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## **Liberty's response to the CPS consultation on pre-trial witness interviews by prosecutors**

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*Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.*

## **The need for change?**

The Damilola Taylor trial was a truly exceptional case. The number of cases in which there are comparably serious doubts about a prosecution witness' reliability which might have benefited from a pre-trial interview is very small indeed. Although the jury were ultimately directed by the trial judge to disregard the key witness' evidence, the Damilola case was not withdrawn from the jury – a pre trial interview would not have prevented the case coming to trial. The key witness' reliability was only seriously undermined because of expert and detailed cross examination – a pre-trial interview can never test a witness to this extent since this would necessarily taint the witness' evidence.

In our view given,

- (a) the limited benefits of pre-trial interviews
- (b) the potential for abuse or tainting
- (c) the substantial cost implications in order to safeguard against coaching
- (d) the very limited number of cases in which an interview might produce some benefit,

prosecutor pre-trial interviews will raise more concerns than potential benefit.

The helpful research from other jurisdictions does not demonstrate any clear benefit that justifies the radical reform of the present English system.

## **Cost implications**

In order to safeguard against coaching, any pre-trial witness interview must be videotaped. The video ought to be automatically disclosed to the defence since, even if it is not inconsistent with any other statement of the witness, it necessarily relates to their reliability or credibility or clarifies their evidence. Defence preparation times would increase substantially. Transcripts would have to be prepared. The videos could be played to the jury by the defence or their content put in cross-examination which would

increase trial length and cost. The trial would therefore have many of the problems of a re-trial.

## **Preferred Solution**

The main problem with the prosecutor interviewing the witness is coaching. The problem with the police interviewing the witness is they are neither lawyers nor independent. However, since a witness statement has to be taken from a witness by the police (and not the prosecutor), **in cases where the police are of the opinion that a witness may be unreliable at trial, the police should videotape the taking of the witness' statement.** This maintains the prosecutor's distance from the witness (avoiding coaching) but enables the prosecutor subsequently to assess the witness' demeanour from the video and not merely a statement. It would be more helpful than a prosecutor interview since the police are permitted (within limits) to ask the witness a wide range of questions when taking a statement.

The facilities for the police video taping the taking of a witness statement already exist and are routinely used for witnesses requiring special measures (e.g. vulnerable, young witnesses and sexual complainants). Although vulnerable witness' video evidence can be adduced as their evidence in chief, it is not suggested that the videotape of the taking of the statement should be adduced in the same way – it is merely for the reliability assessment.

In appropriate cases a prosecutor could ask the police to clarify an aspect of a witness' evidence (as currently occurs) and this could also be videotaped – enabling a further reliability/demeanour assessment by the prosecutor.

The only disadvantage of the preferred solution would be that police officers might fail to recognise potentially unreliable witnesses. However, in practice this would be unlikely in serious cases which involve experienced officers. Guidance could be issued by

prosecutors to enable officers to spot potentially problematic cases: e.g. witness has strong incentives to lie, witness is only evidence against accused.

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

The only purpose should be to assess the reliability of the witness. It is inappropriate for a prosecutor to put a witness at ease about giving their evidence. A prosecutor, with the expert assistance of Witness Support, can, however, reassure a witness about courtroom procedure. If a reliability assessment can only be done by discussing the evidence (no obvious example is given), then the police officer should obtain a further statement which can be video taped and viewed by the prosecutor. It would be difficult to control the scope of ‘clarification interviews’ by prosecutors who might (unwittingly) taint the evidence.

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

The interview should be held at the earliest possible stage – if the accused has given his account the potential for coaching (unwitting or otherwise) is very high. The ‘interview’ should be the process of taking the witness statement by the police and should be video recorded.

### **Q.3 What form should the interview take?**

If the ‘interview’ is the process of taking the witness statement by the police then, providing this is video taped, there is no need for the defence to be present. If the interview is by the prosecutor then fairness and openness dictates that the defence should be involved with the right to intervene – particularly since the evidence is being tested to assess its reliability. The relative informality of the Formal Preliminary Examination procedure is insufficient justification for the exclusion of the defence. A prosecution witness can be reassured by Witness Support before the witness interview and not just

before court if necessary. Liberty has published a Victims Charter which argues for enhanced rights and support for victims and witnesses.

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

If the ‘interview’ is the video taping of the taking of the witness statement by the police (which necessarily occurs at an early stage of the proceedings), then the evidence should be safeguarded against contamination. Leading questions, superfluous reference to other witnesses’ evidence and deliberate probing of the evidence in order to produce alteration should be prohibited by statutory guidance to police (or prosecutors).

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

We agree that it is difficult to predict all categories of case in which an interview might be required. However, the procedure (in any form) should not become widespread. The reasons for the need for an interview should be recorded in advance and the procedure should not be used for less serious cases (e.g. those triable on indictment only).

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

Special measures meetings have a wholly different purpose (the witness’ special needs at trial) to reliability interviews (the quality of their evidence). Reliability interviews should occur at the earliest possible stage and should not occur after the special measures meeting.

**Q.7 Should attendance be compulsory or voluntary?**

This is not an issue if the ‘interview’ is the videotaping of the taking of the witness statement by the police. If the witness has made a statement, then attendance should be compulsory – it is beneficial to all to know at the earliest possible stage if and why a witness is reluctant to co-operate with the prosecution.

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

Subject to sensitive material editing, the entirety of the meeting should be disclosed (on video).

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

This is not an issue if the ‘interview’ is the videotaping of the taking of the witness statement by the police. Only the particular prosecutor who needs to have a reliability assessment which cannot be done on paper should have access to the witness.

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

This is not an issue if the ‘interview’ is the videotaping of the taking of the witness statement by the police. If it is to be done by a prosecutor the trial prosecution should not be the interviewer. Since coaching is the primary objection to prosecutor witness interviews, it would place the trial prosecutor in an impossible position if s/he were accused of coaching. The accusation may only surface during trial when the significance of a line of questioning becomes clear.

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

See Preferred Solution. However, if the prosecutor is to be the interviewer, then the police should play no active role.

**Alex Bailin**

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