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| ONR Guidance Document  The expert witness in Criminal proceedings in Scotland |



ONR Guidance Document

The expert witness in Criminal proceedings in Scotland

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# Introduction

An expert witness to the court in Scotland fulfils a particular role. It is the duty of an expert witness instructed in a criminal case to act in the cause of justice. There is no ‘ownership’ of an expert by either the prosecution or the defence in a criminal case. Instead, the expert’s role is to assist the court or jury on matters where their ordinary, everyday experience does not enable them to adequately consider the issues in the case.

There is sometimes confusion in distinguishing between (i) an expert who is assisting the court and who has expertise and skills which they bring to the investigation of a potentially criminal offence and (ii) a witness to the facts who may be an ONR official with particular skills and knowledge.

Expert witnesses have three privileges over ordinary witnesses to fact:

* They can remain in court prior to giving evidence, (unless there is a challenge raised about any factual evidence from which they might form their opinion) in order to hear evidence of both fact and circumstance;
* They may express an opinion on matters within their expertise; and
* They may refer to the works of others within their field of expertise without infringing the rules against hearsay.

All the above is subject to the active permission of the court.

## Purpose and Scope

This general guide is intended to aid those who act as an expert in criminal proceedings, and those who engage or interact with a person who is likely to be appointed as an expert to assist the court. If the expert is giving evidence in a Fatal Accident Inquiry (the Scottish equivalent of a Coroner's Hearing), in a Statutory Inquiry (held under the Inquiries Act 2005) or in a civil case then separate advice should be sought since there are some procedural differences and in potential outcomes. This guide is relevant to the role of an expert at all stages of Scottish criminal court proceedings. (An individual professionalism may also have their own codes of practice issued by the relevant body regarding the role of an expert in criminal proceedings. Such codes of practice are out-with the scope of this document.)

The guide does not attempt to describe how an expert report is written other than in general terms, nor what is essential content; each report will vary dependant on the questions an expert is asked, and the facts they may have to consider.

This guide addresses (i) the Scottish Courts and Legal System; (ii) relevant guidance; (iii) the role of an investigator instructing an expert; (iv) the role of an expert being instructed by an investigator; and (v) the role of a prosecutor intending to use an expert in criminal proceedings.

# The Scottish Courts and Legal System

The Scottish Courts are divided into two sections, populated by the same judges who fulfil different roles when sitting in the different courts. The highest civil court is known as the Court of Session. It is divided into the Outer House, which is the court of first instance and the Inner House, which is usually the civil appeal court. There is an appeal from the Inner House, with permission, to the Supreme Court.

The highest criminal court is known as the High Court of Justiciary. It deals with the most serious cases at first instance and also acts as an appeal court. The High Court of Justiciary is peripatetic, sitting around Scotland, but mostly in Glasgow and Edinburgh. There is a further appeal to the Supreme Court on criminal matters, with permission, but only where a devolution issue under the Scotland Act 1998 arises.

The Sheriff Court sits below the High Court of Justiciary and deals with less serious cases, again both civil and criminal. It can hear cases involving safety breaches, general prosecutions and Fatal Accident Inquiries.

All prosecutions in Scotland are brought in the name of the Lord Advocate in the High Court, usually by Advocate Deputes who are senior advocates and solicitors chosen by the Lord Advocate, and in the name of the Procurator Fiscal in the lower courts. The Fiscal holds a warrant to act in the name of the Lord Advocate.

The prosecutors all come under the umbrella of the Crown Office and Procurator Fiscal Service (COPFS). With very few exceptions, they will decide whether a case is to be prosecuted and will manage the prosecution process, including giving instructions to the police investigators, determining who the prosecution witnesses will be and commissioning expert reports as appropriate. COPFS has a number of Specialist Casework units with experience in particular types of cases (including Health and Safety Crime). This has the advantage of experienced prosecutors operating in cases which are likely to involve ONR.

When regulatory bodies, such as ONR, have investigated an incident and provided a report to COPFS, it will be for the Lord Advocate or the Fiscal, as prosecutors, to determine whether a prosecution is appropriate. If a prosecution is to proceed then it is likely an ONR official will be required to give evidence in the Scottish Courts.

# Legislation, Rules, and Directions

## Legislation

The legal system governing the investigation and prosecution of crimes in Scotland is separate from that which applies in England and Wales. Accordingly, much of the legislation which applies in England and Wales is not relevant to the prosecution of cases in Scotland. Criminal investigations in Scotland are governed by a number of statutes including the following:

* *Criminal Procedure (Scotland) Act 1995*; (the 1995 Act)
* *Regulation of Investigatory Powers (Scotland) Act 2000*;
* *Criminal Justice and Licensing (Scotland) Act 2010*; and
* *Criminal Justice (Scotland) Act 2016*.

These statutes contain little in relation to the use of expert witnesses. There is no statutory codification of the role of an expert under Scots law. These matters are instead dealt with by guidance and case law.

## Rules

The Criminal Procedure rules are contained in the *Act of Adjournal (Criminal Procedure Rules) 1996* (the Rules) and apply to the investigation and prosecution of crime in Scotland. These rules are made by the High Court of Justiciary and are binding and must be followed by those investigating or prosecuting a crime.

The Rules contain provisions on evidence at Part VI but not in relation to the instruction or duties of experts.

## Codes of Practice

A Code of Practice relating to disclosure of evidence in criminal proceedings in Scotland was published by the Lord Advocate under section 164 of the Criminal Justice and Licensing (Scotland) Act 2010. The code extends only to Scotland.

The code outlines 6 core principles of revelation which are as follows:

1. The Police are obliged to reveal to COPFS all information that may be relevant to the issue of whether the accused is innocent or guilty.
2. "Relevant" means any information that appears to an investigator to have some bearing on the offence or offences, under investigation or any person being investigated or the surrounding circumstances, unless it is incapable of having any impact on the case.
3. This obligation persists in perpetuity. This means that the duty exists during any appeal process and even where there is no live appeal, for example where such information comes to the attention of the police after conviction, or after an appeal has been refused.
4. Compliance with the duty requires the Police to provide COPFS with all witness statements obtained, including statements from defence witnesses.
5. Compliance with the duty also requires the Police to reveal to COPFS the existence of criminal history records (previous to convictions and outstanding charges) for all witnesses for whom statements are provided.
6. Failure to properly and timeously reveal all potentially relevant information to COFPS could lead to a failure to disclose material information to the accused which could result in a miscarriage of justice.

It is a requirement under section 164 that police forces, prosecutors and other investigating agencies (including ONR) must have regard to the code in carrying out functions in relation to investigation, reporting and prosecution of crime. It is important when expert witnesses are instructed that they are made aware of the code's existence.

The Code of Practice also outlines 6 core principles of disclosure. The Crown is the prosecutor for the purposes of the Code. The principles are as follows:

1. The Crown is obliged to disclose all material information for or against the accused (subject to any public interest considerations). This relates to statements but it also relates to *all* information of which the Crown is aware.
2. "Material" means information which is likely to be of real importance to any undermining of the Crown case, or the casting of reasonable doubt on it and of positive assistance to the accused.
3. This legal duty persists in perpetuity. This means that the duty exists during the appeal process and even where there is no live appeal, for example, where such information comes to the attention of the Crown after conviction, or after an appeal has been refused.
4. Compliance with the duty requires the Crown in all solemn proceedings to disclose all statements (as opposed to precognitions) of all witnesses on the Crown *and defence* lists, including section 67 notices (the list of witnesses consisting of the names of the witnesses together with an address at which they can be contacted for the purposes of precognition, required by the 1995 Act).
5. Compliance with the duty requires the Crown, without having to be requested to do so, to disclose all material previous conviction and outstanding charges for all witnesses on the Crown lists, including section 67 notices.
6. Failure to disclose material information risks a miscarriage of justice. Disclosure carried out properly and timeously ensures that justice is done and prevents unnecessary trials and delays.

The Code of Practice (which came into force on 6 June 2011) can be accessed here:

[Code of Practice - Disclosure of Evidence in Criminal Proceedings](https://copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Code%20of%20Practice%20-%20Disclosure%20of%20Evidence%20in%20Criminal%20Proceedings.pdf)

## Practice Notes and Directions

Practice Notes and Directions for proceedings in the High Court of Justiciary and the Sheriff Court (where it is exercising its functions in relation to criminal matters) are issued by the Lord Justice General, the senior criminal court judge, exercising his statutory powers in relation to criminal proceedings. These inform practitioners of a practice that the court is minded to take, or of a practice that the courts expect of practitioners. Again, these provide little guidance in relation to expert reports.

## COPFS Guidance

A guidance document for specialist reporting agencies (such as ONR) has been produced to accompany the Code of Practice on disclosure of evidence in criminal proceedings by the Crown Office and Procurator Fiscal Service (COPFS). It can be accessed here:

[Guidance to Specialist Reporting Agencies - Disclosure of Evidence in Criminal Proceedings](https://www.copfs.gov.uk/publications/disclosure-of-evidence-guidance-for-specialist-reporting-agencies/)

COFPS have also produced a guidance booklet for expert witnesses. This document provides information about the role of the expert witness and disclosure. The duties of an expert witness are summarised as follows:

1. Expert evidence presented to the court should be seen to be the independent product of the expert uninfluenced as to form or content of the party instructing the opinion.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his/her expertise. An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions on which his/her opinion is based. He/she should not omit to consider material facts which detract from his concluded opinions.
4. An expert should make it clear when a particular question or issue falls outside his/her expertise.
5. If an expert's opinion is not properly researched because he/she considers that insufficient data is available then this should just be stated with an indication that the opinion is no more than a provisional one.

In addition to summarising the expert duties, it also gives guidance on disclosure obligations.

Although not binding, it may be of assistance if the guidance is provided to expert witnesses instructed by ONR. A copy of it is available here:

[Guidance booklet for expert witnesses](https://copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20booklet%20for%20expert%20witnesses%20%20June%2015.pdf)

Guidance published by COPFS for specialist reporting agencies on the making of reports to the procurator fiscal may also be relevant. A copy of this guide (which was last updated in 2006) is available here:

[Reports to the Procurator Fiscal - A Guide for Specialist Reporting Agencies](https://copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Specialist%20Reporting%20Agencies%20-%20Reports%20to%20the%20Procurator%20Fiscal%20-%20A%20Guide%20for%20Specialist%20Reporting%20Agencies%20-%207th%20edition%202006.PDF)

# The Investigator, Instructing the Expert

Just because they have become aware of an investigation, might have provided advice, and possibly given direction to lines of enquiry does not preclude a specialist from being an expert witness instructed in a criminal case to act in the cause of justice. Importantly, it must be recognised that the more a specialist becomes intimate with the investigation process, the more vulnerable they are to challenge at court regarding their independence.

A specialist inspector may advise the investigator(s) on the gathering of evidence, such as questions to put to witnesses or to a suspect. However, if a specialist has been appointed (or is intending) to act as a potential expert in any future proceedings, they should generally avoid taking statements as part of the investigation or attending an interview of a suspect) if possible. (Good practice is to utilise different specialist inspectors in these roles to prevent their independence from being questioned.) If a specialist inspector (who is not to act as an expert) attends an interview, the fact of their specialist expertise should be disclosed (to the interviewee and any legal representative).

This should be considered by investigators – particularly for areas where subject matter experts are rare within ONR – when conducting their investigations (see Step 3 – Plan and resource investigation, ONR-ENF-GD-005).

Expert evidence presented to the court should be and *should be seen to* be the independent product of the expert uninfluenced as to form or content instructing the part. (This is why ONR does not use templates for structure of the report generated by the expert.) Those instructing an expert need to think carefully about what information should be supplied to them and how it should be communicated. It is good practice to ask open questions of the expert in any communications, which allow them the scope to form their own unbiased opinion. However, the investigator should not prevent the expert from conducting their own lines of enquiry, even if it seems that this could undermine any potential proceedings. The expert is acting on behalf of the court.

Where an expert witness is being interviewed the example standard statement form contained within the COPFS guide to specialist reporting agencies should be used.

It is likely that an expert will need to give oral testimony, in an adversarial environment. A question to consider is whether a subject matter expert can explain a particular matter key to the considerations of the court, in a manner that assists the court. It is worth noting that to maximise authority, in many cases the expert's communication skills are just as important as their expertise in the topic under discussion.

# The Expert, Receiving Instructions

Those requested to act as experts should only accept the request in matters where they:

* have the knowledge, experience, expertise, qualifications, or professional training appropriate for the assignment;
* have access to the resources required for the assignment.

They should make clear what can and cannot be expected on completion of the assignment. In particular, as soon as possible after being instructed, they should identify any aspects of a commission with which they are unfamiliar, or not professionally qualified to deal, or on which they require or would like further information or guidance.

If any part of the assignment is to be undertaken by parties other than the individual instructed, then it should be made clear to the prosecutor.

Finally, the expert is likely to be interviewed prior to proceedings to evaluate the value and quality of their evidence. The prosecutor cannot lead the expert to an opinion, merely question to see whether the expert adds value to court proceedings. They cannot ‘rehearse’ the expert to practice presenting their valuable addition to court proceedings in the best way. The outcome of this process may mean that an expert will not be used by the prosecutor. This, however, does not devalue the expertise of the expert.

# The Prosecutor, Reviewing and Using an Expert

As noted at section 3 above, prosecution of offences in Scotland is carried out by the Crown Office and Procurator Fiscal Service (COPFS). It is therefore for COPFS to determine whether to use expert evidence in the prosecution of any particular case.

There are no rules that a prosecutor in Scotland will consider when determining whether to utilise expert evidence in criminal proceedings. In contrast to the English position, there are no directions or rules which explain the admissibility of expert evidence in criminal proceedings.

In regulatory prosecution work you may well encounter a defence expert's report that seeks to go well beyond the true role of an expert by dealing with issues that are not within the expert's proper remit and can seek to impinge upon the Jury's own functions. This can take the form of seeking to introduce factual evidence on behalf of the defence, or expressing opinion upon matters that are not issues for the expert to address. In addition, attempts may be made to express opinions on matters that may be technical issues but which are actually outside that particular expert’s discipline.

It is important to remember that it is the evidence that is placed before the Jury that is crucial. Occasionally oral evidence at trial can differ substantially from the written evidence that the experts considered when compiling their report. For this reason, it is essential that the prosecution expert witness is present at court throughout the whole of the evidence as it is ultimately that evidence that he/she she must base their opinion on, rather than other material that has not been presented to the Jury. As noted above, an advantage of expert witnesses is that, unlike other witnesses, they are permitted to remain in court whilst other witnesses are giving evidence unless their presence is objected to.

# Conclusion

When carrying out investigations in Scotland, inspectors should consider the following points:

* COPFS are in control of the process and will make all the decisions in relation to prosecution;
* Building good relations with COPFS will assist with the efficient progression of cases;
* Disclosure should be in accordance with the guidance and Code of Practice;
* The most appropriate inspector should prepare any expert report, bearing in mind other inspectors may be witnesses to fact.

The ONR expert should:

* prepare his or her report as professionally/completely as possible;
* submit it to COPFS to consider; and
* be prepared to explain issues to COPFS.