

Protected Witnesses: s 21M *Evidence Act 1977*¹

Where the defendant has a lawyer to cross-examine the witness

It is a fundamental right of every person accused of a crime to represent himself at his trial. The defendant has elected to do so. You must not draw any adverse inference against him because he has exercised the right of every citizen.

However, if a defendant elects to defend himself, the law prevents him from cross-examining any witness who is a “protected witness”. (Name of witness) is a protected witness. That (name of witness) is a protected witness does not, by that fact alone, add to or detract from the witness’s reliability and credibility.

A lawyer has represented the defendant for one purpose: to cross-examine (name of protected witness). You might think that (name of lawyer) was at somewhat of a disadvantage in that he has not been involved in the whole trial. However the law provides for such a procedure in the trial of an unrepresented defendant who chooses otherwise not to have a lawyer represent him.

[The evidence of (name of protected witness) is, you might think, essential to the prosecution case. Indeed, you will probably conclude that the prosecution case stands or falls on your assessment of her reliability and truthfulness. Keep in mind that you cannot convict unless satisfied beyond reasonable doubt that the evidence upon which the prosecution relies to support (the counts) is both truthful and reliable.]

You must not draw any adverse inference against the defendant because he is required to have a lawyer for the purpose of cross-examining (name of protected witness).

If the defendant elects not to have a lawyer to cross-examine the protected witness

In the presence of the empanelled jury, say to the defendant:

¹ If a witness is a “protected witness” under s 21M of the *Evidence Act 1977*, the defendant may not personally cross-examine the witness: s 21N. In such cases, if he is unrepresented, the Court is obliged to inform him of the procedure provided for in s 21O(2).

If the defendant does not have a legal representative other than for the cross-examination of a protected witness, or does not have a legal representative for the cross-examination of a protected witness, the court must give the jury any warning necessary to ensure the defendant is not prejudiced by any inference that might be drawn from the fact that he has been prevented from cross-examining the protected witness in person: s 21R.

(Name of defendant) you have elected to represent yourself. As you are aware, (name of protected witness) is a protected witness who will give evidence on behalf of the prosecution. As you also know, you are therefore prevented from personally cross-examining that witness. You are entitled to have a lawyer, either to represent you generally at the trial or only to cross-examine (name of protected witness). Legal Aid is available free of charge. It is your choice.

You have informed the Court before today that you wish to represent yourself and that you do not require a lawyer to cross-examine (name of protected witness). Before the trial gets under way, I wish to give you a further opportunity to have a lawyer to represent you for the entire trial or else solely to cross-examine (name of protected witness). Do you want a lawyer?

At the time the witness is called, and repeated in the summing up

The same as the above direction (where lawyer cross-examines witness), except that for the second and third paragraphs substitute:

The defendant has chosen not to have a lawyer to cross-examine (name of protected witness). So (name of protected witness) will not be [was not] cross-examined, because the defendant is not permitted to cross-examine her. Cross-examination tests whether a witness is truthful and reliable. It is often an important aid to a jury's assessment of where the truth lies. As (name of protected witness) has not been cross-examined, you will have to assess the accuracy of her evidence without the assistance cross-examination might have provided.

And, instead of the last sentence in the first direction above:

You must not draw any adverse inference against the defendant because he has chosen not to have a lawyer, as a result of which the evidence of (name of protected witness) has not been tested by cross-examination.