



Police Service of Scotland Solicitor Access Guidance Document

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Glossary of Terms

ACPOS	Association of Chief Police Officers in Scotland
CCBE	Council of Bars and Law Societies of Europe
COPFS	Crown Office and Procurator Fiscal Service
CRO	Custody Review Officer
ECHR	European Convention on Human Rights
HMA	Her Majesty's Advocate
IO	Investigating Officer
LA	Lord Advocate
LSS	Law Society of Scotland
PACE	Police and Criminal Evidence Act 1984
PDSO	Public Defence Solicitors Office
PSoS	Police Service of Scotland
SARF	Solicitor Access Recording Form
SG	Scottish Government
SIO	Senior Investigating Officer
SLAB	Scottish Legal Aid Board
SPR	Standard Prosecution Report
UKSC	United Kingdom Supreme Court

Introduction

This guidance document replaces all existing legacy guidance on solicitor access and its introduction specifically replaces the Association of Chief Police Officers in Scotland (ACPOS) Manual of Guidance on Solicitor Access, published to coincide with the withdrawal of previous interim guidelines issued by the Lord Advocate on 9 June 2010 in relation to “Access to a Solicitor by Suspects”.

This guidance will be updated as legislation is refined, and practices and procedures are amended.

1. Suspects

1.1 The Criminal Procedure (Scotland) Act 1995 (hereafter referred to as “the Act”) was amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. For the purposes of this guidance, the Act applies specific rights to a suspect who:

- Is detained under Section 14 of the Act ;
- Attends voluntarily at a police station or other premises or place for the purpose of being questioned by a constable on suspicion of having committed an offence; or
- Is arrested (but not charged) in connection with an offence, and being held at a police station or other premises or place for the purpose of being questioned by a constable in connection with the offence.

1.2 Any reference to the term suspect in this document means the application above unless so specified in the text (such as Section 13, below, which considers the interview of suspects outwith police stations).

1.3 This guidance is only intended to consider the rights and procedures for suspects liable to interview. It does not impact on routine rights associated with custody in general such as intimation and access to a solicitor afforded to all custodies.

1.4 Further, the Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014 provides that all persons in police custody are provided with information about their rights, verbally and in writing. In this regard, a 'Letter of Rights' **must** be provided to every detained suspect and arrested person, unless there is a particular reason for not doing so.

2. Solicitors

2.1 The term solicitor, insofar as this guidance is concerned, should be taken to mean “Enrolled Solicitor”. This means a member of the Law Society of Scotland (LSS) who is entitled to practice in Scotland. Enrolled Solicitors should have LSS Identity Cards and have their details listed on the LSS website www.lawscot.org.uk , which can be searched on an A-Z basis on solicitors’ surnames.

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- 2.2 Article 4 of [The Law Society Code of Conduct for Criminal Work](#), (identification of Solicitors) provides that in the absence of a valid Law Society identification card the following are acceptable forms of confirmation of identity for solicitors:
- A valid Council of Bars and Law Societies of Europe (CCBE) Lawyer's [Professional Identity Card](#); or
 - A valid and current Practising Certificate together with a form of visual identification, e.g. valid passport, photocard driving licence.
- 2.3 The Law Society of Scotland issues Practising Certificates to fully qualified solicitors and Restricted Practising Certificates to second year trainee solicitors. The restricted Practising Certificate allows second year trainee solicitors to carry out some of the functions of “fully qualified” solicitors. Both types of practising certificates entitle the solicitor to apply for the issuing of Identity Cards and result in automatic listing on the website indicated above.
- 2.4 Precognition agents, paralegals, first year trainee solicitors and any other people are not Enrolled Solicitors and should not be afforded access to suspects. This situation differs from the practice of access by “legal representatives” elsewhere in the UK, where a large number of access visits are made by individuals who are not solicitors.
- 2.5 All staff are reminded to check that an individual being provided access to suspects as a “solicitor” is indeed an Enrolled Solicitor, entitled to practise law in Scotland.

3. Rights of suspects

- 3.1 The exercising of the rights afforded to suspects under the Act is a matter for suspects. As well as making the suspect aware of their rights, police officers and staff **must not attempt to influence in any way** the suspect's decision-making process (with certain caveats which will apply to children and vulnerable adults (see Section 16 of this guidance). The Act provides the following rights for all suspects:

3.2 Right of intimation to solicitor

- 3.2.1 A suspect has the right to have intimation sent to a solicitor (S.15A) of any or all of the following:
- The fact of the suspect's:
 - Detention;
 - Attendance at a police station (or other premises or place); or
 - Arrest (as applicable).
 - The police station or other premises or place where the suspect is being detained or is attending; and
 - That the solicitor's professional assistance is required by the suspect.

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- 3.2.2 Refer to Section 7 of this guidance for detail of how this right should be intimated to a solicitor.
- 3.2.3 This intimation to a solicitor **must** be sent by a constable without delay, or if some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is necessary.
- 3.2.4 The tests of ‘**in the interests of the investigation**’ and ‘**the prevention of crime**’ have been in place under previous statutes relating to the detention of suspects. Any such delays are anticipated, from previous experience, to be extremely rare. Such delays can be expected to be subjected to close scrutiny and decision-making will most probably need to be justified.

3.3 Right to private consultation before questioning

- 3.3.1 The suspect also has a right to a private consultation with a solicitor before any questioning begins (S.15A (3)(a)),
- 3.3.2 It is only in exceptional circumstances that this right may be delayed and only in so far as necessary in the interests of the investigation or the prevention of crime or the apprehension of offenders that questioning of a suspect can begin or continue without the suspect having been provided a private consultation with a solicitor requested by them.
- 3.3.3 The Act uses the term “**in exceptional circumstances**”. Previous guidance in this area has made reference to the term **truly exceptional and compelling circumstances**. Any delays to the provision of rights are expected to be very much the exception to the norm. Again any delays are expected to be extremely rare and decisions by officers can be expected to be tested.
- 3.3.4 It is the responsibility of the Investigating Officer (IO) to justify any such decision, which is likely to be subject to intense scrutiny by the courts. If a decision is taken to proceed to interview without the presence of a solicitor where it has been requested both the solicitor and the suspect should be informed in advance.

3.4 Right to private consultation at any other time during questioning

- 3.4.1 The suspect also has a right to a private consultation with a solicitor at any other time during questioning (S.15A (3)(b)).
- 3.4.2 This is similar to the right to a private consultation before questioning but is a distinct right. Where a suspect has elected to waive their rights to intimation and / or private consultation before questioning they may still wish to take up this right. The Solicitor Access Recording Form (SARF) – Suspects Rights (Police Service of Scotland (PSoS) Form 051-007) records this right and officers **must** remind suspects of this right prior to interview.
- 3.4.3 Where this right is engaged or requested, the above guidance at 3.3 also applies.

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3.5 Waiver of rights

- 3.5.1 Where a suspect chooses to waive their rights to solicitor access and/or their right to a private consultation with a solicitor, this **must** be recorded on the SARF, and should be referred to at the start of any interview and also recorded in the Standard Prosecution Report (see Section 18 of this guidance for recording requirements). The suspect will be required to sign a waiver of their rights on SARF. This will significantly reduce the likelihood of police officers and staff working in custody areas being required to attend court.
- 3.5.2 It should be noted that the Lord Advocate has instructed that a suspect being supported by an appropriate adult **may not waive** their right to legal advice. In all such cases, legal advice **must** be afforded to the suspect. Further, where a suspect is under 16 years, they too **must** be provided with access to a solicitor prior to interview. In both instances, this is irrespective of the position of the suspect and/or their parent/support.
- 3.5.3 Fuller information on the treatment of juveniles and vulnerable adults can be found within Section 16 below.

3.6 Suspect's change of decision or change of status

- 3.6.1 Police officers and staff are reminded that individuals have the right to access advice from a solicitor at any time during which they remain suspects. This means they may ask at any time for advice from a solicitor, even if they have previously indicated they did not wish such advice. Where suspects change their mind about the exercising of rights this **must** be accurately recorded on the SARF and reference made in the Standard Prosecution Report (See Section 18 of this guidance).
- 3.6.2 Whenever a suspect's status changes; for example, from voluntary attendee to detainee, or from detainee to arrest, they **must** be reminded of their rights in relation to solicitor access. Such affording of rights **must** be fully recorded (See Section 18 of this guidance). Where a suspect's status changes to arrest and they are to be cautioned and charged, with no requirement for further interview, there is no need to obtain the services of a solicitor solely to consult on the caution and charge.
- 3.6.3 Accurate recording of this information is vital to the integrity of the operation of the Act and is likely to be subject to considerable scrutiny in the courts and elsewhere.

4. Informed waiver

- 4.1 The amendments to the Act have been considered by many to be amongst the most significant changes in Scots Law for generations and the provision of solicitor access is at the heart of the change in the law. The right to access is one which can be waived, but the greatest of care **must** be taken if the suspect wishes to waive this right. Any waiver of the rights of a suspect **must** be "informed", "voluntary" and "unequivocal" and **must** be fully recorded.
- 4.2 To ensure all suspects are fully informed in their decision, all suspects will be provided a specific form of words, standardised in a manner like the common

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law caution, when explaining rights to suspects as follows. This standard form of words is contained with the SARF (PSoS form 051-007).

4.3 Pre-interview review of rights

4.3.1 In order to ensure that rights are reviewed at the commencement of each interview in a corporate and standard manner, to ensure that any waiver of rights is informed and unequivocal, the form of words as contained in the SARF will be adopted. This will ensure a standard, consistent approach is taken in summarising a suspect's chosen position at that time, and will further mitigate against the issue of waiver being contested, potentially compromising the prosecution of a case.

Note: All officers **must** ensure that the wording on the SARF and pre-interview review of rights is followed exactly in every case.

5. Role of the solicitor

Note: The Law Society of Scotland is developing further guidance for their members around interviews within police stations. Police Scotland will also issue more detailed guidance for officers in the near future.

- 5.1 The role of solicitors, so far as the Act is concerned, is to provide professional advice and assistance to suspects. Police officers and staff will clearly appreciate that solicitors have a role in the criminal justice process aimed at the best interests of their client rather than in assisting the police investigation.
- 5.2 It is essential that police officers deal with solicitors in a professional and courteous manner. A suspect has the right to seek advice from a solicitor at any time during an interview. This is a developing area of Scottish police practice.

6. Initial contact with solicitors

Note: The Law Society of Scotland is developing further guidance for their members around interviews within police stations. Police Scotland will also issue more detailed guidance for officers in the near future.

- 6.1 Initial contact with solicitors is very likely to be by telephone and will be facilitated by the police. The Act provides that **constables must** make certain information available to solicitors in terms of:
- The suspect's status i.e. detainee, voluntary attendee or under arrest;
 - The police station or other place where the suspect is held; and
 - That a solicitor's professional assistance is required.
- 6.2 The responsibility for the provision of this information is that of the Investigating Officer, not custody staff. The Act, at Section 15A (7), states that intimation **must** be sent by a constable.
- 6.3 It is likely at this stage that solicitors will ask further questions such as:

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- Nature of crime(s) under investigation;
 - Evidence in support of detention/arrest;
 - Details of the police officers involved;
 - Any assessment of a suspect's wellbeing or vulnerabilities;
 - Any anticipated timescales for any interview(s) involving the suspect.
- 6.4 Officers and staff **must** carefully consider any requests for further information that solicitors may make. Although there is no legal obligation to provide further information, officers and staff may do so where they consider that it is appropriate for additional information to be passed to the solicitor at this stage. It is considered that it will usually be appropriate to provide the date, time and location of the alleged offence (if known). Further information relating to briefing solicitors can be found in Section 14 of this guidance.
- 6.5 It will also be appropriate to provide information concerning medical, vulnerability or language issues relating to the suspect which may have a bearing on the solicitor's contact with the suspect or have a bearing on the safety of the solicitor.
- 6.6 If the suspect does not wish the attendance of the solicitor, through waiving of their rights or the preference of consultation by telephone, officers are reminded that the Act allows for a suspect to change their mind and have a further consultation at any time during their detention or questioning by the police.

7. Securing solicitor access

- 7.1 There is a need for police officers and staff to develop, through good communication, constructive and professional relationships with solicitors. An appreciation of each other's role is important. To assist in this regard, this Guidance will be shared with the Law Society of Scotland and Scottish Legal Aid Board, as well as being available on the PSoS Guidance Site.
- 7.2 Where a suspect has exercised their rights in terms of solicitor access and difficulty has been encountered in providing their rights due to, for example, multiple suspects, ability of solicitors to attend or other delays, caution and diligence **must** be exercised before proceeding to interview without their rights being honoured. All reasonable steps **must** be taken to avoid an interview without solicitor access (where requested) and this should only be used as a last resort where all other solutions have been explored.
- 7.3 On any occasion where a suspect is interviewed without all their rights being provided then the full circumstances **must** be recorded, including all the steps taken by the police to secure the rights of the suspect. The suspect should be advised of these circumstances prior to interview and the steps taken to secure the rights of the suspect should be outlined in full in any Standard Prosecution Report in the Police Interview / Text of Admissions section. Such circumstances are expected to be rare and can reasonably be expected to be the subject of significant challenge (See Section 18 of this guidance).

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- 7.4 Scottish Legal Aid Board (SLAB) staff a 24/7 Solicitor Contact Line. When a suspect wishes to exercise their right to solicitor access, whether the solicitor is named or not, officers should call this number and be in a position to provide the following information to SLAB staff:
- Name and age of “suspect”. If the “suspect” is 16 or 17 years of age and under Social Work supervision this **must** be highlighted.
 - Status of “suspect”: Arrested; Section 14 detainee; or attending at police station voluntarily.
 - Nature of the investigation.
 - The police station in which the “suspect” is being held.
 - The time the “suspect’s” detention started, including the time detained at locus and time of arrival at police station.
 - The time the “suspect” was provided their rights of solicitor access.
 - Details of the named solicitor chosen by the “suspect”, if applicable.
 - If the “suspect” previously waived their right to solicitor access and has changed their mind this should be highlighted.
 - Contact name and telephone number to enable the solicitor to respond.
 - Any vulnerabilities of the “suspect”.
 - Any reason which may prevent a consultation when the solicitor calls back, i.e. medical assessment, illness, intoxication, requirement for interpreter or appropriate adult, etc.
- 7.5 It is the responsibility of the SLAB employees to make appropriate solicitor access arrangements and no further action is required of police officers and staff in identifying a suitable solicitor.
- 7.6 Where a named solicitor is requested by a suspect and is contacted by SLAB staff, the named solicitor will thereafter telephone the police station where the suspect is in custody, on the telephone number provided by the police to the Solicitor Contact Line.
- 7.7 Whilst SLAB staff will make arrangements to contact an appropriate solicitor, based on the choice of the suspect, the Solicitor Contact Line will be staffed with qualified solicitors. When appropriate they can provide legal advice by way of a telephone consultation with the suspect, for example, due to the unavailability of the named solicitor.
- 7.8 Unless there is a reason which may prevent a suspect from being able to receive an initial telephone consultation with a solicitor, for example, due to intoxication, there is an expectation that the telephone consultation will take place within 30 minutes of the call from the police station to the Solicitor Contact Line being completed. Where this is **not** the case, police officers should telephone the Solicitor Contact Line to assess when a telephone call from a solicitor can be expected.

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- 7.9 This process will secure the initial consultation between a suspect and a solicitor in shorter timescales and, in turn, enable police investigations to progress more quickly with “suspects” being detained for shorter periods of time.
- 7.10 The Solicitor Contact Line will also facilitate, where required, the personal attendance of a solicitor to consult with a suspect prior to police questioning. This will be arranged either by securing the attendance of the named solicitor requested by the suspect or through a “duty scheme” for which solicitors have registered.
- 7.11 On most occasions where a solicitor attends a police station for a private consultation there will be an advantage in the solicitor attending a police station quickly to consult with their client; however, there will be two main circumstances when this cannot be achieved:
- 7.11.1 It may be that investigating officers have enquiries to complete prior to interviewing a suspect, such as statement taking, review of Closed Circuit Television (CCTV), etc. In such circumstances investigating officers should discuss timescales for starting an interview with the relevant solicitor. They should also agree a suitable time for the solicitor to attend the police station and consult with their client prior to the interview starting. It is of no benefit to police officers and staff, solicitors or suspects to have solicitors waiting unnecessarily at police stations and every effort should be made to avoid such a situation.
- 7.11.2 Where a suspect is to be interviewed at a remote police station, having exercised their right of solicitor access and requested a personal consultation with a solicitor, the practicalities of travelling to the police station by the solicitor have to be considered. In most areas of Scotland, it is expected solicitors will be able to attend police stations within an hour of the conclusion of the initial telephone consultation with the suspect (assuming the investigating officers will be ready to question the suspect and the ‘suspect’ is able to interviewed). Solicitors attending a remote police station, such as island stations within Ayrshire, Argyle and Bute or Highlands and Islands regions, may require additional travel time and possibly the use of a boat or aircraft, to attend. In such circumstances, police officers and staff are expected to exercise flexibility and reasonableness in planning for the personal attendance of the solicitor.
- 7.12 Where a suspect has exercised their rights in terms of solicitor access and difficulty has been encountered in providing their rights due to; for example, multiple suspects, ability of solicitors to attend or other delays, caution and diligence **must** be exercised before proceeding to interview without their rights being honoured. All reasonable steps **must** be taken to avoid an interview without solicitor access and this should only be used as a last resort where all other solutions have been explored.
- 7.13 On any occasion where a suspect is interviewed without all their rights being provided then the full circumstances **must** be recorded, including all the steps taken by the police to secure the rights of the suspect. The suspect should be advised of these circumstances prior to interview and the steps taken to

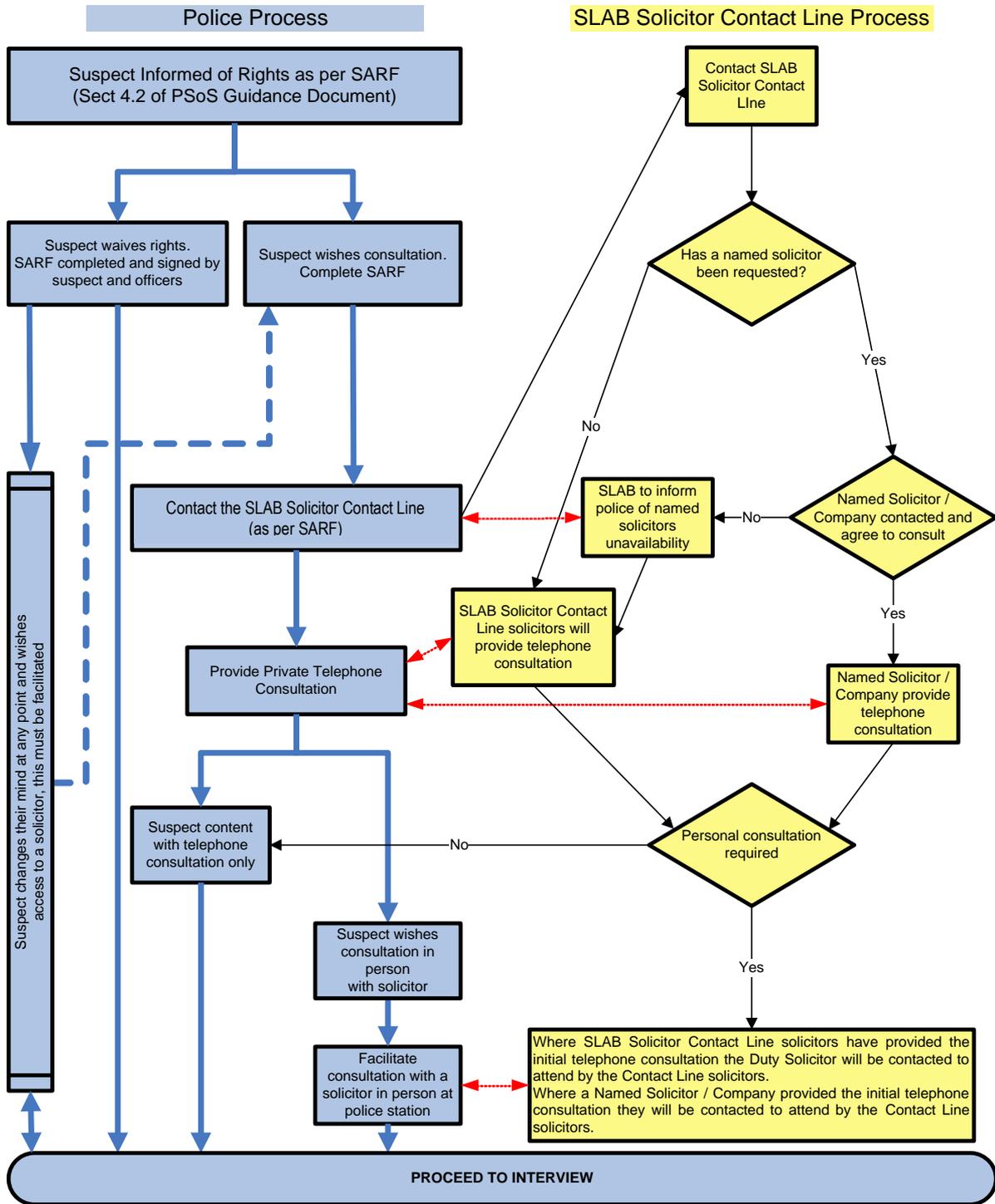
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secure the rights of the suspect should be outlined in full in any Standard Prosecution Report in the Police Interview/Text of Admissions section. Such circumstances are expected to be rare and can reasonably be expected to be the subject of significant challenge (See Section 18 of this guidance).

8. Suspect / solicitor consultation

- 8.1 The Act provides that “consultation” means consultation by such means as may be appropriate in the circumstances, and includes; for example, consultation by means of telephone.
- 8.2 The suspect should at this stage be afforded the opportunity to speak with the solicitor **in private**, unless it is the case that the suspect is so unruly or aggressive that they require to be placed in a cell immediately for their own and others safety.
- 8.3 In the first instance, the suspect should be permitted to speak privately to the solicitor by telephone to provide instructions to the solicitor and receive advice. This initial private telephone consultation may indicate if a personal private, face to face, consultation will subsequently take place.
- 8.4 Clearly, privacy needs to be considered in light of available facilities. Divisions will wish to consider the arrangements available in local custody centres to ensure that an adequate balance is maintained to allow suspects to have private telephone conversations with solicitors (such conversations being subject to legal privilege), having due regard to the safety and security of custody facilities and communications devices. It is suggested that telephones actually fixed to charge bars do not provide the requisite level of privacy unless their handsets can be operated in a cordless manner in other areas of the custody centre.
- 8.5 Where a suspect has indicated that they wish such a face to face consultation with a solicitor prior to interview, and there is no other bar to such access, facilities should be made available for such a private consultation.
- 8.6 The Provision of Rights and Access process is outlined in the following flowchart:

**SOLICITOR ACCESS –
PROVISION OF RIGHTS & ACCESS FLOWCHART**



Remember: -

- That if suspect who has waived their rights changes their mind at interview or any other point, their rights must be afforded.
- The delaying of suspects rights can only be carried out 'in exceptional and compelling circumstances' (see Sect 3.3.2 of PSoS Guidance Document).
- Proceeding to interview without affording solicitor access may render the product of the interview inadmissible.
- THE EXERCISING OF RIGHTS IS A MATTER FOR THE SUSPECT ONLY. POLICE OFFICERS AND STAFF MUST MAKE NO ATTEMPTS TO SWAY THE SUSPECTS DECISION EITHER WAY (see Sect 3.1 of the PSoS Guidance Document).

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9. Attendance at police stations by solicitors

- 9.1 Where solicitors attend at police stations for the purpose of consultations with suspects, this **must** be at the suspect's request. The rights conferred by the Act are, as stated earlier, a matter for suspects and not any other party. The Act does not provide solicitors with a right of access to police stations or other places without a prior request by the suspect.
- 9.2 Officers and custody staff will wish to satisfy themselves that any person attending at a police station, stating that they are a solicitor, can:
- Identify themselves as Enrolled Solicitors to the satisfaction of the force; and
 - Show that their presence has been requested by the suspect(s) as part of the suspect(s) exercising their rights.
- 9.3 Any attempts to gain access to suspects made by persons purporting to be solicitors but unable to satisfy an officer of this fact, without prior request, should be refused.
- 9.4 Where solicitors attend police stations and other places, and officers/custody staff are satisfied that they are attending in furtherance of the provision of suspects' rights, they should be afforded facilities to conduct a private consultation with the suspect.
- 9.5 Further, custody supervisors may wish to consider arrangements available for the safe-keeping of telephones, laptops or other communication devices that attending solicitors may bring to custody facilities. It is not considered best practice to allow visitors, of any description, to carry communication devices into custody areas, for reasons of safety and security.
- 9.6 The risk assessment for each custody facility should highlight that appropriate provision is made to ensure:
- Private facilities for both telephone and personal consultations;
 - Staffing levels to efficiently manage solicitor attendance; and
 - Awareness of the liability for the health & safety of visitors within custody suites, including solicitors.
- 9.7 Where there are any safety concerns, officers and staff should communicate these to solicitors and take reasonable steps to resolve these. It is not possible to provide specific guidance to cover every possible situation but, where there are any points of contention between police officers and solicitors in such situations, they **must** be recorded accurately and fully.

10. Health and safety at police offices

- 10.1 [The Health & Safety at Work etc. Act 1974](#) and [The Management of Health and Safety at Work Regulations 1999](#) (as amended) provide for the health and safety of anyone who may be affected by the work activities of the organisations; for example, contractors, members of the public, solicitors,

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prisoners, etc. Therefore, PSoS **must** comply with the duties set out in the legislation, which includes:

- A requirement for employers to ensure that non-employees who may be affected by work activities, such as members of the public, prisoners, solicitors, contractors, etc., are not exposed to risks to their health and safety. Where young or vulnerable persons may be affected, the duty of care is greater;
- A duty on anyone responsible for the workplace to ensure that the premises, plant and machinery do not endanger the people using them, i.e. PSoS has a duty to maintain its premises, including plant and equipment, to ensure that it does not harm employees and non-employees visiting the premises;
- PSoS is required to carry out risk assessments to eliminate or reduce risks and **must** produce a Generic Risk Assessment for solicitor visits, covering issues such as supervision, interview facilities, fire evacuation procedures, etc.

11. Multiple suspects

11.1 Integrity of investigations

11.1.1 There are issues around the integrity of investigations where an Investigating Officer (IO) / Senior Investigating Officer (SIO) may, for compelling operational reasons, wish to limit communication between multiple suspects at critical points in investigations. Any decision made to limit contact between suspects and solicitors for these reasons **must** be fully recorded on SARF by the IO / SIO and consideration made to supporting such decisions with notebook/policy log entries. Such limiting of access is likely to be necessary in only a small number of cases.

11.2 Logistical issues

11.2.1 There are logistical issues to be considered, one of which is available time. Where multiple suspects have been detained in relation to the same incident and the same solicitor has been requested by more than one suspect, officers are entitled to consider the impact this request may have on the time available to conduct the enquiry. If such a request is likely to cause undue delay, officers may wish to consider whether or not it is appropriate to offer the suspect contact with another solicitor via the SLAB Solicitor Contact Line.

11.2.2 Another logistical issue is whether or not there may be a potential conflict of interest in a solicitor providing advice and assistance to more than one suspect in the same case. **This matter is for solicitors to deal with in order to ensure they are not exposed to a situation where a conflict of interest may arise.** It may be necessary for IOs, without compromise to the investigation, to provide solicitors with a sufficiency of information to enable them to make an informed decision as to whether a conflict of interest may arise.

11.2.3 The legislation provides for the right of access to a **solicitor**, not necessarily one of the suspect's own choosing. In cases involving multiple suspects it may be prudent, if operationally viable, to contact SLAB in advance of pre-planned detentions. Only general information needs to be supplied to SLAB at this early stage. In such cases SLAB may consider having additional solicitors available to speed up the solicitor access process. The provision of additional resources is a matter for SLAB dependent upon the nature and severity of the investigation.

11.3 Standards of conduct for solicitors

11.3.1 The [Law Society of Scotland – Professional Practice Rules 2011](#) state:

Rule B1.6 - "Confidentiality"

"1.6 You **must** maintain client confidentiality. This duty is not terminated by the passage of time. You **must** also supervise your employees to ensure that they keep client matters confidential. Only the client, Acts of the legislature, subordinate legislation or the court can waive or override the duty of confidentiality. The duty does not apply to information about any crime a client indicates they will commit."

Rule B1.7 – "Conflict of Interest"

"1.7.1 You **must** not act for two or more clients in matters where there is a conflict of interest between the clients or for any client where there is a conflict between the interest of the client and your interest or that of your *practice unit*."

"1.7.2 Even where there is only a potential conflict of interest you **must** exercise caution. Where the potential for conflict is significant, you **must** not act for both parties without the full knowledge and express consent of the clients."

12. Period of detention

12.1 Detention up to 12 hours

12.1.1 Section 14 of the Act (as amended) allows suspects to be detained up to a maximum of 12 hours.

12.2 End of detention

12.2.1 Detention **must** end when:

- The grounds for detention no longer exist;
- At the expiry of 12 hours after detention (or 24 hours if extension has been granted (s.14A), see below); or
- The suspect is arrested with the available evidence

12.3 Extension beyond 12 hours

12.3.1 Under the following circumstances, a Custody Review Officer (CRO) can authorise the extension of the detention period beyond 12 hours, to a maximum of 24 hours (Section 14A of the Act):

- a) 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;
- b) An offence in connection with which the detained person is being detained is one that is an indictable offence;
and
- c) The investigation is being conducted diligently and expeditiously.

12.4 Custody review officer

12.4.1 A Custody Review Officer **must**:

- Be at least the rank of Inspector; and
- Have not been involved in the investigation in connection with which the person is detained.

12.5 Indictable offences

12.5.1 There is no exhaustive list available; however, the following guidance is provided:

- Although any Common Law crime can proceed under Indictment, there is a presumption that the likelihood of solemn proceedings would be a factor in the decision-making process. This is a subjective exercise for the CRO, relying on knowledge and experience, taking into account factors such as severity of injury, intention of the accused, community impact, any aggravations, criminal history, etc.
- Any crimes that are in the exclusive jurisdiction of the High Court are indictable.

12.6 Meaning of detention period review

12.6.1 The process of determining whether the detention period should be extended shall be known as the Detention Period Review.

12.6.2 In order to provide some structure for the management of the review process, PSoS have introduced a mechanism for conducting reviews under the direction of CROs.

12.6.3 It is important for all officers and staff to understand that the CRO's role is to consider the necessity and proportionality of extending the period of detention beyond 12 hours to a maximum of 24 hours.

Note: Any extension to detention should **not** be considered routine.

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12.6.4 IOs / SIOs **must** provide the CRO with sufficient information, and sufficiently ahead of the expiry of the 12 hour detention period, to enable them to fully consider whether to authorise the extension.

12.6.5 The Detention Period Review Form (PSoS form 051-009) is to assist CROs and to record the process of review. The review process should, wherever possible, be instigated **no later than 10 hours into the detention period**.

12.7 Detention Period Review Process

12.7.1 Before deciding whether to authorise the extension, the CRO **must** give an opportunity to make representations orally, or in writing, to either:

- The detained person; or
- The solicitor representing the detained person who is available at the time.

12.7.2 The Custody Review Officer may refuse to hear oral representations from the detained person if the officer considers that the detained person is unfit to make representations because of the person's condition or behaviour.

12.7.3 Where the Custody Review Officer decides to authorise the extension, the officer **must** ensure that the following persons are informed of the decision and of the grounds on which the extension is authorised:

- The detained person;

and

- Any solicitor representing the detained person who is available at the time the decision is made,

12.7.4 Where the suspect has not exercised their rights in terms of accessing advice from a solicitor the CRO **must ensure** that the detained person is again informed of their rights and again decide whether there are any grounds for delaying any intimation to a solicitor.

12.8 Role of the Investigating Officer / Senior Investigating Officer

12.8.1 The role of the IO/SIO, insofar as the potential for detention periods to be extended is concerned, is threefold:

- The IO / SIO **must** ensure that suspects are afforded their rights and that this process is recorded on the SARF; and
- The IO / SIO **must** ensure that enquiries are being conducted diligently and expeditiously. This should be taken to mean that suspects should be detained for no longer than is necessary; and
- The IO / SIO **must** consider at the earliest stage possible of any detention whether or not there is a need for an extension of the detention period from 12 hours to a maximum of 24 hours. IOs / SIOs **must** supply CROs timeously with information to support any request for extended detention.

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13. Questioning (prior to a consultation with solicitor)

Note: Interviewing outwith police stations remains a dynamic area of the law. While the below section reproduces the guidance contained within the ACPOS Manual of Guidance on Solicitor Access (v. 1.2) and approved by Crown Office, discussions continue on how best to represent intervening case law and developments within the courts on this topic.

- 13.1 There has been significant debate in the Scottish and United Kingdom courts in regard to when a suspect's right to consult with a solicitor commences in circumstances that do not amount to detention in terms of Section 14 of the Act, arrest or voluntary attendance at a police station.
- 13.2 The [United Kingdom Supreme Court](#) (UKSC) has stated "there is no rule in domestic law that says that police questioning of a person without access to legal advice who is suspected of an offence but is not in custody **must** always be regarded as unfair". The UKSC also provides a distinction between the type and nature of questions which may require a consultation with a solicitor prior to questioning by the police by stating "questions that the police need to put simply in order to decide what action to take with respect to the person whom they are interviewing are unlikely to fall into this category. But they are likely to do so when the police have reason to think that they may well elicit an incriminating response from him".
- 13.3 Accordingly the following guidance is provided in regard to when a suspect is being questioned in circumstances that do not amount to detention in terms of Section 14, arrest or voluntary attendance at a police station:
- Limited questioning at the locus or out with a police station is permissible to the extent that it is required to determine if a crime has been committed, who has committed it and if there are reasonable grounds to suspect that the individual is the offender, and whether the offender is entitled to rely on any statutory defence or wishes to put forward any exculpatory information. The practice of questioning at a locus or out with a police station should continue insofar as it is permissible by statute; for example, in terms of Section 172 of [the Road Traffic Act 1988](#).
 - Questions designed to ensure that the suspect poses no danger to the investigating officers are permissible (such as those designed to identify the whereabouts of any dangerous objects prior to search);
 - If detention and further questioning are necessary, and such questioning can take place in a police station then the questioning should take place at the station instead of at the locus;
 - If any incriminating remarks are made in response to questions made outwith a police station, then these should be repeated in a police station interview, after access to a solicitor has been offered, etc, if interview is deemed to be necessary. It is not envisaged that this will alter procedure in respect of serious road traffic matters, for example, drink driving procedures (See Section 15.3.1 of this guidance);

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- Where searches are being conducted, either of persons, or under warrant questioning prior to the offer of a consultation with a solicitor will be limited to the above criteria.
- 13.4 Further to this guidance the UKSC has considered that if a person's liberty is "significantly curtailed" or their "liberty of movement" is deprived 'to any material extent', then responses to police questioning without a consultation with a solicitor, are unlikely to be admissible.
- 13.5 So the execution of search warrant at a persons home and them being detained under drugs or firearms legislation for example, is likely to be considered as their liberty being "significantly curtailed" and a deprivation of their "liberty of movement". Consequently any responses to further questioning, beyond the points referred to above, without the right to consult with a solicitor prior to questioning by the police, can be expected to be regarded as inadmissible.
- 13.6 There will be situations where an officer requires to question an individual but it is not necessary to detain or arrest them, or the police do not have the power to detain or arrest. This situation occurs routinely during road traffic enquires into the ownership of vehicles and the legally required documentation for drivers' use of vehicles. Often such questioning takes place in a police vehicle for the purposes of maximising safety from passing traffic, for privacy from passers by or simply for good communication without background traffic noise or other distractions.
- 13.7 Continuing this practice could be perceived as 'significantly curtailing' a persons liberty. To avoid such a perception where any of the foregoing reasons apply and a person is asked questions by an officer in a police vehicle, they **must** be advised of the reasons for the questioning taking place in the police vehicle (safety, privacy, noise etc). It should be made clear they are not arrested or detained.
- 13.8 Where the court subsequently considers that the person's liberty was "significantly constrained" or "their liberty of movement" was deprived, then it is likely that any evidence obtained through questioning, and perhaps other evidence, will be considered inadmissible.
- 13.9 As this is an area of law which is rapidly developing it is not possible, at this stage, to provide prescriptive advice that can be taken as a definite and final position. In any circumstances, where officers and staff question a suspect without access to a solicitor, where one was requested, this **must** be fully justified and recorded.

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14. Pre-interview briefing

14.1 Requirement for pre-interview briefing

14.1.1 It is very likely that IOs / SIOs will be asked by solicitors to provide what is termed by some members of the legal community as “pre-interview disclosure”.

14.1.2 All police officers and staff should be aware that any reference to pre-interview disclosure is distinct from Disclosure to the Crown, where the police have a duty to reveal all relevant material in an investigation.

14.1.3 There is no legal requirement to have a meeting with a suspect’s solicitor, or to provide information prior to interview. The legal position in Scotland is clear in that a suspect is innocent until proven guilty and has the right to silence.

14.1.4 The following Case Law is noteworthy:

- In the case of R v Farrell [2004] EWCA Crim 597 it was recognised that the police need not in effect “show their hand”. In that case, the suspect made no admissions when interviewed but made a number of statements which were lies and were relied on during the trial by the prosecution. The suspect had not been told by the police about all the offences he was to be questioned about. The trial judge in that case drew a distinction between active lying to induce a confession and tactics which involve not disclosing the whole case at the outset, which the appeal court found a useful distinction.
- In Ward v Police Service of Northern Ireland [2007] UKHL 50, Lord Bingham indicated ‘But there is no rule of law which requires the police to reveal to a suspect the questions that they wish to put to him when he is being interviewed. Nor are they required to reveal in advance the topics that they wish to cover, even in the most general terms, in the course of an interview. In some cases providing these details in advance will not prejudice their inquiries. But in others it may well do so. This is a judgment that **must** be left to the police. The interview **must** be conducted fairly. But advance notice of the topics to be covered is not a pre-requisite of fairness.

14.1.5 IOs / SIOs may provide solicitors with additional information, or likely questions to be posed during interview, where they consider it appropriate.

14.1.6 Whilst there is no requirement to meet or share information with a suspect’s solicitor, not doing so may increase the likelihood of a ‘no comment’ interview, or interviews being interrupted for a solicitor to provide further guidance to the suspect when unexpected questions arise.

14.1.7 Where IOs / SIOs elect to provide a form of briefing to solicitors, they **must**:

- Not deliberately provide misleading information;
- Fully consider the likely effect of the provision of such information; and
- Record such briefing, where the information extends beyond merely the suspect’s status, grounds for detention; where the suspect is held and that a solicitor’s professional assistance has been requested by the suspect.

14.2 Recording of pre-interview briefing

14.2.1 Pre-Interview Briefings should be recorded in the following manner:

- In Summary cases, details should be inserted in the Interview/Text of Admissions sections of the Standard Prosecution Report (See Section 19 of this guidance).
- In Solemn or complex cases, details should be recorded on the Pre-Interview Solicitor Briefing Record (PSoS form 051-008).

14.3 Content of pre-interview briefing

14.3.1 Areas for consideration in Pre-Interview Briefings:

- An outline of the offence for which the suspect has been detained/arrested;
- The circumstances in which the suspect was detained/arrested;
- Any significant comments (or lack of comments), or material recovered, at the time of arrest, detention or stop/search (See Section 14.5 of this guidance);
- The reasons why it is necessary to interview the suspect in the interests of the investigation of what has occurred and the potential for innocent explanations, self-defence, alibi, mitigation, etc.

14.3.2 The following are examples of briefing which may be provided:

- "The suspect was found in the rear garden of a dwelling that had been broken into a short time previously. He indicated when stopped by uniformed officers that he had been at a party in the same street and initial enquires have not corroborated the suspect's claim. When searched at the locus a screwdriver was found in his back trouser pocket".
- "The suspect was driving a car. During a routine stop, grounds for a search became apparent and a package of white powder was discovered in the boot. After being cautioned at the roadside she stated..."

14.3.3 Often in investigations, the information being gathered is fluid and it may be difficult in sufficient time to fully provenance or ascertain its place in the overall context of an investigation. Questions could be put to suspects, or information provided to solicitors, based on what the interviewing officers believe, from the information at the time available, to be reasonable and fair.

14.3.4 In the fullness of the investigation, the information on which such questions or briefings were based may be contradicted by other sources as the investigation progresses. Accordingly, IOs should be able to demonstrate questions posed to suspects, and information provided to solicitors, were based on the information held by them at the relevant time.

14.3.5 The role of solicitors is to give advice and receive instructions and **not** to answer questions on behalf of suspects. Equally, the test of whether questions, or lines of questioning, are fair and/or admissible is one for the courts, not for individual solicitors. As such, interviewing officers should

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remember their training, use lawful interview techniques and not be deflected from the pursuit of their investigations.

15. Interpreters

- 15.1 Where a suspect requires the services of an interpreter this interpreter can also be used to facilitate both the private consultation with a solicitor and the subsequent interview, without any undue conflict arising surrounding the interpreter's role.
- 15.2 All police officers and staff **must** be aware of the fact that interpreters will be both providing a service for the police and the defence and they may be party to legally privileged conversations and consultations. It therefore follows that police officers and staff should only provide interpreters with sufficient information to provide interpreting services and should not reveal any information about cases, beyond that which they would be comfortable providing to solicitors.
- 15.3 Police officers and staff should also ensure that they do not ask any questions of the interpreters which may be thought to undermine solicitor/client confidentiality.
- 15.4 PSoS will work with partners to develop more detailed information, guidance and other arrangements in relation to interpreters.

16. Children and vulnerable adults

Note: As Whole System Approach and Early and Effective Intervention (EEI) continues to be developed and embedded across the force area, officers should consider local procedures in relation to dealings with children and young persons. The Right to Solicitor Access is based in the right to a fair trial. Generic guidance is being developed to cover all aspects of involvement with youths around criminal allegations.

- 16.1 Where the suspect is a child or a vulnerable adult, officers should continue to follow existing procedures in relation to contacting parents, guardians, social workers, appropriate adults, etc, to seek their presence during interview. The Act does not alter the fundamental nature of the role of the Responsible Adult or Appropriate Adult.
- 16.2 The meaning of "child" is taken to be a child under the age of 16 years or, if the child is under supervision by Social Work, under 18 years.
- 16.3 For children under 16 (and those under supervision orders) who are to be interviewed **at police stations**, the Lord Advocate has directed that they **must** be provided with access to a solicitor prior to interview. They should not be allowed to waive this right, regardless of the position of the suspect's parent or responsible adult.
- 16.4 This access may be in person or by telephone. If a suspect thereafter refuses to engage the services of the solicitor, it is then a matter for the police officers to give consideration as to whether it is appropriate to proceed to interview

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that suspect. They **must** be satisfied that they have no concerns about the suspect's capacity to understand their rights and the consequences of refusing legal advice. Particular regard **must** be had to the suspect's age, maturity and apparent vulnerability.

- 16.5 Officers are reminded that not all offences committed by children will require the child to be arrested and taken to a Police Station. Clearly, the more serious crimes and offences will require arrest and SARF processes, however there are many other less serious matters where arrest and SARF procedures are not appropriate, and the child can be dealt with through alternative measures including formal warnings, restorative justice or partner referral through EEI processes. Guidance on dealing with Child Offenders can be viewed within the Offending by Children PSoS SOP.
- 16.6 In any case involving a suspect of any age who requires the support of an Appropriate Adult, then the suspect **must** be provided with access to a solicitor prior to interview. The suspect should not be allowed to waive their right.
- 16.7 While such a suspect **must** be provided with access to a solicitor prior to interview, there is no requirement they **must** engage the services of a solicitor or have regard to any advice that is given. Access may be in person or on the telephone. If a suspect refuses to engage the services of the solicitor, then it is a matter for the 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.
- 16.8 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 or lack of capacity, the services of an Appropriate Adult **must** be sought to assist in explaining the suspect's rights.
- 16.9 In dealings with both children and vulnerable adults it is expected that in the majority of cases the services of a solicitor will be sought. If this is not the case then this fact, and the reasons, should be fully recorded.

17. Cross-border detentions

- 17.1 The powers available to police officers when involved in cross-border operations within the United Kingdom are regulated by Sections 136 to 140 of [the Criminal Justice and Public Order Act 1994](#).
- 17.2 In summary, detention powers available to officers of PSoS consist of a 12 hour detention period, which is capable of being extended to a maximum of 24 hours, in appropriate cases, as per Section 12 of this guidance. The detention time starts **not** at the place of detention but upon arrival at the police station where the crime or offence is being investigated. There is no "cap" set on the travel-time required to transport a suspect from the point of detention to a police station, but it can be reasonably expected that Courts will examine closely such issues and apply the fairness test.

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- 17.3 More comprehensive guidance on Cross-border Powers is available in the Guidance on the Application of Cross Border Powers - Updated Interim Guidance July 2011
- 17.4 Where the detention and interview takes place outwith Scotland it **must** still be a Scottish enrolled solicitor who provides advice to the suspect. Where officers plan in advance to interview a suspect outwith Scotland, then consideration should be given to advanced consultation with the Scottish Legal Aid Board (SLAB).
- 17.5 Depending on the circumstances, SLAB may send a solicitor outwith Scotland to be on hand should the suspect wish legal advice. Only general details about the offence and the area where the interview will take place need be given at this time. There is no requirement to name the suspect until such time as solicitor access is requested. The decision to send a solicitor(s) outwith Scotland is a decision for SLAB alone based upon the seriousness of the case.

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18. Recording of information

	Suspect exercises right of solicitor access and has consultation with solicitor	Suspect chooses to waive their rights to solicitor access and/or their right to a private consultation with a solicitor	Suspect changes their decision about the exercising of rights
Details to be recorded on SARF	Details to be recorded on SARF.	Waiving of rights to be recorded on SARF and signed by suspect.	Suspect's change of decision to be recorded on SARF.
Comments to be referred to during interview	Interviewing officer(s) to summarise suspect's rights and details of consultation (e.g. by phone / in person, named / duty solicitor) at start of interview prior to putting questions to suspect.	Interviewing officer(s) to summarise waiving of rights at start of interview prior to putting questions to suspect.	Interviewing officer(s) to summarise initial waiving of rights at start of interview prior to putting questions to suspect. If suspect changes decision any interview should be suspended and the change of decision summarised at the start of any subsequent interview prior to putting further questions to suspect.
Details to be entered in Standard Prosecution Report	The fact that suspect was provided access to a solicitor, the nature of access (telephone and/or in person) and whether the solicitor was present at the interview, to be stated, with confirmation that all details are recorded on SARF (Case Related Document) to be mentioned in Standard Prosecution Report (Police Interview/Text of Admissions) prior to outlining any Questions / Answers.	The fact that suspect waived rights, and that this decision was recorded, and signed by the suspect, on SARF (Case Related Document) to be mentioned in Standard Prosecution Report (Police Interview/Text of Admissions) prior to outlining any Questions / Answers.	The fact that suspect waived rights, and that this decision was recorded on SARF (Case Related Document) to be mentioned in Standard Prosecution Report (Police Interview/Text of Admissions) prior to outlining any Questions / Answers. The suspect's change of decision and details of any consultation with a solicitor should be referred to at the appropriate chronological point in the Questions / Answers summary with an indication that full information is provided in SARF (Case Related Documents).

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	Suspect's status changes e.g. from voluntary attendee to detainee, or from detainee to arrest	Suspect is interviewed without all their rights being provided
Details to be recorded on SARF	N/A	Provision of rights, choice(s) by suspect and actions by police will be recorded on SARF.
Comments to be referred to during interview	<p>Interviewing officer(s) to summarise provision of rights, and any waiver, at start of interview prior to putting questions to suspect. If suspect's status changes this should be highlighted in interview and the suspect should be reminded of their rights.</p> <p>Interviewing officer(s) should communicate with custody staff so the change of status, and any decision by the suspect, are recorded on SARF and Custody Record.</p> <p>The suspect's change of status should be summarised at the start of any subsequent interview prior to further questioning.</p>	<p>Interviewing officer(s) to summarise choice(s) by suspect and actions by the police to secure rights.</p> <p>Where a decision has been taken by police to delay the provision of rights (in truly exceptional and compelling circumstances), this must be referred to at the start of interview prior to putting questions to the suspect.</p>
Details to be entered in Standard Prosecution Report	<p>The suspect's change of status should be referred to at the appropriate chronological point in the Questions / Answers summary.</p> <p>A summary of relevant information should be provided with an indication that full information is contained in SARF (Case Related Document).</p>	<p>The provision of rights to the suspect and the suspect's decisions should be recorded in the Standard Prosecution Report (Police Interview/Text of Admissions).</p> <p>A summary of the actions by the police to secure the suspect's rights should be made, and that these actions are recorded on SARF (Case Related Document).</p> <p>Where a decision has been taken by police to delay the provision of rights (in truly exceptional and compelling circumstances), this should be referred to in the same section of the report, or if appropriate, under separate communication to the Crown Office and Procurator Fiscals Service (COPFS).</p>

Pre-interview review of rights

To be read to suspect(s) prior to administering the common law caution in advance of interview(s) at a police office. If the interview is being recorded in a notebook, Portable Digital Assistant (PDA) or similar device the following should be recorded verbatim. If the interview is audio/visually recorded it will be read out whilst the recording device is operating.

About (time and date) you attended at this police station on a voluntary basis / under detention / under arrest in relation to (crime / offence). Is that correct?

You had your rights in relation to access to a solicitor explained to you.

You were asked if you understood each of these rights and you confirmed that you did. Is that correct?

You were then asked if you wished to take up these rights and your answers were recorded on a form which I have here. You were asked:

“Do you wish me to intimate to a solicitor that you have attended voluntarily / been detained / been arrested at this police station?”

Your answer to this was (YES / NO). Is that correct?

If NO:

You then signed the form to confirm that your answer was No. Is that correct?

Is that your signature?

You were then asked,

“Do you wish a private consultation with a solicitor before being questioned by the police?”

Your answer to this was (YES / NO). Is that correct?

If NO:

You then signed the form to confirm that your answer was No. Is that correct?

Is that your signature?

You were then asked,

“Do you want to have a private consultation with a solicitor at any other time during police questioning?”

Your answer to this was (YES / NO). Is that correct?

If NO:

You then signed the form to confirm that your answer was No. Is that correct?

Is that your signature?

Note: Interviewing Officers, if the suspect waived their right to consult with a solicitor and changes their mind you **must** ensure that a consultation with a solicitor is secured unless exceptional circumstances prevail (See Section 4 of this guidance).

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Common Law Caution

I am now going to ask you questions about (crime/offence).

You are not obliged to answer any questions, but anything you do say may be noted, may be audio and visually recorded, and may be used in evidence.

Do you understand that?