

LORD ADVOCATE'S GUIDELINES: LIBERATION BY THE POLICE COVID-19 OR CORONAVIRUS

INTRODUCTION

These Lord Advocate's Guidelines direct Police Scotland on the approach to take regarding individuals who are in Police custody having been arrested during the period of disruption caused by COVID-19 or Coronavirus.

These guidelines will be active from the 20th March 2020 until the end of the disruption, and will remain under review in order to respond to the changing circumstances. During this period these guidelines replace the Lord Advocate's Guidelines on Liberation by the Police.

At all times that a person is in police custody, police officers must have regard to that person's right to liberty under Article 5 of the European Convention on Human Rights and must consider whether it is reasonable or necessary to keep that person in custody.

If a person is kept in custody at any stage, thorough and clearly recorded consideration of the reasons for custody should be maintained. All constables must understand and be able to explain and justify their decision-making if called upon to do so, for example, when giving evidence at trial.

PERSONS NOT OFFICIALLY ACCUSED

Where there are ongoing enquiries, a person arrested but not officially accused should only be kept in custody if it is not appropriate to release the person unconditionally or on investigative liberation subject to appropriate conditions.

Officers should take the following factors into account when considering whether it is appropriate to keep an individual in custody where there are ongoing enquiries:

- the nature of the offence;
if the investigation is not likely to result in solemn proceedings and/or does not involve vulnerable victims or witnesses then it is not likely to be appropriate to keep an individual in custody whilst enquiries are ongoing.
- any substantial risk posed to victims, witnesses or the public if the person is liberated
- the nature of the further enquiries required and the realistic timescales for completing those enquiries.

PERSONS OFFICIALLY ACCUSED

Where a person is in custody having been arrested without warrant and is charged with an offence, a constable may:

- release the person without an undertaking
- release the person with an undertaking
- refuse to release the person.

In all cases there is a presumption of liberty.

Officers should keep an accused in custody where there is a substantial risk to a victim, witness or the public which cannot be mitigated by undertaking conditions.

Where a case is unlikely to result in solemn proceedings and/or does not involve vulnerable victims or witnesses then in the current circumstances it is less likely to be appropriate to keep the accused in custody.

The factors to take in to account include the nature and circumstances of the offence including the severity of the conduct; the likelihood of reoffending; the ongoing risk posed to the safety of the victim, children or any other member of the public; any previous convictions or behaviour suggesting non-compliance with conditions or orders; and whether the incident is part of a course of conduct.

The following list contains examples of the kind of situations where refusing to release an accused may be justified:

- Where the offence involves violence towards a specific individual or individuals and there are previous similar incidents against the same individual(s) recorded in the criminal history record or referenced elsewhere.
- Where the offence involved a course of conduct targeting an individual over a prolonged period where the behaviour escalated to a concerning level.
- Where there is evidence to support the fact that the accused has at any point threatened witnesses in the case with a view to dissuading them from going to Court to give evidence.
- Where the nature of the accused's criminal history record is such that if released it is likely that they will cause harm to an individual or group of individuals either through violence or other disruptive behaviour.
- Where the nature of the accused's criminal history record is such that if released it is likely that they will cause harm to the community either through violence or other disruptive or behaviour.

Given the particular risks associated with domestic abuse cases, in some cases, it will be both reasonable and necessary to hold a person in custody pending the submission of a report to the Procurator Fiscal. Police officers must have regard to the terms of the Domestic Abuse Protocol when considering release of persons arrested for domestic abuse offences. Whilst there is a general presumption to liberty, the Protocol sets out the factors to be considered and applied in each case.

If, having given due consideration to the factors listed above, it is considered that there is a likelihood of the accused reoffending, failing to comply with a relevant undertaking condition or where there is a substantial risk to the safety of the victim, children, witness or any other member of the public and it is not considered that these risks could appropriately be managed by the imposition of proportionate conditions of undertaking, the accused should be detained in custody pending appearance at court.

Where it is proposed to release a suspect on undertaking, consideration must be given to imposing appropriate further conditions of undertaking, having regard to risk and safety considerations. Account should be taken of the views of the victim or witness, particularly in respect of any conditions which might be appropriate. Every effort should be made to ensure that victims are advised that a suspect is to be released, and advised of any conditions of undertaking, before the suspect is in fact released.

The duty in section 50 of the Act to take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody must be considered in every case and the reasons why a person was not released should be fully recorded.

All efforts must be made to overcome any issue regarding an accused who presents as having no fixed abode, or whose identity has not been confirmed prior to the individual being reported in custody. Any decision not to liberate must be regularly reviewed where the person is detained in custody longer than 24 hours. If the reason for the detention in custody no longer remains (where, for example, an address has been provided and confirmed, or the identity of the person is confirmed) the officer should consider releasing the person at that time.

The Act allows for liberation on undertaking for both summary and solemn level offences.

Given the serious nature of solemn offences, liberation on undertaking of persons charged with offences likely to appear on petition or persons arrested on petition warrant, must be considered carefully and the reasons for liberation should be fully recorded.

PRE-CONVICTION WARRANTS AND WITNESS WARRANTS

Where a person is in custody having been arrested on a warrant, a constable may either:

- release that person on an undertaking or
- refuse to release the person from custody

It is not competent to liberate a person arrested on warrant without making them subject to an undertaking and, if necessary and appropriate, further conditions.

In all cases officers should consider release on an undertaking.

Officers should keep a person in custody where there is a substantial risk to a victim, witness or the public which cannot be mitigated by undertaking conditions.

Where the warrant does not relate to solemn proceedings and/or the case to which it relates does not involve vulnerable victims or witnesses then it is less likely to be appropriate to keep the accused in custody.

This guidance applies to both accused persons arrested on a pre-conviction warrant and persons arrested on a witness warrant.

A person arrested on warrant for Post Charge Questioning under s37 of the Act must not be liberated but should be kept in custody to allow for questioning to take place under the terms of the warrant granted.

INVESTIGATIVE LIBERATION

The release of a suspect on investigative liberation will:

- respect the right to liberty under Article 5 of the European Convention on Human Rights and the duty imposed by s50 of the Criminal Justice (Scotland) Act 2016
- allow further enquiry to be carried out
- protect victims, witnesses and the public during the investigation period by the imposition of certain conditions

Investigative liberation may be used:

- where there are further enquiries to carry out
- where, after an appropriate risk assessment, officers are satisfied that the enquiries may be conducted whilst the person is at liberty if relevant conditions are imposed to manage any risk
- where the further enquiries cannot be completed immediately but there is a reasonable prospect of these enquiries being completed within a 28 day period

There are no restrictions on the types of offences for which investigative liberation may be used. Police officers must consider each case on its own merits and assess the necessity and proportionality of imposing conditions.

Given the particular risks associated with domestic abuse cases, in some cases, it will be both reasonable and necessary to hold a person in custody pending the submission of a report to the Procurator Fiscal. Police officers must have regard to the terms of the Domestic Abuse Protocol when considering investigative liberation in respect of persons arrested for domestic abuse offences. Whilst there is a general presumption to liberty, the Protocol sets out the criteria to be considered in each case which officers must consider and apply. These include the nature and circumstances of the offence including the severity of the conduct; the likelihood of reoffending; the ongoing risk posed to the safety of the victim, children or any other member of the public; any previous convictions or behaviour suggesting non-compliance with conditions or orders; and whether the incident is part of a course of conduct.

Where it is proposed to release a suspect in a domestic abuse case on investigative liberation, a full assessment of any risk that the suspect may pose to the victim, witnesses or the investigation must be carried out. This should take into account the views of the victim, particularly in respect of any conditions which might be appropriate. Every effort should be made to ensure that victims are advised that a suspect is to be released, and advised of the conditions of liberation, before the suspect is in fact released.

Conditions attached to Investigative Liberation

Conditions can be imposed by any constable but must be approved as necessary and proportionate for the purpose of ensuring the proper conduct of the investigation by an officer of the rank of sergeant or above. The details of the officer authorising conditions should be recorded.

There are no standard conditions for investigative liberation. Conditions which can be imposed include those aimed at securing that the person liberated does not interfere with witnesses or evidence. However it is not competent to impose a condition that the person must be at a specific place at a specific time, such as a curfew condition. The overriding consideration for any condition must be to ensure the proper conduct of the investigation. Therefore it is not appropriate to use conditions simply as a means of controlling a person whilst enquiries are ongoing. Police officers must be able to demonstrate how the condition assists in the proper conduct of the investigation and it is important that the reasoning behind the imposition of any condition is accurately recorded.

A record must be kept of the following matters:

- what further enquiries are to be carried out
- what additional evidence may be obtained from such enquiries
- how the conditions imposed link with the evidence it is hoped to recover i.e. why the conditions imposed are considered necessary and proportionate for the proper conduct of that investigation

There is no requirement for a suspect to agree to the conditions imposed on investigative liberation. However, they must be given details of the liberation and conditions imposed.

Modification of Investigative Liberation Conditions

A constable of the rank of inspector or above must keep investigative liberation cases under review and consider whether:

- there remains reasonable suspicion that the person has committed the offence(s) in question
- the associated liberation conditions continue to remain necessary and proportionate for the purpose of ensuring the proper conduct of the investigation

There are no specific legislative requirements for this review process, such as the timing or frequency of reviews, and the conduct of reviews remains an operational matter for the police to determine. It is however important that accurate records are maintained of the review process.

If the reviewing officer is of the view that there are no longer reasonable grounds for suspecting that the person has committed an offence, or that any condition is no longer necessary and proportionate for the purpose of ensuring the proper conduct of the investigation, that condition must be removed or modified as soon as practicable.

If a condition is modified or removed, a written notice must be given to the person specifying the time at which the condition is treated as having been modified or removed. Reviewing officers should ensure that notices to withdraw or modify conditions are intimated urgently to persons subject to such conditions. The removal of a condition should also be communicated to any relevant victim or witness. Accurate records must be kept of the time that the decision to remove or modify the condition was made and any reasoning for this.

Review of Conditions of Investigative Liberation by a Sheriff

A person subject to investigative liberation conditions can apply to a sheriff to have the conditions reviewed. The Procurator Fiscal is entitled to be heard in respect of any application for the review of conditions and the police will require to submit a report which details the following matters:

- a summary of the facts in the case
- any conditions imposed
- the rationale behind the decision to impose such condition(s) including:
 - details of the further enquiries being carried out and what additional evidence it is hoped will be obtained from them
 - why the conditions imposed are deemed necessary and proportionate for the proper conduct of that investigation
 - how each condition assists in the proper conduct of the investigation.
 - details of any review process undertaken by a police inspector, including the time that any decision to remove or modify a condition was made and the rationale behind the decision

Any alteration of the liberation conditions by a Sheriff on review should be intimated to any relevant victim or witness as soon as possible.

Breach of Investigative Liberation conditions

A person commits an offence if they fail to comply with an investigative liberation condition. If the person commits an offence which also breaches the terms of an investigative liberation condition, that offence will be aggravated by being committed whilst subject to investigative liberation conditions.

Breach of liberation offences should be reported. The status of the accused in relation to the reported breach should be determined with reference to the guidance on Officially Accused Persons.

UNDERTAKINGS

A constable may release a person on undertaking if the person undertakes to appear at a specified court at a specified time; and to comply with any conditions which may be imposed. The conditions which may be imposed are that the person does not:

- commit an offence
- interfere with witnesses or evidence, or otherwise obstruct the course of justice
- behave in a manner which causes, or is likely to cause, alarm or distress to witnesses

In addition, a constable of the rank of sergeant or above can authorise any further condition necessary and proportionate for the purpose of ensuring that any of the

conditions above are observed except for a curfew condition which can only be authorised by a constable of the rank of inspector or above.

A person can only be released on undertaking if that person consents to the terms of the undertaking and signs the undertaking form. If a person does not consent to the terms of the undertaking they cannot be released on undertaking and must be kept in custody for court on the next lawful day.

Examples of further conditions include the following:

- not to approach or communicate with a witness
- not to enter a particular street or area
- to reside at a different address
- not to have contact with any person under 16 years of age
- not to enter within a certain distance of a sports ground within a certain time period before and after a sporting event
- to report to a police office at certain times
- a curfew condition

This list is not comprehensive and there may be a variety of conditions which might be appropriate in the specific circumstances of a case.

Relevant victims and witnesses should be advised that a person is to be liberated on undertaking and of the details of any conditions imposed. They should also be updated about any changes in conditions as a result of modification by the PF or review by the Sheriff.

The date of the appearance at court should be within 90 days of liberation, or otherwise in accordance with agreements between Police Scotland, COPFS and the Scottish Courts and Tribunals Service (SCTS). The 90 day undertaking period also applies in respect of domestic abuse offences.

Police officers must have regard to the terms of the Domestic Abuse Protocol when considering liberation on undertaking for persons charged with domestic abuse offences. Whilst there is a general presumption to liberty, the Protocol sets out the criteria to be considered in each case which must be considered in conjunction with these guidelines. Given the particular risks associated with domestic abuse cases, in some cases it will be both reasonable and necessary to hold an accused person in custody pending the submission of a report to the Procurator Fiscal.

Where it is proposed to release a suspect in a domestic abuse case on undertaking, consideration must be given to imposing appropriate further conditions of undertaking, having regard to risk and safety considerations. Account should be taken of the views of the victim or witness, particularly in respect of any conditions which might be appropriate. Every effort should be made to ensure that victims are advised that a suspect is to be released, and advised of any conditions of undertaking, before the suspect is in fact released.

Submission of SPR

The Standard Prosecution Report (SPR) must be submitted to the Procurator Fiscal as soon as possible and in accordance with the following timescales:-

- Within 14 days of liberation for all domestic abuse cases
- Within 28 days of liberation for all other cases (although earlier reporting for other sensitive cases, e.g. stalking, sexual offences, is recommended)

A copy of the signed undertaking form must be submitted along with the report.

The SPR should clearly indicate the court and time at which the accused must appear on the undertaking. Any conditions attached to the undertaking must be clearly specified in the report and the identity of the officer who authorised the special conditions must also be clearly specified.

Modification of undertaking conditions

Once a person has been released on undertaking, the terms of the undertaking can only be modified by the Procurator Fiscal: the police have no power to amend the terms of the undertaking. However the Procurator Fiscal cannot impose a more stringent condition than that imposed by the police.

Review of undertaking conditions

A person released on undertaking with further condition(s) may seek a review of the condition(s) by the sheriff. However they cannot seek a review of a condition not to commit an offence, interfere with witnesses or behave in a manner causing alarm or distress to witnesses. Officers should record the reasons for any further condition being imposed and why it was felt that such a condition was necessary and proportionate.

Breach of undertaking conditions

A person liberated on undertaking commits an offence if they:

- fail to appear at court as required by the undertaking; or
- fail to comply with any other condition of the undertaking

Any breach of an undertaking condition must be reported to the Procurator Fiscal at the earliest opportunity. The status of the accused in relation to the reported breach should be determined with reference to the guidance on Officially Accused Persons.

Where an undertaking is breached by the commission of another offence, the new offence will be aggravated by the fact that it was committed whilst the person was subject to an undertaking and that aggravation should be libeled as part of the charge for the new offence.

CHILDREN

Children can be released on investigative liberation and undertakings. However the necessity and proportionality of imposing conditions on a child must be considered

carefully before applying any liberation condition to a child. Full and detailed reasoning for the imposition of such conditions must be recorded.

30 March 2020

(Covid-19 revised version 02)