Chapter 4: Witness Statements

4.1 The Law

4.1.1 The Judicial Committee of the Privy Council, in endorsing **McLeod v HMA** ((No.2) 1998 J.C. 67), has held that the Crown is under an obligation to disclose to the defence the statements of all witnesses on the Crown and defence lists (**Sinclair** at para 49 and **McDonald [PC])**.

4.1.2 The Crown must perform this duty proactively, whether or not the defence calls upon the Crown to do so (**McDonald [PC]** at para 55), unless unusually, the duty is waived by the defence (**Sinclair** at para 53).

4.1.3 The reason for this duty was recently expressed by Lord Rodger of Earlsferry in **McDonald [PC]** at para 57:

> *"Under the Scottish system, the defence has the valuable right to precognosce witnesses…but the law imposes a duty on the Crown to disclose all the statements of these witnesses precisely because, in the nature of things, they may well contain information which even careful precognoscing by the defence would not uncover and which might materially weaken the Crown case or support the defence case".*

4.1.4 In **Thomson v Burns** (2009 HCJAC 45), the Appeal Court confirmed that the obligation in **Sinclair** did not extend to a requirement on the Crown to require police statements to be brought into existence so that they can be disclosed and reaffirmed that the obligation set down in **Sinclair** only related to statements already in existence. In other words, there is no duty on the Crown to create witness statements purely for the purposes of disclosure.

4.2 Policy

4.2.1 The general rule is that all material witness statements that are in the possession of the Crown should be disclosed. For the avoidance of doubt, this general rule includes witnesses whom the Crown does not intend to cite but who are considered material. 'Material' means information which is likely to materially weaken the Crown case or materially strengthen the defence case. Failure to disclose all material statements timeously can give rise to serious practical difficulties at a later stage: for example, see **HMA v G.B.**.

4.2.2 The Crown should, in general, obtain all witness statements from the police and other investigating agencies and disclose all material witness statements to the defence.

4.2.3 As recognised in **McDonald [PC]** at para 53, the Crown's policy of disclosure in relation to witness statements is wider than its Article 6(1) duty of disclosure. In terms of the policy in this manual and in the Crown Practice Statement on Disclosure of Evidence in High Court cases, the Crown will also routinely disclose statements of witnesses who may not appear on any subsequent list of witnesses attached to the indictment or who may not be called to give evidence in a summary trial.

4.2.4 Accordingly, **Lord Rodger of Earlsferry** states at para 54 that:

"if in any particular case the Crown slips up and fails to supply a police statement from someone who does not appear on the Crown list, this may constitute a failure to carry out the Crown's declared policy, but it will not constitute a breach of the Crown's article 6(1) obligation of disclosure – unless the statement does in fact materially weaken the Crown case or strengthen that of the accused. The question whether the Lord Advocate had failed to carry out her declared policy in this way would, accordingly, not be a devolution issue".

4.2.5 In exceptional cases, however, there may be good reason why a witness statement should not be disclosed, e.g. where there is a threat to the life or limb of a witness or other persons[1](see **Swinney v Chief Constable of Northumbria**. (1999) 11 Admin. L.R. 811 and **Osman v Ferguson**, [1993] 4 All ER 344)

4.2.6 Where a statement,

(i) does not contain information which is relevant to the issues in the case (i.e. the information is manifestly irrelevant); or

(ii) contains information which is relevant to the issues in the case, but none of that information falls within the statutory obligation of disclosure, i.e. it does not meet the materiality test e.g. if it contains wholly incriminatory information

it may be withheld where the information is sensitive (Criminal Justice and Licensing (Scotland) Act 2010 s122)and/or the circumstances in paragraph 4.2.5 above apply. 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.

4.2.7 A decision to withhold a statement in terms of paragraph 4.2.6 above 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. (See Chapter 13 paragraphs 13.3.1 – 13.3.4.)

4.2.8 If a particular witness statement contains material information, 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**
- **to form part of the evidence to be led by the prosecutor in the proceedings against the accused**

and there is a compelling reason why it should not be disclosed, e.g. where there may be a threat to the life or limb of a witness or other persons, the matter should be referred initially to the functional lead High Court / Sheriff & Jury / Summary (depending on the forum of the case), the Federation Head or another appropriately vetted member of COPFS staff.

[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.

Thereafter the matter should be reported, including an appropriate recommendation, by that person to the Director of Serious Casework for the onward attention of Crown Counsel. Crown Counsel will issue a final decision as to how the issue should be addressed. However, non disclosure should be the last option after all other possibilities have been considered. (See Chapter 13, paragraphs 13.3.5 – 13.3.9.)

4.2.9 Before a witness statement is provided to the defence, it shall be open to the Crown to redact the statement to obscure information of a sensitive nature, which is **not** covered by the materiality test (Criminal Justice and Licensing (Scotland) Act s161)**.**

Any redaction should be obvious on the face of the statement. For further guidance on what material should be redacted from witness statements, see Chapter 15 of this Manual. Attention must always be paid to witnesses' rights, such as where there is a threat to the life or limb of a witness or other persons, and there may be other circumstances where public interest immunity may be claimed, as mentioned at paragraph 4.2.6 above.

4.2.10 Any inconsistencies or alteration of the position of the witness, as between statements, should be apparent to the defence on the face of the disclosed statements.

4.2.11 Details of the procedures to follow for the disclosure of statements can be found in Chapters 8 - 10 of this Manual.

4.3 Original Manuscript Witness Statements

4.3.1 As a matter of routine, the police will submit electronic typed versions of original manuscript statements obtained from witnesses. Unless specifically requested by the Crown, these original manuscript statements will **not** be submitted.

4.3.2 Each police force has specific procedures in place for ensuring that the typed version is an accurate reflection of the original statement and that there are no discrepancies, material or otherwise.

4.3.3 The Crown will satisfy its obligation to disclose witness statements by disclosing the typed version of the statement and not the original manuscript version. Accordingly, the Crown should resist defence requests for disclosure of the manuscript statement except where the request is reasonable in the circumstances. A desire to check the accuracy of the typed version against the manuscript version will not usually be considered to be a reasonable request.

4.3.4 Original manuscript statements should be obtained and lodged as a production where there is a *reasonable* concern that a witness may not speak to his/her statement.

4.3.5 Where an original manuscript statement is obtained, the depute or precognoscer should confirm the accuracy of the typed version against it. Any material discrepancies between the two **must** be disclosed to the defence, unless the typed statement was not disclosed. Such discrepancies can be disclosed in the form of a letter or by provision of a copy of the manuscript statement, suitably redacted.

4.3.6 It is essential, particularly in High Court Cases, that the precognoscer properly assesses the likelihood of a civilian witness requiring to have their statement

put to them at trial, either under section 260 or 263 of the 1995 Act. To assist in this assessment process, the police will highlight in the remarks section of the SPR and in section 6 of the typed NSS if there is any information that might indicate that a witness might be reluctant, hostile or otherwise struggle to remember what they said at the time the statement was taken (e.g. high degree of intoxication). If any further information comes to the attention of the police after the submission of the SPR and NSS, then the police will submit a separate subject sheet detailing this. This information, along with any information obtained by the precognoscer will be used to inform the assessment of whether the original manuscript statement may be required.

4.3.7 Precognoscers should err on the side of caution when making this assessment, particularly where the evidence of the witness is controversial and crucial to the proof of the case, i.e. the victim, an eye-witness or a witness who evidence is otherwise crucial, e.g. if the witness speaks to admissions made to them by the accused

4.3.7 In addition, in all High Court cases, the precognoscer must complete the Witness Precognition Record, which includes 2 columns relating to manuscript witness statements:

i) The precognoscer must specify in relation to each civilian witness whether there is a reasonable belief that the witness will not speak to their statement; and
ii) Where the original manuscript statement has been obtained, whether there is any material discrepancies between it and the typed version disclosed to the defence.

4.3.8 At the preliminary hearing stage, the Advocate Depute may also consider whether any further original handwritten witness statements from other witnesses will be required. If further statements are requested, the precognoscer should obtain these and add them as productions by section 67 notice.

4.4 Questionnaires (Pro Forma and House to House)

4.4.1 Although questionnaires are usually prepared at an early stage in an investigation, they are indistinguishable from police statements (**McLeod v HMA**, No. 2 1998 J.C. 67, at paragraph 87).

4.4.2 As set down in paragraph 16.4.2 of this Manual, however, there is no mandatory requirement for the police to reveal questionnaires. It is open for the Reviewing Officer to seek the permission of the Solemn Legal Manager not to submit these. Prosecutors and Precognoscers must be vigilant to this and ensure that they have liaised with the Reviewing Officer to confirm the existence of any such questionnaires. Where the questionnaires have not been submitted, the precognoscer must confirm with the Reviewing Officer that the materiality of such questionnaires has been discussed with the Solemn Legal Manager and permission has been obtained not to submit them.

4.4.3 As, however, questionnaires are deemed to be statements, the Crown must, in terms of **Sinclair** *and* **McDonald [PC]** disclose any such questionnaires relating to any witness **listed on the indictment or whom the Crown intends to lead at trial**.

4.5 Victim Impact Statements

4.5.1 Where a victim makes a statement to the court about how they have been affected by a crime, under section 14 of the Criminal Justice (Scotland) Act 2003, such statements should not be disclosed to the defence in advance of the trial as a matter of routine.

4.5.2 While a victim statement is not laid before the court until the point of conviction or a guilty plea, it is normal practice for such a statement to be obtained in advance of this stage, in anticipation of such a conviction/plea. As the statement is quite distinct from an evidential police statement, it should not be routinely disclosed to the defence in advance of trial.

4.5.3 In some instances, however, there will be a duty to disclose the content of such a statement at an earlier stage in order to satisfy the Crown's obligations in terms the materiality test (Criminal Justice and Licensing Act s121(3)). While it is made clear in the guidance to victims that the statement should not contain material about the circumstances of the incident and should be limited to information about how the victim has been affected by the crime, it is inevitable that such information will be included on occasion.

4.5.4 Should the victim statement disclose: (a) any alteration or inconsistency by a witness on a material matter; or (b) information which either materially weakens the Crown case or materially strengthens the defence case, this must be disclosed to the defence in advance of trial in order to fulfil the Crown's disclosure obligations.

4.5.5 Where a victim impact statement exists, any assessment of its materiality must be kept under review. In particular, where evidence is led from the witness at trial regarding the impact of the incident, care must be taken to ensure that any material departure from the victim impact statement is disclosed to the defence.

4.4.6 Guidance on the National Victim Impact Statement scheme is contained in Crown Office Circular 4/2009, which provides full details of those cases where victim impact statements might be obtained.

4.6 Precognitions

4.6.1 The Law

4.5.1.1 Precognitions are not admissible in evidence, with the exception of precognition on oath (Criminal Procedure (Scotland) Act 1995 s260). The courts will not, in general, order the production of precognitions, as they are not admissible in evidence (see **Ward v HMA** (1993 SLT 1202) and **HMA v Fleming** ([2005] HCJ 02 2005 Scot (D) 38/10)). There is no general rule that the Crown is obliged at all times to provide information to the defence about the contents of its precognitions (see **Fraser v HMA** (2008 HCJAC 26)). Nevertheless, the information which is contained in a precognition may include information which falls to be disclosed, by reference to 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

4.6.1.2 Lord Rodger of Earlsferry recognised in **McDonald [PC]** (para 61) that the duty to routinely provide the witness statements of all witnesses listed on the indictment did not extend to precognitions.

4.6.2 Policy

4.6.2.1 Information which falls within the materiality test should be disclosed notwithstanding that it comes to the Crown's attention in the context of the precognition process.

4.6.2.2 In the first instance, in the event of (a) any significant material discrepancy emerging between the account given in the witness statement and that at precognition, or (b) any significant additional information being supplied, whether it is contradictory or not, consideration should be given to assessing the value of obtaining a further police statement from the witness recording such contradictory or additional material information, and any such further statement is to be disclosed, subject to any public interest issues arising.

4.6.2.3 Thereafter, Procurators Fiscal will need to consider whether or not further disclosure is required of any material departure or difference between the witness's position at precognition and the terms of any police statement which has been submitted by the police. It is essential that any material departure or difference from the terms of a police statement are fully explored with the witness at precognition, so that the precise nature and extent of any difference and, if available, any explanation for the difference, can be furnished to the defence.

4.6.2.4 It is the material information that is obtained during the precognition that requires to be disclosed as opposed to the precognition itself (**HMA v Fraser**). The method of disclosure of information contained in a precognition, however, is a matter for the discretion of the Procurator Fiscal, having regard to the particular circumstances of the case. In most cases it will suffice that the defence is told in writing about material information obtained in the course of the precognition process which falls within the materiality test. The defence should be told that the information being provided is contained in a precognition. A written record of the communication with the defence should be retained.

4.6.2.5 Copies of precognitions, however, should not normally be provided to the defence. The Crown's duty of disclosure does not extend to the provision of Crown precognitions to the defence (see **Harvey v HMA** (2008 HCJAC 46 at para 27)**; Fraser v HMA** (2008 HCJAC 26 at para 189)**; Sinclair** (para 49); **Downie v HMA** (1952 JC 37).

4.6.2.6 Material discrepancies between statements and precognitions should be disclosed to the defence at the earliest opportunity. However, where it relates to a vulnerable witness and the precognoscer is considering recommending no proceedings, it is best practice to delay disclosure until Crown Counsel's instructions have been received, at which stage the discrepancies will only need disclosed if proceedings are to continue.

4.6.3 Precognoscers' Notes

4.5.3.1 Precognoscers' notes appended to precognitions should <u>not</u> be shown to the defence unless the note contains material information as distinct from a precognoscer's personal opinion. It will be unusual that information contained in a precognoscer's note falls within the materiality test but if the note does contain such

information, this should be disclosed too if it is not already known to the defence, e.g. the witness made the precognoscer aware of a conviction for wasting police time, or making false statements in another jurisdiction. Precognoscers must be very careful about the information contained in these notes. Any notes should, in general, be restricted to the precognoscer's opinion about how the witness presented at precognition, or is likely to present in court. In **Fraser v HMA**, Lord Osborne stated at para 226 that the Crown should be at liberty to prepare precognitions in which observations of a confidential nature can be made concerning witnesses, for the benefit of those possessed with the responsibility of conducting the prosecution (or the defence to it) without fear of prosecution.

4.6.4 Disclosure Advice to Witnesses

4.5.4.1 Precognoscers should be careful **not** to advise witnesses that precognitions are confidential. This avoids any difficulties arising from any necessary subsequent disclosure of any part of a precognition.

4.5.4.2 There is no requirement for precognoscers to advise witnesses that the whole or part of their precognition may be disclosed. However, if a witness enquires about disclosure, precognoscers should advise the witness that it is part of the Crown duty to disclose to the accused, or the accused's legal representative, all material evidence for or against the accused provided by witnesses, including the witness being interviewed, in order to ensure a fair trial.

4.6.5 Precognitions of Children

4.5.5.1 Particular consideration should be given to providing the defence with access to precognitions of children. Reference is made to paragraph 16.79 of the Book of Regulations regarding precognitions of children.

4.6.6 Reluctant Witnesses

4.6.6.1 Where a witness is reluctant, this fact does not require to be disclosed as a matter of course. In general, the fact that a witness is reluctant should only be disclosed where the witness's reluctance is related to the content of their evidence, for example, if a witness's reluctance relates to the credibility, reliability, accuracy or truth of what they previously stated, that is a matter that is likely to require to be disclosed. If a witness's reluctance stems from extraneous pressure being applied to them that is not a matter that necessarily requires to be disclosed.

4.6.6.2 For the avoidance of doubt, if the Crown receives information which is not directly related to the evidence provided by a witness and which indicates the witness's intention not to attend court, this does not require to be disclosed as a matter of course.

4.6.7 Witnesses who adopt their Statements at Precognition

4.6.7.1 Where a witness attends for precognition and is unable to recall the incident but does adopt their statement on the basis that the police or another investigating agency were told the truth, this is **not** a material change in the evidence and accordingly there is no requirement to disclose this to the defence.

4.6.7.2 Where however the witness is unable to recall the incident and states at precognition that the statement given cannot be adopted, then this **will** constitute a material change in their evidence and must be disclosed to the defence.

4.6.7.3 Where a witness is willing at precognition only to adopt part of the statement and refuses or is otherwise unable to adopt the remainder then the defence must be advised of those parts that they are unable or unwilling to adopt as, again, this constitutes a material change in the witness's evidence. Similarly, where a witness has given multiple statements, but only adopts some of them and is unable or unwilling to adopt the remainder, the defence must be advised of those statements that the witness is unable or unwilling to adopt.

4.7 Vulnerable Witness Summary Reports

4.7.1 Guidance in relation to these reports can be found in Chapter 33 of this Manual.

4.8 Evidence introduced by Section 259 Certificate

4.8.1 Where a witness is deceased, or falls within any of the other categories listed at section 259(2) of the Criminal Procedure (Scotland) Act 1995 (unfit or unable to give evidence to his/her bodily or mental condition; resides outwith UK or cannot be located; refuses to give evidence on basis of incrimination; refuses to give evidence at trial or refuses to take the oath), and evidence of a statement made by that person is being introduced by section 259, then, for the purposes of disclosure, the witness must be treated as if they were giving oral evidence (**Allison v HMA**)

4.8.2 Accordingly, all witness statements taken from this witness must be disclosed to the defence, subject to any redaction considerations.

4.8.3 Similarly, if the witness was precognosed prior to the decision to introduce their evidence via section 259 of the 1995 Act, then any material differences/additional information elicited at precognition must be disclosed to the defence.

4.9 Defence Witnesses

4.9.1 The Judicial Committee of the Privy Council, in endorsing **McLeod v HMA,** has held that the Crown is under an obligation to disclose to the defence the statements of all witnesses on the Crown and defence lists:

> *"The statements of all the witnesses in the list attached to the indictment or in any supplementary notice served under section 67 of the Criminal Procedure (Scotland) Act 1995 must contain material evidence against, or, in some cases, in favour of the accused. Similarly, if the defence give notice that they intend to lead a witness and the Crown have a statement from him, then that statement is likely to contain material evidence for the accused".*(**Sinclair** para 49)

4.9.2 Where the defence have intimated an intention to lead a witness, **all** statements and material criminal history record information held by the Crown or the police or other investigating agency in relation to this witness **must** be disclosed. This will include any statement that the police might have taken for this witness at an earlier stage in the investigation, e.g. a house to house questionnaire.

4.9.3 Accordingly, where the Crown obtains a statement from a defence witness, then this statement must be disclosed to the defence, subject to the principles of redaction set down in Chapter 15 of this Manual.

4.9.4 Where a defence witness statement requires to be disclosed, and there are co-accused, the statement must be disclosed to the agents for all accused, not just the accused who has intimated the intention to lead the defence witness.

4.9.5 Where there are any concerns regarding the appropriateness of disclosing a defence witness statement to a co-accused, e.g. if there is sensitive information within it that is material, then a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions.

4.10 Recording of Witness Statements on Schedules

4.10.1 Witness statements will usually be listed on the non-sensitive schedule. In exceptional circumstances, they may be listed in the sensitive or highly sensitive schedule but only where the *existence* of such a statement would, if it were disclosed, risk :

i) Causing serious injury, or death, to any person,
ii) Obstructing or preventing the prevention, detection, investigation or prosecution of crime; or
iii) Causing serious prejudice to the public interest.

4.10.2 As the Crown must provide the defence with details of all non-sensitive relevant information that is not material, it is essential that witness statements are only listed in the sensitive or highly sensitive schedules where absolutely necessary. Such an assessment must be approved in all cases by the appropriate solemn legal manager.

4.10.3 Where a statement contains sensitive information that may require redaction prior to disclosure, the police or other investigating agency should highlight this in the note section of the schedule.