SPEAKING TO WITNESSES AT COURT –

DRAFT CPS GUIDANCE FOR CONSULTATION

RESPONSE TO CONSULTATION ON BEHALF OF

THE CRIMINAL BAR ASSOCIATION

Introduction

The Criminal Bar Association (CBA) represents about 4,000 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest Specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

1. Speaking to a witness at court can and often does help alleviate anxiety connected with giving evidence. Attendance at court or even remotely on a video-link in order to give evidence is a stressful experience. This is particularly so for the lay witness whom the Guidance proposed within this consultation paper is designed to assist.

2. Much of what is suggested is good practice and Crown Prosecution Service policy already. It has been carried out by prosecution counsel for some time, particularly in cases which involve sexual allegations or those cases involving children and other vulnerable witnesses.

3. Sections 1 and 2 are self-explanatory and need no further comment.

Section 3: Meeting a witness at court

4. Some further thought should be given to the practical and logistical requirements of an obligation for counsel to speak with every witness.

5. At the start of the trial there are usually a number of matters that prosecution counsel must manage; discussing the evidence with opposing counsel, checking and adjusting jury bundles, considering matters of law and other issues which have arisen late in the day, and also issues concerning the witnesses that counsel is to call. A reasonable request for time to deal with any of these matters is usually acceded to by the trial judge. A Crown Prosecution Service representative is not always available to assist with some of these tasks, which can be time-consuming.

6. Time to deal with talking to witnesses in order to put them at their ease cannot be guaranteed by counsel. The trial judge may not permit it. The attendance of witnesses at court is usually timed to prevent a long wait before they go into the witness box and thus time before trial and during a trial can be short for any conversation. The staggering of witnesses may not afford an opportunity for counsel to speak with them other than at the start of the court day. A trial judge may not permit repeated interruptions to the progress of the case to permit a number of separate meetings with separate witnesses.

7. Other than for general matters, witnesses must be spoken to separately, and it follows that any meetings between counsel and witnesses must be conducted separately.

8. The guidance suggests that prosecuting counsel should meet all witnesses before they give evidence, and inform them of various matters set out in Section 3 at sub-paragraphs (a)-(e). Most of the elements of information set out in these paragraphs are generic and uncontroversial, with the exception of sub-paragraph (d).

9. Given that much of the information counsel would be obliged to dispense is generic and not case specific, consideration should be given to this role being delegated to a Police Officer, CPS caseworker or to a representative of witness support, or in carefully worded and readily available written information. Representatives of

witness support already undertake a helpful and vital role in explaining court procedures and requirements.

10. Counsel should of course be given the opportunity to speak with particularly vulnerable witnesses or in circumstances where the process of giving evidence is likely to cause particular distress.

Section 3(d) Providing Assistance for Cross-Examination

11. The proposed disclosure to prosecution witnesses raises the danger that witnesses will tailor their evidence to meet the defence case, and raises a number of practical difficulties for the trial process. The benefits to witnesses are outweighed by the risks presented.

Section 3(d)(i)

12. In many cases the defence to be advanced will be obvious to most witnesses and is usually covered by careful questions put in the original witness statement/ABE. There will often be matters that a witness has not disclosed to the Police/CPS but of which the Defence have some knowledge – this is particularly true in RASSO cases where the complainant and Defendant are known to each other.

13. Witnesses should be carefully and objectively questioned in the initial investigation to avoid them being ambushed by cross-examination. This should vitiate the need to specifically tell them the nature of the defence.

14. The rationale behind the purpose of telling a witness at court, due to give evidence shortly after the meeting with counsel, the nature of the defendant's defence is not clear. It seems that the purpose is to prepare a witness to be ready in relation to questions in connection with that defence. Not only is that objectionable in law, it can so easily backfire and undermine evidence of a witness who has subconsciously or otherwise re-thought their testimony to counter the defence. That witness, who may have been honest and truthful and compelling, may appear to have been prepared and their evidence tailored. Their evidence may well be given less weight or completely rejected.

15. Subsequent to this consultation process, if a decision is taken (in further consultation with the Criminal Procedure Rules Committee) that the nature of the defence is to be disclosed, a method of limiting the inherent risks of the proposed approach would be for any disclosure to the witness to be made in writing after the defence case statement has been received. A form of words could be considered by prosecution and defence counsel and the court long in advance of the trial, and could be adjusted to suit the particular facts of the case and any particular vulnerability of the witness. For example, in a simple assault trial, the written disclosure to the witness could read: *Mr Smith's defence is that he was acting in self-defence;* OR *Mr Smith's defence is that he did not strike Mr Brown at all.* An audit trail would be needed to show when the disclosure document was provided to the witness.

16. Once the general prohibition upon prosecuting counsel disclosing factual matters to the witness is relaxed, the presumption that nothing improper has passed between prosecutor and witness is eroded. If, having received the disclosure, the witness presses for further information in a subsequent meeting with prosecuting counsel, what record will be kept of the request and counsel's response? Depending on the circumstances, the defence may have a legitimate interest in knowing the details of these meetings. In the present climate it seems doubtful that the additional resources necessary to record pre-trial meetings will be available.

17. Disclosure of these matters to a witness by prosecuting counsel raises an obvious risk. Once prosecuting counsel has discussed, to any extent, the facts of the allegations with the witness, that discussion becomes part of the circumstances which may affect what the witness says in evidence, and those circumstances themselves are a legitimate area for cross-examination.

18. This may create a problem in a number of different ways. The witness may not fully understand what is said to them, despite best efforts to provide the information simply and clearly. The situation may arise where a witness in front of the jury says "But Miss X said to me that I would be asked about Y but that isn't this." Or "Mr Z told me to say this…" Defence cross-examination, in seeking to establish why a witness's account has changed, may include consideration of what the witness was told by prosecuting counsel and exploration of the circumstances in which it was said. Once the jury are invited to consider the impact upon a witness's account of their meeting with prosecution counsel, the risk of the trial becoming derailed increases. Consider the situation where the witness gives an account of the pre-trial

meeting with prosecuting counsel which prosecuting counsel knows to be untrue or inaccurate. Consider also the situation where the witness in cross-examination denies that the defence was disclosed to him, but in fact it was. Prosecution counsel cannot re-examine a witness about the terms of a conversation between the witness and prosecution counsel. Prosecuting counsel would be under a duty to disclose the discrepancy, but may himself be the only witness to the fact.

Section 3(d)(ii)

19. In relation to disclosure of sensitive and/or confidential material, this is a topic that must be discussed with the witness pre-trial. In order to obtain medical and psychiatric notes, for example, the consent of the witness must be sought. The discussion that some or all of that material may be disclosed and that the witness will be informed of that decision should be done before trial. The witness can and should be reassured at this time that legal arguments will take place to ensure that only that material that is relevant to the case would be disclosed. It is too late at trial for the witness to be told that this personal material has been disclosed.

20. As far as Third Party material such as Social Services notes and family court documents are concerned, there is a right of the interested party to make submissions in respect of disclosure of that material initially under Article 8, but now regulated by the Criminal Procedure Rules. Again, any notification about disclosure of this material should be done pre-trial. This is highlighted in cases where the complainant has significant learning or social difficulties, including but not limited to mental health issues - it could be unfair not to allow them the time to consider the impact of the disclosure of sensitive documentation.

21. It is suggested that if the witness is to be told that there has been disclosure and of what, this should be clarified with the court and defence and agreed in respect of the form of words to be used.

Sections 3(d)(iii) and (iv)

22. The same concerns in relation to the disclosure of the defendant's defence pertain to the disclosure to a witness that they may be cross-examined as to their "bad character".

23. However, should the witness need to be informed, the court and the parties must agree what it is that they are to be told. The witness will then at least know that the court has ruled that only that which is strictly relevant will be presented before the court.

24. Cross-examination in respect of sexual history or behaviour is a particularly sensitive topic. Many complainants go to the Police regarding a specific allegation, not anticipating that their previous sexual history and personal life may be the subject of cross-examination. However, there are obvious and inherent risks in informing the witness in broad terms that their history may be a subject of cross-examination which may lead to them to high levels of anxiety not necessary in the circumstances, whereas being more specific may well undermine the rule against fore-warning and fore-arming the witness.

25. Occasionally counsel agree between themselves that the witness may be told that they will not be asked the details of certain matters in their past. However, this is not routine and is not ideal. If the witness is to be told any information they should do so only with the agreement of the court (which is likely to be ruling on the issue under s41 YJCEA 1999 or s100 CJA 2003).

26. This should be the exception rather than the rule. An early understanding in the trial process that the sexual history of the witness can only be brought up in certain circumstances on order by the Judge should be routine.

Conclusion

27. In many cases the anxiety suffered by a witness could be alleviated to some small extent by limited knowledge of the issues with which they will be confronted. However, we consider that the benefits of such disclosure in terms of reducing anxiety for the witness are still outweighed by the potential unfairness that may result. The observations of the Court of Appeal in *Momodou and Limani* [2005] EWCA Crim 177 should apply just as much to disclosure to a prosecution witness of what the defendant has said, as they do to disclosure to a prosecution witness of what another prosecution witness has said. The defendant is a witness like any other. And as the Court of Appeal stated "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…"

28. In our view, most witnesses would benefit far more from the early provision of generic information about the trial process and the provision of adequate support and facilities once they are at court. Consistent, properly resourced efforts in these areas would have a much greater impact in terms of improving the treatment of witnesses and present no risk to the fairness of the trial process.

29. Better guidance and training should be provided to all those with whom the witness comes into contact at court.