

# Memorandum of Understanding

## Electronic Communication Devices being taken into Custody Suites by Solicitors

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## **1. SCOPE OF THE GUIDANCE**

- 1.1 This guidance has been adapted from that produced via ACPO in 2011 and concerns the prevention of unauthorised communications by or on behalf of detainees using mobiles phones, computers and other electronic communication and recording devices belonging to solicitors and other third parties, as well as their use as digital recording devices.
- 1.2 References to 'solicitors' includes accredited and probationary representatives described by paragraph 6.12 of PACE Code C.

It is in addition to, and does not detract from:

- The separate guidance in Home Office Circular 34/2007 "Safety of Solicitors ...at police stations" which concerns risks to physical safety and would apply for the purposes of assessing risks to physical safety which might arise from the presence of such devices; and
- The provisions of Code C paragraphs 6.9 and 6.10 and Code E which should be considered when the use of any such device by a solicitor appears to interfere with the conduct and recording of the interview.

## **2. REASONS FOR THE GUIDANCE**

- 2.1 There are varying practices by police forces about whether mobile telephones, computers and other electronic communication and recording devices may be taken into and used in the custody area and in particular, whether a legal representative should be allowed to have any such device with them for use during a private consultation with their client.
- 2.2 PACE Code C sets out limitations on the right of detainees to communicate with others and for others to communicate with detainees but makes no mention of the use laptops and hand-held devices for instant communication and making records by third parties, notably solicitors, when they are in the custody area. These devices are widely used and accepted as an important, often essential, aid to effective working and it is important to recognise the benefits of allowing solicitors access to laptops and hand-held devices when they are in the custody area.
- 2.3 Unfortunately, there have been instances of detainees gaining access to communication devices brought in by solicitors and whilst these may be isolated cases, their unauthorised use can cause an unnecessary and high level of risk to the investigation and put victims and witnesses at risk of being intimidated.
- 2.4 With the above concerns in mind, the NPCC Custody and Movement of Prisoners Portfolio and the Law Society, re-publishes the following guidelines.

### **3. PACE REQUIREMENTS ON COMMUNICATION WITH AND BY A DETAINEE**

- 3.1 Section 5 of PACE Code C describes the right of a detainee not to be held incommunicado. In doing so, it determines when, if and on what authority a detainee may communicate and have contact with others. Communication by or with the detainee is a matter for the custody officer and where specific authorisation is required, a senior officer.
- 3.2 No third party, solicitor or otherwise has the right or authority to enable or assist a detainee to contact anyone by telephone, email or other electronic format or in writing. Any such communication would require a specific direct authorisation from the custody officer. It is difficult to imagine any circumstances in which it would be appropriate or necessary for the custody officer to authorise external communication to take place via a solicitor or any other third party.
- 3.3 Solicitors are not bound by the PACE Codes, As a result, any breach of Code C would be a breach by police officers and police staff. Therefore, the custody officer is entitled to be satisfied that all contact with or by a detainee is made or authorised in accordance with the Code.

In certain situations, a custody officer may consider that it would be inappropriate for a solicitor to possess communication devices whilst in the custody area.

### **4. WHY NOT INTRODUCE A BLANKET BAN ON SOLICITORS USING MOBILE PHONES AND ELECTRONIC MEANS OF COMMUNICATIONS IN THE CUSTODY SUITE?**

- 4.1 Solicitors, like many others, use mobile telephones, laptops and handheld devices as part of their day-to-day working life. Their use in the custody suite allows them to be more effective and efficient in carrying out their duties, for example:
- A laptop will allow a record to be made of a client's instructions during a consultation and enable access to earlier documents. It can also be used to gather information in a format that can be emailed at the earliest opportunity to expedite the completion and submission of papers, reports and other information relevant to the case. This ability will assist solicitors to contribute to the efficient administration of justice.
  - A mobile telephone allows a solicitor to keep in contact with the Defence Solicitor Call Centre (DSCC) and their colleagues to notify delays, to be kept informed of changing commitments and to seek or provide advice.

## **5. CRITERIA FOR USE**

- 5.1 The following provisions are recommended for use when determining force policy on the use of mobile telephones and electronic communication or recording devices by solicitors in the secure custody area, during private consultations with detainees:
- (A) Unless there is good reason to prevent a solicitor from retaining their mobile telephone and other electronic communication or recording devices such as laptop computers, the presumption should be to allow the solicitor to retain and use these devices.
  - (B) The custody officer will determine on a case-by-case basis whether mobile telephones and other electronic communication or recording devices such as laptop computers, will be surrendered either:
    - On entering the custody area; or
    - Before any private consultation with a detainee.
  - (C) The custody officer will only seek surrender of any such device where there are reasonable grounds to believe that surrender is necessary to prevent unauthorised communications being made by or on behalf of any detainee and must inform the solicitor of the grounds for the decision.
  - (D) The solicitor must disclose to the custody officer or custody staff what electronic communication or recording devices they have in their possession, if so required by or on behalf of the custody officer.
  - (E) Where the custody officer has concerns about allowing any such device to be retained, the solicitor must if requested, explain to the custody officer why it is necessary for them to retain possession of it whilst they are in the custody area or during any contact with their client, whether in a private consultation or otherwise.
  - (F) If the custody officer decides to allow the solicitor to retain any such device, the solicitor must agree that they can retain it on condition that they will:
    - Not allow any detainee to have access to the device; and
    - Not use that device to communicate with anyone on behalf of any detainee.
  - (G) The solicitor must also:
    - Agree to report any breach of this condition whereby any detainee has access to, or makes use of, any such device including the circumstances whereby the breach took place; and
    - Report any such breach to the custody officer as soon as practicable after it occurs.
  - (H) A decision not to allow a solicitor to retain and use any relevant device

should be recorded in the custody record of each detainee to whom that solicitor has been called to give advice or elsewhere in accordance with locally agreed arrangements.

- (I) A solicitor who is not allowed to retain any communication device must be allowed to make appropriate contact arrangements, for example, with the DSCC or their office, to cover the period for which they will not have access to it.
- (J) A solicitor who is told that they are not allowed to retain any communication or recording device must be asked to hand the device over:
  - On or before entering the custody suite, or
  - As the case may be, before any consultation with a detainee, and the device must be placed in a tamper proof bag or locker and the custody officer will be responsible for its safe custody and prompt return in accordance with locally agreed arrangements.
- (K) Solicitors may use a digital device, including a laptop, mobile phone or Dictaphone, to create a recording of any police interview with their client. There is nothing within PACE that prohibits a solicitor recording an interview. In practice, they often note down every question and answer on paper or typed notes, which carry the same risks from being shared.

Some solicitors may have disabilities that are accommodated for via the use of technology that requires a recording to be made.

Solicitors can also obtain a copy of their client's interview from forces, following local procedures. Allowing them to make their own copy, so long as it does not interfere with the interview procedure, will be in the best interests of the investigation as it will expedite processes.

For the avoidance of doubt, this provision does not extend to others who may be present, including appropriate adults and interpreters, who are not regulated via a professional body in the same way that solicitors are.

## **6. RESPONSIBILITY OF THE SOLICITOR**

- 6.1 A breach by a solicitor of the agreement in 5.1(F) above not to allow any detainee to have access to the device and not use that device to communicate with anyone on behalf of the detainee, may lead to the matter being investigated as an attempt to pervert the course of justice. The breach may also be brought to the attention of the court if the case comes to trial. Any breaches of the requirements placed on solicitors which would include

attempts not to disclose possession of a telephone or communication or recording device and any false declarations to the custody officer should be reported to the Solicitors Regulation Authority to consider disciplinary action and if the solicitor is attending the station under Duty Solicitor Scheme, also to the Regional Office of the Legal Aid Agency (LAA).

- 6.2 A decision not to allow a solicitor to retain any communication or recording device should not prevent the solicitor from giving legal advice to their client and failure to comply with a request to hand over any such device would not be considered as justification for claiming that a detainee's access to legal advice has been denied or delayed. For this reason, when informing a solicitor that they may not retain any such device and of the grounds for this decision, the custody officer should point out that it is the device which is not allowed into the custody area but they are not being prevented from advising their client provided that they surrender the device. If the solicitor refuses to accept this condition of entry and decides not to visit their client, the custody officer must inform the DSCC of the circumstances so that alternative arrangements can be made to secure legal advice for the detainee.

## **7. REVIEW AND IMPROVEMENTS**

- 7.1 It is accepted by all signatories that there will be occasions when changes to this MOU are required.

The signatories agree that:

- (A) Where there are minor, administrative alterations to the MOU that are required (such as the alteration of a word, email address or contact number) then the completing agency will make those alterations and recirculate the agreement to the other signatory and update the version control below and document footer.
- (B) Where there are substantive alterations that do or could involve, as examples:
- Alterations to any of the responsibilities of any signatory agency; or
  - Alterations to any of the internal processes of either signatory; or
  - Legislative changes affecting either agency; or
  - Any change that does or could have an impact on one or both signatory agencies.
- (C) Such changes will be referred to each respective signatory for their consensus on the suggested change(s).

## Disputes

It is expected that implementation and application of this MOU will reduce incidents of misunderstanding, and where such incidents do occur these will be resolvable at a local level. However, where this is not possible, and requires escalation, it will be via the relevant agency signatory representative.

## Version Control

Version	Date	Details of changes
V2	01/07/2025	Re-written, with new NPCC Custody lead and addition of: 5.1(K) Use of digital recording devices in interview 7) Review and Improvements.