



## ***POLICE STATION INTERVIEWS***

***ADVICE AND INFORMATION FROM THE  
LAW SOCIETY OF SCOTLAND***



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## INTRODUCTION

This advice and information is for solicitors, who are called upon to provide representation, advice and assistance to suspects detained in police stations. Solicitors should be aware these are not Practice Rules. They should not be used as an authoritative guide or be considered a substitute for independent professional decision-making.

Solicitors must, at all times, rely on their professional judgment. In addition, it is recognised that the approach to, and relationship with, the Police may vary considerably from one area to another.

Following the judgement in *Cadder –v- HMA*, UKSC [2010] 43, Scots Law recognised that a detained suspect must have the opportunity to consult a solicitor before being questioned in relation to a criminal allegation. As a direct result of the *Cadder* ruling, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 came in to force thus making significant amendments to the Criminal Procedure (Scotland) Act 1995. The UK Supreme Court reflected the decision of the European Court of Human Rights (ECtHR), which held in *Salduz v Turkey* (2009) 49 E.H.R.R. 19, and subsequently, that the case against an accused person can be irretrievably prejudiced if they do not have access to a lawyer. The ECtHR recognised that the evidence obtained during the investigation stage provides the framework in which the offence is carried to trial. The accused person is particularly vulnerable given the stage of proceedings and complexity of the law. In most cases this can only be compensated by a lawyer whose task, amongst other things, is to ensure respect of the right not to incriminate oneself.

It is the responsibility of solicitors providing advice to suspects at police stations, or providing advice to suspects via telephone, to satisfy themselves as to the relevant law which applies in any situation so as to give the advice appropriate in the particular circumstances.

Much of the information contained in this document can also be applied to non-police interviews, for example where a client is being interviewed by the Home Office Border Force, the Department for Work and Pensions or HMRC or other agencies.

## 1. INITIAL CONTACT

### (A) ACCEPTING INSTRUCTIONS

#### ACCEPTING INSTRUCTIONS VIA THE SCOTTISH LEGAL AID BOARD (SLAB) SOLICITOR CONTACT LINE

##### ***The SLAB Solicitor Contact Line***

SLAB's Solicitor Contact Line service commenced on 4 July 2011, when SLAB was given the duty under the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 to arrange for solicitors to be available for the purpose of providing advice and assistance to suspects to whom Section 15A of the Criminal Procedure (Scotland) Act 1995 applies. Solicitors may still be contacted by the police direct in certain circumstances, e.g. when a suspect simply wants intimation of detention.

##### ***SLAB Contacting the Solicitor***

The request to attend a police station interview should originate from the SLAB Contact Line.

The SLAB Contact Line will make contact with the solicitor if:

1. The solicitor has been named by the suspect. In these circumstances the SLAB Contact will contact the solicitor regardless of whether he or she is on the police station duty scheme. A named solicitor who is not on the police station duty scheme can still advise a suspect by telephone or personal attendance, but cannot be paid by SLAB for doing so.
2. The solicitor is on duty as the police station duty solicitor, the suspect does not nominate a named solicitor and the suspect requires a personal attendance.

The SLAB Contact Line staff should notify the solicitor of the name of the suspect and the relevant police station where the suspect is being or is to be detained.

##### ***Solicitor Voicemail***

Where the SLAB Contact Line is unable to speak directly to the named solicitor, or another representative at their office, a message shall be left that a client is seeking advice. The solicitor should advise SLAB as soon as he or she receives the message as SLAB will allow for only 15 minutes for the solicitor to return a call, before assuming the solicitor is unavailable.

The solicitor should consider setting up his or her voicemail so that it is personalised. SLAB will only leave case details on a voicemail facility if the answering system is a personalised recording, clearly identifying the solicitor concerned.

### ***Advice and Assistance Grant***

Where a personal attendance is necessary, the solicitor should ensure that SLAB will sanction the necessary authorised increase in the advice and assistance grant to cover the solicitor's proposed attendance at the interview.

### ***Delay***

The solicitor should establish the time that the request was notified to SLAB to gauge any delay already incurred. If the solicitor is concerned about delay then he or she can request a copy of the suspect's SLAB detention record. This will be provided by the SLAB Contact Line if the suspect has provided his or her consent for it to be passed on.

### ***Contacting the Police and Getting to the Police Station***

The solicitor must contact the relevant police station within at least 30 minutes of receiving the call from the SLAB Solicitor Contact Line.

On contacting the police the solicitor should make the necessary arrangements and confirm attendance where appropriate, providing an indication of expected time of arrival. The solicitor must obtain the suspect's details and the nature of the suspected offence.

Where the solicitor is providing a personal attendance at the police station, it is considered that

- 1 hour from the time that the solicitor has informed the Police that they will attend is a reasonable timescale for a solicitor to attend the police station if they live in an urban area; and
- 2 hours from the time that the solicitor has informed the Police that they will attend is reasonable for the solicitor to attend if they live in a rural area, although consideration will be taken of issues such as
  - Availability of modes of transport and weather conditions; or
  - A mutually agreed time with the investigating officer for attending at the police station.

The police should not contact the solicitor directly, except as referred to above, but, in that event, the solicitor will be expected to provide advice and representation at the interview if he or she accepts instructions from the police,

The solicitor must obtain the suspect's details and the nature of the suspected offence, and the relevant police station where the suspect is being or is to be detained.

If the solicitor is on the police station duty scheme, the solicitor should contact the SLAB helpline for legal aid purposes. There is no need to contact SLAB where legal aid considerations do not apply.

The solicitor must provide the police with an indication of his or her expected time of arrival.

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#### ACCEPTING INSTRUCTIONS VIA A THIRD PARTY

It is not good practice for a solicitor to accept instructions via a third party in relation to a suspect who has been detained at a police station.

Solicitors should ensure that they comply with the relevant Law Society Rules and Code of Conduct for Criminal Work.<sup>1</sup>

There may be occasions where the solicitor may wish to make enquiries of the police or the SLAB Solicitor Contact Line as to whether a suspect either requires or already has representation - for example, if the solicitor has been contacted by a family member of a child suspect or a person who may be vulnerable or lack capacity or require communication support (see section 4 below).

In these circumstances the solicitor should attempt to obtain the suspect's confirmation of instructions as soon as practicable.

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#### ACCEPTING INSTRUCTIONS FROM THE SUSPECT

If the call is from the suspect direct, the solicitor's authority stems from his/her instructions. If the solicitor is on the police station duty scheme they should contact SLAB regarding payment arrangements. There is no need to contact SLAB where legal aid considerations do not apply.

#### (B) DETERMINING WHETHER TO PROVIDE TELEPHONE ADVICE OR MAKE A PERSONAL ATTENDANCE

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#### WHERE THE SOLICITOR IS THE NAMED SOLICITOR

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<sup>1</sup> <http://www.lawscot.org.uk/rules-and-guidance/section-f/division-a-criminal-work/guidance/the-code-of-conduct-for-criminal-work>

On first making contact with the suspect the solicitor should:

- Ensure that the suspect understands that he or she has the right to have a solicitor present before and at any time during any questioning;
- Ascertain from the suspect if he or she wishes the solicitor to attend; and
- Ensure the suspect has any necessary support for communication or interpretation or any other reasonable adjustment which may be required due to disability.

In determining whether to attend in person, each case will depend upon its own facts in the circumstances of the individual case. Clearly, if a suspect asks for a personal attendance, then the solicitor should be attending.

It is suggested that factors and circumstances where attendance will almost always be necessary should include:

- Complex and/or serious suspected offences;
- Where there are to be identification procedures;
- If there is a complaint of police misconduct;
- Where the suspect is less than 18 years old, a potentially vulnerable person (see below) or other person whom the solicitor considers might be at risk; [Section 4 (D) Child Suspects states personal attendance is strongly recommended, but cannot force child to engage with solicitor;]
- If appropriate advice cannot be given with sufficient confidentiality on the telephone;
- Necessary representations cannot be made over the telephone; or
- The suspect has a disability and requires a personal attendance as a reasonable adjustment.

**Note** – this list is not exhaustive, and is illustrative only. It does not endorse non-attendance in circumstances not listed. The decision whether or not to attend is a matter for the solicitor using his or her professional judgment.

**It may be that merely advising clients over the telephone will not be sufficient to ensure proper exercise of the right to legal advice.**

**The Solicitor should attempt to obtain sufficient disclosure from the police to properly advise a client or carry out many of the other duties suggested in this advice and information. However, that may not be possible and the issue of police disclosure is**

**currently under review.. Solicitors should bear in mind that, in England and Wales, telephone advice is only sufficient for the most minor offences for which an interview is not ordinarily required.**

If the solicitor is not to attend in person he or she should:

- Explain the reasons for not attending to the suspect; and
- Give appropriate advice on the telephone and record it.

If the suspect is dissatisfied, decline instructions and inform the custody officer so that he or she has the opportunity to seek an alternative legal representative. If the solicitor decides that personal attendance is not required, then they should make a record of this with reasons behind the decision.

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#### WHERE THE SOLICITOR IS THE DUTY SOLICITOR

When a duty solicitor is called upon by the Solicitor Contact Line to attend a police station to provide advice in person to a suspect, it is because the suspect has requested a personal attendance, and not further telephone advice from another solicitor.

Therefore duty solicitors must be able to provide face to face advice to the suspect and so provide it, and it is anticipated that:

- 1 hour is a reasonable timescale for a solicitor to attend the police station if they live in an urban area; and
- 2 hours is reasonable for the solicitor to attend if they live in a rural area, although consideration will be taken of issues such as
  - o availability of modes of transport and weather conditions; or
  - o a mutually agreed time with the investigating officer for attending at the police station.

If the duty solicitor is unable to attend within the timescales required by the police for the purposes of the investigation, for example due to previously arranged court commitments, another police station attendance, family/caring responsibilities, or medical reasons, these circumstances will not be considered as an unreasonable failure to attend.

#### (C) INFORMING POLICE OF INTENTIONS

The solicitor should inform the custody officer if he / she is to attend the police station and should:

- Provide an indication of expected time of arrival;

- Request that this be conveyed to the suspect; and
- Obtain confirmation from the custody officer that no interview will commence until arrival.

If the solicitor is unlikely to arrive at the police station within a reasonable time frame, the solicitor should consider declining to accept the suspect's instructions and advising the suspect and police officer of this, so that alternative arrangements can be made for another solicitor to attend in his or her place.

## 2. PRELIMINARY MATTERS TO BE CONSIDERED

### (A) ACTING FOR MORE THAN ONE SUSPECT

Acting for more than one suspect at an interview can cause difficulties. The solicitor must have regard to the fact that a conflict of interest may arise.

If upon taking instructions it becomes clear that there is a conflict of interest between the suspects, the solicitor should only act for those suspects who are not in conflict with each other.

The solicitor may have to consider if he or she needs to withdraw from representing all of the suspects. This may be the case where the solicitor has spoken with two or more suspects and each provides information which incriminates the other. In such circumstances, the solicitor should inform the custody officer that he or she is unable to provide representation, but must not give the reason for this, as this will alert the police of the conflict between the suspects and possibly raise confidentiality issues.

### (B) DETERMINING WHETHER TO DELEGATE RESPONSIBILITY

It is the solicitor's decision whether to attend in person or delegate to a solicitor representative to attend and take instructions from the suspect.

If the solicitor is on the police station duty plan, they can delegate an attendance or the provision of advice to a solicitor in another firm, provided the solicitor to whom the duty work is delegated has been accepted onto a police station duty plan.

### (C) VERIFICATION OF FINANCIAL ELIGIBILITY – (NOT APPLICABLE IF CLIENT IS PRIVATE OR IF LEGAL AID CONSIDERATIONS DO NOT APPLY)

A solicitor can only charge SLAB for attendance at a police station if he or she is on the Police Station Duty Scheme. SLAB will normally authorise an increase in the advice and assistance grant to cover the interview.

At the present time, with contributions being applicable to the station duty attendances by a nominated solicitor or a duty solicitor, the solicitor still needs to verify the financial eligibility of the suspect on taking instructions.

However, where a duty solicitor has appeared at a police station interview, and he or she is unlikely to see the client again to get verification, in the Online Advice and Assistance application, after the question:

*“If you have not been able to obtain financial verification for income, please explain how you were satisfied that you could grant advice and assistance and what reasonable steps you took or are taking to obtain this information”*

The solicitor should simply state that he/she was the duty solicitor and that the advice was in respect of a police interview, and is unlikely to see the client again.

#### (D) WHAT TO TAKE TO THE POLICE STATION

It is suggested that the solicitor takes the following materials and items to the police station:

- a) Personal identification –Law Society of Scotland Smartcard as well as a business card (access may be denied without a current Law Society Smartcard)
- b) Headed note paper - in case representations in writing are necessary
- c) Standardised police station pro-forma – until Scottish form is prepared the English version offers a useful guide<sup>2</sup>
- d) Advice and assistance declaration form and mandate
- e) Reference materials including copies of relevant legislation and this guide
- f) If the solicitor is a delegated representative, a letter of authority
- g) Contact telephone numbers for support if necessary

### 3. ARRIVAL AND INITIAL ACTION AT THE POLICE STATION

#### (A) PRE-INTERVIEW DISCLOSURE

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<sup>2</sup> The English form can be accessed at: <http://www.legalaidreform.org/police-station-legal-advice/other-police-station-legal-advice-resources/item/194-england-police-station-legal-advice>

At various stages during the organisation of the police interview, it is likely that the solicitor will have the opportunity to speak to the Custody and/or Investigating Officer regarding the suspect.

During these discussions the solicitor should seek to obtain as much information as possible that will assist in advising the suspect.

In terms of what to ask the Investigating Officer, each case will depend on its own circumstances and the solicitor should use their own professional judgment. By way of examples only:

- Nature of crime(s) under investigation;
- Time and place of detention;
- Has the suspect made any statement, written or oral;
- Has the suspect been questioned at any time during detention;
- Reasons why it is necessary to interview the suspect;
- Evidence in support of detention such as details of any evidence or material recovered, at the time of detention;
- Any assessment of a suspect's wellbeing or vulnerabilities; and
- Any anticipated timescales for any interview(s) involving the suspect.

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Following the pre-interview meeting, the solicitor should ask the Investigating and Custody Officers for a private consultation with the suspect of adequate duration before any interview process commences.

## (B) ACCESS TO THE SUSPECT

The right to have a private consultation with a solicitor exists before any questioning of the suspect by a police officer begins, and at any other time during such questioning – Section 15A(3) of the Criminal Procedure (Scotland) Act 1995.

This means that before the police interview, the suspect must be given the opportunity to consult in private with their solicitor. The solicitor should ensure that the consultation period afforded is of adequate duration.

Access may be delayed in certain circumstances. Section 15A (8) of the Act allows for such access to be delayed where it is 'necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders' and in 'exceptional circumstances'.

If access is delayed, restricted or refused then the solicitor should ascertain the reasons, and note these carefully and also consider if it is necessary to make representations.

The solicitor's consultation with the suspect must be in private. If facilities do not allow for this, the solicitor should make a note and make any necessary representation to the police.

#### (C) THE LETTER OF RIGHTS

Since July 2013 the police have provided suspects with a letter to provide them with information about their rights in police custody.

The Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014 enshrines into Scots Law the entitlement of suspects and accused persons to a letter of rights under the EU Directive on the Right to Information in Criminal Proceedings.

The letter of rights is a simple booklet that explains a person's rights whilst in police custody in Scotland, in straightforward language. The Letter is designed to raise awareness of a person's rights as provided for under Scots Law, especially the right of access to a lawyer. A person who is taken into police custody will get a copy of the letter at the police station.

The solicitor should establish with the suspect if he or she has received the letter of rights. If the solicitor believes that the letter of rights has not been provided, the solicitor should ascertain the reasons, and note these carefully. The solicitor might also wish to consider if it is necessary to inform the senior police officers and/or challenge the failure to provide access to the relevant material at a later date.

## 4. CLIENT WELFARE

### (A) INITIAL ASSESSMENT

When speaking to the suspect on the telephone or in person an initial assessment has to be made as to whether the suspect:

- Understands the process that he/she is involved in and has capacity to instruct;
- Understands that he/she has the right to have a solicitor present before and during questioning by the police;
- Understands his/her right to silence;
- Has a disability which may require a reasonable adjustment such as communication support, or requires an interpreter;

### (B) HEALTH OF SUSPECT

If the suspect appears to be suffering physical illness or mental disorder or is injured, showing signs of insensibility and unawareness, or fails to respond to normal questions, or otherwise appears in need of medical attention the solicitor should ask the police to call a doctor.

The solicitor should also request a doctor if the suspect requests a medical examination.

If the suspect is injured, the solicitor should ask the police to note any injuries and, where appropriate, request that photographs of the injuries are taken. In addition, the solicitor should record notes of injuries.

If the suspect complains of a physical assault in police custody, the solicitor should note his/her complaint fully and consider whether to inform the senior police officers and/or to advise the suspect to make a complaint.

### (C) SUSPECTS REQUIRING INTERPRETERS

The solicitor should make an assessment as to whether the suspect may require an interpreter. Where necessary, the solicitor should request that an appropriate interpreter be provided for the interview.

This may be the case:

- Where English is not the suspect's first language; or

- Where the suspect has a hearing or communication impairment, or some other disability which would require a reasonable adjustment such as British Sign Language interpreter or a lip speaker.

The solicitor should ensure that any interpreter is impartial and understands that the solicitor has a duty of confidence and that he or she is bound by those confidentiality obligations.

Solicitors should satisfy themselves that the interpreter is suitably qualified and competent for the communication needs. Any concerns about the interpreter's ability should be recorded and raised immediately with the custody and investigating officers.

The solicitor should intervene immediately if it appears that the interpreter is saying anything additional to the suspect, not acting impartially or is having difficulty understanding what is being said by the suspect.

#### (D) CHILD SUSPECTS

A child is a person who is under 16 years old, or who between the ages of 16 and 17 and who is subject to a supervision requirement (within the meaning given by Children (Scotland) Act 1995).

The solicitor should always seek to provide a personal attendance where the suspect is a child. A personal attendance is always strongly recommended if the suspect is a child. However, ultimately, it is a matter for the suspect. The suspect should not be forced to engage with the services of a solicitor and a personal attendance should not be forced upon the suspect.

A child suspect, who is arrested or subject to section 14 detention, must have that fact intimated to his/her parent or other responsible person in whose care the child normally rests and that person shall be afforded access to the child. The police will attend to this.

Where a parent or guardian is present the solicitor must explain to that parent or guardian and the child suspect:

- The role of the parent or guardian is to provide support, and aid communications where necessary; and
- The parent or guardian must not answer or ask questions on behalf of the child suspect.

The solicitor should explain to the child suspect that the parent or guardian is not bound by confidentiality and confirm that the child suspect understands and is content with this.

The solicitor should confirm with the child suspect that they are in agreement to have their parent or other responsible adult present during the legal private consultation and, if necessary, at the police interview.

Special care should be exercised in advising a child at the police station. The solicitor must only take instructions from the child suspect as the client and, not the parent or responsible adult, but consult with the parent or responsible adult whenever practicable.

#### (E) VULNERABLE SUSPECTS

The solicitor should assess the suspect's vulnerability as they may be vulnerable due to mental disorder such as mental illness, personality disorder or learning disability.

The solicitor should always seek to provide a personal attendance where the suspect is vulnerable. A personal attendance is always strongly recommended if the suspect is vulnerable. Current guidance indicates a vulnerable suspect cannot waive legal access.

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#### SUSPECTS WITH MENTAL DISORDERS

The Mental Health (Care and Treatment) (Scotland) Act 2003 defines mental disorder as '*any mental illness, personality disorder, learning disability however caused or manifested*'. In practice this includes people with acquired brain injury, autistic spectrum disorder and dementia.<sup>3</sup>

Where officers have reasonable grounds to believe that an adult suspect may be unable to advise if they wish a private consultation with a solicitor prior to interview, due to mental disorder, the police must seek the services of an Appropriate Adult to assist in explaining the suspect's rights.

Appropriate Adults facilitate communication between the police and adults (persons aged 16 or over) who have any mental illness, personality disorder or learning disability.

The role of the Appropriate Adult is to help ensure that those with a mental disorder have the same understanding as any other person involved in the process of what is going on and to help ensure that any answers they choose to give are understood.<sup>4</sup> The role is not currently defined in statute.

An Appropriate Adult should be completely independent of the police and, where possible, the suspect. They should have a sound understanding of and experience or training in dealing with and communicating with those with a mental disorder or with the needs of a particular group.

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<sup>3</sup> For examples see - <http://www.scotland.gov.uk/Publications/2005/08/30105347/53516>

<sup>4</sup> For more detailed explanation of the role of the appropriate adult see the Scottish Government Guidance at <http://www.scotland.gov.uk/Resource/Doc/1099/0053903.pdf>

The solicitor must not act as the Appropriate Adult for the suspect. The role of Appropriate Adult is distinct from that of solicitor or legal adviser. The solicitor should ask the police to contact the relevant Appropriate Adult Services.

In addition to the Appropriate Adult a relative; friend or carer may in exceptional circumstances be present to provide reassurance and support.

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#### VULNERABLE SUSPECTS, YOUNG PERSONS AND CHILDREN –THE RIGHT OF ACCESS TO A SOLICITOR

Careful consideration of circumstances will be required where the individual is:

- Under 18 and under supervision;
- A child as defined by the Social Work (Scotland) Act 1968, i.e. a child under 16 years of age; or
- Suffering from a mental illness or has learning disabilities.

In September 2012, the Lord Advocate's instruction was that suspects of any age who required the support of an appropriate adult must be provided with access to a solicitor prior to interview and should not be allowed to waive this right.

However, since that instruction was issued there were practical difficulties with its operation particularly where the suspect was adamant that they did not wish to instruct a solicitor. Therefore, the Crown Office revised their instructions in July 2013 to confirm that while a suspect must be provided with access to a solicitor prior to interview, it was confirmed that this did not mean that they must engage the services of a solicitor.

If the suspect refuses to engage the services of a solicitor, this cannot be forced upon them. In these circumstances, it is a matter for police officers to give consideration as to whether it is appropriate to proceed to interview that suspect.

A relevant factor in making such a decision will be whether the interviewing officer believes that the suspect is able to understand the caution and the consequences of not taking legal advice.

If the decision is made to proceed to interview the suspect, then the reasoning for this should be clearly set out in the prosecution report.

The police will continue to phone the SLAB Solicitor Contact Line where a vulnerable suspect has declined legal advice. The solicitors on the SLAB Solicitor Contact Line will offer to speak to the suspect about the case, and where this is declined, that will end the matter.

However, if the suspect changes his/her mind and wishes to speak to the SLAB Solicitor Contact Line, legal advice will then be provided, either over the telephone or where requested by a personal attendance from a duty solicitor.

## 5. ADVISING THE SUSPECT PRIOR TO THE POLICE INTERVIEW

### (A) PRIVATE CONSULTATION WITH THE SUSPECT

Upon meeting the suspect, the solicitor should:

- Introduce himself/herself;
- Explain his/her role in attendance (to provide advice assistance and representation to the suspect in connection with the suspected offence they have been detained for);
- Explain relationship of confidentiality and confirm the suspect understands this; and
- Assess the suspect's fitness to be interviewed.

### (B) ASSESSING FITNESS TO BE INTERVIEWED

From initial conversations and/or meetings with the suspect, the solicitor should assess the suspect's fitness to be detained and interviewed. This is a matter for the solicitor's own professional judgment, but the following suggested factors should be considered.

- The solicitor should ascertain whether the suspect is able to understand, and appreciate the significance of, questions put to him and his answers to those questions;
- A suspect may be unfit to be interviewed because he or she is unable to appreciate or understand significance of questions or answers as a result of his/her consumption of drink or drugs;
- A suspect might be unfit for a variety of other reasons such as stress, anxiety or tiredness, or because necessary communication support or other reasonable adjustments are not in place.

If the solicitor has any concern that the suspect is unfit for interview, the solicitor should record his/her concerns and, if appropriate, notify these to the custody and investigating officers.

The solicitor should use his/her own professional judgment to decide whether to object to any proposed interview and request that the objection be noted on the custody record.

Where appropriate, the solicitor may wish to consider recommending that medical examination be sought – but should be aware that this might result in delay.

Following any representation made by the solicitor regarding fitness to be interviewed, where the investigating officer decides to proceed with the interview, the solicitor should make representations to the custody officer and request that his/her concerns are noted on the custody record. The solicitor should also consider recording any objection to the interview based on the solicitor's assessment of his client's fitness, and the solicitor should insist that his objection is recorded at the outset of the interview.

#### (C) ADVICE

The solicitor will be expected to provide the suspect with advice. To ensure the advice is appropriate the solicitor must convey to the suspect information obtained via police disclosure, including:

- Nature of the alleged offence;
- Evidence that has been disclosed;
- Any witness statements that have been provided;
- Details of any earlier statements the suspect may have made;
- The likely nature of the police questions;
- What the police are seeking to ascertain.

In order to properly advise the suspect, the solicitor must be prepared to ask the police to provide as much information as possible about the alleged offence. However, under current guidelines, which are subject to review, the police are not obliged to provide information. The solicitor must then provide the suspect with the opportunity to put forward his or her explanation/version of events in response to the police allegation during the private consultation.

Once satisfied that they are in possession of all relevant information, subject to the above, the solicitor should advise the suspect accordingly, explaining:

- The strength of the police case;
- The nature of the offence suspected;
- Any defences appropriate or apparent;
- The suspect's right of silence.

The particular advice the solicitor gives will depend upon the particular circumstances of the suspect, case, alleged offence and evidence. The list above is not an exhaustive list and the advice the solicitor gives will be a matter for his or her professional judgement.

#### (D) TAKING INSTRUCTIONS FROM THE CLIENT

Detailed instructions should be obtained from the client about his position in relation to the alleged offence(s).

These should be carefully noted, together with a record of the advice given.

The solicitor may also want to consider asking the suspect to sign to confirm his or her instructions or the advice given. This may be particularly important where a suspect does not wish to accept the advice.

#### (E) PREPARING THE CLIENT FOR THE POLICE INTERVIEW

The solicitor should explain and ensure the suspect understands:

- The right to silence; and
- The right to take further legal advice during questioning.

In addition, the solicitor should explain the process of the interview and the format it is likely to take, ensuring the suspect is aware of and understands:

- That he or she may request the interview to be suspended at any time for further legal consultation in private;
- How the interview will take place, and its structure;
- The role of the solicitor during interview, see below at 6(A).

The solicitor should discuss with his/her client whether he/she has a disability which might require a reasonable adjustment and discuss what information in relation to that he/she wants disclosed to the police and whether to request any specific adjustments such as breaks during the interview.

The solicitor should keep full written records of his/her consultation with the suspect.

#### (F) STRATEGIES THE SOLICITOR MAY WISH TO CONSIDER

It is the suspect's decision to decide on the approach to be adopted during the interview.

The solicitor should explain to the suspect that whether he or she answers questions or provide samples etc. is entirely his or her choice, subject to the terms of section 18 of the Criminal Procedure (Scotland) Act 1995 (Prints, samples etc. in criminal investigations): the solicitor is there only to advise and not to make the decisions on behalf of the suspect.

The solicitor should advise the suspect of the likely consequences of answering questions or, in particular, providing admissions to the police.

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#### RIGHT OF SILENCE / ADVISING NO COMMENT

The solicitor may wish to advise the suspect to either remain entirely silent or state “no comment” or “no reply” to the questions asked. If the suspect wishes to adopt this strategy the solicitor should rehearse his or her client in this regard.

In other cases it may be that the suspect wishes to give a written statement of his position but refuses to answer any further questions.

In England and Wales and Northern Ireland, a written statement can be used to avoid inferences being drawn from silence. Given that these considerations would not apply in Scotland, the circumstances where a written statement might be used are likely to be rare. Nevertheless, the solicitor may wish to explore the option of providing a written statement where, for example the client wishes to put his or her side of events forward but, perhaps because of the complexities of the case, is unlikely to be able to give his or her account in the best way in an interview situation.

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#### ADVISING THE CLIENT TO ANSWER ALL QUESTIONS / SOME QUESTIONS / ADVANCING AN EXPLANATION / DENIAL OR DEFENCE

Again, it’s a matter for the solicitor how to advise his or her client and a matter for the client as to how he/she would like to proceed.

The solicitor should explain that the interview is a formal process and that nothing will be “off the record”.

The solicitor should advise the suspect to listen carefully and concentrate on what is being said at all times during the interview. The solicitor should also advise the suspect to speak slowly during the process and clearly and not to answer a question unless they have fully understood its meaning. The suspect may ask for the question to be repeated.

The solicitor should advise that there is no obligation to answer any particular question.

## 6. THE POLICE INTERVIEW

### (A) THE SOLICITOR'S ROLE DURING THE POLICE INTERVIEW

Current legislation does not, in fact, provide a specific right for a solicitor to be present at an interview. Case law,<sup>5</sup> however, requires police officers to allow solicitors to be present during the interview process.

The role of the solicitor during the interview is to represent, protect and advance the legal interest and rights of the suspect.

The solicitor should:

- Ensure that he/she actively participates in the interview;
- Position themselves in the interview room so that he/she can communicate easily with the suspect and the officer who is asking the questions;
- Have regard to the overall length of the interview and to the suspect's condition and any reasonable adjustment which may be required as a result of any disability; and
- Be observant and intervene if appropriate (e.g. if the suspect appears tired or unwell, distressed or visibly distraught).

The solicitor should not:

- Assume a passive role where he or she merely observes;
- Answer questions on a suspect's behalf or provide them with written replies to put forward orally; or
- Whisper messages or pass written notes to the suspect during an interview.

The solicitor should make a full record of all that takes place during the interview including:

- Details of the interviewing officers;
- Questions asked during the interview;
- Responses put forward by the suspect;

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<sup>5</sup> *Salduz v Turkey* - 36391/02 [2008] ECHR 1542 (27 November 2008); *Cadder v HM Advocate* [2010] UKSC 43 (26 October 2010); *Dayanan v Turkey* - 7377/03, [2009] ECHR 2278

- Any representation put forward as to the nature of the questioning; and
- The overall conduct of the interview.

This list is illustrative and the solicitor should take any notes and record any information he/she considers necessary.

Where the interview is to be taped, the solicitor should state his/her name and role before the interview commences and confirm that he/she is acting for the suspect.

If the solicitor has objected to any aspect of the interview process, or has not been afforded an appropriate initial disclosure, then the solicitor should ensure that any objections he has are recorded at the outset of any taped interview.

#### (B) WHETHER, AND AT WHAT POINT, TO INTERVENE DURING THE INTERVIEW

The solicitor must be alert to the nature and conduct of the questioning by the investigating police officer(s) during the interview.

The solicitor's role is to protect the legal rights and interests of the suspect. This may require the solicitors to intervene and make representation during the course of the interview.

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#### NON-VERBAL OCCURRENCES

The investigating officer may record non-verbal occurrences particularly if the interview is on tape or digitally recorded, e.g. the suspect "nodded his/her head" or "shrugged his/her shoulders". The solicitor must be alert to any attempt to put on record prejudicial or misleading observations.

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#### UNFAIR QUESTIONING

If the solicitor considers that questions are improper or improperly put, he/she should intervene and explain his/her objections for the record. If improprieties remain uncorrected or continue, the solicitor should consider advising the suspect of his/her right to remain silent, and explain this for the record.

The solicitor should consider intervening if the officer is not asking questions but only making comments. Objection should be taken to questions which are hypothetical and the solicitor should advise the suspect not to answer such questions if they are asked.

The solicitor should consider objecting to any questions containing either implied or express inducements to the suspect to answer in a certain way. Also consider objecting to leading questions.

The solicitor should consider objecting to questions which are ambiguous and to which the answer could be taken to mean something other than what the client intended it to mean.

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#### SUSPECT INTERRUPTED DURING AN ANSWER

If the solicitor believes that the suspect has been interrupted during an answer, then he or she should request that the suspect is given the opportunity to finish his/her response without interruption.

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#### HARASSMENT / OPPRESSION

The solicitor should be alert to questioning that is oppressive, becomes aggressive, offensive, insulting, threatening or otherwise.

Oppression can result from continued repetition of questions which have already been answered or to which a “no comment” answer has been given, from an officer raising his/her voice or becoming angry or from continued interruptions of the suspect by the officer.

The solicitor should be alert to the tone of the interview and intervene if the interview is becoming oppressive. If such behaviour persists, the solicitor should consider seeking to suspend the interview and make representation to the custody officer / senior officer.

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#### PSYCHOLOGICAL PLOYS OR INAPPROPRIATE CONDUCT

The solicitor should make a professional judgment as to whether to intervene if he or she believes that officers are attempting to influence the suspect’s decision making by seeking to:

- Undermine or belittle the solicitor or suspect;
- Give inappropriate reassurance to the suspect;
- Build rapport with the suspect in order to influence his/her decision making;
- Be over-familiar;
- Persuading a ‘no comment client’ to answer questions by asking about his/her finances or antecedent history.

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#### (C) MESSAGES AND WRITTEN NOTES

The solicitor must not whisper messages or pass written notes to the suspect during an interview. If communication is necessary, the solicitor should intervene to seek a break in the interview for a further private consultation.

If a police interview is interrupted for reasons other than solicitor-client consultation (e.g. client going to the toilet), the solicitor should seek to put that on the record when the interview resumes, if the interviewing officer has not done so.

#### (D) EXCLUSION FROM THE INTERVIEW PROCESS

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The solicitor should intervene in order to seek clarification, challenge an improper question which has been put to the client or the manner in which it was put, advise the client not to reply to particular questions, or if the solicitor wishes to give the client further legal advice.

If the solicitor is excluded from the interview process he/she should make a careful note of what happened and the reasons for the exclusion. The solicitor should consider reporting his/her exclusion to a senior police officer and/or the Procurator Fiscal.

## 7. AFTER THE POLICE INTERVIEW

### (A) POINT OF DEPARTURE

The solicitor's point of departure from the police station will depend on whether his or her continued presence is necessary in the client's interest. The solicitor should not just leave the police station. He or she should have a discussion with the client about the next steps and who will continue to look after his/her interests. The solicitor should ask the police for a final private consultation with the suspect to provide further legal advice on potential outcomes and subsequent processes.

The solicitor should anticipate the possibility that the suspect may be re-arrested or re-interviewed and advise appropriately, including advice as to his/her right to further legal advice.

### (B) OUTCOMES

#### FURTHER DETENTION

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<sup>6</sup> We believe that the Lord Advocate's Guidelines of 2010 are no longer in force, but we still endorse this statement.

Section 14 of the Criminal Procedure (Scotland) Act 1995 (as amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010) allows suspects to be detained up to a maximum of 12 hours. The 12 hours can be extended up to 24 hours if:

- The continued detention of the detained person is necessary to secure, obtain or preserve evidence (whether by questioning the person or otherwise) relating to an offence in connection with which the person is detained;
- An offence in connection with which the detained person is being detained is one that is an indictable offence;
- The investigation is being conducted diligently and expeditiously; and
- It is authorised by a custody review officer.

The extension must be authorised before the expiry of the initial 12 hour period.

If detention is to be extended the Custody Review Officer must give the solicitor an opportunity to make representations orally or in writing.

Solicitors should familiarise themselves with the relevant sections of the 1995 Act (as amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010). In particular, where a custody review officer is considering whether to authorise the extension, Section 14B(8) of the 1995 Act provides that he or she must make a written record of the officer's decision on whether to authorise the extension, and any of the grounds which apply in Section 14B (8)(b).

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#### RELEASE

The police may release the suspect from the police station unconditionally and without charge. The solicitor might wish to provide the suspect with his/her office contact details in case he/she needs to contact the solicitor again.

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#### CHARGE

The police might charge the suspect or intimate to him/her that they intend to report him/her to the Procurator Fiscal with a view to such a charge (i.e. once the initial police investigation is complete).

- LIBERATION ON UNDERTAKING (POLICE BAIL)

The suspect may be released from the police station if he/she signs a document undertaking (promising) to come to court on the date the police have given him/her. The undertaking may have conditions such as an obligation not to commit any other offence and not to

interfere with witnesses. It may also contain further conditions specific to the circumstances of the alleged offence.

The undertaking should be for a court appearance on a date no later than 28 days after liberation.

The solicitor should explain to the client that he/she must appear at the specified court on the specified day and specified time. The solicitor should ensure that he/she understands any conditions attached to the undertaking. The solicitor should advise that his/her release from custody is conditional on the agreement to appear in court and on the acceptance of conditions. The solicitor should discuss with the client requirements for legal representation at the court stage.

- LIBERATION FOR REPORT

The client might be charged and liberated for report. This means that there is no undertaking for the client to appear at court at this stage. The police will prepare a report which will be referred to the Procurator Fiscal.

The solicitor should explain the potential outcomes to his/her client, including what will happen if the case is to be cited for prosecution and any possible alternatives to prosecution. The solicitor should provide him/her with office contact details in case he/she needs to contact the solicitor again.

- REMAND IN POLICE CUSTODY

The police may keep the suspect in police custody if there appears to be a substantial risk that he/she will:

- Abscond;
- Fail to appear;
- Commit further offences;
- Interfere with witnesses;
- Obstruct the course of justice;
- In some other way threaten public safety; and
- Fail to comply with the conditions of the undertaking.

The solicitor should ascertain from the police when the client is likely to appear in court (this should be the following day or the first working day if at a weekend). The solicitor should explain the subsequent processes and procedures to the client.

## 8. ADDITIONAL MATTERS

### (A) THE IMPORTANCE OF KEEPING A COMPREHENSIVE RECORD.

The solicitor should make full and timed records at all times. He/she should keep detailed notes of events which take place at the police station, as they might be required subsequently. Suggested records are (note this list is by way of guidance rather than exhaustive):

- Time of arrival and departure;
- Time and content of information given by police including reason for client's arrest/detention;
- Time and content of consultation with client;
- Content and reasons for advice given by solicitor;
- Client's decision following advice;
- Time and content of formal interview with police;
- Time and content of representations made;
- Time and content of any identification procedures;
- Time and details of any taking of samples;
- Time and details of any injuries alleged and any medical examination; and
- Time and details of any unusual features of the interview process.

### (B) DETENTION PERIOD

The initial detention period is 12 hours. During the initial 12 hour period, a police custody review officer can authorise an extension to 24 hours without having to get a court's permission.

The solicitor should seek to avoid delay where possible and appropriate. Delays between arrival at the police station, attending with the client and the interview commencing will cause inconvenience to all parties within the process.

The solicitor should record all waiting times when at the police station.

#### (C) IDENTIFICATION PARADES

The Courts have power to order and the police may request the suspect take part in an identification parade. However, there are certain safeguards for the conduct of identification parades, for example, the suspect has the right to have a solicitor present and the other people in the parade should look broadly similar to the suspect in terms of gender, age, height, dress and general appearance.

#### (D) PRINTS AND SAMPLES

Section 18 of the Criminal Procedure (Scotland) Act 1995 is relevant here. This section outlines that, after the suspect has been arrested and is in custody or detained, the police may require the suspect to provide finger prints, palm prints or other type of print as defined in the Act, as the police reasonably considers appropriate. The police must have regard to the circumstances of the suspected offence in respect of which the person has been arrested or detained.

The police may also take a standard photograph 'mug shot'.

Section 18 also provides that, where a person has been arrested and is in custody, a constable may, with the authority of an officer of the rank of inspector or above, take the following samples:

- Body hair samples, other than pubic hair;
- Finger or toe-nail clippings or other material from the nail;
- Blood or other body tissue or fluid gained by swabbing or rubbing;
- Saliva that can be swabbed from the inside of the mouth; and
- Blood samples can also be taken as long as there is a warrant to do so.

The police might use reasonable force in obtaining samples if a police inspector provides permission.

In addition, a constable, or at a constable's direction a police custody and security officer, may take from the inside of the person's mouth, by means of swabbing, a sample of saliva or other material. Mouth swabs do not require the authorisation of an inspector.

Intimate samples in Scotland are defined in the Immigration and Asylum Act 1999 as:

- A sample of blood, semen or any other tissue fluid, urine or pubic hair;
- A dental impression; and
- A swab taken from a person's body orifice other than the mouth.

Whilst it may sometimes be lawful for some intimate body searches to be undertaken without consent, the British Medical Association and Faculty of Forensic and Legal Medicine considers that medical practitioners should only participate with the individual's consent.<sup>7</sup>

## SEARCHES

The police have the power to search a suspect at the police station.

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The police require a warrant to carry out an internal(invasive) search. However, non-invasive strip searches can be authorised by a Custody Supervisor. There are rules governing each of them.

The British Medical Association and Faculty of Forensic and Legal Medicine consider that such searches should be carried out by a doctor only when the individual has given consent. If consent is not given, the doctor should refuse to participate and have no further involvement in the search.<sup>8</sup>

Police procedures and powers in relation to searches in Scotland come from a mixture of the common law and legislation. Solicitors should familiarise themselves with the relevant legislation, including the relevant sections of the Criminal Procedure (Scotland) Act 1995 and the Police, Public Order and Criminal Justice (Scotland) Act 2006 as well as the common law position in relation to powers of search on arrest and detention.

## (E) TERRORIST SUSPECTS

<sup>7</sup> British Medical Association & Faculty of Forensic and Legal Medicine (2007) Guidelines for doctors asked to perform intimate body searches. London: BMA

<sup>8</sup> British Medical Association & Faculty of Forensic and Legal Medicine (2009) Health Care of Detainees in Police Stations

Different considerations may apply in relation to terrorist suspects and solicitors should familiarise themselves with the Terrorism Act 2000 and other relevant legislation.

#### (F) SUSPECTS WHO ARE MEMBERS OF THE ARMED SERVICES – MILITARY POLICE INTERVIEWS

Different considerations will apply in relation to interviews by the military police. A solicitor should not consider advising members of the armed forces in relation to “military” interviews unless he or she is accredited in terms of the Police and Criminal Evidence Act 1984.

Any interview with a member of the armed forces by military police will be governed by the Police and Criminal Evidence Act 1984 and all Codes of Practice which have been developed in relation to interview procedure.

#### (G) ASYLUM SEEKERS

Under section 25A(2) Immigration Act 1971 an "asylum seeker" means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under the Refugee Convention (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (interpretation)), or the Human Rights Convention (within the meaning given by that section).

Solicitors should familiarise themselves with Section 31 of the Immigration and Asylum Act 1999 and Article 31 of the 1951 Convention Relating to the Status of Refugees.

The solicitor should advise any client who is claiming asylum to inform the authorities in the UK without delay and as soon as reasonably practicable. The solicitor should advise the suspect to inform the police at the start of an interview that he or she is seeking asylum so that the suspect can make full use of any defence under section 31 of the Immigration and Asylum Act 1999. Advising the suspect to provide this information at the beginning of the interview will also ensure that police officers take into account any additional matters for interviewing a suspect who is seeking asylum.