

A statutory basis for disclosure in criminal proceedings in Scotland
Proposals for legislation to implement the recommendations in the Coulsfield report

A Scottish Government consultation paper

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Introduction

On 12 September 2007, the Scottish Government published the report of Lord Coulsfield's independent Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland (<http://www.scotland.gov.uk/Publications/2007/09/11092728/0>), together with an Executive Summary (<http://www.scotland.gov.uk/Publications/2007/09/11092705/0>).

The Cabinet Secretary for Justice, Kenny MacAskill, welcomed the report and announced the Government's intention to consult publicly on the key proposals, with a view to subsequent legislation.

Lord Coulsfield's report contained 44 recommendations, some calling for legislation and others requiring action by the police and the Crown Office and Procurator Fiscal Service. The main purpose of this consultation paper is to invite views on those recommendations which will require legislation, though it also invites specific comment on his recommendations, not requiring legislation, relating to disclosure for summary cases.

Almost all the other recommendations which do not require legislation are already being taken forward by the Crown Office and Procurator Fiscal Service (COPFS) and the police. These recommendations are listed in the Annex to this consultation paper, and question U invites comments on these or on any other matter arising from Lord Coulsfield's report.

Format of the sections of this paper

Each section of this consultation document considers and seeks comments on a single recommendation or a group of related recommendations from Lord Coulsfield's report. Each section comprises:

- a box containing the key extracts from the report and/or the Executive Summary¹. To facilitate cross-referencing, full or part paragraphs from the report retain their original numbering, and full or part paragraphs from the Executive Summary are identified by ES and their original paragraph number. Lord Coulsfield's specific recommendations are included in bold, identified by their number from the summary of recommendations in the report, prefixed by R.

and

- a box containing questions for comment.

We hope that the inclusion of extensive extracts from Lord Coulsfield's report will make it possible for this consultation document to be read and understood in isolation. However, those wishing to see the full context are encouraged to refer also to Lord Coulsfield's [Report](#) itself.

¹ The Executive Summary was of course itself an abbreviation and paraphrase of the full report.

How to respond to this consultation paper

We are inviting written responses to this consultation paper by **Friday 25 January 2008**. **Please send your response with a completed Respondent Information Form** (see “Handling Your Response”, below) to:

disclosureconsultation@scotland.gsi.gov.uk

or

Disclosure Consultation, Criminal Procedure Division, GW14 St Andrews House, Regent Road, EDINBURGH EH1 3DG.

If you have any queries contact Bill Barron on 0131-244-3320.

This consultation document contains 21 questions designated by the letters A – U. We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Government has an email alert system for consultations ([SEconsult: http://www.scotland.gov.uk/consultations/seconsult.aspx](http://www.scotland.gov.uk/consultations/seconsult.aspx)). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces Scottish Government distribution lists, and is designed to allow stakeholders to keep up to date with all Scottish Government consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** attached to this consultation paper, as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

An interactive version of the **Respondent Information Form** may be accessed [here](#). After downloading the form, double-clicking on the appropriate boxes will allow you to tick them, and the completed form can then be attached to your email when you send us your comments. A copy of the form is also attached at Appendix B, as an alternative, especially for those who prefer to send comments by post.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library and on the [Scottish Government consultation](#) web pages by 3 March 2008. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next ?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us to reach a decision on the way forward. We aim to issue a report on this consultation process by 30 April 2008.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to

disclosureconsultation@scotland.gsi.gov.uk

or

Disclosure Consultation, Criminal Procedure Division, GW14 St Andrews House, Regent Road, EDINBURGH EH1 3DG.

Consultation on a statutory basis for disclosure in criminal proceedings in Scotland

Statutory definition of the disclosure requirement

Lord Coulsfield's analysis and recommendations:

ES5. 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.

ES9. 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.

ES10. 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.

5.33 What is needed is a firm statement of principle or rule which can, in the first instance, provide police and prosecutors with a proper basis of judgement. From the authorities canvassed above [in the full report], it is possible to draw several candidates for that principle:

Edwards: “All material evidence for or against the accused” (remembering that at another point the court identified the defect as being that “relevant” evidence was withheld).

The old English rule: “All material matters which affect the case relied on by the prosecution, whether they could strengthen or weaken the prosecution case or assist the defence case.”

CPIA (as amended): “Any prosecution material... which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.”

Australian guidelines: “Any material which might be relevant to guilt or innocence of the defendant.”

Stinchcombe: “All material evidence whether favourable to the accused or not.” “All evidence which may assist the accused even if the Crown does not propose to adduce it.”

McLeod: “All material evidence for or against the accused... information which would tend to exculpate the accused” (LJG). “Not all evidence but all material evidence” (LJC).

Sinclair: “All material evidence... any evidence which would tend to undermine the prosecution’s case or assist the case for the defence is to be taken to be material” (Hope).

5.34 These formulations 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, it seems to me that what is said in *Sinclair* is not quite the same as what is said in *McLeod*. The difference, in my view, is that the formulation in *Sinclair*, deliberately or not, places less emphasis on the *materiality* of the evidence, objectively considered, and more on the subjective assessment of the defence. The different formulations were discussed at some length in the Reference Group². In these discussions, it was argued strongly that “evidence which may assist the case for the defence” had a wider scope than “material evidence for or against the accused”. From comments made to me by judges and sheriffs, it is clear that similar arguments have been repeatedly canvassed in court since the decision in *Sinclair* and have given rise to a degree of uncertainty. The differences between the rival formulations may be subtle, but they are sufficient, given the existing apparent uncertainty, to make it desirable to set out the rule for Scotland in statute.

ES12. 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.

ES13. 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”.

R1. The formulation in *McLeod*, to specify what requires to be disclosed, should be adopted in statute to clarify the law in Scotland. (see also recommendation 5)

R5. There should 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.

² Lord Coulsfield’s review was supported by a Reference Group of individuals and representatives of organisations with a close involvement in the criminal justice process. The membership of the group is listed at paragraph 2.4 of the [Report](#).

R6. 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.

R7. 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 libelled.**
- **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.**

Questions:

A. Do you agree that there should be a statutory definition of the disclosure requirement?

B. Do you agree that the statutory requirement should be based on McLeod and could be “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”?

C. Do you have any comment on recommendations 6 and 7?

Disclosure of statements

Lord Coulsfield's analysis and recommendation:

5.39 The effect of *Sinclair* is to require production and disclosure of all statements of persons whom the Crown intend to call as witnesses. That, I think, does have to be taken as a fixed requirement in solemn cases, although if the matter were free from direct authority, I would be inclined to suggest that in most cases there are a number of witnesses whose evidence is not central and that in such cases a summary or brief indication of the nature of the evidence would be amply sufficient.

9.9 These considerations seem to me to have still greater force in the summary setting, because what a witness has said on a previous occasion may have been recorded in a number of ways and to a greater or lesser degree of detail. For example, police officers called to a brawl in a crowded pub may have other preoccupations, such as apprehending suspects without giving rise to increased disturbance and renewed violence, and may have to content themselves with one or two words scribbled in a notebook as a "statement". I therefore think that the duty of disclosure does not require the creation and disclosure of formal statements of every prosecution witness in every summary prosecution where there is a plea of not guilty, let alone in the much greater number of cases which the police report to the procurator fiscal. It should, in my view, be quite sufficient to protect the fairness of the trial if the defence is entitled to ask for either copies of, or an opportunity to inspect, records of what has been said by the witnesses whom the Crown propose to use, which the Crown and the police have, in the form in which they already exist, that is, as full statements or copies of notes. I appreciate that there may be pragmatic reasons for making wider use of disclosure of statements but in this report I am concerned only with what the duty of disclosure requires.

ES20. 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.

R3. 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.

Question:

D. Do you agree that the requirement for disclosure of statements should include production and disclosure of all statements of persons whom the Crown intend to call as witnesses in solemn cases (as per Sinclair), and otherwise be defined in accordance with recommendation 3?

Disclosure of criminal history records

Lord Coulsfield's analysis and recommendations:

5.45 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 may be cases in which a conviction is so old or so trivial or so unrelated to the sort of issue which arises in the prosecution that it could not reasonably be regarded as of any value to the defence. That issue arose in *McGhee v HMA* but has not been resolved in that case. Again, I find it difficult to see any 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.

18.1 *Holland v HMA* placed an obligation on the Crown routinely to obtain and disclose all previous convictions and outstanding charges for those witnesses that the Crown intends to call at trial. As I explained earlier, in my view this does not necessarily apply to summary cases; even for solemn cases the extent of the obligation is not entirely clear, and I believe that an interpretation which required disclosure of these even when they could have no impact on the case would risk being in breach of Article 8. Having spoken to a number of practitioners and taken into consideration the rights of victims and witnesses during the course of the review, I recommend the system set out below.

R4. The rule that it is material matters which have to be disclosed should also apply to previous convictions and outstanding charges, and that should also be made clear in any legislation.

R40. In both solemn and summary cases, the Crown should obtain criminal history records for all witnesses whom they intend to call at trial.

R41. In solemn cases, the Crown should then apply the *McLeod* (or statutory) disclosure test to each of these records, with only those which may be relevant being disclosed.

18.5 In summary cases, the defence should be entitled to receive the same information on request. However, in many summary cases the defence see no need to consider the previous criminal history records of Crown witnesses, and it would therefore be a waste of effort to disclose them routinely.

R42. For summary cases, disclosure of Criminal History 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.

Questions:

E. Do you agree that the disclosure requirement should only extend to previous convictions and outstanding charges of witnesses where they comprise material information?

F. Do you agree that in summary cases, the Crown should provide this information on request, rather than automatically?

Code of practice

Lord Coulsfield's analysis and recommendations:

R8. 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.

10.5 The actual application of the requirements to pursue alternative lines of enquiry and to identify exculpatory evidence is a matter for the officer in charge of a particular investigation. However, there needs to be a system for ensuring as far as possible that the police do not lose sight of any areas of investigation that positively exculpate the accused or undermine the prosecution case, and the police also need to recognise that what they do can subsequently be open for examination. In major investigations the police Senior Investigating Officer (SIO) will record decisions on lines of enquiry, and the recording of such decisions by the officer responsible for the investigation should be encouraged even in the less complex cases.

17. 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.

10.14 I have recommended that there should be a statutory definition of disclosable material. However, the police need to have a practical working rule of thumb when deciding what material to record and retain, and that rule should be designed to encourage them to include rather than exclude material whose relevance may be doubtful or marginal. 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, and should err on the side of recording doubtful material rather than discarding it. I therefore recommend that the statutory code of practice should include a definition of material which "may be relevant", which could be based on that in the Crown Prosecution Service Disclosure Manual in England and Wales, where (at Chapter 1, Paragraph 6) "relevant material" is defined as:

“...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”.

I think that this definition is sufficiently broad to cover material that has either been obtained or generated during the life of an investigation, and could be used as the working guide for investigators.

21. The statutory code of practice should include a definition of material which “may be relevant”, which could be based on that in the Crown Prosecution Service Disclosure Manual in England and Wales.

Questions:

G. Do you agree that there should be a statutory code of practice to set out disclosure procedures and responsibilities in more detail than the legislation?

H. Do you agree with the recommended definition of material which “may be relevant”, to inform police judgements on whether information requires to be retained and recorded?

Decision making

Lord Coulsfield’s analysis and recommendations:

7.1 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. Since the prosecution authorities have all the information which may be disclosable, it is inevitable that they will require to exercise some discretion in the process of decision as to what is disclosable, because no one else is in a position to make the decision, at least initially. I do not think this observation is in conflict with *Rowe and Davis*: what that case decides, I think, is that the prosecution cannot at their own hands decide not to disclose something which otherwise passes the test for determining what is disclosable, however that test is formulated.

7.2 It follows that someone must decide which documents and items are disclosable and which are not. I did consider whether this process could be simplified by devising a categorisation based on types of material: some which should automatically fall to be disclosed; some which would not normally be disclosed; and others on which no presumption could be made in advance. However, on consideration I have concluded that it is impossible to devise a classification which would be really useful and reliable: any list of “normally disclosable” documents would inevitably be superficial, and would risk leading to too much attention being placed on those within the list, and not enough on those outside it. The best approach, in my view, is:

R10. It should be made 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.

ES37 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.

R11. 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.

Question:

- 1. Do you agree that the police and the Crown should carry the responsibilities set out in recommendations 10 and 11?*

Public Interest Immunity

Lord Coulsfield's analysis and recommendation:

ES22 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.

ES23 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.

ES26 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).

ES27 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.

ES28 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.

ES29 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.

ES31 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.

ES32 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.

ES33 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.

ES34 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.

R9. 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.

R15a. Legislation should allow for the use of Public Interest Immunity applications in summary cases as in solemn.

Questions:

J. Do you agree that there is a need for a system of Public Immunity Interest hearings to be introduced in Scotland?

K. Do you have any comments on the proposed details of the system, as set out in Lord Coulsfield’s description and analysis of the system in England and Wales?

Schedules for solemn cases

Lord Coulsfield's analysis and recommendations:

7.5 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. Flaws and insecurity in either part of the process can undermine the effectiveness of the disclosure system overall. I have noted above that decisions and judgements will inevitably be taken by police officers and by the Crown. The obvious next question is whether safeguards can be put in place to minimise the risk of error in these decisions, and to maximise the scope for reversing any that are wrongly called. 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 *revelation* is promoted by requiring the police to apply a test (material which “may be relevant”) which is far wider than the disclosure test later applied by the Crown (material which may be capable of undermining the prosecution or assisting the defence); and
- 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.

7.6 It is clearly necessary to keep records of material obtained during an investigation, except possibly material which is so obviously irrelevant that there can be no question of it figuring in any subsequent proceedings. It is also obviously desirable to provide police officers with a structured procedure within which decisions can be made and recorded. Nevertheless, 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, and as a result something very similar to the English system seems to be required for all solemn cases.

9.8 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. In addition, in discussion with practitioners in England, it has been said that the system of schedules probably is operated in the bigger and more serious cases, but that it is doubtful whether it really is operated, at least fully, in more routine cases. Most importantly, summary practitioners in Scotland did not think that it would serve a useful purpose to prepare schedules in the way proposed for solemn cases.

R12. A system of schedules of material in solemn cases should be introduced, along the lines of the system in England and Wales.

R15b. There should be no requirement for the production of schedules in summary cases.

R26. 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.

R27. 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. The code of practice should set out the procedures to be followed.

R28. 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.

R29. 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.

R30. The statutory code of practice should make it clear that the Senior Investigating Officer (SIO), Reporting Officer (RO) or dedicated officer will be responsible for ensuring that the material has been reviewed, and that the schedules prepared and submitted are complete.

Questions:

L. Do you agree that requiring the production of schedules of material would provide an appropriate safeguard for the accuracy of disclosure in all solemn cases?

M. Do you have any comments on the detailed arrangements proposed in recommendations 26-30?

N. Do you agree that schedules should not be required for summary cases?

Information from the defence

Lord Coulsfield's analysis and recommendations:

7.7 A further important question is how to allow the defence to convey information about their thinking to the prosecutor, in order to inform and stimulate decisions on disclosure which accurately reflect the intentions of the defence. In most cases it is likely to be obvious to the Crown whether any material they hold is potentially exculpatory, but sometimes there will be unexpected lines of defence which the prosecutor could not reasonably foresee, and in these cases advance notice by the defence will put the prosecutor in a better position to judge what material needs to be disclosed. There is no doubt that it can be to the advantage of the defence to provide such a statement if there is a particular and positive line of defence and the defence are looking for material to support it. Any system of disclosure therefore needs to enable and encourage the defence to make an advance statement of their position whenever they perceive that this would help to secure fuller relevant disclosure and a fair trial for their client.

7.8 The statutory system in England and Wales goes further than this. Under the CPIA, the provision of a defence statement in response to initial disclosure is mandatory in all Crown Court cases, and the statement is required to specify the respects in which the defence takes issue with the Crown case. As I understand the position, that requirement was intended not only to assist in the process of disclosure, but also to help in case management. However, discussion with practitioners has indicated that in the majority of cases defence statements are late, unspecific and unhelpful. It has been argued to me that that is not a reason for not insisting on the provision of defence statements, and that the obligation to provide them could be more rigorously enforced. Experience suggests, however, that it would be difficult to enforce a requirement without either causing delay, or prejudicing a legitimate defence or both. In Scotland there are well-established rules defining the cases in which notice of a special defence has to be given. If it is necessary for the defence to apply to the court for additional disclosure, as discussed later, it will be necessary for them to explain the reasons for the request. 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.

R13. 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.

R14. The code should set out a standard recommended form for a defence statement for this purpose.

Questions:

- O. Do you agree that the defence should not be required to provide a defence statement following initial disclosure by the Crown, but should be entitled to do so voluntarily? Do you agree that there should be a standard recommended form for voluntary statements provided by the defence to inform further disclosure considerations?*
- P. Do you agree that the Crown should be required to review disclosure decisions in the light of any new information provided by the defence?*

Witnesses to refer to their statements

Lord Coulsfield's analysis and recommendation:

5.42 There is a further point about statements which applies to both solemn and summary trials. 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. Sometimes this may be valid and important, but in many cases it seems of dubious value for the pursuit of justice. This is not strictly an issue of disclosure in the sense with which this report is concerned 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. It has been suggested that this might lead to an increased risk of witnesses standing by a statement containing a version of events which might have been given carelessly or inadvertently, or which had been embellished (inadvertently or deliberately). However, I believe that rigour in the way statements are taken, as I recommend below, should reduce the risk that such problems will arise. Elsewhere in the UK, the practice of giving witnesses copies of their statements is accepted and uncontroversial.

R2. 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.

Question:

- Q. Do you agree that witnesses should be able to refer to copies of their statements when called to give evidence?*

Misuse of disclosed information

Lord Coulsfield's analysis and recommendation:

15.8 Safeguards against the misuse of disclosed material by a solicitor or advocate are already in place, but there is no corresponding safeguard in place governing the use that an unrepresented accused can make of disclosed material.

15.13 The main issue therefore concerns misuse of disclosed material by accused persons or third parties. If an accused, or a third party, were to use material provided to them by the prosecuting authorities to intimidate or even threaten a witness, then it is open to the Crown to prosecute that person for attempting to pervert the course of justice. This would not, however, cover the case where the accused, or third party, misuses disclosed material in other ways, for example, to embarrass the witness in the community.

15.14 In England and Wales, sections 17 and 18 of the CPIA make provision for the confidentiality of disclosed information. In essence, section 17 sets out that, where an accused is given or allowed to inspect a document or other object as part of the disclosure process, then the accused may only use or disclose that object or information (a) in connection with the proceedings for which the material was disclosed, (b) with a view to the taking of further criminal proceedings (for instance, by way of an appeal) or (c) in connection with such further proceedings.

15.15 Section 18 provides that it is a contempt of court for a person knowingly to use or disclose an object or information recorded in it if the use or disclosure of it is in contravention of section 17 of the CPIA.

15.16 Introducing similar legislation in Scotland would be a logical companion to a more rigorous system of disclosure by the prosecution authorities.

R35. Given the increase in the amount of personal information which may require to be disclosed in different types of cases, there should be legislation making it an offence to misuse disclosed information, similar to that in England and Wales.

Question:

R. Do you agree that misuse of disclosed information should be made an offence?

Disclosure for summary cases

Although not requiring legislation, the Government would also welcome comments on Lord Coulsfield's analysis of disclosure for summary cases, including his recommendations on the importance of the disclosable summary of evidence.

Lord Coulsfield's analysis and recommendation:

13.1 Recently, 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.

13.2 I see this as a very significant development. It seems to me that the practice of providing a summary of evidence at the earliest possible stage is right in principle and should be welcomed and built upon. Two important questions follow:

How can it be ensured that the summaries provided are fair, complete and reliable?
and

What additional disclosure would then need to be made to the defence following a plea of not guilty?

How can it be ensured that the summaries provided are fair, complete and reliable?

13.3 I understand that the Lord Advocate's intention is that summaries of evidence should be derived readily from the report by the police to the procurator fiscal. If the summary is to perform its function, enabling the defence to give early advice to their client and promoting speed and efficiency, [then -]

R31. The summary of evidence to be provided with a summary complaint will require to give a reasonably full account of the evidence available at the time of the police report, including:

- a. the basis of the case against the accused;**
- b. 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;**
- c. whether there is CCTV which supports the prosecution case;**
- d. whether forensic information has been recovered and if so whether it has been analysed; and crucially**
- e. 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.**

R32. 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.

13.5 This may represent an expansion of the requirements for the template, but this seems to me to be necessary for the system to work as intended. If the summaries fail to gain credibility as being a reliable and fair source of information for the defence and the accused, then they will fail to achieve the benefits they have been designed to secure.

What additional disclosure would then need to be made to the defence following a plea of not guilty?

13.6 The summary, which importantly must include all material evidence or information which would tend to exculpate the accused, should provide the defence with good information about the evidence in the case, sufficient to enable them to give initial advice on their client's plea. However, in the event of a plea of not guilty (or if a case is continued without plea to allow the defence to pursue disclosure issues first), the defence will need the ability to access further information in order to prepare for trial.

R33. 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.

13.7 In most summary cases, this level of information should be sufficient. However, I am aware that 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. As I have explained, 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.

13.9 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. Thus for civilian witnesses, and occasionally where police witnesses have recorded their observations in writing, the defence should be entitled to ask for copies of text already recorded, for example the notes from police officers' notebooks. Such requests should initially be made informally to the Crown, with an explanation of why the greater detail may be important for preparation of the defence. I would encourage the Crown to be as open as possible when responding to such requests, even when there is no legal requirement to disclose. Over time, it could then be that confidence in the summaries of evidence grew to the point where such requests were made less frequently.

Questions:

- S. Do you agree with Lord Coulsfield's recommendations on the content of the summary of evidence to be provided with the complaint, and do you have any comments on the practical steps needed to implement this system?***
- T. Do you have any comments on Lord Coulsfield's recommendations for additional disclosure following a plea of not guilty in a summary case?***

Other issues

Lord Coulsfield's other recommendations are listed in the Annex.

Question:

- U. Do you have any other comments on the recommendations in the Annex or on any other issues raised in Lord Coulsfield's report?***

ANNEX

OTHER RECOMMENDATIONS FROM THE COULSFIELD REPORT

The following recommendations can be implemented without legislation, and are already being taken forward³ by the police and COPFS.

R16. ACPOS and the Scottish Police Services Authority 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. There would also be value in having, for a limited time, a central unit to prepare plans for effective training and to monitor results; and a system of inspection or supervision to assist individual forces and the SPSA in ensuring that the effect of training is not dissipated.

R18. 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.

R19. When the police are required to reveal a civilian witness statement to the procurator fiscal but no signed version of the statement is available, the information that is revealed should, as far as possible, consist of the exact words used by the witness.

R20. 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.

R22. The organisation of retention and recording must be secure. Police forces should therefore 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.

R23. Police guidance notes on the management of and retention of material 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 also 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.

R24. In large scale investigations, Senior Investigation Officers 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 the responsibilities of such an officer should be set out in the code of practice.

³ The exception is the first sentence of recommendation 43. There are no plans at present for a specific piece of work to review the relationship between the principles of the Children (Scotland) Act 1995 and the principles of disclosure.

R25. The disclosure facility on HOLMES2 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.

R34. The Crown's internal guidelines on redaction 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.

R36. Current practice regarding Crown precognitions should be strengthened in one respect, in order to satisfy the obligation to disclose material evidence that would tend to exculpate the accused that has been elicited during the precognition of a witness. While not disclosing the actual precognition, it would be appropriate for the Crown to tell the defence what the material evidence is, rather than merely advising the defence that they should precognosce the witness. Such intimation of material evidence should, insofar as possible, be made in writing.

R37. Efforts should continue, to address the problem of ensuring that there is equipment available on which the visual-image recordings can be played.

R38. It may commonly be necessary to effect disclosure of visually-recorded material not by passing a copy of the tape to the defence, but by arranging for them to view it under controlled conditions.

R39. 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.

R43. 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.

R44. 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 COPFS 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.

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses⁴. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: [Scottish Government consultations](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

⁴ <http://www.scotland.gov.uk/consultations>

APPENDIX B

RESPONDENT INFORMATION FORM: A STATUTORY BASIS FOR DISCLOSURE IN CRIMINAL PROCEEDINGS IN SCOTLAND

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual go to Q2a/b and then Q4
- (b) **on behalf of** a group/organisation go to Q3 and then Q4

INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in the Scottish Government library and on the Scottish Government website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential

- 2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

- 3 The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

Yes

No We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes

No

