



### Proofing Witnesses

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#### Background and Purpose

1. The purpose of this policy is to ensure national consistency in the process of witness proofing.
2. "Proofing a witness" or "conferencing a witness" is the process of speaking to a witness, usually in person, about the substance of his or her evidence, going through the person's statement and taking the witness to the documents or other proposed exhibits sought to be tendered through that witness.
3. It is often the case that substantial time has elapsed between a witness making a statement and the need for them to give evidence. The evidence of a particular witness may be highly complex or particularly significant. Proofing is a mechanism aimed at ensuring the witness' evidence will proceed efficiently and effectively in court. It is also likely to assist in assessing whether there is, or remains, a reasonable prospect of conviction. Finally, proofing civilian witnesses will often assist in determining whether they are a witness of truth – if they are not, they cannot be called by the prosecution.
4. Notwithstanding consideration of proofing a witness, all witnesses should be contacted, if necessary subpoenaed, and reminded to read their statement ahead of giving evidence. Witnesses who are not familiar with the Court process such as non-police or non-agency witnesses can be spoken to briefly, by telephone, about the court process.

#### Who should be proofed and when?

5. Witnesses who are significant or who are giving complex evidence are more likely to require proofing. Examples include:
  - where the evidence of the witness is critical to the prosecution establishing a reasonable prospect of conviction;
  - an expert witness;

- a witness who has been indemnified or provided with a section 16AC Crimes Act 1914 undertaking to give evidence, noting however that there may be cases where this is neither necessary nor desirable<sup>1</sup>; and
  - victims.
6. Proofing of witnesses is most often required in indictable trials, rather than summary hearings. Managers should work with staff to ensure that unnecessary proofing of witnesses does not occur.
  7. Proofing of witnesses usually occurs in the lead up to a trial, hearing or committal, however, in rare circumstances, it may occur prior to a proceeding being commenced.

#### What should occur at the conference with the witness?

8. A witness must always be proofed by one person with another person present. Most commonly this may be Counsel with the instructing solicitor, or the instructing solicitor with another CDPD lawyer, as appropriate. Agency investigators should not be present during the proofing of witnesses.
9. During proofing, it is best practice to work off a copy of the witness' statement, noting the matters arising from proofing that are new and go beyond the existing statement, or that involve a correction or retraction of matters in the witness' statement. Such an approach avoids extensive notes being taken which simply confirm the witness' original version.
10. During proofing, additional information may emerge. If a supplementary statement is required, the agency investigator should be advised of the additional information obtained from the witness so that the investigator can approach the witness separately to obtain the information in evidential format.
11. A contemporaneous file note of any witness proofing as to the fact of the conference along with any marked-up witness statement should be made and placed on the file. This will assist later if an issue arises about what the witness told you in conference. Prosecutors making contemporaneous file notes of such conferences will need to be mindful of both their ongoing disclosure obligations and any potential claim for Legal Professional Privilege that may attach to such a file note.<sup>2</sup> As such, any notes about further work arising should be made separately and not on the witness statement, so that a claim can be made separately for privilege.
12. Proofing of a critical witness should take place no later than one week before the commencement of the trial, in order to address any issues arising including possible disclosure, supplementary statement or issues of credit. Depending on the case, it may be necessary to proof witnesses earlier than one week before trial.

#### Ethical Issues

13. Only one witness must be proofed at a time, and never two or more witnesses together.<sup>3</sup>
14. A witness must not be coached or advised what answers the witness should give. This does not preclude a prosecutor telling a witness during the process of conferral that they must tell the truth when giving evidence.<sup>4</sup>
15. The prosecutor must not confer with any witness called by the prosecution on any matter related to the proceedings while that witness remains under cross-examination. In an exceptional situation where it may be necessary, this should always be raised with both the court and defence counsel beforehand, and leave of the Court sought.<sup>5</sup>

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<sup>1</sup> In the latter situation, it will be important to obtain the views of trial counsel and the Branch Head

<sup>2</sup> *R v Petroulias (No 22)* [2007] NSWSC 692

<sup>3</sup> LPCR-WA, r.40; ASCR, r.25; LPCR-ACT s.25; RPCP-NT r.17.30

<sup>4</sup> LPCR-WA, r.39; ASCR, r.24; LPCR-ACT s.24; RPCP-NT r.17.28

<sup>5</sup> LPCR-WA, r.40; ASCR, r.26; LPCR-ACT s.26; RPCP-NT r.17.32

16. There is no property in witnesses, so no lawyer has the sole right to call and discuss the case with a witness. It follows that a prosecutor must not take any step to prevent or discourage the prospective witness from conferring with opposing counsel or with an appropriate person on behalf of the defendant, or being interviewed by these persons. Some care may need to be exercised by defence representatives however if there are any bail conditions that prevent an accused contacting a particular witness. This does not prohibit a prosecutor from simply telling a prospective witness the accurate legal position, namely that he/she has a choice whether to be interviewed by or on behalf of the defendant and need not agree to be interviewed.<sup>6</sup>
17. In the rare event that it is thought appropriate to interview a prospective witness who is expected to be called by the defence, it should be the result of advice from trial counsel. Useful guidelines for such a situation include the following:
  - The lawyer should inform the prospective witness of his/her role (i.e. that lawyer's role);
  - Be very clear about informing the witness who the lawyer acts for; and
  - Inform the witness of the right to decline to discuss the matter.

### Links

- Australian Solicitors' Conduct Rules ("ASCR") which were adopted by the Law Council of Australia in June 2011 and updated in April 2015. These Rules were adopted in Queensland, Tasmania, NSW, Victoria and South Australia: <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>
- Legal Profession Conduct Rules 2010 (WA) ("LPCR-WA"): [https://www.slp.wa.gov.au/legislation/statutes.nsf/law\\_s42914.html](https://www.slp.wa.gov.au/legislation/statutes.nsf/law_s42914.html)
- Legal Profession (Solicitors) Conduct Rules 2015, ACT ("LPCR-ACT") <http://www.legislation.act.gov.au/sl/2015-37/current/pdf/2015-37.pdf>
- Rules of Professional Conduct and Practice, NT ("RPCP-NT") [http://lawsocietynt.asn.au/images/stories/Professional\\_Conduct\\_and\\_Practice.pdf](http://lawsocietynt.asn.au/images/stories/Professional_Conduct_and_Practice.pdf)
- The Federal Court of Australia addresses '*Some Ethical Issues for Legal Practitioners*' at part (b) 'Witness preparation' looking at case law to support the parameters set by this NLD. See: <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-griffiths/griffiths-j-20140304>

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<sup>6</sup> LPCR-WA, r.38; ASCR, r.23; LPCR-ACT s.23; RPCP-NT, r.17.33 and 17.34