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| ONR GUIDE | | | |
| **Interviewing Suspects – Guidance for ONR Inspectors in Great Britain**  **THIS GUIDE HAS BEEN WITHDRAWN**  **Email onr.operational.investigation@onr.gov.uk for support and guidance** | | | |
| **Document Type:** | ONR Enforcement Guide | | |
| **Unique Document ID and Revision No:** | ONR-ENF-GD-008 Revision 3 | | |
| **Date Issued:** | September 2020 | **Review Date:** | September 2023 |
| **Prepared by:** |  | Principal Inspector | |
| **Approved by:** |  | Professional Lead – Operational Inspection | |
| **Record Reference:** | CM9 Folder 1.1.3.976. (2020/270380) | | |
| **Revision commentary:** | Version 1: Minor update to reflect purchase by ONR of NEAL recorders.  Version 2: Update and retitle to reflect guidance on interviewing suspects in Scotland.  Version 3: Instruction to contact a PACE Trained ICT Inspector before using PACE legislation | | |

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Published 10/20

1. INTRODUCTION

When investigating a duty holder you need to be mindful of the difference between a witness and a suspect, and the administrative law that must be followed to ensure that the information provided by the witness or suspect is collected in such a way that it may later be used in legal proceedings. A witness or a suspect can be a legal entity, for example, an individual; a partnership; a limited liability partnership; incorporated bodies or unincorporated associations; trusts; charities. The employment status of the individual can also be important.

1. PURPOSE AND SCOPE

This guide is not a replacement for adequate training. Rather, it is intended to supplement that training and remind investigators of points salient to ONR.

Investigators should not consider embarking on interviewing suspects unless they are deemed competent by ONR to do so.

The ONR guide ONR-ENF-GD-007 ‘Witness statement taking’ 1 provides guidance about witnesses, interviewing them, and collecting and retaining the material they can provide. The purpose of this guide is to concentrate on suspects and properly record the information they give. It covers processes in Scotland, England and Wales.

This ONR Guide is based on the legislation and guidance available at the time of its issue. The user should always check they are meeting the latest versions of legislation and practice.

The appendices to this guide contain useful letters to aid the interview process.

1. whO is a witness and whO is a SUSPECT?

Black’s Law dictionary ninth edition (2009) defines a witness as ‘one who sees, knows or vouches for something. One who gives testimony under oath or affirmation, in person, by oral or written deposition or by affidavit’. For ONR’s purposes, a witness is a person who is likely to provide information during preliminary enquiries and investigations.

Oxford Dictionary of English third edition (2010) defines a suspect as ‘a person thought to be guilty of a crime or offence’.

The definitions above seem quite black and white, however in practice they are not.

During their work, inspectors will interact with people who provide information. Sometimes that information will lead the inspector to consider whether there has been a failure to meet the required standards. Those interactions do not always lead the inspector to consider an investigation as described in ONR-ENF-GD-005 ‘Process for Conducting Investigations’ 2. In the main, it is for those matters that are covered or referred to in reference 2 that lead to preliminary inquiries and investigations where the issue of the difference between a witness and a suspect becomes important.

When carrying out preliminary enquiries investigations, inspectors may find themselves interviewing those who they consider witnesses, but who in fact may have committed an offence; in this position the following guidance (reference 3, paragraph 2.220) is relevant:

‘Any decision on an appropriate course of action will involve taking into account the seriousness of the crime admitted and weighing it against the seriousness of the crime under investigation.’

It may be that the inspector decides to treat someone as a witness for the investigation of a crime, and then return to them to interview them further about that or another crime they might have admitted to, treating them that time as a suspect.

The remainder of this guide addresses when the inspector is interviewing a person as a suspect, and the procedures they must follow to ensure that information collected is collected in accordance with the relevant legislation.

1. whether to interview a suspect

Section 11A of Code C of the Police and Criminal Evidence (PACE) Codes of Practice 4 describes an interview with a suspect as:

‘… the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences which, under paragraph 10.1, must be carried out under caution.’

As seen later, descriptions and procedure are broadly the same across the two Great Britain jurisdictions when interviewing suspects.

Paragraph 10.1 states,

“a person whom there are grounds to suspect of an offence, see *Note 10A,* must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if either the suspect’s answers or silence, (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. A person need not be cautioned if questions are for other necessary purposes, e.g.:

(a) solely to establish their identity;

(b) to obtain information in accordance with any relevant statutory requirement,

or

(c) to seek verification of a written record.”

Note 10A says:

“There must be some reasonable, objective grounds for the suspicion, based on known facts or information which is relevant to the likelihood the offence has been committed and the person to be questioned committed it.”

The investigator may decide that it is beneficial to interview a suspect about their involvement. But the investigator may also believe that they have already collected sufficient material which they could introduce at court to have a realistic prospect of conviction (see ONR guidance ‘The role of the Approval Officer in Enforcement’ Decisions ONR-ENF-GD-20 5). The question then is, do they *need* to interview the suspect?

There is no express legal requirement that a person suspected of having committed an offence must be interviewed under caution before any decision as to whether to prosecute is taken. However, 11.6(a) of reference 4 makes it clear that investigators have a duty to allow a suspect the opportunity to answer the allegations against them and give their own account before a decision on prosecution is made. Whether this should be via an interview or by providing the opportunity to make a written submission will be subject to the circumstances of each investigation.

1. Legislation relevant to Great Britain

Whoever the person an investigator is speaking to has rights.

Investigators must act fairly when questioning victims, witnesses or suspects. They must ensure that they comply with all the provisions and duties under the Equality Act 2010 6 and the Human Rights Act 1998 7. Guidance on both Acts can be found on The Equality and Human Rights Commission’s website 8.

Acting fairly means that the investigator must not approach any interview with prejudice. The interviewer should be prepared to believe the account that they are given but use common sense and judgement rather than personal beliefs to assess the accuracy of what is being said.

People with clear or perceived vulnerabilities should be treated with particular care, and extra safeguards should be put in place. Interviewing vulnerable persons will be considered later in this guide.

1. the Key legislation and guidance relevant in england and wales

**The Police and Criminal Evidence Act 1984**

The Police and Criminal Evidence Act 1984 (PACE) (1984 c. 60) 9 is an Act of Parliament which provides a legislative framework for the powers of police officers in England and Wales to combat crime and provides codes of practice for the exercise of those powers. The aim of PACE is to strike a balance between the powers of the police in England and Wales and the rights and freedoms of the public. PACE was brought in following recommendations set out by the Royal Commission on Criminal Procedure, which followed the Brixton Riot of 1981. A key causative element of the riot was the disproportionate and indiscriminate use of 'stop and search' powers by the police.

Although PACE is a fairly wide-ranging piece of legislation, it mainly deals with police powers to search an individual or premises, including their powers to gain entry to those premises, the handling of exhibits seized from those searches, and the treatment of suspects once they are in custody, including being interviewed.

Two sections of PACE are of relevance to the work of ONR Investigators.

Section 66 says the following:

“**Codes of practice**.

The Secretary of State shall issue Codes of Practice in connection with- …

(b) the detention, treatment, questioning and identification of persons by police officers.”

Section 67 says the following:

“**Codes of practice - supplementary**.

…

(9)   Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of a code.

…

(11)   In all criminal and civil proceedings any code shall be admissible in evidence; and if any provision of a code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.”

ONR and its officers are people who should have regard to the PACE Codes.

The High Court has found that the duty “to have regard to” guidance requires that guidance to be taken into account, and for there to be “clear” reasons for any departure from it, but that it does not go so far as to require a “compelling justification” for a departure 10.

**PACE Codes of Practice, Codes C and E**

The Secretary of State has issued eight Codes of Practice under Section 66 of PACE. Only PACE Codes C 4 and E 11 are relevant to the ONR investigator when interviewing suspects. The admissibility of PACE Codes as evidence in criminal proceedings means they have the same status as Approved Codes of Practice (ACoP) created under the Health and Safety at work etc. Act 1974. The PACE Codes, like an ACOP, include other information, known as Notes. (*The Notes are written in italics.)* The Notes for Guidance included are not provisions of the Codes. They form guidance about their application and interpretation.

PACE Code C lists the requirements for the detention, treatment and questioning of suspects not related to terrorism in police custody by police officers. It includes the requirement to explain a person’s rights while detained and the requirement to explain the rights of a person who has not been arrested that apply to a voluntary interview; the latter element is particularly relevant. The current version of PACE Code C was issued in August 2019. Investigators should always refer to the current version when conducting interviews with suspects.

PACE Code E lists the requirements for audio recording of interviews with suspects. Whilst interviews can be recorded visually or by handwriting, audio recording is the preferred method when facilities and equipment are available. The current version of PACE Code E was issued in July 2018.

Both PACE Codes C and E must be available during an interview with a suspect.

This guide considers the material above, and then reflects the differences in Scotland (which are small). We now consider those parts of PACE Codes C and E which are relevant to the work of ONR in England and Wales.

1. relevant parts of code c

**When to conduct an interview**

The first point to note is that an interview is not with a suspect unless:

* There are reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood the offence has been committed and the person to be questioned committed it, and
* The intention is to ask them questions about that offence

Because a person was previously interviewed as a suspect, that does not make the record of their interview ‘evidence’. If evidence is required from them, then they must have their statement taken as ‘a witness’.1

Even if there are reasonable, objective grounds to suspect a person of an offence, the investigator can talk to them about other matters. However, if there is an intention to ask them questions about that offence *for the purposes of collecting evidence*, then the person must be cautioned.

An interview is the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences. The interview can only start once they are cautioned (unsolicited comments are considered later in this guide).

In order to help ensure that the relevant parts of the PACE Codes that consider a voluntary interview with a suspect are adhered to, the investigator should use the resources found in the annexes to this guide.

Prior to being interviewed, a person and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it in order to allow for the effective exercise of the rights of the defence. However, whilst the information must always be enough for the person to understand the nature of any offence, this does not require the disclosure of details at a time which might prejudice the criminal investigation. The decision about what needs to be disclosed for the purpose of this requirement therefore rests with the investigator who has enough knowledge of the case to make that decision. A record of the information disclosed and when it was disclosed must be made and kept to prevent the possibility of later challenge (see R v. Ali Hersi Roble [1997] 12).

**The solicitor**

As indicated above, a suspect is entitled to have representation if they are to be interviewed. If they were being interviewed by the police, then they would have the right to have free, independent advice provided for them. However, note 3J of PACE Code C has the following to say about organisations such as ONR:

*For voluntary interviews conducted by non-police investigators, the provision of legal advice is set out by the Legal Aid Agency at paragraph 9.54 of the 2017 Standard Crime Contract Specification (reference 13). The rules mean that a non-police interviewer who does not have their own statutory power of arrest would have to inform the suspect that they have a right to seek legal advice if they wish, but payment would be a matter for them to arrange with the solicitor.*

**Vulnerable persons**

PACE Code C describes the protections that must be in place if it becomes necessary to interview a vulnerable person. The Code describes a vulnerable person as any person who, because of a mental health condition or mental disorder:

1. may have difficulty understanding or communicating effectively about the full implications for them of any procedures and processes connected with the exercise of their rights and entitlements
2. does not appear to understand the significance of what they are told, of the questions they are asked or of their replies
3. appears to be particularly prone to:

* becoming confused and unclear about their position;
* providing unreliable, misleading or incriminating information without knowing or wishing to do so;
* accepting or acting on suggestions from others without consciously knowing or wishing to do so; or readily agreeing to suggestions or proposals without any protest or question.

A person may be vulnerable as a result of having a mental health condition or mental disorder. Similarly, simply because an individual does not have, or is not known to have, any such condition or disorder, does not mean that they are not vulnerable for the purposes of an interview. It is therefore important that the person investigating the offence considers on a case by case basis, whether any of the factors described in the paragraph above might apply to the person in question. In doing so, the investigator must take into account the particular circumstances of the individual and how the nature of the investigation might affect them.

The Mental Health Act 1983 Code of Practice 14 at page 26 describes the range of clinically recognised conditions which can fall with the meaning of mental disorder for the purpose of paragraph 7.6.

Investigators are minded that those involved in an incident may need to be treated as a vulnerable person because of the events they have witnessed, participated in, or have knowledge of.

If there are grounds to suspect that the persons who the investigator wishes to interview about a suspected offence are vulnerable, then the guidance found *at Annex E of PACE Code C must be followed where appropriate.*

**Interpreters**

ONR is responsible for providing appropriately qualified independent persons to act as interpreters and to provide translations of essential documents. ONR addresses this responsibility by having arrangements with HSE to access their services. Further guidance is found in ONR-ENF-GD-013 – Witness statement taking 1.

A suspect who requires an interpreter because they do not appear to speak or understand English must not be interviewed unless arrangements are made for a person capable of interpreting to assist the suspect to understand and communicate.

When a written record of the interview is made (see later in this guide), the interviewer shall make sure that the interpreter makes a note of the interview at the time in the person’s language for use in the event of the interpreter being called to give evidence, and certifies its accuracy. The interviewer should allow enough time for the interpreter to note each question and answer after each is put, given and interpreted. The person should be allowed to read the record, or have it read to them and sign it as correct or indicate the respects in which they consider it inaccurate.

In the case of a person making a statement under caution (see later in this guide) to an ONR investigator in a language other than English:

(a) the interpreter shall record the statement in the language it is made;

(b) the person shall be invited to sign it;

(c) an official English translation shall be made in due course.

Where a suspect requires an interpreter or other appropriate assistance to enable effective communication with them because they appear to have a hearing or speech impediment, they must not be interviewed without arrangements having been made to provide an independent person capable of interpreting or of providing other appropriate assistance. In these circumstances IRG should be contacted for advice.

If translation services in the circumstances described in the paragraph above are required, then IRG should again be contacted.

**The interview**

The interview should, wherever possible, be carried out at a location which has a PACE room. The PACE room should be laid out so that, where possible, it meets the Home Office requirements for such facilities.

As mentioned above, the interview cannot commence until the suspect is cautioned. (If there is a break in the interview then upon its resumption the suspect must be reminded that they are still under caution.)

The caution should be given in the following terms:

“You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.”

Where the use of the Welsh Language is appropriate, the investigator may provide the caution directly in Welsh in the following terms:

“Does dim rhaid i chi ddweud dim byd. Ond gall niweidio eich amddiffyniad os na fyddwchchi’n sôn, wrth gael eich holi, am rywbeth y byddwch chi’n dibynnu arno nes ymlaen yn y Llys. Gall unrhyw beth yr ydych yn ei ddweud gael ei roi fel tystiolaeth.”

[If the investigator is not fluent in the Welsh language, then HSE Interpretation and Translation Services should be used as previously noted.]

Minor deviations from the words of any caution given in accordance with PACE Code C do not constitute a breach of the Code, provided the sense of the relevant caution is preserved.

The specialist PACE trained ICT Inspector conducting the interview must be prepared to explain the caution in their own words if it appears a person does not understand the caution. Where an interpreter is required, the interpreter should also make such preparations.

The following extracts from part 11 of PACE Code C are relevant:

* At the beginning of an interview, the interviewer, after cautioning the suspect, shall put to them any significant statement or silence which occurred in the presence and hearing of an ONR inspector before the start of the interview and which have not been put to the suspect in the course of a previous interview. The interviewer shall ask the suspect whether they confirm or deny that earlier statement or silence and if they want to add anything.
* A significant statement is one which appears capable of being used in evidence against the suspect, in particular a direct admission of guilt. A significant silence is a failure or refusal to answer a question or answer satisfactorily when under caution.
* No interviewer may try to obtain answers or elicit a statement by the use of oppression.
* No interviewer shall indicate, except to answer a direct question, what action will be taken by the police if the person being questioned answers questions, makes a statement or refuses to do either. If the person asks directly what action will be taken if they answer questions, make a statement or refuse do either, the interviewer may inform them what action the police propose to take provided that action is itself proper and warranted.

The interview or further interview of a person about an offence with which that person has not been informed they may be prosecuted, must cease when:

(a) the investigator in charge of the investigation is satisfied that all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, this includes allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable, e.g. to clear up ambiguities or clarify what the suspect said;

(b) the investigator in charge of the investigation has taken account of any other available evidence; and

(c) the investigator in charge of the investigation reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence.

The Criminal Procedure and Investigations Act 1996 Code of Practice states ‘In conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect. What is reasonable will depend on the particular circumstances.’ Interviewers should keep this in mind when deciding what questions to ask in an interview.

1. relevant parts of PACE code e

The majority of PACE Code E is relevant to the work of ONR, hence the current version should be referred to directly. The provisions of this Code which govern the conduct and recording of interviews do not apply to interviews with or taking statements from, witnesses.

The following points are highlighted:

* An authorised recording device with removable media must be used. ‘Removable recording media device’ means a recording device which, when set up and operated in accordance with the manufacturer’s instructions and the operating uses removable, physical recording (such as magnetic tape, optical disc or solid state memory card) for the purpose of making a clear and accurate, audio recording of the interview in question which can then be played back and copied using that device or any other device. A sign or indicator on the device which is visible to the suspect must show when the device is recording.
* The device currently authorised for use is the NEAL 9321P Fully Portable triple simultaneous CD interview recorder. (ONR also has its own transcribing machines, seals, and CDs.) A smart phone or similar device is not an alternative means of recording an interview. A summary of the instructions for its use are found at Appendix 1. Further information can be found on the NEAL website. The maximum recordable time of CDs used in the NEAL recorder is 77 minutes.
* Provisions in section 2 of PACE Code E set out the requirement that should be met when an authorised recording device is used to record a suspect interview. Provisions in PACE Code E Section 3 apply to removable recording media devices. A written record of interview is considered in section 9 of this guide.
* Interviewers should use the guide to audio interviewing found at Appendix 4 to this guide to ensure that key requirements for an interview are met.
* The interview should allow for regular breaks, and the interviewee should be offered or allowed refreshments at appropriate times.
* When using an authorised removable recording media device one recording, the master recording, will be sealed in the suspect’s presence. A second recording will be used as a working copy. The master recording is any of the recordings made by the multi-drive machine. The working copy is one of the other recordings made by the multi drive machine. (The remaining copy can be provided to the suspect for their own use.) The purpose of sealing the master recording before it leaves the suspect’s presence is to establish their confidence that the integrity of the recording is preserved.

1. Written records of interviews

**Written statement under caution**

A written record of an interview with a suspect should be made only if,

(a) an authorised recording device in working order is not available; or

(b) the suspect or the appropriate adult on their behalf, objects to the interview being audibly recorded and the interviewer, after having regard to the nature and circumstances of the objections decides that a written record shall be made. (Objections are those based on the suspect’s genuine and honestly held beliefs which allow the interviewer to exercise their discretion to decide that a written interview record is to be made according to the circumstances surrounding the suspect and the investigation. Objections that appear to be frivolous with the intentions of frustrating or delaying the investigation would not be relevant.)

However, paragraph 12.13 of PACE Code C refers to “written statements made … under caution”, so there is a process to follow if such a record needs to be made.

Written statements under caution should be made on forms ONR LP77 15 and ONR LP 78 16. These statements should only be made in person and not in correspondence.

The guidance found in PACE Code Annex D “Written statements under caution” should be applied as appropriate.

**Written statement under caution – Foreign languages**

In the case of a person making a statement under caution in a language other than English:

(a) the interpreter shall record the statement in the language it is made;

(b) the person shall be invited to sign it;

(c) an official English translation shall be made in due course.

**Written record when a suspect appears to have a hearing impediment**

If the suspect appears to have a hearing impediment, the interviewer shall make a written note of the interview at the same time as audio recording it. (This provision is to give a person who is deaf or has impaired hearing equivalent rights of access to the full interview record as far as this is possible using audio recording.) If a written record is required, then forms ONR LP 75 17 and ONR LP 76 18 should be used.

1. prepared statements

Suspects may wish to use prepared statements. Prior to starting the interview, the interviewer may wish to ask the legal representative whether a prepared statement is likely to be produced.

If a pre-prepared statement is handed in or read out by the suspect’s legal representative at the beginning of an interview, the investigator is still entitled to question the suspect about either the contents of the prepared statement or other matters.

A prepared statement is compiled by the suspect’s legal representative in consultation with the suspect, signed and dated by the suspect and submitted by the defence prior to or during a suspect interview. Where the investigator is aware that a statement has been prepared but is not submitted, the interview should be conducted as planned, based on the material available to the investigator at that time.

On receipt of a prepared statement, the investigator should consider suspending the interview to consider the contents of this document.

There may be occasions when the suspect prepares a signed and dated statement that is not submitted to the police until charge or, in some cases, until trial. This may be because the statement contains incriminating information or may otherwise assist the prosecution case.

Even if the suspect maintains their right to silence, the investigator should ensure that the questions posed give the suspect every opportunity to provide a full verbal account. For the leading cases in relation to prepared statements see reference 19 and 20.

1. unsolicited comments

During the course of an investigation a comment might be made by a person that is significant and gives the investigator reasonable grounds to suspect the person of an offence. Normal practice is not to discuss the matter further with the person who has now become a suspect and return to the comment at a later date when the investigator is better prepared. However, on occasion in an ONR investigation the comment could contain significant information, which it is important to capture at the time in a format which gives it some evidential value. If this occurs a record should be made of such any comments, along with the time at which the comment was made. The investigator should sign the record and record the time the comment(s) were made.

The investigator should also give the suspect the opportunity, where practicable, to read the record and sign it as correct or to indicate the respects in which they consider it inaccurate. If the suspect agrees the record is correct, they should be asked to endorse the record with, for example, 'I agree this is a correct record of what was said’ and add their signature. Where the suspect disagrees with the record, the investigator should record the details of any disagreement and ask the suspect to read these details and sign them to the effect that they accurately reflect their disagreement. Any refusal to sign should also be recorded.

1. Invitation to make a written submission

If a suspect declines to attend for a PACE interview, and the investigator believes they already have enough evidence for a realistic prospect of conviction, it is still recommended that the investigator writes to invite them to make a written submission. This gives the suspect an opportunity to bring matters they think are relevant to the potential charge they could be facing to the attention of the investigator. This process occurs prior to the investigation papers being submitted to the Approval Officer for their consideration.

If the approach above is adopted, then the template found at Appendix 5 can be used.

Formal admissions are not captured by PACE, instead being part of the pre-trial process. They occur where certain facts are agreed with the defence, so that these facts will not need to be proved at court. This procedure is known as making admissions of fact, or formal admissions (as distinct from the confession, or informal admission, of a defendant).

1. the key legislation and guidance relevant in scotland

The Criminal Justice (Scotland) Act 2016 ("CJSA") 21 is the Scottish legislation analogous to PACE. One of its purposes is to make provision about police powers.

**Lord Advocate's Code of Practice**

Section 57 of the CJSA which commenced on 25 January 2018 obliges the Lord Advocate (i.e. Scotland's equivalent of both the Attorney General and the Director of Public Prosecutions), following public consultation, to issue a Code of Practice which includes the questioning, and recording of questioning, of persons suspected of committing offences. Section 57(3) provides that the code is to apply to the Police Service of Scotland and such other bodies as are specified in the code responsible for reporting offences to the procurator fiscal. The Office for Nuclear Regulation is such a body. References below to ‘police’ should be read as meaning ONR investigator. The Lord Advocate's Code of Practice is awaited.

**Cadder v HM Advocate**

Chapter 4 of Part 1 of the CJSA, consisting of sections 31 - 37, is entitled "Police Interview". The impetus behind chapter 4 is the Supreme Court decision of *Cadder v HM Advocate [2010] UKSC 43* 22. This changed the law in Scotland in this area. *Cadder* provides that a detainee's Article 6 rights require they should have access to advice from a lawyer **before** being subjected to police questioning, unless a compelling reason exist not to do so.

It is anticipated the Lord Advocate's Code of Practice in terms of section 57 of the CJSA will refer to chapter 4 of Part 1 of the CJSA. Police Scotland's Crime Investigation Standard Operating Procedure (SOP) dated 28 November 2018 23 deals, at Section 7 with Interviewing of Suspects and is replete with references to Chapter 4 of Part 1 of the CJSA.

**Chapter 4 of Part 1 of the CJSA**

Section 31 sets out the information to be given to a person before interview. The key points of this section for ONR's purposes are that not more than one hour before the interview of a person about an offence the police officer has reasonable grounds to suspect them of committing, the person must be informed:

(i) of the general nature of that offence;

(ii) that the person is under no obligation to say anything other than to give their name, address, date of birth, place of birth and nationality;

(iii) of their right to have a solicitor present during the interview.

Section 31 raises the question as to whether it would be unlawful for the Police to inform the interviewee of the information set out in this section *more* than one hour before the interview commenced. It is submitted that the courts would interpret this provision as meaning that it would be lawful for the Police to inform the interviewee of the information set out in s.31 more than one hour before the interview commenced, provided they did so *again* during the one hour window before the start of the interview. This means ONR current practice of providing ‘Roble disclosure’ (see 7.6 above) is valid in Scotland.

Section 32 establishes the architecture supportive of the right to have a solicitor present when being interviewed by a police officer in terms of s.31. The key points of s.32 for ONR's purposes are as follows:

(i) Unless the person consents to being interviewed without a having a solicitor present, the officer must not begin the interview until their solicitor is present;

(ii) Their solicitor must not be denied access to the person at any time during the interview;

(iii) Notwithstanding (i) and (ii) in exceptional circumstances an [investigator] may proceed to carry out the interview without the solicitor, if necessary, in the interests of the investigation or the prevention of crime, or the apprehension of offenders. The decision to do this may only be taken by a [Superintending Inspector] who … has not been involved in investigating the offence of which the person is suspected;

(iv) Where the person consents to be interviewed without having a solicitor present, the time of consent must be recorded along with any reason given by the person for waiving their right to have a solicitor present.

Section 33 deals with vulnerable people consenting to being interviewed without a solicitor. The key points of s.33 for ONR's purposes are as follows:

The following persons may not consent to being interviewed without having a solicitor present - any person under 16 years of age; any person aged 16 or 17 years who is subject to a compulsory supervision order (CSO), or interim CSO, made under the Children's Hearings (Scotland) Act 2011; and any persons aged 16 years or over who, owing to mental disorder, appears to a police officer to be unable to understand sufficiently what is happening or communicate effectively with the police;

A person aged 16 or 17 years, not subject to a CSO or interim CSO, can consent to being interviewed without having a solicitor present if a relevant person agrees.

A "relevant person" for the purposes of (ii) is an adult aged at least 18 years of age who has been reasonably named by the 16 or 17 year old.

Section 34 deals with questioning by the police following arrest. This is not a power ONR has, but ONR may be involved in joint investigations with the police, so need to be aware of this section.

Sections 35 to 37 sets out procedures for the court authorising police officers to question a person about an offence after they have been officially accused of committing it e.g. after Roble disclosure and cautioning them.

**Police Scotland's Crime Investigation SOP - 28 Nov 2018**

Chapter 7 deals with the Interviewing of Suspects. The following points are relevant for ONR's purposes:

(i) Paragraph 7.3.2 provides that where the police are investigating a matter that is likely to proceed on petition[[1]](#footnote-1), the interview should be digitally recorded by suitably trained police officers who have completed their Initial Investigator's Interviewing Course (IIIC) or other previously accredited equivalent training using digital interview recording equipment.

(ii) Paragraph 7.3.5 provides that where digital recorded interviewing equipment is not readily available, dependent upon the matter under investigation, officers may to prevent the loss of potential evidence, conduct a contemporaneous written interview, reading over the contents of the interview under digital recorded conditions as soon as they become available, with the decision appropriately recorded.

(iii) Paragraph 7.4.1 provides that when questioning a not officially accused person who is a vulnerable person, or whose ability to understand their rights may be impinged by a mental health condition or learning disability, officers should ensure that an Appropriate Adult is present. The presence of such an independent person will remove any doubt as to the fairness of the interview.

(iv) Paragraph 7.6.1 in cases where English is not a suspect's first or preferred language then consideration must be given to engaging the services of an interpreter. In addition to any language issues, cultural and religious sensitivities should be addressed where possible.

The following are a number of specific subjects pertinent to interviews from a Scottish perspective

**Written Submissions**

When writing directly to a suspect about an alleged offence in Scotland and inviting them to make a written submission, it would be prudent to include a caution in the letter. The undernoted wording, derived from the caution found at 7.11.15 of Police Scotland's Crime Investigation SOP, which is itself based on the Scottish common law caution referred to in paragraph 24.40 on p443 of *Renton and Brown: Criminal Procedure* 24 - the principal textbook on criminal procedure in Scotland should be used:

"You need not provide a written submission, but should you wish to do so, anything in your submission may be used in evidence."

**Prepared statements by suspects**

These are not a common feature in Scots criminal law. Indeed, the principal textbook on Criminal Procedure, Renton and Brown, does not mention them. However, suspects are not prohibited from handing over prepared statements. It is suggested that the same principles which informs the approach to Written Submissions set out above should apply in this context. For the avoidance of doubt, when a suspect is legally represented, it is considered unnecessary to give a caution prior to the prepared statement being handed over.

**The right to silence**

Unlike in England and Wales, the law in Scotland does not permit any adverse inference to be drawn at trial when the accused relies there on a factor which they did not mention when questioned by the police or other investigating authorities. No change to the law of Scotland in this area is anticipated.

Below is wording for the caution which should be used in Scotland derived from the materialsreferred to in the **Written Submissions** sub-section above:

"You need not say anything, but should you wish to do so, anything you say may be noted and used in evidence."

**Unsolicited comments**

The approach set out in section 11 of this guidance is also appropriate to Scotland.

**Challenges in communicating with those being questioned**

The approach in Scotland is very similar to that in England and Wales. Police Scotland's Interpreting and Translating Services SOP 25 dated 6 July 2018, is referred to in the Crime Investigation SOP. Neither SOPs require the interpreter to make a written note of each question and answer during an interview as set out in section 7.15 of this guidance.

**Use of a police station**

There is no common law prohibition on an ONR inspector interviewing a suspect in a police station, provided the policeconsent. There appears to be no statutory prohibition of this and there is certainly no prohibition found in the principal legislation relating to Police Scotland namely the Police and Fire Reform (Scotland) Act 2012. For Police Scotland not to allow ONR inspectors to interview a suspect in a police station, without good reason, would be inconsistent with section 1.3 of the Crime Investigation SOP which states:

"Where a crime has been committed it is the duty of the Police to trace the offender and bring them to justice. *Police Scotland recognises that the investigation of a crime requires a high degree of cooperation between all departments/stakeholders/partner agencies to achieve this goal* (emphasis added)."

1. References
2. ONR-ENF-GD-007 ‘Witness statement taking’
3. ONR-ENF-GD-005 ‘Process for Conducting Investigations’
4. Ministry of Justice (2011) [Achieving Best Evidence in Criminal Proceedings](https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf)‘ paragraph 2.220
5. Code C of the Police and Criminal Evidence (PACE) Codes of Practice
6. ONR-ENR-GD-020. ‘The role of the Approval Officer in Enforcement Decisions
7. [Equality Act 2010](https://www.legislation.gov.uk/ukpga/2010/15/contents)
8. [Human Rights Act 1998](https://www.legislation.gov.uk/ukpga/1998/42/contents)

1. [The Equality and Human Rights Commission](https://www.equalityhumanrights.com/en) website
2. The Police and Criminal Evidence Act 1984
3. [Regina (on the application of London Oratory School Governors) v Schools Adjudicator [2015] EWHC 1012 (admin)](https://www.judiciary.uk/wp-content/uploads/2015/04/oratory_school-170415-final-2.pdf)
4. Code E of the Police and Criminal Evidence (PACE) Codes of Practice
5. R. Roble [R. v Ali Hersi Roble](http://www.bailii.org/ew/cases/EWCA/Crim/1997/118.html)
6. [Standard Crime Contract 2017](https://www.gov.uk/government/publications/standard-crime-contract-2017)

14 [Code of Practice: Mental Health Act 1983](https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983)

1. ONR LP 77 – Contemporaneous Records of Interview
2. ONR LP 78 – Record of Interview – Continuation Sheet
3. ONR LP 75 – Record of Audio Recorded Interview
4. ONR LP 76 – Continuation of Record of Audio Recorded Interview
5. [R v Knight [2003] EWCA Crim 1977](http://www.bailii.org/ew/cases/EWCA/Crim/2003/1977.html)
6. [R v Turner (Dwaine) [2003] EWCA Crim 3108](http://www.bailii.org/ew/cases/EWCA/Crim/2003/3108.html)
7. [Criminal Justice (Scotland) Act 2016](https://www.legislation.gov.uk/asp/2016/1/contents/enacted)
8. [Cadder v HM Advocate [2010]](http://www.bailii.org/uk/cases/UKSC/2010/43.html)
9. [Crime Investigation Standard Operating Procedure (SOP) 28th November 2018](https://www.scotland.police.uk/spa-media/uwwcamlx/crime-investigation-sop.pdf)
10. Renton and Brown: Criminal Procedure 6th Edition 24 October 1996
11. [Interpreting and Translating Services Standard Operating Procedures 6th July 2018](https://zakon.co.uk/admin/resources/downloads/interpreting-and-translating-services-sop.pdf)

APPENDICES

**APPENDIX 1: Instructions for operating a three-CD NEAL tape Recorder (instructions are the same for operation of the portable version)**



 **APPENDIX 2 – Template Letter to invite an individual to a recorded interview**

**(Use ONR headers with the letter)**

|  |  |
| --- | --- |
|  | [Name]  [Title]  [Address line 1]  [Address line 2]  [Address line 3]  [Address line 4]  [Postcode]  Telephone: [ ]  Email: [ ]  Our Reference:[ ]  Unique Number:[ ]  Your Reference:[ ]  Unique Number:[ ] |
| [Addressee]  [Address] |
| Date: |  |

Dear Sir / Mr / Mrs / Ms

**The Police and Criminal Evidence Act 1984 (PACE)/Criminal Justice (Scotland) Act 2016 delete as appropriate**

**Investigation into ....[*details of investigation*]....**

As part of my investigation into the above matter, I invite you to attend [*insert as appropriate]* on [*insert two dates not more than 4 weeks from the date of this letter*] for an interview under caution. This interview will be audio recorded and conducted in accordance with the appropriate legislation and Codes. The purpose of this interview is to investigate the above matter including any possible breaches of legislation by you.

You do not have to attend this interview and you are strongly advised to seek legal advice about the contents of this letter and your rights under [*insert relevant legislation*]*.* You are further advised to have your legal adviser present at the interview.

I look forward to hearing from you within [*XX*] days in relation to whether you will attend an interview under caution and which of the two proposed dates is acceptable. If you are unable to attend either of them please suggest an alternative date before [*insert a date – 6 weeks from the date of this letter*]. Alternatively, if you do not wish to attend an interview, please let me know by the same date. If I do not hear from you by [*XX*], I will assume that you have declined this invitation to attend an interview under caution and will progress the investigation accordingly.

Yours faithfully / sincerely

**A N Other**

**Title (e.g. ONR Superintending Inspector – Nuclear Safety)**

**Distribution**

A N Other 1, ONR GDA

**Guidance note to inspector [not part of letter text]:**

The Appendix should contain:

* + A description of potential charges,
  + A summary of the evidence
  + A list of documents you intend to refer to at the interview

and include the following text:

“*The interview will not be limited to these matters and further areas may be explored depending upon the answers given. Similarly, further material evidence collected during my investigation may be referred to during the interview. You and your legal advisor will have adequate opportunity to go through this evidence before answering related questions*”.

**APPENDIX 3 – Template letter to invite a corporate entity to interview**

**(Use ONR letter headed paper)**

|  |  |
| --- | --- |
|  | [Name]  [Title]  [Address line 1]  [Address line 2]  [Address line 3]  [Address line 4]  [Postcode]  Telephone: [ ]  Email: [ ]  Our Reference:[ ]  Unique Number:[ ]  Your Reference:[ ]  Unique Number:[ ] |
| [Addressee]  [Address] |
| Date: |  |

Dear Sir / Mr / Mrs / Ms

**The Police and Criminal Evidence Act 1984 (PACE)/Criminal Justice (Scotland) Act 2016 delete as appropriate  
Investigation into** *....*[*details of investigation*]…..

As part of my investigation into the above matter, I am writing to invite you to nominate a representative of [*name of the body corporate*] to attend the Office for Nuclear Regulation’s office at the address below on [*insert two dates no more than 4 weeks from the date of this letter*] to be interviewed under caution. This interview will be audio recorded and conducted in accordance with the relevant legislation and Codes.

This interview will be conducted on the basis that the person attending is authorised to speak on behalf of [*name of body corporate*] and s/he should therefore bring a formal letter signed by another senior officer of [*name of the body corporate*] confirming this authorisation.

The purpose of this interview is to investigate the above matter including any possible breaches of legislation by [*name of body corporate*]. The interview will be conducted under caution. This will be given to the attendee in his/her capacity as authorised representative of [*name of the body corporate*] and not as an individual. The attendee will not be interviewed in his/her personal capacity and any answers given during the interview will not therefore be used against him/her as an individual, but may be used in evidence against [*name of body corporate*].

The Appendix to this letter outlines the areas the interview will cover [and lists the documentation enclosed with this letter as pre-interview disclosure].

[*Name of body corporate*] does not have to attend this interview and you are strongly advised to seek legal advice about the contents of this letter and [*name of body corporate*]’s rights under *[insert as appropriate*]*.* You are further advised to have [*name of the body corporate*]'s legal adviser present at the interview.

I look forward to hearing from you within [*XX*] days in relation to (a) whether a nominated person will attend an interview under caution; (b) the identity of the nominated person; and (c) which of the two proposed dates is acceptable. If you are unable to attend any of them please suggest an alternative date before [*insert a date – 6 weeks from the date of this letter*]. Alternatively, if you do not wish to attend an interview, please let me know by the same date. If I do not hear from you by [*XX*], I will assume that you have declined this invitation to nominate a representative to attend an interview under caution and will progress the investigation accordingly.

Yours faithfully / sincerely

**A N Other**

**Title (e.g. ONR Superintending Inspector – Nuclear Safety)**

**Distribution**

A N Other 1, ONR GDA

Guidance note to inspector [not part of letter text]:

The Appendix should contain:

* + A description of potential charges,
  + A summary of the evidence
  + A list of documents you intend to refer to at the interview

and include the following text ;

“*The interview will not be limited to these matters and further areas may be explored depending upon the answers given. Similarly, further material evidence collected during my investigation may be referred to during the interview. You and your legal advisor will have adequate opportunity to go through this evidence before answering related questions*”.

**APPENDIX 4 Audio recording of interview – Guidance**

**Note a specialist PACE trained ICT Inspector must conduct the interview on the investigator’s behalf. This is requested via email to** [**onr.operational.investigation@onr.gov.uk**](mailto:onr.operational.investigation@onr.gov.uk)

(Read this guidance in full prior to interview to ensure correct parts are selected and employed. *Amend as appropriate.)*

|  |
| --- |
| **Remember:**   1. If in doubt, consult the text of PACE Codes (C) and (E) associated guidance. 2. The recorder is blind; describe the presentation of exhibits and non-verbal responses. 3. Explain disruptions, stating times and reason.   Other things to consider: toilets and breaks; phones; smoking; fire alarms (including tests); drinks; have they brought any documents?; who is the solicitor representing?; introductions … |

**1 SETTING UP THE MACHINE**

Set up the machine in accordance with the operator instructions for the triple CD recorder. User guides and operator instructions should be in the room, along with the up to date guides; *please check*. Break open the sealed CDs in the presence of the interviewee and insert them into the machine. Write details of interview on an ONR LP 75. Start recording when you are ready.

**2A STARTING THE INTERVIEW – AN INDIVIDUAL**

SAY: **“*This interview is being recorded and is being conducted in the*** [interview room]**at**[state the owner of the office] ***office at*** [address]**. *The date is ….... The time is …….*** [make a note of time on LP73/LP73/CD].

***I am ……….. Other Inspectors present are……….*** [Name(s) and Job title(s) to be spoken by those present]**.**

**I am interviewing ………..** [Name]**. Would you please give your name, home address and date of birth ………..** [Await answer]. **Also present is ………..** [Name and role spoken by those present]**.**

IF THE INTERVIEWEE HAS NO LEGAL REPRESENTATION:

SAY**: “*Before commencing this interview, I must remind you that you are entitled to have a solicitor present. Do you wish to have a solicitor present*”?**

ADMINISTER CAUTION.

**[ADD CAUTION]. “*Do you understand this*”?** [Confirm the interviewee understands of the caution].

THEN SAY **“*I am NOT using the powers given to me under Section 20 of the 1974 Health and Safety at Work etc. Act, or Schedule 8 of the Energy Act 2013 during this interview. This means that you do NOT have to answer my questions if you do NOT wish to do so. Do you understand this? You are not under arrest and are free to leave any time. Do you understand this*”?** [Confirm interviewee understands].

**2B STARTING THE INTERVIEW – REPRESENTATIVE OF PARTNERSHIP / COMPANY**

SAY **“*This interview is being recorded and is being conducted in the*** [interview room]at[state owner of office] ***office at …..*** [address]**. *The date is ….. The time is ….*.** [make a note on LP73/LP73/CD]**.**

***I am* ………… *Other Inspectors present are …………*** [Name(s) and Job title(s) to be spoken by those present … ]**. *I am interviewing …..*** [Name] ***as a representative of the partnership / company*. *Would you please give your name, home address and date of birth* ……….** [Await Answer]. ***Also present is ………..*** [Name and role spoken by those present]**”.**

IF THE INTERVIEWEE HAS NO LEGAL REPRESENTATION:

SAY **“*Before commencing this interview, I must remind you that you are entitled to have a solicitor present. Do you wish to have a solicitor present*”?.....**

THEN SAY:

**“*Please confirm which partnership / company you are authorised to speak on behalf of*”?**

**“*Please confirm how you have been authorised? Do you have written authority*”?** [Request sight of and confirm details of any written authority for the benefit of the recording]**.**

ADMINISTER CAUTION – You can refer to either “The partnership”“The company” or “Your company”. ‘The company’ is used below.

SAY **“*AS A PERSON IN A POSITION TO MAKE AN ADMISSION ON BEHALF OF ………..*** [Name of Company], ***I AM NOW GOING TO CAUTION YOU AS A REPRESENTATIVE OF THE COMPANY………..*”**

***[INSERT APPROPRIATE CAUTION] “Do you understand this*”?** [Confirm interviewee understands of the caution].

THEN SAY **“*I am NOT using the powers given to me under Section 20 of the 1974 Health and Safety at Work etc. Act or Schedule 8 of the Energy Act 2013 during this interview. This means that you do NOT have to answer any questions on behalf of the company if you do NOT wish to do so. Do you understand this*?... *You are not under arrest and are free to leave any time. Do you understand this*”?** [Confirm interviewee’s understanding].

**3 REFUSAL TO HAVE INTERVIEW RECORDED**

Explain that recording will provide a clear and undisputed account. Switch on and introduce interview as normal if objection continues record the objections. Once objections are recorded or if suspect will not speak, SAY **“ *I am switching off the recorder because ….* “** If possible continue with contemporaneous notes.

**4 MECHANICAL BREAK-DOWN DURING THE INTERVIEW**

Alarm sounds continuously. Refer to message on the recorder alarm display. Otherwise press stop button; check for correct loading or CD damage; check connection of leads; then attempt to restart machine. If successful, resume interview explaining what has happened. If alarm continues, switch off and continue interview using contemporaneous notes.

**5 CHANGING THE CD**

Alarm sounds briefly, explain alarm to the interviewee. Conclude that part of the interview, stating time and that you are switching off the recorder. Switch off the recorder. Remove and mark the CDs (e.g. M1, W1, D1 - Duty Holder). It is not necessary to seal and label them at this stage. Prepare new ONR LP75 per stage 1. Open new set of CDs, load machine, switch on, state time [note on ONR LP 75], why the break occurred, verify persons present, that no one has left the room and get interviewee to confirm that they are still under caution [if there is any doubt, re-administer caution] and resume the interview.

**6 BREAKS IN INTERVIEW**

Do not stop the recording without good reason. State the time and reason for the break, then stop the machine.

**a) If no one leaves the room -** At the end of the break, restart the machine, state the time, why the break occurred, verify persons present, that no one has left the room and get interviewee to confirm that he/she is still under caution [if there is any doubt, re-administer the caution] and resume the interview.

**b) If the interviewee or interviewers leave the room –** Switch off the recorder. Remove the CDs. Seal and label one as the master and the other as a working copy (CD - label 3rd as duty holder copy). The interviewee, interviewers and third party should sign the master seal before they or the interviewers leave the room. At the end of the break, open new CDs in the presence of the interviewee, load the machine, switch on, state time, why the break occurred, verify persons present and get interviewee to confirm that they are still under caution [if there is any doubt, re-administer the caution] and resume the interview.

**7 CONCLUDING THE INTERVIEW**

SAY **“ *I have no further questions, do you wish to clarify any point or add to anything further*”? …..**

THEN SAY **“*If…..*** [you / the partnership/ the company] ***were to be prosecuted is there anything*** [you / the partnership/ the company] ***would like to say*”? ….**

THEN SAY **“ The time is now …..** [make a note of the time on the ONR LP75 (or continuation form ONR LP 76 if used) ***I am now switching off the recorder*.”**

Remove final CDs. Seal the master CD(s) [i.e. M1, M2 etc.] using the Master Seal. Label the other CDs. Complete any missing details on the Seal(s) and then interviewee, interviewers and any third party (legal representative etc.) should sign the Master Seal(s). Ask if Duty Holder requires copies of tapes / pass Duty Holder copies of CDs [i.e. D1, D2 etc.] to Duty Holder and note in notebook.

**8 AFTER DEPARTURE OF THE SUSPECT**

Ensure master CDs are securely stored. Interviewing Inspector is to introduce master CDs as exhibits via their statement. Interviewing Inspector to ensure a typed summary/record of interview is prepared on forms LP75 and LP76.

**APPENDIX 5 Invitation to make a written submission**

**(Use ONR letter headed paper)**

|  |  |
| --- | --- |
|  | [Name]  [Title]  [Address line 1]  [Address line 2]  [Address line 3]  [Address line 4]  [Postcode]  Telephone: [ ]  Email: [ ]  Our Reference:[ ]  Unique Number:[ ]  Your Reference:[ ]  Unique Number:[ ] |
| [Addressee]  [Address] |
| Date: |  |

Dear Sir / Mr / Mrs / Ms

**Invitation to provide a written submission [amend as per guidance for Scotland]**

**Investigation into** *....*[*details of investigation*]…..

I have completed my investigation into the above matter and I have identified possible breaches of legislation by [*name of the body corporate/you].*

The Appendix to this letter describes the potential charges and provides a summary of the evidence. [*It also lists the documentation enclosed with this letter*].

Prior to ONR’s enforcement decision you are entitled to provide written submissions on matters you wish ONR to take into account when making the decision. This is a formal opportunity for [*name of body corporate/you*] to provide an explanation as to the matters under investigation. You are strongly advised to seek legal advice about the contents of this letter. Your submission should reach this office by [*insert date – 6 weeks from the date of this letter*]. Submissions received after this date may not be taken into account when decisions are made about what action ONR will take following the investigation.

Yours faithfully / sincerely

**A N Other**

**Title (e.g. ONR Superintending Inspector – Nuclear Safety)**

**Distribution**

A N Other 1, ONR GDA

Guidance note to investigator [not part of letter text]:

The Appendix should contain:

* + A description of potential charges,
  + A summary of the evidence
  + A list of relevant documents

**Information about what is sent should be recorded in Appendix 7 of the Investigation Report.**

1. ‘On petition’ refers to a hearing held in private at the earliest court stage of a serious criminal prosecution. All ONR cases are likely to be on petition. [↑](#footnote-ref-1)