

Chapter 13: Witness Statements: General

13.1 General Practice

Timing of disclosure of witness statements

13.1.1 The general rule is that in all summary cases where the accused is on bail or ordained to appear, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, not less than 28 calendar days before the Intermediate Diet.

13.1.2 The general rule is that in all summary cases where the accused is remanded, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, not less than 7 calendar days before the Intermediate Diet.

13.1.3 The general rule is that in all solemn cases, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, within 28 calendar days of the accused's first appearance.

Content of disclosure

13.1.4 The general rule is that the Crown should provide the defence with copies of statements of all witnesses that are in their possession. It should be noted that this is not limited to those witnesses that the Crown intends to call at trial.

13.2 Withholding Statements Temporarily

13.2.1 Statements may be withheld where the Crown proposes to disclose a statement but further steps are necessary before disclosure is made, e.g. statements of vulnerable witnesses (particularly where the case involves sexual offences) and/or child witnesses where the Crown intends to precognose these witnesses prior to their statements being disclosed to the defence. In such circumstances, care should be taken to ensure early precognition of such witnesses in order to limit the period during which the statement is withheld. (See Chapter 4, paragraphs 4.2.3 - 4.2.7, Chapter 9, paragraphs 9.7.1 – 9.7.4, and Chapter 10, paragraphs 10.6.1 – 10.6.4.)

13.3 Withholding Statements Completely

13.3.1 The Crown may require to consider withholding a statement where it contains information which is covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons¹ (**Swinney v Chief Constable of Northumbria** (1999) 11 Admin LR 811 and **Osman v Ferguson** [1993] 4 All ER 344).

13.3.2 If the statement does not contain any information which would fall to be disclosed in terms of the materiality test i.e. information which is likely to

- materially weaken or undermine the evidence that is likely to be led by the prosecutor;

¹ See **Swinney v Chief Constable of Northumbria**, (1999) 11 Admin. L.R. 811, in which the court considered the duty owed by the police to informers, to take reasonable care in preventing confidential information from being disclosed to the public. See also **Osman v Ferguson**, [1993] 4 All ER 344, in which the court stated that the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so.

- materially strengthen the defence case; or
- form part of the evidence to be led by the prosecutor in the proceedings against the accused

for example, where the statement is wholly incriminatory of the accused, the Crown may, if the circumstances referred to in paragraph 13.3.1 pertain, decide not to call the witness and to withhold the statement. (**See Chapter 4, paragraphs 4.2.3 - 4.2.5.**)

13.3.3 Where the statement contains sensitive information as defined by section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010 and/or the circumstances in paragraph 4.2.6 above (in Chapter 4 of this Manual) apply, it may be withheld. However, non disclosure should be the last option after all other possibilities have been considered, and, in particular, relevant wholly incriminatory information should only be withheld in exceptional cases.

13.3.4 A decision to withhold a statement in terms of paragraph 4.2.6 above (in Chapter 4 of this Manual), must be taken by the appropriate Legal Manager. In solemn cases, the matter should be reported to the Director of Serious Casework, for Crown Counsel's instructions. If a statement is withheld on these grounds, the witness may not be called to give evidence.

13.3.5 If the statement contains information which is disclosable in terms of the materiality test i.e. information which is likely to

- materially weaken or undermine the evidence that is likely to be led by the prosecutor;
- materially strengthen the defence case; or
- form part of the evidence to be led by the prosecutor in the proceedings against the accused,

then the Crown must consider whether or not the statement can be withheld while still fulfilling its obligations. The following are possible ways of securing that the Crown's obligations of disclosure are fulfilled while still withholding the sensitive information which is not disclosable:-

- (i) disclose the statement in a redacted form removing the sensitive information, so that the defence is provided with all information which must be disclosed in terms of the materiality test; or
- (ii) making an admission of facts, essentially providing a note advising the defence of the content of the statement which is disclosable in terms of the materiality test without providing a copy of it.

13.3.6 If the Crown's obligations cannot be secured in this way, the Crown has two options:-

- (i) to discontinue proceedings; or
- (ii) to seek to a non-disclosure/non-notification order/exclusion order as appropriate. Full guidance on these orders can be found in Chapter 25 of this Manual.

13.3.7 If the Crown is not prepared to discontinue proceedings, it is not entitled unilaterally to withhold the information from the defence. The question of whether the information is disclosable i.e. material can be decided by the Court. However if the summary/solemn legal manager deems the information to be disclosable but considers that disclosure would not be in the public interest the matter should be referred initially to the functional lead for High Court/Sheriff and Jury/Summary or the Federation Head. Thereafter the matter should be reported to the Director of Serious

Casework for the attention of Crown Counsel with an appropriate recommendation, for a decision as to how the issue should be addressed.

13.3.8 Where Crown Counsel considers that it is not in the public interest to disclose the information to the accused, Crown Counsel may consider it best that the information be withheld and that an application for a non-disclosure order is made to the court.

13.3.9 If the Court has ruled that the information is disclosable in terms of the materiality test, then careful consideration requires to be given as to whether or not to disclose a redacted version (removing any sensitive and immaterial information). Under no circumstances should a non-redacted version be made available. It is important however to note that a Court ruling that information is disclosable, is not per se a ruling to disclose the information. In these circumstances the Crown will require to respect the decision of the court and take necessary steps to deal with the situation.

13.3.10 In circumstances where the Crown continues, following a Court ruling that the information is disclosable, to be of the view that it is not in the public interest to disclose the information (even in a redacted form) a report should be submitted to the Director of Serious Casework for Crown Counsel's Instructions as to whether or not the case merits risking the Crown being held to have breached its disclosure obligations. It should be remembered that breach of the Crown's disclosure obligations will not always result in an unfair trial in terms of Article 6 ECHR. This approach should only be followed in exceptional circumstances and under the authority of Crown Counsel and the Director of Serious Casework.

13.3.11 It will be highly exceptional for statements to be completely withheld. In any case where a decision is taken to withhold a statement completely, it will not usually be appropriate to disclose the reasons for withholding where such reason may of itself present a security risk, e.g. where the information has been provided by an informant.

13.3.12 Where a statement has been withheld in whole or in part, it will be necessary to keep the question of disclosure under review. New information and other developments in the case may require the question of disclosure to be revisited.

13.4 Additional Witness Statements

13.4.1 Where the Crown, in the course of its preparation or investigation of the case, receives additional statements of any further witnesses who are material to the case against the accused and who have not been previously provided to the defence, it will provide to the defence copies of these as soon as practicable, subject to the same qualifications that apply to the original provision of copy statements.

13.4.2 It should be noted that this also applies where the Crown receives additional statements of witnesses already known to the Crown and disclosed to the defence.

13.5 Release of Statements

13.5.1 Where any disclosure of statements is to be made, it should be conditional on the statements only being used for the limited purpose of the proper preparation and presentation of the case in which disclosure is made. This is clearly specified in the Article 11 of the Code of Conduct in Criminal Work, which governs the use and retention of disclosed information by defence solicitors. The guidance note attached

to Article 11 states that *“solicitors are reminded that, in receiving documentation, material or recordings from the COPFS, or other third parties, that they are accepting an implied undertaking to comply with the terms of this Article”*.

13.5.2 Moreover, section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that information disclosed will not be used or further disclosed other than :-

- (a) For the purposes of the proper preparation and presentation of the accused’s case in the original proceedings;
- (b) With a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
- (c) For the purposes of the proper preparation and presentation of the accused’s case in any such appeal

13.5.3 It is an offence under section 163 of the Criminal Justice and Licensing (Scotland) Act 2010 for any person to knowingly use or disclose information, or anything recorded in it, for any purpose other than those detailed at paragraph 13.5.2 above.

13.6. Access to statements by witnesses.

13.6.1 Section 54 of the Criminal Justice and Licensing (Scotland) Act 2010 enables the Crown at any point before the witness gives evidence in the criminal proceedings, to provide any witness who is cited (or likely to be cited) with a copy of their statement (or statements) or to otherwise give the witness access to their statement. In light of this being a permissive provision the practicalities of implementation will need to be assessed and in summary cases this will be by way of a pilot in an appropriate area/office(s). The main aim of this provision was to ensure that the quality of the evidence of Crown witnesses would be enhanced as previously the witness was the only person in court not entitled by law to see their statement.

13.6.2 Section 54 will only apply where the statement is contained within a document. Under section 262 of the 1995 Act, a statement will be deemed to be contained within a document where the witness:

- a) Makes the statement in the document personally;
- b) Makes a statement which is, with or without his/her knowledge, embodied in a document by whatever means or by any person who has direct personal knowledge of the making of the statement; or
- c) Approves a document as embodying the statement.

13.6.3 A document will, as specified in section 262 of the 1995 Act, include:

- a) Any document in writing;
- b) Any map, plan, graph or drawing;
- c) Any photograph;
- d) Any disc, tape, sound track or other device in which sounds or other data (not being visual images) are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- e) Any film, negative, disc or other device in which one or more visual images are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.

Accordingly, under section 54, copies of audio or visually recorded statements can be provided to witnesses, in the same way as statements held in NSS format.

13.6.4 By virtue of subsection (3), section 54 does not apply to victim impact statements provided under section 14 of the Criminal Justice (Scotland) Act 2003. However, this subsection does not prohibit the Crown from providing such a statement in response to a subject access request from the witness under the Data Protection Act 1988. Similarly, by virtue of section 262 of the 1995 Act, section 54 does not apply to a precognition except where it is a precognition on oath.

13.6.5 A statement should not be provided to the witness unless the statement has been or will be made available to the defence. It will be the disclosable redacted statement which will be given to the witness. This will show the witness that any sensitive information has been removed prior to disclosure to the defence and should not cause any problems for the witness as they should recall what information they gave to the police. Reference may have to be made to the unredacted version if there is dispute as to the content although this will be extremely unlikely due to the fact that the redaction will have been applied in order to protect either the personal details of the witness or some other immaterial information which should not be disclosed.

13.6.6 Under section 261A of the 1995 Act (as inserted by section 85 of the 2010 Act), a witness may, where permitted by the Court, refer to their statement when giving evidence, provided both the prosecutor and the accused (or the solicitor or advocate acting on his/her behalf) has seen or been given the opportunity to see the statement. It should be borne in mind that the defence will only have seen the redacted version of a statement and therefore the witness should not make reference to any information which has been redacted.

13.6.7 It is important to ensure that a record is kept in the case papers of which witnesses have been given access to their statement to allow this to be addressed if raised by the defence.

13.6.8 It has been agreed that a two tier policy will be applied to ensure that section 54 can be implemented by COPFS taking account of the different nature of procedures in summary and solemn cases and to complement the aims of purpose driven precognition.

13.6.9 Care must be taken to ensure that a witness is not placed at a disadvantage by not having access to their statements prior to giving evidence.

13.6.10 As the definition of “document” contained within section 262 of the 1995 Act extends to audio and visual images, where a witness has provided a statement in the form of an audio or visual recording, the witness can be provided with a copy of the recording. In such circumstances, however, it may be more appropriate to provide the witness with access to his/her statement.

13.7 Solemn Cases

13.7.1 The precognoser in consultation with the SLM will determine who should and should not have access to their statements(s). In certain circumstances it may be that it is impractical or inappropriate to provide the witness with a copy of his/her statement(s) Examples of where this would apply would be:

- a) Where it is suspected that a witness might share his/her witness statement with other persons involved in the proceedings;
- b) Where provision of a copy might present a security risk to the wellbeing of the witness, e.g. if the witness is in prison or has a connection with the accused

c) Child Witnesses

This list is not exhaustive and there may be other situations not detailed above where it may be more appropriate to provide the witness with access to the statement. All decisions should be recorded within the disclosure page of the case papers so that an informed review can be carried out at a later stage if required.

13.7.2 Where a witness is being precognosed

The witness will be allowed to read over a copy of their statement(s) immediately prior to the precognition commencing. The precognition will thereafter take place and any inaccuracies in the content of the statement should be addressed. Where there are material inconsistencies then the nature of this must be recorded in the precognition and details disclosed to the defence. This should also be highlighted within the body of the precognition and recorded on the disclosure page.

13.7.3 Where a witness is not being precognosed.

Where a witness is essential to the case but no precognition is required they may be allowed access to their statement prior to the trial, unless there are good reasons why it would be inappropriate for such a witness to have sight of their statement and to prepare their evidence accordingly. This will generally take place at the PF Office and will be organised through the precognoser.

13.7.4 This offer will be made to a witness at the point when witnesses are cited. This will ensure that only those witnesses who are to be cited will be given access to their statements. In exceptional circumstances a witness may be offered access to their statement at an earlier stage although this must be under the authorisation of the Solemn Legal manager.

13.7.5 The most likely circumstances when this will occur are when a decision has been taken that the witness is essential to the case and they are not to be precognosed but there is a concern around the content of the statement or the status of the witness in light of all the other information available during the precognition process. This will only apply where there are circumstances which can not be addressed by the police re-interviewing the witness.

13.7.6 Full details of the processes to be applied are contained within chapter Q of the Case Processing Manual

13.7.7 The presumption in all child witness cases is that children will NOT be given access to their statement prior to a trial.

13.7.8 Where the witness wishes to question the content or depart considerably from the details contained in the statement then the witness should be informed that they will be contacted by the police and a further statement obtained.

13.7.9 The PO or SLM should thereafter contact the reporting officer and instruct that a subsequent statement be obtained from the witness. This will allow the details of the changes to be recorded and disclosed to the defence.

13.7.10 The witness should have been asked to sign the statement given to the investigating agency and should therefore already be aware of the content of any statement given.

13.7.11 Full details of all decisions made and access provided must be recorded in the disclosure page of the case papers. However the fact that a statement has been

provided to a witness in advance of trial **does not** require to be disclosed to the defence as part of the Crown's disclosure duty. Should any additional or contradictory information be provided by the witness at the point at which they have access to the statement then, providing this information meets the materiality test, it should be disclosed to the defence.

13.7.12 Witnesses in solemn cases should **not** be provided with access to a copy of their statement on the day of trial unless there is an express instruction allowing this from the trial Advocate Depute, the Solemn Legal Manager or the Depute conducting the trial. The prosecutor giving the instruction should confirm whether access is to be supervised or not.

13.8 Summary Cases

13.8.1 A Pilot is being run at Glasgow Procurator Fiscal's Office in relation to witnesses in summary cases being given access to their statements. Until this pilot has been fully run and evaluated this provision will not be implemented within any other PF Office.

13.8.2 Where the case has sensitive or vulnerability considerations and there is VIA involvement, VIA will contact the witness and arrange for them to attend at the PF Office to have access to their statement if the witness wishes it. This should be linked into the provision of information about attending court and arrangement of court visits.

13.8.3 Where the case does not fall into one of the categories of cases where there is VIA involvement then the witness who will have been given the opportunity to opt-in to see his/her statement, will receive a copy of their statement at court on the day of the trial. If practical a room separate from the witness room will be made available for this purpose.

13.8.4 Where the witness wishes to dispute the content of the statement they should be informed that this should be addressed with the trial depute.

13.8.5 Full details of the processes to be applied in relation to this provision are contained within chapter Q of the Case Processing Manual.

13.8.6 Where the witness is a child then it will not be appropriate for them to be offered access to their statement prior to the trial.

13.8.7 Where the witness indicates that they do not agree with the content of a statement this should be addressed by the Depute in court who if necessary may need to instruct the police to re-interview the witness prior to commencement of the trial. Where the witness is questioning a minor issue within the statement this should be addressed in the examination in chief if required.

13.8.8 The witness should have been asked to sign the statement given to the investigating agency and should therefore already be aware of the content of any statement given.

13.8.9 The fact that a statement has been provided to a witness in advance of trial **does not** require to be disclosed to the defence as part of the Crown's disclosure duty. Should any additional or contradictory information be provided by the witness at the point at which they have access to the statement then, providing this information meets the materiality test, it should be disclosed to the defence.

13.9 Witness statements: Use during trial.

13.9.1 Section 85, of the 2010 Act provides an amendment to the Criminal Procedure (Scotland) Act 1995 by insertion of section 261A which provides at subsection 2 that a court may allow the witness to refer to a statement while the witness is giving evidence.

13.9.2 This provision applies where

- a) a witness is giving evidence in criminal proceedings,
- b) the witness has made a prior statement,
- c) the prosecutor has seen or has been given an opportunity to see the statement, and
- d) the accused (or a solicitor or advocate acting on behalf of the accused in the proceedings) has seen or has been given an opportunity to see the statement.

13.9.3 In solemn cases a copy of the statement will be contained within the case papers and can be accessed for this purpose. It may also be listed as a production. Whilst in summary cases if the witness has opted in to receive a copy of his/her statement then they will have the statement with them. Where there has been no opt-in then a short adjournment may need to be sought to allow a copy of the statement to be obtained from the PFO.