Evidence Law and Advocacy in the Solomon Islands

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Forward

In June 2010, Robert Cavanagh made a proposal to a group of practitioners within the Public Solicitor's Office to develop a work that covered the *Evidence Act* 2009, criminal procedure, and advocacy in the Solomon Islands. There is no published work that covers these areas of law and practice in the Solomon Islands context, and the practitioners in the Office were interested in developing their knowledge.

The work covers those areas of law and practice that were raised by the lawyers in the Public Solicitor's Office as being of particular interest to them. Many areas covered in this text were included as a result of questions arising from cases being conducted by new lawyers. It also covers sections of the Evidence Act that have not yet been used by most of the lawyers in the Office.

The work includes extensive reference to the case law of the Solomon Islands, which is not easily accessible for those without the internet. The work will be particularly useful for those appearing in courts in the provinces.

This text book will be of use to police prosecutors, law students and criminal law practitioners in the Solomon Islands. I commend the text to those who appear in my court. I also have no doubt that it will be very useful for those practitioners who appear in the High Court and Court of Appeal.

Rodgers Tovosia
Principal Magistrate
Honiara, Solomon Islands
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Introduction

Solomon Islands common law has developed rapidly in recent years, with a significant increase in case law generated in the High Court and Court of Appeal. Additionally, the recently introduced *Evidence Act 2009* introduces changes to the practice of criminal law that are yet to be understood by the majority of practitioners.

This text considers those sections of the Solomon Islands *Evidence Act 2009* relevant to criminal law and practice, a number of the most often applied criminal laws in the *Penal Code*, common law defences, criminal procedure governed by the *Criminal Procedure Code*, and best practice criminal advocacy.

The criminal trial process is examined from the point of arrest through to appeal, examining criminal procedure from the perspective of each major player. This work considers the role played by the police who investigate crimes, prosecution lawyers, defence lawyers and the accused, with an emphasis on the requirement for fact gathering, advocacy, the application of the rules of evidence and procedure, and the need for ethical conduct.

The criminal trial is adversarial. As McHugh and Hayne JJ stated in *Gipp v The Queen*:

> A criminal trial under the common law system remains today, as it has been for many centuries, based on the theory that it is an adversarial contest between the Crown and the accused. Each party gathers its own evidence, tenders its own evidence and cross-examines the evidence of the opposite party. Each party selects the grounds upon which it relies and argues them without assistance from the court. For its part and subject to statutory exceptions, the court's role is generally limited to determining what legal rules govern the issues selected by the parties and whether the evidence and contentions of the parties are within those rules.[1]

This view, however, fails to take account of the ethical and procedural requirements set forth in common law and statute. From the beginning of the trial process, there is an interrelationship between the police, the prosecution and the defence. The prosecution lawyers rely on the police to provide them with material and information and to respond to any requisitions for further assistance. Defence lawyers rely on the prosecution and the police to provide the material and information that is needed to advise the accused. This reliance and interrelationship extends into the hearing, where there is a need for all parties to behave responsibly while still vigorously presenting their cases.

The criminal trial process begins at different stages depending on the role of each party. For the police officer it commences when he or she first

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1 (1998) 194 CLR 106; [1998] HCA 21, [51].

becomes aware that a crime may have been committed. For the alleged offender it begins when first informed that he or she is a suspect. For the prosecution lawyer, the process starts when advice is received that a prosecution should be considered. For the defence lawyer the trial process commences when instructions to act are received.

When informed that a criminal offence may have been committed, a police officer has a number of duties to perform. The carriage of these duties requires an awareness of the interests and rights of the accused and the alleged victim, as well as the protection of the community. The primary functions of a police officer are to protect any member of the community who appears to be in danger and the alleged victim (if required), to protect property and to investigate the identity of the offender(s), make an arrest, and collect evidence to prove the prosecution case.

In carrying out these functions the officer must proceed in a way that ensures the integrity of the investigation process while also protecting the rights of individuals and the community. Any breach of approved and appropriate investigatory methods leaves open the real possibility that the evidence collected may not be admissible before a tribunal of fact. Moreover, such breaches may lead to a corruption of the process, with severe implications for the integrity of the system and the confidence of the community. For instance, in the Solomon Islands police frequently fail to properly advise an accused about the right to silence. This oversight is considered in Chapter 5 where the law relevant to admissions is reviewed.

The accused is usually a person who is not well acquainted with the criminal law or the procedures that are followed once an investigation commences. Most people experience considerable psychological stress when they are placed under investigation or charged with a criminal offence. As a result, suspects may provide unclear or ambiguous information, or may act in a way that unnecessarily prejudices their defence. With these issues in mind, the police officer must ensure that the accused is made aware of his or her basic legal rights. Additionally, the police officer should ensure that all reasonable steps are taken to protect the physical well being of the accused after an arrest has occurred.

The defence lawyer also has a many factors to take into account to ensure that the interests of the accused are protected. The accused is the client, and a relationship involving client privilege is established once instructions are taken. While a majority of clients may not require their matters to be determined by a tribunal of fact, the defence lawyer should not begin with this assumption as it could result in adverse consequences to the accused. The defence lawyer should take account of the possibility that a case may go to hearing even when instructions are only taken for the purpose of giving preliminary advice or initial representation. The consequences are usually foreseeable if the lawyer is aware of the relevant law and pre-hearing and hearing procedures.

All practitioners should be conversant with the fundamental steps that should be undertaken in the preparation and presentation of a case. The approach taken by the defence lawyer when advising, investigating, assisting and representing an accused in a criminal case has many similarities to that adopted by lawyers in civil cases.

Whether prosecutor or defence, there is a requirement for practitioners to understand fact gathering, analysis of the facts and application of the law to the facts and, where appropriate, the necessity to obtain more evidence to enable the application of law. The approach to fact gathering and analysis which should be adopted by practitioners is summarised by Anderson and Twining, who state:

> Every lawyer must know enough about basic legal principles to be able to identify potential legal problems in a client's request for assistance. The lawyer must have research skills sufficient to find the authorities from which to derive legal principles that are relevant to resolving the problems. The lawyer must have investigative skills sufficient to discover and document facts that are relevant in light of available legal principles. The lawyer must have interpersonal and communication skills necessary to gather and transmit information effectively. The lawyer must know how to employ such knowledge and skills effectively in different roles – as counsellor, as draftsman, as negotiator, and as advocate. In all the roles and for each of the tasks, however, the lawyer must be able to analyze the law and the facts and to relate the two. The lawyer must have skill in both law analysis and fact analysis and be able to combine the two effectively. Both are aspects of practical reasoning, but the specific methods of reasoning required for each component differ. Skill in one does not necessarily produce skill in the other. …
>
> Legal analysis is familiar to students, teachers and practitioners of law. Legal analysis requires reasoning and analytic skills necessary to derive and apply legal principles to a specific set of facts. The case method was designed to teach these skills. The facts are given in the case at hand, in the teacher's hypothetical, or in the partner's assignment memorandum to the law clerk. The student or the clerk is required to determine from the cases or other authorities the relevant legal principles and, in light of how those principles have been applied in analogous situations, to determine how they would, should, or could be applied to the facts given.
>
> Legal analysis ordinarily requires analysis of the facts, but customarily this analysis is limited to selection and variation and to identification of facts needed and lines of investigation to be pursued. Which of the given facts are likely to be (or should be) perceived as important by the court? How can the facts be structured to make it clear that the case at hand falls clearly within the rule for which the student or practitioner contends? What additional facts are necessary to determine the principles to be applied? Although facts are crucial in law analysis, the facts are ordinarily treated as given and are used to manipulate and test the scope and applicability of legal rules.

> Factual analysis is different. It is more familiar to practitioners than to students. The skills necessary are those required to organize and analyze a mass of raw data - the evidence actually or potentially available – and to determine the inferences that can properly be drawn from that data in relation to the ultimate facts in issue in a case. To illustrate the distinction, factual analysis ordinarily assumes that the applicable legal principles are given. Agreed jury instructions for a trial, an indictment, or the settled pleadings would be examples. From these the lawyer can determine the ultimate factual propositions that must be proved if the plaintiff or prosecutor is to win. The analytic and reasoning task for the lawyer then becomes determining whether the factual data available as evidence support inferences that can be ordered to frame a compelling argument that the elements of the ultimate proposition have or have not been proven according to the applicable standard of proof. Although the principles of logic are involved in both legal analysis and factual analysis, the application of these principles in factual analysis differs from their application in legal analysis.[2]

Whilst Anderson and Twinning talk of students and lawyers it is likewise necessary for police officers to adopt a similar approach, even if their understanding of the statutory and case law is not as highly developed. Without an ability to gather facts, analyse them and apply the law (at least in a preliminary way), police officers will not be able to perform their duty to assist practitioners and the courts with the administration of justice. Police officers are required to have high ethical standards that include upholding the law and preserving an individual's rights and freedom.

These ideals were highlighted by former New South Wales Police Commissioner Ryan, and they are relevant for police officers in the Solomon Islands where pressure from wantoks and family can be great. He stated:

> Even though we live in a changing society with changing values, customs and even laws, there are certain elements which must resist change. Scrupulously avoid even the hint of compromised ethical standards. Act in an ethical and profession manner. Society judges us by our conduct, ie, our actions and inaction.
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> …
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> Your actions are judged within a system of moral principles. There are many circumstances in which you may be tempted to perform an illegal or improper act. However, you must act ethically and professionally at all times in a way which places integrity above all.
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> Be aware that situations can arise where there is a conflict between your duty as a police officer and the demands of members of the community to act, or omit to act, in a manner which is in contradiction to your official position. These demands could come from family or friends. Do not allow

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2 Anderson T and Twining W (1991) *Analysis of Evidence: How to do Things with Facts*, Weidenfeld and Nicolson, London, pp. xiv–xv.

> yourself to be put in a position where there is an apparent conflict of interest and be conscious of the community's perceptions of the police role. Where persons with whom you are closely associated are the subject of a police inquiry, you should seek to distance yourself as far as practicable, from that inquiry.
>
> There are no degrees of ethical standards and any action which breaches these standards is not tolerated. Accepting monies is both unethical and corrupt. Such an act, when accompanied by a misuse of authority and personal gain, is categorised as a police corruption.[3]

Even the best intentions, the highest ethical codes, and declarations by those in charge of the police service count for very little if individual police officers do not maintain the ethical standards required. When police officers apply unnecessary physical force, fabricate or tamper with evidence, obtain confessions by improper means, or otherwise abuse their powers, such conduct is called 'process corruption'. Former New South Wales Royal Commissioner Wood has described this form of corruption as 'one of the most obvious, pervasive and challenging forms of corruption'.[4] His comments are relevant to the Solomon Islands as they are to other common law jurisdictions.

The effect of process corruption is described by Commissioner Wood in his final report of the Royal Commission into the New South Wales Police Service. He stated *inter alia*:

> 2.34 An excellent illustration of this last point has been the reaction to the decision in *Williams v The Queen* [(1986) 161 CLR 278] which, rejecting the English development of the common law, declared the detention by police of a suspect for the purpose of investigation, to be unlawful. Police practice was, however, little affected in NSW, and interviews of suspects continued between arrest and appearance before a justice:
> under the fiction that the suspect had not been arrested but was present at the station 'voluntarily', 'to assist with inquiries';
>
> by the stratagem of effecting arrests at times when magistrates were not immediately available; or
>
> in the expectation that if a confession was obtained it would result in a guilty plea, or (particularly in the case of serious crime) not be rejected in the exercise of the discretion to exclude unlawfully obtained evidence.
>
> 2.35 The law as expressed in *Williams* is clear enough, yet police practice has remained indifferent to it. Even though unlawful, process corruption accords with long-standing practice, has been condoned by senior ranks and only infrequently leads to the exclusion of evidence.

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3 Cited in New South Wales Police Service, 'NSW Police Service, Code of Conduct and Ethics', 25 February 1997, Commissioner's Instructions, Instruction 3 – Professional responsibility in policing.

4 Justice Wood, Royal Commission into the New South Wales Police Service, Final Report, Volume 1: Corruption, May 1997, p 28.

2.36 In other more obvious areas, such as verballing and planting evidence, and the use of threats or improper persuasion to procure confessions, the conduct has been less obviously condoned, yet was not seen by operational detectives to have constituted 'bad policing'. Again they have been confronted with:

long-standing practices which appeared to have the imprimatur of senior command;

the view that crime control has been strangled by due process, an impression reinforced by statements by some officers and public commentators, or by their own experience of failed prosecutions in which they had been left to explain the outcome to incredulous and angry victims of crime; and

political campaigns in which law and order was loudly proclaimed, and in which commissioners of police or local commanders were called upon to produce satisfactory crime clear-up statistics, or explain their inability to do so.

2.37 In such circumstances the ends can easily come to justify the means and clear the road to process corruption without too much concern or shame. Those officers who do make the effort to think the matter through are often able to make a distinction between acceptable and non-acceptable deviance. For them, corruption of this kind can still become a means of crime control rather than an end in itself, and so far as they promote this philosophy among junior police it can have a significant ideological effect upon the Service.

2.38 Process corruption may result from an exercise of partiality in criminal investigations and/or prosecutions. Partial investigations and prosecutions involve the abuse of police powers resulting from the ability of officers to exercise discretion. The existence of a lack of impartiality among police is potentially attributable to many factors which, without attempting to be exhaustive, include:

attitudes to particular crimes which police themselves may commit, or personally condone, for example, drug taking, domestic violence, or driving while drunk;

financial gain in return for protection given to drug dealers and others;

the desire to obtain convictions, or information, regardless of the legality of the means used, or their consequences;

the existence of personal attitudes based on race, gender, sexuality, religion, and/or socio-economic status;

the desire to protect a fellow officer at the expense of a member of the public;

the desire to protect friends or family suspected of an offence; and

undue respect for, or concern as to the consequence of charging people who are particularly well placed socially or politically.

2.39 An unbiased, impartial approach to the exercise of police powers is important. If the community perceives that the Service is partial in the discharge of its duties, it will not be trusted. Moreover if process corruption is motivated by prejudice, the effectiveness of the court system is diminished.

2.40 Fundamental change is required to bring about a definition of 'good policing' that is understood and accepted by the rank and file, is based upon sound ethical standards and impartiality, and excludes matters such as process corruption. A useful beginning has been made by the Service with the replacement of the vaguely defined and uninstructive Statement of Values by a broad and enforceable Code of Conduct and Ethics, designed to underpin the ethical and professional standards required of the Service.

2.41 Police must be:

provided with the powers and the authorities they need to carry out the job entrusted to them, subject to suitable safeguards to accommodate the competing interests involved; and

adequately instructed as to the use of their powers within a context that promotes impartiality, teaches legal values and principles, and reinforces the understanding that the law applies to police and that they hold an office which attracts special responsibilities rather than exemptions.[5]

The ethical responsibilities and duties of legal practitioners are certainly no less than those required of police officers. The basic ethical principles for legal practitioners can be found in the Legal Practitioners (Professional Conduct) Rules. Rules 4 and 5 state:

Duty of every legal practitioner

4. It is the duty of a legal practitioner—

(a) not to engage in conduct (whether in pursuit of his profession or otherwise) which—

(i) is illegal;

(ii) is dishonest;

(iii) is unprofessional;

(iv) is prejudicial to the administration of justice;

(v) may otherwise bring the legal profession into disrepute;

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5 Ibid 29–30 (references omitted).

(b) to observe the ethics and etiquette of the legal profession;

(c) to be competent in all his professional activities; and

(d) to respond within a reasonable time and in any event within twenty-one (21) days (or such extended time as the Committee may allow) to any requirement of the Committee for comments or information on a complaint and in doing so he shall furnish in writing a full and accurate account of his conduct—

(i) in relation to the matter the subject of the complaint; or

(ii) in relation to any other matter the subject of an investigation or inquiry by the Committee;

(e) to respond within the time and in the manner required by the Committee to any requirement of the Committee for comments or information on a complaint; and

(f) to comply with the Act and these Rules and other rules of practice which are applicable in Solomon Islands.

Maintaining professional integrity

5. (1) A legal practitioner shall not—

(a) attempt to further his client's case by unfair or dishonest means; or

(b) knowingly

(i) assist; or

(ii) seek to induce,

a breach of these Rules by another legal practitioner.

The ethical standard required of practitioners and some of the difficulties they confront in trying to maintain appropriate standards, is described by the former Australian High Court Justice Kirby when he stated in an article based on an address about ethical issues:

> In a time when so many fundamentals are questioned, doubted, even rejected, it is hardly surprising that the ethics of the legal profession should also be doubted by some of its members and attacked by its critics. It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection, particularly to minorities, those who are hated, even demonized, and reviled. Without some kind of spiritual foundation for our society, we can do little else than reach back into the collective memory of our religious past or to rely on consensus declarations as to contemporary human values.

…

> The hope must be that some of the old fashioned notions of selfless and faithful service will survive even in these changing times. In the void left by the undoubted decline of belief in fundamentals, we must hope that a new foothold for idealism and selflessness will be found.[6]

It is incumbent upon all those who engage in the criminal process – police officer and legal practitioner alike – to fully understand the requirements for performing their duty in an ethical fashion, and the potential barriers to doing so.

Chapter 1 covers arrest, preparation for trial and case management. Chapter 2 examines the law in respect of bail and how best a defence lawyer can seek to obtain the release of an accused on bail. Chapter 3 covers preliminary inquiries (committals). Chapter 4 considers hearing procedures including: examination-in-chief, cross examination, re-examination, the voir dire, witness unavailable, unfavourable witnesses and relevance. In Chapter 5 the law and procedure in respect of confessions in criminal proceedings is covered. Chapter 6 deals with identification evidence. Chapter 7 covers propensity evidence. Chapter 8 examines the use of expert evidence, mental health defences, post-mortems and crime scene examination. Chapter 9 covers hearsay evidence. Chapter 10 considers competence and compellability. Chapter 11 covers privilege. Chapter 12 deals with documentary evidence, an area of law where significant changes have been introduced by the *Evidence Act 2009*. Chapter 13, one of the most important areas for the majority of practitioners, deals with pleas of guilty and sentencing. Chapter 14, the final chapter, covers appeals.

Throughout this work relevant police procedures, legislation and case excerpts often of some length are provided to assist the reader to interpret and analyse the trial process, and because these materials are sometimes difficult to find in the Solomon Islands. However, the references in this volume are not exhaustive. The legislation and cases cited are the most recent available at the time of writing, but practitioners should note that new cases and new or amended legislation causes the law to change.

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[6] Kirby M, 'Legal Professional Ethics in Times of Change', Speech delivered at the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996; available online at http://www.nswbar.asn.au/docs/ professional/pcd/kirby.pdf (retrieved 30 June 2011).

Chapter 1: Preparing for Trial and Case Management

This chapter covers some of the preliminary matters that need to be attended to before a decision is taken to enter a plea. It emphasises the need for the defence practitioner to be particularly careful when taking instructions from the client and when preparing a brief of evidence. The need for full disclosure by the prosecution is also highlighted.

The trial process begins with the arrest of an accused and may continue until all avenues of appeal have been exhausted. The steps involved in trial preparation involve: fact gathering, fact analysis, and the application of the law. These steps are relevant for the prosecution and the defence, with some variations. However, many of the processes are strikingly similar.

The process of fact gathering, fact analysis, and the application of the law, if diligently and competently done, will assist the defence practitioner and the client to:

1. Evaluate whether the prosecution case is strong or weak. In this regard the seriousness of the charge(s) is not the issue. The factors that need to be considered are numerous, but include:
   (a) The number of prosecution witnesses who can provide evidence of the alleged offending;
   (b) The circumstances in which witnesses say they saw or heard relevant matters;
   (c) Whether the accused confessed;
   (d) Whether a complainant is corroborated;
   (e) Any motives the complainant or witnesses may have for lying;
   (f) The worth of any physical evidence gathered at a crime scene or from the accused; and
   (g) The extent to which reliance can be placed on police evidence collection, recording, security and analysis.

2. Identify those issues that need to be addressed for a hearing.

3. Apply for bail.

4. Decide if a plea of guilty should be entered.

5. Decide if there should be a long or short form preliminary inquiry. A long form preliminary inquiry can be very useful as an evidence gathering tool, or where the prosecution case is weak can lead to the discharge of an accused.

6. Prepare for examination-in-chief and cross examination

Interviewing the Accused/Client

In all cases where an accused person is charged with a serious offence it is necessary for the defence lawyer to have more than one conference with their client. These interviews may occur in the following sequence:

At the police station following arrest and detention.

1. To obtain details for a bail application.
2. To obtain instructions for trial or sentence. The number of interviews with the client in preparation for trial or sentence will vary depending on the complexity of the case and client need.

For a defence lawyer, an interview (conference) with a client is integral to the task of preparing a criminal case. The first interview should be aimed at obtaining information about the circumstances surrounding the arrest and detention. When such an interview is conducted the practitioner is primarily obtaining evidence that may be of use at trial, and must therefore keep in mind how the evidence might be used throughout the trial process.

To obtain maximum benefit for the client during the interview process, it is essential for practitioners to have a good knowledge of criminal law, and the practices and procedures followed by police, prosecutors and the courts. Opportunities may be lost if a practitioner interviews a client without understanding the elements of the offence charged. For example, if the client is charged with robbery pursuant to section 193 of the *Penal Code* the defence practitioner needs to consider the elements of the crime and determine whether they are consistent with the police facts and, ultimately, the client's instructions. The prosecutor will also consider whether the police facts fit the elements of the offence. Section 193 of the *Penal Code* states:

> **Robbery**
>
> **293.** (1) Any person who –
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; or
>
> (b) robs any person and, at the time of or immediately before or immediately after such robbery, uses or threatens to use any personal violence to any person,
>
> is guilty of a felony, and shall be liable to imprisonment for life.
>
> (2) Any person who robs any person is guilty of a felony, and shall be liable to imprisonment for fourteen years.
>
> (3) Any person who assaults any person with intent to rob is guilty of a felony, and shall be liable to imprisonment for five years.

The first thing that becomes clear is that robbery is an aggravated form of stealing from a person. The elements comprising up the offence of robbery are therefore:

1. The intentional taking of a thing and carrying away from a person;
2. Without the consent of the person;
3. In the presence of the person;
4. With the intention of permanently depriving the person of the thing; and
5. At the same time these acts take place, the person committing them:
   (a) Is armed with an offensive weapon or instrument; or
   (b) Acts together with one or more people acting in common purpose; or
   (c) Assaults the person; or
   (d) Uses threats of personal violence immediately before or after the taking of the thing.

It is for the prosecution to prove the elements of the offence beyond reasonable doubt. The defence practitioner throughout the interviewing process needs to be able to apply the law to the facts as they are gathered and supplied by the prosecution with the aim of identifying whether there is sufficient evidence to prove the elements of the offence. Depending on instructions, the defence practitioner may also need to consider possible defences.

The Accused Client

When interviewing a client who has been accused of a criminal offence, the method to be employed varies in a number of ways from that used when interviewing a client who is seeking assistance with a civil law problem. The environment where the interview is conducted may also be quite different from that found in civil cases.

For example, unless the offence is minor, the best practice approach places less emphasis on encouraging the client to provide details about the alleged offence, at least during the first few interviews. unless the offence is minor. By contrast, in other areas of legal practice, encouraging the client to provide full details at the first interview may be an efficient and effective way obtaining information to provide the best professional assistance.

The place where an interview is conducted can also be less than optimal. A practitioner may find him or herself interviewing a client in a police cell, in a prison, standing in a court room dock, at a crime scene, and in other places where the facilities of a well equipped office are not available. Nevertheless, there are some basic principles that should be remembered when interviewing a client who is charged with a criminal offence, no matter the conditions at the place of interview. These are set out below.

Principles for Client Interviews

The following principles should be borne in mind by all defence practitioners while interviewing clients.

Presumption of Innocence

The accused is presumed innocent until a tribunal of fact determines that the prosecution has proven its case beyond reasonable doubt.[7] All accused are presumed innocent and the onus of establishing guilt beyond reasonable doubt stays immovably with the prosecution.

Right to Silence

The accused has a right to silence.[8] The accused should be advised of this right at the first available opportunity. Indeed, an accused should be asked to exercise the right at least until such time as all reasonably available evidence has been collected, analysed and legal advice given. No adverse inference can be drawn from a failure to answer questions or provide information. In some jurisdictions, legislation has undermined this right by allowing penalties to be imposed for not supplying some basic information; however, the right to silence remains in place for serious criminal cases.

Approach with an Open Mind

The practitioner should not make assumptions about the veracity of the client. The finding of guilt can only be made by a tribunal of fact; or the client can accept guilt by making an admission and entering a plea of guilty. The role of the practitioner is to advise and represent, not to evaluate the client's truthfulness. This proposition is subject to the proviso that the client should be advised of any inconsistencies or impossible scenarios in their instructions. For example, if instructions are given that 'I was not at home at the time of the shooting' and evidence is available that close friends observed the accused at home at the relevant time, then this situation should be brought to the attention of the accused. The accused may wish to amend the instructions or the practitioner may need to develop the case in a way that explains the unreliable nature of the identification evidence.

Support Person

If possible, the accused should be given the opportunity to have a support person present during interviews; this is especially important where the alleged offender is a juvenile. However, care should be taken to ensure that the accused feels capable of answering questions in the presence of the third party. Furthermore, the support person should be made aware that his or her role does not include asking questions or answering for the client.

Barriers to Communication

The practitioner should identify whether any factors affect the client's ability to give clear instructions. Among other things, the practitioner

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7 *Woolmington v DPP* [1935] AC 253; [1935] UKHL 1.

8 *Petty v The Queen* (1991) 173 CLR 95; [1991] HCA 34. The position under the Solomon Islands *Evidence Act 2009* is discussed further in Chapter 6 of this volume.

should consider whether the client has a hearing impairment, difficult speaking the same language as the practitioner, an intellectual disability or a mental health problem.

Literacy
The practitioner should identify the level of literacy of the accused. There are many people who have difficulty reading and writing.

Legal Privilege
The practitioner should advise that interviews are conducted under legal privilege, and that anything said by the client is therefore said in confidence.

Limited Scope of Initial Interviews
The client needs to be advised that the initial interviews will be limited in scope and that the practitioner will not be asking about the client's involvement in the commission of the alleged offence. Before asking questions about any involvement, the practitioner should read the prosecution brief of evidence and provide legal advice about the strength of the prosecution case and possible defences. In the event that the client preempts this process by making an admission of guilt to the practitioner, and subsequently elects to enter a plea of not guilty, the practitioner may be placed in the position of having to refuse the case, or provide only limited defence advocacy. The proper preparation and conduct of a client's case significantly reduces the potential for ethical dilemmas, delays in the administration of justice, errors of law, unnecessary restrictions on liberty, miscarriages of justice, and unnecessary cost to the client and community.

Courtesy
The client is to be treated with courtesy at all times.

Diligence and Competence
Diligence and competence on the part of the practitioner are essential to avoid miscarriages of justice. Additionally, diligent and competent practice can avoid client complaints or assist in resolving any such complaints. If a practitioner lacks experience in a particular area of criminal law, and is not being assisted by an experienced practitioner, the best practice option for that practitioner may be to withdraw from the case.

Length of Interview
The length of each interview with the client is determined by the client's needs. Relevant factors include the taking of instructions to prepare the case, giving professional legal advice to the client about options, and other matters relating to the client's personal welfare. The exact timing of each interview will depend on the demands of the case; it would be inappropriate to have a formula that limits interview time to meet the financial needs of a practice.

Detailed Notes

Contemporaneous detailed notes of all interviews should be made and filed. At a minimum the notes should contain the following:

1. Date;
2. Place where the interview took place;
3. Names of those present;
4. Commencement and completion times;
5. The name of any interpreter, if present;
6. Details of advice given, eg, 'advised of right to silence'; and
7. Details of information received from the client.

At the end of the interview the police should be informed about whether or not the client wants to engage in a record of interview.

Interviewing Methods

During initial interviews and conferences with the client, the practitioner should avoid asking open ended questions that allow a variety of responses. For example, asking a client "what happened?" may result in an unnecessarily lengthy answer that contains unhelpful information. At the initial interview with the client, and at any subsequent bail conference, the practitioner's questions should be directed towards eliciting specific information about factual matters involving arrest, detention, welfare needs, and factors that would assist in an application for bail. This approach is best maintained until evidence has been gathered and analysed.

When the case reaches the stage where conferences need to be held to determine whether the client is going to proceed to hearing or sentence, it will be appropriate to employ a combination of both directive and open ended questions.

Recording of Advice and Instructions

The practitioner needs to make detailed notes of all conferences with clients. It is preferable that these notes be comprehensive and legible. Where the client recounts words that were spoken, those words should be recorded in the first person.

Whether the client intends to plead guilty or not guilty, detailed instructions should be taken and the client should be asked to sign the instructions. When the client makes the decision to plead guilty, it is especially important to confirm the instructions received, and for the client to acknowledge at least the outline of the legal advice that has been given.

Comprehensive instructions assist the practitioner to recall details of the case and prepare for trial. Furthermore, if the client later claims that the practitioner gave incompetent legal advice or representation, the notes and signed instructions can be used as evidence. For example, an individual may appeal against conviction on the basis that his or her legal representative was incompetent. One way for this claim to be assessed is by reference to

notes taken during conferences, as these can indicate whether the client was properly advised.

Some practitioners find it useful to have a standardised instruction sheet as a means of ensuring that basic details about the client and the case are not inadvertently overlooked.

Fact Gathering by the Practitioner

The defence practitioner should be in a position to advise about the law as it relates to police facts prior to interviewing an accused about the substantive case. This requires the practitioner to avoid questioning the client about the extent of their involvement in the alleged case, if any, until:

1. the practitioner has been provided with the full brief of police evidence; and
2. all reasonable forensic investigations have been undertaken.

This approach may not be necessary where the client has been charged with a minor criminal offence, such as the following examples from the *Penal Code*:

> **Drunk and incapable**
>
> **179.** Any person found in a public place drunk so as to be incapable of taking care of himself is guilty of an offence and shall be liable to a fine of twenty dollars and such person may be arrested without warrant by any police officer.
>
> **Shouting, etc., in town**
>
> **180.** (1) Any person who in any town area wilfully and wantonly, and after being warned to desist, shouts or beats any drum or tomtom or blows any horn or shell, or sounds or plays upon any musical instrument, or sings or makes any other loud or unseemly noise, to the reasonable annoyance or disturbance of the public, is guilty of an offence, and shall be liable to a fine of ten dollars or to imprisonment for one month.
>
> ...
>
> **Sorcery**
>
> **190.** Any person who-
>
> (a) performs any magic ritual in respect of which there is a general belief among any class of persons that harm may be caused to any person; or
>
> (b) has in his possession, without lawful excuse, any article commonly associated by any class of persons with harmful magic,

> is guilty of a misdemeanour, and shall be liable to imprisonment for two months or to a fine of forty dollars.

In such cases if the facts are clearly stated and the client agrees with them, a simple plea of guilty can be entered without obtaining discovery as a matter of necessity.

In many cases, the first step in the preparation of a criminal trial begins when the defence practitioner is informed that a person is under arrest and requires legal representation. The behaviour and procedures adopted by police at each stage of arrest and investigation can have significant evidentiary value. A conference should be arranged with the accused at the earliest opportunity; preferably at the police station where charges are being laid.

Initial enquiries of the police about the circumstances of the arrest need to be made. In most instances it is appropriate to speak to the police before speaking to the accused in order to gather information about the reasons for the arrest and the circumstances surrounding the arrest. Police officers should be aware of the necessity to take detailed notes about the alleged criminal incident and should therefore be able to provide a reasonably detailed account of the alleged offence.

At the police station, the defence lawyer should seek out the arresting police and make enquiries about the following:

1. time, date and place of arrest;
2. grounds for making the arrest;
3. time of arrival of the accused at the police station;
4. whether the accused said anything relevant at the time of arrest or while in detention;
5. whether the police took any items from the accused or from the place of arrest;
6. whether substance use or any physical or mental health problems have been identified;
7. whether the accused has any language or communication difficulties; and
8. whether the accused sustained any injuries during or after arrest.

If the arresting police are not available, there will often be a police officer available who has knowledge of the case. Detailed contemporaneous notes should be taken by the defence lawyer of any conversations with the police. This may assist later if there is any dispute about events, and may be useful in the evidence collection process.

In each case it is important to review the reasons for arrest and detention. The law of arrest should be considered to determine the lawfulness of the arrest and to evaluate whether any evidence collected is admissible at trial.

Section 10 of the *Criminal Procedure Code* describes the initial arrest procedure.

Section 10 states:

> **Arrest**
>
> **10.** (1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest:
>
> Provided that nothing in this section contained shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

The use of force when arresting an accused is not unusual. However, the extent of the force used and whether it was necessary at all may indicate the attitude of the police towards the alleged offender. Further, in cases where a confession has been made, excessive force at the time of arrest may have been a precursor of later treatment. Excessive force at arrest may therefore be used in evidence to support an application seeking to exclude a record of interview containing a confession on the basis that the confession was not voluntary.

It should be understood that fact gathering is not the sole province of the police. A defence lawyer has a duty not only to analyse the facts gathered by the police but also to gather facts that may be of value to the client's case. Prosecutors also have a duty to ensure that the relevant facts have been gathered by the police.

Fact gathering should begin at the first available opportunity. Even a limited knowledge of the history of criminal investigation should alert the practitioner to the reality that police may edit the fact scenario in order to facilitate a successful prosecution. Moreover, the police may not be aware of the relevance of certain facts. If not recognised, the failure of police to identify relevant evidence can lead to a miscarriage of justice.

Relevant facts gathered at the time of arrest may also assist in obtaining liberty for the client, provide a basis for welfare assistance, or be of material value later in the trial process. For example, if there is a dispute about what happened at the time of arrest, or about any words said, the tribunal of law or fact will regard evidence to be more reliable if it is drawn from more contemporaneous notes. Such notes may also assist the tribunal of law to

determine the admissibility of evidence, or aid the tribunal of fact in deciding what evidence it will accept or reject.

It is also very important to ensure that any health problems affecting the arrested person are addressed as soon as possible. Deaths in custody are not unusual in some jurisdictions, and practitioners have a duty to help with the preservation of life.

Most practitioners will encounter clients with language difficulties that are not readily apparent. If this is the case, special care should be taken when the person is being interviewed by the police and when the defence lawyer is taking instructions. It may be necessary to obtain the services of an interpreter. If the arresting police have not identified an existing language difficulty they may misinterpret words said by the accused and draw inappropriate, adverse inferences. If the defence lawyer misconceives the client's words and intentions, the results may be broad ranging and are nearly always adverse. For example, failure to identify language difficulties can reduce the chances of obtaining bail, or cause unnecessary problems at trial over the admissibility of evidence.

Conference with Accused at Police Station

If bail is not granted by the police, a conference should be held with the client, if possible, at the police station. This conference should not be for the purpose of obtaining information about the elements of the alleged offence but rather to obtain a version of the arrest, and the procedures adopted by the police, along with details of any health difficulties. The following matters should be canvassed and detailed notes taken.

1. The time, date, and place of arrest;
2. Any conversation with the police from the time of arrest and up until the conference;
3. Actions of the arresting and detaining police up until the time of the conference;
4. Actions by the accused up to the time of the conference;
5. Any items taken by the police at the time of arrest;
6. Medical condition, mental disorder or language difficulties;
7. Injuries sustained during the arrest – details should be noted with particular care and where appropriate a diagram of the part(s) of the body injured should be made;
8. Names and addresses of witnesses to the arrest;
9. Relatives or friends the accused wishes to contact;
10. Names and addresses of any possible sureties; and
11. Names and addresses of any potential witnesses.

The information gleaned from the police and the accused may be useful for obtaining bail and also preparing for trial. These details will be especially relevant if the police have acted unlawfully or breached their procedural guidelines. Even if the accused ultimately pleads guilty to an offence, there

can be significant factual variations between the versions of events presented by the prosecution and those suggested by the accused. The version provided by the client, if accepted by the court, may assist by providing facts and explanations that reduce the degree of criminality that might otherwise be considered present. Additionally, if the analysis points to unreliability in the police version of events, it may be useful to compare accounts provided by the police (at and after arrest) with the version given by the accused. A finding that the police version of the circumstances is unreliable may also assist the tribunal of fact to evaluate the reliability of the prosecution case as whole.

If the accused has sustained any injuries, and has not been granted bail by the police, it is essential that a medical practitioner be contacted as soon as possible. If the client is released on bail by the police then medical treatment should be arranged and the treating doctor advised that there may be a requirement to give evidence at a hearing. In either circumstance, photographs should be taken at the earliest opportunity of the injuries sustained by the accused. Consideration should also be given to obtaining specialist medical reports.

Principles for Witness Interviews

The following principles are designed to assist with the collection of evidence in statement form in a way that provides order, clarity and that comply with the rules of evidence. They are equally applicable for police, prosecutors and defence lawyers.

The investigator/interviewer should not be a person who is connected to the event under investigation

The interviewer should not be an eyewitness to an event under investigation, or have friends or relatives who suffered injury arising from the event. As far as reasonably possible an interviewer should be objective: being emotionally involved in a matter under investigation is inappropriate. Further, if an interviewer has witnessed an incident under investigation it may be suggested, when the case comes before a tribunal of fact, that the evidence collected was contaminated by the interviewer's version of events. Where the interviewer has a relationship with a person who suffered harm, it may be suggested that his or her vested interest resulted in the evidence being contaminated, or deliberately manipulated to suit the interviewer's interests. Apart from these obvious problems, a lack of detachment on the part of an interviewer may result in flaws in the investigation to the extent that doubt may be cast on the reliability of the evidence, even if no suggestion is made that it was contaminated or fabricated. Professional investigators such as police officers, or legal practitioners should aim to gather evidence in a way that can be used to help with understanding the truth of what occurred.

Record preliminary information to assist the formal interviewing process
Before commencing a formal interview with a witness, it may be necessary or convenient to obtain preliminary information from the individual. This can be done by recording some basic details about the witness and the matter under consideration. This information can be recorded in a note book, entered on a questionnaire, or simply recorded in a way that can form part of the evidence documentation. Information recorded in this way can be very helpful in providing investigative leads and for the formulation of interview questions. However, such information can only be regarded as preliminary and it has to be further developed if it is going to be used in an effective way in a court of law.

One useful preliminary step is to gather information that allows a time line to be developed prior to formal interview. Questions can be asked in a sequence that allows the evidence to be recorded in chronological order. For example:

10am (date) _____	11am_____	11.30am
arrived at scene	three (3) other people arrive at scene	fight started

11.35am_____	11.50am
man stabbed	ambulance arrives

Do not interview witnesses together
A witness should not provide an account of observations in the presence of another witness. Every witness should be encouraged to provide his or her best recall without the assistance of another. This rule applies at all stages of the interviewing process. No distinction should be made between the taking of a preliminary outline and a formal statement, or a record of interview.

When witnesses are interviewed together it can be difficult to determine whose account is being recorded. There can also be a dominant person who intentionally or inadvertently influences the recall of another, mutual influence or both. This can result in a false memory or memories, and the contamination of evidence.

In the event of witnesses being interviewed together and some form of joint record being made, then at a later date the witnesses being asked to recall their individual accounts, they may simply find it impossible to do so.

Additionally, statements made in the presence of other witnesses can be questioned during cross examination in a way that casts doubt on the reliability of the witnesses.

Ensure that the witness is being interviewed in an environment that is quiet, and as far as possible, not intimidating
If the witness displays anxiety (for example, by crying) the interviewer should ask the witness if he or she would like a break. The interviewer needs to be aware that a witness may have suffered significant trauma and may have some difficulty recalling the events. A support person for the witness during the interview may be appropriate. A support person can be most helpful where the witness is young or has suffered physical and/or psychological trauma.

To attempt to interview a witness who is suffering significant trauma is to invite the suggestion that the attempt was insensitive and any information collected potentially unreliable.

Record the personal identification details of the witness
Basic information such as, name, date of birth (age), address and other information that might assist to locate the witness at a later time needs to be obtained. The full name of the witness needs to be recorded to avoid possible later confusion of identity. Where a person has changed name the former name needs to be recorded. These steps may assist other people to recognise an individual.

Include details about the witness's background
It may also be useful to obtain the background of the witness and any historical detail that explains a relationship between the witness and the events. For example, if the witness had an active role in the events under investigation or suffered because of the actions of those involved, then this should be recorded.

Warn the witness that their evidence may be used in court and that criminal penalties may be suffered if untruthful information is provided
Police usually insert the following words at the beginning of every statement.

> This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. This statement is true to the best of my knowledge and belief and I make it knowing that, I shall be liable to prosecution if I wilfully stated anything which I know to be false or do not believe to be true.

This part of the statement is sometimes called the jurat. It is probably a good idea for all interviewers to include these words where evidence is being recorded in statement form.

Record the details of the circumstances of the interview
The place, date, and time it started and ended and the names of all people present during it should be recorded. It may be necessary to later call on a person present to corroborate what a witness said during an interview. The length of the interview is also important to ensure that there is a complete

record and to help rebut any later suggestion that more or less was done at interview than suggested by the record.[9]

It is not unusual for a witness to claim that he or she gave information that was not recorded or worse that he or she was intimidated or assaulted during an interview. Careful recording of interview time, date and place, as well as a corroborating interviewer, can be helpful in overcoming such allegations. Whilst allegations of this type are usually made by a suspect about police interviewers, they can and are made by witnesses about other investigators, or legal practitioners.

Whenever possible, record what the witness observed in chronological order

As far as possible, the statement or record of interview should detail what was observed by the witness in chronological order. To assist in this process, the witness should be asked to start at the beginning and be allowed to recall, in an unhurried way. Simple questions such as, 'What happened then?' can assist in this process.

This approach allows the witness to order thoughts and to mentally picture the sequence of observations. It also allows the reader to better understand the evidence.

If a witness is having difficulties recalling the date of an incident, he or she should be asked to relate the incident to other events

If other events can be recalled then it may be possible to place the incident within a short time frame. This may be a sufficient link to other evidence to identify either a date or a short period of time within which the event occurred.

Often, simply identifying a period of time between known dates is sufficient for a tribunal of law and fact. Identifying such a period of time may also be sufficient to corroborate other witness evidence as to time.

Before this approach is adopted the interviewer should endeavour to have the witness try to identify the period of time by other means, such as diary entries.

Listen carefully to the answers so that questioning can follow the witness's best recollection

Whilst the interviewer may have prepared questions in advance, it is important that he or she remain flexible and adapt questions so as to obtain as much detail as possible about the incident under investigation. If the interviewer primarily focuses on prepared questions, he or she could be

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[9] The names of all people present and the time of starting and finishing an interview recorded in statement form are not requirements of legislation. However, if they are not recorded in the statement of the witness they should recorded in the interviewer's statement or at least recorded in note form.

distracted from carefully listening to the answers, and thus may lose the opportunity of obtaining relevant, probative evidence. Towards the end of an interview, the interviewer can check any prepared notes to ensure that all relevant matters have been covered.

When a witness is providing information that describes what is being said, obtain a record of the words in the first person
Where the witness is recounting a conversation, an attempt should be made to obtain the conversation in the first person. The witness should not provide an interpretation of what was said but should, as far as possible, provide the exact words. Where a witness is having difficulty recalling the exact words this fact should be noted. It can be noted by simply prefacing any first person conversation with words such as, 'Although I cannot recall the precise words, they were to the following effect …'

An example of conversation in the first person is, 'I said, "George put down the knife", George said, "I will not, I hate you and I am going to kill you."'

Ask questions that are short and to the point
This approach may assist the witness to remain focused on the event and reduce the possibility of concern about what the interviewer is thinking. It also reduces the possibility of the witness being confused about the meaning of the question.

Mainly ask non leading questions
It is essential that the interviewer allows the witness to provide his or her evidence using independent recall. A leading question is a question that suggests the answer, for example:

Q. *George had a knife didn't he?*

This question suggests the answer to the witness; that is that George in fact had a knife. One better way of asking the question is:

Q. *Did George have anything in his hand?*

Avoid asking multiple questions.
A multiple or 'double barrelled' question can result in an ambiguous answer. An example of a multiple question is:

Q. *Did George pick up the knife and stab Henry in the stomach?*

A more appropriate way of asking the questions would be:

Q. *Did you see anything in George's hand?*
A. *George had a knife in his hand.*
Q. *What happened then?*

The form of questions will be different in each case but the basic principles

directing the form remain the same.

When asking a witness to describe a scene, ensure that questions are asked about conditions at the scene
Ensure when questioning a witness about an incident that he or she observed, to ask questions about time of day, date, place, weather conditions and lighting. Where physical damage is involved ask about the extent of the damage that the witness observed. Each case will be different and therefore conditions at the scene will vary, requiring consideration of those matters that require description.

Where a witness is being asked to describe a scene he or she should also be asked to sketch the scene
A detailed description of the scene where the event occurred should be obtained from the witness. It is often useful to ask the witness to sketch the scene and mark on it where people were located at relevant times. Where the witness was at relevant times should also be carefully marked on the plan. If a sequence of events occurred at a scene whilst the witness was present, a series of sketch plans may be useful.

The sketch plan should be signed and dated by the witness and attached to the statement or record of interview. If photographs of the scene are available at the time of questioning, the witness should be shown the photographs and asked if he or she can recognise the scenes depicted. Where there is recognition, the witness should be asked to mark the photographs as the interviewer requires. In order to test the reliability of the witness it is better to obtain the sketch before showing the photographs.

A view of the scene of an event should be undertaken by the interviewer
Prior to interviewing witnesses, the interviewer should view the scene to better understand any description being provided.

Where the interview is being conducted with an eyewitness near the place where the incident occurred or if arrangements can be made to visit the scene with the witness, it is important that the interviewer go to the scene with the witness. This allows the interviewer to better understand the event and thereby be in a position to better formulate questions. Audio visual equipment should be used when conducting a site view with a witness. The interviewer and witness should be filmed and any words passing between them, recorded. If such equipment is not available, relevant parts of the scene should be photographed and a statement prepared by the interviewer describing the relevance of each photograph. Evidence collected on film in this way, is admissible in court. Where an interview is audio visually recorded at a scene, it is often called a ‘walk through interview’.

In most cases, any interview at the scene should be done after the interviewer has visited the scene, and after an initial interview with the witness away from the scene.

A witness should be given the opportunity to write their statement without assistance

This usually occurs after the witness has been formally interviewed. It gives the witness the opportunity for further reflection upon the evidence and to recall any matters that may not have come to mind at the time of the interview. It may also be the case that a witness may prefer to recall events without the assistance of an interviewer.

However, a witness may not be able to read or write. If this is the case, the statement, or the transcript of the record of interview should be read to the witness and the witness asked if he or she wishes to amend it, and then if the witness is prepared to adopt the statement or record of interview as a true and accurate record. This process should, at least, be recorded on audio tape.

Analyse the evidence

An interviewer needs to carefully analyse the evidence provided by a witness to determine what further lines of inquiry need to be made. The further lines of inquiry can involve, amongst other things, interviewing other witnesses, gathering physical evidence and conducting a crime scene examination. However, it can often involve interviewing the witness again to gather more information and to clarify parts of the evidence previously given. Even very experienced investigators have to re-interview witnesses. Where a further statement or record of interview is made reference to the previous record should be included.

It is also important for investigators to seek assistance from their colleagues if in doubt about investigative steps or how a witness should be questioned.

Concluding stages of the interview

Once the interview is concluded, it is important that the following steps be taken.

1. If a record of interview has been conducted using audio or video tape recording, then it needs to be transcribed. Once it is transcribed, it should be supplied to the witness to read, make any amendments or additions, dated and signed by the witness as a true and accurate record. When the witness signs the document his or her signature should be witnessed.[10] A copy of the transcribed record of interview should be provided to the witness. It is a document from which the witness can refresh memory before giving evidence in court.

2. If the evidence has been taken in statement form, or put in statement form, from an audio-taped or video-taped record of interview, then it should be supplied to the witness to read, any amendments or additions made, dated and signed as a true and accurate record. The witness' signature should be witnessed. It is also a document from which the

[10] Police record the adoption of the interview in a different fashion.

witness can refresh memory.

Prepare an interviewer statement.
The interviewer needs to be aware that by engaging in the investigative process, he or she may also become a witness in any future prosecution. With this in mind, the interviewer should prepare a statement outlining his or her role in the investigation. This statement may be brief and simply include the name of the interviewer, the time, date and place of the interview, the name of the interviewee and the fact that the interview took place and was recorded. Where there are a number of witnesses interviewed and a number of investigative steps undertaken, the interviewer's statement may be lengthy and detailed.

Subsequent Steps Prior to Hearing
The number of conferences held with the client and interviews with witnesses will vary in each case, as will the questions asked of a client after the prosecution brief has be served. In a serious case, prior to a committal hearing (short or long form preliminary inquiry), the defence will be provided with copies of the evidence upon which the prosecution is relying to prove its case. These materials generally include all relevant statements, records of interview, expert reports, statements and other documents referring to physical evidence that have been collected and a statement of facts. Before committal, some defence practitioners rely upon this material without seeking to ensure that all relevant probative information in the possession of the prosecution has been supplied. It is appropriate to discover prior to committal all relevant material that the police and the prosecution have in their possession. By seeking to discover such material before committal, the defence is better placed to prepare for both the committal and, if necessary, a trial. However, if full discovery is not obtained prior to the committal, it certainly should be sought prior to the trial.

It is a prosecutor's duty to disclose relevant material. However, this is sometimes not done, either because the prosecutor did not have it in his or her possession or because the prosecutor did not realise its relevance. The Solomon Islands Court of Appeal has stressed the need for full disclosure as a matter of fairness. In *Malaketa v Regina* the Court stated:

> There is no doubt that the prosecution has a duty to disclose the statements of material witnesses. In *R v Brown* [1997] 3 All ER769 Lord Hope of Craighead said (at 773 ff) –
>
> The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context ... the great principle is that of open justice. It would be contrary to that principle for the prosecution to withhold from the defendant material which might undermine their case against him or which might assist his defence …

> So far as disclosure of material that that relates to the credibility of defence witnesses is concerned, Lord Hope said (at 777–8) –
>
> … [The] principle of fairness lies at the heart of all the rules of the common law about the disclosure of material by the prosecutor. But that principle has to be seen in the context of the public interest in the detection and punishment of crime. A defendant is entitled to a fair trial, but fairness does not require that witnesses should be immune from challenge as to their credibility. Nor does it require that he be provided with assistance from the Crown in the investigation of the defence case or the selection, on grounds of credibility, of the defence witnesses ... To repeat the words of Diplock LJ in *Dallison v Caffery* [1964] 2 All ER 610 at 622, [1965] 1 QB 348 at 375, the duty of the prosecutor is to prosecute, not to defend. The important developments in the prosecutor's duty of disclosure since he wrote these words have not altered the essential point that there is a difference between the functions of the prosecutor and those of the defence. The prosecutor's duty is to prosecute the case fairly and openly in the public interest. It is not part of his duty to conduct the case for the defence.
>
> The common law rules which I have described are designed to ensure the disclosure of material in the hands of the prosecutor which may assist the defence case. But, once that duty has been satisfied, the investigation and preparation of the defence case is a matter for the defence. That includes the tracing, interviewing and assessment of possible defence witnesses. And material which may assist the defence case can be distinguished from material which may undermine it or may expose its weaknesses. The adversarial system under which trials in this country are conducted applied to the examination of witnesses in support of the defence case in the same way as it does to the examination of the witnesses for the Crown. No witness enters the witness box with a certificate which guarantees his credibility. Every witness can be cross-examined upon the veracity or reliability of his evidence. Cross-examination which is directed only to credibility may lose much of its force if the line is disclosed in advance. This weakens the opportunity for the assessment of credibility by...[the tribunal of fact]. To insist on such a disclosure would, sooner or later undermine the process of the trial itself. It would protect from challenge those who were disposed to give false evidence in support of a defence which had been fabricated. That would be to tip the scales too far. Justice would not have been done. [11]

In *Grey v The Queen* the High Court of Australia also held that there is an ongoing obligation on the prosecution to make full disclosure. [12] Regardless of these rules or, indeed, a magistrate or judge's directions about disclosure of material, the defence should take all necessary steps to discover any materials that would be beneficial to the presentation of an accused's case.

The defence practitioner should make written and oral requests to the prosecution for the supply of all relevant evidence. The prosecution should

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11 [2007] SBCA 5.

12 (2001) 184 ALR 593; [2001] HCA 65.

give disclosure, and it is not unusual for the prosecution to serve the brief of evidence without the need for a formal order by the magistrate. The *Prosecution Policy* on disclosure states:

> **20. Disclosure**
>
> **20.1** Prosecutors are under a continuing obligation to make full disclosure to the accused to ensure a fair trial. This includes disclosure of all material which:
>
> (a) is relevant or possibly relevant to an issue in the case, whether inculpatory or exculpatory;
>
> (b) raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use; and
>
> (c) holds out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations.
>
> **20.2** In all cases, disclosure should include (but is not limited to):
>
> (a) an accused's prior convictions;
>
> (b) copies of all witness statements of all witnesses to be called (addresses and telephone numbers of witnesses may be deleted);
>
> (c) copies of all documentary exhibits that the Crown proposes to tender or an opportunity to examine any exhibits that the Crown proposes to tender;
>
> (d) copies of any tape or transcript of a record of interview or other relevant communication, or an opportunity to listen to such a tape;
>
> (e) copies of any statement or document amounting to a prior inconsistent statement of any Crown witness;
>
> (f) copies of any reports or statements of any expert witness to be called by the Crown;
>
> (g) an opportunity for defence to speak with any such expert prior to the trial;
>
> (h) copies of any warrant used in the gathering of evidence to be adduced at trial; and
>
> (i) any information in the possession of the Crown that reflects materially on the credibility of any crown witness including prior convictions for perjury or offences involving dishonesty; adverse findings in other proceedings (whether criminal, disciplinary, civil or Commission of Inquiry); details of any concession granted to the witness such as an undertaking not to

prosecute or details of a charge negotiation/sentencing discount relating to their evidence.

20.3 Police should advise the prosecutor of any material in police possession that is not contained in the Crown brief, and produce copies to the prosecutor if requested. The Director may withhold or delay disclosure of specific material where the prosecutor is of the opinion that, in the public interest, the material is immune from disclosure. In such cases the Director must inform defence that material has been withheld, and claim immunity against disclosure in respect of the material and identify the basis for that claim.

20.4 Legal professional privilege ordinarily will be claimed against the production of any document in the nature of an internal advising and/or memorandum of the ODPP. Legal professional privilege attaching to notes of conferences/ witness proofing with witnesses made by prosecutors may be waived by the Director in appropriate circumstances (for example, if a witness provides in conference/ witness proofing inconsistent or additional information to that contained in a witness statement or preliminary inquiry hearing; but the better course in such circumstances is for Police to take a further statement containing such information and for the ODPP to disclose that to the defence).

20.5 Relevant factors for determining whether a claim for public interest immunity should be made include:

(a) the material is clearly irrelevant;

(b) withholding the material is necessary to prevent the identification of an informant;

(c) withholding the material is necessary to protect the safety or security (including protection from harassment) of persons who have supplied information to Police;

(d) the material if disclosed could prejudice an ongoing investigation, or facilitate the commission of other offences;

(e) the material discloses Police methods that are not a matter of public knowledge;

(f) the material relates to internal workings of the Police Force;

(g) the material was supplied to Police on condition that it would not be disclosed; and

(h) the material relates to national security.

20.6 There is an overriding duty of the Crown to present its case with fairness. Where a claim for public interest immunity is made before the Court then the question of disclosure will be settled by the Court. In cases where the claim is upheld, if the withholding of material will prevent a fair trial then the matter should be referred to the Director

to determine whether or not the trial should proceed in the circumstances.

20.7 Where a claim to protect information claimed by the Police is unsuccessful, the Director shall determine, after consultation with Police, whether the interests of justice require that the material should be disclosed or that the charges should be withdrawn.

20.8 In appropriate cases a prosecutor may conditionally disclose sensitive material to the defence on the basis of a defence undertaking not to disclose the material to parties other than the accused and his counsel.[13]

At any subsequent conferences, the defence practitioner should ensure that the client is:

1. Made fully aware of the contents of the prosecution brief and about any other evidence;
2. Advised about the elements of the offence;
3. Provided with advice on areas of evidence that require further discovery. For example, any expert reports required;
4. Provided with a view about the strength of the Crown case;
5. Given details about pre-trial and trial procedure;
6. Carefully asked about any witnesses who may be of assistance and who need to be interviewed;
7. Provided with an explanation about the discounts available for a plea of guilty.

The client should be provided with a copy of the prosecution brief and asked to read it carefully and make notes of areas where there is disagreement.

Written instructions should be taken, although the form in which they are recorded may vary. Detailed notes are required, and should be retained on the case file in chronological order. It is good practice to have the client sign instructions, or confirm them by letter.

It is only when the practitioner has obtained, read and analysed all relevant documents in a case that he or she is in a position to assist an accused to make a decision about whether to proceed to hearing or enter a plea of guilty. The prosecution documents may also indicate witnesses who could be relevant but who have not provided statements and are not on the prosecution list of witnesses. Documents invariably provide some detail of the circumstances surrounding an incident and help the practitioner to determine specific issues that remain to be investigated or that may assist in analysing a case.

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[13] *Prosecution Policy*, Office of the Director of Public Prosecutions, Solomon Islands, 14 May 2009.

The prosecution should routinely receive all relevant evidence collected by the investigating police. The prosecution makes an assessment of the evidence to determine whether a case should proceed or if there is a need to obtain further evidence prior to hearing. The defence receives, at least initially, some of the documents after taking instructions from an accused and often has to seek other material to decide on the most appropriate course for the defence of the accused.

There should be little difference between the way a prosecutor and a defence practitioner analyse the evidence provided by the police and how they apply the law to the evidence. The main difference in most cases is that the prosecution may have access to a greater range of resources, including the police and experts, than the defence. The restricted position of the defence should not, however, be allowed to jeopardise the representation of an accused person. With appropriate communication between prosecution and the defence, the defence practitioner can often be assisted by the expeditious provision of relevant material and information by the prosecution to the defence. Additionally, appropriate communication can avoid undue delay and unnecessary expense to both the state and the accused.

Checklist of Steps That Should be Taken Prior to Trial
Each of the following steps should be undertaken by the defence practitioner prior to trial:

1. Ensure that all prosecution statements and records of interview are obtained.
2. Obtain committal documents, exhibits and transcript.
3. Obtain any photographs and video recordings.
4. Obtain any diagrams and/or plans.
5. Read prosecution brief of evidence.
6. Analyse the prosecution brief of evidence.
7. Apply the law to the prosecution brief of evidence.
8. Ensure that the accused understands the prosecution case, and the law as it applies to the case.
9. Obtain instructions from the accused about the prosecution evidence.
10. Interview potential defence witnesses.
11. Where necessary, obtain expert reports on the prosecution evidence.
12. Obtain psychiatric and psychological reports on the accused, if necessary. This may be required where the circumstances suggest possible issues of fitness to stand trial, substantial impairment or insanity.
13. Provide advice to the accused on the procedures followed at trial.
14. Advise the accused on the discounts available and other benefits that may apply to a plea of guilty.
15. Obtain instructions and advise on any pre-trial applications.

Preparation of Brief of Evidence by the Defence
In a criminal case it is usual for the police to take statements, conduct

records of interview and collect physical evidence. This material is then used by the prosecution to progress its case against the accused. Subject to some exceptions these materials are then provided to the defence.

It is the defence solicitor's responsibility to prepare a brief of evidence. This will assist the practitioner to prepare for and advance the case. As part of this process, the practitioner has an ongoing responsibility to ensure that all relevant documents have been obtained. This process may not be completed until the end of the case. Nonetheless, the brief should be in sufficient order to allow a practitioner to represent a client competently well in advance of a hearing.

A number of matters need careful attention when preparing a brief of evidence. Once the prosecution brief has been received, it is essential that the solicitor read the material and prepare a brief of evidence for his or her use, as well as for the use of others who may be assisting with the case. During this process the evidence should be sorted and an index created.

Index of Brief

An index should be prepared of all documents that have been obtained. These documents need to be put into categories. For example, the brief may contain:

1. Facts sheet;
2. Police statements;
3. Witness statements;
4. Witness records of interview;
5. Accused's statements and records of interview;
6. Expert reports;
7. Photographs and diagrams;
8. Client instructions;
9. Correspondence;
10. Defence witness statements; and
11. Legislation and cases.

The arrangement of each brief will depend on the documents that have been supplied by the prosecution and collected by the defence.

The index should list in alphabetical order under similar categories as listed above:

1. The full name of person;
2. Type of document;
3. Date of creation; and
4. Number of pages.

It is important to ensure that the full document has been obtained. It is good practice to include the number of pages of each document and to check that no pages are missing.

Examples:

Police Statements

Jones John, Sergeant of Police, *Statement*, 1 January 2002, 7 pages

Witnesses

Ryan Mark, *Record of Interview*, 10 February 2003, 20 pages

It should be remembered that it is important to be able to quickly turn from the index to the actual document. Therefore, a number should be placed next to each document referred to in the index and a tab with the same number on it placed on the full document in the brief. For example:

Police Statements

1. **Jones** John, Sergeant of Police, *Statement*, 1 January 2002, 7 pages

The index should be updated as additional material becomes available.

Summary of Evidence
Each document should be analysed and the gist of its contents recorded. This summary document should follow the index.

The summary allows the reader to quickly identify the contents of the brief, and at a later time to quickly refresh their memory. The summary is not a substitute for carefully reading of the whole brief. An example of a summary is:

1. **Jones** John, Sergeant of Police, *Statement*, 1 January 2002, 7 pages

Finds body at the Public Solicitor's Office on 20 December 2001

Observations
General observations, including reference to client instructions and identification of any relevant law should be included at the front of the brief. The observations should also include an outline of any actions being taken to further prepare the case.

In some cases, it may be appropriate to include an indication of lines of questioning for particular witnesses.

Copies of Brief
There should the at least two (2) copies of every brief, one copy should contain unmarked original documents and the other should be a bar table (working copy).

Instructions from Client to Solicitor

Instructions should be carefully recorded and retained on the solicitor's brief. Where client privilege may be involved, care must be taken to remove instructions before forwarding the brief to another solicitor.