Witness issues

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1. Selection of prosecution witnesses

The decision as to which witnesses to call to prove the prosecution case is solely a matter for the DPP.

In the interest of shorter and cheaper trials an undesirably large number of witnesses may be reduced by:

- avoiding unnecessary duplication of evidence;
- exploring with the defence the scope for agreement, eg on formal matters and other matters not genuinely in dispute.

A decision not to call a witness or witnesses, who could be expected to give evidence pertinent to the case, when viewed against the conduct of the trial as a whole, may be seen in some circumstances to give rise to a miscarriage of justice. The failure to call the witness(es) in those circumstances could constitute a ground for setting aside the conviction (see *R v Apostilides* (1984) 154 CLR 562, discussed below).

Some witnesses may be, or feel, vulnerable to retaliation for the part they play in the prosecution case.

Protected witnesses almost certainly are vulnerable and guidelines are in place for dealing with them.

Some occupations expose people to the possibility of giving evidence in a criminal prosecution. Bank tellers who make suspect transactions reports often fear retaliation and their concern should be allayed by adherence to the agreed guidelines (see below). If fear and mistrust deterred bank officers from making suspect transaction reports the loss to law enforcement would be significant.

Officers must be aware of local Bar rules applying to witnesses.

2 Overseas witnesses

Approval should be sought from the Director or the First Deputy Director, for:

- overseas witness travel related to sensitive or high profile matters;
- matters where multiple overseas witnesses will be required; or
- where the total cost of overseas witness travel, accommodation, allowances and daily fees is greater than $5,000 per witness or $15,000 per matter.

Deputy Directors and the Assistant Deputy Director, Sydney may approve travel for overseas witnesses where the total cost of travel, accommodation, allowances and daily fees is less than $5,000 per witness or $15,000 per matter.

A submission to the Director or First Deputy Director should contain:

(a) full details of the case;

(b) the nature of the evidence to be given by the witness and a copy of the witness' statement if available;

(c) whether in the view of the regional office and of counsel (if briefed), the evidence of the witness is essential for the conduct of the case;

(d) the approximate cost (including a brief breakdown) of bringing the witness to Australia; and

(e) the approximate cost of the witnesses giving evidence by audio video link and whether giving evidence by AVL would be feasible and admissible.

Where a number of potential witnesses are overseas, regional offices should try to reduce to a minimum the number to be brought to Australia without detriment to the prosecution case. For example, the evidence of certain witnesses may overlap, or the defense may be prepared to make admissions in respect of formal matters.

3 Disclosure of a witness' name

Some agencies, including Telstra, have expressed concern that their officers may be endangering their safety by giving evidence.

All court proceedings must be conducted in public, requiring:

- all witnesses to give their evidence publicly, and
- all witnesses to identify themselves publicly.

However, a court hearing a matter has the discretion to order that a witness not disclose his or her name or that his or her name not be published.

Non-civilian witnesses such as police officers, medical practitioners and technical officers are generally allowed to state their occupational address rather than their private address. However, that is a matter of discretion for the court.

The only classes of cases in which there is a generally recognised exception to public disclosure of the name of a witness are blackmail and serious sexual offences where the victim is accorded anonymity. The public policy justifying it is that publication of names will cause affront and discourage victims from coming forward to complain of the crime.

All other cases are dealt with on a case by case basis. A court has a discretion to order that a witness need not publicly disclose his or her identity, for example where there is a reasonable apprehension that his or her life or welfare, or that of his or her family, may be endangered. The Judge is told the witness' name.

Prosecutors should seek to have a non-civilian witness of the type referred to above give his or her occupational address rather than private address. If there is a reasonable basis for apprehending danger to the life or welfare of the witness or his or her family, the prosecutor should apply for non-disclosure of the witness' name.

The ultimate decision as to whether such an application is warranted must be that of the DPP. There is the possibility of a witness obtaining separate representation to argue that he or she should not have to disclose his or her identity publicly, notwithstanding that the DPP does not agree. That would be most undesirable and every effort should be made to reach agreement on the issue.

4 The use of bank officers as witnesses in structuring offences

Certain procedures have been agreed between this Office and AUSTRAC concerning the use of bank officers as witnesses in structuring prosecutions under s31 of the *Financial Transaction Reports Act 1988* or *Anti Money Laundering and Counter Terrorism Financing Act*.

In order to prove a structuring offence it is sometimes necessary to obtain a witness statement from a bank officer. A bank officer may be able to identify the defendant as the person who conducted the relevant transactions. In other cases the prosecution may need to call evidence of what the defendant did or said at the time of the transactions in order to prove the purpose behind those transactions.

AUSTRAC has responsibility for administering the *FTR Act* and *AML Act*. In order to administer that Act effectively it needs to encourage banks and their employees to send suspect transaction reports to AUSTRAC. These reports are the starting point for investigations into possible breaches of the structuring offences or drug offences, money-laundering or other serious offences.

The Australian Banker's Association and AUSTRAC have expressed concern at the prospect of the bank officer who files a suspect transaction report being called to give evidence for the prosecution. Bank officers did not want it to emerge that it was as a result of their action that the defendant was charged.

The Office has agreed the following points and procedures:

1) The Prosecution Policy of the Commonwealth recognises that criminal charges should not automatically be laid in every case where an offence can be proved. Charges should only be laid if the public interest requires prosecution.

2) A significant degree of criminality is required before the public interest test is satisfied. For example charges would not normally be laid where it appears that a person engaged in structuring transactions so as to maintain privacy and it is clear that the money in question was lawfully obtained.

   However the public interest test is likely to be satisfied where it is clear that the relevant money represented the proceeds of crime even if that could not be proved by admissible evidence.

3) Wherever possible the Office will prosecute without calling evidence from the bank officer who filed the original suspect transaction report. For example where it is necessary to prove a transaction, if possible the Office will do so on the basis of records produced by a nominated officer of the bank. However if it is necessary to call a bank officer to give evidence the Office will do everything possible to protect the identity of the bank officer. The possible measures are:

   - using a business address, or no address at all, rather than a residential address;
   - deleting the employee's name from documents provided to the defence (if that can be done under applicable law which may vary from State to State);
   - applying for an order to permit the employee to give evidence under a pseudonym (where there is a proper basis for doing so), and
   - applying for a suppression order to prevent publication of the employee's name or evidence.

4) The Office will not object to any bank officer being represented by a lawyer at meetings between its officers and the bank officer. Nor will it oppose any application that may be made to a court for a bank employee to have separate legal representation (although this will be a matter for the court to decide).

5) A bank officer's home address will not normally be disclosed to the defence or in open court where a business address will be sufficient.

Some of the concerns which have been expressed by AUSTRAC and the Australian Banker's Association have been addressed by amendments to the FTR Act in 1997. S16(5D) and S16(5E)) prohibit the admission into evidence of a suspect transaction report, or any evidence as to whether a report was prepared at all, or any evidence as to any information or suspicion that such a report might contain. Bank officers can no longer be cross-examined about whether they prepared such a report, or the basis of their suspicion which prompted the filing of a suspect transaction report.

5 Office practice in relation to unreliable witnesses

During the course of criminal proceedings a prosecutor may form the view that a witness is not likely to give reliable evidence. Unreliability may be based on a number of different factors, eg

- an intention to assist the defendant by giving untruthful evidence;
- a co-accused who wishes to minimise their own culpability or is expected to give evidence which is partly truthful and partly not;
- mental or physical incapacity of the witness rendering his or her evidence unreliable.

A prosecutor has a duty to call as witnesses only those persons who are witnesses of truth. Therefore if there are specifically identifiable and reasonable grounds that a witness' evidence is unreliable, that witness should not normally be called to give evidence. However, it is not sufficient for a prosecutor to decide not to call a witness because of a mere suspicion that they might be untruthful. The decision must be based on specifically identifiable and reasonable grounds.

The High Court in *The Queen v Apostilides* (1984) 154 CLR 563 at 575 held that the following propositions applied to the conduct of criminal trials with respect to the selection of witnesses:

> *"1. The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.*
> *2. The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons*
> *3. Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness*

4. When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.

5. Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence.

6. A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice."

These principles represent the common law in Australia with respect to the role and responsibility of the prosecutor in making a judgement concerning the selection of witnesses, including unreliable witnesses.

The Office is aware of the professional conduct rules of some Law Societies and Bar Associations which stipulate special duties for legal practitioners when acting as prosecutors.

For example, in NSW the professional conduct rules state that a prosecutor's discretion not to call admissible testimony is limited to testimony from witnesses where the prosecutor believes on reasonable grounds that the testimony of the witness is plainly unreliable by reason of the witness being in the camp of the accused. The rules go on to state that the prosecutor must inform his/her opponent of the identity of such a witness together with the reasons for having reached the decision not to call the witness, and that the prosecutor must call the witness for the purposes of allowing his/her opponent to cross-examine the witness.

These rules go further than the common law as set out in *Apostilides.*

The Office position, as set out above, is that if there are specifically identifiable and reasonable grounds that a witness' evidence is unreliable, that witness should not normally be called to give evidence.

There may be exceptional circumstances, however, particularly in relation to eye witnesses, where there are identifiable and reasonable grounds to believe that the witness is unreliable but where the prosecution considers that its obligation to call all relevant witnesses necessitates the calling of the witness, on the basis that an application will be made under s 38 of the *Uniform Evidence Act* to cross examine the witness. If it is determined that such an application will be made, the prosecution should advise the defence and the court as soon as practicable.

There may also be circumstances where a witness is expected to give evidence which is partially truthful and partially not, for example a co-accused who wishes to minimise their own culpability. The prosecution may consider that its obligation to call all relevant witnesses necessitates the calling of the witness, on the basis that an application will be made under s 38 of the *Uniform Evidence Act* to cross examine the witness on those matters relevant to the witness's credibility. If it is determined that such an application will be made, the prosecution should advise the defence and the court as soon as practicable.

Where the prosecutor holds suspicions (but lacks identifiable and reasonable grounds for believing) that the witness is unreliable then in those jurisdictions where s38 of the *Uniform Evidence Act* applies the prosecution should consider whether a s38 application will be made. If it is determined (either before the witness is called or during the course of the witness' evidence) that such an application will be made the prosecution should advise the defence and the court as soon as practicable.

6 Ensuring the attendance of witnesses

Witnesses from investigating agencies or other relevant departments or agencies must be kept informed of dates and times that they are required to attend court to give evidence. The CDPP Victims of Crime Policy provides that where a witness is required to give evidence, any inconvenience to the victim should be minimised, as far as possible.

It is prudent to issue a summons to any non-official witness, particularly if the witness has refused, is apparently reluctant, or for any other reason is thought unlikely, to attend.

7 Service of sensitive material on witnesses

Where a private process server is required to deliver copies of statements and other documents to a witness, particularly if the copy documents contain sensitive information, the documents must be placed in a sealed envelope before they are given to the AFP or process servers for delivery to a witness.

8 Supplying witnesses with copies of their statements

Witnesses should be provided with a copy of their statement unless circumstances exist that suggest that the interests of justice would not be served by doing so. Ordinarily the interests of justice will be served by providing a copy of their statement.

If requested, transcripts of committal evidence and other pre hearing examinations by the witness provided to the defence, under disclosure obligations, may be provided to the witness unless it is not in the public interest.

9 A co-accused who is a witness in the trial of another co-accused

Section 17 of the *Uniform Evidence Act* makes compellable an "associated accused" as a witness for or against an accused person provided he or she is being tried separately from the accused. This reverses the previous position that such a co-accused witness would need to have been dealt with, or indemnified, before providing such evidence.

Where section 17 applies, consideration should be given as to whether the co-accused witness can be dealt with before giving evidence. Alternatively, consideration may need to be given to whether

the co-accused witness should be indemnified (either by the CDPP or via a Certificate from the Judge in jurisdictions where this is available) before being called to give evidence.

10 A witness who is a defendant in another jurisdiction

On rare occasions a witness in a prosecution conducted by one regional office may be being prosecuted by a different regional office (for example, where the person is a witness in a matter being prosecuted by the Brisbane office and being prosecuted for an offence by the Adelaide office). Where this occurs, the prosecutors of each case should liaise with each other concerning time frames to ensure, where possible, that the court time table for one prosecution does not impinge on the other.