

THE APPOINTED LAWYER SCHEME

DECEMBER 2021

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THE LAW SOCIETY
OF NEW SOUTH WALES

The Appointed Lawyer Scheme

The Appointed Lawyer Scheme (**the Scheme**) is established under the [Australian Security Intelligence Organisation Act 1979](#) (the ASIO Act).

Lawyers seeking to participate in the Scheme are advised to read the conditions of appointment carefully.

Executive Summary

The Law Society has identified a number of issues that arise and provides the following guidance to assist members to maintain their ethical obligations whilst participating in the Scheme:

- Lawyers participating in the Scheme should note that breaches of the ASIO Act could result in the member being charged with a criminal offence;
- There are limitations on the contact/interaction between the Appointed Lawyer and the Subject;
- The contact between the Appointed Lawyer and the Subject can be monitored (issues of client confidentiality and privilege may need to be considered);
- The Appointed Lawyer cannot intervene in the questioning except to request clarification and breaks; which may inhibit full and frank disclosure (consider the fulsomeness of instructions received and whether the Subject fully appreciates their legal rights) and
- Secrecy provisions operate.

Other issues that require careful consideration include:

- (a) The operation of initial constraints of appointment and the impact this may have on the ability to properly establish a client-lawyer relationship;
- (b) The constraints on the role the lawyer may ordinarily play;
- (c) The impact on the lawyer's duty of confidentiality;
- (d) The heightened risks with the provision of any undertakings by the lawyer; and
- (e) The complexities of acting for children or minors.

Background

During the Parliamentary scrutiny of the originating Bill in 2021, the Law Council of Australia raised several concerns about limitations on the role of lawyers for questioning warrant subjects. This included the significant limitations on the ability of lawyers to effectively represent and act in the best interests of their clients during questioning, particularly in the case of post-charge questioning.

This is in sharp contrast to the role of lawyers in compulsory questioning conducted in other contexts, including by the Australian Criminal Intelligence Commission as part of compulsory 'examinations' in which lawyers for the subjects are not prohibited from raising objections and otherwise participating fully in questioning.

The Law Council also raised concerns about a lack of transparency in the statutory arrangements governing the appointment of a pool of lawyers. This included a lack of statutory arrangements to ensure that persons appointed to the pool have expertise in criminal defence work, and to prevent actual or perceived conflicts of interest from arising, including by reason of the lawyer's employment or retention by the Commonwealth in other matters.¹

[Prescribed Authority \(PA\)](#) is one appointed by the Attorney-General and is independent of ASIO and the Government and includes a Judge or a retired Judge of a superior court, a president or deputy president of the Administrative Appeals Tribunal and Queens or Senior Counsel.

[Subject](#) is used to describe an individual subject to a Warrant.

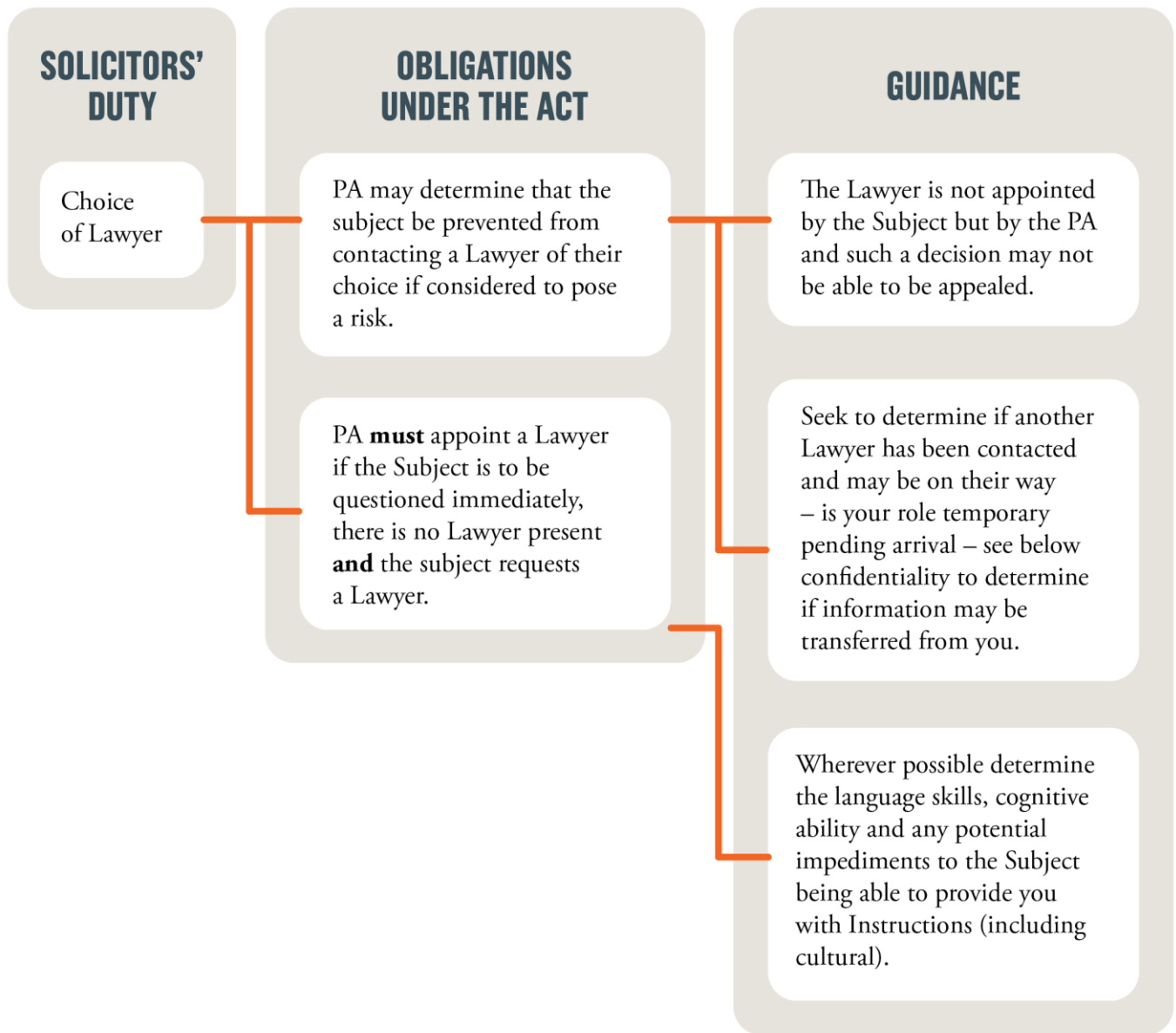
Participants should note that the framework of representation of the Subject is regulated and as such controls the client-Lawyer relationship in that active participation on behalf of the Subject is also subject to the discretion of the PA who can make a determination as to the behaviour of the Lawyer as 'disruptive' with the potential for consequential removal from the appointment. The following guidance is provided for Lawyers seeking to participate in the Scheme and only seeks to identify some of the considerations relevant to the appointment.

Resources available at:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6554%22>

¹ (See further: Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Australian Security Intelligence Organisation Amendment Bill 2020, 3 July 2020, 69-76 at [280]-[309].)

Choice of lawyer



Lawyers should be cognizant of some initial constraints of appointment and the impact this may have on the ability to properly establish a client-lawyer relationship either by virtue of time or lack of trust. This latter arises from the Subject not being able to have their ‘choice of lawyer’ present and the Subject potentially not regarding the Appointed Lawyer as impartial.

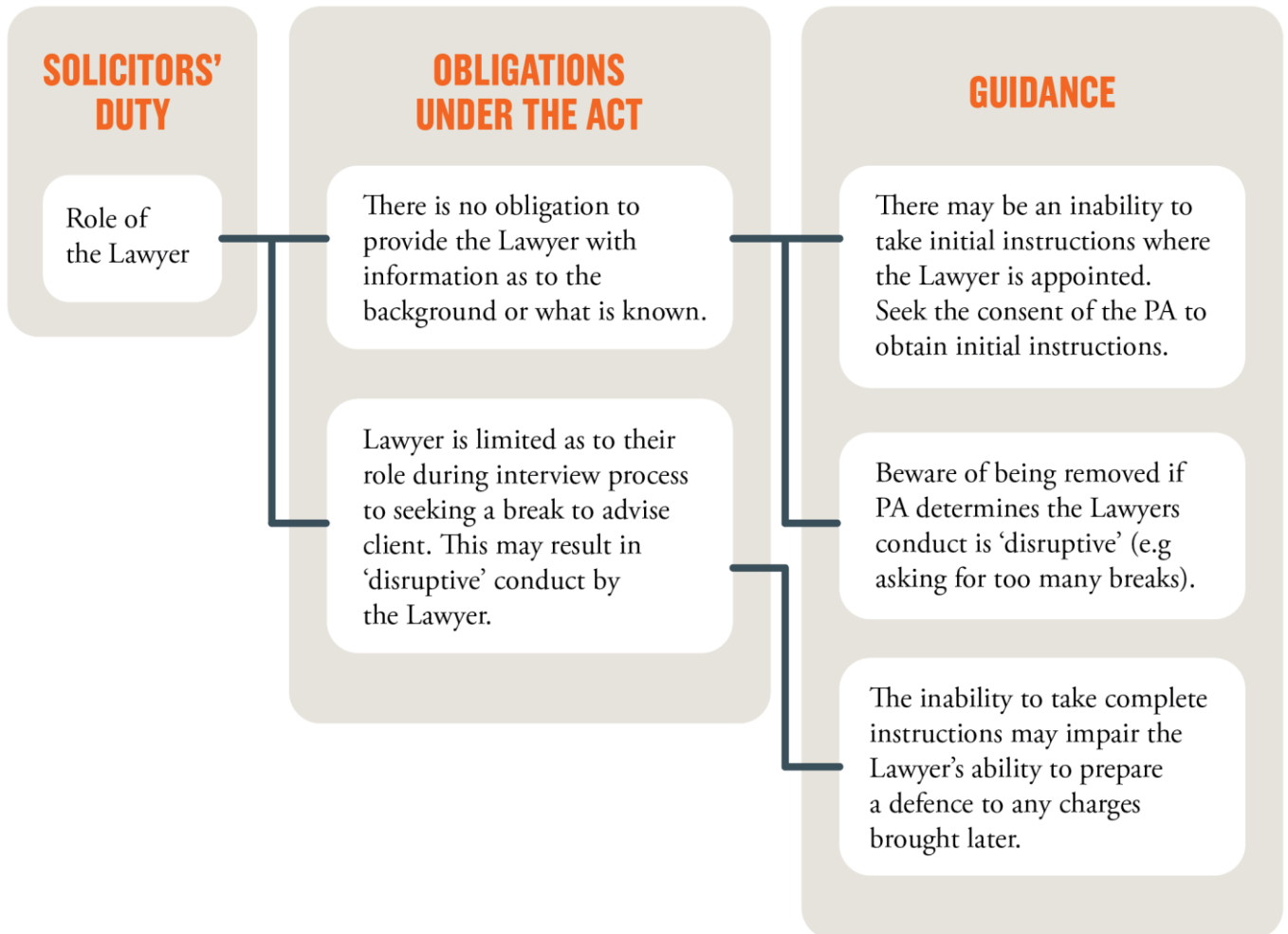
Lawyers may be appointed to assist Subjects in the contents of post charge or imminent charge questioning and may need to advise their clients about the abrogation of self-incrimination privilege in respect of their compulsion

to answer questions about the subject matter of an unresolved or imminent charge, and the process by which such questioning material can be disclosed to law enforcement.

Choice of Lawyer is at the discretion of the PA not the Subject, however the Lawyer can decline to act.

Whilst the Lawyer may seek a copy of the Warrant, it may contain certain redactions so the Lawyer may not be able to fully advise the Subject as to the full scope of the Warrant and any implications – noting that self-incrimination is not available as a defence.

The role of the Lawyer



A Lawyer must not intervene in the questioning or address the PA during questioning, except to:

- request clarification of an ambiguous question, or
- request a break in questioning to provide advice to the Subject.

The ability of the Lawyer to ask for clarification or seek a break is not unfettered and is at the discretion of the PA.

While the Lawyer for a questioning Subject is limited in their ability to participate in proceedings (only requesting breaks and seeking clarification of ambiguous questions), they can raise concerns about questioning with the IGIS (or representative) if present. If the IGIS or representative raises a concern with the Prescribed Authority, the latter must pause questioning to consider the issue.

‘Unduly disruptive’ is undefined and it is at the discretion of the PA to make such determination. There is no appeal from that decision and the Subject may not be able to appoint another Lawyer due to time or other constraints.

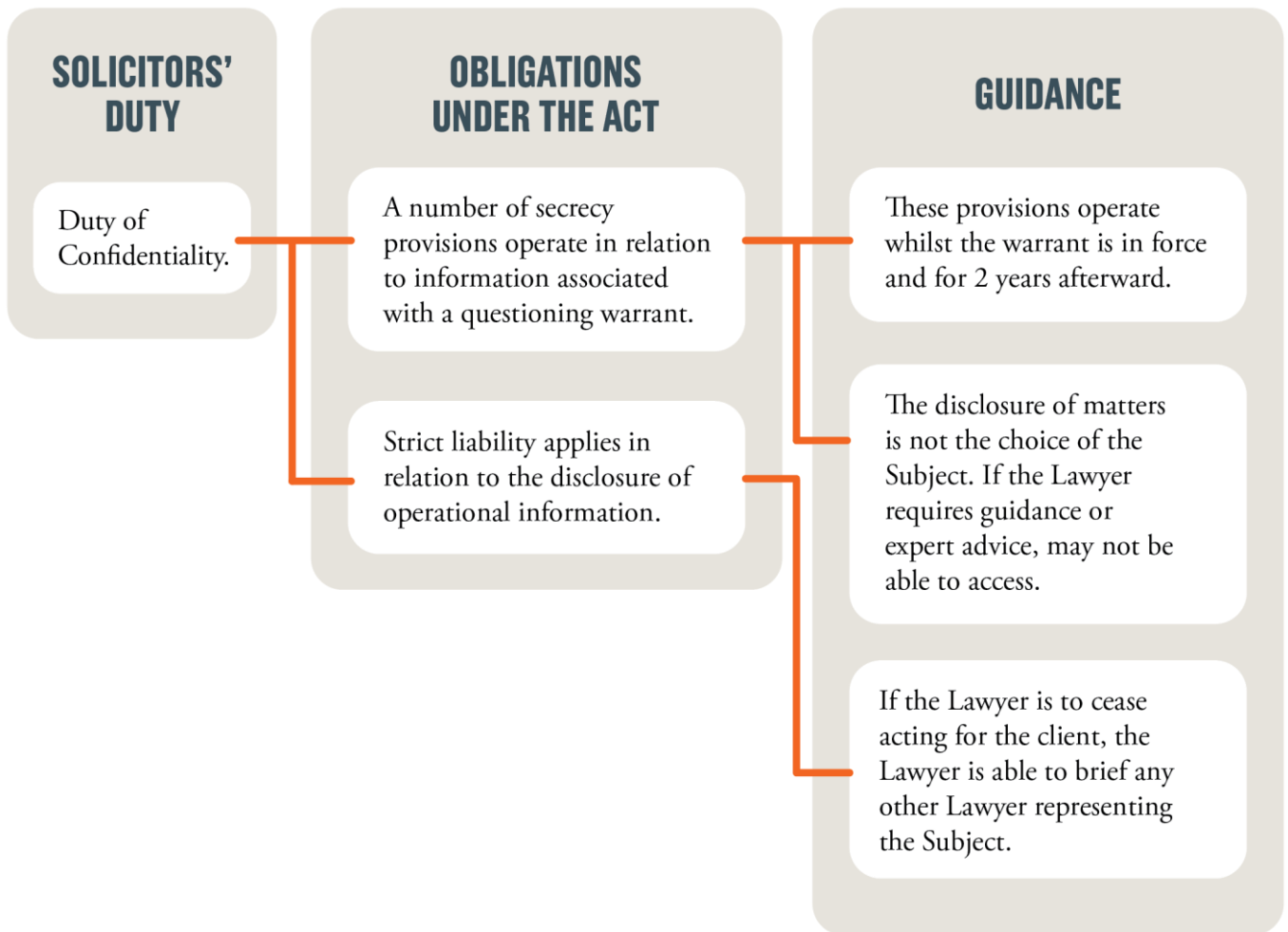
The Lawyer does not have unrestricted access to the Subject and some of the matters on which the Lawyer would ordinarily advise the Subject are undertaken by the PA prior to the Lawyer being present.

The Lawyer can request a copy of the warrant, and this may be granted by the Director-General of Security, subject to redactions on security or privacy grounds, at the discretion of the Director-General. If the Lawyer considers that the redactions render it impossible to provide advice to their client on a matter, it would be open to them to raise the matter with the Director-General or representative, or the Inspector-General of Security (potentially by way of complaint). However, there is no formal right of review (noting ASIO’s administrative decisions in relation to warrants are excluded from statutory judicial review).

The warrant Subject may also seek to engage a lawyer (possibly the appointed Lawyer, or another lawyer) to commence proceedings seeking a remedy relating to the issuance or execution of a warrant, including their treatment during questioning. The ASIO Regulations 2016 regulate lawyers’ access to that information².

² see reg 8, made under s 34FG of the ASIO Act

Duty of confidentiality



The duty of confidentiality to the Subject is affected by obligations to ASIO; albeit that Legal Professional Privilege is specifically stated not to be affected.

One cannot obtain the 'informed consent' of the Subject, as it were, to release information. Therefore, if the Lawyer is appointed in a second matter to which information from another matter is known, the Lawyer cannot seek the informed consent of the former client to disclose to the current client.

There is a procedure whereby the Subject contacts a Lawyer and the Subject's chosen Lawyer arrives at questioning in circumstances where a Lawyer has been appointed for the Subject in the interim (irrespective of whether the Subject has been required to attend immediately).

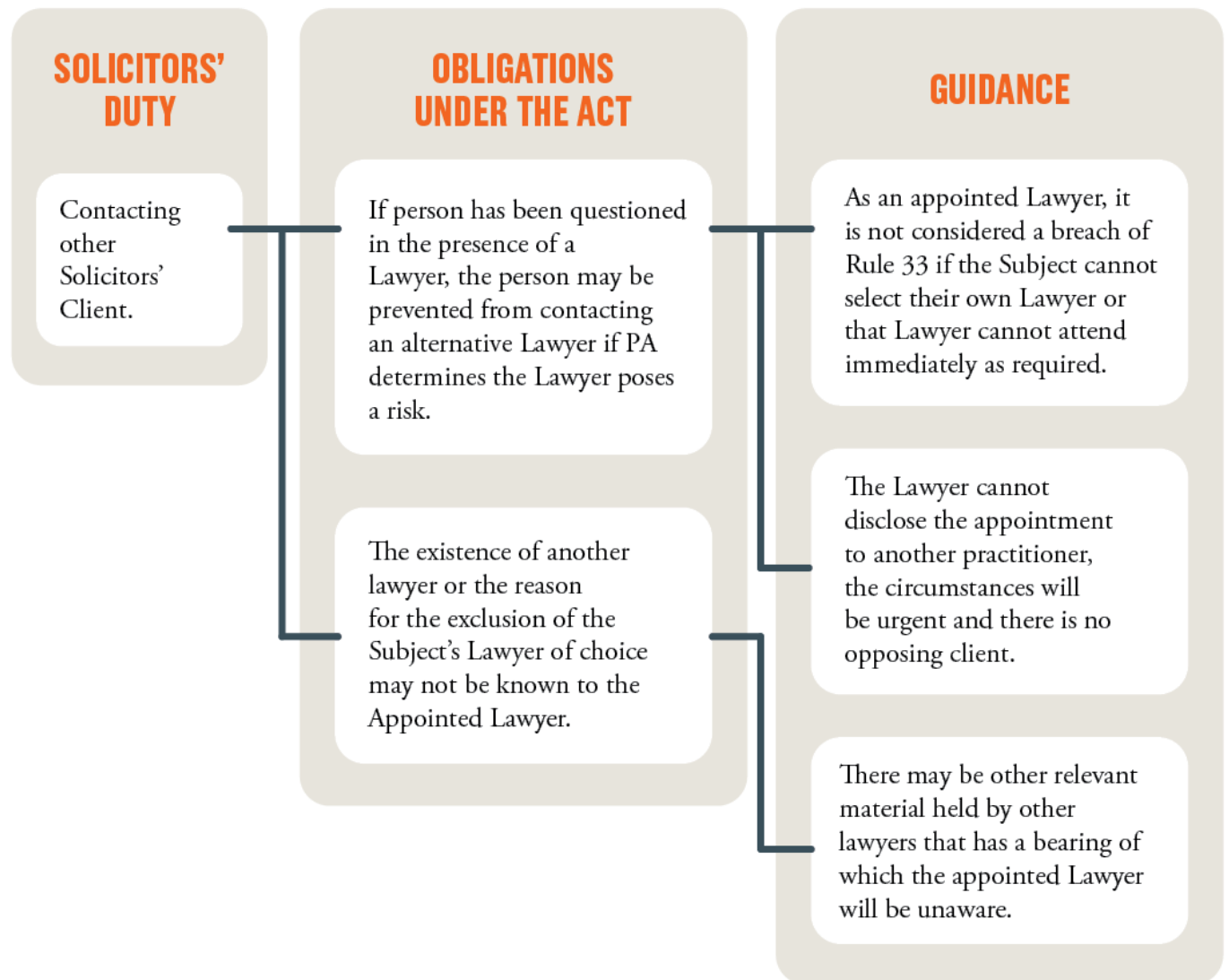
In those circumstances, the PA must direct that questioning be deferred for a reasonable period to enable the appointed Lawyer to brief the Lawyer of choice and for the Lawyer of choice to then provide advice to the Subject.

To ensure that the appointed Lawyer is permitted to leave, the PA must also revoke the directions appointing the Lawyer and requiring their presence at questioning.

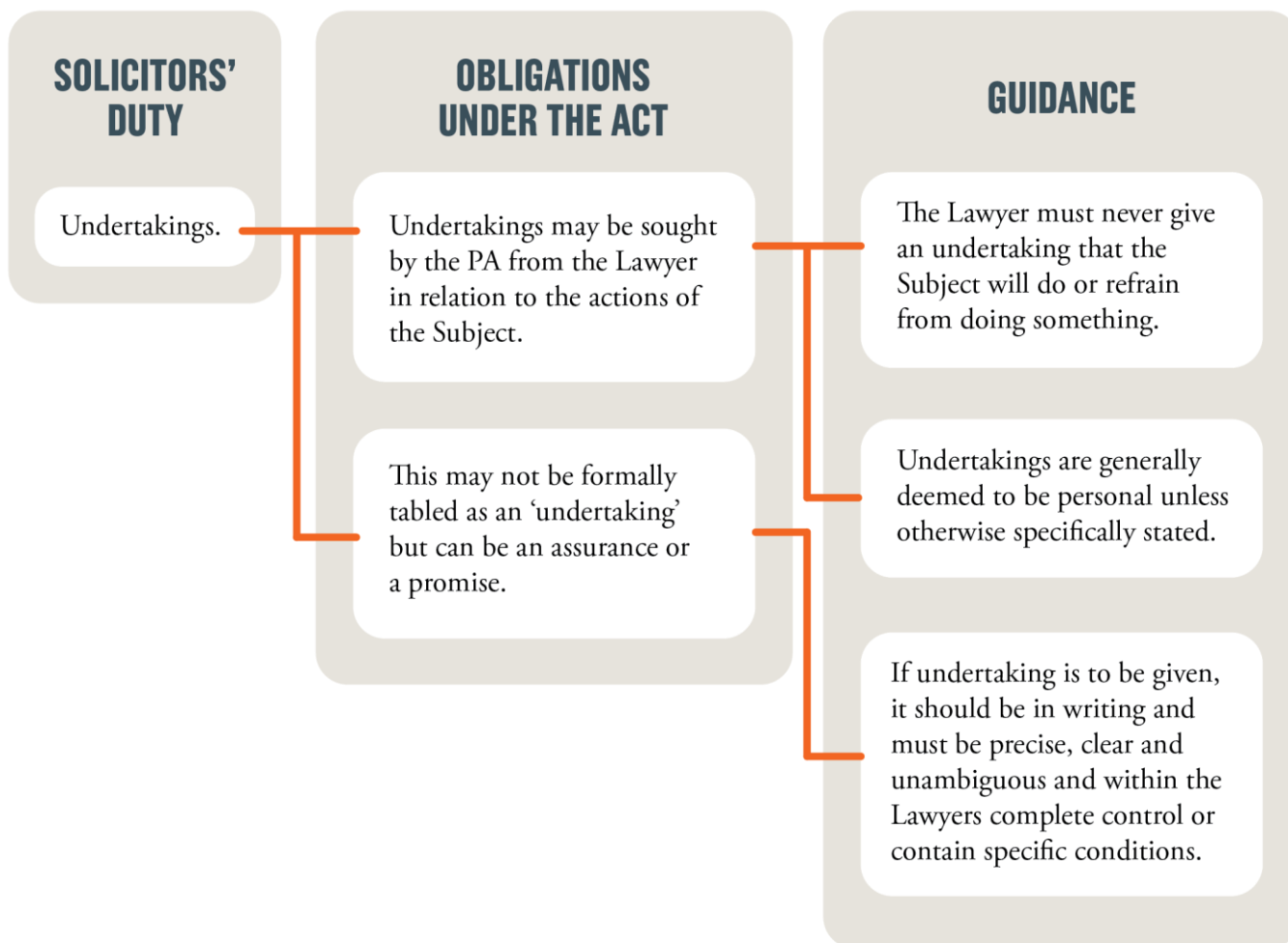
ASIO cannot monitor confidential lawyer-client communications at the place of questioning, such as during breaks in questioning (in contrast to the previous scheme whereby this was explicitly permitted). (However, it is possible that ASIO could seek a separate covert surveillance warrant to do so.)

As noted above, a Subject's privilege against self-incrimination in relation to information or requested by ASIO in a warrant is expressly abrogated and there are specific limitations that apply in the manner in which responses etc can be used.

Contacting another Solicitor's client

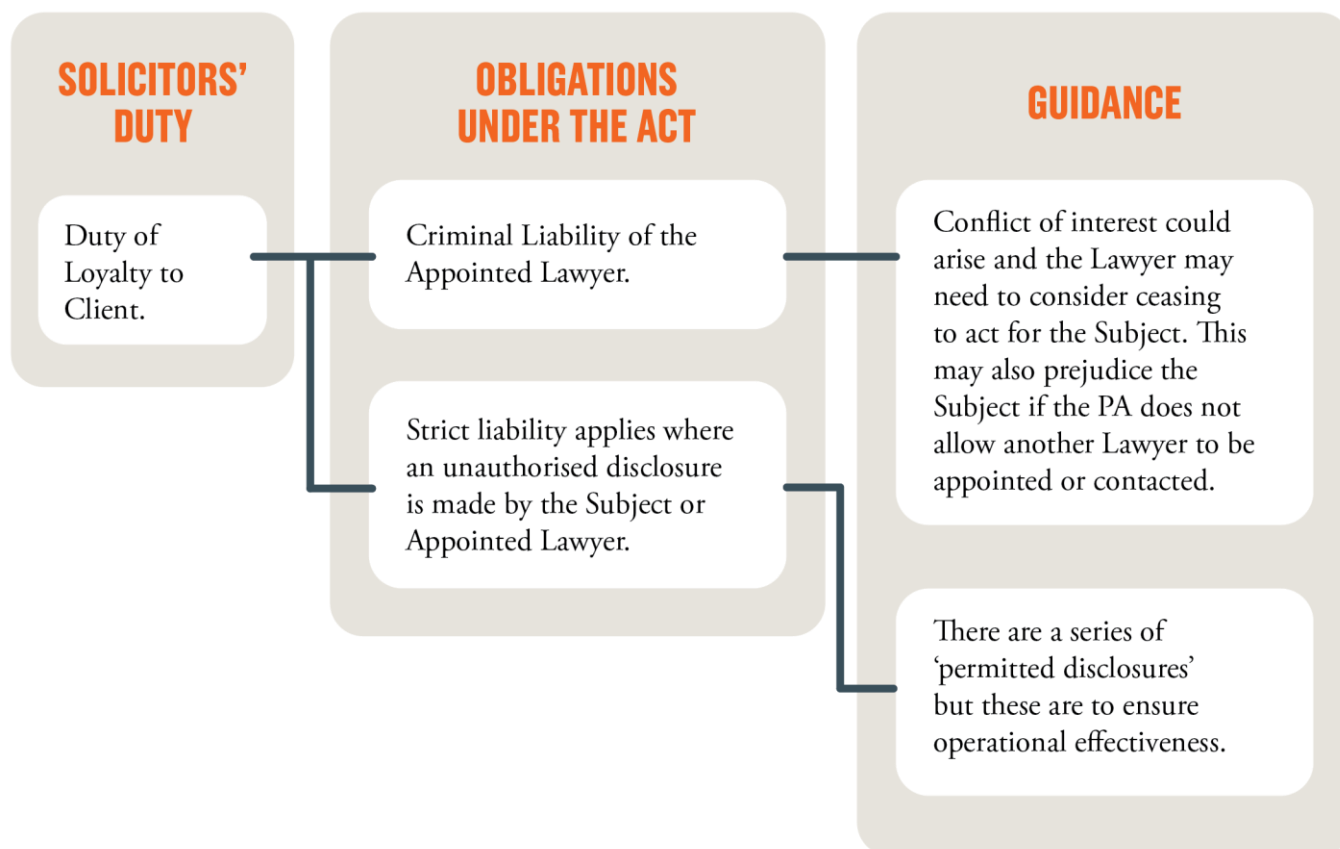


Providing undertakings



The law (Rule 6 of Solicitors Conduct Rules) provides for strict compliance with undertakings by Lawyers and any breach of an undertaking can have extremely serious consequences including adverse disciplinary findings for a Lawyer.

Duty of loyalty to a client

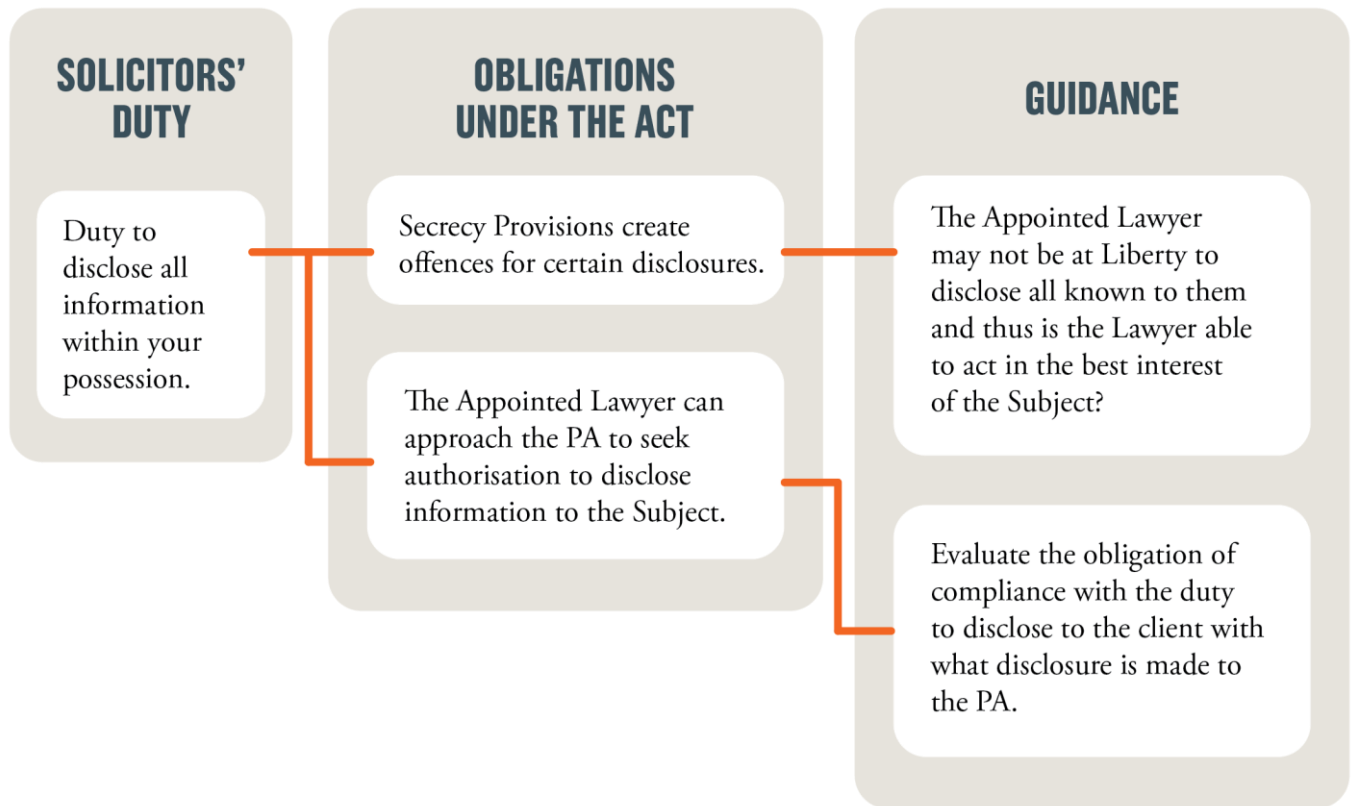


A lawyer must never act where their own interest conflict with their client's interests. The Act imposes obligations on the Appointed Lawyer personally which may create such a conflict.

One of the permitted disclosures is of course that made to a Lawyer for the purpose of obtaining legal advice or legal representation in relation to the warrant.

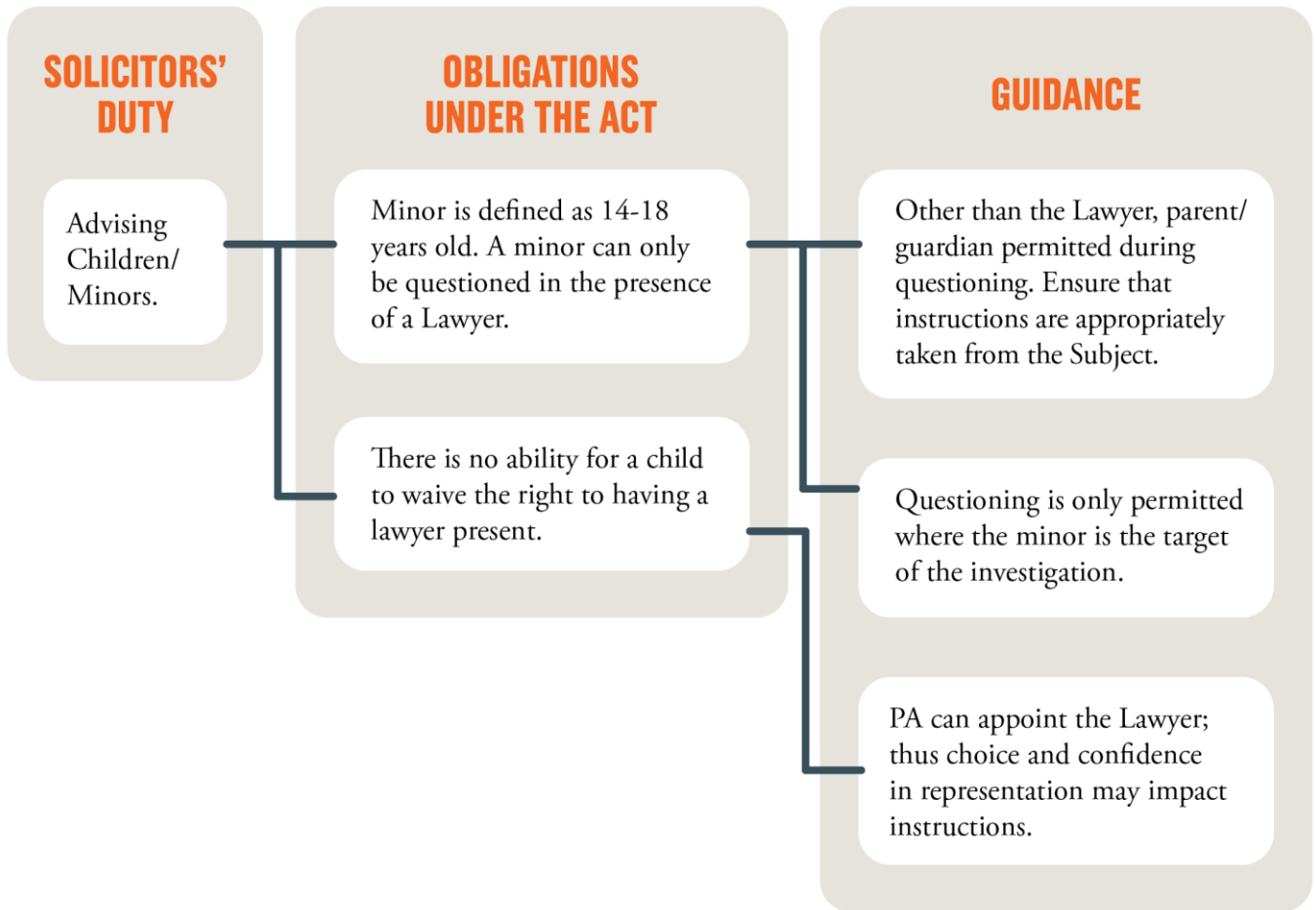
Strict liability applies to the circumstances where the unauthorised disclosure is made by the Subject or the Appointed Lawyer. This means the Appointed Lawyer needs to be cognizant at all times if information is to be disclosed as there is no need to prove fault in relation to the disclosure of information where it relates to the 'issuance' or 'content of the warrant' or is 'operational information'.

Disclosure of information



The issue is one of being able to share all that the Appointed Lawyer knows solely for the benefit of the client may be compromised by virtue of having to seek the permission of the PA in the first instance. This may also become relevant where the Appointed Lawyer has acted in other such appointed situations.

Children and minors

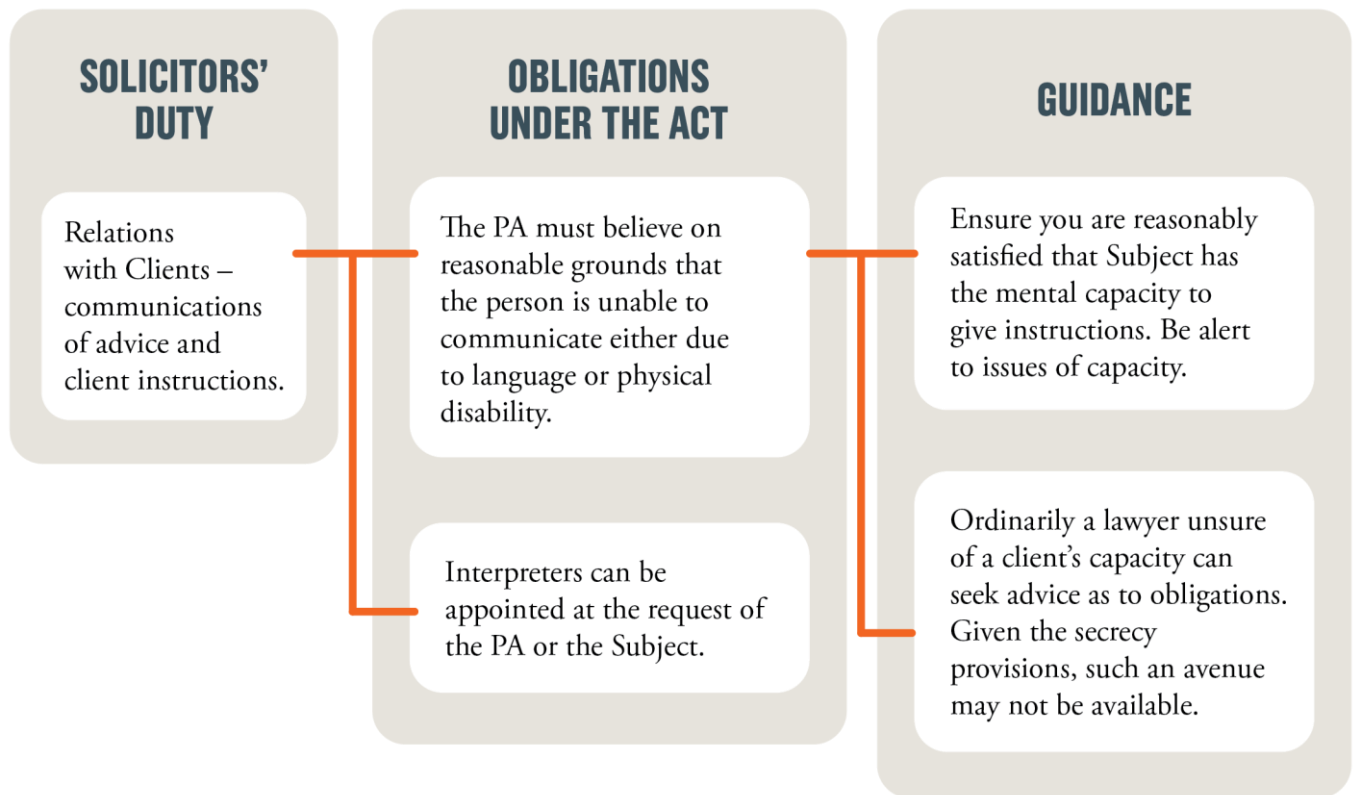


Issues for consideration and clarification include the disclosure of information by the Lawyer to the parent who is not present during questioning.

Special considerations may arise in the case of an unaccompanied minor, who may not have a parent or guardian or other person present to monitor their wellbeing during questioning (only their lawyer). It may fall to the Lawyer to raise issues pertaining to the child's wellbeing in those circumstances

No comparison is made with the role of an Independent Children's Lawyer as the construct here is different.

Capacity



Take time to assess capacity and comprehension. Ensure the obligation on the PA to explain various matters is appropriately discharged.