

		RSD Internal Guidance		RIG-2006-03	
Guidance on interviewing suspects under caution under the Police and Criminal Evidence Act 1984 (PACE)					
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Keywords		PACE; interview; suspect; investigation; prosecution			
Summary		This RIG provides updated guidance (current as at 1 Nov 2018) on interviewing suspects under caution, following updates to PACE introduced on 31 July 2018. It applies to ALL interviews held after 21 August 2018. It should be read in conjunction with the HSE enforcement manual. This guidance applies in England and Wales only,			
Original consultation		Errol Archer Legal			
Subsequent consultation (reviews only)		Helen Ayers, Tom Wake, RMT 2017 Garry Stimpson, Chloe Barton (Legal), Oct 2018			

Detail

Purpose

This guidance highlights and addresses some key issues for inspectors preparing for interviews under caution. It is not a comprehensive guide to the Police and Criminal Evidence Act and the Codes of Practice and inspectors should consult the HSE Enforcement Manual (be aware that as at 20 Aug 18 the HSE guide had not been updated with the recent changes to PACE) <http://www.hse.gov.uk/enforce/enforcementguide/investigation/witness-questioning.htm>. The Gov.UK website contains updated versions of the Codes of Practice for reference: <https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice>

PACE requires the interviewer to be trained in the use of the PACE machine; previously ORR staff attended an Advanced investigative Interviewing course to receive PACE training but this has not been run for a number of years; RSD's training team is looking into whether to rerun the course or provide replacement training. There is a folder on BOX which contains practical guidance on conducting PACE interviews using CD and tape machines ([link](#)). Please look at folder this before conducting PACE interviews.

Introduction

1. The Police and Criminal Evidence Act 1984 ("PACE") is primarily concerned with the powers and duties of the police, the rights of suspects and the admissibility of evidence. Seven Codes of Practice have been adopted under this Act, including Code C for the Detention, Treatment and Questioning of Persons by Police Officers, and Code E on the audio recording of interviews with suspects. Changes to Codes C and E introduced in July 2018 mean:

- Anyone under the age of 18 is now deemed a juvenile for the purposes of PACE. There are additional safeguards for juvenile suspects (including the right to have an "appropriate adult" to support them throughout). If you believe you may need to interview a juvenile suspect, or anyone who appears vulnerable, please contact either the Investigation and Enforcement Manager or Legal before arranging the interview. The list of factors to consider when assessing vulnerability are outlined at Code C para 1.13(d).
- The suspect must now be informed of all their rights, entitlements and safeguards that will apply **before they are asked to consent to the interview** and are to be given a notice to explain these matters. The draft letter at Annex A will inform suspects of these matters. The notice at Annex B should be provided for the suspect to read, sign and date before the interview commences. It will remind them of those rights, entitlements and safeguards.
- If an authorised audio-recording device (aka the PACE machine) is in

working order **and** an interview room or other location suitable for that device to be used, are both available, that device shall be used. Broadly this means we cannot opt for a written record of an interview under caution if the PACE machine is available and a suitable room is available. A written record can only be made if the device is not available or the location is not available and a “responsible officer” considers that the interview cannot be delayed. It is very unlikely that ORR would not want to rearrange the interview for a later date in the situation that the PACE machine or location was not available/suitable.

- Code E requires us to use only “authorised” audio-recording devices. This means that having machines we have authorised ORR staff to use, provided the interviewers are trained to set up and operate the devices, in compliance with the manufacturer’s instructions and subject to any operating procedures required by ORR.

2. Section 67(9) of PACE places a duty on persons other than police officers "who are charged with the duty of investigating offences or charging offenders" to have regard to any relevant provisions of the Codes of Practice. Section 67(9) includes ORR. Therefore, we should apply the same principles, and you should be familiar with the provisions of the Codes, and follow them when you are questioning suspects.

3. There is no specific 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, it is desirable that persons who are suspected of committing offences are interviewed under caution because:

- the interview may provide important evidence against the suspect, which you would otherwise be unable to obtain;
- the interview may provide important information revealing further lines of inquiry;
- the interview may provide relevant information to be considered in the prosecution decision; and
- it is fair and proper to allow a potential defendant an opportunity to answer the allegations and give their own account.

4. In the light of the above, you should generally attempt to interview suspects under caution. In the event that a body corporate (e.g. a company) is invited to attend an interview under caution, you should ask the body corporate to nominate a person to attend the interview under caution to answer questions on its behalf.

Written representations

5. There is no obligation on the suspect to attend an interview and we are

seeing an increase in situations where a legal advisor states that their client will not attend a recorded interview but will provide written representations. Whilst this is less satisfactory than a face-to-face interview, because you cannot explore their answers by asking supplementary questions, a written submission can be useful and is considered acceptable if a suspect declines to attend an interview. Nevertheless, you should always stress that a direct interview has benefits for both parties. See para. 3 above.

6. Annex A gives some suggested text and a format that might assist with the letter to the individual or company when inviting them to a recorded interview under caution.

7. If you receive no response to your invitation, it may be appropriate to attempt to write to the suspect again, providing a final deadline for a response.

8. Although there is no express legal requirement that a person suspected of committing an offence must be interviewed under caution investigators do have a duty to allow a suspect the opportunity to answer the allegations against them and give their own account before a decision on whether to prosecute is taken. In situations where there is comprehensive evidence in support of the alleged breach it may be appropriate to simply invite written representations relating to the alleged offence with the offer of an interview under PACE if the suspect so wishes.

Pre-interview disclosure

9. You may receive a request from a suspect's solicitor for disclosure of information prior to the suspect's attendance at an interview under caution. There is no obligation on an investigator to disclose the whole of the evidence against a suspect prior to interview. You have a wide discretion in relation to disclosure of such information. When a request is made, it is appropriate to provide the suspect with some information so that the solicitor is in a position to usefully advise their client in relation to the interview under caution.

10. If you receive a request for pre-interview disclosure, you may write a letter to the defence in which you include information on the offence(s) that you suspect may have been committed and a factual summary of the nature of the case against the suspect. You can also include in the letter a broad description of the areas that you intend to cover during the interview under caution.

11. You should not disclose, at this stage, copies of witness statements or the names of witnesses. If you refer to the contents of statements in the summary of facts, you should say for example, "a number of witnesses saw that..."

12. Sometimes you will receive a request from a defence solicitor for a written list of the questions that you intend to ask at the interview under caution. You should not agree to such a request, as it is highly unlikely that you

will be able to provide an exhaustive list; you will wish to react to the answers given in interview by asking further questions. At the most, you should provide a list of the broad areas to be explored in the interview as already mentioned above.

13. If the suspect has indicated that they will not attend an interview, but will make a written submission, then you should also supply them with any specific questions you wish them to address, as well as the broader areas.

Interview by correspondence

14. Rarely, a solicitor may write, asking that you interview their client by caution and letter. Inspectors should only agree to this in exceptional circumstances. Guidance on this is available on the [HSE website](#).

15. RIG-2010-04-FC provides guidance for staff on obtaining transcripts of interviews under cautions: [link](#)

Text for possible inclusion in the letter inviting a suspect to a recorded interview under caution

Letter heading must provide notification of the investigation concerned
Common text for both companies and individuals

As part of the investigation into the above matter, I am writing to invite you [or to nominate a representative of] to attend the Office of Rail and Road's office aton where they/you will be interviewed under caution.

Before I can ask you whether you consent to this interview, I must inform you of all the rights, entitlements and safeguards that will apply and give you a notice explaining these matters. This letter sets out these rights, entitlements and safeguards these matters but you will receive a further explanation and written notice at the ORR office of these if you consent to the interview.

Rights and Entitlements

You have the legal right to agree not to attend this interview.

If you are asked questions about a suspected offence, you do not have to say anything. However, it may harm your defence if you do not mention when questioned something that you later rely on in court. Anything you do say may be given in evidence.

If you agree to attend voluntarily at the location and on the date and time set out above, you will be given a caution but at the same time will be informed by the person who gives the caution that you are not under arrest, that you are not obliged to remain at the location but if you agree to remain, you may obtain free and independent legal advice if you want.

You are strongly advised to seek legal advice about the contents of this letter and your rights under PACE and the Codes made under it **before** agreeing to consent to the interview and **before** attending the location above. You are also entitled to have your legal adviser present at the interview.

Before the interview commences you will be given a copy of a notice explaining the arrangements for obtaining legal advice and told that the right

to legal advice includes the right to speak with a solicitor on the telephone and to be asked if you want legal advice (if your solicitor is not already present). If you request legal advice, the interviewer will allow you to make those arrangements before commencing the interview.

If you consent to the interview, it will be recorded in accordance with the requirements of the Police and Criminal Evidence Act 1984 (“PACE”), and associated Codes of Practice (“the Codes”). You are entitled to ask to look at the Codes of Practice and should ask the interviewer if you wish to do so.

The interviewer must ensure that the provisions of the PACE Codes concerning the conduct and recording of interviews of suspects are followed insofar as they can be applied to suspects who are not under arrest. This includes determining whether you require an interpreter and the provision of interpretation and translation services. Please advise us as soon as possible whether you will require the assistance of an interpreter or translator.

Text for letter to companies only:

It is intended that this interview will be conducted on the basis that the person attending is authorised to speak on behalf of and they should therefore bring with them a formal letter signed by a senior officer of confirming this authorisation.

The purpose of this recorded interview under caution is to investigate any possible breaches of health and safety legislation byregarding the above matter. The interview will include a caution. This will be given to the attendee in his/her capacity as authorised representative ofand not as an individual. Therefore any answers given during the interview will not be used against him/her as an individual but may be used in evidence against.....

This is a formal opportunity for to provide an explanation as to the matters under investigation.

Reasons for application of PACE

We are considering charges under *{insert details of relevant legislation being considered}*. **For example**

HSWA section 2(1)

‘It is the legal duty for every employer to ensure so far as is reasonably practicable the health, safety and welfare at work of all his employees’

ss2(c) 'the provision of such information, instruction, training and supervision as is necessary to ensure so far as is reasonably practicable, the health and safety at work of his employees'.

The circumstances of the potential breach(es)

Insert a summary of the facts that your investigation has revealed, focussing on those parts that are relevant to the recipient of this letter.

The areas to be covered during this interview will be (but not limited to):

Insert a list of the areas you wish to explore, for example:

- *How the employer recruits, trains, assesses and maintains competence*
- *how they conducted risk assessment and implemented the findings*
- *how they inform workers of the safe systems of work required*
- *maintenance of plant and equipment etc*
- *how work is supervised/monitored*

- *Specifics of how the incident came about and what does the company think caused it*

- *What action they have taken as a result of the incident under investigation*

Text for letter to individuals

The purpose of a recorded interview under caution is to assist with our investigation. Whilst you do not have to attend this interview, it may be in your interests to do so as it gives you an opportunity to explain your position and clarify any information we may have received from elsewhere. An interview can help us to:

- obtain any further important information that might reveal additional lines of enquiry, or confirm our understanding of the facts;

- give you an opportunity to put your side of events; and
- help us gather any further information that we should take into account when deciding on what action we might take once our investigation is complete.

Reasons for Application of PACE

We are considering charges under {insert details of relevant legislation here}

For example

HSWA Sc 7(a)

It shall be the duty of every employee whilst at work –

- (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work”*

The circumstances of the potential breach(es)

Insert a summary of the facts that your investigation has revealed, focussing on those parts that are relevant to the recipient of this letter.

The areas to be covered during this interview will be (but not limited to):

Insert a list of the areas you wish to explore with the individual, for example:

- background employment history, skills and competencies
- what instruction and information they were given before starting the job
- who did they report to, what supervision/monitoring of the work took place
- what actually happened
- what would you do in similar circumstances again

Notice of Rights and Entitlements for suspect voluntarily attending for interview under caution with The Office of Rail and Road (ORR)

Note to interviewer: you must give a copy of this notice to the person attending for voluntary interview and ask them to sign below to confirm they have received the notice of their rights and entitlements. This must be done before the interview commences.

- **Access to Legal Advice.** Before the interview commences you will be given a copy of this notice explaining the arrangements for obtaining legal advice and told that your right to legal advice includes the right to speak with your solicitor on the telephone and to be asked if you want legal advice (if your solicitor is not already present). If you request legal advice, the interviewer will allow you to make those arrangements before commencing the interview. You are also entitled to have your legal adviser present at the interview.
- You have the legal right to agree not to attend this interview.
- If you are asked questions about a suspected offence, you do not have to say anything. However, it may harm your defence if you do not mention when questioned something that you later rely on in court. Anything you do say may be given in evidence.
- If you agree to attend voluntarily at the location and on the date and time set out above, you will be given a caution but at the same time will be informed by the person who gives the caution that you are not under arrest, that you are not obliged to remain at the location but if you agree to remain, you may obtain free and independent legal advice if you want.
- **PACE Codes.** If you consent to the interview the interviewer must ensure that the provisions of the PACE codes concerning the conduct and recording of interviews of suspects are followed insofar as they can be applied to suspects who are not under arrest. The interview will be recorded in accordance with the requirements of the Police and Criminal Evidence Act 1984 (“PACE”), and associated codes of practice (“the Codes”). You are entitled to ask to look at the Codes of Practice and should ask the interviewer if you wish to do so.
- **Interpreter and translation services.** Under the PACE codes the interviewer should determine whether you require an interpreter and the provision of interpretation and translation services. Please advise

us as soon as possible whether you will require the assistance of an interpreter or translator.

- You are to remind the suspect that the provisions of this Code and Codes E and F concerning the conduct and recording of interviews of suspects are followed insofar as they can be applied to suspects who are not under arrest. This includes you asking whether they require an interpreter and the provision of interpretation and translation services.
- If the location of the interview is any place or premises for which the interviewer requires the person's informed consent to remain, for example, the person's home, then the references that the person is "not obliged to remain" and that they "may leave at will" mean that the person may also withdraw their consent and require the interviewer to leave their home or place of business.

Signature of person/representative

Date and time of receiving notice