



**RESPONSE**  
**by**  
**THE FACULTY OF ADVOCATES**  
**TO THE PUBLIC CONSULTATION**  
**ON**  
**THE LORD ADVOCATE'S CODE OF PRACTICE**  
**ON THE QUESTIONING AND RECORDING OF QUESTIONING**  
**OF PERSONS SUSPECTED OR ACCUSED OF COMMITTING OFFENCES**

The Faculty of Advocates welcomes the opportunity to contribute to the Crown Office and Procurator Fiscal Service consultation process on the Lord Advocate's draft Code of Practice on the questioning, and recording of questioning, of persons suspected of committing offences.

Faculty recognises the importance of achieving the consistent implementation of best practice by balancing the interests of the suspect with the duty to investigate crime. The two aims can coexist with the introduction of a robust Code of Practice.

Faculty notes the limited time scale for responses to this consultation and raises the concern that this may not encourage the widest range of responses from across all interested agencies. It is suggested that a longer period to allow for responses be considered in the future.

This response is presented to correspond with the relevant articles which we believe require further consideration.

## The Faculty Response

### 1.4

Faculty welcomes the approach adopted in this Code which will assist in fostering and supporting diversity in all areas of Scottish society including within the criminal justice sector. We have noted observations by contributors to this exercise that suspects accused of sexual offences are often queried as to their sexuality where such a query has no apparent relevance to the crime being investigated. It is hoped and expected that the incorporation of this approach will prevent such a line of questions being put in future interviews.

### 1.8

Faculty recognises the fundamental nature of the Code of Practice and welcomes ease of access for all persons who may require to refer to it. We welcome the online availability however stress the need for access to the Code for those persons who are to be the subject of questioning, at the place where they are to be questioned. This would necessarily include the provision of information on the Code (and the Code itself) to persons suspected of committing offences, at the place where they are to be questioned.

We therefore suggest that article 1.8 be amended as follows:

This Code must be available to view *online and in hard* copy at all premises where a suspect may be interviewed.

### 1.11

We believe that whether a breach of the Code may give rise to a legal claim should not be automatically excluded and is a decision best left to the Court.

Therefore, we propose an amendment to article 1.11 as follows:

A breach of the Code does not in itself give rise to grounds for any legal claim *unless a Court or tribunal determines otherwise.*

### **1.15**

Faculty raises concerns around the questioning of a person designed to establish whether there are reasonable grounds to suspect that person of having committed a crime. This is especially so where the grounds come to exist as a result of that person's answers. This often transgresses the right of a person to remain silent. The dividing line between a person who may or not may be a suspect is often a fine one. Other investigative methods may produce a similar result without the pitfalls of legal challenges to admissibility.

Faculty therefore proposes an amendment to delete from the second bullet point "*and to determine if there are reasonable grounds to suspect that a person committed the crime.*"

And to delete the third bullet point in its entirety.

## **Chapter 2**

Faculty agrees with the proposals contained within this chapter and support the suggested framework to support the suspect's right of access to a solicitor.

## **Chapter 3**

Faculty supports fully the proposals for Child Suspects. The proposals for Child Suspects set out a framework for a presumption in favour of additional rights for child suspects and we commend this approach.

The rights of child suspects will require to be future-proofed to remain compliant with the UN Convention on the Rights of the Child.

#### **4.7**

Faculty supports the attendance of an appropriate adult for all vulnerable suspects however has some reservations regarding the effectiveness of the involvement of the appropriate adult.

These reservations could be addressed by a clear requirement for robust and directed training in assisting vulnerable suspects in the custody setting. This environment can be outwith the comfort zone of many Appropriate Adults, in situations where they are dealing with professionally trained police constables, themselves at home within the custody setting. The appropriate adult must have the ability and willingness to intervene during interviews conducted by experienced, professionally trained constables.

Faculty recognises that this Code of Conduct cannot be expected to regulate the workings of the appropriate adult scheme beyond making the amendment proposed at paragraph 4.18 and 4.22. However, we do take this opportunity to request of the Scottish Government and other criminal justice partners that specific consideration be taken of how best to procure real and effective support for vulnerable people suspected of being involved in criminality.

#### **4.18**

We propose to delete the words *should also* where they appear in line three and substitute the word *shall*.

We thereafter propose to insert the following at the end of 4.18:

*The Appropriate Adult shall create a written record detailing the nature of their meeting with the vulnerable suspect and recording what, if any, measures required to be taken to best protect the vulnerable suspect's interests during the interview. At the conclusion of any interview the Appropriate*

*Adult shall make a record of their own impression of the conduct of the interview and shall note any concerns that they might have regarding any element of the conduct of that interview.*

#### **4.22**

We also propose the following insertion after 4.22:

*A written record shall be created by the Appropriate Adult in accordance with paragraph 4.18 above.*

We consider this a necessary and easy safeguard to implement. At present the only method of recording any concerns of the appropriate adult will be via a police statement which may be noted by one of the interviewing officers. This proposed safeguard removes the potential for partiality or influence.

We believe that the appropriate adult should keep a written record of the interview.

#### **Chapter 5**

We agree with the proposals contained within this chapter and have no further comment.

#### **Chapter 6**

There is an inconsistent approach to the provision of information by the police to the suspect's solicitor prior to interview. As is noted at article 6.2, the failure to engage with the solicitor increases the likelihood of a suspect providing no comment to questions asked during the interview, or of interviews being interrupted for a solicitor to provide further guidance to the suspect when unexpected questions arise. A failure by the police to engage is often noted verbally by the solicitor at the commencement of the interview and can often be counter-productive for the constable and the suspect.

We consider there to be no good rationale for the failure to meet and provide information, in the ordinary course. The interview is an opportunity to ask questions of the suspect. It must be fair and is

not designed to be an interrogation or cross examination of the suspect. Co-operation with the suspect's solicitor would reinforce a professional approach to the process.

We therefore propose the following amendments:

#### **6.1**

We propose replacing 6.1 with the following:

*The interviewing constable should meet with the suspect's solicitor and provide information prior to interview.*

#### **6.2**

We propose to delete article 6.2

#### **6.3**

We propose the following change to article 6.3:

*Constables are expected to provide solicitors with the type of information listed at 6.4 [as newly numbered] below as well as a list of likely questions to be asked during interview unless there is a demonstrably good reason not to do so. Such a reason might include, for example, risk of interference with a witness, or a material risk to the course of justice.*

#### **6.4**

We propose the following amendment to article 6.4:

*In providing such information a constable must not deliberately mislead a solicitor. The constable must keep a record of what information has been provided.*

## 6.5

We propose the following amendment to article 6.5:

*“Information that constables shall provide to the solicitor includes:”*

## 6.14

Faculty recognises that there are occasions where a suspect's ability to participate effectively in the interview is compromised by intoxication. Therefore, we propose the following insertion to the Code:

Article 6.14

*Where it is considered that the fitness of a suspect to be interviewed has been compromised by the ingestion of drink or drugs, consideration should be given to the delay of the holding of that interview pending the suspect's recovery from the effects of any such ingestion.*

## 6.15

In line with our comments at article 1.15, we reiterate our concerns that this often transgresses the right of a person to remain silent. Accordingly, at article 6.15, we propose the deletion from the second bullet point *“and to determine if there are reasonable grounds to suspect that a person committed the crime”*.

We also propose the deletion of the third bullet point in its entirety.

## 6.20

Faculty believes that the terms of the caution should be modernised. The caution must be understood by children, vulnerable suspects and adults alike. The variation in comprehension between suspects is considerable. When asked if the caution is understood, many suspects will agree that it is, through compliance or an unwillingness to expose their lack of understanding.

Faculty proposes that a different form of caution should be introduced using plain language and one fact per statement. We propose, as a starting point for further proposal:

*"I am now going to ask you questions about [details of offence]. You do not have to answer any questions. If you say anything, we will write it down. We will also record it. We can use anything you say as evidence against you at a trial"*

## **6.21**

In line with the comments above, we propose that, as a matter of course, the person administering the caution should have the suspect explain their understanding in their own words. We propose to delete the line "Do you understand?" and replace it with the following:

*"Please tell me what that means"*

We propose that where it is clear that the suspect cannot provide an adequate recap of the caution no further questions should be asked at that interview. The rationale for this is clear; the suspect has a right to silence. That right is protected by Article 6 of the European Convention on Human Rights. It is also a right long since respected within the common law of Scotland. Such a right must be effective. If it is not effective, it has no value and is not being applied or respected.

## **6.24**

We propose the following amendment to article 6.24:

*After any break in an interview under caution, the suspect being questioned must be reminded of the terms of the caution and that they remain under caution.*

## **Chapter 7**

### **7.15 and 7.16**



The best record of an interview is one which is audio-visually recorded. We propose the deletion of the word "should" in articles 7.15 and 7.16 and the insertion of the word "*must*".

### **7.33**

We wish to underline the importance of the caution to the requirement for fairness at interview. We therefore propose the following amendment to article 7.33:

*After any break in the interview the interviewing constable must, before resuming the interview, remind the suspect of their right to have a solicitor present if they have not exercised it and repeat the caution.*

### **7.37**

The interview should be a written or audio-visual recording. If conducted fairly, we can see no purpose to "double record" any statement. We propose to delete from article 7.37:

*"including the taking and reading back of any written statement".*

The Faculty of Advocates hopes that its response is of assistance and would be happy to assist further as appropriate.

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