adult and the legal adviser could be set out on the App so that the suspect better understands what is expected of them in the interview. This could include a video showing role-play of different scenarios which highlight both good and poor practice. The video could also be helpful to familial appropriate adults who, without any training, may not understand how they can assist young suspects in the interview, particularly if told by the police not to intervene.

#### *The experience of young suspects in police custody*

- Young suspects accepted their experience of being detained and interviewed by the police as part of their punishment. As one put it, “It’s not meant to be nice. It does what it’s there for ... You go in, get our punishment and come out.”

App: It could be explained to young suspects that they should be treated with dignity and respect in the criminal process and if this does not happen, they can make a complaint. They could also be told that the process is not intended to be a punishment and that every suspect is presumed innocent until they either accept guilt or guilt is proved following a trial.

- There are many young suspects who have mental health problems, including ‘attention deficit hyperactivity disorder’ (ADHD) (Young et al., 2013) but there is no mental health assessment required prior to the interview which takes into account their fitness to be questioned. A diagnosis of ADHD makes it more likely that young suspects will give ‘don’t know’ responses to police questions which can be misconstrued as being uncooperative, and they are more likely to make false confessions (Feld, 2012 and Young et al., 2013).
- App: Personal data collected could be used to highlight the need for additional safeguards. These could include whether there has been a diagnosis of mental health problems or learning disability and other factors such as intoxication, drug use, and physical illness or sleep deprivation, which could flag up the need for an assessment.

After considering what information is required on the App to assist young suspects in better understanding their legal rights, the way in which such information is presented also needs to be examined. We will be talking to children and young people about what formats are preferred when accessing complex information and we anticipate that responses will vary depending on age and mental ability. For younger children, for example, it may be that cartoons and animations are the preferred format, whereas for young adults the use of avatars and graphics might be more appropriate. The potential for gamification to encourage young suspects to engage in better understanding their legal rights is also to be explored. Through gaming, the creation of tasks can encourage young suspects to engage and encourage knowledge and skill development so that this could be a useful tool to be incorporated into the App. However, it is important that suspects' legal rights are taken seriously and it might be more appropriate to develop this as a public legal education resource instead of being part of the App.

### **Developing the App**

The steering group is to meet in the summer to consider proposals for a feasibility study that will involve further developing and testing the App with young suspects, children and young people and hard-to-reach vulnerable people who are likely to have contact with the police. A project team will be involved in further developing the App and designing the comprehension test, which will adopt an education-focused approach to understanding rights and assessments that can flag up vulnerabilities requiring additional safeguards. The team includes practitioners from the police and defence lawyers as well as academic educationalists, linguists, psychologists, social scientists, lawyers and statisticians.

The App also needs to break down suspects' legal rights into language, hypertext, video, graphics and animation that help suspects understand their rights. In the US, Ferguson and Leo (2017:4) propose 'bringing *Miranda* into the 21<sup>st</sup> Century by developing a "*Miranda* App" to replace the existing, human *Miranda* warnings and waiver process with a digital, scripted computer program of videos, text, and comprehension assessments.' They state that the way in which suspects' legal rights are set out in the *Miranda* App must provide the actual *Miranda* warnings as envisioned by the Supreme Court, and recrafted by law enforcement professionals. In recognising the need for flexibility in police departments over how to convey the warnings, they point out the need for the App to take seriously the

importance of suspects' understanding those rights, and thus requires an overt education-focused approach to explaining *Miranda* rights.

Ferguson and Leo (2017:23-24) note that such an approach is absent in most police practice, with a one-directional explanation with little practical ability to seek clarification, admit confusion, or pause for reflection. There was similarly a one-directional explanation of rights observed in the comparative study of procedural rights for young suspects (Kemp and Hodgson, 2016). In complying with strict case law from the European Court of Human Rights (ECtHR), in order for a waiver of legal advice to be effective and valid, it must not only be voluntary but must also constitute a knowing and intelligent relinquishment of the right. Which means it must be shown that the suspect could reasonably have foreseen what the consequences of his or her conduct would be. However, research has shown that there is a gap between what the ECtHR requires for waiving the right, namely a free, unequivocal and informed waiver and the reality on the ground (Vanderhallen et al., 2016). One of the problems here is that it is not very clear what an 'informed' waiver exactly means (compare medical law where there is a very clear and precise understanding as to what it means to give informed consent). It must clearly mean more than a realisation that there will not be a lawyer at the interview and requires some understanding of what kind of assistance a lawyer can give in the interview.

An App that sets out digital information can help in addressing such issues. As noted by Ferguson and Leo (2017:24), for example, an App can offer a three-fold change to existing practice allowing: (1) better comprehension of the words that convey constitutional rights; (2) clarity about the meaning of constitutional rights; and (3) a space for deliberative reflection about the decision at hand. By design, an App can offer a more intentional educational approach specifically addressing some of the weaknesses in current practice. The App is not intended to tell suspects how to exercise their rights, and thereby it is not seeking to discourage confessions or encourage suspects to remain silent in the interview, but the design needs intentionally to try to maintain an impartial and fair discussion of rights and options (Ferguson and Leo, 2017:50).

### **Challenges to providing effective police station legal advice**

EU Directive [2013/48] requires Member States to provide access to a lawyer in criminal proceedings to help secure a fair trial. While the intention is to provide effective police

station legal advice throughout the EU, this is posing a challenge to many jurisdictions as to how to make this right practical and effective, particularly in these time of austerity. With funding from the British Academy, I am conducting semi-structured interviews with defence lawyers and legal aid policy officers to address such issues. The study will include examining variations in legal aid arrangements/funding as well as differences in the role expected of lawyers in police interrogations. We will also consider the potential for technology to be used in not only achieving efficiencies and cost savings but also to help improve procedural safeguards. It is important when considering the potential use of technology in the criminal process to recognise the possible negative consequences, particularly when dealing with vulnerable suspects.

We are discussing with research respondents the potential for a police station App to provide a consistent approach in delivering to suspects' information about their legal rights, even though the information on rights would need to vary between jurisdictions. We will also examine the potential for lawyers to speak remotely to their clients held in custody. By using Skype, for instance, conversations between lawyers and their clients could be facilitated through the tablet used to host the App. While it could help to improve access to legal advice for suspects held in custody, it is important that this facility is not used to provide an alternative to lawyers sitting in on the police interview.

### **Next Steps**

While developing the App, interviews with defence lawyers and legal aid policy officers will help to identify gaps in providing police station legal advice and this is where the App could be useful to suspects as a 'self-help' tool. In England and Wales, for example, due to the payment of a fixed fee, lawyers are not remunerated for the time spent on cases. This means that they tend to focus on the police interview, which can leave other areas of law where it can be difficult for suspects to obtain legal advice. At the conclusion of cases, for instance, it seems that suspects are seldom able to get advice on whether or not to accept an out-of-court disposal if offered by the police. This includes a police caution or youth caution which is a criminal sanction imposed as an alternative to court. As such, legal criteria have to be met before such disposals can be imposed, which includes there being both an admission and sufficient evidence to prosecute. Research has shown that cautions can be imposed when the legal criteria have not been met, particularly when the police are under pressure to increase

the number of detections (Kemp, 2014). Interestingly, despite custody officers complaining how this can lead to young people being criminalised unnecessarily, defence lawyers were seen to be ineffective in protecting clients from such unlawful practices (Kemp, 2014). While it is not appropriate for legal advice to be provided through the App, it could usefully set out relevant information that could assist suspects when deciding whether or not to accept an out-of-court disposal in the absence of legal advice.

It will be useful to discuss further at the ILAG Conference the potential for the police station App to be used as a self-help tool and to be extended into other jurisdictions to help improve practice, process, understanding and fairness.

## References

- Carlile, A. (2014) *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court*, 2014 - [http://www.ncb.org.uk/media/1148432/independent\\_parliamentarians\\_\\_inquiry\\_into\\_the\\_operation\\_and\\_effectiveness\\_of\\_the\\_youth\\_court.pdf](http://www.ncb.org.uk/media/1148432/independent_parliamentarians__inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf)
- Feld, B. (2012) *Kids, Cops and Confessions* (New York: NYU Press).
- Fenner, S., Gudjonsson and Clare, C. (2002) 'Understanding of the Current Police Caution (England and Wales) Among suspects in Police Detention', *Journal of Community and Applied Social Psychology*, 12:2.
- Ferguson, A. and Leo, R. (2017) *The Miranda App: Metaphor and Machine* - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906554)
- Horan, J. and Maine, S. (2014) 'Criminal Jury Trials in 2030: A Law Odyssey', in the *Journal of Law and Society*, 41:4, 551-575.
- Kemp, V. (2014) 'PACE Performance Targets and Legal Protections', *Criminal Law Review*.
- Kemp, V. (2013) 'No Time for a Solicitor: Implications for Delays on the Take-up of Legal Advice', *Criminal Law Review*, 2013.
- Kemp, V. (2012) *Bridewell Legal Advice Study: Interim Report* - <http://eprints.nottingham.ac.uk/28246/1/Kemp%20BLAST%20Interim%20Report.pdf>

- Kemp, V. (2010) *Transforming Legal Aid: Access to Criminal Defence Services* - <http://eprints.nottingham.ac.uk/27833/1/Kemp%20Transforming%20CD%202010.pdf>
- Kemp, V. and Hodgson, J. (2016) 'England and Wales: Empirical Findings' in M. Vanderhallen *et al.* (eds) *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (Cambridge: Intersentia).
- Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989) *Advice and Assistance at Police Stations and the 24 hour Duty Solicitor Scheme*. London: Lord Chancellor's Department.
- Skinns (2009) 'I'm a Detainee Get Me Out of Here: Predictors of Access to Custodial Legal Advice in Public and Privatized Police Custody Areas in England and Wales', *British Journal of Criminology*, 43:3.
- Vanderhallen, M., van Oosterhout, M., Panzavolta, M. and de Vocht, D. (eds) *Interrogating Young Suspects: Procedural Safeguards from an Empirical Perspective* (Cambridge: Intersentia).
- Young, S., Goodwin, E., Sedgwick, O. and Gudjonsson, G. (2013) 'The Effectiveness of Police Custody Assessments in Identifying Suspects with Intellectual Disabilities and Attention Deficit Hyperactivity Disorder', *BMC Medicine*.