

**THE GENERAL COUNCIL OF THE BAR/CRIMINAL BAR
ASSOCIATION**



CONSULTATION PAPER RESPONSE

NOTIFICATION OF DEFENCE WITNESS PROVISIONS

15 January 2010

A response to the Draft Code for the Arrangement and Conduct of Interviews with Defence Witnesses Practice and Statutory Instrument (Notification of Intention to Call Defence Witnesses) (Time Limits) Regulations 2010 No.XXX [in accordance with section 40 of the Criminal Justice Act 2003].

INTRODUCTION

- 1) The Bar Council of England and Wales and the Criminal Bar Association welcome the opportunity to respond to the Draft Code of Practice for Arrangement and Conduct of Interviews with Defence Witnesses and Statutory Instrument (Notification of Intention to Call Defence Witnesses) (Time Limits) Regulations 2010 No. XXX. In setting out this response, we represent members of the Bar who both prosecute and defend.

- 2) Whilst it is understood that the primary purpose of this consultation is not to consider the merits of the underlying proposals, we note that we are invited to consider these issues in light of the passage of time. We therefore take this opportunity to summarise our concerns regarding the proposed implementation of notification of defence witnesses.

LEGISLATIVE FRAMEWORK

- 3) The statutory basis for the above is summarised as follows:
 - a. Under **section 6(c)** of the Criminal Procedure and Investigations Act 1996 (as amended by **section 34** of the Criminal Justice Act 2003) the accused is obliged to give the prosecutor and the court a notice indicating whether he intends to call any witnesses at trial and give details of those witnesses [*Appendix 1*].

 - b. **Section 39** of the Criminal Justice Act 2003 stipulates the consequences of failing to comply with the above, namely that

such an omission may be the subject of comment by the court or any other party; and permits the court or jury to draw such inferences as appear proper in deciding whether the accused is guilty of the offence. Note: The accused may not be convicted of an offence *solely* on the basis of such an inference. [*Appendix 2*].

- c. **Section 21A** of the Criminal Procedure and Investigations Act 1996 (as amended by **Section 40** of the Criminal Justice Act) requires a Code of Practice which gives guidance to police officers and other persons charged with the duty of investigating offences, in arranging and conducting interviews with defence witnesses [*Appendix 3*].
- d. Under **sections 12** and **77(4)** of the Criminal Procedure and Investigations Act 1996, the Secretary of State is permitted to make regulations concerning the time limits for the notification of defence witnesses.

NOTIFICATION OF DEFENCE WITNESSES – IN PRINCIPLE

BACKGROUND

- 4) The Bar Council and the Criminal Bar Association in responding to the original consultation in 2002 raised a fundamental objection in principle to the proposal, drawing support from the Auld Review's conclusion that such a measure would offend "*the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself*". We are firmly of the view that the principled objections raised in 2002 apply with no less force today.

Permitting a jury to use non-compliance with section 6(c) of the CPIA as *additional evidence* against the accused would do little to advance the interests of justice and, arguably, may be positively damaging to the fair and efficient conduct of criminal trials. The proposal amounts to a further erosion of the principle that a defendant is not required to establish his innocence. Such a step is to be deprecated.

5) Furthermore, we believe that the proposals will present significant difficulties in practice. The likely problems resulting from implementation of these provisions are summarised as follows:

6) The likely deterrence of potential defence witnesses:

- a. Potential defence witness may be dissuaded from agreeing to co-operate with defence solicitors if they know that their details must be disclosed to the prosecution (and may be in due course to co-defendants) and that they will be subject to interview by police.
- b. One cannot ignore the fact that many potential witnesses are (rightly or wrongly) inherently distrustful of the police and the authorities in general. This is particularly so amongst certain sections of the community. Operation Trident cases provide telling illustrations of the real difficulty that is faced in persuading witnesses to come forward and engage with police notwithstanding that those witnesses may have crucial evidence to give and are would make perfectly credible witnesses.
- c. Witnesses *in general* may be far less inclined to assist where the procedure necessarily entails far greater time and

inconvenience to them (e.g. having to submit to separate interviews with defence solicitors and the police at separate locations).

- 7) **Increase in Costs:** The increased costs to police resources and time for this purpose, arising from the audio-taping of witness interviews and disclosure for the witness's legal representative will be considerable, and come at a time when public funds are already over-stretched. This is coupled with the increased costs incurred by solicitors who attend the interview, and will then spend time obtaining further information and drafting and updating witness lists. Inevitably in some cases applications will need to be made to the court for extensions of time, taking up court time and resources. These factors will all combine to add significantly to the financial burden placed on the criminal justice budget.
- 8) **Increase in length of trial:** inevitably the introduction of the proposed provisions will lead to additional legal argument and require yet further convoluted directions to the jury in summing up.
- 9) We can readily identify the following areas as likely to give rise to dispute and argument at trial:
 - a. why a witness list was served late (e.g. when the witness details or the nature or significance of this evidence became known to the accused or his solicitor, or when the accused's intention to call the witness was formed);
 - b. what was said in the course of a police/witness interview where the record is written/summarised (as opposed to tape recorded);

c . dispute over what a witness was told by the police officer and their response in circumstances where the witness has refused to co-operate with the police.

d. the reasons for the non-availability or non-cooperation of the witness when required for police interview.

10) Such factual disputes will be important in determining whether an inference direction should be given to the jury. Leave of the court is required for any such adverse comment and/or direction.

11) An inevitable consequence will therefore be an increase in legal argument and voir dires to resolve factual disputes. The net effect will be an increase in the length of trials and a consequential increase in costs.

12) There is potential for delay to be occasioned where for good reason or otherwise notification of defence witnesses occurs at or shortly before trial. The ensuing cumbersome procedure, involving interviews by police, attendance of the defence solicitor and possibly legal representation for the witness would inevitably occasion delay.

13) **The potential risk of interference by the investigating authorities:** The potential for influencing or worse, to deter potential witnesses is a live consideration which should not be ignored. Opportunities will always exist for "informal chats" outside the interview process which, whether intended or not, may have the effect of dissuading a witness from giving evidence.

- 14) **The risks inherent in disclosing a witness's details to a co-defendant (where there is a "cut-throat" defence):** It will frequently be the case that, in line with the prosecution's duty of disclosure, one defendant's witness details may be disclosed to a co-defendant. This carries with it a resulting risk of witness intimidation at the hands of the co-defendant or his associates where that co-defendant perceives that the evidence that the witness will give may be damaging to his case. Such interference will be difficult to detect and almost impossible to guard against. Where such potential for interference exists so too does the risk of injustice.

NOTIFICATION OF DEFENCE WITNESSES – DIFFICULTIES IN PRACTICE

- 15) A review of the draft Code of Practice and S.I. Regulations reveals a number of practical difficulties which do not appear to have been fully considered. These are as follows:

CODE OF PRACTICE

- 16) The draft code is only engaged where an investigator exercises his or her discretion to interview a witness. There is no guidance as to how this discretion is to be exercised. Guidance should be provided at the outset of the code, together with a

statement of principle as to treatment of defence witnesses and the role of police in this area.

Definitions [para.2]

- 17) The statute makes no distinction between witnesses as to *character* or *fact*. Indeed the defendant is not required to disclose what type of witness he is calling (save an Alibi witness). There could be occasions where a defendant proposes to call several character witnesses and an investigator could be placed in a position where significant resources are devoted to interviewing witnesses which are not concerned with the facts in issue. If the regime is really intended to cover *all* witnesses, the process may become strained beyond breaking point. Consideration must be given to limiting the application of the provisions solely to witnesses as to fact rather than character witnesses.

- 18) There is no definition of an "interview" and where there is a risk of informal contact with a witness, it is prudent that "interview" be appropriately defined.

Arrangement of the Interview [para.3]

- 19) Initial contact between an investigator and a defence witness is an area that is likely to be problematic. Communications should be governed by a written document setting out the witness's rights and obligations. This could be set out in an annex to the Code.

- 20) This proposed measure would minimise the potential for dispute between the parties where a witness declines to co-operate and provides a safeguard for the witness, police officer and defendant. The alternative would be potential legal argument and evidence at trial over what was or was not said between the police /investigator and the witness at this crucial stage.
- 21) The legal representatives for the witness will require disclosure about the case in order to play a meaningful role in safeguarding their client's interests and determining the relevance of questions asked. The Code is presently silent on this matter.
- 22) The Codes recognises that there may be a need for legal representation for the witness and indeed attendance of the legal representative for the defendant. These are important safeguards. However to be effective safeguards, there needs to be in place a system of funding for this representation. We are concerned that there are currently no proposals for such funding to be put in place and furthermore that the Code expressly states that nothing in the code puts an obligation on the LSC to provide such funding.

Identification of Date, Time and Venue for the Interview [para.5]

- 23) There is no guidance or protocol for police officers making arrangements for the interview itself beyond the basic requirement that the investigator should nominate "a reasonable date, time and venue".

24) The wishes of the witness as to venue should be expressly sought and accommodated where possible. For instance the witness may prefer to be interviewed at home, or at a neutral venue such as the witness's solicitor's office or indeed at the defendant's solicitor's office. Attendance at a police station may be intimidating for a potential witness and may act as a deterrent.

25) In relation to arranging interviews, the police should deploy the same degree of accommodation as shown to prosecution witnesses. Experience shows that, for a number of reasons, witnesses can be difficult to locate or to attend (e.g. work commitments, illness, being abroad, child care issues) with initial appointments often having to be cancelled and re-scheduled. When considering the question of time constraints, the *preparatory work* for the actual interview must also be borne in mind (e.g. providing information for the witness and defendant beforehand and obtaining consent/arranging for legal representation).

Notification of the interview to defendant's solicitor [para 6]

26) The defence solicitor should be kept up to date with the status of any proposed interview irrespective of the consent of the witness.

Conduct of the Interviews [para.7]

27) There is no protocol or guidance regarding the conduct of such interviews. Guidance must be provided to officers to ensure

that the interviewing of such witnesses remains a fact-finding exercise and not an opportunity to undermine or deter the witness. There is a risk that a proportion of police officers will tend towards a more hostile line of questioning for defence witnesses than they would deploy for prosecution witnesses.

- 28) It is submitted that a statement of principle is set out at the outset of the Code that defence witnesses are to be treated with respect and where any interview take place it must clearly be understood to be a fact finding exercise.
- 29) The attendance of the defendant's solicitor should be automatic unless the witness objects for good reason. This is an important safeguard and may reduce the risk of subsequent disputes between the prosecution and defence as to the conduct and record of the interview.
- 30) The defendant's solicitor should not be prevented from intervening to object to improper conduct on the part of the interviewing officer. The current provision in the draft code on this topic is an unnecessary and inappropriate restriction on the scope of a defence solicitor's essential duty to his client, the court and the interests of justice.

Recording of the Interview [para.10]

- 31) The draft code is vague and does not provide guidance as to best practice. The manner of recording such interviews will be crucial. A written or summarised note could give rise to disputes at trial regarding what was said by the witness, with three potentially conflicting sets of notes on the point (e.g. interviewing officer,

solicitor for the witness, solicitor for the defendant). Where possible, all interviews should be tape recorded (audio or video).

S.I. TIME LIMIT REGULATIONS

- 32) It is the experience of the response group that, in all but the simplest cases, the time limit proposed is unworkable and will lead to routine failures to comply and applications for extension of time. The prosecution generally purport to comply with their disclosure obligations on service of the papers. At that stage the principal task of the defence solicitor will be to read and digest the prosecution evidence and begin the task of taking instructions from the defendant.
- 33) The task of obtaining witness details and then taking statements from them will follow weeks and often months afterwards, depending on the complexity of the case. Further time may be required while the statement is typed and the witness is asked to confirm its accuracy and sign it.
- 34) It would be unlikely that, and possibly irresponsible or negligent for, a solicitor to place a witness on a list before a statement has been taken from the witness. In any event it could hardly be said in many situations that the accused 'intends to call' a witness until a statement has been taken and the accused consulted. Indeed that intention to call a witness can often only properly be formed after receipt of legal advice; and such advice itself can often only be given on mature reflection of the case as a whole. In practice, for justifiable professional reasons, such decisions are regularly not taken until shortly before or even at trial.

- 35) The requirement to give notice of witnesses within 14 days of the prosecutor complying *or purporting to comply* with their disclosure obligations under section 3 is accordingly unrealistic and would place a disproportionate burden on the defendant and his legal representatives.
- 36) Adopting *purported compliance* by the prosecution with their disclosure obligations under section 3 may result in practice in the defence having to disclose their case before the prosecution have properly disclosed their case to the defendant. This is contrary to the twin fundamental principles of criminal justice referred to in paragraph 4 above.
- 37) It is submitted that a far more appropriate trigger would be the completion of the service of the prosecution evidence. This would avoid the risk identified above and would enable the defence to identify with appropriate precision which witnesses it may need to call to meet the prosecution case.
- 38) A date for final service of the prosecution evidence could be set at the PCMH and the time limit for service of the witness orders would run from that date. Given the difficulties with contacting witnesses, 21 or 28 days or such other time which in the circumstances of the case the judge may direct would be more appropriate as a time limit to run from the recommended trigger for service.
- 39) A provision permitting an 'out of time' application for an extension of time for good reason is essential to avoid injustice. This would enable the court to accommodate the situation where justifiable delays had occurred where, for example, a witness was abroad or

where late disclosure by the prosecution had identified the need for a particular witness to be called.

Conclusion

- 40) A considerable period of time has passed since the CJA 2003 received Royal Assent. The notification of defence witness requirements has not hitherto been implemented. The delay in introducing the provisions is undoubtedly due in part to recognition of the difficulties inherent in implementing these provisions in practice.
- 41) The code of practice was intended to provide safeguards to meet concerns about the provisions expressed at the time of the enactment of the CJA 2003. The form of the draft code does not provide sufficient safeguards rather it provides a recipe for further dispute and has the potential to create unfairness.
- 42) The availability of free and independent legal representation for the witness and the right of the defendant to have his solicitor present during the interview process are fundamental safeguards. We are concerned that there is currently no proposal to make funding available for this.
- 43) These provisions if implemented will have a tendency to lengthen the trial process and will inevitably incur considerable additional costs in terms of police time and resources. In the current climate, with significant cuts proposed to the legal aid budget, it is submitted that the proposed implementation and Code is misguided and should be carefully reviewed.
- 44) The Bar Council and the Criminal Bar Association have very grave doubts that the implementation of this provision will enhance the quality of criminal justice. On the contrary, we regard the additional administrative bureaucracy and juridical burden as likely,

in the majority of cases, to obscure and hinder the just and efficient business of criminal proceedings.

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