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CROWN
PROSECUTION
SERVICE

**Pre-trial Witness Interviews by
Prosecutors
A Consultation Paper**





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Witness Interviews
by Prosecutors**

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Foreword

by The Attorney General



In April 2002, there was acute public concern about the outcome of the Damilola Taylor murder case. I therefore asked the Director of Public Prosecutions to look into the Crown Prosecution Service's handling of the case, to consider whether there were implications for the conduct of future cases. I asked him particularly to consider whether the time had come to introduce a system where, before trial, key witnesses could be interviewed by the prosecutor.

Discussion of this issue is particularly timely. The CPS is a key player in the administration of justice. In recent times it has reinforced this role by a greater focus on supporting victims and witnesses, building strong and effective cases by closer cooperation with the police, and greater and earlier involvement in the decision to charge.

Although there are many other jurisdictions which allow direct access to witnesses by prosecutors, this is a new departure for England and Wales. It is right that any proposals of this sort should be open to debate as to whether a change would serve the interests of justice. This Consultation Paper will be a valuable springboard for comment, both from within and outside the legal profession.

A handwritten signature in black ink, which appears to read "Lord Peter Goldsmith". The signature is written in a cursive, flowing style.

Lord Peter Goldsmith
Attorney General

Introduction

by The Director of Public Prosecutions



As part of my review into the CPS handling of the tragic case of Damilola Taylor, I was asked by the Attorney General to consider the desirability of allowing prosecutors direct access to witnesses in order for their credibility to be assessed. Following the publication of the review, the Attorney General announced that he would issue a consultation paper to enable the public, the police, the legal profession and the judiciary to express their views.

The difficult issues raised by the Damilola Taylor case, together with other significant changes to CPS working practices, make this consultation both welcome and timely. Closer working with the police through co-location, earlier involvement of prosecutors in the charging process and the introduction of special measures meetings with vulnerable or intimidated witnesses all make it desirable that we should consider whether it is now time to allow prosecutors the discretion to interview certain witnesses at an early stage when there may be reasons to doubt their reliability and credibility.

As I said in my review of the Damilola Taylor case, it may seem incredible to some people that a prosecutor has to decide whether a witness's account is capable of belief without having any direct contact with the witness to inform that decision. By contrast, such practice occurs without objection in other common law jurisdictions.

I acknowledge that there are strongly held views that allowing prosecutors to interview a witness and to speak about that witness's evidence before trial, carries potential risks of coaching or otherwise tainting the witness's evidence. These are views that will need to be carefully considered as part of the consultation process.

There are therefore issues of significant public importance that need to be debated before we in the CPS can reach a decision about the course of action that we should take. It goes without saying that any debate must be wide, public and frank in order to ensure that the decision we eventually take is fully and properly informed.

I look forward to receiving your response.

A handwritten signature in black ink that reads "David Calvert-Smith". The signature is written in a cursive, flowing style.

Sir David Calvert-Smith
Director of Public Prosecutions

Preface

This paper considers the desirability of allowing prosecutors direct access to witnesses in order for their reliability and credibility to be assessed and seeks views on the issues likely to arise from direct contact between prosecutor and witness pre-trial.

It is clear that some prosecutions fail because witnesses do not give evidence in accordance with their statements or because their evidence proves unreliable when tested under cross-examination. Reducing the numbers of cases that fail through lack of reliable evidence would be a vital contribution towards narrowing the justice gap and increasing public confidence in the criminal justice system. Allowing prosecutors the discretion to meet witnesses, in appropriate cases, for the purpose of making an assessment of their reliability and credibility would seem, *prima facie*, both a sensible and necessary step to take towards achieving this objective.

As part of our deliberations, we have examined the practice and procedures of other prosecuting authorities, most in other jurisdictions, with a view to establishing whether the perceived benefits of prosecutors meeting witnesses do in fact exist; the potential disadvantages and dangers of such a practice; and whether any safeguards can be put in place to minimise such dangers. We describe in **Annex A** to this paper the various different approaches we found and comment on their applicability or otherwise to the system in England and Wales. We are grateful to everyone for time they gave to explaining their practices and procedures to us and, in some cases, allowing us to observe these in operation. We obtained valuable information as a result which has helped us to form some of the views we express in this paper.

We emphasise that our views are preliminary views and we recognise that we are considering a fairly radical proposal so far as the English legal system is concerned. The issues raised by the proposal require further detailed consideration before we can form a definitive view.

We wish to consult as widely as possible on the issues raised and we have set out in this paper a number of questions on which we would particularly welcome views. Respondents are invited to comment on these together with any other issues they consider important.

The Consultation Process

The consultation period will end on 21 July 2003.

Responses should be sent to Dan Jones, Policy Directorate, Crown Prosecution Service, United House, Piccadilly, York YO1 9PQ. The e-mail address is: dan.jones1@cps.gsi.gov.uk. Responses may be published and attributed unless the individual requests otherwise.

Further copies of the consultation document can be ordered by telephoning 01904 545439. The document is also available online from the CPS website at www.cps.gov.uk

Introduction

1. It has long been an accepted rule of conduct in England and Wales that prosecutors do not speak to witnesses to fact about their evidence. Any pre-trial contact has usually been limited to an exchange of courtesies or, in cases where witnesses are nervous about giving evidence, an attempt to put them at ease and explain court procedures. The relationship between prosecutors and victims is, however, already in the process of change. Prosecution decisions to discontinue proceedings or to reduce charges are explained direct to victims, either by letter or in face to face meetings. New procedures introduced by the Youth Justice and Criminal Evidence Act 1999 established pre-trial meetings with vulnerable or intimidated witnesses to provide both a link with the CPS and reassurance that the witness's needs would be taken into account as well as explaining special measures.
2. The reasons for the present lack of contact can in part be explained by the guidance set out in the Bar's Code of Conduct which effectively prohibits any discussion between prosecution counsel and witnesses (save for experts or principal investigating officers) about the substance of their evidence. While the rules on direct contact for other purposes have been relaxed to permit counsel to introduce themselves to witnesses or to seek to put nervous witnesses at ease and explain court procedures (Written Standards for the Conduct of Professional Work — 6.1.3 and 6.1.4), it still remains the case that in a contested Crown Court case, prosecution counsel cannot interview a witness about that or any other witness's evidence (6.3.1). Barristers acting in civil cases have considerably more latitude to speak to witnesses about their evidence.
3. The rationale for this standard appears to be to prevent counsel being placed in a position where he or she may be accused of coaching or otherwise contaminating the evidence of a witness.
4. The position of the solicitor is different. Principle 21.10 of the Law Society's Guide to Professional Conduct states that: *it is permissible for a solicitor acting for any party to interview and take statements from any witness or prospective witness at any stage in the proceedings*. With certain caveats, the Bar Written Standards provide for the same in relation to civil matters.
5. There does not appear to be any qualification to this rule anywhere in the Law Society's Guide to Professional Conduct or the Code for Advocacy for solicitors acting in criminal cases. In short, there appears to be nothing to prevent prosecutors who are solicitors from speaking, in advance of a trial, to witnesses in criminal cases about the evidence they can provide.
6. The desire not to be seen to be in a position to coach or otherwise contaminate the evidence of a witness is clearly regarded by prosecutors as the most significant reason for not meeting witnesses prior to trial.
7. This may only be part of the explanation for the lack of contact between prosecutors and witnesses. While prosecutors can provide legal advice to the police prior to charge, the conduct of the investigation has always been a police function. Any further enquiries requested by the prosecutor, including obtaining further statements from witnesses, are undertaken by the police. Witness care and contact has also always been a police function.

The practical effect of the status quo on prosecution decision making

8. While the current relationship between the prosecutor and the police may, on the face of it, serve to maintain the independence of the CPS decision from the police investigation, paradoxically it may also reduce public confidence that the CPS is reaching decisions entirely independently of the police.
9. If the prosecutor is reliant on the opinion of the police officer as to the reliability or credibility of a witness, he or she is unable to make a wholly independent assessment of the quality of evidence that witness can provide.
10. There are other, more obvious, practical disadvantages to the current position. Police officers are investigators, not lawyers, and may not always be in the best position to assess the importance of certain aspects of the evidence that the witness has provided. At present a prosecutor cannot speak to a witness at any stage prior to trial in order to clarify or test the evidence of the witness with a view to assessing its reliability.

11. On the other hand the lack of contact with witnesses reduces the risk of prosecutors losing the ability to reach objective casework decisions as a result of pressure from, or sympathy towards, the witness. Prosecutors are also unlikely to be placed in a position where accusations of coaching or otherwise can be made.

The potential advantages of permitting prosecutors to speak to witnesses

12. First, not only is the prosecutor in a position to assess the demeanour of the witness rather than relying on the opinion of the police officer, direct pre-trial contact may also provide an opportunity to question the witness, for the purposes of clarification or expansion of detail, about the contents of the witness statement provided to the police.
13. As a result, weak cases are more likely to be weeded out at an early stage (with consequential benefits in terms of reducing stress), while cases that may have seemed weak on paper appear stronger when the witness has been seen in person.
14. Secondly, an early meeting between prosecutor and witness — whether or not there is a need to ask the witness about his or her evidence — would provide an opportunity to put a witness at ease, explain the prosecution process and answer any questions a witness may have. As a result a potentially reluctant witness may be more likely to support the prosecution if he or she feels reassured that all aspects of the case have been fully examined and his or her interests properly taken into account.

Specific questions on which views are sought

15. Respondents are invited to comment about any issue they wish, especially in relation to any matter that we may have overlooked, but we would particularly appreciate views on the issues set out below. Where we have a preference or a proposal we have set it out in the text.
16. We have not specifically addressed different types of offence or categories of witness (for example, children, vulnerable adults). However, we would very much appreciate comments on these matters. We fully acknowledge that if we were to move towards meeting witnesses it would be imperative that prosecutors conducting meetings should be both properly trained and of the appropriate experience and ability.

Q.1 What should be the purpose and extent of the witness interview?

17. The primary purpose of the interview will be to assess the reliability of the evidence that the witness can provide. How this is done would vary from case to case depending on the nature of the offence, the quality of the available evidence or the likely reliability of the witness. In some cases it may be possible to do this by assessing generally the witness's demeanour and concerns without any discussion of the evidence. However, there will be cases where, in order properly to assess the reliability of a witness, the prosecutor will have to question the witness about the evidence contained in the witness's statement.

Q.2 At what stage of the proceedings should the interview be held?

18. In order for the perceived advantages of witness interviews to accrue, the preferable time for an interview to take place would be before the prosecutor reaches a decision to proceed and after the point at which the prosecutor considers that he or she has sufficient information and evidence for an interview to be of value. In many cases, especially those of a complex and/or serious nature, the appropriate stage will almost certainly be prior to charge. However, this would not preclude the interviewing of further witnesses who came to light after a decision to prosecute had been reached.

Q.3 What form should the interview take?

19. In most jurisdictions the interview, be it termed precognition or consultation, is relatively informal and does not involve the defendant or the defence. The exception is the Formal Preliminary Examination (FPE) used by Army prosecutors. The advantages of the former appear to be that the relative informality is more likely to put the witness at his or her ease and by its very nature may encourage a less stilted approach than a procedure such as the FPE. This is likely to be particularly the case with vulnerable witnesses. It also allows the prosecutor to advise the witness of the prosecution process and answer any questions that the witness may have about court procedure. A further benefit is the relative speed with which such interviews could be arranged as opposed to an FPE which requires the availability of the defence solicitor and, if he or she wishes to attend, the defendant, as well as suitable accommodation to house the proceedings.
20. On the other hand a more formal procedure such as the FPE may give the prosecutor a better idea of how a witness may stand up to cross-examination. The question of coaching is less likely to be an issue as the defence are present and can intervene if they believe that the prosecutor may risk contaminating the evidence, most obviously through the use of leading questions. The proceedings are also recorded contemporaneously.

Q.4 What safeguards can be introduced to reduce the possibility of coaching or otherwise contaminating the evidence of a witness?

21. The usual opposition to allowing a prosecutor to speak to a witness about his or her evidence is that the prosecutor may deliberately coach the witness, or that he or she may unwittingly contaminate the witness's evidence. This could occur in a number of different ways; by introducing other evidence into the interview in such a way that the witness is aware that it is the evidence of another witness; by asking leading questions in relation to the witness's account or by probing into a witness's account in such a way as to cause the witness to question the accuracy of his or her recollection and change the account accordingly.
22. So far as other jurisdictions are concerned, where prosecutors are permitted to speak to witnesses about their evidence prior to trial, the risk of coaching or otherwise contaminating the evidence does not appear to be regarded as a significant issue and defence accusations of coaching appear to be rare. However, historically in England and Wales the issue of witness coaching has always been a significant cause of concern. For this reason it is necessary to decide whether or not the concern about coaching or tainting the evidence can be addressed to the satisfaction of those concerned by considering safeguards that could be introduced.
23. There are means by which an interview between a prosecutor and a witness could be recorded. This could be by means of a contemporaneous written note or audio or visual recording. The Practice Guidance issued in relation to special measures meetings requires a contemporaneous written record to be taken by a CPS employee.
24. There may be advantages and disadvantages to the various methods suggested, although visual recording would provide the closest thing to an unassailable record of what was said. It is noteworthy that prosecutors and investigators at the SFO felt that the presence of an audio record of the interview may provide protection against accusations from both the defence and a potentially hostile witness that coaching had occurred. On the other hand witnesses may find it intrusive and there must be a question as to whether it would be necessary in those meetings where the evidence of the witness was not discussed.

Q.5 Should the extent of the prosecutor's discretion to interview a witness be limited to specific types of case or witness?

25. Apart from Scotland, where witnesses are precognosed in a wide variety of cases, the trend in other common law jurisdictions is for witness interviews to be conducted on a limited basis in those cases in which the prosecutor believes that there is a need for the witness to be seen, usually to assess the reliability of the evidence that the witness can provide. Such interviews may take place in any case but are usually limited to serious or complex cases where the evidence of the witness is a crucial part of the prosecution case, such as homicides, sexual offences or organised crime.
26. However, there could also be less serious cases in which such an interview might be desirable. The practical limitations on more widespread interviews do not appear to be based on issues of principle so much as available prosecution time and resources. Allowing a wide discretion seems preferable to limiting it to particular categories of offence and/or witness, as there will inevitably be cases falling outside imposed categories in which a witness interview ought to be held.

Q.6 How would a power to interview witnesses affect special measures meetings?

27. In the case of vulnerable and intimidated witnesses we already have special measures meetings which allow the trial advocate to see the witness in person in order to explain the prosecution process to the witness and deal with any questions the witness may have. However, a special measures meeting will be held after the prosecutor has made an initial decision to proceed with a prosecution and it is not, nor is it intended to be, primarily a witness assessment tool.
28. The advantage of seeing the witness at an earlier stage is that it would assist the prosecutor in deciding what special measures might be appropriate if the matter were to go to trial. It also allows the prosecutor to explain the process to the witness. Such early contact may not be necessary or, more realistically, practicable in every case but the discretion would be available to the prosecutor. This does not necessarily preclude a later meeting to explain what measures have been granted and to introduce trial counsel.

Q.7 Should attendance be compulsory or voluntary?

29. In Scotland a witness will be cited to attend precognition. If the witness fails to attend a warrant may be issued to bring him or her before the Sheriff for a deposition to be sworn. This power is rarely used, although the threat of its use may be enough to convince a witness to attend precognition. In the other jurisdictions attendance is voluntary, with the exception of the Army where witnesses are summonsed to attend the FPE.

Q.8 How much of the contents of the meeting should be disclosed?

30. The question is whether or not the whole of the record of interview (subject to editing of sensitive material) should be disclosed in the interests of openness, or just those parts of the interview that the prosecution intends to rely upon or that fall to be disclosed by application of the principles of the Criminal Procedure and Investigations Act 1996.

31. Given that the Practice Guidance on special measures meetings states that the notes (subject to editing for sensitive material) should be served on the defence in their entirety, we believe that this is a precedent we should follow.

32. So far as the revelation of any further evidence during interview is concerned, upon which the prosecution would seek to rely, we anticipate that the most appropriate course of action would be to ask the police to take a further statement reflecting what was said.

Q.9 To what extent, if at all, should independent counsel conduct or participate in witness interviews?

33. In most cases counsel is not instructed until after the decision to prosecute has been reached. In those cases, if a witness interview is necessary it should already have been conducted by the prosecutor before counsel is instructed. In cases to which special measures apply, counsel is permitted to speak to witnesses about non-evidential matters.

34. However, there are serious cases in which counsel is instructed at a very early stage of the prosecution, often to advise on whether a prosecution should be brought. The question arises as to whether in such cases counsel, as well as the Crown Prosecutor, should be permitted to interview witnesses and whether that should include, where necessary, discussing the evidence.

Q.10 Should the prosecutor who conducts the witness interview also be permitted to prosecute that case if it goes to trial?

35. We do not see any obvious objections to this course of action if the witness interview does not involve any questions relating to the witness's evidence. However if the prosecutor does ask the witness questions relating to his or her evidence and subsequently appears as the trial advocate, questions relating to independence and coaching may arise. The prosecutor may potentially become a witness. It remains to be seen whether the issues raised are matters of principle that are insuperable or can be dealt with through the recording of the interview to create an unassailable record of what was said.

Q.11 What role would the police have in the interview process?

36. While what is proposed is very much a CPS responsibility, experience of other jurisdictions reveals that the officer in the case will usually be present at the interview although in a non-participative role.

Summary of key questions

- Q.1** What should be the purpose and extent of the witness interview?
- Q.2** At what stage of the proceedings should the interview be held?
- Q.3** What form should the interview take?
- Q.4** What safeguards can be introduced to reduce the possibility of coaching or otherwise contaminating the evidence of a witness?
- Q.5** Should the extent of the prosecutor's discretion to interview a witness be limited to specific types of case or witness?
- Q.6** How would a power to interview witnesses affect special measures meetings?
- Q.7** Should attendance be compulsory or voluntary?
- Q.8** How much of the contents of the meeting should be disclosed?
- Q.9** To what extent, if at all, should independent counsel be permitted to conduct or participate in witness interviews?
- Q.10** Should the prosecutor who conducts the witness interview also be permitted to prosecute that case if it goes to trial?
- Q.11** What role would the police have in the interview process?

Annex A

Examples from other jurisdictions or prosecuting authorities

Scotland

1. For historical reasons, the Procurator Fiscal is responsible both for investigating and conducting prosecutions, although in practice the police will, in most cases, have de facto conduct of the investigation. In serious cases to be tried by a jury, the fiscal has the power to “precognosce” (interview) prosecution (and defence) witnesses if he or she wishes to do so. This is regarded as an integral part of the investigation/case review process, not least because witness statements taken by the police are not signed and are regarded as rather more perfunctory than those taken by the police in England and Wales.
2. In the case of prosecution witnesses it is a practice that is carried out to a greater or lesser extent in all cases to which precognition applies. The power is discretionary and is usually restricted to significant witnesses. Many precognitions are conducted by non-legally qualified precognition officers under the instructions of a more senior fiscal who will decide which witnesses should be precognosced. It is not uncommon for precognitions to take place over the telephone, particularly with more peripheral or uncontentious witnesses.
3. The purpose of a precognition is to allow the prosecutor to assess the reliability of the witness and judge whether the version of events that the witness gave to the police is correct. It may also be used to allow the witness to expand in any particular respect upon his or her evidence if there has been an omission in the account given to the police. It also allows the fiscal to explain the prosecution process to the witness and answer any questions the witness may have. The precognition is confidential and will not automatically be disclosed to the defence, although the defence have a corresponding right to precognosce prosecution witnesses.
4. The very widespread use of precognition by the procurator fiscal is partly attributable to the limited content and quality of police statements. The purpose of precognition is therefore primarily to ascertain whether the police statement is accurate and whether the witness has any more evidence to provide. A natural concomitant of the precognition will be, however, to enable an assessment to be made of the reliability and credibility of the witness.
5. Our enquiries in Scotland have led us to conclude that, although there are distinct advantages to be gained from precognition, because of the essential differences in the legal system and also the relationship between the police and the fiscal service, the precognition process as a whole is not something that we believe can, or indeed should, be imported into the common law system that we have in England and Wales.

Northern Ireland

6. The Northern Irish system of criminal justice is similar to that in England and Wales. In cases to be tried at the Crown Court, prosecutors from the office of the Director of Public Prosecutions and, where necessary, trial counsel, have discretion to “consult” with prosecution witnesses after the police investigation has been completed and a full file of evidence has been prepared but before a decision has been taken to prosecute.
7. The purpose of the “consultation” is similar to the purpose for which precognitions are held in Scotland. However, unlike precognitions, consultations are not held as a matter of routine, but rather take place when the prosecutor is of the opinion that there is some doubt about reliability of the witness is in issue or it is desirable to assess the witness’s attitude to giving evidence and how he or she may respond to cross-examination.
8. A police officer is present at the consultation to make a contemporaneous note of the interview and will be available to be cross-examined if necessary during trial. If any further evidence of use to the prosecution comes to light the officer will take a further statement from the witness. If any unused material that falls to be disclosed to the defence under the Criminal Procedure and Investigations Act 1996 is revealed, the defence will be informed by way of letter.

The Army Legal Service

9. The court-martial process provides for the prosecution to hold a “formal preliminary examination” (FPE) in order to assess the reliability of a witness’s evidence before a decision is reached on whether or not to prosecute. The decision to hold an FPE is entirely at the prosecutor’s discretion and is held relatively rarely — about 1% of cases, typically in cases involving sexual offences, complex cases and cases where conviction rests on whether the word of the victim is accepted against that of the defendant.
10. The form of the FPE is similar to an old style committal where evidence was called. The witness will already have made a statement that the prosecutor will have. The witness is called and his or her evidence is taken down in a deposition. Unlike most old-style committals, the prosecutor may explore gaps in the witness’s evidence. However, there is no judicial presence. Where this form of witness assessment differs from the other jurisdictions is that the defence may (and do) attend to cross-examine the witness. The defendant may attend if he wishes and give evidence, although few do.
11. The FPE is not intended to be a process designed to reassure nervous witnesses and put them at ease, nor is it used as an opportunity to explain court procedure. In fact, prosecutors will avoid contact with witnesses in order to pre-empt any suggestion that coaching has taken place.

Canada

12. The Canadian system is based on a strict separation of powers of investigation and prosecution similar to that which exists in England and Wales. Indeed, of the various jurisdictions that the Philips Royal Commission on Criminal Procedure (Cmnd 8092) considered, the Canadian model was the one that was recommended as a basis for the CPS.
13. In Canada prosecutors have the discretion to see witnesses after the police have charged the defendant with an offence but prior to reaching a decision whether or not to prosecute, although there appears to be no bar to interviewing further witnesses who come to light after a decision to prosecute has been reached. The interview may be conducted by the prosecutor who is to prosecute the trial. Such interviews are not routine and tend to take place in sexual cases or cases involving organised crime.
14. The purpose of the interview is to assess the reliability of a witness’s evidence, and build up a rapport with the witness. The process is known as “screening” but it is also felt to be something that is necessary for the purposes of good trial preparation (if the case proceeds).
15. Where new evidence comes to light during the interview, the prosecution will write to the defence setting out that material. If it is something that may be led in evidence by the prosecution, it is not always necessary to take a further statement unless there is a significant amount of material. In such a case the police will be asked to make enquiries and take a further statement. Any material that the prosecution decides not to use as part of its case is disclosed to the defence.
16. In some Canadian provinces prosecutors may conduct a pre-charge witness interview similar to the taking of a witness statement. There has been some controversy in Canada over the implication that this has for the separation of powers of investigation and prosecution and this remains unresolved.

The Serious Fraud Office (SFO)

17. The role of the prosecutor at the SFO is rather different from the CPS prosecutor because the SFO has an investigative function. As such it is accepted that prosecutors will be involved in interviewing witnesses and this is a role that they regularly carry out. There is some separation of power in that a case controller, who will not usually see witnesses, will make the final decision.
18. All witness interviews, be they voluntary or conducted under compulsion, are tape-recorded — at an early stage it may not be clear whether the person is a potential witness for the prosecution or a potential defendant. If the witness is prepared to make a statement, the prosecutor will then draft a witness statement based on the contents of the interview and provide it to the witness to check and sign.

For your notes

For your notes

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