

## **SUGGESTED PROTOCOL FOR SOLICITORS REPRESENTING SUSPECTS AT A POLICE STATION**

### **SHOULD I ATTEND AT A POLICE STATION?**

1. You should not be required to physically attend at police stations because the present conditions are unsafe, in terms of the risk they present both to those attending, but more widely, because of the risk of spreading the virus to the wider community by not working in accordance with the PHE guidance to change working patterns wherever possible. Any such attendance would be contrary to the Government's clear advice to socially isolate and minimise contact with each other, wherever possible in the working context, to help prevent the spread of coronavirus. Requiring such attendance could constitute a breach of Article 2 of the Convention on Human Rights and could be a breach of the duty of care of a public service, both to those using the service (including suspects) and in respect of those working within it, to provide safe working conditions.

2. If your firm adopts a policy of no face-to-face services at police stations or courts the LCCSA advise you that should notify your contract manager to inform them that it is your view that the current pandemic satisfies Clause 30.6 of the Standard Crime Contract 2017 [please see the joint [message](https://www.lccsa.org.uk/a-message-from-the-lccsa-clsa-attending-police-stations-magistrates-courts/) <https://www.lccsa.org.uk/a-message-from-the-lccsa-clsa-attending-police-stations-magistrates-courts/> from CCLSA and CLSA].

3. Reasons in support of such a decision may include the following. Code C Note for Guidance 3E states '3E The Detention and Custody Authorised Professional Practice (APP) produced by the College of Policing (see <http://www.app.college.police.uk>) provides more detailed guidance on risk

assessments and identifies key risk areas which should always be considered. See Home Office Circular 34/2007 (Safety of solicitors and probationary representatives at police stations).

4. The Circular provides details on the duties of the police and you as a solicitor in assessing risk. This document and the relevant PACE Codes have already been adopted in prepared statements explaining the reason for not attending a police station and why an interview should not take place, reference being made to amongst other things: unsanitary conditions, lack of washing facilities and breach of social distancing guidance. PACE Code C, paragraph 3.8 requires that “Risk assessments must follow a structured process which clearly defines the categories of risk to be considered and the results must be incorporated into the detainee’s custody record.”

5. EXTRACT from Home Office Circular 34/2007:

“3. Police and solicitors including accredited and probationary representatives, should work together to help identify potential risks and to prevent or minimise any impact of that risk. In order to comply with health and safety requirements:

**(a) the police (as the employer)**

should ensure so far as reasonably practicable:  
the health and safety of those employed in custody suites;  
that the operation of the custody suite does not expose non-employees, such as detainees, solicitors, appropriate adults and others who may be present, to risk; and  
should carry out an assessment of the risks to employees and others who come into the custody suite  
should provide solicitors with any relevant information that could usefully inform the solicitors’ own risk assessments

**(b) the police (as an employee)**

should take reasonable care to ensure their own health and safety; and should familiarise themselves with force instructions on custody suite health and safety policies and procedures

**(c) the solicitor firm (as the employer)**

has a duty to assess the risks to their staff associated with working in custody suites;

**(d) the solicitor (as an employee)**

has a duty to review their own safety before each consultation with a detainee.

should seek relevant information from police in order to assess the risks to their own safety before any consultations with suspects

should not expose themselves to unnecessary risk simply for the sake of expediency

should co-operate with police to ensure that their actions do not compromise the overall safety of those in the custody suite

should explain how any risk assessments they have carried out might affect their client suspect.”

**WHAT REPRESENTATIONS SHOULD I MAKE REGARDING DETENTION ?**

6. Arrest and detention should be restricted to truly exceptional cases where immediate incarceration is absolutely necessary. Even in such apparent circumstances you should consider making representations to bail the suspect or have them released under investigation rather than being detained for interview. Such an approach is particularly important for suspects who: are children or young people; fall into the vulnerable COVID-19 category (over 70's, underlying health conditions or pregnant) are mentally vulnerable, have learning difficulties and /or are suffering from drug withdrawal or any other physical illness.

7. Any period of detention should be kept to an absolute minimum as the Police and Criminal Evidence Act 1984 (PACE) Code C states “1.1 All persons

*in custody must be dealt with expeditiously and released as soon as the need for detention no longer applies.”*

8. If detention does take place then disclosure should be sent by email. This should include an up to date copy of the full Custody Record, which should include details of whether the person detained has disclosed any symptoms consistent with having contracted coronavirus. If the suspect has symptoms then current Government guidance should be adopted. This question should now be expressly asked and recorded on the custody record form and the solicitor should be notified at the outset of the answers provided.

9. Solicitors and Appropriate Adults must be enabled to communicate and advise by secure video link or telephone [where appropriate with the assistance of interpreters]. Assurances should be obtained that all such communications will not be listened to or recorded. Take into account the type of case you are dealing with and proceed with caution. It is difficult to see how such measures can be given effect quickly, and cheaply, without the use of mobile phones, at least at this juncture. Enquire whether the custody officer will permit this and if not, what facilities are available.

### **SHOULD A SUSPECT REFUSE TO BE INTERVIEWED?**

10. Each case will turn on its own facts but there is a strong argument in these exceptional circumstances to advise your client not to be interviewed and to remain in the ‘safety’ of their cell. Police stations can be unsanitary and are busy places. This includes interview rooms, where the Government policy to socially isolate and minimise contact where possible would be breached in any event. The interview room may be contaminated from previous use. Indeed your client may well have been, or should be, self-isolating.

11. In normal circumstances if a suspect refuses to be interviewed it does not follow that an adverse inference will necessarily be drawn [R v Hind [2005] EWCA Crim 971]. However, these are not normal circumstances and genuine concerns over contracting or indeed spreading COVID-19 are powerful reasons as to why a submission can be made to a judge, in due course, inviting them to direct a jury not to draw an adverse inference. Factors to take into account include: the health of the suspect their family members and those they have been in contact with; the situation at the police station and the up to date Government advice in relation to social distancing and measures in force to prevent the spread of the virus. Can social distancing be maintained in the interview room? Is the suspect concerned about contracting the virus? Do their family members have particular vulnerabilities? These are the types of considerations that you need to canvass with your client. Keep a careful record of the advice that you give, and the instructions that you receive, bearing in mind that unusually, a decision may subsequently be taken by your client to waive legal privilege in order to explain at their trial why they refused to be interviewed. In such circumstances you would become a potential witness. Have regard to the fact that the conditions in which we all find ourselves may mitigate against your client's ability to effectively participate in a police interview in any event. But also be alive to the possibility that there may still be cases, where a client has a cogent account to give and wishes to give that account promptly, that it is in their best interests to do so. Such an approach may help to avoid a protracted investigation in relation to a crime they did not commit. In these circumstances they should still proceed to interview.

### **SHOULD A 'REMOTE' INTERVIEW TAKE PLACE?**

12. There will be inevitable concerns about the risks of 'remote' interviews (interviews where the solicitor has only advised and participated remotely,

either using a phone or using a visual platform) particularly with clients you have never met before. This will ultimately be a matter for your judgment but you need to give careful consideration to the inherent risks. It will be much more difficult to gain the client's trust; investigate if they fall into any vulnerable categories, particularly in relation to fitness and mental health issues, and thereafter take proper and accurate instructions. There will be no ability to see how the interview is being conducted or how your client is responding to questions if you are working over the telephone. Not all visual platforms have good imagery. None are an effective substitute for face to face contact. As you know an important part of the job is monitoring your client's and the OIC's body language. You will have to consider all of these factors in determining whether a remote interview should take place and if so whether it should be comment or no comment.

13. In the event that an interview takes place this should be with your full effective participation via a remote link. This should include being able to view and hear all participants in the interview and to be heard by those present. If this is not possible, record the concerns and objections that you have raised with the police. They may decide to proceed with the interview regardless of your representations and you should reflect on whether this impacts on your advice to your client. If any new material is to be put to the suspect you must be sent an electronic copy as it is presented in interview.

14. **There is no short cut and there can be no second rate justice. A remote interview is still a police interview and the PACE 1984 Codes apply. If you need more time with your client, or more information from the police, if you need an interpreter, appropriate adult, if your client needs to see a doctor, or any other issues arises, as you would in ordinary circumstances, make those representations.** If you feel that an

interview conducted remotely is not going to achieve effective participation for either you, your client, or any other professionals (eg appropriate adult or interpreter) make representations to that effect ie. that at this point in time the interview would be unfair because X, Y and or Z could not effectively participate, but that your client consents to interview once the period of lock down has ended (for example) or once remote participation can be achieved in a way that secures the effective participation of all of the parties.

15. Throughout this process it is particularly important to remind your client that if the police attempt an interview without your remote participation they should refuse and ask to speak to you again.

### **SHOULD MY CLIENT SERVE A PREPARED STATEMENT?**

16. Consider serving a prepared statement that details the exceptional circumstances that coronavirus and COVID-19 has brought about, Government guidelines and that these are the reasons why no participation in an interview will take place, if those are your client's instructions.

17. You may wish to supplement such a statement with a more traditional version that briefly outlines your client's defence, if your client so instructs.

18. In extreme cases consider recording your client's instructions and advice on whether to serve a prepared statement on your phone or laptop [with their consent]. In any event keep a clear, written, contemporaneous and timed note of your client's instructions and your advice on these important topics.

19. Given the extraordinary circumstances and the limited ability to communicate, having your client check, understand the ramifications and sign such a document remotely may well cause you to reflect on the viability of

serving any prepared statement at all. There is a distinction between serving a document that records as a result of the risk assessment that your client will not be participating in an interview and a document that asserts a positive defence. Consider the clarity and quality of your instructions and the facts of the case.

20. The examples of prepared statements that we have seen outline the reasons why participation in an interview would be impossible and notes that when the risk has abated an interview can be held. Thereafter they are either silent as to what the defence is or make reference to the pre interview disclosure and that a statement from the suspect will be emailed to the OIC in due course. Bear in mind that there is no such thing as a 'generic' prepared statement. Each prepared statement must reflect the instructions of your client. You may of course in the coming weeks find yourself in receipt of very similar instructions from clients all of whom are concerned about risk to health in the current climate, and that may result in your utilising a similar type document on each occasion, but any statement served must still reflect the instructions of the particular client that you are representing. There may be very specific and compelling reasons in relation to a particular client to explain why they cannot be interviewed – for example that they are self -isolating because they have symptoms, live with a pregnant partner and therefore are concerned to minimise the risk of exposure, have underlying health vulnerabilities or live with someone who does. In other words, if there are pressing personal factors as well as 'generic' factors (ie applicable to the whole population) include them. You would not serve a 'generic' defence case statement. A prepared statement is personal to your client and should reflect, if relevant, their particular personal situation if that explains their reasoning, given in instructions to you, that they do not wish to participate in an interview at this time, but would consent to do so in the future, in safe conditions. It will also better protect that client against



future argument at trial that they have sought to use the present national situation as a way of avoiding interview, if in fact there is a record of their own very personal and pressing reason to minimise their risk, either of contracting the virus, or spreading it to other people, if they so instruct.

21. Of course any instructions taken pre-interview but not served could be used to rebut any suggestion of recent fabrication at trial if the client subsequently chose to waive privilege, but remember this is always an unusual course and would remain so, even in these unusual circumstances [ see paragraph 11]

22. A remote interview is still an interview, you still need to have the opportunity of sufficient conference time, clarity of instructions, and police disclosure.

23. Because you should not be required to physically attend to advise a detained suspect during the period of lockdown this protocol is restricted to advice and guidance in relation to remote participation.

24. In the event that none of the above is possible, and a decision is made not to act, the LCCSA advise you to make clear contemporaneous notes of your reasoning and to notify your contract manager accordingly (<https://www.lccsa.org.uk/a-message-from-the-lccsa-clsa-attending-police-stations-magistrates-courts/>).

## **OUR DUTY**

25. It would be unconscionable if we, as a profession, judges, barristers and solicitors combined, continue to stand by as police stations become hotbeds of infection and fail to change our collective working practices with immediate

effect to prevent this. Solicitors and Legal Representatives enter these establishments 24/7 and know the risks already prevalent better than most. We must use our collective voice as a matter of urgency to influence the Government and Police and Crime Commissioners. We can and we must relieve the pressure in our police stations in an effort to maintain safe conditions for those detained and working within them during the COVID-19 epidemic.

**The time to act is now. We all have a role to play.**

**Please circulate this protocol to all of your professional contacts working within the criminal justice sector.**

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<sup>1</sup>The views expressed in this document are those of the authors and not necessarily representative of those of Garden Court Chambers. We would also like to thank Rhean Bailey of Goldman Bailey Solicitors for her input and assistance in drafting this document.