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 Only the sensitive immaterial information contained within the criminal history record should be redacted along with any material that Crown Counsel have instructed should not be disclosed in the public interest. Section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010 defines sensitive information as that which if it were to be disclosed would constitute a risk of (a) causing serious injury, or death, to any person; (b) obstructing or preventing the prevention, detection, investigation or prosecution of crime; or (c) causing serious prejudice to the public interest

19.1.3 Since the decision in **Holland v HMA** that criminal history records are a class of information that is always disclosable, the Privy Council has clarified that this obligation only requires the disclosure of such previous convictions, outstanding charges and direct measures, if any, as materially weaken the Crown's case or materially strengthen the defence case.

19.1.4 In **HMA v Murtagh**, the Privy Council also recognised that the system whereby the Crown makes the initial decision regarding materiality of criminal history information is compatible with the accused's right to a fair trial (paragraphs 35 and 40).

19.1.5 As stated by Lord Hope of Craighead in **HMA v Murtagh**, the materiality of criminal history information must depend on whether the information could have any bearing on the credibility or character of the witness (paragraph 30).

19.1.6 Any previous conviction, outstanding charge or direct measure which would be relevant to a legitimate attack on the credibility or character of a witness must always be considered as disclosable. However, when determining the materiality of a previous conviction, outstanding charge or direct measure, the Crown should not exclude everything to which objection might possibly be taken on the ground that it was not relevant as any decision as to what may be used to support an attack on credibility or character is a matter for the Court. Accordingly, **a generous approach should be applied when determining whether information is material or not** (paragraph 31).

19.1.7 Disclosure of a previous conviction, outstanding charge or direct measure, however, does not reflect an admission or concession that the previous conviction, outstanding charge or direct measure 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. As stated by Lord MacFadyen in **Maan Petitioners** (2001 SCCR 172)**,** provided witnesses' previous convictions are relevant to a legitimate attack on character or their credibility, then they would be relevant to the accused's defence. This principle will, of course, extend to outstanding charges and direct measures.

19.1.8 In **HMA v Murtagh** the Privy Council also stated that it was not necessary for the Crown to redact all immaterial information from a criminal history record prior to disclosure. As stated by Lord Hope of Craighead at paragraph 37,

> *"…the balance is in need of adjustment towards a general working rule that only those parts of the criminal history should be withheld that are likely to*

be embarrassing or damaging to the witness if disclosed to the defence ***and*** *do not satisfy the test of materiality".*

19.1.9 In addition, Lord Rodger of Earlsferry stated at paragraph 61:

"In my view, the Crown can properly and prudently proceed on the basis that, unless some particular conviction is both immaterial and potentially sensitive, the wiser and more appropriate course is to disclose all the previous convictions of witnesses on the Crown list".

19.1.10 Accordingly, when deciding what information within a criminal history record should be disclosed to the defence, the Crown must consider:

i. What information is material;
ii. Whether any of the remaining immaterial information is potentially sensitive and therefore non-disclosable; and
iii. Whether there is any reason in the public interest why any of the *material* information should be withheld.

Thereafter, only the sensitive immaterial information should be redacted along with any material information that Crown Counsel have instructed should not be disclosed in the public interest.

19.1.11 Annex M provides a flowchart setting out the considerations to apply when considering criminal history records for redaction purposes.

19.1.12 The next parts of this Chapter will provide guidance on each of these 3 considerations, along with guidance on what parts of the criminal history record must be considered for disclosure.

19.2 What should be considered for Disclosure

19.2.1 The Crown must apply the materiality test to the following information recorded on the criminal history record;

i. Outstanding Charges (**Holland v HMA**);
ii. Previous Convictions including absolute discharges (**Holland v HMA**);
iii. Children's Hearing Appearances
iv. PF Direct Measures, including warnings; and
v. Fixed penalties issued by the police or other specialist reporting agency (**HMA v Murtagh**).

19.3 Previous Convictions & the 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 merely by virtue of it being spent. The materiality considerations set out in section 19.6 below should instead be applied.

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.

19.5 Direct Measures, Police Fixed Penalties & the Rehabilitation of Offenders Act 1974

19.5.1 Although Lord Hope of Craighead recognised, in **HMA v Murtagh**, that almost every case in which an alternative to prosecution has been utilised will be trivial and of no materiality because they will have no real bearing on the witness's character or credibility, he also recognised at paragraph 38 that there could be no fixed rule on this point and, accordingly, *"the materiality principle applies to this aspect of a witness's criminal history record in the same way as it does to the rest".*

19.5.2 Lord Rodger also stated at paragraph 68 that:

> *"So far as outstanding charges, fiscal fines and other alternatives to prosecution are concerned, the same general approach should be applied [as for previous convictions]…Article 6(1) requires that they should all be disclosed where they are material, but not otherwise. Again, however, the Crown can in their discretion disclose other non-sensitive information".*

19.5.3 By their nature, most direct measures will not meet the test for materiality. But some will. Although acceptance of a direct measure is not an acceptance of guilt, the existence of a direct measure may, depending on its nature, provide a proper basis for legitimate defence inquiry.

19.5.4 For example, a direct measure relating to an attempt to pervert the course of justice could legitimately be deployed by the defence in the context of an attack on the witness' credibility. Similarly a direct measure relating to an attempt to wasting police time or breaching a court order, although rare, would require to be disclosed.

Also recent direct measures against an eye witness relating to possession of drugs could found a legitimate line of cross-examination relating to the witness' reliability.

19.5.5 Schedule 3 to the Rehabilitation of Offenders Act 1974 provides the framework in respect of 'rehabilitation' of alternatives to prosecution. Schedule 3 defines when an alternative to prosecution becomes spent; what protection is afforded to persons in relation to spent alternatives to prosecution; and the limitations to that protection. In essence the limitations for alternatives to prosecution mirror those laid down in section 7 in respect of convictions i.e. 'rehabilitation' 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)".*

19.5.6 Accordingly, a spent alternative to prosecution should <u>not</u> be redacted from the schedule of previous convictions and outstanding charges merely by virtue of it being spent. The materiality considerations set out in section 19.6 below should instead be applied.

19.6 Assessing Materiality

19.6.1 Criminal history information may be relevant and material for one of two reasons:

i) It potentially bears on an issue in the case; or

ii) It may legitimately be used to attack the credibility or reliability of the witness.

The Crown should assess each piece of criminal history information and decide whether or not that piece of information is material on one of these grounds. If the Crown does not consider that the information is material that information should not be disclosed. A generous approach should be taken when determining materiality. Where the issue of disclosure is one of fine judgement or balance, then the Crown should disclose the information.

Criminal history information bearing on an issue in the case

19.6.2 Criminal history information bearing on an issue in the case should always be disclosed. For example, where the accused is charged with assault criminal history information of the complainer which indicates or may indicate a violent or quarrelsome disposition should be disclosed, since it may be relevant to issues of provocation or self defence (**HMA v Murtagh** at para 30). This will include information relating to crimes of violence, breaches of the peace and possession of knives or offensive weapons.

Criminal history information bearing on credibility

19.6.3. Criminal history information which could reasonably be considered to bear on the credibility of the witness should be disclosed. The question in any case is whether or not the information could legitimately be relied upon by the defence in an attack on the credibility of the witness at trial. Convictions, outstanding charges or direct measures for dishonesty or against the administration of justice will always require to be considered for disclosure. Other convictions which could be founded upon to attack the general character of the witness should also be considered for disclosure. Again, when determining what information is relevant to an attack on the credibility of a witness, a generous approach should be taken as the final decision on

what may be used to support an attack on the credibility or character of a witness is a matter for the sheriff or the judge at trial (**HMA v Murtagh** at para 31).

19.6.4 It is legitimate for the Crown, when considering whether a particular piece of criminal history information is material, to have regard to the totality of the witness's record. So, for example, the Crown may properly take the view that elderly convictions for relatively minor offences – except offences of dishonesty – are immaterial if the witness has no recent criminal record. The Crown may properly take the view that such offences are of no relevance to the question of whether the witness is likely now to tell the truth in court. This was specifically recognised by Lord Hope of Craighead in **HMA v Murtagh** who stated at paragraph 32 that:

> *"A conviction for an offence many years ago which was, on any view, of a trivial nature only and was not repeated would fall well outside the threshold of what was relevant".*

Offences for dishonesty, however, must always be disclosed regardless of the age of the offence as these will always be relevant to an attack on credibility (**HMA v Murtagh** at para 30).

19.6.5 On the other hand, a catalogue of significant recent offending, even if it does not involve dishonesty in the narrow sense may fall to be disclosed on the basis that it reveals contempt for the law and general depravity of character. As stated by Lord Rodger of Earlsferry at paragraph 61 in **HMA v Murtagh**,

> *"While no individual minor conviction may be of any significance, a long trail of even minor infractions may sometimes point to a certain disregard for the law that may be of legitimate interest to the defence".*

19.6.6 Accordingly, convictions, outstanding charges or direct measures for attempts to pervert the course/ defeat the ends of justice, wasting police time, false oaths or accusation, perjury, fraud and other crimes involving dishonesty or indicating a propensity towards dishonesty should be disclosed irrespective of the age of the conviction.

19.6.7 Convictions, outstanding charges or direct measures for crimes which are not crimes of dishonesty in the narrow sense require to be disclosed if they could legitimately, individually or cumulatively, be relied upon to attack the credibility of the witness. Such an attack might be mounted on the ground that the pattern of offending reveals contempt for the law or general depravity of character. In this context, the proximity in time, frequency and nature of the offending will require to be considered and a judgment made as to whether or not the information is material. Supply offences under the Misuse of Drugs Act will require to be disclosed under this head on the basis that, though they are not offences of dishonesty in the narrow, sense, they indicate participation in a dishonest trade. A single road traffic offence would not normally be material, but repeated convictions in the recent past for offences such as driving while disqualified and without insurance should be disclosed, on the basis that such offending, if repeated, indicates a contempt for the law.

19.6.8 Similarly any convictions or outstanding charges for breaches of court orders, including breaches of bail and failures to appear, should be disclosed regardless of the age of the conviction on the basis that such offending, whether repeated or not, indicates a contempt for the court.

Criminal history information bearing on reliability

19.6.9 Criminal history information which could legitimately be used to attack the reliability of the witness should also be disclosed. So for example, recent convictions, outstanding charges or direct measures relating to the misuse of drugs may, in the case of an eye witness, be disclosable, since they may provide a basis for cross-examination as to whether the witness had been taking drugs at the time of the incident and whether this affected the witness's reliability. Similarly, if an eye-witness has a number of recent convictions for being drunk and incapable, this would be disclosable as, again, it may provide a basis for cross-examination as to whether the witness had been drunk and incapable at the time of the incident.

19.7 Determining what to Redact on the basis of Sensitivity

19.7.1 Following an initial assessment regarding the *materiality* of information contained within a witness's criminal history record, the Case Preparer must then consider what of the immaterial information is potentially sensitive and therefore should not be disclosed to the defence.

19.7.2 The sensitivity of a previous conviction or an outstanding charge may be determined by either the nature of the conviction or charge or by reference to the material information that is being disclosed.

19.7.3 If there is any doubt regarding the sensitivity of a conviction/charge/ direct measure or any part of a record, this should initially be referred to the appropriate legal manager to consider whether a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions.

Sensitivity based on the nature of the conviction or charge

19.7.4 Any immaterial previous conviction or outstanding charge which might impact on the witness's safety or lifestyle or which could seriously affect the witness's relationship with others such as his/her neighbours, employer or members of his/her family will be sensitive and therefore should be redacted (**HMA v Murtagh** at para 32).

19.7.5 Examples would include where the disclosure of a conviction or charge might affect a witness's employment, business or economic well-being; a witness with an *immaterial* conviction, outstanding charge or direct measure of a sexual nature that may be unknown to their family or within their community.

19.7.6 Additional examples include convictions of a prostitute under section 46 of the Civic Government (Scotland) Act 1982 for loitering or soliciting in a public place; convictions for consensual sexual acts committed by men in private before such acts were decriminalised; and convictions for shamelessly indecent conduct which falls outside the limits of public indecency as described in **Webster v Dominick** (2005 JC 65) and does not otherwise remain criminal.

Sensitivity by reference to the material information being disclosed

19.7.7 In addition to identifying those immaterial convictions, outstanding charges and direct measures that are sensitive due to the nature of the charge, the Case Preparer or depute must also consider whether the remaining *immaterial* convictions, charges or direct measures are sensitive by reference to the material convictions/charges/ direct measures already being disclosed.

19.7.8 In **HMA v Murtagh** Lord Rodger of Earlsferry recognised at paragraph 59 that:

> *"When the schedule already reveal convictions for dishonesty or violence, witnesses are scarcely going to be concerned if the Crown also reveal some trivial conviction for, say, breach of the peace".*

Where, therefore, there is a significant a number of material convictions, charges and/or direct measures being disclosed to the defence, this will reduce or even negate the sensitivity of the remaining information, i.e. if the witness has a number of convictions for dishonesty which require to be disclosed and a few additional immaterial convictions, e.g. for road traffic offences, then, in light of the information already being disclosed, these road traffic offences would not be considered to be of concern to the witness and therefore could be disclosed on the basis that they are non-sensitive.

19.7.9 Conversely, if the witness has no *material* convictions, outstanding charges or direct measures, then the disclosure of any remaining *immaterial* information might be of concern, and therefore sensitive, to the witness. As disclosure of such information would not be necessary to ensure a fair trial, then the *immaterial* information should be redacted on the basis that it is sensitive information, i.e. the whole record should be withheld and the defence should be advised of this.

19.7.10 Similarly, if a witness has a relatively small number of *material* convictions, outstanding charges and/or direct measures, but a substantially greater number of *immaterial* convictions, charges or direct measures also exist, then there is a reasonable expectation that the disclosure of this remaining *immaterial* information might be of concern to the witness. In such circumstances, the balance may lie in the non-disclosure of the immaterial information on the basis that it is sensitive information. Although, in such circumstances, it must always be borne in mind that a generous approach towards disclosure should be applied.

19.8 Non-Disclosure of Material Information in the Public Interest

19.8.1 Notwithstanding the material nature of criminal history information, circumstances may exceptionally arise where the Crown considers that public interest immunity should be claimed, for example where disclosure of the information could create a threat to life and limb of a witness or other persons. Where this arises, the matter should be referred initially to the, functional lead (High Court/Sheriff and Jury/Summary) and then the Federation Head for consideration of a referral to the Director of Serious Casework including a report for the attention of Crown Counsel, with an appropriate recommendation, for a decision as to how the issue should be addressed.

19.8.2 A non-disclosure/non-notification/exclusion order (as appropriate) may be applied for (note exclusion orders can only be sought in solemn cases) upon an instruction to do so from Crown Counsel via the Director of Serious Casework.

19.8.3 Full guidance in relation to the process to follow where the Crown is seeking to withhold material information is contained in chapter 25 of this Manual.

19.9 Disclosure to the Defence

19.9 Once the considerations set down above have been applied, the criminal history record should be redacted to remove:

i. Any immaterial and sensitive convictions, charges, children's hearing appearances and direct measures (including fixed penalties issued by the police or specialist reporting agency; and

ii. Any material conviction where Crown Counsel has authorised non-disclosure in the public interest.

All remaining convictions, charges, children's hearing appearances and direct measures (including fixed penalties issued by the police or specialist reporting agency) should be disclosed.

19.10 Redaction in Solemn Cases

19.10.1 Criminal history records 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.

19.10.2 In all High Court cases, where the witness is listed on the draft indictment, the Case Preparer should include a recommendation on the disclosure of criminal history records. (**See Chapter 10, paragraph 10.7.3.**)

19.10.3 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 materiality test i.e. information which is likely to materially weaken or undermine the evidence that is likely to be led by the prosecutor; materially strengthen the defence case; or form part of the evidence to be led by the prosecutor in the proceedings against the accused.. (**See Chapter 10, paragraph 10.7.3.**)

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

19.11 Keeping the position under review

19.11.1 Where a decision has been made not to disclose any part of the criminal history information of a witness on the ground that it is not material, the position must be kept under review. In particular, issues may arise at trial which require disclosure of criminal history information which until then has not been considered to be material.

19.11.2 For example, if a witness were to give evidence indicating that they did not know anything about drugs, but had been the subject of direct measures for offences involving the possession of controlled substances, those would require to be disclosed, if they had not been disclosed at an earlier stage. If a witness were to give evidence that they had never been in trouble with the police, but undisclosed information about direct measures or outstanding charges came to light, these would then require to be disclosed.