



RESPONSE TO CONSULTATION ON DRAFT CPS GUIDANCE ON SPEAKING TO WITNESSES AT COURT

About us

1. 25 Bedford Row is a leading set of criminal chambers. We specialise in defence advice and advocacy in all areas of criminal law, providing representation from the magistrates' court to the Supreme Court. Chambers is made up of 17 Queen's Counsel and 43 junior barristers. Together we have a wealth of experience of criminal proceedings at every level of the criminal justice system. Our members have acted in many of the most sensitive and high profile criminal cases of recent years and we strive to maintain the highest professional standards. We were named Crime Set of the Year in 2014 by Legal 500.

Overview

2. 25 Bedford Row endorses efforts to improve the court experience and offer support for witnesses. It is right that witnesses should be familiarised with court processes and procedures so that they understand how the system works and to help make the experience less daunting. To that extent, it is to the benefit of all parties for witnesses to be prepared for the rigours of giving evidence.
3. Moreover, we wholly support (and are actively involved in) recent initiatives to improve the methods of adducing evidence from children and vulnerable

witnesses and defendants, for example, by reforming the rules of examination in chief and cross examination.

4. However, the CPS proposals for providing assistance to prosecution witnesses for cross-examination go well beyond witness familiarisation or simple reassurance; they run the risk that witnesses' evidence may be tainted or 'coached'. If implemented, these proposals would undermine the fair administration of justice and the integrity of our adversarial system.
5. The degree of contact proposed between prosecutors and complainants and witnesses also risks increasing the partiality of counsel and may give complainants a disproportionate influence over proceedings. Some prosecution witnesses might wrongly regard prosecutors as 'their advocate'. Support for vulnerable or reluctant witnesses and complainants can be more appropriately delivered by properly trained police officers, not by prosecuting advocates. The Witness Service already facilitate pre-trial court visits, support while in the witness box, and support after the trial and there are several other agencies working towards similar ends.
6. Presently, all witnesses have the benefit of a direct Victim Liaison Officers (VLOs) and Witness Liaison Officers (WLOs). VLOs and WLOs are experienced and specially trained to deal with all aspects of complainants' and witnesses' needs. Witnesses can meet their VLOs and WLOs as frequently as is necessary. During the course of proceedings both VLOs and WLOs can, and often do still assist witness. Further, victims of sexual allegations also have the benefit of independent support through professionally recognised providers who work along side the police, which include 'victim support' and, particularly in London, the Havens professional service. Finally, children and vulnerable witnesses and defendants can have the support of registered intermediaries.

7. We believe that these proposals run the very risks the Court of Appeal identified in *Momodou* [2005] EWCA Crim 177, a case on the issue of witness training.

“The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved"”

8. The Bar Council gave assistance in the light of *Momodou* in respect of witness familiarisation processes, when it set out the following:

*“As part of the witness familiarisation process,...it is appropriate for barristers to advise witnesses as to the **basic requirements** for giving evidence e.g. the need to **listen to and answer the question put**, to **speak clearly and slowly** in order that the Court hears what the witness is saying, and to **avoid irrelevant comments**”* [see the Bar Standards Committee review on the guidance for Witness preparation 2008]

9. The goal of all parties in the criminal process must be the achievement of the best evidence. That has to be the achievement of the best ‘uncontaminated’ evidence. These proposals do not ensure such an outcome.

Question 1: Does the guidance cover the key issues that impact upon the victim or witness's experience at court? If not, what other subject areas might be covered?

10. We feel unable to answer this question as there are no empirical data in the paper to establish what are referred to as the “key issues that impact upon the victim [sic] or witness’s experience at court”. The paper seems to assume that the matters identified in it are the key issues.

Question 2: Does the guidance strike the right balance between supporting the witness in advance of their appearance at court and ensuring that the trial is, and is seen to be, fair to the defendant?

11. No it does not.

12. The proposed measures on providing assistance for cross-examination represent an unacceptable encroachment on a fundamental principle of our adversarial system. These proposals are impractical, they will give rise to real risks that prosecution witnesses will be coached and they will undermine confidence in the integrity of the trial process and the independence of prosecution advocates.

13. It is wholly unnecessary, for the purposes of supporting prosecution witnesses in advance of their appearance at court, to disclose to them the nature of the defence or any other material that may be used in cross-examination. The proposed guidance conflates support for witnesses in unfamiliar surroundings with measures designed to give witnesses a substantial advantage in relation to the issues in the case. Prosecution witness evidence has nothing to do with the defence being advanced and should be given uninfluenced by what anyone else has said. It has never been the function of the prosecution to warn witnesses of the likely defence and it is inconceivable that a prosecution witness would not be influenced in some way by knowledge of the nature of the defence. Honest witnesses might be tempted to tailor their evidence according to what they have heard, even in respect of matters they perceive not to be crucial to the case, while untruthful witnesses will be equipped with

the tools they need to prepare to adapt their evidence to meet the defence case.

14. A witness's reaction in court when the specifics of a defence case are revealed is an important matter for a jury or bench to consider. If prosecution witnesses are forewarned of the nature of the defence, this element of the trial process will be lost. Defence counsel will in some cases begin cross-examining prosecution witnesses about the opportunity they have had to reconsider their evidence in the light of disclosure they have received, undermining the credibility of the same witnesses these proposals seek to protect
15. In an article in *Counsel Magazine* in March 2015 the Director of Public Prosecutions argued that cross-examination is not about ambush, adding: "no one benefits – prosecution, defence or the public more generally – from a situation which is unfairly stacked against the victim." We do not agree that the system is unfairly stacked against complainants – there are a range of safeguards and statutory checks and balances against inappropriate cross-examination and in respect of issues such as non-defendant bad character and previous sexual history. Special measures are available in many cases and pre-recorded cross-examination of child witnesses is being piloted, with cross-examination subjected to judicial scrutiny in advance. All of these measures are designed to protect witnesses and to help them give their best evidence. Prior knowledge of the defence case – or warning of any other real issues of substance - may not increase witness confidence any further yet would significantly affect the fairness of proceedings for the defendant.
16. If witnesses are to be informed that material about them has been disclosed to the defence, or that a judge has ruled that they may be cross-examined about their bad character or sexual history, there should be no discussion at all beyond the simply informing the witness.

Question 3: Does the guidance set out clearly what a prosecutor should do when meeting a witness at court? Is there anything else that might be done?

17. No it does not.

18. The guidance fails to explain how meetings between prosecutors and witnesses would be recorded and what resources would be available to ensure that there are sufficient safeguards for prosecutors who could be criticised for seeing witnesses alone. If implemented, the guidance would need to provide for keeping accurate records of any significant comments made by witnesses in meetings with prosecutors and disclosure of the same.

19. The guidance does not make clear whether every prosecution witness of fact should be met and assisted with cross-examination, or only those perceived as vulnerable or requiring re-assurance.

20. The guidance does not explain the position in respect of multi-handed cases where the nature of each defence case might differ, or where defendants blame each other. We are also unclear as to how technical defences might be explained to witnesses, if at all.

Question 4: Does the guidance give enough information regarding other support services at court?

21. Yes it does.

22. As set out above, we say that the police, witness service and agencies other than the prosecution are better placed than prosecuting advocates to provide support to witnesses attending court.

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