The Attorney General Falkland Islands

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The Attorney General's Guidance on Victims and Witnesses

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The Law and Regulation Directorate
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Contents

1. Introduction

1. Being a victim or a witness to a crime is an unpleasant and difficult experience. The Royal Falkland Islands Police and Prosecutors have pledged to treat all victims and witnesses with respect and understanding throughout the justice process.

2. This Guidance sets out how victims and witnesses will be treated and supported by the Royal Falkland Islands Police, Prosecutors and the Witness Service.

3. The aim of this Guidance is to address specific victim and witness care issues as they arise at each stage of the justice process.

2. General Principles

Impact

4. Prosecutors will take into account the impact on the victim or their family when deciding whether to bring charges in any case. Prosecutors work closely with the police to build the best possible case and seek to ensure that the charge reflects the seriousness of the crime. Where appropriate Prosecutors will also take into account the likely effect that the type of crime has had on the local community.

Communication

5. The Royal Falkland Islands Police are the point of contact for victims and witnesses and they will regularly update victims and witnesses as to the progress of the case.

6. Where a victim has to attend court to give evidence and at that stage the defendant indicates that he or she intends to plead guilty, the prosecutor will, wherever possible, speak to the victim to ensure that their views are taken into account when considering whether to accept the plea.

7. Prosecutors will introduce themselves to victims and witnesses at court and answer any questions they may have and give an indication of how long they may have to wait before giving evidence. Prosecutors are not allowed to discuss the evidence with victims and witnesses, but can answer any questions they have on court procedure and processes. Victims and witnesses will be kept informed if there are delays to them giving evidence.

8. Victims and witnesses will be given an opportunity to read their witness statements or see video recorded statements before they give evidence.

9. Where an appeal is lodged the Royal Falkland Islands Police will keep victims updated on the progress of the appeal and inform them of the outcome.

Protection

10. Prosecutors will address the specific needs of a victim and where justified seek to protect their identity by making an appropriate application to the court. For example for reporting restrictions to be imposed.

11. The Royal Falkland Islands Police will undertake and assessment with victims and witnesses to determine whether they require the assistance of special measures when giving evidence. For example by giving evidence over a live link or from behind a screen.

12. The Witness Service will support victims and witnesses when they attend court. If for any reason the Witness Service is unavailable a police officer will support victims and witnesses at court.

13. Prosecutors will protect victims and witnesses from unwarranted or irrelevant attacks on their character and may seek the court's intervention where cross-examination is considered to be inappropriate or oppressive. Prosecutors will robustly challenge defence mitigation which is derogatory to a victims or witnesses character.

14. Prosecutors will apply for appropriate orders to protect and compensate victims. For example restraining orders, compensation orders and sexual harm prevention orders.

3. Interviewing Witnesses

Interviewing witnesses for the other side

15. Whether or not a witness has been interviewed or called as a witness by the other side, the prosecution and defence:

    (a) may interview each other's witnesses or prospective witnesses;

    (b) may take statements from those witnesses; and

    (c) **must** ensure that no attempt is made to persuade the witness to change his/her account.

16. Where it is intended to interview a witness for the other side, who has given evidence or who it is known will be giving evidence, it is wise to give notice to the other side stating:

    (a) that the interview is required;

    (b) the reasons for it; and

    (c) that a representative from the other side should be present.

17. The right to interview defence witnesses after they have given evidence should only be exercised with the approval of a Prosecutor and the police should be discouraged from interviewing defence witnesses after the witnesses have given evidence unless advised to do so.

18. A witness does not have to be interviewed; it is a matter for the witness, who can refuse. A witness may agree to be interviewed only at the police station, in which case this facility should be made available.

19. If the defence wish to interview prosecution witnesses who are police officers, they cannot object to a senior police officer being present. It is preferable if the senior officer at the interviews has no connection with the proceedings in question.

20. If the defence wish to interview potential defence witnesses who are police officers, it is a matter for the Chief of Police to determine the conditions for the interviews, provided they are reasonable.

Alibi Witnesses

21. Where a formal alibi notice has been given:

(a) before interviewing an alibi witness the police should give the solicitor for the defence reasonable opportunity to be present; or

(b) if the defendant is unrepresented, it is not appropriate for the defendant to be present at the interview of the alibi witness, but the police should try and arrange for some independent person to be present.

(c) the solicitor present at the interview of the alibi witness is primarily an observer to lessen the risk of allegations that the police acted improperly. He/she has no right to interfere with the interview if there is no solicitor client relationship with the witness

4. Pre-Trial Witness Interviews

Permission

22. A pre-trial witness interview ("PTWI") may only be conducted by a Prosecutor with the specific authority of the Attorney General.

Selection of Cases

23. Interviews may take place in any case in which the prosecutor considers an interview would assist in assessing the reliability of the witness's evidence and/or to assist in understanding complex evidence. The purpose is to enable the prosecutor to reach a better informed decision about any aspect of the case.

24. Interviews will normally be of most value in serious indictment-only cases. However, nothing precludes the holding of an interview in a summary case. The decision to hold such an interview will be a matter for the Attorney General.

25. The interview may take place at any stage in the proceedings (including pre-charge) until the witness starts to give evidence. Ideally a PTWI will take place before the prosecution decision is made, that is to say pre-charge, or in the case of a threshold test case, as soon as practicable.

26. However, a PTWI should not take place until the police investigation is complete and the witness must have made a witness statement.

27. The reviewing prosecutor should consider whether a PTWI would assist in reaching a prosecution decision. If he/she considers that it would, he/she should, at this point, refer the case to the Attorney General for a decision to be made. If the case is pre-charge and suitable for police bail, the police will need to bail the defendant for an appropriate period of time.

Arranging an interview

Children and other vulnerable witnesses

28. Where the witness is a child or vulnerable adult witness, special care must be taken when deciding whether to hold a witness interview. Generally, further interviews with children or vulnerable adult witnesses should be avoided, to prevent trauma from repetition of the account. Where a further interview is unavoidable, the prosecutor should first consider whether that could be undertaken by the original interviewing police officer, who will already have established a rapport with the child or vulnerable adult witness.

29. If, having considered all these factors, it is decided that a pre-trial witness interview should take place the prosecutor should go on to consider the age, degree of vulnerability and status of the witness before reaching a final decision. This should be done in consultation with the investigating officer.

Consultation with others on holding an interview

30. When a decision has been made in principle to invite a witness for interview, the prosecutor must advise the officer in charge of the case and seek his/her view on the merits and practicalities of conducting an interview.

31. If the police are opposed to a pre-trial interview taking place, the officer in charge must set out his/her reasons in writing. If, having considered the police objections, it is decided to proceed with the interview; the matter must be discussed with the Attorney General. It may be appropriate to seek the views of a senior police counterpart but the decision whether or not to conduct an interview will rest with the Attorney General**.**

Contacting the witness

32. Initial contact with the witness should be made through the police and should be followed up with a letter setting out the purpose of the interview. The officer in the case will be responsible for delivering the letter.

33. It is both good practice and courteous to let the witness know why they have been asked to attend an interview with the prosecutor. The letter should introduce the prosecutor and set out:

    (a) the purpose of the interview;

    (b) where the interview will take place;

    (c) how long the interview is expected to take;

    (d) who will be present;

    (e) practicalities (location of the office, parking, payment of expenses);

    (f) point of contact for the witness to call if the witness has any queries

34. The witness may bring a supporter with them but it should be made clear that the prosecutor has the final discretion on who can attend the interview and that the supporter must not be a witness in the case or a potential suspect. The witness should be asked to provide the name of the supporter in advance of the meeting. This will give the investigating officer an opportunity to confirm whether the supporter is connected with the case in some way.

35. The investigating officer will identify any special needs or disabilities that may affect the location where the interview is to take place.

36. Where the witness is a child under the age of 14 the letter should be addressed to the parent(s) or guardian(s). Where the child is 14 - 16 years of age each case should be considered separately, following discussions with the investigating officer. In most cases there will be no problem informing the parent(s)/guardian(s) but there may be some cases where the child alone should be written to.

37. Witnesses cannot be compelled to attend a witness interview. If a witness fails to attend, or indicates that he/she will not attend, it should ascertained why this is so. Non-attendance does not automatically mean the witness is unreliable or hostile. There may be a good explanation as to why they have not attended, from cultural barriers to fear of the defendant.

38. Arrangements should be made for advance payment of expenses when a witness cannot afford to travel.

39. The defence should normally be made aware of any failure on the part of the witness to attend the interview in accordance with the prosecutor's disclosure obligations.

Interpreters and intermediaries

40. If an interpreter or intermediary is required to attend the interview (whether or not one was used when the original statement was taken), the prosecutor should arrange and pay for a suitably qualified person to attend the interview.

41. Potential witnesses must not act in the role of interpreter or intermediary, but a person who assisted in the taking of a witness statement may assist at a witness interview.

Preparing for the Interview

Practical issues

42. In most cases the interview will take place at the Attorney General's Chambers, although it can take place elsewhere, (such as at the police station) if it is necessary or desirable to do so for reasons of security or accessibility.

43. With the exception of children or vulnerable adult witnesses all PTWIs must be audio recorded.

44. For children and vulnerable adult witnesses whose original evidence has been visually recorded the pre-trial witness interview must be visually recorded.

45. In the case of other adult witnesses whose original evidence was visually recorded, the pre-trial witness interview may be visually recorded. Where the facility is available and it is practicable to do so, prosecutors should record the interview visually rather than in audio.

46. In such cases the interview should normally take place at the police interview suite specifically set up and equipped for interviewing such witnesses.

47. The rationale for visual recording is consistency of approach. The witness will be familiar with the video suite and the process of video-recorded interviews. Pre-trial witness interviews may be conducted remotely, although where possible this should be avoided. However, there will be cases where a remote interview is the best that can be achieved. In such cases the prosecutor may use his/her discretion to conduct an interview by indirect means such as a telephone or video-link. The prosecutor must ensure that the interview is audio or visually recorded.

48. Police officers are not required to attend witness interviews as a matter of routine, but if the prosecutor considers that the presence of a police officer may assist in putting the witness at ease or assist in relation to any issues that may arise or if there are real concerns that the witness may pose a risk the prosecutor should discuss the issues with the SIO/OIC. If necessary, request the attendance of a police officer at the interview. The officer attending should be familiar with the case but play no part in the questioning process.

49. The prosecutor may also want another member of chambers staff present for administrative support. Whoever is chosen, the prosecutor should make sure that they are willing and able to attend and brief the nominated person on what is required of them in advance.

Preparation

50. The prosecutor must have a detailed knowledge of the case. An interview should only be held if the prosecutor has a full evidential statement from the witness.

51. There will be cases where new and unexpected evidence comes to light that could not reasonably have been foreseen. In such cases a second interview may be unavoidable, but unnecessary interviews can be avoided in most cases by waiting until all the key evidence is in.

52. The prosecutor must satisfy themselves of the elements of the offence that need to be proved. Establish which witnesses prove which elements. Keep in mind the possible defences to the charge. The prosecutor should go through all the key witness statements and cross-refer them. It should be noted who corroborates who and any inconsistencies or gaps in the evidence. Check to see that all exhibits are exhibited by the correct person.

53. In preparing to interview the witness the prosecutor will need to ensure that they have considered the source, reliability and admissibility of the evidence he/she has to give and question the witness accordingly.

Post Interview

54. Following the interview, the prosecutor must make a file note to the effect that the interview took place, details of who was present, etc. The tape will need to be copied for the police and for disclosure purposes. Ensure that the master tape and working copy are properly labelled so the tape can be identified, logged into some form of record and filed securely.

55. If further evidence has come to light and no police officer was present, the prosecutor must inform the SIO/OIC and ask them to take another witness statement or conduct another video interview as appropriate. Ensure that they have a copy of the tape of interview before doing so. The police should be advised to listen to the tape and use the relevant contents of the tape as the basis of the draft statement.

Disclosure of unused material

56. The disclosure officer should be notified of any unused material generated through this process and will record it on the appropriate disclosure schedule.

57. The record of a pre-trial interview will generally be unused material and disclosure should be determined by the application of the appropriate statutory test(s). A record of the pre-trial interview will normally meet these tests and - subject to the application of public interest immunity - the recording of the interview will be supplied automatically to the defence as unused material. The defence should be required to sign the undertaking.

58. No transcript will be prepared, unless in rare cases, this is necessary for PII purposes because the tape cannot be disclosed to protect the identity or safety of the witness or others.

Logging and storage

59. One of the two audio recordings should be designated as the master copy and sealed using the printed label. It should be stored in a secure cabinet until required at court or the conclusion of the case (including any appeal period). A log should be maintained of all audio/video recordings. Where the PTWI has been visually recorded, the master disc should also be sealed, logged and retained in a secure cabinet.

5. Safeguarding Children

Definition

60. **Safeguarding** is defined as:

''the process of protecting children from abuse or neglect, preventing impairment of their health and development, and ensuring they are growing up in circumstances consistent with the provision of safe and effective care that enables children to have optimum life chances and enter adulthood successfully.''

61. The purpose of this section is to provide detailed practical and legal guidance to prosecutors dealing with cases that involve children and young persons as victims and witnesses.

Prosecutors and safeguarding

62. Prosecutors have contact with children as victims or witnesses and also as defendants, indirectly when making charging decisions and file reviews and more directly when prosecuting cases in court.

63. Although the main responsibility for children's welfare and safety will usually lie with agencies such as social, health and education services, there is, nevertheless, a role for prosecutors in terms of safeguarding.

64. This guidance details the measures that can be taken to help safeguard children in the course of criminal proceedings, but the position can be summed up in the following principles: expedition; sensitivity; and fairness.

65. Examples of the role of the prosecutor in safeguarding are:

(a) fulfilment of the stated principles of expedition, sensitivity and fairness in cases involving allegations of child abuse;

(b) high standards of advice, decision-making, case preparation, advocacy and witness care in cases of child abuse;

(c) alertness to the involvement of children in prostitution, and the policy of regarding them as victims;

(d) consideration of the wider impact of offences of domestic violence upon children of the family;

(e) consideration of the use of children as witnesses, witness care and of special measures to enable them to give evidence in the best way possible in terms of quality of their evidence and reducing trauma to them; and

(f) high standards of advice, decision-making (as to prosecution or diversion), case preparation and advocacy in relation to young offenders

66. Prosecutors' decisions and actions may have a direct impact on the safety of a child in individual cases, for example: when considering whether bail (with or without conditions) is appropriate; or when deciding on the level of charge or the public interest in prosecuting a case; or successfully prosecuting offenders who pose a danger to children, so that the courts can impose protective sentences.

67. One of the key points to recognise is that the prosecution process itself, especially the trial, can be daunting and stressful for children. There are risks of re-traumatising the child or causing them unnecessary worry and distress.

Working together

68. Where independence and objectivity are not compromised, prosecutors should positively engage with other departments in safeguarding. One formal forum where such engagement can take place is the Safeguarding Children Board.

Cases involving children

69. Children can be victims in relation to any offence. For example, as victims they may be abused sexually or physically by adults or, much more commonly, they may be assaulted by other children or have their possessions damaged or stolen.

70. Children may also be witnesses in cases involving other children or adults for offences from common assault to homicide. In the domestic setting they may witness violence against a close family member.

71. Children can be affected by crime even if they are not themselves victims or witnesses. A child may be seriously affected by, for example, domestic violence, even if not present in the same room where the offence is committed.

72. The Code for Prosecutors includes committing an offence in the presence of or in close proximity to a child or young person as a public interest factor in favour of prosecution.

73. Whatever the offence, prosecutors should consider the position of the child and what can be done, having regard to the role and the powers of the prosecutor, to safeguard the child. He/she will still be likely to suffer from stress and worry at the thought of having to give evidence in court. It is unlikely to be possible to eliminate this altogether, but prosecutors should take such steps as are possible to reduce it to a minimum.

74. There is no lower age limit in relation to giving evidence, but prosecutors should be satisfied that the child will be able to give understandable evidence - all witnesses have to be able to understand questions and be able to give replies that can be understood. Whether this is critical to the case will depend on what other evidence is available. Prosecutors should, however, consider all options available that would enable a young child or a child with learning difficulties to give evidence effectively; for example, through the use of an intermediary. It is important not to make assumptions based on age alone. Each child is an individual and will have different levels of ability.

75. It is not open to the judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children. In particular, although the chronological age of the child will inevitably help to inform the judicial decision about competency, in the end, the decision is one about the individual child and his or her competence to give evidence in the trial in question.

76. When considering the public interest in prosecuting, prosecutors should give primary consideration to the best interests of the child. In terms of prosecution, this means that prosecutors are bound to consider the likely consequences for any children, be they victims or witnesses, of proceeding with a prosecution. Careful consideration must therefore be given to the factors for and against prosecution.

77. Factors in favour of prosecution that may relate to cases involving child victims include the defendant was in a position of authority or trust; the victim of the offence was in a vulnerable situation and the suspect took advantage of this or there is a marked difference between the ages or levels of understanding of the defendant and victim.

78. These factors are particularly relevant to cases involving an adult defendant. They may carry less weight where the defendant is also a child as Prosecutors must consider the interests of a child when considering whether it is in the public interest to prosecute. In such circumstances it will be necessary to balance the competing public interest factors before reaching a decision on prosecution.

79. The other public interest factor that must be taken into account is whether a prosecution is likely to have a bad effect on the victim's physical or mental health. This is equally applicable to deciding whether or not a child witness, who is not a victim, should be required to give evidence in court.

80. The more traumatic the offence for the child (being a victim of or a witness to violence or sexual abuse are the most obvious examples) the more likely it is that criminal proceedings may re-traumatise and cause further emotional damage to the child. Yet the most serious cases are usually the ones that will, on the facts, require a prosecution in the public interest, both to secure justice but also to provide protection for the child and the public at large.

81. It follows that prosecutors will have to balance the interests of the child with the wider interests of the public at large in reaching a decision on whether or not to prosecute. Some decisions will inevitably be very sensitive and finely balanced.

82. In such cases prosecutors should ensure that the final decision is fully supported by relevant information and reasoning. In many cases it is possible adequately to mitigate adverse effects of the trial process by applying for appropriate special measures. In extreme cases, witness anonymity, for example, may be considered.

83. As part of the review process, prosecutors should always be satisfied that the police have provided them with adequate information on the circumstances of the child for an informed decision on the public interest to be made. This may entail asking the police to make further enquiries with the child's family or social services as to the effect that giving evidence may have psychologically or emotionally on the child.

84. Prosecutors should also ensure that the police have informed them of ALL children who may be involved in the case whether or not they are witnesses to the offence(s) under investigation, in order that a fully informed casework decision can be made. Other children may be at risk - this is an important factor to take into account when considering the public interest. Prosecutors should enquire whether there have been any previously recorded incidents and whether there are or have been any other relevant criminal or civil/family proceedings.

85. The views of the child and the carers about giving evidence must be considered and factored into the balancing exercise when considering the public interest test.

6. Communicating Decisions

86. Where a decision is made not to proceed with an offence the victim will be informed in a timely manner. In the first instance the officer in the case will inform the victim and in appropriate cases a meeting with the Prosecutor will be offered.

87. Where the victim is a child the officer will speak to the child's parents/guardian unless the circumstances are such that the child is old enough to be spoken to directly and the parents have some other involvement in the case.

88. Police officers and Prosecutors will explain decision making to victims in plain language. In some cases victims will not agree with the decision that has been made. Police officers and Prosecutors will endeavour to ensure that even though the victim would have preferred a different outcome the reasons for the decision will have nonetheless been clearly explained.

7. Non-Recent Cases

89. Allegations arising from incidents (from several to many) years earlier are a common feature of prosecutions, particularly allegations of sexual offences.

90. There are good reasons why such cases do not come to light at the time of the incidents, beyond the possibility that they are untrue. For example: children are used to being controlled by adults and offenders can be expert at exercising control; they may not even realise until they are older that they have been subjected to abuse; they may only be prompted to reveal what happened to them when they see the pattern being repeated with younger relatives.

91. There is nothing that intrinsically prevents a prosecution merely because the incident dates from a much earlier time. Abuse of process arguments can often be successfully defended. Nevertheless, prosecutors must take additional care with such cases, if for no other reason than that the evidence is inevitably more fragile and susceptible to attack. Consideration must also be given to what evidence may no longer be available and how this might impact on the fairness of the trial.

92. Police officers and Prosecutors will not pre-judge cases purely on the basis that the complaint has been delayed and recognise that coming forward to give an account about non-recent offending that occurred during childhood is a painful and difficult experience. All allegations will be assessed on their own merits and regardless of the outcome of the police investigation and prosecution charging decision people will be supported through the process.

8. Bail

93. The imposition of appropriate conditions or a remand in custody where applicable can be a highly effective way of protecting victims and witnesses. The nature of the application will depend on the circumstances of the case; where the defendant is charged with an allegation of physical or sexual abuse, protection of the victim will be obvious. However, there will be cases where there is a person who is not a victim or a witness, for example a child connected to a victim or witness, but where the behaviour of the defendant is such that there are substantial grounds for believing that the third party is in danger.

94. Where possible police officers will liaise with victims and witnesses to gather information to assist the Prosecution and the court in determining whether a defendant should be remanded into custody or released on bail with, or without, conditions.

95. Bail conditions can include conditions against contacting victims and witnesses, conditions against engaging in specified activities, conditions not to go to specified locations and conditions to live and sleep at specific locations.

96. Where a defendant breaches conditions of bail then they are liable to be arrested and produced back before the court. Defendant's found to be in breach of bail conditions can be remanded into custody.

9. Special Measures

97. Timely special measures assessments by police officers may help to reduce worry and stress by giving an explanation of the measures available to help victims or witnesses to give evidence. The following special measures are available:

(a) Screening witnesses from the defendant.

(b) Witnesses giving evidence by live link from a different location.

(c) Observing proceedings by live link from a different location.

(d) Witnesses giving evidence in private.

(e) Judiciary and legal representatives removing wigs and gowns.

(f) A witness's video recorded statement being played as evidence.

(g) Pre-recorded cross-examination or re-examination.

(h) Examination of witnesses through an intermediary where there are specific issues around communication and understanding.

(i) Aids to communication.

10. Disclosure

98. Police officers and Prosecutors have a duty to ensure a fair trial by disclosing material to the defence that assists the defence case or undermines the prosecution case. Sometimes this material will consist of material that contains private or sensitive information about a witness.

Medical and social service records

99. Victims and witnesses with mental health issues have particular concerns about how the prosecution, court and the defence will deal with their medical records.

100. Information about a person's health and treatment for ill health is both private and confidential, and must be handled in a sensitive manner. This stems not only from the confidentiality of the doctor patient relationship but from the nature of the information itself.

101. The confidentiality of a patient's medical record belongs to the patient. The patient may waive confidentiality and consent to release their medical records. Before inviting a person to consent to release their records, they must be informed of the purpose of the request, and the potential use that may be made of the records.

102. Police officers and Prosecutors will keep victims and witnesses informed in respect of disclosure of medical records, will explain the reasons why disclosure has to be made and ensure that disclosure of records is restricted only to information that properly meets the disclosure threshold.

103. It is important that decisions about the obtaining and disclosure of a person's medical history are made at as early a stage as possible, and that such material is handled sensitively.

104. Prosecutors have a duty to identify any risks to the credibility of a witness and to do all that they can to put in place the necessary support to mitigate such risks so that witnesses can give their best evidence, and so that the prosecutor can rebut effectively any claims by the defence that a witness is unreliable. At the same time, prosecutors also have a duty to meet their obligations under the disclosure provisions to disclose information that undermines the case for the prosecution, or assists the case for the defence.

105. When reviewing the evidence, a prosecutor may consider that the medical history of a victim or witness may be relevant to the charging decision. If so, where a witness with mental health issues is known to be under medical care, or has been so in the recent past, prosecutors will need to consider whether it is necessary to advise police to seek access to any medical records.

106. If police enquires indicate that there may be material in the records which falls within the disclosure test, the prosecutor should request the police to secure access to such records having first obtained the witness's informed consent. Such material as falls within the test should then be disclosed to the defence with the witness's informed consent.

107. Disclosure of medical records will engage the right to privacy of the witness. It is crucial that the police obtain appropriate consent to:

(a) gain access to the records; and

(b) enable disclosure, where appropriate, to take place.

108. The victim or witness will be informed **why** the request is being made and **what might happen** to the record. The victim or witness has the right to decline consent if he or she so wishes but must also be told about the possible consequences as far as the case outcome is concerned.

109. There are three potential scenarios relating to the medical records of the victim or witness:

First scenario

110. The victim or witness gives informed consent allowing the police access to the medical records and service of the records as additional evidence or unused material, as appropriate.

Second scenario

111. The victim or witness gives qualified consent, allowing their medical records to be disclosed to the police and prosecutor but not to the defence. The prosecutor needs to carry out the usual test of relevance, deciding whether the records should form part of the prosecution case or whether they should be disclosed to the defence. If the record is of value to the prosecution case, the prosecutor should inform the victim or witness of his decision and seek consent to use the record as part of the case.

112. If the victim or witness maintains his/her original position (qualified consent), the prosecutor must decide if the evidence is critical to the success of the prosecution case. If so, the prosecutor may need to consider if the case can proceed further. If the evidence is not critical, the prosecutor should apply the disclosure test, and if necessary, make a PII application to the court.

113. If the prosecutor thinks that some or all of the records meet the disclosure test and should be disclosed as unused material then the consent of the witness to disclose should once again be sought.

114. If consent is not forthcoming then the prosecutor should make a PII application allowing the witness to make representations to the court as to why the material should not be disclosed. In such a situation, having seen the record, the prosecutor may be able to represent the interests of the victim or witness at the PII hearing. However, it is more likely that the victim or witness will not want the prosecutor to represent his/her interests or the prosecutor may feel that s/he is unable to represent their interests.

115. The victim or witness should be given the opportunity to make oral or written representations, either with or without independent assistance or representation. It is then for the court to determine the public interest issue.

Third scenario

116. The victim or witness does not consent to the release of their medical records. In circumstances where there are reasonable grounds to believe that disclosable material is contained within the medical records, prosecutors will need to consider whether it is necessary to use the witness summons procedure to obtain access to these records. The victim or witness has a right to make representations to the court as to why the records should not be disclosed. In such circumstances, the prosecutor would not usually be able to represent the interests of the victim or witness at the hearing because the prosecutor would be unaware of the content of the records, and their relevance (or otherwise) to the proceedings.

117. The courses of action outlined above mean that the prosecutor has some control over what information the defence receives. In many cases, the medical records may be of no evidential consequence. But once received, the prosecutor must review the records applying the statutory disclosure test.

118. If, applying the test for disclosure, the prosecutor decides that it is necessary to disclose medical records; it is the prosecutor's responsibility to explain this to the victim or witness, so that they understand how the decision was reached. The prosecutor may make a PII application to the court (see above in the second scenario), or the prosecutor may have to decide whether the case can continue. In this situation, the prosecutor must explain to the victim the decision not to proceed.

119. If the prosecution has decided that the records do not satisfy the test for disclosure, the defence must make an application to the court for disclosure pursuant to section 225 of the Ordinance. In such cases, the prosecution may represent the interests of the victim or witness at that hearing, both in relation to whether the material satisfies the test for disclosure, and, if applicable in respect of PII. However, the victim or witness may wish to make their own representations to the court either with or without independent assistance or representation.

11. Selection of Witnesses

120. The prosecution has discretion about the selection of prosecution witnesses. The principles governing which witnesses the prosecution should call at trial are different depending upon the type of case. Prosecutors recognise that being asked to attend court as a witness is disruptive and time consuming. Prosecutors will endeavour to ensure that only the witnesses necessary to do justice in the case are required to attend court.

121. The principles for the calling of prosecution witnesses are:

(a) The prosecution must have at court those witnesses whose statements have been served on the defence and upon whom the prosecution intend to rely on evidence if the defence want those witnesses to attend;

(b) The prosecution have a discretion whether to call and examine a witness or to call and tender them for cross examination;

(c) This discretion is fettered; the prosecutor has a duty to act in the interests of justice so as to promote a fair trial;

(d) The prosecution ought normally to call or offer to call the witnesses who give direct evidence of the primary facts of the case unless there is good reason to regard the witness's evidence as unworthy of belief;

(e) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case and which are marginal.

122. Where witness statements have been served on the defence as unused material, the prosecution are not under any duty to call the makers of those statements as witnesses. The courts retain a power to issue a witness summons of its own motion should it need to do so.

123. Where the prosecution decides not to call a witness the court cannot compel the prosecution to call that witness but the court has the power to call a witness who has not been called by either the prosecution or the defence, and without the consent of either, if it is necessary in the interests of justice. This power should be exercised rarely however.

13. Before the Trial

Familiarisation visits

124. Witnesses should have the opportunity to see the courtroom before they give evidence should they wish to do so. This can be vital in ensuring that the witness is not overawed on the day of the trial and that they understand the layout of the court when giving evidence, whether in court or from a live link room.

Memory refreshing

125. All witnesses must have an opportunity to refresh their memory before giving evidence in court. Witnesses are entitled to see a copy of their statement before the trial. With regards to viewing video evidence in chief, how, when and where this is done should be decided upon a case by case basis. The overriding aim is to enable the witness to give their best evidence in court - in particular when being cross-examined.

126. Viewing the video recorded interview ahead of the trial, in more informal circumstances, may help the witness to concentrate on the content rather than watching the video recording in court during the trial. Experience has shown that it is preferable to arrange for recordings to be seen prior to the witness being called to give evidence. This reduces the time the witness has to spend at court and prevents the witness from feeling embarrassed at having to watch a video of themselves in a public setting. Ideally a witness should view the recording no more than 48 hours before they are due to give evidence.

Publicity

127. The Ordinance limits publicity in certain circumstances. For example in cases involving sexual offences no report of the proceedings shall reveal any particulars likely to lead to the identification of the alleged victim. In appropriate cases prosecutors will make applications to limit the matters that can be reported or published.

14. The Trial

Introductions

128. It is important that the prosecution advocate speaks to victims and witnesses before the trial. Experience has shown that victims and witnesses feel more at ease when they have met the advocate who will be calling them to give evidence. This is even more important when a child is to give evidence by live link and will only see the advocates on screen when giving evidence.

Explaining procedures

129. The purpose of speaking to witnesses is to explain procedures with which they will be unfamiliar, to put them at ease and to thank them for coming to give evidence. Advocates should try to adjust their tone and language to an appropriate one for the age and ability of the witness without being patronising. Straightforward non-legal language should be used and questions should be kept short and simple.

130. Advocates should ensure that the witness understands the procedures and is given an opportunity to ask questions. It should not be assumed that the witness has understood what has been said, even if they say they have and care should be taken to ensure that the witness understands the process of giving evidence. This is particularly so where a child is a witness or where a witness has learning disabilities as such witnesses are more likely than others to say they understand something that they do not; this may come from a desire to please or may be a learned response aimed at avoiding trouble.

131. Advocates should confirm any special measures arrangements and make sure the witness understands and is content with them.

132. Advocates should also explain the court's procedure including roles, oath taking and the order in which questions are asked by the advocates. The role of the defence advocate is to represent their client and to put their client's case and challenge the prosecution's version of events, including by suggesting the witness is mistaken or lying. The witness should be informed that they should listen carefully to any such suggestion and clearly say whether they agree or disagree with it.

133. Witnesses should be told that they should not be afraid to ask for a break if they genuinely need one such as when they feel tired, are losing concentration or if they want to compose themselves emotionally.

Providing Assistance about Giving Evidence

134. Advocates should explain to the witness the importance of listening to all questions carefully and making sure they understand each one before answering it. Witnesses should be encouraged not to be afraid to ask the advocate asking the question or the judge to repeat or rephrase any question which they do not understand.

135. Witnesses must be told to answer all questions truthfully, however difficult they may be. They should be informed that it is not a sign of weakness if they do not know or do not recall the answer to a particular question and, if this is genuinely the case, they should not be afraid to say so.

136. If the witness has provided a witness statement or video testimony, explain the importance of the witness refreshing their memory from such a statement before going into court. Encourage them to do so. However, the witness should also be reassured that giving evidence is not a "memory game" and that in certain circumstances they may be able to refresh their memory from their witness statement whilst giving evidence. A witness should be told that they should not hesitate to ask to see their statement when giving evidence if they think their memory would be assisted by it.

137. Cross examination within the adversarial system is usually designed to cast doubt on the version of events being provided by either the witness or the defendant. This can put pressure on individual witnesses, especially where their character is attacked in order to reduce their credibility. Questioning may also address deeply personal aspects of the witness's life, for example in sexual offence cases involving young, vulnerable victims who have been subject to sexual exploitation.

138. Although some witnesses will have no problem anticipating the type of cross-examination they will face, others, and particularly those who are vulnerable due to lack of maturity, mental health issues or learning disability, may have little or no idea what to expect. Relying on witnesses to 'work it out for themselves' is unfair and unrealistic. To justify this on the basis that giving such information is 'coaching' is unhelpful and inaccurate.

139. It is important that prosecutors should not provide the detail of, discuss or speculate upon the specific questions a witness is likely to face or discuss with them how to answer the questions. However, to enable witnesses to give their best evidence prosecutors should ensure that they are informed of the following matters.

140. The witness must be told that the purpose of doing so is to provide information to assist them and not to elicit information from them. They should be discouraged from giving a response. Should the witness make any comment which is relevant to the issues in the case then it should be recorded and disclosed, if it may undermine the prosecution case or assist the defence case.

141. If it is possible to do so, vulnerable and intimidated witnesses should be provided with this information in advance of the trial date. This could ideally be done by the officer in the case at the same time as a special measures meeting.

142. In the case of others, the best time to give this information is when the witness is being referred to his / her witness statement and being reminded that they should tell the truth. They should then additionally be informed that nothing they are told should affect what they say but that they are permitted to be informed of the following information to assist them:

(a) The general nature of the defence case where it is known (for example mistaken identification, consent, self-defence, lack of intent). The prosecutor must not, however, enter into any discussion of the factual basis of the defence case.

(b) The nature of the defence case may be obtained from a number of sources including the police interview, the Defence Case Statement (DCS), the Plea and Trial Preparation Hearing form in the Crown Court or the Preparation for Effective Trial form in the magistrates' court. Prosecutors should outline the defence case based on the most recent information which will typically be the DCS (where there is one).

(c) Prosecutors should not speculate on potential defences and where the general nature of the defence is not clear, the prosecutor should speak to the defence advocate(s) to clarify the defence case before speaking to the witness.

(d) Where third party material about a particular witness has been disclosed to the defence as being capable of undermining the prosecution's case or assisting the defence case (such as social services, medical or counselling records) then that particular witness should be informed of the fact of such disclosure. The witness may, in any event, have already consented to the disclosure of some sensitive and / or confidential material that relates to them such as their medical records but even if you believe this to be so, you should check and remind them. The details and the impact on the defence cross-examination should be not be discussed.

(e) Where leave has been given for a particular witness to be cross-examined about an aspect of their bad character or their sexual history then that particular witness should be informed that such leave has been given.

(f) Witnesses should be reassured that objection can be taken to intrusive/irrelevant cross- examination and the judge will decide whether the questions need be answered. The witness should be advised that the judge's decision must be followed.

(g) The record of any meetings between the prosecutor and a witness should be sent to the disclosure officer for scheduling on the MG6 series. When the witness has been spoken to at court on the day of trial, the prosecutor will need to decide whether anything said meets the test for disclosure and if it does, to disclose this immediately to the defence, updating the disclosure officer where appropriate.

Providing Assistance about Giving Evidence – Sexual History

143. Where leave has been given for a witness to be cross-examined about their sexual history the witness is entitled to be informed that this will be an area on which they may be asked questions. Criminal proceedings are not a game and witnesses should be protected from being ambushed by questions on a personal and sensitive topic, which they may not have been expecting to be questioned about.

144. Prosecutors should not provide detail of, discuss or speculate upon the specific questions a witness is likely to face or discuss how best to answer the questions. However, a witness should be told that leave had been given for them to be cross-examined about their sexual history and be reassured that where questions become irrelevant or are outside of the leave that has been granted objection will be made and the court can stop the questions if it agrees with the objection. The witness should be advised that they must follow the directions of the court.

145. Where leave has been given to cross-examine on sexual history a further special measures assessment should be undertaken to ensure that the witness is supported by special measures if they are eligible.

Waiting time

146. It is good practice to give witnesses an indication of the time they are likely to have to wait, to minimise the waiting time at court for victims and children and to arrange for them to be at court for the shortest possible time.

147. It may be possible to arrange for the Court to start a trial in the afternoon so that preliminaries can be dealt with in the absence of the witnesses. The witnesses can then attend the next morning and are likely to be fresher and more alert.

148. A trial timetable should be prepared and approved by the court in advance of the trial to allow for witnesses to be staggered and to be given set times to attend in order to prevent witnesses having to wait for prolonged periods of time.

Explaining delays

149. Prosecutors should, where possible, explain the reasons for any delays. If they cannot do so in person because they cannot leave the courtroom they should ensure that an assistant or court official does so. Not only is it courteous, but it will also reduce anxiety levels. That is important in itself but will also mean that the witness is more likely to give their best evidence.

Sentencing

150. Advocates should challenge inaccuracies in mitigation. If in mitigation defence advocates make assertions which are unfair or run contrary to the Crown's case, prosecution advocates should object.

151. If the defence advocate persists, the prosecution advocate should invite the court to rule on the issue, holding a Newton Hearing if there has been a guilty plea. Where relevant, the prosecution advocate should direct the court's attention to the provisions of the Criminal Procedure and Evidence Ordinance regarding derogatory assertions.

15. Explaining the Outcome

152. Prosecutors should make sure that after the hearing witnesses are told what has happened and that they understand. This is particularly important when the case is concluded at court or lesser pleas are accepted. The sentence the defendant has received and its effect should also be explained.

153. If a witness is not present at the hearing the designated police contact will normally inform the witness of the result of the case as soon as reasonable practicable. It is important that communicating the result of the case is not unduly delayed as outcomes are reported quickly by the media and witnesses should not hear about the outcome of the case from third parties before official information has been provided.

154. It is very important that all witnesses who have attended court (whether they have given evidence or not) should be thanked for attending. Giving evidence can be a unsettling experience and attending court is time consuming and disruptive to daily life. Acknowledging these facts means that a person is much more likely to assist in the future and informs the wider community that fulfilling the civic duty to attend court to give evidence is important and appreciated.

16. Mental Health and Learning Difficulties

Mental health issues

155. Terminology for mental health can vary across different organisations. For the purposes of the public policy statement and this Guidance the term 'people with mental health issues' is used. This is an intentionally broad definition. It combines the commonly recognised term 'mental health problems' with the preference of many people with mental ill health to avoid the use of the word 'problem' and substituting that word with 'issue/s'.

156. Mental health issues are a very common part of life and one in four people will experience them at some point in their lives. Mental health issues cover a range of conditions, including, but not restricted to, depression, anxiety, panic attacks, obsessive-compulsive disorder, phobias, schizophrenia, bipolar disorder (manic depression) and personality disorders. Within this phrase we include people who have a mental health diagnosis (who may or may not use mental health services) as well as people who have not been diagnosed clinically but consider themselves to have mental health needs.

157. While mental health issues are very common, they are also some of the least understood conditions in society. Around nine out of ten people with mental health issues have experienced stigma and discrimination in their lives.

Learning disabilities

158. The World Health Organisation defines learning disabilities as *'a state of arrested or incomplete development of mind'*. Somebody with a learning disability is said also to have *'significant impairment of intellectual functioning' and 'significant impairment of adaptive/social functioning*'.

159. A learning disability may be mild, moderate or severe and affects the way someone learns and communicates. It results in a reduced ability to learn new skills, understand complex information or live independently. Learning disabilities have a lasting effect on development socially and educationally, and can often be combined with physical conditions such as reduced functional skills.

160. There are many different causes of learning disability and often it is not possible to say why someone has a learning disability. Most learning disabilities are caused by the way the brain develops - before, during or soon after birth. It is a life-long condition.

161. Learning difficulties is the term more commonly used to cover specific problems with learning in children that might arise as a result of a number of different factors, e.g. medical or emotional issues or language impairment. This is a much larger sub-group of the population and the term tends to be used in education circles.

People, not 'labels'

162. The terms 'mental health issues' and 'learning disabilities' cover people with a wide range of experiences, conditions and support needs. It is not possible to generalise about the experience of people who come within these categories, or what support people may need to remain with a case through the court process. However, training and awareness of the differences as well as the similarities will help in understanding how to approach working with people in an appropriate, tailored way. A person may have both learning disabilities and mental health issues; there may need to a combination of adjustments required to enable them to participate in the court process.

Importantly, people with mental health issues and/or learning disabilities are people first, rather than the label that 'defines' them. Arrangements therefore need to be determined on a case by case basis.

Distinguishing mental capacity from competence of the witness

163. It is important to recognise that the competence of a witness is a separate issue to that of the mental capacity of a witness. A person's capacity to take decisions may be affected by, for example, a stroke or brain injury; a mental health issue; dementia; a learning disability; or alcohol or substance misuse.

164. However, having a mental illness, having mental health issues or having a learning disability does not mean that a person lacks capacity to take all decisions. And capacity can vary over time, even over the course of a day. This is particularly the case for people with mental health issues, whose effects can be fluctuating in nature.

165. The general rule is that people are competent to act as witnesses unless they cannot understand questions asked of them at court and answer them in a manner which can be understood (with, if necessary, the assistance of special measures).

166. Prosecutors and police should discuss, at an early stage, whether the witness is likely to be accepted as a competent witness by the courts, taking into account information provided by the victim or witness themselves as well as others, for example, a doctor, family members, or a social worker etc.

167. The assistance of an intermediary (one of the available special measures) may be an effective method to help a witness to understand the questions being asked, and to answer them in a way that can be understood.

168. Mental capacity is only relevant to the competence of the witness in terms of assessing the witness's ability to understand questions asked and to give replies that can be understood. For people with mental health issues the clarity of their evidence could be affected by distress, anxiety or panic which is not relevant to the question of capacity.

169. Medication issues may be relevant when considering the timing of giving evidence and the need for maximum lucidity. This factor may be equally relevant to any witness taking medication, whether mental capacity is an issue or not.

Expert evidence

170. Where the prosecutor wishes to obtain an expert opinion on any aspect of a witness's mental health or learning disability, (either to satisfy themselves about the witness's credibility/reliability or to obtain further information about the nature of their mental health condition or learning disability) it is vital that the expert is provided with all relevant material. This must include as a minimum:

(a) copies of every account provided to the police by the witness (whether in statement or DVD format);

(b) copies of the prosecution bundle;

(c) copies of any defence statement;

(d) copies of any available medical records.

171. The instructions must focus the expert's attention on the issues in the case and be clear as to the questions to which an answer is requested and as to the opinion which is sought.

172. Prosecutors should additionally consider holding a conference with the expert where this might assist in the presentation of the issues for resolution or where the expert's opinion is likely to be sought on a series of follow up questions, the formulation of which depend on answers yet to be given by the expert. At the conclusion of such a conference it is essential that the expert be asked to provide a witness statement confirming any relevant opinion or view expressed during the conference.

173. In every case in which an expert is instructed to comment on a witness's credibility/reliability the following series of questions (as a minimum) must be addressed:

(a) What is the nature and extent of the witness's mental health condition or learning disability?

(b) How do the symptoms of this condition manifest themselves in respect of this particular individual?

(c) Could the nature or extent of the witness's mental health condition or learning disability affect their (a) understanding (b) perception or (c) recollection of an incident?

(d) To what extent would (a), (b) or (c) be affected in comparison to someone without this condition?

(e) If it could affect either (a) (b) or (c) above, in what specific ways might it do so?

(f) Could it do so to an extent that might undermine the credibility/reliability of the account they have given in the case?

(g) If so, what is the likelihood of it doing so? Are there any factors which increase or decrease such likelihood? Are there any measures which can be taken by the prosecutor or any other agency to reduce any such likelihood?

(h) How might the nature or extent of the witness's mental health condition or learning disability affect their ability to give evidence and withstand cross-examination, particularly with reference to their response to questioning and cross-examination, concentration and attention, ability to communicate and interaction with other people.

174. Where the opinion of the expert is that the witness's mental health condition or learning disability does not affect the reliability or credibility of their account then, in the absence of special circumstances (see below) the report:

(a) cannot be served as part of the prosecution case as 'oath helping' or to bolster the witness's credibility/reliability;

(b) will not satisfy the disclosure test;

(c) may be withheld from the defence.

175. The defence may seek to challenge the witness's evidence on the grounds that their mental health condition or learning disability makes them unreliable. Similarly they may raise the issue of the witness's competence to give evidence. In these circumstances the report may be served (and the expert called) as rebuttal evidence.

176. Exceptionally the report, while neutral on the issue of credibility/reliability, might contain factual passages which satisfy the disclosure test. For example, the report might refer to an account of events given by the witness which is inconsistent with his statement. In these circumstances the relevant extract should be separately disclosed to the defence by way of a letter.

177. Where the opinion of the expert is that the witness's mental health condition or learning disability does or might affect the reliability/credibility of their account then it should be disclosed to the defence as undermining material for the purpose of the disclosure test.

The victim or witness is entitled to know what the report contains and how it is proposed to be used.

Document Control

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