

ANNEX 4A

**PROTOCOL FOR THE PROVISION OF EVIDENCE BY PROSECUTORS TO
THE PRINCIPAL REPORTER**

Section 53 of the Children (Scotland) Act 1995

1. Introduction

1.1 Section 53 of the Children (Scotland) Act 1995 provides a statutory framework for the provision of evidence by the Procurator Fiscal ("the prosecutor") to the Principal Reporter ("the reporter"). This protocol is intended to provide rules and guidance on the practical application of Section 53(4), (5) and (6), and related situations. For more general guidance on the working relationship between reporter and prosecutor, see Annex 4 of Chapter 16 of the Crown Office and Procurator Fiscal Service Book of Regulations.

1.2 Any difficulties with the operation of this protocol which can not be resolved at local level, or are considered to have implications for national practice, should be referred to the Crown Office Policy Group and/or the Scottish Children's Reporter Administration. Contact information is listed at Annex A.

1.3 Use of this protocol will be greatly helped by a mutual understanding of the criminal justice and children's hearing systems. A rudimentary guide to each is set out at Annex B. As a general rule, reporters' proceedings are likely to precede criminal proceedings. Reporters and prosecutors are encouraged to familiarise themselves with the other's procedures in order to reach a better understanding of colleagues' needs and priorities.

1.4 Section 53 of the Children (Scotland) Act 1995 is reproduced in full at Annex C. The provisions relating to the supply of evidence by the prosecutor to reporters are contained in Subsections (4),(5),(6) and (7).

2. Guidelines for the Application of Section 53 of the Children (Scotland) Act

When does Section 53(4) apply?

2.1. Section 53(4) provides that where an application has been made to the sheriff by the Principal Reporter under Section 65 of the Act, or by any other person under Section 85 of the Act, the Principal Reporter may request any prosecutor to supply him with evidence held by him. Section 53 does not, therefore, apply at the investigative stage of proceedings by the reporter. (See 2.14 infra). The "Principal Reporter" refers to any children's reporter.

What does "evidence" mean?

2.2. Section 53 refers to evidence lawfully obtained in the course of, and held by the prosecutor in connection with, the investigation of a crime or suspected crime. Evidence held by the police before a report has been submitted to the prosecutor is not covered by Section 53. (See 2.13 infra).

2.3. "Evidence" in a general legal context means the testimony of witnesses, and documents and articles which go to proving alleged facts. The most common types of evidence which it is envisaged will be the subject of Section 53 requests are:-

- medical and forensic science reports
- articles of clothing
- weapons
- plans and maps
- birth certificates
- recorded confessions

2.4. Where a statement is recorded in writing or on tape, both that writing or tape, and oral evidence from the interviewer are equally primary evidence. In addition to the name of the relevant police officer, copies of taped police interviews with the accused will be made available by prosecutors to reporters, provided they contain relevant material e.g. incriminating statements, or details of a substantive defence. If the tape has been transcribed, a copy of the transcript will also be provided. Copies of witness statements taken by the police will not normally be supplied by the prosecutor, as they are normally supplied direct by the police. It will always be open to the reporter to cite the relevant witness(es) to give oral evidence.

2.5 Evidence does not, by definition, include precognitions which are confidentially held by the prosecutor, and which are not admissible in criminal proceedings. It has been agreed, however, that copy precognitions of child victims will normally be made available on a confidential basis. It must be stressed that **no attempt should be made by reporters to lodge precognitions as productions in proceedings before the sheriff.** Although hearings before the sheriff in terms of Section 65(7), 65(9) and 85 of the Children (Scotland) Act 1995 come within the meaning of civil proceedings for the purposes of the Civil Evidence (Scotland) Act 1988, the definition of a statement **does not** extend to a statement in precognition form and, accordingly, precognitions are not admissible as hearsay evidence in reporters' proceedings in terms of the above sections.

2.6 Reporters may precognosce children, and it may be useful for the prosecutor to have sight of such a precognition. In cases where both reporter and prosecutor have a potential interest, it is recommended that the reporter advise the prosecutor that a precognition has been taken, and vice versa. The reporter should contact the prosecutor for the area in which the offence occurred, to discuss whether it would be helpful to make a copy of the reporter's precognition available. The prosecutor should contact the reporter for the area in which the child lives. A list of prosecutors and reporters is given at Annex D.

Are there any qualifications as to the nature of the evidence which can be supplied?

2.7 The evidence must be evidence which may assist the sheriff in determining the application under Section 65 or 85. It will be for the reporter to make that preliminary assessment. Prosecutors should also have regard to this test when considering requests. The fact that a reporter has not requested a specific piece of evidence (of which he may have no knowledge) should not prevent a prosecutor alerting the reporter to the existence of evidence which may, in his judgement, assist the sheriff in proceedings under the 1995 Act.

2.8 The request by the reporter must be made in writing and must confirm that an application has been made to the sheriff (s.53(4)). To ensure that all relevant factors are covered, it is recommended that the request be made on a pro forma, the style of which is appended at Annex E. The pro forma will also be used as a receipt, and will specify the date by which the items must be returned.

How should the prosecutor deal with a request under Section 53(4)?

2.9 The prosecutor has a duty to comply with such a request unless he reasonably believes that it is necessary to retain the evidence for the purposes of any proceedings in respect of a crime. Proceedings need not have been commenced to justify refusal, but a decision should have been made to proceed.

When is it reasonable to retain evidence?

2.10 It will be reasonable for the prosecutor to retain evidence where:-

- criminal proceedings are imminent
- evidence requires to be forensically or otherwise examined, analysed or inspected
- evidence is required for precognition purposes
- releasing it would create a risk to the public, or to the security or integrity of the evidence
- a copy, if necessary certified a true copy for the purposes of the Civil Evidence (Scotland) Act 1988, or a photograph, would be sufficient for the reporter's purposes
- releasing it would prejudice the accused's right to inspect the evidence (Section 68 of the Criminal Procedure (Scotland) Act 1995)

This list is not exhaustive but illustrative only.

What should happen when the evidence is handed over?

2.11 Reporters should respect the confidentiality of the items handed over (see 2.17 infra), and comply with the conditions set out in the pro forma (see Annex E).

Nothing should be done to alter, contaminate or damage the evidence.

What happens when the evidence is returned to the prosecutor?

2.12 The prosecutor should acknowledge receipt of the evidence. If the items handed over have been altered in any way, the reporter must bring this to the attention of the prosecutor, explain how it occurred and give details of any relevant witnesses. A brief report of any significant events relating to the evidence (e.g. if the accused denied that an article of clothing was his, or challenged a document) would be useful. Prosecutors should have regard to para.16.61 in the Book of Regulations which provides that Crown Counsels' instructions must be obtained in relation to any proposal to lead evidence of admissions arising out of care and protection proceedings.

What happens in cases which fall outwith the terms of Section 53?

Before the case has been reported to the prosecutor

2.13 Where evidence is being held by the police in connection with the investigation of a crime which has not yet been reported to the prosecutor, any request for access to such evidence should be intimated to the police and prosecutor. The police should then provide the prosecutor with an interim report containing such information about the investigation and the evidence as will enable the prosecutor to decide whether Section 53 is likely to apply in the future, and what should be done with the request in the interim. If Section 53 is likely to apply (i.e. a prosecution is a strong possibility) procedures similar to those detailed above should be applied. Where proceedings are not likely, the prosecutor can authorise the police to deliver the productions to the reporter.

Before an application has been made to the sheriff

2.14 Requests for evidence by the reporter before an application to the sheriff i.e. at the investigative stage of proceedings by the reporter, should be dealt with informally with the prosecutor. Sight of the evidence held by the prosecutor may be the determining factor in deciding what, if any, proceedings are appropriate before a children's hearing, and it is recommended that prosecutors co-operate, if necessary on a confidential basis at that stage, with such requests.

"No Criminal Court Proceedings"

2.15 Requests for access to evidence in cases that have been marked by the prosecutor for disposal otherwise than by criminal court proceedings, should be made to the prosecutor to enable him to issue the necessary authorisation to the police. It should be borne in mind that the police may dispose of evidence, or return it to its owner, immediately the non-court marking is made. Any request for productions would require to be made before they are disposed of or returned. Police should be aware of, or should be made aware of, the reporter's interest in the case, and should not dispose of evidence in such cases until the reporter's proceedings are at an end, or a decision has been taken by the reporter to take no proceedings (see 2.14 above). Evidence will, however, be retained where cases are marked "no proceedings meantime", a common marking in uncorroborated child abuse cases.

Evidence lodged with the Sheriff Clerk or Clerk of Justiciary

2.16 Requests for evidence which has been lodged with the court in anticipation of a trial, are unlikely to be granted, but if access to the evidence is considered essential, the matter should be discussed with the prosecutor in order that consideration may be given to his applying to the court for temporary release of the evidence. Where the trial has been concluded, and the productions

are still held by the Court, requests should be made to the relevant clerk of court.

Confidentiality

2.17 Productions borrowed by the reporter are lent to him in confidence. They can be shown to other parties in the proceedings and to any expert instructed by the reporter. Any other requests for access should be referred to the prosecutor.

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