



Review of the Law and Practice of Disclosure

IN CRIMINAL PROCEEDINGS IN SCOTLAND

Executive Summary

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by
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Part I: Introduction and Context

Chapter 1 - Remit

1. The remit of the review was:

“To review the law and practice of disclosure of evidence and other relevant material in criminal proceedings in Scotland with a view to making recommendations that will secure a system that is both practical and effective, recognising the rights of the accused, the interests of victims and witnesses and the wider interests of justice.”

2. The review was made necessary as a result of a number of recent court decisions, particularly in the cases of *McLeod v HMA (No 2)* [1998] JC 67, *Holland v HMA* [2005] SC (PC) 3 and *Sinclair v HMA* [2005] SC(PC) 28.

3. Proposals for changes in the law in this field are subject to constraints, arising from decisions of the European Court of Human Rights and of the Judicial Committee of the Privy Council (JCPC), applying the principles of the European Convention on Human Rights (ECHR) in accordance with the related provisions in the Scotland Act and the Human Rights Act. These decisions have to be taken as defining rules or principles which are binding on the courts in Scotland and also on the Scottish Parliament and Executive.

Chapter 2 - Review strategy and method of working

4. My remit from the Scottish Ministers was a personal one and the analysis and conclusions in this report are my own. However, while responsibility for the content of the report rests with me, the review has benefited from a great variety of assistance for which I am extremely grateful.

Chapter 3 - An Introduction to the problem

5. It is a long-established rule in the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, that is, to tell him what charges he faces and what is the evidence which the Crown intends to bring to prove the charges. Disclosure has the additional purpose of ensuring that any *exculpatory* material is identified and made available to the defence. This apparently simple aim raises a number of practical challenges.

6. The problem is compounded by two factors. The first concerns trust between the prosecution and the defence. Defence practitioners have expressed doubts about the extent to which current police attitudes and practices encourage or enable police officers to perform fully the duty of identifying and passing on potentially exculpatory material. It is important that they should be trusted to do so properly.

7. The second complicating factor concerns the role of the defence. The traditional assumption has been that, fair notice of the case having been given, it was for the defence to investigate it and look for exculpatory evidence. It is widely thought that the extent to which the defence carry out that function of independent investigation has been much reduced in recent years. Any reduction in independent investigation by the defence throws an even greater emphasis on the Crown's duty of disclosure.

Part II: The Duty of Disclosure

Chapter 4 - Issues of principle

8. A regime to govern disclosure has to deal with four main issues:
- to define the material which falls under the duty of disclosure;
 - to determine whether and if so in what circumstances material which falls under the general duty can be withheld, in order to protect other important interests;
 - to determine who should make the decision to disclose or withhold material, and to provide an appropriate procedure for reaching the decision;
 - to determine what consequences follow if material which should have been treated as disclosable is withheld by those responsible for the investigation and prosecution.

Chapter 5 - The general duty of disclosure

9. At least since the decision in *Smith v HMA* [1952] JC 66, it has been clear that the prosecuting authorities, including both the police and the Crown, have the initial information about potential criminal proceedings and vastly greater resources to investigate than does the defence and that they are under some corresponding obligation to disclose what they know in order to secure a fair trial.

10. On the other hand, there is very substantial reason to think that, because of the amount of material generated in even a simple inquiry, totally unrestricted disclosure would be impracticable and probably damaging to the operation of the criminal justice system. If, however, withholding information is to be justified it must be justified pragmatically, and there must then be a robust, fair and reliable system of selection of material which is not to be disclosed to make it acceptable to deprive the defence of the possibility, be it remote, of turning up some valuable piece of evidence.

11. What is needed, therefore, is a firm principle which can provide police and prosecutors with a proper basis of judgement. From various authorities, it is possible to draw several candidates for that principle. These could be regarded as different ways of saying almost the same thing, but there are shades of difference between them which could lead to significantly different results. In particular, what is said in *Sinclair* is not quite the same as what is said in *McLeod*. The formulation in *Sinclair* places less emphasis on the *materiality* of the evidence and more on the subjective assessment of the defence.

12. The formulation in *McLeod* is that what should be disclosed is “all material evidence for or against the accused” and “all information which would tend to exculpate the accused.” This correctly reflects the requirements of the European Court decisions, particularly *Edwards v United Kingdom* [1992] 15 EHRR 417. Having regard to the experience in other jurisdictions, particularly in that of England and Wales, it should enable the requirements of the defence for equality of arms to be met without overloading the process with useless and

irrelevant material. It is as clear and definite as can be expected and should be adopted in statute to clarify the law in Scotland.

13. Because any definition is open to interpretation, the statute should make it clear that the prosecuting authorities should have regard to the overriding requirement of a fair trial. Further it would be desirable to add to the precision of the process by specifying the principal categories of evidence or information which should be regarded as exculpatory and “material”.

14. There should therefore be a statutory definition of the duty of disclosure which should provide that, with a view to implementing the requirement of fair trials in criminal matters, the duty of the prosecutor in both solemn and summary cases is to disclose to the defence all material evidence or information which would tend to exculpate the accused whether by weakening the Crown case or providing a defence to it.

15. The statute should provide that the duty applies to all categories of material produced or recovered in the course of a criminal investigation and that it applies throughout the whole course of the investigation and prosecution.

16. The statute should provide that the material to be disclosed includes but is not limited to the following six categories:

- Evidence which may point to the conclusion that no crime has been committed or that no crime was committed on the date or at the place labelled.
- Evidence which may contradict evidence (real or oral) on which the Crown case will rely.
- Information which may cast doubt on the credibility or reliability of the Crown witnesses.
- Information which may be inconsistent with scientific or other expert evidence on which the Crown will rely or with inferences which may be drawn from such evidence.
- Evidence or information which may point to another person as perpetrator.
- Evidence or information which might reduce the degree of seriousness of the offence.

17. The key provisions on disclosure should be contained in primary legislation, but there should also be a code of practice issued under the statute. This could contain supporting information on the implications of the Act and could also specify standard processes.

Particular instances – statements

18. Over recent years reference to previous statements of witnesses has become very much more common in Scottish criminal trials. There is however a strong feeling, particularly among judges and sheriffs, that the effect of the greater use of statements on trials has been adverse, and that a great deal of time is liable to be taken up with excessive criticism of mere verbal discrepancies between the evidence and previous statements. This is not to

question the point established by *Sinclair* that in solemn cases, witness statements have to be disclosed. But it does call into question whether the same practice need apply in summary cases (see chapters 9 and 13).

19. It is now the norm for the previous statements of witnesses to be available to both prosecution and defence, but not to the witnesses themselves. The complaint has been made that too often the result is that the trial takes the form of a one-sided memory-test, where any discrepancy between the witness's words at court and the words in their statement may be the subject of meticulous cross-examination. This is not strictly an issue of disclosure but I agree with the suggestion that witnesses should be able to refer to copies of their statements when called to give evidence in court, in all cases where these statements have been made available to the Crown and to the defence. Elsewhere in the UK, the practice of giving witnesses copies of their statements is accepted and uncontroversial.

20. In *HMA v B* [2006] SCCR 692, Lord Hardie made some comments which might be taken as going further than *Sinclair*. On one reading, these could be taken to mean that all statements in the possession of the prosecuting authorities should be disclosed, relevant or irrelevant, material or immaterial. If that is the meaning intended, it seems to me that it goes much too far, and is not justified by the requirement of a fair trial. It should be made clear in any legislation that the rule that what has to be disclosed is relevant and material information applies to statements as well as any other material.

Particular instances – convictions and outstanding charges

21. A similar issue arises in relation to the previous convictions and outstanding charges of witnesses. There can be no doubt, now, that in solemn cases the ordinary rule is that convictions and outstanding charges should be disclosed. There is however an outstanding question as to whether there are any exceptions to that rule. There is no logical reason why the rule that it is material matters which have to be disclosed should not apply to previous convictions and outstanding charges, and I recommend that that should also be made clear in any legislation.

Chapter 6 - Withholding material

22. The authorities appear to recognise that in some circumstances material which would otherwise be disclosable may be withheld from the defence on grounds of public interest or damage to other persons or interference with their rights. There are two broad classes of case in which this question may arise. The first is where disclosure would be prejudicial to individuals. The second is where it would cause prejudice to the public interest in preserving security and preventing or detecting crime.

Questions of disclosure of sensitive material – the current system in England and Wales

23. There is extensive experience in England of the operation of a system of public interest immunity (PII) hearings to enable the courts to manage issues of disclosure, and in practice that system seems to operate reasonably satisfactorily. If the Crown Prosecution Service (CPS) considers any material both disclosable and sensitive, and cannot separate out the disclosable material and make it available in a way that does not compromise the public interest, it then has three options, namely to abandon the case; or to disclose the sensitive

material because the overall public interest in pursuing the prosecution is greater than that in abandoning it: or to seek a court order to withhold the material, by means of a PII application.

24. Initially, the CPS made a high number of applications to withhold material which was not in fact “disclosable” as it did not meet the statutory definition. The amount of court time taken up by such PII hearings was substantial, and represented a significant cost to the system as a whole. Later, following the House of Lords decision in *R v H and C* [2004] UKHL 3, there has been a sharp decline in the number of PII applications by the CPS.

25. I accept that the earlier practice in England and Wales caused difficulties for the CPS and the court, and that these were at times quite severe. Nevertheless, in my view, there are good reasons for allowing, at least initially, wider use of PII hearings, even for material which the prosecutor does not consider disclosable, especially when the defence is not aware of the existence of the material. This would enable the court to check the prosecutor’s combined judgement on whether the material is *disclosable* as well as sensitive. It would perhaps also contribute to building up trust in the fair operation of the system.

26. Under the current arrangements in England and Wales there are three types of PII hearing, depending on the level of sensitivity:

- Type 1 (*inter partes*): In this case, the prosecutor informs the defence of the category of material at issue, and the defence is allowed to make representations at an *inter partes* hearing;
- Type 2 (*ex parte*): The prosecutor informs the defence that an application is being made, but gives no details of the category of material. The defence may make broad statements to the court but the hearing then proceeds in the absence of the defence and accused.
- Type 3 (*ex parte*): The defence is not notified; hearing takes place entirely in their absence. These are the most serious cases and the CPS rarely uses this route. (The European Court has not ruled specifically on whether type 3 procedures are Convention compliant. Clearly, if the defence does not know that a PII application has been made, it is not able to launch an appeal).

27. The PII hearing is held before the judge who is to conduct the trial. The judge examines the material at issue in the context of the case and it is open to the court to order that the prosecution cannot proceed without full disclosure; or that the case may continue without disclosure of part or all of the material at issue. The court can only reach the latter conclusion if it considers, in the context of the case as a whole, that a fair trial is still possible.

28. The court may revise its decision during the subsequent course of the trial, if subsequent developments cast doubt on the conclusion that the accused can still have a fair trial without the sensitive material being disclosed.

29. Judges in England and Wales have power to call for special counsel to safeguard the interests of the defendant in *ex parte* PII hearings (i.e. type 2 and type 3 hearings). The purpose is to permit the retention of a Chinese wall between the defence and any sensitive material, while allowing the interests of the defence to be represented at the PII hearing. Special counsel can engage in adversarial argument about the strength of public interest in

keeping the material secret, and, briefed by the defence, draw attention to any particular issues to which the material was relevant. Communication between the defence and special counsel is, however, a one way street. Special counsel are not permitted to inform the defence of the nature of the sensitive material.

30. There has been some debate over whether special counsel should be used more widely in type 2 and 3 hearings, in the interests of fairness. However, in *R v H & C*, the House of Lords held that appointment of special counsel should only be ordered if the trial judge was satisfied that no other course would adequately meet the overriding requirement of fairness to the defendant. On this view, the use of special counsel will always be exceptional and a course of last resort.

Discussion

31. The problem of handling sensitive information can be simplified if a clear view is taken as to what types of material require to be disclosed. The majority of sensitive information may then not have to be treated as disclosable at all, and the dilemma about its disclosure would not then arise. However, it is certain that there will be some cases in which the dilemma will be unavoidable and, in the nature of things, these will often be complex and high-profile cases.

32. The contrasting European cases of *Jasper v United Kingdom* [2000] 30 EHRR 441 and *Edwards and Lewis v United Kingdom* [2005] 40 EHRR 24 show that, although the PII system in England and Wales seems to have worked reasonably well and has survived some Article 6 challenges, it is by no means free from problems. There are persistent doubts as to whether the system, particularly in relation to type 3 applications, is Article 6 compliant. My personal view is that these doubts may very well be justified, as regards type 3 and even type 2 cases, and that the fact that the initial decision whether or not to make an application at all lies with the prosecutor is a weakness in the system.

33. In trying to work through this set of problems as a whole, I have found it increasingly difficult to believe that the system of PII hearings provides an adequate and satisfactory long term solution for the dilemmas created by the competing pressures. These problems may have to be approached on a wider basis than disclosure in isolation, and to be thought through in terms of finding ways to secure fairness in the whole process of intelligence-based and covert investigation as well as prosecution. Any move in that direction would, however, have implications extending well beyond mere questions of disclosure.

34. Nevertheless, I have come to the conclusion that, despite the uncertainties, I should recommend the introduction of legislation to provide for a system of PII applications on the same lines as that operating in England and Wales. I do not see that there is any practicable alternative in the short or medium term. I have hesitated as to whether that recommendation should include type 3 applications, but it has been strongly urged by police and security organisations that they should be included. However, their use should be severely discouraged, except in the most unusual cases.

35. Legislation should provide for a system of “Public Interest Immunity” hearings in Scotland, along the lines of the English model. The trial judge or sheriff should conduct the hearings, and the use of ex-parte applications and special counsel should be possible when necessary. This facility should extend to both solemn and summary cases.

Chapter 7 - Decision making

36. If disclosure is to be limited to information which is relevant and material, someone will have to exercise judgement in deciding what should and what should not be disclosed. The best approach is to make it absolutely clear that the prosecution authorities have a responsibility to consider each document or item on its own merits, and decide whether it has potential exculpatory value.

37. It is inevitable that some of the decisions will be made by the police themselves. It follows that some understanding of the requirements of disclosure is necessary at all levels in the police service, increasing, of course, at senior levels. Police training is therefore a fundamentally important part of the package. The final decision as to what is to be disclosed will be taken by the procurator fiscal or Crown counsel so the position can be summed up quite simply: the police should tell the procurator fiscal everything that they know, apart from the totally and manifestly irrelevant, and the responsibility for discriminating between disclosable and non-disclosable material should lie with the prosecutor.

38. A reliable disclosure system therefore needs to address revelation of disclosable material by the police to the Crown, as well as disclosure by the Crown to the defence. The system in operation in England and Wales does this by providing for the preparation of schedules. Briefly, the police are required to list all material which “may be relevant” on a pair of schedules (for non-sensitive and for sensitive material) which they pass to the prosecutor, and the prosecutor is required to go through the schedules and confirm on them whether each item listed is “disclosable”. This imposes a discipline on the handling of information which in itself reduces the risk of error. In addition, the completeness of disclosure is promoted by disclosing the schedule of non-sensitive material to the defence, allowing them to make representations if they consider anything listed may be helpful to their client’s case.

39. I have had some doubts about the creation of schedules, because it does seem to me to be potentially over-cumbersome. I would therefore have preferred to be able to recommend a simpler system. It is, however, difficult to do so. A system of schedules of material in solemn cases should therefore be introduced, along the lines of the system in England and Wales.

40. In England and Wales, the provision of a defence statement in response to initial disclosure is mandatory in all Crown Court cases. However, in Scotland there are well-established rules defining the cases in which notice of a special defence has to be given. I have not been convinced that a general requirement for a defence statement would give any significant additional benefit, to justify the additional work and cost which would be generated.

41. The legislation or the statutory code of practice should explicitly place on the Crown a responsibility to review disclosure decisions in the light of any new information provided by the defence. The code of practice should set out a standard recommended form for a defence statement for this purpose.

Chapter 8 - The consequences of a failure to disclose

42. A breach of any of the recognised human rights guaranteed by the ECHR and the Human Rights Act is a very serious matter and can never be passed over lightly. On the other hand, it is important in the interests of justice that prosecutions should not be defeated by minor or technical infringements which do not substantially affect the fairness of the proceedings. Most if not all systems recognise this in their laws governing criminal procedure by providing that a conviction is not to be quashed or set aside unless there has been a miscarriage of justice, or some similar phraseology.

43. The present position in Scotland is complicated by the provisions of the Scotland Act and the interpretation which has been given to it. Section 57(2) of the Act provides:

“A member of the Scottish Executive has no power to make any subordinate legislation or to do any other act so far as the legislation or act is incompatible with any of the Convention rights or with community law.”

The Lord Advocate is a member of the Executive, and it has, in consequence, been held that the Lord Advocate has no power to proceed with a prosecution when to do so involves a breach of a convention right. On one view, the effect of the decision in *Sinclair* may be to equate a failure in disclosure, of whatever kind, with an unfair trial. If that is correct, it seems to me that the effect of that decision is much too stringent and is prejudicial to the proper administration of justice.

44. It is possible that the question of the meaning and effect of section 57(2) will be reconsidered in cases which will be heard by the House of Lords in the near future, in particular in an appeal against the decision of the Inner House in *Somerville v The Scottish Ministers* [2006] CSIH 52, 2007 SLT 96.

45. The interpretation of the Scotland Act is a matter for the JCPC, whose decision will be binding on the Scottish Parliament and Executive. In view of the present uncertainties, I do not find it possible to make a positive recommendation, but suggest that, if there is a remaining doubt about the consequences of a failure in disclosure, consideration should be given to the possibility that the Scottish Parliament might legislate in order to try to resolve the doubt.

Chapter 9 - Principles for summary cases

46. Many summary prosecutions are concerned with minor offences involving quite straightforward issues and limited evidence. To implement a disclosure regime in all summary cases at the same level as is recommended for solemn proceedings would risk creating a great deal of unnecessary work for both police and prosecution, and sometimes also for the defence. In the application of Article 6, it is recognised that the principle of proportionality applies in deciding what measures are necessary to implement the right to a fair trial. Nor do I think that the possibility of a different regime for summary proceedings is excluded by the decisions in *Sinclair* and *Holland*.

47. A distinction should be preserved between what the police and prosecutors decide to do in the interests of efficiency and good management of prosecutions and what is required by the obligation of disclosure. It would not be desirable to allow the disclosure obligation to

drive investigation and prosecution practice in other respects: for example, the police and prosecutors should not be put in the position of being obliged to create witness statements which they would not think necessary for their own purposes in order to have something to disclose.

48. What is needed is a simple and reliable regime, coupled with the possibility of applying to the court for assistance where the needs of a particular case make it appropriate to do so.

49. I considered whether I should recommend the creation of schedules in summary as in solemn cases. However, in a very great many summary cases, once the material needed for the presentation of the Crown case has been identified and produced, there will not be a great quantity of relevant material left over, and there should be no real problem in deciding what to do with it. Most importantly, when I consulted summary practitioners in Scotland they did not think that it would serve a useful purpose to prepare schedules in the way proposed for solemn cases.

50. Issues of sensitivity in regard to the personal history of witnesses may well arise frequently in summary cases, for example in domestic violence cases. There is increasing pressure to ensure that the privacy of complainers and witnesses is respected. It follows that the arrangements for PII applications must be available in the summary courts.

51. Legislation should allow for the use of Public Interest Immunity applications in summary cases as in solemn; but there should be no requirement for the production of schedules in summary cases.

Part III Practical Application

Chapter 10 - Responsibilities of the police

52. Police training from the probationary level should be designed to enable officers to understand the principle of the right to a fair trial and the advantages which a proper performance of their duty has to investigation and prevention of crime as well as to prosecution. Equally, it is important to “sell” the principle to serving officers.

53. The Association of Chief Police Officers in Scotland (ACPOS) and the Scottish Police Services Authority (SPSA) should review how the principles related to disclosure are presented to probationers, and should consider the need for a Scotland-wide initiative to promulgate the principles and practice in this report to all serving officers. ACPOS is in the process of developing a central unit to prepare plans for effective training and to monitor results. Such a unit would have a valuable role, at least for a limited time. There would also be value in having, again for a limited time, a system of inspection or supervision to assist individual forces and the SPSA in ensuring that the effect of training is not dissipated.

54. The code of practice should include a section outlining the responsibilities of the investigating officer to conduct reasonable lines of enquiry and identify possible exculpatory evidence.

55. Under the current Scottish system, there is potential for misleading or inaccurate statements to be recorded in witnesses' names if the officer's interpretation departs from the witness's intention, or if errors are made during writing up or typing. To minimise this risk, in any investigation of a serious crime which could lead to a solemn criminal trial, the norm should be for all statements taken from civilian witnesses to be written or typed out in full and signed by the witness, at or close to the time when the statement is taken.

56. When the police are required to disclose a civilian witness statement to the procurator fiscal but no signed version of the statement is available, the information that is disclosed should, as far as possible, consist of the exact words used by the witness.

57. In summary cases, the practice of getting full statements signed by witnesses will often be beneficial; the police should therefore adopt this practice whenever it is practicable to do so and a proportionate use of their time and the witness's time.

58. Greater precision in the taking of statements will be made easier by one recent and one anticipated development. Firstly, the National Standard Statement is a template for recording statements in a standard form, split between disclosable and non-disclosable content. Secondly, an "electronic notebook" or Personal Digital Assistant is currently being piloted in Lothian and Borders Police and under active consideration by other forces.

59. During the process of an investigation police officers may need to inspect a great deal of information which has been obtained or generated. It is imperative that they should accurately record and retain the information which *may be relevant* either to proof of the case or to exculpation. The statutory code of practice should include a definition of material which "may be relevant", which could be based on that in the CPS Disclosure Manual in England and Wales:

"...Anything that appears to an investigator, or the officer in charge of an investigation or the disclosure officer to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances unless it is incapable of having any impact on the case".

60. The organisation of retention and recording must be secure. Police forces should therefore be encouraged to carry out a full review of their systems and practices, in the light of this report, in order to secure clear and reliable systems, backed by effective IT.

61. Each individual Scottish Police Force has guidance on the management of and retention of material. These guidance notes should be reviewed to ensure that they conform to requirements. They should also form part of the police training package to ensure that frontline officers are fully aware of their duties and responsibilities of recording, retention and storage of material. A section outlining the responsibilities of officers in charge of investigations should be included in the code of practice detailing their duties in respect of the reviewing, recording and retaining of material obtained or generated during investigations.

62. In large scale investigations, Senior Investigation Officers (SIOs) should consider the appointment of a dedicated officer to deal exclusively with the reviewing of the information obtained or generated, the preparation of schedules and subsequent revelation to the procurator fiscal. This officer should be suitably trained in revelation and disclosure

requirements and should work closely with the SIO and the procurator fiscal. The responsibilities of such an officer should be set out in the code of practice.

63. The Home Office Large Major Enquiry System (HOLMES2) is a computer database that has been designed to aid investigation into large-scale enquiries. It can be used by the police to collate and subsequently cross reference all information gathered in a major investigation.

64. HOLMES2 has a customised disclosure facility, though this is currently only in use in England and Wales. This facility will require to be reviewed by the HOLMES community in Scotland and adapted to comply with Scottish disclosure requirements. Similarly there will be significant training implications for dedicated officers and HOLMES staff.

Chapter 11 - Advance disclosure of the prosecution's case

65. The police and the Crown require to give notice of the prosecution case in accordance with statutory requirements, as well as to identify and disclose any exculpatory material. The prosecution case is comprised of material on which the Crown intends to rely at trial. Currently, different procedures apply, depending on whether the case is proceeding on indictment or summarily.

Chapter 12 - Disclosure for solemn cases – schedules of material

66. In Scotland, as already happens in Northern Ireland, all material that may be relevant to a solemn case should be listed on a schedule, without a distinction between “used” and “unused” material.

67. The schedules will have twin purposes: to ensure that the fiscal is aware of all material held by the police which may be relevant to the case; and secondly to inform the defence what material has not been provided to them. The code of practice should set out the procedures to be followed.

68. The police should include on the schedules all items that “may be relevant” – ie anything which could have a bearing on the outcome of the case – and should err on the side of including material in interpreting this requirement. There should be one schedule for non-sensitive material and another for material which is “sensitive” – ie if its disclosure would create a real risk of serious prejudice to an important public interest.

69. The Crown will then require to go through the schedules and consider:

- whether they wish to see any of the items for their own purposes;
- whether they agree with the police classifications of items as disclosable or non-disclosable and as sensitive or non-sensitive;
- whether the descriptions of items are sufficiently informative and fit-for-purpose, including for defence use in the case of the non-sensitive schedule.

The Crown will add their comments and revisions to the schedules and then send a copy of the non-sensitive schedule to the defence.

70. It will be open to the defence to apply, informally to the Crown or formally to the court, for disclosure of any item on the schedule in the usual way. However such requests should not require to be granted unless the defence can justify why there is a need for disclosure.

71. The statutory code of practice should make it clear that the Senior Investigating Officer, Reporting Officer or dedicated officer will be responsible for ensuring that the material has been reviewed, and that the schedules prepared and submitted are complete.

Chapter 13 - Disclosure for summary cases

72. As part of the summary justice reform programme, the Lord Advocate has announced the Crown's intention to issue a summary of evidence with the complaint in all summary cases. The practice of providing a summary of evidence at the earliest possible stage is right in principle and should be welcomed and built upon.

73. If the summary is to perform its function, enabling the defence to give early advice to their client and promoting speed and efficiency, it will require to give a reasonably full account of the evidence available at the time of the report, including:

- the basis of the case against the accused;
- the main witnesses in the case; what type of notes or statements (if any) has been taken from each, and the main points that each will speak to;
- whether there is CCTV which supports the prosecution case;
- whether forensic information has been recovered and if so whether it has been analysed; and crucially
- whether there is any material evidence or information which would tend to exculpate the accused whether by weakening the Crown case or providing a defence to it, and if so, the nature of this.

74. Amendments should be made to the standard prosecution report template, and any other (abbreviated) report templates agreed for use by the Crown and the police, to prompt for this information, and a police officer should be required to confirm the completeness and robustness of the information provided.

75. In summary cases, following a plea of not guilty the defence should continue to receive a provisional list of witnesses covering those the Crown intends to call and any who might be expected to support the defence. It should be possible to provide this considerably faster than the timescale allowed for post-plea disclosure under the existing system. A plea of not guilty should also trigger action by the Crown to disclose, prior to the Intermediate Diet, a *provisional* list of productions – with the ability to inspect any of the productions on request; and all information which meets the *McLeod* (or statutory) disclosure test if it has not already been provided with the complaint – and this could include any statements taken from witnesses who dispute or doubt the Crown's case.

76. In most summary cases, this level of information should be sufficient. However, in most summary cases following a plea of not guilty, the Crown's current practice is to disclose also the statements and criminal history records of all Crown witnesses. I consider that this goes beyond the minimum required by Article 6. It should therefore be open to the Crown to decide to what extent to continue these practices for summary cases in the sheriff court and in the district court.

77. In cases (if any) in which disclosure of Crown witness statements is not provided following a plea of not guilty, it would need to be possible for the defence to request further details of notes or statements recorded from witnesses. Although I see nothing in the law on summary cases which obliges the Crown and police to provide these as well as the summary of evidence, it might in practice help to remove doubt and uncertainty if they complied with these requests and provided such statements which already existed. However, for police witnesses, it is rare that any written "statement" will exist in addition to the summary, and I see no benefit in requiring officers to produce these on request.

Chapter 14 - Redaction, and resolution of disputes

78. Redaction is an obvious means of enabling the prosecuting authorities to meet their obligation to ensure that the defence receive the material that they require for the proper preparation and presentation of their defence, while also ensuring that the Crown complies with other Convention rights. Differences of opinion will, however, inevitably arise about the degree of editing which is appropriate and acceptable to the defence.

79. Redaction is an appropriate means of trying to reconcile competing interests. However, the Crown's internal guidelines should be checked in light of this report, to ensure that they clearly and accurately set out guidance on redaction and including (i) when information should be classified as irrelevant and sensitive and (ii) the proper practice to follow where information is relevant and sensitive. The guidelines should if possible be made public, so that all parties can share a common understanding of how redaction is carried out.

Chapter 15 - The Unrepresented accused & Protection of disclosed material

80. It is important to ensure that the accused's right to a fair trial under Article 6 of the Convention is balanced appropriately against the rights of victims and witnesses under Articles 2 and 8. This can be a particularly delicate balancing exercise where the accused has chosen to represent himself.

81. In principle the unrepresented accused has an equal right of access to the case file, although the arrangements for providing access may be different. Two existing methods for protecting the rights of other parties are the limitations on the type of case in which an accused can represent himself; and the provision of disclosure by allowing access to material rather than providing copies of it.

82. In England and Wales, sections 17 and 18 of the Criminal Procedure and Investigations Act 1996 make it a contempt of court to misuse disclosed information. Introducing similar legislation in Scotland would be a logical companion to a more rigorous system of disclosure by the prosecution authorities. Given the increase in the amount of

personal information which may require to be disclosed in different types of cases, a similar offence should be created in Scotland.

Part IV: Some specific issues

Chapter 16 - Crown Precognitions

83. There is no requirement within *Sinclair* by which the Crown must routinely disclose precognitions to the defence, and nor is routine disclosure of precognitions necessary to ensure that the accused has a fair trial in terms of Article 6. There remains, however, a duty, as stated in *McLeod*, to disclose any information elicited during the precognition process that might tend to exculpate the accused. Current practice for the fulfilment of this duty should be strengthened in one respect: rather than merely advise the defence that they should precognosce the witness, it would be appropriate for the Crown to tell the defence what the material evidence is, while not disclosing the actual precognition. Such intimation of material evidence should, insofar as possible, be made in writing.

84. Ambiguity can arise when the Crown ask the police to take an additional statement from a witness after the case has progressed from the “investigation” stage to preparation of the prosecution. For disclosure purposes, all statements taken by police officers should, *prima facie*, be treated as “statements” rather than as “precognitions”, and so be eligible for disclosure.

Chapter 17 - Visually-recorded interviews and CCTV footage

85. It is important that disclosure procedures and protocols can be applied to visual-image recordings as to documents. Visually-recorded footage, especially recordings of vulnerable witnesses, may be unusually sensitive. Just as with a sensitive document, this cannot normally outweigh the requirement for recordings with potential exculpatory value to be made available to the defence. However, it may commonly be necessary to effect disclosure not by passing a copy of the tape to the defence, but by arranging for them to view it under controlled conditions.

86. Contributors to the review have emphasised the importance of ensuring that there is equipment available on which recordings can be played, and I urge that efforts continue to address this problem.

87. A further question which has been raised about CCTV evidence concerns whether entire tapes must be viewed by the defence when the relevant part of the footage may last for a few minutes or even less. There is no requirement for the prosecution to disclose an entire tape, but only the relevant part of it. However, where an extract is provided the defence should be told the duration of the entire tape; in the usual way, they should be entitled to apply to the Crown and if necessary the court for additional footage, provided they can justify such a request.

Chapter 18 - Criminal History records

88. In both solemn and summary cases, the Crown should obtain criminal history records for all witnesses whom they intend to call at trial. This is necessary to allow the Crown to consider the potential significance of this information to the case as a whole.

89. In solemn cases, the Crown should then apply the *McLeod* test to each of these records, with only those which may be relevant to the case being disclosed. In summary cases, disclosure of this information should only be made if it is requested. However, the Crown should still be required to obtain the information, partly for its own purposes, and partly to avoid delays in the event that such a request is made.

90. The issue of disclosing the findings of Children's Hearings which are relevant to the defence of an accused may require further consideration, in the light of the principles and policies of the Children (Scotland) Act 1995. In the meantime, the Crown should not simply apply *Holland* and make disclosure automatically. It will be necessary to give careful consideration to the extent to which a decision of a Children's Hearing should be disclosed and, if there is any doubt, to refer the issue to the court under the PII procedures.

Chapter 19 - Victim Statements

91. Victim statements are not the same as statements gathered by the prosecuting authorities as part of the investigation. Their purpose is not investigatory, but instead focussed on the effect of the crime on the victim. Accordingly, victim statements should not be disclosed as part of routine advance disclosure of witness statements, but where the victim statement does contain material that would tend to exculpate the accused, the Crown must provide the defence with written details of that material. This need not take the form of providing the defence with a copy of the statement.

Part V: The Next Steps

Chapter 20 – The need for early legislation and action

92. What emerges from the review is that a workable and fair system requires that there should be a clear definition of the duty of disclosure coupled with a reasonable and flexible approach to its application, bearing in mind that the purpose is to secure, overall, a fair trial. All the recommendations are intended to make it possible to achieve that combination. I hope that this report will itself help to promote the clarity and security that the system of disclosure needs; as no doubt will future decisions of the higher courts. However, a range of legislative and executive action is also needed to secure substantial improvements to disclosure practices at the present time.

Chapter 21 – Comments on possible resource implications

93. I have been conscious throughout this review of the potential for disclosure requirements to impose very heavy burdens on the police and the Crown, or to have severe resource implications for defence teams. We have seen this to some extent over the last two years since *Holland* and *Sinclair*. The police and the Crown have been devoting considerably

more time to disclosure matters, which must have had some impact on their ability to fulfil other parts of their important functions.

94. Nevertheless, I do not believe that the requirements of disclosure, which of course derive from the requirement for trials to be fair, need impose unsustainable burdens on the system. Without doubt there is a substantial amount of work involved, but disclosure systems which are well-designed and efficiently carried out can also help to reduce work later on in the process. As always, the key to achieving these goals within the available budget will depend on clarity of the requirements, good organisation and training, and good use of IT. I hope this report has contributed at least to the first of these.

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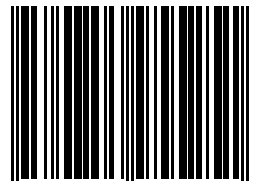
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