
DISCLOSURE MANUAL

VERSION TABLE

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FOREWORD

Message from the Lord Advocate

Disclosure is a crucial and integral component of the criminal justice system in Scotland. This was highlighted, and the basic parameters of the Crown's duty of disclosure to the defence were set down, in 1998, by the court in *McLeod v HMA*¹. Since then the law and disclosure practice has developed at a rapid pace, following the judgements in *Holland*² and *Sinclair*³, and was most recently addressed at length by the court in *McDonald v HMA*⁴.

The critical nature of the Crown's disclosure obligations cannot be stated highly enough: ultimately, if the Crown does not fulfil its disclosure obligations to the defence, this may result in a breach of the Article 6 rights of an accused to a fair trial under the European Convention of Human Rights (ECHR), and a conviction being quashed on appeal.

Importantly **all** members of COPFS staff have a responsibility and a role to play in ensuring that the Crown properly carries out and fully discharges its duty of disclosure to the defence.

The disclosure duty persists in perpetuity. It is vital, therefore, that the Crown's disclosure responsibilities are considered at all stages of a case, from the point at which the case may proceed to trial, right through to the conclusion of any trial, and any subsequent appeal proceedings, and even after the final disposal of a case. In addition, the Crown must consider for disclosure *all* information obtained in the course of an investigation and any criminal proceedings and ensure that all material information is disclosed to the defence.

In addition, the Crown must constantly review its disclosure duty in light of any new information or developments that arise as a case proceeds, notwithstanding that the Crown has already disclosed relevant information to the defence on one, or more occasions, and, also, maintain a record of all material disclosed and all disclosure decisions.

It is also relevant to consider whether or not disclosure of operational information that might place a member of the public, who is not a witness, at risk, e.g. disclosure of an observation point in a member of the public's home.

¹ (No.2) 1998 JC 67.

² 2005 S.C. (P.C.) 3.

³ 2005 S.C. (P.C.) 28.

'The Crown's Principles of Disclosure' and the 'Summary of the Crown's Approach to Disclosure' (overleaf) set out the essential elements of the Crown's disclosure duty. All staff should be familiar with these and I would encourage you regularly to refer to them. More detailed disclosure policy and practice is set out in the rest of the Disclosure Manual. I consider this to be an essential tool for all COPFS staff. The manual contains a statement of national disclosure practice which **must** be followed by all staff in all Areas. This will ensure effective and consistent disclosure practice in all cases across Scotland.

Eilish Angiolini
Lord Advocate

The Crown's Principles of Disclosure

1. The Crown is obliged to disclose all material evidence for or against the accused. This relates to statements, but it also relates to all information of which the Crown is aware.

2. "Material" means evidence which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused.

3. This legal duty persists in perpetuity. This means that the duty exists during the appeal process, and even where there is no live appeal, for example, where such material comes to the attention of the Crown after conviction, or after an appeal has been refused.

4. Compliance with the duty requires the Crown to disclose all statements of all witnesses on the Crown and defence lists, including section 67 notices.

5. Compliance with the duty requires the Crown, without having to be requested to do so, to disclose all previous convictions and outstanding charges for all witnesses on the Crown lists, including section 67 notices, subject to the materiality test and the public interest in protecting the Convention Rights of the witnesses.

6. Failure to disclose material evidence risks a miscarriage of justice. Disclosure carried out properly and timeously ensures that justice is done and prevents unnecessary trials and delay.

CROWN OFFICE

February 2008

A SUMMARY OF THE CROWN'S APPROACH TO DISCLOSURE OF EVIDENCE IN CRIMINAL PROCEEDINGS

Relevant Material

1. The police have a duty to submit **all relevant material** to the Procurator Fiscal.
2. This duty should be informed by an assessment of what is relevant **after all necessary investigation** by the police. The critical value of such investigation will be apparent where, for example, false but apparently relevant information is deliberately provided to an investigation in an attempt to pervert the course of justice.
3. In terms of the current guidance to COPFS/ACPOS, relevant material will routinely include all witness statements (without further qualification), subject to any exceptions which, due to the scale of the enquiry, may be permitted with the agreement of the Procurator Fiscal.
4. However all COPFS staff should be aware that the duty on the police to submit relevant material extends to other sources or types of information such as intelligence, which includes information passed to the police by Crimestoppers, information acquired through surveillance, and information from an informant (CHIS) or other covert source.

Related Cases

5. It is important to recognise that relevant material may also include information derived from another enquiry, for example, a related police investigation into the conduct of police officers involved in an ongoing police investigation/prosecution; an enquiry by the Area Procurator Fiscal into criminal allegations made by the accused against a police officer who is a witness in an ongoing prosecution; a counter criminal complaint by the accused against the victim in an ongoing prosecution; or, a parallel deaths investigation.

Disclosure Duty on the Crown

6. The overarching disclosure duty on the Crown is set out in *McLeod v HMA*⁵ and was most recently expressed in *McDonald v HMA*⁶.
7. The Crown has a subsisting duty to provide to the defence **all material evidence for or against the accused**⁷. This includes **information obtained during the course of the investigation and any criminal proceedings, of which the Crown is aware, which is likely to be of real importance to any undermining of the Crown case, or to any**

⁵ (No.2) 1998 JC 67.

⁶ 2008 SCCR 154

⁷ *McDonald*, at page 21, paragraph 40.

casting of reasonable doubt on it, and which is of positive assistance to the accused⁸.

8. The duty was expressed in **McLeod** in the following terms by the **Lord Justice General (Rodger)**⁹:

“Our system of criminal procedure therefore, proceeds on the basis that the Crown have a duty at any time to disclose to the defence information in their possession which would tend to exculpate the accused.”

9. And by **Lord Hamilton**¹⁰:

*“If material in the possession and knowledge of the Crown is significant to an indicated line of defence, the Crown would and should inform the defence about the matter (**Smith v HM Advocate per Lord Justice-Clerk Thomson** at pp 72-73). That line may in modern circumstances be indicated at police interview, at judicial examination, on the lodgement of a special defence or at any other stage. The same responsibility to inform arises, in my view, where the Crown has in its possession and knowledge material which is likely to be of real importance to any undermining of the Crown case or to any casting of reasonable doubt on it.”*

10. The decision of the Privy Council in **Sinclair v HMA**¹¹ established that the police statements of all the witnesses who are to be called at the trial are to be regarded as containing material evidence either for or against the accused and that the Crown are, accordingly, under an obligation, in terms of article 6(1), to disclose their statements to the defence. This was endorsed by the Appeal Court in **McDonald**.
11. The case of **Sinclair** also confirms, per **Lord Roger** at paragraph 49, that the **Crown Practice Statement** on Disclosure in High Court Cases can properly be regarded as fulfilling this aspect of the Crown’s obligation of disclosure under article 6(1).

Extent of the Disclosure Duty on the Crown

12. For the avoidance of doubt, **the Crown’s disclosure duty extends:**

- (i) throughout the investigation and any criminal proceedings;
- (ii) to **all** information received and known to the Crown in the course of the investigation and any criminal proceedings;
- (iii) to the conclusion of any trial and any subsequent appeal proceedings, and even after the final disposal of a case;

and **may encompass:-**

⁸ **McDonald**, at page 23, paragraph 41.

⁹ At page 79, third paragraph.

¹⁰ At page 83, first paragraph.

¹¹ 2005 S.C. (P.C.) 28.

a) **negative findings;**

- A negative finding may tend to support the defence case or to undermine the Crown case. For example, if analysis of an internal swab taken from a rape complainer does not disclose any DNA, or the DNA of the accused, this would plainly fall to be disclosed.
- Therefore, when the results of a forensic analysis are reported to the Crown, *any* negative findings must be disclosed to the defence unless a public interest issue arises.
- Disclosure must be made even if the result is reported only by telephone and there is no forensic science report.
- Negative findings include all information of that nature derived from *any* expert witness.

b) **failures, or difficulties, in identifying at ID procedures which are not otherwise recorded in a disclosable statement or production;**

c) **any new information elicited at precognition which may demonstrate material inconsistencies in a witness's evidence, or otherwise may undermine the crown case or support the defence case;**

- When a precognition is obtained from a witness, the Crown should consider whether or not there is any information in the precognition which should be disclosed.
- Material discrepancies between the contents of a police statement and the witness' position at precognition may bear on the witness' credibility and/or reliability and would fall to be disclosed.
- It will not normally be sufficient simply to advise the defence that they should precognosce the witness – the information must be disclosed, but the defence should be told that the information is contained in a precognition.

d) **information which tends to suggest that a complainer or witness may have provided inaccurate or false information.**

13. This list is not exhaustive; it merely illustrates the type of information the Crown must consider for disclosure to the defence.

14. **If a new line, or a change in the line of defence is intimated, the Crown should consider whether there is information which was not previously considered disclosable which should be disclosed in light of the new line of defence.**

15. **The Crown must disclose *any* information which meets the *McLeod* and *McDonald* test. Such information may be received and/or held in various forms, and may include, for example –**
- (i) the content of phone calls;
 - (ii) information in text messages;
 - (iii) the content of conversations which is not included in any statement or the formal precognition process;
 - (iv) file notes, e-mails, letters or faxes;
 - (v) subject reports, and notes written on them;
 - (vi) surveillance reports / logs; and
 - (vii) CHIS reports.
16. **Importantly, it is the *nature* of any information which is significant and not the format in which it is held.**
17. **Any new information received by the Crown at any stage in the preparation of a case, during trial or any subsequent appeal proceedings, or even after the final disposal of a case, may require previous decisions in relation to disclosure to be reviewed.**
18. **Without prejudice to any specific duties to disclose certain classifications of information, e.g. witness statements, the Crown must consider each document or item for disclosure on its own merits and decide on that basis whether it undermines the Crown case or assists the defence case, as opposed to reaching a decision based purely on the classification of the information.**

Criminal History Information

19. The Crown must obtain, and consider for disclosure all criminal history records for civilian and police witnesses cited for trial in **all** cases, whether summary or solemn.
20. Criminal history information must be disclosed where it meets the materiality test in **McLeod** and **McDonald** (c/f paragraph 7 above, and the fifth Principle of Disclosure).
21. In Summary, and Sheriff and Jury cases, Procurators Fiscal should consider and decide what criminal history information is disclosable. Crown Counsel's instructions should be sought in Sheriff and Jury cases where the Crown is seeking to withhold criminal history information for any reason (c/f paragraph 25 below).

22. In High Court cases, Procurators Fiscal should include in the precognition, and make a recommendation about the disclosure of, criminal history information for every civilian and police witness listed on the indictment. Crown Counsel will take the final decision about what information requires to be disclosed.

Decisions to Withhold Information

23. Any decision ***not*** to disclose information, on the basis that it does not meet the ***McLeod*** and ***McDonald*** test, and the reason(s) for that decision, must **be clearly recorded** in the case papers.

24. Where the defence requests from the Crown disclosure of information that does not meet the ***McLeod*** and ***McDonald*** test, and the Crown decides not to disclose the information, the appropriate course of action is for the defence to lodge a petition for recovery of documents with the Court. This approach has been explicitly endorsed by the Court in ***McDonald***.

25. Where there is material which in terms of ***McLeod*** and ***McDonald*** is disclosable, but which it is considered should not be disclosed in the public interest because of its sensitive nature, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed.

Consultation with Legal Manager

26. If there is any doubt about what information should be disclosed, the appropriate Legal Manager should be consulted immediately.

Appeal Proceedings

27. When dealing with any disclosure issues in the course of any appeal, the Appeals Unit should be consulted on any decision on disclosure being taken.

CROWN OFFICE

February 2008

Chapter 1: Introduction

1.1 Disclosure is a vitally important aspect of criminal procedure. The principal purpose of disclosure is to secure the fair disposal of criminal proceedings and ensure that justice is done. Non-disclosure of material evidence may prejudice the fairness of a trial. It would be incompatible with the Article 6 rights of the accused, and could – if a conviction is secured – result in an appeal being successful. It can also result in judicial criticism of the Crown – see, for example, *PF Glasgow v Von & Hume*¹².

1.2. This Manual is designed to ensure that Procurators Fiscal and their staff are aware of the Crown's disclosure obligations to the defence and that those obligations are fully and consistently implemented.

1.3 The instructions contained in this manual **must** be followed by **all** members of COPFS staff in order to ensure a consistent approach to disclosure. Any derogation from, or variation of, these instructions must be agreed by the Deputy Crown Agent. Consistency in this area is vital.

1.4 These instructions apply to all Crown prosecutions and appeals.

¹² [2008] HCJAC 9

Chapter 2: Disclosure Duty on the Crown: Overview

2.1 General Principles

2.1.1 Our system of criminal procedure proceeds on the basis, as required by Article 6 and set out by the court in *McDonald*¹³ and *McLeod*¹⁴, that **the Crown has a duty at any time**, to provide to the defence **all material evidence for or against the accused**¹⁵. This includes **information obtained in the course of the investigation and any criminal proceedings, of which the Crown is aware, which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt on it, or which is of positive assistance to the accused**¹⁶.

2.1.2 This is summarised in the first and second Principles of Disclosure:-

1. The Crown is obliged to disclose all material evidence for or against the accused. This relates to statements, but it also relates to all information of which the Crown is aware.

2. “Material” means evidence which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused.

2.1.3 It is the Crown’s duty to disclose such information to the defence. This duty does **not** depend on the defence making an application or request to the Crown for disclosure.

2.1.4 **The Crown’s duty is a continuing one – it persists in perpetuity.** It continues throughout and to the conclusion of any trial, and any subsequent appeal proceedings, and even after the final disposal of a case. Accordingly, notwithstanding that information which meets the *McDonald* and *McLeod* test may already have been disclosed to the defence on one or more occasion:-

(a) *any* new information received by the Crown at *any* stage in the preparation of a case, during trial or any subsequent appeal proceedings, or even after the final disposal of a case must be considered for disclosure and may require previous decisions in relation to disclosure to be reviewed to assess whether further information requires to be disclosed to the defence;

(b) if a new line, or a change in the line of defence is intimated, the Crown should consider whether there is information which was not previously considered disclosable which should be disclosed in light of the new line of defence. Previous decisions about disclosure may need to be reviewed in light of a new, or a change in the accused’s, defence to

¹³ 2008 SCCR 154

¹⁴ (No.2) 1998 JC 67, at page 79, third paragraph.

¹⁵ *McDonald*, at page 21, paragraph 40.

¹⁶ *McDonald*, at page 23, paragraph 41.

assess whether further information requires to be disclosed to the defence. Where it is decided that information does not require to be disclosed in light of a new, or a change in the line of defence, this information should be highlighted, in solemn cases, in the Disclosure Page (following the Observations Page) in the precognition, and in summary cases, recorded in the case papers; and

- (c) if it becomes apparent that there has been an earlier failure to disclose material evidence, i.e. evidence which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused, that material must be disclosed.

2.1.5 The Crown's disclosure duty extends to all information received and known to the Crown in the course of an investigation and any criminal proceedings.

2.1.6 However this does **not** mean that the Crown should disclose **all** information in its possession. It means that the Crown requires to consider all information for disclosure, and disclose any information which meets the **McDonald** and **McLeod** test, i.e. all material evidence for or against the accused, which includes information obtained in the course of the investigation and any criminal proceedings, of which the Crown is aware, which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt on it, or which is of positive assistance to the accused.

2.1.7 The information to be considered for disclosure includes not only documents, but also other types and formats of information which come into the Crown's possession. The information need not be in written form. It would, for example, include:-

- (i) video/audio evidence;
- (ii) information which has been provided orally, such as a negative result of a forensic analysis which has been reported to the Crown by telephone; and
- (iii) information contained in emails or text messages.

2.1.8 Information falling within paragraph 2.1.7 above is disclosable even if it would not be, or is in a form which would not be, admissible at trial. For example, information contained within a standard precognition which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt on it, or which is of positive assistance to the accused must be disclosed to the defence, even though that information is contained in a document which would not itself be admissible at trial.

2.1.9 The Courts have identified certain information which **must** be disclosed **in all cases**. In particular:-

- (a) statements for all witnesses on the Crown and defence lists; and
- (b) material criminal history information for all witnesses on the Crown lists (e.g. previous convictions and outstanding charges) must be disclosed subject to the public interest in protecting the Convention rights of the witnesses.

2.1.10 There is further detailed guidance about disclosure of statements and criminal history information in Chapters 13 - 20 of this Manual. **Remember**, the duty to disclose these particular items does not exhaust the duty of disclosure. The Crown's disclosure duty extends to *all* information which falls within the **McDonald** and **McLeod** test set out at paragraph 2.1.1 above.

2.1.11 In exceptional circumstances, **there may be good reason for seeking to withhold information which is normally disclosable in terms of the McDonald and McLeod test**, e.g. material covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons¹⁷. However any decision on whether or not the Crown may withhold information which would otherwise be disclosable, must be taken by the Court.

2.1.12 Where there is material which in terms of **McDonald** and **McLeod** is disclosable, but which it is considered should not be disclosed in the public interest, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed.

2.1.13 Further guidance on the handling of sensitive material and related disclosure decisions is included in Chapter 25 of this Manual.

2.2. The legal basis of the obligation of disclosure

2.2.1 The Crown's obligation of disclosure arises at common law. The duty was articulated by the Appeal Court in **McLeod**, and has been explained and re-affirmed in **McDonald**. As explained in the latter case, "is likely to be of real importance to any undermining of the Crown case or to any casting of reasonable doubt on it", including any material which is of positive assistance to the accused¹⁸.

2.2.2 In addition, it is unlawful for the Crown to act incompatibly with Article 6 of the European Convention on Human Rights; the Scotland Act 1998, section

¹⁷ C/f **Swinney v Chief Constable of Northumbria**, (1999) 11 Admin. L.R. 811, in which the court considered the duty owed by the police to informers, to take reasonable care in preventing confidential information from being disclosed to the public. See also **Osman v Ferguson**, [1993] 4 All ER 344, in which the court stated that the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so.

¹⁸ **McDonald**, at paragraph 41.

57(2); or the Human Rights Act 1998, section 6(1). In **Rowe and Davis v United Kingdom**¹⁹, a Grand Chamber of the European Court of Human Rights articulated the law in the following terms:-

“It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given an opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party ... In addition Article 6(1) requires, as indeed does English law ..., that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused ...”

2.2.3 The Crown’s common law obligation is co-extensive with its obligations under Article 6 of the Convention, **McLeod and McDonald**.

2.2.4 **Failure to disclose material evidence may result in a breach of Article 6 and constitute a miscarriage of justice.** In some cases unfairness occasioned by non-disclosure is capable of being cured by disclosure during an appeal of the information which had not been disclosed at first instance (e.g. **Botmeh and Alami v United Kingdom**²⁰; **Kelly v HMA**²¹), but in other cases the effect of non-disclosure at first instance will be irreparable (e.g. **Rowe and Davis**; **Kidd v HMA**²²) and will result in a conviction being quashed.

¹⁹ [2000] 30 EHRR 1.

²⁰ Application no. 15187/03, 7 June 2007

²¹ 2006 SCCR 9

²² 2005 SCCR 200

Chapter 3: The Obligation of the Police to Submit Relevant Information to the Crown

3.1. The Law

3.1.1 The police are under an obligation to submit **all relevant material** to the Crown. The court in *Smith v HMA*²³ set out that it is the duty of the police,

“to put before the Procurator-fiscal everything which may be relevant and material to the issue of whether the suspected party is innocent or guilty. We repeat, it is not for the police to decide what is relevant and material but to give all the information which may be relevant and material.

Clearly, in reporting the results of their investigation, the police must exercise a power of selection. It would be absurd to suggest that all their results should be submitted. But a cautious officer will remember that he is not the judge of what is relevant and material and will tend to err on the safe side. If he is in doubt, he should consult the Procurator-fiscal. He will also remember that, as he and he alone has the opportunity of the initial investigation in the public interest, he must put the result of his investigations fairly before the Fiscal in order that the Crown may have a fair basis on which to decide whether or not to prosecute.”

3.1.2 In the course of their investigation the police will retain information which *may be relevant*, which includes anything that appears to the police 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. Thereafter, the police will submit all relevant material, or in other words, all material which is not manifestly irrelevant.

3.1.3 A failure on the part of the police to fulfil this obligation may result in a miscarriage of justice and/or breach of Article 6. For examples of cases in which non-disclosure of material by the police to the Crown gave rise to difficulties, see *HMA v. Johnston*²⁴ and *HMA v G.B.*²⁵.

3.2. Policy

3.2.1 In terms of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions, notwithstanding the disclosure duty on the Crown to disclose all statements of all witnesses on the Crown and defence lists, the police must **submit** to the Crown **all** statements held by them in respect of a case. Where multiple statements are taken from one witness, **all** of the statements taken **must** be submitted, regardless of whether the information contained in the statement is also included in later statements taken from the same witness.

3.2.2 There is no general requirement for the police to submit to the Procurator Fiscal ‘door-to-door’ enquiry forms or pro forma questionnaires

²³ 1952 JC 66, third & fourth paragraphs, at pages 71 & 72.

²⁴ 2006 SCCR 236

²⁵ 2006 SCCR 692

used to gather information and/or evidence at an early stage of the investigation. However,

(a) any enquiry form or pro forma questionnaire from a witness who then provides a statement to the police, which is submitted to the Procurator Fiscal and disclosed to the defence, should be submitted to the Procurator Fiscal; and

(b) such material may require to be submitted to the Procurator Fiscal in the circumstances discussed below.

3.2.3 Where 'door-to-door' enquiry forms or pro forma questionnaires exist and they are not from a witness from whom a witness statement is subsequently taken, the Reporting Officer must discuss with the Solemn Legal Manager whether any or all of this material should be submitted to the Crown. **(C/f Chapter 27, in particular paragraphs 27.2.2 – 27.2.5. and Chapter 16, paragraphs 16.4.1 – 16.4.3.)**

3.2.4 Where there is an appeal following conviction, for example, in additional evidence appeals, the Procurator Fiscal should remind the Reporting Officer to further consider, in light of the grounds of appeal, whether or not there is information which exists, from individuals who are not witnesses, which should be submitted to the Crown.

3.2.5 The fact that the material in question is voluminous is not a good reason for not submitting relevant material to the Crown. If the volume of material which should be submitted to the Crown poses practical difficulties, the police should discuss practical arrangements for consideration of the material by the Crown with the Solemn Legal Manager. For example, depending on the circumstances, it may suffice that the Procurator Fiscal is given access to the relevant material in the hands of the police. **(C/f Chapter 27, in particular paragraphs 27.2.1 – 27.2.7, and Chapter 16, paragraphs 16.6.7 – 16.6.8.)**

3.2.6 **In order to ensure that the Crown is meeting its disclosure obligations, the Crown must be satisfied that the police have submitted all relevant material held by them.** Further guidance is contained in Chapter 16 of this Manual about specific procedures in place for High Court cases to ensure this.

Chapter 4: Witness Statements

4.1 The Law

4.1.1 The Judicial Committee of the Privy Council, in endorsing **McLeod**, has held that the Crown is under an obligation to disclose to the defence the statements of all witnesses on the Crown and defence lists²⁶.

4.2 Policy

4.2.1 The general rule is that all material witness statements that are in the possession of the Crown should be disclosed. For the avoidance of doubt, this general rule includes witnesses whom the Crown does not intend to cite but who are considered material. 'Material' means evidence which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused. Failure to disclose all material statements timeously can give rise to serious practical difficulties at a later stage: for example, see **HMA v G.B.**²⁷.

4.2.2 The Crown should, in general, obtain all witness statements from the police and disclose all material witness statements to the defence. However it should be noted that there is a long established practice in Glasgow District and Stipendiary Magistrate courts, originally agreed with the Glasgow Bar Association, whereby witness statements are not routinely obtained from the police and disclosed to the defence. This practice does not operate in any other part of Scotland, but will continue at present in Glasgow, pending further consideration of this issue, and indeed, the Crown's disclosure duty in summary cases in general.

4.2.3 In exceptional cases, however, there may be good reason why a witness statement should not be disclosed, e.g. where the statement contains information covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons²⁸.

4.2.4 Where a statement,

- (i) does not contain information which is relevant to the issues in the case (i.e. the information is irrelevant and immaterial); or
- (ii) contains information which is relevant to the issues in the case, but none of that information falls within the **McLeod and McDonald**

²⁶ *Sinclair v HMA* 2005 S.C.C.R. 446, at paragraph 49.

²⁷ 2006 SCCR 692

²⁸ *C/f Swinney v Chief Constable of Northumbria*, (1999) 11 Admin. L.R. 811, in which the court considered the duty owed by the police to informers, to take reasonable care in preventing confidential information from being disclosed to the public. See also **Osman v Ferguson**, [1993] 4 All ER 344, in which the court stated that the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so.

obligation of disclosure, i.e. if it contains wholly incriminatory information (i.e. the information is relevant but immaterial)

it may be withheld where the information is sensitive and/or the circumstances in paragraph 4.2.3 above apply. However, non disclosure should be the last option after all other possibilities have been considered, and, in particular, relevant wholly incriminatory information should only be withheld in exceptional cases.

4.2.5 A decision to withhold a statement in terms of paragraph 4.2.4 above, must be taken by the appropriate Legal Manager. In solemn cases, the matter should be reported to the Deputy Crown Agent, for Crown Counsel's instructions. If a statement is withheld on these grounds, the witness may not be called to give evidence. (**C/f Chapter 13, paragraphs 13.3.1 – 13.3.4.**)

4.2.6 If a particular witness statement contains material information, i.e. information which falls within the **McDonald** and **McLeod** disclosure obligation, and there is a compelling reason why it should not be disclosed, e.g. it contains material covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed. However, non disclosure should be the last option after all other possibilities have been considered. (**C/f Chapter 13, paragraphs 13.3.5 – 13.3.9.**)

4.2.7 Before a witness statement is provided to the defence, it shall be open to the Crown to redact the statement to obscure information of a sensitive nature, which is not covered by the disclosure test in **McDonald** and **McLeod**, i.e. it is not material evidence which is likely to be of real importance to any undermining of the Crown case, or to any casting reasonable doubt on it, and of positive assistance to the accused. Any redaction should be obvious on the face of the statement. For further guidance on what material should be redacted from witness statements, see Chapter 15 of this Manual. Attention must always be paid to witnesses Article 8 rights, such as where there is a threat to the life or limb of a witness or other persons, and information which is covered by public interest immunity, as mentioned at paragraph 4.2.6 above.

4.2.8 Any inconsistencies or alteration of the position of the witness, as between statements, should be apparent to the defence on the face of the disclosed statements.

4.2.9 Details of the procedures to follow for the disclosure of statements can be found in Chapters 8 - 10 of this Manual.

4.3 Victim Statements

4.3.1 Where a victim makes a statement to the court about how they have been affected by a crime, under Section 14 of the Criminal Justice (Scotland)

Act 2003, such statements should not be disclosed to the defence in advance of the trial as a matter of routine, subject to the guidance in 4.3.4 below.

4.3.2 While a victim statement is not laid before the court until the point of conviction or a guilty plea, it is normal practice for such a statement to be obtained in advance of this stage, in anticipation of such a conviction/plea. As the statement is quite distinct from an evidential police statement, it should not be routinely disclosed to the defence in advance of trial.

4.3.3 In some instances, however, there will be a duty to disclose the content of such a statement at an earlier stage in order to satisfy the Crown's obligations in terms of **McDonald** and **McLeod**. While it is made clear in the guidance to victims that the statement should not contain material about the circumstances of the incident and should be limited to information about how the victim has been affected by the crime, it is inevitable that such information will be included on occasion.

4.3.4 Should the victim statement disclose: (a) any alteration or inconsistency by a witness on a material matter; or (b) information which either undermines the Crown case or materially assists the defence case, this must be disclosed to the defence in advance of trial in order to fulfil the Crown's disclosure obligations in terms of **McDonald** and **McLeod**.

4.3.5 Further details of the victim statement scheme and the considerations regarding disclosure of these are contained in Crown Office Circular 16 of 2003: Criminal Justice (Scotland) Act 2003 – Victim Statements.

4.4 Precognitions

4.4.1 The Law

4.4.1.1 Precognitions are not admissible in evidence, with the exception of precognition on oath²⁹. The courts will not, in general, order the production of precognitions, as they are not admissible in evidence (c/f **Ward v HMA**³⁰ and **HMA v Fleming**³¹). There is no general rule that the Crown is obliged at all times to provide information to the defence about the contents of its precognitions (c/f **Fraser v HMA**³²). Nevertheless, the information which is contained in a precognition may include information which falls to be disclosed, by reference to the **McDonald** and **McLeod** test.

4.4.2 Policy

4.4.2.1 **Information which falls within the *McDonald* and *McLeod* test should be disclosed notwithstanding that it comes to the Crown's attention in the context of the precognition process.** Such information will

²⁹ Section 260 of the Criminal Procedure (Scotland) Act 1995.

³⁰ 1993 SLT 1202

³¹ [2005] HCJ 02; 2005 Scot (D) 38/10

³² 2008 HCJAC 26, Lord Justice Clerk at paragraph 189

inter alia include: (a) information which tends to exculpate the accused or to support any known or anticipated line of defence; (b) information which tends to undermine the credibility or reliability of the prosecution case; and (c) any *additional* evidence, not provided in the police statement(s) but which is *material* in nature.

4.4.2.2 In the first instance, in the event of (a) any significant material discrepancy emerging between the account given in the witness statement and that at precognition, or (b) any significant additional information being supplied, whether it is contradictory or not, consideration should be given to assessing the value of obtaining a further police statement from the witness recording such contradictory or additional material information, and any such further statement is to be disclosed, subject to any public interest issues arising.

4.4.2.3 Thereafter, Procurators Fiscal will need to consider whether or not further disclosure is required of any material departure or difference between the witness's position at precognition and the terms of any police statement which has been submitted by the police. It is essential that any material departure or difference from the terms of a police statement are fully explored with the witness at precognition, so that the precise nature and extent of any difference and, if available, any explanation for the difference, can be furnished to the defence.

4.4.2.4 It is the material information that is obtained during the precognition that requires to be disclosed as opposed to the precognition itself³³. The method of disclosure of information contained in a precognition, however, is a matter for the discretion of the Procurator Fiscal, having regard to the particular circumstances of the case. In most cases it will suffice that the defence is told in writing about material information obtained in the course of the precognition process which falls within the **McDonald** and **McLeod** test. The defence should be told that the information being provided is contained in a precognition. A written record of the communication with the defence should be retained.

4.4.2.5 Copies of precognitions, however, should not normally be provided to the defence. The Crown's duty of disclosure does not extend to the provision of Crown precognitions to the defence (c/f **Fraser v HMA**³⁴; **Sinclair v HMA**³⁵; **Downie v HMA**³⁶)

4.4.3 Precognoscer's Notes

4.4.3.1 Precognoscer's notes appended to precognitions should not be shown to the defence unless the note contains material information as distinct

³³ Fraser v HMA 2008 HCJAC 26, Lord Osborne at paragraph 226; Lord Johnston at paragraph 238

³⁴ 2008 HCJAC 26, Lord Justice Clerk at paragraph 189

³⁵ 2005 S.C. (P.C.) 28, Lord Hope of Craighead at paragraph 28 & Lord Rodger of Earlsferry at paragraph 49

³⁶ 1952 JC 37

from a precognoscer's personal opinion. It will be unusual that information contained in a precognoscer's note falls within the **McDonald** and **McLeod** test, but if the note does contain such information, this should be disclosed too if it is not already known to the defence, e.g. the witness told the precognoscer that s/he has a conviction for wasting police time, or making false statements in another jurisdiction. Precognoscers must be very careful about the information contained in these notes. Any notes should, in general, be restricted to the precognoscer's opinion about how the witness presented at precognition, or is likely to present in court. In **Fraser v HMA**, Lord Osborne stated that the Crown should be at liberty to prepare precognitions in which observations of a confidential nature can be made concerning witnesses, for the benefit of those possessed with the responsibility of conducting the prosecution (or the defence to it) without fear of prosecution³⁷.

4.4.4 Disclosure Advice to Witnesses

4.4.4.1 Precognoscer's should be careful **not** to advise witnesses that precognitions are confidential. This avoids any difficulties arising from any necessary subsequent disclosure of any part of a precognition.

4.4.4.2 There is no requirement for precognoscers to advise witnesses that the whole or part of their precognition may be disclosed. However, if a witness enquires about disclosure, precognoscers should advise the witness that it is part of the Crown duty to disclose to the accused, or the accused's legal representative, all material evidence for or against the accused provided by witnesses, including the witness being interviewed, in order to ensure a fair trial.

4.4.5 Precognitions of Children

4.4.5.1 Particular consideration should be given to providing the defence with access to precognitions of children. Reference is made to paragraph **16.79** of the Book of Regulations regarding precognitions of children.

4.4.6 Reluctant Witnesses

4.4.6.1 Where a witness is reluctant, this fact does not require to be disclosed as a matter of course. In general, the fact that a witness is reluctant should only be disclosed where the witness's reluctance is related to the content of their evidence, for example, if a witness's reluctance relates to the credibility, reliability, accuracy or truth of what they previously stated, that is a matter that is likely to require to be disclosed. If a witness's reluctance stems from extraneous pressure being applied to them that is not a matter that necessarily requires to be disclosed.

4.4.6.2 A witness's reluctance should be fully explored in all cases, including at precognition in solemn cases. Crown Counsel's instructions should be

³⁷ 2008 HCJAC 26, Lord Osborne at paragraph 226

sought if there is any doubt about whether or not the fact of a witness's reluctance should be disclosed.

4.4.6.3 For the avoidance of doubt, if the Crown receives information which is not directly related to the evidence provided by a witness and which indicates the witness's intention not to attend court, this does not require to be disclosed as a matter of course.

4.4.6.4 There is an assumption that the defence will check whether or not witnesses are in attendance at court. However, if a witness fails to attend court and it is clear that the defence is unaware of this, it is the duty of the Crown to advise the defence that the witness is not present.

4.4.6.5 Where there is an early indication of reluctance on the part of a witness, consideration should be given to obtaining a witness warrant in advance of the trial, either under Section 90(3) or Section 156(3) of the Criminal Procedure (Scotland) Act 1995 Act. (In respect of Summary Cases, c/f Chapter 9 of the Best Practice Guide.)

Chapter 5: Criminal History Records

5.1 The Law

5.1.1 The Judicial Committee of the Privy Council has stated that information about the previous convictions of any witness who is to be led at the trial is information that would be likely to be of material assistance to the proper preparation or presentation of the accused's defence, and that the accused's agents and counsel are accordingly entitled to have that information disclosed so that they can prepare his defence: **Holland v HMA**³⁸.

5.1.2 The Judicial Committee has also stated that information about any outstanding criminal charges that a witness faces is also considered to be information that would be likely to be of material assistance to the proper preparation and presentation of the accused's defence, so that, in principle, the Crown should disclose this information: **Holland**³⁹.

5.1.3 Given the reaffirmation in **McDonald** of the **McLeod** test being applied in relation to disclosure obligations, which requires the Crown to disclose all material evidence, and then in applying this to consideration of disclosure of criminal history information, the Crown's position is that not every previous conviction and outstanding criminal charge (PCOC) of a witness will necessarily be relevant and disclosable in terms of **McDonald** and **McLeod**.

5.1.4 There is a view that **Holland** requires the Crown to disclose all PCOCs for all witnesses on the lists, regardless of whether they are material or not. The Crown is seeking clarification on this matter in a suitable appeal. Pending further clarification of the law, the basic principle is that disclosure of criminal history information is subject to the materiality test in **McDonald** and **McLeod**.

5.1.5 Examples of information which should be regarded as material, and therefore disclosable, without further consideration, include offences of dishonesty, and offences against justice such as perjury and wasting police time. Another example is where an accused's defence is self defence; in this scenario, a witness's conviction for possession of an offensive weapon would be material.

5.2 Policy: Civilian Witnesses

5.2.1 Criminal history records, i.e. details of previous convictions and outstanding charges should be obtained in respect of all civilian witnesses (see definition at Annex A of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions), that the Crown intends to rely on at trial in summary proceedings, and in respect of all civilian witnesses listed on the provisional list of witnesses in solemn cases.

³⁸ 2005 SCCR 417 at paragraph 72.

³⁹ 2005 SCCR 417 at paragraph 71.

5.2.2 All material previous convictions and outstanding charges in respect of all civilian witnesses cited for trial in summary cases, and on the indictment in solemn cases, should be disclosed, unless the information is manifestly irrelevant to the issues in the case and to the credibility and reliability of the witness.

5.2.3 Guidance on the procedures to follow for the disclosure of criminal history records is contained in Chapters 8 - 10 of this Manual.

5.2.4 Guidance on the content and redaction of criminal history records is contained in Chapters 13 - 15 of this Manual.

5.3 Policy: Police Witnesses

5.3.1 Guidance on obtaining and disclosing criminal history records for police officers is contained in Chapter 20 of this Manual.

Chapter 6: Productions

6.1 The Crown's disclosure duty applies to all material information which includes all productions. All productions listed in the Crown list, and other items submitted by the police which are not listed as productions, require to be considered for the purpose of disclosure in terms of the materiality test set out in **McDonald** and **McLeod**. Any material information contained in additional items which are not listed on the indictment should be disclosed to the defence. For the avoidance of doubt, this includes items which, if listed as productions, would be labels.

6.2 Further guidance in relation to the disclosure of productions is contained within Chapter 22 of this Manual.

Chapter 7: Disclosure of Evidence Prior to Pleading Diet in Summary Cases

7.1 General Principles

7.1.1 In all summary cases, where proceedings are taken in court, a summary of evidence is provided to the accused along with his or her complaint. This applies to District, Stipendiary and Sheriff Summary Proceedings. A summary of evidence should be provided in both police reported cases and specialist reported cases. IT software has been designed to assist with this process in relation to police reported cases. Where the report is from a Specialist Reporting Agency, different procedures will need to be followed.

7.1.2 It is important that the charges labelled are an accurate reflection of the summary of evidence. Particular care should be taken when drafting charges to ensure that they correspond to what can be proved on the basis of the available evidence as reflected in the summary of evidence, subject to any necessary evidential charges.

7.2 Submission of the Police Report

7.2.1 When the police electronically submit a police report to the Procurator Fiscal, the FOS system will automatically create a separate document containing an extract from the SPR. When you open the case in FOS, this will appear in the list of documents as "Summary of Evidence.doc".

7.2.2 This extract of the police report contains the following sections of the Section 4 summary of the SPR:

- Description of locus
- Description of events
- Police involvement
- Interview with accused
- Caution and charge
- Medical evidence

7.2.3 The extract will not include the following sections of the Section 4 summary:

- Antecedents
- Background information
- Reason for warrant request
- Analysis of evidence
- Remarks
- Further Enquiry

7.3 Preparing the Summary of Evidence

7.3.1 Once it is decided that Summary Court Proceedings are appropriate, the marking depute should read the summary of evidence document and confirm that (a) there is no information within the summary that should not be disclosed, having regard to the redaction guidance detailed in Chapter 15 of this Manual and (b) there is no information in any of the parts of the report listed at paragraph 7.2.3 above that should be disclosed. **This should always be done before the checklist is completed and the C-kit is generated.**

7.3.2 Where information *is* contained in the summary which should not be disclosed, for example, for reasons of confidentiality, taking into account the current redaction guidance, it can be edited from the summary. Unlike the redaction of information from a witness statement or a criminal history record, the removal of the material should not be obvious on the face of the summary. What the Crown is disclosing is a summary of evidence not an extract of the police report, albeit we extract that summary from the police report for reasons of practicality and convenience. Therefore, there is no need to show the defence that material has been removed.

7.3.3 Where there is information in the police report which is not included in the summary of evidence but which falls to be disclosed, e.g. information contained within the “background information” section regarding an earlier incident that might have provoked the accused, then this should be manually copied and pasted into the summary of evidence document.

7.3.4 Consideration should also be given to whether additional information which has been submitted by means of a subject sheet (e.g. details of additional witnesses) should be included in the summary of evidence. If such additional information should be disclosed, again this should be manually added to the summary of evidence document.

7.3.5 A summary of evidence should **never** be provided to the accused without it first being checked as detailed in this section above.

7.4 Preparing the C-kit

7.4.1 Once the summary of evidence has been checked and the marking depute is satisfied that it can be disclosed to the accused, the checklist should be completed.

7.4.2 When the C-kit is generated it will pull in 3 copies of the summary of evidence. Accordingly, the summary should be prepared before completing the checklist. One copy of the summary should be attached to the complaint and served on the accused. The other two copies should be retained on file.

7.5 Specialist Reporting Agency Cases

7.5.1 At present, when an electronic SRA report is submitted, a “summary of evidence” document is not automatically created. Accordingly, once it has been decided that summary court proceedings are appropriate, a separate

document should be created. A summary should then be manually copied and pasted from the SPR and inserted into this document.

7.5.2 After generating and printing off the C-kit, three copies of the summary of evidence document should be printed off (as these will not automatically be pulled into the C-kit). One copy should be attached to the complaint and served on the accused. The other two copies should be retained on file.

7.5.3 As for police reported cases, care should be taken to ensure that no material is included in the disclosed summary that should not be disclosed having regard to the redaction guidance in Chapter 15 of this Manual.

7.6 Failed/Rejected Direct Measures

7.6.1 Where a case has been marked for a direct measure (e.g. a diversion scheme referral or a road traffic conditional offer of a fixed penalty etc.) which has been unsuccessful and a decision is taken to commence court proceedings, a disclosable summary of evidence will require to be prepared.

7.6.2 It is a matter for local practice whether this summary should be prepared at the stage the case is marked, for the direct measure, or at the stage court proceedings are taken up. Divisional/District Fiscals should, however, issue clear guidance on which stage is the appropriate stage to ensure that the summary is properly considered prior to disclosure.

7.6.3 If the summary is being considered at the marking stage, then this should be considered by the marking depute.

7.6.4 If the summary is being considered at the stage court proceedings are commenced, then this should be considered by the member of staff (administrative or legal) who is preparing the case for court.

7.7 Roll Up Cases

7.7.1 At present the summary of evidence function does not fully operate in respect of roll up cases. The summary of evidence for the destination (main) case is the only summary which will automatically be pulled into the C-kit. In respect of the source case(s) rolled up into the destination case, the summary(ies) will need to be printed and manually added to the C-kit.

7.7.2 Policy Division and ISD are working to achieve a long term solution to resolve the need to manually print summaries of evidence.

7.8 Information that routinely needs to be removed

7.8.1 Where Procurators Fiscal find that they are routinely removing material from the summary of evidence document in police reported cases, the District/Divisional Fiscal should liaise with the relevant Divisional Commander to ensure that such material is included in one of the non-disclosable parts of the police report, as listed in paragraph 7.2.3 above.

7.9 Custody Statements

7.9.1 Where the accused is reported in custody and bail is to be opposed, the summary of evidence provided to the accused will be sufficient intimation of the evidence against him/her. There is, therefore, no requirement to serve a separate custody statement. It is good practice, in such cases, to insert at the end of the summary "Bail opposed" to give the accused and his/her representative early notice that the Crown will be opposing bail.

7.10 Disclosure of further information

7.10.1 Provision to the accused of the summary of evidence does not absolve the Crown of its duty to disclose further information which falls within the duty of disclosure described in Chapter 2 above.

Chapter 8: Procedures for Requesting & Disclosing Statements and Criminal History Records: General

8.1 Joint Protocol between ACPOS and COPFS

8.1.1 An ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions has been agreed, which sets out fixed procedures and business rules for the requesting, obtaining and disclosure of statements and criminal history records.

8.2 Initial Processing of Cases

8.2.1 When reporting a case, the police should allocate all witnesses a witness type: civilian, police or “professional/expert/official”. The definitions of these witness types are set out in Annex A of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions.

8.2.2 Once the police have submitted a case and a legal member of staff has marked it for court proceedings, be it for summary or petition proceedings, the marking depute should then consider the witness types and ensure that the witnesses have been properly categorised. Where necessary, the witness type should be updated.

8.2.3 If a case has been marked for a direct measure, such as a referral to a diversion scheme, or a road traffic conditional offer of a fixed penalty which is subsequently rejected or fails in some way, when processing the case for court, the witness types should be considered and, where necessary, updated.

8.3 Disclosure Timelines

8.3.1 Once a case has been marked for proceedings, statements and PCOCs should be obtained and disclosed at certain stages of proceedings, depending on whether the case is marked for summary or solemn proceedings.

8.3.2 The procedures to follow for summary proceedings are contained in Chapter 9 of this Manual.

8.3.3 The procedures to follow for solemn proceedings are contained in Chapter 10 of this Manual.

8.4 Disclosure to Accused’s Representative

8.4.1 Disclosure of witness statements, previous convictions and outstanding charges should **only be made to the accused’s representative**.

8.4.2 Separate guidance on the disclosure of material to an unrepresented accused is set out in Chapter 23 of this Manual.

8.4.3 Details of the accused's legal representative must be stored in the PROMIS (the COPFS live, operational database which is used to manage the processing of reports submitted to Procurators Fiscal by the police and other reporting agencies) / FOS (Future Office System – the COPFS system used to process all summary business and facilitate disclosure processes) database. Both PROMIS and FOS are designed to allow the user to update the legal representative's details. The solicitor must notify the Crown that they act for the accused before disclosure will take place. Guidance on how to update the legal representative's details is contained in the FOS User Guide Manual: Disclosure Processing – Disclosure of Lists of Witnesses and Statements.

8.4.4 If an accused changes his or her legal representation, the solicitor holding material disclosed by the Crown should pass the material on to the accused's new legal representative or they should return the material to the Crown. This is set out in Article 11 of the Code of Conduct in Criminal Work, which governs the use and retention of disclosed material by defence solicitors. Should further disclosure require to be made to the new legal representative, he/she should be asked to formally intimate that they now act for the accused.

8.4.5 If a solicitor ceases to act for the accused and the accused becomes unrepresented, any material disclosed by the Crown should be returned to the Crown, as set out in Article 11. Guidance on the disclosure of material to an unrepresented accused is set out in Chapter 23 of this Manual.

Chapter 9: Procedures for Requesting and Disclosing Statements & Criminal History Records: Summary Cases

9.1 Marking Witnesses for Citing

9.1.1 When marking witnesses for citing, staff should take care to cite only the minimum number of witnesses reasonably required to prove the charge(s) libelled, as detailed in Paragraph 7.61 of the Book of Regulations.

9.2 Statements & Witness 'S' (CHS) Numbers: What to Request

9.2.1 Statements will be requested for all witnesses listed in the police report (SPR – Standard Prosecution Report). Statement requests will **not** be restricted to those witnesses marked for citing.

9.2.2 'S' (CHS) numbers will be requested for all civilian witnesses that have been marked for citing.

9.2.3 Full statements and 'S' (CHS) numbers must be ordered through the administration record. Details of how to request full statements and 'S' (CHS) numbers can be viewed in the Summary Administration Instructions.

9.3 Statements & Witness 'S' (CHS) Numbers: When to Request

9.3.1 Where the accused pleads not guilty and is remanded in custody, statements and witness 'S' (CHS) numbers should be ordered immediately after court (i.e. on the same day). This is particularly important where the plea is tendered on a Friday. Where the plea of not guilty is tendered in a court that does not finish until after office hours, care should be taken to ensure that the statements and witness 'S' (CHS) numbers are ordered the following morning. Local arrangements should be put in place to deal with courts that overrun on a Friday to ensure that the police are advised at the earliest opportunity that statements are required, e.g. obtaining local agreement to order statements before court, in cases where bail is opposed..

9.3.2 Where the accused pleads not guilty and is bailed or ordained to appear, statements and witness 'S' (CHS) numbers should be ordered, as soon as possible after the plea is tendered but not later than 3 calendar days after the pleading diet.

9.3.3 Where the accused pleads not guilty and is bailed or ordained to appear and the court has fixed custody diets, due to the nature of the case, statements and witness 'S' (CHS) numbers should be ordered as if it were a custody case.

9.3.4 In FOS, a COP update is required in order to request statements through a checklist. If, at the stage statements require to be ordered in order to comply with the above timescales, a COP update has not yet been provided, statements should be requested outwith the checklist. In each such

case, the appropriate member of staff must go into each individual case manually and set the BU.

9.4 Event Records

9.4.1 When requesting full statements and witness 'S' (CHS) numbers, the "FOS BU" date should be set for 28 calendar days after the date of the pleading diet, where the accused is on bail or ordained to appear. This will be the date by which the police must submit full statements and witness 'S' (CHS) numbers.

9.4.2 Where the accused is remanded in custody, the "FOS BU date" should be entered set for 7 calendar days after the pleading diet, i.e. the date on which a plea of not guilty was tendered.

9.5 Submission of Statements & Witness 'S' (CHS) numbers

9.5.1 In terms of the Joint Protocol for the Disclosure of Evidential Material in Criminal Prosecutions, the police should submit full statements for all witnesses, along with 'S' (CHS) numbers, where they exist, for those civilian witnesses who have been cited, within agreed timescales. The timescales depend on whether the case is a custody or bail case.

9.5.2 Where the accused is remanded in custody, the police should submit statements and witness 'S' (CHS) numbers within 7 days of the plea of not guilty being tendered.

9.5.3 Where the accused is at liberty, the police should submit statements and witness 'S' (CHS) numbers within 28 calendar days of the plea of not guilty being tendered.

9.5.4 Where the accused is at liberty and, due to the nature of the case (see guidance on **priority cases** at paragraph 5.6 of the Joint Protocol for the Disclosure of Evidential Material in Criminal Prosecutions), custody diets have been fixed, the police should submit statements and witness 'S' (CHS) numbers within 7 days of the plea of not guilty being tendered. The fulfilment by the police of this requirement will be dependant on the Crown advising the police of the custody diets that have been fixed.

9.5.5 Where a case is identified as a priority case at case marking, and subsequently a plea of not guilty is tendered and custody diets are fixed, the court depute (or other appropriate member of staff according to local arrangement) at the time the plea of not guilty is tendered must send an ISCJIS email to the Reporting Officer immediately after court (i.e. on the same day), advising that the case is a priority case, that custody diets have been fixed and the relevant dates, and requesting the submission of full statements within 7 days of that date, i.e. the date on which a plea of not guilty was tendered. The email request must make clear that the 7 day deadline for submission of full statements applies notwithstanding any other timescale specified in any other *standard* full statement request.

9.5.6 After the Reporting Officer has been advised of these details by way of an ISCJIS email, the papers should be passed to the relevant member of staff to request full statements in the usual way, but with an instruction that the request must be sent that day, i.e. the date on which a plea of not guilty was tendered.

9.5.7 Notwithstanding the timescale specified in the standard full statement request, a FOS BU date should be entered, set for 7 calendar days after the pleading diet, i.e. the date on which a plea of not guilty was tendered.

9.5.8 Policy Division and ISD are working to achieve a solution which will allow priority cases to be identified at the marking stage and thereafter any full statement requests to be made, in the usual way, but automatically within the custody timescales, without the need to notify the Reporting Officer that the case is a priority case.

9.6 List of Witnesses

9.6.1 The defence should be provided with a list of witnesses 14 days after the plea of not guilty being tendered where the accused is at liberty, subject to the defence confirming in writing that they act for the accused. In custody cases and other cases where custody diets have been fixed, this list should be provided within 3 working days of the pleading diet.

9.6.2 This list should include all the witnesses listed in the SPR, and should not be restricted to the witnesses that the Crown is citing for trial.

9.6.3 The list of witnesses should generally be provided to the defence in advance of the disclosure of statements, previous convictions and outstanding charges.

9.6.4 Further guidance on the creation of a disclosable provisional list of witnesses is contained in Chapter 12 of this Manual.

9.7 Consideration of Statements

9.7.1 Once statements have been submitted by the police to the Crown, a legal member of staff should consider the statements and decide whether they should be withheld or disclosed to the defence in terms of the guidance set out in Chapters 4, 13 & 14 of this Manual. If the statement is to be disclosed or withheld meantime, it should then be considered for redaction purposes in terms of the guidance set out in Chapter 15 of this Manual.

9.7.2 Where there are only police witnesses in the case, statements do not need to be checked prior to disclosure to the defence. Where, however, there are civilian and police witnesses, the police witness statements should be checked to ensure that they do not contain any sensitive information about the civilian witnesses.

9.7.3 Where a legal member of staff considers that it is appropriate to withhold a statement completely, which contains either irrelevant or relevant *and* immaterial information, the decision not to disclose the statement must be taken by the District/Divisional Procurator Fiscal or a senior legal manager expressly authorised to act on his or her behalf in this regard. If a statement is withheld on these grounds, the witness may not be called to give evidence. **(C/f Chapter 4, in particular, paragraphs 4.2.3 – 4.2.5, and Chapter 13, paragraphs 13.3.1 – 13.3.4.)**

9.7.4 However, If a particular witness statement contains material information, i.e. information which falls within the **McDonald** and **McLeod** disclosure obligation, and there is a compelling reason why it should not be disclosed, e.g. it contains material covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed. However, non disclosure should be the last option after all other possibilities have been considered. **(C/f Chapter 4, paragraph 4.2.6, and Chapter 13, paragraphs 13.3.5 – 13.3.9.)**

9.8 Consideration of Criminal History Records

9.8.1 On receipt of the witness statements, where a witness is identified as having an 'S' (CHS) number, the criminal history record for that 'S' (CHS) number should be electronically requested from the Criminal History System (CHS). Further details on this are contained in Chapter 18 of this Manual.

9.8.2 Once criminal history records have been obtained, they should be checked to ascertain whether, and to what extent, they should be disclosed, subject to the materiality test.

9.9 Disclosure to the Accused's Legal Representative

9.9.1 Once the statements and criminal history records have been checked, and where appropriate redacted, they should be disclosed to the accused's representative.

9.9.2 Where the accused is remanded in custody pending trial and the defence solicitor has intimated in writing that he or she is acting for the accused, the Procurator Fiscal should, not later than 7 calendar days before the intermediate diet, provide the defence solicitor with those statements and criminal history records in their possession, which require to be disclosed.

9.9.3 Where the accused is at liberty and the defence solicitor has intimated in writing that he or she is acting for the accused, the Procurator Fiscal should, not later than 28 calendar days before the intermediate diet, provide the defence solicitor with those statements and criminal history records in their possession, which require to be disclosed.

9.9.4 Where the accused is at liberty but the case has been assigned a custody diet and the defence solicitor has intimated in writing that he or she is acting for the accused, the Procurator Fiscal should, not later than 7 days before the intermediate diet, provide the defence solicitor with those statements and criminal history records in their possession, which require to be disclosed.

9.9.5 After disclosure has been made, and if further statements and/or criminal history records are submitted to the Procurator Fiscal, these should be checked and, where appropriate, disclosed to the defence at the earliest opportunity.

9.9.6 Guidance on the method by which material should be disclosed to the accused's legal representative is contained within Chapter 11 of this Manual.

Chapter 10: Procedures for Disclosure of Statements and Criminal History Records: Solemn Cases

10.1 Requesting Statements & Criminal History Records: What to Request

10.1.1 The same information will be requested regardless of whether the case has been provisionally identified as a High Court case or a Sheriff and Jury case.

10.1.2 In terms of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions, notwithstanding the disclosure duty on the Crown to disclose all statements of all witnesses on the Crown and defence lists, **all** statements held by the police should be requested. This includes **all** statements held by the police for a particular witness. The police should then provide **all** statements held by them in respect of the case.

10.1.3 Criminal history records will be requested for all civilian witnesses (as defined in the categories of witnesses at Annex A of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions) listed in the SPR or subsequently intimated to the Crown by the police, regardless of whether or not the witness is likely to be included as a witness in the indictment.

10.1.4 Full statements and criminal history records must be ordered through the administration record. Details of how to request full statements and criminal history records can be viewed in the Solemn Administration Instructions.

10.2 Requesting Statements & Criminal History Records: When to Request

10.2.1 *Custody Cases*

10.2.1.1 Where the case is reported as a **custody** case and is marked as a petition, statements and witness criminal history records should be ordered at the time the custody case is prepared for court, i.e. before the accused appears in court. The timescales for submission will depend on whether bail is being opposed or not.

10.2.1.2 If bail is opposed, essential statements and criminal history records should be requested for submission within 5 calendar days of CFE with the remainder of all statements to be submitted within 21 days of CFE. Essential statements are those statements which are necessary to establish a sufficiency of evidence for full committal.

10.2.1.3 Currently there is no facility in FOS to automatically identify and request the submission of full statements and criminal history information for essential witnesses, within the specified timescales. Policy Division is working closely with ISD to achieve a long term solution which will enable

deputes to insert details of essential witnesses within the Depute Instructions in FOS. That information will then be extracted automatically and included in the full statement request, for submission within 5 calendar days of CFE.

10.2.1.4 In the meantime, until a suitable solution is in place, it is the responsibility of the marking depute where a case is marked for petition proceedings and bail is opposed by the Crown, to identify what witness statements are essential for submission before full committal, and to send an ICJIS email to the Reporting Officer confirming details of those essential witnesses. The Reporting Officer will thereafter prioritise these statements and ensure that these and the relevant criminal history records are submitted within 5 calendar days of CFE. The remainder of statements and criminal history records will then be submitted within 21 days.

10.2.1.5 If bail is granted and no Crown Bail appeal is marked, the Custody Court Clerk should contact the Reporting Officer or Case Management, depending on local arrangements, and advise them that essential statements are no longer required within 5 days. In such a case **all** statements and criminal history records should be submitted within 21 days of CFE.

10.2.2 *Petition Warrants*

10.2.2.1 Where the case is marked as a **petition warrant**, statements and criminal history records should be requested immediately, i.e. at the time of marking. It is not necessary to wait for the accused to answer the warrant. All statements in the case should be requested at this stage. The reporting officer should be asked to submit these within 21 days in all such cases.

10.2.2.2 If, when the accused answers the petition warrant, the statements and criminal history records have not yet been submitted, a reminder should be sent immediately after court where the accused is remanded in custody. This is particularly important where the appearance is on a Friday. As with custody cases, essential statements should be requested for submission within 5 days of CFE, with the remainder being submitted within 21 days of CFE.

10.2.2.3 Where the accused is committed for further examination and remanded in custody, in a court that does not finish until after office hours, care should be taken to ensure that reminders for submission of the statements and criminal history records are ordered the following morning. Where this is a regular occurrence on a Friday, the District/Divisional Fiscal should liaise with the relevant Divisional Commander to ensure procedures are in place for intimating requests at the earliest opportunity.

10.2.2.4 Where, on answering a petition warrant, the accused is admitted to bail and the statements and criminal history records have not yet been received, a reminder should be sent as soon as possible after court, and not later than 3 calendar days after the accused has been committed for further examination.

10.3 Event Records

10.3.1 When requesting full statements and criminal history records, an “Event Date” should be entered into the “Administrative Record” for 21 calendar days after the date of first appearance, where the accused is on bail. This will notify the date by which the police must submit full statements and criminal history records.

10.3.2 Where the accused is remanded in custody, the “Event Date” should be entered into the “Administrative Record” for 5 calendar days after first appearance.

10.4 Submission of Statements & Criminal History Records

10.4.1 In terms of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions the police will submit full statements, along with criminal history records (where they exist) for all civilian witnesses, within agreed timescales, depending on whether the case is a custody or bail case.

10.4.2 Where the accused is remanded in custody, the police will submit essential statements and associated criminal history records within 5 calendar days of committal for further examination. The remainder of the statements and criminal history records will be submitted within 21 days of CFE.

10.4.3 Where the accused is at liberty, the police will submit statements and criminal history records within 21 calendar days of committal for further examination.

10.4.4 Where the accused is at liberty and, due to the nature of the case, it is to be reported to Crown Office within custody timescales, the police will submit statements and criminal history records in accordance with the custody timescales set out above. However, the marking depute (or other appropriate member of staff according to local arrangement) must advise the Reporting Officer that the case is a priority when sending notification of the essential witnesses whose statements and criminal history information should be submitted within 5 days of CFE. Therefore, the case is being treated as a custody case.

10.4.5 Policy Division and ISD are working to achieve a solution which will allow priority cases to be identified at the marking stage and thereafter any full statement requests to be made, in the usual way, but automatically within the custody timescales, without the need to notify the Reporting Officer that the case is a priority case.

10.5 List of Witnesses

10.5.1 Once a defence agent has confirmed in writing that he or she acts for the accused, they should be provided with a provisional list of witnesses in the

case. This list should include all the witnesses listed in the SPR, and should not be restricted to the witnesses that the Crown is citing for trial.

10.5.2 The provisional list of witnesses should be provided to the accused's representative within 14 calendar days of first appearance. Where no agent has intimated that they are acting for the accused, arrangements should be put in place for that witness list to be available within that time frame, so that it can be issued when a solicitor has intimated in writing that he or she is engaged on behalf of the accused. Intimation is not required for preparation of the list but it is required before the list is issued.

10.5.3 It may be appropriate in certain cases to temporarily withhold the details of a witness. Guidance on the drafting of the provisional list of witnesses is contained in Chapter 12 of this Manual.

10.6 Consideration of Statements

10.6.1 Once statements have been submitted to the Crown, the Solemn Legal Manager should consider the statements and decide whether they should be withheld or disclosed to the defence in terms of the guidance set out in Chapters 4, 13 & 14 of this Manual. If the statement is to be disclosed or withheld meantime, it should then be considered for redaction purposes in terms of the guidance set out in Chapter 15 of this Manual.

10.6.2 Where the Solemn Legal Manager considers that it is appropriate to withhold a statement completely, which contains either irrelevant or relevant *and* immaterial information, the matter should be reported to the Deputy Crown Agent, for Crown Counsel's instructions. If a statement is withheld on these grounds, the witness may not be called to give evidence. **(C/f Chapter 4, in particular paragraphs 4.2.3 – 4.2.5, and Chapter 13, paragraphs 13.3.1 – 13.3.4.)**

10.6.3 However, If a particular witness statement contains material information, i.e. information which falls within the **McDonald** and **McLeod** disclosure obligation, and there is a compelling reason why it should not be disclosed, e.g. it contains material covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed. However, non disclosure should be the last option after all other possibilities have been considered. **(C/f Chapter 4, paragraph 4.2.6, and Chapter 13, paragraphs 13.3.5 – 13.3.9.)**

10.6.4 **All** witness statements should be checked for redaction purposes prior to disclosure unless there are no civilian witnesses in the case. (In summary cases, where the only witnesses in the case are police witnesses, their statements do not routinely require to be checked for redaction purposes prior to disclosure.) In solemn cases, police statements should be routinely

checked to ensure that no sensitive information is disclosed, e.g. references to a CHIS, ongoing confidential operations, details of where police took observations of the accused from etc.

10.7 Consideration of Criminal History Records

10.7.1 Once criminal history records have been obtained, they should be checked to ascertain whether, and to what extent, they should be disclosed in accordance with the materiality test set out in **McDonald** and **McLeod**.

10.7.2 When a witness attends for precognition, the precognoser should advise the witness that it will be necessary to disclose details of their previous convictions and/or outstanding charges where the Crown intends to disclose this information. They should also canvass with the witness if there are any grounds for non-disclosure, as set out in Chapter 17 of this Manual.

10.7.3 Any decision or recommendation not to disclose criminal history information should be recorded in the Disclosure Page, between the f107 Observations Page and the Witness Non-Availability sheet, in the precognition. Where appropriate, the 'PCOCs' column in the Witness Precognition Record should be completed with a general indication of "yes" or "no" in terms of a recommendation on whether or not the previous convictions and/or outstanding charges of a witness should be disclosed. Where appropriate, for example, where the recommendation is that only part of a witness's record should be disclosed, and part should be withheld, further details of the recommendation should be included in the relevant section of the Disclosure Page in the precognition. **(C/f Chapter 19, paragraphs 19.2.2 and 19.2.3 on the different recommendations required in High Court cases and Sheriff and Jury Cases.)**

10.7.4 In all solemn cases, a witness's criminal history information should be inserted into the precognition behind the witnesses' precognition and police statements. Where a civilian witness has **no** criminal history record this should be highlighted at the top of the precognition or the first page of the police statement.

10.8 Disclosure to the Accused's Legal Representative

10.8.1 Once the statements and criminal history records have been checked, and where appropriate redacted, they should be disclosed, at the stages detailed below, to the accused's representative. This should only be done where the solicitor has confirmed in writing that he or she is acting for the accused. **Please note that in solemn cases, the criminal history records are disclosed at a later stage than the statements.**

10.8.2 In terms of the Crown Practice Statement on Disclosure in High Court Cases, the Crown will provide the defence with copies of all civilian, police, "professional/expert/official" witness statements that are in its possession, within 28 days of first appearance in all cases that are likely to be indicted in the High Court.

10.8.3 The Crown will also provide the defence with copies of all civilian, police and “professional/expert/official” witness statements that are in its possession, within 28 days of first appearance in all cases that are likely to be indicted in the Sheriff and Jury courts.

10.8.4 In all cases that are being indicted, either in the High Court or in the Sheriff and Jury Courts, the defence should be provided, at the time the indictment is served, with copies of criminal history records against those civilian witnesses listed on the indictment. These should be sent out with the style covering letter SOLDISPCOCSLET.

10.8.5 Where witnesses are added by a notice served under the terms of section 67 of the Criminal Procedure (Scotland) Act 1995, copies of the statements of the relevant witnesses should be given to the defence at the time of service, if they are available, along with copies of their criminal history records, if applicable, subject to the materiality test.

10.8.6 Guidance on the method by which material should be disclosed to the accused’s legal representative is contained within Chapter 11 of this Manual.

Chapter 11: Transmission of Disclosure Material

11.1 Further guidance will be available in the next few months on the appropriate procedures for transmission of disclosure bundles to the defence. This is currently under review following concerns about posting out material rather than arranging for the defence agent to collect and sign for the material.

11.2 In addition, BBPD and ISD are working with external developers to design a secure website for disclosure to the defence which, subject to successful testing should be in place before the end of 2008. At the same time we are continuing to work on disclosure on DVD, in particular to achieve a secure method of redaction. It is likely disclosure of DVD will be piloted before being rolled out nationally.

Chapter 12: List of Witnesses

12.1 General Practice

12.1.1 The general practice adopted by the Crown on disclosure of lists of witnesses is set out in the Crown Practice Statement on Disclosure in High Court Cases. This applies to Sheriff and Jury, Summary and District cases as well.

12.1.2 In Summary cases, the Crown should, where the accused's representative has confirmed in writing that they act for the accused, provide them with a provisional list of witnesses within 14 days of the pleading diet.

12.1.3 In Solemn cases, the Crown should, where the accused's representative has confirmed in writing that they act for the accused, provide them with a provisional list of witnesses within 14 days of first appearance.

12.2 Addresses of a Witness

12.2.1 When sending out the list of witnesses, vulnerable witnesses should be designated as being care of the police.

12.2.2 Witnesses who are witnesses in the course of their employment should be designated as being care of their place of employment.

12.3 Withholding details of a Witness

12.3.1 The obligation is to issue a **provisional** list of witnesses. It may be necessary to withhold disclosure of the details of some witnesses temporarily pending further steps. The Crown Practice Statement on Disclosure in High Court Cases specifically permits this, subject to those details being provided as soon as practicable. This exception will apply principally in the case of vulnerable witnesses as set out in the Precognoscer's Handbook.

12.4 When to withhold

12.4.1 It may be appropriate to withhold details of vulnerable witnesses to ensure that they are given a full explanation of the precognition process and the court procedure that may follow thereafter, prior to them being questioned by the defence in circumstances where they have no such understanding. Details of when a witness would be considered vulnerable are contained in Crown Office Circular 5 of 2006: Vulnerable Witnesses (Scotland) Act 2004. Procurators Fiscal should also exercise their discretion in this regard in respect of other witnesses where appropriate.

12.4.2 This is particularly relevant in the case of child witnesses where the child or his or her carers should be advised of the possibility of defence precognition before details are provided to the defence.

12.4.3 Issues of operational security should also be borne in mind. There may be witness details which, for reasons in the public interest, or related to Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, it is appropriate to withhold, until such time as the outstanding issues have been resolved. In this event, an early FOS BU date should be fixed in order to ensure this position is reviewed for the purpose of disclosure.

12.4.4 If it is not clear from the initial police report whether a witness is of relevance to the case (because his or her involvement is not specified in the narrative or analysis sections) then such details should be withheld pending receipt of full statements. It should be borne in mind that the list of witnesses is a **provisional** list and that in most cases it will be the disclosure of statements that will be of material interest to the defence.

12.4.5 In any case where a decision is taken to withhold the details of a witness temporarily, they must be released as soon as practicable thereafter. The consequences of a decision to withhold details will be that the witness whose details are withheld must be precognosed as soon as possible. As this is likely to apply almost exclusively to vulnerable witnesses, this is in keeping with best practice and is consistent with the terms of General Minute to All Staff No 4/03 on preventing delay. It is essential that an early FOS BU is created where witness details are withheld in order to ensure that this position is reviewed for the purpose of disclosure.

12.4.6 In exceptional circumstances it may be necessary to withhold the details of a witness *completely* on public interest grounds and this is recognised in the Crown Practice Statement on Disclosure in High Court Cases. Although it may be possible to advise the defence that this has been done it should be borne in mind that the very disclosure that information has been withheld may allow the defence to identify the nature of the evidence, e.g. that of an informant, with a consequential risk to security. Details of a witness should only be withheld on public interest grounds on the explicit instructions of the Area Procurator Fiscal or a senior legal manager expressly authorised to act on his or her behalf in that regard. The Area Procurator Fiscal or senior manager will only give such instructions after the matter has been reported to the DCA for the attention of the Law Officers, and receipt of explicit instructions.

12.5 Additional Witnesses

12.5.1 Where, after the provisional list of witnesses has been disclosed to the defence, the Crown identifies, during the course of its preparation or investigation of the case, any further witnesses who are relevant to the case against the accused and who have not been previously intimated to the defence, it will provide to the defence details of these as soon as practicable, subject to the same qualifications as apply to the provisional list of witnesses.

Chapter 13: Witness Statements: General

13.1 General Practice

13.1.1 The general practice adopted by the Crown in relation to the provision of statements to the accused's representatives is set out in this Manual and in the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions.

Timing of disclosure of witness statements

13.1.2 The general rule is that in all summary cases where the accused is on bail or ordained to appear, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, not less than 28 calendar days before the Intermediate Diet.

13.1.3 The general rule is that in all summary cases where the accused is remanded, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, not less than 7 calendar days before the Intermediate Diet.

13.1.4 The general rule is that in all solemn cases, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, within 28 calendar days of the accused's first appearance.

Content of disclosure

13.1.5 The general rule is that the Crown should provide the defence with copies of statements of all witnesses that are in their possession. It should be noted that this is not limited to those witnesses that the Crown intends to call at trial.

13.2 Withholding Statements Temporarily

13.2.1 Statements may be withheld where the Crown proposes to disclose a statement but further steps are necessary before disclosure is made, e.g. statements of vulnerable witnesses (particularly where the case involves sexual offences) and/or child witnesses where the Crown intends to precognose these witnesses prior to their statements being disclosed to the defence. In such circumstances, care should be taken to ensure early precognition of such witnesses in order to limit the period during which the statement is withheld. **(C/f Chapter 4, paragraphs 4.2.3 - 4.2.7, Chapter 9, paragraphs 9.7.1 – 9.7.4, and Chapter 10, paragraphs 10.6.1 – 10.6.4.)**

13.3 Withholding Statements Completely

13.3.1 The Crown may require to consider withholding a statement where it contains information which is material covered by public interest immunity, or

which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons⁴⁰.

13.3.2 If the statement does not contain any information which would fall to be disclosed in terms of **McDonald** and **McLeod**, for example, where the statement is wholly incriminatory of the accused, the Crown may, if the circumstances referred to in paragraph 13.3.1 pertain, decide not to call the witness and to withhold the statement. (C/f Chapter 4, paragraphs 4.2.3 - 4.2.5.)

13.3.3 Where the statement contains sensitive information and/or the circumstances in paragraph 4.2.3 above (in Chapter 4 of this Manual) apply, it may be withheld. However, non disclosure should be the last option after all other possibilities have been considered, and, in particular, relevant wholly incriminatory information should only be withheld in exceptional cases.

13.3.4 A decision to withhold a statement in terms of paragraph 4.2.4 above (in Chapter 4 of this Manual), must be taken by the appropriate Legal Manager. In solemn cases, the matter should be reported to the Deputy Crown Agent, for Crown Counsel's instructions. If a statement is withheld on these grounds, the witness may not be called to give evidence.

13.3.5 If the statement contains information which is disclosable in terms of **McDonald** and **McLeod**, the Crown must consider whether or not the statement can be withheld while still fulfilling its obligations under **McDonald** and **McLeod**. (C/f Chapter 4, paragraph 4.2.6.) The following are possible ways of securing that the Crown's obligations of disclosure are fulfilled while still withholding the sensitive information which is not disclosable:-

- (i) disclose the statement in a redacted form removing the sensitive information, so that the defence is provided with all information which must be disclosed in terms of **McDonald** and **McLeod**; or
- (ii) making an admission of facts, essentially providing a note advising the defence of the content of the statement which is disclosable in terms of **McDonald** and **McLeod**, without providing a copy of it.

13.3.6 If the Crown's obligations in terms of **McDonald** and **McLeod** cannot be secured in this way, the Crown has two options:-

- (i) to discontinue proceedings; or

⁴⁰ C/f **Swinney v Chief Constable of Northumbria**, (1999) 11 Admin. L.R. 811, in which the court considered the duty owed by the police to informers, to take reasonable care in preventing confidential information from being disclosed to the public. See also **Osman v Ferguson**, [1993] 4 All ER 344, in which the court stated that the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so.

- (ii) to seek to invoke public interest immunity.

13.3.7 If the Crown is not prepared to discontinue proceedings, it is not entitled unilaterally to withhold the information from the defence. The question of whether the information should be disclosed will have to be decided by the Court. When this arises, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported to the Deputy Crown Agent for the attention of the Law Officers by the District or Area PF with an appropriate recommendation, for a decision as to how the issue should be addressed.

13.3.8 It will be highly exceptional for statements to be completely withheld. In any case where a decision is taken to withhold a statement completely, it will not usually be appropriate to disclose the reasons for withholding where such reason may of itself present a security risk, e.g. where the information has been passed by an informant.

13.3.9 Where a statement has been withheld in whole or in part, it will be necessary to keep the question of disclosure under review. New information and other developments in the case may require the question of disclosure to be revisited.

13.4 Additional Witness Statements

13.4.1 Where the Crown, in the course of its preparation or investigation of the case, receives additional statements of any further witnesses who are material to the case against the accused and who have not been previously provided to the defence, it will provide to the defence copies of these as soon as practicable, subject to the same qualifications that apply to the original provision of copy statements.

13.4.2 It should be noted that this also applies where the Crown receives additional statements of witnesses already known to the Crown and disclosed to the defence.

13.5 Release of Material

13.5.1 Where any disclosure of statements is to be made, it should be conditional on the material only being used for the limited purpose of the proper preparation and presentation of the case in which disclosure is made. This is clearly specified in the Article 11 of the Code of Conduct in Criminal Work, which governs the use and retention of disclosed material by defence solicitors. The guidance note attached to Article 11 states that *“solicitors are reminded that, in receiving documentation, material or recordings from the COPFS, or other third parties, that they are accepting an implied undertaking to comply with the terms of this Article”*.

Chapter 14: Witness Statements: Format & Content

14.1 General

14.1.1 To promote good quality and best practice in statement taking, a National Standard Statement (NSS) was designed. This now forms the template for dictation of **all** statements to be submitted to the Fiscal by all Scottish Police Forces. A copy of the template is attached at Annex A.

14.1.2 ACPOS and COPFS have prepared joint guidance on Police Reports, Statements and Presentation of Evidence in Court which includes guidance on completion of the national standard statement.

14.2 Framework of the National Standard Statement

14.2.1 The NSS is in two parts. The first part is the statement itself and is designed to be disclosed. The second part contains confidential information about the witness that does not form part of the statement and is for the information of the Procurator Fiscal. Either part may, however, contain material that is or is not disclosable in terms of **McDonald** and **McLeod** and Procurators Fiscal will require to consider both parts when considering whether material requires to be disclosed.

14.3 Disclosable Part of the National Standard Statement

14.3.1 Sections one to three of the NSS make up the disclosable part of the statement.

14.3.2 The first section contains basic information about the witness, such as name, disclosable address and age.

14.3.3 The second section confirms the circumstances in which the statement was taken, including details of the date and time it was compiled, where it was compiled and the identity of the persons present. This section – the provenance section – also notes details of where the original statement is recorded (whether in a notebook, hard copy statement, log or elsewhere). Finally, this section provides details of whether the witness has authenticated the contents. Completion of the details in the provenance section are mandatory, e.g. if a witness does not authenticate the statement it will still be necessary to say whether the witness has refused to sign the statement. A police officer's statement must be verified by that officer as his or her own statement. If the witness has not have the opportunity of doing so, then that statement should not be submitted until it has been verified except where the statement is required urgently for full committal. In such circumstances, it has been agreed nationally that the police can submit essential statements unauthenticated for the purposes of full committal, but thereafter must confirm their accuracy within 21 days of committal for further examination, i.e. by the date that the remainder of the statements in the case should be submitted.

14.3.4 The third section of the disclosable part is free text. This will contain details of what the witness says. Where there is information that is operationally sensitive, or if there is personal information about the witness that is not relevant to the case, this should be put in the separate confidential part.

14.4 Confidential Part of the National Standard Statement

14.4.1 Sections four to six of the NSS make up the confidential part of the statement. Although, in general, the information contained in this part of the NSS is confidential, it may nevertheless contain information which the Crown is obliged to disclose to the defence in terms of *McDonald* and *McLeod*.

14.4.2 Section Four contains additional personal data, such as mobile phone numbers, private addresses etc. This section will also note details of whether a witness has an 'S' (CHS) number. Completion of this information is mandatory, e.g. if a witness does not have an 'S' (CHS) number then it is necessary to state this by selecting the option "No SCRO Record". A search for a 'S' (CHS) number will only be carried out if the witness is a civilian witness. Where the witness is either a police witness or a "professional/expert/official" witness, then the officer must state that the 'S' (CHS) number is "not applicable". (**C/f Chapter 17, sections 17.4 – 17.5.**)

14.4.3 Section Five provides details of a witness's availability to come to Court over a 12-month period. This is particularly critical in High Court cases because the Court must have a range of dates available for each witness in order to set a date upon which it is known that any trial will proceed.

14.4.4 Section Six contains any confidential material that would not, in the opinion of the police, be disclosable to the defence but which the officer requires to bring to the attention of the Fiscal. This will include any concerns that the officer may have regarding the accuracy of the 'S' (CHS) number included in section four of the NSS. Ordinarily this part of the statement will not be treated as part of the statement for the purposes of disclosure.

14.5 Specialist Reporting Agency Cases

14.5.1 Currently statements submitted as part of a Specialist Reporting Agency Case will not necessarily be in the format of the National Standard Statement. Special care may, therefore, need to be taken when redacting these statements.

14.6 Content of Witness Statements

14.6.1 It is a fundamental and obvious requirement that statements should be compiled as accurately as possible. Prosecution decisions depend on the accuracy of statements. Statements may be used, both by the Crown and by the defence in the course of the trial. The contents of a statement may, in certain circumstances, become evidence in the case. All of this presupposes

that statements contain an accurate account of the witness' evidence as given to the police.

14.6.2 Guidance to the police on the form and content of statements is contained in the COPFS/ACPOS Guidance on Police Reports, Statements and the Presentation of Evidence in Court. Further detailed guidance on the form and content of statements from medical witnesses and police casualty surgeons is included in the COPFS/Strathclyde Police Guidance Notes for the Prosecution of Serious Crime .

14.6.3 Where the police submit statements that do not comply with the guidance detailed at paragraph 14.6.2 above, consideration should be given to requiring the Reporting Officer to submit fresh statements, particularly where any of the matters specified in the guidance have not been adequately dealt with in the statements originally submitted. In addition, in light of other information which is or becomes available to the Crown, the police may be instructed to take an additional statement. In any case where a fresh statement is obtained, both the original and the new statement should be disclosed to the defence.

Chapter 15: Witness Statements: Redaction

15.1 General Principles

15.1.1 The Crown may redact any witness statement to obscure information of a confidential nature contained within the statement, provided that the information redacted does not fall within the **McDonald** and **McLeod** obligation of disclosure.

15.1.2 **Any such redaction of a witness statement must be obvious on the face of the statement.** The relevant text should be blacked out. Under **no** circumstances should the text simply be deleted from the disclosable copy of the statement so that the redaction is not apparent on the face of the document.

15.1.3 There are various types of information within a statement that may require to be redacted. These are considered further below. However, the question of redaction must always be considered in light of and subject to the Crown's obligation of disclosure in terms of **McDonald** and **McLeod**.

15.1.4 In any case of doubt, staff should consult the appropriate legal manager.

15.1.5 **Care must be taken to read the entirety of the statement, as it may be that references are made in section 3 of the statement to information which should be redacted and this may not be obvious.**

15.1.6 Where statements have been obtained from defence witnesses and these are being disclosed to the defence, the same principles of redaction apply.

15.2 Personal Details

15.2.1 Before disclosing any statement, any personal data that is not relevant to the case should be redacted.

15.2.2 The Full Name of a witness should **not** be redacted unless redaction is considered necessary in order to ensure the anonymity of a witness to whom such disclosure may represent a risk to life, health or security, or in order to avoid prejudicing ongoing investigations or proceedings. *This will be highly exceptional*⁴¹.

15.2.3 The Age of a witness should **not** be redacted.

15.2.4 The Date of Birth of a witness should **not** be redacted.

15.3 Address of a Witness

⁴¹ HMA v Giovanni Mola, 2007 SCCR 124.

15.3.1 The address inserted in **Section 1** should generally not be redacted. There is a presumption that the police officer taking the statement will have canvassed this issue with the witness and, accordingly, the address given in **Section 1** will be the address the witness is willing to have disclosed to the defence.

15.3.2 Where there are concerns that the police are inserting addresses into **Section 1** of the NSS without first canvassing the issue with the witness, District/Divisional Fiscals should arrange for this to be addressed at a local level.

15.3.3 Redaction of the address should only be necessary where:

- (i) The witness is the victim of an offence of a sexual nature;
- (ii) Where the witness fears reprisals or intimidation;
- (iii) Where the witness is speaking to matters arising from his/her employment (such witnesses should be designated and cited at their places of employment); or
- (iv) The witness otherwise indicates that he/she does not wish their address disclosed.

15.3.4 The address inserted in **Section 4** of the NSS should never be disclosed.

15.3.5 Where the home address of a witness is not to be disclosed, particular care should be taken when checking the statement of the police officer who took the statement from the witness, as the officer may make reference in **Section 3** of his or her own statement to attending at the home address of the witness to take their statement. **Section 2** should also be checked to ensure that it does not contain details of an address which should not be disclosed.

15.4 Telephone Numbers

15.4.1 These should always be redacted unless:

- (i) The information is already known to the accused, for example in a domestic matter; or
- (ii) It is essential to proving the charge.

15.4.2 Telephone numbers of witnesses should only be noted in the confidential section of the statement.

15.5 Occupation

15.5.1 This should not be redacted unless:

- (i) Redaction is considered necessary in order to ensure the safety of a witness, for example where the complainant is the

victim of a housebreaking (thus the accused knows their address) and their occupation is a police officer, COPFS employee, prison officer etc.;

- (ii) Disclosure of the occupation may lead to the location of the workplace and that information is irrelevant to the offence.

15.6 Place of Work

15.6.1 This should be redacted unless it is relevant to the offence.

15.6.2 This information should normally only be noted in the confidential section of the statement.

15.7 Next of Kin/ Family History Details

15.7.1 There is a presumption that this information should be redacted.

15.7.2 This information should normally only be noted in the confidential section of the statement and should not be disclosed unless the defence advance a case that is based upon such features in any way.

15.8 Medical Information

15.8.1 This should be redacted unless it is directly material to the cases, for example where there are injuries sustained by a complainant in an assault case, or where it is relevant to explaining the behaviour of a witness.

15.8.2 Again, this position should be reviewed if the defence advance a case that is based upon such features in any way.

15.9 Where & When a Statement was taken and by Whom

15.9.1 This should not be redacted unless the information is not disclosable, with reference to the points above, for example, if it would reveal a private address. The police should use general descriptions like "Witness Business Address" or "Witness Home Address" rather than give the actual addresses.

15.10 Security Information

15.10.1 The police will occasionally record information that could potentially reveal security aspects of domestic or business premises. This information may be relevant to the crime but very often it is not and disclosure would be inappropriate.

15.10.2 Where such information is contained within a statement, and is irrelevant, it should be redacted. This category will include, for example, information on where a witness stores valuables or keys. It can also include dates where the witness will be on holiday, which should normally be contained within **Section 5** of the NSS.

15.10.3 Care should also be taken where the witness does not wish a home address to be disclosed. The police may do so inadvertently by including details of the witness's movements that refer to the address indirectly in the body of the statement, e.g. "*I called in to the Jet garage across the road from my house*". If the visit to the garage was by way of general background but not directly relevant to the facts of the case, this part should be redacted if the witness has indicated that the home address should not be disclosed.

15.10.4 Security information regarding other witnesses in the case should also be redacted.

15.11 Operational Information

15.11.1 A witness statement may sometimes reveal information about an ongoing Police operation which, if it were to be known to the accused, may prejudice that operation.

15.11.2 An example would be a witness statement that disclosed what the accused had said to a witness about his involvement in the crime, e.g. his movements or his involvement with a production. It may be necessary, prior to redaction, to check with the Reporting Officer whether or not the line of enquiry that this information may have produced has been completed or whether it would be necessary to consider withholding or redacting the statement until such time as that has been done.

15.11.3 Another common example is where the police have been engaged in surveillance operations that implicate the accused but are not necessarily needed to prove the case against the accused. In those circumstances, the revelation of the existence of the details of the surveillance may prejudice a larger operation of which the case in point may only be a small part.

15.11.4 It is also relevant to consider whether or not disclosure of operational information that might place a member of the public, who is not a witness, at risk, e.g. disclosure of an observation point in a member of the public's home.

15.11.5 If the information is not relevant to the case against the accused, then it is not disclosable under **McDonald** and **McLeod**, and the information may properly be redacted. If it is relevant to the case against the accused but does not fall within the Crown's obligation of disclosure (e.g. because any relevance which it might have would be wholly incriminatory of the accused), the Crown may redact the statement to obscure that information. If there is any doubt about what information should be redacted the appropriate legal manager should be consulted.

15.11.6 If the information would fall to be disclosed under **McDonald** and **McLeod**, the Crown has two options:-

- (i) to discontinue proceedings; or

(ii) to seek to invoke public interest immunity.

15.11.7 If public interest immunity is invoked, the question of disclosure will have to be resolved by the Court. When this arises, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported to the Deputy Crown Agent for the attention of the Law Officers by the District or Area PF with an appropriate recommendation, for a decision as to how the issue should be addressed.

15.12 Issues of Materiality and Admissibility

15.12.1 Issues of materiality and admissibility should not be considered as part of the redaction process. Thus potentially irrelevant material such as hearsay evidence or statement of opinion should be disclosed unless there is any other reason to withhold or redact it. **In no case should information which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt on it, or which is of positive assistance to the accused be redacted.**

15.13 Review of Decisions

15.13.1 Any decision to redact information should be reviewed: (a) if the defence request access to the redacted information; or (b) if it becomes apparent, in light of any new information or other developments in the case, that the appropriateness of the redaction should be revisited.

15.13.2 Any such review of a decision to redact information should be taken by the appropriate Legal Manager, depending on the type of case. If there is any doubt about what information should be redacted / disclosed, the matter should be reported to the Deputy Crown Agent for Crown Counsel's instructions.

15.14 Copies of Redacted Statements

15.14.1 Where a statement has been redacted, a file/hard copy of the redacted statement must be retained for audit purposes.

15.14.2 In High Court cases, a further two copies should be prepared: one for the Advocate Depute and one for the trial judge. Further details of this are contained in Chapter 21 of this Manual.

Chapter 16: Reconciliation of Statements and Criminal History Records in High Court Cases

16.1 General Purpose of Reconciliation

16.1.1 It is of particular importance in High Court Cases, that the Crown should be able, if required, to satisfy the Court that it has met its disclosure obligations in terms of **McDonald** and **McLeod**. The Crown must have an accurate and full record of all material disclosed to the defence throughout all stages of a case.

16.1.2 The Crown must be satisfied in each case that:

- i) The police have submitted all statements taken;
- ii) The Crown has considered and, where appropriate, disclosed every material statement submitted by the police;
- iii) The police have submitted (where it exists) the 'S' (CHS) numbers for all witnesses that the Crown intends to call at trial;
- iv) The Crown has considered and, where appropriate, disclosed every material conviction and/or charge contained in the Criminal History Record (CHR) obtained from the CHS or the police;
- v) Any decisions to redact statements have been correct; and
- vi) Where a decision has been taken to withhold a statement completely from the defence, that this decision has been a correct one.

16.1.3 All High Court precognitions submitted to Crown Office **must** contain the information necessary to enable the Court to be satisfied that the reconciliation process detailed above has been carried out in each case. Full details of what information should be included in the precognition are contained in paragraphs 16.13 and 16.14 below.

16.1.4 The Disclosure Reconciliation Checklist (template checklist included at Annex C) and associated reports should accurately record details of all witness statements submitted by the police, held by the Crown and disclosed to the defence, i.e. provide an overview of the disclosure process for witness statements, up to a certain point in a case.

16.1.5 The Disclosure Page in the precognition, between the f107 Observations Page and the Witness Non-Availability sheet, should record any outstanding disclosure issues, where a decision has yet to be taken on disclosure of certain material, or a decision has been taken not to disclose certain information. Keeping a record of specific decisions not to disclose information allows these decisions to be reconsidered and reviewed at a later stage if necessary. The Disclosure Page, in the same way as the Observations Page, is a living document and should be regularly updated as

disclosure decision are taken, reconsidered and reviewed. This applies in both High Court and Sheriff and Jury cases.

16.1.6 The effectiveness of the reconciliation process in every High Court case is dependant on both the Police and Crown carrying out the processes detailed below.

16.1.7 A timeline setting out the processes detailed below and the stages at which these processes should be carried out is attached at Annex B. These processes only apply in High Court cases and not in Sheriff and Jury cases.

16.2 Identifying Cases as High Court Cases

16.2.1 It is essential that offices identify cases as potential High Court Cases at the earliest opportunity in order to ensure that the proper procedures for reconciliation are put into effect as soon as possible.

16.2.2 Once a case has been identified as a potential High Court case, the Reporting Officer should be advised of this. This should always be done not later than the allocation stage of the case for precognition. A copy of the template letter can be found in the FOS templates on the intranet.

16.3 Anticipated Reporting and Preliminary Hearing Dates

16.3.1 As soon as the precognoscer is advised of (i) the date by which the precognition is to be reported to Crown Office and (ii) the anticipated date of the preliminary hearing, he or she **must** advise the Reporting Officer of this information. A copy of the template letter can be found in the FOS templates on the intranet.

16.4 Submission of Material by the Police

(C/f Chapter 3, paragraphs 3.2.1 – 3.2.5 and Chapter 27, in particular paragraphs 27.2.2 – 27.2.5.)

16.4.1 The police **must** submit every statement taken during the investigation of a case. Where multiple statements are taken from a single witness, **all** of the statements taken **must** be submitted, regardless of whether the information contained in the statement is also included in later statements taken from the same witness.

16.4.2 There is no mandatory requirement for the police to submit to the Procurator Fiscal 'door-to-door' enquiry forms or pro-forma questionnaires used to gather information and/or evidence at an early stage of an investigation. Where such material exists, however, the Reporting Officer must discuss with the Solemn Legal Manager whether it should be provided to the Procurator Fiscal and thereafter disclosed to the defence. It is important to remember that the Crown's duty in terms of **McDonald** and **McLeod** continues throughout the case and can apply to such material as well as to 'traditional statements'.

16.4.3 Where, however, the 'door-to-door' enquiry form or the pro forma questionnaire relates to a witness whose statement or statements have been disclosed, then the enquiry or pro forma form **must** be submitted and, as appropriate, disclosed in accordance with the materiality test.

16.5 Inventory of Statements and Criminal History Records

16.5.1 In every High Court case, a master inventory of statements and criminal history records should be created and completed jointly by the Crown and the police. This inventory will record:

- i) All statements noted by the police;
- ii) All statements and CHRs/'S' (CHS) numbers that the police have submitted to the Procurator Fiscal; and
- iii) All statements and CHRs that the Procurator Fiscal has disclosed to the defence.

16.5.2 This inventory **must** be created for **each** High Court case and should be updated regularly. Although the information contained within the inventory will be transferred into the Disclosure Checklist and the Disclosure Page in the precognition, the inventory should also be included with the Disclosure Bundle, to provide the necessary confirmation of the position to the court should any issue as to the extent of disclosure arise at any point in the proceedings.

16.5.3 A style master inventory is attached at Annex E. This style **must** be used and completed in **every** High Court case. It will be a matter for local arrangement with the police as to whether this is completed and retained in electronic format, or whether it is used exclusively hardcopy, either as a single item or in successive updated hard copy versions.

16.5.4 Further guidance on the completion of the inventory by the police and the Crown is detailed below.

16.6 Submission of Inventory of Statements Held by the Police & Statements Submitted by the Police

16.6.1 Following the decision in *HMA v G.B.*, it has been agreed that the police **must** provide the precognoscer with an inventory of all statements **held** by the police (regardless of relevance) in a case and all statements **submitted** by the police to the Procurator Fiscal. This inventory (in the form contained at Annex E) must include:

- (1) A list of all statements **held** including:-
 - i) All statements taken in the case, whether these were taken in notebooks or on witness statement sheets;

- ii) All pro forma questionnaires; and
- iii) All door-to-door enquiry forms;

(2) A list of all statements **submitted** to the Procurator Fiscal; and

(3) A list of all 'S' (CHS) numbers or CHRs for witnesses.

16.6.2 Notwithstanding the terms of paragraphs 3.2.2 & 3.2.3 (in Chapter 3 of the Manual), which states that there is no mandatory requirement on the police to submit pro-forma questionnaires and door-to-door enquiry forms, it is essential that the precognoscer has a clear record of all information held by the police (regardless of relevance) as this in turn ensures that the submission and disclosure of this material can be kept under review throughout the precognition, preparation and presentation of the case in court. Accordingly, this information, including the names of the persons to whom the questionnaire/door to door enquiry form refers, should always be included in the inventory.

16.6.3 Each entry on the inventory should be completed in a way that ensures that it is possible to differentiate between different witnesses with the same or similar names and between different statements taken from the same witness.

16.6.4 This inventory should initially be submitted with the full statements, which should be submitted **within 21 days of committal** for further examination.

16.6.5 Thereafter, where applicable, an updated inventory should be submitted at the following stages of the case:

- i) 7 days prior to the reporting date of the precognition to Crown Office; and
- ii) 14 days prior to the preliminary hearing.

16.6.6 Thereafter, if the police **obtain** any further statements etc. that should be included in the inventory, the Reporting Officer **must** liaise directly with the precognoscer in order to ensure that the statement is submitted and, if appropriate, disclosed to the defence at the earliest opportunity.

16.6.7 The above guidance (in Section 16.6) is subject to the guidance in Chapter 3 at paragraph 3.2.5 about exceptional cases involving a large volume of material. The fact that the material in question is voluminous is not a good reason for not submitting relevant material to the Crown. However if the volume of material which should be submitted to the Crown poses practical difficulties, the police should discuss practical arrangements for consideration of the material by the Crown with the Solemn Legal Manager. For example, depending on the circumstances, it may suffice that the

Procurator Fiscal is given access to the relevant material in the hands of the police.

16.6.8 In addition, in these exceptional cases, the police and the Solemn Legal Manager should discuss how information should be recorded on the inventory, given that it may not be practical in light of the volume of information to list every irrelevant statement or questionnaire held. For example, it may be appropriate in the circumstances of a particular case to agree that the inventory will record that the police hold 20, 000 questionnaires from people at one specific location between specific times on a specific date.

16.7 Reconciling the Information Contained in the Police Inventory

16.7.1 On receipt of the inventory from the police, the precognoscer **must** compare the list of statements held against the list of statements submitted to establish what, if any, of the material held by the police has **not** been submitted to the Procurator Fiscal. The precognoscer should then complete the appropriate columns in the inventory detailing the date that the statements were received.

16.7.2 Where material has not been submitted this should normally be because it is in the form of 'door-to-door' enquiry forms or questionnaires. Statements taken in notebooks or on witness statement sheets should always be submitted.

16.7.3 Where material has not been submitted, the precognoscer should make an initial assessment of whether this material requires to be obtained by the Crown with a view to considering its disclosability unless the Reporting Officer has discussed the material in advance of submission of the inventory. This will require close consultation between the precognoscer and the Reporting Officer.

16.7.4 Where the decision is taken that material which has been retained by the police does not require to be submitted, the precognoscer should record this in the appropriate section of the precognition as detailed in paragraph 16.1.5 above, and paragraph 16.14 below.

16.7.5 The Crown's disclosure duty in terms of **McLeod** and **McDonald** persists in perpetuity. Therefore any decision not to obtain material from the police with a view to considering its disclosability should be reviewed whenever appropriate (e.g. when a special defence is lodged, where during the course of the trial the defence change their position etc.). Care must be taken to ensure that the disclosure of such material is not overlooked where it is appropriate.

16.8 Method of Submission of Statements and Impact on Reconciliation Processes

16.8.1 The police should submit statements individually in the form of the NSS. Where statements are submitted electronically with each statement as

an individual document, a production record for the statement will be **automatically** created in PROMIS for that statement.

16.8.2 An **automatic** production record will **not** be created in PROMIS where a statement has been submitted by any of the following means:

- i) In one document containing a batch of statements, (as occurs in HOLMES cases);
- ii) Attached to a subject sheet;
- iii) Under a different PF Reference Number (e.g. associated death, CAP, or criminal case);
- iv) Hard copy only, e.g. statements from Scenes of Crime Officers, Forensic Scientists etc.; and/or
- v) On CD-Rom.

16.8.3 Accordingly, where a statement is submitted using one of the above methods, administrative staff **must** add a **manual** production record for the statement. This is an essential step in the reconciliation process as the electronic reports (referred to below) that must be produced in each case pulls information from these production records. Guidance on how to add a manual production record is contained within the Solemn Administration Instructions.

16.9 Electronic FOS Reports

16.9.1 FOS Reports detailing information received by the Crown from the Police

16.9.1.1 In order to manage the reconciliation process effectively, electronic FOS reports can be created using the Reports Generator feature that staff can access from their Desktop. These reports will extract the information that has previously been entered into PROMIS. For the avoidance of doubt, these reports can be created at any stage of the case – whether it is still in FOS or not.

16.9.1.2 The following reports can be created to assist in the management of the reconciliation process:

Case Level Reports

- i) **List of all statements held in FOS** – this report details all the statements in a case that are held in FOS and includes the date and time the statement was obtained from the witness (this list will only be required where, for whatever reason, at the stage of reconciliation, the case is still in FOS, e.g. where the case has been retained in FOS to enable redaction to be carried out in FOS).
- ii) **List of all statement production records** – this report details all the statements in the case for which there is a production record (thus, it is essential that manual production records are created where the statement has been submitted in one of the ways described above at

paragraph 16.8.2). The report includes details of whether or not the statement has been disclosed; the disclosure status of the statement; witness information (first initial and surname); the date and time the statement was obtained and a note field.

- iii) **'Do not disclose statement', or 'do not disclose statement meantime' production records** – this report details all the statements in the case which have a disclosure status of 'do not disclose' or 'do not disclose meantime'. The report includes details of the disclosure status; witness information; date and time the statement was obtained and a note field.
- iv) **Disclosed witness statements to defence agents** (revised) – this report details all the statements that have been disclosed to the defence and confirms details of when the statement was obtained from the witness and when it was disclosed to the defence.

Office Level Reports

- v) **PE*(All): No witness statements production records 21 days after CFE** – this report details all the petition cases (regardless of whether they have been given a provisional marking on PROMIS of PESJ or PEHC) in a particular office where statements have not been received within 21 days of CFE. This report will check for production records so, where statements have been manually submitted or submitted in a batch document within 21 days of CFE but no manual record has been added yet, this will show in the report as a case where no statements have been submitted.
- vi) **PE (Only): No witness statement production records 21 days after CFE** – as for the last report but this will only include those cases with a PE marking in PROMIS. It will not include cases with a PESJ or PEHC marking.
- vii) **PESJ: No witness statement production records 21 days after CFE**- as for the above report but this will only include those cases with a PESJ marking in PROMIS. It will not include cases with a PE or a PEHC marking.
- viii) **PEHC: No witness statement production records 21 days after CFE** – as for the last report but this will only include those cases with a PEHC marking on PROMIS. It will not include cases with a PE or PESJ marking.
- ix) **PE*(All): Non disclose witness statements production records 28 days after CFE** – this report lists all the petition cases (regardless of whether they have been given a provision marking on PROMIS of PESJ or PEHC) in an office in which statements (or some statements in a case) have been received from the police but have not yet been disclosed to the defence.

- x) **PE (Only): Non disclose witness statements production records 28 days after CFE** - as for the last report but this will only include those cases with a PE marking in PROMIS. It will not include cases with a PESJ or PEHC marking.
- xi) **PESJ: Non disclose witness statements production records 28 days after CFE** - as for the above report but this will only include those cases with a PESJ marking in PROMIS. It will not include cases with a PE or a PEHC marking.
- xii) **PEHC: Non disclose witness statements production records 28 days after CFE** - as for the last report but this will only include those cases with a PEHC marking on PROMIS. It will not include cases with a PE or PESJ marking.

16.9.1.3 As stated above, these reports will only be as accurate as the information contained in PROMIS. If there is no production record for a statement under the relevant PF reference number, then the statement will **not** be included in the report. Accordingly, production records **must** be manually created for **all** statements where an automatic record has not been created. Solemn Administrative Managers should expressly identify someone to carry out this work. This work should **always** be done **before** the FOS report is created.

16.9.1.4 As part of the reconciliation process the following reports should be created in **every** High Court case:

- i) The report of all statement production records;
- ii) The report of all statements held in FOS; and
- iii) A report showing all statements received electronically by COPFS from the police (the witness production record).

16.9.1.5 A manual check should then be carried out, with reference to report (iii), to ensure that report (i) is accurate and that production records exist for all statements submitted in the case.

16.9.2 FOS Reports detailing information regarding the disclosure status of statements

16.9.2.1 Of the reports listed at paragraph 16.9.1.2 above, the following FOS reports can be created using the Reports Generator, to provide details of the disclosure status of a statement:

- i) the report showing all statements held in a case and their disclosure status; and

- ii) the report that lists all statements that have been disclosed to the defence and the date on which they were disclosed.

16.9.2.2 Again, the accuracy of these reports is dependent on there being a production record for the statement and this record being updated at the point the statement is disclosed to the defence.

16.10 How to run FOS Reports

16.10.1 Guidance on how to run the FOS Reports detailed above is contained in the FOS User Guide.

16.11 Provision of Electronic FOS Reports to the Police

16.11.1 At key milestones in the progress of the case, the precognoscer should create the three reports referred to at paragraph 16.9.1.4 and check that the first report is consistent with the reports detailing the statements held in FOS and SOS. This first report detailing all the statement production records should then be provided to the Reporting Officer (or, if a particular officer has been appointed to deal with disclosure in the case, then to that officer) who should then be instructed to carry out a reconciliation to ensure that all statements that should have been provided to the Crown have, in fact, been received.

16.11.2 The key milestones in the case are:

- i) 21 days after committal for further examination – the point by which the police must provide all statements in a case to the Procurator Fiscal;
- ii) When the precognition is submitted to Crown Office;
- iii) The start of the AD's preparation week for the Preliminary Hearing; and
- iv) Any point identified at the discretion of the precognoscer or Crown Counsel in cases where they are aware that the police are continuing to carry out further investigations, e.g. between the preliminary hearing and the start of the trial.

16.11.3 The precognoscer should ensure that the Reporting Officer carries out the reconciliation timeously and provides the precognoscer with a **written** record of the results of the reconciliation.

16.11.4 Where the Reporting Officer does identify statements that have not been provided to the Crown which should have been provided, the precognoscer should liaise with the Reporting Officer to ensure that the statement or statements are submitted at the earliest opportunity in order that it/they can be considered and, as appropriate, disclosed to the defence. Where appropriate, the precognoscer should also obtain an explanation from the Reporting Officer about how the statements were identified as being

relevant material to be provided to the Crown and the reason why the material was identified at that stage in the case.

16.12 Disclosure of Statements to the Defence

16.12.1 When disclosing material to the defence, **all** covering letters **must** contain the following information:

- i) A list of the disclosure material which accompanies the letter; and
- ii) A statement that the defence **must** contact the Procurator Fiscal **within 14 days** of the date of the letter to raise any dispute about the content of the disclosure material, otherwise they will be deemed to have accepted the list of contents.

16.12.2 This covering letter must be included regardless of whether the disclosure material is posted out or uplifted from the Procurator Fiscal's Officer.

16.12.3 A template covering letter to this effect has been created and should be used in all cases STATDISCLET.

16.12.4 The Precognoser should also complete the relevant columns in the inventory setting out the date the statements were disclosed.

16.13 Use of Electronic FOS Reports for Management and Auditing Purposes

16.13.1 The FOS Report that can be created showing the list of all cases within a PF Office, in which no statements have been disclosed, should be used by Solemn Managers to ensure that the disclosure processes are being carried out timeously.

16.13.2 Solemn Managers should create this report on a weekly basis and identify those cases which have passed the disclosure stage for the case (i.e. it is more than 28 days since the accused was committed for further examination) but no statements have been disclosed. The Solemn Legal Manager should then make enquires to ascertain why disclosure has been delayed and take immediate steps to rectify this.

16.14 Submission of the Precognition to Crown Office

16.14.1 When submitting **any** High Court precognition to Crown Office, the following information should be included with the precognition, at the start of the disclosure bundle:

- i) A Disclosure Reconciliation Checklist (template checklist included at **Annex C**);

- ii) A copy of the FOS Report showing all the statements held by the Crown at the date of the report to Crown Counsel; and
- iii) A copy of the FOS Report showing all the statements disclosed to the defence at the date of the report to Crown Counsel.

16.14.2 The Disclosure Page in the precognition, between the f107 Observations Page and the Witness Non-Availability sheet, should record any outstanding disclosure issues, where a decision has yet to be taken on disclosure of certain material, or a decision has been taken not to disclose certain information. Keeping a record of specific decisions not to disclose information allows these decisions to be reconsidered and reviewed at a later stage if necessary.

16.14.3 The Disclosure Page, like the f107 Observations Page, is a living document and should be regularly updated as disclosure decisions are taken, reconsidered and reviewed.

16.15 The Disclosure Reconciliation Checklist

16.15.1 As stated above at paragraph 16.14.1, the Disclosure Reconciliation Checklist should be included with the precognition, at the start of the disclosure bundle, when it is submitted to Crown Office. Both the precognoscer and the counter-signing officer should sign this hard copy checklist.

16.15.2 Like the f107 Observations Page, this checklist will remain as a living document within SOS and should be updated on SOS as appropriate, in order that the Advocate Depute can have access to the updated checklist when preparing for the preliminary hearing and/or the trial.

16.15.3 Accordingly, where, after the precognition has been submitted to Crown Office, there is a change to the disclosure position set out in the hard copy checklist included with the precognition (e.g. further statements are taken by the police, submitted by the police and/or disclosed to the defence), then the precognoscer **must** update the electronic version of the checklist stored in SOS and forward a hard copy to Crown Office (or other appropriate location depending on the stage of the case, e.g. where the papers have been transmitted to Glasgow in advance of the preliminary hearing or trial taking place there) for inclusion in the Advocate Depute's papers. Updated versions of the inventory should also be forwarded to Crown Office. It is the responsibility of the precognoscer and the Solemn Legal Manager to ensure that the checklist is updated in SOS and that an up-to-date hard copy version is included with the Advocate Depute's papers.

16.15.4 After the case has been submitted to Crown Office, it is the responsibility of the precognoscer and the Solemn Legal Manager to ensure that further versions of the reports referred to in paragraph 16.9.1.4 are created at the relevant stages, and included with the Advocate Depute's papers along with the up-to-date hard copy version of the disclosure

reconciliation checklist. The precognoser is also responsible for ensuring that the PF section of the inventory is kept updated, particularly in relation to the disclosure of criminal history records.

These updates should be created at the following stages:

- i) Prior to passing the papers to the Advocate Depute for preparation for the Preliminary Hearing;
- ii) One day prior to the Preliminary Hearing (depending on the location of the PH, it may be appropriate for the High Court teams/High Court manager to arrange for these reports to be passed to the Advocate Depute in advance of the PH);
- iii) Prior to passing the papers to the Advocate Depute for preparation for trial; and
- iv) One day prior to the Trial (depending on the location of the trial, it may be appropriate for the High Court teams/High Court manager to arrange for these reports to be passed to the Advocate Depute in advance of the trial)

It is the responsibility of the Solemn Managers, to ensure that PROMIS is properly updated in order to ensure that further versions of the reports referred to in paragraph 16.9.1.4 are up-to-date and give an accurate reflection of the current disclosure position.

16.15.5 A copy of the template checklist can be found in the FOS Templates on the intranet, and is included at Annex C of this Manual.

16.16 Cases Transferred between PF Offices

16.16.1 Where a case is received at one PF Office (the originating office) and the decision is taken that the case should be transferred to another PF Office (the receiving PF Office), it is important that the police are advised of the new PF Reference Number for the case. Otherwise the police will continue to submit documents, including statements, under the PF reference number for the case in the original office. The new PF office, therefore, would **not** receive these new statements, and instead they would be received by the original PF office who may not necessarily notice as they will have marked the case as closed.

16.6.2 It should be noted, however, that all documents electronically submitted to the original PF reference **before** the case is transferred will be transferred to the receiving PF Office as part of the case papers.

16.16.3 It is the responsibility of the originating PF Office to advise the Reporting Officer of the new PF number for case. The originating PF office obtains this at the stage the case is transferred. Thereafter, it is the

responsibility of the Reporting Officer to ensure that all documents submitted to the PF thereafter are submitted under the new PF reference number.

16.16.4 As a matter of best practice, where the receiving office takes the decision to place a transferred case on petition, the receiving office should also advise the Reporting Officer of the new reference number.

16.17 Submission by the Police of Updated Versions of Statements Already Submitted

16.17.1 As a general principle, the police should not submit a statement to the Procurator Fiscal until the content of the statement has been authenticated and, where applicable, that the typed version of the statement is a true and accurate reflection of the original handwritten statement from which the typed version has been created.

16.17.2 On occasion, however, in order to meet strict timescales (primarily in relation to petition custody cases where the essential statements are required by the Procurator Fiscal in order to determine whether there is sufficient evidence for full committal), the police might submit a statement without this authentication process being carried out. In such circumstances, the authentication process will be carried out **after** the statement has been submitted to the Procurator Fiscal. Where there is a mistake in the statement or something has been accidentally omitted, it may be necessary to submit an updated version of the statement.

16.17.3 Where the Reporting Officer requires to submit an updated version of a statement, the following procedure **must** be followed:

- i) The Reporting Officer must advise the Solemn Legal Manager of the need to resubmit the statement. He or she must clearly specify the reason(s) why the statement requires to be resubmitted and, where it is due to an inaccuracy in the typed statement, specific details of the inaccuracy should be provided;
- ii) If the Solemn Legal Manager agrees that the statement should be resubmitted, they should make arrangements for the Help Desk to be contacted and advised that a new version of the statement is to be submitted. Help Desk will then rename the first version submitted as "superseded-statement-for-...". This will enable the COPFS system to accept the new version of the statement.

16.17.4 If the Reporting Officer submits an updated statement without following the above procedures, the statement will not be received by the COPFS system. Instead the police will receive an automatic message advising them that the statement has been rejected. In addition, a central COPFS report will be created on a daily basis listing all cases where statements have been automatically rejected. This information will then be passed to the relevant offices.

16.17.5 When an updated statement is submitted, care should be taken to ensure that the updated version of the statement is disclosed to the defence. Where the original version has already been disclosed, the updated version should then be provided confirming that the updated version is the authenticated version of the original witness statement. Where possible, however, a statement should not be disclosed until it has been authenticated.

16.17.6 Where a statement has not yet been disclosed to the defence and an updated version is received, the Solemn Legal Manager should consider the two versions of the statement and determine whether it is appropriate to disclose both versions of the statement to the defence, e.g. where there is a material difference in the versions that cannot be easily explained as a typographical error. In general, where there are only transcription differences between the statements it will normally be appropriate to disclose only the updated statement, but where there are material differences, both statements should be disclosed to the defence.

Chapter 17: Criminal History Records: General

17.1 General Obligations & Timing of Disclosure

17.1.1 The general practice adopted by the Crown in relation to the provision of criminal history records (previous convictions and outstanding charges) to the accused's representatives is set out in this manual and the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions.

Timing

17.1.2 In all summary cases, the Crown should obtain criminal history records, i.e. details of previous convictions and outstanding charges (PCOCs), in respect of all civilian witnesses cited for trial. Where the accused is on bail or ordained to appear, the Crown should provide the defence with copies of all material criminal history records as are then in the possession of the Crown not less than 28 days before the Intermediate Diet.

17.1.3 In all summary cases where the accused is remanded, the Crown should provide the defence with copies of material criminal history records as are then in the possession of the Crown and are suitable for disclosure, not less than 7 days before the Intermediate Diet.

17.1.4 In all solemn cases, the Crown should obtain criminal history records in respect of all civilian witnesses listed on the provisional list of witnesses. The Crown should provide the defence with copies of material criminal history records in respect of all civilian witnesses listed on the indictment as are then in the possession of the Crown, when the indictment is served on the accused.

Content of Disclosure

17.1.5 The Crown should provide the defence with copies of material criminal history records of all civilian witnesses that the Crown are citing for trial in summary cases or are listed on the indictment in solemn cases.

17.1.6 Criminal history information should be obtained at the same time as statements in order that it can be considered during the precognition process. There is no requirement to obtain a more up-to-date criminal history record at the stage of disclosure, but should any new information in respect of a witness's criminal history come to the attention of the Crown during the proceedings, this should be disclosed.

17.1.7 For the purpose of this Manual, there is no distinction to be made between previous convictions and outstanding charges.

17.1.8 The Crown will provide details of the information recorded on the Criminal History System (CHS) at the beginning of the prosecution. There is no requirement to provide information held on any other criminal database

such as PNC (Police National Computer) unless this has been specifically brought to the Crown's attention. Nor is there any requirement to seek further information from the CHS or to carry out regular checks on the COPFS National Database against witnesses, unless the defence specifically requests this and that request provides reasonable grounds for believing that the position may have changed significantly since the original disclosure.

17.2 When to obtain and when to Disclose

17.2.1 The extent to which criminal history records are to be obtained and disclosed depends on the nature of the witness and the evidence he or she is likely to give.

17.2.2 Witnesses will fall into one of three categories in the police report:

- Civilian
- Police
- Professional/Expert/Official

Definitions of these categories are contained in Annex A of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions. The action to be taken on obtaining and disclosing criminal history records will depend into which particular category the witness falls.

17.3 Civilian Witnesses

17.3.1 Details of previous convictions and/or outstanding charges should be obtained in respect of all civilian witnesses (as defined in the categories of witnesses at Annex A of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions) either,

- a) listed on the provisional list of witnesses in solemn cases; or
- b) marked for citing in a summary case.

17.3.2 The decision whether it is necessary to disclose criminal history information will depend on the material nature of the information, the charges against the accused and the nature of the evidence that the witness is likely to give. When considering the materiality of PCOCs, specific regard will be had to the non contentious nature of the evidence and the likelihood of challenge.

17.3.3 Where the evidence of a civilian witness who will be led at trial is unlikely to be the subject of agreement by the defence, e.g. victims and their associates, eye-witnesses, accomplices, associates of the accused, or even circumstantial evidence, the general rule is that all material previous convictions and/or outstanding charges should be disclosed subject to the public interest in protecting the Convention rights of the witnesses.

17.3.4 Where the civilian witness is a victim of a crime to which **section 288(C) of the Criminal Procedure (Scotland) Act 1995** applies, details of

previous convictions and/or outstanding charges should be routinely obtained and considered for disclosure in the usual way. Taking into account the terms of section 274 of the Criminal Procedure (Scotland) 1995 Act, the defence would need to make an appropriate application to the court under section 275 of the same Act to allow the material to be used in the course of the trial.

17.4 Police Witnesses

17.4.1 Particular guidance on criminal history records for on-duty police officers is contained in Chapter 20 of this manual.

17.4.2 Where a police officer is a witness to an offence and is off-duty at the time, he/she should be classified as a civilian witness, e.g. victim of housebreaking, vandalism, assault etc. Where, however, an off-duty police officer witnesses an offence and intervenes in his or her capacity as a police officer, i.e. placing himself or herself on duty in order to apprehend an accused who has just assaulted someone, then they should be classified as a police witness.

17.5 Professional / Expert / Official Witnesses

17.5.1 This category is designed to include professional or expert witnesses and witnesses whose evidence arises from the supply of information in a formal capacity as defined in Annex A of the ACPOS/COPFS Joint Protocol on Disclosure.

17.5.2 It is not necessary to routinely **obtain** details of criminal history records for witnesses categorised as “Professional”, “Expert” or “Official”.

17.5.3 The obligation to disclose relevant material under **McDonald** and **McLeod** remains but only crystallises, for the purpose of further enquiry as to the existence of previous convictions and/or outstanding charges, if an issue arises as to the integrity of such a witness, either through the Crown's own investigation or from any indication from the defence at any stage that there is such an issue. If such circumstances arise, details of any criminal history record should be sought although their existence is likely to be highly exceptional.

17.5.4 Where criminal history records do exist in any such case, the matter should be reported for Crown Counsel's instructions on the issue of disclosure. Such reports should be marked for the attention of the Deputy Crown Agent and copied to the Information & Records Management Team, Policy Division for information. This can be done by e-mailing the report to the **_Information & Records Management Team** mailbox.

17.6 Cases Submitted by Specialist Reporting Agencies

17.6.1 Where the case is one reported by a specialist reporting agency, e.g. TV Licensing Authority, Health & Safety Executive etc, 'S' (CHS) numbers for

civilian witnesses should be requested from the police case management divisions.

17.6.2 Staff should ensure that witnesses have been properly categorised in terms of the definitions set out in Annex A of the ACPOS/COPFS Joint Protocol on Disclosure, as the majority of witnesses in specialist reporting agency cases will be “professional/expert/official” witnesses.

17.7 What should be disclosed as part of the Criminal History Record

17.7.1 The criminal history record that is received from CHS contains a number of different sections. The format of the criminal history record and guidance on what should be included in the disclosure copy is contained in Chapter 18 of this Manual.

17.7.2 Where a witness has a criminal history record and redaction is appropriate for one or more of the convictions/charges, it must be obvious on the face of the record that something has been redacted.

17.7.3 Where redaction is necessary and the result is that the entire record is redacted, there is no value in providing the defence with a redacted copy. Instead, the defence should be advised that the Crown have considered the information about the witness but have decided that this information has no relevance and accordingly it will not be provided to the defence.

17.8 Checking Accuracy of Criminal History Record with the witness

17.8.1 It is not necessary routinely to check with witnesses, prior to disclosure, that their record is accurate.

17.8.2 If, at the time of carrying out the CHS search, the police locate a ‘S’ (CHS) number for a witness and they have concerns that this might not be accurate, the police should provide the ‘S’ (CHS) number in **Section 4** of the National Standard Statement and should state in **Section 6** of the NSS that they have concerns regarding the accuracy of the record. Section 6 should also contain the reasons for these concerns. This is set out in the ACPOS/COPFS Joint Protocol on Disclosure.

17.8.3 Where the police have highlighted concerns regarding the accuracy of the ‘S’ (CHS) number, the record **must** be checked with the witness. **The record should not be disclosed to the defence until this has been done.**

17.8.4 This should be done by sending a copy of the schedule to the witness with covering letter WITPCOCSLET . If the witness does not respond within 21 days, then the record should be deemed to be accepted.

17.8.5 If the witness replies disputing that the record, or any part of it, is theirs, then the Reporting Officer should be instructed to take this up with CHS. In the meantime, the record, or the disputed part of the record, should

not be disclosed. For the avoidance of doubt, the non-disputed part of the record can be disclosed.

17.8.6 In such circumstances, the police should be advised of the need to carry out checks with CHS at the earliest opportunity so as to minimise any delay to the trial.

17.9 Multiple Accused

17.9.1 Where there are multiple accused in a case, it is not necessary to determine whether or not a witness is only giving evidence against one of the accused, prior to disclosure. Where a civilian's witness's record is to be disclosed, it should be disclosed to the representatives of **all** the accused in the case.

17.10 Co-accused as a Witness

17.10.1 Where there are multiple accused in a case, and a plea is accepted from an accused, and that accused is to be called as a witness, consideration must be given to disclosing his/her criminal history record.

17.10.2 The PCOCs of a former accused should be disclosed on request subject to the materiality test. However, it will not be sufficient to provide the remaining accused's representatives with a copy of the schedule prepared for the court as this will (a) not include pending cases and (b) not have been considered in terms of the redaction principles set out in Chapter 19 of this Manual.

17.11 Criminal History Records for Defence Witnesses

17.11.1 It is standard policy, where the Crown has obtained details of defence witnesses, to advise the police to obtain statements from and criminal history records for these witnesses.

17.11.2 Where the Crown obtains a defence witness's record, it **must** be disclosed to the defence in the same way as that of a Crown witness. Prior to disclosure, the schedule of previous convictions and outstanding charges must be considered, and redacted, if appropriate in terms of the principles set down in Chapter 16 of this Manual.

17.11.3 Where a statement and criminal history record are being requested for a defence witness, the statement will be submitted along with the 'S' (CHS) number for that person. The CHS record should then be obtained from CHS using the electronic link between CHS and FOS. Where, however, only the record is requested or the case is no longer in FOS, the police should be asked to submit the actual criminal history record for the defence witness and not just the 'S' (CHS) number.

17.12 Release of Material

17.12.1 Where any disclosure of criminal history records is to be made, it should be conditional on the material only being used for the limited purpose of the proper preparation and presentation of the case in which disclosure is made. This is clearly specified in the Article 11 of the Code of Conduct in Criminal Work. The guidance note attached to Article 11 states that *“solicitors are reminded that, in receiving documentation, material or recordings from the COPFS, or other third parties, that they are accepting an implied undertaking to comply with the terms of this Article”*.

17.12.2 Guidance on the method by which material should be disclosed to the accused’s legal representative is contained within Chapter 11 of this Manual.

17.13 Advising Witnesses that Criminal History Records may be disclosed

17.13.1 When a witness is cited for trial, they will receive a leaflet setting out what is involved in being a witness. There are leaflets for District Court, Sheriff Court, Sheriff & Jury Court and High Court. Each of these leaflets advises the witness that the accused’s representative is usually entitled to receive details of any previous convictions or pending cases that the witness might have. The leaflets also confirm that the court will not always allow such information to be referred to at trial but may do so if it considers that it is relevant to the evidence that the witness will be giving.

Chapter 18: Criminal History Records: Content

18.1 Electronic Link to Criminal History System

18.1.1 The Crown now has direct access when a case is in FOS to CHS and, where the Crown has an 'S' (CHS) Number, it can request the criminal history record attached to that 'S' (CHS) Number. Accordingly, prior to submitting witness statements, the police will carry out a CHS check for all civilian witnesses marked for citing. In summary cases, the police will routinely provide the 'S' (CHS) number, not the record itself. Staff should then obtain the record direct from CHS. In solemn cases, the police will continue to provide hard copies of the criminal history records.

18.1.2 When the police prepare statements, there will be an entry in **Section 4** of the National Standard Statement for inserting details of the witness's 'S' (CHS) Number. This is a mandatory field which must always be completed by the submitting officer.

18.1.3 Where the witness is either a police witness or a "professional/expert/official" witness, this field will always be completed as follows: "'S' Number: Not Requested". Therefore it is very important to ensure that a witness is properly categorised at the time statements are requested from the police.

18.1.4 Where the witness is a civilian witness, this field will either be completed as "'S' Number: S12345/67E (this will be the unique 'S' (CHS) number for the witness) or as "'S' Number: No Note of Convictions".

18.1.5 Where a statement is submitted with an 'S' (CHS) Number, this number will be automatically populated into the relevant field in the witness record in FOS/PROMIS. Staff should then request criminal history records for such witnesses from the CHS.

18.1.6 Statements are normally electronically submitted as individual statements in the National Standard Statement format. If, however, the statement is submitted by any other means, the 'S' (CHS) number in the statement will not be automatically populated into the witness record in FOS/PROMIS. This would include where the statement is submitted by any of the following means:

- (i) Electronically in one document containing a batch of statements, as occurs in HOLMES cases;
- (ii) Electronically attached to a subject sheet;
- (iii) By any means under a difference PF reference number, e.g. where there is an associated criminal or death case;
- (iv) Hard copy only, e.g. statements from Scenes of Crime Officers, HOLMES cases; or
- (v) On CD-Rom

18.1.7 Where a statement has been submitted by any of the above means, the 'S' (CHS) number will have to be manually added to the relevant field in the witness record in FOS/PROMIS in order that the criminal history record can be obtained.

18.1.8 Once the records are requested, these will then be electronically submitted by CHS, and will be available in FOS for redaction. Staff should be aware that criminal history records cannot be obtained directly from the CHS once a case has been transferred from FOS to SOSVI.

18.1.9 On receipt of the criminal history record, staff will have access to a variety of information that they can then pull into a final record. This final record can then be considered and, if appropriate, redacted prior to disclosure to the defence.

18.2 Content of the CHS Record

18.2.1 The CHS record initially received from the CHS will provide the following information:

- Personal Details: 'S' (CHS) Number, Date of Birth, Forename and Surname
- Home address
- Firearms details
- Gender
- Number of cases and number of antecedents
- Alias details (names, dates of birth and addresses)
- Warning Signals
- Pending Cases Section (this relates to pending cases that have not yet been reported to the Fiscal)
- Bail Details Section
- Fiscal Pending Cases Section (this relates to pending cases that have been reported to the Fiscal, but proceedings have not yet commenced)
- Court Records Section (this relates to pending cases where proceedings have commenced)
- Disposal Records Section

18.2.2 Not all of this information requires to be disclosed to the defence.

18.2.3 Once the CHS record has been received, staff should create a final copy of the record. This disclosure copy will then be disclosed to the defence subject to the principles of redaction set out in Chapter 19 of this Manual. Details of what information must always be excluded and what information must always be included are detailed at paragraphs 18.2.5 and 18.2.6 below. While a legal member of staff must then consider the CHS record for redaction purposes, a member of either legal or administrative staff can create the pre-redaction record.

18.2.4 Some of the information listed at paragraph 18.2.1 should never be disclosed to the defence. As there is no obligation to disclose it, however, it need not be obvious on the disclosed record that the information has been removed. Accordingly, when creating the final record, staff can elect to exclude certain information from the final print out.

18.2.5 The following information should always be excluded from the final record:

- Home address of the witness
- Firearms details
- Gender
- Number of cases and number of antecedents
- Alias details (names, dates of birth and addresses)
- Warning Signals
- Bail Details Section

18.2.6 The following information should always be included in the final record:

- Personal Details: 'S' (CHS) Number, Date of Birth, Forename and Surname
- Pending Cases Section
- Fiscal Pending Cases Section
- Court Records Section
- Disposal Records Section

18.2.7 Although this information must always be included in the final record, some of the information may not be suitable for disclosure on applying the redaction principles set out in Chapter 19 of this Manual. It **must** be obvious on the face of the copy provided to the defence that this information has been redacted. It is on this basis that it must be selected for inclusion in the final record. If it is removed at the stage of creating the final printout, it will simply not be included in the record and, thus, it will not be obvious that it has been removed.

18.3 Pre-redaction CHS Record

18.3.1 Once the pre-redaction CHS record has been created, containing the sections referred to in paragraph 18.2.6, it can be checked to determine whether any of the pending cases or previous convictions should be redacted, applying the principles set out in Chapter 19 of this Manual.

18.3.2 Detailed guidance on how to redact a previous conviction or outstanding charge is contained in FOS Guidance Manual.

18.4 Requesting Criminal History Records from the Police

18.4.1 The direct link to CHS is interfaced with FOS. Accordingly, once a case has been routed out of FOS and into SOS, staff can no longer access the CHS and obtain witness records.

18.4.2 Summary cases should be retained in FOS until the disclosure processes have been completed. Care should be taken to ensure that, where a witness has an 'S' (CHS) number, records are obtained from CHS prior to the case being routed to SOS.

18.4.3 Circumstances will arise, however, where witness records are required after the case has been routed to SOS. This will most likely arise where the case involves a number of associated police reports or where the summary case is routed to SOS after disclosure but then a civilian witness requires to be cited who had not previously been marked for citing.

18.4.4 Where it is necessary to obtain records after a case has been routed to SOS, then these must be requested from the Reporting Officer. The request should clearly specify that it is the record that is required and not the 'S' (CHS) number.

Chapter 19: Criminal History Records: Redaction

19.1 General Principles

19.1.1 This Chapter should be read in conjunction with Chapter 5 of this Manual.

19.1.2 The decision of the Judicial Committee of the Privy Council in **Holland** did not expressly discuss any Convention or other rights of witnesses such as privacy. Nor did it consider how, in a Scottish context, the relevant rights of a witness might be protected. Witnesses with previous convictions may have rights, which ought to be respected. For example, a witness with an old conviction of a sexual nature, which may be unknown to that witness' family or within the community, may have an interest in that conviction not being disclosed unless it is necessary in the interests of justice that it should be.

19.1.3 Given the reaffirmation in **McDonald** of the **McLeod** test being applied in relation to disclosure obligations, which requires the Crown to disclose all material evidence, and then in applying this to consideration of disclosure of criminal history information, the Crown's position is that not every previous conviction and outstanding criminal charge (PCOC) of a witness will necessarily be relevant and disclosable in terms of **McDonald** and **McLeod**.

19.1.4 There is a view that **Holland** requires the Crown to disclose all PCOCs for all witnesses on the lists, regardless of whether they are material or not. The Crown is seeking clarification on this matter in a suitable appeal. Pending further clarification of the law, the basic principle is that disclosure of criminal history information is subject to the materiality test in **McDonald** and **McLeod**.

19.1.5 Examples of information which should be regarded as material, and therefore disclosable, without further consideration, include offences of dishonesty, offences against justice such as perjury and wasting police time. Another example is where an accused's defence is self defence; in this scenario, a witness's conviction for possession of an offensive weapon would be material.

19.1.6 Notwithstanding the material nature of certain criminal history information, the Crown may consider it appropriate to withhold it where the information is covered by public interest immunity, or it raises Article 8 issues, such as where there is a threat to life and limb of a witness or other persons. Where this arises, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed.

19.1.7 Disclosure of a previous conviction or pending case does not reflect an admission or concession that the previous conviction or pending case is relevant either to the issues in the case or to the credibility or reliability of the

witness. Deputes should, where appropriate, take objection to reliance on the criminal history of a witness where there are good grounds for doing so.

19.2 Redaction in Solemn Cases

19.2.1 Previous Convictions and Outstanding Charges (PCOCs) should be obtained for all civilian witnesses. Copies of these should be placed behind the precognition or statement of each witness in both Sheriff and Jury and High Court precognitions.

19.2.2 In all High Court cases, where the witness is listed on the draft indictment, the precognoscer should include a recommendation on the disclosure of criminal history records. **(C/f Chapter 10, paragraph 10.7.3.)**

19.2.3 In Sheriff and Jury Cases, Crown Counsel's instructions should only be sought where the Crown is seeking to withhold material information, in terms of the test set out in *McDonald* and *McLeod*. **(C/f Chapter 10, paragraph 10.7.3.)**

19.2.4 Redaction of criminal history records can be completed manually in both High Court and Sheriff and Jury cases.

19.3 Rehabilitation of Offenders Act 1974

19.3.1 Section 4 of the Rehabilitation of Offenders Act 1974 protects a person who has been convicted of an offence from being asked any questions, during any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain, relating to his or her past which cannot be answered without acknowledging or referring to a spent conviction. Section 7, however, clearly states that the section 4 does not *"affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto...in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter)"*.

19.3.2 Accordingly, a spent conviction should not be redacted from the schedule of previous convictions and outstanding charges, unless it falls to be redacted for other reasons.

19.4 Children's Hearing Appearances & Pending Cases against Children

19.4.1 If a child commits a criminal offence and an order is made in terms of the Children's Hearing system, this order will remain on the child's criminal history record until the child turns 16 years of age at which point it will be removed from the record unless one of the following exceptions apply:

- (i) A supervision order requirement is imposed; or
- (ii) The disposal was made in a criminal court and not within the Children's Hearing System.

19.4.2 Where one of these exceptions apply, the supervision order or criminal conviction will remain on their criminal history record until either:

- (i) The supervision order/conviction has been held on the system for 20 years; or
- (ii) The person has reached 40 years of age (whichever is longer).

19.4.3 Children's Hearing appearances should not be redacted from the schedule of previous convictions and outstanding charges, unless the appearance falls to be redacted for other reasons.

19.4.4 Similarly, outstanding charges for children under the age of 16 years should not be redacted, unless the pending case falls to be redacted for other reasons.

Chapter 20: Criminal History Records: Police Officers

20.1 General Principles

20.1.1 It is not anticipated that the situation where a police officer has a criminal history record and the Crown intends to call him or her as a witness will arise very often. The Crown, however, is still obliged to ascertain whether or not a police witness has a criminal history record and to disclose that, as appropriate in accordance with the materiality test.

20.1.2 It is recognised, however, that it would be very resource intensive for the police to carry out a Criminal History System (CHS) check every time an officer is cited as a witness in a summary case or appears on the list of witnesses in a solemn case. Accordingly, procedures have been put in place to ensure that the Crown meets its obligations in terms of **Holland**, while also ensuring that the information is obtained efficiently.

20.1.3 The COPFS holds and maintains a database detailing all serving police officers with 'S' (CHS) numbers. This database is checked automatically whenever a police report (SPR – Standard Prosecution Report) is submitted to the Procurator Fiscal. Where an officer listed in the SPR as a witness, is also listed in the COPFS database, his/her 'S' (CHS) number will be populated automatically in PROMIS (the COPFS live, operational database which is used to manage the processing of reports submitted to Procurators Fiscal by the police and other reporting agencies), thus enabling COPFS staff to obtain the relevant criminal history record direct from the CHS.

20.2 The Police Officer / CHS Database

20.2.1 Every police officer has a unique reference number (URN). Whenever a police officer is listed in an SPR as a witness, his/her URN is also included in the report. This is mandatory and no police officer can be listed as a police witness unless his/her URN is inserted.

20.2.2 The COPFS database holds details of every serving police officer with an 'S' (CHS) number. In order to ensure confidentiality and satisfy data protection principles, police officers are referred to in the database by their URN rather than their name. Associated to each URN in the table is the corresponding 'S' (CHS) number for that police officer. If a police officer does not have an 'S' (CHS) number, his/her URN will not appear on the table.

20.2.3 The COPFS database can only be viewed and accessed by a limited number of staff in ISD (COPFS Information Systems Division). Staff in PF Offices do not require access to this database.

20.2.4 On receipt of the SPR, POLIN (the COPFS computer system that enables the Crown to receive electronic reports) will automatically access the database and ascertain whether any of the URNs in the database match any of the URNs in the police report. If there are any matches, POLIN will extract

the 'S' (CHS) number associated to that URN and insert it into the relevant witness record in FOS/PROMIS.

20.3 Updating the Database

20.3.1 The Professional Standards Unit within each Police Force has responsibility for advising ISD of any updates to the system, for example, when a police officer listed in the database leaves the Police Force, or a police officer requires to be added to the database.

20.4 Obtaining the CHS Record for the Police Witness

20.4.1 The CHS record for the police witness should be obtained in the same way as for a civilian witness with an 'S' (CHS) number, by requesting the record directly from the CHS. Full guidance on this is contained in Chapter 18 of this Manual.

20.4.2 If the case is no longer in FOS at the stage the criminal history records are being requested, then the records can no longer be obtained directly from the CHS. In such circumstances, the criminal history record will require to be obtained from the reporting officer. Therefore, wherever possible, criminal history records should be requested directly from the CHS, before a case is transferred from FOS to SOS.

20.4.3 Where a police officer is a witness, but not in his or her capacity as a police officer, then they will be listed in the police report as a civilian witness and their 'S' (CHS) number should be obtained from the police in their witness statement in the same way as for other civilian witnesses.

20.5 Disclosing the CHS Record to the Accused's Representative

20.5.1 Once the criminal history record has been obtained for a police witness, a legal member of staff should consider the record for disclosure purposes and determine, in terms of the principles set out in Chapter 19 of this Manual, whether any of the material requires to be redacted prior to disclosure.

20.6 Disciplinary Proceedings and CAP investigations

20.6.1 There is no obligation in terms of *Holland* to disclose such material as a matter of course, pending further consideration of this matter by the Appeal Court.

Chapter 21: Copies of Disclosure Material in High Court Cases

21.1 Submission of Precognition to Crown Office

21.1.1 It is essential that the trial Advocate Depute has a set of statements which corresponds to the set which has been disclosed to the defence.

21.1.2 Accordingly, a copy of the materials disclosed to the defence must be sent with every precognition submitted to Crown Office with a view to obtaining an instruction for High Court proceedings. Crown Office will then retain this copy for the Advocate Depute's use at the trial.

21.1.3 Care should be taken to ensure that this copy of the disclosed materials is an *exact* copy of the materials disclosed to the defence.

21.1.4 A copy of the schedule of the statements included in the disclosure bundle (as per the schedule used as a receipt obtained from the defence for materials disclosed by the Crown) should be attached to each copy bundle.

21.2 Copies of Disclosure Bundles for the Preliminary Hearing Judge

21.2.1 It is not necessary for a copy of the disclosure pack to be made available for the Preliminary Hearing as a matter of routine. Where, however, it is reasonably anticipated that an issue may arise at the Preliminary Hearing that may require the leading of evidence, e.g. a challenge to the admissibility of certain evidence, then a copy of what has been disclosed to the defence, and a copy of the schedule of the statements included in the disclosure bundle, should be prepared for the Preliminary Hearing judge and submitted to Crown Office in advance of the Preliminary Hearing.

21.3 Copies of Disclosure Bundles for the Trial Judge

21.3.1 Once a case is set down for trial, a copy of the materials disclosed to the defence, and a copy of the schedule of the statements included in the disclosure bundle, should be prepared for the trial judge.

21.3.2 This copy of the disclosure bundle should then be submitted to the Sitting Manager so that it is included with the rest of the papers for the trial judge.

Chapter 22: Productions

This is interim guidance only – fuller guidance in relation to disclosure of productions, including redaction of productions, is currently being prepared by Policy Division and will be issued in due course.

22.1 General Obligations

22.1.1 As stated in Chapter 6 of the Manual, the Crown's disclosure duty applies to all material information which includes all productions. All productions listed in the Crown list and other items submitted by the police which are not listed as productions will require to be considered for the purpose of disclosure in terms of the materiality test set out in **McDonald** and **McLeod**.

22.1.2 In particular, in High Court cases, the Crown Practice Statement on Disclosure in High Court Cases commits the Crown to disclosure to the defence of copies of important documents as soon as practicable.

22.2 Early Disclosure of Productions

22.2.1 Early disclosure is particularly important in relation to forensic science reports. Consideration should be given to supplying a copy of any such report to the defence in early course. Arrangements should be in place to ensure that there is no significant time delay between the completion of a report and its transmission to the Fiscal. It may be possible, in certain circumstances, to receive reports in electronic format in order to speed up the process.

22.2.2 Other examples of potentially important documents, which should be disclosed as soon as reasonably practicable, are medical records, photographs, surveillance logs, search warrants and transcripts of taped police interviews. Such documents may, however, require to be redacted prior to disclosure, e.g. medical records to remove immaterial sensitive information.

22.2.3 Early disclosure of material productions is likely to assist the defence, not only in preparation for trial, but also in assessing whether or not evidence can be agreed. It may also facilitate consideration of a plea. As the timing of a plea of guilty is a matter which requires consideration by the Court in every case, and in the High Court the Crown will be expected to provide full information about those circumstances, the Crown should do what it can to facilitate the possibility of early disposal. The Crown should avoid being put in a position where the defence may argue that a plea of guilty has been delayed significantly because of lack of access, for example, to a critical document which was in the Crown's possession for some time before it was disclosed.

22.3 Service of the Indictment

22.3.1 In respect of more routine productions, which are not provided as stated above, the Crown Practice Statement on Disclosure in High Court Cases commits the Crown to making these remaining documents available upon service of the indictment, together with a courtesy copy of the indictment itself (although in many cases a service copy indictment will be served upon the solicitor in accordance with the new legislative provisions). It is good practice to ensure that arrangements are in place to facilitate defence inspection of label productions in a convenient and structured way. No charge should be made for the provision of copy productions.

22.4 Sensitive Productions

22.4.1 Care requires to be taken in relation to productions that contain sensitive material. It may be necessary in intelligence-based cases to redact part of an original document where there are sound operational reasons for doing so. This often occurs in cases where RIPSAs apply where, for example, the disclosure of the full copy of a surveillance authority may prejudice an ongoing operation. In such a case the provision of a certified copy of a redacted version of the authority would be appropriate, provided that this does not conflict with the Crown's duty under *McDonald* and *McLeod*. Information should only be redacted if it is *immaterial*.

22.4.2 A similar approach may be required where productions contain sensitive *material* information which, for example, relates to children, or the investigation of indecent images. In those circumstances it may be appropriate to limit disclosure to the defence to allowing access to view the material rather than the providing a copy production, e.g. a copy of a visual recording of an interview of a child.

22.5 Visual Recording of Child Witness Interviews

22.5.1 Where there is a visual (including audio) recording of a child witness interview, a copy of the visual (and audio) recording should not be provided to the defence. Instead, arrangements should be made for the defence to view the recording at the relevant Procurator Fiscal's Office.

22.5.2 Routinely, the recording shown should be an unedited version of the interview, but where the interview contains sensitive immaterial information, careful consideration should be given to showing the defence an edited version. This will not require the same considerations as for the redaction of statements as the accused will not be given access to the video.

22.5.3 The defence may take notes when viewing the recording of the interview – an interview transcript is not usually available at this stage. The defence should be allowed to view the recording more than once if necessary, but not to borrow it.

22.5.4 At present, the police will only provide a transcript of the interview once it has been confirmed that the recording is to be used as a production in the case. When a transcript is available, this should be disclosed to the defence, subject to the same principles of redaction as set out in Chapter 15 of the Manual in respect of witness statements.

22.5.5 If the defence are not satisfied with viewing the recording of the interview and reading a copy of an interview transcript, if available, and demand a copy of the recording, a report should be submitted to the Head or Deputy Head of the High Court Unit for instructions. There remains, however, a presumption in favour of non-disclosure of the recording of the interview.

22.6 Productions Added by Section 67 Notice

22.6.1 The use of section 67 notices should be avoided wherever possible.

22.6.2 If a notice is served less than 7 days before the Preliminary Hearing (not the trial diet), the productions or witnesses will only be added to the list on cause shown. It will be necessary, in such circumstances, to provide the Advocate Depute instructed for the Preliminary Hearing with a full explanation as to why the witness or production was not included at an earlier stage.

Chapter 23: Disclosure to the Unrepresented Accused

23.1 General Principles

23.1.1 The Crown's Principles of Disclosure apply equally to represented and unrepresented accused.

23.1.2 In *Foucher v France*⁴², the European Court indicated that in principle the unrepresented accused has an equal right of access to the case file although the arrangements for providing access might be different.

23.1.3 The Crown's obligation to disclose material to the defence can therefore be satisfied through either (a) providing copies of such material to the defence; or (b) providing suitable access to view the material. It is also open to the Crown to use a combination of these methods.

23.2 Policy

23.2.1 The Crown should only disclose to the unrepresented accused such material as it is obliged **by law** to disclose. This applies whether the case is proceeding on indictment or at summary level.

23.2.2 Therefore, where the accused is unrepresented, the accused will **not** as a matter of routine be provided with copies of all witness statements in the case. The Crown is legally obliged to provide an unrepresented accused with copies of, or access to, all statements of witnesses on the Crown and defence lists. In addition, the Crown is obliged to provide copies or access to all other material information of which the Crown is aware. This means, for example, that any remaining witness statements, and other *relevant* information, will require to be considered in terms of the materiality test in *McLeod* and *McDonald*.

23.3 Available Methods of Disclosure

23.3.1 Where disclosure is made to an unrepresented accused under the authority of a "protective order", this can include disclosure by provision of copies of material and/or disclosure by access to material.

23.3.2 There are, therefore, four methods of disclosure to the unrepresented accused:

- i) Disclosure of material to the accused without any application to the court;
- ii) Disclosure of copies of material to the accused under the terms of a "protective order";

⁴² [1997] 25 EHRR 234

- iii) Disclosure of material to the accused by providing him/her access to the material under the terms of a “protective order”; and
- iv) Disclosure of material to the accused partially by provision of copies of material, and partially by providing the accused with access to material, but all under the terms of a “protective order”.

23.4 Safeguarding the Material provided to the Unrepresented Accused

23.4.1 Where disclosure is made to the accused’s representatives, there are safeguards in place to ensure that the material is used only for the proper preparation and presentation of the defence case, namely Articles 11 and 12 of the Law Society Code of Conduct in relation to Criminal Work. At present, however, there are no similar safeguards in place to protect material provided directly to the unrepresented accused.

23.4.2 Accordingly, it is open to the Crown to apply to the court for a “protective order”, setting out the terms on which disclosure is made. Should the accused then breach that order, then the accused would be in contempt of court.

23.5 Disclosure of Material without any application to the Court

23.5.1 In **exceptional circumstances only** it may be appropriate to disclose material to the unrepresented accused without seeking an order from the Court to protect the disclosed material. It is likely that such disclosure will only occur where there are *only* police witnesses (and there are no sensitivity or intelligence issues). Where, for example, the offence relates to a minor road traffic offence and there are only police (or other formal) witnesses, it would usually be appropriate to disclose material to the defence without seeking an order.

23.5.2 Where there are additional witnesses and their evidence is formal in nature (e.g. the licensee of premises), again, in **exceptional circumstances**, it may be appropriate to disclose the material without the protection of a court order.

23.5.3 Where disclosure is being considered without the protection of a court order, the Crown **must** be satisfied that the accused will act responsibly and use the material only for the proper preparation or presentation of their defence case.

23.5.4 Even where the Crown can be satisfied that the unrepresented accused will act responsibly, it may be necessary, having regard to the material in the case and the forum of the case, to seek a “protective order”. There are, for example, general presumptions that need to be considered and applied. Further details of these are contained below.

23.5.5 Under **no circumstances** should material be disclosed without the protection of a court order where the case involves vulnerable or child witnesses.

23.6 Determining the Appropriate Method of Disclosure

Summary Cases

23.6.1 In **all** summary cases, the **Summary Legal Manager** must decide (i) what material should be disclosed to the unrepresented accused, i.e. what material the Crown is **legally obliged** to provide to the accused (c/f paragraph 23.2.2) and (ii) the method by which that material should then be disclosed to the defence (as stated in paragraph 23.3.2 (iv) above, this might involve a combination of provision of copies of some of the material and access to the remainder).

23.6.2 In cases of particular difficulty or sensitivity, the **Summary Legal Manager** should report the matter for Crown Counsel's instructions marked for the attention of the Deputy Crown Agent. The report should contain clear details of the material in the case, and recommendations on the proposed method of disclosure.

23.6.3 A style application for a "protective order" in summary cases in attached at Annex F and is available in the FOS templates, [DISCSUMPROTORD].

Solemn Cases

23.6.4 **Any** material in **solemn** cases should **only** be disclosed under the protection of a court order. Material should only be disclosed directly to the unrepresented accused without there being a court order on the explicit instructions of Crown Counsel.

23.6.5 In **all** solemn cases, regardless of whether the case is being recommended for Sheriff and Jury or High Court proceedings, the **precognoser** must consider, **in close consultation with the Solemn Legal Manager**, the appropriate method of disclosure. Style applications for "protective orders" in Sheriff and Jury and High Court cases are available in the FOS templates [DISCSHJPROTORD and DISCHCROTORD respectively]

23.6.6 The precognoser should then:

- i) prepare a draft application (style applications for solemn cases are attached at Annexes G & H) in terms of **Section 79 (and sections 71(2) or 72(3) or (6)(b)(i))** of the **Criminal Procedure (Scotland) Act 1995** ("the 1995 Act"); and
- ii) if the case is a **High Court case**, the precognoser should highlight in the Disclosure Page that the accused is unrepresented and seek

Crown Counsel's instructions to disclose the material as per the recommended approach set out in the draft application (see Annex H); or

- iii) If the case is a **Sheriff and Jury case**, the Disclosure Page should highlight the fact that the accused is unrepresented and a draft application (see Annex G) has been prepared. Crown Counsel's instructions should only be sought, however, where the **Solemn Legal Manager** is unable to decide the appropriate method of disclosure (e.g. where the case is complex or sensitive). It must be clearly stated in the Disclosure Page that Crown Counsel's instructions are sought.

23.6.7 Any application to the court for a "protective order" **must** specify the method by which the material will be disclosed to the unrepresented accused. Depending on the nature and/or content of the material, disclosure might be by provision of the material to the accused or by arranging for the accused to have access to the material.

23.6.8 When determining whether disclosure should be by provision of material or by access to the material, it is appropriate to consider which method of disclosure would best protect the victim and witnesses in the case. Accordingly, it is essential to consider any sensitivity and/or vulnerability issues. These might be highlighted:

- within the Police Report;
- by the Reporting Officer;
- by VIA;
- within the material to be disclosed; and/or
- anywhere else in the case papers.

23.6.9 The following material should only **ever** be disclosed **by access** to the material (and this list is not exhaustive):

- Criminal History Records;
- Video/DVD/CCTV recordings;
- Recorded (audio or video) Interviews with witnesses;
- Photographs of victims/witnesses;
- Indecent Images of children;
- DVDs of VIPER parades;

- Medical Records;
- Social Work Records;
- School Records;
- Housing Records;
- Death and Birth Certificates;
- Search Warrants;
- Post Mortem Reports;
- Expert Reports which contain information of a sensitive nature; and
- Personal Letters.

23.7 Access to Material for the duration of the Trial

23.7.1 Where disclosure is to be carried out by providing access to the material, the accused must be provided with copies of the material for the duration of the trial.

23.7.2 Accordingly, this material should be lodged with the Clerk of Court in advance of the trial. The accused can then use and refer to the material during the trial but should not be permitted to remove the material from the courtroom.

23.7.3 The material must be returned to the Clerk of Court at the conclusion of the trial and, where the trial lasts more than one day, the material should be returned to the Clerk of Court at the end of each day. The prosecutor should seek confirmation from the Clerk of Court that this has been done.

23.8 Arrangements for Access to Material

23.8.1 Arrangements for the accused to view “access only” material should be agreed at a local level between the police and the Procurator Fiscal.

23.8.2 Where material is to be viewed at the Procurator Fiscal’s Office, a risk assessment will require to be carried out. Further guidance on this is contained in Annex J attached.

23.8.3 The accused should **always** be supervised when viewing material (c/f Section 23.13 below). In addition, the accused should **always** be required to sign an acknowledgement to confirm that s/he has been given access to view certain material. The acknowledgement should contain details of all of the material to which the accused has been given access.

23.8.4 Where necessary, full guidance on interpreting, translating and transcription of material for persons with special needs can be found in the Diversity Guidance on the Intranet. In cases of doubt, or where the Diversity Guidance does not provide assistance, staff should contact the Diversity Team, Policy Division.

23.9 Applications to the Court for “Protective Orders”

Summary Cases

23.9.1 In summary cases, the application for a protective order can be made as an incidental application under authority of **Section 134** of the **1995 Act**.

23.9.2 A style application for a “protective order” in summary cases is attached at Annex F and is available in the FOS templates, [DISCSUMPROTORD].

Solemn Cases

23.9.3 In solemn cases, an application for a protective order can be made at the preliminary hearing or first diet under authority of **Sections 71** or **72** of the **1995 Act**.

23.9.4 In terms of **Section 71(2)** of the **1995 Act**, the court shall at a first diet consider any preliminary plea or preliminary issue (within the meaning specified in **Section 79(2)** of the **1995 Act**) where the Crown (or the defence) has given the required notice not less than 2 clear days before the first diet.

23.9.5 In terms of **Section 72(3)** of the **1995 Act**, the court shall at a preliminary hearing consider any preliminary plea or preliminary issue (within the meaning specified in **Section 79(2)(a)** of the **1995 Act**) where the Crown (or the defence) have given the required notice not less than 7 clear days before the preliminary hearing.

23.9.6 **Section 79(2)** of the **1995 Act** specifies the preliminary pleas and preliminary issues. An application for disclosure of material to the unrepresented accused would be a preliminary issue in terms of **Section 79(2)(b)(vi)**, namely *“any other point raised by a party, as regards any matter not mentioned in sub-paragraphs (i) to (v), which could in his opinion be resolved with advantage before the trial”*.

23.9.7 A style application for a “protective order” in Sheriff and Jury cases is attached at Annex G and is available in the FOS templates, [DISCSHJPROTORD].

23.9.8 A style application for a “protective order” in High Court cases is attached at Annex H and is available in the FOS templates, [DISCHCPROTORD].

23.10 Timing of Applications for “Protective Orders”

23.10.1 In summary cases, such applications are made as an incidental application, which can be made to the court at any stage after proceedings have commenced. In common practice, however, such applications should normally be made at the intermediate diet. This is on the basis that those accused who are unrepresented at the pleading diet often obtain legal representation by the stage of the intermediate diet. This should, therefore, reduce the risk of making unnecessary or premature applications to the court.

23.10.2 Where it is reasonably clear that the accused will not be seeking legal representation (e.g. where the accused is a serial unrepresented accused), then incidental applications for “protective orders” should be made at the earliest opportunity.

23.10.3 In solemn cases, the authority under which the application is made is either **Sections 71** or **72** of the **1995 Act** and relates to preliminary issues. Accordingly, such applications must be made at the preliminary hearing or the first diet.

23.11 Consideration of Material prior to disclosure

23.11.1 Where material is being disclosed to an unrepresented accused, be it by access or provision of the actual material, it **must** be carefully scrutinised by a legal member of staff to ensure that all irrelevant, and immaterial sensitive and/or confidential information is appropriately redacted.

23.11.2 In anticipation that the accused will obtain legal representation, disclosure bundles should be available for disclosure and prepared in accordance with the normal timescales.

23.12 Content of Applications to the Court

23.12.1 Templates of applications for “protective orders” under **Sections 79** and **134** of the **1995 Act** can be accessed in the FOS templates [see above for details]. These templates contain style paragraphs that can be populated or deleted as required.

23.12.2 Sample applications for both summary and solemn proceedings are attached at Annexes F, G & H.

23.12.3 **Any** application for a “protective order” must include the following information:

- i) Details of the information to be disclosed – this must include specification of what the information actually is, e.g. *“police witness statements for witnesses 1-4 listed on the indictment and police witness statement for witness 5 listed on the Section 67 notice dated ... and served on the accused on...”*;

- ii) Specification of the means by which the Crown are seeking to disclose material to the accused (e.g. provision of copies of the actual material, or access to x material and provision of copies of xx material); and
- iii) Seek a prohibition that the accused does not disclose the contents of any of the material to any other person without the consent of the court, and that the accused does not use the material for any purpose other than the proper preparation and presentation of the accused's defence.
- iv) Seek a condition that the accused must return any copies to the Procurator Fiscal at the stage the accused is convicted/acquitted, prior to the case being adjourned, subject to the accused intimating an intention to lodge an appeal, in which case, the material should be returned on completion of the appeal proceedings.

23.12.4 Where the application includes specification of disclosure of some of the information by access only, then the application must also state:

- i) That copies of the "access only" material will be lodged with the Clerk of Court prior to the commencement of the trial for use by the accused during the course of the trial. The accused must not remove these from the courtroom and must return them to the Clerk of Court at the end of each day of evidence and at the conclusion of the trial; and
- ii) Any other restrictions sought in relation to access to the material (c/f Section 23.13 below).

23.13 Restrictions placed on accused during access to information

23.13.1 Where material is only provided to the accused by access, this is usually done to further restrict the possibility of the accused misusing the material, e.g. publication on the internet. Accordingly, it is essential that the accused's access to such material is supervised and, where appropriate, restrictions are put in place.

23.13.2 No accused should be permitted to photocopy, video, photograph, or otherwise reproduce by electronic or mechanical means the content of any material to which the accused has access. Unless there are exceptional circumstances, the accused will normally be permitted to take notes.

23.13.3 Any application for disclosure by access to material should clearly specify any such restrictions in order to ensure that they are included in the interlocutor granted by the court.

23.13.4 In any cases in which an application for a protective order has been made, and a difficulty has arisen in the treatment of that application by the court, a report should be submitted to the Deputy Crown Agent as a matter of urgency for consideration of appeal proceedings.

23.13.5 In solemn cases, leave to appeal must be sought from the court in terms of section 74(1) of the 1995 Act. Any appeal under section 74 must be lodged not later than 2 days after the decision in terms of section 74(2)(b). The report to the Deputy Crown Agent must be submitted as a matter of urgency to ensure that this timescale is met. If leave to appeal is refused, the matter should still be immediately reported in order that consideration can be given to lodging a Crown Bill of Advocation.

23.13.6 In summary cases, leave to appeal is not required and that matter should be reported as a matter of urgency in order that consideration can be given to lodging a Crown Bill of Advocation.

23.13.7 Pending a decision from the Appeals Unit, provision of material to the accused should be delayed to await the outcome of any appeal.

23.14 Procedure after an Application has been granted

23.14.1 Once the court has granted an application, then a copy of the interlocutor should be obtained from the Clerk of Court. This should be done at the earliest opportunity, to ensure disclosure is carried out as soon as practicable after the granting of the application.

Provision of Copies

23.14.2 Copies of any material to be provided to the accused should then be handed over to the accused in court if at all possible, along with a copy of the interlocutor and a covering notice [DISCNOTUNREP] clearly setting out (i) the basis on which disclosure is being made, i.e. for the proper preparation and presentation of the defence case, and (ii) that misuse of the material could result in the accused being found in contempt of court.

23.14.3 When making the application the prosecutor should request that, in the event that the court grants the application, the accused be directed to wait in the court until the disclosure materials, copy interlocutor and covering notice (mentioned in the above paragraph) are provided. Accordingly, these materials should be prepared in advance of court, in anticipation of the application being granted.

23.14.4 In addition, the accused should **always** be required to sign an acknowledgement to confirm receipt of copies of the disclosure materials, along with a copy interlocutor and covering notice. The acknowledgement should contain details of all of the material of which the accused has been provided with copies. Should the accused refuse to sign the acknowledgement, the material should not be provided to the accused. Instead, the accused should be invited to make arrangements to view the material under supervision. A template of the acknowledgment receipt where copies are provided can be accessed in the FOS templates [DISCACKCOP]. The acknowledgement should be signed by both the accused and the member of staff providing the accused with copies of the material.

23.14.5 A template of the covering notice mentioned at paragraph 23.14.2 above can be accessed in the FOS templates [DISCNOTUNREP].

23.14.6 In summary cases where,

- (i) the accused has never appeared in person, and material is to be provided by **access** (including where disclosure will be made by partly providing copies of material to the accused, and partly by providing the accused with access to view certain material); or
- (ii) the accused has submitted a plea of 'not guilty' by letter, and there has been no other communication from the accused other than the letter tendering such a plea, **regardless** of the intended method of disclosure;

the prosecutor should ask the court to continue the case for a personal appearance of the accused.

23.14.7 In summary cases where the accused has never appeared in person, and only copies of the disclosure material are to be provided to the accused, a copy of the interlocutor and the covering notice setting out (i) the basis on which disclosure is being made, i.e. for the proper preparation and presentation of the defence case, and (ii) that misuse of the material could result in the accused being found in contempt of court, should be sent to the accused along with a covering letter advising the accused that s/he should attend at the Procurator Fiscal's Office to uplift the material. A style letter for this purpose has been created and can be accessed in the FOS templates [DISCCOPIET].

Provision by Access

23.14.8 Where material is to be provided by access, a copy of the interlocutor and the covering notice should be sent to the accused along with a letter containing details of the appropriate person to contact to arrange access. A style letter for this purpose has been created and can be accessed in the FOS Templates [DISCACCESSLET].

23.14.9 Where the accused receives access to material at the Procurator Fiscal's Office, s/he must sign an acknowledgment confirming that s/he has received access to the material. This acknowledgment will specify the material being accessed and must also be signed by the member of staff who supervised the access. A template of the acknowledgment to be signed when material is accessed has been created and is available in the FOS templates [DISCRCPTEVIDMAT]

23.14.10 Where the accused is to receive access to material at the local police office, the reporting officer should be advised of this and be provided with a blank acknowledgment receipt for the accused to sign. This should then be signed by the accused and by the officer supervising the access. The signed copy should then be returned to the Procurator Fiscal's Office. A style

letter including the blank acknowledgement has been created and is available in the FOS templates [DISCACCESSROLET]. Where the accused is to receive access to **redacted** material, e.g. redacted sensitive statements, the reporting officer **must** be sent copies of the redacted material to show the accused, otherwise there is a danger that the accused will be shown unredacted copies.

Provision of Copies and by Access

23.14.11 Where the accused is to be provided with access to some material and copies of the remainder of the material, a copy of the interlocutor and the covering notice should be sent to the accused along with a covering letter advising the accused to (a) arrange a suitable time to access the material and (b) attend at the Procurator Fiscal's Office to uplift the relevant copies of the material. A style letter for this purpose has been created and can be accessed in the FOS templates [DISCACCESSCOPLET].

23.14.12 The accused will be required to sign an acknowledgment for receipt of the copies of the material [DISCACKCOP] and an acknowledgment confirming access to material [DISCRCPTEVIDMAT]. Both receipts must be signed both by the accused and by the appropriate member of staff providing the copies or supervising the access.

23.15 Breaches of the "Protective Order"

23.15.1 Where the Crown obtains any information to suggest that the accused has breached the terms of the "protective order" and has effectively misused the material, the Crown should instruct the police to carry out further enquiries and to submit a report regarding the alleged misuse.

23.15.2 Once satisfied that there is sufficient evidence to establish that the accused has breached the "protective order", the Crown should consider whether the breach amounts to a criminal offence and, if so, whether it is in the public interest to commence proceedings.

23.15.3 Whether or not a breach of the order amounts to a criminal offence, will depend on the individual circumstances of the accused's behaviour, e.g. misuse of the material for the purpose of intimidating a witness into changing their evidence will amount to an attempt to pervert the course of justice; misuse that distresses or alarms a witness such as public references to a witness's criminal record might amount to a breach of the peace.

23.15.4 If the Crown is satisfied that the contempt amounts to a criminal offence and it is in the public interest to prosecute, then, subject to the procedures set down below (which will vary depending on the forum in which the "protective order" was granted), proceedings should be raised.

23.15.5 There is a general presumption that the appropriate forum for the crime will be the same or higher forum in which the "protective order" was granted, e.g. if the protective order was granted in the sheriff summary court,

then proceedings arising from the breach of that order should at least be raised in the sheriff summary courts, if not on petition. Determining the appropriate forum will depend very much on the nature and circumstances of the breach of the order.

23.15.6 If the contempt does **not** amount to a criminal offence or it is not considered in the public interest to prosecute the accused for the criminal offence, then there is a **strong presumption** in favour of bringing the contempt to the attention of court.

23.16 Procedure where there is a breach of a “Protective Order”

23.16.1 Where satisfied that there is sufficient evidence of a breach of a protective order granted in respect of any case, a report should be submitted to the Deputy Crown Agent for Crown Counsel’s Instructions. This report should set out the following sections:

- i) Background Information – this should detail the following:
 - Details of when the protective order was granted;
 - Details of when the interlocutor was served on the accused;
 - Where disclosure is by (or partially by) access, details of when access to material was given;
- ii) Evidence in Support of Breach – this should detail the following:
 - The nature and the extent of the alleged breach;
 - The evidence that supports the alleged breach (bearing in mind that evidence may require to be led to satisfy the court);
- iii) Criminal Offence – this should detail that consideration has been given to whether the alleged contempt amounts to a crime. Where appropriate, it should specify the appropriate crime; and
- iv) Recommendations – this should set out recommendations regarding whether criminal proceedings should be raised or whether the contempt should be brought to the attention of the court. Where criminal proceedings are to be recommended, a draft charge should be included.

23.17 Additional Procedure where there is a breach of a *sheriff summary or Justice of the Peace* order

23.17.1 The **Summary Legal Manager** should consider any breaches of the order and determine whether the contempt amounts to a criminal offence. If satisfied that a criminal offence has been committed, the Summary Legal

Manager should then consider whether it would be in the public interest to prosecute the accused for the offence.

23.17.2 If it is in the public interest to prosecute the accused for the crime arising out of the contempt, then proceedings should be raised in the normal way.

23.17.3 If the contempt does not amount to a crime or it is not in the public interest to prosecute, then the Summary Legal Manager should prepare a report for submission to the Deputy Crown Agent for Crown Counsel's instructions as set out in paragraph 23.16 above.

23.18 Bringing an alleged contempt to the attention of the Court

23.18.1 Where the action amounting to the contempt occurs during the proceedings (or so closely related to the proceedings in time and place), then the court can deal summarily with the alleged contempt following the procedural safeguards set down in *Robertson v HMA* and *Gough v HMA*⁴³ (for further guidance see the "Contempt of Court" entry in the Knowledge Bank). Insofar as possible, the Court should be invited to deal with any breach of a protective order summarily.

23.18.2 Where the accused fails to return any disclosed material at the stage of conviction/acquittal, this should be **immediately** brought to the attention of the court, and the court should be invited to consider whether the accused is acting in contempt of the court order. Where the case is adjourned for a proof in mitigation the court should be invited to record that the material should be returned at the conclusion of the proof in mitigation. Where the accused indicates an intention to appeal against any part of the determination, the material should be returned on conclusion of the appeal proceedings.

23.18.3 Where the action amounting to the contempt occurs outwith the proceedings, then the Crown should bring the matter to the notice of the court by the process of Petition and Complaint, which may be at the instance of the Lord Advocate or any other interested party⁴⁴. As a petition and complaint is addressed to the court seeking the exercise of its power *nobile officium*, it can only be presented to the High Court of Justiciary.

23.18.3 In the Petition and Complaint the Lord Advocate does no more than to allege the commission of an offence against the Court itself and in performance of her duty and no doubt mindful of the direction of the trial judge, calls the attention of the Court thereto. The Petition is in no sense an attempted prosecution upon a criminal charge for it neither bears to be nor is it concerned with the matter of complaint as the subject of criminal prosecution.

⁴³ Supra

⁴⁴ *HMA v Aird* Supra; *Robertson v HMA* and *Gough v HMA*, Supra

23.18.4 The Crown should present the Petition and Complaint to the High Court craving the court to grant warrant to serve the same on the accused, to ordain him/her to lodge answers thereto, if so advised, and to appear personally before the court, and on the matter complained of being admitted or proved to inflict upon him/her such penalty as to the court should seem proper.

23.18.5 A Sample Petition and Complaint is contained at Annex I. A Style Petition and Complaint can be accessed in the FOS templates [DISCCONTEMPT].

23.19 Proving an alleged Breach of a “Protective Order”

23.19.1 It is likely that after a Petition and Complaint has been presented, and any answers lodged, that the Court will require to hear evidence from both parties. This will usually require an adjournment in order that the Crown can cite witnesses.

23.20 Limitations on the Cases in which an Accused can be Unrepresented

23.20.1 In terms of **Section 288C** of the **1995 Act**, an accused charged with a sexual offence to which **Section 288C** applies is prohibited from conducting his or her defence in person in the following circumstances:

- (i) At or for the purposes of a preliminary hearing;
- (ii) At the trial; or/and
- (iii) At any victim statement proof relating to any such offence.

23.20.2 **Section 288C** applies to the following offences:

- (i) Rape;
- (ii) Sodomy;
- (iii) Clandestine injury to women;
- (iv) Abduction of a woman or girl with intent to rape;
- (v) Assault with intent to rape;
- (vi) Indecent assault;
- (vii) Indecent behaviour (including any lewd, indecent or libidinous practices or behaviour);
- (viii) An offence under Section 311 (non-consensual acts) or Section 313 (persons providing core services: sexual offences) of the Mental Health (Care and Treatment) (Scotland) Act 2003;
- (ix) An offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 –
 - (a) Sections 1-3 (incest and related offences)
 - (b) Section 5 (unlawful sexual intercourse with a girl under 13 or 16)
 - (c) Section 6 (indecent behaviour towards a girl between 12 or 16)
 - (d) Section 7(2) and (3) (procuring by threats etc.)

- (e) Section 8 (abduction and unlawful detention)
- (f) Section 10 (seduction, prostitution, etc. of a girl under 16)
- (g) Section 13(5)(b) or (c) (homosexual offences);
- (x) Attempting to commit any of the offences set out in paragraphs (i) to (viii) above;
- (xi) Where in the case of any offence (other than one set out, above) the court is satisfied that there appears to be a substantial sexual element in the alleged commission of the offence, that it ought to be treated as the offences, above (in terms of **Section 288C(4)**). The court shall, either on the application of the Crown or *ex proprio motu*, make an order.

23.20.3 Where the accused is being prosecuted for any of the offences listed at paragraph above, he or she is not entitled to represent him or herself and, accordingly, should not be provided with copies of **any** witness statements in the case, nor should he or she be allowed to view any productions in the case. This applies whether the case is a summary case or a case proceeding on indictment.

23.20.4 Where, in such cases, the accused does not engage a solicitor, then the court will appoint one. There is no authority to indicate that this practice is contrary to the accused's right to a fair trial under Article 6 of the European Convention.

23.21.1 Third Party Interests

23.21.1 From time to time third party interest groups may seek access to case related information on the basis that they are seeking to explore elements of a case, post conviction, on behalf of the accused, where there is no live appeal.

23.21.2 Any such requests should be reported to the Deputy Crown Agent for Crown Counsel's Instructions.

Chapter 24: CAP Cases & Disclosure

Guidance in respect of this area is currently being prepared by Policy Division and will be issued in due course.

Chapter 25: Sensitive & Intelligence Material

25.1 It is vital in considering information for disclosure in terms of **McLeod** and **McDonald** that regard is had to material which is of a confidential and/or sensitive nature, and whether or not, in light of that, the material should be disclosed.

25.2 In exceptional cases, there may be information which in terms of **McLeod** and **McDonald** is material and ought to be disclosed, but which for good reason should not, in fact, be disclosed. This may be because the information is covered by public interest immunity, or raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons.

25.3 Where information of a confidential and/or sensitive nature is,

- (i) irrelevant, i.e. it is not relevant to the issues in the case; or
- (ii) it is relevant to the issues in the case, but it does fall within the **McLeod** and **McDonald** obligation of disclosure, i.e. if it contains wholly incriminatory information (in other words, it is relevant but immaterial);

it may be withheld where the circumstances outlined in paragraph 25.2 above exist.

25.4 This may mean, for example, that a whole document is withheld, or that a document is disclosed to the defence but with the confidential and/or sensitive information redacted. (See Chapters 15, 19 and 22 of the Manual for further guidance on redaction.) Alternatively, it may be appropriate to provide the defence with a note/summary of any disclosable information contained in a document, excluding any of the confidential and/or sensitive material, without providing a copy of the document.

25.5 In general, non disclosure should be the last option after all other possibilities have been considered, and, in particular, relevant, wholly incriminatory information should only be withheld in exceptional cases.

25.6 Subject to any specific instruction contained elsewhere in this Manual, where there is any doubt about what information should be disclosed and/or withheld, the appropriate Legal Manager should be consulted immediately, and if necessary Crown Counsel's Instructions should be sought.

25.7 Where information is disclosable in terms of **McLeod** and **McDonald**, i.e. it is relevant *and* material, and there is a compelling reason why it should not be disclosed, e.g. it is covered by public interest immunity, or raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, the matter should be referred initially to the District or Area PF. Thereafter the matter should be reported by the District or Area PF to the

Deputy Crown Agent for the Law Officers attention, with an appropriate recommendation, for a decision as to how the issue should be addressed.

25.8 In these circumstances, the Crown has two options:

- (i) to discontinue proceedings; or
- (ii) to seek to invoke public interest immunity.

25.9 Where the Crown is not prepared to discontinue proceedings it is not entitled unilaterally to withhold the information from the defence. The question of whether the information should be disclosed will require to be decided by the Court.⁴⁵

25.10 The law in relation to public interest immunity is currently under consideration by the courts. Further guidance will be issued in due course on the procedure to be followed when the Crown decide to seek to invoke public interest immunity.

25.11 Further specific guidance in relation to the disclosure and withholding of witness statements is included in Chapters 4 and 13 of this Manual. (**See, in particular, Chapter 4, Section 4.2, and Chapter 13, Sections 13.2 & 13.3.**)

⁴⁵ C/f *Hemming v HM Advocate*, 1997 JC 140, in which the court considered the public interest in disclosure of witness statements. See also *Friel v Chief Constable of Strathclyde*, 1981 SC 1, and *Parks v Tayside RC*, 1989 SC 38, in which the courts sought to balance various factors in terms of the public interest in the disclosure or otherwise of information.

Chapter 26: Appeals

26.1 General Principles

26.1.1 The Crown's disclosure duty, as required by Article 6 and *McDonald* and *McLeod*, exists in perpetuity. (C/f Chapter 2, in particular, paragraphs 2.1.1 – 2.1.3.) Therefore it applies post-conviction and even after the final disposal of the case, which includes any appeal proceedings.

26.1.2 While the court in *McLeod* only considered the Crown's duty of disclosure in relation to trial proceedings, the principle enunciated there extends beyond that stage. (C/f paragraphs 8 and 9 of the Summary of the Crown's Approach to Disclosure.)

26.1.3 Where, in the course of appeal proceedings, it becomes apparent to the Crown that material information has not been disclosed, whether that is,

- (i) material information which should have been disclosed at an earlier stage;
- (ii) information which was not previously considered disclosable and now, in light of developments in the appeal, should be disclosed; or
- (iii) new information received by the Crown,

the Crown must, in respect of (i), rectify that, and, in respect of (i) – (iii), disclose any material information to the defence in advance of, and during the appeal proceedings, as part of its continuing obligation to ensure that there has been a fair trial. If the procedure as a whole has secured a fair trial, there will not have been a breach of Article 6.

26.1.4 In *Botmeh and Alami v United Kingdom* the European Court of Human Rights held:

“44. Given the extent of the disclosure to the applicants of the withheld material by the Court of Appeal, the fact that the court was able to consider the impact of the new material on the safety of the applicants' conviction in the light of detailed argument from their defence counsel and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial, the Court considers thatthe failure to place the undisclosed material before the trial judge was in the particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.”

26.2 Disclosure in Appeals

26.2.1 The Appeal Court has, on occasion, considered applications for recovery of documents at the appeal stage. Although the decision of the

Court in ***Hoekstra v HMA (No 1)***⁴⁶ was subsequently set aside, on account of comments made by one of the judges regarding the European Convention, the court's dicta on the appropriate approach to applications for recovery remain instructive:

"In general terms, this court should not order the Crown to disclose new material in the course of an appeal against conviction unless the court is satisfied that the material to be disclosed is likely to be of value for the purpose of evaluating the grounds of appeal and determining whether or not there has been a miscarriage of justice. The court may be prepared to consider ordering the production of new material which is shown to be of potential importance even if it is not material which is, on a strict reading, relevant to an existing ground of appeal, provided that, in that case, the material sought could provide the basis for a new or amended ground of appeal which the appellant should, at this late stage, be allowed to advance. In giving consideration to these issues in the present appeals the court must bear in mind that it is now almost three years since the convictions and that considerable indulgence has already been shown to the appellants in relation to the advancing of new grounds of appeal. The grounds of appeal now before this court are, as has been pointed out, not grounds for which leave was obtained under section 107 of the 1995 Act and they are entertained, though lodged very late, only by leave of the court. Furthermore, they have been added to, with the court's permission, at the appeal hearing itself."⁴⁷

26.2.2 The court continued:

"Certain of the submissions made to us were to the effect that disclosure as sought should be ordered so that the appellants and their advisers could now scrutinise the whole investigatory antecedents (however remote) of the interception of the *Isolda* so that these might be investigated for any irregularities. No order for such a purpose would in our view be justified. To do so would be inconsistent with the ratio of *McLeod v H.M. Advocate*, by which we are bound. We shall therefore refuse to order the Crown to disclose the material referred to in heads 1, 2 and 3 (and of head 6 insofar as related to them) of the 'Schedule to the Devolution Minute'.⁴⁸

26.2.3 The court returned to the issue in ***Hoekstra v HMA (No 5)***⁴⁹, the Lord Justice-General (Rodger) discussing ***McLeod*** and continuing:

"Both the Lord Justice-Clerk and Lord Hamilton expressed their agreement with the Lord Justice-General's reasoning. This shows that they saw no inconsistency between their description of the approach to be followed and the description given by him. Nor do we. For present purposes it is sufficient to say that, as the advocate-depute indeed accepted, where, say, an accused intends to seek to have evidence excluded on the ground that it was obtained illegally, that is

⁴⁶ (No.1) 2000 SCCR 263

⁴⁷ ***Hoekstra (No 1)*** at page 290.

⁴⁸ ***Hoekstra (No 1)*** at page 294.

⁴⁹ (No 5) 2001 SCCR 121

a matter which relates to the accused's 'proposed defence' to the charge in question. It follows that the court may order the production of documents relating to that matter if they would be likely to be of material assistance to the proper preparation or presentation of that aspect of the accused's defence. Mutatis mutandis the same test would fall to be applied at the appeal stage. For these reasons we are satisfied that the test applied by the court in **McLeod** is not open to the criticism advanced by Dr Sjöcrona and in these circumstances we have not found it necessary to refer to the decisions of the European Court of Human Rights which he cited to us.”⁵⁰

26.2.4 It is, accordingly, apparent that the test set out in **McLeod** applies equally to applications for recovery of documents made at the appeal stage. On making such application, an appellant will “*require to explain the basis upon which he asks the court to order the haver to produce the documents*”.⁵¹ The order will only be granted if it would serve a proper purpose and be in the interests of justice.

26.2.5 In **McDonald** the Appeal Court again considered specifically the obligations of disclosure arising in appeals. The appellants McDonald and Dixon had each lodged a petition for recovery of documents in the following terms:

“1. All material in the possession of or under the control of the Lord Advocate which ought to have been (and ought to be) disclosed in terms of his (*sic*) obligation under Article 6(1) when read with Section 57(2) of the Scotland Act 1998.

2. Failing principals, drafts, copies or duplicates of the above whether in paper or digital form.”⁵²

26.2.6 The court held, in line with its previous decision in **Hoekstra (No 5)**:

“**McLeod**, subject only to the specific refinements laid down in **Sinclair** and in **Holland**, remains the guiding authority in Scots law on the test for the extent of the Crown's duty of disclosure.”⁵³

26.2.7 It went on to observe:

“In the present cases each of the appellants has been granted leave to appeal against conviction on specific grounds. It is not suggested that the granting of any general order by the court for recovery of documents or other material would assist in the presentation of these grounds; nor (subject to an exception for the appellant Blair) is it suggested that there are other arguable grounds on the basis of which, in the event of particular classes of documents (or particular other materials or classes of material) being recovered, the court would now allow any of these appeals to be presented..... Having

⁵⁰ **Hoekstra (No 5)**, at page 127, paragraph 7.

⁵¹ **McLeod**, at page 99.

⁵² **McDonald**, at page 159, paragraph 4.

⁵³ **McDonald**, at page 171, paragraph 47.

regard to the consequences of non-compliance, the haver is entitled to be told with precision what documents or classes of document he or she is obliged to produce. These calls wholly fail to do so, giving no practical content to any order for recovery.”⁵⁴

26.2.8 The court further observed that any application for recovery of particular classes of material which might be relevant would require to be considered on its merits, with specific reference to the issues arising, or which properly might arise, in the appeals.⁵⁵

26.3 Extent of Disclosure

26.3.1 In addition to paragraph 26.1.3 above, the following material will be disclosed in live appeal proceedings (subject to any relevant guidance in respect of redaction and withholding of material set out elsewhere in this Manual – in particular see Chapters 15, 19, 22 and 25):

- (i) Any fresh material information coming to the Crown’s attention which is relevant to the grounds of appeal;
- (ii) Any material information requested by the appellant which is relevant to the grounds of appeal; or
- (iii) Any material information requested by the appellant which although not relevant to existing grounds of appeal is relevant to specific avenues of enquiry arising from the grounds of appeal.

26.4 Limits of Crown Duty

26.4.1 Subject to 26.1.3, the Crown will **not** at the stage of appeal proceedings,

- (i) review the entire case material;
- (ii) re-investigate the case; or
- (iii) review the history of disclosure.

26.4.2 Review will only be considered in cases in which new information comes to light, or examination of the papers reveals that there has been non-disclosure of material information at the trial stage, and only where (and to the extent to which) it is relevant to the grounds of appeal, and the Crown considers it necessary in the light of that information or examination.

26.5 Handling of Requests

26.5.1 Any request received by Procurators Fiscal for disclosure of material where there are live appeal proceedings should immediately be referred to the

⁵⁴ *McDonald*, at page 173, paragraph 56.

⁵⁵ *McDonald*, at page 175, paragraph 61.

Crown Office Appeals Unit without any undertaking being given as to what will or will not be disclosed.

26.6 Disclosure Requests where no Appeal Proceedings

26.6.1 Any request received post-conviction by the Crown for disclosure of information in cases in which there are no live appeal proceedings should be handled in the same way as those in which there are live appeal proceedings, and should immediately be referred to the Crown Office Appeals Unit without any undertaking being given as to what will or will not be disclosed.

26.6.2 Any such request will be considered on its merits in the light of the Crown's obligations in terms of *McLeod* and *McDonald*.

26.7 Response to Disclosure Requests

26.7.1 The Crown is entitled, before responding to a request from the defence for disclosure on appeal, to have a reasoned explanation justifying disclosure. The extent of such explanation will depend on circumstances. The Crown is also entitled to ask the defence to,

- (i) confirm that they did not have the information at the trial stage;
- (ii) identify what material was disclosed at the trial stage;
- (iii) advance a specific justification for the request.

26.7.2 In the absence of such justification, the request, unless there are exceptional circumstances, will normally be refused.

26.8 Significance of Disclosure

26.8.1 Disclosure at appeal stage of information which was not disclosed at trial stage does not involve any concession by the Crown,

- (i) that the non-disclosure has prejudiced a fair trial;
- (ii) that the material disclosed or the non-disclosure would justify a new ground of appeal;
- (iii) that the court should allow a new ground of appeal to be received;
or
- (iv) that there has been a miscarriage of justice.

26.9 Reconciliation of Disclosed Material

26.9.1 At the stage of submitting a report in any appeal (other than an appeal against sentence), or if otherwise requested by the Crown Office Appeals unit,

the Procurator Fiscal should, so far as possible, provide an inventory of material already supplied to the appellant.

26.10 Records of Disclosed Material

26.10.1 Where disclosure of additional material is made in the course of an appeal, an inventory will be prepared of all items disclosed.

26.10.2A Disclosure Log will be maintained in all solemn conviction appeals, and a note kept in that of any material (by reference to the inventory if appropriate), to whom it was passed, and the date. This will form a cumulative summary of what is in the inventories. Copies of each inventory will be kept filed with the Disclosure Log.

26.10.3 Completion of Disclosure Logs and inventories is the responsibility of the staff in the Crown Office Appeals Unit dealing with the case.

Chapter 27: Review of Disclosure

27.1 Duty to Review Disclosure

27.1.1 **The prosecutor must keep disclosure under review.** The Crown's disclosure duty persists in perpetuity. Throughout the life of the prosecution, any subsequent appeal proceedings, and even after the final disposal of the case, decisions may be taken to disclose or to withhold information. The Crown must regularly review disclosure to ensure that any decision to withhold information remains the correct decision in terms of *McDonald* and *McLeod*.

27.1.2 In particular, disclosure will require to be reconsidered and reviewed if the defence lodge a new line of defence, or advise of a change in the line of defence.

27.2 Unused Material – Witness Statements (C/ Chapter 3, section 3.2.)

27.2.1 During a case, a decision might be taken by the prosecutor:

- (i) not to obtain, what appears at the time to be, irrelevant material from the police; or
- (ii) not to disclose irrelevant material held by the Crown to the defence.

27.2.2 In terms of the ACPOS/COPFS Joint Protocol on Disclosure of Evidential Material in Criminal Prosecutions, notwithstanding the disclosure duty on the Crown to disclose all statements of all witnesses on the Crown and defence lists, the police must submit to the Crown *every* statement obtained during the course of an investigation. This means that any material which has not been submitted by the police, will normally be limited to door-to-door enquiry forms and pro forma questionnaires which are irrelevant, and do **not** relate to witnesses on the Crown or defence lists, or other persons from whom a statement has been obtained in the course of the investigation.

27.2.3 Where such material exists, however, the Crown must still be advised of its existence (along with a brief indication of the general nature of the content) in order to take a decision on whether or not it requires, on the grounds of relevancy, to be submitted to the Crown, and, thereafter, disclosed to the defence subject to the materiality test.

27.2.4 It is essential that the Crown continues to keep the relevancy of such material under review. While at the start of the precognition process, such material might be irrelevant, it is possible that the relevancy of the material will change as the case progresses, especially as the Crown becomes more aware of the nature of the defence.

27.2.5 Accordingly, where such material is not submitted by the police, it is vital that the prosecutor is aware of what material has not been submitted on the basis that it is irrelevant, in order to keep disclosure under review.

27.2.6 Where immaterial sensitive information has been redacted from statements, or a statement has been withheld completely on this basis, such decisions should be reviewed during the life of the case, to ensure that the redacted information or the statement does not become material.

27.2.7 Where information which has been redacted from a statement later becomes material, this information should be disclosed to the defence as soon as reasonably possible, unless a public interest issue arises.

27.3 Unused Material – Criminal History Records

27.3.1 Where the criminal history of a witness is obtained but is not considered material and is therefore not disclosed, this decision must be kept under review. If it becomes clear that the information is material and should be disclosed, this should be provided to the defence. An example of when this might arise is where a witness in a housebreaking charge speaks only to the house being secure and then broken into and property stolen but the defence indicate that their position is that while the house might have been broken into no property was stolen or that the house was never secure.

27.3.2 Similarly, if a particular conviction or outstanding charge is redacted from a disclosed criminal history schedule, this may need to be reviewed once the nature of the defence becomes clear. An example of when this might arise is where a conviction for indecent assault has been redacted but the defence position in an assault case is that he or she only punched the accused because the accused attempted to sexually assault him or her.

Chapter 28: Auditing of Disclosure Practices

28.1 Mandatory Objectives

28.1.1 Management Board and the Area Fiscal's Group have agreed mandatory objectives intended to help ensure that there is a consistent approach across the Service in areas of activity that are of key importance in driving forward improvements in efficiency and effectiveness.

28.1.2 Mandatory Objectives have been prepared in relation to the Crown's duty of disclosure. These are available on the Intranet under Performance Appraisal: Mandatory Objectives.

28.2 Solemn Cases

28.2.1 Area Fiscals will identify an appropriate person in each PF Office with the 'day to day' responsibility for ensuring compliance with the Principles of Disclosure, the Disclosure Manual and, in every potential High Court case, the Crown Practice Statement on Disclosure in High Court Cases and that the Crown's disclosure obligations are fulfilled. This will normally be the Solemn Legal Manager for a dedicated solemn team. The *primary* responsibility for this remains with Area Fiscals.

28.2.2 All precognosers must be wholly familiar with the Principles of Disclosure, the Disclosure Manual and the Crown Practice Statement in order to properly discharge the Crown's disclosure duty and complete all necessary steps in the disclosure process. Precognosers should alert the Solemn Legal Manager to any difficulty in complying with any part of the COPFS disclosure guidance, or where there have been any material developments that may require the case to be reviewed for the purpose of disclosure.

28.3 Best Practice for Solemn Legal Managers

28.3.1 Solemn Legal Managers already have responsibility for the strategic direction of a precognition and will usually set this following consideration of the statements in the case. It is best practice for the Solemn Legal Manager to ensure that such an exercise takes place at the earliest opportunity so that consideration can be given at the same time to disclosure issues. It is also best practice to commence identification of evidence that may be the subject of agreement at this point.

28.3.2 The Solemn Legal Manager should therefore carry out the exercise of considering statements in a High Court or Sheriff and Jury case as soon after first appearance as possible, and, as part of that exercise, ensure that issues of (i) strategic direction of a precognition, (ii) agreement of evidence and (iii) disclosure are considered at the outset of the precognition process. It may be possible in some offices to commence this exercise at the stage where statements are being considered for the purpose of full committal -this is best practice where it can be achieved. In particular, it is unnecessary to deal with the disclosure of a provisional list of witnesses and of witness statements in

two stages, if it is possible to disclose witness statements within 14 days of first appearance.

28.3.3 The police should assist the disclosure process by providing quality witness statements that have been the subject of some consideration on the issue of confidentiality, operational security and sensitivity prior to submission to the Procurator Fiscal.

28.3.4 It is best practice for the Solemn Legal Manager to make early contact with the Reporting Officer in every potential High Court case to ensure that there is a full and mutual understanding of the disclosure issues in the case, in particular, any matters that may affect the Crown's capacity to disclose witness details, statements and productions in accordance with the Principles of Disclosure, the Disclosure Manual, and the Crown Practice Statement on Disclosure in High Court Cases.

28.4 Auditing Redaction Decisions

28.4.1 In addition to the requirements set out in the mandatory objectives, Area and District Fiscals and Legal Managers (Summary Legal Manager for summary cases; Solemn Legal Manager for solemn cases) are required to take appropriate steps, such as sample checks, to satisfy themselves that **redaction** of witness statements and criminal history information is being carried out in accordance with the Principles of Disclosure, the Disclosure Manual, and, in High Court cases, the Crown Practice Statement.

Abbreviations

CHR	Criminal History Record
CHS	Criminal History System
COP	Scottish Court Service computer system
COPFS	Crown Office and Procurator Fiscal Service
FOS	Future Office System - the COPFS system used to process all summary business and facilitate disclosure processes.
ISD	(COPFS) Information Systems Division
PCOCs	Previous Convictions and Outstanding Charges
PNC	Police National Computer
POLIN	The COPFS computer system that enables the Crown to receive electronic reports.
PROMIS	The COPFS live, operational database which is used to manage the processing of reports submitted to Procurators Fiscal by the police and other reporting agencies.
SOS	Standard Office System - the COPFS system used to process all solemn business.
SPR	Standard Prosecution Report
URN	Unique Reference Number

