

ii) Where the court refuses an application on the papers, unless both parties have consented to it being dealt with on the papers alone, the order should be endorsed with a statement of the right to make (within 7 days or such other time as the court considers appropriate) an application to have the order set aside, varied or stayed under CPR rule 3.3(5). If the parties have consented to a paper determination, then the order will be final and should be endorsed with a statement of the right to appeal to this court within 21 days.

iii) Any application for an adverse decision made on the papers to be 'reconsidered' at an oral hearing should clearly state that it is made under CPR rule 3.3(5) (or, if made under another specific provision of the rules, that it is so made).

- 1 https://gov.wales/sites/default/files/publications/2020-04/guidance-for-local-authorities-in-supporting-people-sleeping-rough-covid-19_0.pdf.
- 2 The authors are grateful to Mark Prichard, a homelessness expert, for drawing this to our attention.
- 3 See also page 40 of this issue.

Jan Luba QC is a senior circuit judge and a designated civil judge. Sam Madge-Wyld is a barrister at Tanfield Chambers. They would like to hear of relevant cases in the higher or lower courts.

Custody protocol: COVID-19 response

Ed Cape and Matthew Hardcastle highlight areas of concern with the new interview protocol, designed at speed to improve safety for those attending the police station during the pandemic.



Ed Cape



Matthew Hardcastle

The COVID-19 pandemic has created significant challenges for the operation of the criminal justice system; not least in how to keep the justice system running while reducing the risk to individual safety. One immediate, and acute, challenge is how to reduce risk at the early stages of the criminal process, where a person is held in custody at a police station following arrest. This has resulted in an interview protocol between the Crown Prosecution Service (CPS), the National Police Chiefs' Council (NPCC), the Law Society, the Criminal Law Solicitors' Association, and the London Criminal Courts Solicitors' Association, which was issued on 2 April 2020.¹

The protocol introduced alternative ways for interviews to take place in an attempt to increase safety measures for those attending the police station. The covering letter to chief constables recognises that the Police and Criminal Evidence Act 1984 (PACE) is being applied in circumstances which were unlikely to have been anticipated. That has to be right and it is also a pragmatic and sensible approach. Designing a protocol in such a short period of time is a challenging endeavour and, notwithstanding our comments below, the efforts of all involved ought to be recognised and applauded. The protocol is the result of a lot of hard work by those parties, but there is still further to go. The protocol will be reviewed monthly and the purpose of this article is to feed into that review process.

Our principal feedback falls into five categories:

1. The unclear status of the protocol.
2. Annex A: Does the suspect need to be interviewed now?
3. The ability for representation to be provided by telephone.
4. Application of the protocol to vulnerable suspects (including children).
5. Application of the protocol to volunteers.

The unclear status of the protocol

The protocol is written in discretionary terms to 'assist' investigators and

prosecutors in deciding whether suspects should be interviewed during the COVID-19 pandemic. The likely intention was to allow officers to evaluate the correct way to proceed in the particular circumstances of their investigation. The protocol will also need to be implemented by each chief officer of police² and, at the time of writing, this process was ongoing.

The discretionary approach should provide a necessary degree of flexibility but, instead, it removes any real strength from the document as there is no immediate consequence if an interview takes place in breach of the protocol. The authors are aware of a mixed response to the protocol, at least in the initial period following its introduction, with some custody officers unable or unwilling to implement it. The necessary protection is more readily found in PACE Codes C and H, and Home Office Circular 34/2007, which set out the obligation on custody officers to undertake a risk assessment and implement actions judged to be necessary. If a custody officer is to disregard the protocol then it will need to be a considered, rational, and documented decision. A failure to ensure a safe environment for those involved in an interview is likely to feature heavily in the determination of whether an adverse inference ought to be drawn.

Annex A: Does the suspect need to be interviewed now?

The College of Policing describes investigative interviews as 'a crucial element of the process of [an] investigation',³ and the protocol recognises that a suspect interview is 'generally a reasonable line of enquiry' (para 5). However, the protocol continues, 'for public health reasons interviews may need to be postponed or even dispensed with. If there is a genuine and pressing need for an interview with all parties present it must be carried out in accordance with government advice on precautionary behaviour, including social distancing.'

The protocol sets out a cascading decision-making process in deciding whether and how an interview ought to take place:

1. a completely virtual interview; or
2. legal advice to be provided by telephone with the solicitor's attendance in the interview facilitated by live link; or
3. all parties physically in attendance; or
4. a written statement under caution; or
5. a charge without interview (the process set out in Annex A).

There are positives and negatives for each of the first four types of interview, but on the facts of any given case they may be appropriate. However, as drafted, the Annex A process raises a number of concerns.

First, the process is predicated on circumstances where there is to be a charge without interview. It is a surprising omission that where the evidence against a suspect is too frail to support a charge, there is no avenue within the protocol for the suspect to be released without interview. While the requirement, contained in PACE 1984 s37, that an arrested person should only be detained if it is *necessary*⁴ for investigative purposes should provide a safeguard, most solicitors will have experienced police interviews where there was no realistic prospect of a charge unless a suspect was to make admissions.

Second, the Annex A process does not contain a provision for admissions to be made, thereby limiting the potential for a statutory (or non-statutory) diversion from prosecution such as a conditional caution.

A strict application of the current draft of the protocol would fetter discretion and be open to challenge. There is no easy fix to this. While, in theory, a suspect could be offered the opportunity to make admissions, this would still require the assistance of a lawyer⁵ and could potentially be seen as an inducement to a confession.

The ability for representation to be provided by telephone

The protocol considers three routes to interview: (1) by live link; (2) by writing; and (3) in person. A telephone interview is considered and rejected in the covering letter as being outside of PACE. While the PACE Codes of Practice contain provisions for an investigating officer to conduct an interview via live link (PACE Code C para 12.9A), they do not contain a provision for a suspect to take part in the same way. Similarly, while prepared statements are referenced in the Codes, the more substantive process of a written interview is not.

For the purposes of both methods of conducting an interview, the protocol applies PACE in a purposeful way so that a remote attendance can be accommodated. Therefore, it is difficult to understand why that line of demarcation is drawn for a telephone interview.

The disadvantage of a solicitor attending by telephone is that they will

not be able to see their client nor the interviewing officers, but this limitation must be considered in the context of a public health crisis. The absence in the protocol of an avenue by which an interview can be conducted by telephone is an important one. Telephones are a cost-effective and easily implementable route to remote attendance. Indeed, the absence of telephone interviews is likely to have contributed to the delayed implementation of the protocol.

Application of the protocol to vulnerable suspects (including children)

Many of the functions of an appropriate adult (AA) require their presence and cannot be carried out remotely. For example, samples cannot be taken in the absence of an AA nor can an interview take place (including a voluntary interview: PACE Code C para 11.15). This is a significant challenge when looking to ensure social distancing in the police station. It must also affect a solicitor's assessment of whether a remote attendance is appropriate.

The Annex A (no interview) and Annex B (written statement under caution) processes both have unsatisfactory features. The Annex A process would, essentially, remove the ability to proceed by way of an 'out-of-court disposal', which would have a disproportionate impact on children and young people.⁶

The Annex B process requires a suspect to retain and process a significant amount of information given orally. This will inevitably be more challenging for the young and the vulnerable. The remote presence of a solicitor will also reduce their ability to view and assess the suspect's comprehension. As an AA will be present, they may be able to provide some significant assistance, but the solicitor will need to be cautious not to substitute the AA's assessment for their own. There are also occasions where the AA may not be present – for example, when instructions are taken.

A solicitor's remote attendance for a young or vulnerable client would be best achieved using live link, but unless there is a change to allow an AA to attend remotely then it will be incumbent on custody officers to assess the specific risks to the suspect and to the AA (PACE Code C paras 3.6 and 3.8A) and to implement the response to any identified risk (PACE Code C para 3.9).

Application of the protocol to volunteers

The protocol does not explicitly extend to volunteers. This is likely to be a result of the fact that voluntary interviews can be more easily postponed and the fact that a volunteer interview can take place outside of a custody suite.

As a volunteer should be treated with 'no less consideration' (PACE Code C Notes for Guidance 1A) than an arrested suspect, there is no logical reason why the protocol would not equally apply to volunteers. Regrettably, the approach to date for volunteers has been 'business as usual', with no willingness on the part of the police to delay unless a suspect is actively symptomatic. The authors have heard reports of volunteers being threatened with arrest if they were to fail to attend.

For an arrest to be lawful it must, *inter alia*, be necessary. This is a higher threshold than merely 'desirable' or 'convenient'. Determining necessity is a mixed subjective/objective test: does the officer honestly believe that an arrest is necessary; and if so, would a reasonable person in possession of the same information as the arresting officer conclude that an arrest is necessary.

In satisfying the objective element of this test, an officer must have 'solid ground' for believing that the arrest is necessary – eg, that a suspect might hide or destroy evidence – and a theoretical possibility that a suspect might do something is not sufficient. The test of necessity is also context-specific and should take some account of the risks of arrest (in the context of COVID-19) compared with proceeding on a voluntary basis. Therefore, a suspect could well agree to attend an interview as a volunteer, but with a pre-condition that the interview is conducted in accordance with the protocol.

If the police were to refuse this request and the suspect therefore refused to attend an interview then it is difficult to see how the police could proceed. It is unlikely that it could be considered necessary to arrest a suspect simply because they refused to attend an interview with fewer protections in place than if they had been arrested.

Conclusions

The relationship between police officers and solicitors in the custody suite is often strained. Solicitors have

an obligation to achieve the best result for their client and officers want to secure the best evidence for their investigation. The two aims are not always aligned. But, for this protocol to work, there will need to be confidence that it is being applied in good faith. If solicitors do not trust that the police will act as they have agreed to then remote working will fail. Likewise, if the police are not able to rely on solicitors executing their professional and regulatory obligations then a remote attendance will not be a realistic option. The only way for the protocol to succeed is for both sides to recognise and respect the aims and obligations of their opposite number.

Update

On 24 April, the protocol was updated to allow telephone interviews to take place. The update also recognised the difficulties in interviewing the young and vulnerable, and the NPCC/CPS covering letter⁷ calls for 'special care' to be taken in deciding whether an interview should proceed. The covering letter sets out the scope of the protocol as covering 'suspect interviews whether conducted in custody, or elsewhere'. This provides support for our argument that the protocol must properly apply to voluntary interviews as it does to interviews following an arrest, but further clarity would be welcome.

- 1 See: www.lawsociety.org.uk/support-services/advice/articles/coronavirus-covid-19-interview-protocol/.
- 2 Ie, the chief constable of a police force maintained under Police Act 1996 s2 or, in relation to the Metropolitan Police, the Commissioner of Police of the Metropolis (Police Reform and Social Responsibility Act 2011 s102(1)).
- 3 See: www.app.college.police.uk/app-content/investigations/investigative-interviewing/.
- 4 Necessity is considered below, but is a higher threshold than merely 'desirable' or 'convenient'.
- 5 A suspect has the right to consult a solicitor prior to a caution being issued and a suspect must be informed of the evidence against them and the decision to offer them a caution (*Simple cautions for adult offenders*, Ministry of Justice, 2015, para 78).
- 6 *National strategy for the policing of children & young people* (National Police Chiefs' Council, 2016).
- 7 www.lccsa.org.uk/wp-content/uploads/2020/04/24.04.20-Joint-CPS-and-NPCC-Letter-Amended-Custody-Protocol-Covid-19-R...pdf.

Ed Cape is Emeritus Professor of Criminal Law and Practice at the University of the West of England. Matthew Hardcastle is an associate at Kingsley Napley.